

ORAL ARGUMENT SCHEDULED FOR OCTOBER 16, 2019

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

Nos. 18-1224, *et al.* (consolidated)

ATLANTIC COAST PIPELINE, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**SUPPLEMENTAL BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

James P. Danly
General Counsel
Robert H. Solomon
Solicitor
Lona T. Perry
Deputy Solicitor
Susanna Y. Chu
Attorney

For Respondent
Federal Energy Regulatory
Commission
Washington, D.C. 20426

September 20, 2019

TABLE OF CONTENTS

I. INTRODUCTION1

II. BACKGROUND1

III. IMPLICATIONS OF *COWPASTURE*3

 1. “Whether an Administrative Workaround or Alternative Route Would Allow the Pipeline to Proceed on the Same Certificate of Public Convenience and Necessity”4

 2. “Whether the Prospects of Building the Pipeline Using the Same Certificate Are So Speculative that These Petitions Are Unripe on Either Constitutional or Prudential Grounds”6

 3. “Assuming that the Petitions Are Unripe, Whether the Appropriate Remedy Is to Dismiss the Petitions or to Hold Them in Abeyance”7

TABLE OF AUTHORITIES

COURT CASES

Appalachian Voices v. FERC,
Nos. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019).....3

Atlantic Coast Pipeline LLC v. Cowpasture River Pres. Ass’n, et al.,
S. Ct. No. 18-15872

Cowpasture River Preservation Association v. Forest Service,
911 F.3d 150 (4th Cir. 2018) 1, 2, 3, 4, 6, 7

Del. Riverkeeper Network v. FERC,
857 F.3d 388 (D.C. Cir. 2017).....3

Devia v. NRC,
492 F.3d 421 (D.C. Cir. 2007).....4

Moreau v. FERC,
982 F.2d 556 (D.C. Cir. 1993).....4

Myersville Citizens for a Rural Cmty., Inc. v. FERC,
783 F.3d 1301 (D.C. Cir. 2015).....3

Sierra Club v. U.S. Forest Service,
897 F.3d 582 (4th Cir. 2018), *reh’g granted in part*,
739 F. App’x 185 (4th Cir. 2018).....4

Sierra Club v. U.S. Dep’t of the Interior,
899 F.3d 260 (4th Cir. 2018)5

U.S. Forest Serv., et al. v. Cowpasture River Pres. Ass’n, et al.
S.Ct. No. 18-15842

ADMINISTRATIVE CASES

Atlantic Coast Pipeline, LLC,
161 FERC ¶ 61,042 (2017).....3

Atlantic Coast Pipeline, LLC,
164 FERC ¶ 61,100 (2018).....3

STATUTES

Mineral Leasing Act

30 U.S.C. § 185(a)..... 2, 4

30 U.S.C. § 185(b)(1)2

Natural Gas Act

Section 19(b), 15 U.S.C. § 717r(b).....6

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

Nos. 18-1224, *et al.* (consolidated)

ATLANTIC COAST PIPELINE, LLC, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

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

**SUPPLEMENTAL BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

INTRODUCTION

Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”) submits this supplemental brief in response to the Court’s September 13, 2019 order directing the parties to address whether *Cowpasture River Preservation Association v. Forest Service*, 911 F.3d 150 (4th Cir. 2018), “renders this case unfit for review at this time.”

BACKGROUND

Cowpasture concerns the Forest Service’s issuance of a special use permit authorizing construction of the Atlantic Coast Pipeline project through parts of the

George Washington and Monongahela National Forests, including land traversed by the Appalachian National Scenic Trail. *Id.* at 154-55. The Fourth Circuit vacated the Forest Service’s authorization and remanded to that agency for further proceedings. Among other things, the Fourth Circuit held that the Forest Service lacked statutory authority to grant a right-of-way for pipeline construction in portions of national forest land traversed by the Appalachian Trail. *Id.* at 179-81. The Fourth Circuit determined that land underlying the Appalachian Trail falls within the National Park System and thus is ineligible for the grant of a pipeline right-of-way under the Mineral Leasing Act, 30 U.S.C. §§ 185(a) and (b)(1).

