UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Atlantic Coast Pipeline, LLC) Docket No. CP15-554

COMMENTS IN SUPPORT OF PROJECT AND PROTEST OF PROPOSED RECOURSE RATES OF THE NORTH CAROLINA UTILITIES COMMISSION

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure, the North Carolina Utilities Commission ("NCUC"), an intervenor[1] in this proceeding, comments in support of the construction of needed new natural gas pipeline infrastructure proposed by Atlantic Coast Pipeline, LLC ("ACP") in the above-referenced certificate application. Unfortunately, ACP has failed to demonstrate that the proposed recourse rates in its certificate application comply with the statutory requirements of the Natural Gas Act ("NGA") to demonstrate that the proposal be consistent with the public convenience and necessity. Accordingly, the NCUC protests the recourse rates proposed by ACP. Finally, the NCUC provides comments on ACP's proposed tariff. In support thereof, the NCUC states:

I. DESCRIPTION OF THE FILING

On September 18, 2015, ACP filed an application under section 7(c) of the NGA and Part 157 of the Commission's regulations requesting authorization to install, construct, own, operate and maintain certain natural gas pipeline facilities for its Atlantic

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[1] The NCUC filed a notice of intervention in Docket No. CP15-554 on September 25, 2015.

Coast Pipeline project consisting of: i) approximately 564.1 miles of various diameter pipeline; ii) three new compressor stations; and iii) various appurtenant and auxiliary facilities designed to transport up to approximately 1.5 million dekatherms per day (MMDt/d) of natural gas.[2] Facilities to be constructed are located in West Virginia, Virginia and North Carolina. Additionally, ACP is seeking Blanket Certificates of public convenience and necessity pursuant to Part 284, Subpart G authorizing the transportation of natural gas for others, and Part 157, Subpart F authorizing certain facility construction, operation and abandonment activities, all as more fully described in the application.[3]

ACP has executed precedent agreements for 96 percent of the newly-proposed capacity with the following shippers under negotiated rates: Duke Energy Progress, Inc., Duke Energy Carolinas, LLC, Piedmont Natural Gas Company, Inc., Virginia Power Services Energy Corp., Inc., Public Service Company of North Carolina, Inc., and Virginia Natural Gas, Inc.[4]

II. COMMENTS IN SUPPORT OF APPLICATION

The ACP will provide 1.5 million dts/day of new pipeline capacity from West Virginia to a point near Lumberton, North Carolina, with a lateral to Chesapeake, Virginia. ACP will provide capacity to fuel growth and electric generation, provide an interstate pipeline footprint along the I-95 corridor of North Carolina, and provide new competition in the wholesale provision of natural gas in North Carolina. The NCUC supports the ACP project.

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2 Application at 14-17.

3 *Id.* at 2.

4 Exhibit I.

III. PROTEST OF RECOURSE RATES

While the NCUC supports the ACP project, review of the Application demonstrates that important elements of the recourse rates proposed therein have not been adequately supported. Section 7(c) of the NGA and the Commission's implementing regulations, 18 C.F.R. § 157 (2015), require that a pipeline seeking a certificate of public convenience and necessity demonstrate that the application is required by the present or future public convenience and necessity. The ACP project represents over $5.1 billion in new investment.[5] ACP has entered into negotiated rate agreements for 96% of the capacity of the project.[6]

The Commission permits pipelines to negotiate individualized rates[7] which, unlike discounted rates,[8] are not constrained by the maximum and minimum rates in the pipeline's tariff.[9] However, pipelines must permit shippers the option of paying the traditional cost-of-service recourse rates in their tariffs, instead of requiring them to

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5 Application at 9.

6 *Id.* at 17-18.

7 *Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, 74 FERC ¶ 61,076 at p. 61,241, *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement); *Natural Gas Pipeline Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification*, 114 FERC ¶ 61,042 (2006), *dismissing reh'g and denying clarification*, 114 FERC ¶ 61,304 (2006).

8 *See Northern Natural Gas Co.*, 105 FERC ¶ 61,299 at PP 18-19 (2003) (clarifying the distinction between discounted and negotiated rates).

