ORAL ARGUMENT IS SCHEDULED FOR JANUARY 28, 2019

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

Nos. 17-1271, *et al.* (consolidated)

APPALACHIAN VOICES, *ET AL.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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December 20, 2018

CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties:

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

B. Rulings Under Review:

1. *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (Certificate Order), JA 1101; and

2. *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018) (Rehearing Order), JA 1776.

C. Related Cases:

This case has not been before this Court or any other court. Petitioners Bold Alliance, Bold Education Fund, Jerry and Jerolyn Deplanes, and Karoly Givens (and others) recently filed a notice of appeal (D.C. Cir. No. 18-5322) of the district court's September 27, 2018 ruling in *Bold Alliance et al. v. FERC*, Case No. 17-CV-01822 (RJJ), which dismissed for lack of subject matter jurisdiction various claims challenging the Mountain Valley Pipeline project and a separate natural gas pipeline project. In *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624 (4th Cir. 2018), *cert. petition pending*, the Fourth Circuit affirmed the district court's dismissal for lack of subject matter jurisdiction of claims brought by landowners

along the path of the Mountain Valley Pipeline project challenging the constitutionality of various provisions of the Natural Gas Act.

In addition, petitions for review concerning the Mountain Valley Pipeline project, but not involving the Commission, are currently pending before, or have been recently resolved by, the Fourth Circuit in Docket Nos. 18-1173 and 18-1757 (Army Corps of Engineers determinations); 17-2399, 18-1012, 18-1019 and 18-1036 (Forest Service and Bureau of Land Management determinations); 17-1714 (West Virginia water quality certification); and 17-2406 and 17-2433 (Virginia water quality certification).

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Advisory Council	Advisory Council on Historic Preservation
Amicus Br.	Corrected Brief Of Amicus Curiae Niskanen Center In Support Of Petitioners
Br.	Petitioners' Joint Opening Brief
Certificate Order	*Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017), JA 1101
Commission or FERC	Federal Energy Regulatory Commission
Environmental Impact Statement or EIS	Environmental Impact Statement for the Mountain Valley Project, issued June 2017
Mountain Valley	Mountain Valley Pipeline, LLC
NEPA	National Environmental Policy Act
NGA	Natural Gas Act
NHPA	National Historic Preservation Act
2018 Notice of Inquiry	*Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018)
Petitioners	Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia, Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance, Ben Rhodd, Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek Watershed Association, Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, Tony Williams, Bold Alliance and Bold Education Fund

Policy Statement	*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)
Project	Mountain Valley Pipeline Project
Rehearing Order	*Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 (2018), JA 1776

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BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUES

In this proceeding, the Federal Energy Regulatory Commission (FERC or Commission) issued a certificate of "public convenience and necessity" under section 7(c) of the Natural Gas Act (NGA), 15 U.S.C. § 717f(c), to Mountain Valley Pipeline, LLC (Mountain Valley). That certificate conditionally authorized Mountain Valley to construct and operate a new natural gas pipeline in West Virginia and Virginia. *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (Certificate Order), JA 1101, *on reh'g*, 163 FERC ¶ 61,197 (2018) (Rehearing Order), JA 1776.

The Mountain Valley Pipeline project (Project), a new 303 mile-long pipeline, would provide additional transportation capacity from West Virginia to Virginia, enhancing the pipeline grid by connecting sources of natural gas to markets in the Northeast, Mid-Atlantic, and Southeast regions and making reliable natural gas service available to end users. The new capacity is fully subscribed under long-term precedent agreements with shippers.

In its Environmental Impact Statement (EIS), the Commission determined that the Project may result in some adverse environmental impacts on specific resources. Most would be temporary or short-term. Others would be reduced to less-than-significant levels by the implementation of appropriate mitigation measures. Ultimately, upon balancing the evidence of public benefits against the potential adverse economic effects of the Project and findings regarding environmental impacts, the Commission determined the Project would serve the public interest.

In Petitioners' Joint Opening Brief (Br.),[1] Petitioners question whether the Commission reasonably issued the certificate of public convenience and necessity based on:

[1] *See* Br. at 3-7 (listing 16 issues). Petitioners are Appalachian Voices, Chesapeake Climate Action Network, Sierra Club, West Virginia Rivers Coalition, Wild Virginia, Blue Ridge Environmental Defense League, Preserve Montgomery County, VA, Inc., Elizabeth Reynolds, Michael Reynolds, Steven Vance, Ben Rhodd, Preserve Craig, Inc., Protect Our Water, Heritage, Rights, and Indian Creek

(1) **public benefit**, where the Project is fully subscribed under binding, 20-year contracts with affiliated shippers that demonstrate market need, and will add infrastructure to an underdeveloped area, and Mountain Valley sufficiently minimized adverse economic impacts on landowners and communities;

(2) **initial recourse rates**, calculated with a return on equity of 14 percent and a capital structure of 50 percent debt and 50 percent equity, consistent with that applied to similarly-situated new companies constructing new major pipelines;

(3) **environmental review**, and other appropriate mitigation, in the Environmental Impact Statement and the Commission's orders, of greenhouse gas emissions, surface water impacts from sedimentation and erosion, groundwater impacts from construction in areas with karst features, cultural attachment, and alternative routes; and

(4) **consultation** with relevant parties regarding the avoidance or mitigation of impacts to historic properties under the National Historic Preservation Act (NHPA).

Watershed Association, Greater Newport Rural Historic District Committee, Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, Tony Williams, Bold Alliance, and Bold Education Fund.

Petitioners also question whether Mountain Valley may exercise eminent domain authority based on the Certificate Order and under the Natural Gas Act.

STATUTORY AND REGULATORY PROVISIONS

Pertinent statutes and regulations are in the separate Addendum.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

A. Natural Gas Act

The Natural Gas Act is designed "'to encourage the orderly development of plentiful supplies of … natural gas at reasonable prices.'" *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (quoting *NAACP v. FPC*, 425 U.S. 662, 670 (1976)). To that end, sections 1(b) and (c) grant the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. 15 U.S.C. §§ 717(b), (c). Before a company may construct a natural gas pipeline, it must obtain from the Commission a "certificate of public convenience and necessity" under NGA section 7(c), 15 U.S.C. § 717f(c), and "comply with all other federal, state, and local regulations not preempted by the NGA." *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

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

the issuance of the certificate … such reasonable terms and conditions as the public convenience and necessity may require." *Id.*

B. National Environmental Policy Act

The Commission's consideration of an application for a certificate of public convenience and necessity triggers the National Environmental Policy Act (NEPA). *See* 42 U.S.C. §§ 4321, *et seq.* NEPA sets out procedures to be followed by federal agencies to ensure that the environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004). Accordingly, an agency must "take a 'hard look' at the environmental consequences before taking a major action." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

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

C. National Historic Preservation Act

Under NHPA section 106, 54 U.S.C. § 306108, federal agencies must consider the effects of their "undertakings" on historic properties listed or eligible for listing in the National Register of Historic Places.[2] The Advisory Council on Historic Preservation's (Advisory Council) implementing regulations establish a procedure for compliance with section 106: (1) a determination of whether the proposed undertaking could affect historic properties, (2) an identification of potentially affected properties, (3) an assessment of whether there will be adverse effects on those properties, and (4) a resolution of effects. *See* 36 C.F.R. §§ 800.3-800.6. The agency must consult with state and tribal historic preservation officers and other interested parties to consider ways to resolve those effects. *Id*. The consulting parties may enter into an agreement documenting the resolution of adverse effects and compliance with Section 106. *Id*. § 800.6(c).

Section 106 does not require federal agencies to engage in any particular preservation activities. It only requires agencies to consult with the Advisory Council and other relevant parties and consider the impacts of their undertakings. *See Davis v. Latschar*, 202 F.3d 359, 370 (D.C. Cir. 2000).

[2] "Undertaking" includes "a project, activity, or program … requiring a Federal permit, license, or approval …." 54 U.S.C. § 300320.

II. THE COMMISSION'S REVIEW OF THE PROJECT

A. The Environmental Review

The Project is intended to provide up to 2 million dekatherms per day of firm transportation from West Virginia to Virginia (with each dekatherm roughly equivalent to 1,000 cubic feet of gas). Certificate Order P 7, JA 1103. It will serve natural gas demand in the Northeast, Mid-Atlantic, and Southeast regions by connecting sources of natural gas to markets in those areas. *Id*. P 62, JA 1127. Mountain Valley executed long-term contracts (precedent agreements) for 100 percent of the capacity provided by the Project. *Id*. P 9, JA 1105.

The Commission's pre-filing review of the Project began in April 2015 with the publication in the Federal Register of a notice of intent to prepare an Environmental Impact Statement. The notice was mailed to 2846 entities, including federal, state, and local government representatives and agencies; elected officials; regional environmental groups and non-governmental organizations; Indian tribes and Native Americans; affected property owners; other interested entities; and local libraries and newspapers. *Id*. P 122, JA 1149. The notice invited written comments on the environmental issues to be examined and listed the date and location of six public scoping meetings. *Id*. In response, the Commission received over 1000 comment letters, and 169 people presented oral comments at the public scoping meetings. *Id*. P 123, JA 1150.

Commission staff issued a draft Environmental Impact Statement in September 2016, which addressed the issues raised during the scoping period. *Id*. P 127, JA 1151. Subsequently, Commission staff held seven public comment sessions in the Project area, where over 260 speakers provided oral comments and the Commission received 1237 written comments. *Id*.

Commission staff issued the final Environmental Impact Statement in June 2017, which addressed timely comments on the draft Environmental Impact Statement. *Id*. P 129, JA 1152. The final Environmental Impact Statement, like the draft, was widely distributed to the Commission's environmental mailing list, as well as newly-identified affected landowners and any additional entities that commented on the draft. *Id*. The Environmental Impact Statement addressed geological hazards 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 and noise impacts; safety; cumulative impacts; and alternatives. *Id*.

The Environmental Impact Statement concluded that construction and operation of the Project may result in some adverse environmental impacts on specific resources. *Id*. P 130, JA 1152. Most impacts would be temporary or

short-term, except forest clearing impacts which necessarily would be long-term and significant. *Id*. For the other resources, mitigation measures would reduce impacts to less-than-significant levels. *Id*.

B. The Certificate Order

On October 23, 2017, the Commission issued a conditional certificate of public convenience and necessity to Mountain Valley. Certificate Order P 3, JA 1102. (One Commissioner dissented on certain issues.) The Commission applied the criteria set forth in its Policy Statement[3] to determine whether there is a need for the pipeline and whether it would serve the public interest. *Id.* PP 30-31, JA 1112. The Commission found a market need for the Project, as evidenced by precedent agreements for 100 percent of the pipeline's capacity. *Id.* PP 41, 55, JA 1117, 1124. The Commission accepted Mountain Valley's proposed return on equity of 14 percent for its initial recourse rates, but required that Mountain Valley reduce the equity component of its capitalization to 50 percent, consistent with Commission policy and the risks facing new companies constructing major new pipelines. *Id*. PP 79, 82, JA 1133, 1134.

[3] *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) (Policy Statement). The Commission recently issued a Notice of Inquiry regarding potential revisions to its approach under its currently effective Certificate Policy Statement. *Certification of New Interstate Natural Gas Facilities,* 163 FERC ¶ 61,042 (2018) (2018 Notice of Inquiry).

The Commission's environmental review considered the Environmental Impact Statement and all comments and other information in the record. *Id.* PP 307, 310, JA 1207. The Commission found that the Project, if constructed and operated as described in the Environmental Impact Statement and in compliance with the environmental conditions imposed by the Certificate Order, is an environmentally acceptable action. *Id*. P 308, JA 1207.

The Commission explained that, because Mountain Valley had been denied access to certain areas, the National Historic Preservation Act review process could not be completed prior to issuance of the Certificate Order, which confers eminent domain authority under the Natural Gas Act. In order to protect project lands, the Commission barred construction until NHPA consultation was completed. *Id*. P 269, JA 1193.

Ultimately, the Commission determined that the Project, with appropriate environmental conditions and mitigation measures, is required by the public convenience and necessity. *Id.* P 308, JA 1207.

C. The Rehearing Order

In the Rehearing Order, the Commission denied or dismissed all requests for rehearing. Rehearing Order P 5, JA 1778. (Two Commissioners dissented on certain issues.) As relevant here, the Commission rejected arguments that the Commission: wrongfully denied late interventions (*id*. PP 9-14, JA 1778-81);

erred in finding a need for the Project (*id*. PP 34-51, JA 1792-1803); erred in approving a 14 percent return on equity for initial recourse rates (*id*. PP 52-60, JA 1803-08); erred in granting Mountain Valley eminent domain authority (*id*. PP 63-92, JA 1809-25); and violated section 4(f) of the Department of Transportation Act (*id*. PP 93-94, JA 1825-27). The Commission also rejected arguments that its environmental analysis inadequately addressed: alternatives to the pipeline (*id*. PP 131-58, JA 1843-55); impacts on surface water and groundwater (*id*. PP 163-205, JA 1857-78); historic and cultural resources (*id*. PP 248-267, JA 1899-1907); and the Project's downstream greenhouse gas emissions (*id*. PP 268-309, JA 1907-29).

SUMMARY OF ARGUMENT

The Commission satisfied all of its statutory responsibilities in approving the Project. Under the Natural Gas Act, Congress entrusted the Commission with broad power to balance the many competing interests and determine whether a natural gas certificate application is in the "public convenience and necessity." Here, consistent with agency policy and court precedent, the Commission reasonably found that the Mountain Valley Project, if constructed and operated in accord with numerous mitigation measures, advances the public interest.

There is a market need for the Project as demonstrated by long-term contracts for 100 percent of pipeline capacity. That the contracts are with

Mountain Valley affiliates does not undermine this finding; the Commission reasonably concluded that affiliates would not have entered into long-term binding contracts without a legitimate business need for the capacity. The Project also will add infrastructure to an underdeveloped area, permit producers to access new markets, and benefit end users by improving grid reliability. Because Mountain Valley sufficiently minimized adverse economic impacts on landowners and communities, the Commission reasonably determined that the Project's public benefits outweighed its adverse economic effects.

