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August 13, 2019

Via ECF

Mark J. Langer
Clerk of the Court
United States Court of Appeals for the District
of Columbia Circuit
E. Barrett Prettyman United States Courthouse
333 Constitution Avenue, N.W.
Washington, DC 20001

Re: *Atlantic Coast Pipeline, LLC et al. v. FERC*, Nos. 18-1224 et al.
Conservation Petitioners' Response to Rule 28(j) Supplemental Authority
Oral argument scheduled for October 16, 2019

Dear Mr. Langer:

Conservation Petitioners submit this response to the Rule 28(j) letter filed on August 9, 2019, by the Federal Energy Regulatory Commission ("FERC"). The Court's opinion in *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. Aug. 2, 2019), where relevant, only reinforces the arbitrariness of FERC's approval of the Atlantic Coast Pipeline.

A key question here is whether FERC reasonably determined market need for the pipeline relying solely on precedent agreements with affiliated monopoly utility shippers. Conservation Br. 11-17; Conservation Reply Br. 2-5. The precedent agreements in *Allegheny* did not involve affiliated utilities. See *Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125, at ¶ 11 (2017). *Allegheny* merely confirms the Court's previously articulated view that precedent agreements can be sufficient to establish need in cases that do *not* involve affiliated utility shippers. Further, in finding need for the Atlantic Sunrise Project, FERC cited evidence beyond precedent agreements. Slip op. at 10. Here, FERC relied exclusively on precedent agreements and declined to consider additional evidence. See Certificate Order ¶¶ 22-23, 55, 63 [JA4902-03, 4916-17, 4920]; Reh'g Order ¶ 52 [JA5592].

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Allegheny's findings about FERC's evaluation of Atlantic Sunrise alternatives stand in stark contrast to FERC's assessment of alternatives here. Far from "openly grapp[ing] with the factors favoring the [alternative route] and reasonably explain[ing] why the proposed route was nonetheless superior," slip op. at 9-10, here FERC failed to analyze non-national forest routes—as the Fourth Circuit has already held. *See* Conservation Reply Br. 10-11.

Allegheny also squarely rejects FERC's contention that in its environmental review FERC need not consider downstream greenhouse gas emissions as indirect effects of the project. Slip op. at 7 ("despite what the Commission argues, the downstream greenhouse-gas emissions are just such an indirect effect" requiring consideration). The Court upheld FERC's mere estimation of the amount of such emissions in *Allegheny* because it found that petitioners had failed to identify what more FERC should have done. *Id.* at 7-8. Here, Conservation Petitioners *have* identified what FERC should have done beyond quantification: discuss the incremental effects and significance of downstream greenhouse emissions as NEPA requires. Conservation Br. 36-38.

Respectfully submitted,

/s/ Mark Sabath

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 28(j) because the body of the letter contains 350 words.

/s/ Mark Sabath

Mark Sabath

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Dated: August 13, 2019

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2019, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit through this Court's CM/ECF system, which will serve a copy on all registered users.

I served the following counsel via U.S. Mail:

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/s/ Mark Sabath

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