The Forest Service and pipeline filed petitions for *certiorari* in June 2019. *U.S. Forest Serv., et al. v. Cowpasture River Pres. Ass’n, et al.*, S. Ct. No. 18-1584; *Atlantic Coast Pipeline, LLC v. Cowpasture River Pres. Ass’n, et al.*, S. Ct. No. 18-1587 (distributed for October 1, 2019 conference). The Forest Service seeks review of the Fourth Circuit’s ruling concerning the Mineral Leasing Act. Petition for Writ of Certiorari at 10-13, No. 18-1584 (explaining that, although it “disagrees” with other aspects of the Fourth Circuit’s ruling, it does not seek review of those aspects because “they, unlike the court’s ruling concerning the Mineral Leasing Act, can be resolved by the Forest Service on remand”).

IMPLICATIONS OF COWPASTURE

The *Cowpasture* decision does not affect the validity of the certificate of public convenience and necessity issued by the Commission for the Atlantic Coast Pipeline Project, 161 FERC ¶ 61,042 (2017) (“Certificate Order”), 164 FERC ¶ 61,100 (2018) (“Rehearing Order”). As this Court has recognized, the Commission may issue certificates conditioned upon receipt of necessary permits from other federal and state governmental agencies. *See, e.g., Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 397-99 (D.C. Cir. 2017) (certificate conditioned on receipt of Clean Water Act permit); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1319 (D.C. Cir. 2015) (certificate conditioned on receipt of Clean Air Act permit); *see also* FERC Br. 45-46.

Thus, the invalidation of permits issued by federal or state governmental agencies other than the Commission does not invalidate the Commission’s issuance of a certificate of public convenience and necessity under the Natural Gas Act. This Court has recognized that vacatur of a similar Mineral Leasing Act right-of-way and related Forest Service plan amendment “ha[s] no bearing on the validity of [a FERC] certificate under the Natural Gas Act.” *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) (unpublished) (Commission’s issuance of a certificate for the Mountain Valley Pipeline “did not hinge” on other federal agency permits vacated by the Fourth

Circuit in *Sierra Club v. U.S. Forest Service*, 897 F.3d 582, 596 (4th Cir. 2018), *reh'g granted in part*, 739 F. App'x 185 (4th Cir. 2018)); *see also Moreau v. FERC*, 982 F.2d 556, 562 (D.C. Cir. 1993) (state agency's suspension of required permit meant that pipeline applicant "no longer satisfied one of the conditions on which FERC granted the certificate of public convenience and necessity, namely that [pipeline] obtain all necessary state and local permits").

In short, the orders on review remain unaffected by *Cowpasture*, and judicial review may proceed on the Commission's orders.

Nevertheless, as a prudential matter, the Commission recognizes the special circumstances and uncertainty associated with the Fourth Circuit's decision in *Cowpasture* and the petitions for *certiorari* pending before the Supreme Court. *See Devia v. NRC*, 492 F.3d 421 (D.C. Cir. 2007) (finding review of an NRC license unripe and holding the appeal in abeyance where denials of necessary rights-of-way and a lease by other agencies made it speculative whether the project would ever be able to proceed). On this issue, in response to the questions posed in this Court's September 13, 2019 order, the Commission states:

1. "Whether an Administrative Workaround or Alternative Route Would Allow the Pipeline to Proceed on the Same Certificate of Public Convenience and Necessity"

It is not within the Commission's knowledge whether the pipeline can develop an "administrative workaround or alternative route that would allow the

pipeline to proceed on the same certificate of public convenience and necessity,” in the event the Fourth Circuit’s ruling concerning the Mineral Leasing Act is affirmed by the Supreme Court, or in the event *certiorari* is denied. *See* Petition for Writ of Certiorari at 27-28 n.15, No. 18-1584 (noting “substantial questions” as to availability of a workaround). If the pipeline develops a route other than that authorized by the Commission in the Certificate Order, however, Commission authorization, including, potentially, additional environmental review, would be required.