The Commission accepted Mountain Valley's proposed 14 percent return on equity for its initial recourse rates, upon requiring Mountain Valley to reduce the equity component of its capitalization from 60 to 50 percent. Reviewing the proposed initial rates under the "public interest" standard of Natural Gas Act section 7, not the "just and reasonable" standard of sections 4 and 5, the Commission reasonably found this return commensurate with that awarded to similarly-situated companies and reflective of the risk to new companies of building major new pipelines.

Petitioners' contentions that Mountain Valley could not exercise eminent domain authority have no merit. First, the Commission's public convenience and necessity finding was not based on Mountain Valley having all necessary permits, but on its determination that the Project's benefits outweighed its adverse effects.

And, consistent with this Court's precedent, that finding satisfies the Takings Clause's public use requirement. The Commission also reasonably determined that the Natural Gas Act's broad conditioning authority provision permits it to approve projects contingent upon the applicant obtaining other necessary authorizations. Such a certificate, like other conditioned certificates, provides the holder with eminent domain authority.

In addition, due process was satisfied here. While not required, a pre-deprivation hearing was provided. The Certificate Order considered and responded to the parties' arguments, and this Court considered Petitioners' motions and petition for a writ of mandamus seeking a stay of the Certificate Order. Furthermore, consistent with Congress' design, eminent domain appropriately proceeded before this Court's review of the claims on appeal here. Natural Gas Act section 7(h) provides a certificate holder with eminent domain authority, and section 19(c) specifically provides that neither a request for Commission rehearing nor a petition for judicial review stays the Commission's order. Furthermore, courts have uniformly found that the Commission may issue tolling orders to extend the time for it to address the merits of rehearing requests, even if eminent domain proceedings have begun.

The Commission's decision that the Project was an environmentally acceptable action was informed and reasoned. The Environmental Impact

Statement fully identifies, describes, and analyzes the Project's potential impacts on, as relevant here, greenhouse gas emissions, surface water, groundwater, and cultural attachment; it also considers alternative routes and recommends appropriate mitigation measures to address identified adverse impacts. With potential adverse impacts effectively mitigated to the greatest extent practicable, the Commission was justified in concluding, after balancing pipeline benefits and impacts, that the Project advances the public interest.

Finally, the Commission fulfilled its obligations under the National Historic Preservation Act. The Commission engaged in extensive outreach to and consultations with state historic preservation officers, interested Indian tribes, government agencies, the Advisory Council, and the public regarding potential impacts on historic properties. Throughout this process, the Commission reasonably exercised its discretion in resolving requests for consulting party status and offered numerous avenues for public input.

Because some landowners barred Mountain Valley from entering their property to complete necessary surveys, the consultation process could not be completed without the eminent domain authority conferred by the Certificate Order. Accordingly, consistent with this Court's precedent, the Commission conditioned its approval of the Project upon, and barred any construction until, successful completion of the consultation process. Two months after the

Certificate Order, the Commission concluded the consultation process with the execution of a programmatic agreement with the Advisory Council and others to address the Project's impacts on historic properties.

ARGUMENT

I. STANDARD OF REVIEW

The Court reviews Commission actions under the Administrative Procedure Act's narrow "arbitrary and capricious" standard. 5 U.S.C. § 706(2)(A). Under that standard, the question is not "whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S.Ct. 760, 782 (2016). Rather, the court must uphold the Commission's determination "if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made." *Id.* (internal quotations omitted). Because the grant or denial of a section 7 certificate is within the Commission's discretion, the Court does not substitute its judgment for that of the Commission. *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015). The Court evaluates only whether the Commission considered relevant factors and whether there was a clear error of judgment. *Id*.

The arbitrary and capricious standard also applies to challenges under the NEPA. *Nevada v. Dep't of Energy*, 457 F.3d 78, 87 (D.C. Cir. 2006). "[T]he

court's role is 'simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious.'" *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1327 (D.C. Cir. 2004) (quoting *Balt. Gas & Elec.*, 462 U.S. at 97-98).

Agency actions taken pursuant to NEPA are entitled to a high degree of deference. *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377-78 (1989). This Court evaluates agency compliance with NEPA under a "rule of reason" standard. *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014). This Court has consistently declined to "flyspeck" the Commission's environmental analysis. *City of Boston Delegation v. FERC*, 897 F.3d 241, 251 (D.C. Cir. 2018). "[A]s long as the agency's decision is fully informed and well-considered, it is entitled to judicial deference and a reviewing court should not substitute its own policy judgment." *Nat. Res. Def. Council, Inc. v. Hodel*, 865 F.2d 288, 294 (D.C. Cir. 1988) (internal quotations omitted).

II. THE COMMISSION REASONABLY FOUND THE PROJECT TO BE REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY.

Section 7(e) of the Natural Gas Act grants the Commission broad authority to determine whether a proposed natural gas facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e); *see FPC v. Transcon. Gas Pipeline Corp.*, 365 U.S. 1, 7 (1961) (Commission is "the

guardian of the public interest," entrusted "with a wide range of discretionary authority"); *Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 112 (D.C. Cir. 1984) (Commission "vested with wide discretion to balance competing equities against the backdrop of the public interest").

The Commission's "public convenience and necessity" analysis under section 7(e) has two components. *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017). First, the applicant must show that it is prepared to financially support the project without subsidization from existing customers. Certificate Order P 31, JA 1112. Here, Mountain Valley is a new pipeline with no existing customers, so there is no risk of subsidization. *Id*. P 32, JA 1112.

Second, the applicant must make efforts to eliminate or minimize any adverse economic effects the project might have on existing pipelines in the market and their customers, or landowners and communities affected by the construction. *Id*. P 31, JA 1112. If there are residual adverse economic effects following mitigation efforts, the Commission balances the project's public benefits against those residual effects. *Id*. Only if the public benefits outweigh the adverse economic effects will the Commission proceed to its environmental analysis. *Id*.

In 1999, the Commission modified its prior requirement that a proposed project have contractual commitments for at least 25 percent of its capacity, as that bright-line test failed to account for other public benefits that a project may

provide. *See* Policy Statement at 61,743-45. Evidence of public benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Id.* at 61,748.

A. The Commission Reasonably Found Market Need For The Project Based On Precedent Agreements.

The Commission reasonably determined that Mountain Valley's long-term (20-year) precedent agreements for 100 percent of the proposed capacity demonstrated that additional gas will be needed in the markets served by the Project. Certificate Order P 41, JA 1117. While the Policy Statement broadened the types of evidence an applicant may submit to show a project's public benefits, it did not compel any additional showing beyond precedent agreements. *Id*. P 40, JA 1116. *See also* Rehearing Order P 36, JA 1794.

This Court has recognized that nothing in the Policy Statement "requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers." *Minisink*, 762 F.3d at 111 n.10. *See also Sierra Club*, 867 F.3d at 1379 (affirming Commission reliance on preconstruction contracts for 93 percent of project capacity to demonstrate market need)); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not

'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville*, 783 F.3d at 1311).

The purpose of the Policy Statement was not, therefore, "to reduce FERC's reliance on precedent agreements – especially affiliate agreements." Br. at 26. Rather, the Policy Statement permits applicants to provide other evidence of public benefit to support an application in the absence of precedent agreements. Rehearing Order PP 35-36, JA 1793-95.

Nor does the Policy Statement require enhanced scrutiny of precedent agreements with affiliates. *See* Rehearing Order P 36 n.82, JA 1794. Indeed, the policy adopted therein "is less focused on whether the contracts are with affiliated or unaffiliated shippers." *Id*. The "new focus" is the impact of the project on the relevant interests balanced against project benefits. Policy Statement at 61,748-49. The Commission's primary concern regarding precedent agreements with affiliated shippers is whether there may have been undue discrimination against non-affiliated shippers. Rehearing Order P 37, JA 1795. No such allegation has been made here. Certificate Order P 45, JA 1120.

In Petitioners' view, Mountain Valley's affiliate contracts "invite self-dealing to create the appearance of market demand for capacity on a pipeline despite the lack of identified end users for the gas." Br. at 26. The Commission found, however, that affiliation with a project sponsor does not lessen a shipper's

need for new capacity and its contractual obligation to pay for such service. Rehearing Order P 37, JA 1795. "'[A]s long as the precedent agreements are long-term and binding, [the Commission] do[es] not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need ….'" Certificate Order n.55, JA 1120 (quoting *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277 P 57 (2002)).

Three of the five Project shippers are producers and marketers who will be competing in the interstate market to sell their gas, with no guarantee that they will recover the costs of their capacity commitment. *Id*. P 82, JA 1135. Because those shippers are fully at risk for the cost of their capacity, the Commission concluded that they would not have entered into the precedent agreements absent a need to move their product to market. Rehearing Order P 40, JA 1797. Such shippers presumably have made a positive assessment of the potential for selling gas in markets served by the Project or through interconnects with other pipelines and have made a business decision to subscribe to the capacity on the basis of that assessment. *Id*. P 43, JA 1798. *See, e.g., Bordentown*, 903 F.3d at 262 ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity.").

While marketers or producers are not end users (Br. at 27), that does not make the Project's market demand speculative. Rehearing Order P 43, JA 1798. Due to the development of the interstate pipeline grid, many projects are now designed to move new gas supplies to market centers or pools (*id*.), "which may not correspond to a defined market or end use." 2018 Notice of Inquiry P 22. And local distribution companies are now increasingly purchasing gas supplies further downstream at market area pooling points or their citygates. *Id*. Here, Mountain Valley will transport natural gas from production areas to the pipeline's terminus at Transco Station 165, a pooling point and gas trading hub for the mid-Atlantic market, from which shippers can access east coast markets. EIS at 2-3, JA 771.

This Court has affirmed the Commission's disinclination to look behind precedent agreements to judge shipper needs where end users for a substantial portion of contracted capacity are unknown. *Myersville*, 783 F.3d at 1311. *See* Rehearing Order P 36, JA 1794. As affirmed in *Myersville*, the Commission has found that, since the advent of service unbundling and open-access transportation, it is often impossible to determine who will be the ultimate consumers of gas transported under any particular agreement. *Dominion Transmission, Inc*., 141 FERC ¶ 61,240 P 66 (2012).

The remaining two shippers on Mountain Valley, contracting for roughly 13 percent of pipeline capacity, are public utilities providing local distribution service. Certificate Order PP 10, 292 n.286, JA 1105, 1201. Petitioners assert that those utilities will pass through inflated rates to their captive customers under the precedent agreements. Br. at 29-30. The utilities' state regulators, however, will review the prudence of the contracts before the cost can be recovered in the utilities' retail rates. Rehearing Order P 40, JA 1797; Certificate Order P 53, JA 1123.[4] *See, e.g., Tenn. Gas Pipeline Co. v. FERC*, 824 F.2d 78, 83-84 (D.C. Cir. 1987) (approval of rates in NGA section 7 certification proceeding does not foreclose later prudence review). And "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." Certificate Order P 53, JA 1123. Should the utilities fail to obtain state approval for their contracts, Mountain Valley may be unable to recover its costs, as it is at risk for costs associated with any unsubscribed capacity. Rehearing Order PP 40-41, JA 1797.

[4] Section III below addresses Petitioners' argument that the rates are inflated.

B. Petitioners' Market Studies Do Not Undermine Reliance on The Precedent Agreements.

The market studies cited by Petitioners do not undermine the finding of market need based on Mountain Valley's precedent agreements. *See* Br. at 28-30. First, because it is Commission policy not to look behind precedent agreements (Rehearing Order P 36, JA 1794), this Court has affirmed Commission orders declining to consider market studies proffered to contradict market need evidenced by such agreements. *See Myersville*, 783 F.3d at 1311.

Second, the Commission reasonably concluded that the precedent agreements, reflecting actual demand, were better evidence of need in the Project markets than the theoretical projections in Petitioners' market studies. Certificate Order P 41, JA 1117. Long-term projections of future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Rehearing Order P 46, JA 1800. Given this considerable uncertainty, the Commission primarily relies on precedent agreements in evaluating market need for individual projects. Certificate Order P 42, JA 1118.

Furthermore, the Commission found the market studies at issue to be unpersuasive. The Synapse Study (Br. at 28), regarding expected future demand in the Virginia-Carolinas region, "makes an unlikely assumption that all gas is flowed

by primary customers along their contracted paths." Rehearing Order P 47, JA 1801. The study's demand projection fails to consider the use of regional pipeline capacity by shippers outside of Virginia and the Carolinas through interruptible service or capacity release. Certificate Order n.47, JA 1117.

The Institute for Energy Economics and Financial Analysis study (Br. at 30) speaks in generalities and does not assess the Project markets. Rehearing Order P 47, JA 1801. Nonetheless, the study suggests that pipelines like Mountain Valley may aid in delivering lower-priced natural gas to higher-priced markets, which would serve the public interest. *Id*.

C. The Commission Made Additional Supporting Public Benefit Findings.

Petitioners argue that the Commission's benefit analysis rests entirely on precedent agreements and disregards other public benefits referenced in the Policy Statement. Br. at 23-25. While the market demand evidenced by the precedent agreements sufficiently demonstrates public benefit as discussed above, the Commission nevertheless made additional findings of public benefits. *See* Certificate Order PP 41, 55, 62, JA 1117, 1124, 1128.

Here, the Project will connect sources of natural gas in the Appalachian Basin to markets in the Northeast, Mid-Atlantic, and Southeast regions, permitting upstream natural gas producers to access additional markets for their product and serving natural gas demand in those markets. *Id*. The Project will add

infrastructure to an underdeveloped area, thereby alleviating some of the constraints on Appalachian natural gas production. *See* EIS at 2-3, JA 771. The Commission found that this new infrastructure will benefit end users by enhancing the reliability of the pipeline grid. Certificate Order PP 41, 55, JA 1117, 1124. *See also* Policy Statement at 61,748 (discussing examples of public benefits).

D. The Commission Reasonably Balanced Public Benefits With Adverse Economic Consequences To Landowners.

After the pipeline applicant has made efforts to eliminate or minimize any adverse economic effects on existing customers, existing pipelines, and landowners and communities, the Commission balances any residual potential adverse economic effects against a project's public benefits. Policy Statement at 61,745-46, 61,748-50; *see also Myersville*, 783 F.3d at 1309. This balancing, which precedes the environmental analysis, largely focuses on economic interests such as landowners' property rights. Policy Statement at 61,749. Only when the public benefits outweigh the adverse effects on economic interests will the Commission complete the environmental analysis. *Id*. at 61,745. *See also* Rehearing Order P 50, JA 1803.

