UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

In the matter of:	)	
Atlantic Coast Pipeline, LLC Docket Nos. CP15-554-000 PF15-6-000	)	
	)	September 4, 2018
Dominion Transmission, Inc. Docket Nos. CP15-555-000 PF15-5-000	)	
Atlantic Coast Pipeline, LLC and Piedmont Natural Gas Company Docket No. CP15-556-000	)	

MOTION TO RESCIND AND PLACE IN ABEYANCE

THE CERTIFICATE OF CONVENIENCE AND NECESSITY

AND RESCIND THE FEIS FOR THE ATLANTIC COAST PIPELINE

PURSUANT to FERC Rule 212 at 18 C.F.R. § 385.212, the National Environmental Policy Act ("NEPA") at 42 U.S.C. § 4332, and 40 C.F.R. § 1502.9, Friends of Nelson and Wild Virginia hereby submit a motion to the Commission rescind and place in abeyance the Certificate of Convenience and Necessity for the Atlantic Coast Pipeline issued by the Commission staff on October 13, 2017, to rescind the Final Environmental Impact Statement ("FEIS") for the Atlantic Coast Pipeline ("ACP") issued on July 21, 2017 in the above captioned dockets, to and to initiate a new DEIS/FEIS NEPA process in this matter.

MOTION

Pursuant to NEPA Section 102, 42 U.S.C. § 4332, and its implementing rules, specifically 40 C.F.R. § 1502.9, Friends of Nelson and Wild Virginia move that the Commission rescind and place in abeyance the Certificate of Convenience and Necessity in this matter in accordance with the requirements of the Endangered Species Act, 16 U.S.C. § 1531 et seq. and National Environmental Policy Act, 42 U.S.C. § 4321 et seq. and in violation of FERC conditions placed upon the issuance of the Certificate of Convenience and Necessity. This is necessary because 1) the DEIS published on December 30, 2016 is deemed "so inadequate as to preclude meaningful analysis," *id.*, § 1502.9(a), as demonstrated by the copious amount of new and crucial information that has been submitted to FERC and emerged after the release of the DEIS, 2) the subsequent vacating of the United States Fish and Wildlife takings permit upon which the FEIS is based on August 6, 2018 and 3) the necessary rerouting of the ACP which will require a full NEPA analysis in lieu of the vacating of the right of way permit by the National Park Service on August 6, 2018.

Therefore the Certificate of Convenience and Necessity issued on October 13, 2017 should be rescinded and placed in abeyance until 1) a new route has been determined, 2) a revised DEIS is issued that fully addresses and provides the public an opportunity to comment on the significant new information that has

been submitted to FERC since the release of the original DEIS, 3) a Final Environmental Impact Statement (FEIS) has been issued, and 4) the project and its National Environmental Policy Act (NEPA) analysis is in full compliance with the Endangered Species Act (ESA) as required by NEPA.

SUPPORTING FACTS AND LAW

1. Friends of Nelson is a not-for-profit membership corporation under the laws of Virginia organized to protect the property rights, property values, rural heritage and the environment for all the citizens of Nelson County, Virginia. Wild Virginia is a non-profit organization, incorporated in the Commonwealth of Virginia, with the mission of protecting and conserving the wild and natural values of Virginia's Natural Forests. Friends of Nelson and Wild Virginia are intervenors in this proceeding pursuant to Commission Notice Granting Late Interventions, November 8, 2016. As intervenors, Friends of Nelson and Wild Virginia have the ability to make motions to the Commission pursuant to Commission Rule 212, 18 C.F.R. § 385.212. The interests of Friends of Nelson and Wild Virginia and its members will be significantly affected by the proposed ACP.

2. On September 18, 2015, the Atlantic Coast Pipeline, LLC filed an application under section 7(c) of the Natural Gas Act, requesting authorization to construct, own, and operate the ACP, including three compressor stations and at

least 564 miles of pipeline across West Virginia, Virginia, and North Carolina. The ACP is a joint venture of Dominion Resources, Inc., Duke Energy Corporation, Piedmont Natural Gas Company, Inc. (now a wholly owned subsidiary of Duke Energy), and AGL Resources, Inc. (collectively, "Dominion").

3. On October 2, 2015, the Commission filed its Notice of Application, providing additional details about the application and outlining the review process, and opportunities for public comment.