9 *See* 18 C.F.R. § 284.10(c)(5).

negotiate rates for any particular service.[10] The Commission relies on the availability of recourse rates to prevent pipelines from exercising market power by assuring that the customer can revert to the just and reasonable tariff rate if the pipeline unilaterally demands excessive prices or withholds service.[11]

Recourse rates are also important because FERC's general policy is that interruptible ("IT") and firm transportation ("FT") authorized overrun rates are designed to be equivalent to a 100 percent load factor derivative of the maximum FT cost-based rate and are to be charged based on usage. Consistent with that policy, ACP has designed its maximum recourse rate for service under Rate Schedule IT based on the 100 percent load factor equivalent of the Rate Schedule FT rate.[12]

Therefore, even though ACP will provide Rate Schedule FT service under negotiated rates, ACP's recourse rates need to be properly designed so that they provide a check on the pipeline's market power during the establishment of negotiated rates, and so that the rates for any interruptible or overrun service conform with the NGA's just and reasonable requirement. The ACP project represents an investment of over $5.1 billion. Rather than supporting the proposed 14% return on equity ("ROE")[13] 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.

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[10] A recourse rate is a cost of service based rate for natural gas pipeline service that is on file in a pipeline's tariff and available to customers who do not negotiate a rate with the pipeline company.

[11] Alternative Rate Policy Statement at 61,238-42.

[12] Application at 30.

[13] *Id.*

A. ACP's Proposed 14.00% ROE is Not Adequately Supported, Nor Has it Been Shown to be Reflective Of Current Market Conditions.

The recourse rates contained in ACP's application "are based on an overall pre-tax rate of return of 15.0 percent - - based on a capital structure of 50 percent equity and 50 percent debt, a rate of return on equity of 14 percent, and an estimated cost of debt of 6.8 percent."[14] The only support ACP provided for its proposed 14% ROE is the statement that "[t]he proposed rate of return reflects the risk inherent in a new, major project venture like the ACP and is consistent with returns authorized for other new pipeline companies" supported by one footnote citing cases from 2010 to 2014.[15] Unfortunately, the cases cited in the footnotes do not provide substantial evidence which could be relied upon to support a finding that the proposed 14% ROE and the resulting recourse rates are required by the public convenience and necessity. Instead, those cases merely cite older instances where the Commission accepted recourse rates generally without discussion.[16] While the NCUC recognizes that in the past the Commission has

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[14] Application at 30.

[15] *Id.* at 30, n.24.

[16] In *Constitution Pipeline Co.*, the Commission approved Constitution's request for a 14% ROE without citation to any prior orders. *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199 at PP 48-49 (2014). The underlying application in that proceeding did not provide any analysis of current financial conditions, but instead merely cited three prior orders from 2009 and 2010. *See Constitution Pipeline Co., LLC*, Docket No. CP13-499, June 13, 2013 Application at 9 (citing *Bison Pipeline LLC*, 131 FERC ¶ 61,013 [at P 24] (2010) (which in turn cites certificate applications from 2009); *Fayetteville Express Pipeline, LLC*, 129 FERC ¶ 61,235 (2009) and *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 (2009)). The second case relied upon by ACP, *Sierrita Gas Pipeline, LLC*, approved without discussion a 14% ROE. *Sierrita Gas Pipeline, LLC*, 147 FERC ¶ 61,192 at n.28 (2014). The underlying application in that proceeding cited only to 2008 and 2009 orders for its ROE request. *Sierrita Gas Pipeline, LLC*, Docket No. CP13-73 February 7, 2013Application at 12-13 and n. 21 (citing 2008 and 2009 orders). Finally, while ACP cites *Ruby Pipeline LLC*, 136 FERC ¶ 61,054 at ¶ 11 (2011) that order does not make any new finding, but rather simply cites the original

merely accepted recourse rates based on cases citing previous cases, application of that policy would appear to conflict with the unambiguous statutory requirement that a filing entity demonstrate that its filing, including the recourse rates, comports with the public convenience and necessity.

The recourse rates proposed in ACP's certificate application show that ACP's first-year "Pre-tax Return%" will be approximately three quarters of ACP's first-year cost of service underlying the proposed recourse rates."[17] Accordingly, the ROE chosen to compute the proposed recourse rates has a material impact on the level of ACP's recourse rates. Because the only support ACP provided for its proposed ROE was citations to prior certificate orders, which also simply cited prior certificate orders, its application is devoid of any substantial evidence which would permit an analysis of the majority of the cost of service underlying its proposed recourse rates. The NCUC submits that it would not be reasoned decisionmaking to establish recourse rates for over $5.1 billion of investment without requiring the applicant to comply with its statutory obligation and demonstrate that its proposal, including the proposed recourse rates, are required by the public convenience and necessity based on current market conditions.

