
No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPALACHIAN VOICES, CHESAPEAKE BAY FOUNDATION,
CHESAPEAKE CLIMATE ACTION NETWORK, COWPASTURE RIVER
PRESERVATION ASSOCIATION, FRIENDS OF BUCKINGHAM,
HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, PIEDMONT
ENVIRONMENTAL COUNCIL, SHENANDOAH VALLEY BATTLEFIELDS
FOUNDATION, SHENANDOAH VALLEY NETWORK, SIERRA CLUB, INC.,
SOUND RIVERS, INC., VIRGINIA WILDERNESS COMMITTEE, WILD
VIRGINIA, AND WINYAH RIVERS FOUNDATION,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

JOINT PETITION FOR REVIEW

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As authorized by Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), and Rule 15(a) of the Federal Rules of Appellate Procedure, APPALACHIAN VOICES, CHESAPEAKE BAY FOUNDATION, CHESAPEAKE CLIMATE ACTION NETWORK, COWPASTURE RIVER PRESERVATION ASSOCIATION, FRIENDS OF BUCKINGHAM, HIGHLANDERS FOR RESPONSIBLE DEVELOPMENT, PIEDMONT ENVIRONMENTAL COUNCIL, SHENANDOAH VALLEY BATTLEFIELDS FOUNDATION, SHENANDOAH VALLEY NETWORK, SIERRA CLUB, SOUND RIVERS, INC., VIRGINIA WILDERNESS COMMITTEE, WILD VIRGINIA, and WINYAH RIVERS FOUNDATION jointly petition the United States Court of Appeals for the Fourth Circuit for review of the Federal Energy Regulatory Commission's Order Issuing Certificates in *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (Oct. 13, 2017), and the Commission's Order on Rehearing in *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (Aug. 10, 2018). In accordance with Local Rule 15(b), copies of the Orders are attached as **Exhibit A** and **Exhibit B**, respectively.

In accordance with Rule 15(c) of the Federal Rules of Appellate Procedure, Petitioners have served parties that may have been admitted to participate in the underlying proceedings with a copy of this Joint Petition for Review. As required by Local Rule 15(b), a list of Respondents specifically identifying the

Respondents' names and addresses is attached. Petitioners have served copies of the Joint Petition for Review and exhibits via U.S. first-class certified mail, return receipt requested, on Respondents as required by Local Rule 25(a)(1)(A)(i).

Respectfully submitted,

/s/ Gregory Buppert

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DATED: August 16, 2018

LIST OF RESPONDENTS

As required by Local Rule 15(b), Petitioners provide a list of Respondents below specifically identifying the Respondents' names and the addresses where Respondents and/or their counsel may be served with copies of this Joint Petition for Review.

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CERTIFICATE OF SERVICE

In accordance with Federal Rule of Appellate Procedure 15(c)(1) & (2), the undersigned certifies that, on August 16, 2018, a copy of this Joint Petition for Review and exhibits were served by email to the parties on the Federal Energy Regulatory Commission's official service list of parties admitted to participate in dockets CP15-554-000 et seq. and CP15-555-000 et seq. before the Commission. A list of those served is attached as **Exhibit C**.

In accordance with Local Rule 25(a)(1)(A)(i), Petitioners have served a copy of the Joint Petition for Review and exhibits on the following Respondents via U.S. first-class certified mail, return receipt requested, on August 16, 2018:

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EXHIBIT A

161 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, and Robert F. Powelson.

Atlantic Coast Pipeline, LLC	Docket Nos. CP15-554-000 CP15-554-001
Dominion Transmission, Inc.	CP15-555-000
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.	CP15-556-000

ORDER ISSUING CERTIFICATES

(Issued October 13, 2017)

1. On September 18, 2015, Atlantic Coast Pipeline, LLC (Atlantic) filed an application in Docket No. CP15-554-000, pursuant to section 7(c) of the NGA¹ and Part 157 of the Commission's regulations,² for authorization to construct and operate the Atlantic Coast Pipeline Project (ACP Project). On March 11, 2016, Atlantic filed an amendment to its application in Docket No. CP15-554-001. In its amendment, Atlantic proposed several route changes and additional compression at its proposed compressor station in Buckingham County, Virginia. The ACP Project, as amended, consists of approximately 604 miles of new interstate pipeline and related facilities extending from Harrison County, West Virginia, to the eastern portions of Virginia and North Carolina,³ and 130,345 horsepower (hp) of compression. The ACP Project is designed to provide up to 1.5 million dekatherms per day (Dth/d) of natural gas transportation service. Atlantic also requests approval of its *pro forma* tariff, a blanket certificate under Part 284,

¹ 15 U.S.C. § 717f(c) (2012).

² 18 C.F.R. pt. 157 (2017).

³ The ACP Project extends from West Virginia, southeast to Greensville County, Virginia, then splits into two legs; one leg extending east to the City of Chesapeake, Virginia, and the other leg extending southwest into North Carolina.

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Subpart G of the Commission's regulations to provide open-access transportation services, and a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations.

2. On September 18, 2015, Dominion Transmission, Inc. (DETI)⁴ filed an application in Docket No. CP15-555-000, under sections 7(b) and 7(c) of the NGA⁵ and Part 157 of the Commission's regulations,⁶ requesting authorization to construct and operate approximately 38 miles of pipeline looping facilities and other facility upgrades and modifications to DETI's existing system in Pennsylvania and West Virginia (Supply Header Project). The Supply Header Project is designed to provide up to 1,511,335 Dth/d of natural gas transportation service from supply areas on the DETI system to the proposed ACP Project. DETI also requests authorization to abandon two previously-certificated gathering compressor units in Wetzel County, West Virginia.

3. Also, on September 18, 2015, Atlantic and Piedmont Natural Gas Company, Inc. (Piedmont) filed a joint application in Docket No. CP15-556-000, pursuant to section 7(c) of the NGA⁷ and Part 157 of the Commission's regulations,⁸ for approval of a lease pursuant to which Atlantic will lease 100,000 Dth/d of capacity on Piedmont's system for use by Atlantic in providing service under Atlantic's FERC Gas Tariff (Capacity Lease). Additionally, Piedmont requests a limited jurisdiction certificate to carry out its responsibilities under the lease agreement.

4. As explained herein, we find that the benefits that the ACP Project, Supply Header Project, and Capacity Lease will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Further, as set forth in the environmental discussion below, we agree with Commission staff's conclusion in the Environmental Impact Statement (EIS) that, if constructed and operated in accordance with applicable laws and regulations and with the implementation of the applications' proposed mitigation and staff's recommendations, now adopted as conditions in the attached Appendix A of this order, the projects will result in some adverse and significant environmental impacts, but that

⁴ On May 12, 2017, Dominion Transmission, Inc. changed its name to Dominion Energy Transmission, Inc.

⁵ 15 U.S.C. § 717f(b) and (c) (2012).

⁶ 18 C.F.R. pt. 157 (2017).

⁷ 15 U.S.C. § 717f(c) (2012).

⁸ 18 C.F.R. pt. 157 (2017).

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these impacts will be reduced to acceptable levels. Therefore, we grant the requested authorizations, subject to conditions.

I. Background

5. Atlantic, a limited liability company organized and existing under the laws of Delaware, was formed to develop, own, and operate the ACP Project and does not currently own any existing pipeline facilities and is not engaged in any natural gas operations. Atlantic is composed of four ownership interests: Dominion Atlantic Coast Pipeline, LLC, a Delaware limited liability company and subsidiary of Dominion Resources, Inc. (48 percent ownership); Duke Energy ACP, LLC, a Delaware limited liability company and subsidiary of Duke Energy Corporation (40 percent ownership); Piedmont ACP Company, LLC, a North Carolina limited liability company and subsidiary of Duke Energy Corporation (7 percent ownership);⁹ and Maple Enterprise Holdings, Inc., a Georgia corporation and subsidiary of The Southern Company¹⁰ (5 percent ownership).¹¹ Upon commencing the operations proposed in its application, Atlantic will become a natural gas company within the meaning of section 2(6) of the NGA¹² and will be subject to the Commission's jurisdiction.

6. DETI, a Delaware corporation,¹³ is a natural gas company, as defined in section 2(6) of the NGA.¹⁴ DETI provides natural gas transportation and storage services in Ohio, West Virginia, Pennsylvania, New York, Maryland, and Virginia.

7. Piedmont, a North Carolina corporation, is a local distribution company primarily engaged in the distribution of natural gas to residential, commercial, and industrial utility

⁹ On October 3, 2016, Duke Energy Corporation purchased Piedmont Natural Gas Company, Inc. and became the parent company of Piedmont ACP Company, LLC. Effective on October 3, 2016, Piedmont ACP Company, LLC assigned 3 percent of its original 10 percent ownership interest in Atlantic to Dominion Atlantic Coast Pipeline, LLC.

¹⁰ The Southern Company merged with AGL Resources Inc. in a transaction that closed on July 1, 2016.

¹¹ See Atlantic February 28, 2017 Data Response.

¹² 15 U.S.C. § 717a(6) (2012).

¹³ DETI is wholly-owned subsidiary of Dominion Gas Holdings, LLC, which, in turn, is a wholly-owned subsidiary of Dominion Resources, Inc.

¹⁴ 15 U.S.C. § 717a(6) (2012).

customers in North Carolina, South Carolina, and Tennessee. Piedmont is a “public utility” under Chapter 62 of the North Carolina General Statutes and its North Carolina rates and services are regulated by the North Carolina Utility Commission (NCUC).

II. Proposals

A. Atlantic Coast Pipeline Project

1. Facilities and Services

8. The ACP Project, as amended, consists of two mainlines, three lateral lines, three compressor stations, and nine metering and regulating (M&R) stations. Generally, the ACP Project will receive natural gas at the terminus of the Supply Header Project’s TL-635 Loop in Harrison County, West Virginia, and transport up to 1.5 million Dth/d to receipt points in West Virginia, Virginia, and North Carolina. The ACP Project will involve the construction of the following facilities:

- approximately 333.1 miles of 42-inch-diameter mainline pipeline originating in Harrison County, West Virginia, and terminating at the location of the proposed Compressor Station 3 in Northampton County, North Carolina (AP-1 Mainline);
- approximately 186.0 miles of 36-inch-diameter mainline pipeline originating at Compressor Station 3 in Northampton County, North Carolina, and terminating at the existing Piedmont pipeline system in Robeson County, North Carolina (AP-2 Mainline);
- approximately 83.2 miles of 20-inch-diameter lateral pipeline originating at Compressor Station 3 in Northampton County, North Carolina, and extending east to an interconnect with the existing Virginia Natural Gas pipeline system in the City of Chesapeake, Virginia (AP-3 Lateral);
- approximately 0.4 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline near Lawrenceville in Brunswick County, Virginia, and extending west to Dominion Virginia Power’s Brunswick Power Station (AP-4 Lateral);
- approximately 1.0 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline in Greensville County, Virginia, and extending to Dominion Virginia Power’s proposed Greensville Power Station (AP-5 Lateral);
- a new compressor station consisting of four natural gas-fired, turbine-driven units, one 20,500 hp unit, one 15,900 hp unit, one 10,915 hp unit,

and one 7,700 hp unit, for a total of 55,015 hp, located near milepost (MP) 7.6 of the AP-1 mainline at the proposed Kincheloe M&R station in Lewis County, West Virginia (Compressor Station 1 or Marts Compressor Station);

- a new compressor station consisting of four natural gas-fired, turbine-driven units, one 20,500 hp unit, one 15,900 hp unit, one 10,915 hp unit, and one 6,200 hp unit, for a total of 53,515 hp, located near MP 191.5 of the AP-1 mainline in Buckingham County, Virginia (Compressor Station 2 or Buckingham Compressor Station);
- a new compressor station consisting of three natural gas-fired, turbine-driven units, one 10,915 hp unit, one 6,200 hp unit, and one 4,700 hp unit, for a total of 21,815 hp, located near MP 300.1 of the AP-1 mainline in Northampton County, North Carolina (Compressor Station 3 or Northampton Compressor Station);
- nine new meter stations in West Virginia, Virginia, and North Carolina; and
- various appurtenances.

Atlantic estimates that the proposed facilities will cost \$5,071,226,515.

9. Atlantic states that it conducted a non-binding open season from April 16, 2014, to May 9, 2014, for the proposed firm transportation services offered by the project. Atlantic executed binding precedent agreements with the following six shippers for a total of 1.44 million Dth/d of firm transportation service: (1) Duke Energy Progress, LLC (Duke Energy Progress);¹⁵ (2) Duke Energy Carolinas, LLC (Duke Energy Carolinas);¹⁶ (3) Piedmont;¹⁷ (4) Virginia Power Services Energy Corp., Inc.;¹⁸ (5) Public

¹⁵ Duke Energy Progress, an electricity generator and provider, is a subsidiary of Duke Energy Corporation, which has a 47 percent ownership in Atlantic through its subsidiaries.

¹⁶ Duke Energy Carolinas, an electricity generator and provider, is also a subsidiary of Duke Energy Corporation.

¹⁷ As stated above, on October 3, 2016, Duke Energy Corporation purchased Piedmont.

¹⁸ Virginia Power Services Energy Corp., Inc. is a subsidiary of Virginia Electric and Power Company, which is a subsidiary of Dominion Resources, Inc. Dominion Resources, Inc. has a 48 percent ownership interest in Atlantic through its subsidiaries.

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Service Company of North Carolina, Inc.;¹⁹ and (6) Virginia Natural Gas Company, Inc.²⁰ Atlantic also conducted a binding open season from October 21, 2014, to November 10, 2014, and no additional customers executed binding precedent agreements.

10. Atlantic also requests approval of its proposed *pro forma* tariff. Atlantic proposes initial maximum and minimum recourse reservation and usage rates set forth under Rate Schedules FT (Firm Transportation Service) and IT (Interruptible Transportation Service).

2. Blanket Certificates

11. Atlantic requests a Part 284, Subpart G blanket certificate of public convenience and necessity pursuant to section 284.221 of the Commission's regulations, authorizing Atlantic to provide transportation service to customers requesting and qualifying for transportation service under its proposed FERC Gas Tariff, with pre-granted abandonment authorization.²¹

12. Atlantic also requests a blanket certificate of public convenience and necessity, pursuant to section 157.204 of the Commission's regulations, authorizing future facility construction, operation, and abandonment as set forth in Part 157, Subpart F of the Commission's regulations.²²

B. DETI Supply Header Project

13. DETI proposes to construct and operate the Supply Header Project, which will provide 1,511,335 Dth/d of transportation service from supply areas on DETI's system to

Virginia Power Services Energy Corp., Inc. provides fuel, including natural gas, to Dominion's affiliates.

¹⁹ Public Service Company of North Carolina, Inc., a local distribution company, is a subsidiary of SCANA Corporation and has no affiliation with the ACP Project's sponsors.

²⁰ Virginia Natural Gas Company, Inc., a local distribution company, is a subsidiary of The Southern Company, which has a five percent ownership interest in Atlantic through Maple Enterprise Holdings, Inc.

²¹ 18 C.F.R. § 284.221 (2017).

²² 18 C.F.R. § 157.204 (2017).

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the upstream end of the ACP Project in Harrison County, West Virginia. Specifically, DETI proposes to construct:

- approximately 3.9 miles of 30-inch-diameter pipeline that will loop DETI's existing LN-25 pipeline and connect with DETI's existing TL-591 pipeline in Westmoreland County, Pennsylvania (TL-636 Loop);
- approximately 33.6 miles of 30-inch-diameter natural gas pipeline that will loop DETI's existing TL-360 pipeline in Harrison, Doddridge, Tyler, and Wetzel Counties, West Virginia (TL-635 Loop);
- one 20,500 hp natural gas-fired, turbine-driven compressor unit and ancillary equipment at DETI's existing JB Tonkin Compressor Station in Westmoreland County, Pennsylvania;
- one 7,700 hp natural gas-fired, turbine-driven compressor unit and ancillary equipment at DETI's existing Crayne Compressor Station in Greene County, Pennsylvania;
- two 20,500 hp natural gas-fired, turbine-driven compressor units and ancillary equipment at DETI's existing Mockingbird Hill Compressor Station in Wetzel County, West Virginia; and
- six valve sites and two sets of pig launcher and receiver sites.

14. Additionally, DETI requests authorization to abandon Compressor Units 1 and 2 at its Hastings Compressor Station in Wetzel County, West Virginia. DETI states that, in 2006, the Commission approved the refunctionalization of the compressor units from transmission to gathering, but because DETI intended to continue to use the compressor units, the Commission explained that DETI would need to seek abandonment authority from the Commission in the future as necessary.²³ DETI proposes to replace Hastings Compressor Units 1 and 2 with new, more efficient units that will meet the applicable state and federal air quality requirements.²⁴ DETI asserts that the replacement units will continue to serve a non-jurisdictional function.

²³ *Dominion Transmission, Inc.*, 114 FERC ¶ 61,266 (2006).

²⁴ DETI states that the proposed units at its Mockingbird Hill Compressor Station will be included in the same Title V air permit as DETI's Hastings Compressor Station and Lewis Wetzel Compressor Station. DETI asserts that its initial design studies indicated that the additional compression needed for the Supply Header Project could

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15. The total estimated cost for the Supply Header Project is \$486,388,831. DETI conducted a binding open season between October 21, 2014, and November 17, 2014, for the Supply Header Project's proposed firm transportation services.²⁵ As a result of the open season, DETI executed a binding precedent agreement with Atlantic for 1,450,882 Dth/d of firm transportation service. DETI and Atlantic have entered into a negotiated rate agreement for service on the Supply Header Project.

C. Atlantic's Lease of Capacity on Piedmont's System

16. Atlantic and Piedmont seek approval of a lease, pursuant to which Atlantic will lease capacity on Piedmont's system for use by Atlantic in providing service under Atlantic's FERC Gas Tariff, principally for Public Service Company of North Carolina, Inc. (PSNC). Specifically, Atlantic would lease 100,000 Dth/d on Piedmont's system from the point of interconnection between the ACP Project and Piedmont in Johnson County, North Carolina, to a delivery point between Piedmont and PSNC near Clayton, North Carolina. The Capacity Lease would continue for a primary term of 20 years, consistent with the term of Atlantic's precedent agreement with PSNC.

17. The Capacity Lease requires Atlantic to pay Piedmont a monthly lease charge for the leased capacity. The leased capacity will be treated as part of Atlantic's system for nomination and scheduling purposes, with points identified and made available on Atlantic's electronic scheduling system. Atlantic and Piedmont state that the Capacity Lease will allow Atlantic to provide service to PSNC (or any other customer that may take service off the capacity leased on Piedmont's system) without requiring a direct interconnect between the ACP Project and PSNC's system, thus avoiding the need for the additional construction and environmental disturbance that would be associated with extending the ACP Project to PSNC's system.

18. Piedmont also requests a limited jurisdiction certificate in order to enter into the Capacity Lease with Atlantic to allow for the interstate transportation of natural gas through Piedmont's facilities. Last, Piedmont seeks a determination that the Capacity Lease will not affect its status as a local distribution company not otherwise subject to Commission jurisdiction.

potentially exceed air quality limits unless the two 500 hp Hasting Compressor units are replaced.

²⁵ DETI states that it conducted a reverse open season during the same time period but received no bids in response.

III. Procedural Issues

A. Notice, Interventions, Protests, and Comments

19. Notice of applications in Docket Nos. CP15-554-000, CP15-555-000, and CP15-556-000 was published in the *Federal Register* on October 8, 2015 (80 Fed. Reg. 60,886). Notice of the amendment to Atlantic's application in Docket No. CP15-554-001 was published in the *Federal Register* on March 31, 2016 (81 Fed. Reg. 18,623). In each docket, a number of timely and late motions to intervene were filed.²⁶ Timely, unopposed motions to intervene are granted automatically pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.²⁷ On November 8, 2016, and January 18, 2017, the Commission issued notices granting numerous late motions to intervene. We grant the remaining unopposed late motions to intervene.²⁸

20. Numerous landowners and environmental groups filed protests in response to Atlantic's and DETI's applications. The NCUC protested certain rate and tariff proposals. On December 4, 2015, Atlantic and DETI filed a joint answer to the protests. Shenandoah Valley Network, Friends of the Central Shenandoah, and Friends of Wintergreen filed answers in response to Atlantic and DETI's Answer. Although the Commission's Rules of Practice and Procedure generally do not permit answers to protests or answers to answers,²⁹ our rules also provide that we may, for good cause, waive this provision.³⁰ We will accept all the responsive pleadings filed in this proceeding because they have provided information that assisted us in our decision-making process.

21. In addition, we received numerous comments in support of the ACP Project, asserting it would, among other things, bring jobs to the area, increase economic growth,

²⁶ The Commission's regulations provide that interventions are timely if filed during the comment period on the notice of the application or if filed on environmental grounds during the comment period of the draft EIS. 18 C.F.R. §§ 157.10, 380.10(a), 385.214(c) (2017). Thus, if interventions are filed outside of these periods, the intervention is late. *See Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, at P 40 n.13 (2016).

²⁷ 18 C.F.R. § 385.214(c) (2017).

²⁸ 18 C.F.R. § 385.214(d) (2017).

²⁹ 18 C.F.R. § 385.213(a)(2) (2017).

³⁰ 18 C.F.R. § 385.101(e) (2017).

and provide affordable natural gas supplies to consumers, and a large number of comments raising concerns over the need for and the environmental impacts of the proposed projects. These concerns are addressed in the EIS and below.

B. Request for Evidentiary Hearing

22. Some interveners and commenters object to Atlantic's use of shortened procedures pursuant to Rules 801 and 802 of the Commission's Rules of Practice and Procedure,³¹ and request an evidentiary hearing. Conservation Groups³² argue that allegations concerning the need for the proposed projects cannot be resolved on the basis of the written record. In its June 21, 2017 Motion for an Evidentiary Hearing, Conservation Groups aver that the disputed facts will depend on live testimony from multiple, conflicting experts offering opinions on complex technical issues related to pipeline financing, electricity demand forecasting, existing pipeline capacity, and renewable energy forecasting. Conservation Groups state that expert testimony and cross examination is essential for the Commission to effectively evaluate the credibility and reliability of each witness.

23. Section 7 of the NGA provides for a hearing when an applicant seeks a certificate of public convenience and necessity, but does not require that all such hearings be formal, trial-type hearings.³³ An evidentiary trial-type hearing is necessary only when there are material issues of fact in dispute that cannot be resolved on the basis of the written record.³⁴ The issues raised in this proceeding, including those concerning the need for the proposed projects, have been adequately argued, and a determination can be made on the basis of the existing record in this proceeding. All interested parties have been afforded a full complete opportunity to present their views to the Commission through numerous written submissions. We find that there is no material issue of fact that we cannot resolve on the basis of the written record in the proceeding. Therefore, we will deny the request for a formal, trial-type hearing.

³¹ 18 C.F.R. §§ 385.801 and 385.802 (2017).

³² Conservation Groups are Shenandoah Valley Network, Highlanders for Responsible Development, Virginia Wilderness Committee, Shenandoah Valley Battlefields Foundation, Natural Resources Defense Council, Cowpasture River Preservation Association, Friends of Buckingham, and Winyah Rivers Foundation.

³³ *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240, at P 25 (2012).

³⁴ *See, e.g., Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (1988); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012).

IV. Discussion

24. Since the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.

A. Application of Certificate Policy Statement

25. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new pipeline construction.³⁵ The policy statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. It explains that, in deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

26. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

³⁵ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

1. Atlantic Coast Pipeline Project

a. Subsidization and Impacts on Existing Customers

27. As discussed above, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without subsidization from existing customers. Friends of the Central Shenandoah argue that because a subsidiary and parent are one unit,³⁶ the ACP Project is subsidized by the affiliated shippers' captive ratepayers. Friends of the Central Shenandoah assert that lower cost options for natural gas transportation are available and these affiliated shippers will pass on the higher costs of the ACP Project to their ratepayers.

28. The Commission's test regarding subsidization analyzes the impacts on existing customers of the pipeline, not customers of the affiliated shippers.³⁷ Atlantic is a new pipeline entrant with no existing customers. Thus, there is no potential for subsidization on Atlantic's system or degradation of service to existing customers. Issues concerning proposed service to affiliated shippers are discussed more fully below.

b. Need for the Project

29. Several parties and commenters challenged the need for the ACP Project. They raise a variety of arguments including: (1) the availability of existing infrastructure to serve markets; (2) insufficient demand for natural gas in Virginia and North Carolina; (3) insufficient production growth in the Appalachian Basin; (4) the availability of renewable energy to meet future demand for electricity generation; (5) the need for a regional analysis to determine if the project is needed; and (6) the use of precedent agreements with affiliated utilities to demonstrate project need. The commenters also challenged the studies submitted by Atlantic showing that the project is needed to serve demand growth in Virginia and North Carolina. On December 4, 2015, Atlantic filed an answer to the initial comments.³⁸

³⁶ Friends of the Central Shenandoah cite *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), where the Court stated that a subsidiary and its parent are "in reality, one unit." Friends of the Central Shenandoah April 3, 2017 Comments at 11.

³⁷ Certificate Policy Statement, 88 FERC at 61,745.

³⁸ Atlantic's answer was filed in response to comments made during the initial notice of application comment period. Since that time, additional comments related to the need for the proposed project have been filed. All comments concerning project need are addressed here.

i. Existing Infrastructure to Serve Markets

30. Commenters argue that there is not currently a supply constraint in the region and that there is adequate natural gas infrastructure to serve future market demand in Virginia and North Carolina. Commenters assert that a study conducted by Synapse Energy Economics Inc. (Synapse),³⁹ which compares the region's existing natural gas supply capacity to its expected future peak demand for natural gas, concluded that, given the existing pipeline and natural gas storage capacity, the expected flow reversal on the Transcontinental Gas Pipe Line Company, LLC (Transco) pipeline system under the Atlantic Sunrise Project,⁴⁰ and the expected upgrade of an existing Columbia Gas Transmission (Columbia) pipeline,⁴¹ the capacity of the Virginia-Carolinas region's natural gas infrastructure is more than sufficient to meet expected future peak demand.⁴² Commenters also note that both Duke Energy Progress and Duke Energy Carolinas have testified before their state commission that adequate pipeline capacity already exists for their planned construction projects.⁴³

³⁹ Synapse Energy Economics Inc., *Are the Atlantic Coast Pipeline and Mountain Valley Pipeline Necessary?* (Sept. 12, 2016) (filed Dec. 20, 2016) (Synapse Study).

⁴⁰ The Atlantic Sunrise Project, approved by the Commission on February 3, 2017, will provide up to an additional 1.7 million Dth/d of firm transportation service from northern Pennsylvania to Alabama. *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (2017) (*Transco*).

⁴¹ The Synapse Study cites the WB Express Project, which would provide up to an additional 1.3 million Dth/d of bi-directional firm transportation service on Columbia's system, which is located in the ACP Project area. The WB Express Project is currently pending before the Commission, in Docket No. CP16-38-000.

⁴² Specifically, the Synapse Study analyzes the winter peak hour gas usage under various scenarios, and finds that, even under the highest gas usage scenario modeled, natural gas supply exceeds demand by approximately 100 MMcf through 2030. Synapse Study at Figure ES-2.

⁴³ *See, e.g.*, Friends of Nelson July 5, 2017 Comments at 29 (citing Direct Testimony of Swati V. Daji, NCUC Docket No. E-100-147, at 14 (Feb. 16, 2017) ("Currently, Duke Energy has agreements in place that provide firm transportation to eleven current and future gas generation facilities in North and South Carolina including all of Duke Energy's current and approved combined cycle facilities as well as several combustion turbine sites")).

31. Commenters also state that the U.S. Department of Energy (DOE) found that average pipeline utilization between 1998 and 2013 is only 54 percent and that with changes to existing infrastructure, new natural gas pipelines will not likely be needed to supply gas to Southeastern markets.⁴⁴ Additionally, commenters note that the Commission has repeatedly found that if pipeline projects are not built, production would reach markets by alternative means.

32. Moreover, commenters assert that relying on Transco's and Columbia's systems has the added benefit of providing shippers more diverse supply sources. Commenters state that the lower cost of gas from the Appalachian Basin is offset by Atlantic's high transportation costs. Thus, commenters conclude that supplying gas by reconfiguring existing infrastructure through pipeline reversals or expansions of existing systems would be more economical and have less of an impact on the environment.

ii. **Insufficient Demand for Natural Gas in Virginia and North Carolina**

33. Commenters also contend that there is a lack of need for additional natural gas in the markets being served by the ACP Project. Commenters assert that neither Virginia nor North Carolina is expected to experience an increase in natural gas demand, calling into question whether additional natural gas-fired generation will be built.⁴⁵

⁴⁴ See, e.g., Shenandoah Valley Network October 23, 2015 Motion to Intervene at 12 (citing U.S. DEP'T OF ENERGY, *NATURAL GAS INFRASTRUCTURE IMPLICATIONS OF INCREASED DEMAND FROM THE ELECTRIC POWER SECTOR*, (Feb. 2015), <http://energy.gov/epsa/downloads/report-natural-gas-infrastructure-implications-increased-demand-electricpower-sector>).

⁴⁵ Commenters cite: (1) the utilities downward revisions to their load forecasts; (2) the U.S. Energy Information Administration's (EIA) 2017 Energy Outlook, which estimates that South Atlantic demand for natural gas for electricity generation will decrease from 2015 to 2020; and (3) a study by ICF International, which found that Virginia is not likely to experience a significant increase in natural gas demand. See, e.g., Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing (citing Direct Testimony of James F. Wilson, Va. State Corp. Comm., Case No. PUE-2016-00049 (Aug. 17, 2016); U.S. Energy Information Admin., Annual Energy Outlook 2017 Reference Case Table A2, (Jan. 2017), <https://www.eia.gov/outlooks/aeo/>; ICF International, *The Economic Impacts of the Atlantic Coast Pipeline* (February 9, 2015)).

34. Commenters further contend that the Integrated Resource Plans of Dominion Virginia Power,⁴⁶ Duke Energy Progress, and Duke Energy Carolinas overestimate future demand.⁴⁷ Specifically, commenters state that Duke Energy Progress' and Duke Energy Carolinas' 2016 plans may overestimate demand because they (1) assume a peak winter load for the first time; (2) underestimate the growth of renewable generation; and (3) include high reserve margins.⁴⁸ With respect to Dominion Virginia Power, commenters note that for 2027, PJM Interconnection's (PJM)⁴⁹ 2017 forecast is approximately 3,500 Megawatts (MW) less than Dominion Virginia Power's own projection from its 2016 plan.⁵⁰

35. The 2016 Synapse Study, submitted by several commenters, finds that the EIA projections relied upon by Atlantic to show a need for additional capacity in the region are out of date and have been significantly modified.⁵¹ Commenters further contend that Atlantic wrongly relies on the Clean Power Plan to support claims of natural gas demand

⁴⁶ Dominion Virginia Power will receive gas from the ACP Project from Virginia Power Services Energy Corp., Inc.

⁴⁷ Moreover, commenters note that Duke Energy Carolinas' and Duke Energy Progress' most recent integrated resource plans do not mention the ACP Project as a source of natural gas supply. *See, e.g.*, Friends of Nelson July 5, 2017 Comments at 29 (citing Duke Energy Progress, Integrated Resource Plan (Annual Report) at 16, NCUC Docket E-100-141 (Sept. 1, 2014); Duke Energy Carolinas, Integrated Resource Plan (Annual Report) at 16, NCUC Docket E-100-141 (Sept. 1, 2014)).

⁴⁸ *See, e.g.*, Public Interest Groups April 5, 2017 Comments at 23.

⁴⁹ PJM is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

⁵⁰ *See, e.g.*, Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing (citing Direct Testimony of James F. Wilson, Va. State Corp. Comm., Case No. PUE-2016-00049 at 15-17 (Aug. 17, 2016)).

⁵¹ Synapse Study at 14-15. Commenters further note that EIA, PJM, and the individual utilities have all revised their projections downward from their 2014 assessments, when the ACP Project was initially conceived. *See, e.g.*, Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing at 5.

growth because the Clean Power Plan has been stayed and the current administration is not likely to pursue its implementation.⁵²

36. Next, commenters assert that the ACP Project is not needed to supply gas to the Greensville and Brunswick Power Stations, two power plants directly connected to the ACP Project, because those plants are already being served from the same supply region by Transco at a lower rate.⁵³ Commenters further state that when the power plants were approved by the Virginia State Corporation Commission, Virginia Electric and Power Company cited existing pipelines as its source for natural gas and did not rely on the fact that either plant was connected to the ACP Project.⁵⁴ Additionally, commenters note that supplying these same two power plants has already been cited for the approval of two Transco expansion projects.⁵⁵ With respect to the potential to supply future generating facilities, commenters note that the location and timing of those generating facilities is not currently known.⁵⁶

⁵² On October 10, 2017, the U.S. Environmental Protection Agency issued a notice of proposed rulemaking to repeal the regulations implementing the Clean Power Plan.

⁵³ Comparing the recourse rates for the ACP Project to the Transco Southside Expansion Project, which supplies gas to the Brunswick Power Station, commenters state that transporting gas via the ACP Project results in an additional \$218.5 million in costs for the first year. *See, e.g.*, Friends of the Central Shenandoah April 3, 2017 Comments at 14.

⁵⁴ *See, e.g.*, Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing at 23 (citing State Corporation Commission of Virginia, “Final Order,” Case No. PUE-2012-00128 (Aug. 2, 2013) and Application of Virginia Electric and Power Company for Approval and Certification of the Proposed Greensville County Power Station Electric Generation and Related Transmission Facilities Under §§ 56-580 D, 56-265.2 and 56-46.1 of the Code of Virginia and for Approval of a Rate Adjustment Clause, Designated Rider GV, Under § 56-585.1 A 6 of the Code of Virginia, Case No. PUE-2015-00075, at 7).

⁵⁵ Transco’s Southside Expansion Project, which was approved by the Commission and went into service in 2015, connects to the Brunswick Power Station. The Greensville Power Station will be served by Transco’s Southside Expansion Project II, which was approved by the Commission in 2016.

⁵⁶ *See, e.g.*, Friends of Nelson April 5, 2017 Comments (citing Atlantic’s December 8, 2016 Data Response at Question 3). Commenters state that although the ACP Project is expected to be online by 2019, Duke Energy Carolinas and Duke Energy Progress do not plan to bring new generation online before 2022. With respect to

37. Last, commenters argue that since additional natural gas is not needed to serve market demand in Virginia and North Carolina, the real purpose of the project is to deliver gas to DETI's Cove Point LNG terminal. Commenters contend that the Commission should not grant a certificate for the ACP Project if its primary purpose will be to export natural gas.

iii. Insufficient Natural Gas Production in the Appalachian Basin

38. Commenters argue that there is not sufficient production from the Appalachian Basin to justify the ACP Project and other proposed projects in the region.⁵⁷ Commenters assert that shale production will peak around 2020 and then decline significantly, absent a change in natural gas prices. Commenters contend that the EIA projections ignore that shale wells decline quickly (75 to 85 percent in first 3 years) and that the most productive areas of shale plays have already been developed. Thus, they say, it is not realistic to presume that there will be enough supply for the useful life of the ACP and other projects, and that doing so may lead to stranded pipeline and generation assets.

39. Commenters note that industry experts and executives have stated that production in the Appalachian Basin is slowing and takeaway capacity is expected to be overbuilt.⁵⁸ Commenters argue that because the price of natural gas has fallen, many shale gas producers may be unable to produce gas at a profitable price and will subsequently shut down their production.

Dominion Virginia Power, commenters note that it has not applied for or obtained approval to construct any new natural gas-fired facilities, much less any plant that will rely exclusively on the ACP Project for fuel supply. *See, e.g.,* Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing.

⁵⁷ Commenters cite FERC Office of Enforcement Division of Energy Market Oversight, 2014 State of the Markets Presentation at Slide 8 (March 19, 2015); Joanna Wu, *US Gas Insight: Midstream Madness*, Bloomberg New Energy Finance (Mar. 8, 2016); Jeremiah Shelor, *Marcellus/Utica On Pace for Pipeline Overbuild, Says Braziel*, NGI's Daily Gas Price Index (June, 8 2016). *See, e.g.,* Friends of the Central Shenandoah April 3, 2017 Comments at 22-24.

⁵⁸ *See, e.g.* Appalachian Mountain Advocates June 2, 2016 Comments at Attachment (Institute for Energy Economics and Financial Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* at 11-13 (April 2016) (IEEFA Study)).

iv. **Use of Renewable Energy to Serve Electricity Demand**

40. Commenters argue that under the NGA, the Commission should reject proposals when alternative proposals would better serve public convenience and necessity, even when the Commission lacks the authority to mandate the alternative.⁵⁹ Thus, commenters aver that the Commission should consider whether renewable energy could better serve the need for additional generation in Virginia and North Carolina.⁶⁰

41. Commenters assert that renewable energy may replace the need for the project in the future. Citing the Clean Power Plan and the decreasing costs of renewable energy, commenters note that states will be increasingly moving toward renewable energy to meet emission targets, which may result in stranded natural gas assets. Additionally, commenters note that large energy consumers are increasingly demanding or planning to switch to 100 percent renewable energy to meet their needs. Moreover, Appalachian Mountain Advocates (AMA)⁶¹ assert that unlike renewable energy, which has a fixed fuel cost, natural gas-fired generation poses risks to consumers if natural gas prices fluctuate.

42. Commenters also argue that approval of natural gas infrastructure will foreclose investment in renewable energy sources in the future. Commenters argue that instead of investing in natural gas-fired electricity, utilities should invest in renewable resources, which more closely align with long-term goals to reduce greenhouse gases. Oil Change International argues that any assessment of need for a proposed project should consider climate goals.

⁵⁹ Commenters cite *City of Pittsburgh v. FPC*, 237 F.2d 741, at 756 n.28 (D.C. Cir. 1956).

⁶⁰ Commenters state that the Commission must also consider collocation with other pipelines and utility rights-of-way and whether modifications to existing infrastructure can serve the same markets with fewer environmental impacts. The final EIS evaluated these alternatives. *See* Final EIS at § 3.0.

⁶¹ AMA filed comments on behalf of Allegheny Defense Project, Appalachian Voices, Center for Biological Diversity, Chesapeake Climate Action Network, Christians for the Mountains, Citizens Climate Lobby, Dominion Pipeline Monitoring Coalition, Eight Rivers Council, Friends of Water, Mountain Lakes Preservation Alliance, Ohio Valley Environmental Coalition, Sierra Club, Virginia Chapter of the Sierra Club, West Virginia Highlands Conservancy, and Wild Virginia.

v. **Regional Plan for Natural Gas Pipeline Infrastructure**

43. Commenters contend that the Commission should evaluate the need for new pipeline infrastructure on a region-wide basis. As noted above, commenters argue that there is insufficient supply in the Appalachian Basin for all of the proposed pipeline projects and there is insufficient need for new pipeline capacity serving markets in Virginia and North Carolina. Commenters argue that if all the projects serving the Appalachian Basin are built, ratepayers will be paying for unused capacity.⁶² AMA argues that the Commission must conduct an independent investigation of the actual need for the ACP Project in order to protect consumers, as required by the NGA. Commenters further assert that even if more pipeline capacity is needed to serve southern markets, other pipeline projects may be more environmentally advantageous.⁶³

vi. **Precedent Agreements with Affiliated Shippers**

44. Commenters argue that because all but one of the shippers on the ACP Project are affiliated with the project's developers, those contracts are not sufficient to demonstrate project need. Commenters argue that the Certificate Policy Statement requires the Commission to examine "all relevant factors reflecting on the need for the project"⁶⁴ and states that "traditional factors for establishing the need for a project, such as contracts and precedent agreements, may no longer be a sufficient indicator that a project is in the public convenience and necessity."⁶⁵ Additionally, commenters emphasize that the

⁶² See, e.g., Public Interest Groups April 5, 2017 Comments (citing IEEFA Study at 12).

⁶³ The Synapse Study avers that considering each new pipeline proposal in isolation ignores important alternatives, such as upgrades to existing pipelines and storage facilities, which would increase regional natural gas supply capacity and avoid the adverse impacts on communities or the environment. Synapse Study at 4. Similarly, the IEEFA Study argues that the Commission should evaluate regional requirements for additional pipeline capacity similar to other infrastructure programs such as electric transmission and highways. IEEFA Study at 6.

⁶⁴ See, e.g., Friends of Nelson April 5, 2017 Comments (citing Certificate Policy Statement, 88 FERC at 61,747).

⁶⁵ See, e.g., Friends of Nelson April 5, 2017 Comments (citing Certificate Policy Statement, 90 FERC at 61,390). Commenters also cite to former Chairman Norman Bay's statement that the Commission should look beyond precedent agreements and reevaluate its test for need. See, e.g., Friends of Nelson April 5, 2017 Comments (citing

Certificate Policy Statement states that “[a] project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate”⁶⁶ and “using contracts as the primary indicator of market support for the proposed pipeline project . . . raises additional issues when the contracts are held by pipeline affiliates.”⁶⁷ Friends of the Central Shenandoah note that in Order No. 497, the Commission stated that there is an economic incentive for the pipeline to favor “transactions conducted on a pipeline that benefits the pipeline or the corporate group of which it is a part.”⁶⁸

45. Commenters further contend that Atlantic’s failure to provide a study showing that the ACP Project is needed conflicts with the Certificate Policy Statement. Commenters note that the policy statement states that when, as here, a new pipeline will serve markets already reached by existing infrastructure, “the evidence necessary to establish the need for the project will usually include a market study.”⁶⁹

46. Next, Commenters argue that, without looking behind the precedent agreements supporting the ACP Project, the Commission cannot determine whether the shipper commitments represent a genuine growth in market demand to warrant construction. Commenters assert that affiliated shippers have no incentive to seek out the lowest cost transportation for their gas. Instead, the shippers are incentivized to contract with their affiliate since all costs, including the rate of return of 14 percent, are recoverable from captive ratepayers.⁷⁰ Thus, all the risks associated with the pipeline project are shifted to

Separate Statement of Chairman Bay in *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 (2017)).

⁶⁶ See, e.g., Friends of Nelson April 5, 2017 Comments (citing Certificate Policy Statement, 88 FERC at 61,748).

⁶⁷ See, e.g., Friends of Nelson April 5, 2017 Comments (citing Certificate Policy Statement, 88 FERC at 61,744).

⁶⁸ Friends of the Central Shenandoah April 3, 2017 Comments at 10 (citing *Inquiry Into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines*, Order No. 497, FERC Stats. & Regs. ¶ 30,820 (1988), *order on reh’g*, Order No. 497-A, FERC Stats. & Regs. ¶ 30,868 (1989)).

⁶⁹ See, e.g., Friends of Nelson April 5, 2017 Comments (citing Certificate Policy Statement, 88 FERC at 61,748).

⁷⁰ Commenters claim that Dominion Resources, Inc. and Duke Energy Corporation will likely realize more profits from sales of electricity from gas-fired

captive ratepayers.⁷¹ Moreover, Public Interest Groups urge the Commission to view with skepticism precedent agreements that were not connected to the open season process.⁷²

47. Last, AMA avers that the public utility regulators in Virginia and North Carolina have not conducted a meaningful review of the precedent agreements and whether the shippers' should recover the costs of the contracts from ratepayers. AMA asserts that it is unlikely that state regulators will have the opportunity to examine the economic necessity for the pipeline prior to a decision on Atlantic's certificate application.⁷³ AMA states that even though the North Carolina Utilities Commission authorized Duke Energy Progress, Duke Energy Carolinas, and Piedmont to enter into affiliated contracts with Atlantic in 2014, it did not evaluate the necessity for the pipeline or consider whether the affiliated contracts would allow an unnecessary project to proceed.⁷⁴ Moreover, AMA notes that those approvals occurred nearly three years ago, and, according to Duke Energy's own analysis, the market demand for natural gas for electricity generation in North Carolina has since dropped.

generators because they own the ACP Project, rather than simply purchasing natural gas and counting it as an expense.

⁷¹ However, the IEEFA Study acknowledges that investors are subject to some risk regarding the project if state regulators refuse to let the affiliated shippers pass through the costs of the transportation contracts to ratepayers. IEEFA Study at 21.

⁷² Public Interest Groups April 5, 2017 Comments at 28 (citing *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at 62,141 (2002) (citing *Independence Pipeline Co.*, 89 FERC ¶ 61,283, at 61,840 (1999)) ("The proffered precedent agreement was not the result of, or related to, Independence's open season. For this reason, we found that the DirectLink agreement did not constitute reliable evidence of market need to support a finding that the proposal was required by the public convenience and necessity.")).

⁷³ Similarly, the IEEFA Study, which was submitted by multiple commenters, concludes that the state regulatory processes do not have the ability to prevent overbuilding because any prudency determination by a state regulator would likely occur after the pipeline is already placed into service and any challenge to the rates charged by the interstate pipeline would be under the Commission's exclusive jurisdiction.

⁷⁴ AMA notes that Dominion Virginia Power has not sought approval from the Virginia State Corporation Commission for its affiliate contracts to accept gas from the pipeline, and the Virginia State Corporation Commission will not review contracts for gas purchases on the ACP Project until after pipeline construction concludes.

vii. Inadequacy of Atlantic's Studies

48. Several commenters filed a 2015 review, conducted by Synapse, of the ICF International analysis and the Chmura Economics and Analytics analysis filed by Atlantic with its application.⁷⁵ The 2015 Synapse Report concluded that the analyses overestimated the benefits of the pipeline.⁷⁶ Specifically, the 2015 Synapse Report finds that the ICF International analysis wrongly assumes, without support, that the price differential between the Dominion South point and Henry Hub will be between \$1.50 and \$1.75. The 2015 Synapse Report notes that in 2015, on average, the price spread was only \$0.81⁷⁷ and that the prices at the Dominion South point and Henry Hub are converging.⁷⁸ Moreover, the 2015 Synapse Report finds that even assuming the price differential reported by ICF International, because of higher transportation costs associated with the project, there are no annual net savings from the ACP Project until 2027.⁷⁹

49. Next, the 2015 Synapse Report states that it is unclear whether ICF International's energy cost savings for Virginia residents is properly calculated. The 2015 Synapse Report notes that due to the state's membership in PJM, any cost savings would be distributed throughout the entire region and not be solely allocated to Virginia customers.⁸⁰ The 2015 Synapse Report also states that the ICF International analysis wrongly asserts that the proposed project will help consumers by reducing volatility in the market because volatility in the wholesale markets do not create volatility in the

⁷⁵ Synapse Energy Economics Inc., *Atlantic Coast Pipeline Benefits Review* (June 12, 2015) (filed June 12, 2016) (2015 Synapse Report).

⁷⁶ The ICF International analysis, the Chmura Economics and Analytics analysis, and 2015 Synapse Study discuss the effects of the ACP Project on jobs and the economy of the region. These socioeconomic effects are discussed in the final EIS and below. Here, we review only those issues related to the need for the proposed project.

⁷⁷ Commenters also note that as more takeaway capacity from the Marcellus shale is built, the price differential will decrease even more.

⁷⁸ 2015 Synapse Report at 2-3.

⁷⁹ *Id.* at 4. The IEEFA Study comes to similar conclusions when analyzing Atlantic's claims. IEEFA Study at 19.

⁸⁰ 2015 Synapse Report at 6-7.

regulated retail markets.⁸¹ Last, the 2015 Synapse Report asserts that ICF International wrongly states that the proposed project will enhance electric reliability in the region. The 2015 Synapse Report asserts that any improvement in electric reliability would be the result of new generation being built and not because of the pipeline being in place.⁸²

viii. Atlantic's Answer

50. In its December 4, 2015 answer, Atlantic states that it has entered into precedent agreements with end users for 96 percent of its capacity. Atlantic notes that the genesis for the project was a response to a solicitation by Duke Energy Corporation and Piedmont for competitive firm transportation to North Carolina to serve its growing need for natural gas. Additionally, Virginia Power Services Energy Corporation also requested proposals for firm transportation to serve natural gas-fired generation in Virginia. Atlantic states that these customers viewed the ACP Project as the best way to support their growing need for natural gas. Atlantic notes that all the project's customers and several producer groups have filed comments supporting the project.

51. Atlantic contends that the Commission's long-standing policy is that contracts are strong evidence of market demand and commenters wrongly assert that market studies are the best evidence of demand for a project. Atlantic further notes that EIA studies document growing demand for natural gas in Virginia and North Carolina and that the Clean Power Plan encourages utilities to switch from coal-fired generation to natural gas. Moreover, Atlantic asserts that the ACP Project will improve electric reliability by enhancing gas supply security and providing flexibility and optionality to generators. Atlantic contends that the ACP Project will result in a net energy cost savings to consumers of \$377 million between 2019 and 2038.

52. Next, Atlantic asserts that existing and proposed pipelines cannot replace the need for the ACP Project. Atlantic states that its customers chose the ACP Project as the best means to meet their needs and the Commission has no basis to second guess those commercial decisions. With respect to unused capacity on existing pipelines, Atlantic notes that the historic load factor does not suggest that firm transportation is available to Atlantic's customers. Atlantic acknowledges that flow reversals of existing pipelines are occurring, but states that those projects have their own customers.

53. With respect to renewable energy, Atlantic states that natural gas-fired generation provides flexibility for the region's utilities to continue working to incorporate renewable energy into their portfolios. Atlantic notes that its customers have determined that more

⁸¹ *Id.* at 7.

⁸² *Id.*

natural gas generation is required and the ACP Project is the best way to serve those generators.

ix. Commission Determination

54. The Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.⁸³ These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.⁸⁴ The Commission stated that it would consider all such evidence submitted by the applicant regarding project need. Nonetheless, the policy statement made clear that, although precedent agreements are no longer required to be submitted, they are still significant evidence of project need or demand.⁸⁵ As the court affirmed in *Minisink Residents for Environmental Preservation & Safety v. FERC*, the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers.⁸⁶ Moreover, it is current Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.⁸⁷

⁸³ Certificate Policy Statement, 88 FERC at 61,747. Prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. *See* Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,743. The ACP Project, at 96 percent subscribed, would have satisfied this prior, more stringent, requirement.

⁸⁴ Certificate Policy Statement, 88 FERC at 61,747.

⁸⁵ *Id.*

⁸⁶ *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014); *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (finding that pipeline project proponent satisfied the Commission's "market need" where 93 percent of the pipeline project's capacity has already been contracted for).

⁸⁷ Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

55. We find that Atlantic has sufficiently demonstrated that there is market demand for the project. Atlantic has entered into long-term, firm precedent agreements with six shippers for 1,440,000 Dth/d of firm transportation service, approximately 96 percent of the system's capacity.⁸⁸ Further, Ordering Paragraph (K) of this order requires that Atlantic and DETI file a written statement affirming that they have executed final contracts for service at the levels provided for in their precedent agreements prior to commencing construction. The shippers on the ACP Project supply gas to end users and electric generators, and those shippers have determined that natural gas will be needed and the ACP Project is the preferred means of obtaining that gas. We find that the contracts entered into by those shippers are the best evidence that additional gas will be needed in the markets that the ACP Project intends to serve. We also find that end users will generally benefit from the project because it would develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets in Virginia and North Carolina.⁸⁹

56. We disagree with commenters' assertion that the Commission should examine the need for pipeline infrastructure on a region-wide basis. Commission policy is to examine the merits of individual projects and each project must demonstrate a specific need.⁹⁰ While the Certificate Policy Statement permits the applicant to show need in a variety of ways, it does not suggest that the Commission should examine a group of projects together and pick which projects best serve an estimated future regional demand. In fact, projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given the uncertainty associated with long-term demand projections, such as those presented in the Synapse Study and other studies cited by commenters, where an applicant has precedent agreements for long-term firm service, the Commission deems

⁸⁸ *Constitution Pipeline Company, LLC*, 154 FERC ¶ 61,046, at P 21 (2016) (“Although the Certificate Policy Statement broadened the types of evidence certificate applicants may present to show the public benefits of a project, it did not compel an additional showing ... [and] [n]o market study or other additional evidence is necessary where ... market need is demonstrated by contracts for 100 percent of the project's capacity.”).

⁸⁹ *See ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010, at P 20 (2010).

⁹⁰ With respect to comments requesting the Commission to assess the market demand for gas to be transported by other proposed interstate pipeline projects, we note that the Commission will evaluate the proposals in those proceedings in accordance with the criteria established in our Certificate Policy Statement.

the precedent agreements to be the better evidence of demand. Thus, the Commission evaluates individual projects based on the evidence of need presented in each proceeding. Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service, the Commission places substantial reliance on those agreements to find that the project is needed.

57. With respect to the use of existing infrastructure or new renewable generation to meet the project's need, our environmental review considered the potential for energy conservation and renewable energy sources, and the availability of capacity on other pipelines, to serve as alternatives to the ACP Project and concluded that they do not presently serve as practical alternatives to the project.⁹¹ Thus, contrary to commenters' assertions, we are not persuaded that authorization of the ACP Project would lead to the overbuilding of pipeline infrastructure.

58. In addition, we are not persuaded by commenters' contention that there is insufficient supply in the Appalachian Basin to support the pipeline. While we agree, and Atlantic acknowledges, the intended source of supply for the ACP Project will be production in the Appalachian Basin, the ACP Project is also connected to other interstate pipelines, such as DETI⁹² and Transco, which could potentially supply gas to the project from other areas of supply. Additionally, because, as the commenters note, the amount of gas that will be produced from the region is reflective of, among other things, the price of natural gas, projections regarding the amount of gas available for the ACP Project are speculative.

59. Moreover, the fact that five of the six shippers on the ACP Project are affiliated with the project's sponsors does not require the Commission to look behind the precedent agreements to evaluate project need.⁹³ When considering applications for new

⁹¹ See Final EIS at 5-38 (concluding that existing pipelines do not have the capacity to transport the required volumes of gas and that generation of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation are not transportation alternatives and cannot function as a substitute for the proposed projects).

⁹² DETI's Supply Header Project would receive natural gas from two interstate pipelines, Rockies Express Pipeline, LLC and Texas Eastern Transmission, and from regional production at two receipt points. Atlantic's September 18, 2015 Application at Exhibit I.

⁹³ *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 57 ("as long as the precedent agreements are long-term and binding, we do not distinguish between

certificates, the Commission's primary concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.⁹⁴ Here, no such allegations have been made, nor have we found that the project sponsors have engaged in any anticompetitive behavior. As discussed above, Atlantic held both a non-binding and binding open season for capacity on the project and all potential shippers had the opportunity to contract for service. Moreover, Atlantic's tariff, as discussed below, ensures that any future shipper will not be unduly discriminated against.

60. We also do not find merit in the commenters' argument that the proposed project will be subsidized by the affiliated shippers' captive ratepayers. First, to the extent a ratepayer receives a beneficial service, paying for that service does not constitute a "subsidy."⁹⁵ Further, as several commenters and the Institute for Energy Economics and Financial Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* study (IEEFA study) note, state utility regulators must approve any expenditures by state-regulated utilities. We disagree with commenters who suggest that once the Commission has made a determination in this proceeding, state regulators cannot effectively review the expenditures of utilities that they regulate. In fact, any attempt by the Commission to look behind the precedent agreements in this proceeding might infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate. Here, the North Carolina Utilities Commission has already approved the precedent agreements between Atlantic and Duke Energy Progress, Duke Energy Carolinas, and Piedmont. With respect to the precedent agreement to supply natural gas to Virginia Electric and Power Company, issues related to the utility's ability to recover costs associated with its decision to subscribe for service on the ACP Project involve matters to be determined by the Virginia State Corporation Commission; those concerns are beyond the scope of the Commission's jurisdiction. Should they elect to construct the projects before affirmative action by the state regulators, the applicants will be at risk of not being able to recover some, or any, of their costs.

61. Further, we disagree with commenters claim that because Greenville and Brunswick Power Stations are already served by Transco's pipeline, the ACP Project is not needed. The fact that these two generating facilities are already connected to interstate pipelines does not diminish the reliability benefits of having alternative sources

pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project").

⁹⁴ See 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

⁹⁵ See Certificate Policy Statement, 90 FERC ¶ at 61,393.

of natural gas for those generators in case of a supply disruption. In addition, the ACP Project will be able supply additional existing generation units through interconnections with existing pipelines. For example, Atlantic cited 14 Dominion Virginia Power and 5 Duke Energy Progress facilities that could be served by the ACP Project.⁹⁶

62. Lastly, allegations that the project is not needed because gas may be exported are not persuasive. The Commission does not have jurisdiction to authorize the exportation or importation of natural gas. Such jurisdiction resides with the DOE, which must act on any applications for natural gas export or import authority.⁹⁷ Moreover, the ACP Project's shippers are domestic end users of natural gas and there is no evidence in the record that these end users intend to use their capacity to provide gas to an export terminal.

63. In conclusion, we find that the ACP Project will provide reliable natural gas service to end use customers. Precedent agreements signed by Atlantic for approximately 96 percent of the project's capacity adequately demonstrate that the project is needed.

⁹⁶ Atlantic's December 8, 2016 Data Response at Question 3.

⁹⁷ Section 3(a) of the NGA provides, in part, that "no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so." 15 U.S.C. § 717b(a) (2012). In 1977, the Department of Energy Organization Act transferred the regulatory functions of section 3 of the NGA to the Secretary of Energy. 42 U.S.C. § 7151(b) (2012). Subsequently, the Secretary of Energy delegated to the Commission authority to "[a]pprove or disapprove the construction and operation of particular facilities, the site at which such facilities shall be located, and with respect to natural gas that involves the construction of new domestic facilities, the place of entry for imports or exit for exports." DOE Delegation Order No. 00-004.00A (effective May 16, 2006). The proposed facilities are not located at a potential site of exit for natural gas exports. Moreover, the Secretary of Energy has not delegated to the Commission any authority to approve or disapprove the import or export of the commodity itself, or to consider whether the exportation or importation of natural gas is consistent with the public interest. *See Corpus Christi Liquefaction, LLC*, 149 FERC ¶ 61,283, at P 20 (2014) (*Corpus Christi*). *See also National Steel Corp.*, 45 FERC ¶ 61,100, at 61,332-33 (1988) (observing that DOE, "pursuant to its exclusive jurisdiction, has approved the importation with respect to every aspect of it except the point of importation" and that the "Commission's authority in this matter is limited to consideration of the place of importation, which necessarily includes the technical and environmental aspects of any related facilities").

c. Existing Pipelines and their Customers

64. The ACP Project is designed to transport domestically sourced gas from Appalachian Basin supply areas to markets in West Virginia, Virginia, and North Carolina. Commenters assert that the project will negatively impact existing pipelines because any natural gas transported by the ACP Project would not be available for transport on an existing pipeline. As stated above, the EIS analyzed the availability of capacity on other pipelines to serve as alternatives to the ACP Project, and concluded that they do not presently serve as practical alternatives to the project.⁹⁸ Further, no transportation service provider or captive customer in the same market has protested this project. Therefore, we find that the ACP Project will have no adverse impact on existing pipelines or their captive customers.

d. Landowners and Communities

65. Regarding impacts on landowners and communities along the project route, Atlantic proposes to locate its pipeline within or parallel to existing utility corridors where feasible. Approximately nine percent of Atlantic's pipeline rights-of-way will be collocated or adjacent to existing pipeline, roadway, railway, or utility rights of way.⁹⁹ Atlantic also proposes to use available capacity on the Piedmont system to avoid duplicative pipeline construction on undisturbed lands. Atlantic participated in the Commission's pre-filing process and has been working to address landowner and community concerns and input. Specifically, Atlantic incorporated 201 route variations, totaling 199 miles, into its proposed route for various reasons, including landowner requests, avoidance of sensitive resources, or engineering considerations.¹⁰⁰ Additionally, Atlantic has stated that it will make good faith efforts to negotiate with landowners for any needed rights, and will resort only when necessary to the use of the eminent domain. Accordingly, while we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of our consideration under the Certificate Policy Statement, we find that Atlantic has generally taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.

66. A number of commenters request that the Commission not grant Atlantic eminent domain authority. The Commission itself, however, does not confer eminent domain powers. Under NGA section 7, the Commission has jurisdiction to determine if the

⁹⁸ Final EIS at 5-38.

⁹⁹ *Id.* at 2-20.

¹⁰⁰ *Id.* at 3-51.

construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, it is NGA section 7(h) that authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.¹⁰¹

67. Next, commenters state that the Certificate Policy Statement creates a balancing test whereby the Commission balances the need for the project against the impact on landowners. Commenters contend that in this case, the balancing test requires denial of the ACP Project because of Atlantic's lack of colocation with existing rights-of-way, its extensive use of private land,¹⁰² and its negative effects on property values and economic activity.

68. The Certificate Policy Statement "allows the Commission to take into account the different interests that must be considered."¹⁰³ In this vein, the policy statement specifically noted that where a pipeline has acquired property rights for a proposed project, the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation.¹⁰⁴ Thus, the Certificate Policy Statement specifically contemplated a scenario where, if a company might not be able to acquire a perhaps significant amount of property rights through negotiation, the Commission might deny the application if there has not been a sufficient demonstration of need.¹⁰⁵ However, here, as discussed above, Atlantic has demonstrated public benefits for the proposed project. Approximately 96 percent of the ACP Project is subscribed under long-term firm transportation precedent agreements, a strong showing of need.¹⁰⁶

¹⁰¹ 15 U.S.C. § 717f(h) (2012).

¹⁰² Commenters note that the amount of land that will be acquired through eminent domain is not publically available, but suggest that it is significant.

¹⁰³ Certificate Policy Statement, 88 FERC at 61,749.

¹⁰⁴ *Id.*

¹⁰⁵ See *Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190 (2016), *reh'g denied*, 157 FERC ¶ 61,194; *Turtle Bayou Gas Storage Company, LLC*, 135 FERC ¶ 61,233 (2011).

¹⁰⁶ Certificate Policy Statement, 88 FERC at 61,749 ("if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits").

69. With respect to the lack of collocation with existing rights-of-way, the final EIS evaluated numerous alternatives where the pipeline would be collocated with existing rights-of-way and found that many of those alternatives did not offer significant environmental advantages or were technically infeasible when compared to Atlantic's proposed route. As a result of input from Commission staff and stakeholders during the pre-filing process, Atlantic revised its route to parallel various existing infrastructure corridors and thus added nearly 60 miles of collocation to the project. Therefore, we find that Atlantic has made a reasonable effort to collocate its pipeline with existing rights-of-way.

e. **Conclusion**

70. We find that the benefits that the ACP Project will provide to the market outweigh any adverse economic effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of Atlantic's proposal, as conditioned in this order.

2. **DETI Supply Header Project**

71. As stated, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for new construction that are higher than the company's existing system rates, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.¹⁰⁷ Here, DETI proposes an incremental firm transportation base reservation rate, which is higher than its existing system-wide rate, to recover the costs of the project. The proposed incremental rates are calculated to recover all construction, installation, operation, and maintenance costs associated with the project. Accordingly, we find that the Supply Header Project will not be subsidized by existing customers and satisfies the threshold no-subsidy requirement under the Certificate Policy Statement.

72. We also find that the proposal will not adversely affect DETI's existing customers because there will be no degradation of existing service. In addition, other pipelines and

¹⁰⁷ See *Transcontinental Gas Pipe Line Corp.*, 98 FERC ¶ 61,155, at 61,552 (2002) (noting that the Commission has previously determined that where a pipeline proposes to charge an incremental rate for new construction, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers) (citations omitted); see also, *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016) (same).

their captive customers will not be adversely impacted because the proposal is not intended to replace service on other pipelines. Rather, the project would allow DETI to provide additional transportation services to Atlantic on its system. Further, no pipeline or their captive customers have protested the application.

73. Moreover, DETI has designed the Supply Header Project to minimize impacts on landowners and surrounding communities. Approximately 31 percent of the right-of-way for the proposed project will be collocated or adjacent to existing pipeline, roadway, railway, or utility rights of way.¹⁰⁸ Additionally, most of the project facility installations will be on lands that are either owned by DETI or on which DETI holds leaseholder or easement rights.

74. We also find that DETI's proposed abandonment of facilities is permitted by the public convenience and necessity.¹⁰⁹ As stated above, the two compressor units at the Hastings Compressor Station currently serve a gathering function. Therefore, their abandonment would not affect any of DETI's jurisdictional transportation or storage customers. Last, no shipper affected by the proposed abandonment has filed comments in opposition to DETI's proposal.

75. We find that the benefits that the Supply Header Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding communities. Consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of DETI's proposal, as conditioned in this order.

3. Eminent Domain Authority

76. Bold Alliance, Bold Education Fund, Friends of Nelson, and individual landowners (collectively, Bold Alliance) filed a petition for declaratory order and injunctive relief in Federal District Court for the District of Columbia.¹¹⁰ Bold Alliance alleges that the eminent domain provisions of the NGA and the Commission's Certificate

¹⁰⁸ Final EIS at 2-20.

¹⁰⁹ 15 U.S.C. § 717f(b) (2012).

¹¹⁰ The petition was filed with the Commission on September 6, 2017.

Policy Statement do not further a public use, and therefore, violate the Due Process Clause and Takings Clause of the Fifth Amendment.¹¹¹

77. As stated above, the Commission itself does not confer eminent domain powers. Under NGA section 7, the Commission has jurisdiction to determine if the construction and operation of proposed interstate pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination and issues a natural gas company a certificate of public convenience and necessity, it is NGA section 7(h) that authorizes that certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain if it cannot acquire the easement by an agreement with the landowner.¹¹²

78. While this matter is currently before the court, we note that Bold Alliance's legal theory is unfounded. Bold Alliance generally argues that the Commission's certification process falls short of the standard required by the Constitution for a taking: that the exercise of eminent domain is for a "public use." As noted above, Congress provided in NGA section 7(h) that a certificate holder was entitled to use eminent domain. Congress did not suggest that there was a further test, beyond the Commission's determination under NGA section 7(c)(e),¹¹³ that a proposed pipeline was required by the public convenience and necessity, such that certain certificated pipelines furthered a public use, and thus were entitled to use eminent domain, while others did not. The Commission has interpreted the section 7(c)(e) public convenience and necessity determination as requiring the Commission to weigh the public benefit of the proposed project against the project's adverse effects.¹¹⁴ We undertake this balancing through our application of the

¹¹¹ On September 25, 2017, Bold Alliance filed comments raising the same issues discussed in their petition for declaratory order. We reject Bold Alliance's comments as untimely.

¹¹² 15 U.S.C. § 717f(h) (2012).

¹¹³ 15 U.S.C. § 717f(e).

¹¹⁴ As the agency that administers the Natural Gas Act, and in particular as the agency with expertise in addressing the public convenience and necessity standard in the Act, the Commission's interpretation and implementation of that standard is accorded deference. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 392 (D.C. Cir. 2017); *Office of Consumers Counsel v. FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980); *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865, at *21 (S.D. Tex. July 15, 2016), *aff'd*, 859 F.3d 325 (5th Cir. 2017); *see also MetroPCS Cal., LLC v. FCC*, 644 F.3d 410, 412 (D.C. Cir. 2011) (under *Chevron*, the Court "giv[es] effect to

Certificate Policy Statement criteria, under which we balance the public benefits of a project against the residual adverse effects.¹¹⁵ Thus, through this balancing process we make findings that support our ultimate conclusion that the public interest is served by the construction of the proposed project.¹¹⁶ Accordingly, once a natural gas company obtains a certificate of public convenience and necessity, it may exercise the right of eminent domain in a U.S. District Court or a state court.

79. The Commission, having determined that the ACP Project is in the public convenience and necessity, need not make a separate finding that the project serves a “public use” to allow the certificate holder to exercise eminent domain. In short, the Commission’s public convenience and necessity finding is equivalent to a “public use” determination.¹¹⁷ In enacting the NGA, Congress clearly articulated that the transportation and sales of natural gas in interstate commerce for ultimate distribution to the public is in the public interest.¹¹⁸ This congressional recognition that natural gas

clear statutory text and defer[s] to an agency’s reasonable interpretation of any ambiguity”).

¹¹⁵ Certificate Policy Statement, 88 FERC at 61,747-49,

¹¹⁶ *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (because the Commission declared that the subject pipeline would serve the public convenience and necessity, the takings complained of did serve a public purpose); *see also Guardian Pipeline, L.L.C. v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002) (no evidence of public necessity other than the Commission’s determination is required).

¹¹⁷ *See Midcoast Interstate Transm., Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000); *see also, e.g., Troy Ltd. v. Renna*, 727 F.2d 287, 301 (3rd Cir. 1984) (“authoriz[ing] an occupation of private property by a common carrier . . . engaged in a classic public utility function” is an “exemplar of a public use”); *E. Tenn. Natural Gas Co. v. Sage*, 361 F.3d 808 (4th Cir. 2004) (“Congress may, as it did in the [Natural Gas Act], grant condemnation power to ‘private corporations . . . execut[ing] works in which the public is interested.’”) (quoting *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878)).

¹¹⁸ 15 U.S.C. § 717(a) (2012) (declaring that the “business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest”). *See also Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950)(*Thatcher*), *cert. denied*, 340 U.S. 829 (1950) (explaining that Congress, in enacting the NGA, recognized that “vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital

transportation furthers the public interest is consistent with the Supreme Court's emphasis on legislative declarations of public purpose in upholding the power of eminent domain.¹¹⁹

80. Bold Alliance erroneously cites to *Transco*,¹²⁰ where the Commission, after evaluating record evidence of need for the project at issue, found that there was a need for the project for purposes of section 7(c) of the NGA¹²¹ and that the project served a public purpose sufficient to satisfy the Takings Clause.¹²² We have done the same here. The proposed projects in this proceeding are designed to primarily serve natural gas demand in Virginia and North Carolina. Through the distribution of natural gas from the projects, the public at large will benefit from increased reliability of natural gas supplies. Furthermore, upstream natural gas producers will benefit from the project by being able to access additional markets for their product. Therefore, we conclude that the proposed project is required by the public convenience and necessity.

81. Notwithstanding the fact that we addressed a takings argument raised in *Transco* and here, such a question is beyond our jurisdiction; only the courts can determine whether Congress' action in passing section 7(h) of the NGA conflicts with the Constitution. We note, however, that courts have found eminent domain authority in section 7(h) of the NGA to be constitutional.¹²³

need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line.”).

¹¹⁹ *Kelo v. City of New London, Conn.*, 545 U.S. 469, 479-80 (2005) (upholding a state statute that authorized the use of eminent domain to promote economic development); *see also id.* at 480 (noting that without exception the Court has defined the concept of “public purpose” broadly, reflecting the Court's longstanding policy of deference to the legislative judgments in this field).

¹²⁰ *Transco*, 158 FERC ¶ 61,125.

¹²¹ *Id.* PP 20-33.

¹²² *Id.* PP 66-67.

¹²³ *See Thatcher*, 180 F.2d at 647. In addition, the eminent domain authority in many federal statutes mirror the authority in section 7(h) of the NGA. For instance, section 21 of the Federal Power Act (FPA), 16 U.S.C. § 814 (2012), provides that when a licensee cannot acquire by contract lands or property necessary to construct, maintain, or operate a licensed hydropower project, it may acquire the same by the exercise of the right of eminent domain in a U.S. District Court or a state court. The U.S. Supreme

4. Antitrust Complaint

82. On May 12, 2016, Mr. Michael Hirrel filed with the Commission an undated copy of a filing addressed to the Federal Trade Commission (FTC), in which he alleged that Dominion Resources and Duke Energy were in violation of section 2 of the Sherman Act and section 5 of the Federal Trade Commission Act, and asked the FTC to file comments in this proceeding.¹²⁴ On June 24, 2016, Mr. Hirrel filed with the Commission a June 23, 2016 letter from the Virginia Chapter of the Sierra Club to the FTC supporting Mr. Hirrel's complaint. On August 30, 2016, DETI and Atlantic filed a response to which Mr. Hirrel responded to on November 4, 2016.

83. Mr. Hirrel's initial filing was made with the FTC, not with the Commission, and accordingly is a matter for the FTC to review. However, Mr. Hirrel is correct when he states in his response¹²⁵ that questions regarding competition, including antitrust concerns, may be considered by the Commission in making its public convenience and necessity findings.¹²⁶ Here, the Commission has, pursuant to the policy statement, found that the proposed project will not have negative impacts on existing pipelines and their customers, and, to the extent that the filings raised issues concerning the need for the proposed projects and the precedent agreements with affiliated shippers, those issues were discussed above. We see no reason to further address Mr. Hirrel's allegations.

5. Compressor Station Spacing

84. Mr. Richard Laska alleges that the ACP Project is overbuilt because the compressor stations on the project are located over 200 miles apart, even though the typical range between compressor stations is 40 to 100 miles. Additionally, Blue Ridge Environmental Defense League questions whether three compressor stations are sufficient for the ACP Project and if other compressor stations are planned, but have not been disclosed. In response to Commission staff's November 23, 2016 data request, Atlantic states that case-specific hydraulics, along with the location of receipt and

Court has not questioned the constitutionality of section 21 of the FPA. *See FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 123-24 (1960). Similarly, Congress included the same eminent domain authority for permit holders for electric transmission facilities when it enacted the Energy Policy Act of 2005. 16 U.S.C. § 824p(e)(1) (2012).

¹²⁴ The FTC has not filed comments.

¹²⁵ November 4, 2016 response at 18.

¹²⁶ *See NAACP v. FPC*, 425 U.S. 662, 670, n.6. (1976) (citations omitted) (stating that "the Commission has authority to consider conservation, environmental, and antitrust questions").

delivery points, dictate the appropriate location of compression facilities. Atlantic asserts that its system is designed for a specific situation, and therefore, the distance between compressor stations will vary from the general ranges cited by Mr. Laska.

85. Based upon its review of the pipeline design, hydraulic models, and explanation of how the location of compressor stations are determined, Commission staff determined that Atlantic has properly designed its pipeline system based upon design and location constraints. Mr. Laska's allegations that the pipeline is over-built because of the distances between compressor stations exceed the typical range of 40 to 100 miles apart does not take into consideration the specific transportation requirements nor the design and operating conditions that are unique to the project.

B. Blanket Certificates

86. Atlantic requests a Part 284, Subpart G blanket certificate in order to provide open-access transportation services. Under a Part 284 blanket certificate, Atlantic will not require individual authorizations to provide transportation services to particular customers. Atlantic filed a *pro forma* Part 284 tariff to provide open-access transportation services. Since a Part 284 blanket certificate is required for Atlantic to offer these services, we will grant Atlantic a Part 284 blanket certificate, subject to the conditions imposed herein.

87. Atlantic has also applied for a Part 157, Subpart F blanket certificate. The Part 157 blanket certificate gives an interstate pipeline NGA section 7 authority to automatically, or after prior notice, perform certain activities related to the construction, acquisition, abandonment, and replacement and operation of pipeline facilities. Because Atlantic will become an interstate pipeline with the issuance of a certificate to construct and operate the proposed facilities, we will issue to Atlantic the requested Part 157, Subpart F blanket certificate.

C. Lease Agreement

88. As described above, Atlantic and Piedmont have entered into a Capacity Lease Agreement whereby Atlantic will lease 100,000 Dth/d of capacity on Piedmont's system and use the leased capacity to provide service under the terms of its FERC Tariff.

89. Historically, the Commission views lease arrangements differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.¹²⁷ To enter into a lease agreement, the lessee generally needs to be a natural gas company under the NGA and needs section 7(c) certificate

¹²⁷ *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001).

authorization to acquire the capacity. Once acquired, the lessee in essence owns that capacity and the capacity is subject to the lessee's tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.¹²⁸

90. The Commission's practice has been to approve a lease if it finds that: (1) there are benefits from using a lease arrangement; (2) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease on a net present value basis; and (3) the lease arrangement does not adversely affect existing customers.¹²⁹ The lease agreement between Atlantic and Piedmont satisfies these requirements.

91. First, the Commission has found that capacity leases in general have several potential public benefits. Leases can promote efficient use of existing facilities, avoid construction of duplicative facilities, reduce the risk of overbuilding, reduce costs, minimize environmental impacts, and result in administrative efficiencies for shippers.¹³⁰ Here, the lease arrangement will provide Atlantic the ability to serve markets in North Carolina without construction of duplicative facilities which would essentially parallel the Piedmont system. The leased capacity allows for the efficient use of the available capacity on Piedmont, avoids the environmental impact and impacts on landowners associated with constructing duplicative facilities, substantially reduces the costs of constructing Atlantic's system, and allows Atlantic's system to be placed into service earlier than if redundant facilities were constructed. The lease will provide Atlantic's shippers with seamless access, under a single firm transportation contract, from the Appalachian Basin to delivery points in North Carolina.

92. Second, Atlantic states that the monthly lease charge it will pay to Piedmont is less than Piedmont's maximum applicable transportation rates for comparable service. Piedmont states that comparable transportation service is offered under Rate Schedule 113, which has an annual average daily rate of \$0.23 per Dth.¹³¹ According to Atlantic and Piedmont's October 3, 2016 data response, Atlantic will make a monthly payment of

¹²⁸ *Texas Gas Transmission, LLC*, 113 FERC ¶ 61,185, at P 10 (2005).

¹²⁹ *Id.*; *Islander East Pipeline Co., L.L.C.*, 100 FERC ¶ 61,276, at P 69 (2002).

¹³⁰ *See, e.g., Dominion Transmission, Inc.*, 104 FERC ¶ 61,267, at P 21 (2003); *Islander East Pipeline Co. L.L.C.*, 100 FERC ¶ 61,276 at P 70.

¹³¹ In Rate Schedule 113, Piedmont offers two seasonal rates, a summer rate and a winter rate. For our analysis of the lease payments, we used an average daily rate based on the entire year.

\$228,125 to Piedmont for the leased capacity of 100,000 Dth/d. This equates to a daily demand charge of \$0.075 per Dth, which is lower than the rate for comparable transportation service on Piedmont's system.

93. Third, the lease will use existing capacity on Piedmont's system and will not adversely affect Piedmont's existing customers. Piedmont's existing customers will not subsidize the costs of providing capacity for Atlantic, and Piedmont states that it will not pass on any costs associated with the lease to its existing customers.¹³² In addition, the North Carolina Utilities Commission has authorized Piedmont to enter into the lease in an order issued October 28, 2014.¹³³

94. Because the lease payments are satisfactory, there are significant benefits, and those benefits outweigh any potential harm to Piedmont's customers, we find that the proposed lease is required by the public convenience and necessity.

95. To enable Piedmont to carry out its responsibilities under the lease agreement, we will issue Piedmont a limited jurisdiction certificate. The Commission looks closely at proposals that would create dual jurisdiction facilities, i.e., facilities that would be subject to state and federal jurisdiction, in order to avoid duplicative and/or potentially inconsistent regulatory schemes over the same facilities. However, here, although federal regulation of Piedmont will be "limited," Piedmont and Atlantic will both be subject to exclusive federal regulation regarding the lease of 100,000 Dth/d of capacity on the Piedmont system and any issues that may arise thereunder. The limited jurisdiction certificate will enable Piedmont to operate the leased capacity being used for NGA jurisdictional services subject to the terms of the lease and subject to Atlantic's open-access tariff.¹³⁴ The limited jurisdiction certificate will require Piedmont to operate the leased capacity in a manner that ensures Atlantic's ability to provide services, including interruptible transportation, using the leased capacity on an open-access, non-discriminatory basis. We have approved similar leases in the past involving intrastate

¹³² Atlantic and Piedmont's Joint Application at 13.

¹³³ "Order Accepting Affiliated Agreements For Filing and Permitting Operation Thereunder Pursuant to G.S. 62-153 and Authorizing Piedmont to Enter into Related Redelivery Agreements," issued by the NCUC in its Docket No. G-9, Sub 655, on Oct. 28, 2014.

