

No. 18-1224 (consolidated with Nos. 18-1280, 18-1308,
18-1309, 18-1310, 18-1311, 18-1312, 18-1313)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ATLANTIC COAST PIPELINE, LLC, *et al.*,
Petitioners,

LORA BAUM, *et al.*,
Petitioner-Intervenors,

v.

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent,

ATLANTIC COAST PIPELINE, LLC, *et al.*,
Respondent-Intervenors.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

**FINAL REPLY BRIEF OF INTERVENORS
LORA BAUM AND VICTOR BAUM**

David Bookbinder
Megan C. Gibson
Niskanen Center
820 First Street, NE, Suite 675
Washington, DC 20002
(202) 810-9260
dbookbinder@niskanencenter.org
mgibson@niskanencenter.org

TABLE OF CONTENTS

Table of Contents.....	i
Table of Authorities.....	ii
Glossary.....	iii
Argument.....	1
Notice About Intervention in Order to Seek Rehearing.....	4
Conclusion.....	4
Certificate of Compliance	
Certificate of Service	

TABLE OF AUTHORITIES

Cases

<i>Market Street Ry. Co. v. R.R. Comm’n</i> , 324 U.S. 548, 559 (1945).....	3
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 335 (1976).....	2
<i>Mullane v. Central Hanover Trust Co.</i> , 339 U.S. 306 (1950).....	2

Statutes

15 USC § 717f(h)	4
------------------------	---

GLOSSARY OF TERMS

ACP

Atlantic Coast Pipeline

DEIS

Draft Environmental Impact Statement

FERC

Federal Energy Regulatory Commission

Argument

FERC argues that Intervenors Lora and Victor Baum (“the Baums”) had adequate notice about the need to intervene in order to seek judicial review because of statements in five documents they received: (1) ACP’s Notice of Application, (2) ACP’s Amended Notice of Application, (3) ACP’s Landowner Rights summary, (4) FERC’s Landowner Brochure, and (5) the Draft Environmental Impact Statement (“DEIS”). This is a superficially impressive list, because FERC does not say that the two Notices of Application each had one such sentence about the need to intervene as a condition of seeking judicial review among 4 pages of single-spaced text;¹ ACP’s Landowner Rights summary was another 4-page, single-spaced document which had a seven-word parenthetical on this issue; FERC’s Landowner Brochure, a 32-page single-spaced document, had a single clause stating that intervenors would be able “. . . to be heard by the courts if you choose to appeal the Commission’s final ruling”; and this warranted one lone sentence in the 742-page, single-spaced DEIS. DEIS at 4; JA1141.

The Baums – highly-educated people, who submitted five separate comments to FERC about the ACP (Declaration of Victor Baum, Addendum to Baum Opening Brief at ADD 084, 088, ¶¶ 13, 28, 29) – have submitted declarations that these

¹ FERC cites two separate statements in the Notices of Application (FERC Br. 87), but the first says only that “any person wishing to obtain legal status by becoming a party to the proceedings for this project” should move to intervene, without mentioning intervention as a condition to seeking judicial review.

statements did not adequately convey the need to intervene in order to seek rehearing or judicial review of FERC's Certificate Decision. These sentences (or sentence fragments), buried deeply in long, complex documents do not satisfy due process, which requires that, "the notice must be of such nature as reasonably to convey the required information." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). FERC's "Where's Waldo?" approach, wherein it has reduced information *about the single most important step landowners can take to protect their rights* to the barest minimum possible, does not satisfy this standard. As noted in Intervenor's Opening Brief (pp. 4-5), FERC's efforts fail every aspect of the test laid out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) as to whether government procedure satisfies due process:

(1) 'the private interest that will be affected by the official action;' (2) 'the risk of an erroneous deprivation of such interest through the procedures used;' (3) 'the probable value, if any, of additional or substitute procedural safeguards;' and (4) 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'

FERC did not respond to this, instead saying that notice was adequate because "numerous individuals" did intervene. FERC Br. 91. But all FERC cites for this is a statement in the Certificate Order saying that, "a number of timely and late motions to intervene were filed" (Certificate Order ¶ 19, JA4901). Intervenor will therefore supply some relevant details; attached as Exhibit 1 is the Declaration of Ernest Reed, former President of two groups who led organizing efforts among landowners. As he explains (*id.* ¶ 9; emphasis added):

Between September 23 and October 15, 2015, I assisted at least 100 people or organizations in filing motions to intervene in FERC Docket #CP15-554-000. *Not one of them understood from anything that they received from FERC or ACP what intervention entailed or what they would lose if they did not do so.*

This effort was necessary “because people found the FERC process incredibly confusing, and they did not understand why they should, or how they could, protect their rights via intervention”, “the mass of paper people received merely served to confuse people”, and “[o]f the hundreds of Virginia residents that I met with, not one had an understanding of the necessity of intervention to protect their rights from documents sent by ACP or FERC.” *Id.* ¶ 8. People did indeed intervene, but only after someone explained to them what ACP and FERC had failed to.