Petitioners assert that the Commission failed to properly balance the adverse impacts of eminent domain against project benefits. Br. at 31. The Commission, however, reasonably found that Mountain Valley had taken sufficient steps to minimize adverse impacts and that, on balance, the Project's public benefits

outweighed the adverse economic effects on landowners. Certificate Order P 57, 64, JA 1124, 1128; Rehearing Order PP 49, 98, JA 1802, 1828.

"Economic impacts on landowners and surrounding communities can be, and often are, mitigated, for example, through alternative routing of the proposed rights-of-way, co-location with existing utility corridors and negotiating the purchase of rights-of-way." 2018 Notice of Inquiry P 30. Here, to reduce adverse impacts to landowners and communities, avoid sensitive environmental resources and avoid steep terrain, Mountain Valley incorporated over 11 major route variations and 571 minor route variations during pre-filing, and another 2 major route variations and 130 additional minor variations in post-application filings. Rehearing Order P 49, JA 1802 (citing EIS at ES-3, JA 753); Certificate Order P 57, JA 1124. Additionally, approximately 30 percent of Mountain Valley's rights-of-way would be adjacent to existing pipeline, roadway, railway, or utility rights-of-way. Rehearing Order P 49, JA 1802.

The Commission urges companies to negotiate easement agreements with private landowners prior to construction. *Id*. Mountain Valley committed to make good faith efforts to negotiate with landowners, and resort to the use of eminent domain only when necessary. *Id*.; Certificate Order P 57, JA 1124. Mountain Valley ultimately obtained about 85 percent of the properties needed for pipeline

construction by agreement. *See Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline*, 2018 WL 648376 at **1, 12 (W.D. Va. Jan. 31, 2018), *appeal pending*, No. 18-1159 (4th Cir. Feb. 8, 2018).

Contrary to Petitioners' argument (Br. at 30-33), the Commission's analysis followed its "sliding scale approach," under which the negotiated acquisition of rights-of-way could lessen the required showing of public benefits. *See* Policy Statement at 61,749. The Commission has recognized that, "[i]n most cases, it will not be possible to acquire all necessary right-of-way by negotiation." *Id*. To counterbalance these impacts, evidence of market demand is necessary, but under the "sliding scale approach the benefits needed to be shown would be less than in a case where no land rights had been previously acquired by negotiation." *Id*. For instance, for purposes of the Policy Statement analysis, precedent agreements for most of the new capacity "would be strong evidence of market demand and potential public benefits that could outweigh the inability to negotiate right-of-way agreements with some landowners." *Id*.

Here, the Commission recognized that Mountain Valley had been unable to reach agreement with many landowners. *See* Certificate Order P 57, JA 1124. Nevertheless, consistent with the Policy Statement, the Commission found that Mountain Valley had taken sufficient steps to minimize landowner impacts –

including acquiring as much right-of-way as possible by agreement – and that such economic impacts were outweighed by the Project's public benefits. *Id*. P 64, JA 1128; Rehearing Order PP 49, 98, JA 1802, 1828. The Commission has broad discretion to balance competing equities in determining the public interest and reasonably exercised that discretion here. *See Bordentown*, 903 F.3d at 263 (FERC is afforded broad discretion in balancing public benefits against adverse economic effects). *Minisink*, 762 F.3d at 111 (same).

III. THE COMMISSION REASONABLY APPROVED MOUNTAIN VALLEY'S RETURN ON EQUITY.

Section 7 of the Natural Gas Act authorizes the Commission to attach to a certificates "such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e). Under that authority, FERC employs a "public interest" standard to determine the initial rates that a pipeline may charge for newly-certificated service, which is less exacting that the "just and reasonable" standard of NGA sections 4 and 5. *See Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 390-91 (1959); *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1068, 1070 (D.C. Cir. 2003). The initial section 7 rates are "a temporary mechanism to protect the public interest until the regular rate setting provisions of the NGA come into play." *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) (internal quotation omitted). The delay inherent in determining just and reasonable rates under sections 4 and 5, 15 U.S.C. §§ 717c, 717d, makes that standard

inappropriate for regulating initial rates under section 7. *Consumer Fed'n of Am. v. FPC*, 515 F.2d 347, 356 n.56 (D.C. Cir. 1975) (citing *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 227-28 (1965) (affirming Commission certification under section 7 of producer sales at the same "in-line" price levels as approved in other contemporaneous certificate proceedings)).

Mountain Valley proposed initial rates based on a capital structure of 40 percent debt and 60 percent equity, with a return on equity of 14 percent. Certificate Order P 79, JA 1133. Under Commission policy, however, a return on equity of 14 percent is appropriate only where the equity component of the capitalization is not more than 50 percent, because equity financing is typically more costly than debt financing and therefore more costly to ratepayers. *Id.* P 80 (citing *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, *on reh'g*, 156 FERC ¶ 61,160 (2016), *vacated and remanded on other grounds*, *Sierra Club*, 867 F.3d at 1377 (affirming approval of 14 percent return on equity based on a 50-50 debt equity structure); and *Mark West Pioneer, L.L.C.*, 125 FERC ¶ 61,165 (2008)).

Petitioners argue that the Commission approved the 14 percent return on equity based on "blind reliance on precedent." Br. at 33. To the contrary, the Commission's decision reflects the risk Mountain Valley faces as a new market entrant constructing a new pipeline system. Certificate Order P 82, JA 1134.

The return on equity underlying an initial rate reflects the pipeline's risks in

recovering the capital invested in an approved and constructed project. Rehearing Order P 56, JA 1805. Approving equity returns of up to 14 percent with an equity capitalization of no more than 50 percent provides an appropriate incentive for new pipeline companies to enter the market and reflects the fact that projects undertaken by a new entrant face higher business risks than those undertaken by established pipelines, which have existing customers and financial relationships. Certificate Order P 82, JA 1134 (citing *Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats. & Regs. ¶ 31,220 P 127 (2006)). By contrast, new entrants building new pipelines do not have an existing customer base or pipeline system to leverage and may be constructing a significantly larger amount of facilities than existing pipelines typically do in incremental expansion projects. Rehearing Order PP 53, 56, JA 1804, 1805. Commission policy thus requires existing pipelines that provide incremental services through an expansion to use the return on equity underlying their existing system rates and last approved in a NGA section 4 rate case proceeding when designing the incremental rates. *Id*. P 53, JA 1804. This tends to yield a return below 14 percent, reflecting the lower risk. *Id*.

Petitioners argue that the Commission has not established Mountain Valley's "true risk" in calculating the return on equity. Br. at 36. But this proceeding only involved an initial rate to "hold the line" until just and reasonable rates can be

determined. Rehearing Order PP 59-60, JA 1807-08. As a new pipeline company, Mountain Valley's proposed initial rates are based on estimates of its costs and revenues that necessarily are unsupported by any operating history. Certificate Order P 83, JA 1135. Because actual costs associated with constructing the pipeline and providing service may increase or decrease, it is reasonable to review the initial rates once the pipeline has an operating history. *Id*.

To ensure this review, the Commission required Mountain Valley to file a cost and revenue study at the end of its first three years of actual operation. *See id*.; Rehearing Order P 54, JA 1805. The three-year report will allow the Commission and the public to review Mountain Valley's estimates underlying Mountain Valley's initial rates, to determine whether Mountain Valley is over-recovering its cost of service and whether the Commission should establish just and reasonable rates under NGA section 5. Certificate Order P 83, JA 1821. Alternatively, Mountain Valley may elect to make an earlier NGA section 4 filing to revise its initial rates. *Id*. Accordingly, the Commission reasonably concluded that Mountain Valley's initial rates will "'ensure that the consuming public may be protected'" until just and reasonable rates can be determined under sections 4 and 5 of the NGA. Rehearing Order P 60, JA 1808 (quoting *Atl. Ref.*, 360 U.S. at 392).

While the Commission approved the 14 percent return on equity, it required Mountain Valley to lower the equity portion of its capital structure from 60 to 50

percent, which reduces the overall rate, and treats Mountain Valley the same as other new pipelines. Rehearing Order PP 53, 59, JA 1804, 1807. Returns approved for other utilities, such as electric utilities and local distribution companies, are not relevant because these companies are inherently less risky than new pipelines proposed by a new natural gas pipeline company. Rehearing Order P 57, JA 1806; Certificate Order P 82, JA 1134. While Petitioners make passing reference to the low cost of debt (Br. at 36), debt financing rates are not a proxy for the return on equity, and Petitioners make no effort to demonstrate otherwise. *See Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100 P 70 (2018). Due to the large amount of capital required, most new companies building new pipelines obtain some level of debt financing, so Mountain Valley is no different in that regard. Rehearing Order P 56, JA 1805.

Petitioners complain that subsequent, more exacting section 4 or 5 rate review is ineffective because the purportedly excessive rate of return will already have incentivized construction of an unnecessary pipeline. Br. at 36-37. But as explained in section II above, the Commission conducts an independent public interest determination of the need for the pipeline. Here, the Commission was satisfied that there is demand for the Project. Rehearing Order P 58, JA 1807.

IV. MOUNTAIN VALLEY APPROPRIATELY EXERCISED EMINENT DOMAIN BASED ON THE CERTIFICATE.

Petitioners acknowledge that NGA section 7(h), 15 U.S.C. § 717f(h), provides the holder of a FERC-issued certificate of public convenience and necessity authority to obtain property needed to construct or operate the project through eminent domain. Br. at 38. Petitioners contend, nonetheless, that Mountain Valley does not have eminent domain authority here. None of the arguments in support of this contention has merit.

A. The Public Convenience And Necessity Finding Was Premised On The Balancing Of Project Benefits And Adverse Impacts, Not On Mountain Valley Having All Necessary Permits.

Petitioners first argue that Mountain Valley does not have eminent domain authority because the Commission's public convenience and necessity finding was premised on Mountain Valley having all necessary permits. Br. at 38-39. But the Commission determined that the Project is required by the public convenience and necessity because its benefits outweigh its adverse effects. Rehearing Order PP 66, 82, 135, 285, 286, JA 1811, 1820, 1844, 1918; Certificate Order PP 60, 62, 64, 70, JA 1126, 1128, 1130; *see also supra* pp. 25-28. Whether Mountain Valley had all necessary authorizations was not a factor in this analysis. *See* Rehearing Order P 66, JA 1811 (explaining that once a natural gas company obtains a certificate of public convenience and necessity it may exercise eminent domain regardless of the status of other authorizations for the project); *id.* P 114, JA 1836 (finding that

Mountain Valley had provided sufficient information for the Commission to issue a certificate of public convenience and necessity). Such authorizations and permits are, of course, prerequisites to construction of the Project. *Id*. P 72, JA 1814; *see also* Certificate Order P 187, JA 1170. Thus, the Commission prohibited Mountain Valley from commencing construction prior to obtaining all permits and satisfying all environmental conditions. Rehearing Order P 72, JA 1814. *See also*, *e.g.*, R. 5910, JA 1600-01 (FERC notice permitting specific construction to begin where, among other things, the Commission confirmed Mountain Valley had received all relevant federal authorizations); R. 5928 (same).

B. The Public Convenience And Necessity Finding Satisfies The Takings Clause's Public Use Showing.

Bold Alliance and Bold Education Fund (Bold Petitioners) further claim that Mountain Valley could not exercise eminent domain because, without all necessary permits, the Project lacks a public use. Br. at 44-45. But this ignores the Commission's determination, consistent with this Court's precedent, that a public convenience and necessity finding under the Natural Gas Act satisfies the Takings Clause's public use showing. Certificate Order PP 60-62, JA 1126-28 (citing, *e.g*., *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (finding that public convenience and necessity determination establishes that a project serves a public purpose)); Rehearing Order PP 65-68, JA 1810-13.

In the Natural Gas Act, Congress declared that the transportation and sale of natural gas in interstate commerce for ultimate distribution to the public is in the public interest. Certificate Order P 61, JA 1127 (citing 15 U.S.C. § 717(a)). A certificate holder is authorized, pursuant to NGA section 7(h), 15 U.S.C. § 717f(h), to acquire property necessary to construct the certificated facilities by exercising eminent domain. *Id*. PP 59-60, JA 1125-26. Neither Congress nor any court has indicated that anything beyond the Commission's public convenience and necessity finding is necessary to trigger eminent domain rights. *Id*. P 60, JA 1126; Rehearing Order P 65, JA 1811; *see also, e.g., Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 110 (D.C. Cir. 2018) ("Once FERC issues a certificate of public convenience and necessity, the pipeline company may acquire the necessary rights-of-way through eminent domain."); *Bordentown*, 903 F.3d at 265 (NGA section 7(h) "affords certificate holders the right to condemn such property, and contains no condition precedent other than that a certificate is issued and that the certificate holder is unable to 'acquire [the right of way] by contract'").

C. Eminent Domain Authority Applies To Certificates Conditioned On Obtaining Other Authorizations.

Petitioners also argue that Congress did not intend for eminent domain to apply to certificates conditioned on the holder obtaining other permits and authorizations. Br. at 39-42. The Commission reasonably found otherwise.

Courts have consistently upheld the Commission's practice of issuing certificates conditioned on the holder obtaining other authorizations or permits. Rehearing Order P 81, JA 1820 (citing cases). And NGA section 7(e) does not restrict the Commission's conditioning authority to "limitations," as Petitioners contend (Br. at 40-41). *Id.* Rather, that provision broadly states that: "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 U.S.C. § 717f(e), *see also, e.g.*, *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1128 (D.C. Cir. 1979) ("The actual language of [NGA] section 7(e) is broad indeed.").

There is no support for Petitioners' contention that the Commission's conditioning authority is restricted to "limitations." Br. at 40-41. "The NGA simply does not contain a provision limiting the exercise of eminent domain when conditions have not been met, and '[c]ourts have repeatedly rejected similar arguments that a pipeline company cannot exercise eminent domain because a FERC Order is conditioned.'" *Mountain Valley Pipeline, LLC v. Simmons*, 307 F. Supp. 3d 506, 518-19 (N.D. W. Va. 2018), *appeal pending*, No. 18-1165 (4th Cir. Feb. 12, 2018) (quoting *Transcon. Gas Pipe Line Co, LLC v. Permanent Easement for 2.14 Acres*, No. 17-715, 2017 WL 3624250, at *6 (E.D. Pa. Aug. 23, 2017), *appeal pending*, No. 17-3076 (3d Cir. Sept. 20, 2017)). The Commission's

reasonable interpretation of this statutory provision, which it administers, is due deference and should be upheld. *See, e.g.*, *Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 395-96 (D.C. Cir. 2017) (affirming FERC-issued pipeline certificate contingent on subsequent receipt of necessary Clean Water Act permit).