¹³⁴ Atlantic and Piedmont also request a waiver of the Commission's "shipper must have title" rule to allow Atlantic to transport gas on the leased Piedmont capacity for Atlantic's customers using gas owned by those customers. This waiver is not necessary as the leased capacity will now be considered part of Atlantic's system and is subject to the terms and conditions of Atlantic's tariff.

pipelines and local distribution companies,¹³⁵ and our finding that Piedmont is NGA-jurisdictional is limited to its role as lessor-operator of capacity used by Atlantic to provide Atlantic's interstate services. Piedmont will remain non-jurisdictional as to its intrastate activities.

96. We will require Atlantic to file with the Commission a notification in this docket, within 10 days of the date of acquisition of the capacity leased from Piedmont, providing the effective date of the acquisition.¹³⁶ We also remind the applicants that when the lease terminates, Atlantic is required to obtain authority to abandon the leased capacity.¹³⁷

D. Rates

1. Atlantic Coast Pipeline Project

a. Atlantic's Initial Rates

97. Atlantic proposes to provide firm (Rate Schedule FT) and interruptible (Rate Schedule IT) transportation services under Part 284 of the Commission's regulations at cost-based recourse rates, and also requests the authority to offer service at negotiated rates. Atlantic proposes a maximum FT reservation recourse rate of \$1.7249 per Dth and a FT commodity charge of \$0.0041 per Dth.¹³⁸ The maximum IT recourse rate of \$1.7290 per Dth is based on the maximum daily FT reservation rate plus the FT commodity charge.¹³⁹ Atlantic states that it designed its initial recourse rates consistent

¹³⁵ See, e.g., *The East Ohio Gas Co.*, 133 FERC ¶ 61,076 (2010).

¹³⁶ *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 70 (2017).

¹³⁷ *Transcontinental Gas Pipe Line Company, LLC*, 156 FERC ¶ 61,092, at P 57 (2016).

¹³⁸ Atlantic proposes to include in its Statement of Applicable Rates, on *pro forma* tariff record 10.20, the applicable DETI rates that will be assessed to customers utilizing the capacity Atlantic contracted on the DETI Supply Header Project, pursuant to section 29 (Off-System Capacity) of the General Terms & Conditions (GT&C).

¹³⁹ Atlantic states that its fuel retention percentage will be adjusted on a quarterly basis and that any over- or under- recoveries of fuel will be tracked and flowed through in future period fuel retention percentages, pursuant to GT&C section 31. Atlantic states that it will submit a tariff filing 30 to 60 days prior to going into service to establish its initial Transportation Fuel Retainage Percentage, which is currently stated as "TBD" in its *pro forma* tariff.

with the Straight-Fixed Variable rate design methodology based on the full design capability of 1,500,000 Dth/d and first-year cost of service of \$946,320,533. Atlantic developed its proposed first year cost of service utilizing a capital structure of 50 percent debt and 50 percent equity, with a debt cost of 6.8 percent, a return on equity (ROE) of 14 percent, and a depreciation rate of 2.5 percent.

98. The NCUC states that Atlantic has failed to provide any analysis of current financial markets and/or current investor expectations to justify the proposed 14 percent ROE.¹⁴⁰ The NCUC suggests that it would not be reasoned decision-making to establish recourse rates for over \$5.1 billion of investment without requiring Atlantic to comply with its statutory obligation of demonstrating that its proposed project is required by the public convenience and necessity based on current market conditions.¹⁴¹ The NCUC asserts that Atlantic's first-year pre-tax return of 15 percent accounts for approximately three quarters of Atlantic's first-year cost of service and the ROE chosen to compute the recourse rates has a material impact on those rates.¹⁴² Further, the NCUC suggests that the cases cited by Atlantic in its application are not as relevant as the Commission's more recent Opinion No. 524-A, where the Commission reaffirmed a decision using a discounted cash flow analysis that resulted in a median ROE of 10.28 percent.¹⁴³ The NCUC cited a number of other cases in which the Commission approved ROEs much lower than 14 percent;¹⁴⁴ however, the NCUC also recognizes that the ROEs approved in those cases were for existing pipeline companies rather than new companies such as Atlantic.¹⁴⁵

99. Many commenters also cite the IEEFA Study, which concludes that the Commission policy allowing an ROE of 14 percent for new pipeline construction leads to overbuilding of pipelines because the ROE is higher than that of other regulated utilities.

¹⁴⁰ NCUC Protest at 6.

¹⁴¹ *Id.*

¹⁴² *Id.* (citing Atlantic Initial Application at Exhibit P, Page 3, Lines 8-9).

¹⁴³ *Portland Natural Gas Transmission Sys.*, Opinion No. 524-A, 150 FERC ¶ 61,107, at P 195 (2015).

¹⁴⁴ *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040, at P 686 (2013); *Portland Natural Gas Transmission Sys.*, Opinion No. 510-A, 142 FERC ¶ 61,198, at P 250 (2013), *order on reh'g*, 150 FERC ¶ 61,106 (2015); *Kern River Gas Transmission Co.*, Opinion No. 486-F, 142 FERC ¶ 61,132, at P 263 (2013).

¹⁴⁵ NCUC Protest at 7.

The IEEFA Study notes that the average ROE granted by state public utilities commissions to investor-owned electric utilities was 9.92 percent and the Commission recently lowered its allowed return on equity for electric transmission companies in New England to a maximum of 11.74 percent. The IEEFA Study also notes that a study by the Natural Gas Supply Association found that a majority of pipeline companies earned returns on equity greater than 12 percent, with two of those companies earning returns on equity in excess of 24 percent.

100. In its answer, Atlantic states that the NCUC provides no basis for Atlantic to be treated differently than all other new pipeline projects approved in recent years. Additionally, Atlantic asserts that the Commission has never found that changed financial conditions over the past ten years have warranted a reduction in the ROE allowed for new pipelines, which stands at 14 percent.¹⁴⁶ Atlantic reiterates that its proposed 14 percent ROE reflects the construction, financial, regulatory, and contractual risks faced by new pipelines and few of the approved cases spanning the past decade contain the sort of “analysis of current financial markets and/or current investor expectations” that the NCUC seeks.¹⁴⁷

101. In section 7 certificate proceedings, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard, which is a less rigorous standard than the just and reasonable standard under NGA sections 4 and 5.¹⁴⁸ The Commission does not believe that conducting a discounted

¹⁴⁶ Atlantic Initial Application at 30 n.24. *See, e.g., Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at PP 48-49 (2014) (50/50 capital structure and ROE 14%); *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at P 39 n.28 (2014) (70/30 capital structure and ROE 14%); *Ruby Pipeline L.L.C.*, 136 FERC ¶ 61,054, at P 11 (2011) (50/50 capital structure and ROE 14%).

¹⁴⁷ Atlantic Answer at 25-26.

¹⁴⁸ *Atlantic Refining Co. v. Public Serv. Comm'n of New York*, 360 U.S. 378 (1959) (*CATCO*). In *CATCO*, the Court contrasted the Commission's authority under sections 4 and 5 of the NGA to approve changes to existing rates using existing facilities and its authority under section 7 to approve initial rates for new services and services using new facilities. The Court recognized “the inordinate delay” that can be associated with a full-evidentiary rate proceeding and concluded that was the reason why, unlike sections 4 and 5, section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certifies new facilities, expansion capacity, and/or services. *Id.* at 390. The Court stressed that in deciding under section 7(c) whether proposed new facilities or services are required by the public convenience and necessity, the Commission is required to “evaluate all factors bearing on the public interest,” and noted that an

cash flow analysis in individual certificate proceedings would be the most effective or efficient way for determining the appropriate ROE. While parties have the opportunity in section 4 rate proceedings to file and examine testimony with regard to the composition of the proxy group to use in a discounted cash flow analysis, the growth rates used in the analysis, and the pipeline's position within the zone of reasonableness with regard to risk, it would be difficult, if not impossible, to complete this type of analysis in section 7 certificate proceedings in a timely manner, and attempting to do so would unnecessarily delay proposed projects with time sensitive in-service schedules.¹⁴⁹

102. As noted by Atlantic, in prior cases, the Commission has allowed a 14 percent ROE for greenfield pipeline projects based on a capital structure that contains no more than 50 percent equity. The Commission's policy of approving equity returns of up to 14 percent with an equity capitalization of no more than 50 percent reflects the fact that greenfield pipelines undertaken by a new entrant in the market face higher business risks than existing pipelines proposing incremental expansion projects.¹⁵⁰ Thus, approving Atlantic's requested 14 percent return on equity in this instance is not merely "reflexive"; it is in response to the risk Atlantic faces as a new market entrant, constructing a new greenfield pipeline system. Moreover, the returns approved for electric utilities and local distribution companies are not relevant because there is no showing that these companies face the same level of risk as faced by greenfield projects proposed by a new natural gas pipeline company.¹⁵¹

applicant's proposed initial rates are not "the only factor bearing on the public convenience and necessity." *Id.* at 391. Thus, as explained by the Court, "[t]he Congress, in § 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require when the Commission exercises authority under section 7," *id.*, and the Commission therefore has the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA. *Id.* at 392.

¹⁴⁹ *Id.* at 391.

¹⁵⁰ See, e.g., *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, at P 127 (2006) (explaining that existing pipelines who need only acquire financing for incremental expansions face less risk than "a greenfield project undertaken by a new entrant in the market").

¹⁵¹ The Commission has previously concluded that distribution companies are less risky than a pipeline company. See, e.g. *Trailblazer Pipeline Co.*, 106 FERC ¶ 63,005, at

103. Further, as explained below, we are requiring Atlantic to file a cost and revenue study at the end of its first three years of actual operation to justify its existing cost-based rates. The three-year study will provide an opportunity for the Commission and the public to review Atlantic's original estimates, upon which its initial rates are based, to determine whether Atlantic is over-recovering its cost of service with its approved initial rates, and whether the Commission should exercise its authority under section 5 of the NGA to establish just and reasonable rates. Alternatively, Atlantic may elect to make a NGA section 4 filing to revise its initial rates. The public would have an opportunity to review Atlantic's proposed return on equity and other cost of service components at that time and would have an opportunity to raise issues relating to the rate of return, as well as all other cost components. As such, we find that Atlantic's proposed rates will "ensure that the consuming public may be protected" until just and reasonable rates can be determined through the more thorough and time-consuming ratemaking sections of the NGA.¹⁵²

104. We have reviewed Atlantic's proposed cost of service and initial rates and find they reasonably reflect current Commission policy for a new pipeline entity. Therefore, we accept Atlantic's proposed recourse rates as the initial rates for service on its pipeline.

b. Three-Year Filing Requirement

105. Consistent with Commission precedent, Atlantic is required to file a cost and revenue study no later than three months after the end of its first three years of actual operation to justify its initial cost-based firm and interruptible recourse rates.¹⁵³ In its filing, the projected units of service should be no lower than those upon which Atlantic's approved initial rates are based. The filing must include a cost and revenue study in the form specified in section 154.313 of the Commission's regulations to update cost of service data.¹⁵⁴ Atlantic's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, Atlantic is advised to include, as part of the eFiling description, a reference to Docket No. CP15-554-000 and the cost and

P 94 (2004) (rejecting inclusion of local distribution companies in a proxy group because they face less risk than a pipeline company.).

¹⁵² *CATCO*, 360 U.S. at 392.

¹⁵³ *Rover Pipeline, LLC*, 158 FERC ¶ 61,109, at P 82 (2017); *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at P 57 (2009); *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165, at P 34 (2008).

¹⁵⁴ 18 C.F.R. § 154.313 (2017).

revenue study.¹⁵⁵ After reviewing the data, the Commission will determine whether to exercise its authority under NGA section 5 to investigate whether the rates remain just and reasonable. In the alternative, in lieu of this filing, Atlantic may make a general NGA section 4 rate filing to propose alternative rates to be effective no later than three years after the in-service date for its proposed facilities.

2. DETI Supply Header Project

106. DETI proposes to establish as its recourse rates an initial monthly incremental transportation base reservation charge of \$4.7459 per Dth and its existing system maximum base usage charge of \$0.0083 per Dth.¹⁵⁶ The reservation charge was based on a first year cost of service of \$86,072,419 and full design capacity of 1,511,335 Dth/d.¹⁵⁷ In developing its first year cost of service, DETI uses a pre-tax return of 13.70 percent and its system depreciation rate of 2.5 percent, which DETI states were approved in a settlement in Docket No. RP97-406-000.¹⁵⁸ Further, DETI plans to charge all other applicable rates, charges, and surcharges under its Rate Schedule FT, including its Transportation Cost Rate Adjustment and Electric Power Cost Adjustment charges, the maximum usage charge, and maximum system fuel retention percentage.

107. The NCUC protested DETI's proposed recourse rates stating DETI has not demonstrated that use of a pre-tax return of 13.70 percent to calculate its proposed recourse rates is reflective of current financial market conditions. The NCUC believes the use of a pre-tax return from a rate case filed over 15 years ago means that a major element of the proposed recourse rates does not reflect current costs.¹⁵⁹ The NCUC asserts that DETI's first-year pre-tax return of 13.70 percent will be over three quarters of DETI's cost of service underlying the proposed recourse rates, and because DETI simply followed the Commission's policy of using the last return on file without regard to whether the pre-tax return reflects current market conditions, DETI's application is devoid of any evidence which would permit an analysis of the majority of the cost of service underlying its proposed recourse rates. The NCUC asserts that application of the Commission's policy may result in reasonable recourse rates when a pipeline's rate of

¹⁵⁵ *Electronic Tariff Filings*, 130 FERC ¶ 61,047, at P 17 (2010).

¹⁵⁶ DETI March 15, 2016 Data Response at Question 5.

¹⁵⁷ DETI March 15, 2016 Data Response, Question 5 at Page 3 of Attachment 2.

¹⁵⁸ *CNG Transmission Corp.*, 85 FERC ¶ 61,261, at 62,051 (1998).

¹⁵⁹ NCUC Protest at 7.

return, debt costs, and capital structure were recently, or are being concurrently, reviewed; however, that is not the case here.

108. The NCUC states financial markets are very different now than when DETI's ROE was last approved and that the Commission's most recent pronouncements on ROE provide valuable perspective on the reasonableness of DETI's proposed 13.70 percent pre-tax return. For example, the NCUC points out that the Commission recently reaffirmed a decision using a discounted cash flow analysis, based on the six-month period ending March 31, 2011, which resulted in a median ROE of 12.08 percent.¹⁶⁰ In addition, the NCUC states the Commission has approved an ROE of 10.55 percent for El Paso Natural Gas Company, 12.99 percent for Portland Natural Gas Transmission System, and 11.55 percent for Kern River Gas Transmission Company.¹⁶¹ The NCUC recognizes that these ROEs are not directly comparable to the pre-tax return proposed by DETI; however, the lack of specified ROE, debt costs, and capital structure in DETI's application precludes any apples-to-apples comparison.

109. In its answer, DETI states that it has developed a large number of projects on its system with incremental rates and the Commission has consistently approved the 13.70 percent pre-tax rate of return. DETI asserts that the use of the pre-tax return follows well-established Commission policy and the Commission has considered and rejected the same argument advanced by the NCUC with regards to DETI's Allegheny Storage Project.¹⁶²

110. As the NCUC acknowledges, the Commission's consistent policy in section 7 certificate proceedings is to require that a pipeline's cost-based recourse rates for incrementally-priced expansion capacity be designed 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.¹⁶³ DETI's proposed

¹⁶⁰ *Portland Natural Gas Transmission Sys.*, Opinion No. 524-A, 150 FERC ¶ 61,107 at P 195.

¹⁶¹ *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 at P 686; *Portland Natural Gas Transmission Sys.*, Opinion No. 510-A, 142 FERC ¶ 61,198 at P 250, *order on reh'g*, 150 FERC ¶ 61,106; and *Kern River Gas Transmission Co.*, Opinion No. 486-F, 142 FERC ¶ 61,132 at P 263.

¹⁶² *Dominion Transmission, Inc.*, 141 FERC ¶ 61,240 at P 41.

¹⁶³ *See, e.g., Trunkline Gas Co., LLC*, 135 FERC ¶ 61,019, at P 33 (2011); *Florida Gas Transmission Co., LLC*, 132 FERC ¶ 61,040, at P 35 n.12 (2010); *Northwest Pipeline Corp.*, 98 FERC ¶ 61,352, at 62,499 (2002); and *Mojave Pipeline Co.*, 69 FERC ¶ 61,244, at 61,925 (1994). *See also Dominion Cove Point LNG, LP*,

incremental recourse rate for the Supply Header Project is based on the specified pre-tax return of 13.70 percent underlying the design of its approved settlement rates in Docket No. RP97-406-000.¹⁶⁴ While DETI has twice entered into settlements with its customers reaffirming its rates while providing certain rate relief, neither of those settlements specified the rate of return or most other cost of service components used to calculate the settlement rates.¹⁶⁵ Therefore, DETI calculated its proposed incremental rates in this certificate proceeding consistent with Commission policy by using the last Commission-approved specified pre-tax return.

111. The Commission's current policy of calculating incremental rates for expansion capacity using the Commission-approved ROEs underlying pipelines' existing rates is an appropriate exercise of its discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA.¹⁶⁶ As discussed above, we do not believe that conducting discounted cash flow analyses in individual certificate proceedings would be the most effective or efficient way for determining the appropriate ROEs for proposed pipeline expansions.

112. DETI's proposed incremental monthly recourse reservation charge of \$4.7459 per Dth is higher than the generally applicable Rate Schedule FT reservation

115 FERC ¶ 61,337, at P 132 (2006), *order on reh'g*, 118 FERC ¶ 61,007, at PP 120, 122-123 (2007) (allowing, on rehearing, Dominion Cove Point LNG to recalculate incremental rates using the rates of return ultimately approved in its pending rate case, as opposed to its proposed rates of return). If a pipeline's most recent general section 4 rate case involved a settlement that did not specify a rate of return or pre-tax return, the Commission's policy requires that incremental rates in the pipeline's certificate proceedings be calculated using the rate of return or pre-tax return from its most recent general section 4 rate case (or rate case settlement) in which a specified return component was used to calculate the approved rates. *See, e.g., Equitrans, L.P.*, 117 FERC ¶ 61,184, at P 38 (2006). This policy applies even if a pipeline calculated its proposed incremental rates for expansion capacity using a rate of return *lower* than the most recently approved specified rate of return. *Id.* (rejecting Equitrans's proposed use of 14.25 percent ROE component for incremental rates for mainline extension and requiring recalculation using the specified pre-tax rate of return of 15 percent that was approved in its rate case).

¹⁶⁴ *CNG Transmission Corp.*, 85 FERC ¶ 61,261 at 62,051.

¹⁶⁵ *See Dominion Transmission, Inc.*, 146 FERC ¶ 61,068 (2014); *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285 (2005).

¹⁶⁶ *See Transcontinental Gas Pipe Line Co.*, 156 FERC ¶ 61,092 at PP 26-29; *Transcontinental Gas Pipe Line Co.*, 156 FERC ¶ 61,022, at PP 23-26 (2016).

charge of \$3.8820 per Dth contained in DETI's tariff. Additionally, DETI's proposes to use its existing system maximum base usage charge of \$0.0083 per Dth.¹⁶⁷ We find that DETI's proposed recourse rates are consistent with the Certificate Policy Statement and therefore approve them as the initial recourse rates for firm service using the incremental capacity created by the project.

113. DETI proposes to charge its system-wide fuel retention rate for the project. In order to ensure that existing shippers do not subsidize the project, DETI provided a fuel study which shows that the total estimated fuel used by the project facilities during the Summer Design Day¹⁶⁸ is 9,300 Dth. Using DETI's current fuel retention rate of 1.95 percent for the total Maximum Daily Transportation Quantity (MDTQ) of 1,511,335 Dth results in a total daily fuel retention of 30,057 Dth. The total daily fuel retention exceeds the projected maximum daily fuel used by the project facilities; consequently no subsidization by existing customers will occur and DETI's proposal to charge its system-wide fuel retention rate is appropriate.

114. We will require DETI to keep separate books and accounting of costs and revenues attributable to the proposed incremental services and capacity created by the Supply Header Project as required by section 154.309 of the Commission's regulations. The books should be maintained with applicable cross-reference as required by section 154.309. This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.¹⁶⁹

3. Negotiated Rates

115. DETI and Atlantic propose to provide service to their shippers under negotiated rate agreements. DETI and Atlantic must file either their negotiated rate agreements or tariff records setting forth the essential elements of the agreements in accordance with the

¹⁶⁷ DETI March 15, 2016 Data Response at Question 5.

¹⁶⁸ The Summer Design Day is used to determine the incremental fuel because DETI projects it to be the day that will have the highest daily fuel usage by the project's facilities.

¹⁶⁹ 18 C.F.R. § 154.309 (2017).

Alternative Rate Policy Statement¹⁷⁰ and the Commission's negotiated rate policies.¹⁷¹ DETI and Atlantic must file the negotiated rate agreements or tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.

E. Non-Conforming Contract Provisions

116. Atlantic and DETI entered into precedent agreements that contained certain contractual rights not available to other customers, which they state may be viewed as material deviations, but are necessary incentives to secure the level of contractual commitments to develop the projects. Atlantic and DETI request that the Commission approve these non-conforming contract provisions.

117. If a pipeline and a shipper enter into a contract that materially deviates from the pipeline's form of service agreement, the Commission's regulations require the pipeline to file the contract containing the material deviations with the Commission.¹⁷² In *Columbia Gas Transmission Corp.*, the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff and (2) affects the substantive rights of the parties.¹⁷³ The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.¹⁷⁴ However, not all material deviations are impermissible. As the Commission explained in *Columbia*, provisions that materially deviate from the

¹⁷⁰ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

¹⁷¹ *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042, *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

¹⁷² 18 C.F.R. §§ 154.1(d), 154.112(b) (2017).

¹⁷³ *Columbia Gas Transmission Corp.*, 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*).

¹⁷⁴ *Monroe Gas Storage Co., LLC*, 130 FERC ¶ 61,113, at P 28 (2010).

corresponding *pro forma* agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers and (2) provisions the Commission can permit without a substantial risk of undue discrimination.¹⁷⁵ In other proceedings, we have also found that non-conforming provisions may be necessary to reflect the unique circumstances involved with constructing new infrastructure and to provide the needed security to ensure the viability of a project.¹⁷⁶

118. As discussed below, with the exception of Atlantic's special no-notice service, we find that Atlantic's and DETI's proposals are permissible material deviations. At least 30 days, but not more than 60 days, before providing service to any project shipper under a non-conforming service agreement, Atlantic and DETI must file an executed copy of their non-conforming service agreements and identify and disclose all non-conforming provisions or agreements affecting the substantive rights of the parties under the tariff or service agreement. This required disclosure includes any such transportation provision or agreement detailed in a precedent agreement that survives the execution of the service agreement. Consistent with section 154.112 of the Commission's regulations, Atlantic and DETI must also file a tariff record identifying the agreements as non-conforming agreements.¹⁷⁷ In addition, the Commission emphasizes that the above determination relates only to those items identified by Atlantic and DETI and not to the entirety of the precedent agreements or the language contained in the precedent agreements.¹⁷⁸

¹⁷⁵ *Columbia*, 97 FERC at 62,003-04. *See also Equitrans, L.P.*, 130 FERC ¶ 61,024, at P 5 (2010).

¹⁷⁶ *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 82 (2008); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).

¹⁷⁷ 18 C.F.R. § 154.112 (2017).

¹⁷⁸ A Commission ruling on non-conforming provisions in a certificate proceeding does not waive any future review of such provisions when the executed copy of the non-conforming agreement(s) and a tariff record identifying the agreement(s) as non-conforming are filed with the Commission, consistent with section 154.112 of the Commission's regulations. *See, e.g., Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160, at P 44 n.33 (2015).

1. Atlantic

119. Atlantic entered into precedent agreements with two categories of shippers: Foundation Shippers and Anchor Shippers.¹⁷⁹ Atlantic states that its Foundation and Anchor Shippers have been granted certain contractual rights not available to other customers, which may be viewed as material deviations, but are necessary incentives to secure the level of contractual commitments to develop the project. In particular, Atlantic identifies six provisions as non-conforming: (a) contract extension rights and a contractual right of first refusal (ROFR); (b) expansion rights; (c) special no-notice service via a “pack account”; (d) reduction rights; and (f) DETI capacity rights.¹⁸⁰ Atlantic states that all prospective customers were given the opportunity to become a Foundation or Anchor Shipper through the open season process.

120. As discussed more fully below, we find the (1) contract extension rights; (2) reduction rights; (3) DETI capacity rights; and (4) expansion rights to be permissible material deviations from Atlantic’s *pro forma* service agreements. However, as proposed, the special no-notice service via a “pack account” is not a permissible material deviation.

a. Extension Rights and Reduction Rights

121. Atlantic has provided its Foundation and Anchor Shippers with a contractual right to extend their initial 20-year primary term contracts by additional five-year extension periods, which may be exercised up to four times per Article III.A of the precedent agreements. At the end of the final five-year extension period, Atlantic has provided shippers with a contractual ROFR per General Terms and Conditions section 25 of Atlantic’s *pro forma* tariff. Atlantic has also provided Foundation Shippers with a right to specify a reduction in their MDTQs to be applied upon commencement of each extended five-year term.

122. The Commission has approved non-conforming provisions that reflect the unique circumstances involved with the construction of new infrastructure and provide the

¹⁷⁹ A Foundation Shipper is defined as a shipper that contracts for at least 300,000 Dth/d of firm transportation capacity for a term of at least 20 years, and an Anchor Shipper is defined as a shipper that contracts for at least 150,000 Dth/d, but less than 300,000 Dth/d, for a term of at least 20 years. Atlantic Initial Application at 13.

¹⁸⁰ Atlantic provided public versions of the *pro forma* service agreements in redline/strikeout identifying the non-conforming language verbatim in its August 19, 2016 data response.

needed security to ensure that the project gets built.¹⁸¹ Here, Atlantic states that these provisions were necessary to ensure contractual commitments without which the project could not go forward. We find these rights are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.¹⁸²

b. DETI Capacity Rights

123. Prior to the termination date of Atlantic's firm transportation service agreement with DETI, Atlantic will determine if any initial shipper elects to extend its DETI capacity right, and if so, Atlantic will contract with DETI accordingly. If any initial shipper elects not to maintain its DETI capacity rights, such rights will be removed from the affected service agreements. We find that the DETI capacity rights provision is not unduly discriminatory because General Terms and Conditions section 29.2.A of Atlantic's *pro forma* tariff provides all firm transportation shippers the same rights. Therefore, we find these rights are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.

c. Expansion Rights

124. Exhibit A of the Foundation Shipper precedent agreements contains contractual incentives for the shippers to request that Atlantic undertake an expansion of its system at any time between the in-service date of the initial pipeline project and the fourth anniversary of such date.¹⁸³ Foundation and Anchor Shippers will have a one-time option to elect to contract for an additional quantity up to one-third of their MDTQs, for a new 20-year term, in the first expansion of the pipeline. Atlantic has also agreed, in Exhibit B of the applicable precedent agreements, upon the rate methodology to be used in calculating charges for the optional capacity to be charged to the Foundation and Anchor Shippers for the requested optional incremental expansion service. Atlantic also provides, in Exhibit A, Part 4 of the Foundation Shipper precedent agreements, that Foundation Shippers have the right to request that Atlantic consider undertaking a second expansion either (1) at the time of Customer's election of Optional Quantities or (2) after

¹⁸¹ See, e.g., *Tennessee Gas Pipeline Co. L.L.C.*, 144 FERC ¶ 61,219, at PP 26-33 (2013); *Rockies Express Pipeline, LLC*, 116 FERC ¶ 61,272 at PP 74-78.

¹⁸² *Tennessee Gas Pipeline Co L.L.C.*, 144 FERC ¶ 61,219 at P 32.

¹⁸³ Atlantic has also afforded Anchor Shippers, in Exhibit A of their precedent agreements, the ability to participate in the first expansion once a Foundation Shipper initiates such a request; however an Anchor Shipper cannot trigger the timing of such expansion. Atlantic Initial Application at 27-28.

the date of a Commission order concerning the expansion that creates the capacity to transport the Optional Quantities and during the primary term of its Service Agreement. Atlantic states that at such time as the Foundation Shipper requests a second expansion, Atlantic shall determine the scope, design, and estimated costs and rates (calculated pursuant to the cost-of-service methodology described in Exhibit C) of the second expansion project.

125. The NCUC states that it is not clear whether Atlantic will roll-in the costs of subsequent inexpensive expansions for purposes of calculating recourse rates and requests that the Commission clarify that nothing in Atlantic's application exempts Atlantic from complying with Commission policy requiring roll-in of inexpensive expansion capacity for purposes of calculating recourse rates.¹⁸⁴

126. Atlantic states that the NCUC's request that the Commission rule now that Atlantic must roll in the costs of potential future expansions is premature. Atlantic states that it does not propose to be exempt from any Commission policy for pricing service utilizing inexpensive expansion capacity.¹⁸⁵ Atlantic concludes that there is no basis to determine now how recourse rates should be calculated in the event that additional capacity is added at an unknown future date.¹⁸⁶

127. The Commission has found that giving project sponsors certain priority rights to future expansion capacity is a permissible material deviation from the *pro forma* service agreement because such provision reflects the unique circumstances of the initial project.¹⁸⁷ As the Commission discussed in *Transcontinental Gas Pipeline Co., LLC*, "where a subsequent expansion is envisioned that will be less costly due to the anchor shipper's subscription, such capacity priority is reasonable when an anchor shipper is committing to both projects and the provision was offered to all potential shippers in the open season."¹⁸⁸ We find Atlantic's provision to offer optional capacity to Foundation and Anchor Shippers, via an expansion, to be a contractual incentive for obtaining each shipper's binding commitments to the project. We find these rights are permissible because Atlantic offered all Anchor and Foundation shippers the expansion rights in its open season, and the expansion rights do not present a risk of undue discrimination, do

¹⁸⁴ NCUC Protest at 8-9.

¹⁸⁵ Atlantic Answer at 27.

¹⁸⁶ Atlantic Answer at 28.

¹⁸⁷ *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 at P 104.

¹⁸⁸ *Transcontinental Gas Pipeline Co., LLC*, 145 FERC ¶ 61,152, at P 34 (2013).

not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.

128. Further, we find that the negotiated rate calculation methodologies for the first and second expansions outlined in Exhibits B and C are permissible as they apply only to Atlantic's Foundation and Anchor shippers. Without knowing the size and costs associated with any future expansion, the Commission cannot determine if those costs should be rolled in to Atlantic's system rates in a future section 4 rate case.

d. No-Notice Service

129. Atlantic proposes to provide its Foundation and Anchor shippers a no-notice service via a "pack account," which enables a select group of shippers to, on any gas day, tender gas quantities into an account within its MDTQ, for later delivery, as early as the next gas day, on a no-notice basis. Atlantic states that the no-notice service allows Atlantic to provide "cold start" capability to electric generation in Virginia and North Carolina. Atlantic asserts that because there are no storage capabilities on its system, to offer this service Atlantic will draw upon a substantial share of its line pack. Atlantic contends that the no-notice service ensured the viability of the project by incentivizing Anchor and Foundation shippers to commit to supporting the pipeline.

130. Under the NGA and the Commission's regulations,¹⁸⁹ we have consistently rejected pipeline proposals that present a significant potential for undue discrimination among similarly situated shippers.¹⁹⁰ Here, Atlantic proposes to offer a special no-notice service only to a select group of shippers and acknowledges that by offering this service, it is not capable of offering any park and loan service on its system to any other shipper.¹⁹¹ Thus, similarly situated firm shippers are foreclosed from receiving the same level of service as Foundation and Anchor shippers on Atlantic's system. Because Atlantic's proposed no-notice service presents a significant potential for undue discrimination, we find it to be an impermissible material deviation and will require Atlantic to remove the provision from the non-conforming service agreements. If Atlantic wishes to offer this no-notice service, or a similar park and loan service, it must do so on a non-discriminatory basis through a new rate schedule.

¹⁸⁹ 15 U.S.C. § 717(c) (2012); 18 C.F.R. §§ 284.7(b), 284.9(b) (2017).

¹⁹⁰ See *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069, at P 54 (2007) (rejecting a provision that allowed the pipeline to provide a different quality of firm service to original shippers at the potential expense of future shippers).

¹⁹¹ Atlantic June 2, 2017 Data Response at 3-4.

2. DETI

131. DETI states that there are several provisions in its precedent agreement with Atlantic, its Anchor shipper, which do not conform to the *pro forma* Form of Service Agreement set forth in DETI's tariff, and DETI requests pre-approval by the Commission that the provisions are permissible material deviations.¹⁹² Specifically, DETI's precedent agreement with Atlantic includes three non-conforming provisions: (1) contract extension and reduction rights; (2) delivery obligations; and (3) secondary access. DETI asserts that these terms of service reflect the unique circumstances involved with securing financial commitments necessary to support the development and construction of the project and were offered to all potential shippers through the non-discriminatory, open season bidding process for the project.

a. Extension and Reduction Rights

132. The firm transportation agreement with Atlantic includes a provision addressing extension rights, and if extended, MDTQ reduction rights that DETI states mirror the rights Atlantic provided to its own Foundation and Anchor Shippers. DETI states that these provisions were agreed upon to reflect Atlantic's use of the Supply Header capacity. Specifically, the provision provides Atlantic the right to extend the initial 20-year primary term of its agreement by additional 5-year extension periods, which may be exercised up to 4 times. Further, if Atlantic elects to extend the initial primary term, Atlantic would have the option to reduce its prospective MDTQ, with no subsequent unilateral right to increase its MDTQ.

133. The Commission has approved non-conforming provisions that reflect the unique circumstance involved with the construction of new infrastructure and provide the needed security to ensure that the project gets built.¹⁹³ Here, DETI states that these provisions were necessary to ensure contractual commitments without which the project could not go forward. Additionally, we find that the contract extension rights provision is not unduly discriminatory because it conforms to DETI's tariff, which permits DETI and a customer to mutually agree to an extension of the term of a service agreement. Therefore, we find these rights are permissible because they do not present a risk of

¹⁹² DETI filed a copy of the proposed Firm Transportation Service Agreement (FT Agreement) with Atlantic identifying three non-conforming provisions.

¹⁹³ See, e.g., *Tennessee Gas Pipeline Co.*, 144 FERC ¶ 61,219 at PP 26-33; *Rockies Express Pipeline, LLC*, 116 FERC ¶ 61,272 at PP 74-78.

undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.¹⁹⁴

b. Delivery Obligations

134. The firm transportation agreement also includes provisions addressing delivery obligations, including measurement, at the new Marts Junction Interconnect and the nearby Kincheloe Metering and Regulating Station.¹⁹⁵ Specifically, the provisions state that the measurement at the primary delivery point (i.e., the Marts Junction Interconnect) be at the nearby Kincheloe M&R Station because the Marts Junction Interconnect is located on unsuitable terrain for the installation of measurement facilities, and DETI and Atlantic will also interconnect at the Kincheloe M&R Station. Further, the provisions provide that DETI, at its operating discretion, may deliver volumes into Atlantic at either the Marts Junction Interconnect or at the Kincheloe Interconnect and all volumes delivered by DETI to Atlantic at either of these interconnects will be treated contractually as delivered at the Marts Junction Interconnect. We find these rights are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.

c. Secondary Access

135. Section 6.1C of Rate Schedule FT of DETI's *pro forma* Form of Service Agreement provides for secondary access to the Applicable Market Center Point¹⁹⁶ on both the Access Segment¹⁹⁷ and Delivery Segment.¹⁹⁸ DETI's precedent agreement with Atlantic includes a provision where secondary access to the Applicable Market Center Point applies on only the Access Segment. DETI asserts that secondary access on the

¹⁹⁴ *Tennessee Gas Pipeline Co.*, 144 FERC ¶ 61,219 at P 32.

¹⁹⁵ The Kincheloe M&R Station is approximately 7.6 miles downstream from the Marts Junction Interconnect.

¹⁹⁶ Where a Customer's Primary Receipt Point entitlement is designated as upstream of Valley Gate Junction, the Applicable Market Center Point is South Point. *See* GT&C Section 11A.4.G of DETI's Tariff.

¹⁹⁷ The Access Segment is from the Customer's Receipt Point to the Applicable Market Center Point. *See* GT&C Section 11A.4.G of DETI's Tariff.

¹⁹⁸ The Delivery Segment is from the Applicable Market Center Point to the Customer's Delivery Point. *See* GT&C Section 11A.4.G of DETI's Tariff.

Delivery Segment is not necessary because DETI has the capability to provide primary access on the Delivery Segment. We find these rights are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.¹⁹⁹

F. Atlantic's Pro Forma Tariff

1. North American Energy Standards Board (NAESB)

136. Atlantic states that it intends to include tariff provisions in GT&C section 12, Nomination and Confirmation, and GT&C section 17, Incorporation of NAESB Standards, implementing the NAESB Wholesale Gas Quadrant's (WGQ) revised business practice standards that the Commission incorporated by reference in its regulations. Atlantic is directed to file tariff records, 30 to 60 days prior to its in-service date, implementing the latest version of the business practice standards adopted by the NAESB WGQ applicable to interstate natural gas pipelines.²⁰⁰

2. GT&C Section 5 – Billing and Payments

137. GT&C section 5.5 of Atlantic's tariff outlines the procedure for handling a customer's failure to make a full payment of any portion of any bill for services received. Specifically, GT&C section 5.5.B states, in part, "[i]f after 15 days Customer has not yet paid Pipeline or has not provided written assurances as required by GT&C Section 6.5, then Pipeline shall be authorized to suspend service."

138. The Commission has not permitted pipelines to impose reservation charges when a pipeline elects to suspend service and it is not providing the service required under the

¹⁹⁹ Exhibit A to the FTS Agreement provides in relevant part that "[f]or purposes of Section 11.A.4.G [of DETI's GT&C] ... access to the Applicable Market Center Point for the Access Segment (as those terms are defined in [DETI's GT&C] for all Points of Receipt shall be South Point on a Secondary basis only." However, it appears that the referenced section is stated erroneously, missing a parenthetical placement. DETI is directed to correct the parenthetical placement, and identify all non-conforming provisions in redline format in section C3 of Exhibit A to the FTS Agreement, as appropriate.

²⁰⁰ The NAESB WGQ Version 3.0 Standards were promulgated in *Standards for Business Practices of Interstate Natural Gas Pipelines; Coordination of the Scheduling Processes of Interstate Natural Gas Pipelines and Public Utilities*, Order No. 587-W, FERC Stats. & Regs. ¶ 31,373 (2015), *order on reh'g*, 154 FERC ¶ 61,207 (2016).

contract during suspension. Thus, Commission policy for suspension of service provides that when pipelines elect to suspend service they are making an election of remedies; i.e., they are determining that the risks of continued service outweigh the potential collection of reservation or other charges during the time of the suspension.²⁰¹

139. We approve the above-quoted language in GT&C section 5.5.B of Atlantic's tariff subject to revision because it does not make clear that Atlantic may not impose reservation charges during any such period of suspension. Therefore, we direct Atlantic to include additional language specifying that Atlantic will not impose reservation charges during the period of suspension, consistent with the Commission's policy noted above.

3. GT&C Section 9 – Force Majeure

140. Atlantic's proposed definition of force majeure events in GT&C section 9.2 includes "arrests and priority limitation or restraining orders of any kind of the government of the United States or a State or of any civil or military entity." The Commission has found that outages necessitated by compliance with government standards concerning the regular, periodic maintenance activities a pipeline must perform in the ordinary course of business to ensure the safe operation of the pipeline, including the Pipeline and Hazardous Materials Safety Administration's integrity management regulations, are non-force majeure events requiring full reservation charge credits.²⁰² Conversely, outages resulting from one-time, non-recurring government requirements, including special, one-time testing requirements after a pipeline failure, are force majeure events requiring only partial crediting.²⁰³ Atlantic's proposed tariff language conflicts with these Commission policies because it can be interpreted to include regular, periodic maintenance activities required to comply with government actions as force majeure events.

141. In addition, Atlantic's proposed definition of force majeure events in GT&C section 9.2 includes "any other causes, whether of the kind herein enumerated or otherwise, *not reasonably within the control* of the party claiming suspension, which by

²⁰¹ *Policy Statement on Creditworthiness for Interstate Natural Gas Pipelines and Order Withdrawing Rulemaking Proceeding*, 111 FERC ¶ 61,412, at P 24 (2005).

²⁰² *Kinder Morgan Louisiana Pipeline LLC*, 154 FERC ¶ 61,145, at P 30 (2016); *TransColorado Gas Transmission Co., LLC*, 144 FERC ¶ 61,175, at PP 35-43 (2013); and *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224, at PP 28-47 (2012), *order on reh'g*, 144 FERC ¶ 61,215, at PP 31-34 (2013).

²⁰³ *See Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038, at P 104 (2015).

due diligence such party is unable to overcome.”²⁰⁴ The Commission has defined force majeure outages as events that are both “unexpected and uncontrollable.”²⁰⁵ Therefore, we direct Atlantic to revise GT&C section 9 to comply with the Commission Policies, as described above.

4. GT&C Section 10 – Curtailment and Interruption

142. Atlantic’s GT&C section 10.2 outlines when and how reductions of service due to curtailments and interruption will be handled and how those reductions of service will be performed. GT&C section 10.2.A outlines the order in which service interruptions, based on scheduled nominations, shall occur. Specifically, section 10.2.A states:

In cases where Pipeline's ability to Receive, transport, or Deliver is affected, Pipeline shall first order interruption or, where sufficient transportation supplies are available, allocation of transportation quantities to customers based upon scheduled nominations, in the following order:

1. Scheduled service pursuant to GT&C Section 13.3.G
2. Scheduled service pursuant to GT&C Section 13.3.F
3. Schedule service under all Firm Transportation Service Agreements pursuant to GT&C Sections 13.3.A through E

GT&C Section 13.3 outlines the order in which customer’s nominations will be scheduled, through each point of receipt and delivery, after accounting for any adjustments to a customer’s nominations based upon service priorities on segments.

143. The NCUC states that Atlantic's reduction of service provisions in GT&C section 10.2.A.3 appear to apply the same reduction of service priority between primary point and secondary point services. The NCUC suggests that Atlantic's tariff should conform to Commission policy in Order Nos. 636 and 636-A.²⁰⁶ In Order No. 636-A, the Commission found that existing shippers retained their primary priorities “at designated receipt and delivery points and may not be bumped, preempted, or curtailed under the

²⁰⁴ Emphasis Added.

²⁰⁵ *North Baja Pipeline, LLC v. FERC*, 483 F.3d 819, 823 (D.C. Cir. 2007), *aff'g*, *North Baja Pipeline, LLC*, 109 FERC ¶ 61,159 (2004), *order on reh'g*, 111 FERC ¶ 61,101 (2005). *See also, e.g., Kinder Morgan Louisiana Pipeline LLC*, 154 FERC ¶ 61,145 at P 29; *Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038 at P 103.

²⁰⁶ NCUC Protest at 11.

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flexible receipt and delivery point policy.”²⁰⁷ Order No. 636 and Order No. 636-A also recognized that alternate/flexible points are inferior to primary firm points.²⁰⁸

144. In its answer, Atlantic states that the NCUC misinterprets its provision in GT&C section 10.2.A.3 and clarifies that the section was intended to reflect a similar ordering of priorities among firm services when allocating capacity as outlined in GT&C sections 13.3.A through E. Atlantic explains that section 13.3 provides the ordering of nomination priorities, starting with primary point services. Atlantic suggests that to clarify its provision in section 10.2.A.3, it proposes to add the phrase, "in the reverse order of priority provided in that section for scheduling.”²⁰⁹

145. Atlantic’s proposed revision to GT&C section 10.2.A.3 of its tariff, as discussed above, provides that reductions in service will be in the reverse order of the scheduling priorities outlined in GT&C section 13.3. Generally, the scheduling priorities for firm service are based on whether a customer's nomination is at primary points, secondary points within the capacity path, or at secondary points outside the capacity path. We find this approach to be inconsistent with our policy that once scheduled, all firm service is assigned the same priority for curtailment purposes, irrespective of whether capacity is utilized on a primary or secondary basis.²¹⁰ Accordingly, we direct Atlantic to revise its tariff to be consistent with Commission policy.

²⁰⁷ *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh’g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, at 30,583, *order on reh’g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh’g*, 62 FERC ¶ 61,007 (1993), *aff’d in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

²⁰⁸ Order No. 636, FERC Stats. & Regs. ¶ 30,939 at 30,429; Order 636-A, FERC Stats. & Regs. ¶ 30,950 at 30,583.

²⁰⁹ Atlantic Answer at 29.

²¹⁰ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh’g denied*, Order No. 637-B, 92 FERC ¶ 61,062, at 62,013 (2000), *aff’d in part and remanded in part sub nom. Interstate Natural Gas Ass’n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh’g*, 106 FERC ¶ 61,088 (2004), *aff’d sub nom. American Gas Ass’n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

5. GT&C Section 11 – Requesting and Contracting for Service

146. GT&C section 11.3 states:

A Customer request to add a new Primary Point or change an existing Primary Point under a firm Service Agreement may not affect the priority of existing customers using such point as a Primary Point. Pipeline shall be entitled to reasonably reserve point capacity associated with unsold segment capacity. Pipeline shall not be obligated to add a new Primary Point or change an existing Primary Point if such point is associated with unsold segment capacity. A Customer may add or change a Primary Point only if the requested point is within Customer's Capacity Path Entitlements.

147. The NCUC argues that Atlantic's proposed GT&C section 11.3 appears to be inconsistent with the Commission's flexible point policies.²¹¹ The NCUC believes Atlantic is proposing to limit shippers' ability to use capacity outside of their "Capacity Path" entitlements even though shippers pay for capacity on the entire pipeline via postage stamp rates.²¹²

148. In its answer, Atlantic states that GT&C section 11.3 is intended to promote Atlantic's ability to market its small amount of unsubscribed capacity. Atlantic asserts that this limited restriction to their flexibility is reasonable and notes that the provision was accepted by all of its customers.²¹³

149. In Atlantic's September 20, 2016 data response, Atlantic clarified that GT&C section 11.3 does not limit a customer's ability to nominate to points outside of its capacity path entitlements on a non-permanent basis.²¹⁴ Atlantic noted that in Order No. 637-A, the Commission recognized the need to balance the flexible receipt and delivery point policy with a pipeline's interest in marketing unsubscribed capacity, stating "[e]ven if the pipeline is not fully subscribed, it could protect its ability to sell

²¹¹ 18 C.F.R. §§ 284.221(g) and (h) (2017) (providing pipelines the authority to permit flexible receipt points for receipts of gas volumes into their systems and gives pipelines the authority to permit flexible delivery points for deliveries of gas volumes from their systems).

²¹² NCUC Protest at 10.

²¹³ Atlantic Answer at 29.

²¹⁴ Atlantic September 20, 2016 Data Response at 1.

available mainline capacity by reserving an appropriate percentage of the receipt or delivery point capacity to be associated with the unsubscribed mainline capacity.”²¹⁵

150. In *Northern Border Pipeline Co.*, the Commission stated that it has required that pipelines permit shippers to move the primary points listed in their contracts to another point that is outside their contractual path on a permanent basis, subject to the availability of capacity.²¹⁶ Further, the Commission rejected language proposed by Northern Border similar to the language contained in Atlantic’s GT&C section 11.3.²¹⁷ Northern Border’s tariff language would have permitted it to reserve primary point capacity for the purpose of selling associated unsubscribed capacity. The Commission has found such reservation of point capacity to be unnecessary on a system where the Commission has allowed a pipeline to limit primary point capacity to mainline contract demand.²¹⁸ We therefore reject Atlantic’s proposal to reserve unsold segment capacity for unsubscribed mainline capacity. Further, Atlantic is directed to clarify its tariff language so that shippers are permitted to permanently change a primary point, subject to available capacity and payment of the appropriate additional incremental rate to cover the cost of additional capacity reserved, as directed in *Northern Border*.

6. GT&C Section 13 – Scheduling and Scheduling Priorities

151. GT&C section 13 outlines the processes and priorities for scheduling a customer’s nominated gas on Atlantic’s system. As previously discussed, GT&C section 13.3 outlines the order in which an Atlantic customer’s point nominations will be scheduled.

152. In GT&C section 13.3.C and 13.3.D, Atlantic proposes to schedule those customers nominating receipts or deliveries within their contract MDTQ at a primary point for the purpose of resolving imbalances under FT service agreements before scheduling those customers nominating firm service at points outside of their capacity path entitlements. The Commission has stated that imbalance quantities for makeup or payback should not be given a higher scheduling priority than any firm service quantities, stating that firm service with secondary scheduling rights is still firm service, and

²¹⁵ *Id.* at 2 (citing Order 637-A, FERC Stats. & Regs. ¶ 31,099 at 31,594 n.121).

²¹⁶ *Northern Border Pipeline Co.*, 103 FERC ¶ 61,134, at PP 36-37 (2003) (*Northern Border*).

²¹⁷ *Id.*

²¹⁸ *Id.* (citing *ANR Pipeline Co.*, 103 FERC ¶ 61,022, at P 44 (2003)).

therefore, should have a scheduling priority directly following primary firm service.²¹⁹ Atlantic's proposal in GT&C section 13.3.C and 13.3.D contradict this Commission Policy, as imbalances under 13.3.C would have scheduling priority over firm nominations in 13.3.D. Therefore, Atlantic must revise its scheduling point priorities by moving the scheduling priority of firm primary point imbalances (GT&C section 13.3.C) after the scheduling priority for those customers nominating firm service at points outside of their capacity path entitlements (GT&C section 13.3.D).

7. GT&C Section 25 – Right of First Refusal

153. Atlantic's GT&C section 25 outlines the provisions within a qualifying customer's service agreement that enables it to continue service under a right of first refusal (ROFR) pursuant to its existing rate schedule and service rights. GT&C section 25.2.C provides that a customer may "elect[] to exercise the ROFR as to only a portion of its capacity." GT&C section 25.2.F.4 provides, in part, that "Pipeline shall notify Customer and the winning bidder in writing of the best bid(s), within five business days after the close of the bid period. The notice to Customer shall include an executable copy of a Service Agreement in the Form of Service Agreement set forth in this Tariff and containing the matching terms" and "[i]f a competing bidder or bidders submits a bid for only a portion of Customer's capacity subject to the ROFR, Customer must match that bid to retain the amount of capacity to which the bid applies." In addition, GT&C section 25.2.F.6 provides, in part, that if no competing bidder submits an applicable bid, "Customer may exercise its ROFR for all or a part of the capacity by notifying Pipeline."

154. We find that although GT&C section 25.2 provides that a customer may elect to retain only a portion of its capacity, GT&C section 25.2 does not expressly indicate when, in the ROFR bid matching process, the customer can make such election. The Commission's long-standing policy is that such election is not required until the service provider has notified the existing shipper of the best bid(s) received from third parties for all or a portion of the expiring capacity.²²⁰ Therefore, Atlantic is directed to clarify GT&C section 25.2 to provide that a shipper is not required to elect how much capacity it will seek to retain through the ROFR process until after receiving notification from Atlantic as to the best offer(s) for its expiring capacity, and may then notify Atlantic of its intent to match the best offer(s) for all or a volumetric portion of its capacity.

²¹⁹ *Colorado Interstate Gas Company*, 111 FERC ¶ 61,216, at P 19 (2005); *Panhandle Eastern Pipe Line Company*, 78 FERC ¶ 61,202, at 61,872 (1997).

²²⁰ *See, e.g., Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192, at P 77 (2014); *Transcontinental Gas Pipe Line Corp.*, 101 FERC ¶ 61,267, at P 26 (2002).

155. GT&C section 25.F.4 provides, in part:

*To retain capacity, Customer must match the competing bids up to the recourse rate applicable to the service currently being provided under the subject Service Agreement, for the term bid by the best bidder. In determining whether the existing Customer's bid matches the best third party bid, Pipeline shall use the evaluation criteria specified in its posted notice pursuant to GT&C Section 26.2, as applied to the quantity of service that Customer elects to retain.*²²¹

156. The emphasized language quoted above contradicts the sentence that follows it. Pursuant to GT&C section 26.2, the pipeline will include in its notice the criteria by which the pipeline will evaluate bids. GT&C section 26.4.D.1 provides one of the evaluation criteria as “[t]he highest net present value (NPV) of the reservation charges or other source of guaranteed revenue to be received by Pipeline over the term of service.” The Commission has found that “[u]nder an NPV bid evaluation method, shippers may bid whichever combination of rate and term best represents the value they place on the capacity.”²²² Thus, an existing shipper is not required to match the rate or term bid by a third party when the pipeline has posted in the notice that NPV will be the bid evaluation criteria. Therefore, we direct Atlantic to delete the emphasized language quoted above from GT&C section 25.F.4.

8. GT&C Section 29 – Off System Capacity

157. Atlantic’s proposed section 29.1 provides as follows:

From time to time, Pipeline may enter into transportation and/or storage agreements with other interstate or intrastate pipeline companies. If Pipeline acquires capacity on an off-system pipeline, Pipeline will only render service to Customers on the acquired capacity pursuant to Pipeline’s FERC Gas Tariff and subject to approved and/or negotiated rates, as such tariff and rates may charge from time to time. For transactions entered into under this Section 29, such capacity shall be referred to as “Off System Capacity”, and further, the “shipper must have title” requirement is waived.

²²¹ Emphasis Added.

²²² *Transcontinental Gas Pipe Line Corp.*, 105 FERC ¶ 61,365, at P 20 (2003).

158. We find that this language is consistent with the Commission's *Texas Eastern* policy concerning the acquisition of upstream capacity by interstate pipelines.²²³ Under that policy a pipeline can acquire off-system capacity without preapproval if it makes a tariff filing that includes a statement that it will only transport gas for others on the acquired capacity pursuant to its open access tariff and subject to its Commission-approved rates. Upon the pipeline filing an appropriate tariff provision, we will grant a generic waiver of the "shipper must hold title" policy for any such transportation that the pipeline subsequently provides.

159. Atlantic states that it will utilize capacity on the DETI Supply Header Project to serve its customers in a seamless, integrated fashion, treating natural gas received through the DETI Supply Header Project as if it is a receipt onto its own system.²²⁴ Atlantic's GT&C section 29.2 outlines the terms and conditions for its primary firm transportation customers that have rights on DETI as outlined in their service agreements. Atlantic states that all of its customers desired the option to have access to DETI capacity corresponding to their full MDTQs.²²⁵

160. The NCUC filed comments suggesting that the language contained in GT&C section 29.1 appears to be inconsistent with the discussion regarding Atlantic's DETI capacity in its transmittal letter. Specifically, the NCUC states that Atlantic indicated in its application that a shipper on its system may use any point on the DETI system on a secondary basis "in accordance with the terms of D[E]TI's FERC Gas Tariff" while GT&C section 29.1 states in part that the "Pipeline will only render service to Customers on the acquired capacity pursuant to Pipeline's FERC Gas Tariff."²²⁶

161. In its answer, Atlantic states that in addition to GT&C section 29.1, section 29.2 provides that customer's "rights shall not exceed the rights of Pipeline under its firm transportation service agreement with D[E]TI or D[E]TI's FERC Gas Tariff." Atlantic explains that the statement in its initial application was a short-hand reference to its tariff provision and that the tariff provision should resolve any perceived inconsistencies.²²⁷

²²³ *Texas Eastern Transmission Corp.*, 93 FERC ¶ 61,273 (2000), *reh'g denied*, 94 FERC ¶ 61,139 (2001) (*Texas Eastern*).

²²⁴ Atlantic Initial Application at 19.

²²⁵ *Id.*

²²⁶ NCUC Protest at 11.

²²⁷ Atlantic Answer at 30.

162. GT&C section 29.2.D states that “[c]ustomer may utilize any points of receipt or delivery on the D[E]TI system, provided however, Customer’s rights shall not exceed the rights of Pipeline under its firm transportation service agreement with D[E]TI or D[E]TI’s FERC Gas Tariff” We find the language contained in GT&C section 29 to be acceptable.

9. GT&C Section 37 – Overruns and Penalties

163. GT&C section 37 of Atlantic’s tariff outlines the provisions for overruns and penalties for both authorized and unauthorized overruns applicable to each shipper’s MDTQ.

164. The NCUC states that the penalties contained in GT&C section 37 are cumulative and that the Commission has held that pipelines are prohibited from applying multiple penalties for the same infraction.²²⁸ The NCUC further states that section 37 appears to contradict the alternative point rights set out in Rate Schedule FT section 5.3 and is inconsistent with the Commission’s flexible point policies as it assesses an overrun penalty if a shipper uses its capacity at an alternative point and exceeds its Maximum Daily Receipt Obligation (MDRO) or Maximum Daily Delivery Obligation (MDDO) at that point even if the shipper is within its overall daily contract quantity. The NCUC also argues that GT&C section 37.4 provides no basis for charging shippers for Operational Balancing Agreement (OBA) costs if shippers are in perfect balance every day within a given month.²²⁹

165. Atlantic, in its answer, states that a shipper would not incur multiple penalties on any single dekatherm delivered; rather, a shipper could incur different penalties on different quantities within the same day. Atlantic further explains that a shipper could incur scheduling penalties, as outlined in GT&C section 37.3, for certain quantities and then incur overrun penalties, as outlined in GT&C section 37.2, for different quantities within the same day. For example, Atlantic states that “[if] a shipper schedules 80% of its MDTQ and then takes 105% of its MDTQ: that shipper would incur scheduling penalties for quantities between 80% and 102% of the MDTQ and overrun penalties on the quantities in excess of 102%.”²³⁰ Atlantic concludes that a shipper could not incur multiple penalties on any single dekatherm delivered, but in its example, would incur two different penalties on the different quantities on the same day. Atlantic also notes that penalties associated with Operational Flow Orders, as provided in GT&C section

²²⁸ NCUC Protest at 11.

²²⁹ *Id.* at 12.

²³⁰ Atlantic Answer at 30.

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18.5.C, are in lieu of any penalties assessed pursuant to sections 37.2 and 37.3. Atlantic concludes that its terms and conditions for assessing penalties are reasonable and consistent with Commission policy.²³¹

166. In response to the NCUC's concerns regarding alternative point rights and overrun penalties, Atlantic states that the NCUC misconstrues the provision in GT&C section 37.2. Atlantic states that shippers only have applicable MDDOs and MDROs at the primary points along their contract paths; therefore, a shipper could not exceed a maximum contractual point right and incur an overrun charge when delivering or receiving gas at an alternative point.²³²

167. Lastly, in response to the NCUC's concern that a shipper would be assessed OBA costs even if they were in perfect balance every day of the month, Atlantic suggests the NCUC overlooked a relevant portion of the language contained in GT&C section 37.4, emphasized below:²³³

Customer shall be responsible for any charges that are incurred by Pipeline pursuant to the operational balancing agreements (OBA) between Pipeline and the upstream and downstream interconnecting pipelines to the extent such charges are not recovered or offset through any other sources. Upon determination that certain OBA charges are not recoverable from such sources and *to the extent such charge incurred by Pipeline is caused by Customer(s)*, Pipeline shall promptly bill such Customer(s) in the next billing invoice for such charges pro rata based on the Customers' scheduled quantities for the applicable month. Upon request of the Customer, Pipeline shall provide documentation in support of any charges billed pursuant to this Section.

168. We find that Atlantic's proposed overrun and penalty provisions are in compliance with Order No. 637, relying on penalties when necessary to protect system integrity.²³⁴

²³¹ *Id.*

²³² *Id.* at 28.

²³³ *Id.* at 31.

²³⁴ See Order No. 637-A, FERC Stats. & Regs. ¶ 31,099 at 31,598.

Commission policy prohibits multiple penalties for the same infraction.²³⁵ Atlantic has satisfactorily clarified the concerns raised by the NCUC; therefore, we find the language contained in GT&C section 37 acceptable and consistent with Commission precedent and policy, as discussed further below.

169. Atlantic's GT&C section 37.5 provides for the crediting of unauthorized overrun and penalty revenues to its customers. GT&C sections 30.2 and 30.3 outline Atlantic's ability to confiscate unauthorized gas volumes; however, section 37.5 does not provide for a mechanism to credit such confiscated gas volumes to existing customers. The Commission has found that a pipeline's confiscation of gas left on its system is an operationally justified deterrent to shipper behavior that could threaten the system or degrade service to firm shippers.²³⁶ However, the Commission has found that the value of such confiscated gas must be credited to existing customers. Atlantic has not provided such a mechanism in its tariff. Therefore, we direct Atlantic to revise section 37.5 of its tariff to credit the value of any confiscated gas, net of costs, to non-offending shippers.

10. GT&C Section 37.3 – Scheduling Penalty

170. GT&C Section 37.3 of Atlantic's initial application provides as follows:

If Deliveries by a Customer to a Point of Delivery on any Gas Day deviate from the scheduled quantity by more than 5%, then Customer shall be subject to a scheduling penalty. The scheduling penalty shall equal the rate published on Tariff Record No. 10.30 for each Dt of deficiency below 95% of scheduled quantities and each Dt of excess above 105% of scheduled quantities. Customer shall pay the Scheduling Penalty in addition to any other applicable charges and penalties. However, for purposes of determining the Scheduling Penalty applicable to Customer, any available Section 41 Pack Account Balance shall be used to reduce the deficiency, and any available Customer's Section 41 MPQ shall be used to reduce the excess before a Scheduling Penalty is calculated.

171. On October 23, 2015, Atlantic filed to modify section 37.3 of its tariff to include the following sentence at the end of the proposed language in section 37.3: "For firm customers that do not hold a Section 41 Pack Account, the 5% threshold shall be based on 5% of Customer's MDTQ in lieu of scheduled quantities." Atlantic believes this

²³⁵ *Crossroads Pipeline Co.*, 71 FERC ¶ 61,076, at 61,265 (1995) and 100 FERC ¶ 61,025, at P 51 (2002); *East Tennessee Natural Gas Co.*, 98 FERC ¶ 61,060, at P 107 (2002); *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,084, at P 201 (2002).

²³⁶ *AES Sparrows Point LNG, LLC*, 126 FERC ¶ 61,019, at P 42 (2009); *Colorado Interstate Gas Co.*, 122 FERC ¶ 61,256, at P 102 (2008).

additional language will provide an adequate incentive for its customers to schedule accurately without impacting the service of other customers on its system.

172. As discussed above, we find that the special no-notice service via a “pack account” is not a permissible material deviation and directed Atlantic to remove the provision from the non-conforming service agreement. Therefore, we reject Atlantic’s modified section 37.3, as it relates to firm customers that do not hold a “pack account.”

173. The Commission has found with regard to the tolerance level for daily scheduling penalties during non-critical periods, that pipelines must have penalty provisions in place which are at a sufficient level to prevent impairment of reliable service.²³⁷ Determining the penalty tolerance levels necessary to deter certain conduct is an exercise of reasonable judgment.²³⁸ Therefore, when Atlantic submits its proposed tariff 30 to 60 days prior to its in-service date, Atlantic may submit the GT&C section 37.3²³⁹ as proposed in its initial application²⁴⁰ or the modified GT&C section 37.3. However, whichever language Atlantic chooses must afford all shippers the same rights.

11. GT&C Section 38 – Interruptible Services Revenue Crediting

174. The Commission’s policy regarding new interruptible services requires the pipeline either to credit 100 percent of the interruptible revenues, net of variable costs, to maximum rate firm and interruptible customers, or to allocate costs and volumes to these services.²⁴¹ Atlantic chose the interruptible revenue crediting option.

175. Atlantic proposes to credit 100 percent of its interruptible revenue credits accrued during the calendar year to customers paying recourse rates or negotiated reservation rates under long-term contracts of one year or more and to interruptible customers and short-term customers pursuant to GT&C section 38.3 of its *pro forma* tariff. Atlantic

²³⁷ *MoGas Pipeline LLC*, 151 FERC ¶ 61,201, at P 10 (2015).

²³⁸ *Id.*

²³⁹ As discussed below, Atlantic is directed to remove all references of the “pack account” from its tariff and *pro forma* service agreements.

²⁴⁰ As proposed in Atlantic’s initial application, GT&C section 37.3 is consistent with Commission Policy. *Columbia Gas Transmission Corp.*, 133 FERC ¶ 61,217, at P 56 (2010)

²⁴¹ *See, e.g., Creole Trail LNG, L.P.*, 115 FERC ¶ 61,331, at P 27 (2006); *Entrega Gas Pipeline Inc.*, 112 FERC ¶ 61,177, at P 51 (2005).

states that the revenue credits will be allocated based on each respective customer's actual base reservation revenue contribution as a percentage of the total base reservation contribution of all eligible customers during the annual revenue crediting period.

176. Atlantic's GT&C section 38.3 states that shippers eligible for interruptible revenue credits may include negotiated rate shippers. We agree that Atlantic is permitted to share interruptible revenues with its negotiated rate shippers;²⁴² however, we note that maximum rate customers, as a group, must receive a proportionate share of 100 percent of interruptible revenues collected (less administrative costs to provide the interruptible service).²⁴³ Interruptible revenues due to maximum rate shippers cannot be reduced to reflect revenues for negotiated rate agreements. Further, the provisions of a negotiated rate are specific to actual negotiated rate filings and are required to be reported in a tariff record that identifies the negotiated rate provisions.²⁴⁴ However, in general, the Commission has found that it is not appropriate to place language on negotiated rate terms in various sections of the GT&C of the tariff. Therefore, we accept the provisions in section 38 subject to Atlantic to removing references to negotiated rates in this section.²⁴⁵

177. The NCUC states that GT&C section 38.4 provides that Atlantic will only pay interest on overrun funds collected from January through March when a revenue credit is to be provided, however, no interest will be paid for the period during the year in which the credit is accruing.²⁴⁶ In Atlantic's August 19, 2016 data response, Atlantic clarified language contained in GT&C section 38.4, which intended to state that Atlantic will accrue interest on revenue credits from interruptible transportation service rendered from January 1 to December 31 of any given year and continuing through the month prior to when the customer will be invoiced. In the August 19, 2016 data response, Atlantic also proposes to revise GT&C section 38.4 to state "[r]evenue credits shall be paid to Customers via a credit on the invoices sent to Customers *in April...*" in order to clarify

²⁴² *Cheyenne Plains Gas Pipeline Co., L.L.C.*, 108 FERC ¶ 61,052, at PP 12-13 (2004); *Wyoming Interstate Co. Ltd.*, 121 FERC ¶ 61,135, at P 11 (2007).

²⁴³ *Wyoming Interstate Co. Ltd.*, 121 FERC ¶ 61,135, at P 11 (2007).

²⁴⁴ Alternative Rate Policy Statement, 74 FERC ¶ 61,076, *order granting clarification*, 74 FERC ¶ 61,194, *order on reh'g and clarification*, 75 FERC ¶ 61,024, *reh'g denied*, 75 FERC ¶ 61,066, *reh'g dismissed*, 75 FERC ¶ 61,291 (1996), *petition denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998).

²⁴⁵ *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 at P 131.

²⁴⁶ NCUC Protest at P 12.

when customer invoices will be sent. Atlantic proposes an additional clarification to section 38.4, which states “pipeline shall accrue interest through March of the year in which Customer invoices are credited.”²⁴⁷ Atlantic proposes to make the modifications to GT&C section 38.4 when actual tariff records are submitted 30 to 60 days prior to the in-service date. Atlantic's proposed modifications to GT&C section 38.4 of its tariff satisfactorily clarify the confusion surrounding the interest to be paid to customers, as raised by the NCUC.

12. GT&C Section 39 – Reservation Charge Adjustment

178. GT&C section 39.2.A states that “Pipeline shall not be obligated to provide reservation charge credits on any Day for quantities not delivered to Customer under the following circumstances ... [d]ue to the conduct of the upstream point operator at the firm Primary Receipt Point or the downstream point operator of the facilities at the firm Primary Delivery point, not controlled by the Pipeline” The NCUC suggests that it is not clear whether DETI, an affiliate and upstream operator, potentially having the inability to supply gas to Atlantic should be considered a force majeure event on Atlantic’s system after 10 days.²⁴⁸

179. In its response, Atlantic states that its tariff exception to not provide reservation charge credits to its customers in the event deliveries are interrupted due to an upstream or downstream operator, as provided in section 39.2.A.3, is fully consistent with Commission policy. Atlantic states that the exception is applicable because it does not control the actions of its interconnecting point operator, and the fact that an affiliate happens to be the upstream interconnecting pipeline is immaterial.²⁴⁹

180. The Commission permits pipelines to include tariff exemptions from providing reservation charge credits in situations such as those proposed by Atlantic in section 39.2.A.3.²⁵⁰ Further, the Commission has required pipelines to clarify that such exemptions are only applicable when the pipeline’s failure to perform is caused solely by the conduct of others not controllable by the pipeline (i.e., operating conditions on

²⁴⁷ Atlantic August 19, 2016 Data Response at Question No. 4.

²⁴⁸ NCUC Protest at 12.

²⁴⁹ Atlantic Answer at 31-32.

²⁵⁰ See, e.g. *Enable Gas Transmission, LLC*, 152 FERC ¶ 61,052, at PP 133-134 (2015); *Dominion Transmission, Inc.*, 142 FERC ¶ 61,154, at PP 51-52 (2013).

upstream or downstream facilities).²⁵¹ As Atlantic notes, whether the upstream or downstream interconnecting pipeline is affiliated is irrelevant. Therefore, we will accept the proposed tariff language.

13. GT&C Section 41 – Foundation/Anchor Shipper Pack Account

181. GT&C section 41 provides Foundation and Anchor shippers a no-notice service via a “pack account.” As discussed above, we rejected Atlantic’s proposed no-notice service as unduly discriminatory. Therefore, Atlantic is required to remove section 41, including all references to such section within the tariff and *pro forma* service agreements.

14. GT&C Section 42– Imbalance Resolution Procedures

182. GT&C section 42 of Atlantic’s tariff outlines the procedures for resolving system imbalances and requires that each customer eliminate its end-of-month imbalances under each transportation service agreement per the timeline of this section. GT&C section 42.5 states that “[a] customer may correct such net imbalance within seventeen (17) business days after Customer receives such notification of the month-end imbalance from Pipeline.”

183. The NCUC states that GT&C section 42.5 provides that if a shipper does not correct its net imbalance within 17 business days after it receives notice of its month-end imbalance, Atlantic has the right to correct the imbalance by immediately suspending deliveries to or receipts from the shipper. The NCUC suggests that this type of discretion appears to be “draconian” because it could be applied to imbalances of any size without regard to whether there is an adverse system impact.²⁵²

184. In its answer, Atlantic states shippers have multiple opportunities and ways to correct their imbalance over the 17-day time period in accordance with Atlantic's tariff and the applicable NAESB rules. Atlantic further suggests that the need for the right to take decisive action for imbalances that remain uncorrected after the 17-day period arises from Atlantic's lack of storage, limited line pack, and no cash-out provisions for

²⁵¹ See, e.g., *Gulf South Pipeline Co., LP*, 141 FERC ¶ 61,224 at P 84; *Iroquois Gas Transmission Sys., L.P.*, 145 FERC ¶ 61,233, at PP 43-44 (2013); *Gas Transmission Northwest LLC*, 141 FERC ¶ 61,101, at P 42 (2012); *Paiute Pipeline Co.*, 139 FERC ¶ 61,089, at P 31 (2012).

²⁵² NCUC Protest at 13.

imbalances. Atlantic suggests its tariff language and actions taken in such circumstances are reasonable.

185. The Commission's regulations provide that a pipeline with imbalance penalty provisions in its tariff must provide, to the extent operationally practicable, parking and lending or other services that facilitate the ability of shippers to manage transportation imbalances, as well as the opportunity to obtain similar imbalance management services from other providers without undue discrimination or preference.²⁵³ In Order No. 637, the Commission stated that “pipelines will be required to provide imbalance management services, like park-and-loan service, and greater information about the imbalance status of shippers and the system, to make it easier for shippers to remain in balance in the first instance.”²⁵⁴ In *Gulf Crossing*, the Commission stated in limited circumstances, where the pipeline lacked storage facilities that can be used for imbalance management and where the pipeline had limited ability to use line pack for such purposes, the Commission has not required the pipeline to provide park and loan services.²⁵⁵ The Commission has historically urged pipelines to establish services, such as park and loan services, and to propose that they be implemented whenever they are operationally feasible, to reduce reliance on penalties to resolve imbalances.²⁵⁶

186. Atlantic has provided two justifications for not offering a park and loan service on its system: (1) a lack of storage on its system and (2) a limited capability to use line pack. Because we have denied Atlantic’s no-notice service for Foundation and Anchor shippers, it is not clear that Atlantic is unable to offer a park and loan service on its system. Therefore, we direct Atlantic to either file to implement park and loan services or to fully explain and document why it is operationally infeasible to do so.

G. Accounting

187. For the period March 2015 through August 2016, Atlantic’s proposed Allowance for Funds Used During Construction (AFUDC) rate is in excess of its proposed overall

²⁵³ 18 C.F.R. § 284.12(b)(2)(iii) (2017).

²⁵⁴ Order No. 637, FERC Stats. & Regs. ¶ 31,091 at 31,309.

²⁵⁵ *Gulf Crossing Pipeline Company LLC*, 124 FERC ¶ 61,282, at P 7 (2008) (*Gulf Crossing*).

²⁵⁶ See, e.g., *High Island Offshore System, L.L.C.*, 97 FERC ¶ 61,156, at 61,690 (2001).

rate of return underlying its recourse rates, resulting in an over accrual of AFUDC.²⁵⁷ AFUDC is a component part of the cost of constructing a project. Gas Plant Instruction 3(17) prescribes a formula for determining the maximum amount of AFUDC that may be capitalized as a component of construction cost.²⁵⁸ That formula, however, uses prior-year book balances and actual costs of borrowed and other capital. In cases of newly created entities, such as Atlantic, prior-year book balances do not exist; therefore, using the formula contained in Gas Plant Instruction 3(17) is not feasible for initial construction projects. Thus, to ensure that appropriate amounts of AFUDC are capitalized for this project, we will require Atlantic to capitalize the actual costs of borrowed and other funds for construction purposes, not to exceed the amount of debt and equity AFUDC that would be capitalized based on the overall rate of return underlying its recourse rates.²⁵⁹

188. In similar cases, the Commission has limited the maximum amount of AFUDC that the pipeline could capitalize by limiting the AFUDC rate to a rate no higher than the overall rate of return underlying its recourse rates (i.e., the rate that it could earn on operating assets).²⁶⁰ Consistent with this precedent, we will therefore require Atlantic to revise its AFUDC methodology to ensure that its maximum AFUDC rate for the entire construction period is no higher than the overall rate of return underlying its approved recourse rates. Further, Atlantic must use its actual cost of debt (short-term and long-term) in the determination of its AFUDC rate, if it results in an AFUDC rate lower than the overall rate of return underlying its recourse rates.²⁶¹

189. Last, Atlantic proposes to lease up to 100,000 Dth/d of available capacity on Piedmont's system. We will require Atlantic to treat the capacity lease with Piedmont²⁶²

²⁵⁷ To calculate its AFUDC rate of 14 percent, Atlantic used a 100 percent equity for the period March 2015 through August 2016.

²⁵⁸ 18 C.F.R. pt. 201 (2017).

²⁵⁹ See, e.g., *Creole Trail LNG L.P.*, 115 FERC ¶ 61,331; *Port Arthur LNG, L.P.*, 115 FERC ¶ 61,344 (2006); *Golden Pass LNG Terminal LP*, 112 FERC ¶ 61,041 (2005).

²⁶⁰ See *Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119 (2000); *Buccaneer Gas Pipeline Company L.L.C.*, 91 FERC ¶ 61,117 (2000).

²⁶¹ See *Weaver Cove Energy, LLC*, 112 FERC ¶ 61,070 (2005); *Pacific Connector Gas Pipeline, LP*, 129 FERC ¶ 61,234 (2009).

²⁶² Piedmont seeks only a limited-jurisdiction certificate under section 7(c) of the NGA authorizing it to make the leased capacity available for transportation of natural gas

as an operating lease and record the monthly lease payments in Account 858, Transmission and Compression of Gas by Others, consistent with similar capacity lease agreements approved by the Commission.²⁶³

H. Environmental Analysis

1. Pre-filing Review

190. On November 13, 2014, Commission staff granted Atlantic's and DETI's requests to use the pre-filing environmental review process in Docket Nos. PF15-6-000 and PF15-5-000, respectively. As part of the pre-filing review, on February 27, 2015, the Commission issued a *Notice of Intent to Prepare an Environmental Impact Statement for the Planned Supply Header Project and Atlantic Coast Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings* (NOI). The NOI was published in the *Federal Register* on March 6, 2015,²⁶⁴ and mailed to 6,613 entities, including federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Indian Tribes and Native Americans; potentially affected landowners; other interested individuals and entities; and local libraries and newspapers. The NOI briefly described the projects and the Commission's environmental review process, provided a preliminary list of issues identified by Commission staff, invited written comments on the environmental issues that should be addressed in the draft environmental impact statement (EIS), listed the date and location of 10 public scoping meetings²⁶⁵ to be held in the project area, and

in interstate commerce; as such, Piedmont is not required to submit proposed accounting entries recording the capacity lease receipts from Atlantic.

²⁶³ See, e.g., *Midwestern Gas Transmission Company*, 73 FERC ¶ 61,320 (1995); *TriState Pipeline LLC*, 88 FERC ¶ 61,328 (1999); *Gulf Crossing Pipeline Company LLC*, 123 FERC ¶ 61,100 (2008); *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028 (2013); and *Constitution Pipeline Co.*, 149 FERC ¶ 61,199.

²⁶⁴ 80 Fed. Reg. 12,163 (2015).

²⁶⁵ Commission staff held the public scoping meetings between March 10 and 24, 2015, in Fayetteville, Wilson, and Roanoke Rapids, North Carolina; Chesapeake, Dinwiddie, Farmville, Lovingston, and Stuarts Draft, Virginia; and Elkins and Bridgeport, West Virginia.

established April 28, 2015, as the deadline for comments. A total of 330 people presented oral comments at the pre-filing public scoping meetings.²⁶⁶

191. On August 5, 2015, the Commission issued a *Supplemental Notice of Intent to Prepare an Environmental Impact Statement for the Planned Atlantic Coast Pipeline Project, and Request for Comments on Environmental Issues Related to New Alternatives Under Consideration* that described three route alternatives for the ACP Project in Virginia. The supplemental NOI was published in the Federal Register on August 11, 2015,²⁶⁷ and sent to 618 entities, including federal, state, and local agencies; elected officials; environmental and public interest groups; Indian Tribes and Native Americans; potentially affected landowners; local libraries and newspapers; and other stakeholders who had indicated an interest in the area of the potential alternatives. Issuance of the supplemental NOI opened a 30-day formal supplemental scoping period for filing written comments on the alternatives under consideration.

192. In total, we received approximately 5,600 written comment letters²⁶⁸ during the pre-filing process, formal scoping and supplemental scoping periods, and throughout preparation of the draft EIS.²⁶⁹

2. Application Review

193. As stated above, on September 18, 2015, Atlantic and DETI filed formal applications with the Commission in Docket Nos. CP15-554-000 and CP15-555-000 for the ACP Project and Supply Header Project, respectively. On the same day, Atlantic and Piedmont also filed a joint application in Docket No. CP15-556-000 for the Capacity Lease.