Notice of the amendment to Atlantic's application in Docket No. CP15-554-001 was published in the *Federal Register* on March 31, 2016 (81 Fed. Reg. 18,623). In each docket, a number of timely motions to intervene including that of Friends of Nelson and Wild Virginia were filed.[1]

4. The Commission has authority under NGA Section 7 (Interstate Natural Gas Pipelines and Storage Facilities) to issue a Certificate of Public Convenience and Necessity ("certificate") to construct a natural gas pipeline. As described in the Commission guidance manuals, environmental documents are required to describe the purpose and commercial need for the project, the transportation rate

[1] The Commission's regulations provide that interventions are timely if filed during the comment period on the notice of the application or if filed on environmental grounds during the comment period of the draft EIS. 18 C.F.R. §§ 157.10, 380.10(a), 385.214(c) (2017). Thus, if interventions are filed outside of these periods, the intervention is late. *See Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080, at P 40 n.13 (2016).

to be charged to customers, proposed project facilities, and how the company will comply with all applicable regulatory requirements.[2] The applicants must evaluate project alternatives, identify a preferred route, and complete a thorough environmental analysis – including consultation with appropriate regulatory agencies, data reviews, and field surveys. The Commission is required to analyze the information provided by Dominion to determine if the project serves the public convenience and necessity. The purpose of the Commission's review is to reduce overbuilding of pipeline capacity in order to protect consumers and property owners.

5. As part of its review process, the Commission prepares environmental documents, and in this case, a DEIS was prepared and released on December 30, 2016. As part of the release, the Commission provided a public comment period until April 6, 2017. Subsequently, the Commission scheduled "public comment sessions" in ten locations along the ACP route to allow for public comments.

6. Between January 11, 2017 and February 24, Dominion submitted 74 documents to the FERC docket, each of which included critical environmental information that clearly supplemented the information in the original application,

[2] Both the FERC Guidance Manual for Environmental Report Preparation (August 2002) and the Draft Guidance Manual for Environmental Report Preparation (December 2015) provide the minimum analysis required by the agency in preparing environmental documents. Neither guidance manual discusses the requirement to supplement environmental documents so the Commission must rely on NEPA guidance.

the information supplied to FERC staff for their review, and the information provided to the public and other agencies in the DEIS for review under NEPA.

7. A motion was filed by Friends of Nelson, Wild Virginia and Heartwood to Rescind and Revise the Final Environmental Impact Statement on March 8, 2017. (Appendix #1) This motion documents the range of specific and detailed environmental information submitted by Atlantic up until that date, in an untimely manner and which was therefore unavailable for review by the public and other agencies during the DEIS comment period.

8. Since that time, Dominion has submitted thousands of pages of additional information and reports that include vital information required for full compliance with NEPA and not available for public review and comment in the creation of the FEIS (Appendix #2). Because this voluminous, newly-submitted information is critical to assessing and disclosing to the public the impacts of the proposed ACP, the Commission is required to revise and reissue the DEIS. Rules promulgated by the Council on Environmental Quality pursuant to NEPA provide mandatory guidance to all Federal agencies on the preparation of environmental statements. Pursuant to those rules, when an agency publishes a draft EIS, it "must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act." 40 C.F.R. § 1502.9(a). "If a draft statement is so inadequate as to preclude meaningful analysis, the agency *shall* prepare and circulate a revised draft of the appropriate portion." *Id*.

(emphasis added). “The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.” *Id*. The volume and importance of the environmental information that has been submitted to FERC after the release of the DEIS demonstrates that the DEIS as released lacked adequate information for FERC, other agencies, and the public to meaningfully analyze the impacts of the project. As such, FERC is required to rescind the DEIS, revise it, and release the revised DEIS for public comment.

9. 40 C.F.R. 1502.9(c)(1)(ii) specifically addresses the obligation of agencies to supplement environmental statements, stating:

> (c) Agencies:
> (1) ***Shall*** prepare supplements to either draft or final environmental impact statements if:
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
> (ii) ***There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts***. (emphasis added).

CEQ guidance on this matter is that:

> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section1502.9(c).

The Motion noted that it is squarely within the requirements of this rule to require

a new DEIS and to require a new comment period for public review. The information submitted to FERC for these dockets is significant and directly relevant to environmental concerns and impacts that must be addressed in the DEIS and, after review by the agency and public review, the information in the new filings is likely to have a bearing on the Commission's action.

NEPA challenges are reviewed under the Administrative Procedure Act. *See The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). In reviewing an agency's decision not to prepare a supplemental EA or EIS, courts evaluate whether the agency's decision was arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010) (citing *Blue Mts. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1211 (9th Cir. 1998)); *see also Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998) *overruled on other grounds by McNair*, 537 F.3d at 987.