As the Commission has recognized, it cannot allow a pipeline to design recourse rates that do not reflect the costs associated with the incremental project.[18] ACP has failed to provide any analysis of current financial markets and/or current investor expectations. As the Commission is well aware, financial markets are very different now

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Ruby certificate order, *Ruby Pipeline, LLC*, 128 FERC ¶ 61,224 at P 53 (2009) (finding Ruby's proposed 14% ROE to be reasonable, citing 2009, 2008 and 2005 orders).

[17] Docket No. CP15-554, Exhibit P at page 3 lines 8 and 9 (showing a year-one pre-tax return of $757,667,447 out of a total cost of service of $957,625,105).

[18] *CMS Trunkline LNG Co.*, 100 FERC ¶ 61,217 at P 66 (2002).

than in the early years of this century. The Commission's most recent pronouncements on return provide valuable perspective on the reasonableness of ACP's proposed 14% ROE. For example, on February 19, 2015, FERC issued Opinion No. 524-A where it reaffirmed a decision using a DCF analysis based on the six month period ending March 31, 2011 which resulted in a median ROE of 10.28%.[19] In addition, the Commission approved an ROE of 10.55% for El Paso Natural Gas Company, 12.99% for Portland Natural Gas Transmission System and 11.55% for Kern River Gas Transmission Company.[20] The NCUC recognizes that the ROE's approved in these decisions were for established pipelines rather than new companies. Nevertheless, in contrast to the cases cited by ACP, these opinions are more pertinent because they analyze more current financial conditions and therefore help put ACP's proposed 14% ROE in perspective.

B. The Costs of Any Inexpensive Expansion Capacity Should be Rolled-In, Thereby Reducing Recourse Rates.

Foundation Shippers on ACP have the right to request that ACP expand the capacity of its system. ACP has agreed to a methodology for setting the negotiated rate charged Foundation and Anchor Shippers for the requested incremental expansion capacity, which is significantly lower than the initial Project rate "reflecting the ability to

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[19] *Portland Natural Gas Transmission System*, 150 FERC ¶ 61,107 at P 195 (2015). In Opinion No. 524-A, the Commission placed Portland at the top of the range of reasonableness 11.59%. It found that "a potential investor could reasonably reach the conclusion that Portland is the most risky of the comparable companies" (*id*. at P 231) based on its significant risk and having a credit rating below investment grade. *Id*. at PP 207, 209.

[20] *El Paso Natural Gas Co.*, Opinion No. 528, 145 FERC ¶ 61,040 at P 686 (2013); *Portland Natural Gas Transmission System*, Opinion No. 510-A, 142 FERC ¶ 61,198 at P 250 (2013), *order on reh'g*, 150 FERC ¶ 61,106 (2015); *Kern River Gas Transmission Co.*, Opinion No. 486-F, 142 FERC ¶ 61,132 at P 263 (2013).

expand the Project inexpensively by adding compression."[21] The NCUC does not challenge the negotiated rate proposals for expansion capacity and agrees that the proposal to afford a priority in allocating any inexpensive expansion capacity to those shippers that make the original project possible and commit to both projects is appropriate.[22] That being said, ACP's application is silent as to the treatment of the costs of inexpensive expansions for purposes of calculating recourse rates.

FERC's general policy is that the rates for preexisting shippers taking service under recourse rates be lowered by rolling in the costs of subsequent inexpensive expansions. As FERC explained in its Policy Statement regarding new pipeline facilities:

> A requirement that the new project must be financially viable without subsidies does not eliminate the possibility that in some instances the project costs should be rolled into the rates of existing customers. In most instances incremental pricing will avoid subsidies for the new project, but the situation may be different in cases of inexpensive expansibility that is made possible because of earlier, costly construction. In that instance, because the existing customers bear the cost of the earlier, more costly construction in their rates, incremental pricing could result in the new customers receiving a subsidy from the existing customers because the new customers would not face the full cost of the construction that makes their new service possible. The issue of the rate treatment for such cheap expansibility is one that always should be resolved in advance, before the construction of the pipeline.[23]

ACP's application is unclear as to whether it will roll-in the costs of subsequent inexpensive expansions for purposes of calculating recourse rates. Instead, the application only explains that ACP will charge lower rates for the expansion capacity to

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[21] Application at 27.