194. On March 14, 2016, Atlantic filed an amendment to its initial application with the Commission in Docket No. CP15-554-001. Atlantic's amended application identified various route modifications to its initially proposed route in West Virginia, Virginia, and North Carolina. As a result, on May 3, 2016, the Commission issued a *Supplemental*

²⁶⁶ Transcripts of the scoping meetings were placed into the Commission's public record for this proceeding.

²⁶⁷ 80 Fed. Reg. 48,093 (2015).

²⁶⁸ Over half the written comment letters were form letters expressing either opposition or support for the projects.

²⁶⁹ Table 1.3-1 of the final EIS provided a list of environmental issues raised during scoping.

Notice of Intent to Prepare an Environmental Impact Statement and Proposed Land and Resource Plan Amendment(s) for the Proposed Atlantic Coast Pipeline, Request for Comments on Environmental Issues Related to New Route and Facility Modifications, and Notice of Public Scoping Meetings that described the route modifications identified in Atlantic's amended application and announced two additional public scoping sessions in Marlinton, West Virginia, and Hot Springs, Virginia, on May 20 and 21, 2016. The second supplemental NOI was published in the Federal Register on May 9, 2016,²⁷⁰ and sent to 9,694 entities, including federal, state, and local agencies; elected officials; environmental and public interest groups; Indian Tribes and Native Americans; potentially affected landowners; local libraries and newspapers; and other stakeholders who had indicated an interest in the area of the proposed route modifications. Issuance of the second supplemental NOI also opened a 30-day formal scoping and comment period for filing written comments on the alternatives under consideration, which concluded on June 2, 2016. A total of 147 attendees provided oral comments at the meetings.²⁷¹

195. On May 11, 2016, July 6, 2016, and August 29, 2016, Commission staff mailed letters to potentially affected landowners along certain modified and adjusted portions of the ACP Project route in West Virginia and Virginia, and requested comments from the affected landowners.

196. To satisfy the requirements of the National Environmental Policy Act (NEPA),²⁷² Commission staff evaluated the potential environmental impacts associated with the construction and operation of the ACP Project and Supply Header Project in an EIS. The U.S. Department of Agriculture, Forest Service (Forest Service); U.S. Army Corps of Engineers; U.S. Environmental Protection Agency (EPA); U.S. Fish and Wildlife Service (FWS) West Virginia, Virginia, North Carolina Field Offices and Great Dismal Swamp National Wildlife Refuge; West Virginia Department of Environmental Protection; and the West Virginia Department of Natural Resources participated as cooperating agencies in the preparation of the EIS.

197. Commission staff issued the draft EIS on December 30, 2016, addressing the issues raised during the initial and supplemental scoping periods and up to the point of publication. The *Notice of Availability* for the draft EIS was filed with the EPA and

²⁷⁰ 81 Fed. Reg. 28,060 (2016).

²⁷¹ Transcripts of the public meetings were placed into the Commission's public record for this proceeding.

²⁷² 42 U.S.C. §§ 4321 *et seq.* (2012). *See also* 18 C.F.R. pt. 380 (2017) (Commission's regulations implementing NEPA).

published in the Federal Register,²⁷³ and established a 90-day comment period²⁷⁴ ending on April 6, 2017. The draft EIS was sent to 9,805 entities on the environmental mailing list for the projects, including additional interested entities that were added since issuance of the NOIs. Commission staff held 10 public sessions between February 13 and March 2, 2017, in the project areas²⁷⁵ to take comments on the draft EIS. In total, 620 people provided oral comments at those sessions.²⁷⁶ Between the issuance of the draft EIS on December 30, 2016, and the end of the comment period on April 6, 2017, the Commission received 1,675 written or electronically filed letters.

198. Commission staff issued the final EIS on July 21, 2017, and the *Notice of Availability* was published in the Federal Register on July 28, 2017.²⁷⁷ The final EIS addressed timely comments received on the draft EIS.²⁷⁸ The final EIS was mailed to the same entities as the draft EIS, as well as to newly identified landowners and any additional entities that commented on the draft EIS.²⁷⁹

3. Major Environmental Issues and Comments on the Final EIS

199. The final EIS concludes that most environmental impacts resulting from construction and operation of the ACP Project and Supply Header Project would be

²⁷³ 82 Fed. Reg. 2,348 (2017).

²⁷⁴ The Forest Service, as a cooperating agency, is using the Commission's EIS for the purpose of amending the Forest Service Land and Resource Management Plans. Accordingly, the Commission adopted a 90-day comment period for the final EIS to accommodate Forest Service regulations pertaining to public notification and scoping for proposed Forest Service Plan amendments.

²⁷⁵ Commission staff held the public comment sessions in Fayetteville, Wilson, and Roanoke Rapids, North Carolina; Suffolk, Farmville, Lovingson, Staunton, and Monterey, Virginia; and Elkins and Marlinton, West Virginia.

²⁷⁶ Transcripts of the draft EIS comment sessions were placed into the public record for the proceedings.

²⁷⁷ 82 Fed. Reg. 35,192 (2017).

²⁷⁸ Appendix Z of the final EIS includes copies of letters in response to the draft EIS received through the close of the comment period, along with Commission staff responses.

²⁷⁹ The distribution list is provided in Appendix A of the final EIS.

temporary or short-term, but that some impacts would be adverse and significant.²⁸⁰ This determination was based on a review of the information provided by Atlantic and DETI in their applications and supplemental filings, including responses to staff data requests; field investigations; scoping; literature research; alternatives analyses; consultations with federal, state, and local agencies, as well as Indian Tribes; and additional information filed by members of the public. As discussed in more detail below, Commission staff considered specified impacts to be short-term to permanent, and forest fragmentation impacts to be significant.²⁸¹ Commission staff concludes that constructing the pipelines in steep terrain or high landslide incidence areas could increase landslide potential, and, where waterbodies are adjacent to steep terrain, slope instability could have long-term and adverse impacts on water quality and stream channel geometry, and, therefore, downstream aquatic biota.²⁸² Additionally, constructing the ACP Project facilities could significantly impact cave invertebrates and other subterranean species that occur in only a few known locations, and result in population-level effects on these species.²⁸³ For most other resources, impacts would be reduced to less than significant levels with the implementation of mitigation measures proposed by the applicants and other mitigation measures recommended by Commission staff and included as environmental conditions in the appendix to this order. Major environmental issues of concern addressed in the EIS are discussed below and include: geological resources such as landslides, earthquakes, and karst terrain; 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 property values, environmental justice, tourism, and housing; cultural resources; air quality; noise; safety; cumulative impacts; and alternatives.

a. Requests to Supplement Draft EIS

200. Several commenters and interveners argue that the draft EIS was insufficient and the Commission should issue a supplemental draft EIS. They assert that, since issuance of the draft EIS, Atlantic and DETI filed extensive, additional information on which commenters should have an opportunity to comment.²⁸⁴

²⁸⁰ Final EIS at ES-16.

²⁸¹ *Id.* at ES-10.

²⁸² *Id.* at ES-4 and 12.

²⁸³ *Id.* at ES-14.

²⁸⁴ Commenters cite 40 C.F.R. § 1502.9(c)(1)(ii) (2017).

201. A purpose of a draft EIS is to elicit suggestions for change.²⁸⁵ The Council on Environmental Quality (CEQ) regulation that the commenters rely upon calls for a supplemental draft or final EIS if the agency “makes substantial changes in the proposed action that are relevant to environmental concerns” or “there are significant new circumstances or information relevant to environmental concerns.”²⁸⁶ The Supreme Court, in *Marsh v. Oregon Natural Resources Council*, stated that under the “rule of reason,” “an agency need not supplement an [EIS] every time new information comes to light after the EIS is finalized.”²⁸⁷ Further, NEPA only requires agencies to employ proper procedures to ensure that environmental consequences are fully evaluated, not that a complete plan be presented at the outset of environmental review.²⁸⁸ In *National Committee for New River v. FERC*,²⁸⁹ the court held that “if every aspect of the project were to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project.”²⁹⁰

202. As shown in the final EIS, the additional information submitted by the applicants between the issuance of the draft EIS and final EIS did not cause the Commission to make “substantial changes in the proposed action,” nor did it present “significant new circumstances or information relevant to environmental concerns.” The final EIS analyzed the relevant environmental information and recommended environmental conditions, which we are imposing in this order, that must be satisfied before the applicants may proceed with their projects.

²⁸⁵ See *City of Grapevine, Tex. v. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) (“[t]he very purpose of a [draft EIS] is to elicit suggestions for change.”).

²⁸⁶ 40 C.F.R. § 1502.9(c)(1) (2017).

²⁸⁷ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

²⁸⁸ See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

²⁸⁹ *National Committee for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004) (*New River*).

²⁹⁰ *Id.* (citing *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at 61,659 (2003)).

b. Geological Resources**i. Steep Slopes and Landslides**

203. About 84 miles of the ACP Project pipeline route and 24 miles of the Supply Header Project pipeline route will cross topography with slopes greater than 20 percent grade.²⁹¹ In West Virginia, 73 percent of the AP-1 mainline will cross areas with a high incidence of, and a high susceptibility to, landslides. In Virginia, approximately 28 percent of the AP-1 mainline route will cross similar areas. The entire Supply Header Project pipeline route will also cross these types of areas. Atlantic and DETI have committed to implementing a *Best in Class Steep Slope Management Program* and to use specialized techniques when constructing on steep slopes. Atlantic and DETI will also implement their *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.

204. Specifically, as part of the *Steep Slope Management Program*, Atlantic and DETI would implement mitigation measures for susceptible slopes or hillsides depending on the length and inclination of the slope. Some of these measures include: (1) implanting drainage improvement, such as providing subsurface drainage at seep locations through granular fill and outlet pipes, incorporating drainage into trench breakers using granular fill, and/or intercepting groundwater seeps and diverting them from the right-of-way; (2) buttressing slopes with concrete trench breakers; (3) changing slope geometry to make the slope shallower; (4) benching and re-grading with controlled backfill; (5) using alternative backfill; (6) using chemical stabilization of backfill (e.g., cement, lime); (7) implementing Geogrid reinforced slope that consists of benching existing slope, installing subsurface drains, and incorporating Geogrid reinforcement into compacted backfill; and/or (8) using retaining structures.²⁹² The final EIS concluded that these measures were generally acceptable. However, because the Phase 2 analysis of slopes was still ongoing, the final EIS recommended, and we will require in Environmental Condition 51, that the final outcomes and designs developed as a result of the Phase 2 analysis be filed with the Commission prior to project construction.

ii. Karst Terrain

205. Karst features, such as sinkholes and caves, form as a result of the long-term action of groundwater on subsurface soluble carbonate rocks (e.g., limestone and dolostone). These features could present a hazard to the pipeline due to cave or sinkhole

²⁹¹ See Final EIS at 4-28.

²⁹² *Id.* at 4-29.

collapse. Commenters expressed concerns regarding subsidence and sinkholes affecting the construction and integrity of the pipeline in areas of karst terrain, and regarding potential impacts on and contamination of karst-related groundwater. The ACP Project will cross 71.3 miles of karst terrain in West Virginia and Virginia, specifically between AP-1 mileposts 59 and 154.²⁹³ Desktop and field surveys conducted by Atlantic identified hundreds of sinkholes and depressions within and adjacent to the ACP Project workspaces. Cave systems and sinking streams also cross beneath and adjacent to the pipeline route.

206. Atlantic and DETI developed a *Karst Mitigation Plan* to minimize and respond to karst activity during construction and operation of the proposed facilities. In addition to the plan, we are requiring further measures to identify and minimize impacts on karst features. Environmental Condition 26 in the appendix to this order requires Atlantic to utilize subsurface analysis, LiDAR data,²⁹⁴ and existing dye tracing studies²⁹⁵ to further identify and characterize karst features along the project route. Environmental Conditions 28, 29, and 62 through 64 require Atlantic to complete further studies and to minimize impacts on site-specific karst features. Environmental Condition 29 requires Atlantic to revise its *Karst Mitigation Plan* to include post-construction monitoring using LiDAR data. We concur with the Virginia Department of Conservation and Recreation's comments on the final EIS that strict adherence to the *Karst Mitigation Plan* is essential to minimizing impacts on sensitive karst areas. We also believe that, with appropriate implementation of the *Karst Mitigation Plan*, the proposed AP-1 pipeline route does not require modification. As stated in the final EIS, the Virginia Department of Conservation and Recreation Division of Natural Heritage and the Virginia Cave Board have endorsed the *Karst Mitigation Plan* as comprehensive and indicate that the measures included would reduce the potential risk posed by the ACP Project to karst resources.²⁹⁶

²⁹³ *Id.* at 4-8.

²⁹⁴ 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.

²⁹⁵ Dye tracing studies encompass a wide variety of techniques that can be used to track or model groundwater flow, either quantitatively or qualitatively. In groundwater karst systems, it can be effective in determining connectivity of underground systems or pathways of groundwater flow.

²⁹⁶ Final EIS at 4-177.

iii. Acid-Producing Rock

207. EPA recommends that, prior to construction, Atlantic complete surveys (beyond desktop analysis) where the AP-1 mainline crosses reclaimed coal surface strip mines, and identify measures to be implemented in the event acid-producing rock is encountered; and that these measures be included in any project approval, or in an appropriate construction and mitigation plan. The final EIS summarizes Atlantic's and DETI's consultation with geologic experts to identify geologic formations crossed by the projects that are known to contain acid-producing minerals, and presents mitigation measures committed to by Atlantic and DETI. Such measures include surveys for acid rock drainage, limiting the duration of stockpiled materials to less than 30 days to minimize potential for acid rock drainage, and applying lime or replacing topsoil with acid-free topsoil.²⁹⁷ We find these measures to be sufficient.

iv. Mining Operations

208. After the issuance of the final EIS, Western Pocahontas Properties (WPP) filed comments regarding ongoing and future plans for coal mining on its properties. In sum, WPP states that the ACP Project route, as proposed, would interfere with several locations in which WPP plans to actively mine coal resources. WPP states that the pipeline as currently routed would prohibit WPP's mining activities, given restrictions on blasting by Atlantic, and would pose safety concerns to the pipeline and the mine. To address these concerns, WPP requests that the Commission adopt an alternative route that WPP now submits for consideration.

209. Section 4.1.4.5 and Appendix Z of the final EIS discusses concerns related to active mineral mining, which includes comments filed by WPP on the draft EIS. The final EIS noted that based upon consultations by Atlantic and DETI with mine owners and operators of active mines in the project area, it appears that those mines are of a design that locates shafts hundreds of feet below the ground surface. Thus, the final EIS concluded that the project would neither conflict with mining activities nor pose a public safety concern.²⁹⁸ WPP's comments do not provide sufficient information about the depth or specific design of its mining operations for us to definitively conclude whether the ACP Project would conflict with WPP's mining operations. However, depending on the specific mine type and design, we do acknowledge that the project could impact WPP's ability to extract some of the coal resources on its properties. We note that the specific alternative submitted by WPP would result in impacting additional landowners and merely shift the projects impacts to a new group of landowners who have not had the opportunity to participate in the Commission's environmental review process or provide

²⁹⁷ *Id.* at 4-32 through 4-34.

²⁹⁸ *Id.* at 4-35.

comments. Further, while we believe it may be possible to develop a more modest route deviation that would avoid impacts on the locations from which WPP plans to extract mineral resources, we are unable to do so at this time due to the illegibility and insufficient level of detail of the mapping provided by WPP.

210. Accordingly, while we are not approving WPP's requested alternative, we believe WPP's concerns can be addressed through ongoing consultations between Atlantic and WPP, and that minor alignment shifts and mitigation measures specific to construction in areas of active mining can be developed. Therefore, we have added Environmental Condition 73 that requires Atlantic to develop a Mining Area Construction Plan and provide documentation of ongoing consultation with WPP regarding minor alignment shifts to avoid planned mining efforts.

c. Water Resources

i. Groundwater

211. Bedrock aquifers predominate in the project areas, with minor surficial alluvial aquifers occurring along streams. The pipeline trench will rarely exceed 10 feet in depth, but could encounter shallow groundwater. In those situations, the trench will be dewatered through filters into adjacent vegetated uplands so that there will be some recharge to shallow aquifers.

212. The ACP Project pipeline route will also cross four wellhead protection areas²⁹⁹ in West Virginia and two in Virginia.³⁰⁰ No groundwater source protection areas were identified in the vicinity of the Supply Header Project.

213. Current survey information has identified 4 public and 236 private water supply wells near the ACP Project, and 18 private wells near Supply Header Project.³⁰¹ One of the public wells and 12 of the private wells are within the ACP Project workspace, and one is within the Supply Header Project workspace. A total of 124 springs were identified near the ACP Project, and 4 springs were identified near Supply Header Project.³⁰² The Virginia Department of Health's Office of Environmental Health Services provided comments related to existing wells and water supplies. Specifically,

²⁹⁹ A wellhead protection area encompasses the area around a drinking water well where contaminants could enter and pollute the well. Final EIS at 4-78.

³⁰⁰ *Id.* at 4-79.

³⁰¹ *Id.* at 4-80.

³⁰² *Id.*

the Office of Environmental Health Services recommended that surveys for wells and springs be completed prior to construction. Due to lack of landowner permission and survey access, Environmental Condition 52 in the appendix to this order requires Atlantic and DETI to complete and file the remaining survey results for wells and springs after this order is issued. The Office of Environmental Health Services also recommended that Atlantic conduct a sanitary survey for sewage systems near the pipeline's final path. Atlantic committed to route around onsite sewage systems if possible, and to work with property owners to relocate onsite sewage systems that cannot be avoided. If previously unidentified sewage systems are encountered, we believe that Atlantic's commitment to relocate any system would resolve any issues, or that reroutes would be accommodated under Environmental Condition 5.

214. Commenters noted the degree of groundwater interconnectivity in areas of karst terrain. Commenters also stated that many landowners depend on wells or springs sourced from karst-generated groundwater for their domestic drinking water supplies, livestock watering, and irrigation of agricultural lands. Because karst features provide a direct connection to groundwater, there is a potential for pipeline construction to increase turbidity in groundwater, due to runoff of sediment into karst features or to contaminate groundwater resources by inadvertent spills of fuel or oil from construction equipment. To minimize impacts on wells, springs, and karst-related groundwater from construction-associated sedimentation and runoff, Atlantic and DETI have committed to implement the erosion control measures outlined in their *Karst Mitigation Plan* as well as the measures in the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* (FERC Plan). Further, to minimize the potential for hazardous materials to contaminate groundwater, Atlantic and DETI will implement the measures outlined in their *Stormwater Pollution Prevention Plan; Spill Prevention, Control, and Countermeasures Plan; Contaminated Media Plan; and Blasting Plan*.

215. Atlantic and DETI have begun and will continue to conduct pre-construction water quality evaluations on water wells and springs within 150 feet of the construction workspace (500 feet in karst terrain), and will complete post-construction testing for damage claims during and after construction. Environmental Condition 68 requires Atlantic and DETI to offer post-construction testing of water supplies to all landowners within 150 feet of the construction workspace (500 feet in karst terrain). EPA suggested that the applicants develop a "communication plan" for conveying the information related to well testing with landowners. We believe that providing this information is important to landowners, but we find it unduly burdensome to require the development of an additional plan here. Atlantic and DETI have committed to providing information regarding well testing to landowners, and they are required to do so by this order. Additionally, Environmental Condition 9 requires Atlantic and DETI to develop a complaint resolution procedure, which would provide landowners recourse to secure copies of the reports if they are not provided or solicit the aid of Commission staff. In situations where project-related construction damages the quantity or quality of water

supplies, the applicants have committed to compensate the landowner for damages, repair or replace the water systems to pre-construction conditions, and provide temporary sources of water.

ii. Surface Waters and Fisheries

216. The ACP Project will require 1,536 crossings of surface waterbodies, 587 of which are perennial and 18 of which are defined by the Commission as major waterbodies (more than 100 feet wide).³⁰³ The ACP Project pipeline route will cross 17 waterbodies listed on the Nationwide Rivers Inventory maintained by the National Park Service of rivers with outstanding qualities that may qualify for wild, scenic, or recreational designation; 12 federal navigable waters; as well as numerous state-designated waterbodies.³⁰⁴ Atlantic will cross waterbodies using a variety of methods, including the wet open-cut, dry open-cut (flumed, dam-and-pump, or cofferdam), horizontal directional drill (HDD), and bore methods. All navigable water crossings will be completed via HDD or the cofferdam method.

217. The Supply Header Project will require 133 crossings of intermediate and minor surface waterbodies, of which 115 are perennial.³⁰⁵ DETI will cross waterbodies using either dry open-cut or bore crossing methods.

218. Nine public surface water intakes are within 3 miles downstream of the ACP Project route, and one is within 3 miles downstream of the Supply Header Project route.³⁰⁶ Six source water protection watersheds will be crossed in North Carolina.³⁰⁷ Atlantic and DETI will use dry and trenchless crossing methods at these crossings.

219. Trout, anadromous fish, or federal or state/commonwealth protected species are present in several waterbodies that will be crossed by the ACP and Supply Header projects. Atlantic and DETI will minimize aquatic resource impacts by using the various trenchless or dry crossing methods, extra workspace restrictions, and restoration procedures. Atlantic will implement mussel relocation in West Virginia, Virginia, and North Carolina, and will implement relocation plans for certain non-mussel species in Virginia and North Carolina. Atlantic and DETI will also implement measures outlined

³⁰³ *Id.* at 4-100 through 4-103.

³⁰⁴ *Id.* at 4-112 through 4-113.

³⁰⁵ *Id.* at 4-100 through 4-103.

³⁰⁶ *Id.* at 4-110 through 4-112.

³⁰⁷ *Id.*

in their construction and restoration plans, such as restoring stream beds and banks to preconstruction conditions and implementing measures to minimize erosion and sediment loads. Where in-stream blasting may occur, Atlantic and DETI will implement blasting plans that provide measures for minimizing fishery impacts. Atlantic and DETI agreed to adhere to in-water work windows established by state resource agencies for crossing streams that contain or may contain sensitive species or special designations. However, given the number of waterbodies crossed, the final EIS concluded, and we agree, that certain designated water resources should be crossed with prescribed time of year restrictions to further avoid impacts on these resources. Therefore, Environmental Condition 20 in the appendix to this order requires Atlantic and DETI to adhere to additional in-water work windows, as detailed in appendix K of the final EIS.

220. EPA recommended that the Neuse River crossing be completed via the HDD method, pending a hydrofracture study that indicates low risk of inadvertent release, or to use the direct pipe method if the risk is not shown to be low. Environmental Condition 35 requires Atlantic to file a hydrofracture potential analysis for the Neuse River (located at MP 98.5 on AP-2), and to utilize the HDD method at this crossing if the potential for hydrofracture is low. If the HDD method is not feasible, Environmental Condition 35 requires Atlantic to consult with the U.S. Fish and Wildlife Service and North Carolina Wildlife Resources Commission to identify additional conservation measures that Atlantic will implement at this crossing to mitigate for the potential impacts on Endangered Species Act-listed, proposed, and/or under review species.

221. In its comments on the final EIS, the Virginia Marine Resource Commission provided recommendations for measures to be implemented at two waterbody crossings, Quaker Swamp and Cohoon Creek, including erosion and sediment control measures outlined in an April 13, 2017 memorandum from Environmental Resources Management to DETI, as well as timing restrictions related to predicted rainfall events. In a letter dated April 13, 2017, from Atlantic to the Virginia Department of Environmental Quality, that included the Environmental Resources Management memorandum as an attachment,³⁰⁸ Atlantic committed that, if weather forecasts indicate that heavy rainfall is predicted, trenching would not occur until the threat of rain has passed. Further, Atlantic agreed in its letter to improve erosion and sediment control measures, as outlined in the memorandum.

222. Atlantic and DETI will require a total of approximately 86.6 million gallons of water for hydrostatic testing (82.9 million gallons for the ACP Project and 3.7 million gallons for the Supply Header Project).³⁰⁹ Of this volume, 46.9 and 39.7 million gallons

³⁰⁸ Atlantic's April 13, 2017 Letter to the Virginia Department of Environmental Quality (filed May 5, 2017).

³⁰⁹ Final EIS at 4-121.

will be required from municipal sources and surface water sources, respectively. Water for hydrostatic testing will be withdrawn and discharged in accordance with the Commission's *Wetland and Waterbody Construction and Mitigation Procedures* (FERC Procedures), state/commonwealth regulations, and required permits. Atlantic and DETI will construct temporary cylindrical water impoundment structures adjacent to several of the water withdrawal points to allow a slower withdrawal rate. As recommended by staff in the final EIS and adopted here, Environmental Condition 61 requires Atlantic and DETI to limit water withdrawal to not exceed 10 percent of instantaneous flow at waterbodies that contain federally protected species.³¹⁰ Environmental Condition 17 requires Atlantic and DETI to identify proposed or potential sources of water used for dust control, anticipated quantities of water to be appropriated from each source, and the measures they will implement to ensure water sources and any related aquatic biota are not adversely affected by the appropriation activity.

223. We received comments regarding potential effects on surface waterbodies during construction and operation of the projects due to sedimentation or spills or leaks of hazardous materials. We also received comments after the issuance of the final EIS claiming that open-cut waterbody crossings would prevent navigation or migration of aquatic species and cause excessive upstream flooding. Studies show that dry open-cut waterbody crossings result in temporary (less than 4 days) and localized (for a distance of only a few hundred feet of the crossing) increases in turbidity downstream of construction. The magnitude of this increase is small in comparison to increased turbidity associated with natural runoff and precipitation events.³¹¹ Once construction is complete, streambeds and banks will be restored. The FERC Procedures (at section V.C.1.) stipulate the use of clean gravel or native cobbles for the upper one foot of trench backfill in all waterbodies that are classified as coldwater fisheries. The FERC Procedures also stipulate that downstream flows must be maintained (for aquatic resources) and that crossings are designed to meet the maximum flows of the water body. Furthermore, these crossings would be subject to ongoing monitoring while flows are diverted to prevent any undue damming of waterbodies. Atlantic and DETI will minimize impacts on riparian vegetation at the edge of waterbodies by narrowing the width of the standard construction rights-of-way at waterbody crossings to 75 feet and by siting most temporary workspaces at least 50 feet away from stream banks. Atlantic and DETI will minimize impacts on surface waterbodies by implementation of the construction practices outlined in their project-specific construction plans, the FERC Plan and Procedures, and by adhering to state and federal construction, restoration, and

³¹⁰ The VA Department of Game and Inland Fisheries noted it was unable to confirm whether this was required in the final EIS, and we confirm here that Atlantic will be required to adhere to this measure.

³¹¹ See Final EIS at 4-229.

operational requirements. To avoid or minimize the potential impacts of fuel or oil or other hazardous materials spilled from construction equipment, Atlantic and DETI will follow the procedures outlined in their *Spill Prevention, Control, and Countermeasures Plan*, which includes both preventative and mitigation measures such as personnel training, equipment inspection, refueling procedures, and spill cleanup and containment. Additionally, Atlantic and DETI will employ onsite environmental inspectors who will ensure that the applicants follow their construction plans and adhere to the environmental conditions described in this order.

224. In addition to the measures we require here, the U.S. Army Corps of Engineers as well as the Pennsylvania Department of Environmental Protection, West Virginia Department of Environmental Protection, Virginia Department of Environmental Quality, and North Carolina Department of Environmental Quality, have the opportunity to impose conditions to protect water quality pursuant to section 401 and 404 of the Clean Water Act. We expect strict compliance by the applicants with any such conditions.

iii. Wetlands

225. Construction of the ACP and Supply Header projects will impact a total of 798.2 acres of wetlands, including 91 acres of emergent wetlands, 97.4 acres of scrub-shrub wetlands, and 604.1 acres of forested wetlands.³¹² Construction of the projects' aboveground facilities will result in the loss of 7.4 acres of wetlands.³¹³ To ensure this loss of wetlands is appropriately mitigated, Environmental Condition 53 in the appendix to this order requires Atlantic and DETI to file a copy of their final wetland mitigation plans and documentation of U.S. Army Corps of Engineers approval of the plans prior to construction. The remainder of wetlands will be restored after pipeline installation. However, in some cases there will be conversions of wetland types and functions.

226. EPA recommended continued efforts, including route modifications, to avoid and minimize impacts on cypress gum swamps, riparian habitats, and other special aquatic habitats. As stated in the final EIS in response to EPA's comments on the draft EIS,³¹⁴ impacts on these and other sensitive wetlands would be avoided, minimized, and/or mitigated through the U.S. Army Corps of Engineers' section 404 and 401 review and permit process. The final wetland mitigation plan, and U.S. Army Corps of Engineers' approval, would include appropriate mitigation for impacts on forested and high quality wetland resources.

³¹² Final EIS at 4-135.

³¹³ *Id.* at 4-139.

³¹⁴ *Id.* at Attachment Z, page 53.

227. Within the 10-foot-wide corridor centered on the pipelines that is mowed on a regular basis in accordance with the FERC Procedures, there will be a permanent conversion of forested and shrub wetlands to herbaceous wetlands. Impacts on emergent and scrub-shrub wetlands within temporary workspaces will be short-term. After construction, those areas will be restored, with emergent and scrub-shrub wetlands returning to their original condition and function within a few years. Forested wetlands within temporary workspaces will be subject to long-term impacts. While trees could regenerate in those areas, it will take decades for them to mature and return the forested wetlands to their original condition and function.

228. In general, construction and operation-related impacts on wetlands may also be mitigated by the applicants' compliance with the conditions of the Clean Water Act sections 404 and 401 permits. For unavoidable wetland impacts, Atlantic and DETI commit to purchase wetland and stream credits from approved mitigation banks in the respective states. In-lieu fee state programs may also be considered.³¹⁵ Proof of compensatory mitigation credit purchase will be provided by the applicants to the U.S. Army Corps of Engineers prior to construction. With implementation of the acceptable avoidance and minimization measures, as well as the environmental conditions of this order, we agree with the final EIS's conclusion that the ACP and Supply Header projects would not significantly impact wetlands.³¹⁶

d. Vegetation, Forested Land, and Wildlife

229. Construction of the ACP Project will affect 5,522 acres of forest, 379 acres of shrublands, and 226 acres of grasslands.³¹⁷ Operation of the ACP Project will affect about 2,455 acres of forest, 172 acres of shrublands, and 101 acres of grasslands.³¹⁸ About 532 acres of forest will be permanently converted to industrial land use at aboveground facilities and permanent access roads for the ACP Project.

³¹⁵ In-lieu-fee programs may be used pursuant to an agreement between a regulatory agency or agencies in which an external mitigation sponsor collects funds from permittees (applicant) in lieu of the permittees providing their own permittee-responsible compensatory mitigation that would be required for their U.S. Army Corps of Engineers permit. The external sponsor can then use those collected funds from multiple applicants or permittees to create one or more mitigation sites.

³¹⁶ Final EIS at 4-140.

³¹⁷ *Id.* at 4-155 through 4-156.

³¹⁸ *Id.*

230. Construction of the Supply Header Project will affect a total of about 614 acres of forest, 6 acres of shrublands, and 226 acres of grasslands.³¹⁹ Operation of the Supply Header Project will affect about 290 acres of forest, 175 acres of shrublands, and 101 acres of grasslands.³²⁰ About 97 acres of forest and 2 acres of shrublands will be permanently converted to industrial land use at aboveground facilities and permanent access roads for the Supply Header Project.

231. The ACP Project will pass through several managed or vegetation communities of special concern, including the James River and Horsepen Wildlife Management Areas; the Kumbrabow and Seneca State Forests; the Monongahela National Forest and George Washington National Forest; late seral forests; 16 Natural Heritage Conservation Sites in Virginia; and 12 natural heritage natural areas and 9 natural communities in North Carolina. The Supply Header Project will pass through the Lewis Wetzel Wildlife Management Area in West Virginia. Since the issuance of the final EIS, the Virginia Department of Conservation and Recreation has identified three new stream conservation units (Spruce Creek, Matthews Creek, and Kingsale Swamp) and two new conservation sites (Duncan Knob Access Road and Wilson Mountain) that would be crossed by the AP-1 mainline. Atlantic will be required to implement the agency-recommended time of year restrictions and crossing measures, and comply with the restoration requirements, that were developed in consultation with resources agencies and contained in the FERC Plan and Procedures when crossing the newly identified stream conservation units.

232. The Virginia Department of Conservation and Recreation reiterated its previous comments that a hydrologic study of the Emporia Powerline Bog and Handsom-Gum Powerline Conservation Sites is essential to determine appropriate construction and restoration measures within these conservation sites. Atlantic has committed to completing hydrologic surveys of these sites, but does not propose to do so until the second quarter of 2018. To ensure that construction and restoration measures can be developed in coordination with the Virginia Department of Conservation and Recreation, Environmental Condition 60 requires Atlantic to complete the hydrologic studies of these sites prior to any construction within these conservation sites, and to file the results of the studies, along with construction and restoration measures developed in consultation with the Virginia Department of Conservation and Recreation, for Commission staff review.

233. The 50-foot-wide operational pipeline easements in uplands will be kept clear of trees, resulting in the permanent conversion of forest to grasslands/shrub land use. The remainder of the temporary construction workspace along the pipeline routes in forested uplands will be allowed to regenerate; although it will take many years for trees to mature. This will be a long-term impact affecting about 2,772 acres of forest, but the

³¹⁹ *Id.*

³²⁰ *Id.*

resource will eventually recover. The removal of interior forest in order to create the necessary pipeline rights-of-way will result in the conversion of forest area to a different vegetation type. This will contribute to forest fragmentation and the creation of forest edges, which will remove habitat for interior species.

234. The ACP Project pipeline route will cross seven EPA Level III ecoregions: the Western Allegheny Plateau, Central Appalachians, Ridge and Valley, Blue Ridge Mountains, the Piedmont, Southeastern Plains, and Middle Atlantic Coastal Plain. All components for the Supply Header Project will be within the Western Allegheny Plateau ecoregion. Combined, these ecoregions make up a total area of more than 200 million acres, of which more than 120 million acres is forested. In considering the total acres of forest affected by the projects, the quality and use of forest for wildlife habitat, and the time required for full restoration in temporary workspaces, we agree with the final EIS's conclusion that the projects will have significant impacts on forest.³²¹

235. EPA recommended that in forested areas, the permanently-maintained right-of-way be kept to the narrowest width possible. As described in the final EIS, Atlantic would generally maintain a permanent corridor of 50 feet, and a narrower corridor in sensitive areas such as wetlands. Atlantic's permanent right-of-way will be reduced significantly from the construction right-of-way, which typically measures 125 feet in width. A maintained corridor is important to facilitate routine and thorough inspections of the pipeline by its operator. These inspections are required by federal law to ensure safe operation of the pipeline and ensure an adequate degree of public health and safety. Given these considerations and because the width of the right-of-way has been reduced to the minimum necessary, we do not find it reasonable or practical in this instance to require further reductions in the width of the right-of-way.

236. To minimize forest fragmentation and edge effects, Atlantic has collocated about 9 percent and DETI 31 percent of the pipeline routes with existing linear corridors. Atlantic and DETI will seed and install temporary and permanent erosion control measures according to their *Restoration and Rehabilitation Plan*, the FERC Plan and Procedures, and the *Construction, Operation, and Maintenance Plan*, which is being developed by the applicants in coordination with the Forest Service. Atlantic and DETI have also developed an *Invasive Species Management Plan*. Environmental Condition 18 in the appendix to this order requires Atlantic and DETI to revise their *Restoration and Rehabilitation Plan* and *Invasive Species Management Plan* to minimize and/or restrict herbicide, pesticide, and insecticide applications.

237. The Virginia Forest Conservation Partnership recommended that an additional forest fragmentation analysis be completed using Virginia Forest Conservation Partnership methodologies, and that mitigation, including compensatory mitigation, be

³²¹ *Id.* at 4-170.

provided for direct and indirect impacts on forests. The final EIS assesses the fragmentation and edge effect impacts that would result from construction and operation of the pipeline using similar methodologies recommended by the Virginia Forest Conservation Partnership, and presents measures committed to by Atlantic and DETI that would be implemented to minimize or avoid fragmentation impacts.³²² Specifically, the final EIS concluded that the ACP Project would result in the loss of interior forest habitat, creation of new forest edges, fragmentation of forest cores, and reduction in the size of forest cores.³²³ Atlantic has committed to incorporating mitigation measures including: (1) using regionally-specific flowering plant seed mixes to provide food and habitat for pollinators and local wildlife species; (2) mitigating for impacts on sensitive environmental resources including listed species habitats and migratory birds; (3) restricting maintenance mowing to occur outside of the bird nesting season for migratory birds; (4) identifying conservation easements or sites where forested areas could be restored; and (5) acquiring a 400-acre conservation site adjacent to the Monongahela National Forest to provide offsite mitigation.³²⁴ The Commission does not require or encourage applicants to participate in compensatory mitigation to groups, governments, or agencies. The mitigation measures proposed or recommended in the final EIS's analysis target specific natural resources. The final EIS concludes, and we agree, that despite the mitigation measures that would be implemented in Atlantic's and DETI's construction and restoration plans and conditions of this order, forested areas would experience long-term to permanent significant impacts as a result of fragmentation.³²⁵

238. EPA, Virginia Department of Conservation and Recreation, and Virginia Department of Game and Inland Fisheries recommended that an expanded list of invasive and noxious plant species be included in the *Invasive Plant Species Management Plan*. The nine species of noxious weeds identified in Atlantic's *Invasive Plant Species Management Plan* are consistent with the Virginia Administrative Code and with those species identified during correspondence with the program manager for the Virginia Department of Agriculture and Consumer Services. Although the *Invasive Plant Species Management Plan* does not include an expanded list of non-regulated invasive and noxious weeds, many of the measures included in Atlantic's plan will aid in minimizing the spread of non-regulated species in addition to the regulated species. Additionally, restoration measures outlined in the FERC Plan and Procedures require that the restored

³²² *Id.* at 4-187 through 4-202.

³²³ *Id.* at 4-200.

³²⁴ *Id.* at 4-202.

³²⁵ *Id.* at 5-14.

right-of-way must have a similar density and cover of non-nuisance vegetation as compared to adjacent undisturbed areas. We find these measures sufficient.

239. In its comments on the final EIS, the Virginia Department of Game and Inland Fisheries reiterated its comments on the draft EIS³²⁶ regarding identification of invasive aquatic plant species of concern that may occur in the ACP Project corridor, and recommended measures to be included in an invasive species plan. The final EIS acknowledges the comments of the Virginia Department of Game and Inland Fisheries in the discussion of invasive aquatic species.³²⁷ Further, the final EIS notes that Atlantic and DETI would control the potential transport of invasive aquatic species through adherence to federal and state-specific regulations for preventing the land transport of such species by primarily utilizing municipal sources of water for HDDs, hydrostatic testing, and dust control, and, where sourced from surface waters, by discharging hydrostatic test waters into well-vegetated upland areas.³²⁸ We also will require Atlantic and DETI to include with their Implementation Plans measures to control the spread of invasive aquatic species and procedures for notifying federal and state agencies should invasive aquatic species be identified during construction.

240. A variety of wildlife species occupy the ecoregions and habitats to be crossed by Atlantic's and DETI's pipelines. Construction of the projects may result in limited mortality for less mobile animals, such as small rodents, reptiles, amphibians, and invertebrates, that are unable to escape equipment. More mobile animals will likely be displaced to adjacent similar habitats during construction. Once the right-of-way is revegetated, it will be reoccupied by the displaced wildlife.

241. The ACP Project could have significant adverse impacts on karst, cave, and other subterranean habitat, as well as on the species associated with such habitat. Subterranean species are often located in only a few locations and are vulnerable to changes in hydrological pattern or water quality. Impacts associated with construction activities could have population-level impacts on these species (such as cave-adapted amphipods).

242. Additionally, constructing the projects could disrupt bird courting, breeding, or nesting behaviors. Migratory birds, including Birds of Conservation Concern, are associated with the habitats that will be affected by the projects. Three Bird Conservation Regions will be crossed by the ACP Project: Bird Conservation Regions

³²⁶ These comments were addressed by Atlantic and DETI. *See* Final EIS at Attachment Z, page 248.

³²⁷ *Id.* at 4-238.

³²⁸ *Id.* at 4-239.

27 (Southern Coastal Plain), 28 (Appalachian Mountains),³²⁹ and 29 (Piedmont). In addition, 10 Important Bird Areas will be crossed by the projects. Atlantic and DETI developed a *Migratory Bird Plan* to minimize impacts on bird species, and have agreed to conduct tree clearing outside of state-specific migratory bird nesting seasons. Our Environmental Condition 19 requires Atlantic and DETI to revise their *Migratory Bird Plan* and address potential impacts on active rookeries. Additionally, on August 29, 2017, the Forest Service provided supplemental comments on the *Migratory Bird Plan*, offering minor textual revisions and improvements. We recognize these additions may have some benefits; therefore, we have modified Environmental Condition 19 to include the Forest Service in any of Atlantic and DETI's ongoing consultations with state wildlife agencies.

e. **Threatened, Endangered, and Other Special Status Species**

243. Commission staff identified 36 federally listed threatened or endangered species (or federal candidate species or federal species of concern) that could be present in the vicinity of the projects.³³⁰ However, four of these species do not occur in the specific project area. Of the remaining 32 species, the final EIS concludes that the ACP Project would have no effect on 11 species, would not be likely to adversely affect 14 species, and would be likely to adversely affect 7 species (Indiana bat, northern long-eared bat, Roanoke logperch, Madison Cave isopod, clubshell mussel, small whorled pogonia, and running buffalo clover).³³¹ The final EIS further evaluated designated critical habitats³³² for the Indiana bat and Atlantic Sturgeon and concluded that construction and operation of the ACP Project would have no effect on U.S. Fish and Wildlife designated critical habitat for the Indiana bat and would not adversely modify U.S. Fish and Wildlife designated critical habitat for the Atlantic sturgeon.³³³ The final EIS concludes that the Supply Header Project would not likely adversely affect two mussels, but would likely

³²⁹ Bird Conservation Region 28 (Appalachian Mountains) will also be crossed by the Supply Header Project.

³³⁰ Final EIS at 4-247 through 4-250.

³³¹ *Id.* at ES-7.

³³² Not all threatened or endangered species have U.S. Fish and Wildlife Service designated critical habitats. However, for species that do have designated critical habitats, the action agency must evaluate a project's effects on designated habitat(s) in addition to the effects on the species itself.

³³³ *Id.* at 4-269 and 4-286.

adversely affect the Indiana bat and northern long-eared bat.³³⁴ The conclusions by Commission staff in the final EIS were based in part upon Atlantic's and DETI's commitments for implementing certain species-specific avoidance and minimization measures. Commission staff has submitted a Biological Assessment to the U.S. Fish and Wildlife Service that includes a detailed assessment regarding the effects of the projects on federally listed species, initiating formal consultation with the U.S. Fish and Wildlife Service regarding species that will likely be adversely affected by either the ACP or Supply Header project. Environmental Condition 54 in the appendix to this order stipulates that construction cannot begin until after staff completes the process of complying with the Endangered Species Act.

244. We clarify that the final EIS requires that electric resistivity studies and/or air track drilling surveys of karst features identified within the construction workspace and within 5 miles of known or survey-identified bat hibernacula be completed for all project areas, not just for those areas that have been or would be surveyed in 2017. Accordingly, Environmental Condition 64 of this order has been revised to clarify this requirement.

245. The projects will also affect, to varying degrees, over one hundred species that are state-listed as threatened, endangered, or were noted by the applicable state agencies as being of special concern (in addition to those species already counted as federally listed). The final EIS concludes that that for species with high site fidelity and/or limited mobility (such as isopods), construction activities could impact and alter their habitat or cause localized population declines or local extirpations.³³⁵ Atlantic and DETI will implement various construction plans to minimize impacts on these species.³³⁶ Additional species-specific conservation measures that would be implemented by Atlantic and DETI are described in Appendix S of the final EIS.³³⁷

³³⁴ *Id.* at 4-269 and 4-277.

³³⁵ *Id.* at 4-342.

³³⁶ The following plans all have measures that will help minimize impacts: the FERC Plan and Procedures; the *Restoration and Rehabilitation Plan*; the *HDD Plan*; the *Karst Mitigation Plan*; the *Spill Prevention, Control, and Countermeasures Plan*; the *Timber Removal Plan*; the *Invasive Plant Species Management Plan*; the *Blasting Plan*; the *Migratory Bird Plan*; the *Protected Snake Conservation Plan*; the *Fire Plan*; the *Fugitive Dust Control and Mitigation Plan*; and the *Construction, Operations, and Maintenance Plan* (on National Forest lands).

³³⁷ *Id.* at Appendix S.

f. **Land Use, Recreation, and Visual Resources**

246. The ACP Project pipeline route will mostly cross forest (56.1 percent), followed by agricultural land (27.7 percent), and wetlands (8.6 percent).³³⁸ The Supply Header Project pipeline route will mostly cross forest (88.4 percent), followed by agricultural land (7.1 percent), and developed lands (3.6 percent).³³⁹

247. Combined, both projects will affect about 3,453 acres of agricultural lands.³⁴⁰ Impacts on agricultural lands will be short-term, lasting during the period of construction and restoration and returning to pre-construction conditions within a few years. The applicants have committed to compensate farmers for the loss of agricultural production during the construction and restoration period. Following pipeline installation, the right-of-way will be restored to near pre-construction conditions and use, and agricultural practices could resume. Except for orchards, crops and pasture can be planted directly over the entire right-of-way. Mitigation measures typically implemented in agricultural lands (as specified in the FERC Plan) include topsoil segregation, rock removal, soil decompaction, and repair/replacement of irrigation and drainage structures damaged by construction. Environmental Condition 40 in the appendix to this order requires Atlantic to develop site-specific *Organic Farm Protection Plans* that outline measures to be implemented when crossing organic farms.

248. Atlantic identified 77 residences and DETI identified 5 residences within 50 feet of their respective proposed construction rights-of-way.³⁴¹ Site-specific residential mitigation plans are included as appendix J1 of the final EIS. The final EIS concludes that with implementation of Atlantic's and DETI's mitigation measures, including the construction methods in residential areas, and Landowner Complaint Resolution Procedures, impacts on residences would be minimized or mitigated.³⁴² We agree.

249. Federally owned or managed recreational and special use areas that will be crossed by the ACP Project pipeline route include the Appalachian National Scenic Trail, Blue Ridge Parkway, Monongahela National Forest, and George Washington National Forest. The Blue Ridge Parkway, managed by the National Park Service, and the Appalachian National Scenic Trail, managed by the Forest Service, will be crossed under with an

³³⁸ *See id.* at 4-344 through 4-349.

³³⁹ *See id.*

³⁴⁰ *Id.* at 4-349.

³⁴¹ *See id.* at 4-374 through 4-375.

³⁴² *Id.* at 4-377.

HDD, eliminating any surface impacts on either the Blue Ridge Parkway or the Appalachian National Scenic Trail. Construction and operation of the pipeline under the Appalachian National Scenic Trail and Blue Ridge Parkway will also not have a significant visual impact. Additionally, the final EIS discussed contingency planning for the HDD crossing of the resources, as well as an analysis of alternate crossing locations of the Blue Ridge Parkway and Appalachian National Scenic Trail.

250. The ACP Project pipeline route will pass through the Monongahela National Forest and George Washington National Forest for a total of 5.2 miles and 16.0 miles, respectively. As listed on table 2.2-2 of the final EIS, the ACP Project will affect about 112 acres in the Monongahela National Forest and 318 acres in the George Washington National Forest during construction.³⁴³ The Monongahela National Forest and George Washington National Forest operate under Land and Resource Management Plans. The Forest Service analyzed amending its Management Plans to allow for the project within the Monongahela National Forest and George Washington National Forest, and on June 21, 2017, issued a draft record of decision to authorize the use and occupancy of National Forest System lands for the ACP Project. The draft record of decision was available for public objections until September 5, 2017. After resolving objections, the Forest Service will issue a final decision on the respective authorizations before it. Impacts on National Forest resources will be minimized by Atlantic following the measures outlined in its *Construction, Operation, and Maintenance Plan*.

g. Socioeconomics

i. Property Values, Mortgages, and Insurance

251. Several commenters expressed concerns regarding the potential effect of the projects on property values, mortgages, and homeowner's insurance. The final EIS identifies ten studies that conclude that the presence of a pipeline or compressor station either has no effect or an insignificant effect on property values.³⁴⁴ Commenters cite a study performed by Key-Log Economics LLC,³⁴⁵ which they assert demonstrates that property values will decrease as result of the proposed project. As stated in the final EIS, the Key-Log Study provides anecdotal evidence regarding sale value of properties, but does not present sources for the data presented with regard to loss of property value due

³⁴³ *Id.* at 2-18.

³⁴⁴ However, the final EIS acknowledges that specific valuation predictions cannot be made on a property-by-property basis. *Id.* at 4-504 through 4-506.

³⁴⁵ Key-Log Economics LLC, *Economic Costs of the Atlantic Coast Pipeline* (Feb. 2016) (filed Feb. 16, 2016) (Key-Log Study).

to proximity to a pipeline.³⁴⁶ Accordingly, we conclude here, as we have in other cases, that the proposed project is not likely to significantly impact property values in the project area.³⁴⁷

252. With regard to concerns regarding to homeowner's insurance, our staff has researched this extensively and has found no evidence of any practices by mortgage companies to re-categorize properties, nor are we aware of federally insured mortgages being revoked, based on proximity to pipelines.³⁴⁸ Accordingly, the final EIS concludes, and we agree, that homeowners' insurance rates are unlikely to change due to construction and operation of the proposed projects.³⁴⁹

ii. Environmental Justice

253. Executive Order 12898 requires that specified federal agencies make achieving environmental justice part of their missions by identifying and addressing, as appropriate, disproportionately high and adverse human or environmental health effects of their programs, policies, and activities on minorities and low income populations.³⁵⁰ The Commission is not one of the specified agencies and the provisions of Executive Order 12898 are not binding on this Commission. Nonetheless, in accordance with our usual practice, the final EIS addresses this issue.³⁵¹

³⁴⁶ For example, the Key-Log Study uses opinion surveys of realtors in Wisconsin to support its claims. However, these surveys are strictly personal opinion and do not carry with them the rigors of statistically developed and controlled studies. Final EIS at 4-504.

³⁴⁷ See, e.g., *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 at P 106; *Central New York Oil & Gas Co., LLC*, 116 FERC ¶ 61,277, at P 44 (2006).

³⁴⁸ Final EIS at 4-506. See also *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 at PP 107-108.

³⁴⁹ Final EIS at 4-506.

³⁵⁰ Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Executive Order 12,898 (Feb. 11, 1994), reprinted at 59 Fed. Reg. 7629.

³⁵¹ Final EIS at 4-511 through 4-515.

254. In accordance with EPA guidance,³⁵² the final EIS followed a three step approach for environmental justice reviews: (1) determine the existence of minority and low-income populations in the project area; (2) determine if the resource impacts are *high and adverse*; and (3) determine if any identified high and adverse impacts fall disproportionately on environmental justice populations. If the federal agency finds that any of these conditions are not present, the agency may then conclude its review and determine the action is not sited in a discriminatory manner on low-income or minority communities.

255. The construction and operation of the proposed facilities would affect a mix of racial/ethnic and socioeconomic areas in the ACP and Supply Header project area.³⁵³ However, not all impacts identified in the final EIS would affect minority or low-income populations. The primary adverse impacts on the environmental justice communities associated with the construction of projects would be the temporary increases in dust, noise, and traffic from project construction.³⁵⁴ These impacts would occur along the entire pipeline route and in areas with a variety of socioeconomic background. We also received numerous comments expressing concern about minority and low income communities near the proposed Compressor Station 2 in Buckingham County, Virginia. Based on the methodology used in the final EIS, of the three census tracts within one mile of Compressor Station 2, one is a designated low-income community, and *none* of the tracts were designated as minority environmental justice populations.³⁵⁵

256. Atlantic and DETI would implement a series of measures that would minimize potential impacts on the communities, including environmental justice communities, near project facilities. For example, Atlantic and DETI propose to employ proven construction-related practices to control fugitive dust, such as application of water or other commercially available dust control agents on unpaved areas subject to frequent vehicle traffic. Similarly, Atlantic and DETI will implement noise control measures during construction and operation of the projects.

257. In response to comments regarding specific environmental health concerns of minority communities, including African American populations, the final EIS considered in greater detail the potential risks of impacts falling on these communities, and what

³⁵² EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analyses* (April 1998).

³⁵³ *Id.* at 4-512 through 4-513.

³⁵⁴ *Id.* at 4-513.

³⁵⁵ *Id.* at 4-513.

those effects would be. Due to construction dust and compressor station emissions, African American populations³⁵⁶ near ACP and Supply Header projects could experience disproportionate health impacts due to higher rates of asthma within the overall African American community.³⁵⁷ However, health impacts from construction dust would be temporary, localized, and minor. Health impacts from compressor station emissions would be moderate because, while they would be permanent facilities, air emissions would not exceed regulatory permissible levels. While the final EIS discusses the potential for the risk of impacts to fall disproportionately on minority communities, it further notes that, in relation to comments received regarding Compressor Station 2's effects on African Americans, the census tracts around the station are not designated as minority environmental justice populations. Therefore, by following the methodology outlined above, the final EIS concludes, and we agree, that the projects 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 Compressor Station 2.³⁵⁸ Further, no disproportionately high and adverse impacts on environmental justice populations as a result of other resources impacts will be expected as a result of the projects.³⁵⁹

iii. Housing, Business, and Tourism

258. About 50 percent of the projects' workforce (5,815 workers) will be non-local, resulting in demand for local temporary housing in the projects' areas.³⁶⁰ The final EIS estimates that there are at least 52,875 rooms/sites available in the project area, and there are sufficient accommodations to meet the increase in demand caused by the influx of the non-local construction workforce.³⁶¹ While some construction activity will be conducted during the peak tourism season, sufficient temporary housing is still likely to be available

³⁵⁶ As stated above, although minorities, including African Americans, do reside in the three census tracts within one mile of Compressor Station 2, none of the tracts were designated as minority environmental justice populations.

³⁵⁷ *Id.* at 4-514 (citing U.S. Dep't of Health and Human Services, Centers for Disease Control and Prevention, *Asthma Facts – CDC's National Asthma Control Program Grantees* (July 2013)).

³⁵⁸ *Id.*

³⁵⁹ *Id.* at 4-515.

³⁶⁰ *Id.* at 4-492.

³⁶¹ *Id.*

for tourists, however, it may be more difficult to find (particularly on short notice) or more expensive to secure. The final EIS concludes, and we agree, that the increase in demand for short-term housing from non-local construction workers during the construction of the projects would be temporary and minor.³⁶²

259. The projects will have economic benefits to local communities through expenditures on goods and services, including spending on hotels and restaurants, and tax revenues.³⁶³ However, the final EIS acknowledges that some local businesses may be directly and indirectly impacted by the projects.³⁶⁴

260. The Commission received comments that the ACP Project would cause a delay or potentially prevent two large projects from being developed in the Rockfish Valley area. The first is the development of a self-described luxury hotel at Wintergreen Resort. Based on information provided by Wintergreen Property Owners Association Inc. and Wintergreen Resort Inc., the hotel would be located over one mile east of the ACP Project near AP-1 MPs 159.0 to 160.0. Wintergreen Pacific LLC and Pacific Group Resorts, the developers of the project, claim that they “would be forced to discontinue development of [the] hotel, or substantially delay its development” if the ACP Project is constructed. Commenters expressed concern regarding blocking access along Beech Grove Road leading to the resort area and hindering future development and sale of lots. Commenters also speculated that if the hotel at Wintergreen Resort was not developed, the value of the existing resort would diminish, impacting the future viability of the resort. Wintergreen Resort is cited as the largest employer in Nelson County, and commenters claimed that any diminishing value or opportunities for the resort could cause negative economic impacts for the entire Rockfish Valley area and the county, including the loss of property values if Wintergreen Resort went out of business.

261. The second development is the Spruce Creek Resort and Market, a proposed resort, hotel, restaurant, and public market on 100 acres of mature woodland along Virginia State Route 151 and bisected by Spruce Creek. Based on information provided by the developer, the AP-1 mainline would cross the resort between approximate MPs 162.4 and 162.7 in Nelson County, Virginia. The developer is concerned that ACP Project would cross the middle of the property, eliminating the attractiveness of the resort area and, thus, development of the resort would be stopped.

³⁶² *Id.* at 4-492.

³⁶³ *Id.* at 4-510.

³⁶⁴ *Id.* at 4-510.

262. The final EIS concluded, and we agree, that construction of ACP Project and development of the hotel at Wintergreen Resort and the development of Spruce Creek Resort and Market could still be accomplished such that the overall socioeconomic impacts associated with the ACP Project are reduced or mitigated, while maintaining the appeal of the area, as demonstrated by other residential and commercial developments in the area of similar projects throughout the country.³⁶⁵

263. However, the final EIS acknowledges that the Spruce Creek Resort and Market could be impacted by the proposed projects.³⁶⁶ Because of these impacts, Commission staff assessed other alternatives, primarily the “Spruce Creek Alternative,” to avoid the proposed development. As further described in the final EIS, these other alternatives would result in similar but different impacts on a different set of landowners.³⁶⁷ These included a privately-owned airstrip and various other local businesses or commercial endeavors, including Blue Heron Farms, High View Farm, Blue Toad Hard Cider, and a bed and breakfast. Commission staff concluded that the Spruce Creek Alternative did not offer a significant environmental advantage, and thus, did not recommend its adoption.

264. Commenters also indicated that construction and operation the projects could adversely impact local tourism. The final EIS found no evidence that short-term effects of pipeline construction have long-term significant impacts on the tourism industry in areas where pipeline construction has occurred. The final EIS concludes, and we agree, that recreational uses and tourism activities in the project area would not be affected by operation of the project.³⁶⁸

h. Cultural Resources

265. Atlantic identified 198 archaeological and historic sites within the area of potential effect for the ACP Project that are listed in the National Register of Historic Places (National Register), eligible for listing, are unevaluated, or would otherwise require treatment during construction (e.g., cemetery avoidance plans for cemeteries that are not eligible for listing).³⁶⁹ State Historic Preservation Office (SHPO) concurrence with

³⁶⁵ *Id.* at 4-510.

³⁶⁶ Specifically, the developer asserts in its comments that the development could lose up to 30 percent of its accommodations and its spa complex.

³⁶⁷ Final EIS at 3-44.

³⁶⁸ *Id.* at 4-497 through 4-500.

³⁶⁹ *See id.* at 4-516 through 4-530.

Atlantic's recommendations of eligibility is pending on most of these sites. Atlantic will avoid impacts on eligible or unevaluated cultural sites by project design, or will conduct additional studies to further assess National Register eligibility.

266. DETI identified two cultural resources sites that are recommended as eligible and will be avoided or mitigated during construction: one historic farmstead that is recommended as eligible, but will not be affected by the Supply Header Project; and three historic cemeteries that are recommended not eligible, but will be avoided during construction.³⁷⁰

267. The ACP Project pipeline route crosses two Historic Districts: Warminster Rural Historic District and South Rockfish Rural Historic District. Atlantic will assess potential effects on these historic districts, consult with the Virginia Department of Historic Resources and other interested parties as needed, and make recommendations for further evaluation or mitigation of adverse effects. Two access roads along the AP-3 pipeline will cross the Sunray Agricultural Historic District. Atlantic asserts that use of these roads will not affect the historic district. After the issuance of the final EIS, Roberta Koontz, co-owner of "The Wilderness," filed comments taking issue with Atlantic's survey of the property and Atlantic's recommendations regarding eligibility for listing in the National Register. The Virginia Department of Historic Resources commented that the property was determined eligible for listing on the National Register, and the Virginia Department of Historic Resources review board approved the nomination of "The Wilderness" for listing on the Virginia Landmarks Registry and the National Register. While discrepancies in the absolute boundaries of the parcel and exact location of structures are apparent, we clarify here, as did the final EIS, that the historic farmstead "The Wilderness" does meet the criteria for listing on the National Register and includes a residence, numerous outbuildings, and agricultural fields. Thus, the property will continue to be considered as part of staff's ongoing consultations under the National Historic Preservation Act. An assessment of effects and proposed mitigation for the historic property is required to be completed before project construction.

268. Atlantic and DETI consulted with 15 federally recognized Indian tribes to provide them an opportunity to comment on the projects. Several tribes and organizations requested additional information, and we have responded to tribes that commented on the projects. Atlantic and DETI have prepared plans to be used in the event any unanticipated archaeological sites or human remains are encountered during construction. The plans provide for work stoppage and the notification of interested parties, including Indian tribes, in the event of discovery.

269. Commission staff has not finished consultations with the SHPOs. In addition, Atlantic and DETI are still conducting investigations at sites where access was previously

³⁷⁰ *See id.* at 4-530 through 4-535.

denied. If, in the future, Commission staff determines that any historic properties will be adversely affected, staff will notify the Advisory Council on Historic Preservation, and consult with appropriate consulting parties regarding the production of an agreement document to resolve adverse effects, in accordance with 36 C.F.R. § 800.6. The process of compliance with section 106 of the National Historic Preservation Act has not yet been completed for ACP and Supply Header projects. Therefore, Environmental Condition 56 in the appendix to this order precludes construction until after any additional required surveys and evaluations are completed, survey and evaluation reports have been reviewed by the appropriate consulting parties, the Advisory Council on Historic Preservation has had an opportunity to comment, and the Director of OEP provides written notification to proceed.

i. **Air Quality and Noise Impacts**

i. **Air Quality**

270. Air quality impacts associated with construction of the projects will include emissions from construction equipment and fugitive dust. The final EIS concludes that such air quality impacts will generally be temporary, localized, and not have a significant impact on air quality or contribute to a violation of applicable air quality standards.³⁷¹ We agree.

271. Operational emissions will be mainly generated by the three new compressor stations for the ACP Project and the modification of four compressor stations for the Supply Header Project. Atlantic's proposed new Compressor Stations 1, 2, and 3 will be subject to a Prevention of Significant Deterioration (PSD) major source threshold of 250 tons per year. Potential operational emissions from the Crayne and JB Tonkin Compressor Stations after proposed modifications will remain below PSD major source thresholds; therefore, these stations will not be subject to PSD regulations. While emissions from the Mockingbird Hill Compressor Station will be minor, the net emissions increase of particulate matter, particulate matter with an aerodynamic diameter less than or equal to 10 microns, particulate matter with an aerodynamic diameter less than or equal to 2.5 microns, and greenhouse gasses (GHGs) will still exceed the major modification thresholds, representing a significant net emissions increase and requiring a Best Available Control Technology analysis. The Mockingbird Hill and JB Tonkin Compressor Stations are currently subject to Clean Air Act Title V regulations and will remain Title V facilities after construction. The Crayne Compressor Station, authorized under a state operating permit, is a minor source under Title V and will remain so after construction of the Supply Header Project. The final EIS concludes, and we agree, that

³⁷¹ *Id.* at 5-32.

emissions resulting from operation of the compressor stations will not cause or contribute to a violation of national air quality standards.³⁷²

ii. Noise Impacts

272. Noise levels are quantified according to decibels (dB), which are units of sound pressure. The A-weighted sound level, expressed as dBA, is used to quantify noise impacts on people. Sound level increases during pipeline construction will be intermittent and will generally occur during daylight hours, with the possible exception of some HDD activities. Construction equipment noise levels will typically be around 85 dBA at a distance of 50 feet. Blasting may be necessary to trench through shallow bedrock. Blasting noise levels have been documented at about 94 dBA at a distance of 50 feet. Noise impacts during construction will be transient as pipe installation progresses from one location to the next. HDD operations at the entry and exit locations will result in high noise levels at the source location. Typically, noise from HDD operations is estimated to be about 90 dBA at 50 feet.

273. As stated in the final EIS, the applicants modeled noise levels at noise sensitive areas (NSA) near each compressor station during operation. Increases over existing ambient noise levels will be barely noticeable, ranging from 0.1 dBA to 8.5 dBA. “Worst case” modeled noise levels at each NSA due to typical compressor station operation will be below the Commission staff’s noise limit of 55 dBA, with the exception of the JB Tonkin Compressor Station.³⁷³ At the existing JB Tonkin Compressor Station, four NSAs currently experience total noise levels above the Commission staff guideline. However, after the proposed modifications, these NSAs will experience an overall *decrease* in noise ranging from 1.1 dBA to 3.9 dBA. Environmental Conditions 69, 70, and 72 in the appendix to this order require that the applicants file the results of noise surveys during operation of the compressor stations, and if noise exceeds the day-night sound level of 55 dBA at any NSA (or is above existing sound levels in the case of the existing NSAs at the JB Tonkin Compressor Station), the applicants must install additional noise controls and refile noise survey results a year later.

274. Therefore, the final EIS concludes, and we agree, that construction and operation the projects would not result in significant noise impacts on residents, and the surrounding communities.³⁷⁴

³⁷² *Id.* at 4-561 and 4-563.

³⁷³ *Id.* at 4-571 through 4-575.

³⁷⁴ *Id.* at 4-576.

j. Safety

275. Numerous commenters questioned the safety of the projects. The final EIS notes that the project facilities must be designed, constructed, operated, and maintained to meet or exceed the U.S. Department of Transportation's (DOT) Minimum Federal Safety Standards³⁷⁵ and other applicable federal and state regulations. These regulations include specifications for material selection and qualification; minimum design requirements; and protection of the pipeline from internal, external, and atmospheric corrosion.

276. Data reviewed by Commission staff and discussed in section 4.12 of the EIS support the conclusion that Commission-jurisdictional pipelines are a safe, reliable means of transporting natural gas. The rate of total fatalities for the nationwide natural gas transmission lines in service is approximately 0.01 per year per 1,000 miles of pipeline.³⁷⁶ Using this rate, the 642.0-mile-long ACP and Supply Header projects' pipelines might result in a fatality (either an industry employee or a member of the public) on the pipeline every 156 years. Therefore, the final EIS concludes, and we agree, that the projects would represent only a slight increase in risk to the nearby public.³⁷⁷

277. We received comments during scoping and on the draft EIS from residents and emergency response representatives of Wintergreen Resort; Bath County, Virginia; and several community members and landowners regarding single-point access roads and the ability to evacuate in event of an emergency. Atlantic stated its intention is to work with local emergency responders to ensure they are comfortable with their ability to respond to a natural gas emergency, including evacuation, and by holding annual meetings and setting up table-top drills to work through the action items necessary to resolve a natural gas emergency scenario. Atlantic would also prepare *Operational Emergency Response Plans* in coordination with local emergency response providers. *The Operational Emergency Response Plans* would address incident evacuation requirements. Therefore, the final EIS concluded, and we agree, that operation of the project would represent only a slight increase in risk to the nearby public.³⁷⁸

³⁷⁵ See 49 C.F.R. pt. 192 (2017).

³⁷⁶ Final EIS at 4-590.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 4-584; see also *EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) (the "opinions and standards of – and [the LNG operator's] future coordination with – federal and local authorities" were a reasonable component of the Commission's public safety evaluation).

278. We also received comments expressing concern that the ACP Project may become a target for a future act of terrorism. The likelihood of future acts of terrorism or sabotage occurring along the ACP or Supply Header Projects' pipelines or at any of the myriad natural gas pipeline or energy facilities throughout the United States is unpredictable given the disparate motives and abilities of terrorist groups. Further, the Commission, in cooperation with other federal agencies, including the U.S. Department of Homeland Security, industry trade groups, and interstate natural gas companies, is working to improve pipeline security practices, strengthen communications within the industry, and extend public outreach in an ongoing effort to secure pipeline infrastructure. In accordance with the DOT surveillance requirements, the applicants will incorporate air and ground inspection of its proposed facilities into its inspection and maintenance program. Security measures at the new aboveground facilities will include secure fencing.

k. Programmatic Environmental Impact Statement

279. Several interveners and commenters contend that the Commission should prepare a programmatic EIS for natural gas infrastructure projects in the Marcellus and Utica Shale formations. Commenters argue that the CEQ recommends the use of a programmatic EIS in circumstances like those surrounding the ACP Project where "several energy development programs proposed in the same region of the country have similar proposed methods of implementation and similar best practices and mitigation measures that can be analyzed in the same document." Commenters argue that reviewing individual applications in isolation masks regional impacts. They note that other agencies, including the U.S. Department of Energy and the U.S. Bureau of Land Management, have used a programmatic EIS to address energy development issues on a regional basis.

280. CEQ regulations do not require broad or "programmatic" NEPA reviews. CEQ's guidance provides that such a review may be appropriate where an agency is: (1) adopting official policy; (2) adopting a formal plan; (3) adopting an agency program; or (4) proceeding with multiple projects that are temporally and spatially connected.³⁷⁹ The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only if there has been a report or recommendation on a

³⁷⁹ Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* 13-15 (Dec. 24, 2014) (citing 40 C.F.R. § 1508.18(b)), https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf. We refer to the memorandum as 2014 Programmatic Guidance.

proposal for major federal action with respect to the region.³⁸⁰ Moreover, there is no requirement for a programmatic EIS where the agency cannot identify projects that may be sited within a region because individual permit applications will be filed later.³⁸¹

281. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.³⁸² Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines. Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.”³⁸³ What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. As to projects that have a clear physical, functional, and temporal nexus such that they are connected or cumulative actions,³⁸⁴ the Commission will prepare a multiple-project environmental document.³⁸⁵ Such is not the case here.

282. The Commission is not engaged in regional planning. Rather, the Commission processes individual pipeline applications in carrying out its statutory responsibilities under the NGA. That there currently are a number of planned, proposed, or approved infrastructure projects to increase infrastructure capacity to transport natural gas from the

³⁸⁰ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (*Kleppe*) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

³⁸¹ See *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009) (*Piedmont Environmental Council*).

³⁸² See, e.g., *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145 at PP 82-88; *National Fuel Gas Supply Corp.*, 154 FERC ¶ 61,180, at P 13 (2016); *Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014); *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 (2014).

³⁸³ 15 U.S.C. § 717f(e) (2012).

³⁸⁴ 40 C.F.R. § 1508.25(a)(1)-(2) (2017) (defining connected and cumulative actions).

³⁸⁵ See, e.g., EA for the Monroe to Cornwell Project and the Utica Access Project, Docket Nos. CP15-7-000 & CP15-87-000 (filed Aug. 19, 2015); Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects, Project Nos. 1888-030, 2355-018, and 405-106 (filed Mar. 11, 2015).

Marcellus and Utica Shale does not establish that the Commission is engaged in regional development or planning.³⁸⁶ Instead, this confirms that pipeline projects to transport Marcellus and Utica Shale gas are initiated solely by a number of different companies in private industry. As we have noted previously, a programmatic EIS is not required to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, a federal plan or program in that region.³⁸⁷

283. The Commission's siting decisions regarding pending and future natural gas pipeline facilities respond to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the kind of facilities that will be proposed.³⁸⁸ Any broad, regional environmental analysis would "be little more than a study . . . containing estimates of potential development and attendant environmental consequences,"³⁸⁹ and could not present "a credible forward look" that would be "a useful tool for basic program planning."³⁹⁰ In these circumstances, the Commission's longstanding practice to conduct an environmental review for each proposed project, or a number of proposed projects that are interdependent or otherwise interrelated or connected, "facilitate[s], not impede[s], adequate environmental

³⁸⁶ See, e.g., *Sierra Club v. FERC*, 827 F.3d 36, 50 (D.C. Cir. 2016) (Freeport LNG) (rejecting claim that NEPA requires FERC to undertake a nationwide analysis of all applications for liquefied natural gas export facilities); cf. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1326-27 (D.C. Cir. 2015) (*Myersville*) (upholding FERC determination that, although a Dominion Transmission Inc.-owned pipeline project's excess capacity may be used to move gas to the Cove Point terminal for export, the projects are "unrelated" for purposes of NEPA).

³⁸⁷ See *Kleppe*, 427 U.S. at 401-02 (holding that a regional EIS is not required where there is no overall plan for regional development).

³⁸⁸ Lack of jurisdiction over an action does not necessarily preclude an agency from considering the potential impacts. As explained in the indirect and cumulative impact sections of this order, however, it reinforces our finding that because states, and not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting), the location, scale, timing, and potential impacts from such development are even more speculative.

³⁸⁹ *Kleppe*, 427 U.S. at 402.

³⁹⁰ *Piedmont Environmental Council*, 558 F.3d at 316.

assessment.”³⁹¹ Thus, the Commission’s environmental review of the ACP and Supply Header projects together in a single EIS is appropriate under NEPA.

284. In sum, CEQ states that a programmatic EIS can “add value and efficiency to the decision-making process when they inform the scope of decisions,” “facilitate decisions on agency actions that precede site- or project-specific decisions and actions,” or “provide information and analyses that can be incorporated by reference in future NEPA reviews.”³⁹² The Commission does not believe these benefits can be realized by a programmatic review of natural gas infrastructure projects because the projects subject to our jurisdiction do not share sufficient elements in common to narrow future alternatives or expedite the current detailed assessment of each particular project. Thus we find a programmatic EIS is neither required nor useful under the circumstances here.

I. Indirect Impacts of Upstream and Downstream Activities

285. Interveners and commenters broadly argue that the EIS must consider the project’s indirect effects, particularly regarding impacts of induced upstream production of natural gas from the Marcellus and Utica Shale. In addition they assert that the Commission must consider as indirect impacts the downstream end-use, of natural gas on greenhouse gases and climate change.

286. CEQ’s regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.³⁹³ Indirect impacts are defined as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”³⁹⁴ Further, indirect effects “may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”³⁹⁵ Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it is both (1) caused by the proposed action; and (2) reasonably foreseeable.

³⁹¹ *Id.*

³⁹² 2014 Programmatic Guidance at 13.

³⁹³ 40 C.F.R. § 1508.25(c) (2016).

³⁹⁴ *Id.* § 1508.8(b).

³⁹⁵ *Id.* § 1508.8(b).

287. With respect to causation, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause”³⁹⁶ in order “to make an agency responsible for a particular effect under NEPA.”³⁹⁷ As the Supreme Court explained, “a ‘but for’ causal relationship is insufficient [to establish cause for purposes of NEPA].”³⁹⁸ Thus, “[s]ome effects that are ‘caused by’ a change in the physical environment in the sense of ‘but for’ causation,” will not fall within NEPA if the causal chain is too attenuated.³⁹⁹ Further, the Court has stated that “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁴⁰⁰

288. An effect is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁴⁰¹ NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”⁴⁰²

³⁹⁶ *U.S. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, at 767 (2004) (*Pub. Citizen*) (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983) (*Metro Edison Co.*)).

³⁹⁷ *Id.*

³⁹⁸ *Id.*; *see also* Freeport LNG, 827 F.3d at 46 (FERC need not examine everything that could conceivably be a but-for cause of the project at issue); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (Sabine Pass LNG) (FERC order authorizing construction of liquefied natural gas export facilities is not the legally relevant cause of increased production of natural gas).

³⁹⁹ *Metro. Edison Co.*, 460 U.S. at 774.

⁴⁰⁰ *Pub. Citizen*, 541 U.S. at 770; *see also* Freeport LNG, 827 F.3d at 49 (affirming that *Public Citizen* is explicit that FERC, in authorizing liquefied natural gas facilities, need not consider effects, including induced production, that could only occur after intervening action by the DOE); Sabine Pass LNG, 827 F.3d at 68 (same); *EarthReports, Inc. v. FERC*, 828 F.3d at 955-56 (same).

⁴⁰¹ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). *See also* *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

⁴⁰² *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

i. Impacts from Upstream Natural Gas Production

289. With respect to the argument that the Commission must analyze the environmental impacts associated with the upstream production of natural gas that may be induced by the approval of ACP and Supply Header projects, as we have previously concluded, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.⁴⁰³ A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there will be no other way to move the gas).⁴⁰⁴ To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.

290. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. There are no forecasts in the record which would enable the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission

⁴⁰³ See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. Appx., 472, 474-75 (2nd. Cir. 2012) (unpublished opinion).

⁴⁰⁴ See *cf. Sylvester v. U.S. Army Corps of Engineers*, 884 F.2d 394, 400 (9th Cir. 1989) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). See also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, “growth-inducing” impact); *City of Carmel-by-the-Sea v. U.S. Dep’t of Transportation.*, 123 F.3d 1142, 1162 (9th Cir. 1997) (acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project’s potential to induce additional development).

knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states. Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.⁴⁰⁵

291. Nonetheless, we note that the Department of Energy has examined the potential environmental impacts generally associated with unconventional natural gas production activities.⁴⁰⁶ The DOE Addendum concludes that such production, when conforming to regulatory requirements, implementing best management practices, and administering pollution prevention concepts, may have temporary, minor impacts to water resources.⁴⁰⁷

⁴⁰⁵ *Habitat Education Center v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with enough specificity to make their consideration meaningful need not be included in the environmental analysis). *See also Sierra Club v. DOE*, 867 F.3d 189, 198-199 (D.C. Cir. 2017) (accepting DOE’s “reasoned explanation” as to why the indirect effects pertaining to induced natural gas production were not reasonably foreseeable where DOE noted the difficulty of predicting the incremental quantity of natural gas that might be produced, where at the local level such production might occur, and that an economic model estimating localized impacts would be far too speculative to be useful).

⁴⁰⁶ U.S. Department of Energy, *Addendum to Environmental Review Documents Concerning Exports of Natural Gas from the United States*, 79 Fed. Reg. 48,132 (Aug. 15, 2014) (DOE Addendum), available at <http://energy.gov/sites/prod/files/2014/08/f18/Addendum.pdf> (analyzing air quality, water resource, GHG emissions, induced seismicity, and land use impacts from unconventional natural gas production activities in the lower 48 states). The U.S. Court of Appeals for the D.C. Circuit has upheld DOE’s reliance on the DOE Addendum to supplement its environmental review of the proposed export of LNG. *See Sierra Club v. DOE*, 867 F.3d at 195, 201.

⁴⁰⁷ DOE Addendum at 19; *see also Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands*, 80 Fed. Reg. 16,128, 16,130 (Mar. 26, 2015) (Bureau of Land Management promulgated regulations for hydraulic fracturing on federal and Indian lands to “provide significant benefits to all Americans by avoiding potential damages to water quality, the environment, and public health”).

With respect to air quality, the Department of Energy found that natural gas development leads to both short- and long-term increases in local and regional air emissions.⁴⁰⁸ It also found that such emissions may contribute to climate change.⁴⁰⁹ But to the extent that natural gas production replaces the use of other carbon-based energy sources, the U.S. Department of Energy found that there may be a net positive impact in terms of climate change.⁴¹⁰ We find the information provided in the DOE Addendum to be helpful to generally inform the public regarding potential impacts of increased natural gas production and therefore consider the DOE Addendum to be supplemental material to our environmental review.

292. While the DOE Addendum provides a nation-wide impacts analysis, Commission staff estimated the impacts on land use and water consumption associated with the production wells that would be required to provide 100 percent of the volume of natural gas which could be transported by the ACP and Supply Header projects over the life of the projects⁴¹¹ from the Marcellus and Utica Shale basin. Each natural gas well pad and associated infrastructure (road infrastructure, water impoundments, and pipelines) requires about 1.48 acres of land.⁴¹² Based on the projects' volume and the expected estimated ultimate recovery of Marcellus/Utica Shale wells,⁴¹³ our Commission staff estimates that between 2,149 and 4,212 wells would be required to provide the gas over the estimated 30-year project lifespan. Therefore, on a normalized basis,⁴¹⁴ drilling wells

⁴⁰⁸ DOE Addendum at 32.

⁴⁰⁹ *Id.* at 44.

⁴¹⁰ *Id.*

⁴¹¹ Our environmental staff assumed a 30 year life of the project.