Finally, responding to the facially contradictory instructions on the mechanics of intervention FERC had provided, FERC disingenuously cites *Market Street Ry. Co. v. R.R. Comm’n*, 324 U.S. 548, 559 (1945). But FERC excised the relevant portions from the quoted passage, which actually referred to counsel’s strategic error in not objecting to a document introduced as evidence at trial, and not the government providing contradictory information about the basic mechanics – who must be served, with how many copies, etc. – of intervention.²

² *E.g.*, FERC’s Landowner Brochure “stated that you have to file 14 paper copies with the Commission or file electronically, while the Notice of Application stated that you had to file 7 paper copies with the Commission and serve all of the parties.” Baum Decl. ADD 86, ¶ 19.

Notice About Intervention in Order to Seek Rehearing

The only “notice” as to Commission rehearing (as opposed to judicial review) that FERC cites are (1) the 1-sentence statement in the DEIS, discussed above, and (2) a statement *not* in any material provided to the Baums, but rather one on the Commission’s website providing “instructions on how to intervene.” FERC Br. 89. Thus notice as to needing to intervene in order to seek rehearing *need not be contained in material actually provided to the landowner*, because the material provided informs landowners that, should they decide to intervene, FERC’s website will then explain why they should do so. This is completely backwards: Not, “in order to seek rehearing, you need to intervene”, but rather “If you want to intervene, go to our website for instructions on how to do so, and there we’ll tell you why this is necessary in order to seek rehearing.”

Conclusion

For the reasons stated herein, and in Intervenor’s Opening Brief, the Court should vacate the Certificate insofar as it authorizes ACP to take the Baums’ property under 15 U.S.C. 717f(h).

Respectfully submitted,

/s/ David Bookbinder

David Bookbinder

D.C. Bar No. 455525

Megan Gibson

D.C. Bar No. 1021191

Niskanen Center

820 First Street, NE

Washington, DC 20002

(202) 899-1172

mgibson@niskanencenter.org

dbookbinder@niskanencenter.org

*Attorneys for Intervenors Victor Baum
and Lora Baum*

Dated: July 24, 2019

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit set by this Court's briefing order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 999 words.

2. This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Respectfully submitted,

/s/ David Bookbinder

David Bookbinder

EXHIBIT 1

¹ See <http://friendsofnelson.com/about-us/> (Last visited July 9, 2019).

6. The Atlantic Coast Pipeline (“ACP”) filed its Certificate Application with the Federal Energy Regulatory Commission (“FERC”) on September 18, 2015.

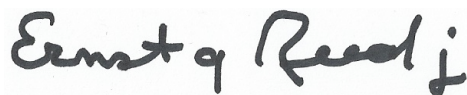
7. Citizen and environmental groups, including Friends of Nelson and Wild Virginia, immediately began working to educate affected landowners and citizens about becoming an intervenor in the FERC process, and to help them intervene. *See, e.g.* Wild Virginia’s *Becoming an Intervenor in FERC* Worksheet, attached as Exhibit A.

8. We did this because people found the FERC process incredibly confusing, and they did not understand why they should, or how they could, protect their rights via intervention. In fact, the mass of paper people received merely served to confuse people about what they could do to protect their rights. Of the hundreds of Virginia residents that I met with, not one had an understanding of the necessity of intervention to protect their rights from documents sent by ACP or FERC.

9. Between September 23 and October 15, 2015, I assisted at least 100 people or organizations in filing motions to intervene in FERC Docket #CP15-554-000. Not one of them understood from anything that they received from FERC or ACP what intervention entailed or what they would lose if they did not do so.

I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. § 1746).