[22] *See id*. at 27, n.23.

[23] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 at p. 61,746 (1999); *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128 (2000); *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000).

its negotiated rate shippers. As explained *supra*, even though firm service on ACP will be provided under negotiated rates, the recourse rates are nonetheless important because they are the basis for ACP's proposed IT and overrun rates. The NCUC respectfully submits that in issuing the certificate to ACP, the Commission should clarify that nothing herein exempts ACP from complying with Commission policy requiring roll-in of inexpensive expansion capacity for purposes of calculating recourse rates.

IV. COMMENTS ON TARIFF

Exhibit P of the Application contains a *pro forma* FERC Gas Tariff setting out the rates, terms and conditions under which ACP proposes to provide service over its new facilities. As demonstrated below, several of the proposed provisions of that tariff appear to be inconsistent with FERC policy and precedent.

In Order No. 636, the Commission established that a firm shipper has the right to use the capacity for which it has paid on a secondary basis.[24] Thus, a firm shipper is entitled to use secondary points in any part of a zone which its reservation charge encompasses without additional charge.[25] ACP is proposing system-wide "postage

[24] 18 C.F.R. §§ 284.221 (g)-(h) (2015); *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, *FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996* ¶ 30,939, at p. 30,429 (1992), *order on reh'g, FERC Statutes and Regulations, Regulations, Preambles January 1991-June 1996* ¶ 30,950 (Order No. 636-A), *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Distribution Cos. v. FERC*, 88 F.2d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997); *see also* Order No. 636-A at p. 30,585; *ANR Pipeline Company*, 64 FERC ¶ 61,140, at p. 62,042 (1993) (if a shipper pays a reservation charge for a zone, the entire zone is within the path).

[25] *See, e.g.*, *Gas Transmission Nw. Corp.*, 107 FERC ¶ 61,157 at P 12 (2004).

stamp" rates.[26] Since shippers on ACP are paying postage stamp rates, under the Commission's flexible point policies, they should be afforded secondary service at any point on the system without additional charge. Several provisions of ACP's proposed tariff appear to be inconsistent with the Commission's flexible point policies.

ACP's tariff requires the establishment of Maximum Daily Receipt Obligations (MDROs) and Maximum Daily Delivery Obligations (MDDOs). Rate Schedule FT § 5.2. In the event a shipper exceeds its MDRO or MDDO, it is assessed an overrun penalty. *See* GT&C § 37. Therefore, if a shipper were to use its capacity at an alternate point, even if it is the only shipper at that point, and even if it is within its overall daily contract quantities, it could be assessed penalties for exceeding its MDRO or MDDO at a given point. That result would appear to negate the alternative point rights set out in Rate Schedule FT § 5.3, as well as being inconsistent with FERC's flexible point policies. The Commission should ensure that ACP's tariff does not assess penalties for shippers using the capacity they have paid for on a flexible basis.

The tariff provides that the Pipeline is not obligated to add new Primary Points or change an existing Primary Point if such point is associated with "unsold segment capacity." GT&C §11.3. Those rights are limited to points with a Customer's Capacity Path entitlements. *Id.* Thus, it appears that ACP is proposing to limit shippers' ability to use capacity outside of their "Capacity Path" entitlements even though shippers pay for capacity on the entire pipeline via postage stamp rates. This provision appears to be inconsistent with FERC's flexible point policies.

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[26] Application at 30.

The Commission's long-standing policy requires that service between primary points must be given a higher priority than secondary services.[27] In contrast, the reductions in service provisions of ACP's tariff (GT&C §10.2.A.3) treat all firm service equally, rather than providing a priority for primary firm to primary firm points. ACP's tariff should conform with Commission policy.

GT&C § 29.1 states in part that "Pipeline will only render service to Customers on the acquired capacity [i.e., the DTI Supply Header] pursuant to Pipeline's FERC Gas Tariff." In its Application, ACP states that shippers may use any point on the DTI system on a secondary basis "in accordance with the terms of DTI's FERC Gas Tariff."[28] The ACP tariff appears to be inconsistent with the assertion in the Transmittal Letter.

