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Pipeline company questioned over revoked permits

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BY JOHN BRUCE • STAFF WRITER

RICHMOND — Investment research analysts focused on the stalled Atlantic Coast Pipeline during a July 31 earnings call in which Dominion Energy CEO Thomas Farrell assured them the \$7.8 billion project would resume construction next year following a favorable U.S. Supreme Court decision.

“We are pleased that the Solicitor General filed an appeal to the Supreme Court of the Fourth Circuit Cowpasture decision as it relates to ACP’s crossing underneath the Appalachian Trail,” he said. “To date, 16 states, the American Gas Association, Interstate Natural Gas Association, the chamber of commerce, several unions, the National Association of Manufacturers, Mountain Valley Pipeline have all filed (friend of the court) briefs.”

Company confident in success

“History indicates cases appealed by the Solicitor General have an approximately 70 percent chance of being considered,” Farrell said in his opening remarks. “We expect that in October or November, the Supreme Court will schedule arguments to occur in the spring of next year with a final decision no later than June 2020. We are confident that the Fourth Circuit’s ruling will be overturned. And though at present we are not publicly discussing potential administrative or legislative alternatives, the options that have been described by the developers of the Mountain Valley Pipeline should be expected to be applicable to the Atlantic Coast Pipeline.”

He was referring to MVP builder EQM Midstream Partners’ announcement of a deal with the U.S. Department of the Interior to swap ownership of private land over which some of the Appalachian Trail travels in return for the right to drill under the trail.

EQM boosted that project’s cost estimate to a maximum of \$5 billion from \$4.6 billion.

“We are disappointed that last week, the Fourth Circuit vacated the project’s biological opinion,” Farrell added. “Over recent months, we have been taking steps to bolster the official record of the case in the event the court ruled negatively. These steps include the additional surveying of the rusty patched bumble bee along the project corridor, which has been under way since mid-June. There’s nothing in the court’s opinion on the four species that we expect would prevent the biological opinion from being reissued in time to recommence construction by year-end and complete critical path tree falling during the November through March window.”

Ferrell did not mention that the court called the Fish and Wildlife Service permit “arbitrary and capricious,” or that the court’s 50-page opinion suggested the federal agency had “lost sight of its mandate” under the Endangered Species Act to protect and conserve endangered and threatened species and their habitats. The four species cited in the case are the rusty-patched bumblebee, the Madison Cave isopod, the clubshell mussel, and the Indiana bat.

The Dominion CEO also did not mention the challenge to the Federal Energy Regulatory Commission’s issuance of a certificate for the ACP (on October 13, 2017) that was filed with the Fourth Circuit Court of Appeals in August 2018, and has since been transferred to the D.C. Circuit Court of Appeals. The plaintiffs are 14 conservation groups, represented by the Southern Environmental Law Center, Appalachian Mountain Advocates, and Chesapeake Bay Foundation.

One basis of the suit is the petitioners’ contention that FERC did not look into the affiliate agreements that Dominion Energy and Duke Energy, principal project partners, demonstrate that the pipeline is needed in Virginia and North Carolina. The petitioners argue FERC’s Environmental Impact Statement, including its environmental justice review, is fatally flawed.

As part of this case, the City of Staunton and Nelson County have filed friend of the court briefs stating their concerns regarding the impacts of the ACP on their communities.

Oral arguments will be this fall.

On Jan. 23, 2018, the U.S. Forest Service granted the ACP a Special Use Permit to cross national forest lands and a right of way to cross beneath the Appalachian Trail, after the Forest Service amended its forest plans to accommodate the project.

In February 2018, seven groups filed suit to challenge, arguing the Forest Service rushed to approval, despite serious questions about the project’s ability to be built over steep mountain terrain without serious environmental damage.

On Dec. 13, 2018, the Fourth Circuit threw out the permit, saying the Forest Service failed to assess off-forest alternatives, and that it lacked the authority to grant permission to cross the trail.

The ACP and USFS then asked the court to bring the case before a full panel of judges. The court said no.

Analysts probe revocation

During the July 31 earnings call, analysts asked questions about how Dominion is handling the court's decision to throw out the biological opinion and options the company might follow.

Greg Gordon, senior managing director and head of power and utilities research with Evercore ISI, asked about Dominion's confidence in its ability to get the Fish and Wildlife Service to effectively mediate the concerns associated with this second certification of the permits from the Fourth Circuit.

"In reading that document, I've heard varying opinions on how high the hurdle is that the Fish and Wildlife Service needs to get over in order to issue a valid permit, given some of the pretty strong language in that," Gordon said. "While it was a detailed brief, they gave very good detail as to why they felt that the decision was arbitrary and capricious. Some people's opinion that the standard that they've put the Fish and Wildlife Service to, and the details of what they have problems with, might be very difficult to meet. So could you just comment on why you think, based on your reading and your experts' reading, that you can meet those hurdles with just more information on the three other species and adequately doing the survey on the bees?" Gordon asked.

Diane Leopold, Dominion executive vice president, replied, "As we look at the four species, there was an enormous amount of information and analysis that went into the process to begin with, while we were in formal consultation with the Fish and Wildlife Service. And based on the amount of information that they have and the surveys that we have completed, we believe based on — there's nothing surprising that's coming out of it that would make us think that they cannot resolve it with the enormous amount of analysis and information that they have," Leopold said.

"I will just add one thing," Farrell said. "The surveys — the one issue they had is, they didn't think enough surveys were done around the bees, and we've been doing those surveys since mid-June. They'll be done this quarter and there will be more than sufficient facts, we believe, to justify issuing the biological opinion."

Shar Pourreza, managing director of energy/power at Guggenheim Partners, asked Farrell about "potentially looking at like a land swap similar to what we've seen with MVP. Are there other sort of administrative solutions that you could be looking at outside of just the land swap?"

"Yes, there are a number," Farrell replied. "And as we said before, we really don't want to get into a lengthy discussion about what all those options are. There has been some discussions from the developers of the MVP pipeline that, as I've said a few minutes ago, we would expect all of those solutions to be available to us as well."

Pourreza asked, "And then, just from a timing perspective of when you're ready to discuss publicly the administrative or legislative path, is that sort of at a point when (the Supreme Court) affirms whether they would hear this case or not?"

“We’re completely focused on that right now,” Farrell said. “The Fourth Circuit decision is a very poor precedent, we think, for energy policy in the United States, setting up a 2,000-milelong barrier wall to bring energy resources from the Midwest and South, the western parts of the country into the East. Don’t think that’s what compressible intent was. So it’s very important that the precedent not stand.”

‘Hard to answer’

Michael Weinstein, vice president of leveraged finance underwriting at Crédit Suisse, asked how much capital has been put into ACP to date.

Dominion chief financial officer James Chapman replied that as of June 30, the total cash invested capital is \$3.4 billion from all parties from all forms.

Stephen Byrd, head of North American equity research, power/utilities and clean tech at Morgan Stanley, asked, “Assuming that a revised biological opinion and incidental take statement is issued but is stayed by the court yet again, what would the next process steps be at that point? Is there an appeal process or where would you go at that point if the unrevised is yet again stayed?”

“Well, you can do a preliminary,” Farrell said. “You can appeal a stay ... it will depend on what the stay was for, if one was entered at all. Would it be the entire 600 miles or would it be a segment? Also it’s kind of difficult to answer that question. There are a variety of remedies we can pursue, but without a real detailed issue, it’s hard to answer that question,” Farrell said.