Executed on July 10, 2019
(Date)



ERNEST REED

EXHIBIT A



September 25, 2015

Becoming an Intervenor in FERC

Atlantic Coast Pipeline Docket #: CP15-554

On September 18, 2015, Dominion Resources, Inc. filed their Certificate Application for the Atlantic Coast Pipeline (ACP) with FERC, the Federal Energy Regulatory Commission. Dominion began the pre-filing process on November 13, 2014, during which time Wild Virginia teamed up with environmental and citizen groups across West Virginia, Virginia, and North Carolina to spread awareness about the detrimental consequences of the proposed 550-mile pipeline. Now that Dominion has filed the Certificate Application, individuals or groups can file with FERC as intervenors. Status as an intervenor allows individuals to submit comments and documents “on the record” to the agency. As an intervenor, you will also be allowed to appear at ACP-related hearings and have legal standing to state your case in front of a court. Whether you are a land owner along the proposed route, or a concerned citizen who loves hiking in the National Forests, we all have a stake in ensuring the pipeline does not get built.

We are calling on you to consider becoming an intervenor on the Atlantic Coast Pipeline, Docket #CP15-554.

FERC moves quickly, so **registration must be completed as soon as possible**. As an intervenor, you will receive the applicant’s filings and all other public Commission documents related to the case and materials filed by other intervening parties. But as an intervenor, you also have responsibilities, including that you are required to submit whatever comments or documents you submit to FERC to the “service list,” the list of all the other parties who have signed up at the time of your submission.

The following information outlines the steps to register with FERC and submit your opposition to the Atlantic Coast Pipeline project.

How to Register:

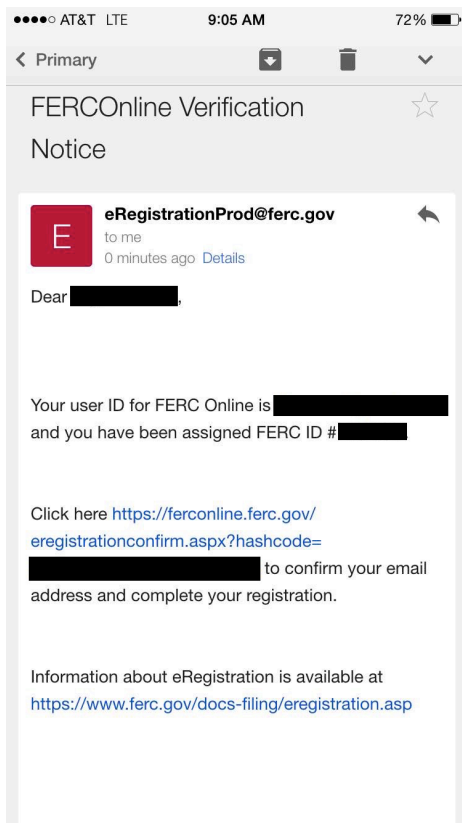
- I. Enter <http://www.ferc.gov/docs-filing/efiling.asp> into your browser. The page should look like this:



2. Click on the
Fill out the following two pages.

button. This should bring you to registration.

3. After have registered with FERC, you should get an email that looks like this:



Once you have gotten this email, you are now able to sign up for FERC's eFiling (electronic document submission), eSubscription (receiving all information related to your relevant docket), eComment (comment submission), and to become an intervenor.

4. If you return to the FERC Online Home Page (<https://ferconline.ferc.gov/FERCOOnline.aspx>), you should be able to log-in with your email and password. You will then come to this screen.

 [E-mail this page](#)

FERC Online Home Page

Welcome to FERC Online! FERC Online is the single entry point for all of FERC's electronic access applications. If you have not previously eRegistered with FERC Online, please use the *New Registration* link on the left menu to do so. Once you are registered, you will be able to login to FERC Online to eSubscribe and eFile.

FERC Online Applications

[Company Registration](#) - Submit Company Registration Requests

[eFiling](#) - Submit documents electronically

[eSubscription](#) - Subscribe to electronically receive all information related to a docket without intervening

[eComment](#) - Submit an eComment electronically

[Query Mailing List/Recipients by State](#) - View and download lists of postal mail addresses for contacts associated with FERC docketed proceedings. Also, view and download a mailing list of all contacts who reside in a specific state

[Query Service List](#) - View and download lists of contacts receiving service in FERC docketed proceedings

[My Service List](#) - View and download lists of dockets associated with the current logged in user

[eLibrary](#) - Search and retrieve electronic documents related to proceedings

[eTariff Viewer](#) - Browse and Search Tariffs

5. You are now registered with FERC and able to take further action to halt Dominion in the FERC process.


6. From here, you will access the Atlantic Coast Pipeline project by entering the docket number CP15-554 into the various sections listed. If you wish to register for the eSubscription, for example, you will go to "eSubscription" and click, "Add New Subscription." If you are following the ACP project, you will receive email notifications whenever new documents or comments are submitted. You will also want to file as an intervenor, instructions as follows:

Filing as an Intervenor:

1. Return to the FERC Online Home Page (<https://ferconline.ferc.gov/FERCOOnline.aspx>), and click on "eFiling."
2. Choose the following pathway: "General" --> "Intervention" --> "(doc-less) Motion to Intervene." Click "Next."

