BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. E-2, SUB 1052
DOCKET NO. E-7, SUB 1062

In the Matter of: Advance Notice by Duke Energy Carolinas, LLC and Duke Energy Progress, LLC of Intent to File Proposed Precedent Agreements with Atlantic Coast Pipeline, LLC, Request to Enter into the Proposed Agreements, and Request for Waiver of Code of Conduct	))))))))))	MOTION FOR RECONSIDERATION

INTRODUCTION

On October 29, 2014, the Commission issued an *Order Accepting Affiliate Agreements, Allowing Payment Thereunder and Granting Limited Waiver of Code of Conduct*, authorizing Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC's ("DEP") (collectively, "Utilities") to, among other things, enter into precedent agreements for firm natural gas transportation services between DEC and DEP and Atlantic Coast Pipeline, LLC. The precedent agreements require Atlantic and its customers to execute firm transportation service agreements within 30 days after Atlantic receives and accepts authorizations from the Federal Energy Regulatory Commission ("FERC"). The Commission's order reported that DEC and DEP stated that they intended to file the precedent agreements with the FERC pursuant to the Natural Gas Act and the FERC's regulations.

On June 21, 2017, the Utilities filed a Request for Expedited Acceptance of Affiliate Agreement Amendment, seeking expedited acceptance and approval of amendments to the then-existing precedent agreements (the "Amendments"). According to the Utilities' filing, the precedent agreements included a right of termination by each party in the event that the FERC did not issue a Certificate of Public Convenience and Necessity ("CPCN") for the Pipeline by June 30, 2017. The Utilities' filing stated that they were requesting acceptance of the Amendments "in order to avoid a change in the parties' rights under the existing Precedent Agreements [redacted]."

In an order entered June 28, 2017, the Commission accepted the Amendments for filing and authorized DEC and DEP to operate according to their terms. The Commission's order included a provision that "the authority granted by this Order neither constitutes approval of the amount of any compensation that may be paid under the Precedent Agreements, as amended, nor prejudices the right of any party to take issue with any provision of the Precedent Agreements, as amended, in a future proceeding."[1]

The Sierra Club urges the Commission to reconsider its approval of the Amendments to the precedent agreements. First, in seeking expedited approval of the Amendments, the Utilities failed to comply with regulatory conditions imposed in connection with the merger of Duke Energy and Piedmont Natural Gas. Additionally, and more fundamentally, circumstances have changed since 2014, when the Commission first approved the precedent agreements.

[1] *Order Accepting Amendment to Affiliate Agreements, Allowing Payment Thereunder and Granting Limited Waiver of Code of Conduct*, Docket Nos. E-2, Sub 1052 and E-7, Sub 1062 (June 28, 2017) at 2.

LEGAL STANDARD

The Commission has the authority, upon its own motion or upon motion by any party, "to reconsider its previously issued order, upon proper notice and hearing . . . ."[2] On reconsideration, the Commission may rescind, alter, amend, or refuse to make any change to its earlier order.[3] As the North Carolina Supreme Court has explained,

> We think it clear that G.S. 62-80 is broad enough to permit the Commission to modify and amend its order, even substantially, for the reason that, upon further consideration of the record before it, the Commission comes to the opinion that its order was due to the Commission's misapprehension of the facts, or disregard of facts, shown by the evidence received at the original hearing.

Id. at 584, 232 S.E.2d at 182. *See also State ex rel. Utilities Comm'n v. N. C. Gas Serv.*, 128 N.C. App. 288, 293-94, 494 S.E.2d 621, 625 (1998) ("[T]he Commission may not arbitrarily or capriciously rescind its order approving a contract between utilities. The rescission must be made only due to a change of circumstances requiring it for the public interest. An application for rehearing pursuant to section 62-80 "is addressed to and rests in the discretion of the [Commission].").

ARGUMENT

1. In seeking expedited approval of the Amendments, the Utilities have failed to comply with regulatory conditions imposed in connection with the merger of Duke Energy and Piedmont Natural Gas.