⁴¹² Life Cycle Analysis of Natural Gas Extraction and Power Generation, Dept. of Energy and Nat'l Energy Tech. Laboratory DOE/NETL-2015/1714; page 22, Table 3-6, (August 30, 2016).

⁴¹³ Energy Information Assoc. <http://www.eia.gov/conference/2015/pdf/presentations/staub.pdf>, and Environmental Impacts of Unconventional Natural Gas Development and Production, DOE/NETL-2014/1651 (May 29, 2014).

⁴¹⁴ 30 year impacts averaged on a per year basis.

may affect between 106 and 208 acres a year.⁴¹⁵ Previous research⁴¹⁶ indicates that, within the Marcellus and Utica Shale areas, about 72.3 percent of the land affected by natural gas production is forest, about 22.4 percent is agricultural, and about 5.3 percent is grass or open lands.

293. Recent estimates⁴¹⁷ show that drilling and developing an average Marcellus Shale well requires between 3.88 and 5.69 million gallons of water, depending on whether the producer uses a recycling process. Therefore, producing wells required to supply the project could require the normalized consumptive use of as much as 278 to 798 million gallons of water per year over the 30-year project life. In addition, staff conservatively estimated the upstream GHG emissions from extraction as 1.2 million metric tpy CO_{2e}, and from processing as 2.4 million metric tpy CO_{2e}.⁴¹⁸

294. The record in this proceeding does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the proposed projects that would necessitate the specific local-level impacts analysis that commenters

⁴¹⁵ Dept. of Energy and Nat'l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714, page 22, table 3-6 (August 30, 2016) .

⁴¹⁶ *Id.* at DOE/NETL-2015/1714, pg 24, table 3-8.

⁴¹⁷ Environmental Impacts of Unconventional Natural Gas Development and Production May 29, 2014 DOE/NETL-2014/1651; page 76, exhibit 4-1.

⁴¹⁸ The upstream GHG emissions were estimated using the May 29, 2014 Life Cycle Analysis of Natural Gas Extraction and Power Generation May 29, 2014 DOE/NETL-2014/1646. Generally, Commission staff used the average leak and emission rates identified in the NETL analysis for each segment of extraction, processing, and transport. The method is outlined in Section 2 of the NETL report, and the background data used for the model is outlined in Section 3.1. Staff used the results identified in Tables 4.3, 4.4, and 4.5 to look at each segment and grossly estimate GHG emission. To be conservative, staff did not account for the New Source Performance Standards Oil & Gas rule changes, or other GHG mitigation. Additionally, staff made a conservative estimate of the length of non-jurisdictional pipeline prior to the gas reaching Project components, as well as the length of downstream pipeline to the delivery point. *See Sierra Club v. DOE*, 867 F.3d at 201-202 (finding sufficient DOE's estimate of potential GHG emissions from producing, transporting and exporting LNG reported in a 2014 Life Cycle Report on Exporting LNG).

seek.⁴¹⁹ The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. We have acknowledged that the pipeline projects are designed to move gas supplies from the Appalachian Basin to markets in Virginia and North Carolina. This does not mean, however, that approving these particular projects will induce further shale gas production. Rather, as we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.⁴²⁰ If the proposed projects were not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.⁴²¹ Again, any such production would take place pursuant to the regulatory authority of state and local governments.⁴²²

⁴¹⁹ See *Sierra Club v. DOE*, 867 F.3d at 200 (rejecting contention that DOE must project shale-play level environmental impacts specific to the amount of liquefied natural gas exports it authorized).

⁴²⁰ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015). See also *Sierra Club v. DOE*, 867 F.3d at 198 (accepting DOE's explanation that natural gas production is driven by numerous factors including the price of gas, pace of technological change, and U.S. environmental regulations and that there is fundamental uncertainty about how natural gas production at the local level will respond to price changes at the national level); *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

⁴²¹ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 at P 39; see also *Sierra Club v. DOE*, 867 F.3d at 199 (noting that there is an interconnected pipeline system throughout the lower 48 states).

⁴²² We acknowledge that NEPA may obligate an agency to evaluate the environmental impacts of non-jurisdictional activities. That states, however, not the Commission, have jurisdiction over natural gas production and associated development (including siting and permitting) supports the conclusion that information about the scale, timing, and location of such development and potential environmental impacts are even more speculative. See *Sierra Club v. DOE*, 867 F.3d at 200 (DOE's obligation under NEPA to "drill down into increasingly speculative projections about regional

295. Moreover, even if a causal relationship between our action here and additional production were presumed, the scope of the impacts from any induced production is not reasonably foreseeable. That there may be incentives for producers to locate wells close to pipeline infrastructure does not change the fact that the location, scale, and timing of any additional wells are matters of speculation, particularly regarding their relationship to the proposed projects. As we have previously explained, a broad analysis, based on generalized assumptions rather than reasonably specific information, will not provide meaningful assistance to the Commission in its decision making, e.g., evaluating potential alternatives to a specific proposal.⁴²³

ii. **Impacts from Downstream Combustion of Project-Transported Natural Gas**

296. Intervenors and commenters also assert that the Commission must consider the impacts on climate change as a result of the end-use consumption of the natural gas transported by the pipeline.

297. With respect to impacts from GHGs, the final EIS discusses the direct GHG impacts from construction and operation of the projects and other projects that were considered in the Cumulative Impacts analysis, the climate change impacts in the region, and the regulatory structure for GHGs under the Clean Air Act. The final EIS also quantifies GHG emissions from the projects' construction (totaling 1,115,374 tons, CO₂-equivalent [CO_{2e}]) and operation (1,347,035 tons per year [tpy] CO_{2e}).⁴²⁴

298. In addition, Commission staff used an EPA-developed methodology to estimate the downstream GHG emissions resulting from the ultimate use of the gas transported on the ACP and Supply Header projects.⁴²⁵ The final EIS includes a conservative estimate

environmental impacts [of induced natural gas production] is also limited by the fact that it lacks any authority to control the locale or amount of export-induced gas production, much less any of its harmful effects”) (citing *Pub. Citizen*, 541 U.S. at 768).

⁴²³ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 at P 40. *See also Sierra Club v DOE*, 867 F.3d at 198 (holding that the dividing line between what is reasonable forecasting and speculation is the “usefulness of any new potential information to the decision-making process”).

⁴²⁴ *See* final EIS at 4-556 through 4-559.

⁴²⁵ Estimated using EPA's GHG Equivalencies Calculator - Calculations and References *available at* <https://www.epa.gov/energy/ghg-equivalencies-calculator-calculations-and-references>.

of downstream GHG emissions of 29.96 million tpy CO_{2e} from end-use combustion.⁴²⁶ We note that this estimate represents an upper bound for the amount of end-use combustion that could result from the gas transported by these projects. This is because some of the gas may displace other fuels, which could actually lower total CO_{2e} emissions. It may also displace gas that otherwise would be transported via different means, resulting in no change in CO_{2e} emissions.

299. Sierra Club argues that because of the recent decision by the D.C. Circuit Court of Appeals in *Sierra Club v. FERC*⁴²⁷ the Commission should reopen the record in this proceeding and issue a supplemental EIS to address GHG emissions and climate impacts. Sierra Club asserts that, although the final EIS did estimate the GHG emissions from combustion, the final EIS erroneously states that those emissions are not “causally connected” to the projects. To support its claim, Sierra Club cites *Sabal Trail*, in which the court stated that burning gas transported by pipeline “is not just ‘reasonably foreseeable,’ it is the project’s entire purpose.”⁴²⁸

300. Sierra Club claims that the final EIS was not only required to quantify the GHG emissions, but also must include a discussion of their significance and any cumulative impacts associated with GHG emissions. Sierra Club argues that the final EIS only provides a cursory analysis of the impact associated with downstream combustion, comparing the emissions to state-wide totals.⁴²⁹ Sierra Club also states that the final EIS relies on the assertion that the projects would result in the displacement of some coal, but that this approach was rejected by the court in *Sabal Trail* because the Commission failed to assess whether total emissions would be reduced or increased, or what the degree of reduction or increase would be.⁴³⁰

301. Next, Sierra Club asserts that the final EIS should have used the social cost of carbon methodology to determine how the proposed project’s incremental contribution to

⁴²⁶ Total annual emissions of GHG were estimated for ACP and Supply Header projects based on the total capacity of 1.5 billion cubic feet per day for the projects.

⁴²⁷ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*).

⁴²⁸ *Sabal Trail*, 867 F.3d at 1372.

⁴²⁹ Sierra Club states that the final EIS states both “we cannot determine whether the projects’ contribution to cumulative impacts on climate change would be significant,” and that “we conclude that ACP and SHP would not significantly contribute to GHG cumulative impacts or climate change.”

⁴³⁰ *Sabal Trail*, 867 F.3d at 1374-75.

GHG emissions would translate into physical effects on the global environment. Sierra Club asserts that the court in Sabal Trail held that the Commission must explain why it did not use the methodology to determine project-specific impacts.⁴³¹

302. Last, Sierra Club states that the final EIS's statement that "the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described" does not adequately address the cumulative impacts of the projects. Sierra Club avers that the final EIS incorrectly downplays the cumulative climate impacts associated with the natural gas infrastructure build out in Pennsylvania, West Virginia, Virginia, North Carolina, and surrounding states, and does not quantify the project's GHG emissions in combination with these past, present, and reasonably foreseeable gas projects.

303. Sierra Club concludes that as a result of the final EIS's failure to address these concerns, the Commission did not conduct an informed public process and failed to provide information necessary to assess potential alternatives and mitigation measures.

304. The court in Sabal Trail held that where it is known that the natural gas transported by a project will be used for end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."⁴³² As Sierra Club acknowledges, the final EIS did just that. The fact that the final EIS stated that the emissions were not "causally connected" to the project is immaterial because the information was presented in both the draft and final EIS.⁴³³ Thus, the Commission and the public were fully informed of the potential impacts from the project.

305. In an effort to provide some context to the GHG emissions from the ACP and Supply Header projects, the final EIS included the GHG inventory for Pennsylvania, West Virginia, Virginia, and North Carolina.⁴³⁴ Table 1 compares the GHG emissions from the project to the GHG Inventories for the four-state region and nationwide. Table 1 includes two scenarios: (1) all natural gas transported by the projects is used for

⁴³¹ *Id.* at 1375.

⁴³² *Id.* at 1371.

⁴³³ Final EIS at 4-620; Draft EIS at 4-512 through 4-513.

⁴³⁴ Final EIS at 4-620.

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end-use combustion (full burn) and (2) 79 percent of the natural gas transported by project is used for power generation (estimate of actual consumption).⁴³⁵

Table 1		
	Estimate of Actual Consumption Emissions	Full Burn Emissions
GHG Volume (Million Metric tons per year)	23.67	29.96
Percentage of Four State Inventory	4.12	5.2
Percentage of National Inventory	0.44	0.56

Thus, we estimate that the downstream use of the natural gas to be transported by the projects would potentially increase the GHG emissions inventory in the four-state region by up to 5.2 percent.

306. Moreover, the final EIS acknowledged that the emissions would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change.⁴³⁶ However, as the final EIS explained, because the project's incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects' contribution to cumulative impacts on climate change would be significant.⁴³⁷

307. We also disagree with Sierra Club's assertion that the Commission should have used the social cost of carbon methodology to determine how the proposed projects' incremental contribution to GHGs would translate into physical effects on the global environment. While we recognize the availability of the social cost of carbon methodology, it is not appropriate for use in any project-level NEPA review for the following reasons: (1) EPA states that "no consensus exists on the appropriate [discount]

⁴³⁵ Atlantic anticipates approximately 79.2 percent of the natural gas transported by project would be used as a fuel to generate electricity for industrial, commercial, and residential uses. *Id.* at 1-3.

⁴³⁶ *Id.* at 4-620.

⁴³⁷ *Id.*

rate to use for analyses spanning multiple generations”⁴³⁸ and consequently, significant variation in output can result;⁴³⁹ (2) the tool does not measure the actual incremental impacts of a project on the environment; and (3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews. The methodology may be useful for rulemakings or comparing regulatory alternatives using cost-benefit analyses where the same discount rate is consistently applied; however, it is not appropriate for estimating a specific project’s impacts or informing our analysis under NEPA. Moreover, Executive Order 13783, Promoting Energy Independence and Economic Growth, has disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and directed the withdrawal of all technical support documents and instructions regarding the methodology, stating that the documents are “no longer representative of governmental policy.”⁴⁴⁰

m. Cumulative Impacts

308. A number of commenters raised issues related to the cumulative impacts of the projects. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”⁴⁴¹ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

309. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”⁴⁴² CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”⁴⁴³ Further, a

⁴³⁸ See Fact Sheet: Social Cost of Carbon issued by EPA in November 2013, <http://www.epa.gov/climatechange/Downloads/EPAactivities/scc-fact-sheet.pdf>.

⁴³⁹ Depending on the selected discount rate, the tool can project widely different present day cost to avoid future climate change impacts.

⁴⁴⁰ Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

⁴⁴¹ 40 C.F.R. § 1508.7 (2017).

⁴⁴² *Kleppe*, 427 U.S. at 413.

⁴⁴³ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997) (1997 Cumulative Effects Guidance).

cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”⁴⁴⁴ An agency’s analysis should be proportional to the magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.⁴⁴⁵

310. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.⁴⁴⁶ The agency should then establish the geographic scope for analysis. Next, the agency should establish the time frame for analysis.⁴⁴⁷ Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the proposed action.⁴⁴⁸ As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.⁴⁴⁹

311. Commission staff defined the geographic scope for its analysis of cumulative impacts on specific environmental resources to include projects/actions within the same construction footprint as the projects for geology, soils, and land use; within the U.S. Geological Survey hydrologic unit code 10 watersheds for water resources, wetlands, vegetation, aquatic resources, wildlife, and reliability and safety; within 0.5 mile of the projects for visual resources, with an additional 5-mile visual radius around each compressor station; at the county level for socioeconomic impacts; within 0.5 mile of the projects for NSAs around compressor stations; within the area of potential effect for cultural resources; within the Air Quality Control Regions for climate change; and for air quality impacts, within 0.5 mile of the project for construction impacts and within the Air Quality Control Regions for operational impacts.

⁴⁴⁴ *Id.*

⁴⁴⁵ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005).

⁴⁴⁶ 1997 Cumulative Effects Guidance at 11.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2 (June 24, 2005).

312. The types of other projects, in addition to the ACP and Supply Header projects, evaluated in the final EIS within the same geographic region and appropriate time frame that could potentially contribute to cumulative impacts on a range of environmental resources include other Commission-jurisdictional natural gas interstate transportation projects; non-jurisdictional pipelines and gathering system projects; oil and gas exploration and production activities; mining operations; transportation or road projects; commercial/residential/industrial and other development projects; and other energy projects, including power plants or electric transmission lines.

313. The final EIS concludes that most cumulative impacts would be temporary and minor when considered in combination with past, present, and reasonably foreseeable activities. Long-term but minor cumulative impacts would occur on wetland, upland forested vegetation, and associated wildlife habitats, as well as waterbodies, special status species, and visual quality. Impacts on vernal pools, rocky outcrops, and subterranean features could adversely affect habitat of wildlife species with limited mobility and home ranges. Subterranean obligate species are often endemic to only a few known locations, and are vulnerable to changes in hydrological pattern or water quality;⁴⁵⁰ therefore, it is possible that impacts associated with construction activities could have population-level impacts on these species. Short-term cumulative benefits will also be realized through jobs and wages and purchases of goods and materials. There is also the potential that the projects will contribute to a cumulative improvement in regional air quality if a portion of the natural gas associated with the proposed projects displaces the use of other, more polluting fossil fuels.⁴⁵¹

n. Alternatives

314. The final EIS analyzes alternatives, including the no action alternative, system alternatives, and route alternatives. If the no action alternative is selected, the environmental impacts outlined in the final EIS will not occur. However, if the projects are not authorized, their stated objectives will not be realized, and natural gas will not be transported from production areas in the Appalachian Basin to end-users in Virginia and North Carolina. In response to the no active alternative, shippers may seek other infrastructure to transport natural gas to customers, and construction of those other

⁴⁵⁰ West Virginia Division of Natural Resources, 2015 West Virginia State Wildlife Action Plan (Sep. 1, 2015), <http://www.wvdnr.gov/2015%20West%20Virginia%20State%20Wildlife%20Action%20Plan%20Submittal.pdf>.

⁴⁵¹ Final EIS at 4-623.

projects may result in environmental impacts that will be similar to or greater than the proposed projects.

315. The final EIS also considers if the contracted volumes of the ACP and Supply Header projects could be transported through the Mountain Valley Project and Equitrans Expansion Project (collectively, the Mountain Valley Project) proposed in Docket Nos. CP16-10-000 and CP16-13-000, respectively. The EIS examines two hypothetical scenarios⁴⁵² for this: (1) the merged system alternative, in which the ACP and Supply Header projects' volumes would be transported together with the Mountain Valley Project volumes in a single pipeline along the proposed Mountain Valley Project route; and (2) the collocation alternative, in which the ACP Project pipeline would be relocated along the same route as the Mountain Valley Project, with additional pipeline to meet Atlantic's delivery requirements.

316. With respect to the collocation alternative, as described in the final EIS, there is insufficient space along the narrow ridgelines to accommodate two parallel 42-inch-diameter pipelines, making this alternative technically infeasible.⁴⁵³ Construction of such pipelines would require side-hill or two-tone construction techniques, with additional acres of disturbance required for additional temporary workspace, given the space needed to safely accommodate equipment and personnel, as well as spoil storage. The final EIS concludes, and we agree, that when the environmental factors, technical feasibility, and ability to meet the purpose and need of the projects are cumulatively considered, the collocation alternative does not offer a significant advantage.⁴⁵⁴

317. With respect to the merged system alternative, if the volumes of both the Mountain Valley Project and ACP Project, totaling about 3.44 billion cubic feet per day, were combined into a single 42-inch-diameter pipeline, the significant additional

⁴⁵² We note that no applicant has proposed to construct, and no shipper indicated an interest in utilizing either of the hypothetical alternative pipeline systems.

⁴⁵³ See Final EIS at 3-9. See also *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.") (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir.1992) (internal quotation marks omitted)); see also *Nat'l Wildlife Fed'n v. F.E.R.C.*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C.Cir.1972) (same).

⁴⁵⁴ Final EIS at 3-11.

compression needed for such a project would restrict Atlantic's ability to provide operational flexibility for customers' potentially needed flow rate variations and line pack, and may prohibit any future expansion of the pipeline system. Commission staff estimated that the necessary additional compression could triple air quality impacts in comparison to the Mountain Valley Project and ACP Project considered individually. Construction of larger diameter, non-typical 48-inch diameter pipeline would require a wider construction right-of-way.⁴⁵⁵ Although, as the final EIS notes, the merged system alternative may hold an environmental advantage,⁴⁵⁶ because this alternative may negatively impact shippers by reduced operational flexibility and future expansibility, the Commission finds that this alternative is not preferable.⁴⁵⁷

318. We are mindful, as the D.C. Circuit has acknowledged, that "given the choice, almost no one would want natural gas infrastructure built on their block."⁴⁵⁸ But as the court noted:

[G]iven our nation's increasing demand for natural gas . . . it is an inescapable fact that such facilities must be built somewhere. . . . Congress decided to vest the [Commission] with responsibility for overseeing the construction and expansion of interstate natural gas facilities. And in carrying out that charge, sometimes the Commission is faced with tough judgment calls as to where those facilities can and should be sited.⁴⁵⁹

⁴⁵⁵ Final EIS at 3-10 (installation of 48-inch pipeline would require 30 feet or more of additional construction right-of-way over entire length of the pipeline route and would displace about 30 percent more soil).

⁴⁵⁶ Final EIS at 3-9. We note that since no entity has proposed or engineered this hypothetical alternative, our assessments of potential benefits and impacts is necessarily limited, and based on best available information.

⁴⁵⁷ *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967-68 (D.C. Cir. 2000) (FERC must carefully consider alternatives, but even in the face of a preferable alternative, FERC may reasonably find that the proposed project is in the public convenience and necessity).

⁴⁵⁸ *Minisink Residents for Environmental Preservation and Safety v. FERC*, 762 F.3d 97, 100 (D.C. Cir. 2014) (affirming the Commission's decision to approve project where two dissenting commissioners preferred an alternative pipeline project).

⁴⁵⁹ *Id.*

319. While “the existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity,”⁴⁶⁰ we conclude, based on record evidence, that when considering the environmental factors, technical feasibility, and ability to meet the purpose and need of the projects, including the time frames in which service has been requested by the shippers, these alternatives do not provide an advantage over the ACP and Supply Header projects.⁴⁶¹

320. The final EIS also considered 26 other major route alternatives, 3 route variations along the ACP Project route, and 1 route variation along the Supply Header Project route. In almost all cases, the alternative routes were found to not provide a significant environmental advantage over the proposed route segments and were not recommended, with the exception of the Butterwood Creek Route Variation, a minor alignment shift that would reduce the number of stream crossings. We agree with the conclusions in the final EIS.

321. A number of commenters suggested that additional crossing locations be considered for the HDD of the Blue Ridge Parkway and Appalachian National Scenic Trail. In response, the final EIS considered several alternatives in the vicinity of the Rockfish Gap that would relocate the Blue Ridge Parkway and Appalachian National Scenic Trail HDD as well as modify the sections of the pipeline project to accommodate the shift in the crossing location. The final EIS concluded, based on a variety of factors, that relocating the HDD to the Rockfish gap could encounter difficulties based on constraints in the area including steep topography, structures, roads, bridges, a railroad tunnel, and limited locations for workspace outside of National Park Service lands and workspace necessary to fabricate the pull-back section of pipe, and ultimately may be infeasible.⁴⁶²

322. In addition, the Rockfish Gap alternatives identified by commenters involved collocating with existing roadways. The final EIS analyzed these alternatives and noted that roadways had been carved into the mountainside such that the alternative would involve extreme side-slope construction (i.e., significant grading, large workspaces, and

⁴⁶⁰ *City of Pittsburgh v. FPC*, 237 F.2d 741, 751 n.28 (D.C. Cir. 1956).

⁴⁶¹ The Commission’s NEPA obligation requires that it “‘identify the reasonable alternatives to the contemplated action’ and ‘look hard at the environmental effects of [its] decision[].’” *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (quoting *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C.Cir.1999)) (alterations in original).

⁴⁶²Final EIS at 3-30.

large spoil staging areas). Furthermore, residential and commercial development along highways in the area would prevent the installation of a 42-inch-diameter pipeline in many areas. Therefore, the alternative routes would have to be modified in many areas to avoid construction constraints, which reduces the collocation advantages that this route could offer. Therefore, the final EIS concluded and we agree that the Rockfish Gap Alternatives did not offer a significant environmental advantage and not requiring their adoption into the project.⁴⁶³

4. Environmental Analysis Conclusion

323. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the ACP Project, Supply Header Project, and the Capacity Lease, as well as the other information in the record. We are accepting the environmental recommendations in the final EIS as modified herein, and are including them as conditions in Appendix A to this order.

324. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this order. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.⁴⁶⁴

325. Based on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the projects, if constructed and operated as described in the final EIS, are environmentally acceptable actions. Therefore, for the reasons discuss above, we find that the projects are in the public convenience and necessity.

⁴⁶³ *Id.*

⁴⁶⁴ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

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326. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the applications, and exhibits thereto, and all comments and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing Atlantic to construct and operate the Atlantic Coast Pipeline Project, as described in this order and in the applications in Docket Nos. CP15-554-000 and CP15-554-001.

(B) A certificate of public convenience and necessity is issued authorizing DETI to construct and operate the Supply Header Project, as described in this order and in the application in Docket No. CP15-555-000.

(C) A blanket transportation certificate is issued to Atlantic under Subpart G of Part 284 of the Commission's regulations.

(D) A blanket construction certificate is issued to Atlantic under Subpart F of Part 157 of the Commission's regulations.

(E) The certificate authority issued in Ordering Paragraph (A) and (B) shall be conditioned on the following:

(1) Applicants' completion of the authorized construction of the proposed facilities and making them available for service within three years from the date of this order, pursuant to section 157.20(b) of the Commission's regulations;

(2) Applicants' compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the regulations;

(3) Applicants' compliance with the environmental conditions listed in Appendix A to this order.

(F) A certificate of public convenience and necessity is issued to Atlantic authorizing it to lease the subject capacity from Piedmont as described herein.

(G) A limited-jurisdiction certificate of public convenience and necessity is issued to Piedmont to operate 100,000 Dth per day of capacity on its North Carolina intrastate pipeline system for Atlantic.

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(H) Atlantic shall notify the Commission within 10 days of the date of the acquisition of the capacity leased from Piedmont.

(I) DETI is authorized to abandon Compressor Units 1 and 2 at the Hastings Compressor Station in Wetzel County, West Virginia.

(J) DETI shall notify the Commission within 10 days of the date of the abandonment of the compressor units.

(K) Atlantic and DETI shall file a written statement affirming that they have executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(L) Atlantic's initial rates and tariff are approved, as conditioned and modified above.

(M) Atlantic is required to file actual tariff records reflecting the initial rates and tariff language that comply with the requirements contained in the body of this order not less than 30 days and not more than 60 days prior to the commencement of interstate service consistent with Part 154 of the Commission's regulations.

(N) Atlantic and DETI must file not less than 60 days before the in-service date of the proposed facilities an executed copy of the non-conforming agreements reflecting the non-conforming language and a tariff record identifying these agreements as non-conforming agreements consistent with section 154.112 of the Commission's regulations.

(O) No later than three months after the end of its first three years of actual operation, as discussed herein, Atlantic must make a filing to justify its existing cost-based firm and interruptible recourse rates. Atlantic's cost and revenue study should be filed through the eTariff portal using a Type of Filing Code 580. In addition, Atlantic is advised to include as part of the eFiling description, a reference to Docket No. CP15-554-000 and the cost and revenue study.

(P) DETI's request for authority to charge an incremental reservation rate for the Supply Header Project is approved.

(Q) DETI shall file actual tariff records setting forth its incremental rates at least 30 days, but no more than 60 days, prior to the date the project facilities go into service. That filing should be made as an eTariff compliance filing using type of filing code 580, and will be assigned an RP docket. It will be processed separately from the instant certificate proceeding in Docket No. CP15-555-000.

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(R) DETI's request to use its system-wide fuel retention percentage as well as its EPCA and TCRA surcharges is approved.

(S) DETI shall keep separate books and accounting of costs and revenues attributable to the Supply Header Project, as more fully described above.

(T) Atlantic shall adhere to the accounting requirements discussed in the body of this order.

(U) Atlantic and DETI shall notify the Commission's environmental staff by telephone or facsimile of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Atlantic or DETI. The Applicants shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

(V) The requests for a trial-type hearing are denied.

By the Commission. Commissioner LaFleur is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix A
Environmental Conditions

As recommended in the final environmental impact statement (EIS) and otherwise amended herein, this authorization includes the following conditions. The section number in parentheses at the end of a condition corresponds to the section number in which the measure and related resource impact analysis appears in the final EIS.

These measures will further mitigate the environmental impact associated with construction and operation of the projects. We have included several conditions that require the applicants to file additional information **with their Implementation Plan or prior to construction**. Other conditions require actions **during operations**. Some are standard conditions typically attached to Commission Orders. There are conditions that apply to both applicants, and other conditions are specific to either Atlantic Coast Pipeline, LLC (Atlantic) or Dominion Energy Transmission, Inc. (DETI).

Conditions 1 through 12 are standard conditions that apply to both Atlantic and DETI.

1. Atlantic and DETI shall follow the construction procedures and mitigation measures described in their applications and supplements (including responses to staff data requests) and as identified in the EIS, unless modified by the Order. Atlantic and DETI must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification**.
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the order, and take whatever steps are necessary to ensure the protection of all environmental resources during construction and operation of the projects. This authority shall allow:
 - a. The modification of conditions of this order;

- b. stop work authority; and
 - c. the imposition of additional measures deemed necessary to assure continued compliance with the intent of the conditions of the order as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.
3. **Prior to any construction**, Atlantic and DETI shall file affirmative statements with the Secretary, certified by senior company officials, that all company personnel, Environmental Inspectors (EIs), and contractor personnel would be informed of the EIs' authority and have been or would be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
 4. The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets, and shall include the staff's recommended Butterwood Creek Route Variation and workspace modifications identified in the EIS. **As soon as they are available, and before the start of construction**, Atlantic and DETI shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Atlantic's and DETI's exercise of eminent domain authority granted under the Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Atlantic's and DETI's rights of eminent domain granted under NGA section 7(h) do not authorize them to increase the size of their natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas

5. Atlantic and DETI shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations; staging areas; pipe storage yards; new access roads; and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified

on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area.**

This requirement does not apply to extra workspace allowed by the FERC *Upland Erosion Control, Revegetation and Maintenance Plan* (Plan) and/or minor field realignments per landowner needs and requirements that do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **At least 45 days prior to construction**, Atlantic and DETI shall file their respective Implementation Plans with the Secretary, for review and written approval by the Director of OEP. Atlantic and DETI must file revisions to their plans as schedules change. The plans shall identify:
- a. how Atlantic and DETI would implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the Order;
 - b. how Atlantic and DETI would incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to on-site construction and inspection personnel;
 - c. the number of EIs assigned per spread and how the company would ensure that sufficient personnel are available to implement the environmental mitigation;
 - d. the number of company personnel, including EIs and contractors, who would receive copies of the appropriate material;

- e. the location and dates of the environmental compliance training and instructions Atlantic and DETI would give to all personnel involved with construction and restoration (initial and refresher training as the projects progress and personnel change), with the opportunity for OEP staff to participate in the training session(s);
 - f. the company personnel (if known) and specific portion of Atlantic's and DETI's organizations having responsibility for compliance;
 - g. the procedures (including use of contract penalties) Atlantic and DETI would follow if noncompliance occurs; and
 - h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram) and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of on-site personnel;
 - iii. the start of construction; and
 - iv. the start and completion of restoration.
7. Atlantic and DETI shall employ a team of EIs (i.e., two or more or as may be established by the Director of OEP) per construction spread. The EI(s) shall be:
- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and

- f. responsible for maintaining status reports.
8. **Beginning with the filing of the Implementation Plans**, Atlantic and DETI shall each file updated status reports with the Secretary on a weekly basis until all construction and restoration activities are complete. On request, these status reports would also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Atlantic's and DETI's efforts to obtain the necessary federal authorizations;
 - b. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance, and their cost;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints that may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Atlantic and DETI from other federal, state, or local permitting agencies concerning instances of noncompliance, and Atlantic's and DETI's responses.
9. Atlantic and DETI shall develop and implement an environmental complaint resolution procedure. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the ACP and Supply Header projects and restoration of the right-of-way. **Prior to construction**, Atlantic and DETI shall each mail the complaint procedures to each landowner whose property would be crossed by the ACP Project and Supply Header Project.

- a. In its letter to affected landowners, Atlantic and DETI shall:
 - i. provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - ii. instruct the landowners that if they are not satisfied with the response, they should call Atlantic's and DETI's Hotline; the letter should indicate how soon to expect a response; and
 - iii. instruct the landowners that if they are still not satisfied with the response from Atlantic's and DETI's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.
 - b. In addition, Atlantic and DETI shall include in their respective weekly status report a copy of a table that contains the following information for each problem/concern:
 - i. the identity of the caller and date of the call;
 - ii. the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
 - iii. a description of the problem/concern; and
 - iv. an explanation of how and when the problem was resolved, would be resolved, or why it has not been resolved.
10. Atlantic and DETI must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Atlantic and DETI must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof). The Director of OEP will not issue a notice to proceed with construction of the Atlantic or DETI project facilities independently.
 11. Atlantic and DETI must receive written authorization from the Director of OEP **before placing their respective projects into service**. Such authorization would only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the ACP and Supply Header projects are proceeding satisfactorily.

12. **Within 30 days of placing the authorized facilities in service**, Atlantic and DETI shall file affirmative statements with the Secretary, certified by a senior company official:
- a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities would be consistent with all applicable conditions; or
 - b. identifying which of the Certificate conditions the applicant has complied with or would comply with. This statement shall also identify any areas affected by their respective projects where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

Condition 13 applies to Atlantic and shall be implemented upon issuance of this Order and during operation of the facilities.

13. Atlantic shall not exercise eminent domain authority granted under section 7(h) of the NGA to acquire a permanent pipeline right-of-way exceeding 50 feet in width. In addition, where Atlantic has obtained a larger permanent right-of-way width through landowner negotiations, routine vegetation mowing and clearing over the permanent right-of-way shall not exceed 50 feet in width. (*Section 2.2.1.1*)

Conditions 14 through 25 apply to both Atlantic and DETI, and shall be addressed as part of Atlantic's and DETI's Implementation Plan

14. Atlantic and DETI shall design all workspaces that are not identified in table 2.3.1-2 of the EIS to comply with the FERC Procedures. Any additional modifications to the FERC Procedures must be requested and justified in **Atlantic's and DETI's Implementation Plans**. (*Section 2.3.1.1*)
15. **As part of Atlantic's and DETI's Implementation Plans and prior to receiving written authorization from the Director of the OEP to commence construction of any project facilities**, Atlantic and DETI shall file with the Secretary environmental constraints maps illustrating the avoidance and conservation measures required by the resource agencies and committed to by Atlantic and DETI along the ACP Project and Supply Header Project routes. The environmental constraints maps can be provided in the form of alignment sheets with a separate environmental constraints band. (*Section 2.4*)
16. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, a *Plan for Discovery of Unanticipated Paleontological Resources* that describes how Atlantic

and DETI will recognize and manage significant fossils encountered during construction. This plan shall also describe the notification procedures to the appropriate authorities in each state crossed by the ACP and Supply Header projects. (*Section 4.1.5*)

17. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, proposed or potential sources of water used for dust control, anticipated quantities of water to be appropriated from each source, and the measures it will implement to ensure water sources and any related aquatic biota are not adversely affected by the appropriation activity. (*Section 4.3.2.7*)

18. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary and appropriate federal and state agencies an updated *Restoration and Rehabilitation Plan* and *Invasive Species Management Plan*, for review and written approval by the Director of OEP, that includes the following measures:
 - a. aerial spraying will not be utilized for invasive species control along the right-of-way;
 - b. no herbicides will be applied within 25 feet of Endangered Species Act (ESA)-listed plant species;
 - c. no use of herbicides or pesticides within 100 feet of a waterbody or wetland, except where allowed by state or federal agencies;
 - d. no spraying of insecticides or herbicides will be allowed within the 300-foot karst feature buffer, except where allowed by state or federal agencies; and
 - e. includes the results of the West Virginia and Virginia Natural Heritage Program recommendations for herbicide treatment adjacent to sensitive features. (*Section 4.4.4*)

19. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, a revised *Migratory Bird Plan* that incorporates the results of consultation with the West Virginia Department of Natural Resources, Virginia Department of Game and Inland Fisheries (VDGIF), North Carolina Wildlife Resources Commission (NCWRC), and the Forest Service, and verify that no additional conservation measures will be required to minimize impacts on active rookeries. In addition, table A-1 of the revised plan shall incorporate the NCWRC's recommended updates to the North Carolina Birds of Conservation Concern list. The revised plan shall also include the Virginia Piedmont Forest

Block Complex, Allegheny Mountains Forest Block Complex, and the Southern Allegheny Plateau Forest Block Complex Important Bird Areas that would be crossed by the ACP and Supply Header projects in Virginia and West Virginia. (*Section 4.5.3.5*)

20. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, revised Master Waterbody Crossing tables for the ACP and Supply Header projects that address the recommended conditions in the identified column of appendix K of the EIS, and that include all National Rivers Inventory segments crossed. The revised table or accompanying filing shall document correspondence and input from the appropriate federal and state agencies regarding the updated information and any additional mitigation measures Atlantic and DETI will incorporate for each waterbody. (*Section 4.6.1*)
21. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, revised *Virginia Fish Relocation Plan, Freshwater Mussel Relocation Protocol for ACP in North Carolina, and North Carolina Revised Fish and Other Aquatic Taxa Collection and Relocation Protocol for Instream Activities*. These revised plans and protocols shall include notification to the appropriate federal and/or state agencies should an invasive aquatic species be observed or collected during relocation efforts; and, in consultation with the appropriate federal and/or state agency, identify the mitigation measures that Atlantic and DETI will implement at the crossing location if invasive aquatic species are observed. (*Section 4.6.4*)
22. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, an aquatic invasive species protocol for West Virginia mussel relocation efforts on both the ACP and Supply Header projects. (*Section 4.6.4*)
23. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, a final *Timber Removal Plan* that:
 - a. incorporates the recommendations included in the Virginia Department of Environmental Quality's (VDEQ) letter dated April 6, 2017 (Accession No. 20170406-5489);
 - b. updates the construction schedule discussion; and
 - c. updates all time of year restrictions (TOYR) related to migratory birds and special status species for tree clearing. (*Section 4.8.1.1*)

24. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, finalized site-specific *Timber Extraction Plans*. (*Section 4.8.1.1*)
25. **As part of their Implementation Plans**, Atlantic and DETI shall file with the Secretary, for review and written approval by the Director of OEP, final site-specific *Residential Construction Plans* for all residences within 50 feet of the construction work areas identified after issuance of the draft EIS (including the residence at AP-1 milepost [MP] 169.4). (*Section 4.8.3*)

Conditions 26 through 50 apply only to Atlantic and shall be addressed as part of Atlantic's Implementation Plan. Condition No. 37 also includes a condition that shall be addressed during construction.

26. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, the results of the fracture trace/lineament analysis utilizing remote sensing platforms (aerial photography and LiDAR), along with the results of existing dye trace studies. Atlantic shall provide the results of this analysis on a composite map(s), illustrating surficial karst features with the potential for intersecting shallow interconnected karst voids and cave systems over a wide area; specifically, between the pipeline and nearby water receptors (i.e., public water supply wells, municipal water supplies, private wells, springs, caves systems, and surface waters receiving discharge). (*Section 4.1.2.3*)
27. **As part of its Implementation Plan**, Atlantic shall consult with the Virginia Department of Conservation and Recreation (VDNR) to determine if the route alignment and construction activities will impact the Burnsville Cove Cave Conservation Site. Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, the results of its consultations, along with any proposed construction modifications or alignment shifts to avoid impacts on this site. (*Section 4.1.2.3*)
28. **As part of its Implementation Plan**, Atlantic shall conduct a data review and field survey of potential karst features in Augusta County, Virginia between AP-1 MPs 106.8 and 110, and file this information with the Secretary, along with any mitigation measures, for review and written approval by the Director of OEP. (*Section 4.1.2.3*)
29. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a revised *Karst Terrain Assessment Construction, Monitoring, and Mitigation Plan* that includes

monitoring of all potential karst areas for subsidence and collapse using LiDAR monitoring methods during years 1, 2, and 5 following construction.

(*Section 4.1.2.3*)

30. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, updated site-specific crossing plans for major waterbody crossings. The plans shall include, as necessary, the location of temporary bridges and bridge type, appropriate cofferdam locations, water discharge structure locations, pump locations, and agency-imposed TOYR and construction and restoration requirements. (*Section 4.3.2.2*)
31. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of the OEP, site-specific plans to minimize and mitigate impacts on the waterbodies that will be impacted at the Blue Ridge Parkway (BRP)/Appalachian National Scenic Trail (ANST) horizontal directional drill (HDD) entry and exit workspaces. Final plans shall be developed in consultation the U.S. Army Corps of Engineers and/or appropriate state agency(s). (*Section 4.3.2.6*)
32. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a site-specific plan for the water impoundment structure at Jennings Branch (AP-1 MP 129.1), or identify an alternative location for the structure. (*Section 4.3.2.7*)
33. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a revised *Restoration and Rehabilitation Plan* that incorporates recommended mitigation measures and seed mixes for Seneca State Forest based on consultation with the West Virginia Division of Forestry. (*Section 4.4.2.1*)
34. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, and the Forest Service for review and concurrence, detailed mapping of the existing conditions and proposed improvements to access road 36-016.AR1, including digital data, a description of the construction and operation impacts, including impacts on the adjacent vegetation communities, potential pond crossings identified in appendix K of the EIS, George Washington National Forest (GWNF) locally rare species located downslope, and identify the conservation measures that will be implemented to mitigate potential impacts. (*Section 4.4.7*)
35. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a hydrofracture potential analysis for the Neuse River (AP-2 MP 98.5). If the potential for hydrofracture is

low, Atlantic shall utilize the HDD method at this crossing to reduce potential impacts on ESA-listed, proposed, and/or under review species. If the HDD method is not feasible, Atlantic shall consult with the U.S. Fish and Wildlife Service (FWS) and NCWRC to identify additional conservation measures that Atlantic will implement at this crossing to mitigate for the potential impacts on ESA-listed, proposed, and or under review species. (*Section 4.7.1.8*)

36. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a hydrofracture potential analysis for the Nottoway River (AP-1 MP 260.7). If the hydrofracture potential is low, Atlantic shall utilize the HDD method at this crossing to reduce potential impacts on ESA-listed, proposed, and/or under review species. If the HDD method is not feasible, Atlantic shall consult with the FWS and VDGIF to identify additional conservation measures that Atlantic will implement at this crossing to mitigate for the potential impacts on ESA-listed, proposed, and/or under review species. (*Section 4.7.1.10*)
37. **As part of its Implementation Plan**, Atlantic shall file revised Carolina madtom habitat assessments based on 2017 surveys and consultations with the FWS North Carolina Field Office. This information shall also be incorporated into the ACP Master Waterbody Crossing table. **During construction**, Atlantic shall assume presence of the Carolina madtom where there is suitable habitat and implement the *North Carolina Revised Fish and Other Aquatic Taxa Collection and Relocation Protocol for Instream Construction Activities*, as well as the FWS' enhanced conservation measures for ESA sensitive waterbodies as defined in section 4.7.1 of the EIS. (*Section 4.7.1.11*)
38. **As part of its Implementation Plan**, Atlantic shall file with the Secretary the results of consultation with the VDGIF regarding in-stream construction activities proposed during the Roanoke logperch VDGIF TOYR at Waqua Creek and Sturgeon Creek. Documentation shall include any additional conservation measures required by VDGIF, which shall also be incorporated into the final ACP Master Waterbody Crossing table for each waterbody. (*Section 4.7.4.2*)
39. **As part of its Implementation Plan**, Atlantic shall file with the Secretary the results of consultation with the VDGIF regarding in-stream construction activities proposed during the VDGIF TOYR for green floater in waterbodies where presence has been assumed for this species (see appendix K of the EIS), in addition to in-stream construction activities proposed at Sturgeon Creek during the VDGIF TOYR for Atlantic pigtoe and dwarf wedgemussel. Documentation shall include any additional conservation measures required by the VDGIF, which shall also be incorporated into the final ACP Master Waterbody Crossing table for each waterbody. (*Section 4.7.4.2*)

40. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a site-specific *Organic Farm Protection Plan* for the certified organic farms affected by the ACP Project, including (but not limited to) the milk and corn farm crossed between AP-1 MPs 141.8 and 142.4; the certified organic hog farm crossed between AP-2 MPs 118.8 and 118.9; and any additional certified organic farms not previously identified prior to construction. (*Section 4.8.1.1*)
41. **As part of its Implementation Plan**, Atlantic shall file a final copy of its *Haul Plan*, which will address transportation of equipment, materials, and personnel along narrow public roads in steep terrain. (*Section 4.8.1.4*)
42. **As part of its Implementation Plan**, Atlantic shall identify by milepost the locations where it will adopt a narrowed right-of-way to reduce impacts on forest land within the Seneca State Forest, and identify the locations of corresponding additional temporary workspace (ATWS). Atlantic shall also provide updated and reduced construction impacts information for all applicable resources (land use, wetlands, soils, vegetation, cultural resources, etc.) affected by the changes to construction right-of-way and ATWS. (*Section 4.8.5.1*)
43. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a finalized *Contaminated Media Plan* that considers the recommendations included in the VDEQ's letter dated April 6, 2017 (Accession No. 20170406-5489). As appropriate, provide evidence of consultations with the VDEQ regarding its comments on the *Contaminated Media Plan*. (*Section 4.8.7*)
44. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, site-specific visual mitigation measures for each scenic byway developed in consultation with the DOT, Federal Highway Administration, West Virginia Department of Transportation, Virginia Department of Transportation, VDCR, and North Carolina Department of Transportation. Atlantic shall also provide documentation of agency consultation. (*Section 4.8.8.2*)
45. **As part of its Implementation Plan**, Atlantic shall identify mitigation measures, for review and written approval by the Director of OEP, to reduce the impacts on the Fenton Inn at approximately AP-1 MP 158.7 resulting from lighting equipment needed to support the HDD of the BRP and the ANST. (*Section 4.8.8.2*)
46. **As part of its Implementation Plan**, Atlantic shall file with the Secretary the locations where it will adopt a narrowed right-of-way to reduce impacts on forest

land and ecologically sensitive areas within the Monongahela (MNF) and GWNF, along with the locations of corresponding ATWS. (*Section 4.8.9.1*)

47. **As part of its Implementation Plan**, Atlantic shall file with the Secretary a revised trail, road, and railroad crossing table that lists the final crossing method that it will implement at each trail, road, and railroad. The crossing method at trails and roads on the GWNF shall be developed in consultation with GWNF staff. (*Section 4.8.9.1*)
48. **As part of its Implementation Plan**, Atlantic shall, if a bore or HDD crossing is not feasible, file with the Secretary, for review and written approval by the Director of OEP, site-specific crossing plans that identify the location(s) of a detour, public notification, signage, and consideration of avoiding days of peak usage for each trail and road affected by the ACP Project on the GWNF. The crossing plans shall be developed in consultation with GWNF staff. (*Section 4.8.9.1*)
49. **As part of its Implementation Plan**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, a final site-specific HDD crossing plan and an alternative direct pipe crossing plan for the BRP. Provide documentation that Atlantic has consulted with the National Park Service (NPS) regarding both of these plans and adopted or addressed any substantive comments from the NPS into these plans. (*Section 4.8.9.1*)
50. **As part of its Implementation Plan**, Atlantic shall file with the Secretary aerial photographs depicting the entry and exit sites for the proposed Interstate 79 and Route 58 HDDs. The aerials shall identify any noise-sensitive areas (NSAs) within 0.5 mile of the entry/exit sites for each HDD or clearly demonstrate that there are no NSAs within 0.5 mile of the entry/exit sites. (*Section 4.11.2.2*).

Conditions 51 through 56 apply to both Atlantic and DETI and shall be addressed before construction is allowed to commence.

51. **Prior to construction**, Atlantic and DETI shall file with the Secretary:
 - a. all outstanding geotechnical studies for sites SL024, SS018, SL235, and SL239; geohazard analysis field reconnaissance of the 25 sites on the AP-1 mainline and 5 sites on the TL-635 loopline (as well as any additional geotechnical studies proposed following completion of site reconnaissance of these sites); and any mitigations proposed following the geotechnical studies and geohazard analysis field reconnaissance; and

- b. status of the Best in Class Steep Slope Management Program analysis related to the ACP and Supply Header projects. (*Section 4.1.4.2*)
52. **Prior to construction**, Atlantic and DETI shall complete the remaining field surveys for wells and springs within 150 feet of the construction workspace, and within 500 feet of the construction workspace in karst terrain, and file the results, including type and location, with the Secretary. (*Section 4.3.1.5*)
 53. **Prior to construction**, Atlantic and DETI shall file with the Secretary a copy of its final wetland mitigation plans and documentation of U.S. Army Corps of Engineers approval of the plans. (*Section 4.3.3.8*)
 54. Atlantic and DETI **shall not begin construction of the proposed facilities until:**
 - a. all outstanding biological surveys are completed;
 - b. the FERC staff complete any necessary section 7 consultation with the FWS; and
 - c. Atlantic and DETI have received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin. (*Section 4.7.1*)
 55. **Prior to construction and upon completion of 2017 surveys**, Atlantic and DETI shall file with the Secretary and FWS the total acreages of:
 - a. northern long-eared bat occupied habitat that will be impacted by the ACP and Supply Header projects; and
 - b. northern long-eared bat suitable habitat that will be impacted by the ACP and Supply Header projects. (*Section 4.7.1.4*)
 56. Atlantic and DETI shall **not begin** construction of the ACP and Supply Header projects facilities or use of contractor yards, ATWS, or new or to-be-improved access roads **until:**
 - a. Atlantic files with the Secretary documentation of communications with the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and the Meherrin Tribe regarding traditional tribal sites, including natural resources gathering locations in the project area;
 - b. Atlantic and DETI file with the Secretary:

- i. all survey reports, evaluation reports, reports assessing project effects, and site treatment plans, and cemetery avoidance treatment plans;
 - ii. comments on all reports and plans from the Pennsylvania, West Virginia, Virginia, and North Carolina SHPOs, the MNF, GWNF, and NPS, as well as any comments from federally recognized Indian tribes, and other consulting parties, as applicable; and
 - iii. revised *Unanticipated Discovery Plans* that include tribal contact information for those tribes that request notification following post-review discovery of archaeological sites, including human remains, during project activities;
- c. the ACHP is afforded an opportunity to comment if historic properties will be adversely affected; and
 - d. the FERC staff reviews and the Director of OEP approves the cultural resources reports and plans, and notifies Atlantic and DETI in writing that treatment plans/mitigation measures (including archaeological data recovery) may be implemented and/or construction may proceed.

All material filed with the Commission that contains **location, character, and ownership** information about cultural resources must have the cover and any relevant pages therein clearly labeled in bold lettering “**CUI//PRIV – DO NOT RELEASE.**” (*Section 4.10.7*)

Condition 57 applies only to DETI and shall be addressed before construction is allowed to commence.

57. **Prior to construction**, DETI shall continue to consult with the Westmoreland Conservancy regarding a route variation to minimize impacts on conservation easements, and shall file with the Secretary documentation regarding the results of its consultations and any proposed route modifications. (*Section 3.4.2*)

Conditions 58 through 60 apply only to Atlantic and shall be addressed before construction is allowed to commence.

58. Atlantic shall incorporate the Butterwood Creek Route Variation into its final route for the ACP Project. **Prior to construction**, Atlantic shall file with the Secretary the results of all environmental surveys, an updated 7.5-minute U.S. Geological Survey topographic quadrangle map, and a large-scale alignment sheet that illustrates this route change. (*Section 3.4.4*)

59. **Prior to construction**, Atlantic shall file with the Secretary documentation of concurrence from the VDEQ that the ACP Project is consistent with the Coastal Zone Management Act. (*Section 4.8.6*)
60. **Prior to construction within the Emporia Powerline Bog and Handsom-Gum Powerline Conservation Sites**, Atlantic shall:
- a. complete hydrologic studies using methodologies developed in conjunction with the Virginia Department of Conservation and Recreation; and
 - b. develop in conjunction with the Virginia Department of Conservation and Recreation construction and restoration measures to avoid or minimize hydrology impacts on the sites for review and written approval by the Director of OEP.

Condition 61 applies to both Atlantic and DETI and shall be addressed during construction.

61. **During construction**, to minimize potential impacts of water withdrawals on ESA-listed, proposed, and under review species, Atlantic and DETI shall limit water withdrawal to not exceed 10 percent of instantaneous flow at ESA sensitive waterbodies identified in appendix K of the EIS. (*Section 4.7.1*)

Conditions 62 through 67 apply only to Atlantic and shall be addressed during construction, or before specific construction activities are allowed to commence.

62. **Prior to construction, but following tree clearing**, Atlantic shall file with the Secretary, for review and written approval by the Director of OEP, the results of the electrical resistivity imaging (ERI) studies along with any proposed construction modifications or alignment shifts to avoid impacts on Mingo Run and the Simmons-Mingo cave system. (*Section 4.1.2.3*)
63. **Prior to completing any geotechnical boring in karst terrain**, Atlantic shall file with the Secretary verification that it consulted with VDCR karst protection personnel regarding each geotechnical boring and shall follow the Virginia Cave Board's "Karst Assessment Standard Practice" for land development when completing the borings. (*Section 4.1.2.3*)
64. **Prior to construction, but following tree clearing**, Atlantic shall:

- a. conduct ERI and/or air track drilling surveys of karst features identified within the construction workspace that are located within 5 miles of known or survey-identified bat hibernacula;
 - b. file a report(s) documenting these surveys with the Secretary and the appropriate federal and state agencies; and
 - c. if data suggests that construction activities have the potential to impact subsurface karst features that are connected to downstream bat hibernacula and/or the Madison Cave isopod suitable habitat (based on the ERI and/or air track drilling surveys), Atlantic shall consult with the FERC staff, FWS, and VDCR, and other appropriate federal and/or state agencies to develop the appropriate site-specific mitigation measures to avoid potential impacts on these species and their habitat. (*Section 4.7.1*)
65. **If the candy darter is proposed or listed during the life of the ACP Project**, Atlantic shall assume presence of the candy darter within Knapp Creek, Clover Creek, Glade Run, Thomas Creek, and the Greenbrier River, and apply the FWS' enhanced conservation measures for aquatic species outlined in section 4.7.1 of the EIS to these waterbodies, and any perennial tributaries within 1 mile of these crossing locations to minimize impacts on this species (see appendix K of the EIS). (*Section 4.7.1.12*)
66. **Prior to construction, but following tree clearing**, Atlantic shall:
- a. conduct ERI and/or air track drilling surveys of the karst features identified during 2017 karst surveys that are within the construction workspace within the Madison Cave isopod priority area, including along proposed access roads;
 - b. file a report(s) documenting these surveys with the Secretary, and the appropriate federal and state agencies; and
 - c. if data suggests that construction activities have the potential to impact subsurface karst features that are connected to downstream Madison Cave isopod suitable habitat (based on the ERI and/or air track drilling surveys), Atlantic shall consult with the FERC staff, FWS, and VDCR, and other appropriate federal and/or state agencies to develop the appropriate site-specific mitigation measures to avoid potential impacts on this species and its habitat. (*Section 4.7.1.13*)

67. Atlantic shall file in the **weekly construction status reports** the following for NSA S9, the Gatehouse, and the office building near BRP; the Route 17 HDD entry and exit sites; and NSAs S11, S13, and S14 near the Swift Creek entry site:
- a. the noise measurements from these NSAs, obtained at the start of drilling operations;
 - b. the noise mitigation that Atlantic implemented at the start of drilling operations; and
 - c. any additional mitigation measures that Atlantic will implement if the initial noise measurements exceeded an L_{dn} of 55 decibels on the A-weighted scale (dBA) at the nearest NSA and/or increased noise is greater than 10 dBA over ambient conditions. (*Section 4.11.2.2*)

Condition 68 applies to both Atlantic and DETI, and shall be addressed after construction.

68. Atlantic and DETI shall offer to conduct, with the landowner's permission, **post-construction** water quality tests, using the same parameters used in the preconstruction tests, for all water supply wells and springs within 150 feet of the construction workspace and within 500 feet of the construction workspace in karst terrain. (*Section 4.3.1.7*)

Conditions 69 and 70 apply to only DETI and shall be addressed after construction or during operation of the facilities.

69. DETI shall file a noise survey with the Secretary **no later than 60 days** after placing the JB Tonkin Compressor Station in service. If a full load condition noise survey of the entire station is not possible, DETI shall instead file an interim survey at the maximum possible horsepower load and file the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the JB Tonkin Compressor Station under interim or full horsepower load conditions exceeds existing levels at NSAs S10, S11, S12, and S14 or 55 dBA L_{dn} at any other nearby NSAs, DETI shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. DETI shall confirm compliance with the above requirements by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. (*Section 4.11.2.2*)
70. DETI shall file a noise survey with the Secretary **no later than 60 days** after placing each of the Crayne and Mockingbird Hill Compressor Stations in service. If a full load condition noise survey of the entire station is not possible, DETI shall instead file an interim survey at the maximum possible horsepower load and file

the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the Crayne and Mockingbird Hill Compressor Stations under interim or full horsepower load conditions exceeds 55 dBA L_{dn} at any nearby NSAs, DETI shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. DETI shall confirm compliance with the 55 dBA L_{dn} requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. (*Section 4.11.2.2*)

Conditions 71 and 72 apply to only Atlantic and shall be addressed after construction or during operation of the facilities.

71. **Following construction**, Atlantic shall replant long-leaf pine within the ATWS and the temporary construction workspace along the ACP Project route, and outside the 50-foot-wide permanent right-of-way, where it was cleared for construction. Based on Atlantic's May 1, 2017 supplemental filing, long-leaf pine-wire grass communities occur between AP-2 MPs 156.5 and 156.9. (*Section 4.7.1.5*)
72. Atlantic shall file a noise survey with the Secretary **no later than 60 days** after placing each of the ACP Project compressor stations in service. If a full load condition noise survey is not possible, Atlantic shall instead file an interim survey at the maximum possible horsepower load and file the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at any station under interim or full horsepower load exceeds 55 dBA, L_{dn} at any nearby NSA, Atlantic shall file a report on what changes are needed and shall install the additional noise controls to meet the level **within 1 year** of the in-service date. Atlantic shall confirm compliance with the 55 dBA L_{dn} requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. (*Section 4.11.2.2*)

Condition 73 was developed after issuance of the final EIS, applies only to Atlantic, and shall be addressed as part of Atlantic's Implementation Plan.

73. **As part of its Implementation Plan and prior to construction**, Atlantic shall file with the Secretary, for review and written approval of the Director of OEP, a Mining Area Construction Plan that includes specific mitigation measures that it will use in areas of active or planned mining and that addresses issues related to mine subsidence and safe construction. Atlantic's Mining Area Construction Plan shall include documentation of its consultation with Western Pocahontas Properties (WPP) **including site-specific route deviations, as appropriate**, to resolve the concerns of WPP.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC	Docket Nos. CP15-554-000 CP15-554-001
Dominion Transmission, Inc.	CP15-555-000
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.	CP15-556-000

(Issued October 13, 2017)

LaFLEUR, Commissioner *dissenting*:

With the increasing abundance of domestic natural gas, the Commission plays a key role in considering applications for the construction of natural gas infrastructure to support the delivery of this important fuel source. Under the Certificate Policy Statement, which sets forth the Commission's approach to evaluating proposed projects under Section 7 of the Natural Gas Act, the Commission evaluates in each case whether the benefits of the project as proposed by the applicant outweigh adverse effects on existing shippers, other pipelines and their captive customers, landowners, and surrounding communities.¹ For each pipeline I have considered during my time at the Commission, I have tried to carefully apply this standard, evaluating the facts in the record to determine whether, on balance, each individual project is in the public interest.² Today, the Commission is issuing orders that authorize the development of the Mountain Valley Pipeline Project/Equitrans Expansion Project (MVP) and the Atlantic Coast Pipeline Project (ACP). For the reasons set forth herein, I cannot conclude that either of these projects as proposed is in the public interest, and thus, I respectfully dissent.

Deciding whether a project is in the public interest requires a careful balancing of the need for the project and its environmental impacts. In the case of the ACP and MVP

¹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) (Certificate Policy Statement), *order on clarification*, 90 FERC ¶ 61,128, *order on clarification*, 92 FERC ¶ 61,094 (2000); 15 U.S.C. 717h (Section 7(c) of the Natural Gas Act provides that no natural gas company shall transport natural gas or construct any facilities for such transportation without a certificate of public convenience and necessity.).

² *See Millenium Pipeline Company, L.L.C.*, 140 FERC ¶ 61,045 (2012) (LaFleur, Comm'r, *dissenting*).

projects, my balancing determination was heavily influenced by similarities in their respective routes, impact, and timing. ACP and MVP are proposed to be built in the same region with certain segments located in close geographic proximity. Collectively, they represent approximately 900 miles of new gas pipeline infrastructure through West Virginia, Virginia and North Carolina, and will deliver 3.44 Bcf/d of natural gas to the Southeast. The record demonstrates that these two large projects will have similar, and significant, environmental impacts on the region. Both the ACP and MVP cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Furthermore, the projects traverse many important cultural, historic, and natural resources, including the Appalachian National Scenic Trail and the Blue Ridge Parkway. Both projects appear to be receiving gas from the same location, and both deliver gas that can reach some common destination markets. Moreover, these projects are being developed under similar development schedules, as further evidenced by the Commission acting on them concurrently today.³ Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects. In so doing, I am not persuaded that both of these projects as proposed are in the public interest.

I am particularly troubled by the approval of these projects because I believe that the records demonstrate that there may be alternative approaches that could provide significant environmental advantages over their construction as proposed. As part of its alternatives analysis, Commission staff requested that ACP evaluate an MVP Merged Systems Alternative that would serve the capacity of both projects.⁴ This alternative would largely follow the MVP route to deliver the capacity of both ACP and MVP in a single large diameter pipeline. Commission staff identifies significant environmental advantages of utilizing this alternative. For example, the MVP Merged Systems Alternative would be 173 miles shorter than the cumulative mileage of both projects individually. This alternative would also increase collocation with existing utility rights-of-way, avoid the Monongahela National Forest and the George Washington National Forest, reduce the number of crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway, and reduce the amount of construction in karst topography. Commission staff eliminated this alternative from further consideration because it failed to meet the project's objectives, in particular that it would "result in a significant delay to the delivery of the 3.44 Bcf/d of natural gas to the proposed customers of both ACP and

³ ACP and MVP filed their applications for approval pursuant to section 7(c) of the Natural Gas Act on September 18, 2015 and October 23, 2015, respectively.

⁴ ACP Final Environmental Impact Statement (FEIS) at 3-6 – 3-9.

Docket No. CP15-554-000, *et al.*

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MVP”⁵ due to the significant time for the planning and design that would be necessary to develop a revised project proposal.⁶

Similarly, in the MVP FEIS, Commission staff evaluated a single pipeline alternative to the MVP project that would utilize the proposed ACP to serve MVP’s capacity needs.⁷ While this alternative was found to have certain environmental disadvantages, such as the need for additional compression to deliver the additional gas, the EIS acknowledges that this alternative would “essentially eliminate all environmental impacts on resources along the currently proposed MVP route.”⁸

I recognize that the two alternatives described above were eliminated from further consideration because they were deemed not to meet each project’s specific stated goals. However, I believe that these alternatives demonstrate that the regional needs that these pipelines address may be met through alternative approaches that have significantly fewer environmental impacts.

While my dissents rest on my concerns regarding the aggregate environmental impacts of the proposed projects, particularly given the potential availability of environmentally-superior alternatives, I believe that the needs determinations for these projects highlight another issue worthy of further discussion.

The Commission’s policy regarding evaluation of need, and the standard applied in these cases, is that precedent agreements generally are the best evidence for determining market need. When applying this precedent here, I believe there is an important distinction between the needs determinations for ACP and MVP. Both projects provide evidence of precedent agreements to demonstrate that these pipelines will be fully subscribed. ACP also provides specific evidence regarding the end use of the gas to be delivered on its pipeline. ACP estimates that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes, 8.9 percent will serve industrial purposes, and 2.8 percent will serve

⁵ *Id.* at 3-9.

⁶ Staff also found that this alternative would likely limit the ability to provide additional gas to the projects’ customers, another of the stated goals for the original proposal. *Id.*

⁷ MVP FEIS at 3-14.

⁸ *Id.*

other purposes such as vehicle fuel.⁹ In contrast, “[w]hile Mountain Valley has entered into precedent agreements with two end users ... for approximately 13% of the MVP project capacity, the ultimate destination for the remaining gas will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets, and thus, is unknown.”¹⁰

In my view, it is appropriate for the Commission to consider as a policy matter whether evidence other than precedent agreements should play a larger role in our evaluation regarding the economic need for a proposed pipeline project. I believe that evidence of the specific end use of the delivered gas within the context of regional needs is relevant evidence that should be considered as part of our overall needs determination. Indeed, the Certificate Policy Statement established a policy for determining economic need that allowed the applicant to demonstrate need relying on a variety of factors, including “environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure.”¹¹ However, the Commission’s implementation of the Certificate Policy Statement has focused more narrowly on the existence of precedent agreements.

I believe that careful consideration of a fuller record could help the Commission better balance environmental issues, including downstream impacts, with the project need and its benefits.¹² I fully realize that a broader consideration of need would be a change in our existing practice, and I would support a generic proceeding to get input from the

⁹ ACP FEIS at 1-3.

¹⁰ *Mountain Valley Pipeline, LLC, Equitrans, L.P.*, 161 FERC ¶ 61,043 at FN 286 (October 13, 2017).

¹¹ *Certificate Policy Statement*, 88 FERC ¶ 61,227 at 61,744.

¹² I note that this approach would not necessarily lead to the rejection of more pipeline applications. Rather, it would provide all parties, including certificate applicants, the opportunity to more broadly debate and consider the need for a proposed project. This could, for example, support development of new infrastructure in constrained regions where there may be demand for new capacity, but barriers to the execution of precedent agreements that are so critical under the Commission’s current approach. In such situations, evidence of economic need other than precedent agreements might be offered as justification for the pipeline.

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regulated community, and those impacted by pipelines, on how the Commission evaluates need.¹³

I recognize that the Commission's actions today are the culmination of years of work in the pre-filing, application, and review processes, and I take seriously my decision to dissent. I acknowledge that if the applicants were to adopt an alternative solution, it would require considerable additional work and time. However, the decision before the Commission is simply whether to approve or reject these projects, which will be in place for decades. Given the environmental impacts and possible superior alternatives, approving these two pipeline projects on this record is not a decision I can support.

For these reasons, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

¹³ See also, *National Fuel Gas Supply Corporation, Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (Bay, Comm'r, *Separate Statement*).

EXHIBIT B

164 FERC ¶ 61,100
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,
and Robert F. Powelson.

Atlantic Coast Pipeline, LLC	Docket Nos. CP15-554-002
Dominion Transmission, Inc.	CP15-555-001
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.	CP15-556-001

ORDER ON REHEARING

(Issued August 10, 2018)

1. On October 13, 2017, the Commission issued an order under section 7(c) of the Natural Gas Act (NGA),¹ authorizing: (1) Atlantic Coast Pipeline, LLC (Atlantic) to construct and operate its new Atlantic Coast Pipeline Project (ACP Project); (2) Dominion Transmission, Inc. (DETI)² to make modifications to its existing facilities (Supply Header Project); and (3) Atlantic to lease capacity on the Piedmont Natural Gas Company, Inc. (Piedmont) system.³
2. Timely requests for rehearing of the Certificate Order were filed by: (1) Atlantic; (2) Demian Jackson;⁴ (3) the Fairway Woods Homeowners Condominium Association;

¹ 15 U.S.C. § 717f(c) (2012).

² On May 12, 2017, Dominion Transmission, Inc. changed its name to Dominion Energy Transmission, Inc.

³ *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2018) (Certificate Order).

⁴ Demian Jackson and Bridget Hamre jointly sought rehearing individually and as owners of Nelson County Creekside, LLC.

(4) Friends of Buckingham;⁵ (5) Friends of Nelson;⁶ (6) the North Carolina Utilities Commission (NCUC); (7) Public Interest Groups;⁷ (8) Satchidananda Ashram-Yogaville, Inc. (Ashram-Yogaville); (9) Shenandoah Valley Network;⁸ (10) Sierra Club;

⁵ Friends of Buckingham include Heidi Dhivya Berthoud, Quin Robinson, Robert Day Jr., Carlos Arostegui, Mercedes Villamán, Jeffrey Fogel, Ruby Laury, John Laury, Irene Leech, and Swami Dayananda.

⁶ Friends of Nelson include Peter A. Agelasto III, Jonathan M. Ansell, Eleanor M. Amidon, Dawn Averitt, Richard G. Averitt III, Dr. Sandra Smith Averitt, Richard Averitt, Jill Averitt, Constance Brennan, James Bolton, Joyce D. Burton, Anne C. Buteau, Heidi Louise Cochran, R. Craig Cooper, Michael Craig, Lee M. Diehl, Pamela S. Farnham, Carolyn Fischer, Friends of Nelson, Charles R. Hickox, Dima Holmes, Horizons Village Property Owners Association, Inc., Emily Scruby Irvine, Demian K. Jackson, Bridget K. Hamre, Janice Jackson, Chapin Wilson Jr., Nancy Kassam-Adams, Shahir Kassam-Adams, James F. Kelly, Kathleen L. Kelly, Eric Lawson, Lisa Y. Lefferts, Elizabeth Leverone, Paul Leverone, Janet Lychock, David Drake Makel, Carolyn J. Maki, William S. Moore, Carol M. Moore, Beth Musick, Susan H Norton, Anne Norwood, Ken Norwood, James W. Raup, Jane W. Raup, Charlotte L. Rea, Ernest Reed, Randy Reed, Rockfish Valley Foundation, Victoria C. Sabin, Joanna Salidis, Alice Scruby, Timothy Mark Scruby, Marilyn Shifflett, Hershel Spears, Darlene Spears, Lawrence Stopper, Sharon Summers, Elizabeth Hunter Tabony, Lisa K. Tully, Carl Van Doren, Michelle Van Doren, Katherine P. Versluys, Vici Wheaton, the Wintergreen Country Store Land Trust, and Kenneth M. Wyner.

⁷ The Public Interest Groups include: North Carolina Waste Awareness and Reduction Network (NC WARN); Clean Water for North Carolina; Concerned Citizens of Tillery; the NC Alliance to Protect the People and the Places we Live; Beyond Extreme Energy; Triangle Women's International League for Peace and Freedom; Haw River Assembly; Winyah Rivers Foundation, Inc.; River Guardian Foundation; 350.org Triangle; the Chatham Research Group; and the Blue Ridge Environmental Defense League and its chapters, Protect Our Water! (Faber, VA), Concern for the New Generation (Buckingham, VA), Halifax and Northampton Concerned Stewards (Halifax and Northampton, NC), No Pipeline Johnston County (Johnston, NC), Nash Stop the Pipeline (Spring Hope, NC), Wilson County No Pipeline (Kenly, NC), Sampson County Citizens for a Safe Environment (Faison, NC), No Fracking in Stokes (Walnut Cove, NC), and Cumberland County Caring Voices (Eastover, NC).

⁸ Shenandoah Valley Network sought rehearing with Highlanders for Responsible Development; Virginia Wilderness Committee; Shenandoah Valley Battlefields Foundation; Natural Resources Defense Council; Cowpasture River Preservation Association; Friends of Buckingham; Chesapeake Bay Foundation; Appalachian Voices;

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(11) William Limpert; and (12) Friends of Wintergreen and Wintergreen Property Owners Association, Inc. (Friends of Wintergreen).

3. On November 14, 2018, Anne Bryan and Lakshmi Fjord separately filed late requests for rehearing. On November 20, 2018, Friends of Nelson filed a corrected copy of their earlier request for rehearing.

4. All of the requests for rehearing with the exception of that filed by Atlantic, NCUC and Demian Jackson, also sought a stay of the Certificate Order.

5. For the reasons discussed below, the requests for rehearing are rejected, dismissed, denied, or granted, and the requests for stay are dismissed as moot.

I. Background

6. The ACP Project is a new pipeline system designed to provide up to 1.5 million dekatherms (Dth) per day of firm transportation service to the Southeast United States. The project includes approximately 600 miles of 16- to 42-inch-diameter pipeline running from Harrison County, West Virginia, to eastern portions of Virginia and North Carolina. The project also includes 130,345 horsepower (hp) of compression at three compressor stations, interconnection facilities, metering and regulation facilities, and other appurtenant facilities. Atlantic has executed precedent agreements with six shippers for 1.44 million Dth per day of firm transportation service on the project: (1) Duke Energy Progress, LLC (Duke Energy Progress);⁹ (2) Duke Energy Carolinas, LLC (Duke Energy

Center for Biological Diversity; Chesapeake Climate Action Network; Friends of Nelson; Sierra Club; Wild Virginia; West Virginia Rivers Coalition; Richard Averitt; Louis Ravina; William McClain; Dawn Averitt; Judy Allen; Wade and Elizabeth Neely; William Limpert; Jackie Tan; Elfrieda McDaniel; Bold Alliance; Nelson Hilltop LLC; Rockfish Valley Foundation; and Rockfish Valley Investments.

⁹ Duke Energy Progress, an electricity generator and provider, is a subsidiary of Duke Energy Corporation, which has a 47 percent ownership in Atlantic through its subsidiaries.

Carolinas);¹⁰ (3) Piedmont;¹¹ (4) Virginia Power Services Energy Corp., Inc.;¹² (5) Public Service Company of North Carolina, Inc.;¹³ and (6) Virginia Natural Gas Company, Inc.¹⁴

7. The Supply Header Project is designed to provide up to approximately 1.5 million Dth per day of firm transportation service from supply areas on the existing DETI system to the ACP Project. DETI will add approximately 38 miles of 30-inch-diameter pipeline looping facilities, install four units totaling 69,200 hp of compression at three existing compressor stations, make upgrades to its system in Pennsylvania and West Virginia, and abandon two certificated gathering compressor units in Wetzel County, West Virginia. DETI executed a binding precedent agreement with Atlantic for 1,450,882 Dth per day of firm transportation service.

8. Atlantic will lease 100,000 Dth per day on Piedmont's system between its point of interconnection with the ACP Project in Johnson County, North Carolina, and a delivery point with the Public Service Company of North Carolina, Inc. near Clayton, North Carolina. Piedmont is a local distribution company and a public utility under Chapter 62 of the North Carolina General Statutes and its North Carolina rates and services are regulated by the North Carolina Utility Commission.

9. In the Certificate Order, the Commission agreed with the conclusions presented in the final Environmental Impact Statement (EIS) and adopted the EIS's recommended mitigation measures as modified in the order. The Certificate Order determined that the

¹⁰ Duke Energy Carolinas, an electricity generator and provider, is also a subsidiary of Duke Energy Corporation.

¹¹ On October 3, 2016, Duke Energy Corporation purchased Piedmont, a local distribution company.

¹² Virginia Power Services Energy Corp., Inc. is a subsidiary of Virginia Electric and Power Company, which is a subsidiary of Dominion Resources, Inc. Dominion Resources, Inc. has a 48 percent ownership interest in Atlantic through its subsidiaries. Virginia Power Services Energy Corp., Inc. provides fuel, including natural gas, to Dominion's affiliates.

¹³ Public Service Company of North Carolina, Inc., a local distribution company, is a subsidiary of SCANA Corporation and has no affiliation with the ACP Project's sponsors.

¹⁴ Virginia Natural Gas Company, Inc., a local distribution company, is a subsidiary of The Southern Company, which has a five percent ownership interest in Atlantic through Maple Enterprise Holdings, Inc.

ACP and Supply Header Projects, if constructed and operated as described in the Final EIS, are environmentally acceptable actions and required by the public convenience and necessity. The Certificate Order also granted Piedmont an NGA section 7 limited jurisdiction certificate to carry out its responsibilities under the lease agreement.

II. Procedural Matters

A. Party Status

10. Under section 19(a) of the NGA and Rule 713(b) of the Commission's regulations, only a party to a proceeding may request rehearing of a final Commission decision.¹⁵ Any person seeking to intervene to become a party must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.¹⁶

11. Clean Water for North Carolina, Concerned Citizens of Tillery, the NC Alliance to Protect the People and the Places We Live, Beyond Extreme Energy, Triangle Women's International League for Peace and Freedom, Haw River Assembly, River Guardian Foundation, 350.org Triangle, and the Chatham Research Group never sought to intervene in these proceeding, but joined the rehearing request of NC WARN and the Blue Ridge Environmental Defense League, who are parties to this proceeding. Because the aforementioned groups are not parties to this proceeding, they may not seek rehearing of the Certificate Order, and we therefore dismiss the pertinent rehearing requests as to them. We nonetheless note that by answering issues raised by parties below, we also address non-party commenters' concerns.

B. Untimely Requests for Rehearing

12. Pursuant to section 19(a) of the NGA, an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order.¹⁷ Under the Commission's regulations, read in conjunction with section 19(a), the deadline to seek

¹⁵ 15 U.S.C. § 717r(a) (2012); 18 C.F.R. § 385.713(b) (2017).

¹⁶ 18 C.F.R. § 385.214(a)(3) (2017).

¹⁷ 15 U.S.C. § 717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order"). The Commission has no discretion to extend this deadline. *See, e.g., Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250, at P 10 n.13 (2017) (*Transco*) (collecting cases).

rehearing was 5:00 p.m. U.S. Eastern Time, November 13, 2017.¹⁸ Ms. Bryan¹⁹ and Ms. Fjord²⁰ failed to meet this deadline. Because the 30-day rehearing deadline is statutorily based, it cannot be waived or extended, and their requests must be rejected as untimely.²¹ For this same reason, we reject Friends of Nelson's²² corrected request for rehearing filed on November 20, 2017.

¹⁸ Rule 2007 of the Commission's Rules of Practice and Procedure provides that when the time period prescribed by statute falls on a weekend, the statutory time period does not end until the close of the next business day. *See* 18 C.F.R. § 385.2007(a)(2) (2017). The Commission's business hours are "from 8:30 a.m. to 5:00 p.m.," and filings – paper or electronic – made after 5:00 p.m. will be considered filed on the next regular business day. *See* 18 C.F.R. §§ 375.101(c), 385.2001(a)(2) (2017).

¹⁹ Ms. Bryan filed her request at 10:19 p.m. on November 13, 2017.

²⁰ Ms. Fjord filed her request at 5:02 p.m. on November 13, 2017.

²¹ *See, e.g., Associated Gas Distributors v. FERC*, 824 F.2d 981, 1005 (D.C. Cir. 1987) (stating that "the Commission cannot waive the jurisdictional bar of [section] 19" of the Natural Gas Act); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) (holding that an identical 30-day time requirement to file a request for rehearing in the Federal Power Act (FPA) "is as much a part of the jurisdictional threshold as the mandate to file for a rehearing"); *Boston Gas Co. v. FERC*, 575 F.2d 975, 979 (1st Cir. 1978) (holding that the rehearing provision of the NGA is "a tightly structured and formal provision. Neither the Commission nor the courts are given any form of jurisdictional discretion"); *PJM Interconnection, L.L.C.*, 138 FERC ¶ 61,160, at P 3 (2012); *La. Energy and Power Auth.*, 117 FERC ¶ 61,258, at 62,301 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 10 (2005); *Texas-New Mexico Power Co. v. El Paso Elec. Co.*, 107 FERC ¶ 61,316, at P 22 (2004); *California Independent System Operator Corp.*, 105 FERC ¶ 61,322, at P 9 (2003); *Tennessee Gas Pipeline Co.*, 95 FERC ¶ 61,169, at 61,546-47 (2001); *Columbia Gas Transmission Corp.*, 40 FERC ¶ 61,195, at 61,655 (1987). The rehearing provisions in the FPA and the NGA are identical and read *in pari materia*. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (because relevant provisions of the Natural Gas Act and Federal Power Act "are in all material respects substantially identical," it is "established practice" to cite "interchangeably decisions interpreting the pertinent sections of the two statutes").

²² Friends of Nelson filed two requests for rehearing on November 13, 2017, and November 20, 2017. We only reject its November 20, 2017 filing as untimely and will address its timely November 13, 2017 request in this order.

C. Answers

13. On December 12, 2017, Atlantic filed a motion for leave to answer and answer to the requests for rehearing. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure²³ prohibits answers to a request for rehearing. Accordingly, we reject Atlantic's filing.

D. Motions for Stay

14. The Fairway Woods Homeowners Condominium Association, Friends of Buckingham, Friends of Nelson, Public Interest Groups, Ashram-Yogaville, Shenandoah Valley Network, Sierra Club, William Limpert, and Friends of Wintergreen request that the Commission stay the Certificate Order pending issuance of an order on rehearing. This order addresses and denies or dismisses their requests for rehearing; accordingly, we dismiss the requests for stay as moot.