The cases Petitioners cite in support of their "limiting" conditions interpretation do not help them. Br. at 40-41. *Atlantic Refining*, 360 U.S. at 391, recognizes that section 7(e) "authorize[s] the Commission to condition certificates in such manner as the public convenience and necessity may require," and shows that the Commission's authority to condition certificates as required by the public convenience and necessity is as broad as its authority to evaluate the public convenience and necessity. *See* Rehearing Order P 82, JA 1820. The conditions the Commission set here limit Mountain Valley's activities as necessary to ensure that the Project is consistent with the public convenience and necessity. *Id.*

The other cases Petitioners cite (Br. at 41) do not support their interpretation either. *See* Rehearing Order n.218, JA 1820. *Panhandle*, 613 F.2d at 1129, held that section 7(e)'s conditioning power "does not extend to adjusting previously approved rates for services not before the Commission in the relevant certificate proceeding." And *Northern Natural Gas Co. v. FERC*, 827 F.2d 779, 792-93 (D.C. Cir. 1987), likewise held that "the Commission does not have authority

under [Natural Gas Act] section 7 to compel flow-through of revenues to customers of services not under consideration in that proceeding for certification."

D. Eminent Domain Courts, Not The Commission, Have Jurisdiction To Address Just Compensation Matters.

Petitioners also contend, without citing any authority, that the Commission should have determined whether Mountain Valley would be able to pay just compensation in an eminent domain proceeding. Br. at 42-44. But courts, not the Commission, have jurisdiction regarding eminent domain matters, including compensation issues. *See* 15 U.S.C. § 717f(h); Rehearing Order P 76, JA 1816; Certificate Order P 60, JA 1126; *see also, e.g.*, *Mountain Valley Pipeline, LLC v. Easement to Construct, Operate and Maintain a 42-Inch Gas Transmission Line*, No. 17-4214, 2018 WL 1004745, at *11-12 (S.D. W. Va. Feb. 21, 2018), *appeal pending*, No. 18-1329 (4th Cir. Mar. 26, 2018) (district court would ensure that just compensation will be paid before possession through eminent domain). Any complaints Petitioners have regarding the courts' actions on eminent domain matters (Br. at 43-44) are properly raised in appeals of those actions, not on review of the Commission's orders.

E. Due Process Was Satisfied Here

1. Although Not Required, A Pre-Deprivation Hearing Was Provided Here.

Bold Petitioners assert that they were denied a pre-deprivation hearing because the Commission purportedly failed to consider their unspecified arguments

before issuing the Certificate Order. Br. at 45-46; *see also* Amicus Br. at 5-9. In the takings context, however, there is no right to a pre-deprivation hearing. *Del. Riverkeeper*, 895 F.3d at 111.

In any event, the Certificate Order addressed the assertions raised by Bold Petitioners and others. For example, in response to Bold Petitioners' claim that it would be unconstitutional for Mountain Valley to exercise eminent domain because the Project would not serve a public purpose, the Certificate Order explained that the Commission's public convenience and necessity determination satisfies the Takings Clause's public use requirement. *See* Certificate Order PP 58-63, JA 1125-28. Moreover, Petitioners had the opportunity to, and did, file motions and a petition for a writ of mandamus with this Court to stay the Certificate Order. The Court found that none of the numerous issues raised by Petitioners warranted a stay. *See Appalachian Voices v. FERC*, No. 17-1271, *et al.* (D.C. Cir. Feb. 2 and Aug. 30, 2018). *See also Bold Alliance v. FERC*, No. 18-1533 (4th Cir. June 7, 2018) (denying motion for stay pending agency rehearing of FERC notices to proceed with Project construction).

2. Eminent Domain Appropriately Proceeded Before Court Review Of The Certificate Orders.

Bold Petitioners further assert that Petitioners were denied due process because eminent domain hearings proceeded before this Court reviewed Petitioners' claims on appeal here. Br. at 45-46; *see also* Amicus Br. at 8-22. But

Congress designed the Natural Gas Act to produce that default outcome. *See Simmons*, 307 F. Supp. 3d at 516 (NGA "allows natural-gas companies to exercise the power of eminent domain upon receipt of a Certificate rather than after the Certificate has been subject to judicial review"). NGA section 7(h), 15 U.S.C. § 717f(h), provides the holder of a certificate of public convenience and necessity eminent domain authority, and section 19(c), *id*. § 717r(c), specifically provides that neither the filing of an application for Commission rehearing nor a petition for judicial review stays the effectiveness of the Commission's order unless the Commission or court specifically orders otherwise. *See, e.g., Jupiter Corp. v. FPC*, 424 F.2d 783, 791 (D.C. Cir. 1969) (NGA "provides that orders of the Commission shall not be stayed pending appeal unless the reviewing court grants a stay").

Furthermore, this Court and others have uniformly determined 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." *Del. Riverkeeper*, 895 F.3d at 113. *See also Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018); *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018);

Kokajko v. FERC, 837 F.2d 524, 525 (1st Cir. 1988); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969).

Section 19(a), 15 U.S.C. § 717r(a), provides that, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." Amicus argues that this reflects Congress's intent to ensure quick judicial review. Amicus Br. at 15-16. But this Court long ago affirmed the Commission's determination that this language was intended to permit the Commission to deny rehearing requests by silence. *Cal. Co.*, 411 F.2d at 721-22. The Court was "reluctant to impute to Congress a purpose to limit the Commission to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active consideration by the agency." *Id.* at 722. Here, the tolling order was issued so the Commission could carefully consider the numerous issues raised on rehearing. Rehearing Order P 79, JA 1818.

Next, Amicus asserts that tolling orders provide the Commission with unlimited time to consider matters on rehearing. Amicus Br. at 11. But if parties believe the Commission is taking too long, they can raise that concern to the Court of Appeals in a petition for a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a). *See Telecomm. Research and Action Ctr. v. FCC*, 750 F.2d 70, 75-76

(D.C. Cir. 1984) ("a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction."); *Coalition to Reroute Nexus v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018) (denying writ of mandamus alleging delay in FERC rehearing process).

Amicus also contends that the Commission did not, and could not, address Petitioners' just compensation, conditional certificate, and tolling order claims and, therefore, that judicial review need not await Commission rehearing.[5] Amicus Br. 13-14, 18-22. But the Rehearing Order addressed each of these claims. *See* Rehearing Order P 76 (interpreting NGA section 7(h) in addressing just compensation issue), JA 1816; *id*. PP 81-82 (interpreting NGA section 7(e) addressing Commission's conditioning authority), JA 1820; *id*. P 78-79 (addressing use of tolling orders and timing of eminent domain proceedings), JA 1817-19. *See also supra* pp. 33-41.

Petitioners had notice of and participated in the certificate proceeding, and had the opportunity to seek judicial review of the Commission's orders. Rehearing

[5] Although Amicus cites pages 45-46 of Petitioners' brief as raising a tolling order issue, those pages do not mention tolling orders. Tolling orders are mentioned only in the background of Petitioners' Brief at 2, 10, which explains that some petitioners considered the Certificate Order to be a final, reviewable order because they believed the Commission's Secretary did not have authority to issue the tolling order. Amicus raises a different contention – that issuing the tolling order violated due process because it delayed court review of issues the Commission did not and could not address. Amicus Br. at 12-22.

Order P 78, JA 1818. While that review might not have occurred as quickly as Bold Petitioners and Amicus would prefer, the Commission appropriately issued the tolling order to ensure that it had sufficient time to carefully consider the numerous issues raised on rehearing. *See id.* P 79, JA 1818.

The Commission's statutory interpretations and findings regarding these issues fall squarely within its jurisdiction and expertise. *See* Certificate Order n.79, JA 1126; Rehearing Order n.177, JA 1812; *see also Del. Riverkeeper*, 857 F.3d at 395-96 (court defers to Commission's reasonable interpretation of Natural Gas Act). And even if Petitioners' claims involved challenges to the constitutionality of the Natural Gas Act itself, Petitioners still needed to present those claims to the Commission before they could raise them to this Court. Indeed, the Fourth Circuit, affirming the district court's dismissal of a collateral objection to the Project on constitutional grounds, explained that Congress "intended those claims to be brought under the statutory review scheme established by the Natural Gas Act." *Berkley*, 896 F.3d at 633. *See also Jarkesy v. SEC*, 803 F.3d 9, 18 (D.C. Cir. 2015) ("[S]o long as a court can eventually pass upon the challenge, limits on an agency's own ability to make definitive pronouncements about a statute's constitutionality do not preclude requiring the challenge to go through the administrative route."). As the Supreme Court has recognized, there are many

threshold questions that may accompany a constitutional claim to which an agency can apply its expertise. *Elgin v. Dep't of Treasury*, 567 U.S. 1, 22 (2012).

V. THE COMMISSION'S ENVIRONMENTAL REVIEW FULLY COMPLIED WITH NEPA.

The Environmental Impact Statement addressed all substantive issues raised during the scoping period, including geological hazards 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 and noise impacts; safety; cumulative impacts; and alternatives. Certificate Order P 129, JA 1152. That analysis concluded that construction and operation of the Project may result in some adverse environmental impacts on specific resources. *Id*. P 130, JA 1152. While the impacts on most environmental resources would be temporary or short-term, the impacts of forest clearing would be long-term and significant. *Id*. For the other resources, impacts will be reduced to less-than-significant levels with the implementation of mitigation measures. *Id*. *See also* Rehearing Order P 98, JA 1828; EIS at 5-1, JA 961. Based on the Environmental Impact Statement and the full record in the proceeding, the Commission found that the Project, if constructed and operated as described in the Environmental Impact Statement, is

an environmentally acceptable action. Certificate Order P 308, JA 1207.

Petitioners challenge the Commission's findings regarding greenhouse gas emissions, the mitigation of surface water impacts from sedimentation and erosion, the mitigation of groundwater impacts from pipeline construction in areas with karst features, and cultural attachment, as well as its consideration of alternative routes. Br. at 46-74. Each of these issues was fully evaluated in the Environmental Impact Statement, and therefore Petitioners fail to demonstrate that the Commission fell short of NEPA's "hard look" requirement. *See Balt. Gas & Elec.*, 462 U.S. at 97 (agency took a "hard look" where it adequately considered and disclosed the environmental impact of its actions). While Petitioners disagree with the Environmental Impact Statement's conclusions and analysis of environmental impacts, those disagreements do not show that the Commission's decision-making process was uninformed, much less arbitrary and capricious. Rehearing Order P 117, JA 1837. And to the extent Petitioners disagree with the Commission's choice of methodology, this Court affords "'an extreme degree of deference'" to FERC's evaluation of scientific data within its technical expertise. *Del. Riverkeeper*, 857 F.3d at 396 (quoting *Myersville*, 783 F.3d at 1308).

A. The Commission Reasonably Analyzed Downstream Greenhouse Gas Emissions.

The Environmental Impact Statement presented the direct and indirect greenhouse gas emissions associated with the construction and operation of the

Project and the potential climate change impacts of such emissions. *See* EIS at 4-484 to 4-518, 4-619, JA 919-953, 959. Using a method developed by the Environmental Protection Agency, the Environmental Impact Statement also estimated that the greenhouse gas emissions associated with the end-use combustion of the Project's full design capacity would amount to roughly 48 million metric tons per year. *See* EIS at 4-620, JA 960.[6] This estimate was conservative, as it did not account for the fact that gas transported by the Project could displace other fuels, like coal, thereby potentially offsetting some regional greenhouse gas emissions, or displace gas that would otherwise be transported via different means, which would result in no change in downstream emissions. Certificate Order P 293, JA 1201. In an effort to add context to these emissions, the Commission examined both regional and national greenhouse gas emissions and determined that combustion of all the gas transported by the Project would, at most, increase greenhouse gas emissions regionally by two percent and nationally by one percent. *See* EIS at 4-617 to 4-618, JA 957-958; Certificate Order P 294, JA 1201. *See also Sierra Club*, 867 F.3d at 1374 ("Quantification would permit the agency to compare" project emissions to "total emission from the state or the

[6] The Environmental Impact Statement determined that, if the pipeline's maximum capacity (2.4 billion cubic feet per day) were transported 365 days a year and then burned, downstream emissions would amount to approximately 48 million metric tons per year of carbon dioxide equivalent. EIS at 4-620, JA 960.

region, or to regional or national emissions-control goals").

The Environmental Impact Statement qualitatively described how greenhouse gases occur in the atmosphere and how they induce global climate change. *See* EIS at 4-488, JA 923. The Commission also described the potential cumulative impacts of climate change in the Project markets. *See id*. at 4-618, JA 958; Rehearing Order P 273, JA 1910; Certificate Order PP 292-95, JA 1201-1202. But because the Project's incremental, climate change-related impacts on the environment cannot determined, the Commission could not assess whether the Project's contribution to cumulative impacts on climate change would be significant. Certificate Order P 295, JA 1202. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 320 (D.C. Cir. 2013) (rejecting challenge to EIS that did not specify global impacts that would result from additional emissions).

This analysis went beyond that which is required by NEPA because the downstream use of natural gas was not a "reasonably foreseeable" impact, nor "casually connected" to the Project, as those terms are defined for NEPA purposes. Rehearing Order P 271, JA 1909. Nonetheless, the Commission at the time provided such additional information to the public.

Petitioners raise a series of arguments in an effort to establish that NEPA requires a more in-depth downstream emissions analysis. None has merit.

1. End-use Greenhouse Gas Emissions Are Not An Indirect Impact Of The Project.

NEPA requires agencies to consider indirect impacts that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b). To determine whether an effect is "reasonably foreseeable," the agency must engage in "reasonable forecasting and speculation,' with *reasonable* being the operative word." *Sierra Club v. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (citation omitted).