This standard requires courts to "determine whether the agency has taken a 'hard look' at the consequences of its actions, 'based [its decision] on a consideration of the relevant factors and provided a convincing statement of reasons to explain why a projects impacts are insignificant.'" *Babbitt,* 241 F.3d at 730 (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

"In the context of reviewing a decision not to supplement an [EA or an] EIS, courts should not automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance – or lack of significance – of the new information." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989).

10. Case law on the agency's requirement to revise an environmental document is clear. An EIS that fails to provide the public a meaningful opportunity to review and understand the agency's proposal, methodology, and analysis of potential environmental impacts violates NEPA. See e.g., California ex rel. Lockyer v. U.S. Forest Service, 465 F. Supp. 2d 942, 948-50 (N.D. Cal. 2006); see also Idaho ex rel. Kempthorne v. U.S. Forest Service, 142 F.Supp.2d 1248, 1261 (D. Idaho 2001) ("NEPA requires full disclosure of all relevant information before there is meaningful public debate and oversight.").

New information causes environmental documents to be supplemented, even after the environmental document has been completed and the agency action taken. In its review of one action, the Court found there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) (new study of use of park lands). Of course, not

all new information is significant or relevant; but the Commission is required to take a “hard look” at the new information and, after review, incorporate it into environmental documents. As discussed in Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989),

> The parties are in essential agreement concerning the standard that governs an agency's decision whether to prepare a supplemental EIS. They agree that an agency should apply a "rule of reason," and the cases they cite in support of this standard explicate this rule in the same basic terms. These cases make clear that an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made. On the other hand, and as the petitioners concede, NEPA does require that agencies take a "hard look" at the environmental effects of their planned action, even after a proposal has received initial approval.

The Court endorsed the “hard look” at new information even after a proposal had received its initial approval, and permit, from the agency. “When new information is presented, the agency is obligated to consider and evaluate it and to make a reasoned decision as to whether it shows that any proposed action will affect the environment in a significant manner not already considered.” Ibid., 490 U.S. at 374; also endorsed by the Court in Arkansas Wildlife v. U.S. Army Corps, 431 F.3d 1096 (Fed. 8th Cir., 2005).

Since the Motion was filed by Friends of Nelson and Wild Virginia there have been hundreds of submissions to the docket from Atlantic, State and Federal agencies, individuals and organizations that contain new and relevant

information to the NEPA process for the project.

11. Commission staff issued the final EIS on July 21, 2017. On October 13, 2017, the Commission staff issued an Certificate of Convenience and Necessity

12. On August 6, 2018, the United States Court of Appeals for the Fourth Circuit vacated the United States Fish and Wildlife (FWS) Incidental Take Statement (ITS) and ruled that

> FWS has failed to create proper habitat surrogates, failed to explain why numeric limits are not practical, and failed to create enforceable take limits for the Clubshell, the Rusty Patched Bumble Bee, the Madison Cave Isopod, the Indiana Bat, and the Northern Long-Eared Bat. Because FWS's vague and unenforceable take limits are arbitrary and capricious, we vacated the ITS pending the issuance of this opinion. Sierra Club v. United States Dep't of the Interior, 722 F. App'x 321, 322 (4th Cir. 2018).

The Certificate of Convenience and Necessity issued on this matter contains Condition 54. "Atlantic and DETI shall not begin construction of the proposed facilities until: a. all outstanding biological surveys are completed; (and) b. the FERC staff complete any necessary section 7 consultation with the FWS…" (Cert, p. 146; October 13, 2017)

As part of consultation, FWS must provide "a statement concerning incidental take, if such take is reasonably certain to occur," which is included with the biological opinion. 50 CFR § 402.14(g)(7); *see also§* 402.14(i). FWS confirmed

that take is reasonably certain to occur, but the incidental take statement attached to the project's biological opinion is now invalid. Without a valid incidental take statement, consultation is incomplete and must be reopened.

13. On May 15, 2018, the United States Fourth Circuit Court of Appeals vacated the Fish and Wildlife Service's (FWS) Incidental Take Statement for the Atlantic Coast Pipeline (ACP). Consequently is clear that FERC and FWS must reopen consultation for the ACP because of the absence of a valid incidental take statement. Because consultation must be reopened FWS must: (1) require completion of survey work it has already identified as necessary to an informed decision, (2) update its analysis to account for newly available information including new survey data, (3) revise its erroneous no jeopardy determination for the Rusty Patched Bumble Bee and Clubshell, and (4) complete consultation for the newly-listed Yellow Lance mussel.