E. Evidentiary Hearings**1. The Commission Appropriately Denied an Evidentiary Hearing**

15. Shenandoah Valley Network contends that the Certificate Order erred by denying its June 21, 2017 Motion for an Evidentiary Hearing.²⁴ Shenandoah Valley Network argues that an evidentiary hearing must be set to resolve substantial disputed issues regarding the market demand for natural gas in the regions to be served by the ACP Project and the ability of Atlantic's precedent agreements with affiliated shippers to demonstrate need for the project sufficient to support a finding of public convenience and necessity.²⁵ Shenandoah Valley Network contends that the Commission's failure to hold an evidentiary hearing prevented it from adequately assessing the parties' conflicting contentions and rendered the Certificate Order arbitrary and capricious.²⁶

16. The Certificate Order appropriately denied Shenandoah Valley Network's request.²⁷ An evidentiary, trial-type hearing is necessary only where there are material

²³ 18 C.F.R. § 385.713(d)(1) (2017).

²⁴ Shenandoah Valley Network Rehearing Request at 7, 41.

²⁵ *Id.* at 41-42.

²⁶ *Id.* at 26.

²⁷ Certificate Order, 161 FERC ¶ 61,042 at P 23.

issues of fact in dispute that cannot be resolved on the basis of the written record.²⁸ No party has raised a material issue of fact that the Commission cannot resolve on the basis of the written record. As demonstrated by the discussion below, the existing written record provides a sufficient basis to resolve the issues relevant to this proceeding. The Commission has done all that is required by giving interested parties an opportunity to participate through evidentiary submission in written form.²⁹ Therefore, we will deny the request for a trial-type evidentiary hearing.

2. The Commission Will Not Reopen the Record to Allow Petitioners to Submit New Evidence

17. On rehearing, Shenandoah Valley Network attempts to submit new evidence from proceedings before the Virginia State Corporation Commission to support its claim that the ACP Project is not needed.³⁰ Specifically, the Shenandoah Valley Network contends that the evidence includes a statement that the project would serve existing generation facilities in Virginia, contrary to Atlantic Coast's statements in its application for a certificate of public convenience and necessity.³¹ The Shenandoah Valley Network also contends there is evidence that the existing Transco system can serve Dominion Energy Virginia's needs, thus negating the need for the ACP Project.³² Further, the Shenandoah Valley Network argues that contrary to Atlantic's claims of customer savings, there would actually be a net cost to ratepayers.³³ Shenandoah Valley Network also argues that Dominion Energy Virginia overstated the demand for electricity in its service territory, thereby suggesting that there is no true market demand for the project.³⁴

18. As the Commission previously has explained, the Commission's procedures encourage the timely submission of evidence and, consequently, the Commission adheres

²⁸ See, e.g., *Southern Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Dominion Transmission, Inc.*, 141 FERC ¶ 61,183, at P 15 (2012).

²⁹ *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993).

³⁰ Rehearing Request of Shenandoah Valley Network at 17, 25-37.

³¹ *Id.* at 25.

³² *Id.* at 27.

³³ *Id.*

³⁴ *Id.* at 29.

to the general rule that the record once closed will not be reopened.³⁵ Because Rule 713(d)(1) of the Commission's Rules of Practice and Procedure³⁶ prohibits answers to requests for rehearing, "allowing parties to introduce new evidence at the rehearing stage would raise concerns of fairness and due process for other parties to the proceeding"³⁷ and "would frustrate needed administrative finality."³⁸ We thus dismiss Shenandoah Valley Network's argument,³⁹ and reject the Shenandoah Valley Network's request to supplement or reopen the record.

19. As we stated above, and in the Certificate Order, the issues raised in this proceeding, including those concerning the need for the proposed projects, have been adequately argued, and a determination can be made on the basis of the existing record in this proceeding. All interested parties have been afforded a complete opportunity to present their views to the Commission through numerous written submissions. We find that there is no material issue of fact that we cannot resolve on the basis of the written record in the proceeding. Therefore, we will reject Shenandoah Valley Network's attempt to submit new evidence at the rehearing stage.

³⁵ See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Servs.*, 133 FERC ¶ 61,014, at P 24 (2010) (citing *Transwestern Pipeline Co.*, Opinion No. 238, 32 FERC ¶ 61,009 (1985), *reh'g denied*, Opinion No. 238-A, 36 FERC ¶ 61,175, at 61,453 (1986)).

³⁶ 18 C.F.R. § 385.713(d) (2017).

³⁷ *Kinetica Deepwater Express*, 155 FERC ¶ 61,183, at P 20 (2016).

³⁸ *PaTu Wind Farm, LLC v. Portland General Electric Company, LLC*, 151 FERC ¶ 61,223, at P 42 (2015). See also *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010).

³⁹ *Northeast Utilities Serv. Co.*, 136 FERC ¶ 61,123, at P 9 (2011) ("We will deny rehearing. CRS' attempt to introduce new evidence and new claims at the rehearing stage is procedurally improper"); *Commonwealth Edison Co.*, 127 FERC ¶ 61,301, at P 14 (2011) ("We reject as untimely the new affidavit which ComEd includes in its request for rehearing. Parties are not permitted to introduce new evidence for the first time on rehearing."); *New York Indep. Sys. Operator*, 112 FERC ¶ 61,283, at P 35 n.20 (2005) ("parties are not permitted to raise new evidence on rehearing. To allow such evidence would allow impermissible moving targets").

F. Due Process

1. Access to Documents

20. Shenandoah Valley Network argues the Commission violated its due process obligations when it issued the Certificate Order without granting participants access to precedent agreements filed as privileged pursuant to 18 C.F.R. § 388.112 (2017) and Exhibit G diagrams filed as Critical Energy Infrastructure Information (CEII) pursuant to 18 C.F.R. § 388.113 (2017).⁴⁰ Shenandoah Valley Network explains that denying it access to the precedent agreements and Exhibit G flow diagrams deprived it and the public at large an opportunity to challenge Atlantic's assertions about need for the project.⁴¹

21. The Commission's regulations provide avenues specifically intended for parties to a proceeding who desire access to privileged documents and CEII. Parties to a proceeding, like Bold Alliance, an intervenor and co-filer to Shenandoah Valley Network's request for rehearing, may seek access to the documents directly from the applicant.⁴² To the Commission's knowledge, Bold Alliance did not avail itself of these opportunities. Rather, Bold Alliance sought access to the Exhibit G flow diagrams using a process outside of these proceedings. On May 26, 2017, Bold Alliance requested access to the Exhibit G flow diagrams through the Commission's CEII process, pursuant to the provisions of 18 C.F.R § 388.113(g)(5).⁴³ On November 17, 2017, four days after the

⁴⁰ Rehearing Request of Shenandoah Valley Network at 175-178.

⁴¹ *Id.*

⁴² Section 388.112(b)(2) of the Commission's regulations provides a process for parties to gain access to privileged material directly from the applicants. Section 388.113(g)(4) provides a process for parties to gain access to CEII material directly from the applicants. Section 388.113(g)(4) provides that "[a]ny person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request *to the filer* for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section." 18 C.F.R. 388.113(d)(4) (2017) (emphasis added).

⁴³ 18 C.F.R. § 388.113(g) (2017). The process outlined at section 388.113(g)(5) is reserved for "any requester not described above in paragraphs (g)(1) through (4) of this section." As the Bold Alliance is a "participant in a proceeding" as described in section 388.113(g)(4), the section 388.113(g)(5) process, pursued outside these proceedings by Bold Alliance, was not applicable or required.

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deadline to file requests for rehearing, the Commission produced these documents to Bold Alliance. Bold Alliance did not challenge the CEII decision.

22. Section 388.113 (pertaining to CEII documents) is crafted to strike a balance between preventing the risk of harm if sensitive materials are disclosed to bad actors and allowing parties to fully participate in Commission proceedings.⁴⁴ The availability of these procedures assures parties the opportunity to access materials, consistent with this balance. Where the parties did not attempt to avail themselves of the full extent of the Commission's available procedures, there can be no demonstration that the procedures themselves, or the Commission's implementation of them, violates due process.

23. Bold Alliance also sought access to the precedent agreements.⁴⁵ Because the precedent agreements themselves were not filed with the Commission in Docket No. CP15-554, the Commission did not prevent access to those documents.⁴⁶ Atlantic, as part of its publicly-filed application, included a summary of the relevant terms of the precedent agreements, on which the Commission relied.⁴⁷

⁴⁴ See, e.g., *Regulations Implementing FAST Act Section 610030 - Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information*, Order No. 833, FERC Stats. & Regs. ¶ 31,389, at P 26 (2016) (cross-referenced at 157 FERC ¶ 61,123) (observing that, with respect to a party's concerns over due process, "under the amended CEII regulations the Commission will balance the need to protect critical information with the potential need of parties participating in Commission proceedings to access CEII"). See Final EIS at 4-590 ("The Commission, like other federal agencies, is faced with a dilemma in how much information can be offered to the public while still providing a significant level of protection to the facility. Consequently, the Commission has taken measures to limit the distribution of information to the public regarding facility design and layout location information to minimize the risk of sabotage. Facility design and location information has been removed from the Commission's website to ensure that sensitive information filed as Critical Energy Infrastructure Information is not readily available to the public").

⁴⁵ The FOIA request for precedent agreements was submitted by Carolyn Elefant. Letter to Carolyn Elefant, FOIA No. FY17-102, Second Rolling Response, June 2, 2018. Her submissions contained no indication of whether she was requesting these documents in her individual capacity or on behalf of an organization, but Ms. Elefant is the attorney on record for Bold Alliance.

⁴⁶ See FOIA No. FY17-102, Third Rolling Response, June 2, 2018 at n.2.

⁴⁷ Atlantic Application at 8, 12, Exhibit I (Sept. 18, 2015).

24. The Commission's action here is consistent with *Myersville Citizens for a Rural Community, Inc. v. FERC*⁴⁸ and *Minisink Residents for Environmental Preservation and Safety v. FERC*.⁴⁹ There the court explained that “[d]ue process requires only a ‘meaningful opportunity’ to challenge new evidence.”⁵⁰ In those cases, the court found no due-process violations because the parties had access to all record evidence filed by the applicants and relied on by the Commission, including confidential filings, prior to the filing due dates for requests for rehearing. The parties in *Minisink Residents* and *Myersville* properly sought access to CEII material from the applicant through a non-disclosure agreement in compliance with Commission regulations.⁵¹ Shenandoah Valley Network and Bold Alliance likewise had access to the precedent agreement information on which the Commission relied, and had the opportunity to obtain the CEII materials, but did not follow the prescribed procedures.

25. In any event, the court in *Minisink Residents* held that “to the extent Petitioners assert that other potentially relevant documents were improperly withheld as confidential, the contention that such documents might support [their] position [is] far too speculative to provide a basis for setting aside [the Commission’s] judgment.”⁵² Likewise here, Shenandoah Valley Network has not adequately explained how the documents it seeks would have affected its rehearing request or otherwise altered the outcome here. With respect to the CEII Exhibit G flow diagrams, Shenandoah Valley Network states that this information would have helped it independently verify need for the ACP Project and can be used to show that a pipeline has been segmented, is overbuilt, has feasible alternatives, or shows that the gas is bound for export. However, Shenandoah Valley Network does not explain why the information in the record and available to the public was insufficient for this purpose or how it would have used the engineering data they believed would be provided by the flow diagrams to aid their assessment. Thus, the Shenandoah Valley Network has not established, in light of its decision not to use the defined procedures for obtaining the Exhibit G flow diagrams, any violation of their due process rights.

⁴⁸ 783 F.3d 1301, 1327 (D.C. Cir. 2015) (*Myersville*).

⁴⁹ 762 F.3d 97, 115 (D.C. Cir. 2014) (*Minisink Residents*).

⁵⁰ *Myersville*, 783 F.3d at 1327; *see also Minisink Residents*, 762 F.3d at 115.

⁵¹ *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at PP 50-52 (2013); *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,198, at PP 71-73 (2012).

⁵² *Minisink Residents*, 762 F.3d at 115 (quoting *B & J Oil*, 353 F.3d at 78) (internal quotations omitted).

2. Missing Information

26. Sierra Club asserts that the order violates due process guaranteed by the Fifth Amendment of the U.S. Constitution by relying on environmental information and reasoning not presented in the applications, Draft EIS, or other documents available for public comment.⁵³ Sierra Club states that the Commission should have made any additional environmental information available for public review either through a supplemental EIS or through a formal evidentiary hearing.⁵⁴

27. We dismiss Sierra Club's due process claims. Sierra Club states that the "order relies on extensive evidence" not made available to the public for comment. In support, it offers nothing more than a bare list of paragraphs in the Certificate Order, and an attempt to incorporate by reference comments from another pleading.⁵⁵ We reject Sierra Club's attempt to "incorporate by reference arguments from a prior pleading" because "such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant."⁵⁶ Moreover, Sierra Club is obligated to "set forth specifically the ground or grounds upon which" its request for rehearing is based.⁵⁷ Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not meet this requirement.

⁵³ Rehearing Request of Sierra Club at 1-2.

⁵⁴ *Id.* at 3-6.

⁵⁵ *Id.* at 1, 2, 5 (citing Rehearing Request of Shenandoah Valley Network at 45-49, 58-61).

⁵⁶ *San Diego Gas and Electric Co. v. Sellers of Market Energy*, 127 FERC ¶ 61,269, at P 295 (2009). See *Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 (2016) ("the Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted."). See also *ISO New England, Inc.*, 157 FERC ¶ 61,060 (2016) (explaining that the identical provision governing requests for rehearing under the Federal Power Act "requires an application for rehearing to 'set forth specifically the ground or grounds upon which such application is based,' and the Commission has rejected attempts to incorporate by reference grounds for rehearing from prior pleadings"); *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.") (citations omitted).

⁵⁷ 15 U.S.C. § 717r(a) (2012). See also *Constellation Energy Commodities Group, Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006) ("Each quoted passage states a conclusion;

28. In any event, all of the environmental documents discussed in Sierra Club's citations were publicly available, and Sierra Club does not dispute that it had access to those documents, including the opportunity to present argument based on those documents on rehearing. Moreover, as discussed below,⁵⁸ any additional environmental information submitted to the record between the issuance of the Draft EIS and the Final EIS did not cause the Commission to make "substantial changes in the proposed action," nor did it present "significant new circumstances or information relevant to environmental concerns."⁵⁹ Further, to the extent the Commission relied on additional environmental information in the Certificate Order, this information was disclosed and available for comment on rehearing. Thus, we find that Sierra Club had an opportunity to comment on additional environmental information and there was no violation of its due process rights.

G. The Commission's Use of a Tolling Order is Lawful

29. Friends of Nelson and Sierra Club argue that under the NGA, the Commission must act upon a request for rehearing in 30 days after it is filed. Friends of Nelson argues that while the Commission has typically issued tolling orders to grant the Commission additional time beyond the 30-day requirement, in this instance, the issuance of a tolling order will be considered a denial of rehearing because their members will suffer irreparable harm from the implementation of the ACP Project.⁶⁰ Friends of Nelson and Sierra Club state that if the Commission issues a tolling order in response to its request for rehearing it will seek immediate review of the Certificate Order in the Court of Appeals.⁶¹

30. We disagree with Friends of Nelson and Sierra Club. Petitioners do not argue that they have been deprived of the opportunity to seek review of the Certificate Order; rather,

neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows "specifically . . . the ground on which rehearing [i]s being sought").

⁵⁸ See *infra* PP 108-109.

⁵⁹ 40 C.F.R. § 1502.9(c)(1) (2017).

⁶⁰ Rehearing Request of Friends of Nelson at 56; Rehearing Request of Sierra Club at 6-7.

⁶¹ Rehearing Request of Friends of Nelson at 56-57; Rehearing Request of Sierra Club at 6-7.

they assert that the potential delay in receiving a substantive order on rehearing will deprive them of their right to seek judicial review of the public use determination.⁶²

31. As the Supreme Court has recognized, “due process is flexible and calls for such procedural protections as the particular situation demands.”⁶³ We have found that “[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.”⁶⁴ Petitioners fail to show that they have been substantially prejudiced by the Commission following its longstanding practice of issuing a tolling order while affording the multiple rehearing requests in this proceeding the careful consideration they are due.⁶⁵ The District of Columbia Circuit Court of Appeals (D.C. Circuit) recently reaffirmed its finding that the Commission’s use of tolling orders is permissible under the Natural Gas Act, which requires only that the Commission “act upon” a rehearing request within 30 days, 15 U.S.C. § 717r(a), not that it finally dispose of it.⁶⁶

⁶² Rehearing Request of Friends of Nelson at 56-57; Rehearing Request of Sierra Club at 7.

⁶³ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁶⁴ *Transco, LLC*, 161 FERC ¶ 61,250 (citing *Phillips v. Internal Revenue Comm’r*, 283 U.S. 589, 596-97 (1931)). See also *Council of & for the Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) (“In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.”) (emphasis in original); *Polk v. Kramarsky*, 711 F.2d 505, 508-09 (2d Cir. 1983) (holding that plaintiff’s property right, while delayed, was not extinguished, and that no deprivation of property interest occurred).

⁶⁵ *Arthur Murray Studio of Wash. Inc. v. FTC*, 458 F.2d 622 (5th Cir. 1972) (showing of substantial prejudice is required to make a case of denial of procedural due process in administrative proceedings).

⁶⁶ *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir., 2018) (citing *Cal. Co. v. FPC*, 411 F.2d 720, 722 (D.C. Cir. 1969) (per curiam); accord *Kokajko v. FERC*, 837 F.2d 524, 526 (1st Cir. 1988); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969)).

H. Public Participation

32. Mr. Limpert contends that the Commission did not encourage public participation and was actively biased.⁶⁷ Mr. Limpert states that the Commission did not expedite the National Environmental Policy Act (NEPA) process, or designate a person to expedite the NEPA process, contrary to its obligations.⁶⁸ Mr. Limpert states that the Commission's public relations staff made public participation more difficult, and informed Mr. Limpert that he would have to send hundreds of letters to other intervenors, but only later did Mr. Limpert understand that this meant he would simply have to email copies of his comments made in the docket to the list of other intervenors in this proceeding. Mr. Limpert further contends, when he asked Commission staff to explain an issue in one of Atlantic's technical filings, staff responded that it is not its responsibility to interpret the filing.⁶⁹ Mr. Limpert argues that the Commission must interpret these filings as part of the Commission's review for the project.⁷⁰

33. We disagree with Mr. Limpert's characterizations. The Commission's rules and processes actively encourage public participation.⁷¹ This includes hosting public forums and offering the public the opportunity to intervene and submit comments. That Mr. Limpert misunderstood the requirements associated with being an intervenor does not mean that the Commission actively prohibited his participation. Mr. Limpert had as much of an opportunity to participate as other intervenors. There is no evidence Mr. Limpert has been prejudiced. He successfully intervened in, and is a party to, this proceeding, participated actively in the proceedings by filing numerous comments, and is currently seeking rehearing.

34. Moreover, it is the Commission's role to analyze and access independent filings by private entities, but not to interpret them for the public outside of our formal documents. The applicant is in the best position to explain the contents of its application, and Mr. Limpert had the opportunity to contact Atlantic directly to obtain the requested clarification and explanations. Although Mr. Limpert argues the Commission should

⁶⁷ Rehearing Request of Mr. Limpert at 6.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ 18 C.F.R. § 157.21(b)(11) (2017); 18 C.F.R. § 380.9 (2017).

inform the public of its interpretation of such filings, the Commission did so, in its detailed Draft EIS, Final EIS, and Certificate Order.

35. Further, Mr. Limpert argues the Commission violated NEPA requirements for public participation.⁷² Mr. Limpert argues that the Commission's regulations⁷³ permit the Commission to designate a person to expedite the NEPA process, and the regulation lists instances in which designation may occur, such as when a project has great public interest, and thus, the ACP Project falls into this category. Mr. Limpert argues that despite the fact that the ACP Project meets this criteria, the Commission did not appoint a person to expedite the NEPA process.

36. Section 1501.8 of the Council on Environmental Quality's regulations encourages agencies to set time limits "appropriate to individual actions."⁷⁴ While not invoking the non-mandatory provisions of section 1501.8, we note that the Commission's procedures for processing certificate applications, including our pre-filing process in which the applicants here participated, are designed with the intent that applications be processed in as timely a manner as practical and appropriate. In light of the quantity and range of issues raised by commenters, no additional actions by the Commission were necessary.

I. The Certificate Order Was Issued With a Requisite Quorum

37. Mr. Limpert argues that the Commission did not have the authority to issue a certificate of public convenience and necessity to the Atlantic because the Commission only had three Commissioners at that time, two of which were newly appointed to the Commission.⁷⁵ Mr. Limpert states the decision regarding the project must be investigated to determine if illegal actions were taken to manipulate the vote.⁷⁶

38. We disagree. Pursuant to section 401(b) of the Department of Energy Organization Act,⁷⁷ a full Commission comprises five members, and a quorum for the transaction of

⁷² Rehearing Request of Mr. Limpert at 6.

⁷³ *Id.* (citing 40 C.F.R. § 1501.8(b)(3) (2017)).

⁷⁴ 40 C.F.R. § 1501.8.

⁷⁵ Rehearing Request of Mr. Limpert at 6-7.

⁷⁶ *Id.*

⁷⁷ 42 U.S.C. § 7171(b) (2012).

business shall consist of at least three members present.⁷⁸ All three Commissioners were properly appointed by the President, with the advice and consent of the Senate, and had taken the oath of Office at the time the Certificate Order was approved and issued.⁷⁹ The Commission's quorum was satisfied, and the votes for the order were legally cast; there is no evidence of illegal manipulation.

III. Discussion

A. The Natural Gas Act

1. The Certificate Order Complied With The Certificate Policy Statement

39. Several petitioners argue that the Commission violated the NGA by failing to establish that the ACP Project is required by present or future public convenience and necessity.⁸⁰ Specifically, petitioners assert that the Commission: (1) inappropriately relied on precedent agreements between Atlantic and its corporate affiliates to establish need;⁸¹ (2) failed to consider market studies showing that there is sufficient infrastructure to meet current demand;⁸² (3) did not appropriately evaluate whether renewable resources

⁷⁸ *Id.* § 7171(e); *accord* 18 C.F.R. § 375.101(e) (2017).

⁷⁹ *Id.* § 7171(e).

⁸⁰ Rehearing Request of Shenandoah Valley Network at 12-37; Rehearing Request of Fairway Woods Condominium Association at 8-16; Rehearing Request of Public Interest Groups at 13-16; Rehearing Request of Ashram-Yogaville at 8-9; Rehearing Request of Friends of Nelson at 14-16, 38-40; Rehearing Request of Mr. Limpert at 2.

⁸¹ Rehearing Request of Shenandoah Valley Network at 13-16; Rehearing Request of Fairway Woods Condominium Association at 10; Rehearing Request of Public Interest Groups at 13-14; Rehearing Request of Ashram-Yogaville at 8; Rehearing Request of Mr. Limpert at 2.

⁸² Rehearing Request of Shenandoah Valley Network at 17-25; Rehearing Request of Fairway Woods Condominium Association at 10, 12; Rehearing Request of Mr. Limpert at 2.

and existing infrastructure could meet demand;⁸³ and (4) did not balance the public need for the project with the harm to landowners and communities.⁸⁴

a. Atlantic Appropriately Demonstrated Project Need

40. Petitioners state that the precedent agreements between Atlantic and its affiliated shippers were insufficient to demonstrate need under the Certificate Policy Statement.⁸⁵ Petitioners argue that the Certificate Policy Statement recognized that “[u]sing contracts as the primary indicator of market support for the proposed pipeline project . . . raises additional questions when the contracts are held by pipeline affiliates.”⁸⁶ Further, Fairway Woods Condominium Association states that Atlantic is building the project for purely speculative purposes.⁸⁷ Shenandoah Valley Network argues that a goal of the Certificate Policy Statement was to reduce the Commission’s sole reliance on precedent agreements, but the Commission continues to adhere to that “outdated” approach.⁸⁸

41. We disagree and affirm the Certificate Order’s finding that even though all but one of the ACP Project’s shippers are affiliated with Atlantic, the Commission is not required

⁸³ Rehearing Request of Shenandoah Valley Network at 22-23; Rehearing Request of Public Interest Groups at 15; Rehearing Request of Mr. Limpert at 2.

⁸⁴ Rehearing Request of Fairway Woods Condominium Association at 9, 15-16; Rehearing Request of Ashram-Yogaville at 12-13; Rehearing Request of Friends of Nelson at 39-40.

⁸⁵ Rehearing Request of Shenandoah Valley Network at 14 (citing *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Order Clarifying Policy Statement); Rehearing Request of Fairway Woods Condominium Association at 10; Rehearing Request of Public Interest Groups at 13-14; Rehearing Request of Ashram-Yogaville at 8; Rehearing Request of Mr. Limpert at 2.

⁸⁶ Rehearing Request of Shenandoah Valley Network at 20 (quoting Certificate Policy Statement, 88 FERC at 61,747); Rehearing Request of Fairway Woods Condominium Association at 12-13.

⁸⁷ Rehearing Request of Fairway Woods Condominium Association at 15.

⁸⁸ Rehearing Request of Shenandoah Valley Network at 14-15.

to look behind precedent agreements to evaluate project need.⁸⁹ The Certificate Policy Statement established a new policy under which the Commission would allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a percentage of the proposed capacity be subscribed under long-term precedent or service agreements.⁹⁰ These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to customers, or a comparison of projected demand with the amount of capacity currently serving the market.⁹¹ The Commission stated that it would consider all such evidence submitted by the applicant regarding project need. Nonetheless, the policy statement made clear that, although companies are no longer required to submit precedent agreements for Commission review, these agreements are still significant evidence of project need or demand.⁹² As the court held in *Minisink Residents*,⁹³ the Commission may reasonably accept the market need reflected by the applicant's existing contracts with shippers.⁹⁴

⁸⁹ Certificate Order, 161 FERC ¶ 61,042 at P 54. *See* Certificate Policy Statement, 88 FERC at 61,748 (explaining that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project); *see also id.* at 61,744 (the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts) (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)). *See also Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158, at P 23 (2018) ("The mere fact that Florida Power & Light is an affiliate of Florida Southeast does not call into question the need for the project or otherwise diminish the showing of market support."); *Millennium Pipeline Co. L.P.*, 100 FERC ¶ 61,277, at P 57 (2002) ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project.").

⁹⁰ Certificate Policy Statement, 88 FERC at 61,747. As we explained in the Certificate Order, prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. The 96-percent subscribed ACP Project would have satisfied this prior, more stringent, requirement. Certificate Order, 161 FERC ¶ 61,042 at n.83.

⁹¹ Certificate Policy Statement, 88 FERC at 61,747.

⁹² *Id.* at 61,747.

⁹³ 762 F.3d 97.

⁹⁴ *Minisink Residents*, 762 F.3d at 110 n.10; *see also Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sabal Trail*) (finding that pipeline project proponent

Moreover, it is current Commission policy not to look behind precedent or service agreements to make judgments about the needs of individual shippers.⁹⁵ Likewise, *Minisink Residents* confirms that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.⁹⁶

42. 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.⁹⁷ When considering applications for new certificates, the Commission's sole concern regarding affiliates of the pipeline as shippers is whether there may have been undue discrimination against a non-affiliate shipper.⁹⁸ We affirm the Certificate Order's determination that in this proceeding no such allegations have been made, nor have we found that the project sponsors have engaged in any anticompetitive behavior.⁹⁹ Atlantic held both non-binding and binding open seasons for capacity on the ACP Project and all potential shippers had the opportunity to contract for service.

satisfied Commission's "market need" requirement where 93 percent of the pipeline project's capacity had already been contracted for).

⁹⁵ Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC at 61,316). See *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 at P 57 ("as long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project").

⁹⁶ *Minisink Residents*, 762 F.3d at 112 n.10; see also *Myersville*, 783 F.3d at 1311 (rejecting argument that precedent agreements are inadequate to demonstrate market need).

⁹⁷ See, e.g., *Greenbrier Pipeline Co., LLC*, 101 FERC ¶ 61,122, at P 59 (2002), *reh'g denied*, 103 FERC ¶ 61,024 (2003).

⁹⁸ See 18 C.F.R. § 284.7(b) (2017) (requiring transportation service to be provided on a non-discriminatory basis).

⁹⁹ Certificate Order, 161 FERC ¶ 61,042 at P 59.

43. As a result of the open season, Atlantic entered into long-term, firm precedent agreements with six shippers¹⁰⁰ for 1.44 million Dth per day of firm transportation service¹⁰¹ – 96 percent of the ACP Project’s total design capacity of 1.5 million Dth per day. This information was publicly available in the record.¹⁰² The Certificate Order found, and we agree, that evidence of contracts entered into by the shippers are the best evidence that additional gas will be needed in the markets served by the ACP Project.¹⁰³

44. Additionally, we find no merit in Shenandoah Valley Network’s argument that the three-year-old precedent agreements were irrelevant to demonstrate need particularly in light of changing market demand for natural gas in Virginia and North Carolina.¹⁰⁴ In accordance with Ordering Paragraph (K) of the Certificate Order, Atlantic filed a written statement affirming that it executed binding final contracts for service at the levels provided for in its precedent agreements prior to commencing construction.¹⁰⁵ Thus, the age of the agreements at the time of the Certificate Order issuance is not relevant here. As confirmed by the execution of the service contracts, the shippers on the ACP Project – who will supply gas to end users and electric generators – determined that natural gas will

¹⁰⁰ Duke Progress, Duke Energy Carolinas, Piedmont, Virginia Power Services Energy Corp., Inc.; Public Service Company of North Carolina, Inc.; and Virginia Natural Gas Company, Inc.

¹⁰¹ Firm transportation service is given the highest priority on the pipeline. Customers holding firm transportation service contracts pay a monthly rate to reserve capacity on the pipeline, whether or not the customer uses this capacity, for a defined contract term. The firm transportation rate is generally not subject to reduction or interruption.

¹⁰² See Atlantic’s Application at 8, 12, Exhibit I, Exhibit 2.1. See also *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (observing that an affidavit attesting that the project was subscribed and customers’ motions to intervene constituted substantial evidence of market need).

¹⁰³ Certificate Order, 161 FERC ¶ 61,042 at P 55. We affirm the Certificate Order’s finding that the information Atlantic filed about the precedent agreements (shipper’s name, contracted capacity, and term of service) was sufficient to demonstrate market support for the project.

¹⁰⁴ Rehearing Request of Shenandoah Valley Network at 19-20.

¹⁰⁵ Atlantic’s February 7, 2018 Supplemental Information and Limited Notice to Proceed at 2 (Accession No. 20180207-5151). See Certificate Order, 161 FERC ¶ 61,042 at ordering para. (K).

be needed and the ACP Project is the preferred means of obtaining that gas. Based on this, we find that additional gas will be needed in the markets that the ACP Project intends to serve. We affirm the Certificate Order's finding that end users will generally benefit from the project because it would develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid by connecting sources of natural gas to markets in Virginia and North Carolina.¹⁰⁶

45. Shenandoah Valley Network disagrees with the Commission's policy not to "look behind precedent agreements to question individual shippers' business decisions to enter into contracts."¹⁰⁷ Petitioners assert that the Commission placed too much weight on the fact that Atlantic secured long-term commitments from shippers as evidence of public need for the project, citing to former Commissioner Bay's statement in *National Fuel Gas Supply Corp.*¹⁰⁸

46. It is well-established that long-term commitments serve as "significant evidence of market demand for the project."¹⁰⁹ And the Commission typically does not look behind such agreements to assess shippers' business decisions.¹¹⁰ The United States Court of Appeals for the D.C. Circuit has confirmed that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the Commission must look beyond the market need reflected by the applicant's contracts with shippers.¹¹¹ Here, all

¹⁰⁶ Certificate Order, 161 FERC ¶ 61,042 at P 55 (citing *ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010, at P 20 (2010)).

¹⁰⁷ Rehearing Request of Shenandoah Valley Network at 15, 18 (quoting Certificate Order, 161 FERC ¶ 61,042 at P 54).

¹⁰⁸ 158 FERC ¶ 61,145 (2017) (Commissioner Bay, Separate Statement). *See* Rehearing Request of Ashram-Yogaville at 12; Rehearing Request of Friends of Nelson at 38.

¹⁰⁹ Certificate Policy Statement, 88 FERC at 61,748.

¹¹⁰ *See, e.g., Transcontinental Gas Pipe Line Co., LLC*, 157 FERC ¶ 61,095, at P 5 (2016); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 39 (2016); *Paiute Pipeline Co.*, 151 FERC ¶ 61,132, at P 33 (2015).

¹¹¹ *Minisink Residents for Env'tl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting argument that precedent agreements are inadequate to demonstrate market need).

of the project's proposed capacity has been subscribed under long-term precedent agreements with six shippers.

47. Shenandoah Valley Network states that precedent agreements between affiliates are not a suitable proxy for market need.¹¹² Specifically, Shenandoah Valley Network asserts that affiliate contracts do not reflect true demand for new capacity, particularly where Atlantic and the affiliated shippers are owned by parent companies (Dominion Energy, Duke Energy, or Southern Company) whose shareholders would profit from the pipeline while the pipeline's costs will be passed along to captive ratepayers.¹¹³

48. As the Certificate Order explained, issues related to a utility's ability to recover costs associated with its decision to subscribe for service on the ACP Project involve matters to be determined by the relevant state utility commissions; those concerns are beyond the Commission's jurisdiction.¹¹⁴ The review that Shenandoah Valley Network seeks in this proceeding,¹¹⁵ looking behind the precedent agreements entered into by state-regulated utilities, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate. For those shippers that are not state-regulated utilities, such as producers or marketers, the Commission has chosen not to look behind the precedent agreements as these parties are fully at-risk for the cost of the capacity and would not have entered into the agreements had they not determined there was a need for the capacity to move their product to market.

49. Further, we find no merit in Shenandoah Valley Network's argument that the project will be subsidized by the affiliated shippers' captive ratepayers. To the extent a ratepayer receives a beneficial service, paying for that service does not constitute a "subsidy."¹¹⁶ Further, state regulatory commissions are responsible for approving any expenditures by state-regulated utilities. Atlantic is responsible for calculating its recourse rate based on the design capacity of the pipeline, placing Atlantic at risk for costs associated with any unsubscribed capacity. The recourse rates are derived using billing determinants based on the design capacity of the project, not subscribed capacity, meaning

¹¹² Rehearing Request of Shenandoah Valley Network at 14, 16, 18, 20.

¹¹³ *Id.* at 18-19.

¹¹⁴ Certificate Order, 161 FERC ¶ 61,042 at P 60.

¹¹⁵ Rehearing Request of Shenandoah Valley Network at 18-21.

¹¹⁶ *See* Order Clarifying Policy Statement, 90 FERC at 61,393.

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any particular customer paying the recourse rate is responsible for paying its share of the design capacity, not the subscribed capacity.¹¹⁷

50. Petitioners contend that that the specific end use of the delivered gas within the context of regional needs should be considered in the overall needs determination.¹¹⁸ Atlantic provided estimates of the likely end uses for the ACP Project, estimating that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes, 8.9 percent will serve industrial purposes, and 2.8 percent will serve other purposes such as vehicle fuel.¹¹⁹

51. However, we do not require companies to provide a specific end use of the natural gas to satisfy the demand determination. The Certificate Policy Statement “does not require that shippers be end-use customers of natural gas. Shippers may be marketers, local distribution companies, producers, or end users.”¹²⁰ As we have stated in other cases, a project driven primarily by marketers and producers does not render it speculative.¹²¹ Marketers or producers who subscribe to firm capacity on a proposed project on a long-term basis presumably have made a positive assessment of the potential for selling gas to end-use consumers in downstream markets served by the pipeline or through markets accessible through interconnects with other pipelines and have made a business decision to subscribe to the capacity on the basis of that assessment.¹²²

52. We affirm that the ACP Project will provide needed natural gas transportation service to both end use customers and natural gas producers and that the precedent

¹¹⁷ See *Cameron Interstate Pipeline, LLC*, 160 FERC ¶ 61,009, at P 11 (2017); *Alliance Pipeline L.P.*, 142 FERC ¶ 62,048, at 64,099 (2013); *Kinder Morgan Interstate Gas Transmission LLC*, 122 FERC ¶ 61,154, at P 28 (2008).

¹¹⁸ Rehearing Request of Ashram-Yogaville at 8-9; Rehearing Request of Public Interest Groups at 14; Rehearing Request of Friends of Nelson at 15.

¹¹⁹ Final EIS at 1-3.

¹²⁰ *Transcontinental Gas Pipeline Co., LLC*, 158 FERC ¶ 61,125, at P 29 (2017); see also *Transco*, 161 FERC ¶ 61,250 at P 29 (rejecting challenge to need for project based on allegation that some of the gas appeared destined for export).

¹²¹ *Transcontinental Gas Pipeline Co., LLC*, 158 FERC ¶ 61,125 at P 29 (citing *Maritimes & Northeast Pipeline, L.L.C.*, 87 FERC ¶ 61,061, at 61,241 (1999)).

¹²² *Id.*

agreements signed by Atlantic, for 96 percent of the project's design capacity, adequately demonstrate project need.

b. The Commission Did Not Ignore Evidence of Lack of Market Demand

53. Petitioners argue that the Commission ignored evidence in the record showing that market demand in Virginia and North Carolina has leveled off since 2014.¹²³ Petitioners contend that the Certificate Policy Statement “sought to remedy problems caused by the Commission’s long-standing sole reliance on precedent agreements”¹²⁴ and thus established other indicators of need, such as reports by the U.S. Energy Information Administration (EIA) or other studies assessing market demand or available pipeline capacity.¹²⁵ Petitioners state that precedent agreements are not dispositive of market demand and the Commission should have evaluated other evidence.¹²⁶ Specifically, Shenandoah Valley Network cites to: (1) a 2015 Synapse Energy Economic, Inc. report (2015 Synapse Report) stating that the ACP Project will likely cost, rather than save, consumers money;¹²⁷ (2) a 2016 Synapse Energy Economics, Inc. study (2016 Synapse Study), asserting that existing gas pipeline capacity, existing storage in Virginia and the Carolinas, and the future operation of Transco’s Atlantic Sunrise Project and Columbia’s WB Xpress Project can satisfy the growing peak demand in that region;¹²⁸ (3) PJM

¹²³ Rehearing Request of Shenandoah Valley Network at 21-22; Rehearing Request of Fairway Woods Condominium Association at 10, 12; Rehearing Request of Mr. Limpert at 2.

¹²⁴ Rehearing Request of Shenandoah Valley Network at 14.

¹²⁵ *Id.* at 17, 21-22; Rehearing Request of Mr. Limpert at 2.

¹²⁶ Rehearing Request of Shenandoah Valley Network at 17, 21-22.

¹²⁷ Synapse Energy Economics Inc., Atlantic Coast Pipeline Benefits Review: Chmura and ICF Economic Benefits Reports (2015) (filed in Shenandoah Valley Network’s Comments in Support of Initial Protest at 44-56) (Accession No. 20161220-5146) (2015 Synapse Report).

¹²⁸ Synapse Energy Economics, Inc., Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An Examination of the Need for Additional Pipeline Capacity into Virginia and Carolinas (2016) (filed in Shenandoah Valley Network’s December 20, 2016 Comments in Support of Initial Protest at 5-43) (Accession No. 20161220-5146) (2016 Synapse Study).

Interconnection's (PJM)¹²⁹ 2017 demand projection forecasting approximately 3,500 megawatts (MW) less demand in 2027 than Dominion Virginia Power's 2016 projection for the same year;¹³⁰ and (4) an EIA analysis suggesting that demand for natural gas for power generation will remain at, or below, 2015 levels until 2034.¹³¹ Shenandoah Valley Network asserts that these studies show that the demand for natural gas in the regions served by the ACP Project is leveling off at the same time that overall pipeline capacity is rapidly expanding, which will lead to significant unused capacity at the expense of ratepayers.¹³²

54. Commission policy is to examine the merits of individual projects and each project must demonstrate a specific need.¹³³ Although the Certificate Policy Statement permits the applicant to show need in a variety of ways, it does not suggest that the Commission should undertake an independent examination of future regional demand and design a system to best serve it. We are unpersuaded by the studies submitted by Shenandoah Valley Network in its attempt to show that there is insufficient demand for the project, particularly general forecasts for load growth in Virginia and North Carolina or certain utility supply forecasts projections made to state utility commissions. To the extent petitioners would have the Commission look at information beyond precedent agreements, we would note that countering the position advanced by the studies they urge, the record also contains evidence of growing demand for natural gas pipeline transportation capacity.¹³⁴ Projections regarding future demand often change and are influenced by a

¹²⁹ PJM is a regional transmission organization (RTO) that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia and the District of Columbia.

¹³⁰ *See, e.g.*, Shenandoah Valley Network June 21, 2017 Motion for Evidentiary Hearing (citing Direct Testimony of James F. Wilson, Va. State Corp. Comm., Case No. PUE-2016-00049 at 15-17 (Aug. 17, 2016)) (Accession No. 20170621-5160).

¹³¹ U.S. Energy Information Admin., *Annual Energy Outlook 2017*, Reference Case Table A2, (Jan. 2017), <https://www.eia.gov/outlooks/aeo/>.

¹³² Rehearing Request of Shenandoah Valley Network at 17, 21-22.

¹³³ With respect to comments requesting the Commission to assess the market demand for gas to be transported by other proposed interstate pipeline projects, we note that the Commission will evaluate the proposals in those proceedings in accordance with the criteria established in the Certificate Policy Statement.

¹³⁴ *See* ICF International, *The Economic Impacts of the Atlantic Coast Pipeline* (filed in Atlantic's September 18, 2015 Application, Resource Report 5 at 5-37)

variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given the uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements, which represent actual, rather than theoretical evidence regarding demand, to be the better evidence of demand. Thus, the Commission evaluates individual projects based on the evidence of need presented in each proceeding. Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project service and subsequently executed those service contracts,¹³⁵ the Commission places substantial reliance on those agreements to find that the project is needed.

c. Use of Renewable Energy and Existing Infrastructure Is Not Sufficient to Meet Demand

55. We disagree with petitioners' contention that we did not evaluate the growth of renewable energy infrastructure and its effects on the need for the ACP Project.¹³⁶ Petitioners assert that by failing to perform this analysis, the Commission permits pipeline infrastructure overbuilding.¹³⁷ The Certificate Order explained that the Final EIS evaluated whether new renewable generation or use of existing infrastructure could meet the demand to be served by the projects.¹³⁸ Additionally, the Final EIS considered the potential for energy conservation and renewable energy sources, and the availability of

(Accession No. 20150918-5212); Chmura Economics and Analytics, *The Economic Impact of the Atlantic Coast Pipeline in West Virginia, Virginia, and North Carolina* (2014) (filed in Atlantic's September 18, 2015 Application, Resource Report 5 at 5-35 – 5-37) (accession No. 20150918-5212).

¹³⁵ Shenandoah Valley Network attempts to introduce evidence of proceedings with state utility regulators to show that Atlantic's precedent agreements with its shippers are on shaky ground. Rehearing Request of Shenandoah Valley Network at 25-37. As stated above, Atlantic executed the precedent agreements (and has subsequently executed service agreements) with its shippers and this is the best evidence of demand for the project.

¹³⁶ Rehearing Request of Shenandoah Valley Network at 22; Rehearing Request of Public Interest Groups at 15.

¹³⁷ Rehearing Request of Shenandoah Valley Network at 22; Rehearing Request of Public Interest Groups at 15.

¹³⁸ Certificate Order, 161 FERC ¶ 61,042 at P 57 (citing Final EIS at 5-38).

capacity on other pipelines, to serve as alternatives to the ACP Project and concluded that they do not presently serve as practical alternatives to the project.¹³⁹

56. Petitioners also argue that existing infrastructure is sufficient to meet natural gas demand in the regions served by the ACP Project.¹⁴⁰ In support, Shenandoah Valley Network cites to the 2016 Synapse Study, which states that even under a “high demand” scenario, the capacity of the existing infrastructure is adequate.¹⁴¹ We disagree. The 2016 Synapse Study makes an unlikely assumption that all gas is flowed by primary customers along their contracted paths. However, the study fails to consider the use of regional pipeline capacity by shippers outside of Virginia and the Carolinas through interruptible service or capacity release.¹⁴²

57. Further, we disagree with petitioners’ argument that the ACP Project is not needed because the Greensville and Brunswick Power Stations are already served by Transco’s pipeline.¹⁴³ The Certificate Order explained that the ACP Project will supply an alternate source of natural gas to the generating facilities in case of a supply disruption.¹⁴⁴ Further, the ACP Project will be able to supply additional existing generation units through interconnections with existing pipelines (e.g., fourteen Dominion Virginia Power and five Duke Energy Progress facilities).¹⁴⁵

58. Finally, we find unpersuasive Mr. Limpert’s allegations that the ACP Project’s capacity will be exported through Kinder Morgan’s Savannah liquefied natural gas

¹³⁹ See Final EIS at 5-38 (concluding that existing pipelines do not have the capacity to transport the required volumes of gas and that generation of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation are not transportation alternatives and cannot function as a substitute for the proposed projects).

¹⁴⁰ Rehearing Request of Shenandoah Valley Network at 23; Rehearing Request of Public Interest Groups at 15.

¹⁴¹ Rehearing Request of Shenandoah Valley Network at 23.

¹⁴² See *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 47 (2018).

¹⁴³ Rehearing Request of Shenandoah Valley Network at 23; Rehearing Request of Fairway Woods Condominium Association at 10-11.

¹⁴⁴ Certificate Order, 161 FERC ¶ 61,042 at P 61.

¹⁴⁵ *Id.* (citing Atlantic’s December 8, 2016 Data Response at Question 3).

facility.¹⁴⁶ As the Certificate Order explained, the ACP Project shippers are domestic end users of natural gas and there is no evidence in the record that these end users intend to use their capacity to provide gas to an export terminal.¹⁴⁷

59. We affirm the Certificate Order's finding that authorization of the ACP Project will not lead to the overbuilding of pipeline infrastructure and will provide needed natural gas transportation service.¹⁴⁸

d. **The Commission Appropriately Balanced the Need for the Project Against Harm to Landowners and Communities**

60. Fairway Woods Condominium Association states that the Certificate Policy Statement requires the Commission to balance the public need for the project with the harm to landowners and the environment, and claims that if the Commission appropriately balanced these interests, it would have denied the project.¹⁴⁹ Specifically, Fairway Woods Condominium Association asserts that the project will have adverse landowner impacts by permitting compulsory taking of private property through eminent domain.¹⁵⁰

61. Consistent with the Certificate Policy Statement,¹⁵¹ the Commission balanced the need for and benefits to be derived from the ACP Project against the adverse impacts on landowners. The policy statement discusses application of a sliding scale approach, where the benefits needed to be shown for a project would vary depending on the project sponsor's ability to negotiate acquisition of property rights.¹⁵² Here, Atlantic has

¹⁴⁶ Rehearing Request of Mr. Limpert at 2.

¹⁴⁷ Certificate Order, 161 FERC ¶ 61,042 at P 62; Final EIS at 1-5.

¹⁴⁸ Certificate Order, 161 FERC ¶ 61,042 at P 57.

¹⁴⁹ Rehearing Request of Fairway Woods Condominium Association at 9, 15-16.

¹⁵⁰ *Id.* at 15-16.

¹⁵¹ Certificate Policy Statement, 88 FERC at 61,745-46. *See also National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012) (*National Fuel*).

¹⁵² Certificate Policy Statement, 88 FERC at 61,749. The Commission has indeed denied applications where project sponsors were unable to sufficiently demonstrate need. *See Jordan Cove Energy Project, L.P.*, 154 FERC ¶ 61,190, *reh'g denied*, 157 FERC ¶ 61,194 (2016); and *Turtle Bayou Gas Storage Company, LLC*, 135 FERC ¶ 61,233 (2011).

demonstrated public benefits for the proposed project by executing firm service contracts for approximately 96 percent of the project; thus providing a strong showing of need.¹⁵³ Further, the Commission found that Atlantic incorporated over 201 route variations, totaling 199 miles, into its proposed route for a various reasons, including landowner requests.¹⁵⁴ Accordingly, although we are mindful that Atlantic has been unable to reach easement agreements with many landowners, for purposes of consideration under the Certificate Policy Statement, we find that Atlantic has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities.

62. Petitioners contend that the Commission should have balanced the project's need against adverse environmental effects, such as the project's impacts on karst terrain, waterbodies, the Appalachian National Scenic Trail, the Blue Ridge Parkway, and many agricultural, residential, and commercial areas.¹⁵⁵ These issues were analyzed in the Final EIS and are addressed below. The Certificate Policy Statement's balancing of adverse impacts and public benefits is an economic, not an environmental analysis.¹⁵⁶ Only when the benefits outweigh the adverse effects on the economic interests will the Commission proceed to consider the environmental analysis where other interests are addressed. In addition, we ensured avoidance of unnecessary environmental impacts by including a certificate condition providing that authorization for the commencement of construction would not be granted until Atlantic successfully executed contracts for volumes and service terms equivalent to those in their precedent agreements.¹⁵⁷

63. Based on the foregoing, we affirm the Certificate Order's conclusion that Atlantic has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities, and that the benefits of the ACP Project outweigh the identified impacts on landowners and surrounding communities.

¹⁵³ Certificate Policy Statement, 88 FERC at 61,749 (“if an applicant had precedent agreements with multiple parties for most of the new capacity, that would be strong evidence of market demand and potential public benefits”).

¹⁵⁴ Final EIS at 3-51.

¹⁵⁵ Rehearing Request of Ashram-Yogaville at 12-13; Rehearing Request of Friends of Nelson at 39-40.

¹⁵⁶ *National Fuel*, 139 FERC ¶ 61,037 at P 12.

¹⁵⁷ Certificate Order, 161 FERC ¶ 61,042 at ordering para. (K).

2. Rates

a. 14 Percent Return on Equity

64. As part of an NGA section 7 proceeding, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard.¹⁵⁸ Unlike NGA sections 4 and 5, NGA section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certifies new facilities, expansion capacity, and/or services.¹⁵⁹ Recognizing that full evidentiary rate proceedings can take a significant amount of time, Congress gave the Commission the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-consuming ratemaking sections of the NGA.¹⁶⁰ The Certificate Order applied the Commission's established policy, which balances both consumer and investor interests, in establishing Atlantic's initial rates. Specifically, the Commission approved Atlantic's proposed 14 percent return on equity, based on a capital structure of 50 percent equity and 50 percent debt.¹⁶¹

65. On rehearing, NCUC and the Shenandoah Valley Network argue that the 14 percent return on equity (ROE) that the Commission permits for a new pipeline's initial recourse rates is unsupported by substantial evidence.¹⁶² Both NCUC and Shenandoah Valley Network argue that the Commission should calculate a project-specific ROE. Shenandoah Valley Network points out that a 14 percent ROE is inflated, relative to other investments, and could lead to overbuilding.¹⁶³ By failing to calculate a project-specific ROE, NCUC argues that the Commission has failed to provide a recourse rate that

¹⁵⁸ *Id.* P 101.

¹⁵⁹ *See Atl. Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 390 (1959) (*CATCO*).

¹⁶⁰ *See id.* at 392.

¹⁶¹ Certificate Order, 160 FERC ¶ 61,022 at P 102.

¹⁶² Rehearing Request of Shenandoah Valley Network at 37; Rehearing Request of NCUC at 6-11.

¹⁶³ Rehearing Request of Shenandoah Valley Network at 37-38.

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provides a check on the pipeline's market power when the pipeline enters into negotiated rates.¹⁶⁴

66. We disagree that the treatment of ROE or the resulting recourse rates in these proceedings are flawed. Because the establishment of recourse rates is based on estimates, the Commission's general policy is to accept the pipeline's cost components if they are reasonable and are consistent with Commission policy.¹⁶⁵ For new pipelines, the Commission has determined that equity returns of up to 14 percent are acceptable as long as the equity component of the capitalization is no more than 50 percent.¹⁶⁶

67. NCUC and Shenandoah Valley Network argue that we have not supported the finding that new greenfield pipelines face higher risks than established pipelines.¹⁶⁷ NCUC and Shenandoah Valley Network claim that the precedent cited by the Commission is not substantial evidence because the cited cases provide inadequate supporting analysis for such a 14 percent ROE.

68. The Commission cited precedent to show that the Commission has accepted a 14 percent ROE for new, greenfield pipelines with a 50 percent debt and 50 percent equity capital structure. The Certificate Order explained that the Commission's policy of accepting a 14 percent ROE in these circumstances reflects the increased business risks that new pipeline companies like Atlantic face.¹⁶⁸

69. The Certificate Order also cited Order No. 678 for this proposition, but NCUC contends that this evidence is inapposite. According to NCUC, Order No. 678 only involved rate regulation of certain natural gas storage facilities, not new natural gas

¹⁶⁴ Rehearing Request of NCUC at 16.

¹⁶⁵ See *Transcontinental Gas Pipe Line Corp.*, 82 FERC at 61,315; *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,637 (1996).

¹⁶⁶ See, e.g., *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, *reh'g denied*, 156 FERC ¶ 61,160 (2016), *aff'd in relevant part sub nom. Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (finding that the Commission "adequately explained its decision to allow Sabal Trail to employ a hypothetical capital structure" of 50 percent debt and 50 percent equity, with a 14 percent return on equity).

¹⁶⁷ Rehearing Request of NCUC at 9-10; Rehearing Request of Shenandoah Valley Network at 39.

¹⁶⁸ Certificate Order, 161 FERC ¶ 61,042 at P 102

pipelines and is therefore inapplicable in this context.¹⁶⁹ We disagree. Order No. 678 explained that new entrants to the natural gas transportation sector face greater risks than established pipeline companies.¹⁷⁰ Because new entrants building greenfield natural gas pipelines do not have an existing revenue base, they face greater risks constructing a new pipeline system and servicing new routes than established pipeline companies do when adding incremental capacity to their systems.¹⁷¹ This is the reason why Commission policy requires existing pipelines that provide incremental services through an expansion to use the ROE underlying their existing system rates and last approved in a section 4 rate case proceeding when designing the incremental rates. This tends to yield a return lower than 14 percent, reflecting the lower risk existing pipelines face when building incremental capacity.¹⁷²

70. Nonetheless, petitioners contend that it is arbitrary and capricious to rely on this approach when market conditions have changed.¹⁷³ Both argue that the Commission must use current market data given the current low cost of capital.¹⁷⁴ Shenandoah Valley Network argues that the Commission first granted a 14 percent ROE in 1997, but in 1997 Moody's AAA bonds yielded 7.26 percent and BAA bonds yielded 7.85 percent.¹⁷⁵ In 2015, these bond ratings yielded 3.89 percent and 5 percent, respectively, and therefore

¹⁶⁹ Rehearing Request of NCUC at 9-10.

¹⁷⁰ *Rate Regulation of Certain Nat. Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220, at 62,345 (2006) (cross-referenced at 115 FERC ¶ 61,343).

¹⁷¹ Certificate Order, 161 FERC ¶ 61,042 at P 102 n.150 (citing Order No. 678, FERC Stats. & Regs. ¶ 31,220 at 62,345).

¹⁷² *See, e.g., Gas Transmission Northwest, LLC*, 142 FERC ¶ 61,186, at P 18 (2013) (requiring use of 12.2 percent ROE from recent settlement, not the proposed 13.0 percent).

¹⁷³ Rehearing Request of NCUC at 8.

¹⁷⁴ Rehearing Request of NCUC at 8-9; Rehearing Request of Shenandoah Valley Network at 38, 40.

¹⁷⁵ Shenandoah Valley Network also argues that the projected rate of return for investors in U.S. stocks over the next five years is projected to be 4 to 7 percent, but provides only the 2015 bond data discussed in the text as support. Rehearing Request of Shenandoah Valley Network at 38, n. 94.

the project ROE should be lower.¹⁷⁶ But debt financing rates are not a proxy for ROE and petitioners have offered no support for their contrary assertion. Shenandoah Valley Network also argues that ACP's proposed ROE is inflated relative to other investments, such as the return for state-regulated investor-owned electric utilities. As discussed in the Certificate Order, the returns approved at the state level for electric utilities and local distribution companies are not relevant because these companies are inherently less risky than greenfield interstate transmission projects proposed by a new natural gas company.¹⁷⁷

71. NCUC and Shenandoah Valley Network allege that the Commission's justification for its ROE based on the business risk to similarly situated pipeline companies is flawed.¹⁷⁸ NCUC points out that rates of return approved in recent decisions were well below 14 percent; further, suggesting that those decisions were applied to established pipelines rather than new companies matters less when some of the companies in those cases have a higher risk profile than ACP.¹⁷⁹ Shenandoah Valley Network contends that that ACP faces less risk because it is structured on affiliate agreements.¹⁸⁰

72. We are not persuaded that we should reconsider Atlantic's proposed ROE. In the case cited by NCUC, *Portland Natural Gas Transmission System*,¹⁸¹ the Commission decided that Portland Natural Gas Transmission System was riskier than other established pipeline companies, not new entrants.¹⁸² Even if ACP has contracted with affiliates, similar to other pipelines, it remains at risk for unsubscribed capacity or terminated contracts. ACP's recourse rates are derived using billing determinants based on overall capacity, not subscribed capacity, meaning any particular customer paying the recourse rate is responsible for paying its share of the overall capacity. Thus, the risk of an underutilization in the event of contract termination remains, by design, with Atlantic.

¹⁷⁶ Rehearing Request of Shenandoah Valley Network at 38, n. 94.

¹⁷⁷ Certificate Order, 161 FERC ¶ 61,042 at P 102.

¹⁷⁸ Rehearing Request of NCUC at 11; Rehearing Request of Shenandoah Valley Network at 40.

¹⁷⁹ Rehearing Request of NCUC at 10-11.

¹⁸⁰ Rehearing Request of Shenandoah Valley Network at 40.

¹⁸¹ 150 FERC ¶ 61,107 (2015).

¹⁸² Rehearing Request of NCUC at 11, n.30 (citing *Portland Nat. Gas Transmission Sys.*, 150 FERC ¶ 61,107 at P 231).

73. NCUC points out that the Commission has conducted discounted cash flow analyses to assess an appropriate ROE in the past and it should have repeated that analysis here or performed other analyses based on current market data. As we explained in the Certificate Order, an initial rate is based on estimates until we can review Atlantic's cost and revenue study at the end of its first three years of actual operation.¹⁸³ ACP's proposed initial rates are based on estimates of what an appropriate rate for the service should be, which is not supported by any operating history. The actual costs associated with constructing the pipeline and providing service may increase or decrease and the revenues recovered may not closely match the projected cost-of-service. Conducting a discounted cash flow analyses in individual certificate proceedings would not be the most effective or efficient way to determine the appropriate ROEs and attempting to do so would unnecessarily delay proposed projects with time sensitive in-service schedules.¹⁸⁴ As the Commission pointed out in the Certificate Order, in a section 4 or 5 proceeding parties have the opportunity to file and examine testimony with regard to the composition of the proxy group in the use of the discounted cash flow analysis, the growth rates used in the analysis, and the pipeline's position within the zone of reasonableness with regard to risk, it would be difficult, if not impossible, to complete this type of analysis in section 7 certificate proceedings in a timely manner.¹⁸⁵ The Commission's current policy of calculating incremental rates for new pipelines using equity returns of up to 14 percent, as long as the equity component of the capitalization is no more than 50 percent, is an appropriate exercise of its discretion to approve initial rates under the "public interest" standard of section 7. These initial rates will "hold the line" until just and reasonable rates are adjudicated under section 4 or 5 of the NGA.¹⁸⁶

74. Finally, Shenandoah Valley Network maintains that the fact that Atlantic's rates will be reassessed, and potentially adjusted, after three years of operations does not protect the public from, what it contends is, an unnecessary pipeline.¹⁸⁷ There is no evidence that this ROE will incentivize what is ultimately an unneeded pipeline. As discussed, the Commission conducts a separate needs determination and is satisfied that there is demand

¹⁸³ Certificate Order, 161 FERC ¶ 61,042 at PP 101-103.

¹⁸⁴ See *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 at P 39.

¹⁸⁵ Certificate Order, 161 FERC ¶ 61,042 at P 101.

¹⁸⁶ *CATCO*, 360 U.S. at 392.

¹⁸⁷ Rehearing Request of Shenandoah Valley Network at 40.

for the ACP Project.¹⁸⁸ Moreover, the Commission requires that initial rates be designed on 100 percent of the design capacity of the project, thereby placing the risk of underutilization on the pipeline.

b. Pack Accounts

75. Atlantic argues that the Commission erred in rejecting its proposed “pack account” provisions for Foundation and Anchor Shippers.¹⁸⁹ Atlantic states that the proposed provisions, which would allow Foundation and Anchor Shippers to tender gas quantities in advance for later use on an essentially no-notice basis, reflect the unique circumstances involved in construction of the ACP Project¹⁹⁰ and do not present a significant risk of undue discrimination among similarly situated shippers.¹⁹¹

76. First, Atlantic contends that although Foundation and Anchor Shippers will exclusively receive this service, all other potential shippers had the opportunity to qualify as Foundation or Anchor Shippers through the open season process, which made clear that certain categories of shippers would receive pack accounts.¹⁹² Thus, Atlantic concludes that the Certificate Order wrongly states that pack accounts were offered to only a “select group of shippers.”¹⁹³ Next, Atlantic argues that because of the commitments made by Foundation and Anchor shippers, they should not be considered similarly situated to other firm shippers.¹⁹⁴ Atlantic asserts that no undue discrimination exists where there is a rational basis for treating two entities differently based on relevant, significant facts.¹⁹⁵ Here, Atlantic contends that shippers making major, long-term commitments necessary to make the project possible are not similarly situated to shippers making lesser

¹⁸⁸ *See supra* PP 39-63.

¹⁸⁹ Atlantic Rehearing Request at 4-10.

¹⁹⁰ Specifically, Atlantic asserts that given the lack of storage on the system, the pack quantities can be used to meet variable and unexpected gas needs for electric generation plants. *Id.* at 5.

¹⁹¹ *Id.* at 4.

¹⁹² *Id.* at 4, 6.

¹⁹³ *Id.* at 6 (citing Certificate Order, 161 FERC ¶ 61,042 at P 130).

¹⁹⁴ *Id.* at 7.

¹⁹⁵ *Id.*

commitments.¹⁹⁶ Atlantic further states that the Certificate Order recognizes the Commission's precedent that pipelines may provide shippers that have made the project possible certain rights that reflect the unique circumstances involved in the construction of new infrastructure.¹⁹⁷

77. The Commission has held that impermissible negotiated terms and conditions of service include any provisions that result in a customer receiving a different quality of service than that provided to other customers under the pipeline's tariff or that affect the quality of service received by others.¹⁹⁸ Consistent with Order No. 637, where a material deviation in a non-conforming contract constitutes a negotiated term and condition of service, the Commission would require that the pipeline modify its tariff to offer the negotiated service to all its customers or explain why it can only provide the service to this one customer.¹⁹⁹ Atlantic's proposed pack accounts are an exclusive arrangement in addition to the standard firm transportation service offered by Atlantic, which results in standard firm shippers receiving a different quality of operational service than that of the Anchor and Foundation Shippers. Therefore, we deny rehearing of Atlantic's original proposal.

78. In the alternative, Atlantic proposes to maintain pack accounts as an aspect of standard firm transportation service.²⁰⁰ That is, rather than allocating the pack capacity only to Foundation and Anchor Shippers, Atlantic would allocate the capacity to all firm

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* (citing Certificate Order, 161 FERC ¶ 61,042 at P 112).

¹⁹⁸ Certificate Order, 161 FERC ¶ 61,042 at P 117; *see also* *Vector Pipeline L.P.*, 155 FERC ¶ 61,251, at P 3 (2016) (citing *Dominion Transmission, Inc.*, 93 FERC ¶ 61,177 (2000)).

¹⁹⁹ *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062 (2000), *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18 (D.C. Cir. 2002), *order on remand*, 101 FERC ¶ 61,127 (2002), *order on reh'g*, 106 FERC ¶ 61,088 (2004), *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005). *See also* *Northern Natural Gas Co.*, 110 FERC ¶ 61,321, at P 10 (2005) (*Northern Natural*) (citing *ANR Pipeline Co.*, 97 FERC ¶ 61,224, at 62,024 (2001)).

²⁰⁰ Rehearing Request of Atlantic at 9.

shippers.²⁰¹ Atlantic asserts that such an approach would resolve the Commission's concerns regarding undue discrimination against other firm transportation customers.

79. We find that Atlantic's alternative proposal is consistent with Commission policy, provided that Atlantic allows firm shippers to opt-in or -out of the pack account service.²⁰² Additionally, in order to ensure that the service is not subsidized by shippers that have opted-out of the service, any costs that may be attributable to providing the pack account service shall only be recoverable from those firm shippers that have opted-in to the service.²⁰³ We direct Atlantic to file actual tariff records setting forth its pro-rata allocation of pack capability provisions available to all firm transportation shippers and the applicable rate associated with the pack account service, at least 30 days but no more than 60 days prior to the date the project facilities go into service.

c. **Allowance for Funds Used During Construction (AFUDC)**

80. Atlantic argues that the Certificate Order erred to the extent that it ruled that the AFUDC rate must not exceed the Commission-allowed overall rate of return in every

²⁰¹ *Id.* Atlantic states that, under current design assumptions, it can offer up to 277,400 Dth per day of pack capacity while still retaining the line pack needed to maintain its day-to-day operations. *Id.* at 6.

²⁰² In the Certificate Order, the Commission also noted that proposed pack accounts limited Atlantic's ability to provide imbalance management services as required by Order No. 637. Because the pack accounts would be available to all firm shippers under the alternative proposal, we find that such an arrangement, along with Atlantic's other imbalance provisions, is consistent with Order No. 637's requirement that "pipelines ... provide imbalance management services, like park and loan service, and greater information about the imbalance status of shippers and the system, to make it easier for shippers to remain in balance in the first instance." Order No. 637, FERC Stats. & Regs. ¶ 31,091, *clarified*, Order No. 637-A, FERC Stats. & Regs. ¶ 31,099, *reh'g denied*, Order No. 637-B, 92 FERC ¶ 61,062, *aff'd in part and remanded in part sub nom. Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, *order on remand*, 101 FERC ¶ 61,127, *order on reh'g*, 106 FERC ¶ 61,088, *aff'd sub nom. American Gas Ass'n v. FERC*, 428 F.3d 255.

²⁰³ Additionally, requiring Atlantic to provide firm shippers with the option to opt-out of the pack account service furthers the Commission's policy favoring the unbundling of services to the extent feasible. *Transcontinental Gas Pipe Line Corp.*, 106 FERC ¶ 61,299, at 62,111 (2004).

month of the construction period.²⁰⁴ Atlantic states that rather than examining individual periods, the Commission should only require that the AFUDC rate not exceed the allowed rate of return for the entire construction period as a whole.²⁰⁵ Atlantic claims that such a ruling would prevent Atlantic from obtaining compensation for its financing costs during construction at the allowed rate that could be earned on operating facilities, contrary to the purpose of AFUDC.²⁰⁶

81. Specifically, Atlantic asserts that the costs of funding for new pipeline companies fluctuate over time, and if a new pipeline company must utilize its actual financing costs in months when they are lower than the allowed rate of return but is capped at the allowed rate at times when its costs are actually higher, the pipeline company will recover less than the allowed return over the entire construction period.²⁰⁷ Atlantic contends that such a result is contrary to the purpose in establishing the AFUDC rate, which was to compensate a company for the capital committed to construction projects at a rate that could be earned on operating assets.²⁰⁸

82. We disagree. A basic tenet of the Commission's AFUDC rules is the allowance should compensate a company for capital committed to construction projects at a rate that could be earned on operating assets. In *Gulfstream Natural Gas System, L.L.C.*, the Commission rejected a proposal where the AFUDC rate was calculated to reflect a phase-in of debt financing that is higher than the rate of return which the Commission would authorize for an operating asset.²⁰⁹ The Commission reasoned that Gulfstream did not show why it is reasonable for it to earn a higher rate of return during construction than the

²⁰⁴ Rehearing Request of Atlantic at 3.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 12.

²⁰⁸ *Id.* (citing *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 51 (2014); *Buccaneer Gas Pipeline Co., L.L.C.*, 91 FERC ¶ 61,117, at 61,447 (2000); *Gulfstream Natural Gas System, L.L.C.*, 91 FERC ¶ 61,119, at 61,466 (2001); Order No. 561, *Amendments to Uniform System of Accounts for Public Utilities and Licenses and for Natural Gas Companies (Classes A, B, C and D) to Provide for the Determination of Rate for Computing the Allowance for Funds Used During Construction and Revisions of Certain Schedule Pages of FPC Reports*, Order No. 561, 57 FPC 608 (1977)).

²⁰⁹ *Gulfstream Natural Gas System, L.L.C.*, 94 FERC ¶ 61,185, at 61,637-38 (2001) (*Gulfstream*).

Commission would authorize it to earn on an operating asset.²¹⁰ Similarly, Atlantic's AFUDC calculation reflects only equity financing through August 2016, and Atlantic has provided no evidence supporting the reasonableness of that approach. Although 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, it has not shown why it is reasonable for it, through its proposed approach, to earn a higher rate of return during portions of construction than the Commission would authorize it to earn on an operating asset.

83. Atlantic is required to use an AFUDC rate for the entire construction period that is less than or equal to the approved overall rate of return on rate base. Although the overall return on operating assets is included in its recourse rates, both the debt and equity components are considered separately. In Atlantic's case, that rate is 50 percent debt at a cost of 6.8 percent,²¹¹ and 50 percent equity based on a 14 percent rate of return. Therefore, the equity component included in the AFUDC rate is capped at 50 percent of the approved recourse rate for equity,²¹² and the debt rate is similarly capped, for the entire construction period. Atlantic is required to recalculate its AFUDC and utilize an AFUDC rate equal to the overall project capitalization and cost rates for the entire construction period.²¹³ This permits the utility to achieve a rate of return on its construction program at approximately the rate which would be allowed in a rate case. The requirement to use an AFUDC rate for the entire construction period includes each period for which AFUDC is calculated, whether the actual calculation is computed on a monthly, quarterly, or semi-annual basis.

3. Eminent Domain

84. Shenandoah Valley Network argues that the Commission violated the Fifth Amendment to the U.S. Constitution and the NGA by granting Atlantic the power of eminent domain through the Certificate Order. Specifically, petitioners state that: (1) the Commission improperly granted Atlantic eminent domain authority before determining whether the pipeline can provide just compensation to landowners;²¹⁴ (2) the

²¹⁰ *Id.* at 61,638.

²¹¹ If Atlantic's actual cost of debt financing exceeds 6.8 percent, Atlantic may include its actual debt cost in its AFUDC rate. *Id.*

²¹² *Weaver's Cove Energy, LLC*, 112 FERC ¶ 61,070, at P 71 (2005).

²¹³ *Gulfstream*, 94 FERC at 61,638.

²¹⁴ Rehearing Request of Shenandoah Valley Network at 170.

Commission's refusal to consider constitutional challenges to eminent domain violated due process rights of landowners;²¹⁵ and (3) the Commission should prohibit "quick take" procedures, which violate the due process clause and the separation of powers doctrine.²¹⁶

85. NGA section 7(h) states that a certificate holder may "acquire . . . by the exercise of the right of eminent domain" all "necessary land or other property."²¹⁷ However, the actual transfer of ownership rights, and the compensation for the ceded property rights, are established in a court proceeding.²¹⁸ The D.C. Circuit has held that the Commission does not have the discretion to deny a certificate holder the power of eminent domain.²¹⁹

86. In NGA section 7(c), Congress gave the Commission jurisdiction to determine if the construction and operation of proposed pipeline facilities are in the public convenience and necessity. Once the Commission makes that determination, in NGA section 7(h), Congress gives the natural gas company authorization to acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain if it cannot acquire the easement by an agreement with the landowner. Some courts have held that a natural gas company may be granted possession pending a trial for just compensation under a preliminary injunction procedure.²²⁰ The Commission itself does not grant the pipeline the right to take the property by eminent domain.²²¹

²¹⁵ *Id.* at 174-175.

²¹⁶ *Id.* at 171-174.

²¹⁷ 15 U.S.C. § 717f(h) (2012).

²¹⁸ *Williston Basin Interstate Pipeline Co.*, 124 FERC ¶ 61,067, at P 8 n.12 (2008).

²¹⁹ *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (*Midcoast Interstate*).

²²⁰ *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 68 (2017) (citing *East Tennessee Natural Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) ("we hold that once a district court determines that a gas company has the substantive right to condemn property under the NGA, the court may exercise equitable power to grant the remedy of immediate possession through the issuance of a preliminary injunction"))).

²²¹ *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at PP 124-31 (2003) (*Islander East*).

87. It is beyond dispute that the federal government has the constitutional power to acquire property by exercise of eminent domain.²²² The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of an NGA section 7 certificate, when needed to fulfill the certificate,²²³ which it has done here.

88. Nonetheless, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of NGA section 7(h), including issues regarding the timing of acquisition and just compensation are matters for the applicable state or federal court.²²⁴ Because the Commission has no authority to determine what constitutes just compensation,²²⁵ it consequently cannot determine whether a party has sufficient assets to pay such just compensation.²²⁶

89. “Quick-take” procedures are established by the judiciary as one method for carrying out the right of eminent domain. While the Shenandoah Valley Network alleges

²²² *Tenneco Atlantic Pipeline Co.*, 1 FERC ¶ 63,025, at 65,203 (1977) (citing *U.S. v. Carmack*, 329 U.S. 230 (1946); *State of Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941)). *See also Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005) (“a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking”); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 230-31 (1984) (“Government does not itself have to use property to legitimate the taking; it is only the taking’s purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause”).

²²³ *Tenneco Atlantic Pipeline Co.*, 1 FERC at 65,203 (1977) (citing *Thatcher*, 180 F. 2d 644); *see also Islander East*, 102 FERC ¶ 61,054 at PP 128, 131.

²²⁴ *Northwest Pipeline, LLC*, 156 FERC ¶ 61,086, at P 12 (2016); *Californians for Renewable Energy, Inc. (Care) v. Williams*, 135 FERC ¶ 61,158, at P 19 (2011) (“The Commission is not the appropriate forum in which to adjudicate property rights.”); *Northwest Pipeline*, 135 FERC ¶ 61,158, at P 19 (2011).

²²⁵ *Rover Pipeline LLC*, 158 FERC ¶ 61,109 at P 54; *Midwestern Gas Transmission Co.*, 116 FERC ¶ 61,182, at P 15. *See also Ketchikan Pub. Util.*, 82 FERC ¶ 61,162, at 61,593 (1998) (“Under eminent domain, the courts determine what is just.”).

²²⁶ Due process rights are nonetheless preserved because constitutional challenges to agency decisions may be raised in appeals of final agency decisions. *See, e.g., Elgin v. Dep’t of Treasury*, 567 U.S. 1, 30 (2012) (citing *Mathews v. Eldridge*, 424 U.S. 319, 327–332 (1976)).

various constitutional infirmities with quick-take procedures as a category, the Commission's role does not include directing courts how to conduct their own proceedings.

4. Conditional Certificates

90. The Public Interest Group contends that the Commission's standard for state issued-permits is overreaching and incorrect.²²⁷ Specifically, they argue that the Commission attempts to assert federal preemption over matters that are clearly within the state's jurisdiction.²²⁸ Public Interest Groups cite *Constitution Pipeline*²²⁹ where the United States Court of Appeals for the Second Circuit found that a state can deny a Clean Water Act section 401 water quality certification for a pipeline if the project does not meet state standards.²³⁰ Public Interest Groups contends that the Commission can only authorize a pipeline project after the state makes its decisions on water quality, erosion control, and air quality for the proposed compressor station in North Carolina.²³¹

91. Shenandoah Valley Network argues that the conditional certificate is statutorily and constitutionally flawed.²³² Shenandoah Valley Network argues that Congress did not intend the NGA to make the certificate of public convenience and necessity "conditional" in the sense of needing to satisfy prerequisites before pipeline activity can commence.²³³ Rather, Shenandoah Valley Network argues that Congress intended to place limitations on pipeline activity.²³⁴ Shenandoah Valley Network cites *CATCO*,²³⁵ where the Supreme Court held that the conditions clause in NGA section 7(e) vests the Commission with control over the conditions under which gas may be initially dedicated to interstate use, so

²²⁷ Rehearing Request of Public Interest Group at 16-17.

²²⁸ *Id.* at 16.

²²⁹ *Constitution Pipeline Co. LLC, v. New York State Dep't of Environmental Conservation*, 868 F.3d 87 (2d Cir. 2017).

²³⁰ Rehearing Request of Public Interest Group at 16-17.

²³¹ *Id.* at 17.

²³² Rehearing Request of Shenandoah Valley Network at 154.

²³³ *Id.* at 154-155.

²³⁴ *Id.* at 155.

²³⁵ 360 U.S. at 389, 392.

that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act.²³⁶ Shenandoah Valley Network acknowledges that some district courts have endorsed the Commission's use of its conditional authority, but contends that the Commission should not rely on these cases to justify its practice.²³⁷

92. The Commission's practice of issuing conditional certificates has consistently been affirmed by courts as lawful.²³⁸ Shenandoah Valley Network claims that the Commission's conditioning authority is *restricted* to limits "on the terms of the proposed service itself,"²³⁹ but such a restriction finds no support in NGA section 7(e). Rather, the statute itself speaks broadly, authorizing the Commission to attach "reasonable terms and

²³⁶ Rehearing Request of Shenandoah Valley Network at 156-157.

²³⁷ *Id.*

²³⁸ See *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 399 (D.C. Cir. 2017) (upholding Commission's approval of a natural gas project conditioned on securing state certification under section 401 of the Clean Water Act); see also *Myersville*, 783 F.3d at 1320-21 (upholding the Commission's conditional approval of a natural gas facility construction project where the Commission conditioned its approval on the applicant securing a required federal Clean Air Act air quality permit from the state); *Del. Dep't. of Nat. Res. & Env'tl. Control v. FERC*, 558 F.3d 575, 578-79 (D.C. Cir. 2009) (holding Delaware suffered no concrete injury from the Commission's conditional approval of a natural gas terminal construction despite statutes requiring states' prior approval because the Commission conditioned its approval of construction on the states' prior approval); *Pub. Utils. Comm'n. of State of Cal. v. FERC*, 900 F.2d 269, 282 (D.C. Cir. 1990) (holding the Commission had not violated NEPA by issuing a certificate conditioned upon the completion of the environmental analysis).

²³⁹ Rehearing Request of Shenandoah Valley Network at 155 (quoting *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 827 F.2d 779, 782 (D.C. Cir. 1987)). As *Northern Natural Gas* explains, the statute does permit the Commission to impose "conditions on the terms of the proposed service." That case, like *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120 (D.C. Cir. 1979), concerns limits on the scope of the Commission's authority to condition rates under section 7(e) as "necessary to preserve the integrity of 'just and reasonable' rate review under sections 4 and 5" of the NGA, 15 U.S.C. §§ 717c, 717d (2012).

conditions” “to the *issuance* of the certificate and to the *exercise* of the rights granted thereunder.”²⁴⁰

93. In this regard, the Shenandoah Valley Network errs in suggesting that the Supreme Court’s decision in *CATCO*²⁴¹ precludes the Commission’s issuance of conditional certificates. In that case, the Supreme Court explained that “Congress, in [section] 7(e), has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require when the Commission exercises authority under section 7.”²⁴² The Court held that, in order to assure that the initial section 7 rates are in the public interest, “the Commission in the exercise of its discretion might attach such conditions as it believes necessary.”²⁴³ The Commission’s authority to evaluate the public convenience and necessity (which encompasses a wide-range of factors, including market need, environmental, and landowner impacts), is as broad as the scope of its authority to condition certificates in such manner as the public convenience and necessity may require. The conditions attached to the Certificate Order limit the companies’ activities where necessary to ensure that the projects are, in fact, consistent with the public convenience and necessity.