For example, following the Fourth Circuit’s vacatur of the National Park Service’s right-of-way allowing Atlantic to cross under the Blue Ridge Parkway, *Sierra Club v. U.S. Dep’t of the Interior*, 899 F.3d 260 (4th Cir. 2018), the Commission ordered Atlantic to cease work on the project pending further inquiry. Rehearing Order n.388, JA 5636. As the Stop Work order explained, “Commission staff cannot predict when [other federal agencies] may act,” and, in the event another federal agency authorizes a pipeline crossing location other than that approved by the Commission, “Atlantic may need to revise substantial portions of the [pipeline] route across non-federal or federal lands, possibly requiring further authorizations and environmental review.” Notification of Stop Work Order, FERC Dkt. CP15-554 (Aug. 10, 2018).

2. “Whether the Prospects of Building the Pipeline Using the Same Certificate Are So Speculative that These Petitions Are Unripe on Either Constitutional or Prudential Grounds”

The Commission does not believe that the “prospects of building the pipeline using the same certificate are *so speculative* that these petitions are unripe.” Sept. 13 Order (emphasis added). As discussed above, the Court has recognized that the Commission may issue certificates conditioned upon the pipeline applicant obtaining necessary approvals from other federal and state agencies. As it did here, the Commission routinely issues certificates conditioned on the receipt of necessary approvals from other government agencies. *See* FERC Br. 45-46; Certificate Order, Environmental Condition 10, JA 5029. Upon issuance of a final order on rehearing, the Commission’s conditional authorization is ripe for review under the Natural Gas Act, 15 U.S.C. § 717r(b).

However, the Commission recognizes the possibility that the outcome of the *Cowpasture* litigation may affect Atlantic’s ability to construct the pipeline as conditionally authorized by the Commission:

If the Supreme Court grants *certiorari* and overturns the Fourth Circuit’s ruling concerning the Mineral Leasing Act, it is the Commission’s understanding that the Forest Service may be able to resolve the remaining issues identified by the Fourth Circuit on remand. *See* Petition for Writ of Certiorari at 13, No. 18-1584 (aspects of Fourth Circuit’s decision, other than the Mineral Leasing Act

issue, “can be resolved by the Forest Service on remand”). If so, the pipeline may be able to proceed as authorized by the Commission.

If the Supreme Court denies *certiorari*, or grants *certiorari* and affirms the Fourth Circuit’s holding, it is the Commission’s understanding that the pipeline may not be able to proceed absent further authorization from the Commission. As the Forest Service explained to the Supreme Court, “[t]he FERC-approved route crosses underneath the Appalachian Trail within a national forest, and no matter what happens on remand, the court of appeals’ decision categorically bars the Forest Service from granting a pipeline right-of-way through federal lands in national forests traversed by the Trail.” Pet. Reply Br. at 8, No. 18-1584. Any change to the pipeline route previously authorized by the Commission would require Commission approval, including, potentially, additional environmental review.

3. “Assuming that the Petitions Are Unripe, Whether the Appropriate Remedy Is to Dismiss the Petitions or to Hold Them in Abeyance”

If the Court determines, on prudential grounds or otherwise, that the case should not be reviewed at this time, abeyance, rather than dismissal, is appropriate, because the FERC certificate remains valid despite ongoing litigation in *Cowpasture*.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

Lona T. Perry
Deputy Solicitor

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426
Fax: (202) 273-0901
Tel.: (202) 502-8464
Email Susanna.Chu@ferc.gov

September 20, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) and this Court's September 13, 2019 order providing that supplemental briefs not exceed 1,800 words, because this brief contains 1,447 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.

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
Tel: (202) 502-6537
Fax: (202) 273-0901

September 20, 2019

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 20th day of September, 2019, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system. The following counsel has been served by U.S. mail:

Michael-John Hirrel
Law Office of Michael J. Hirrel
1300 Army Navy Drive #1024
Arlington, VA 22202-2020

/s/ Susanna Y. Chu
Susanna Y. Chu
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Telephone: (202) 502-8464
Fax: (202) 273-0901
Email: susanna.chu@ferc.gov