Filing Type

How is your filing to be directed?	What kind of filing are you making?	Filing Type (Fee)
General	(Fee) Petition for Declaratory Order (not under FPA Part 1)	(doc-less) Motion to Intervene
Annual Charges	(Fee) Request for Interpretation by Gen. Counsel (not under FPA)	(doc-less) Out-of-Time Motion to Intervene
Hearing/ALJ	Audit Material(to Office of Enforcement; not posted to eLibrary)	Motion to Intervene Out-of-Time
Gas	Comment (on Filing, Environ. Report, or Tech Conf)	
Electric	Comment on Rulemaking (RM, PL, AD dockets)	
Oil	Intervention	
Hydro: Washington DC	Motion (other than Intervention)	
Hydro: Regional Office	Petition for Declaratory Order under FPA Part 1	
	Protest	
	Request for Interpretation by Gen. Counsel under FPA Part 1	
	Request for Rehearing	
	Request to Update Service, Mailing, or Corporate Officials Lists	
	Response to Complaint	

3. Enter docket number CP15-554 on the next screen. This is the docket number for the Atlantic Coast Pipeline. Hit "Search." Click the blue  button to add the docket number. Click "Next" to proceed.
4. You will now see the "Document-less Intervention Description" page. Enter the reason you wish to be an intervenor in the box. You may give any reason you wish which may include, you are a member of Wild Virginia, you are an affected landowner, you are concerned about impacts to the George Washington National Forest, you are a concerned citizen, you are a Dominion customer/stockholder--or whatever you feel applies best to you. Then, click "Next."
5. On the "Specify Filing Parties" page click "on behalf of other party(ies) if you are filing on behalf of a group, or "as an individual" if you are filing for yourself or another person. If you are filing as an individual, enter your e-mail and click, "Add as signer." Click "Next."
6. You will now see the Submission Description page. You can keep the pre-formatted text, reading "(doc-less) Motion to Intervene of Your Name Here under CP15-554-000. Click, "Next."
7. On the "Summary" page, click "Submit." You will receive an email "Receipt of Filing" first, followed by an "Acceptance for Filing."

You have successfully submitted the filing and will receive an eMail confirmation shortly.

[Submission Status](#)

[Printable Submission Confirmation Receipt](#)

[Back to FERCOOnline](#)

Informing the Service list:

- I. The next step is to contact all parties who are on the Service List, which is required of all intervenors. The Service List includes the e-mails of the filer(s) and all parties who have thus far signed up as intervenors. Anytime you file any comments or documents, you must download the latest list and email copies to every party on the list.
2. Return to the FERC site and click "Query Service List"
3. You may have to Log In if you have not already, entering your FERC ID and password and click "Log In"
4. Enter the docket # CP15-554 and click "search"
5. Click on the blue cross under "select"
6. "type of address" should read "email"; "format" should read "delimited with semicolon"
7. Click "download list" and save to your computer. It will read as a .txt document.
8. Cut and paste this list to the address of your e-mail and click "enter" and it should populate your e-mail address field with all of the e-mail addresses on the service list
9. Enter "Docket #CP15-554 – Motion to Intervene" into the subject heading
10. Compose the following message: "Please be advised that (your name) has filed a Motion to Intervene with FERC on Docket #CP15-554" and close with your name and address as you have registered with FERC.
- II. "Send"

You are done registering as an Intervenor!

When you are done, please call Wild Virginia (434-971-1553) to let us know or send us an email (info@wildvirginia.org) so that we can track Wild Virginia friends and members who have registered as intervenors.

Note: If you have missed the deadline to intervene, all is not lost as you still can still file a "Motion to Intervene Out of Time." You must file a request online and justify why you should be considered. Wild Virginia can assist you with this filing.

For further questions, comments, or assistance, contact:

Wild Virginia

Misty Boos, Director

info@wildvirginia.org

(434) 971-1553

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2019, I have served the foregoing document upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Respectfully submitted,

/s/ David Bookbinder

David Bookbinder