94. Moreover, as we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies because large projects, such as this, take considerable time and effort to develop.²⁴⁴ Perhaps more important, their development is subject to many variables whose outcomes cannot be predetermined. And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the necessary information.²⁴⁵

95. We disagree with the Shenandoah Valley Network’s argument that granting conditional certificates violates the Takings Clause of the Fifth Amendment. At the time

²⁴⁰ 15 U.S.C. § 717f(e) (2012) (emphasis added).

²⁴¹ 360 U.S. at 389-94.

²⁴² *Id.* at 391.

²⁴³ *Id.*

²⁴⁴ See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 94; *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225, at P 23 (2003), *aff’d sub nom. Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

²⁴⁵ *Midwestern Gas*, 116 FERC ¶ 61,182 at P 92.

the Commission granted the certificate of public convenience and necessity, there was a public need for the acquisition of the property, and thus a constitutional purpose.

5. Blanket Certificates

96. The Shenandoah Valley Network raises concerns regarding Atlantic's receipt of blanket certificates.²⁴⁶ Specifically, Shenandoah Valley Network states that the Commission's blanket authority: (1) is impermissibly broad and incompatible with the requirements of the NGA;²⁴⁷ (2) violates due process by not allowing for notice and comment on the application;²⁴⁸ (3) permits companies to engage in activities that the applicant has not described in the pipeline application;²⁴⁹ (4) allows companies to use eminent domain authority;²⁵⁰ and (5) minimizes economic and environmental review.²⁵¹

97. We find those arguments amount to an impermissible collateral attack on the blanket certificate program. Moreover, we find that the blanket certificate program is consistent with the NGA. In 1982, the Commission created the blanket certificate program, citing its authority vested in section 7(c) of the NGA.²⁵² The blanket certificate authorization was created because the Commission found that a limited set of activities did not require case-specific scrutiny as they would not result in a significant impacts on rates, services, safety, security, competing natural gas companies or their customers, or on

²⁴⁶ Rehearing Request of Shenandoah Valley Network at 159-170.

²⁴⁷ *Id.* at 160.

²⁴⁸ *Id.* at 163-164.

²⁴⁹ *Id.* at 160-163.

²⁵⁰ *Id.* at 165.

²⁵¹ *Id.* at 163-164.

²⁵² *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 (1985) (cross-referenced at 33 FERC ¶ 61,007). *See also ANR Pipeline Co.*, 50 FERC ¶ 61,140, at 61,427 (1990) ("blanket and individual certificates are issued under section 7 of the Natural Gas Act (NGA) and, as such, are subject to the same statutory requirements. Accordingly, any terms and conditions imposed by the Commission, whether they are imposed on a case-specific basis or through a blanket certificate, must conform to section 7(e) of the NGA which requires that the terms and conditions be 'reasonable' and 'required' by the 'public convenience and necessity.'").

the environment.²⁵³ Blanket authority is issued pursuant to the public convenience and necessity standard.²⁵⁴

98. A blanket certificate authorizes routine activities on a self-implementing basis. A blanket certificate relieves natural gas companies from the requirement of having to obtain a certificate of public convenience and necessity for certain covered activities. The rationale for offering a blanket certificate is that there are certain activities that natural gas pipeline operators must undertake in maintaining and operating facilities for which they have already received a certificate of public convenience and necessity. The blanket certificate increases administrative efficiencies for the Commission and companies subject to its jurisdiction by reducing the filing requirements for those activities. In some instances, these activities are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity.²⁵⁵ For other types of activities, the Commission requires that companies notify the public in advance and provides an opportunity to protest.²⁵⁶

99. Because all the activities permitted under the blanket certificate regulations must satisfy environmental requirements and meet certain cost limits, they have minimal impacts; thus, the close scrutiny involved in considering applications for case-specific certificate authorization is not necessary to ensure compatibility with the public convenience and necessity. Concerns that a company will acquire and construct facilities “well outside the footprint considered and approved by the Commission”²⁵⁷ are misplaced, because the financial and environmental thresholds inherent in the blanket certificate program are intended to preclude the type of work petitioners envision.

²⁵³ *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, at P 8 (2006) (cross-referenced at 117 FERC ¶ 61,074) (explaining that “[t]he blanket certificate program was designed to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding.”).

²⁵⁴ 18 C.F.R. § 157.208 (c)(7) (2017).

²⁵⁵ *Interstate Pipeline Certificates for Routine Transactions*, Order No. 234, FERC Stats. & Regs. ¶ 30,368 (1982) (cross-referenced at 19 FERC ¶ 61,216). These types of blanket certificate project activities are known as Automatic.

²⁵⁶ These types of blanket certificate project activities are known as Prior Notice.

²⁵⁷ Rehearing Request of Shenandoah Valley Network at 82.

100. Shenandoah Valley Network's contentions that blanket certificates permit activities not found in a company's case-specific NGA section 7 certificate application are also misplaced. Shenandoah Valley Network is correct in observing that blanket authority enables a company to undertake activities that go beyond those described in a case-specific application. As noted above, blanket authority is limited to activities that the Commission has found do not result in significant adverse impacts, and thus do not require the same scrutiny as activities subject to case-specific certificate review. Thus, a blanket certificate is intended to serve as adjunct authority to enable a company to make certain relatively minor, cost-constrained modifications to a larger system that has been separately scrutinized and approved under case-specific certificate authorization. To ensure projects with potentially significant impacts are not constructed under blanket authority, companies are prohibited from dividing larger projects into multiple smaller blanket-eligible segments.²⁵⁸

101. Before acting under blanket authority, a company must provide notice to all affected landowners at least 45 days in advance.²⁵⁹ In many cases, landowners must receive notice 60 days in advance, accompanied by an opportunity to protest the proposed project.²⁶⁰ Exceptions to this notification are limited.²⁶¹ In establishing this notice period, the Commission considered the needs of landowners and the nature of permitted projects.²⁶² Additionally, in this instance, Atlantic will also have to document minor future actions performed under the blanket certificate program in either annual reports or as Prior Notice applications,²⁶³ subject to the Commission's environmental review in

²⁵⁸ 18 C.F.R. § 157.208(b) (2017) states a blanket certificate holder "shall not segment projects in order to meet the [blanket program] cost limitation."

²⁵⁹ *Id.* § 157.203(d).

²⁶⁰ *Id.* § 157.205.

²⁶¹ *Id.* § 157.203(d)(3).

²⁶² *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, *order on reh'g*, Order No. 686-A, FERC Stats. & Regs. ¶ 31,249, at P 16, *order on reh'g*, Order No. 686-B, 120 FERC Stats. & Regs. ¶ 31,255 (2007).

²⁶³ Prior Notice applications are those types of blanket certificate program activities which are not deemed automatic and require 60-day notice of publication in the Federal Register, <https://www.ferc.gov/industries/gas/indus-act/blank-cert.asp>.

accordance with section 157.206 of the Commission's regulations.²⁶⁴ For these reasons, blanket certificate process in full compliance with the NGA and consistent with all notice and comment requirements.

102. Receipt of a Part 157 blanket certificate does confer the right of eminent domain authority under section 7(h) of the NGA.²⁶⁵ However, Commission regulations require companies to include information on relevant eminent domain rules in notices to potentially affected landowners.²⁶⁶ The compensation landowners receive for property rights is a matter of negotiation between the gas company and landowner, or is determined by a court in an eminent domain proceeding. In view of the above-noted blanket program procedures and protections, we expect landowners will have the opportunity to raise specific concerns and seek specific relief regarding Atlantic's reliance on blanket authority in undertaking any future activity.

103. Further, we dismiss the argument that the Commission did not properly consider the impact of the case-specific certificate or blanket certificate on nearby property values. The Certificate Order reviewed the submitted anecdotes, public surveys, and opinion polls on property values, and concluded that such examples do not constitute substantial evidence that natural gas projects decrease property values.²⁶⁷ Thus, we find the Commission conducted an appropriate review to identify any appreciable impact on property values due to the ACP Project.

104. We find no merit in the Shenandoah Valley Network's argument that the blanket certificate minimizes economic and environmental review.²⁶⁸ The blanket certificate program is limited to activities that will not have a significant adverse environmental impact. The Commission ensures this by restricting blanket certificate authority to certain

²⁶⁴ 18 C.F.R. § 157.206.

²⁶⁵ See 15 U.S.C. § 717f(h) (2012); also *Columbia Gas Transmission, LLC*, 768 F.3d 300, 314 (3d Cir. 2004) (finding that the plain meaning of the Commission's Part 157 blanket certificate regulations grants the holder of a blanket certificate the right of eminent domain to obtain easements from landowners).

²⁶⁶ 18 C.F.R. § 157.203(d)(2)(v) (2017).

²⁶⁷ Certificate Order, 161 FERC ¶ 61,042 at P 251. See Final EIS at 4-504 ("The responses to these polls were strictly personal opinion and not based on real estate sales data. Also, questionnaires and surveys, while providing a snapshot of public opinion, do not carry with them the rigors of statistically developed and controlled studies").

²⁶⁸ Rehearing Request of Shenandoah Valley Network at 83.

types of facilities and to individual projects that can comply with a cost cap and the environmental requirements specified in the Commission's regulations.²⁶⁹

B. Environmental Issues

1. The Draft EIS Satisfied NEPA Requirements

105. Shenandoah Valley Network argues that the Commission's Draft EIS was missing relevant environmental information and that a substantial amount of information was added to the record after the conclusion of the public comment period, depriving the public of any input and preventing meaningful public participation in the NEPA process.²⁷⁰ In particular, Shenandoah Valley Network argues that the Draft EIS was required to include site-specific construction plans.²⁷¹

106. We disagree. The Draft EIS is a draft of the agency's proposed Final EIS and, as such, its purpose is to elicit suggestions for change.²⁷² A draft is adequate when it allows for "meaningful analysis" and "make[s] every effort to disclose and discuss" "major points of view on the environmental impacts."²⁷³ Shenandoah Valley Network do not demonstrate that the information they list renders the Draft EIS inadequate by these standards. For instance, Shenandoah Valley Network acknowledges²⁷⁴ that at least some of the information submitted after the Draft EIS was addressed in the Final EIS, though it does not identify that information.

²⁶⁹ 18 C.F.R. § 157.206(b) (2017).

²⁷⁰ Rehearing Request of Shenandoah Valley Network at 45-49, 58-61 at 39-40.

²⁷¹ *Id.* at 91.

²⁷² *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1507 (D.C. Cir. 1994).

²⁷³ 40 C.F.R. § 1502.9(a); *see also National Committee for the New River v. FERC*, 373 F.3d 1323, 1328 (D.C. Cir. 2004) (holding that the Commission's Draft EIS was adequate even though it did not have a site-specific crossing plan for a major waterway where the proposed crossing method was identified and thus provided "a springboard for public comment").

²⁷⁴ Request for Rehearing of Shenandoah Valley Network at 53 (discussing the Transco Pipeline Alternative).

107. The inclusion in the Certificate Order of environmental conditions that require Atlantic and DETI to file mitigation plans does not violate NEPA. Indeed, NEPA “does not require a complete plan be actually formulated at the onset, but only that the proper procedures be followed for ensuring that the environmental consequences have been fairly evaluated.”²⁷⁵ Here, Commission staff published a Final EIS that identified baseline conditions for all relevant resources. Later-filed mitigation plans will not present new environmentally-significant information nor pose substantial changes to the proposed action that would otherwise require a supplemental EIS. As we have explained in other cases, practicalities require the issuance of orders before completion of certain reports and studies because large projects, such as this, take considerable time and effort to develop.²⁷⁶ Perhaps more important, their development is subject to many variables whose outcomes cannot be predetermined. And, as we found elsewhere, in some instances, the certificate holder may need to access property in order to acquire the necessary information.²⁷⁷ Accordingly, post-certification studies may properly be used to develop site-specific mitigation measures. It is not unreasonable for the Final EIS to deal with sensitive locations in a general way, leaving specificities of certain resources for later exploration during construction.²⁷⁸ What is important is that the agency make adequate provisions to assure that the certificate holder will undertake and identify appropriate mitigation measures to address impacts that are identified during construction.²⁷⁹ We have and will continue to demonstrate our commitment to assuring adequate mitigation.²⁸⁰

108. Moreover, while the Draft EIS serves as “a springboard for public comment,”²⁸¹ any information that is filed after the comment period is available in the

²⁷⁵ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (*Robertson*).

²⁷⁶ See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048 at P 94; *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 at P 23, *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d at 1323.

²⁷⁷ *Midwestern Gas*, 116 FERC ¶ 61,182, at P 92.

²⁷⁸ *Mojave Pipeline Co.*, 45 FERC ¶ 63,005, at 65,018 (1988).

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ See *Robertson*, 490 U.S. at 349.

Commission's public record, including through its electronic database, eLibrary.²⁸² As noted in the Certificate Order, when Atlantic proposed certain route modifications after the Draft EIS, Commission staff mailed letters soliciting comments from newly affected landowners.²⁸³ Shenandoah Valley Network claims that parties were precluded from commenting on supplemental information,²⁸⁴ but the Commission in fact received numerous written individual letters and electronic filings commenting on the Final EIS or about the projects after the issuance of the Final EIS. The Commission addressed those additional submissions in the Certificate Order.²⁸⁵

109. While Shenandoah Valley Network disagrees with the Commission's Final EIS, both as to its conclusions and its analysis of the environmental impacts, those disagreements do not show that the Commission's decision-making process was uninformed, much less arbitrary and capricious. "If supported by substantial evidence, the Commission's findings of fact are conclusive."²⁸⁶ "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, and requires more than a scintilla but less than a preponderance of evidence."²⁸⁷ When considering the Commission's "evaluation of scientific data within its expertise," the courts afford the Commission "an extreme degree of deference."²⁸⁸ Petitioners have not shown that "omissions in the [draft EIS] left the public unable to make known its

²⁸² The eLibrary system offers interested parties the option of receiving automatic notification of new filings.

²⁸³ Certificate Order, 161 FERC ¶ 61,042 at P 197.

²⁸⁴ Request for Rehearing of Shenandoah Valley Network at 57, 62.

²⁸⁵ *See, e.g.*, Certificate Order, 161 FERC ¶ 61,042 at PP 208, 223, 232, 237-39 (addressing mining; surface water and fisheries; vegetation, forested land, and wildlife.).

²⁸⁶ *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) (quoting *B & J Oil & Gas v. FERC*, 353 F.3d 71, 76 (D.C. Cir. 2004) (citing 15 U.S.C. § 717r(b))).

²⁸⁷ *S. Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 54 (D.C. Cir. 2014) (internal quotation and citation omitted).

²⁸⁸ *Myersville*, 783 F.3d at 1308 (internal quotation marks omitted); *see also Marsh v. Oregon National Resources Council*, 490 U.S. 306, 377 (1989) ("Because analysis of the relevant documents requires a high level of technical expertise, we must defer to the informed discretion of the responsible federal agencies.") (internal quotation marks omitted).

environmental concerns about the project's impact.”²⁸⁹ As more fully discussed below, we find that the Final EIS's conclusions were supported by substantial evidence and affirm the Commission's findings in the Certificate Order.

2. Supplemental EIS

110. Petitioners contend that the Commission must prepare and issue a supplemental EIS because they assert Atlantic supplemented its application 18 times post-Draft EIS issuance, five times post-Final EIS issuance, and three times post-Certificate issuance.²⁹⁰ Petitioners argue that the Commission should have required Atlantic to file all project information prior to issuing its Certificate Order – without doing so, they assert that the Commission did not evaluate all environmental considerations in its decision making process.²⁹¹

111. We dismiss petitioners' claims that we should have prepared a supplemental EIS. Section 1502.9(c) of the Council on Environmental Quality's (CEQ) regulations implementing NEPA requires agencies to prepare supplements to the Draft or Final EIS if “there are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.”²⁹² In determining whether new information is “significant,” courts have provided that agencies should consider whether “the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS.”²⁹³

²⁸⁹ *Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir., July 27, 2018) (rejecting petitioners claim that the Commission's draft environmental impact statement precluded meaningful comment where the applicant had not yet filed an erosion and sediment control plan at the time the draft EIS was published) (citing *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004)).

²⁹⁰ Rehearing Request of Public Interest Groups at 10; Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 11.

²⁹¹ Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 11, 13.

²⁹² 40 C.F.R. § 1502.9(c) (2017).

²⁹³ *Tennessee Gas Pipeline Company, L.L.C.*, 162 FERC ¶ 61,013 (2018) (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984)); *see also City of Olmsted Falls, Ohio v. F.A.A.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (applying the rule from *Wisconsin v. Weinberger*); *Sierra Club v. Froehlke*, 816 F.2d. 205, 210 (5th Cir. 1987) (describing that “significant” requires that “the new circumstance must present a

112. Petitioners state that the Certificate Order relied on significant new evidence that would alter the environmental analysis; however petitioners offer nothing more than a numerical accounting²⁹⁴ or dated list of information filed by Atlantic.²⁹⁵ Petitioners fail to explain why or how the information filed post-Draft EIS issuance presented significant new circumstances that would have altered the analysis in the Final EIS or in the Certificate Order, requiring the preparation of a supplemental EIS. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Further, petitioners are not permitted to incorporate arguments on rehearing by reference and must identify their specific concerns.²⁹⁶ Because petitioners do not list any specific concerns explaining why or how newly filed information altered the determinations in the Final EIS or Certificate Order, we dismiss those allegations.

113. Additionally, Ashram-Yogaville contends that the Commission did not analyze the environmental or visual impacts of the crossing of the Blue Ridge Parkway and the Appalachian National Scenic Trail in the Reeds Gap area if horizontal directional drilling (HDD) is infeasible.²⁹⁷ Thus, the Commission must prepare a supplemental EIS

seriously different picture of the environmental impact of the proposed project from what was previously envisioned”).

²⁹⁴ Rehearing Request of Public Interest Groups at 10.

²⁹⁵ Rehearing Request of Ashram-Yogaville at 7; Rehearing Request of Friends of Nelson at 12.

²⁹⁶ *San Diego Gas and Electric Co. v. Sellers of Market Energy*, 127 FERC ¶ 61,269 at P 295. *See Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 (“[T]he Commission’s regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted.”). *See also ISO New England, Inc.*, 157 FERC ¶ 61,060 (explaining that the identical provision governing requests for rehearing under the Federal Power Act “requires an application for rehearing to ‘set forth specifically the ground or grounds upon which such application is based,’ and the Commission has rejected attempts to incorporate by reference grounds for rehearing from prior pleadings”); *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 (“The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.”) (citations omitted).

²⁹⁷ Rehearing Request of Ashram-Yogaville at 7.

addressing this issue.²⁹⁸ We disagree. The Final EIS explained that Atlantic will only cross the Blue Ridge Parkway and the Appalachian National Scenic Trail in the Reeds Gap area using the direct pipe method if multiple attempts at HDD fail.²⁹⁹ Under its *Initial Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*, Atlantic acknowledged that under the direct pipe option, the length of the pipeline right-of-way that would be visible along portions of Reeds Gap Road would increase. However, the Final EIS concluded that the visual impacts resulting from this option would be the same as the proposed action and access roads, work spaces, and temporary construction areas would be restored as close as possible to pre-construction conditions.³⁰⁰ We agree. As specified in the Certificate Order, Environmental Condition 49 requires Atlantic to file for review and approval, site-specific HDD crossing plans and alternative direct crossing plans for the Blue Ridge Parkway and provide proof of consultation with the Department of the Interior's National Park Service (National Park Service) regarding these plans.³⁰¹ We do not find that any additional information submitted by Atlantic as a result of its potential alternate crossing methods caused the Commission to make substantial changes in the proposed action, nor did it present significant new circumstances or information relevant to environmental concerns.

114. Further, we disagree with Ashram-Yogaville's argument that we rushed to issue the Certificate Order without giving the public an opportunity to review information submitted by Atlantic.³⁰² As discussed in the Certificate Order, staff issued the Draft EIS for a 90-day comment period ending on April 6, 2017.³⁰³ While it is true that "a federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions,"³⁰⁴ the Supreme Court has stated that under the "rule of reason," an agency need not supplement an [EIS] every time new information comes to

²⁹⁸ *Id.*

²⁹⁹ Final EIS at 4-481.

³⁰⁰ *Id.* See Atlantic's October 27, 2017 Supplemental Information at Attachment P (*Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*) (Accession No. 20171027-5240).

³⁰¹ Certificate Order, 161 FERC ¶ 61,042 at Environmental Condition 49.

³⁰² Rehearing Request of Ashram-Yogaville at 7-8.

³⁰³ Certificate Order, 161 FERC ¶ 61,042 at P 197.

³⁰⁴ Rehearing Request of Preserve Craig at 42 (citing *Warm Springs Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980)).

light after the EIS is finalized.”³⁰⁵ The Commission’s approach is fully consistent with *National Committee for New River v. FERC*,³⁰⁶ where the D.C. Circuit held that “if every aspect of the project were to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project.”³⁰⁷

115. Any additional environmental information filed by Atlantic between the issuance of the Draft EIS and the Final EIS did not cause the Commission to make “substantial changes in the proposed action,” nor did it present “significant new circumstances or information relevant to environmental concerns.”³⁰⁸ Further, to the extent the Commission relied on additional environmental information in the Certificate Order, this information was disclosed and available for comment on rehearing. Thus, we find that Ashram-Yogaville had an opportunity to comment on additional environmental information and there was no violation of its due process rights.

3. Project Purpose and Alternatives

116. Petitioners contend that the EIS’s “statement of purpose and need” is impermissibly narrow and as a result, the Commission failed to fully evaluate several alternatives. Petitioners allege that the Commission should have evaluated the broader energy demands being met by the Projects and whether those needs can be met by existing pipelines or with non-transportation alternatives, such as energy conservation or renewable energy resources.³⁰⁹ Petitioners also allege that the Commission failed to fully consider several route alternatives.

117. We disagree. Pursuant to NEPA, the Commission evaluated alternatives to satisfy the project’s purpose and need.³¹⁰ As discussed below, the Final EIS fully analyzed all reasonable alternatives, including the no action alternative, system alternatives, and route alternatives, or properly dismissed those alternatives that would not meet project goals.

³⁰⁵ *Marsh*, 490 U.S. at 373.

³⁰⁶ 373 F.3d 1323 (D.C. Cir. 2004) (*New River*).

³⁰⁷ *Id.* at 1329 (citing *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 at P 25).

³⁰⁸ 40 C.F.R. § 1502.9(c)(1) (2017).

³⁰⁹ Rehearing Request of Ashram-Yogaville at 10; Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Friends of Nelson at 21.

³¹⁰ 40 C.F.R. § 1502.14 (2017).

a. **Project Purpose and Need Statement**

118. Petitioners contend that the Final EIS narrowly constructed the “Purpose and Need” statement in order to exclude reasonable alternatives.³¹¹ Shenandoah Valley Network faults the Final EIS for relying on Atlantic’s stated project purpose, which, it alleges, does not reflect genuine market demand. Citing *Hughes River Watershed Conservancy v. Glickman*, Shenandoah Valley Network argues that the purpose and need statement is based on misleading economic benefits significant to the evaluation of alternatives.³¹² We disagree.

119. In *Hughes River Watershed Conservancy v. Glickman*, the court found that the EIS at issue failed to properly assess project impacts by mistakenly including gross economic benefit values associated with recreation at a proposed dam rather than net values, resulting in a much higher projected economic benefit.³¹³ Shenandoah Valley Network argues that the Final EIS here is analogous because, it believes, the amount of natural gas transportation service needed is less than that requested in precedent agreements.

120. But as discussed, the precedent agreements are significant evidence of demand. The Certificate Order also explained that the genesis for the project was a response to a solicitation by Duke Energy Corporation and Piedmont for competitive firm transportation to North Carolina to serve its growing need for natural gas.³¹⁴ Thus, the Final EIS reasonably relied on this demand and the applicants’ stated goals, explaining that the ACP Project would provide 1.5 million Dth per day of natural gas to six public utilities and local distribution companies in Virginia and North Carolina, while the upstream Supply Header Project would connect Atlantic’s customers to the Dominion South Point supply hub to access several natural gas supply pipelines.³¹⁵ The Commission’s purpose is

³¹¹ Rehearing Request of Ashram-Yogaville at 8-9.

³¹² Rehearing Request of Shenandoah Valley Network at 50 (citing *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 447 (4th Cir. 1996)).

³¹³ *Hughes River Watershed Conservancy*, 81 F.3d at 447.

³¹⁴ Certificate Order, 161 FERC ¶ 61,042 at P 50. Additionally, Virginia Power Services Energy Corporation also requested proposals for firm transportation to serve natural gas-fired generation in Virginia. *Id.*

³¹⁵ Final EIS at 1-3 to 1-5. *See Sierra Club, Inc. v. U.S. Forest Serv.*, No. 17-2399, 2018 WL 3595760, at *10 (4th Cir. July 27, 2018) (“[T]he statement [of purpose and need] allows for a wide range of alternatives but is narrow enough (i.e., it explains where

“*whether* to adopt an applicant’s proposal and, if so, to what degree,”³¹⁶ not to engage in resource planning for energy end-users.

121. Petitioners also allege that “a major driver” of the project is gas export.³¹⁷ Petitioners fail to provide any support for their contention aside from noting that a gas export facility is located in Georgia.³¹⁸ As discussed, there is no evidence in the record to suggest that the natural gas to be transported by the project is actually intended for export.³¹⁹ Based on the information in the project’s precedent agreements and statements by Atlantic, the ACP Project would provide natural gas domestically to generate electricity and for residential, industrial, and commercial uses.³²⁰

b. Alternatives Analysis in the Final EIS

122. Friends of Wintergreen contend that NEPA requires the Commission to take an independent look at alternative routes in the record, rather than relying on staff’s conclusions in the Final EIS. Friends of Wintergreen cites *Association of Public Agency Customers, Inc. v. Bonneville*³²¹ as support, but that case simply states that NEPA requires that agencies study appropriate alternatives whenever there are unresolved conflicts as to

the gas must come from, where it will go, how much it would deliver) that there are not an infinite number of alternatives.”).

³¹⁶ *Theodore Roosevelt Conservation P’ship*, 661 F.3d at 73.

³¹⁷ Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Ashram-Yogaville at 10; Rehearing Request of Friends of Nelson at 22. *See* Rehearing Request of William Limpert at 2-3.

³¹⁸ Rehearing Request of William Limpert at 2.

³¹⁹ *See supra* at P 58.

³²⁰ Atlantic anticipates approximately 79.2 percent of the natural gas transported by ACP would be used as a fuel to generate electricity for industrial, commercial, and residential uses. Lesser amounts of the natural gas would also be used directly for residential (9.1 percent), industrial (8.9 percent), and commercial and other uses (e.g. vehicle fuel) (2.8 percent). Final EIS at 1-3.

³²¹ *Association of Public Agency Customers, Inc. v. Bonneville*, 126 F.3d 1158, 1174 (9th Cir. 1997).

the proper use of resources, even if the proposed action does not require an EIS.³²² The Commission complied with this requirement by appropriately relying on the staff prepared EIS, which analyzed a wide range of alternatives. No additional analysis was necessary.

c. No Action and System Alternatives

i. No Action and Renewable Energy Alternatives

123. Petitioners next claim that the Commission improperly rejected the no-action alternative based on Atlantic's claims of public benefit and, based on these claims, the Final EIS improperly excluded renewable energy and energy efficiency.³²³ Courts review both an agency's stated project purpose and its selection of alternatives under the "rule of reason," where an agency must reasonably define its goals for the proposed action, and an alternative is reasonable if it can feasibly achieve those goals.³²⁴ When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal, adopting the proposal, or adopting the proposal with some modification.³²⁵ An agency may eliminate those alternatives that will not achieve a project's goals or which cannot be carried out because they are too speculative, infeasible, or impractical.³²⁶

³²² Rehearing Request of Friends of Wintergreen at 13 (citing *Association of Public Agency Customers, Inc. v. Bonneville*, 126 F.3d 1158, 1174 (9th Cir. 1997)).

³²³ Rehearing Request of Ashram-Yogaville at 9; Rehearing Request of Friends of Buckingham at 9; Rehearing Request of William Limpert at 2-3; Rehearing Request of Friends of Nelson at 20, 37.

³²⁴ See, e.g., *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.). See also *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2016) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

³²⁵ See *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72-74.

³²⁶ *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or ... impractical or ineffective.") (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir. 1992) (internal quotation marks omitted)); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d

124. The Final EIS explained that it excluded renewable energy and energy efficiency alternatives because renewable energy and energy efficiency measures do not transport natural gas. Because these energy technologies would not feasibly achieve the projects' aims, they were not considered or evaluated further.³²⁷ Petitioners contend this approach is impermissibly restrictive,³²⁸ but for purposes of NEPA, an agency may take into account an applicant's needs and goals when assessing alternatives, so long as it does not limit the alternatives to only those that would adopt the applicant's proposal.³²⁹

125. Several petitioners also cite the EIS for the Constitution Pipeline Project³³⁰ as an example where the Commission did consider these alternatives.³³¹ There is no indication that the Commission was required to consider such alternatives in that proceeding but they were ultimately dismissed for the reasons stated here. The Constitution EIS concluded that gains in energy efficiency would only occur on a much longer time-line than the shippers' contracted service and would not be expected to eliminate the increasing demand for energy or natural gas in New England.³³² The Constitution EIS also concluded that renewable resources would not meet overall anticipated consumer needs and would not be completely interchangeable with natural gas because the process to electrify the combustion-based uses of natural gas for heating, cooking, and transportation would require that consumers make a costly transition to new electric equipment and

827, 837-38 (D.C. Cir. 1972) (same). *See also Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives).

³²⁷ Final EIS at ES-15.

³²⁸ Rehearing Request of Ashram-Yogaville at 9; Rehearing Request of Friends of Buckingham at 9; Rehearing Request of William Limpert at 3; Rehearing Request of Friends of Nelson at 20.

³²⁹ *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73-74.

³³⁰ Final EIS for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000, CP13-502-000 (Oct. 2014) (Constitution EIS).

³³¹ Rehearing Request of Ashram-Yogaville; Rehearing Request of Friends of Buckingham at 10; Rehearing Request of Friends of Nelson at 21.

³³² Constitution EIS at 3-4 to 3-5.

would require major investment in electric transmission lines to move renewable electricity to consumers.³³³

ii. **Other Pipeline System Alternatives**

126. Petitioners next argue that the Commission erred by dismissing the use of other pipelines to serve as alternatives to ACP.³³⁴ Petitioners allege that the Commission ignored testimony by Thomas Hadwin and the 2016 Synapse Report, both of which allege that existing pipeline infrastructure, with minor modifications, could supply ACP's intended markets.³³⁵ According to Shenandoah Valley Network, the Commission recently approved the nearby Transco pipeline to bring 1.7 billion cubic feet (Bcf) per day of Marcellus gas to the Southeast on behalf of gas marketers, all of which are looking for customers.³³⁶

127. As discussed in the Certificate Order, the Final EIS analyzed the availability of capacity on other pipelines to serve as alternatives to the ACP Project, and concluded that they do not presently serve as practical alternatives to the project.³³⁷ Shenandoah Valley Network alleges the Final EIS ignores the Commission's recent approval of the Transco system to bring gas south. But the Final EIS explained that Transco does not have sufficient capacity to serve the project's customers.³³⁸ Besides new compression, Transco would need to add 640 to 680 miles of new pipeline, including looping to increase capacity and multiple laterals to accommodate Dominion's and Atlantic's proposed receipt and delivery points.³³⁹ The Final EIS concluded that the use of Transco's system would have similar impacts as the ACP and Supply Header Projects, and therefore, would not be environmentally preferable.

³³³ *Id.* at 3-7 to 3-13.

³³⁴ Rehearing Request of Shenandoah Valley Network at 8; Rehearing Request of William Limpert at 3; Rehearing Request of Friends of Wintergreen at 28-33.

³³⁵ Rehearing Request of William Limpert at 3; Rehearing Request of Shenandoah Valley Network at 53.

³³⁶ Shenandoah Valley Network Rehearing Request at 53.

³³⁷ Final EIS at 5-38.

³³⁸ *Id.* at 3-4 to 3-5.

³³⁹ *Id.*

128. Shenandoah Valley Network argues that the Commission should have nonetheless considered a different configuration to use the Transco System, the Columbia System, or both. It argues that the Final EIS failed to support its claim that 300 miles of new pipeline would be necessary to connect Transco's system to supply areas.³⁴⁰ Shenandoah Valley Network also argues that the Final EIS failed consider that the Transco's System is already connected to several of Atlantic's delivery points in southeastern Virginia.³⁴¹ The Final EIS should have also considered those connections and whether existing laterals could connect Transco to Atlantic's proposed delivery points in North Carolina. More broadly, Shenandoah Valley Network argues that the Final EIS should have examined whether combinations of existing interstate and intrastate pipeline infrastructure could connect the Transco system to the Dominion supply hub or otherwise meet customers' needs.³⁴²

129. The Final EIS also considered other pipeline infrastructure. As explained in the Final EIS, the Final EIS considered transportation on existing Columbia, Transco, and East Tennessee Systems and on new pipeline projects—Mountain Valley Pipeline and Columbia's WB XPress Project—but found that these alternatives do not have available capacity and are not environmentally preferable due to necessary modifications.³⁴³ As for other configurations that could potentially connect Dominion to Transco, Columbia, or any other pipeline system, none would be able to meet project purposes given capacity constraints on these systems.³⁴⁴ Like Transco's system, the Columbia system does not have enough capacity to serve the project's customers.³⁴⁵ The Final EIS explained that 400 miles of new pipeline loop as well as a new pipeline segment in North Carolina, similar to the North Carolina section of the ACP mainline, would be required to reach delivery points.³⁴⁶

³⁴⁰ Shenandoah Valley Rehearing Request at 54.

³⁴¹ *Id.* at 55.

³⁴² *Id.* at 54.

³⁴³ Final EIS at 3-4 to 3-6.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 3-5.

³⁴⁶ *Id.*

130. Shenandoah Valley Network argues that the Final EIS should have addressed partial alternatives using existing infrastructure that may meet demand,³⁴⁷ but an agency is not obligated “to consider in detail each and every conceivable variation of the alternatives stated,”³⁴⁸ particularly once it is determined that a key component of that alternative—capacity on interstate systems—renders such an alternative infeasible. Such an alternative would not meet the Project’s goals and is simply too speculative when petitioners fail to point with any specificity to any available intrastate systems.

iii. **Mountain Valley Co-Location and Merged Systems Alternatives**

131. Petitioners next allege that the Final EIS erred when it rejected the merged systems and the co-location alternatives for the ACP Project and Mountain Valley Project and Equitrans Expansion Project³⁴⁹ without assessing the need for either project. According to Shenandoah Valley Network, if the Final EIS had properly examined the need for either project, it could have assessed whether smaller-scale adjustments would allow a pipeline using the Atlantic corridor to meet the actual market demand for both projects.³⁵⁰ Friends of Wintergreen also allege that the Commission did not support the analysis of the merged systems alternative with substantial evidence.³⁵¹

132. The Final EIS properly considered the volumes to be transported by both the Mountain Valley Project and ACP Project at approximately 3.44 billion cubic feet per day. As discussed above and in the Mountain Valley Project proceeding, the Final EIS reasonably relied on this demand and the applicants’ stated goals when assessing the co-location and merged system alternatives.³⁵²

³⁴⁷ Shenandoah Valley Network Rehearing Request at 55.

³⁴⁸ *Brooks v. Coleman*, 518 F.2d 17, 19 (9th Cir. 1975).

³⁴⁹ At the time of the Final EIS, the Mountain Valley Project was proposed in Docket Nos. CP16-10-000 and CP16-13-000. See *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2018); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197.

³⁵⁰ Rehearing Request of Shenandoah Valley Network at 55.

³⁵¹ Rehearing Request of Friends of Wintergreen at 28-33.

³⁵² See *supra* at P 120; *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 134.

133. The Commission need not analyze “the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.”³⁵³ With respect to the collocation alternative, as described in the Final EIS and Certificate Order, there is insufficient space along the narrow ridgelines to accommodate two parallel 42-inch-diameter pipelines.³⁵⁴ As a result, this alternative is technically infeasible and would not offer a significant advantage.

134. The Final EIS also determined that merging ACP Pipeline and the Mountain Valley Pipeline into one pipeline system was infeasible.³⁵⁵ If a 42-inch diameter pipeline were used to transport the volumes to be supplied by both projects, the pipeline would require a higher operating pressure. Because this higher operating pressure would negatively impact shippers by reducing operational flexibility and future expansibility, the Final EIS determined that this alternative was not preferable.³⁵⁶ As explained in the Final EIS, higher pressures would create operational constraints that would restrict Atlantic’s ability to provide flexibility for customers’ needed flow rate variations and line pack, and could foreclose contractually required possible future expansions.³⁵⁷

135. If thicker-walled pipe or higher grade steel modifications were used to maintain necessary pipeline pressure with a 42-inch diameter pipeline, the associated weight increases would render the alternative infeasible.³⁵⁸ This additional weight would: require larger construction equipment; reduce the elasticity of the pipeline; increase the complexity of the welding; and possibly increase the construction period and damage to

³⁵³ *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (quoting *All Indian Pueblo Council v. United States*, 975 F.2d 1437, 1444 (10th Cir.1992) (internal quotation marks omitted)); *Nat’l Wildlife Fed’n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (same).

³⁵⁴ Final EIS at 3-10 to 3-11; Certificate Order, 161 FERC ¶ 61,042 at P 316.

³⁵⁵ Final EIS at 3-8.

³⁵⁶ *Id.*

³⁵⁷ *Id.* ACP Foundation Shippers have a one-time right to request an increase in contracted capacity. *Id.*; see also Certificate Order, 161 FERC ¶ 61,042 at PP 124 – 127 (approving expansion rights as non-conforming tariff provisions).

³⁵⁸ Final EIS at 3-9.

public roads.³⁵⁹ The construction of larger diameter, non-typical 48-inch diameter pipeline would face similar construction challenges due to its heavy weight. Specifically, this scenario would increase the complexity of the welding, increase construction workspaces, and increase construction complexity in steep terrain.³⁶⁰ Such construction would also require a wider construction right-of-way by increasing the trench area, and therefore spoil, by about 30 percent.³⁶¹

136. The Final EIS also found that the merged system alternatives would also result in additional compression, and therefore air emissions and noise, compared to the Mountain Valley Pipeline Project and ACP Project combined.³⁶² Although the merged system alternatives would result in some environmental advantages,³⁶³ the Final EIS did not find that the merged system alternatives hold a significant advantage over the proposed action when these alternatives' environmental factors, technical feasibility, and ability to meet the ACP Project's operational needs and timelines are considered together.³⁶⁴ A more detailed analysis was not required under NEPA once the Commission determined that the one pipeline merged system alternative was not feasible.³⁶⁵

137. Friends of Wintergreen argue these findings are unsupported by the record. First, Friends of Wintergreen argue that the Commission has failed to support the claim that the merged systems alternative would require additional time for planning and design, and therefore, would fail to meet project timeframes.³⁶⁶ As discussed above, the Commission staff's analysis identified several concerns with this alternative, but the Final EIS noted

³⁵⁹ *Id.*; *see also* ACP Resource Report 10 – Alternatives, 10-40.

³⁶⁰ Final EIS at 3-9.

³⁶¹ *Id.* at 3-10 (installation of 48-inch pipeline would require 30 feet or more of additional construction right-of-way over entire length of the pipeline route and would displace about 30 percent more soil).

³⁶² *Id.*

³⁶³ *Id.* We note that since no entity has proposed or engineered this hypothetical alternative, the assessments of potential benefits and impacts is necessarily limited, and based on best available information.

³⁶⁴ *Id.*

³⁶⁵ *See supra* n.353.

³⁶⁶ Friends of Wintergreen Rehearing Request at 29.

that the new alternative would add significant time to the project. Atlantic had originally requested that the Commission authorize the project so that it could begin service by November 1, 2018.³⁶⁷

138. Friends of Wintergreen also argue that the Commission offered no support for its statement in the Certificate Order that the 42-inch-diameter pipeline merged system alternative (Merged System 42-Inch Alternative) would “triple” air quality impacts.³⁶⁸ Friends of Wintergreen points out that the Final EIS only states that compression, and resulting air quality impacts, would increase under this alternative, and Atlantic’s application states that compression would increase between 133 percent and 44 percent.³⁶⁹ The Certificate Order’s claim that the Merged System 42-Inch Alternative would triple air quality impacts was in error. The Certificate Order statement was taken from the Mountain Valley Pipeline Project Final EIS, but that proceeding examined the merged system alternative along the ACP route.³⁷⁰ As discussed above, the Final EIS dismissed the Merged System 42-Inch Alternative based on several factors.

139. Friends of Wintergreen argue that the Final EIS should not have considered future expansibility as a project need when future expansions were not part of the certificated ACP Project.³⁷¹ Friends of Wintergreen argue that this approach violates the requirement, cited in *Citizens Against Burlington, Inc. v. Busey*, that “an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency’s power would accomplish the goals of the agency’s action, and the EIS would become a foreordained formality.”³⁷² The Commission did not so narrowly draw the purpose and need statement that the only project that would meet the purpose and need statement is the project proposed by

³⁶⁷ Atlantic Application at 3 (Sept. 18, 2015).

³⁶⁸ Rehearing Request of Friends of Wintergreen at 29-30.

³⁶⁹ *Id.* (citing Final EIS at 3-9, ACP Resource Report 10 at 10-24 to 10-26).

³⁷⁰ Commission staff’s updated analysis in that proceeding indicated that a merged system along the ACP route would result in additional compression requirements that increase air pollutants by 130 to 520 percent compared to the Mountain Valley Pipeline and ACP Projects considered individually. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 148.

³⁷¹ Rehearing Request of Friends of Wintergreen at 32.

³⁷² *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

Atlantic.³⁷³ *Citizens Against Burlington, Inc. v. Busey* acknowledges that the NEPA permits agencies to take the project proponent's needs into account, which the Commission did here by ensuring that any pipeline alternative be designed to allow for future expansions.³⁷⁴ Regardless, we note that the increased pressure requirements were needed not only to ensure future expandability but for operational requirements as well.³⁷⁵

140. The dissent argues the Commission should have given more consideration to the merged systems alternative given associated environmental benefits, including fewer crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway. The dissent contends that analyzing such an alternative in depth would have been appropriate given that, in *Sierra Club v. U.S. Dept. of the Interior*, the Fourth Circuit Court of Appeals (Fourth Circuit) vacated the National Park Service's (NPS) right-of-way permit allowing the ACP Project to cross under the Blue Ridge Parkway.³⁷⁶ The dissent points out that the Court questioned whether it is possible for the ACP Project to be consistent with parkway purposes,³⁷⁷ and the decision leaves unaddressed the threshold question of whether NPS has authority to grant a pipeline right-of-way at all.³⁷⁸

141. We disagree. As discussed, the Final EIS eliminated the merged systems alternative because it would not meet the project's purpose and need. With respect to the Blue Ridge Parkway crossing, the ACP Project avoids any direct impacts to the Parkway by tunneling under the Parkway using a 4,639-foot-long HDD crossing and, if HDD is unsuccessful, the project will tunnel under the parkway using a shorter trenchless crossing method.³⁷⁹ Under either scenario, after crossing the Parkway, Atlantic would cross private property using an open-cut method. This method requires that Atlantic clear a 125-foot-

³⁷³ Rehearing Request of Friends of Wintergreen at 32

³⁷⁴ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (“When an agency is asked to sanction a specific plan, see 40 C.F.R. § 1508.18(b)(4), the agency should take into account the needs and goals of the parties involved in the application”).

³⁷⁵ Final EIS at 3-8.

³⁷⁶ *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

³⁷⁷ *Id.* at *58.

³⁷⁸ *Id.* at *55.

³⁷⁹ See Final EIS at 3-21 to 3-23.

wide right-of-way during construction, which would narrow to a 50-foot-wide permanent right-of-way.³⁸⁰ Atlantic, in consultation with NPS, prepared a visual impact assessment to examine the project's impacts on the Parkway. The assessment conducted a full simulation of the view from a scenic overlook known as the Three Ridges Overlook and indicated that the cleared right-of-way on Piney Mountain private land, approximately 1 mile outside the Parkway, would be visible.³⁸¹

142. As the Fourth Circuit noted, the visual impact assessment concluded that “[v]iews of the ACP corridor from the Three Ridges overlook . . . would likely be inconsistent with NPS management objectives. . . .”³⁸² The Final EIS included this finding,³⁸³ but mistakenly omitted the assessment's next sentence, which states “[t]o mitigate this effect, Atlantic has committed to planting shrubs and other low vegetation in the right-of-way, to reduce visual contrast”³⁸⁴ This mitigation is required by the Certificate Order³⁸⁵ and all

³⁸⁰ *Id.* at 2-15; 5-24.

³⁸¹ *Id.* at Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 38-42.

³⁸² *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 at * 36 (citing J.A. 1020), *58 (citing J.A. 1020); Final EIS at 4-479, Appendix T, 111.

³⁸³ Final EIS at 4-479.

³⁸⁴ *Id.* at Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 111. *See also id.* at 110 (“With no mitigation, the ACP corridor at KOP 39 would likely be inconsistent with NPS management objectives for visual resources. Atlantic would plant additional shrubs along the right-of-way, as shown in Figure 3-14. These plantings would help to reduce the contrast between the right-of-way and surrounding areas, and would reduce the inconsistency with NPS management objectives.”).

³⁸⁵ Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 1 (“Atlantic . . . shall follow the construction procedures and mitigation measures described in their applications and supplements (including responses to staff data requests) and as identified in the EIS. . . .”); Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 110 (“Atlantic would plant additional shrubs along the right-of-way, as shown in Figure 3-14”); *Updated Restoration and Rehabilitation Plan* at 31 (March 5, 2018) (accession no. 20180305-5034) (“To reduce the AP-1 mainline visual impacts at Piney Mountain between approximately Mileposts 158.9 and 159.4, associated with clearing the rights-of-way and as seen from the west side, particularly from the Three

restoration will be subject to on-site environmental inspectors and multi-year reporting to the Commission.³⁸⁶ With required mitigation and restoration, we agree with the Final EIS that the permanent right-of-way would not significantly impact scenic resources.³⁸⁷ Accordingly, we do not find that the Blue Ridge Parkway crossing alters our conclusions that the merged systems alternative is infeasible and not environmentally preferable.³⁸⁸

d. Route Alternatives

143. The Final EIS considered 26 major route alternatives, 3 route variations along the ACP Project route, and 1 route variation along the Supply Header Project route. In almost all cases, the alternative routes were found to not provide a significant environmental advantage over the proposed route segments and were not recommended. Nonetheless, several petitioners challenge this determination and contend that the Commission violated NEPA by failing to properly consider their preferred alternative.

Ridges Overlook along the Blue Ridge Parkway, Atlantic will replant the temporary construction rights-of-way and ATWS with a combination of shrub and tree species. The 15 feet of the temporary construction areas nearest to the pipeline will be replanted with shrubs and shallow rooted small trees. The remaining areas of the temporary construction rights-of-way will be replanted with trees. The permanent rights-of-way will be seeded with herbaceous vegetation.”).

³⁸⁶ FERC, *Upland Erosion Control, Revegetation and Maintenance Plan* at 2, 3, 17-18, <https://www.ferc.gov/industries/gas/enviro/plan.pdf>; *Updated Restoration and Rehabilitation Plan* (accession no. 20180305-5034).

³⁸⁷ See Final EIS at 5-26; Appendix T, *Visual Impact Assessment for Pipeline Segments in Monongahela and George Washington National Forests, and National Park Service Lands*, 28 (“USFS. As shown in the simulation images, the bottom (closer) portion of the corridor is partially obscured by trees during leaf-off conditions. During leaf-on conditions, this portion of the corridor would likely not be visible at all, although the upper portion of the corridor would remain visible as a vegetated (but not forested) strip. The width of the corridor would become narrower, and the contrast with surrounding areas less prominent, as trees and other vegetation reclaim the temporary right-of-way over time”).

³⁸⁸ On August 10, 2018, the Director of the Commission’s Office of Energy Projects issued a letter ordering Atlantic and DETI to cease work on the project pending further inquiry in light of the recent court decision.

i. Alternatives Affecting National Forest Land

144. Petitioners allege that the Commission did not justify its decision to approve the preferred alternative, route GWNF-6, instead of Atlantic's originally proposed route, particularly when the Final EIS stated that the preferred alternative had more environmental impacts.³⁸⁹

145. In the Final EIS, Commission staff rejected the original route because it was not feasible.³⁹⁰ The U.S. Department of Agriculture's Forest Service (Forest Service) determined that the original route was not consistent with the Land and Resource Management Plans for the Monongahela National Forest and the George Washington National Forest.³⁹¹ According to the Forest Service, the original route would negatively impact wildlife, specifically the endangered Cheat Mountain and Cow Knob Salamanders and their habitats, the West Virginia Northern Flying squirrel and its habitat, and spruce ecosystem restoration areas.³⁹² As explained in the Final EIS, because the Forest Service indicated that it would not approve the alternative, it was no longer feasible and was not analyzed in greater detail.³⁹³

146. Friends of Nelson argues that the Commission was obliged to consider an alternative that completely avoids Forest Service land, noting that the Forest Service can only approve a right-of-way when "[t]he proposed use cannot reasonably be

³⁸⁹ Rehearing Request by William Limpert at 3.

³⁹⁰ Final EIS at 3-21.

³⁹¹ *Id.* (citing January 19, 2016 Letter from Kathleen Atkinson, Regional Forester Eastern Region, and Tony Tooke, Regional Forester Southern Region, to Ms. Leslie Hartz, Atlantic Coast Pipeline, LLC (filed Jan. 20, 2016) (citing 36 C.F.R. § 251.54(e)(1)(i)-(ii))).

³⁹² January 19, 2016 Letter from Kathleen Atkinson, Regional Forester Eastern Region, and Tony Tooke, Regional Forester Southern Region, to Ms. Leslie Hartz, Atlantic Coast Pipeline, LLC (filed Jan. 20, 2016). Atlantic subsequently developed and adopted a 90-mile route change to avoid impacting these resources. *See* Final EIS at ES-15.

³⁹³ Final EIS at 3-21.

accommodated on non-National Forest System land. . . .³⁹⁴ Friends of Nelson notes that instead of fully analyzing alternatives that met this standard, the Final EIS eliminated alternatives that avoided use of National Forest land only because such routes would be longer.³⁹⁵ The Final EIS eliminated routes that would completely avoid National Forest land, including the Blue Ridge Parkway, because such routes would not be environmentally preferable.³⁹⁶ Routing the ACP Project to the south of the Monongahela National Forest and George Washington National Forest would increase the route by 43 miles.³⁹⁷ In general, shorter pipeline routes have fewer environmental impacts than, and are environmentally preferable to, longer routes.³⁹⁸ The Final EIS explained that no information suggested that the shorter pipeline route through the National Forests would have sufficiently greater impacts on sensitive resources that would justify approval of the longer southern route.³⁹⁹ Similarly, the route to the north of the National Forests would affect 15 additional miles through similar forest habitats, waterbodies, and mountainous terrain.⁴⁰⁰ To the extent Friends of Nelson has concerns with the Forest Service's authority to grant Atlantic a special use permit, Friends of Nelson must seek recourse with the Forest Service, not the Commission.

ii. Nelson County Creekside Alternative

147. Mr. Demian K. Jackson jointly with Ms. Bridget K. Hamre, landowners of Nelson County Creekside, contend Atlantic gave insufficient consideration to an alternative route they deem preferable and request the Commission adopt their alternative. Both contend

³⁹⁴ Rehearing Request of Friends of Nelson at 19. Friends of Nelson cites 36 C.F.R. § 251.54(b) but this standard is found in the Forest Service Manual. Forest Service Manual 2703.2(2)(b), <https://www.fs.fed.us/dirindexhome/dughtml/fsm.html>

³⁹⁵ Rehearing Request of Friends of Nelson at 19.

³⁹⁶ Final EIS at 3-18 to 3-21.

³⁹⁷ *Id.* at 3-19.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

that the Commission failed to consider a route alternative that would avoid bisecting their property.⁴⁰¹

148. After publication of the Draft EIS and prior to the issuance of the Final EIS, Atlantic filed a minor route modification on January 19, 2017, adopting a series of minor route adjustments and modifications into its proposed route.⁴⁰² One of these variations crossed the Jackson property at approximate mileposts 170.1 to 171.6, and was developed specifically to avoid structures, septic fields, wells, and springs on the property. The Final EIS notes that this modification had been incorporated into the overall design of the project subsequent to the Draft EIS's issuance.⁴⁰³

149. This modification addresses the concerns expressed by the petitioners by increasing the distance between the route and their residence, springs, and grassed lawn. Commission staff has determined that attempting to exactly match the landowners' request would induce excessively sharp bends in the pipeline that may result in changes to gas hydraulics and impact one new additional landowner. Further, the alternative, as requested, would increase the overall length of the pipeline, nearly all of which would be forested and required the route to parallel a waterbody on the property. Finally, the landowners' preferred alternative would place the route closer to their neighbor's property, including a residence, on the north side of Route 623. On balance, we find the requested alternative would not offer significant environmental advantages.

iii. Wintergreen Resort Alternatives

150. On rehearing, Friends of Wintergreen renew their arguments that the Commission should have accepted their proposed alternatives which would have avoided impacts to the Wintergreen Resort. Atlantic plans to conduct approximately 5,000 feet of hydraulic directional drilling (HDD) to bore under, and avoid impacts to, the Blue Ridge Parkway and Appalachian National Scenic Trail. This HDD route would also cross under the main road providing access to Wintergreen Resort—Beech Grove Road/State Highway 664—with an HDD entry/exit workspace located directly across from the resort's entrance.⁴⁰⁴ Friends of Wintergreen contend that the Commission improperly rejected their South of Highway 664 and Lyndhurst to Farmville Alternatives, and improperly attributed a

⁴⁰¹ Rehearing Request of Demian Jackson at 6-7.

⁴⁰² Atlantic's January 19, 2017 Supplemental Filing (Accession No. 20170119-5180).

⁴⁰³ Final EIS at 3-53.

⁴⁰⁴ See Final EIS at 3-35.

separate alternative, Alternative 28, to Friends of Wintergreen.⁴⁰⁵ As discussed in more detail below, the Final EIS properly dismissed these alternatives.

(a) **South of Highway 664 Alternative**

151. Friends of Wintergreen argue that the Final EIS improperly rejected their proposed South of Highway 664 alternative, which would reroute a portion of the ACP Project to avoid the entrance to Wintergreen Resort.⁴⁰⁶ They claim the Final EIS erred in concluding that the South of Highway 664 Alternative would not reduce the amount of side slope and steep terrain construction when Friends of Wintergreen's expert study shows that the ACP Project's proposed route over Piney Mountain is much steeper than the South of Highway 664 Alternative.⁴⁰⁷ Friends of Wintergreen points out that submitted testimony and soil samples show that soil failure is likely along the ACP Project route and the nearby HDD exit location.⁴⁰⁸ Friends of Wintergreen also argue that the Final EIS's conclusion that the proposed route and the South of Highway 664 route's visual impacts are similar is wrong when the proposed route would impact more local communities and trails. Finally, Friends of Wintergreen argues that the alternative route is superior because the proposed route is directly across from Wintergreen Resort's sole entrance and exit, and therefore poses a safety concern. Friends of Wintergreen contend that their comments were not seriously considered during the NEPA process, pointing out that the analysis of the South of Highway 664 alternative did not change between the Draft EIS and Final EIS.⁴⁰⁹

152. The Final EIS analyzed the South of Highway 664 alternative and did not recommend it because it would not offer a significant environmental advantage over the proposed route. With regard to safety, the Final EIS found that the alternative would increase the distance of the HDD workspace from the Wintergreen gate by 1,400 feet. The Final EIS determined that this would not grant a significant safety advantage because the project would be constructed and operated in accordance with federal regulations and

⁴⁰⁵ Rehearing Request of Friends of Wintergreen at 21-27.

⁴⁰⁶ *Id.* at 21.

⁴⁰⁷ *Id.* at 22.

⁴⁰⁸ *Id.* at 23 (citing a report by Dr. Melvin J. Bartholomew and soil study by Blackburn Associates, discussed in the March 24, 2017 Draft EIS Comments by Friends of Wintergreen, Accession No. 20170324-5252).

⁴⁰⁹ *Id.* at 21.

federal oversight.⁴¹⁰ Atlantic is also required to follow its *Operational Emergency Response Plans* in coordination with local emergency response providers.⁴¹¹ The *Operational Emergency Response Plans* would address incident evacuation requirements. Furthermore, Atlantic must coordinate with landowners and local emergency response services to implement the *Local Emergency Response Providers Emergency Response Plan* in the event of an emergency.⁴¹²

153. As for the remainder of Friends of Wintergreen's alleged benefits, as explained in the Final EIS, the alternative would merely transfer construction constraints and visual impacts from one location to another while adding 0.9 mile to the project route. The South of Highway 664 Route would reduce visual impacts on Wintergreen residences and guests, but similar visual impacts would occur along the side slopes and ridgelines of the Three Ridges and Horseshoe Mountains crossed by the South of Highway 664 Route as would occur along the proposed route's crossing of Piney and Bryant Mountains.⁴¹³ The South of Highway 664 right-of-way would be in the proximity of the viewshed of motorists traversing Highway 664 in the approximate 4-mile stretch approaching Wintergreen Resort. This would expose additional passing receptors (motorists and tourists) along this motorway, which the Final EIS noted is a state-designated scenic byway as part of the Nelson Scenic Route, to permanent visual impacts.⁴¹⁴

154. The Final EIS also explained that this alternative would not reduce the amount of side slope and steep terrain construction, based on aerial and topographic data. Friends of Wintergreen argues that this data is not in the record, but the Commission's regulations specifically require,⁴¹⁵ and Atlantic provided, U.S. Geological Survey 7.5-minute-series

⁴¹⁰ See Final EIS at 3-35. The Final EIS also explained that interstate pipeline operations present low safety risks, noting that from 1997 to 2016, there were an average of 66 significant incidents and 2 fatalities per year. The number of significant incidents distributed over the more than 315,000 miles of natural gas transmission pipelines indicates the risk is low for an incident at any given location. *Id.* at 4-587.

⁴¹¹ Certificate Order, 161 FERC ¶ 61,042 at P 277.

⁴¹² *Id.*; Final EIS at 4-584 to 4-586.

⁴¹³ Final EIS at 3-33 to 3-35.

⁴¹⁴ *Id.* at 4-384.

⁴¹⁵ 18 C.F.R. § 380.12 (c)(3) (2017).

topographic maps with the project facilities, which allows for a technical comparison of project routes over terrain of varying elevations.⁴¹⁶

155. With regard to Friends of Wintergreen's claims that its data proves that there is a high risk of soil failure along the proposed route, we disagree. The Final EIS fully analyzed the risk of soil failures in detail.⁴¹⁷ The Final EIS explained that slope failures or landslides may result from the projects' alteration of the surface and subsurface drainage in construction areas and near natural slopes along the pipeline and access roads.⁴¹⁸ To mitigate these potential impacts, Atlantic developed a suite of mitigation measures and criteria to implement on slopes of varying grades including buttressing slopes, geogrid reinforced slopes, and drainage improvement, including providing subsurface drainage at seep locations through granular fill and outlet pipes, incorporating drainage into trench breakers using granular fill, and/or intercepting groundwater seeps and diverting them from the right-of-way.⁴¹⁹

156. Furthermore, Atlantic conducted additional geotechnical analysis of the slope on Piney Mountain which indicated that the slope in question posed a low geohazard ranking.⁴²⁰ Atlantic's review included that of aerial photography and LiDAR imaging, with additional field review to occur when full access to the property was granted. The Final EIS ultimately concluded that Atlantic's "proposed design features and mitigation measures would minimize the risk of landslides in the project area."⁴²¹ Moreover, while the South of Highway 664 Route avoids one particular slope on Piney Mountain, in doing so the alternative increases the amount of steep slopes—i.e., those greater than 30 percent—from 2.49 miles to 3.61 miles and lands of high susceptibility to landslide from 7.69 miles to 8.59 miles – a fact acknowledged in Friends of Wintergreen's own

⁴¹⁶ Atlantic's Application, Resource Report 1, Appendix 1A (Accession No. 20150918-5212).

⁴¹⁷ *Id.* at 4-25 to 4-31.

⁴¹⁸ *Id.* at 4-27.

⁴¹⁹ *Id.* at 4-29.

⁴²⁰ Atlantic's October 17, 2017 Implementation Plan (Accession No. 20171018-5002)

⁴²¹ Final EIS at 4-48.

comments.⁴²² Thus, we agree with the Final EIS that the South of Highway 664 does not offer a significant advantage over the proposed route.

(b) **Rockfish Gap Alternatives**

157. Friends of Wintergreen contends that the Commission erred in rejecting its proposed Lyndhurst to Farmville alternative that would have routed ACP through Rockfish Gap, which would avoid resource impacts within the Wintergreen resort area.⁴²³ Friends of Wintergreen acknowledges that the Lyndhurst to Farmville alternative would be longer, but asserts that this impact is offset by greater collocation with other utilities and roads. Friends of Wintergreen argues that the 500-foot-long HDD tunnel at Rockfish Gap under the Lyndhurst to Farmville Alternative is superior to the 4,639-foot-long HDD tunnel under the Blue Ridge Parkway and Appalachian Trail, and that the EIS erred by arguing that this alternative crossing would require certain regulatory approvals. Friends of Wintergreen also contends that the Commission erred by attributing to Friends of Wintergreen Alternative Number 28, which is a separate alternative that would also route ACP through Rockfish Gap. Friends of Wintergreen argues that the Commission staff's failure to fix this error after receiving notice is evidence that the Final EIS failed to respond to any of its comments.⁴²⁴

158. As discussed in the Final EIS, the Farmville to Lyndhurst Alternative would require a different HDD tunnel under the Blue Ridge Parkway and Appalachian Trail. Friends of Wintergreen claims that the EIS erred in claiming that Congressional and Presidential approvals would be necessary to cross these resources, referencing its Draft EIS comments in which it asserts that a narrow slice of land is available in which Congressional and Presidential approvals are not required. The Final EIS explained that the alternative was dismissed on other grounds.⁴²⁵ The Farmville to Lyndhurst alternative advanced by Friends of Wintergreen would more negatively impact the Appalachian Trail and Blue Ridge Parkway than the approved route. As discussed in detail throughout the EIS, the Appalachian Trail and Blue Ridge Parkway have various visual and recreation qualities necessitating trenchless crossings to avoid potentially significant impacts on

⁴²² Comments of Friends of Wintergreen, Inc. (Accession No. 20160513-5259).

⁴²³ Rehearing Request of Friends of Wintergreen at 25.

⁴²⁴ *Id.* at 26.

⁴²⁵ Final EIS at 3-31 (“[T]he Congressional and Presidential approval process that would be required to construct the alternative across the [Appalachian National Scenic Trail] was not a significant factor in our decision [to dismiss this alternative].”).

these resources.⁴²⁶ The Final EIS describes the constraints and physical requirements needed to successfully execute trenchless crossings, none of which Friends of Wintergreen address.⁴²⁷

159. Friends of Wintergreen next asserts that the Commission erred in relying on the Final EIS because the Final EIS mistakenly attributes “Alternative 28” to Friends of Wintergreen. The Final EIS mistakenly attributed the alternative to Friends of Wintergreen because Alternative 28 would increase the distance between the Wintergreen Resort and ACP, which is Friends of Wintergreen’s main concern. Nonetheless, we acknowledge this was in error.

160. Finally, Friends of Wintergreen also argues, within its alternatives argument, the Commission failed to reveal Commission staff qualifications.⁴²⁸ We note that that Appendix Y of the Final EIS provides the names and qualifications of all individuals and contractors who contributed to the evaluation of the Final EIS. Additionally, Appendix X provides a list of publicly available references reviewed by staff in preparing the Final EIS.

4. Segmentation

a. South Carolina Expansion

161. Shenandoah Valley Network claims that Atlantic plans to expand the Atlantic Coast Pipeline to South Carolina and that the Commission’s failure to examine this expansion violates the NEPA requirement prohibiting segmentation and requiring that all indirect impacts are analyzed.⁴²⁹ Public Interest Groups argue that the Commission has engaged in “piecemealing” by ignoring in its analysis the alleged South Carolina expansion.⁴³⁰ As evidence, Shenandoah Valley Network points to comments made on September 21, 2017, by Dan Weekley, Vice President of Southern operations for Dominion Energy where he allegedly stated the pipeline could be extended from Lumberton, North Carolina, for approximately 12 miles into South Carolina and deliver nearly 1 Bcf per day of natural gas into South Carolina by adding upstream

⁴²⁶ *Id.* at 3-21, 4-396, 4-460 to 4-63, 4-475 to 4-479.

⁴²⁷ *Id.* at 2-41 to 2-43.

⁴²⁸ Rehearing Request of Friends of Wintergreen at 27.

⁴²⁹ Rehearing Request of Shenandoah Valley Network at 65.

⁴³⁰ Rehearing Request of Public Interest Groups at 37.

compression.⁴³¹ Public Interest Groups argue that this expansion must be considered, particularly when the Commission approved non-conforming agreements in Atlantic's tariff that grant shippers future expansion rights.⁴³² Shenandoah Valley Network argues that the Commission should hold a hearing to assess whether the applicant intends to extend the pipeline and conduct supplemental NEPA analysis based on any new information on that subject that may emerge.⁴³³

162. CEQ regulations require the Commission to include connected actions, cumulative actions, and similar actions in its NEPA analyses.⁴³⁴ "An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration."⁴³⁵

163. CEQ regulations define connected actions as those that: (i) automatically trigger other actions, which may require environmental impact statements; (ii) cannot or will not proceed unless other actions are taken previously or simultaneously; and (iii) are interdependent parts of a larger action and depend on the larger action for their justification.⁴³⁶ Actions are cumulative if, when viewed with other proposed actions, they have cumulatively significant impacts and should therefore be discussed in the same impact statement.⁴³⁷ Only proposed federal actions can meet the regulatory definition of a "connected" or "cumulative" action.⁴³⁸

⁴³¹ Rehearing Request of Shenandoah Valley Network at 66 – 67.

⁴³² Rehearing Request of Public Interest Groups at 37.

⁴³³ *Id.*

⁴³⁴ 40 C.F.R. § 1508.25(a)(1)-(3).

⁴³⁵ See *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (*Delaware Riverkeeper*). Unlike connected and cumulative actions, an agency has some discretion about combining similar actions in the same environmental review. See, e.g., *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1305-06 (9th Cir. 2003).

⁴³⁶ *Id.* § 1508.25(a)(1).

⁴³⁷ 40 C.F.R. § 1508.25(a)(2).

⁴³⁸ See, e.g., *Big Bend Conservation Alliance v. FERC*, No. 17-1002, 2018 WL 3431729 at *10 (D.C. Cir. July 17, 2018) ("The connected-actions doctrine does not require the aggregation of federal and non-federal actions"); *Sierra Club v. U.S. Army*

164. Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”⁴³⁹ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts. Courts have found that an impact is reasonably foreseeable if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”⁴⁴⁰

165. To date, neither Atlantic nor any of its affiliate owners have proposed a pipeline extending from the ACP Project terminus at Lumberton, North Carolina, into South Carolina. Without a proposal, the Commission cannot determine if the projects are related to each other closely enough to be considered a single course of action. Similarly, without a proposal, the alleged expansion is not reasonably foreseeable. At this time, any expansion is speculative in nature, and thus the Commission will not reopen the record to update its NEPA analysis.

b. Piedmont Pipeline Spur

166. Public Interest Groups claim the Final EIS failed to examine the environmental and socioeconomic impacts associated with Piedmont Pipeline’s 26-mile-long spur line from Junction A to the Smith Energy Complex near Hamlet in Rockingham County, North Carolina. Public Interest Groups claim that the Certificate Order erred by stating that this portion of the Piedmont Pipeline already exists when it has yet to be constructed.⁴⁴¹

167. The Final EIS identified the spur line as a nonjurisdictional facility associated with the ACP Project, included in the cumulative impacts analysis.⁴⁴² Public Interest Groups do not challenge, however, the Commission’s cumulative impacts analysis. Rather, Public Interest Groups claim the Commission had improperly segmented its review, alleging that the spur line was “part and parcel to the project” and that the Commission cannot

Corps of Eng’r, 803 F.3d 31, 50 (D.C. Cir. 2015) (holding that CEQ connected action regulation “does not dictate that NEPA review encompass private activity”).

⁴³⁹ 18 C.F.R. § 1508.8(b) (2017).

⁴⁴⁰ *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

⁴⁴¹ Rehearing Request by Public Interest Groups at 36 (citing Certificate Order 161 FERC ¶ 61,042 at P 8).

⁴⁴² Final EIS at 2-58, Appendix W.

“piecemeal” its environmental review.⁴⁴³ The spur line, however, cannot be a connected action. The spur line is a state distribution line subject to NCUC jurisdiction, not a federal action. Accordingly, it would not constitute a “connected action.”⁴⁴⁴

5. Deforestation

a. Forest Fragmentation

168. Shenandoah Valley Network contends that the Final EIS underestimates the impacts of interior forest fragmentation in Virginia by 27,000 acres because it fails to include the indirect impacts of forest fragmentation in a “landscape context.”⁴⁴⁵ Shenandoah Valley Network states that the Virginia Forest Conservation Partnership (VFCP) previously noted that the Final EIS did not acknowledge or analyze impacts of forest fragmentation on “a diverse suite of forest ecosystem services”⁴⁴⁶ and recommended a methodology for quantifying the full scope of indirect forest impacts.⁴⁴⁷ Shenandoah Valley Network asserts that the Final EIS lists the size of individual forest cores that will be fragmented, but does not take into account the relative amount of interior forest in the area, or address the full range of loss of forest values when cores are permanently fragmented.⁴⁴⁸ Shenandoah Valley Network states the mitigation recommended in the Final EIS, including restoration and rehabilitation, “would not offset

⁴⁴³ Rehearing Request by Public Interest Groups at 37-38.

⁴⁴⁴ *Big Bend Conservation Alliance v. FERC*, No. 17-1002 (D.C. Cir. July 17, 2018) (“The connected-actions doctrine does not require the aggregation of federal and non-federal actions.”); *Sierra Club v. U.S. Army Corps of Eng’rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (“The point of the connected actions doctrine is to prevent the government from ‘segment[ing]’ its own ‘federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.’”) (quoting *Delaware Riverkeeper*, 753 F.3d at 1313).

⁴⁴⁵ Rehearing Request of Shenandoah Valley Network at 108.

⁴⁴⁶ *Id.* at 108-109 (quoting VFCP’s August 21, 2017 letter).

⁴⁴⁷ *Id.* at 110 (noting that using VFCP’s methodology, the total acreage of direct and indirect impacts for core forest areas in Virginia is 47,650 acres, more than double the estimate in the Final EIS).

⁴⁴⁸ *Id.* at 109-110.

the substantial indirect impacts to interior forests, including reduction in ecosystem services.”⁴⁴⁹

169. We disagree. The Final EIS fully describes the effects of forest fragmentation and the resulting effects that these losses of habitats cause to the wildlife species that inhabit them using similar methodologies recommended by the Virginia Forest Conservation Partnership, and presents measures committed to by Atlantic and DETI that would be implemented to minimize or avoid fragmentation impacts.⁴⁵⁰ Specifically, the Final EIS discusses that creation of forest edges in previously contiguous block leads to increased predation, changes in microclimate and community structure along the newly formed forest edge, and can exacerbate the spread of noxious and invasive species along the construction and operational rights-of-way.⁴⁵¹ It further notes that where forest tracts are fragmented to beyond minimum levels required for a given species, particularly those that require large tracts of unbroken forest land, those species would need to seek suitable habitat elsewhere.⁴⁵²

170. As stated in the Certificate Order, Atlantic has committed to incorporating mitigation measures including: (1) using regionally-specific flowering plant seed mixes to provide food and habitat for pollinators and local wildlife species; (2) mitigating for impacts on sensitive environmental resources including listed species habitats and migratory birds; (3) restricting maintenance mowing to occur outside of the bird nesting season for migratory birds; (4) identifying conservation easements or sites where forested areas could be restored; and (5) acquiring a 400-acre conservation site adjacent to the Monongahela National Forest to provide offsite mitigation.⁴⁵³ The Certificate Order further found that despite the mitigation measures that would be implemented in Atlantic’s and DETI’s construction and restoration plans and conditions of the Certificate Order, forested areas would experience long-term to permanent significant impacts as a result of fragmentation.⁴⁵⁴

⁴⁴⁹ *Id.* at 116 (quoting VFCP’s August 21, 2017 letter).

⁴⁵⁰ Final EIS at 4-187 to 4-202.

⁴⁵¹ *Id.* at 4-201.

⁴⁵² *Id.* at 4-188.

⁴⁵³ Certificate Order, 161 FERC ¶ 61,042 at P 237 (citing Final EIS at 4-202).

⁴⁵⁴ *Id.* P 237.

171. With respect to arguments that the analysis ignores forest quality, the Final EIS acknowledges that fragmentation would result in disproportionate effects along the right-of-way. For example, the Final EIS notes that in North Carolina, the available habitat is of lesser quality than that of other either West Virginia or Virginia.⁴⁵⁵ In Virginia, the Final EIS categorized the impacts of the project on specific blocks of forest using available datasets and noted whether the value provided, based on an Ecological Integrity Score, was either outstanding, very high, high, moderate, or general.⁴⁵⁶ Of the blocks in Virginia, the Final EIS noted that the greatest effects were on moderate or general quality forest blocks. (150 out of 187 total forest blocks crossed in the state).⁴⁵⁷

b. Impacts on Migratory Birds

172. Shenandoah Valley Network contends that the Final EIS and Migratory Bird Plan fail to disclose and assess the impacts of forest fragmentation on migratory birds, particularly forest interior migrant songbirds and forest interior species experiencing rapid and range-wide declines.⁴⁵⁸ For example, Shenandoah Valley Network states that the cerulean warbler is one of the most rapidly declining migratory songbirds in the United States, and that the Final EIS did not acknowledge or address the cumulative impacts of forest fragmentation that will likely have significant impacts on this and other declining species.⁴⁵⁹ Shenandoah Valley Network contends that despite evidence demonstrating that the cerulean warbler's preferential use of ridgetops for breeding habitat, the *Migratory Bird Plan* states that the vegetation clearing time restriction will minimize direct impacts on nesting cerulean warblers.⁴⁶⁰ Shenandoah Valley Network asserts that this impact was

⁴⁵⁵ Final EIS at 4-201.

⁴⁵⁶ *Id.* at 4-194.

⁴⁵⁷ *Id.*

⁴⁵⁸ Rehearing Request of Shenandoah Valley Network at 111-115. Shenandoah Valley Network further notes that Atlantic did not survey for a single forest interior songbird species along the route or consult publically available data on bird occurrence or abundance. *Id.* at 115.

⁴⁵⁹ *Id.* at 113.

⁴⁶⁰ Shenandoah Valley Network also notes that ridge-associated habitat is used in "high concentration by raptors and songbirds during spring and fall migration." *Id.* at 111-112 (citing Shenandoah Valley Network April 6, 2017 Draft EIS Comments at 117 (Draft EIS Comments) and Laura S. Farwell, Potential Impacts of the Atlantic Coast Pipeline and

not acknowledged even though much of the pipeline will be routed on ridgetops within the Monongahela and George Washington National Forests.⁴⁶¹

173. We disagree. The Final EIS addresses the projects effects on migratory bird species including the cerulean warbler, and acknowledges that habitat losses for migratory birds will occur as a result of the ACP Project.⁴⁶² Specifically, the Final EIS identifies the locations where species presence falls into designated “Important Bird Areas,”⁴⁶³ describes both the direct and indirect effects the project would have on migratory birds,⁴⁶⁴ and describes the consequences of the project in conjunction with other ongoing past, present, or reasonably foreseeable future projects.⁴⁶⁵ With respect to the cerulean warbler specifically, the Final EIS notes that the ACP Project crosses the Upper Blue Ridge Mountains Important Bird Area, which supports what is likely the largest population of cerulean warblers in Virginia.⁴⁶⁶

174. Shenandoah Valley Network also contends that the Final EIS fails to support Atlantic’s claim that 35 acres is the minimum size of interior forest habitat that would support most interior forest bird species.⁴⁶⁷ Shenandoah Valley Network asserts that despite evidence to the contrary, the Draft and Final EIS misrepresent the source used

Supply Header Project on Forest Interior Migratory Birds 10 (Apr. 2017) (Attachment 16 of Draft EIS Comments) (Farwell Report)).

⁴⁶¹ *Id.* at 111.

⁴⁶² Final EIS at 4-179 to 4-181.

⁴⁶³ Important Bird Area are those areas that provide essential habitat for one or more species of bird and include sites for breeding, wintering, and/or migrating birds. *Id.* at 4-179.

⁴⁶⁴ These effects include the destruction of nests with eggs or chicks, the disturbance of active nests outside the right-of-way from construction noise, and the ongoing nuisance effects associated with operational maintenance activities. *Id.* at 4-181.

⁴⁶⁵ *Id.* at 4-609.

⁴⁶⁶ *Id.* at 4-180. We also disagree with Shenandoah Valley Network’s reliance on the Farwell Report because the report fails to acknowledge the importance of time of year tree-cutting restrictions during the breeding season designed to avoid direct mortality of eggs and chicks from occurring in the first place.

⁴⁶⁷ Rehearing Request of Shenandoah Valley Network at 112.

support the 35 acre claim.⁴⁶⁸ Shenandoah Valley Network avers that the article cited actually finds that habitat required for 26 forest bird species range from 0.5 to 2,471 acres, and that the Final EIS failed to respond to or include this information.⁴⁶⁹

175. As stated in the Final EIS, 35 acres is the minimum size of interior forest habitat that would support *most* interior forest bird species.⁴⁷⁰ The 35-acre metric, which the Commission has previously used, supports a broad analysis of the project's fragmentation effects on a wide variety of species.⁴⁷¹ As Shenandoah Valley Network acknowledges, individual species may require habitat as small as 0.5 acres or as large as 2,471 acres, and nowhere does the Final EIS claim that the 35-acre metric would be an appropriate habitat for *all* migratory bird species. Shenandoah Valley Network relies on the Farwell Report to demonstrate that different species require different habitat sizes, but does not suggest what metric the Final EIS should have used to analyze these impacts. Moreover, even if a more restrictive metric were used, the Final EIS's conclusion – that the project would result in significant long-term and permanent impacts on forested vegetation⁴⁷² – would have remained the same.

176. Next, Shenandoah Valley Network argues that the mitigation measures in the Migratory Bird Plan do not address the full scope of adverse impacts or offset the harms caused by the project.⁴⁷³ Shenandoah Valley Network asserts that the Migratory Bird Plan wrongly finds that direct impacts on nesting birds are not anticipated due to the timing of construction of activities and the fact that suitable habitat is available in adjacent areas.⁴⁷⁴ Shenandoah Valley Network contends that this ignores the impacts of forest fragmentation

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.* at 113 (citing Farwell Report at 8).