The Utilities filed the original precedent agreements and the Amendments thereto with the Commission pursuant to N.C. Gen. Stat. § 62-153(b), which requires utilities to obtain Commission approval of contracts with their affiliates. In addition, certain

[2] *Utilities Comm. v. Edmisten*, 291 N.C. 575, 582, 232 S.E.2d 177, 181 (1977) (citing N.C. Gen. Stat. § 62-80).
[3] *Id.*

regulatory conditions established in connection with the merger of Duke Energy and Piedmont Natural Gas are implicated by the Utilities' request for approval of the Amendments. Those regulatory conditions were intended to mitigate the risk of "self-dealing or anti-competitive conduct by and among DEC, DEP and Piedmont after the merger."[4] In seeking expedited approval of the Amendments, the Utilities have failed to comply with these regulatory conditions.

- Regulatory Condition 3.1(a) prohibits DEC, DEP and Piedmont from engaging in any transactions with affiliates "without first filing the proposed contracts or agreements memorializing such transactions pursuant to G.S. 62-153 and taking such actions and obtaining from the Commission such determinations and authorizations as may be required under North Carolina law."
- Regulatory Condition 3.1(c) requires the Utilities to file advance notice and a copy of "an amendment to an existing Affiliate Contract with the Commission at least 30 days prior to a filing with the FERC." If an objection is filed, the proposed filing shall not be executed and filed with the FERC until the Commission issues an order resolving the objection. 3.1(c) (ii).
- The provisions of Regulatory Condition 13.2 apply to an advance notice filed pursuant to Regulatory Condition 3.1. These provisions—setting forth the procedures to be followed in connection with advance notices—clearly

[4] *Order Approving Merger Subject to Regulatory Conditions and Code of Conduct*, Docket Nos. E-2, Sub 1095, E-7, Sub 1100 and G-9, Sub 682 (Sept. 29, 2016) at 57.

contemplate the potential for interested parties to object to the activity to be undertaken, and underscore the importance of notice to those parties and of a free exchange of information regarding the activity to be undertaken.

In its 2014 *Order Accepting Affiliate Agreements*, the Commission recognized that Regulatory Conditions 3.1(c) and 13.2 governed consideration of the original affiliate agreements. By the plain language of the Regulatory Conditions, they apply equally to "an amendment to an existing Affiliate Contract," and should have been followed to allow an opportunity for the public to intervene and scrutinize the amended precedent agreements.

The Utilities' eleventh-hour request for expedited acceptance of the Amendments to the precedent agreements was improper. The Utilities knew or should have known by May 12, 2017 that the FERC would not issue a CPCN by June 30, 2017. As the Utilities acknowledged in their May 15, 2017 quarterly status report filed with the Commission in these dockets, on May 12, 2017, the FERC issued a notice of revised schedule stating that the final Environmental Impact Statement would be delayed from June 30, 2017 to July 21, 2017 and therefore, the 90-day deadline for the FERC to make a final decision on the CPCN would be delayed to October 19, 2017. Yet the Utilities waited until June 21, 2017 to seek Commission approval of the Amendments. By doing so, the Utilities violated Regulatory Conditions 3.1(a), 3.1(c) and 13.2, and deprived interested parties of the ability to review and potentially object to the Amendments.[5] On that basis, the

[5] On June 27, 2017, the Sierra Club filed a consumer statement of position requesting that the Commission deny DEC's and DEP's request for expedited approval of the Amendments. Because the Sierra Club lacked adequate notice, however, it was unable to retain local counsel or attain intervenor status prior to the Commission's order approving

Commission should grant reconsideration of its June 28, 2017 *Order Accepting Amendment to Affiliate Agreements.*

2. On reconsideration, the Commission should review the substance of the underlying precedent agreements as well as the Amendments thereto.

