DC Circ. Asks If 4th Circ. Ruling Kills $7B Pipeline Fight

By Juan Carlos Rodriguez

Law360 (September 16, 2019, 7:40 PM EDT) -- The D.C. Circuit has said it wants to know why it should still consider challenges to the Federal Energy Regulatory Commission's approval of the $7 billion Atlantic Coast gas pipeline now that the Fourth Circuit has invalidated the U.S. Forest Service's authorization for the controversial project.

The appeals court told the company, FERC and others involved in the litigation, including environmental groups and landowners, on Friday that the Fourth Circuit's decision has raised questions that need to be answered before the litigation proceeds.

In December, the Fourth Circuit said the Forest Service flouted the National Environmental Policy Act and National Forest Management Act in allowing the 600-mile Atlantic Coast pipeline to cross portions of the George Washington and Monongahela National Forests and didn't have the Mineral Leasing Act authority to grant a right-of-way for the pipeline across the Appalachian National Scenic Trail.

In light of that, the D.C. Circuit is now asking whether, because the Forest Service approval has been rejected, it's possible that an "administrative workaround or alternative route" could potentially let construction proceed while still using the original FERC certificate of public convenience and necessity.

The court also wants to know whether the chances of using that same certificate to go forward with the project are so slim that the petitions are too speculative to consider.

And it wants to know whether the court should dismiss the petitions or hold them in abeyance if the petitions aren't ripe for review.

The case in the D.C. Circuit covers several angles. Atlantic Coast Pipeline LLC said FERC wrongly rejected its proposal to recoup financing costs for building the project through its rates, meaning it would recover less money than it cost to construct the pipeline. The North Carolina Utilities Commission argued that FERC approved an excessive rate for Atlantic Coast customers that don't directly negotiate a rate with the pipeline's owners.

Meanwhile, the conservation and landowner groups have sued FERC over its October 2017 approval of the pipeline running through West Virginia, Virginia and North Carolina, claiming that the commission failed to show the project was publicly needed — as required by the Natural Gas Act — and failed to take a "hard look" at its environmental impacts, as required by the National Environmental Policy Act.

Atlantic Coast Pipeline has asked the U.S. Supreme Court to overturn the Fourth Circuit's decision, but the justices have not yet said whether they'll take the case.

The pipeline has hit a slew of other obstacles. In July, the Fourth Circuit struck down a U.S. Fish and Wildlife Service permit — the second time the court nixed the same permit.

Atlantic Coast Pipeline and counsel for the conservation groups did not respond to requests for comment on Monday.
FERC spokesperson Mary O’Driscoll said the commission does not comment on court cases.

Atlantic Coast Pipeline is represented by Catherine E. Stetson, Sean Marotta and Michael J. West of Hogan Lovells and J. Patrick Nevins of Latham & Watkins LLP.

The Independent Oil and Gas Association of West Virginia is represented by Randall S. Rich and Valerie L. Green of Pierce Atwood LLP.


The conservation petitioners are represented by Mark Sabath, Gregory Buppert, Charmayne G. Staloff, Emily C. Wyche, David Neal and Gudrun Thompson of the Southern Environmental Law Center, Benjamin A. Luckett and Joseph M. Lovett of Appalachian Mountain Advocates and Jon A. Mueller of Chesapeake Bay Foundation Inc.

The landowner petitioners are represented by Christopher S. Johns of Johns & Counsel PLLC.

The Fairway Woods Homeowners Condominium Association is represented by Michael J. Hirrel.

The Wintergreen Property Owners Association is represented by Carolyn Elefant of the Law Offices of Carolyn Elefant PLLC.

Friends of Wintergreen Inc. is represented by Gerit F. Hull and Andrea I. Sarmentero Garzón of Jennings Strouss & Salmon PLC.


The case is Atlantic Coast Pipeline LLC et al. v. FERC, case number 18-1224, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Additional reporting by Keith Goldberg and Michael Phillips. Editing by Nicole Bleier.