⁴⁷⁰ Final EIS at 4-189 (citing Chandler S. Robins, et al., *Habitat Area Requirements of Breeding Forest Birds of the Middle Atlantic States* (1989)).

⁴⁷¹ Final EIS for the Constitution Pipeline and Wright Interconnect Projects, Docket Nos. CP13-499-000 and CP13-502-000, at 4-71 (2014).

⁴⁷² Final EIS at ES-12 and 4-170.

⁴⁷³ Rehearing Request of Shenandoah Valley Network at 114.

⁴⁷⁴ *Id.*

on adjacent areas, which will impact nesting birds.⁴⁷⁵ Shenandoah Valley Network also contends that the Migratory Bird Plan oversimplifies its conclusion that certain species will benefit from open and successional habitat created by the pipeline corridor.⁴⁷⁶ Shenandoah Valley Network asserts that the Migratory Bird Plan failed to consider widespread population declines in forest interior species, the lack of decline in edge species, the creation of a corridor by which predators may penetrate forests, the development of biotic homogenization, the loss of endemic species, and the creation of ecological traps.⁴⁷⁷

177. Shenandoah Valley Network erroneously asserts that the analysis in the Migratory Bird Plan is inadequate. The Migratory Bird Plan provides mitigation measures committed to by Atlantic and is not a substitute for the analysis done by Commission staff in the Final EIS. As discussed above the Final EIS provided an extensive analysis of the direct and indirect impacts that would occur as a result of deforestation.⁴⁷⁸ Moreover, the Final EIS determined that the time-of-year restrictions will avoid most direct impacts, however, indirect effects, will still occur.⁴⁷⁹

178. Last, Shenandoah Valley Network argues that the Migratory Bird Plan fails to explain how Atlantic's acquisition of 2,820 acres of forest for preservation mitigates the adverse impacts occurring on state and commonwealth-owned lands.⁴⁸⁰ Shenandoah Valley Network notes that the *Migratory Bird Plan* provides no comparison of habitat type and quality.⁴⁸¹ Additionally, Shenandoah Valley Network notes that the acquisition was done to mitigate impacts to state-owned lands, not private forest lands.⁴⁸² Thus,

⁴⁷⁵ Shenandoah Valley Network notes that there are no plans to survey interior forest prior to construction or to monitor birds in impacted areas after construction is complete. *Id.* at 114-115.

⁴⁷⁶ *Id.* at 116.

⁴⁷⁷ *Id.* at 116-117.

⁴⁷⁸ Final EIS at 4-181 to 4-182.

⁴⁷⁹ *Id.* at 4-182 (“most direct impacts on migratory birds would be avoided”).

⁴⁸⁰ Rehearing Request of Shenandoah Valley Network at 117.

⁴⁸¹ *Id.*

⁴⁸² *Id.*

Shenandoah Valley Network concludes that the mitigation measures would not offset the substantial impacts to interior forests or to migrant songbirds.⁴⁸³

179. The acquisition of forested lands for conservation or preservation efforts offset the loss of forested lands that would occur from unavoidable tree removal associated with the ACP Project regardless of whether the primary purpose was to offset losses on state lands, private lands, or national forest lands.⁴⁸⁴ The Final EIS notes that overall operation of the projects would have long-term to permanent effects on about 3,456 acres of vegetation, including about 2,744 acres of upland forest vegetation (deciduous, coniferous, and mixed).⁴⁸⁵ Thus Atlantic's mitigation efforts would fully account for the acreage of forested land permanently lost by the project. Over time, these lands would reach greater maturity in forested canopy and increasingly provide for greater habitat.

6. Seismic Activity and Landslides

180. Shenandoah Valley Network argues that the Final EIS was inadequate because the analysis relating to water impacts from steep slope construction remains ongoing.⁴⁸⁶ Further, Shenandoah Valley Network contends Atlantic is still developing a Best in Class Steep Slope Management Program, but because the standards were not finalized at the time the Final EIS was issued, the Commission's reliance on this standard falls short of NEPA requirements.⁴⁸⁷ Even if the standards were complete by the time of the Final EIS, Shenandoah Valley Network states that this would not satisfy NEPA requirements because an EIS must contain a reasonable discussion of mitigation measures and cannot merely rely on an applicant's general assurance of the implementation of best management practices or best in class methods.⁴⁸⁸ Shenandoah Valley Network argues that because the standards

⁴⁸³ *Id.* at 117-118.

⁴⁸⁴ However, we note that mitigation efforts, associated with state or other federal permits are voluntary and not required by the Commission, but undertaken by the project sponsor at their discretion to meaningfully offset unavoidable impacts.

⁴⁸⁵ Final EIS at ES-10. The Final EIS concluded that the project would permanently alter forested resources and noted that because of the extent in magnitude and quality, it would be a *significant* impact. *Id.* at ES-12.

⁴⁸⁶ Rehearing Request of Shenandoah Valley Network at 77.

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* at 78.

are still developing, the Commission has not yet determined the criteria to identify high-hazard slope locations designation.⁴⁸⁹

181. Shenandoah Valley Network next argues that while the Commission acknowledges that long term impacts related to slope instability have the potential to adversely impact water quality and stream channel geometry, this determination was not based on the Commission's consideration of accurate, high-quality information about environmental impacts. The Shenandoah Valley Network argues that there was considerable fundamental information missing regarding the impacts of construction on steep slopes and landslide-prone areas, and therefore, there is no basis for the Commission's findings about the effects of the ACP Project on water resources, in violation of NEPA. Thus, Shenandoah Valley Network argues the Commission should issue a revised Draft EIS for public comment based on sufficient information from Atlantic to allow the Commission and the Forest Service to make a meaningful assessment of impacts to water quality from erosion and sedimentation caused by construction across steep slopes.

182. Friends of Nelson argues that the Commission and Atlantic failed to adequately consider the potential for slope failure from steep slopes and ridgetops across the route.⁴⁹⁰ Friends of Nelson argues that the filings the Commission used as a basis for the Draft EIS include gross generalities based on regional data sets unsuited for the kind of detailed analysis necessary to ensure the safety of slopes and residents.⁴⁹¹ Friends of Nelson contends the Commission should require a more comprehensive risk-analysis and that site specific stabilization and mitigation be prepared, offering the public the opportunity to review and comment on those plans before a certificate is granted.⁴⁹²

183. We disagree that the Final EIS was based on inadequate information. As we have explained in other cases, practicalities require the issuance of orders prior to completion of certain reports and studies because large projects such as these take considerable time and effort to develop.⁴⁹³ Perhaps more important, project development is subject to many significant variables whose outcomes cannot be predetermined. Thus, some aspects of a

⁴⁸⁹ *Id.*

⁴⁹⁰ Rehearing Request of Friends of Nelson at 46.

⁴⁹¹ *Id.* at 47.

⁴⁹² *Id.*

⁴⁹³ See, e.g., *Weaver's Cove Energy, LLC*, 114 FERC ¶ 61,058, at PP 108-115 (2006); *Islander East*, 102 FERC ¶ 61,054 at PP 41-44.

project may remain in the early stages of planning even as other portions of the project become a reality.

184. As the Supreme Court explained in *Robertson*, NEPA does not require a complete plan to be actually formulated at the onset, but only that the proper procedures are followed for ensuring that the environmental consequences have been fairly evaluated.⁴⁹⁴ Here, we made extensive efforts to ensure that environmental issues were resolved appropriately. The issues the parties raise were discussed in considerable detail in the Final EIS and were subject to public comment.⁴⁹⁵ Based on the information in the record, we imposed additional measures (such as Environmental Condition 51). Environmental Condition 51 requires that further geotechnical studies be completed and the Best in Class Steep Slope Management Program be developed prior to commencement of construction.⁴⁹⁶

185. In this case, the existing information included in the Final EIS is substantial.⁴⁹⁷ This information adequately supports the facts found and the conclusions reached in support of the decision to issue a certificate for the project. The additional information gathering and refinement of mitigation plans that will occur 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.

186. Contrary to petitioner's contentions, the Final EIS examined landslides and steep slopes along the pipeline route and did not simply rely on the best in class standards. As the Final EIS explains, Atlantic identified over 100 possible slope instability hazard locations along the AP-1 mainline where evidence suggests previous slope instability, or where the potential exists for slope instability, and 46 steep slopes that met the criteria for further evaluation used in the Geohazard Analysis Program.⁴⁹⁸ When determining routing, Atlantic and DETI also attempted to avoid slip prone areas and completed a

⁴⁹⁴ *Robertson*, 490 U.S. at 332, 352.

⁴⁹⁵ Final EIS at ES-2 to ES-5; 2-45 to 2-46.

⁴⁹⁶ Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 51.

⁴⁹⁷ Final EIS at 4-26 to 4-31.

⁴⁹⁸ *Id.* at 4-28.

desktop analysis to inventory and categorize areas of slope instability as part of the Geohazards Analysis Program.⁴⁹⁹ We find these measures to be reasonable.

187. Further, the Commission conditioned the certificate upon the requirement that Atlantic provide all the geotechnical studies and mitigation regarding steep slopes pursuant to Environmental Condition 51 prior to proceeding with project construction. This is precisely the type of analysis that Friends of Nelson requests. Specifically, as part of the *Best in Class Steep Slope Management Program*, Atlantic and DETI would implement mitigation measures for susceptible slopes or hillsides depending on the length and inclination of the slope. Some of these measures include: (1) implanting drainage improvement, such as providing subsurface drainage at seep locations through granular fill and outlet pipes, incorporating drainage into trench breakers using granular fill, and/or intercepting groundwater seeps and diverting them from the right-of-way; (2) buttressing slopes with concrete trench breakers; (3) changing slope geometry to make the slope shallower; (4) benching and re-grading with controlled backfill; (5) using alternative backfill; (6) using chemical stabilization of backfill (e.g., cement, lime); (7) implementing Geogrid reinforced slope that consists of benching existing slope, installing subsurface drains, and incorporating Geogrid reinforcement into compacted backfill; and/or (8) using retaining structures.⁵⁰⁰ Thus, Shenandoah Valley Network's contention that the Commission did not include a reasonable discussion of mitigation measures is incorrect.

188. Next, Mr. Limpert argues that the Commission failed to independently verify the ACP Project survey on his property, and that Atlantic failed to conduct a geohazard field survey for his property despite excavation and blasting for the proposed pipeline on slopes up to 78 percent.

189. As stated above, the Geohazard Analysis Program identified slopes along the pipeline route that warranted further evaluation. In addition, Atlantic and DETI are developing a *Best in Class Steep Slope Management Program* to incorporate the results of the Geohazard Analysis Program into the project design and engineering and to address issues of landslide potential and susceptibility. We find that these identification and mitigation measures will ensure that steep slopes are properly identified and addressed with the appropriate measures. Moreover, areas subject to blasting are subject to the *Blasting Plan* that describes how blasting would be conducted to ensure safety and protect

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at 4-28 to 4-31.

nearby facilities, pipelines, residences, wells and springs.⁵⁰¹ Atlantic's *Blasting Plan* contains specific mitigation measures that would be employed when blasting along steep slopes, and describes how Atlantic would conduct post-blasting inspections and repair damages sustained through blasting. These measures, in conjunction with routine in-field FERC compliance monitoring, will ensure that measures are appropriately implemented and any slope instability issues that occur are addressed and remediated promptly to avoid impacts on sensitive resources.⁵⁰²

190. Friends of Nelson further contends that the pipeline route crosses a ridgeline with slopes of 30-40 percent grades on either side. Friends of Nelson argues that the impacts are significant but the impacts are not mentioned anywhere.

191. We disagree. The Final EIS specifically finds that constructing the pipelines in steep terrain or high landslide incidence areas could increase the potential for landslides to occur, including areas outside National Forest lands.⁵⁰³ The mitigation measures described above attempt to minimize these effects.

192. Finally, Friends of Nelson contends that the combined impacts of extreme weather events, such as hurricanes, will be catastrophic, and the Final EIS incorrectly concluded that construction and mitigation measures were generally acceptable. We disagree. The aforementioned mitigation measures will ensure that any significant adverse impacts are fully mitigated. Friends of Nelson's blanket assertions are unsupported and not described with any level of detail, and thus will not be addressed further.

7. Safety

193. Mr. Limpert argues that the proposed pipeline would come within several hundred feet of an area that experienced a very large landslide on a virtually identical slope.⁵⁰⁴ Mr. Limpert argues that geohazard surveyors for Atlantic have designated this as a low hazard area, stating that the landslide was on a much steeper slope than the pipeline would be on, although such slopes are not listed. Mr. Limpert argues he measured the slopes and that

⁵⁰¹ *Id.* at 2-28 (Table 2.3.1-1 showing construction and restoration plans include a Blasting Plan), 4-5 (Table 4.1.2-1 showing types of areas that could be subject to blasting).

⁵⁰² *Id.* at 2-53; 4-4 to 4-7.

⁵⁰³ *Id.* at 4-74, 4-594.

⁵⁰⁴ Rehearing Request of Mr. Limpert at 5.

the pipeline would be on a 60 percent slope, whereas the landslide was on a 62 percent slope.⁵⁰⁵

194. As the EIS acknowledged, numerous segments of pipeline would be constructed on steep slopes and in areas of high landslide potential.⁵⁰⁶ The Commission considered the historic and recent landslide incidences in the immediate project area, and concluded that constructing the pipelines in steep terrain or high landslide incidence areas could increase the potential for landslides to occur.⁵⁰⁷ To address this concern, the Commission found that the aforementioned mitigation measures⁵⁰⁸ and compliance with U.S. Department of Transportation regulations, specifically 49 C.F.R. § 192.317(a), which requires pipeline operators to protect transmission pipelines from hazards, including landslides, would minimize the risk of damage to the pipeline in the event of landslides in the project area.⁵⁰⁹ Moreover, the Final EIS explained that Atlantic and Dominion Energy Transmission, Inc. are working to provide documentation of the likelihood that the proposed restoration design features and mitigation measures that would be implemented in steep slope areas would minimize the risk of landslides in the project area (see section 4.1.4.2).⁵¹⁰

195. Next, Mr. Limpert argued that the Commission failed to adequately address pipeline safety issues, including geohazards and incorrect designation of areas with no egress and no chance of rescue or escape during a pipeline emergency.⁵¹¹ Fairway Woods Condominium Association also argues that the Commission improperly erred by relying on Atlantic's commitment to work with local emergency responders to address an accident or terrorist attack.⁵¹² Fairway Woods Condominium Association explains that there is only one entry and exit from the mountain community, using Wintergreen Drive. If a

⁵⁰⁵ *Id.*

⁵⁰⁶ Final EIS at Volume IV – Part 9 of 11, Z-2983 (item LO70- addressing William Limpert).

⁵⁰⁷ *Id.*

⁵⁰⁸ *Supra* P 189.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ Rehearing Request of Mr. Limpert at 5.

⁵¹² Rehearing Request of Fairway Woods Condominium Association at 6-7.

pipeline incident were to occur at the entrance of Wintergreen Drive, the Fairway Woods Condo Association argues the community cannot evacuate. Thus, Fairway Woods Condominium Association contends the Commission improperly assumes an evacuation is possible.⁵¹³

196. Moreover, Fairway Woods Condominium Association argues that the Commission does not fully address the risk of a terrorist attack upon the pipeline at the entrance to Wintergreen.⁵¹⁴ Fairway Woods Condominium Association states that the Commission simply suggests that terrorist attacks cannot be accounted for because they are “unpredictable,” but because terrorists seek to inflict maximum damage with minimum use of resources, this is likely and devastating.⁵¹⁵

197. We disagree. As we found in the EIS, terrorist attacks are unpredictable,⁵¹⁶ and difficult to measure effectively. Nonetheless, the required *Operational Emergency Response Plans*⁵¹⁷ and Department of Transportation’s Minimum Federal Safety Standards, among other measures, are reasonable to address the safety and security concerns raised by petitioners.

198. Further, Mr. Limpert states that the Commission does not notify property owners who are in the blast zone or the evacuation zone of the pipeline, even though their safety is at risk, and their property values are significantly reduced.⁵¹⁸

199. This is inaccurate. The EIS describes the public outreach to stakeholders and landowners regarding the development of the ACP Project, which includes publication in the *Federal Register*, multiple scoping meetings, and mailings to affected landowners.⁵¹⁹

⁵¹³ *Id.*

⁵¹⁴ *Id.* at 8 (citing Certificate Order, 161 FERC ¶ 61,042 at P 278).

⁵¹⁵ *Id.*

⁵¹⁶ Final EIS at 4-590 to 4-591.

⁵¹⁷ *Id.* at 4-584 to 4-585.

⁵¹⁸ Rehearing Request of Mr. Limpert at 6.

⁵¹⁹ Final EIS at E-2 to ES-3; 1-13, 1-21.

And, the Commission did not find that the property values of nearby landowners will be significantly reduced, contrary to Mr. Limpert's claims.⁵²⁰

200. Finally, Mr. Limpert argues that ACP incorrectly shows no high consequence areas in Bath County, asserting there are seven homes that would be trapped in the evacuation zone with no chance of escape or rescue if an incident were to occur.⁵²¹ Mr. Limpert states that the Pipeline and Hazardous Materials Safety Administration (PHMSA) regulations require that the ACP Project identify high consequence areas, but has not done so here.⁵²²

201. We disagree. High consequence areas are segments along the pipeline route that would pose the greatest threat to human health and safety and property should the pipeline fail. In general, these locations are determined based on population density near pipeline facilities which require more rigorous safety requirements for populated areas.⁵²³ A single home, or low density housing along a pipeline right-of-way typically does not constitute an HCA unless it would be dense enough to qualify as a Department of Transportation Class III area, or there is an identified site where groups of people would gather. The Final EIS identifies and lists high consequence areas for the ACP Project, developed pursuant to PHMSA regulations.⁵²⁴ The area of Bath County was not classified as a high consequence area, nor does the provided evidence suggest the Commission erred in its assessment of this area.

8. Historic Properties

a. Conditional Certificate

202. Shenandoah Valley Network and Friends of Nelson contend that the extent to which the Commission has deferred aspects of compliance with section 106 of the National Historic Preservation Act (NHPA) until after the Certificate Order has severely limited the consideration of alternatives that could avoid, minimize, or mitigate harm to

⁵²⁰ *Id.* at Volume IV – Part 9 of 11, Z-2993 (item LO70- addressing William Limpert).

⁵²¹ Rehearing Request of Mr. Limpert at 5.

⁵²² *Id.* at 6.

⁵²³ 49 C.F.R. § 192.905 (2017); 49 C.F.R. § 192.903 (2017).

⁵²⁴ Final EIS at 4-580 to 4-581.

historic resources.⁵²⁵ Shenandoah Valley Network asserts that this has also foreclosed any opportunity of the Advisory Council on Historic Preservation (Advisory Council) to comment meaningfully on proposed avoidance and mitigation prior to approval of the undertaking.⁵²⁶

203. Similarly, Public Interest Groups argue that the Commission wrongly deferred consultation with the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and the Meherrin Tribe regarding traditional tribal sites.⁵²⁷ Public Interest Groups assert that rather than requiring these consultations as a condition of the Certificate Order, the Commission should have conducted consultations as part of the review process.⁵²⁸ Public Interest Groups also state that these consultations should have occurred with Commission staff, rather than with the project developers.

204. As discussed above,⁵²⁹ the Commission has previously affirmed that a conditional certificate could be issued prior to completion of cultural resource surveys and consultation procedures required under NHPA because construction activities would not commence until surveys and consultation are complete.⁵³⁰ The D.C. Circuit's decision in *City of Grapevine* supports this interpretation. In that case, the D.C. Circuit held that the Federal Aviation Administration properly conditioned approval of a runway project upon the applicant's subsequent compliance with the NHPA.⁵³¹ Moreover, the Advisory Council's regulations permit an agency granting project approval to "defer final identification and evaluation of historic properties if it is specifically provided for in a programmatic agreement executed pursuant to § 800.14(b)."⁵³² On January 19, 2018, the

⁵²⁵ Rehearing Request of Shenandoah Valley Network at 154; Rehearing Request of Friends of Nelson at 48-49.

⁵²⁶ Rehearing Request of Shenandoah Valley Network at 154.

⁵²⁷ Rehearing Request of Public Interest Groups at 29.

⁵²⁸ *Id.* (citing 18 C.F.R. § 2.1c(e) (2017)).

⁵²⁹ *See supra* PP 92-95.

⁵³⁰ *See generally Iroquois Gas Transmission System, L.P.*, 53 FERC ¶ 61,194, at 61,758-64 (1990).

⁵³¹ *City of Grapevine*, 17 F.3d at 1509 (upholding the agency's conditional approval because it was expressly conditioned on the completion of section 106 process).

⁵³² 36 C.F.R. § 800.4(b)(2) (2017). *See also Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 554 (8th Cir. 2004) (the Advisory Council's

Commission executed a Programmatic Agreement (PA) with the Advisory Council on Historic Preservation, the State Historic Preservation Offices (SHPO) of Pennsylvania, West Virginia, Virginia and North Carolina, the Forest Service, and the National Park Service.⁵³³ Therefore, the Commission's practice of issuing a conditional certificate prior to completion of cultural resource surveys and consultation procedures was appropriate.

205. With respect to the Lumbee Indian Nation, Coharie Tribal Council, Haliwa-Saponi Tribe, and the Meherrin Tribe, these tribes are not federally recognized tribes, and therefore, are not "Indian tribes" as defined by the regulations implementing section 106 of the NHPA.⁵³⁴ Thus, these tribes were treated as members of the public with the same rights to comment and participate. Nevertheless, because of concerns raised by the tribes and others during the public comment periods, we directed Atlantic to provide copies of the archaeological survey reports and meet with tribes to hear their concerns.⁵³⁵ None of the tribes have commented on those reports or identified any particular sites or locations of concern.

b. Consultation

206. Next, Shenandoah Valley Network asserts that the Commission failed to meet the requirements of section 106 of the National Historic Preservation Act.⁵³⁶ Specifically, Shenandoah Valley Network contends that the Commission: (1) failed to identify and invite consulting parties to participate in the section 106 process; (2) failed to adequately consider and consult regarding requests from individuals and organizations to participate

regulations "when read in their entirety, thus permit an agency to defer completion of the NHPA process until after the NEPA process has run its course (and the environmentally preferred alternatives chosen), but require that NHPA issues be resolved by the time that the license is issued").

⁵³³ January 19, 2018 Letter Providing the Advisory Council on Historic Preservation with a Copy of the Executed Programmatic Agreement (Accession No. 20180119-3012) (Programmatic Agreement).

⁵³⁴ 36 C.F.R. § 800.16(m) (2017) ("Indian tribe means an Indian tribe, ... which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.").

⁵³⁵ Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 56; Final EIS at 4-539 to 4-540.

⁵³⁶ Rehearing Request of Shenandoah Valley Network at 152 (citing 54 U.S.C. § 300101 (2012)).

as consulting parties; and (3) did not adequately include non-consulting party members of the public.⁵³⁷ Shenandoah Valley Network concludes that because of inadequate consultation, the Commission's process did not sufficiently identify potential resources, evaluate their historic significance, assess whether the undertaking will adversely affect them, and then evaluate ways to avoid, minimize, or mitigate adverse effects.⁵³⁸

207. We disagree. The Final EIS described the public outreach for the project, including Applicant-sponsored open houses, public scoping meetings, and receipt of more than 8,000 written comments. Moreover, Commission staff considered requests for consulting party status in accordance with the regulations implementing section 106 of the NHPA, and Shenandoah Valley Network fails to detail any instance where those determinations were in error.⁵³⁹ For those groups and individuals that did not meet the consulting party criteria, Commission staff asked Atlantic to work with the SHPOs and assist interested stakeholders with obtaining privileged archaeological information on a case-by-case basis.⁵⁴⁰ As a result, Atlantic's and Dominion's surveys⁵⁴¹ identified a total of 447 archeological sites, 770 structures, 10 historic districts, and 57 cemeteries within or in the vicinity of the projects' area.⁵⁴² Four historic districts and 10 archaeological sites listed in or eligible for listing in the National Register of Historic Places would be adversely affected by the project,⁵⁴³ and Atlantic has prepared, or is preparing treatment plans to mitigate the adverse effects of the project on these properties. Thus, the Commission met its consultation obligations pursuant to section 106 of the NHPA.

⁵³⁷ *Id.* at 152-153.

⁵³⁸ *Id.* at 153.

⁵³⁹ Final EIS at 4-538.

⁵⁴⁰ *Id.*

⁵⁴¹ As of September 27, 2017, Atlantic and Dominion had surveyed over 98 percent of the pipeline corridor. Atlantic and Dominion continue to survey as they gain access to additional parcels.

⁵⁴² Atlantic's September 27, 2017 Data Response at 3 (Accession No. 20170927-5104).

⁵⁴³ October 25, 2017 Notification of Adverse Effect for the Atlantic Coast Pipeline and Supply Header Projects (Accession No. 20171025-3044).

c. **Effects on Historic Districts**

208. Shenandoah Valley Network and Friends of Nelson argue that the Commission did not properly evaluate potential impacts on historic districts or districts eligible for listing, such as the Union Hill/Woods Corner area, the Warminster Rural Historic District, the Elk Hill Baptist Church community, Red Apple Orchards, the South Rockfish Valley Rural Historic District (including the Elk Hill Baptist Church community), and the Route 151 Virginia Scenic Byway.⁵⁴⁴ Shenandoah Valley Network faults the Commission for assessing such districts as collections of individual architectural resources and structures without adequately considering impacts of the project on these resources' broader landscapes and settings.⁵⁴⁵ Shenandoah Valley Network notes that National Park Service Bulletin No. 30 states that changes to historic landscapes such as loss of vegetation and the introduction of public utilities can threaten historic integrity, and such impacts to this and other historic districts impacted by the project have been improperly overlooked or downplayed.⁵⁴⁶

209. We disagree. The Final EIS details all historic districts that may be affected by the ACP Project.⁵⁴⁷ With respect to the Union Hill/Woods Corner area, the area is not a historic district and the area of potential affects for the pipeline and compressor station do not constitute a cultural landscape.⁵⁴⁸ The Final EIS explained that the buildings in the area of potential effects were non-farm structures built after World War II, and that the overall landscape did not reflect the development of an agricultural community in the late nineteenth and early twentieth centuries.⁵⁴⁹ Additionally, the visual area of potential effects for the Union Hill area did not exhibit a cohesive cultural landscape that would be threatened by construction of Compressor Station 2 and sub-surface pipeline.⁵⁵⁰

⁵⁴⁴ Rehearing Request of Shenandoah Valley Network at 153; Rehearing Request of Friends of Nelson at 49-52.

⁵⁴⁵ Rehearing Request of Shenandoah Valley Network at 153.

⁵⁴⁶ *Id.*

⁵⁴⁷ Final EIS at 4-515 to 4-545.

⁵⁴⁸ *Id.* at 4-538.

⁵⁴⁹ *Id.* at 4-538.

⁵⁵⁰ *Id.*

210. Of the remaining properties of concern to petitioners, the Final EIS analyzed the project's impacts on historic resources.⁵⁵¹ For Red Apple Orchards, the Final EIS determined that the property was potentially eligible for listing on the National Register of Historic Places,⁵⁵² but surveys confirmed the project would not compromise the historic setting or adversely affect the property not be adversely affected by the project.⁵⁵³ With respect to the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District, the Final EIS explained that consultation was contingent on additional field surveys, but that Atlantic must, after consulting with the Virginia Department of Historical Resources and other interested parties, avoid or mitigate potential adverse effects to cultural resources or historic properties.⁵⁵⁴ Finally, the Final EIS describes the potential visual impacts on scenic byways, including Route 151 from tree removal for construction and operation of the pipeline facilities. The Final EIS recommended, and the Certificate Order required, that Atlantic implement additional visual mitigation measures for scenic byways on a site-specific basis, subject to Commission approval.⁵⁵⁵

211. Friends of Nelson assert that the Draft EIS did not sufficiently examine cultural attachment with regards to Nelson County.⁵⁵⁶ Friends of Nelson note that the Commission did not conduct a cultural attachment assessment, and therefore, had no basis to determine that negative impacts on the rural community's cultural attachment to the landscape are not anticipated.⁵⁵⁷ As stated in the Final EIS, regulations implementing the NHPA do not require an assessment of cultural attachment, and do not recognize a

⁵⁵¹ *Id.* at 4-515 to 4-545.

⁵⁵² *Id.* at 4-524, Table 4.10.1-2.

⁵⁵³ Atlantic's July 28, 2017 Supplemental Information at Appendix D, Part 8a, 114 (Accession No. 20170728-5118) (explaining that the pipeline would not affect any structures, would cross the 1,100 acre property at its northeastern edge through open pasture, and any tree clearing on adjacent parcels would have a minimal effect on the farm's viewshed).

⁵⁵⁴ Final EIS at 3-47, 4-527; Certificate Order, 161 FERC ¶ 61,042 at PP 267, 269, Appendix A, Environmental Condition 56.

⁵⁵⁵ Final EIS at 4-420; Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 44.

⁵⁵⁶ Rehearing Request of Friends of Nelson at 49.

⁵⁵⁷ *Id.*

property type defined by cultural attachment.⁵⁵⁸ However, as detailed above, Commission staff did review the adverse effects on historic districts, historic landscapes, and traditional cultural properties, which can convey the experience of cultural attachment.⁵⁵⁹ Therefore, we find that the Final EIS properly considered cultural attachment.

212. Last, Friends of Nelson contend that the Commission did not consider a September 22, 2017 filing from the Virginia Department of Historical Resources regarding the Phase I Archaeological Survey, which highlights the adverse impacts to the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District.⁵⁶⁰ However, Commission staff's October 25, 2017 letter to the Advisory Council identified the South Rockfish Valley Rural Historic District and the Warminster Rural Historic District as properties which would be adversely affected by the project.⁵⁶¹ Additionally, on March 8, 2018, Commission staff requested that Atlantic provide additional information and mitigation for these two districts to further consider the Virginia Department of Historical Resources' September 22, 2017 letter.⁵⁶² Thus, the Commission is still evaluating the issues identified in the Virginia Department of Historical Resources' September 22, 2017 letter.

9. Property Values

213. Mr. Limpert argues that the Commission improperly concluded that property values would not be reduced by the ACP Project.⁵⁶³ Mr. Limpert states that all the studies the Commission relied upon to draw its conclusion were industry studies and were flawed.⁵⁶⁴ For example, Mr. Limpert argues that one study reviewed rural properties in Katy, Texas, but Katy, Texas is not a rural location.⁵⁶⁵

⁵⁵⁸ Final EIS at 4-528. *See also* 36 C.F.R. § 60 (2017).

⁵⁵⁹ Final EIS at 4-528.

⁵⁶⁰ Rehearing Request of Friends of Nelson at 50-51.

⁵⁶¹ October 25, 2017 Notification of Adverse Effect for the Atlantic Coast Pipeline and Supply Header Projects (Accession No. 20171025-3044).

⁵⁶² March 8, 2018 Data Request (Accession No. 20180308-3011).

⁵⁶³ Rehearing Request of Mr. Limpert at 5.

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

214. As explained in the Certificate Order, the Final EIS identified ten studies that conclude that the presence of a pipeline or compressor station either has no effect or an insignificant effect on property values.⁵⁶⁶ Mr. Limpert fails to describe which studies were flawed or inaccurate with any degree of specificity.

215. Mr. Limpert further argues that the Commission only contacted one appraiser to see if property values would be reduced, and that appraiser told the Commission he did not know if property values would be impacted.⁵⁶⁷ This is incorrect. The Final EIS clearly states its conclusion was based on a variety of factors including independent prior research⁵⁶⁸ conducted by the Commission with real estate appraisers that indicated empirical evidence indicates no difference in value attributable to the existence of a pipeline easement.⁵⁶⁹ The Final EIS acknowledges that specific valuation predictions cannot be made on a property-by-property basis and that it is reasonable to expect that property values may be impacted differently based on the setting and inherent characteristics of the property. Yet, based on the available research, there is no conclusive evidence indicating that natural gas pipeline easements or compressor stations would have a significant negative impact on property values.⁵⁷⁰

10. Wildlife Impacts

216. Shenandoah Valley Network argues that the Draft and Final EIS failed to include sufficient information regarding impacts to wildlife protected by the Endangered Species Act (ESA), such as the Indiana and northern long-eared bats.⁵⁷¹ Shenandoah Valley Network contends that because the Final EIS was issued prior to completion of consultation with the U.S. Fish and Wildlife Service (FWS), full impacts, including

⁵⁶⁶ Certificate Order, 161 FERC ¶ 61,042 at P 251 (citing the Final EIS at 4-504 to 4-506).

⁵⁶⁷ Rehearing Request of Mr. Limpert at 5.

⁵⁶⁸ Final EIS for the Constitution Pipeline and Wright Interconnects Projects at 4-153.

⁵⁶⁹ Final EIS at ES-12 to ES-13, 4-504 to 4-506.

⁵⁷⁰ *Id.* at 4-506.

⁵⁷¹ Rehearing Request of Shenandoah Valley Network at 151.

cumulative impacts, to listed species were not disclosed.⁵⁷² Shenandoah Valley Network asserts that the Draft EIS's failure to include this information is in violation of NEPA regulations, which require "[t]o the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analysis and related surveys and studies required by . . . the Endangered Species Act."⁵⁷³

217. Shenandoah Valley Network's assertions have no merit. As stated in the Final EIS, Commission staff consulted with FWS, U.S. Department of Commerce, National Marine Fisheries Service, Forest Service, and state resource agencies regarding the presence of ESA-listed, proposed for listing, or state-listed species in the project areas.⁵⁷⁴ Based on these consultations and field surveys, Commission staff extensively analyzed the effect the project would have on listed species and determined that construction and operation of the projects are likely to adversely affect seven ESA-listed species, including the Indiana bat and northern long-eared bat.⁵⁷⁵ Last, the Final EIS explicitly complies with the NEPA regulation cited by Shenandoah Valley Network because the Final EIS was developed concurrently with the environmental impact analysis required by the ESA.⁵⁷⁶

11. Visual Impacts

218. Mr. Limpert claims that the Certificate Order violated section 380.15 of the Commission's regulations, which requires the Commission to avoid siting impacts on scenic, historic, wildlife, and recreational values.⁵⁷⁷ Specifically, Mr. Limpert states that the project will severely impact scenic, historic, wildlife, and recreational values of

⁵⁷² *Id.* Shenandoah Valley Network notes that the public does not have an opportunity for comment on FWS's development of a Biological Assessment or Biological Opinion. *Id.*

⁵⁷³ *Id.* at 152 (citing 40 C.F.R. § 1502.25(a) (2017)).

⁵⁷⁴ Final EIS at ES-7.

⁵⁷⁵ *Id.* at ES-7, 4-244 to 4-331, 4-610 to 4-611.

⁵⁷⁶ *Id.* at ES-7 ("In compliance with section 7, we are submitting this EIS as our Biological Assessment and requesting formal consultation with the FWS and [the National Marine Fisheries Service].").

⁵⁷⁷ Rehearing Request of Mr. Limpert at 6. *See* 18 C.F.R. § 380.15 (2017).

ridgetops that will be excavated due to pipeline construction.⁵⁷⁸ Mr. Limpert explains that about 38 miles of excavated ridgeline will be “scarred forever” and disputes the Commission’s conclusion that the ridgelines will not be seen from a lower elevation.⁵⁷⁹ Friends of Nelson argues that this permanent disturbance of forested lands will create a significant visual impact to the Blue Ridge Parkway and the Appalachian National Scenic Trail.⁵⁸⁰

219. We find that the Certificate Order complied with section 380.15 of the Commission’s regulations. The Final EIS and Certificate Order found that the proposed ACP Project route was preferable based on a comparison of the construction and environmental impacts between the proposed route and alternative routes, as discussed above. The proposed site was the most unobtrusive site available among the options evaluated. Atlantic and DETI collocated portions of the proposed facilities where possible and attempted to construct them parallel to cleared and/or previously disturbed linear corridor facilities including pipelines, electric transmission lines, roads and railroads.⁵⁸¹ In the Commission’s examination of alternative sites, we considered landowner concerns, siting impact avoidance, and unobtrusive site selection as required by the regulations.

220. The Final EIS recognizes that pipeline construction will result in a greater degree of visual impacts in heavily forested areas with high elevations and along steep mountainsides, particularly where the cleared and maintained right-of-way in these forested areas will create a visual contrast more noticeable to viewers.⁵⁸² The ACP Project will create long-term permanent impacts in these areas.⁵⁸³ To mitigate the long-term impacts due to the removal of trees along temporary work space areas and the operational right-of-way, the Final EIS recommended that Atlantic identify by milepost the locations where a narrowed construction right-of-way would be adopted to reduce

⁵⁷⁸ *Id.*

⁵⁷⁹ *Id.*

⁵⁸⁰ Rehearing Request of Friends of Nelson at 50-51.

⁵⁸¹ Final EIS at 4-416.

⁵⁸² *Id.* at 4-417.

⁵⁸³ *Id.* at 5-26.

impacts on forest land within the Seneca State Forest, the Monongahela National Forest, and the George Washington National Forest.⁵⁸⁴

221. The Monongahela National Forest and George Washington National Forest operate under Land and Resource Management Plans. The Forest Service analyzed amending its Management Plans to allow for the project within the Monongahela National Forest and George Washington National Forest, and on June 21, 2017, issued a draft record of decision to authorize the use and occupancy of National Forest System lands for the ACP Project. The draft record of decision was available for public objections until September 5, 2017. After resolving objections, the Forest Service issued a final decision on the respective authorizations before it on November 17, 2017.⁵⁸⁵ Impacts on National Forest resources will be minimized by Atlantic following the measures outlined in its *Construction, Operation, and Maintenance Plan (COM Plan)*, which is required as part of any Special Use Permit on Forest Service land.⁵⁸⁶

222. Further, as discussed above, the ACP Project will cross the Blue Ridge Parkway and the Appalachian National Scenic Trail using the HDD method.⁵⁸⁷ Under its *Initial Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*, Atlantic acknowledged that attempts at HDD could fail and, if this happens, Atlantic would attempt to use the direct pipe option; however, Atlantic concluded that the visual impacts resulting from this option would be the same as the proposed action and access roads, work spaces, and temporary construction areas would be restored as close as possible to pre-construction conditions.⁵⁸⁸ We agree and find that the visual impacts to the Blue Ridge Parkway and the Appalachian National Scenic Trail would not be significant. Further, as specified in the Certificate Order, Environmental Condition 49 requires Atlantic to file for review and approval, site-specific HDD crossing plans and alternative

⁵⁸⁴ *Id.*

⁵⁸⁵ Forest Service, *Record of Decision on the Atlantic Coast Pipeline Project Special Use Permit/Land and Resource Management Plan Amendments* at 6 (Nov. 17, 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf.

⁵⁸⁶ Certificate Order, 161 FERC ¶ 61,042 at P 250.

⁵⁸⁷ Final EIS at 4-481.

⁵⁸⁸ *Id.* at 4-481, 5-28. See Atlantic's October 27, 2017 Supplemental Information at Attachment P (*Blue Ridge Parkway and Appalachian National Scenic Trail Contingency Plan*) (Accession No. 20171027-5240).

direct crossing plans for the Blue Ridge Parkway and provide proof of consultation with the National Park Service regarding these plans.⁵⁸⁹

12. Water Resources

a. Surface Water Impacts

i. Construction Across Steep Terrain

223. Shenandoah Valley Network argues that the Final EIS failed to adequately assess or mitigate impacts to streams and wetlands from construction along steep slopes.⁵⁹⁰ Shenandoah Valley contends that such construction will increase sedimentation from erosion and landslides and result in long-term adverse effects on pristine headwaters, wetlands, and brook trout habitat.⁵⁹¹

224. As discussed in the Certificate Order and throughout this order, to avoid or minimize impacts from construction over steep terrain, Atlantic and DETI will adopt the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan (Plan) Wetland and Waterbody Construction and Mitigation Procedures (Procedures)*.⁵⁹² Atlantic is also required to implement a *Best in Class Steep Slope Management Program* to use specialized techniques when constructing on specific steep slopes⁵⁹³ and a *Slip Avoidance, Identification, Prevention, and Remediation – Policy and Procedure* plan to avoid, minimize, and mitigate potential landslide issues in slip prone areas.⁵⁹⁴ Within National Forests, Atlantic must also adhere to its *COM Plan*, which describes the additional avoidance and minimization measures that will be implemented during construction and operation activities to ensure compliance with the National Forests' Land and Resource Management Plans.⁵⁹⁵ The Final EIS concluded, and we affirmed in the

⁵⁸⁹ Certificate Order, 161 FERC ¶ 61,042 at Environmental Condition 49.

⁵⁹⁰ Rehearing Request of Shenandoah Valley Network at 71.

⁵⁹¹ *Id.* at 72.

⁵⁹² FERC, *Wetland and Waterbody Construction and Mitigation Procedures* (May 2013), <https://www.ferc.gov/industries/gas/enviro/guidelines/wetland-pocket-guide.pdf>. See Final EIS at 2-31.

⁵⁹³ Certificate Order, 161 FERC ¶ 61,042 at PP 203 – 204.

⁵⁹⁴ *Id.* P 204.

⁵⁹⁵ Final EIS at 4-73, 4-75, Appendix G.

Certificate Order, these construction requirements will avoid or minimize impacts to soils located on steep slopes and on streams located on and below these slopes.⁵⁹⁶

225. Shenandoah Valley Network argues that the Final EIS failed to fully account for impacts to water resources from construction on steep slopes in the National Forests because the *COM Plan* was not finalized at the time of the Final EIS.⁵⁹⁷ The group notes that a report commissioned by Atlantic, the *Soil Erosion and Sedimentation Model Report*, indicated that sedimentation during the first year of construction on affected National Forest Land could be “approximately 200 to 800 percent above baseline erosion rates,” and argues that such reports likely underestimate sedimentation levels.⁵⁹⁸ Shenandoah Valley Network points to comments by the Forest Service expressing concern that construction techniques along steep slopes in the National Forests have a high risk of failure.⁵⁹⁹ According to Shenandoah Valley Network, the Forest Service expressed concern about this lack of information and indicated, “[s]hould the ACP Project be permitted, multiple additional high hazard areas will need to be addressed on a site-specific basis.”⁶⁰⁰

226. The Final EIS explained that the *Soil Erosion and Sedimentation Model Report* likely overstated construction impacts on erosion. As discussed in the Final EIS, the report modeled impacts over a longer time period (3 months vs. 2 weeks), during the summer when intense storms are more likely to occur (vs. the Project’s proposal to conduct steep slope construction throughout the year), and only relied on slope breakers and silt fences for mitigation in its model when Atlantic will actually use a variety of erosion and sediment control measures.⁶⁰¹ The Final EIS concluded that surface water impacts from construction along steep slopes on Forest Service land would be avoided or minimized through adherence to the mitigation requirements discussed above.⁶⁰² For example, the Commission’s Plan requires more erosion control measures in addition to slope breakers and silt fences, including: temporary seeding, mulching, established

⁵⁹⁶ *Id.* at 5-1; Certificate Order, 161 FERC ¶ 61,042 at P 204.

⁵⁹⁷ Rehearing Request of Shenandoah Valley Network at 75.

⁵⁹⁸ *Id.* (citing the Final EIS at 4-240, 5-20).

⁵⁹⁹ *Id.* at 73.

⁶⁰⁰ *Id.* at 75 (citing Forest Service High-Hazard Stabilization Measures Request).

⁶⁰¹ Final EIS at 4-231, 4-240.

⁶⁰² *Id.* at 2-30 to 2-31.

construction entrances, straw bales, and sediment basins and traps.⁶⁰³ The *Best in Class Steep Slope Management Program* requires additional site-specific mitigation measures, such as soil nailings, enhanced drains (German Drains), armored channels and drain pipes, slope breaker armored outlets, energy dissipation drains, and targeted seep collectors.⁶⁰⁴

227. The *COM Plan* also includes site-specific designs and performance-based standards which would be used in the National Forests to minimize the risks for sliding and other slope instabilities.⁶⁰⁵ The Final EIS included the *COM Plan* as Appendix G, which had already been subject to Forest Service review in its second revision, and explained that additional review of the *COM Plan* by the Forest Service was ongoing. Therefore, mitigation measures included in the plan could be modified should the Forest Service determine that additional mitigation is necessary.⁶⁰⁶ Atlantic submitted an updated *COM Plan* in October 2017 which addressed Forest Service comments and included additional details on mitigation measures to further minimize impacts.⁶⁰⁷ The Forest Service approved the *COM Plan* on November 17, 2017, and will require its use on all special use permits for the ACP Project.⁶⁰⁸

228. Several petitioners contend that the Commission has failed to show that this mitigation is effective.⁶⁰⁹ We disagree. Mitigation measures are sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as

⁶⁰³ Plan at 11-19.

⁶⁰⁴ Atlantic Coast's January 10, 2017, Supplemental Filing, Appendix C: Revised Site Specific Geohazard Mitigation Design Drawings (Accession No. 20170110-5142). See Certificate Order, 161 FERC ¶ 61,042 at P 204 (listing examples of mitigation measures).

⁶⁰⁵ Final EIS at 4-38.

⁶⁰⁶ *Id.* at 2-31.

⁶⁰⁷ Atlantic's October 27, 2017 Supplemental Information (Accession No. 20171027-5240).

⁶⁰⁸ Forest Service, *Record of Decision on the Atlantic Coast Pipeline Project Special Use Permit/Land and Resource Management Plan Amendments* at 6 (Nov. 17, 2017), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd564397.pdf.

⁶⁰⁹ Rehearing Request of Ashram-Yogaville at 11; Rehearing Request of Friends of Buckingham at 11; Rehearing Request of Friends of Nelson at 23-24.

when they are included as mandatory conditions imposed on pipelines.⁶¹⁰ The Commission's Plan and Procedures were developed in consultation with multiple state agencies across the country and updated based on Commission staff's field experience gained from pipeline construction and compliance inspections conducted over the last 25 years. Based on Commission staff's experience, these measures are an effective means to mitigate the impacts of construction and operation of the pipeline on affected resources. The *Best in Class Steep Slope Management Program* was developed based on results of a Geohazard Analysis Program, which identified steep slopes along the project route, and mitigation measures from industry-developed "Mitigation of Land Movement in Steep and Rugged Terrain for Pipeline Projects"⁶¹¹ During construction and restoration, Atlantic and Dominion must employ environmental inspectors to ensure compliance with the aforementioned construction standards and other certificate conditions.⁶¹² The Forest Service also requires construction monitoring by geotechnical professionals to review construction implementation and any needed modifications due to unforeseen conditions.⁶¹³ Where, as here, mitigation measures are mandatory, and a program exists to monitor and enforce those measures, such measures have been found to be sufficiently supported by substantial evidence.⁶¹⁴

ii. Site-Specific Information

229. Shenandoah Valley Network and Friends of Nelson argue that the Commission violated NEPA by failing to have information on site-specific construction plans for each waterbody crossing.⁶¹⁵ Shenandoah Valley Network notes that the Commission required Atlantic to submit site-specific drawings for all major waterbody crossings, which shows that construction procedures at particular sites is essential to understanding actual impacts.

⁶¹⁰ *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).

⁶¹¹ Final EIS at 4-28 to 4-29.

⁶¹² *Id.* at 2-51 to 2-53 (describing the roles and responsibilities of environmental inspectors); *id.* at 2-53 (discussing aspects of the Commission's compliance monitoring program).

⁶¹³ *Id.* at 4-41.

⁶¹⁴ *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997).

⁶¹⁵ Rehearing Request of Shenandoah Valley Network at 91; Rehearing Request of Friends of Nelson at 44.

Accordingly, Shenandoah Valley Network asserts that more detailed site-specific data is warranted.⁶¹⁶

230. We disagree. Site-specific drawings are not required to assess the impacts from all waterbody crossings. The Final EIS provided detailed site-specific information on the 1,536 and 133 waterbodies crossings within the ACP Project and Supply Header Project workspaces, respectively, including location (milepost or facility), waterbody name, flow regime, crossing width, crossing method, and, where applicable, state water quality classifications, anticipated timing restrictions, potential for blasting, proposed water appropriations, and any impairment or sensitivity.⁶¹⁷ The Final EIS explained that Atlantic and DETI would mitigate adverse impacts associated with waterbody crossings. Atlantic and DETI would implement mitigation measures outlined in the FERC Procedures, including the installation of trench plugs to prevent water from flowing along the trenchline during and after construction.⁶¹⁸ For waterbodies being crossed with HDD, Atlantic and DETI have prepared a *HDD Plan* that describes the drilling techniques and other measures that would be implemented to minimize and address potential issues associated with HDD.⁶¹⁹ The Final EIS concludes, and we agree, that with these measures impacts on surface waters would be effectively minimized or mitigated, and would be largely temporary in duration.⁶²⁰

231. Shenandoah Valley Network next alleges that the Commission was required to include site-specific information on water withdrawals and discharges for both hydrostatic testing and dust control.⁶²¹ The Final EIS discussed the impacts from and baseline mitigation associated with water withdrawals. Atlantic and DETI will require a total of approximately 86.6 million gallons of water for hydrostatic testing (82.9 million gallons for the ACP Project and 3.7 million gallons for the Supply Header Project).⁶²² Of this volume, 46.9 and 39.7 million gallons will be required from municipal sources and surface water sources, respectively. Water for hydrostatic testing will be withdrawn and

⁶¹⁶ Rehearing Request of Shenandoah Valley Network at 91.

⁶¹⁷ Final EIS at 4-100, Appendix K.

⁶¹⁸ *Id.* at 4-115.

⁶¹⁹ *Id.* at 4-116 to 4-117.

⁶²⁰ *Id.* at 5-10.

⁶²¹ Rehearing Request of Shenandoah Valley Network at 92-93.

⁶²² Certificate Order, 161 FERC ¶ 61,042 at P 222; Final EIS at 4-121.

discharged in accordance with the Commission's Procedures, state/commonwealth regulations, and required permits. Atlantic and DETI will construct temporary cylindrical water impoundment structures adjacent to several of the water withdrawal points to allow a slower withdrawal rate. Friends of Nelson contends that this practice will result in a significant impact, but we disagree and point to several additional mitigation measures to minimize environmental impacts.⁶²³ For example, Environmental Condition 61 requires Atlantic and DETI to limit water withdrawal to not exceed 10 percent of instantaneous flow at waterbodies that contain federally protected species.⁶²⁴ Environmental Condition 17 requires Atlantic and DETI to identify proposed or potential sources of water used for dust control, anticipated quantities of water to be appropriated from each source, and the measures they will implement to ensure water sources and any related aquatic biota are not adversely affected by the appropriation activity.⁶²⁵ We affirm that these measures are sufficiently protective against any significant impacts associated with water withdrawals.

232. Friends of Nelson argues that the Final EIS failed to consider site-specific details associated with floodplains crossing impacts. The Final EIS explains that any structure built in a floodplain would use graveled lots, but Friends of Nelson contends that such mitigation would produce additional run-off relative to the soils being replaced and that site-specific data are needed to assess impacts.⁶²⁶ We disagree. As discussed, the facilities would be built on graveled lots that allow for some infiltration of rainwater. Based on Atlantic's and DETI's construction and restoration measures, and the minor project-related modifications within floodplains, the Final EIS concluded, and we affirm, that constructing and operating the ACP and Supply Header Projects would not result in a significant impact on floodplains or result in a measurable increase on future flood events.⁶²⁷

233. Shenandoah Valley Network contends that the Final EIS failed to discuss the depth of the pipeline burial.⁶²⁸ It claims if the pipeline is not buried deeply enough, water

⁶²³ Rehearing Request of Friends of Nelson at 45-46.

⁶²⁴ Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 61.

⁶²⁵ *Id.* at Appendix A, Environmental Condition 17.

⁶²⁶ Rehearing Request of Friends of Nelson at 45.

⁶²⁷ Final EIS at 4-118.

⁶²⁸ Rehearing Request of Shenandoah Valley Network at 93-94.

related weather events can re-expose the pipeline.⁶²⁹ We disagree. Installation of the pipeline would include digging a trench at least 8 feet deep for the larger pipeline segments and between 6 and 7 feet for smaller segments to provide a minimum of 3 feet of cover over the top of the pipe after backfilling. These depths provide sufficient cover over the pipeline in accordance with Department of Transportation standards.⁶³⁰

iii. Road Construction Impacts

234. Petitioners argue that the Final EIS violated NEPA because it failed to analyze the impacts from 99 acres of access roads on water resources.⁶³¹ It is not clear which roads petitioners are referring to, but the Final EIS fully analyzed impacts from all access roads. The Final EIS lists the access roads proposed for use for the projects, whether their use is temporary or permanent, and considers these impacts.⁶³² With regard to water resources, the Final EIS analyzed impacts to surface water by describing: all waterbody crossings by access roads,⁶³³ the potential impacts from construction generally,⁶³⁴ and along steep

⁶²⁹ *Id.* at 93.

⁶³⁰ Final EIS at 2-34.

⁶³¹ Rehearing Request of Ashram-Yogaville at 11-12; Rehearing Request of Friends of Buckingham at 11-12; Rehearing Request of Friends of Nelson at 24.

⁶³² Final EIS at 2-25, Appendix E. The Final EIS explained that Atlantic will require 369 existing roads that would need to be temporarily improved, 64 new access roads, and 18 access roads that would also include a new portion that would need to be constructed, with 419 permanent roads that would be required for operation of ACP over the life of the project. Final EIS at 2-25; *see also id.* at 2-16 (acreage). DETI will require 46 existing roads that would need to be temporarily improved for the Supply Header Project, 17 new access roads during construction of for the Supply Header Project, and 12 proposed access roads consist of an existing road that would also include a new portion, with a total of 75 permanent roads that would be required for operation of for the Supply Header Project and maintained for the life of the project. Final EIS at 2-25 to 2-26; *see also id.* at 2-17 (acreage).

⁶³³ *Id.* at 4-104 to 4-106.

⁶³⁴ *Id.* at 4-113.

slopes,⁶³⁵ adjustments to avoid sensitive water resources⁶³⁶ and mitigation to minimize impacts from sedimentation and erosion.⁶³⁷

iv. Impacts to Water Quality Standards

235. Friends of Nelson alleges that the Final EIS erred when it determined that certain waterbody crossings in Nelson County would be minor. Friends of Nelson acknowledges that the Final EIS indicated that these crossings would follow the requirements of the Commission Plan and Procedures, but also notes that this construction would be conducted in accordance with required Construction Stormwater National Pollutant Discharge Elimination System (NPDES) permits, as appropriate under the Clean Water Act. Because these permits require a project-specific Erosion and Sediment Control Plan, Friends of Nelson argues that the Commission's NEPA analysis requires this information as well.⁶³⁸ Friends of Nelson goes on to argue that the Final EIS discusses stormwater NPDES permits for stream crossings, but the entire ACP Project requires this permit as well.⁶³⁹

236. As discussed, the Commission fully considered surface water impacts, including impacts to waterbodies crossings and from stormwater runoff. The Final EIS explained that Atlantic and DETI would minimize impacts from erosion and sedimentation by implementing the Commission's Plan and Procedures, West Virginia Department of Environment's Erosion and Sediment Control Best Management Practice Manual, the Virginia Erosion and Sediment Control Handbook, the Pennsylvania Erosion and

⁶³⁵ *Id.* at 4-27, 4-42, 4-44, 4-46 (explaining that access roads, including existing roads upgraded for the project, have the potential to result in unstable slopes, which could impact nearby streams if left unmitigated).

⁶³⁶ *Id.* at 3-52 to 3-57, 4-16, 4-47 (describing minor route adjustments and the strategy of locating the pipeline route on ridgetops to avoid landslide hazards and stream hazards).

⁶³⁷ *See id.* at 4-66 (explaining for new access roads "erosion controls would be used and maintained to minimize erosion and sedimentation potential" and for temporary access roads, the area "would be reclaimed and revegetated after construction"); *id.* at 4-72 (describing mitigation measures for road construction on Forest Service land; *id.* at 4-115 (describing erosion controls that would be used and maintained to minimize erosion and sedimentation potential from access roads proximate to waterbodies).

⁶³⁸ Rehearing Request of Friends of Nelson at 44.

⁶³⁹ *Id.* at 45-46.

Sediment Pollution Control Program Manual, and the North Carolina Erosion and Sediment Control Planning and Design Manual.⁶⁴⁰ Pursuant to these requirements, Atlantic and DETI would also use compost filter socks at the edges of workspaces and access roads within 300 feet of the ESA sensitive waterbodies, and would implement the FWS' enhanced conservation measures for ESA sensitive waterbodies.⁶⁴¹ Based on these controls, the Final EIS concluded, and we affirm here, that constructed-related stormwater impacts would be minimal. To the extent site-specific mitigation measures are required by Construction NPDES permits or other authorizations, those requirements are in addition to those required by the Commission here, and thus more protective.⁶⁴² With regard to Friends of Nelson's comments regarding state/commonwealth authority under the Clean Water Act, we require applicants to obtain all necessary approvals before construction.

237. Shenandoah Valley Network argues that the Final EIS failed to assess the impacts of NO_x emissions on the Chesapeake Bay and Bay tributaries.⁶⁴³ Shenandoah Valley Network argues that atmospheric deposition of nitrogen is the highest nitrogen input load to the Chesapeake Bay and ACP Project emissions may cause the bay to exceed its Total Maximum Daily Load (TMDL)⁶⁴⁴ for nitrogen.⁶⁴⁵ According to Shenandoah Valley

⁶⁴⁰ Final EIS at 4-231 to 4-232.

⁶⁴¹ *Id.* at 4-232.

⁶⁴² Friends of Nelson suggests that the Commission was required to await development of any site-specific mitigation measures required by such permits. *See* Rehearing Request of Friends of Nelson at 47. But NEPA does not require complete mitigation plans prior to agency action. *Robertson*, 490 U.S. at 353 (“it would be inconsistent with NEPA’s reliance on procedural mechanisms -- as opposed to substantive, result-based standards -- to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act”); *see also U.S. Dep’t of Interior v. FERC*, 952 F.2d 538, 546 (D.C. Cir. 1992) (holding that FERC need not have “perfect information” before acting and need not definitively resolve all environmental concerns).

⁶⁴³ Rehearing Request of Shenandoah Valley Network at 146-51.

⁶⁴⁴ A TMDL is calculation of the maximum quantity of a given pollutant that may be added to a waterbody from all sources without exceeding the applicable water quality standard for that pollutant.

⁶⁴⁵ Rehearing Request of Shenandoah Valley Network at 146 (citing the Chesapeake Bay TMDL).

Network, the Commission should not have relied on Atlantic and DETI's air permit applications to determine whether the Project would increase nitrogen deposition in the Chesapeake Bay. Shenandoah Valley Network points out because Atlantic's air modeling showed that the ACP Project's emissions would come close to National Ambient Air Quality Standards (NAAQS) limits set by the EPA, the Commission should have performed more extensive analysis to ensure that emissions would not violate the Chesapeake Bay TMDL.⁶⁴⁶

238. No additional analysis was necessary. The Final EIS appropriately relied upon federal air emission limits under the Clean Air Act. The Commission reviewed Atlantic's air quality modeling and identified no errors.⁶⁴⁷ Shenandoah Valley Network claims the air quality modeling is inadequate because results for three of six ACP Project compressors show that emissions "are close to" NAAQS limits,⁶⁴⁸ but identifies no error with established practices. Shenandoah Valley Network cites no authority for the proposition that additional modeling is required, and we find that the air quality modeling in the record satisfies NEPA requirements.⁶⁴⁹ In any event, as Shenandoah Valley Network points out,⁶⁵⁰ designated Chesapeake Bay jurisdictions have developed plans for assuring compliance with the Bay TMDL.⁶⁵¹ According to EPA, Clean Air Act regulations and programs, including the NAAQS with which the project emissions comply, will achieve significant decreases in air deposition of nitrogen by 2020, and EPA believes there is reasonable assurance that those reductions will occur and not contribute to further degradation of the Chesapeake Bay.⁶⁵² Based on the estimated emissions from construction and operation of the ACP and Supply Header Projects' facilities, Atlantic's and DETI's commitments to comply with the required federal and state regulations, and a

⁶⁴⁶ *Id.* at 151.

⁶⁴⁷ *See* Final EIS at 4-560; *see also id.* at 4-559 to 4-564.

⁶⁴⁸ Rehearing Request of Shenandoah Valley Network at 150.

⁶⁴⁹ *See* Final EIS at 4-559 to 4-560 (addressing use of background pollutant concentrations in modeling).

⁶⁵⁰ Rehearing Request of Shenandoah Valley Network at 148.

⁶⁵¹ *See* EPA, Chesapeake Bay TMDL: Chesapeake Bay Watershed Implementation Plans, <https://www.epa.gov/chesapeake-bay-tmdl/chesapeake-bay-watershed-implementation-plans-wips>.

⁶⁵² EPA, Chesapeake Bay TMDL: Air Pollution in the Chesapeake Bay Watershed <https://www.epa.gov/chesapeake-bay-tmdl/air-pollution-chesapeake-bay-watershed>.

review of the modeling analysis, the Final EIS determined, and we affirm here, that the projects would result in continued compliance with the NAAQS and would not result in significant impact on local or regional air quality.⁶⁵³

b. Wetlands

239. Shenandoah Valley Network next argues that the Final EIS failed to adequately assess impacts or restoration to forested wetlands and wetland vegetation.⁶⁵⁴ We disagree. Construction of the ACP and Supply Header projects will impact a total of 798.2 acres of wetlands, including 91 acres of emergent wetlands, 97.4 acres of scrub-shrub wetlands, and 604.1 acres of forested wetlands.⁶⁵⁵ The Final EIS found that following construction, the operational easement would be restored and emergent and scrub-shrub wetlands would return in a few years to their original condition and function in accordance with the Commission's Procedures.⁶⁵⁶ The projects would also permanently impact 227 acres of forested wetlands, 98 percent of which would, after clearing, necessarily convert to emergent wetlands.⁶⁵⁷

240. Shenandoah Valley Network argues that the Final EIS failed to fully account for all adverse impacts on forested wetlands, but the Final EIS acknowledged that these impacts would include potential impacts on water quality; changes in the density, type, and biodiversity of vegetation; and impacts on habitat due to fragmentation, loss of riparian vegetation, and microclimate changes associated with gaps in forest canopy.⁶⁵⁸ The Final EIS acknowledged it would take decades for these resources to mature and return to their original conditions and functions.⁶⁵⁹ The Final EIS noted that Atlantic and DETI are working with the U.S. Army Corps of Engineers (Corps) to determine wetland mitigation

⁶⁵³ Final EIS at 4-564.

⁶⁵⁴ Rehearing Request of Shenandoah Valley Network at 83-90.

⁶⁵⁵ See Final EIS at 4-135.

⁶⁵⁶ See *id.* at 4-140.

⁶⁵⁷ *Id.* at 4-138.

⁶⁵⁸ *Id.* at 4-137.

⁶⁵⁹ *Id.*

requirements and we required that they file copies of their final wetland mitigation plans and documentation of Corps approval of the plans.⁶⁶⁰

241. Nonetheless, Shenandoah Valley Network argues that the Final EIS mischaracterized the long-term impacts associated with lost forested wetlands, noting that this loss cannot be characterized as a mere “conversion” when it results in long-lasting and significant impacts.⁶⁶¹ Shenandoah Valley Network argues that the Final EIS is inconsistent when it estimates that upland mature forest will take “a century or more” to return to its precondition state, but forested wetlands will return to its preconstruction state in up to 30 years or more.⁶⁶²

242. We disagree. Mature upland forests and forested wetlands are two different ecosystems with different recovery timeframes. Forested wetlands typically have a mature tree canopy with a diverse range of understory and herbaceous community structure and species.⁶⁶³ However, forested wetlands in both ACP and Supply Header Projects areas are dominated by herbaceous and shrub species similar to those found in emergent and scrub-shrub wetlands, along with a variety of ash, maple, oak, birch, and tupelos, among others.⁶⁶⁴ Furthermore, of the forested wetlands that would be impacted by the ACP Project, the Final EIS notes that nearly all the permanent forested wetland impacts would be considered type conversions (e.g., conversion of forest to scrub-shrub or emergent wetland) meaning that the full length of time to return to full forested canopy would not be required, and thus only a shorter period of time will be necessary to regenerate scrub-shrub and emergent wetland species.⁶⁶⁵ As we explained in the Final EIS, recovery would be closer to 30 or more years rather than a century or more.⁶⁶⁶

243. With regard to upland forests, the Final EIS also explains that the century or more of upland forest recovery refers not only to the mature forest canopy itself, but forest

⁶⁶⁰ Certificate Order, 161 FERC ¶ 61,042 at P 225, Appendix A, Environmental Condition 53; Final EIS at 4-140.

⁶⁶¹ Rehearing Request of Shenandoah Valley Network at 85.

⁶⁶² *Id.* at 86 (citing Final EIS at ES-10, 4-137).

⁶⁶³ Final EIS at 4-132.

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.* at 4-140.

⁶⁶⁶ *Id.* at 4-137.

habitat, including for wildlife species. The Final EIS also explains that upland forest habitat comprises old-growth forest, primarily composed of oak and/or oak-pine regimes in National Forest System lands.⁶⁶⁷ The EIS explained regeneration to existing conditions in upland forest could take a century because the loss of hard mast production (i.e., hard nuts and seeds such as acorns, hickory nuts, and walnuts) will inhibit regeneration. On drier sites, pine species, black gum, and perhaps red maple would be expected to outcompete oak, and on more mesic sites,⁶⁶⁸ a variety of other hardwood species including red maple and yellow poplar would likely outcompete oak, lengthening the time it may take to reach pre-construction conditions of forest growth.⁶⁶⁹

244. Shenandoah Valley Network contends that required restoration measures will not fully restore disturbed wetland vegetation.⁶⁷⁰ It argues that the National Forest Service's *COM Plan*, which requires at least 80 percent of pre-construction cover, is not protective enough of forested wetlands. It contends that the 20 percent of vegetation cover could be trees that do not grow back after construction. It further argues that wetland regeneration will not occur because Atlantic will not segregate the topsoil of wetlands if the soil is inundated. Shenandoah Valley Network argues that failing to segregate soil will disrupt wetland soil layers and the compaction caused by heavy construction equipment will inhibit regeneration.⁶⁷¹

245. The cited *COM Plan* will apply to less than 1 acre of forested and scrub-shrub wetlands that would be temporarily and permanently impacted on federal lands.⁶⁷² The restoration standards in the *COM Plan* are identical to the Commission's Procedures, which also consider revegetation successful if "vegetation is at least 80 percent of either the cover documented for the wetland prior to construction, or at least 80 percent of the cover in adjacent wetland areas that were not disturbed by construction."⁶⁷³ Revegetation will be successful when wetlands reach 80 percent of cover in *density* when compared to

⁶⁶⁷ *Id.* at 4-167.

⁶⁶⁸ Mesic means the site contains a moderate amount of moisture.

⁶⁶⁹ *Id.* at 4-164.

⁶⁷⁰ Rehearing Request of Shenandoah Valley Network at 88.

⁶⁷¹ *Id.* at 90.

⁶⁷² Final EIS at 4-140.

⁶⁷³ FERC, *Wetland and Waterbody Construction and Mitigation Procedures*, Section VI.D.5.b.

adjacent undisturbed wetland locations. The Final EIS explains that forested wetlands comprise the majority of wetland impacts, accounting for 76 percent of all wetlands impacted, and 74 percent of the *permanent* wetland impacts.⁶⁷⁴ Nearly all the permanent forested wetland impacts would be considered type conversions of forest to scrub-shrub or emergent wetland.⁶⁷⁵ We acknowledge that this standard permits permanent forested wetland loss, but requiring revegetation of all wetlands to be contingent upon growth of trees would be setting a standard that would either be unachievable or risk compromising the safety and integrity of the pipeline.

246. Shenandoah Valley Network alleges that Atlantic's treatment of wetland topsoil is not adequately protective. Shenandoah Valley Network points out that Atlantic plans to only segregate topsoil from subsoil in non-saturated wetlands, but the Final EIS explains that the failure to segregate topsoil and subsoil could affect restoration.⁶⁷⁶ Shenandoah Valley Network argues that failing to segregate soil in saturated wetlands will disrupt wetland soil layers and the compaction caused by heavy construction equipment will inhibit regeneration.⁶⁷⁷

247. Shenandoah Valley Network is correct that in saturated wetlands, topsoil will not be segregated. This is due to the difficulty of such an operation and the fact that Atlantic would disturb a greater acreage of the same wetlands in order to store the saturated material. But the Commission requires other measures to minimize impacts on saturated soils. The Commission's Procedures require Atlantic to cut vegetation just above ground level, leaving existing root systems in place.⁶⁷⁸ The Commission's Procedures also protect against compaction concerns. When saturated soils are present, Atlantic must use low-weight construction equipment, or operate normal equipment on timber riprap, prefabricated equipment mats or terramat.⁶⁷⁹ Atlantic must also continue to monitor revegetation of wetlands after construction and file a report with the Commission documenting the success of wetland revegetation. For any areas where revegetation is

⁶⁷⁴ Final EIS at 4-140.

⁶⁷⁵ *Id.*

⁶⁷⁶ Rehearing Request of Shenandoah Valley Network at 89-90.

⁶⁷⁷ *Id.*

⁶⁷⁸ Procedures at 15.

⁶⁷⁹ *Id.* at 26.

unsuccessful, Atlantic must develop and implement a remedial revegetation plan with annual reporting until the area is successfully revegetated.⁶⁸⁰

248. Finally, Shenandoah Valley Network and Friends of Nelson allege that the Final EIS's claim that wetland replacement or compensatory mitigation would replace lost wetland function is unsubstantiated when it did not require proof of this mitigation until before construction.⁶⁸¹ As discussed in the Final EIS, Atlantic and DETI will restore wetlands in accordance with the Commission's Procedures and in coordination with the appropriate federal and state agencies.⁶⁸² Additionally, Atlantic filed its wetland mitigation plans with the Commission on February 23, 2018, including the Corps' approvals of the respective mitigation plans.⁶⁸³ In compliance with Environmental Condition 53 of the Certificate Order, these were received prior to any construction in wetland locations.

c. Groundwater Impacts in Karst Terrain

249. Shenandoah Valley Network states that the Final EIS failed to adequately assess construction impacts on karst and related groundwater resources.⁶⁸⁴ Specifically, it contends that the Commission's conclusion that there would not be a significant impact on aquifers or other groundwater resources was not supported by a meaningful assessment of potential impacts to water quality from construction through fragile karst terrain.⁶⁸⁵

250. As discussed in the Certificate Order, in order to prevent and mitigate adverse environmental impacts associated with construction and operation of the project within karst terrain, Atlantic and DETI developed a *Karst Terrain Assessment, Construction, Monitoring and Mitigation Plan (Karst Mitigation Plan)* to minimize and respond to karst

⁶⁸⁰ *Id.* at 30.

⁶⁸¹ Rehearing Request of Shenandoah Valley Network at 90; Rehearing Request of Friends of Nelson at 43. *See supra* nn. 493, 642 (NEPA does not require completion of mitigation plans prior to agency action).

⁶⁸² Final EIS at 4-138 to 4-140.

⁶⁸³ Atlantic's and DETI's February 23, 2018 Supplemental Information (Accession No. 20180223-5159).

⁶⁸⁴ Rehearing Request of Shenandoah Valley Network at 80.

⁶⁸⁵ *Id.* at 80-81.

activity during construction and operation of the projects.⁶⁸⁶ This plan includes best management practices that will minimize impacts to the karst environment. These practices include: (1) measures to prevent unimpeded flow of surface drainage into the subsurface karst environment, such as, but not limited to, open throat sinkholes, caves that receive surface drainage, sinking streams, and losing stream segments; (2) procedures for unanticipated karst discoveries during construction; (3) mitigation options of karst features such as sinkholes; and (4) procedures for coordination with state agencies.⁶⁸⁷

251. In addition, Environmental Condition 26 of the Certificate Order requires Atlantic to use subsurface analysis and Light Imaging, Detection, And Ranging (LiDAR) data in order to construct digital terrain models, and existing dye tracing studies to further identify and characterize karst features along the project route in order to characterize groundwater flow conditions in the karst environment from construction workspaces to potential environmental receptors. Environmental Condition 29 requires Atlantic to revise its *Karst Mitigation Plan* to include post-construction monitoring data from LiDAR to ensure adequate pipeline integrity and safety in areas of karst terrain where the potential for collapse and subsidence exists. Environmental Conditions 62 through 64 also require specific karst mitigation, including protections to the Mingo Run and Simmons-Mingo cave system, coordination with the Virginia Department of Conservation and Recreation, adherence with the Virginia Cave Board's karst assessments, and protections to bat habitat in karsts.⁶⁸⁸

252. Shenandoah Valley Network contends that the Commission's reliance on its Atlantic's *Karst Mitigation Plan* is insufficient to address this concern because the Commission does not address the underlying problem of how groundwater moves through karst terrain, which Shenandoah Valley Network asserts is unknown without proper analysis.⁶⁸⁹ Shenandoah Valley Network recommends that the Commission implement dye tracing to determine the path groundwater takes through karst terrain.⁶⁹⁰ Although the Final EIS recommends, and Certificate Order requires, that Atlantic rely on past dye tracing studies in a Fracture and Dye Trace Study, Shenandoah Valley Network argues that the results of this study will only be available after the Final EIS has been issued. Shenandoah Valley Network argues that the Commission should issue a supplemental EIS

⁶⁸⁶ Certificate Order, 161 FERC ¶ 61,042 at P 206.

⁶⁸⁷ *Id.* at P 206, Appendix A at Environmental Condition 29.

⁶⁸⁸ *Id.* at P 206, Appendix A at Environmental Conditions 62 to 64.

⁶⁸⁹ Rehearing Request of Shenandoah Valley Network at 80-83.

⁶⁹⁰ *Id.* at 81-83.

once a final analysis is conducted.⁶⁹¹ Otherwise, Shenandoah Valley Network contends the accurate map of the karst terrain through which the pipeline would pass is untimely developed, preventing the agency from identifying the full scope of impacts to groundwater from construction of the pipeline through the karst terrain.⁶⁹²

253. We disagree. Atlantic conducted an extensive analysis of geologic conditions in the project area, consulted with the applicable state agencies and local water management districts, and used these efforts to prepare the aforementioned plans to avoid, minimize, and mitigate project-related impacts on karst resources.⁶⁹³ Atlantic was required to submit the requested Fracture and Dye Trace study before the commencement of construction, which it did as part of October 18, 2017 Implementation Plan. The study an analysis of surficial karst features with the potential for intersecting shallow interconnected karst voids and cave systems over a wide area; specifically, between the pipeline and nearby water receptors (i.e., public water supply wells, municipal water supplies, private wells, springs, caves systems, and to surface waters receiving discharge).⁶⁹⁴ Performing a dye trace at every sinkhole or sink point along the pipeline alignment is not necessary, as requested by Shenandoah Valley Network, is unnecessary because the data generated from the Fracture and Dye Trace study provide groundwater flow paths and dye testing at each and every karst location would not significantly change the understanding of groundwater flow direction. The study used fracture trace/lineament analysis based remote sensing platforms (aerial photography and LiDAR), along with the results of existing dye trace studies to identify potential karst risks along the pipeline route.⁶⁹⁵ The results of this study showed that that many of the karst features within or receiving drainage from the 300-foot-wide corridor along the ACP Project right-of-way are located inside of and/or may lead to the watersheds of nearby springs; that the greatest potential impact to groundwater is from features which allow surface water to plunge into the subsurface such as caves, sinkholes with open, rockbound throats, and sinking or losing streams. The study

⁶⁹¹ *Id.*

⁶⁹² *Id.* at 83.

⁶⁹³ Final EIS at ES-4.

⁶⁹⁴ Certificate Order, 161 FERC ¶ 61,042 at Appendix A, Environmental Condition 26; *see* Atlantic's Implementation Plan, EC26 at Attachment 1 (October 18, 2017) (Accession number 20171018-5002).

⁶⁹⁵ Atlantic's Implementation Plan, EC26 at Attachment 1 (October 18, 2017) (Accession number 20171018-5002) at 2.

confirmed that the protocols in the *Karst Mitigation Plan* should be followed to limit the potential for groundwater to be impacted by Project construction.⁶⁹⁶

254. We reject Shenandoah Valley Network's claim that the results of the study must be integrated into a supplemental EIS. As we discussed above, a supplemental EIS is only required if the new information would create "significant new circumstances or information relevant to environmental concerns" to warrant a supplemental EIS.⁶⁹⁷ In determining whether new information is "significant," courts have provided that agencies should consider whether "the new information presents a picture of the likely environmental consequences associated with the proposed action not envisioned by the original EIS."⁶⁹⁸ Here, however, the original EIS identified potential issues regarding the risk of pipeline construction on karst terrain. The additional studies offer further and more site-specific detail of features located on the terrain along the pipeline route. Any resulting minor routing variations and realignments to avoid impact to a specific resource, such as karst terrain, are commonplace for ongoing construction projects.⁶⁹⁹

255. Next, Mr. Limpert contends that Atlantic incorrectly surveyed his property.⁷⁰⁰ Specifically, Mr. Limpert contends that the survey conducted on his property does not verify the karst conditions that he characterizes as present and obvious, and he further argues that Atlantic has consistently misrepresented karst in Little Valley. Mr. Limpert also contends that the Commission further failed to adequately assess the impacts on well water in this karst region.⁷⁰¹

256. As the Final EIS states, because subsurface karst features, such as caves and sinkholes, can exist without exhibiting any form of surface expression, Atlantic will perform an electrical resistivity imaging investigation survey to detect subsurface solution features along all portions of the route that are mapped as limestone bedrock at the surface prior to construction.⁷⁰² To ensure the analysis reflects field conditions, the resistivity

⁶⁹⁶ Certificate Order, 161 FERC ¶ 61,042 at P 17.

⁶⁹⁷ *See supra* n. 308.

⁶⁹⁸ *See supra* n. 293.

⁶⁹⁹ *Transwestern Pipeline Company, LLC*, 122 FERC ¶ 61,165, at P 68 (2008).

⁷⁰⁰ Rehearing Request of Mr. Limpert at 4.

⁷⁰¹ *Id.*

⁷⁰² Final EIS at 4-18.

results would be correlated with boring logs.⁷⁰³ We find this process sufficient to ensure that any karst features along the pipeline route, including Mr. Limpert's property, will be properly identified, surveyed, mapped, and subsequently addressed with measures identified within Atlantic's *Karst Mitigation Plan*.⁷⁰⁴

257. We further disagree that the Commission did not assess the impacts of well water in the karst region. The EIS explains that private water supply wells and springs have been identified near the ACP Project and Supply Header Project areas; and therefore, Atlantic and DETI will communicate with landowners to complete surveys for private water.⁷⁰⁵ The EIS requires that Atlantic complete and file the results of the remaining field surveys for wells and springs within 150 feet of the construction workspace, and within 500 feet of the construction workspace in karst terrain prior to construction.⁷⁰⁶

13. Climate Change Impacts of Greenhouse Gas (GHG) Emissions from Downstream Consumption and Upstream Production

258. Shenandoah Valley Network argues the Commission failed to adequately analyze the climate change impacts of the end use of the gas to be transported by the projects as required by NEPA.⁷⁰⁷ Shenandoah Valley Network also argues the Final EIS erred by failing to determine the significance of the secondary effects resulting from GHG emissions from the consumption of gas to be transported by the projects by using a tool such as the Social Cost of Carbon.⁷⁰⁸ Shenandoah Valley Network also argues the Commission should have looked at induced production as part of its cumulative effects analysis.⁷⁰⁹

259. Mr. Limpert argues the Final EIS's assessment of the effects of GHG emissions was extremely brief and inaccurate, and violates NEPA.