Relying primarily upon *Sierra Club v. FERC* – which held that emissions from specifically-identified existing and planned power plants to be served by a pipeline were an indirect effect of that project – Petitioners claim that the downstream emissions stemming from the gas to be transported by the Project are an indirect effect. Br. at 48-49. But as the Commission explained, the end users of the gas at issue in *Sierra Club v. FERC* were known. That is not the case here.

In this case, "it is unknown where and how the transported gas will be used and there is no identifiable end use." *See* Rehearing Order P 304, JA 1925. "[T]he ultimate destination" of the vast majority of the gas "will be determined by price differentials in the Northeast, Mid-Atlantic, and Southeast markets and, thus, is unknown." Certificate Order n.286, JA 1201. The Commission thus lacked "meaningful information about the downstream use of the gas; *i.e.*, information about future power plants, storage facilities, or distribution networks" that will

make use of Project gas. Rehearing Order P 303, JA 1925. Nor is there "information as to the extent such consumption will represent incremental consumption above existing levels, as opposed to substitution for existing sources of supply." *Id*. n.814, JA 1926.

Petitioners contend that the Commission's observation that the Project could result in no change to greenhouse gas emissions if it displaces gas that would have been transported by other means lacks "support in the record". Br. at 53 (citing Certificate Order P 293, JA 1201).[7] But that is the point. The Commission cannot determine with any degree of specificity where Project gas will be transported and how it will be used. Accordingly, the Commission reasonably concluded "that ultimate end-use combustion of the gas transported by the Projects is [not] reasonably foreseeable." Rehearing Order P 303, JA 1925.[8] *See Sierra Club*, 867 F.3d at 1374 (acknowledging that "in some cases quantification may not be feasible").[9] Nor is such end use sufficiently casually connected to the Project to be

[7] Petitioners also characterize this observation as "irrational," but offer no explanation to support this claim. Br. at 53.

[8] Due to lack of reasonable foreseeability, the Commission also concluded that downstream emissions were not a cumulative impact of the Project. *See, e.g.*, Rehearing Order PP 301-306, JA 1924-1927.

[9] *See also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (cumulative impact analysis sufficient where it included a short summary discussion of upstream shale gas production activities); *Sierra Club v. Dep't of Energy*, 867 F.3d at 202 (DOE's generalized discussion of

an indirect impact. As the Commission has observed, "end-use consumption of natural gas will likely occur regardless of the Commission's approval of the" Project. *Dominion Transmission, Inc*., 163 FERC ¶ 61,128, P 41 (2018) (cited in Rehearing Order n.740, JA 1909).

Moreover, the fundamental directive from *Sierra Club* was to "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible." 867 F.3d at 1371. The Environmental Impact Statement did just that by calculating the greenhouse gas emissions associated with the combustion of the full design capacity of the pipeline. *See* EIS at 4-620, JA 960; Certificate Order P 293, JA 1201.

2. The Commission Reasonably Determined That It Could Not Assess The Significance Of Downstream Emissions.

Petitioners contend that the Commission was required to discuss the "significance" – *i.e*., the context and intensity – of the downstream emissions. Br. at 51-52. But again, because such emissions are not properly characterized as indirect impacts, the NEPA analysis called for by Petitioners was not required.

Moreover, there is no tool available to meaningfully assess the Project's "incremental physical impacts on the environment caused by climate change."

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impacts associated with non-conventional natural gas production fulfills its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

Certificate Order P 295, JA 1202. Nor is there any widely accepted standard for ascribing significance to a given volume of greenhouse gas emissions. *See* Rehearing Order P 292, JA 1921. Without an appropriate standard to use as a comparative benchmark, the Commission determined it would be inappropriate to ascribe significance to a given rate or volume of greenhouse gas emissions. *Id*.

In any event, the *Sierra Club* court explained that quantifying downstream emissions would "permit the [Commission] to compare the emissions from [the project] to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals." 867 F.3d at 1374. According to the court, this comparative analysis is the means to describe the significance of the downstream emissions because it would allow the Commission to "engage in 'informed decision making' with respect to the greenhouse gas effects of this project." *Id*. Here, the Commission did just that by comparing the downstream emissions with those from regional and national greenhouse gas emissions. *See* Certificate Order P 294, JA 1201.

3. The Commission Reasonably Declined To Utilize The Social Cost Of Carbon Tool.

Petitioners take issue with the Commission's decision not to assess significance with the Social Cost of Carbon tool, which attempts to calculate the

cost today of future climate change damage.[10] Petitioners contend this decision was "not due to any alleged deficiency in the tool," but rather the Commission's rejection of the *Sierra Club* court's determination that FERC is the legally-relevant cause of downstream emissions. Br. at 54-55. That is incorrect. In the underlying orders, the Commission extensively discussed why it believes the Social Cost of Carbon tool is not appropriate for use in project-level NEPA reviews. *See* Certificate Order P 296, JA 1202; Rehearing Order PP 275-297, JA 1912-1923.

With respect to the tool itself, the Commission found that "no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations and consequently, significant variation in output can result." Certificate Order P 296 (internal quotations omitted), JA 1202. *See also* Rehearing Order PP 290-91, JA 1920. Moreover, while the tool can be used to monetize emissions, "there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews." Certificate Order P 296, JA 1202. There is thus "no basis to designate a particular dollar figure calculated from the Social Cost of Carbon tool as 'significant.'" Rehearing Order P 294, JA 1922. Using local or state greenhouse gas emission inventories as a benchmark for significance is also problematic. Two projects of equal capacity could result in

[10] The tool assigns a series of annual costs per metric ton of emissions discounted to a present-day value. Rehearing Order P 277, JA 1913.

vastly different percentage increases depending on whether the project serves a single state (and thus impacts one inventory) or multiple states (and thus multiple inventories). *Id*. P 293, JA 1921. *See EarthReports, Inc. v. FERC,* 828 F.3d 949, 956 (D.C. Cir. 2016) (accepting Commission's rejection of the Social Cost of Carbon based in part on the difficulty of determining significance).

Apart from shortcomings in the tool, the Commission explained that Council on Environmental Quality regulations state that "agencies 'should not' display a monetary cost-benefit analysis when there are important qualitative considerations." Rehearing Order P 283, JA 1917 (citing 40 C.F.R. § 1502.23). The siting of natural gas infrastructure "necessarily involves making qualitative judgments between different resources as to which there is no agreed-upon quantitative value." *Id*., JA 1917. In addition to quantifying the Project's negative impacts, the Commission would also have to calculate the Project's benefits, "including, but not limited to, replacement of coal and oil by natural gas, a task no easier than calculating costs." *Id*. P 284, JA 1917-1918.

4. The Commission Reasonably Declined To Consider Downstream Emissions In Its Public Interest Analysis.

Petitioners criticize the Commission for failing to consider the greenhouse gas effects of downstream emissions when evaluating whether the Project is in the public interest under the Natural Gas Act. Br. at 55-56. This argument, however,

is based on the faulty premise that downstream greenhouse gas emissions are an indirect impact of the Project, which feeds into other pipelines rather than serving discrete end users. As the Commission explained, downstream emissions will not "vary regardless of the project's routing or location," and any conditions the Commission could impose on construction will not "affect the end-use-related [greenhouse gas] emissions." Rehearing Order P 309, JA 1929. To decline to authorize a project based on end-use greenhouse gas emissions "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." *Id*. (quoting *Sierra Club v. FERC*, 867 F.3d at 1357). The Commission believed that this national policy question is not appropriate for resolution in the case-by-case infrastructure review process under the Natural Gas Act. *Id*.

5. The Commission Reasonably Analyzed The No Action Alternative.

Petitioners also contend there is no support for the Commission's observation that the no-action alternative would not decrease the consumption of natural gas or reduce greenhouse gas emissions. Br. at 53. But as the Commission explained, Project shippers executed "long-term contracts with substantial financial obligations that reflect need for natural gas supplies." Rehearing Order P 300, JA 1924. If the Project were not constructed (*i.e*., the no action alternative), that demand for natural gas supplies would have to be satisfied by other means, such as

by "subscribing to other expansions of existing transportation systems or seeking the construction of other new facilities." *Id*. While there may be differences in the greenhouse gas emissions from the construction and operation of the specific type of infrastructure used to transport gas to satisfy the existing demand, the end use emissions associated with any of these alternatives would be the same. *Id*.

Petitioners do not take issue with any aspect of this analysis. They simply cite a Tenth Circuit decision criticizing the Bureau of Land Management for assuming that, if certain coal mining leases were not approved, the same amount of coal would be sourced from elsewhere. *See WildEarth Guardians v. Bureau of Land Management*, 870 F.3d 1222, 1228 (10th Cir. 2017). In that case, however, the court found that the Bureau's assumption was "contrary to basic supply and demand principles," *id*. at 1236, and contradicted by the very report upon which the assumption was based. *Id*. at 1234 ("BLM did not acknowledge portions of EIA's 2008 Energy Outlook which contradict its conclusion"). Here, the Commission cited to record evidence supporting its determination that Project shippers would likely obtain alternative sources of fuel. The Commission's decision was thus not based on an unsupported assumption, and Petitioners have not shown that it contradicts basic economic principles.

B. The Commission Reasonably Found No Significant Impact On Surface Water From Erosion And Sedimentation.

1. The Commission Reasonably Determined That Required Mitigation Would Adequately Protect Surface Water.

The Commission's environmental review examined potential effects on waterbodies during construction and operation of the Project due to erosion and sedimentation. EIS at 4-143 to 4-149, JA 847, 853; Certificate Order P 185, JA 1169. The Environmental Impact Statement concluded that no long-term or significant impacts on surface waters are anticipated because the pipeline would (a) not permanently affect designated water uses, (b) bury the pipeline beneath the bed of all waterbodies, (c) implement erosion and sedimentation controls, (d) adhere to crossing guidelines in their procedures, and (e) restore streambanks and streambed contours as close as practical to pre-construction conditions. Certificate Order P 185, JA 1169; EIS at 4-149, JA 853.

Specifically as to erosion and sedimentation, Mountain Valley agreed to follow best management practices based on, among other things, the Commission's May 2013 *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*,[11] and on Mountain Valley's February 2016 *Erosion and Sediment Control Plan*, JA 171-94,

[11] These Commission plans are available at http://www.ferc.gov/industries/gas/enviro/guidelines.asp.

and its March 2017 *Landslide Mitigation Plan*, JA 526-74.[12] *See* EIS at 2-30 to 2-34, JA 772-76, 4-81, JA 818. These plans provide for erosion control devices and other baseline mitigation measures that will limit sedimentation and runoff from all work areas. Certificate Order P 176, JA 1167. Commission staff reviewed these plans and determined that they will provide acceptable protection of surface waterbodies. Certificate Order PP 146, 185 JA 1158, 1169 (citing EIS at 4-149, JA 853); Rehearing Order PP 176-177, JA 1863-64.

Petitioners assert that the Commission's conclusion that these measures would successfully mitigate erosion and sedimentation was unsupported. Br. at 58-61. The Commission's conclusion reasonably was based on its staff's experience with pipeline construction and Mountain Valley's commitment to cross waterbodies via dry-ditch methods, adherence to the Commission's plans and procedures, and use of extensive monitoring and compliance programs. Certificate Order PP 176-177, JA 1167; Rehearing Order P 177, JA 1864.

The Commission's plans and procedures were developed in consultation with multiple state agencies across the country and updated based on field experience gained from pipeline construction and compliance inspections conducted over the last 25 years. Rehearing Order P 187, JA 1868. Based on that

[12] These plans are included in the Commission record. *Erosion and Sediment Control Plan*, JA 171-94; *Landslide Mitigation Plan*, JA 526-74.

experience, these measures are an effective means to mitigate the impacts of the construction and operation of the Project. *Id*.

In particular, the use of a dry open-cut technique to cross waterbodies will limit downstream sedimentation and turbidity during construction and therefore limit the potential impacts on aquatic resources. EIS at 4-217, JA 871. The Environmental Impact Statement concluded 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. Certificate Order P 185, JA 1169. The magnitude of this increase is minimal compared to increased turbidity associated with natural runoff events. *Id*. The Environmental Impact Statement discussed two peer-reviewed scientific studies, including one prepared by the U.S. Geological Survey, that support the conclusion that the dry-ditch methods will result in minor, short-term, and localized increases in sedimentation. *Id*. P 175, JA 1167; EIS at 4-217, JA 871. *See City of Boston*, 897 F.3d at 255 (affirming Commission's reliance on conclusions of another expert agency).

Further, during construction and restoration, Mountain Valley must employ environmental inspectors to ensure compliance with the construction standards and other certificate conditions. Rehearing Order P 188, JA 1869. *See also* EIS at 2-51, JA 783 (describing procedures for compliance monitoring and quality control).

In addition, Mountain Valley agreed to fund a third-party compliance monitoring program during the construction phase of the Project. Rehearing Order n.521, JA 1870. Under this program, a contractor is selected by, managed by, and reports solely to Commission staff to provide environmental compliance monitoring services. *Id*. The compliance monitor provides daily reports to the Commission-staff project manager on compliance issues. *Id*. Moreover, FERC staff conducts periodic compliance inspections during all phases of construction and throughout restoration. *Id*.

Courts have found mitigation measures sufficient when based on agency assessments or studies or when they are likely to be adequately policed, such as when they are included as mandatory conditions imposed on pipelines. Rehearing Order P 188, JA 1869 (citing *Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 17 (2d Cir. 1997); and *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234, 239 n.9 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993)). *See also Bordentown*, 903 F.3d at 259 (upholding FERC mitigation measures based, in part, on agency oversight and reporting requirements). Here, the Commission reasonably concluded that the erosion and sedimentation mitigation measures met this standard.

2. Petitioners Fail To Demonstrate That The Commission Erred In Finding The Mitigation Measures Adequate.

Petitioners assert that the Fourth Circuit identified "flaws" in the Environmental Impact Statement's sedimentation and erosion analysis that renders FERC's conclusions regarding sedimentation mitigation arbitrary and capricious. Br. at 61-62 (citing *Sierra Club, Inc. v. U.S. Forest Service*, 897 F.3d 582, 591-96 (4th Cir. 2018)). The Fourth Circuit's *Sierra Club* decision does not support Petitioners' claims.