The Atlantic Coast Pipeline is a joint venture of Dominion Resources, Duke Energy, and Southern Company; these three companies own 100% of Atlantic Coast Pipeline, LLC ("Atlantic"), which is the project developer.[6] However, each is also the parent company of one or more of the pipeline's customers that are either regulated utilities or, in the case of Dominion Resources' subsidiary Virginia Power Services, provide natural gas to a regulated utility. Together, these affiliates of Dominion Resources, Duke Energy, and Southern Company have entered into precedent agreements with Atlantic for 93% of the pipeline's contracted capacity (89% of total capacity).[7] Moreover, affiliates of Dominion Resources and Duke Energy hold the bulk of the contracted capacity for use by power plants, and Atlantic anticipates that eventually about 79% of the pipeline's total capacity will fuel gas-fired generation.[8]

In its application to the FERC for a Certificate of Public Convenience and Necessity under the federal Natural Gas Act, Atlantic relied on the precedent agreements as the primary evidence of need for the pipeline, stating in the application that the agreements "demonstrate the long-term market need for the Project from major electric

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the Amendments, as would have been necessary to file a formal objection pursuant to the relevant regulatory conditions.

6 Atlantic Coast Pipeline, LLC, *Abbreviated Application for a Certificate of Public Convenience and Necessity and Blanket Certificates*, FERC Docket No. CP15-554 (Sept. 18, 2015) at 4.

7 *Id.* at 12.

8 *Id.* at 6.

utilities and local distribution companies in Virginia and North Carolina."[9] By seeking the Amendments, the Utilities sought to maintain the binding nature of the precedent agreements, presumably because agreements that could be subject to termination might be viewed as illusory, and therefore not evidence of need, by the FERC. Indeed, a rational market actor unencumbered by an affiliate relationship may have sought to terminate its agreement based on a reassessment of market demand. The Amendments serve the interests of the affiliated companies by shifting the risks of building the pipeline to captive ratepayers while allowing the Utilities' shareholders to earn a lucrative return established by the FERC.

Precedent agreements between a pipeline developer and its affiliates are not reliable indicators of market demand. Energy experts have recognized that pipeline developers use precedent agreements between the developer and an affiliated regulated utility with captive ratepayers—like the agreements at issue here—to justify building pipeline infrastructure even if market demand is weak or absent. For example, James F. Wilson, an independent consultant on energy economics, concludes that because "the future need for incremental gas supply for new gas-fired generation is highly uncertain," precedent agreements between affiliates involving captive ratepayers "may not be a reliable indicator of the market need" for new natural gas pipelines.[10] Steven Isser, an independent consultant in energy law and economics, has concluded that "[w]here pipelines are financed through long-term contracts with LDCs or utilities that are subsidiaries of the parent company building the pipeline, the efficiency of the pipeline

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[9] *Id.* at 33.
[10] Attachment A, J.F. Wilson, Wilson Energy Economics, *Evaluating Market Need for the Atlantic Coast Pipeline* 3 (2017).

cannot be presumed by a full subscription to its capacity. . . . An uneconomic project that creates excess capacity can be financed in this manner by guaranteeing its income stream at the expense of alternative transport options."[11] This structure subverts the "price signals sent by a rational market."[12]

The Commission originally approved the precedent agreements between DEC and DEP and Atlantic Coast Pipeline, LLC in October 2014. Much has changed since 2014, however. The energy landscape that prompted Dominion Energy and Duke Energy to propose the pipeline in 2014 has shifted dramatically, and the purported justification for the pipeline has eroded, if it ever existed at all.