⁷⁰³ *Id.*

⁷⁰⁴ *See id.* at ES-4.

⁷⁰⁵ *Id.* at 4-80; Certificate Order, 161 FERC ¶ 61,042 at PP 213-215.

⁷⁰⁶ Final EIS at 4-80; Certificate Order, 161 FERC ¶ 61,042 at PP 213-215.

⁷⁰⁷ Rehearing Request of Shenandoah Valley Network at 96-106.

⁷⁰⁸ *Id.* 98-105.

⁷⁰⁹ *Id.* at 103.

260. Friends of Buckingham and Ashram-Yogaville argue the Final EIS failed to take a hard look at the cumulative impacts on climate change resulting from the “thousands of existing and reasonably foreseeable shale gas developments.”⁷¹⁰ Friends of Buckingham asserts that the Final EIS should have considered the extent to which the project would offset new renewable energy production.⁷¹¹ Finally, Friends of Buckingham and Ashram-Yogaville assert that the geographic scope of the cumulative impact analysis is fatally flawed because it ignored the substantial impacts of Marcellus and Utica shale gas development and climate change.⁷¹²

a. Quantification of GHG Emissions

261. Evaluating GHG-related climate change impacts implicates two analytical steps.⁷¹³ The first step is quantifying GHG emissions, which can be direct, indirect, or cumulative effects as those terms are defined by CEQ regulations implementing NEPA. The second step, which the *Sabal Trail* court described as a “further analytical step,”⁷¹⁴ is linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis. Consistent with CEQ regulations, the Final EIS estimated the GHG emissions associated with construction and operation of the projects,⁷¹⁵ and included a qualitative discussion of the relationship between GHG emissions and climate impacts.⁷¹⁶

262. With regard to upstream production, such impacts are not reasonably foreseeable. Other sections of this order⁷¹⁷ conclude that upstream production does not fall within the scope of NEPA review under CEQ regulations; therefore, the Commission is not required

⁷¹⁰ Rehearing Request of Friends of Buckingham at 12; Rehearing Request of Ashram-Yogaville at 3-4.

⁷¹¹ Rehearing Request of Friends of Buckingham at 12.

⁷¹² *Id.* at 12-13; Rehearing Request of Ashram-Yogaville at 3-4.

⁷¹³ *See Sabal Trail*, 867 F.3d 1371-75.

⁷¹⁴ *Id.* at 1375.

⁷¹⁵ Final EIS at 4-547, 4-557 (Table 4.11.1-5 showing construction emissions), 4-559 (Table 4.11.1-7 showing compressor station emissions for ACP Pipeline and Table 4.11.1-8 showing meter and regulating station emissions for the ACP Pipeline).

⁷¹⁶ *Id.* at 4-618 to 4-622.

⁷¹⁷ *See infra* at PP 293-294.

to evaluate GHG emissions resulting from upstream production. No more was required.⁷¹⁸

263. With regard to downstream GHG emissions, the Final EIS quantified these emissions⁷¹⁹ and reasonably evaluated cumulative effects of the downstream emissions on climate change. The Final EIS described how these GHG emissions would “increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and contribute incrementally to climate change that produces the impacts previously described.”⁷²⁰ The dissent argues that the Commission’s failure to label these emissions as indirect impacts violates NEPA, but such a finding would be immaterial when the Final EIS conservatively estimated GHG emissions from the downstream consumption of natural gas.

264. As for Shenandoah Valley Network’s argument that this case resembles *Sabal Trail*. *Sabal Trail* relied on the fact that the applicants planned the pipeline facilities to “provide capacity to transport natural gas to the electric generating plants of two Florida utilities,”⁷²¹ to conclude that the Commissions needed to evaluate downstream GHG emissions.⁷²² The *Sabal Trail* court did not require the Commission to analyze the link

⁷¹⁸ See *Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of shale gas production development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh’g*, 138 FERC ¶ 61,104 (2012), *aff’d*, *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App’x 472, 474 (2d Cir. 2012) (Commission’s cumulative impact analysis sufficient where it included a short summary discussion of shale gas production activities). See also *Sierra Club v. DOE*, 867 F.3d at 202 (holding that DOE’s generalized discussion of the impacts associated with non-conventional natural gas production fulfill its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

⁷¹⁹ Final EIS at 4-621. See Certificate Order, 161 FERC ¶ 61,042 at PP 296-307; *id.* P 298 n.426. As discussed above, the information about downstream consumption-related emissions was provided outside the scope of our NEPA analysis. See *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 41-44 (2018).

⁷²⁰ Final EIS at 4-620.

⁷²¹ 867 F.3d at 1372 (quoting *Sabal Trail* brief) (internal quotations omitted).

⁷²² *Id.* at 1374. The environmental impact statement for the pipeline project at issue in *Sabal Trail* did not provide any information on potential GHG emissions from the

between GHG emissions and climate change impacts. Instead, the court required the Commission to “explain in the EIS, as an aid to the relevant decisionmakers, whether the position on the Social Cost of Carbon that the agency took in [*EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016)] still holds, and why.”⁷²³

265. Friends of Buckingham argues the Final EIS failed to adequately address GHG emissions and climate change, specifically arguing that the Final EIS made no attempt to quantify the extent to which natural gas to be transported by the projects would offset fuel oil and coal.⁷²⁴ Shenandoah Valley Network says the Final EIS “impermissibly downplayed” the emissions by discussing how the displacement of coal generation by gas generation could result in a net reduction of GHG emissions.⁷²⁵

266. We disagree that the Final EIS’s quantification was flawed because it failed to provide specific predictions about how alternatives to natural gas electric generation would respond. The Final EIS noted that “[b]ecause natural gas emits less CO₂ 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 GHGs emissions, thereby potentially offsetting some regional CO₂ emissions.”⁷²⁶ The Department of Energy’s *2014 Life Cycle Analysis* provides support for this statement.⁷²⁷

downstream combustion of the transported gas. That EIS did not provide an upper-bound estimate of the downstream GHG emissions.

⁷²³ *Id.* 1375.

⁷²⁴ Rehearing Request of Friends of Buckingham at 12.

⁷²⁵ Rehearing Request of Shenandoah Valley Network at 103.

⁷²⁶ Final EIS at 4-621.

⁷²⁷ See Dep’t of Energy and Nat’l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, at 76 DOE/NETL-2014/1646 (May 29, 2014) (*2014 Life Cycle Analysis*) (“Natural gas-fired electricity has a 44 percent to 66 percent lower climate impact than coal-fired electricity. Even when fired on 100 percent unconventional natural gas, from tight gas, shale and coal beds, and compared on a 20-year [Global Warming Potential], natural gas-fired electricity has 51 percent lower GHGs than coal.”).

267. Mr. Limpert asserts that the citation to the *2014 Life Cycle Analysis* study of methane emissions should have been updated with the *2016 Life Cycle Analysis*.⁷²⁸ The Final EIS relied on the *2014 Life Cycle Analysis* to conclude that “although natural gas may have higher upstream GHG than coal, the total lifecycle GHG emissions from electricity production using natural gas is significantly lower than that of electricity from coal.”⁷²⁹ The *2016 Life Cycle Analysis* used updated and expanded modeling to quantify more accurately fugitive methane emissions.⁷³⁰ However, the *2016 Life Cycle Analysis* does not say the earlier conclusions were flawed, and Mr. Limpert does not explain on rehearing how the conclusions in the *2014 Life Cycle Analysis* were flawed.

268. Shenandoah Valley Network advances a similar argument and relies on *Sabal Trail* in support;⁷³¹ however, the *Sabal Trail* passage Shenandoah Valley Network quotes addresses the issue of whether the “EIS was absolved from estimating carbon emissions by the fact that some of the new pipelines’ transport capacity will make it possible for utilities to retire dirtier, coal-fired plants.”⁷³² The downstream consumption emissions were not quantified in *Sabal Trail*, and the court rejected the argument that potential offsets eliminated the need for quantification. This passage has no applicability here, where the Final EIS for the ACP Project and the Supply Header Project provided the downstream emissions estimates from consumption. The Final EIS also recognized that the displacement of other fuels such as fuel oil and coal would result in lower emissions.⁷³³ The Certificate Order explained that the estimate was an upper bound of GHG emissions, and added that displacement of other fuels could actually lower total

⁷²⁸ Dep’t of Energy and Nat’l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714 (Aug. 30, 2016) (*2016 Life Cycle Analysis*)

⁷²⁹ Final EIS at 4-621. The Final EIS also concluded that “emissions of criteria pollutants, and HAPs are significantly less from natural gas combustion than for coal. For a typical (baseload) case, the report indicates that the lifecycle emissions of electricity from natural gas are less than half that of coal.” *Id.*

⁷³⁰ *2016 Life Cycle Analysis* at 69.

⁷³¹ Rehearing Request of Shenandoah Valley Network at 103-04 (quoting *Sabal Trail*, 867 F.3d at 1375).

⁷³² 867 F.3d at 1375.

⁷³³ Final EIS at 4-621.

GHG emissions.⁷³⁴ The Certificate Order's disclosure of these facts reveals no error in the Commission's quantification of emissions from consumption.

b. Climate Impacts Resulting from GHG Emissions

269. The Final EIS, recognized that "contributions to GHG emissions globally results in the climate change impacts,"⁷³⁵ but observed that "there is no scientifically-accepted methodology available to correlate specific amounts of GHG emissions to discrete changes in average temperature rise, annual precipitation fluctuations, surface water temperature changes, or other physical effects on the environment."⁷³⁶ Shenandoah Valley Network disagrees with these statements, and states that "NEPA requires a more searching analysis than merely disclosing the amount of pollution."⁷³⁷ Instead, Shenandoah Valley Network asserts that the Commission must take the next step of evaluating the secondary effects that result from GHG emissions, including an assessment of the significance of these secondary effects.⁷³⁸

270. We disagree with the premise of these arguments that the Final EIS did not take the next step of evaluating the secondary effects from GHG emissions. The rehearing requests overlook the Final EIS's qualitative analysis that included discussion of how GHGs occur in the atmosphere and how they induce global climate change.⁷³⁹ The Final EIS recognized that GHG emissions are a primary cause of climate change, and that CO₂ is the most prevalent of GHG emissions and methane is the second most prevalent.⁷⁴⁰ The Final EIS discussed the trend in GHG emissions, using data from 1990 to 2014.⁷⁴¹ Further, the cumulative impacts analysis in the Final EIS qualitatively described the link between GHG emissions and potential cumulative impacts of climate change on a global

⁷³⁴ Certificate Order, 161 FERC ¶ 61,042 at P 298.

⁷³⁵ Final EIS at 4-620.

⁷³⁶ *Id.*

⁷³⁷ Rehearing Request of Shenandoah Valley Network at 98.

⁷³⁸ *Id.* at 98-99.

⁷³⁹ Final EIS at 4-618 to 4-622. The Final EIS referred to the U.S. Global Change Research Program's May 2014 Climate Change Impacts in the United States. *Id.* at 4-618.

⁷⁴⁰ *Id.* at 4-619.

⁷⁴¹ *Id.* at 4-619 to 4-620.

scale and in areas where markets expected to be served by the project exist, e.g., the Northeast and Southeast regions.⁷⁴²

271. Globally, the Final EIS observed that (1) “GHGs have been accumulating in the atmosphere since the beginning of the industrial era (circa 1750);” (2) “combustion of fossil fuels (coal, petroleum, and natural gas), combined with agriculture and clearing of forests is primarily responsible for this accumulation of GHG;” (3) “these anthropogenic GHG emissions are the primary contributing factor to climate change;” and (4) “impacts extend beyond atmospheric climate change alone, and include changes to water resources, transportation, agriculture, ecosystems, and human health.”⁷⁴³

272. In the Northeast region, the Final EIS observed that (1) “from 1895 to 2011 the Northeast experienced a nearly 2 [degrees Fahrenheit (°F)] temperature increase;” (2) “from 1958 to 2010 the Northeast experienced a 70 percent increase in the amount of precipitation falling in heavy events and 5 to 20 percent increase in average winter precipitation;” (3) “temperatures are projected to increase by 4.5 to 10 °F by the 2080s under the worst-case scenario (continually increasing emissions), and would increase by 3 °F to 6 °F if emissions were decreased;” (4) “the number of days above 90 °F are projected to increase, resulting in major human health implications;” (5) “the global sea level has risen by about 8 inches since reliable record keeping began in 1880, and is projected to rise another 1 to 4 feet by 2100;” (6) “higher than average sea level rise along the Northeastern coast will occur due to land subsidence;” (7) “increased fall and winter precipitation could damage crops, and wetter springs would result in delayed planting of grain and vegetables;” (8) “risks to the Chesapeake Bay will be exacerbated by climate change, including disruption of certain fish species and increased invasive species;” and (9) “coastal water temperature in several regions are likely to continue warming as much as 4 to 8 °F by 2100.”⁷⁴⁴

⁷⁴² *Id.* at 4-618 to 4-619. Shenandoah Valley Network states the Final EIS makes conflicting statements when it included the qualitative discussion of climate change from a global and regional perspective. Rehearing Request of Shenandoah Valley Network at 101 n.321. As we discuss herein, one section of the Final EIS discussed the global impacts and another section described the impacts that are peculiar to the region. Any fair reading of the Final EIS reveals that both of these sections recognized the global phenomenon of GHG emissions and their climate change impacts. *See* Final EIS at 4-618 to 4-619.

⁷⁴³ *Id.* at 4-618.

⁷⁴⁴ *Id.* at 4-618 to 4-619.

273. In the Southeast region, the Final EIS observed that (1) “from 1970 to 2014 the Southeast experienced an average temperature increase of 2 °F, although this region has cycled between warm and cool periods in the last century;” (2) “the number of days above 95 °F during the daytime and 75 °F at night are projected to increase;” (3) “regional average temperature will increase by 4 °F to 8 °F by 2100 under an increased (worst-case) emissions scenario;” (4) “ground level ozone is projected to increase in the 19 largest urban areas of the Southeast, impacting public health;” (5) “coastal wetlands are at risk from sea level rise, and a reduction in wetlands increases the loss of important fishery habitat;” (6) “heat stress could impact dairy and livestock production, shifting dairy production northward;” and (7) “a 2.2 °F increase in temperature would likely reduce overall productivity for corn, soybeans, rice, cotton, and peanuts across the Southeast, although rising CO₂ levels could partially offset these decreases.”⁷⁴⁵ Therefore, it is not true that the Final EIS here ignored the climate impacts resulting from GHG emissions.

274. The Final EIS reasonably cited significant, easily accessible literature that exhaustively evaluates the link between GHG emissions and climate impacts using the current state of climate science.⁷⁴⁶ Thus, the Commission has not ignored GHG-related impacts. Indeed, it is hard to imagine that the Commission could improve on the science in the Third National Climate Assessment. Accordingly, we deny rehearing.

275. Shenandoah Valley Network also argues that the Final EIS fails to compare the downstream emissions of the project to the emissions of any reasonable alternatives.⁷⁴⁷ Shenandoah Valley Network ignores the comparison in the Certificate Order.⁷⁴⁸

⁷⁴⁵ *Id.* at 4-619.

⁷⁴⁶ *See id.* at 4-618 (referring to the U.S. Global Change Research Program, *Climate Change Impacts in the United States* (May 2014) (Third National Climate Assessment)). The Third National Climate Assessment is a more than 800-page document that “assess[es] the science of climate change and its impacts cross the United States, now and throughout this century. It documents climate change related impacts and responses for various sectors and regions, with the goal of better informing public and private decision-making at all levels.” Third National Climate Assessment at iv.

⁷⁴⁷ Rehearing Request of Shenandoah Valley Network at 106.

⁷⁴⁸ Certificate Order, 161 FERC ¶ 61,042 at P 305.

c. **Usefulness of Social Cost of Carbon for Project Decisions under NGA and as Indicator of Significance under NEPA**

276. Shenandoah Valley Network is mistaken that the Commission failed to explain why the Social Cost of Carbon tool is not an appropriate methodology for determining how the proposed projects' incremental contribution to GHGs would translate into physical effects on the global environment. The Certificate Order explained that the Social Cost of Carbon methodology is not appropriate for determining how the proposed projects' incremental contribution to GHGs would translate into physical effects on the global environment.⁷⁴⁹ The Certificate Order explained that there is no consensus on the appropriate discount rate to be used for analysis spanning multiple generations, resulting in significant variation in results.⁷⁵⁰ The order also explained that there is no established criteria identifying the monetized values that are to be considered significant under NEPA.⁷⁵¹

277. Shenandoah Valley Network nevertheless asserts the Commission should have done more,⁷⁵² i.e., used the Social Cost of Carbon tool, which seeks to estimate the monetized climate change damage associated with an incremental increase in CO₂ emissions in a given year. For the reasons stated in prior decisions, the Commission declines to adopt the Social Cost of Carbon tool.⁷⁵³ Moreover, EPA recently confirmed to the Commission that the tool, which “no longer represents government policy,” was developed to assist in rulemakings and “was not designed for, and may not be appropriate for, analysis of project-level decision-making.”⁷⁵⁴

⁷⁴⁹ *Id.* P 307.

⁷⁵⁰ *Id.*

⁷⁵¹ *Id.*

⁷⁵² Rehearing Request of Shenandoah Valley Network at 98 (“NEPA requires a more searching analysis than merely disclosing the amount of pollution.”).

⁷⁵³ See *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 30-51 (2018); see also *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 275-97. See Third National Assessment at 826 (“Documenting the costs of climate change impacts is extremely challenging because these impacts occur across multiple regions and sectors and over multiple time frames.”).

⁷⁵⁴ July 26, 2018 EPA Comments, Docket No. PL18-1-000 (letter, dated July 25, 2018, from Brittany Bolen, Associate Administrator, Office of Policy, EPA).

278. The dissent argues that the Commission is obligated under NEPA to reach a significance finding on downstream GHG emissions. We are aware of no standard established by international or federal policy, or by a recognized scientific body that would assist us to ascribe significance to a given rate or volume of GHG emissions.⁷⁵⁵ The Certificate Order agreed with the finding in the Final EIS⁷⁵⁶ that “because the project’s incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects’ contribution to cumulative impacts on climate change would be significant.”⁷⁵⁷

279. Commission staff is not aware of studies that assess the significance of monetized damages calculated with the Social Cost of Carbon tool. At most, we are able to publish estimated ranges of monetized damages under different assumptions in the Social Cost of Carbon tool. However, because we have no basis to designate a particular dollar figure calculated from the Social Cost of Carbon tool as “significant,” such action would be arbitrary and would meaningfully inform neither the Commission’s decision making nor the public. Moreover, if we were to calculate the Social Cost of Carbon, any two projects with the same capacity (or multiple smaller projects with an equivalent cumulative capacity), but which are designed to serve end users in different states or multiple states, will contribute identically to global climate change. Accordingly, we conclude that using the Social Cost of Carbon would not assist us in determining whether downstream GHG emissions are significant.

280. Although the Commission has found no studies to assess the significance of monetized damages,⁷⁵⁸ the Certificate Order did not ignore the significance question. As explained in the Certificate Order, the Final EIS provided context for the GHG emissions from the ACP Project and Supply Header Project by including the GHG inventory for Pennsylvania, West Virginia, Virginia, and North Carolina.⁷⁵⁹ The Certificate Order compared “the GHG emissions from the project to the GHG Inventories for the four-state region and nationwide.”⁷⁶⁰ The Certificate Order provided these calculations for a scenario

⁷⁵⁵ *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at P 26 (2018).

⁷⁵⁶ Final EIS at 4-620.

⁷⁵⁷ Certificate Order, 161 FERC ¶ 61,042 at P 306.

⁷⁵⁸ We note that rehearing requesters do not propose a threshold for determining significance.

⁷⁵⁹ *Id.* P 305 (citing Final EIS at 4-620).

⁷⁶⁰ *Id.* Shenandoah Valley Network describes the Certificate Order as “outside the NEPA process.” Rehearing Request of Shenandoah Valley Network at 105. Shenandoah

where “all natural gas transported by the projects is used for end-use combustion”⁷⁶¹ and a scenario where “79 percent of the natural gas transported by project is used for power generation (estimate of actual consumption).”⁷⁶² Taking the highest percentage, the Certificate Order concluded that “the downstream use of the natural gas to be transported by the project would potentially increase the GHG emissions inventory in the four-state region by up to 5.2 percent.”⁷⁶³

281. Although now withdrawn, previous CEQ guidance⁷⁶⁴ “[r]ecommend[ed] that agencies use projected GHG emissions . . . *as a proxy* for assessing potential climate change effects when preparing a NEPA analysis for a proposed agency action.”⁷⁶⁵ This is exactly what the Final EIS did. The Final Guidance recommended that “where agencies do not quantify” GHG emissions, “agencies include a qualitative analysis.”⁷⁶⁶ In this case, the Final EIS did both: (1) The Final EIS quantified downstream GHG emissions; and (2) it included a qualitative analysis of the link between GHG emissions and their climate impacts, both on a global scale and a regional scale. Finally, with regard to a methodology of monetizing costs and benefits such as the Social Cost of Carbon, the Final

Valley Network does not cite any authority. The Supreme Court has stated that under the ““rule of reason,” an agency need not supplement an [EIS] every time new information comes to light after the EIS is finalized.” *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

⁷⁶¹ Certificate Order, 161 FERC ¶ 61,042 at P 305.

⁷⁶² *Id.*

⁷⁶³ *Id.*

⁷⁶⁴ See Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016), Notice of Availability, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (Final Guidance). The Final Guidance, which is “not a rule or regulation” and “does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable,” was subsequently withdrawn. Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

⁷⁶⁵ Final Guidance at 4 (emphasis added).

⁷⁶⁶ *Id.*

Guidance notes that “NEPA does not require monetizing costs and benefits,”⁷⁶⁷ in part explaining that this should not be done “when there are important qualitative considerations.”⁷⁶⁸

d. Public Input on Mitigation Measures

282. Shenandoah Valley Network argues that the failure to take a hard look at the downstream GHG emissions resulted in the failure to adequately seek public input regarding possible mitigation measures.⁷⁶⁹

283. We disagree. Emissions associated with consumption were included in the Draft EIS and all participants had an opportunity to comment.⁷⁷⁰ The Commission does not deny the link between GHG emissions and environmental impacts and climate change. However, linking particular GHG emissions to particular climate and environmental impacts in a way that results in analysis that is useful to the Commission for purposes of fulfilling its obligations under NEPA and the NGA is a different matter. In any event, given the discussion of those GHG emissions in the Draft EIS, any participant to these proceedings had full opportunity to comment on them, including the further analytical step of secondary environmental and climate impacts.

284. An environmental impact statement must discuss possible mitigation measures for adverse environmental consequences.⁷⁷¹ The Final EIS described in detail the federal and state regulatory regimes that will control the projects’ direct emission sources.⁷⁷² The Final EIS also discussed mitigation measures for construction emissions, such as limiting the idling of engines when construction equipment is not in use,⁷⁷³ and mitigation measures for operation emissions, such as preventive maintenance to identify leaks and

⁷⁶⁷ *Id.* at 32.

⁷⁶⁸ *Id.* at 32 (citing 40 C.F.R. 1502.23). *See supra* at PP 39-63 (discussing whether the projects are required by present or future public convenience and necessity).

⁷⁶⁹ Rehearing Request of Shenandoah Valley Network at 106.

⁷⁷⁰ Draft EIS at 4-390, 4-392, 4-401 to 4-412, 4-511 to 4-516, 5-12.

⁷⁷¹ *Robertson*, 490 U.S. at 351-353.

⁷⁷² Final EIS at 4-547 to 4-556.

⁷⁷³ *Id.* at 4-558.

commitments to reduce the frequency of unscheduled maintenance blowdowns, as well as mitigation measures dealing with the full spectrum of environmental resources.

285. We do not believe there are any additional mitigation measures the Commission could impose with respect to the GHG emissions analyzed in the Final EIS. Even if downstream emissions were an effect of the project, the Commission lacks jurisdiction to impose mitigation measures on downstream end-use consumers, be they power plants, manufacturers, or others. EPA and state regulatory agencies have authority to regulate power plant emissions under the federal Clean Air Act.⁷⁷⁴

286. In addition, the vast majority of the lifecycle GHG emissions associated with the natural gas delivery chain are a result of the end use of the natural gas, not the construction or operation of the transportation facilities subject to the Commission's jurisdiction. Thus, the downstream GHG emissions associated with a proposed project are primarily a function of a proposed project's incremental transportation capacity, not the facilities, and will not vary regardless of the project's routing or location. There are no conditions the Commission can impose on the construction of jurisdictional facilities that will affect the end-use-related GHG emissions.⁷⁷⁵ The dissent argues that Section 7 of NGA grants the Commission broad authority to consider multiple factors when determining whether a project is in the public interest. For the reasons we explained in the *Florida Southeast Connection, LLC* issued concurrently today, we disagree.⁷⁷⁶ Were we to deny a pipeline certificate on the basis of impacts stemming from the end use of the gas transported, that decision would rest on a finding not "that the *pipeline* would be too harmful to the environment," but rather that the *end use* of the gas would be too harmful to the environment. The Commission believes that it is for Congress or the Executive Branch to decide national policy on the use of natural gas and that the Commission's job is to review applications before it on a case-by-case basis.⁷⁷⁷

⁷⁷⁴ See *Florida Southeast Connection*, 162 FERC ¶ 61,233 at PP 56-57.

⁷⁷⁵ Contrast this with the direct project-related impacts, which the Commission has the ability to mitigate through conditions on routing (*e.g.*, changes to avoid sensitive resources), construction methodology (*e.g.*, timing restrictions to lessen impacts on wildlife, requirements to drill under sensitive streams rather than open cut), and operations (*e.g.*, noise restrictions, requiring electric instead of gas compressors in appropriate situations).

⁷⁷⁶ See generally, *Florida Southeast Connection, LLC*, 164 FERC ¶ 61,099, at PP 52-57 (2018).

⁷⁷⁷ See *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("FERC's authority to consider all factors bearing on the public interest when

14. Cumulative Impacts

287. Friends of Nelson asserts that the Commission failed to take a hard look at the cumulative impacts of the ACP Project along with other past, present, and reasonably foreseeable future actions, such as the Mountain Valley Pipeline Project and shale gas development projects.⁷⁷⁸

288. CEQ defines cumulative impacts as “the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”⁷⁷⁹ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

289. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”⁷⁸⁰ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”⁷⁸¹ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”⁷⁸² An agency’s analysis should be proportional to the magnitude of a proposed action; actions that will have no significant direct or indirect

issuing certificates means authority to look into those factors which reasonably relate to the purpose for which FERC was given certification authority.”); *American Gas Association v. FERC*, 912 F.2d 1496, 1510-11 (D.C. Cir. 1990) (“[T]he Commission may not use its [Natural Gas Act] § 7 condition power to do indirectly . . . things that it cannot do at all.”).

⁷⁷⁸ Rehearing Request of Friends of Nelson at 32, 36.

⁷⁷⁹ 40 C.F.R. § 1508.7 (2017).

⁷⁸⁰ *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).

⁷⁸¹ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (Jan. 1997), https://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf (1997 CEQ Guidance).

⁷⁸² *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

impacts usually only require a limited cumulative impacts analysis.⁷⁸³ A meaningful cumulative impacts analysis must identify five things: “(1) the area in which the effects of the proposed project will be felt; (2) the impacts that are expected *in that area* from the proposed project; (3) other actions – past, present, and proposed, and reasonably foreseeable – that have had or expected to have impacts *in the same area*; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected in the individual impacts are allowed to accumulate.”⁷⁸⁴

290. The geographic scope utilized in the cumulative impacts analysis was based on: projects and activities with impacts of a magnitude or nature comparable to the ACP Project, including Commission-jurisdictional and non-jurisdictional facilities; planned or proposed projects with a similar construction timeframe; and projects that would impact the same resource category.⁷⁸⁵ Specifically, Commission staff defined the geographic scope for its analysis of cumulative impacts on specific environmental resources to include projects/actions within the same construction footprint as the projects for geology, soils, and land use; within the U.S. Geological Survey hydrologic unit code 10 watersheds for water resources, wetlands, vegetation, aquatic resources, wildlife, and reliability and safety; within 0.5 mile of the projects for visual resources, with an additional 5-mile visual radius around each compressor station; at the county level for socioeconomic impacts; within 0.5 mile of the projects for noise sensitive areas around compressor stations; within the area of potential effect for cultural resources; within the Air Quality Control Regions for climate change; and for air quality impacts, within 0.5 mile of the project for construction impacts and within the Air Quality Control Regions for operational impacts.⁷⁸⁶ Friends of Nelson argues that we should have used a geographic scope of: the ecosystem level for vegetation and wildlife; the total range of population units for migratory wildlife; an entire state or region for land use; and the global atmosphere for air quality.⁷⁸⁷ Friends of Nelson fails to explain how its suggested geographic scopes would

⁷⁸³ See CEQ, Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis at 2-3 (June 24, 2005) (2005 CEQ Guidance).

⁷⁸⁴ *TOMAC v. Norton*, 433 F.3d 852, 964 (D.C. Cir. 2006) (emphasis added) (quoting *Grand Canyon Trust v. FAA*, 290 F.3d 339, 345 (D.C. Cir. 2002) (internal quotations omitted). See also *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

⁷⁸⁵ Final EIS at 5-591 to 4-623.

⁷⁸⁶ Certificate Order, 161 FERC ¶ 61,042 at P 311. See Final EIS at 4-593 to 4-594.

⁷⁸⁷ Rehearing Request of Friends of Nelson at 35-36.

have changed our analysis. We dismiss Friends of Nelson's request and affirm our determination that our geographic scopes are consistent with the requirements of NEPA.

291. We also dismiss Friends of Nelson's blanket claim that the Commission's selected geographic scope "for forested lands, forested and scrub-shrub wetlands and air quality are not consistent with the requirements of NEPA."⁷⁸⁸ Friends of Nelson failed to specify how our evaluation erred. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Because Friends of Nelson does not list any specific concerns with our geographic scope for forested lands, forested and scrub-shrub wetlands, and air quality, we dismiss those allegations.

292. Friends of Nelson asserts that the Final EIS's cumulative impacts analysis, limited to two paragraphs, contained "cursory statements and conclusory terms."⁷⁸⁹ Friends of Nelson claims that the Final EIS wholly failed to address any cumulative impacts on water resources, vegetation, wildlife, fisheries, land use, or air quality.⁷⁹⁰ We disagree. The Final EIS evaluated the cumulative impacts of the ACP Project on past,⁷⁹¹ present,⁷⁹² and future actions on geology,⁷⁹³ soils and sediments,⁷⁹⁴ water resources,⁷⁹⁵ vegetation,⁷⁹⁶ wildlife,⁷⁹⁷ fisheries and aquatic resources;⁷⁹⁸ special status species;⁷⁹⁹ land use, special

⁷⁸⁸ *Id.* at 36.

⁷⁸⁹ *Id.* at 32

⁷⁹⁰ *Id.* at 33.

⁷⁹¹ Final EIS at 4-595 to 4-596.

⁷⁹² *Id.* at 4-596 to 4-602.

⁷⁹³ *Id.* at 4-602 to 4-603.

⁷⁹⁴ *Id.* at 4-603 to 4-604.

⁷⁹⁵ *Id.* at 4-604 to 4-607.

⁷⁹⁶ *Id.* at 4-607 to 4-608.

⁷⁹⁷ *Id.* at 4-608 to 4-609.

⁷⁹⁸ *Id.* at 4-610.

⁷⁹⁹ *Id.* at 4-610 to 4-611.

interest areas, and visual resources;⁸⁰⁰ socioeconomics;⁸⁰¹ cultural resources;⁸⁰² air quality and noise;⁸⁰³ climate change;⁸⁰⁴ reliability and safety;⁸⁰⁵ and national forests.⁸⁰⁶

a. Shale Gas Development

293. Friends of Nelson argues that the Final EIS failed to account for cumulative impacts of Marcellus and Utica shale gas development.⁸⁰⁷

294. We affirm our previous conclusion that future shale development upstream of the ACP Project is not reasonably foreseeable for the purposes of the ACP Project's cumulative impacts analysis and was thus not included in the NEPA review.⁸⁰⁸ A cumulative impacts analysis requires inclusion of impacts to the environment from "reasonably foreseeable future actions."⁸⁰⁹ While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that where the Commission lacks meaningful information about potential future natural gas production within the geographic scope for potential cumulative impacts of a project-affected resource, then production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.⁸¹⁰ Similarly, the

⁸⁰⁰ *Id.* at 4-612 to 4-613.

⁸⁰¹ *Id.* at 4-613 to 4-614.

⁸⁰² *Id.* at 4-614 to 4-615.

⁸⁰³ *Id.* at 4-615 to 4-618.

⁸⁰⁴ *Id.* at 4-618 to 4-622.

⁸⁰⁵ *Id.* 4-622.

⁸⁰⁶ *Id.* at 4-622.

⁸⁰⁷ Rehearing Request of Friends of Nelson at 32-38.

⁸⁰⁸ Certificate Order, 161 FERC ¶ 61,042 at P 289.

⁸⁰⁹ 40 C.F.R. § 1508.7 (2017).

⁸¹⁰ Certificate Order, 161 FERC ¶ 61,042 at P 290; *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255 at P 120; *see also Sierra Club v. U.S. Department of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (increased gas production not reasonably foreseeable when agency cannot predict the incremental quantity of natural gas that might be produced in response to an incremental increase in LNG exports); *Cent. N.Y. Oil & Gas*

Commission found that an analysis of cumulative impacts related to future shale gas development is outside of the scope of ACP Project cumulative impacts because the exact location, scale, and timing of these facilities are unknown.⁸¹¹ However, we note that where known, and within the appropriate resource-specific geographic scope, the Final EIS considered the effects of known past and ongoing oil and gas exploration and production.⁸¹² On rehearing, Friends of Nelson has not raised any new contentions or a change in circumstances to persuade the Commission to reconsider its prior determination.

b. Downstream GHG Emissions

295. Friends of Nelson states that the failure to properly analyze downstream GHG emissions resulted in a flawed cumulative impacts analysis.⁸¹³ Friends of Nelson's argument relies on its flawed assumption that the GHG emissions associated with the downstream use of the gas transported by the projects are cumulative impacts of the project. GHG emissions from the downstream use of the transported gas do not fall within the definition of cumulative impacts.

296. The geographic scope of our cumulative impacts analysis varies from case to case, and resource to resource, depending on the facts presented. Further, where, as here, the Commission lacks meaningful information about downstream use of the gas; i.e., information about future power plants, storage facilities, or distribution networks, within the geographic scope of a project-affected resource, then these impacts are not reasonably foreseeable for inclusion in the cumulative impacts analysis.⁸¹⁴ As stated above, the ACP Project will provide 1.5 million Dth per day of natural gas to six public utilities and local distribution companies in Virginia and North Carolina, while the upstream Supply Header Project would connect Atlantic's customers to the Dominion South Point supply hub to

Co., 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of future Marcellus Shale wells and the associated development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd*, *Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012).

⁸¹¹ Certificate Order, 161 FERC ¶ 61,042 at P 290. *See* Final EIS at 4-597.

⁸¹² Final EIS at 4-597.

⁸¹³ Rehearing Request of Friends of Nelson at 36-38.

⁸¹⁴ *See, e.g., Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 34 (2018).

access several natural gas supply pipelines.⁸¹⁵ There is no evidence in the record that ultimate end-use combustion of the gas transported by the projects is reasonably foreseeable and therefore does not meet the definition of cumulative impacts.

297. The Commission's finding that the end use of the gas being transported by a pipeline is not reasonably foreseeable and the GHG emissions associated with the end-use combustion did not require further analysis is not inconsistent with *Mid States*.⁸¹⁶ In *Mid States*, petitioners argued that the projected availability of 100 million tons of low-sulfur coal per year at reduced rates would increase the consumption by existing power plants of low-sulfur coal vis-à-vis other fuels (e.g., natural gas).⁸¹⁷ The court found that the likely increased consumption of low-sulfur coal by power plants would be an indirect impact of construction of a shorter, more direct rail line to transport the low-sulfur coal from the mining area to existing coal-burning power plants.⁸¹⁸ Thus, the Surface Transportation Board was required to consider the effects on air quality of such consumption. In *Mid States* it was undisputed that the proposed project would increase the use of coal for power generation. Here, it is unknown where and how the transported gas will be used and there is no identifiable end-use as there was in *Mid States*.⁸¹⁹ Further, unlike the case here, the Surface Transportation Board had stated that approval of the rail line would lead to increased coal production.⁸²⁰ It is primarily for this reason that reliance on *Mid States* is "misplaced since the agency in *Mid States* stated that a particular outcome

⁸¹⁵ Final EIS at 1-3 to 1-5.

⁸¹⁶ 345 F.3d 520.

⁸¹⁷ *Mid States*, 345 F.3d at 548.

⁸¹⁸ *Id.* at 550 (finding compelling the fact that while the Board's Draft EIS had stated that it would consider potential air quality impacts associated with the anticipated increased use of the transported coal, the Final EIS failed to do so).

⁸¹⁹ While it may be foreseeable, as some suggest, that the gas transported on the expansion will be burned, we have no information as to the extent such consumption will represent incremental consumption above existing levels, as opposed to substitution for existing sources of supply.

⁸²⁰ *Mid States*, 345 F.3d at 549.

was reasonably foreseeable and that it would consider its impact, but then failed to do so.”⁸²¹ The Commission did neither of those things.

298. Nonetheless, the Certificate Order reasonably evaluated cumulative effects of the downstream emissions and described how these GHG emissions would combine “with past and future emissions from all other sources, and contribute incrementally to climate change.”⁸²² As the Certificate Order explained, “because the project’s incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects’ contribution to cumulative impacts on climate change would be significant.”⁸²³ No more was required.⁸²⁴

c. Other Pipeline Projects

299. Friends of Nelson argues that the Commission did not consider the Mountain Valley Pipeline Project in its cumulative impacts analysis.⁸²⁵ Shenandoah Valley Network also argues that the Commission failed to adequately address the cumulative impacts of the ACP Project when the project crosses a waterbody several times and with other projects.⁸²⁶

300. The Final EIS identified 11 planned, proposed, or existing projects, including the Mountain Valley Pipeline Project, under the Commission’s jurisdiction that would be within the geographic scope of the ACP Project.⁸²⁷ The Final EIS determined and we agree that any potential cumulative impacts would be reduced because all Commission-jurisdictional projects must be: constructed and maintained according to our general measures; subject to additional project-specific mitigation measures; and subject to other construction, operation, and mitigation measures required by federal, state, and local

⁸²¹ See *Ark. Wildlife Fed’n v. U.S. Army Corps of Eng’rs*, 431 F.3d 1096, 1102 (8th Cir. 2005).

⁸²² Certificate Order, 161 FERC ¶ 61,042 at P 306. See Final EIS at 4-620.

⁸²³ Certificate Order, 161 FERC ¶ 61,042 at P 306.

⁸²⁴ See, *infra*, n.**Error! Bookmark not defined.**

⁸²⁵ Rehearing Request of Friends of Nelson at 36.

⁸²⁶ Rehearing Request of Shenandoah Valley Network at 96-97.

⁸²⁷ Final EIS at 4-597 to 4-600.

permitting agencies.⁸²⁸ Specific to the Mountain Valley Pipeline Project, the Final EIS determined that any cumulative impacts arising from the construction and operation of the ACP and Mountain Valley Pipeline Projects would be temporary and minor, such as impacts to: waterbodies,⁸²⁹ fisheries and aquatic resources;⁸³⁰ land use, special interest areas, and visual resources;⁸³¹ air emissions;⁸³² noise;⁸³³ and forests.⁸³⁴

15. Environmental Justice

301. Shenandoah Valley Network and Public Interest Groups state the Final EIS erroneously stated that the Commission is not required to comply with Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and*

⁸²⁸ *Id.* at 4-600.

⁸²⁹ *Id.* at 4-606 to 4-607 (the ACP and Mountain Valley Pipeline Projects have the greatest overlap in waterbody crossings; however, the impacts will occur during construction and be temporary and minor).

⁸³⁰ *Id.* at 4-610 (the ACP and Mountain Valley Pipeline Projects would both affect the candy darter; however the impacts would primarily occur during construction and be temporary and minor).

⁸³¹ *Id.* at 4-613 (the ACP and Mountain Valley Pipeline Projects would both cross the Blue Ridge Parkway and the Appalachian National Scenic Trail. Trail users will not see both the ACP and Mountain Valley Pipeline Projects from any one view point, but may see both projects from multiple viewpoints in a short duration of time or over a short distance. Both Atlantic and Mountain Valley will use the HDD method and/or the bore method to reduce impacts to vegetation and visual resources).

⁸³² *Id.* at 4-615 to 4-616 (the Mountain Valley Pipeline and Rover Projects are located within the geographic scope of the ACP Project and may contribute to air emissions, but these emissions are minor and localized (during construction) and will not result in significant cumulative impacts).

⁸³³ *Id.* at 4-617 (the construction and operation of the Mountain Valley Pipeline and Rover Projects, are required to adhere to similar noise and mitigation measures as the ACP Project and will not result in significant cumulative impacts).

⁸³⁴ *Id.* at 4-622 (portions of the ACP and Mountain Valley Pipeline Projects proposed to be constructed through the Monongahela, George Washington, and Jefferson National Forests will be regulated through project design, best management practices, and National Forest Service permitting, and will not have any significant cumulative impacts).

Low-Income Populations,⁸³⁵ and failed to take a hard look at potential impacts on environmental justice communities, such as the harmful effects and enhanced risk the project imposes on low-income communities, communities of color, and Native American tribes.⁸³⁶ Shenandoah Valley Network asserts it was error to state that the Executive Order does not apply to the Commission, reasoning that once the Commission assumed the responsibility for the analysis, it was required to complete it in compliance with the Executive Order.⁸³⁷

302. We disagree that the Final EIS contained a flawed environmental justice analysis. However, before examining that question, we observe that Shenandoah Valley Network is mistaken that Executive Order 12898 applies to the Commission. The Executive Order states that “[i]ndependent agencies are requested to comply with the provisions of this order.”⁸³⁸ On rehearing, Shenandoah Valley Network does not address the language of the Executive Order, and does not cite any authority for its position. In any event, as we discuss below, the Final EIS and the Certificate Order adequately address environmental justice related impacts.⁸³⁹ The approach in the Final EIS was consistent with the following steps: (1) “[d]etermine the existence of minority and low-income populations”; (2) “[d]etermine if resource impacts are high and adverse”; and (3) “[d]etermine if the

⁸³⁵ 59 Fed. Reg. 7629 (Feb. 11, 1994) (Executive Order 12898).

⁸³⁶ Rehearing Request of Shenandoah Valley Network at 118-45; Rehearing Request of Public Interest Groups at 23.

⁸³⁷ Certificate Order, 161 FERC ¶ 61,042 at P 253 (stating that the Commission “is not one of the specified agencies listed in the executive order, and therefore it is not binding on the Commission”). *See* Rehearing Request of Shenandoah Valley Network at 119.

⁸³⁸ Executive Order 12898 at section 6-604.

⁸³⁹ Certificate Order, 161 FERC ¶ 61,042 at P 253. *See Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at PP 134-138 (2016); *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 at P 260; *Sound Energy Sols.*, 107 FERC ¶ 61,263, at P 109 (2004); *Texas E. Transmission, LP*, 141 FERC ¶ 61,043, at P 44 (2012); *AES Sparrows Point LNG, LNG*, 129 FERC ¶ 61,245, at P 160 (2009) (“While we may consider such impacts as part of our assessment of the socioeconomic aspects of proposed projects in the context of our NEPA review, we are not compelled to do so.”).

impacts fall disproportionately on environmental justice populations.”⁸⁴⁰ If the Final EIS reaches a negative finding at any of these steps, then the analysis concludes. For example, if no minority or low-income populations are found, there is no reason to then consider whether the resource impacts are high and adverse.

a. Existence of Minority and Low-Income Populations

303. Shenandoah Valley Network states that the ACP Project and the Buckingham County compressor station in particular will have a disproportionately high and detrimental effect on environmental justice communities.⁸⁴¹ Shenandoah Valley Network argues that the Final EIS should have provided a more refined analysis for the environmental justice communities most affected by the facilities by defining environmental justice communities using smaller, more granular census blocks, rather than the larger census tracts, because the census blocks “have significantly larger percentages of racial or ethnic minorities or people living in poverty than the broader census tract.”⁸⁴² Shenandoah Valley Network asserts use of the larger census tracts disguises the “more direct and localized impacts felt by those communities closest to the pipeline and the infrastructure.”⁸⁴³ Shenandoah Valley Network and Public Interest Groups assert that the environmental justice analysis with respect to the compressor station in Buckingham County demonstrates how the overall analysis was flawed.⁸⁴⁴ Public Interest Groups specifically argue that the use of census blocks around the Buckingham County compressor station dilutes the impacts to families in the Union Hill area, where 85 percent of adjoining landowners are African-American.⁸⁴⁵

304. Shenandoah Valley Network points out that the Final EIS and the Certificate Order mistakenly stated that three, rather than two, census tracts are within one mile of the

⁸⁴⁰ Final EIS at 4-512. These three steps are based on guidance provided by the U.S. Environmental Protection Agency. EPA, *Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis* (Apr. 1998).

⁸⁴¹ Rehearing Request of Shenandoah Valley Network at 120.

⁸⁴² *Id.* at 120-21.

⁸⁴³ *Id.* at 121.

⁸⁴⁴ *Id.* at 128-34; Rehearing Request of Public Interest Groups at 25.

⁸⁴⁵ Rehearing Request of Public Interest Groups at 25. With the exception of secondary literature, Public Interest Groups do not cite any authority showing the Commission’s environmental justice analysis is flawed. *Id.* at 27 n.23.

Buckingham County compressor station.⁸⁴⁶ We disagree that analyzing three rather than two census tracts resulted in a flawed analysis. As a result of additional letters and comments at public meetings regarding the Union Hill and Union Grove locations near the Buckingham County compressor station, Commission staff asked Atlantic to re-examine the properties near the compressor station.⁸⁴⁷ At this direction, Atlantic resurveyed the location and “expanded the visual [area of potential effects] to include additional properties.”⁸⁴⁸ Including three tracts rather than two cast a wider net for analysis, which was done for the purpose of responding to comments concerning environmental justice. According to Shenandoah Valley Network, these three census tracts should be designated environmental justice populations after comparing the census tract demographics to state-wide rather than county-wide demographics.⁸⁴⁹

305. Mr. Limpert challenges the environmental justice analysis, stating that, with one exception, all counties where the project is located have people who are “below the median income level for their respective states” and that the percentage of people who live below the poverty level who would be living near the pipeline is substantially higher than those living elsewhere.⁸⁵⁰ Shenandoah Valley Network asserts that the methodology for determining low-income populations (comparing census tract with state-wide data) differed from the methodology for determining minority populations (comparing census tract with county-wide data).⁸⁵¹ Shenandoah Valley Network asserts that this disparate approach was arbitrary and capricious.⁸⁵²

306. We disagree that looking at demographics at the census tract rather than the census block level resulted in a flawed environmental justice analysis. The court in *Sabal Trail*, which noted that “the agency’s ‘choice among reasonable analytical methodologies is

⁸⁴⁶ Rehearing Request of Shenandoah Valley Network at 128-29.

⁸⁴⁷ Final EIS at 4-538.

⁸⁴⁸ *Id.*

⁸⁴⁹ Rehearing Request of Shenandoah Valley Network at 130.

⁸⁵⁰ Rehearing Request of Mr. Limpert at 5-6.

⁸⁵¹ Rehearing Request of Shenandoah Valley Network at 133 n.405.

⁸⁵² *Id.*

entitled to deference,”⁸⁵³ specifically observed that census tracts were used to define the relevant communities.⁸⁵⁴ Shenandoah Valley Network’s argument appears to be that that the Commission’s analysis ignored the possibility that the applicants may have sited the project in counties that tended to have high numbers of environmental justice communities.⁸⁵⁵ However, Shenandoah Valley Network ignores an important safeguard in this regard. An environmental justice community can be defined either by comparing the percentage of census tract data with the county, or by identifying the county as a whole being more than 50 percent minority or impoverished – a standard set forth in the EPA guidance.⁸⁵⁶ Shenandoah Valley Network does not cite any authority for using a smaller geographic region for environmental justice.

307. Shenandoah Valley Network states that collectively considering minority groups ignores the impacts the pipeline would have on particular racial or ethnic groups.⁸⁵⁷ More specifically, Shenandoah Valley Network argues that the Final EIS failed to consider the

⁸⁵³ *Sabal Trail*, 867 F.3d at 1378 (quoting *Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004)).

⁸⁵⁴ *Sabal Trail*, 867 F.3d at 1368-69 (defining environmental justice communities “as census tracts where the population is disproportionately below the poverty line and/or disproportionately belongs to racial or ethnic minority groups”). See *Dominion Cove Point LNG, LP*, 148 FERC ¶ 61,244, at P 149 (2014) (comparing census tract demographics to county demographics); *Dominion Energy Cove Point LNG, LP*, 162 FERC ¶ 61,056, at P 98 (2018) (noting that the percentage of minorities in census tracts exceeds 50 percent).

⁸⁵⁵ Shenandoah Valley Network discusses a hypothetical where the African American population is over four times higher than the state average and the Native American population is seven times higher than the state average. Rehearing Request of Shenandoah Valley Network at 133 (noting that its hypothetical county has “disproportionately high African American and Native American populations”).

⁸⁵⁶ EPA, *Guidance for Incorporating Environmental Justice Concerns in EPA’s NEPA’s Environmental Analyses* (1998) available at: https://www.epa.gov/sites/production/files/2014-08/documents/ej_guidance_nepa_epa0498.pdf.

⁸⁵⁷ Rehearing Request of Shenandoah Valley Network at 122.

disproportionate effects the project would have on state-recognized Native American tribes.⁸⁵⁸

308. We disagree. Shenandoah Valley Network cites no authority for its criticism of collective treatment of minority communities, and there is none to be found in Executive Order 12898, nor in the *Sabal Trail's* environmental justice review.⁸⁵⁹ The collective treatment of minorities is consistent with EPA guidance.

b. High and Adverse Resource Impacts

309. Shenandoah Valley Network argues the Final EIS failed to consider the disproportionate exposure to risk of catastrophic accident.⁸⁶⁰ The environmental justice analysis logically focused on impacts that would be unique to the impoverished and minority communities. The Final EIS contained discussion of risk of catastrophic accident; however, on rehearing, Shenandoah Valley Network fails to explain how the risk of a catastrophic accident uniquely affects environmental justice communities. Shenandoah Valley Network asserts the potential impact radius should be 943 feet, not 660 feet, citing a study prepared by Clean Water for North Carolina.⁸⁶¹

310. With regard to catastrophic accidents, Shenandoah Valley Network argues the PHMSA safeguards “have proven insufficient to prevent catastrophic accidents in gas transmission pipelines in the past.”⁸⁶² We disagree. The Final EIS provides perspective for catastrophic events. After considering annual rates of deaths from motor vehicles, poisonings, falls, drownings, fire, smoke inhalation, and burns; floods; lightning; tornados, all of which outnumber deaths from natural gas transmission pipelines, the Final EIS put the issue in perspective when it concluded that operation of this 642.0 miles of pipeline “might result in a fatality (either an industry employee or a member of the public) on the pipeline every 156 years.”⁸⁶³ The Final EIS concluded, and we agree that this

⁸⁵⁸ *Id.* at 122-24.

⁸⁵⁹ *Sabal Trail*, 867 F.3d at 1368-69

⁸⁶⁰ Rehearing Request of Shenandoah Valley Network at 125-28.

⁸⁶¹ *Id.* at 127.

⁸⁶² *Id.* at 128.

⁸⁶³ Final EIS at 4-590.

record supports the finding that “natural gas pipelines continue to be a safe, reliable means of energy transportation.”⁸⁶⁴

c. **Disproportionate Effect on Environmental Justice Populations**

311. Shenandoah Valley Network argues that the Final EIS acknowledged the harmful health effects from air pollution at compressor stations, but failed to consider the environmental injustice of that pollution.⁸⁶⁵

312. The purpose of Executive Order 12898 is to consider whether impacts on human health or the environment (including social and economic aspects) would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group.⁸⁶⁶ This is an inquiry that the Commission and its staff take very seriously.

313. The Certificate Order explained that due to construction dust and compressor station emissions, African American populations⁸⁶⁷ near ACP and Supply Header projects could experience disproportionate health impacts due to higher rates of asthma within the overall African American community.⁸⁶⁸ However, health impacts from construction dust would be temporary, localized, and minor. Health impacts from compressor station emissions would be moderate because, though they would be permanent facilities, air emissions would not exceed regulatory permissible levels. Although the Final EIS discusses the potential for the risk of impacts to fall disproportionately on minority communities, it further notes that, in relation to comments received regarding Compressor Station 2’s effects on African Americans, the census tracts around the station are not designated as minority environmental justice populations. Additionally, the Final EIS required Atlantic and DETI to implement measures from their *Fugitive Dust Control and*

⁸⁶⁴ *Id.* at 4-590.

⁸⁶⁵ Rehearing Request of Shenandoah Valley Network at 134-41.

⁸⁶⁶ Final EIS at 4-511.

⁸⁶⁷ Although minorities, including African Americans, do reside in the three census tracts within one mile of Compressor Station 2, none of the tracts were designated as minority environmental justice populations.

⁸⁶⁸ Certificate Order, 161 FERC ¶ 61,042 at P 257; Final EIS at 4-514 (citing U.S. Dep’t of Health and Human Services, Centers for Disease Control and Prevention, *Asthma Facts – CDC’s National Asthma Control Program Grantees* (July 2013)).

Mitigation Plan to limit fugitive dust emissions.⁸⁶⁹ With this implementation, impacts from compressor station emissions would be moderate because the pollutants would not exceed permissible levels.⁸⁷⁰ Therefore, by following the methodology outlined above, the Certificate Order concluded,⁸⁷¹ and we affirm, that the projects 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 Compressor Station 2.⁸⁷²

314. Shenandoah Valley Network basically argues that there is no evidence of a safe level of exposure to any of the pollutants subject to National Ambient Air Quality Standards.⁸⁷³ We disagree. The EPA established National Ambient Air Quality Standards to protect human health and public welfare, including sensitive subpopulations (e.g. asthmatics, children, and the elderly). To address air quality on a local or regional scale, states may adopt the NAAQS as established by EPA or establish standards that are more stringent than the NAAQS. The Final EIS states that Virginia and North Carolina adopted the federal NAAQS; therefore, these standards are appropriate for consideration of air quality impacts from the projects. The Final EIS concluded that the project would not cause or contribute to a violation of the NAAQS and concluded that a health impact assessment was not required.⁸⁷⁴ We agree.

315. With regard to the risk of catastrophic accidents, we reject Shenandoah Valley Network's assertion that the risk for environmental justice communities "appreciably exceeds the [risk to the] general population."⁸⁷⁵ With regard to fatal accidents and risk from earthquakes, Shenandoah Valley Network has not shown that environmental justice communities are uniquely at risk. Shenandoah Valley Network provides no explanation or authority unique to environmental justice communities and does not rebut the Commission's analysis, which covers the entire pipeline route.

⁸⁶⁹ Final EIS at 5-30 to 5-31.

⁸⁷⁰ *Id.* at 5-31.

⁸⁷¹ Certificate Order, 161 FERC ¶ 61,042 at P 257.

⁸⁷² Final EIS at 4-514.

⁸⁷³ Rehearing Request of Shenandoah Valley Network at 134-41.

⁸⁷⁴ Final EIS at 4-563.

⁸⁷⁵ Rehearing Request of Shenandoah Valley Network at 125.

316. Friends of Nelson argues that the socio-economic impacts to the African-American community in Wingina and Westminster would be especially devastating.⁸⁷⁶ Friends of Nelson argues that the finding in the Final EIS that “there is no evidence that such risks would be disproportionately borne by any racial, ethnic, or socioeconomic group,”⁸⁷⁷ is flawed. However, Friends of Nelson fails to explain how our analysis erred. Simply making blanket allegations that the Commission violated the law without any analysis or explanation does not suffice to raise an issue. Therefore, we dismiss Friends of Nelson’s argument.

d. Alternatives

317. Shenandoah Valley Network argues the alternatives analysis ignored environmental justice concerns.⁸⁷⁸ Shenandoah Valley Network asserts that there was no information about whether alternatives would further harm already over-burdened communities⁸⁷⁹ or how environmental justice communities would be affected when it considered alternatives of electric versus gas powered compressor stations.⁸⁸⁰ Shenandoah Valley Network cites no authority for its position, and we are aware of none.

318. NEPA requires the Commission to analyze the environmental consequences of a proposed pipeline as well as reasonable alternatives to a project.⁸⁸¹ The purpose of NEPA’s requirement is to ensure that the Commission is fully informed of the environmental consequences of a proposal before it decides whether to certificate it.⁸⁸² As discussed above, the Final EIS fully considered alternatives to the ACP and Supply Header Projects. Shenandoah Valley Network does not identify a particular alternative that would have been preferable to environmental justice communities, nor provide analysis disputing our results. Thus, we dismiss Shenandoah Valley Networks’ request.

⁸⁷⁶ Rehearing Request of Friends of Nelson at 52.

⁸⁷⁷ Final EIS at 4-514. *See* Rehearing Request of Friends of Nelson at 52.

⁸⁷⁸ Rehearing Request of Shenandoah Valley Network at 144-145.

⁸⁷⁹ *Id.* at 144.

⁸⁸⁰ *Id.* at 145.

⁸⁸¹ 42 U.S.C. § 4332(C) (2012).

⁸⁸² *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

e. **Environmental Justice Conclusion**

319. Shenandoah Valley Network argues that the Final EIS failed to make use of the limited data it compiled.⁸⁸³ Despite the information about minority and low-income groups in the Final EIS, Shenandoah Valley Network states that the Final EIS and Certificate Order failed to “consider the environmental injustice of allowing a massive, new industrial project to cut through so many communities with high percentages of low-income families, people of color, and American Indians.”⁸⁸⁴ Shenandoah Valley Network also argues that the Final EIS should have considered the secondary environmental justice impacts resulting from secondary projects such as connector lines, proposed gas generation, and other industrial facilities.⁸⁸⁵

320. We disagree. As we have stated in prior cases, the siting of linear facilities between two fixed end points is generally based on environmental and engineering factors.⁸⁸⁶ Short of a substantive approach where the Commission denies the application or conditions it on the rerouting such that minority and impoverished groups are not affected,⁸⁸⁷ it is not clear what additional “consideration” Shenandoah Valley Network seeks. The Final EIS made the information public and included discussion of it. No more is required. We further find that the review of the secondary impacts suggested by Shenandoah Valley Network is not required by law. Further, the inquiry would be unworkable. The impacts suggested by Shenandoah Valley Network are attenuated and often involve facilities and operations that are outside the jurisdiction and control of the Commission. Further, many of the activities are private activities not controlled by any government entity. Expanding the Commission’s environmental justice review to include geographic regions affected by such projects would be unwieldy and result in analysis and information that the Commission would not be able to mitigate. Further, the purpose of the environmental justice review is in part to facilitate participation by environmental justice communities in the Commission’s certificate proceeding; however, it is not clear

⁸⁸³ Rehearing Request of Shenandoah Valley Network at 124-25.

⁸⁸⁴ *Id.* at 124.

⁸⁸⁵ *Id.* at 125.

⁸⁸⁶ See, e.g., *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 235; *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 at P 262.

⁸⁸⁷ “As always with NEPA, an agency is not required to select the course of action that best serves environmental justice, only to take a ‘hard look’ at environmental justice issues.” *Sabal Trail*, 867 F.3d at 1369 (citing *Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475–77 (6th Cir. 2014)).

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how expanding the scope of the environmental justice analysis would increase such participation.

The Commission orders:

(A) The requests for rehearing filed by Demian Jackson; the Fairway Woods Homeowners Condominium Association; Friends of Buckingham; Friends of Nelson; the North Carolina Utilities Commission; Public Interest Groups; Ashram-Yogaville; Shenandoah Valley Network; Sierra Club; William Limpert; and Friends of Wintergreen are dismissed or denied.

(B) Atlantic's November 14, 2017 request for rehearing is granted in part and denied in part, and we direct Atlantic to file actual tariff records setting forth its pro-rata allocation of pack capability provisions available to all firm transportation shippers and the applicable rate associated with the pack account service, at least 30 days but no more than 60 days prior to the date the project facilities go into service.

(C) The November 14, 2017 requests for rehearing filed by Anne Bryan and Lakshmi Fjord are rejected as untimely.

(D) Friends of Nelson's November 20, 2017 corrected request for rehearing is rejected as untimely.

(E) Atlantic's December 12, 2017 answer is rejected.

(F) The requests for stay filed by The Fairway Woods Homeowners Condominium Association, Friends of Buckingham, Friends of Nelson; Public Interest Groups, Ashram-Yogaville, Shenandoah Valley Network, Sierra Club, William Limpert, and Friends of Wintergreen are dismissed as moot.

By the Commission. Chairman McIntyre and Commissioner Glick are not participating. Commissioner LaFleur is dissenting with a separate statement.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC	Docket Nos. CP15-554-002
Dominion Transmission, Inc.	CP15-555-001
Atlantic Coast Pipeline, LLC Piedmont Natural Gas Company, Inc.	CP15-556-001

(Issued August 10, 2018)

LaFLEUR, Commissioner, *dissenting*:

Today, the Commission denies rehearing of its original authorization of the Atlantic Coast Pipeline (ACP) Project.¹ For the reasons set forth herein, I respectfully dissent.

I did not support the Commission's underlying order authorizing the ACP Project because I concluded the project as proposed was not in the public interest.² My consideration of the ACP Project was influenced by my consideration of the certificate application of the Mountain Valley Pipeline (MVP) Project,³ which was decided on the same day as the ACP Project. After carefully balancing the aggregate environmental impacts resulting from the authorization of both of these projects against the economic need of the projects, I could not find either proposal in the public interest. I am dissenting today on the rehearing order for the following reasons: (1) I still do not find the ACP Project is in the public interest. I disagree with the Commission's approach to evaluating system and route alternatives, particularly in light of the recently-issued Fourth Circuit Court of Appeals (Fourth Circuit) decision which vacated the National Park Service's (NPS) federal authorization allowing the ACP Project to cross the Blue Ridge Parkway;⁴ (2) I disagree with the treatment of climate impacts; and (3) I have serious concerns regarding the majority's articulation of how a project's environmental impacts weigh into

¹ *Atlantic Coast Pipeline, LLC*, 164 FERC ¶ 61,100 (2018) (Rehearing Order).

² *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, *dissenting*) (Certificate Order).

³ *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, *dissenting*).

⁴ *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

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the Commission's finding that a project is required by the public convenience and necessity under the Natural Gas Act (NGA).

Route and System Alternatives

As noted in my dissent on the certificate authorizations, ACP and MVP will be located in the same Appalachian region, with similarities in route and timing. The projects, when considered collectively, pose significant environmental impacts. Both pipelines cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Moreover, the impacts on landowners and communities are significant, noting the numerous concerns raised by intervenors in this rehearing proceeding. For these reasons, I believe we should have given more consideration to the collocation and merged system/one-pipe alternative options that could result in less environmental disturbance and fewer landowner impacts.

I believe the record demonstrates that there are system and route alternatives, including collocation with MVP and merging of ACP and MVP into a single pipeline, which could provide significant environmental advantages over the certificated project. The merged systems alternative would largely follow the MVP route to deliver capacity to both ACP and MVP through a single large diameter pipeline. The route alternative would be 173 miles shorter than the cumulative mileage of the ACP and MVP projects individually,⁵ and would substantially increase collocation with existing utility rights-of-way,⁶ avoid sensitive National Forest terrain, and reduce crossings of the Appalachian National Scenic Trail and Blue Ridge Parkway.⁷

While the majority acknowledges that the merged system/one-pipe alternative would result in some environmental advantages, it nonetheless declines to consider it based on the Final EIS's conclusion that the merged system alternative does not have a "significant advantage"⁸ over the existing proposal when considering "environmental factors, technical feasibility, and ability to meet the ACP Project's operational needs and timelines."⁹ The majority also specifically notes that this alternative would add significant

⁵ Final EIS at 3-8.

⁶ *Id.* at 3-9.

⁷ *Id.*

⁸ *Id.*

⁹ Rehearing Order at P 136.

time to the project and would not meet the authorization timeline required by ACP.¹⁰ I believe that the one-pipe options presented as alternatives provided reasonable approaches that warranted serious consideration, even if doing so would have delayed Commission action on the MVP and ACP applications. Going forward, when multiple projects are proposed in the same region, with similar timing, I believe we should consider a regional review for the development of natural gas infrastructure to assess both the need for pipeline capacity in the region, and the environmental impacts of multiple proposed pipelines on the region.

Furthermore, the majority's denial of rehearing challenges to the approved ACP Project route is even more problematic in light of the recent developments concerning the ACP Project. Earlier this week, the Fourth Circuit vacated the NPS's federal authorization allowing the ACP Project to cross the Blue Ridge Parkway.¹¹ As relevant here, the Fourth Circuit concluded that, before issuing a right-of-way permit to cross the Blue Ridge Parkway, the NPS "must make a threshold determination that granting the right-of-way is 'not inconsistent with the use of such lands for parkway purposes' and the overall National Park System to which it belongs."¹² The Court, after describing both the NPS's broad conservation and preservation mandate prescribed in statute,¹³ and the specific purposes of the Blue Ridge Parkway,¹⁴ concluded that the NPS provided no

¹⁰ *Id.* P 137.

¹¹ *Sierra Club v. U.S. Dept. of the Interior*, Opinion No. 18-1082 (4th Cir. Aug. 6, 2018).

¹² *Id.* at *55.

¹³ *Id.* at *55-56 ("Critically, Congress has defined the National Park System's 'purpose' as 'conserv[ing] the scenery, natural and historic objects, and wild life in the System units and [] provid[ing] for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.... Thus, unlike other Federal lands, such as the national forests, the National Park System's sole mission is conservation.'").

¹⁴ *Id.* at *56-57 (noting that the Blue Ridge Parkway's specific purposes are to "connect ... national parks by way of a 'national rural parkway' – a destination and recreational road that passes through a variety of scenic ridges, mountainside, and pastoral farm landscapes"; "conserve the scenery and preserve the natural and cultural resources of the parkway's designed and natural areas"; "provide for public enjoyment and understanding of the natural resources and cultural heritage of the central and southern Appalachian Mountains"; and "provide opportunities for high-quality scenic and recreational experiences along with the parkway and in the corridor through which it

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explanation of how the ACP Project right-of-way satisfied these requirements.¹⁵ In fact, the Court calls into question whether it is even possible for the ACP Project to be consistent with parkway purposes,¹⁶ and the leaves unaddressed the threshold question of whether NPS has authority to grant a pipeline right-of-way at all.¹⁷

In light of these findings and the *vacatur* of the underlying NPS authorization, I believe that it would be prudent for the Commission to grant rehearing and reopen the record regarding route and system alternatives rather than denying rehearing arguments regarding those alternatives.¹⁸ The Court's decision could have major impacts on the ACP Project, including the possibility of significant route changes, or even the abandonment of all or some of the project if it is unable to obtain a right-of-way to cross the Blue Ridge Parkway.

Downstream GHG Emissions from the ACP Project are Indirect Impacts

With regard to the climate impacts associated with the ACP Project, the majority refuses to even acknowledge that downstream GHG emissions in this case constitute indirect impacts. Rather, the majority claims that making a finding on the indirect impacts is immaterial because the Final EIS calculated a full-burn estimate of downstream emissions.¹⁹ I disagree. Under *Sierra Club v. FERC*,²⁰ a finding that GHG emissions are an indirect impact requires the Commission to quantify and consider those impacts under

passes.”).

¹⁵ *Id.* at *58-60.

¹⁶ *E.g., id.* at *58 (“We find this lack of explanation particularly troubling given the evidence in the record indicating that the presence of the pipeline is inconsistent with and in derogation of the purposes of the Parkway and the Park System. Indeed, a visual impact study that NPS oversaw specifically concluded that the effect of the pipeline on views from the Parkway ‘would likely be inconsistent with NPS management objectives.’”).

¹⁷ *Id.* at *55.

¹⁸ I appreciate that today, in response to the Fourth Circuit decision, Commission staff directed ACP to halt all construction of the ACP Project. While I strongly support that decision, the majority's decision to deny rehearing today reiterates the Commission's endorsement of that flawed route.

¹⁹ Rehearing Order at P 263.

²⁰ 867 F.3d 1357 (D.C. Cir. 2017) (*Sierra Club*).

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the National Environmental Policy Act (NEPA).²¹ Thus the majority's assertion runs afoul of Commission's obligations under NEPA because it only quantified the GHG emissions but did not consider them. Consideration of GHG emissions requires the Commission ascribe significance to those impacts. When evaluating the significance of a particular impact, the Commission must consider both context²² and intensity.²³ Here, by evaluating how the emissions from the ACP Project would impact Pennsylvania, West Virginia, Virginia, and North Carolina and nationwide emissions inventories, the majority arguably provides context for the environmental impact.²⁴ The majority fails to reach a determination regarding the intensity of the impact.

Moreover, while the majority sidesteps the discussion of indirect impacts, its analysis under cumulative impacts is directly relevant. The majority states, "[t]he requirement that an impact must be 'reasonably foreseeable' to be considered in a NEPA analysis applies to both indirect and cumulative impacts."²⁵ The majority then concludes, "[t]here is no evidence in the record that ultimate end-use combustion of the gas transported by the projects is reasonably foreseeable and therefore does not meet the definition of cumulative impacts."²⁶ That finding would equally apply to indirect impacts. Thus, while the majority does its best to avoid making a determination on indirect impacts, it nonetheless effectively does so.

I believe that the record in this case demonstrates that downstream GHG emissions are reasonably foreseeable and must be assessed as indirect impacts under *Sierra Club*.²⁷ ACP indicates that the majority of the gas transported on the pipeline, approximately 79.2

²¹ 40 C.F.R. § 1508.8(b) (2017) (Indirect impacts are "*caused by the action and are later in time or farther removed in distance, but still are reasonably foreseeable.*" Indirect impacts "may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." (italics added)).

²² [40 C.F.R. § 1508.27\(a\)](#) (2017) (Context means "that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests and the locality.").

²³ [40 C.F.R. § 1508.27\(b\)](#) (2017) (Intensity refers to "the severity of the impact").

²⁴ Certificate Order at P 305.

²⁵ Rehearing Order at P 288.

²⁶ Rehearing Order at P 296.

²⁷ *Sierra Club*, 867 F.3d 1357.

percent, will be used as fuel to generate electricity for industrial, commercial, and residential uses.²⁸ The Final EIS identifies GHG emissions from two power generation facilities that would be served by ACP, the Brunswick Power Station and the Greenville County Power Station.²⁹ Indeed, the majority itself acknowledges that the ACP Project will supply gas to these two power plants.³⁰ In addition, Public Interest Groups claim the Piedmont Pipeline, which is a 26-mile-long spur line, interconnecting with the ACP pipeline in Robeson County, North Carolina, will deliver gas to Smith Energy Complex in Hamlet, North Carolina.³¹ The Smith Energy Center is also mentioned by Duke Energy Carolinas and Duke Energy Progress (Duke) in their joint comments supporting the ACP Project. Duke states that gas delivered by the ACP facilities will provide needed and critical additional supply for four existing Duke power plants.³² In fact, the Certificate

²⁸ Rehearing Order at P 50 (“[ACP] provided estimates of the likely end uses for the ACP Project, estimating that 79.2 percent of the gas will be transported to supply natural gas electric generation facilities, 9.1 percent will serve residential purposes; 8.9 percent will serve industrial purposes, and 2.8 percent will serve other purposes such as vehicle fuel.”).

²⁹ Final EIS 4-616 and 4-617 (“While ACP would deliver natural gas to the Brunswick and Greenville County Power Stations, these facilities are independent of the proposed projects.”).

³⁰ Rehearing Order at P 57; *see also* Certificate Order at P 8 (“approximately 0.4 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline near Lawrenceville in Brunswick County, Virginia, and extending west to Dominion Virginia Power’s Brunswick Power Station (AP-4 Lateral)” and “approximately 1.0 miles of 16-inch-diameter lateral pipeline originating at an interconnect point with the AP-1 Mainline in Greensville County, Virginia, and extending to Dominion Virginia Power’s proposed Greensville Power Station (AP-5 Lateral)”).

³¹ Rehearing Request of Public Interest Groups at P 36. I note, that the Final EIS identified the spur line as a nonjurisdictional facility associated with the ACP Project. Final EIS at 2-58, Appendix W.

³² Duke Comments at 1-2 (“The four existing Duke Energy Progress (DEP) facilities that will be served by ACP are: 1) H.F. Lee Energy Complex, located in Goldsboro, NC totaling approximately 1,047 MW/910 MW (winter/summer) (Combined cycle); 2) Wayne County Station, located in Goldsboro, NC totaling approximately 959 MW/ 863 MW (winter/summer) (5 combustion turbines); 3) Sutton Energy Complex, located in Wilmington, NC totaling approximately 717 MW/622 MW (winter/summer) (Combined cycle); and 4) Smith Energy Complex, located in Hamlet, NC totaling

Order not only disclosed a full burn estimate of downstream GHG emissions associated with the project, but also an estimate of actual consumption using ACP's 79.2 percent power generation number.³³ Thus, the Commission effectively acknowledges in the underlying Certificate Order that 79 percent of the natural gas transported by the project is used for power generation. I therefore believe there is more than sufficient information in the record to demonstrate that it is reasonably foreseeable that natural gas transported on ACP will be combusted at natural-gas fired generating facilities.

Given the extensive record evidence noted above, including representations by ACP itself, and the Commission recognition of actual downstream consumption in its calculations,³⁴ I am frankly unsure what level of evidentiary support the majority now needs to find that gas transported by ACP will be combusted at downstream generation facilities and cause indirect impacts within the meaning of the *Sierra Club* ruling.³⁵ Even assuming *arguendo* that the Commission did not have sufficient information about the natural gas-fired power plants to calculate the gross and net GHG emissions, I believe the Commission would then have an affirmative duty to seek the additional information to

approximately 1,227 MW/1,088 MW (winter/summer) (Combined cycle) and approximately 916 MW/780 MW (winter/summer) (5 Combustion turbines). In addition, DEP will complete an approximately 100 MW/84 MW (winter/summer) Sutton fast start/black start CT in 2017 that will be able to utilize the transportation service from ACP.”).

³³ Certificate Order at P 305.

³⁴ *Id.*

³⁵ In *Mid States*, the Court considered whether the Surface Transportation Board performed a sufficient environmental review associated with the construction of rail lines intended to transport coal. The Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity regarding the extent to which transported coal would be burned, the Court concluded that the nature of the impact was clear. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*). When the record does not have precise end use and location of natural gas deliveries, the Commission must consider the likely use of gas transported through the Project. NEPA does not require exact certainty; rather, it only requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action. *See, e.g., Sierra Club*, 867 F.3d at 1374 (recognizing that “NEPA analysis necessarily involves some ‘reasonable forecasting,’ and that agencies may sometimes need to make educated assumptions about an uncertain future”).

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clarify the copious information already in the record regarding the downstream end uses, including ACP's own statements and Duke's comments about its power plants, before simply concluding that there are no indirect impacts from the project.

The Social Cost of Carbon

The majority also argues that the Social Cost of Carbon is not an appropriate indicator of significance because “the project’s incremental physical impacts on the environment caused by climate change cannot be determined, it also cannot be determined whether the projects’ contribution to cumulative impacts on climate change would be significant.”³⁶ But that is precisely the use for which the Social Cost of Carbon was developed—it is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.³⁷ I recognize that determining the severity of a particular impact would require thoughtful and complex analysis, and I am confident that the Commission could perform that analysis if it chose to do so; indeed, we routinely grapple with complex issues in many other areas of our work.³⁸

³⁶ Rehearing Order at P 279.

³⁷ *See, e.g.*, Environmental Protection Agency Fact Sheet – Social Cost of Carbon, available at https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf; *see also Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm’r, *dissenting in part*); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (LaFleur, Comm’r, *dissenting in part*); *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158 (2018) (LaFleur, Comm’r, *concurring*); *Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm’r, *concurring*).

³⁸ Many of the core areas of the Commission’s work have required the development of analytical frameworks, often a combination of quantitative measurements and qualitative assessments, to fulfill the Commission’s responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, NGA, and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a discounted cash flow method to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. *See also, e.g., Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh’g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh’g*, Order No. 1000-A, 139 FERC ¶

Additionally, I continue to disagree with the technical and policy arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon, many of which I addressed in my dissent on the *Sabal Trail* Remand Order.³⁹ Without entirely rehashing those arguments, I reject the notion that the Social Cost of Carbon cannot meaningfully inform the Commission's decision-making. The majority presents various excuses, including arguments about the application of a cost-benefit analysis in our pipeline review and lack of consensus regarding the appropriate discount rate. I continue to find these arguments unpersuasive.⁴⁰

Commission's Responsibilities to Consider Environmental Impacts Under the NGA and NEPA

Finally, I note my strong disagreement with the majority's characterization of the Commission's inability under NEPA to impose mitigation measures with respect to GHG emissions. The majority states that "the only way for the Commission to reflect consideration of downstream emissions in its decision making would be, as the *Sabal Trail* court observed, to deny the certificate."⁴¹ I disagree with the majority's binary

61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System).

³⁹ *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

⁴⁰ The majority incorporates arguments raised in prior dockets—many of which I dissented on—to justify its rejection of the Social Cost of Carbon. *See, e.g., Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (LaFleur, Comm'r, *dissenting*).

⁴¹ Rehearing Order at P 286.

distillation of the choice before the Commission: either ignore the impacts of downstream GHG emissions, or deny the certificate. In my view, the appropriate way to consider these impacts is to include them in our public interest analysis that balances the need for the pipeline with its environmental impacts, which would include the impacts from GHG emissions. Given that GHG emissions would be one of many factors reviewed as part of a complete record, I do not believe that consideration of GHG emissions would necessarily dictate a denial of a certificate application.

The majority further contends that, should the Commission actually consider denying a certificate due to the impacts of GHG emissions, its determination would rest on a finding that the “end use of the gas would be too harmful to the environment” and thus implies that the Commission could not legally deny a certificate on those grounds.⁴² I fundamentally disagree—I do not believe the NGA is so limiting. The Commission has broad authority under Section 7 of the NGA, including the discretion not to issue a certificate for a proposed pipeline if the Commission finds that a particular project would not be in the public interest.⁴³ As articulated in *NAACP v. FPC*, the Commission review under Section 7 of the NGA allows for consideration of many factors in determining whether a project is in the public interest.⁴⁴ Therefore, the Commission can act on whatever information is included in its environmental review, including the downstream GHG emissions resulting from the combustion of the transported natural gas. I believe finding a project is in the public interest requires thoughtful review and consideration of all environmental impacts, and that could very well mean deciding not to authorize certain projects based on their environmental impacts.

Accordingly for these reasons, I respectfully dissent.

Cheryl A. LaFleur
Commissioner

⁴² *Id.*

⁴³ 15 U.S.C. § 717f(c) (2012).

⁴⁴ *See NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to “encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices,” the Commission has the authority to consider “conservation, environmental, and antitrust” concerns).

EXHIBIT C

**List of Each Party Admitted to Participate in FERC Proceedings
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