Sierra Club, as relevant here, concerned the Environmental Impact Statement's reliance on the *Hydrologic Analysis of Sedimentation* that Mountain Valley prepared at the request of the Forest Service to analyze the pipeline's erosion and sedimentation impacts on the Jefferson National Forest. *Id*. at 591-92; *Hydrologic Analysis of Sedimentation*, EIS Appendix O-3, JA 989-1020. That analysis showed that strict adherence to the Commission's plans and procedures during construction would reduce sedimentation impacts to below a level of significance. Rehearing Order P 191, JA 1870.

Petitioners' arguments focus upon the *Hydrologic Analysis* finding that erosion and sediment control practices for the Project would produce 79 percent containment. Br. at 61-62. In comments on the Environmental Impact Statement, the Forest Service asserted that the 79 percent containment figure was overstated

because it failed to account for improper implementation of mitigation measures in the field. *Sierra Club*, 897 F.3d at 592. Nevertheless, the Forest Service issued its Rule of Decision permitting pipeline construction without explaining how this concern had been resolved. *Id*. at 596. The *Sierra Club* court remanded the Rule of Decision for the Forest Service to provide the missing explanation. *Id*.

Here, in contrast, the Commission explained why the Forest Service's comment did not undermine the Commission's conclusions about the impacts of sedimentation and erosion over the pipeline route. Rehearing Order P 176, JA 1863. As the Commission found, the Forest Service's generalized concerns with the efficacy of implementation in the field did not address the adequacy of the Commission's mitigation measures but rather were compliance concerns. *Id*. P 192, JA 1871. Again, the Commission's plans and procedures are based on over 25 years of inspection experience, are mandatory, and are closely monitored. *Id*. P 193, JA 1871. Environmental inspectors are required during construction to ensure compliance with all mitigation measures and alert the Commission to any potential compliance issue. Certificate Order, App. C, Condition 7, JA 1227. The Commission found these measures sufficient to mitigate sedimentation impacts. Rehearing Order P 177, JA 1864.

Petitioners also claim that the Commission failed to consider a study they submitted, which found that "in 'high risk' areas, *i.e*. those with steep slopes and

highly erodible soils," sedimentation would increase by 15 percent due to the permanent land cover change from upland forest to herbaceous cover. Br. at 63. Rejecting this argument, the Commission found that both the Certificate Order and the Environmental Impact Statement addressed the potential for sedimentation from steep slopes in the analysis of landslide risk. Rehearing Order P 201, JA 1875 (citing Certificate Order P 146, JA 1158). The Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* is specifically designed to mitigate aquatic impacts from upland construction. *Id*. (citing EIS at 4-81, JA 818). Mountain Valley must comply with its *Landslide Mitigation Plan*, to which the Commission added additional measures, including a more robust monitoring program and construction measures to be used when crossing steep slopes. *Id*. (citing Certificate Order P 145, JA 1158).

The mandatory *Erosion and Sedimentation Plan* requires Mountain Valley to use certain measures (such as compaction, benching, toe keys and slope drains) and long-term erosion control mediums (such as Flexterra, Earthguard, erosion control fabric or a stabilization mat) to ensure stability and revegetate steep slopes. *Id*. (citing, *inter alia*, Mountain Valley's February 2016 Erosion and Sediment Control Plan, JA 171-94). Temporary sediment barriers (such as silt fence and straw/hay bales) that are installed immediately after disturbance of a waterbody or adjacent upland during construction will be replaced by permanent erosion control

devices (such as installing trench breakers and slope breakers) where revegetation has not stabilized the disturbed area. *See* EIS at 2-42, 2-49, 4-81, JA 778, 782, 818.

Petitioners also point to post-record[13] instances where Mountain Valley was cited by other agencies for noncompliance with permit requirements. Br. at 59-60 & n.20. Such citations do not establish that the Commission unreasonably determined that its plans and procedures – developed through extensive experience with pipeline construction across the country – would adequately mitigate erosion and sediment impacts. "[I]nstances of non-compliance do not support a conclusion that there are pervasive flaws in the required mitigation measures." Rehearing Order P 190, JA 1870. Further, it was not expected that the measures would eliminate all sedimentation and erosion impacts of the Project, but rather reduce sedimentation into streams and the potential for slope failures. *See* Certificate

[13] Petitioners attempt to justify consideration of these post-record incidents with a citation to *Amoco Oil Co. v. EPA*, 501 F.2d 722, 729 n.10 (D.C. Cir. 1974), which permitted consideration of post-decision Congressional testimony in support of agency predictions where the agency subsequently reaffirmed its predictions. *Amoco* cautioned against consideration of subsequent events that did not inform the agency decision-making under review, particularly where the information on such events has not been subject to proceedings before the agency to assure its accuracy and completeness. *Id*. In *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 919-20 (D.C. Cir. 2008), this Court affirmed that "[w]e are bound on review to the record before the agency at the time it made its decision," and found the exception to this rule in *Amoco* to be "quite narrow" and based on the particular circumstances of the Congressional testimony.

Order P 146, JA 1158. The Commission's experience confirms that when correctly implemented, the Commission's plans and procedures provide adequate erosion control and protection of aquatic resources. Rehearing Order P 190, JA 1870. The Commission takes matters of non-compliance seriously and relies on its monitoring and enforcement programs to ensure that non-compliance issues will be appropriately addressed and any impacts remediated. *Id*.

C. The Commission Reasonably Found No Significant Impact On Groundwater Resources In Areas With Karst Features.

Karst features, such as sinkholes, caves, and caverns, form as a result of the long-term action of groundwater on subsurface soluble carbonate rocks (*e.g*., limestone and dolostone). Certificate Order P 151, JA 1159. Mature karst systems constitute a subsurface interconnected flow system that may allow for the rapid transport of contaminates including sediment over large distances and can impact groundwater users (wells and springs) over a large area. EIS at 4-63, JA 817.

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. Certificate Order P 171, JA 1166. To minimize such potential impacts, Mountain Valley will implement the erosion control measures outlined in the Commission's *Upland Erosion Control, Revegetation and Maintenance Plan* and Mountain Valley's *Karst-Specific Erosion and Sediment Control Plan*, JA 196-99. Certificate Order P 171, JA 1166.

Petitioners argue that the Commission lacked a sufficient basis to conclude that the impacts of pipeline construction on groundwater in areas with karst features would be adequately mitigated. Br. at 65. They complain that Mountain Valley's *Karst-Specific Erosion and Sediment Control Plan* lists mitigation "objectives" to be achieved with best management practices, but fails to specify exactly what actions will be taken to achieve those objectives. Br. at 65-66. Petitioners make a similar complaint about Mountain Valley's *General Blasting Plan*, which includes mitigation procedures to be used if blasting is required in the vicinity of karst structures. Br. at 67-68.

Initially, Mountain Valley has developed project-specific plans. *See* EIS at 4-59 to 4-60, JA 813-14 (listing some of the best management practice objectives in the *Karst-Specific Plan*, such as "installing a double line of sediment control fencing and straw bales up gradient of karst features"); *id*. at 4-60, JA 814 (listing certain karst mitigation procedures in the *General Blasting Plan* such as "using low force charges designed to only affect the rock to be removed").

Petitioners also fail to mention other mitigation procedures that are designed to assure that the mitigation objectives are achieved. During construction, pursuant to Mountain Valley's *Karst Mitigation Plan* (JA 49-67), Mountain Valley will deploy a Karst Specialist Team – comprised of professional geologists having direct work experience with karst hydrology and geomorphic processes, or persons

working under the direction of such geologists – to inspect karst features and assess the risk for impacting groundwater quality, as well as to provide recommendations for karst feature stabilization and mitigation. EIS at 4-105, JA 828; *Karst Mitigation Plan* at 7, JA 57. The Karst Specialist Team has over 70 years of combined direct field experience evaluating karst features in the vicinity of the pipeline and will be on-site during construction activities within karst terrain. *Id*. at 7, 9, JA 57, 59. They will observe construction activities to assist in limiting potential negative impacts, and to inspect, assess and if necessary mitigate karst features that are encountered or formed during construction in conjunction with recommendations from appropriate state agencies. *Id*.

The *Karst Mitigation Plan* outlines inspection criteria for karst features identified during construction in proximity to the right-of-way. Certificate Order P 155, JA 1161; Rehearing Order P 184, JA 1867. If a karst feature is identified, the Karst Specialist Team will conduct a weekly Level 1 inspection and document soil subsidence, rock collapse, sediment filling, swallets (underground springs), springs, seeps, caves, voids and morphology. Certificate Order P 155, JA 1161; Rehearing Order P 184, JA 1867; *Karst Mitigation Plan* at 10-11, JA 60-61.

If the weekly inspection identifies any changes, the Karst Specialist Team will then conduct more in-depth inspections. Certificate Order P 155, JA 1161; Rehearing Order P 184, JA 1867; *Karst Mitigation Plan* at 12-13, JA 62-63. If a

feature is found to have a direct connection to a subterranean environment or groundwater flow system, Mountain Valley will work with the Karst Specialist Team and appropriate state agencies to develop mitigation measures. Certificate Order P 155, JA 1161; Rehearing Order P 184, JA 1867; *Karst Mitigation Plan* at 12, JA 62.

As an example, the majority of karst features along the proposed pipeline route are sinkholes. Rehearing Order P 183, JA 1866. Under Mountain Valley's *Karst Mitigation Plan*, mitigation of a sinkhole would involve reverse gradient backfilling of the sinkhole to stabilize the sinkhole, while maintaining the sinkhole's groundwater recharge function. EIS at 4-59, JA 813. If larger or more continuous karst features or a cave is identified during construction, the karst inspector would coordinate with the appropriate state agencies regarding mitigation and/or avoidance of the discovered feature. *Id*.

To assure that groundwater protection is in fact achieved, Mountain Valley is further required to offer pre- and post-construction water testing to landowners. Rehearing Order P 196, JA 1873; Certificate Order P 172, JA 1166; *id*. Appendix C, Condition 21, JA 1231. These measures ensure that any adverse Project effects on private wells or other sources of potable water in the area will be fully mitigated. Rehearing Order P 196, JA 1873. In addition to post-construction monitoring, Mountain Valley is required to compensate landowners for damages to

the quantity or quality of domestic water supplies and to repair or replace water systems. Rehearing Order P 196, JA 1873; Certificate Order P 172, JA 1166.[14]

The Commission reasonably concluded that these mitigation measures would adequately minimize groundwater impacts from Project construction in areas with karst features. Certificate Order PP 153, 177, JA 1160, 1167. While Petitioners would have this Court require a completed, detailed plan of action in advance of Commission action, NEPA imposes no such requirement. Mitigation need only "be discussed in sufficient detail to ensure the environmental consequences have been fairly evaluated." *Methow Valley*, 490 U.S. at 352. NEPA does not require that "a complete mitigation plan be actually formulated and adopted." *Id*. Indeed, "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." *Id*. at 353. *See also Theodore Roosevelt Conserv. P'ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010) (NEPA does not require a "detailed, unchangeable mitigation plan" but rather permits adaptable mitigation plan, based on specified performance goals, that would monitor the development's

[14] Unlike the mitigation measures "to be determined" and lacking immediate meaning in *American Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018), here the mitigation measures must be implemented and followed prior to pipeline construction and operation. *See, e.g.,* Certificate Order, App. C, Conditions 12, 21, JA 1228, 1231.

effects on the environment and mitigate those effects as necessary); *Pub. Utils. Comm'n*, 900 F.2d at 282-83 (Commission's deferral of decision on specific mitigation measures until construction started was "both eminently reasonable and embraced in the procedures promulgated under NEPA"); *Mayo v. Reynolds*, 875 F.3d 11, 21 (D.C. Cir. 2017) (NEPA imposes no duty to include in every EIS a detailed explanation of specific mitigation measures).

D. The Commission Reasonably Found No Significant Impact On Cultural Attachment.

Although not required by any federal laws or regulations relating to historic preservation and cultural resources management, the Environmental Impact Statement analyzed "cultural attachment" – *i.e.*, how a group of people relate to its surrounding environment over time, which may include traditions, attitudes, practices and stories – to identify potential impacts to the tangible and intangible values of culture associated with the physical environment. EIS at 4-470, 4-474, JA 905, 909. Here, the Project route would avoid areas of high cultural attachment intensity, and cross a region with moderate or low cultural attachment intensity. EIS at 4-474, JA 909. Staff's analysis, conducted by professional anthropologists, concluded that the Project should not have significant long-term adverse impacts on cultural attachment to the land. Rehearing Order P 267, JA 1907 (citing EIS at 4-476, JA 911).

Petitioners take issue with Commission's analysis of cultural attachment in the Peters Mountain area which, in part, forms the borders between West Virginia and Virginia. Br. at 69-74. That portion of the pipeline route, however, consists only of six miles of underground pipeline; no above-ground facilities will be built in the area. EIS at 4-475, JA 910. After installation, the right-of-way would be restored to its original condition, with only the 50-foot-wide permanent operational easement being kept clear of trees in forested areas. *Id*. Three of the six miles of underground pipeline would be placed adjacent to existing power line rights-of-way. *Id*. The viewshed of Peters Mountain is not pristine, including existing utilities and other infrastructure. *Id*. Therefore, staff concluded that the Project would not significantly alter the visual character of Peters Mountain. *Id*.

No Peters Mountain residents would be separated from their land; Mountain Valley purchased no homes in the area and access to all properties would be maintained. *Id*. at 4-476, JA 911. No buildings outside of the permanent 50-foot-wide operational easement would be removed. *Id*. The Project therefore would not affect land ownership, tenure, or sense of homeplace within the Peters Mountain community. *Id*. Likewise, the Project would not result in changes to the culture, belief systems, or traditional practices associated with the Peters Mountain community. *Id*. After pipeline installation and restoration, citizens could continue

to farm, gather plants, collect firewood, trade, share water and food, and hunt as they always have. *Id.*

While Petitioners express concern about damage to wells and springs (Br. at 72), staff concluded that project-specific construction techniques and mitigation plans, as discussed above in section V.B (surface water) and V.C (groundwater) above, would minimize impacts on water resources. *Id*. Wells or springs that supply domestic water affected by construction would be repaired or replaced. *Id*. Thus, staff reasonably concluded that construction and operation of the Mountain Valley pipeline would not have long-term significant adverse effects on cultural attachment because, *inter alia*, impacts on the Peters Mountain water resources will be reduced or mitigated though measures implemented by Mountain Valley. *Id*. at 4-477, JA 912.