Projected demand for natural gas for power generation in the region that includes Virginia and North Carolina is flat through 2030. As shown in the figure below, the Energy Information Administration ("EIA") projects that the demand for natural gas for electricity generation in the South Atlantic region will decrease from 2015 to 2020, and will not return to 2015 levels until approximately 2034.[13]

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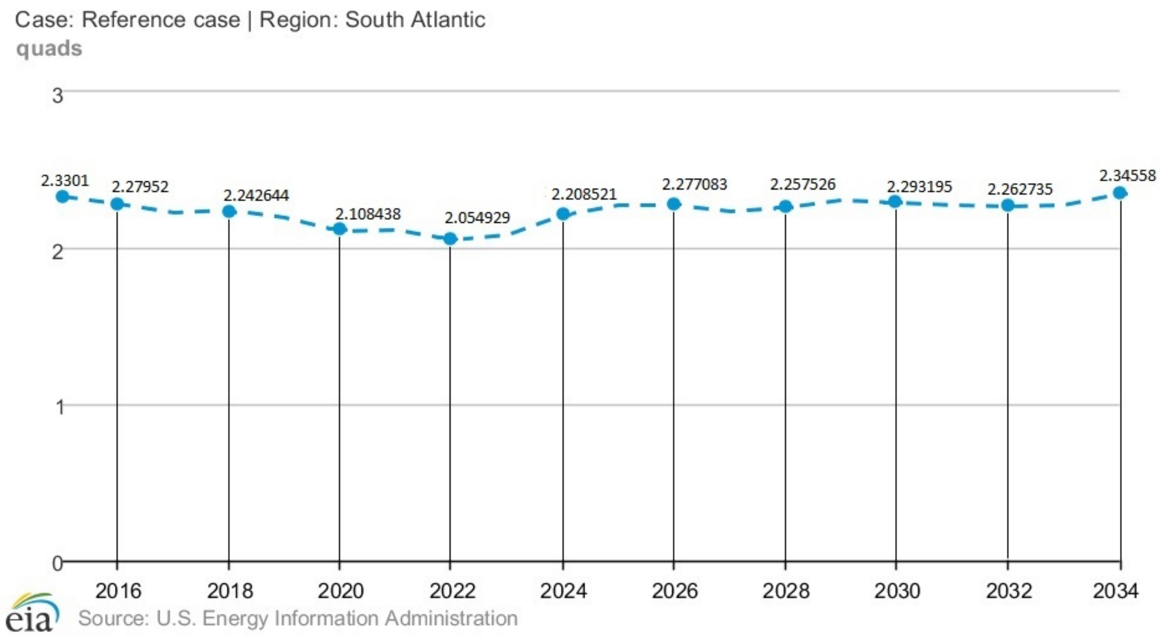
[11] Attachment B, S. Isser, *Natural Gas Pipeline Certification and Ratemaking* (2016) at 24.
[12] *Id.*
[13] *See* U.S. Energy Info. Admin., *Annual Energy Outlook 2017, Table: Energy Consumption by Sector and Source*, https://www.eia.gov/outlooks/aeo/data/browser/#/?id=2-AEO2017&cases=ref2017&sourcekey=0 (last visited June 21, 2017).

Energy Use: Electric Power: Natural Gas



Load forecasts for the electric utilities that would be served by the pipeline have declined since 2014, throwing into question the need for new pipeline capacity to fuel gas-fired power plants. PJM significantly revised its electricity demand projections downward for Dominion Energy Virginia's service territory in 2016 and 2017.[14] And PJM is likely still over-projecting the electricity demand in the Dominion service territory. DEC's and DEP's load forecasts have also declined since 2014. Mr. Wilson concludes that if these utilities "were to re-evaluate [their] commitment to ACP, [they] would likely find that the commitment is not needed at this time, it is unclear when such capacity might be needed, and it is also unknown whether better options might be available at such time as incremental pipeline capacity does become needed."[15]

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[14] *See id.*; Wilson, *supra* note 10, at 13.
[15] Wilson, *supra* note 10, at 5.

