



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Don't End Fight Over FERC Pipeline Approval, DC Circ. Told

By **Keith Goldberg**

Law360 (September 23, 2019, 3:48 PM EDT) -- There's no reason why the Fourth Circuit's invalidation of a U.S. Forest Service authorization for the \$7 billion Atlantic Coast gas pipeline should scuttle challenges to the Federal Energy Regulatory Commission's approval of the controversial project, the D.C. Circuit has heard.

The D.C. Circuit asked the pipeline's developer, project opponents and FERC to weigh in on **whether judicial review** of the agency's approval of the Atlantic Coast project could go forward after the Fourth Circuit in December said the USFS flouted federal law in allowing the 600-mile pipeline to cross the George Washington and Monongahela national forests and in issuing a right-of-way across the Appalachian National Scenic Trail.

The answer Friday from the parties was an unanimous "yes," even if their motivations differed. But they split on what the D.C. Circuit should do if it determined the case was now unripe.

While FERC and Atlantic Coast Pipeline LLC said the case should be held in abeyance and FERC's approval remain in effect, landowner and conservation groups said FERC's approval should be stayed or vacated.

The case in the D.C. Circuit covers several angles. Atlantic Coast Pipeline said FERC wrongly rejected the company's 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 who 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, arguing 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.

But the D.C. Circuit said in a Sept. 13 order that the Fourth Circuit's invalidation of the USFS authorization of the project raised several questions that had to be answered before the cases could proceed.

The D.C. Circuit asked the litigants to opine on whether 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 even with no valid USFS authorization.

The appeals court also wanted 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 wanted to know whether the court should dismiss the petitions or hold them in abeyance if the petitions aren't ripe for review.

"The court has recognized that the commission may issue certificates conditioned upon the pipeline

applicant obtaining necessary approvals from other federal and state agencies," FERC said in its brief Friday. "As it did here, the commission routinely issues certificates conditioned on the receipt of necessary approvals from other government agencies."

Opposing conservation groups and landowners said eminent domain proceedings are still ongoing and that Atlantic Coast has asserted it will restart major construction activities within months. They said they face imminent harm every day FERC's certificate is effective.

"The court should not assume FERC will order Atlantic to stop construction," the conservation and landowner groups said in their brief. "While FERC halted construction after the Fourth Circuit vacated the project's right-of-way permit to cross the Blue Ridge Parkway, it did not when the court vacated the project's incidental take statement from the Fish and Wildlife Service."

Meanwhile, Atlantic Coast Pipeline said it believes it will be able to build the pipeline using the existing FERC certificate. The company expressed confidence that the U.S. Supreme Court will grant **its petition for writ of certiorari** appealing the Fourth Circuit's decision and eventually overturn it.

The Supreme Court is scheduled to consider petitions filed by both Atlantic Coast Pipeline and the USFS at its Oct. 1 conference, according to court records.

"Atlantic's interest, at this point, is to resolve all pending court challenges and to put its pipeline into service without further uncertainty," Atlantic Coast Pipeline said in its brief. "Kicking this case down the road will only drag out the litigation further."

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.

Counsel for the conservation and landowner groups referred Law360 to their brief Monday. Representatives for other parties couldn't be immediately reached for comment.

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.

FERC is represented in-house by general counsel James P. Danly, solicitor Robert H. Solomon, deputy solicitor Lona T. Perry and staff attorney Susanna Y. Chu.

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 North Carolina Utilities Commission is represented by Kathleen L. Mazure, Jason T. Gray and Kenneth Holmboe of Duncan & Allen.

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 Juan Carlos Rodriguez and Michael Phillis. Editing by Orlando Lorenzo.