E. The Commission Reasonably Rejected Hybrid Alternative 1A.

In fulfilling its obligation to consider reasonable alternatives to the proposed pipeline route, the Commission considered major route alternatives that would increase the potential for co-location with existing powerlines or pipelines, or other proposed pipelines. *See* EIS at 3-20, JA 799. This analysis included Petitioners' preferred Hybrid Alternative 1A (Br. at 73-74). *See* Certificate Order P 306, JA 1206; EIS at 3-20, 3-25, JA 799, 804.

The Hybrid 1A Alternative would follow the northern half of Mountain Valley's proposed route and the southern half of an alternative route which would be substantially co-located with existing overhead electric transmission lines. EIS at 3-25, JA 804. The Environmental Impact Statement concluded that this alternative would have certain environmental advantages, such as avoiding the Slussers Chapel conservation site and known karst features, affecting 1.8 fewer miles of the Jefferson National Forest, 68 fewer springs and wells, 11.3 miles fewer of forested lands, and about 5 miles fewer of areas with landslide potential. *Id*. The Hybrid 1A Alternative would only cross one historic district (as opposed to five districts crossed by the proposed route) and would be more co-located with existing corridors by almost 52 miles. *Id*.

But the Hybrid 1A Alternative would also have environmental disadvantages. *Id*. It would increase the length of the pipeline by 6 miles, thereby increasing the area of overall project disturbance by at least 138 acres, affecting 28 more landowners, and crossing 22 more perennial streams and two more major waterbodies. *Id*. Further, the Hybrid 1A Alternative would cross about 0.4 more miles of wetlands and affect about 335 more acres of agricultural land. *Id*. Finally, the alternative would cross 12.2 more miles of steep slopes and 19 more miles of side slopes compared to the proposed route, presenting substantially more obstacles to safe construction, increasing extra workspace requirements, and

potentially affecting worksite stability during construction and after restoration. *Id*.

Overall, the Environmental Impact Statement analysis concluded that the land requirements and resource impacts associated with the Hybrid 1A Alternative would not be significantly different than the proposed route. *Id*. The Commission recognized the benefits of the Hybrid 1A Alternative cited by Petitioners (Br. at 74), but reasonably concluded that it did not provide a environmental advantage over the proposed route sufficient to justify affecting additional landowners and therefore did not accept the proposed alternative. Certificate Order P 306, JA 1206; Rehearing Order P 151, JA 1852.

The Commission enjoys broad discretion in evaluating alternatives and utilizing its expertise to balance competing interests. *Minisink*, 762 F.3d at 111. *See also Myersville*, 783 F.3d at 1324 (deferring to agency's rejection of a pipeline loop alternative that would eliminate the emissions associated with the proposed compressor station but would disturb more land). Indeed, "[e]ven if an agency has conceded that an alternative is environmentally superior, it nevertheless may be entitled under the circumstances not to choose that alternative." *Myersville*, 783 F.3d at 1324. That the Commission reasonably exercised its considerable discretion here is further demonstrated by the Fourth Circuit's affirmance of the Bureau of Land Management's rejection of Hybrid 1A Alternative as a superior

route through the Jefferson National Forest. *Sierra Club*, 897 F.3d at 597. The court noted that, notwithstanding the Hybrid 1A Alternative's co-location benefits, it would also increase the length of the pipeline by six miles, affect 28 more landowners and cross 22 more perennial streams and two more major waterbodies. *Id*.

VI. THE COMMISSION COMPLIED WITH THE NATIONAL HISTORIC PRESERVATION ACT.

Section 106 of the National Historic Preservation Act requires that, "prior to the issuance of any license," the Commission take into account the effect of its authorizations on historic properties and afford the Advisory Council a reasonable opportunity to comment. 54 U.S.C. § 306108. Section 106's implementing regulations specifically identify certain "consulting parties" – relevant state historic preservation officers, tribal historic preservation officers, and local government officials – to be included in the review process. 36 C.F.R. § 800.2(c). Agencies are also vested with discretion to designate individuals and organizations as consulting parties if they have a "demonstrated interest" in the project by virtue "of their legal or economic relation to the undertaking." *Id*. § 800.2(c)(5) (those "with a demonstrated interest in the undertaking *may participate* as consulting parties") (emphasis added). In addition, agencies are encouraged to make use of their existing NEPA procedures to solicit and consider the views of the public. *Id*. § 800.2(d)(3). The Act's "mandate is essentially procedural" and imposes no

substantive standards on agencies. *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) (internal quotations omitted).

In order to implement a particular program to identify and resolve any adverse effects to historic properties, agencies and the Advisory Council may negotiate a programmatic agreement. 36 C.F.R. § 800.14(b). Such an agreement binds the agency and "satisfies the agency's section 106 responsibilities for all individual undertakings of the program covered by the agreement until it expires or is terminated by the agency." *Id.* § 800.14(b)(2)(iii).

A. There Was An Extensive Consultation Process Regarding Impacts To Historic Resources.

In this case, Commission staff consulted with the West Virginia and Virginia State Historic Preservation Officers, interested Indian tribes, government agencies, and the public regarding the Project's potential impacts on historic properties. *See, e.g.*, Rehearing Order P 260, JA 1904; EIS at 4-402, JA 885. Throughout this process, Mountain Valley assisted FERC staff by providing data, analyses, and recommendations in accordance with the regulations of the Advisory Council and the Commission. *See* EIS at 4-403, JA 886; 36 C.F.R. § 800.2(a)(3); 18 C.F.R. § 380.12.

The consultation process could not be completed prior to issuance of the Certificate Order because Mountain Valley was unable to survey and evaluate certain tracts where it was denied access. After the Certificate Order was issued,

Mountain Valley was able to utilize eminent domain proceedings to gain access to such lands. *See* Rehearing Order P 251, JA 1901; Certificate Order P 269, JA 1193. In order to protect lands prior to the completion of consultations, the Commission imposed Environmental Condition 15, which restricts construction until after all additional required surveys and evaluations are completed, survey and evaluation reports and treatment plans have been reviewed by the Advisory Council and appropriate consulting parties, and the Commission has provided written notice to proceed. Certificate Order, App. C, Condition 15, JA 1229.

The section 106 process culminated in December 2017 (two months after the Certificate Order) when the Commission executed a programmatic agreement with the Advisory Council, State Historic Preservation Offices of West Virginia and Virginia, Forest Service, Bureau of Land Management, and the National Park Service. *See* Rehearing Order P 251, JA 1901. The document sets forth the parties' agreement as to those sites that will not be adversely affected and the process for developing treatment plans to resolve adverse effects at sites that could not be avoided. *See* Programmatic Agreement (R. 5865) at 8-14, JA 1580-1586. *See also* C.F.R. § 800.14(b)(2)(iii) (compliance with programmatic agreement satisfies the agency's section 106 responsibilities).

B. The Issuance Of A Conditional Certificate Does Not Violate The National Historic Preservation Act.

Petitioners' primary contention is that issuance of the Certificate Order "prior to the completion of the Section 106 process … violates the plain language" of the National Historic Preservation Act. Br. at 78. This Court, however, has previously upheld conditional licensing under the Act.

In *City of Grapevine v. Dep't of Transp*., 17 F.3d 1502 (D.C. Cir. 1994), the Court rejected the contention that the Federal Aviation Administration (FAA) violated the National Historic Preservation Act by approving the construction of an airport runway conditioned on the successful completion of the section 106 review process. The Court found that conditional approval preserved the FAA's ability to withdraw its support "should the section 106 process later turn up a significant adverse effect." *Id*. at 1509. "[B]ecause the FAA's approval … was expressly conditioned upon completion of the § 106 process," the Court found "no violation of the NHPA." *Id*. This Court has similarly upheld the Commission's practice of conditional approvals in analogous circumstances. *See, e.g*., *Del. Riverkeeper*, 857 F.3d at 399 (upholding approval conditioned on applicant obtaining Clean Water Act certification); *Myersville*, 783 F.3d at 1315, 1317-21 (upholding approval conditioned upon applicant obtaining Clean Air Act permit).

1. Petitioners' Efforts To Distinguish *City of Grapevine* Are Unavailing.

Petitioners argue that *City of Grapevine* does not control here because, in that case, the FAA retained the authority to deny use of the runway based on the results of the section 106 consultation process. Br. at 83. But here too, the Commission prohibited any construction until all necessary "evaluation reports and treatment plans have been reviewed by the appropriate consulting parties, the Advisory Council on Historic Preservation has had an opportunity to comment, and the Commission has provided written notification to proceed." Certificate Order P 269, JA 1193.

Petitioners also contend that this case is distinguishable because the Commission "continued to authorize piecemeal construction without any comprehensive revaluation upon completion of the required Section 106 reviews and consultations." Br. at 84. But again, the Commission prohibited any construction until completion of the necessary consultation process. *See* Certificate Order, Appendix C, Condition 15 (applicant "**shall not begin construction**" until completion of section 106 process) (emphasis in original), JA 1229.

Petitioners (at 78) also point to *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520 (8th Cir. 2003), where the Eighth Circuit remanded a license conditioned on undefined future mitigation measures that was issued before

a programmatic agreement was in place. *Id*. at 554. *Mid States*, however, did not involve a condition expressly precluding construction like Environmental Condition 15. Moreover, as the Commission explained, "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)." Rehearing Order P 250 (citing 36 C.F.R. § 800.4(b)(2)), JA 1900.

2. The Commission's Conditional Approval Did Not Preclude Consideration Of Alternatives.

Petitioners argue that the Commission's conditional approval "foreclosed" the ability of FERC and consulting parties to consider means to avoid, minimize, or mitigate adverse effects on historic properties. Br. at 80-81, 84. That is incorrect. Following the Certificate Order, the Commission continued discussions with the consulting parties and ultimately executed the Programmatic Agreement, which sets forth the process to develop site-specific treatment plans to mitigate impacts to historic properties. *See* Rehearing Order P 251, JA 1901; Programmatic Agreement at 10-12, JA 1582-1583.

Nonetheless, Petitioners allege that the Commission "did not engage in 'consultation' to resolve adverse effects" and "ignored" requests from consulting parties. Br. 81. The record belies Petitioners' unsupported assertion. For example, during the consultation process, the treatment plan for the Greater

Newport Rural Historic District was "substantially revised in response to the feedback received from [the Virginia Department of Historic Resources], Giles County, the Greater Newport Rural Historic Committee, the Advisory Council on Historic Preservation, Shannon Lucas, Clarence and Karolyn Givens, Jerry and Jerolyn Deplazes, and Michael Williams." R. 5964 (Revised Greater Newport Treatment Plan) at 1, JA 1687. *See also* R. 5970 (Revised Bent Mountain Treatment Plan) at 1, JA 1688. The fact that Petitioners' preferred mitigation measures were not adopted does not mean that consultation did not occur.

Moreover, Petitioners' fundamental position is that the Commission should have avoided the historic districts by adopting the Hybrid 1A Alternative. *See* Br. at 73-74, 92-94. That alternative was given extensive consideration and rejected *before* issuance of the conditional approval. *See* EIS at 3-25 to 3-28, JA 804-807. Certificate Order P 306, JA 1206. *See also supra* pp. 71-74.

C. The Commission Reasonably Consulted With Native American Tribes.

Section 101 of the National Historic Preservation Act directs agencies to "consult with any Indian tribe … that attaches religious and cultural significance" to property that may be affected by a federal project. 54 U.S.C. § 302706(b). The Act's implementing regulations require agencies "to make a reasonable and good faith effort to identify" any such tribes. 36 C.F.R. § 800.2(c)(2)(ii)(A).

Petitioners claim that the Commission violated the Act by failing to consult with Petitioners Steven Vance and Ben Rhodd, the Tribal Historic Preservation Officers of the Rosebud Sioux Tribe and Cheyenne River Sioux Tribe. Br. at 85. The Tribes, whose present day tribal lands are in the midwestern and western regions of the United States, indicate that they have cultural ties to the Project area. Br. at 86.

As explained below, the Court lacks jurisdiction to consider this claim. Moreover, the record demonstrates that the Commission reasonably carried out its obligations under the National Historic Preservation Act.

1. The Preservation Officers Are Not Proper Parties To This Appeal.

Under NGA section 19(b), 15 U.S.C. § 717r(b), only "parties" to FERC proceedings may seek judicial review. In this case, the Preservation Officers did not seek to intervene in the FERC proceedings until May 2018 – nearly seven months after issuance of the Certificate Order and five months after they claim to have become aware of the Project. *See* Rehearing Order P 13, JA 1780. The Commission denied late intervention, finding that it would "delay, prejudice, and place additional burdens on the Commission and the certificate holder." *Id*. P 14, JA 1781. Because the Preservation Officers were not parties to the proceeding below, they cannot seek judicial review. *Ala. Mun. Distrib. Grp. v. FERC*, 300 F.3d 877, 878 (D.C. Cir. 2002) ("a litigant seeking judicial review of a FERC order

must have been a party to the proceeding before the Commission and must have applied for agency rehearing"). Moreover, they did not seek rehearing of the Commission's ruling and are therefore separately barred from pressing any claim in this Court. *See* 15 U.S.C. § 717r(a) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.").[15]

2. No Petitioner Challenged The Commission's Tribal Consultation In A Timely-Filed Request For Rehearing.

No Petitioner raised any issues regarding the Preservation Officers' participation in the consultation process in a timely-filed request for rehearing. Certain petitioners did seek rehearing of an April 6, 2018 letter from a FERC staff member (R. 6111, JA 1694-1696) that responded to comments submitted by the Preservation Officers. That letter, however, was "not a final decision or order;" it did "not impose any new obligation, deny any new right, or change any legal

[15] Even if the Preservation Officers had sought rehearing and thus could pursue an appeal, they could only seek review of the Commission's decision to deny them party status. *See Pub. Serv. Comm'n v. FPC*, 284 F.2d 200, 204 (D.C. Cir. 1960) ("would-be intervenor is a party to a proceeding in a limited sense, restricted to the proceedings upon the application for intervention"); *see also New Energy Capital Partners, LLC v. FERC*, 671 Fed. Appx. 802, 804 (D.C. Cir. 2016) (same). Although Petitioners reference the Commission's denial of the Preservation Officers' motion to intervene, they do not challenge that ruling. *See* Br. at 88-89.

relationship." *Mountain Valley Pipeline, LLC*, 164 FERC ¶ 61,086, P 15 (2018).[16] The letter merely responded to the Preservation Officers' concerns by "describ[ing] the steps that have already been taken by the Commission in compliance with" the National Historic Preservation Act. *Id*. If any of the Petitioners wanted to take issue with the Commission's tribal outreach, they "should have done so in response to the Certificate Order or other final order related to the section 106 process." *Id*. *See also* Rehearing Order P 15 (request for rehearing of April 6 letter was filed beyond the statutory 30-day deadline for rehearing of Certificate Order), JA 1781.