The capacity of existing natural gas pipeline will be sufficient to meet demand for natural gas in Virginia and North Carolina. In 2016, the consulting firm Synapse Energy Economics examined the need for additional pipeline infrastructure to deliver natural gas in Virginia, North Carolina, and South Carolina.[16] Synapse concluded that the existing pipeline system and proposed upgrades to that system, such as bi-directional flow on the Transco pipeline, would provide enough gas to this three-state region to meet demand through 2030 even under an unlikely high-gas demand scenario.[17]

As the Commission is aware, the Utilities' captive retail ratepayers will ultimately bear the costs of the Pipeline, if it is built. In testimony before a Congressional committee, Jonathan Peress of the Environmental Defense Fund testified that "we are seeing a disturbing trend of utilities pursuing a capacity expansion strategy by imposing transportation contract costs on state-regulated retail utility ratepayers so that affiliates of those same utilities can earn shareholder returns as pipeline developers. . . . Thus ratepayer costs which may not be justified by ratepayer demand are being converted into shareholder return."[18] This type of financing and ownership structure allows the shipper to "impose long-term financial obligations on captive ratepayers."[19] Utility ratepayers bear the risk that demand for the pipeline will not materialize—along with the other risks inherent in a multi-billion-dollar infrastructure project—while the shareholders of the

[16] Attachment C, Rachel Wilson *et al.*, *Synapse Energy Economics, Are the Atlantic Coast Pipeline and the Mountain Valley Pipeline Necessary? An Examination of the Need for Additional Pipeline Capacity into Virginia and the Carolinas 1 (2016)* at 1–4.
[17] *See id.* at 3-4.
[18] Attachment D, *Hearing to Examine Oil and Gas Pipeline Infrastructure and the Economic, Safety, Environmental, Permitting, Construction, and Maintenance Considerations Associated with that Infrastructure: Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 5 (June 14, 2016) (statement of N. Jonathan Peress, Envt'l Def. Fund).
[19] *Id.* at 5.

utility's parent company receive a generous return. In comments filed with the FERC, the Commission itself has objected to the 14% return on equity ("ROE") proposed by Atlantic, which is factored into the proposed recourse rate.[20] As stated by the Commission, "rather than supporting the proposed 14% return on equity ('ROE') and demonstrating that the proposed ROE reflects current market conditions and investor expectations, ACP has failed to demonstrate that the proposed recourse rates in its application are consistent with the public convenience and necessity."[21]

Although the Commission expressly stated in its order accepting the Amendments that approval of the precedent agreements and Amendments thereto did not constitute approval of the amount of any compensation that may be paid under the precedent agreements (as amended), by the time the Utilities seek to recover costs incurred pursuant to the precedent agreements, it will be too late—the pipeline will already have been built. Now is the time for the Commission to take a hard look at the precedent agreements and determine whether they are in the public interest. Although the FERC has primary jurisdiction over the Pipeline, the protection of North Carolina ratepayers is squarely within this Commission's jurisdiction. Our General Assembly has declared that "the rates, services and operations of public utilities . . . are affected with the public interest," N.C. Gen. Stat. § 62-2(a), and accordingly has vested the Commission with "such general power and authority to supervise and control the public utilities of the State as may be

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[20] The Commission pointed out that even though ACP has entered into negotiated rate agreements with shippers, the cost-of-service-based recourse rate is important because it provides a check on the pipeline's market power during the establishment of negotiated rates.

[21] *Comments in Support of Project and Protest of Proposed Recourse Rates of the North Carolina Utilities Commission*, FERC Docket No. CP15-554 (Oct. 23, 2015) (footnote omitted).

necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties," *id*. § 62-30. The Commission should not cede this jurisdiction to the FERC, or abdicate its responsibility to protect the interests of ratepayers.

CONCLUSION

For the foregoing reasons, the Sierra Club respectfully requests that the Commission reconsider its approval of the Amendments to the precedent agreements, and on reconsideration, that the Commission review the substance of the underlying precedent agreements as well as the Amendments thereto, and reverse its prior order approving the Amendments.

Respectfully submitted this 21st day of July, 2017.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion for Reconsideration by the Sierra Club, as filed today in Docket Nos. E-2, Sub 1052 and E-7, Sub 1062, has been served on all parties of record by electronic mail or by deposit in the U.S. Mail, first-class, postage prepaid.

This 21st day of July, 2017.

s/ Robin G. Dunn