The Commission has held that pipelines are prohibited from applying multiple penalties for the same infraction.[29] In contrast to that policy, the penalties contained in GT&C § 37 are cumulative (*i.e.*, are in addition to "any other applicable charges and penalties"). ACP should revise its tariff so that shippers may only be penalized once for a given action.

GT&C § 37.4 provides that ACP will promptly bill customers pro rata based on scheduled quantities for the applicable month for charges incurred by ACP under its OBAs with upstream and downstream interconnecting pipelines. While that provision may be waived in certain OFO situations (see GT&C § 18.6.B), ACP provides no basis

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[27] *See, e.g.*, *Tennessee Gas Pipeline Co., L.L.C.*, 139 FERC ¶ 61,050 at P 14 (2012).

[28] Application at 20.

[29] *See, e.g.*, *Columbia Gas Transmission Corp.*, 119 FERC ¶ 61,267 at P 69 (2007), *order on reh'g and compliance filing*, 124 FERC ¶ 61,122 (2008), *order on reh'g*, 133 FERC ¶ 61,217 (2010); *Columbia Gas Transmission Corp.*, 100 FERC ¶ 61,084 at P 201 (2002), *order on reh'g, clarification, and compliance filing*, 104 FERC ¶ 61,168 (2003).

for charging shippers for OBA costs, even if the shipper was in perfect balance every day of the month.

ACP will provide a revenue credit in March for overrun, short-term FT and all IT service rendered. However, it will only pay interest on those funds from January through March when the revenue credit is provided. GT&C § 38.4. No interest will be paid for the period during the year that the credit is accruing. ACP provides no rationale for failing to provide interest on those revenue credits during the year the credit is accruing.

Through its Reservation Charge Crediting Policy,[30] FERC requires that the risk of non-performance due to *force-majeure* be shared between a pipeline and its shippers. That concept appears to be properly applied in GT&C § 39.2.A.1. However, ACP proposes an exception to its obligation to provide reservation charge credits "due to the conduct of the upstream point operator at the firm Primary Receipt Point or the downstream point operator of the facilities at the firm Primary Delivery Point, not controlled by Pipeline . . . ." GT&C § 39.2.A.3. It is not clear that the inability of an upstream point operator (who, in the case of DTI, is an affiliate) to supply gas to the pipeline would not be a force-majeure event on the ACP system so that after 10 days, shippers would receive reservation charge credits for the inability to perform. ACP's tariff should be revised to properly reflect the Commission's Reservation Charge Crediting Policy.

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30 *See, e.g., Algonquin Gas Transmission, LLC*, 153 FERC ¶ 61,038 at P 2 (2015) (explaining that FERC policy requires all interstate pipelines to provide full reservation charge credits for outages of primary firm service caused by non-force majeure events (*i.e.*, where the outage occurred due to circumstances within the pipeline's control, including planned or scheduled maintenance) and requiring partial reservation charge credits during force majeure events (*i.e.*, events that are both unexpected and uncontrollable)).

It is unclear why use of Pack Account balances is limited to managing daily imbalances at the furthest downstream primary Delivery Point (or Citygate) on the Foundation/Anchor Shipper's FT agreement during release of the agreement. GT&C § 41.8. That limitation appears to be inconsistent with the Commission's flexible point policies (detailed above) and could unreasonably reduce the value a shipper could receive when releasing its agreement.

If a shipper does not correct its net imbalance within 17 business days after it receives notice of its month-end imbalance, ACP has the right to correct the imbalance by immediately suspending deliveries to or receipts from the shipper. GT&C § 42.5. While the NCUC supports providing pipelines tools to resolve imbalances, the unfettered discretion appears to be draconian because it could be applied to imbalances of any size without regard to whether there is an adverse system impact.

V. CONCLUSION

WHEREFORE, the North Carolina Utilities Commission respectfully requests that the Federal Energy Regulatory Commission:

(1) Consider the foregoing arguments in ruling on ACP's certificate application addressed herein; and

(2) Grant such other relief, as the Commission may deem necessary and appropriate.

Date: October 23, 2015

Respectfully Submitted,

North Carolina Utilities Commission

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2015), I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 23rd day of October 2015.

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