3. The Commission Reasonably Declined To Reopen Consultations.

In any event, the record establishes that the Commission made "a reasonable and good faith effort to identify" any Indian tribes that attach religious and cultural significance to properties that may be affected by the Project. 36 C.F.R. § 800.2(c)(2)(ii)(A). In order to identify tribes that historically used or occupied the Project area, the Commission reviewed ethnographic sources, such as the Handbook of North American Indians, and other data. *See* EIS at 4-424, JA 896. The Commission also contacted Native American organizations and state-recognized tribes. The Commission's efforts identified 32 potentially-interested

[16] No Petitioner has sought review of this August 3, 2018 order. *See* Br. at v.

Indian tribes or organizations (*id*. at Table 4.10.5-1, JA 897) and distributed Project-related materials to them. In a separate effort, Mountain Valley reached out to 39 tribes (most of which were also contacted by FERC) and informed them about the Project and requested comments. *See id*. at 4-428, JA 900.

The Commission's outreach did not include the Sioux tribes represented by the Preservation Officers because FERC staff found no documentation that they ever occupied, or had a historical interest in, the Project area. *See* R. 6111 at 1, JA 1694. Petitioners note that the Project area was formerly occupied by the Tutelo tribe, whose historic language shares a similarity with the ancient Siouan language. *See* Br. 86; R. 6205 at Ex. 2 (discussing linguistic links between Tutelo and Sioux), JA 1743. But the fact that the language of the Tribes' ancestors may have been present in the Project area does not establish the Commission's outreach was unreasonable – a conclusion with which the Advisory Council agrees.

a. The Advisory Council Found That The Commission Undertook Reasonable And Good Faith Efforts To Identify And Consult With Interested Tribes.

In a March 30, 2018 letter in response to the Preservation Officers' indication of interest in the Project, the Advisory Council found that the Commission had made a "reasonable and good faith effort to identify, and consult with, relevant tribes." *See* R. 6115 at 2, JA 1699. The Advisory Council further explained that, with the execution of the Programmatic Agreement, "[t]he Section

106 review process was formally completed." *Id.* Where, as here, new stakeholders emerge, "a federal agency is not obligated to restart the [NHPA] Section 106 review or reconsider previously finalized findings or determinations." *Id.*[17]

b. The Preservation Officers Have Been Invited To Share Pertinent Information.

The fact that the Preservation Officers were not consulting parties in the section 106 process does not mean that they cannot convey information to the Commission. In response to the Preservation Officers' indication that they had information about potential cultural resources, FERC staff asked them to submit detailed information expeditiously. *See* R. 6111 (FERC letter dated April 6, 2018) at 2, JA 1695.

D. The Commission Reasonably Resolved Requests For "Consulting Party" Status.

The National Historic Preservation Act's regulations vest federal agencies with the discretion to designate entities as "consulting parties" for the section 106 review process if they establish a "legal or economic relation to" or "concern with" a project's impact on historic properties. 36 C.F.R. § 800.2(c)(5)). Such a

[17] Petitioners claim that the Advisory Council only addressed the Commission's obligations under NHPA section 106, and not section 101. Br. at 87 n.33. That is a distinction without difference. The requirements of section 101 apply to an agency "carrying out its responsibilities under section" 106. 54 U.S.C. § 302706(b).

designation entitles entities to participate in the agency's identification and resolution of an adverse effects. *See, e.g.*, 36 C.F.R. §§ 800.4(d)(1); 800.5(c), 800.6(a). It does not, however, "confer any substantive rights." Rehearing Order P 257, JA 1904.

1. The Commission Reasonably Denied Blue Ridge Environmental Defense League's Request.

Petitioners argue that the Commission "arbitrarily refused to grant consulting party status" to the Blue Ridge Environmental Defense League (Blue Ridge). Br. at 91. That is incorrect. The Commission found that Blue Ridge had failed to establish the requisite "legal or economic relation to the undertaking or affected properties." *See* Rehearing Order P 254 (citing 36 C.F.R. § 800.2(c)(5)), JA 1903. *See also* R. 4894, JA 521. Blue Ridge does not mention or challenge this ruling. *See, e.g.*, *Corson and Gruman Co. v. NLRB*, 899 F.2d 47, 50 (D.C. Cir. 1990) ("the Company never raised this issue in its opening brief before us and therefore waived the argument in this court").

Petitioners also alleged that the Commission "forced" Blue Ridge and others to choose between being a section 106 consulting party or an intervenor. Br. at 91. Again, the Commission rejected Blue Ridge's request for consulting party status; it did not force Blue Ridge to choose between being a consulting party or an intervenor. Rehearing Order P 257, JA 1904. To be sure, during the review process, FERC staff advised some individuals that they could not both be an

intervenor and a consulting party. *See* R. 5796 at Ex. A, JA 1262. But FERC staff subsequently corrected its position and, in the Rehearing Order, the Commission expressly found that "participants should be able to avail themselves of party status in both proceedings." Rehearing Order P 257, JA 1904. Petitioners have not identified any party who was affected by FERC staff's actions. *See* Br. at 90-91.[18]

2. There Is No Merit To The Claims Of The Newport Petitioners.

In February 2016, the Commission denied the request for the Greater Newport Rural Historic District Committee (Newport Historic District) for consulting party status and explained that the Commission's existing procedures provide the District with "opportunities to comment on cultural resources information." *See* R. 2713, JA 165-166. In April 2016, the Commission also denied requests for consulting party status from Jerry and Jerolyn Deplanes, Karolyn Givens, Frances Collins, Michael Williams, Miller Williams, and Tony Williams (Individual Newport Petitioners) because they had not established a

[18] The cited email was sent to Anita Puckett who was an intervenor (Certificate Order, App. A, JA 1212). Ms. Puckett's organization, Preserve Montgomery County, was denied consulting party status because it "did not demonstrate a direct legal or economic relationship to the undertaking." EIS at 4-410 to 4-111, JA 893-894. Nonetheless, Ms. Puckett was engaged in the section 106 consultation process. *See*, *e.g.*, EIS at 4-411, JA 894; R. 5942 (Revised North Fork Treatment Plan) at 7, JA 1636 ("Ms. Hahn … had communicated with landowners within the district and … all had declined to meet with Mountain Valley to discuss potential mitigation strategies. Anita Puckett, a representative from Preserve Montgomery, confirmed this stance.").

direct legal or economic relationship with the Project. *See* Rehearing Order P 12, JA 1779. In May 2017, after consultations with the Advisory Council, Commission staff reconsidered its position and granted the Individual Newport Petitioners' request to be consulting parties. *Id.* The Newport Historic District and Individual Newport Petitioners contend that the Commission's actions have denied them their "right" to participate as consulting parties. Br. 91.

a. The Court Lacks Jurisdiction To Consider The Individual Newport Petitioners' Claims.

The Individual Newport Petitioners were not parties to the proceedings below. In the Rehearing Order, the Commission denied their request for late intervention, finding that they had failed to establish the requisite good cause. Rehearing Order PP 11-12, JA 1779-80. The Individual Newport Petitioners did not seek rehearing of this decision and Petitioners' opening brief does not mention – much less challenge – this ruling. *See World Wide Minerals, Ltd. v. Republic of Kaz.*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) ("a party waives its right to challenge a ruling … if it fails to make that challenge in its opening brief"). Because the Individual Newport Petitioners were not parties to the proceeding below, they may not press any claim in this Court. *See* 15 U.S.C. § 717r(b); *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990) ("a litigant seeking review must have participated in the proceedings before the agency").

b. The Newport Historic District Does Not Challenge The Commission's Denial Of Its Request For Consulting Party Status.

Petitioners make no effort to explain why they believe the Commission erred in denying the Newport Historic District's request for consulting party status. *See* Br. at 91-92. And the gist of Petitioners' argument appears to be aimed at the prejudice purportedly suffered by the Individual Newport Petitioners, who were ultimately granted consulting party status. *See* Br. at 92 ("the Newport Petitioners have never been consulted on any Section 106 issues – even after being granted consulting party status"). Accordingly, any issues relating to the Commission's denial of the Newport Historic District's request for consulting party status are not properly before this Court. *See Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 39 (D.C. Cir. 1997) ("Because the District raises this issue in such a cursory fashion, we decline to resolve it.").

c. The Newport Historic District And The Newport Individual Petitioners Had Ample Opportunity To Comment On Historic Resources.

The Newport Historic District and the Newport Individual Petitioners contend that they were excluded from consultations relating to the Environmental Impact Statement, cultural resource reports, and alternative routes. Br. at 92-93. The record reveals, however, that there was ample opportunity for comment on all of these issues. Mountain Valley filed its historic and cultural resource reports as

"public" information, and those reports were available for review and comment by any interested parties. *See* Rehearing Order P 260, JA 1904. Likewise, the Commission's draft and final Environmental Impact Statements, which analyzed route alternatives and impacts to historic properties, were also available for review and comment. Indeed, the Newport Historic District and the Individual Newport Petitioners submitted numerous comments regarding historic resources, route alternatives, the Programmatic Agreement, and treatment plans for historic resources.[19]

The fundamental complaint appears to be that these filings and comments were exchanged under standard FERC procedures, rather than under the rubric of the National Historic Preservation Act. But the Advisory Council "encourages"

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[19] *See* Mar. 4, 2016 Newport Historic District Comment (R. 2733) (commenting on cultural resource reports); May 16, 2016 Newport Historic District Comment (R. 2850) (commenting on architectural surveys); Mar. 7, 2017 Newport Historic District Comment (R. 4971) (commenting on draft EIS and Hybrid Alternative 1A); May 10, 2017 Newport Historic District Comment (R. 5237) (commenting on draft EIS and Hybrid Alternative 1A); Sept. 1, 2017 Newport Historic District Comment (R. 5702) (commenting on Hybrid Alternative 1A); Nov. 2, 2017 Individual Newport Petitioners Comment (R. 5785) (seeking additional time to comment on Notification of Adverse Effect and draft Programmatic Agreement); Nov. 3, 2017 Individual Newport Petitioners Comments (R. 5787) (initial comments on draft Programmatic Agreement); Dec. 27, 2017 Individual Newport Petitioners Comment (R. 5879) (additional comments on Programmatic Agreement); Jan. 4, 2018 Individual Newport Petitioners Comment (R. 5883) (commenting on treatment plans); Feb. 22, 2018 Newport Historic District Comment (R. 5984) (commenting on treatment plans); Feb. 23, 2018 Individual Newport Petitioners Comment (R. 5988) (amended comments on treatment plans).

agencies "to use to the extent possible existing agency procedures and mechanisms to fulfill the consultation requirements of section 106." 36 C.F.R. § 800.2(a)(4). The Newport Historic District and the Individual Newport Petitioners do not contend they were denied any pertinent information and the record establishes that they had ample opportunity to share their views regarding the Project's impacts. *See, e.g.*, *Mid States*, 345 F.3d at 553 ("since the public was encouraged to comment on all aspects of the DEIS, we cannot say that there was an insufficient opportunity for public comment under the NHPA").

E. The Commission Properly Identified The Area Of Potential Effect.

Some of Mountain Valley's easement agreements reference a right-of-way for two pipelines. This language is intended to allow Mountain Valley to avoid having to renegotiate its existing easements should it ever decide to seek approval to co-locate a section of a new pipeline within an existing easements. *See* R. 5947 (Revised Big Stony Creek Treatment Plan) at 10, JA 1679. Seizing on this language, Petitioners claim that the Commission's analysis of potential impacts to historic resources was faulty because it only considered one pipeline. Br. at 93. True, the Commission had only a single pipeline proposal before it. Any future pipeline in the same area, should it ever materialize, will be appropriately scrutinized.

VII. THE REQUIREMENTS OF SECTION 4(f) OF THE DEPARTMENT OF TRANSPORTATION ACT DO NOT APPLY.

Section 4(f) of the Department of Transportation Act establishes a national policy that "special effort should be made to preserve the natural beauty of … historic sites," 49 U.S.C. § 303(a), and directs the Secretary of Transportation to approve transportation projects making use of historic sites only if there is no prudent or feasible alternative and the project includes all possible planning to minimize harm from the use. 49 U.S.C. § 303(c). Petitioners allege that the Project is subject to the Act because it is a transportation activity "controlled by the Department of Transportation," and that the Commission failed to "objectively evaluate whether there are feasible and prudent alternatives" that would avoid historic districts. Br. at 94. Petitioners are wrong.

The Natural Gas Act vests FERC with "exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale." *Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 300-01 (1988).[20] While the Natural Gas Pipeline Safety Act authorizes the Transportation Secretary to establish safety regulations for natural gas transportation facilities, the Act "does

[20] *See also Wash. Gas Light Co. v. Prince George's Cty. Council*, 711 F.3d 412, 423 (4th Cir. 2013) ("the NGA gives FERC jurisdiction over the siting of natural gas facilities"); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Congress placed authority regarding the location of interstate pipelines … in the FERC").

not authorize the Secretary of Transportation to prescribe the location or routing of a pipeline facility." 49 § U.S.C. § 60104(e). The Commission thus reasonably concluded that the requirements of section 4(f) of the Transportation Act are not implicated by the Project. *See* Rehearing Order P 94, JA 1826. Petitioners do not reference or challenge this conclusion.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied, and the Commission's orders should be affirmed in all respects.

Respectfully submitted,

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December 20, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e) and this Court's Order of August 30, 2018, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as modified in this Court's order to 21,500 words, because this brief contains 20,744 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

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

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December 20, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on December 20, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Beth G. Pacella
Beth G. Pacella
Deputy Solicitor