Reinitiation of formal consultation is required and shall be requested by ... the Service:

> (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
> (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
> (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
> (d) If a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

At the close of formal consultation, FERC and Atlantic failed to produce population survey data FWS had recognized as necessary to an informed biological opinion. The Service nonetheless issued its biological opinion without that data available and authorized take without information needed to evaluate its scope. With consultation now reopened, the Service must now update its analysis with all newly available data and to advise FERC and Atlantic that such data must be submitted before the Service can authorize take of these affected species.

14. On August 23, 2018 it was reported that

> State scientists have found 20 more examples of (the rusty-patched) bumblebee near the path of the Atlantic Coast Pipeline in the Allegheny Highlands… federal regulation "directs that formal consultation be reinitiated if new information shows that there could be an effect on species 'in a manner or to an extent not previously considered.' ("State scientists confirm more sightings of endangered bumblebee along pipeline route," by Michael Martz, Richmond Times-Dispatch, Aug 23, 2018, https://www.roanoke.com/news/virginia/state-scientists-confirm-more-sightings-of-endangered-bumblebeealong-pipeline/article_dd447d5f-b897-5622-932f-df6c960bc7cb.html) (Appendix #3)

15. On August 6, 2018, the United States Court of Appeals for the Fourth Circuit revisited the vacated right-of-way permit that NPS issued to ACP and ruled that

> NPS's decision to grant ACP a right-of-way was arbitrary and capricious for failing to explain the pipeline's consistency with the purposes of the Blue Ridge Parkway and the National Park System.

As of this date, NPS has not been able to provide such an explanation.

16. Friends of Nelson and Wild Virginia believe that the vacating of the NPS permit will require a rerouting of the ACP that does not require a right-of-way permit from NPS. In the absence of a valid and legally unchallengeable explanation, ACP has no option except to suggest a possible rerouting of the pipeline that does not cross the Blue Ridge Parkway or intersect lands under the jurisdiction of the National Park System.

17. Timely requests for rehearing of the Certificate Order were filed by Friends of Nelson and Wild Virginia (ORDER ON REHEARING, Issued August 10, 2018, pg. 1) and the request for rehearing filed by Friends of Nelson and Wild Virginia was dismissed or denied. (ibid. pg 150) (Appendix #4)

18. Friends of Nelson and Wild Virginia believe that the mandate for a full analysis of the "public convenience and necessity" for pipelines must include all new and untimely-filed information available **at this time**. This must include, but not be limited to, 1) all new, late-filed and supplemental environmental information from Dominion available at the initiation of a new DEIS process, 2) all new and supplemental information concerning rare, threatened and endangered species, including required population inventories and Incidental Take Surveys for all required species, and 3) information on any required rerouting of the ACP in response to the vacating of NPS the right-of-way permit. We believe that all of

this information is relevant and significant.

19. Furthermore, Dominion is not in compliance with Condition 54 of the Certificate of Convenience and Necessity. Condition 54 states that:

> Atlantic and DETI **shall not begin construction of the proposed facilities until:**
>
> a. all outstanding biological surveys are completed;
>
> b. the FERC staff complete any necessary section 7 consultation with the FWS; and
>
> c. Atlantic and DETI have received written notification from the Director of OEP that construction and/or use of mitigation (including implementation of conservation measures) may begin. *(Section 4.7.1)* (Cert, pg. 146.)

The burden is on Dominion to fully comply with the conditions placed upon it by the Commission and the burden is likewise on the Commission to fully investigate the environmental risks and costs associated with the ACP, including all new and supplemental information.

RELIEF REQUESTED

Friends of Nelson and Wild Virginia respectfully request that the Commission grant their motion and rescind and place in abeyance the Certificate of Convenience and Necessity for the Atlantic Coast Pipeline and Supply Header Project, CP15-554-000, CP15-555-000 et.al. and also rescind the

FEIS upon which the Certificate relies. In this matter, the Commission must take a "hard look" at all new information and review it in the context of the application. This must include all information required by NEPA including full review of new information by USFWS and NEPA compliant ITS for all required species. It must also include information relating to any route changes required by the vacating of the NPS authorization of the right-of-way permit that NPS had issued to ACP. At such time that a new DEIS is completed, the commission shall initiate a new public comment period for the intended completion of a FEIS. Lastly, the Commission should require Dominion to file all additional information that is vital to the NEPA environmental review before proceeding further.

/s/ Ernest Reed

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Ernest Reed, on behalf of
Friends of Nelson
Wild Virginia
971 Rainbow Ridge Road
Faber, VA 22938
434-971-1647
lec@wildvirginia.org