UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Mountain Valley Pipeline, LLC) Docket No. CP19-14-001

REQUEST FOR REHEARING OF THE NORTH CAROLINA UTILITIES COMMISSION

The North Carolina Utilities Commission ("NCUC"), pursuant to 15 U.S.C. § 717r(a), and Rule 713 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") rules of practice and procedure, hereby requests rehearing of the Order Issuing Certificate[1] issued June 18, 2020 in the above referenced proceeding. As demonstrated herein, the findings regarding use of a 14% return on equity ("ROE") to establish recourse rates for service over Mountain Valley Pipeline, LLC's ("MVP") Southgate Project are not the product of reasoned decisionmaking. The Commission failed to address, much less satisfy, its own policy that requires a showing that the recourse rates it approved were not the product of pipeline market power. It also failed to demonstrate that applying its general policy and approving a 14% ROE is appropriate in this specific instance.

I. BACKGROUND

On November 6, 2018, MVP submitted an application pursuant to Natural Gas Act ("NGA") section 7(c) and Parts 157 and 284 of the Commission's regulations for authorization to construct, own, and operate its Southgate Project, which will commence

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[1] *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (2020) ("*Certificate Order*").

near the City of Chatham, in Pittsylvania County, Virginia and terminate at a delivery point with Public Service Company of North Carolina, Inc. ("PSNC"), now Dominion Energy North Carolina,[2] near the City of Graham in Alamance County, North Carolina. PSNC is a natural gas distribution company regulated by the NCUC. MVP proposes to construct: (i) approximately 73 miles of new 24-inch and 16-inch-diameter pipeline, (ii) the 28,915 horsepower Lambert Compressor Station in Pittsylvania County, Virginia, and (iii) associated valves, piping, pig launching, and receiving facilities and appurtenant facilities. The Southgate Project is designed to create 375,000 dekatherms per day ("dth/d") of new capacity. MVP has a long-term, binding precedent agreement with PSNC for 300,000 dth/d on the Southgate Project.[3] At the time of the application was filed, the cost of the Southgate Project was estimated to be $468,459,509.[4] MVP requested a separate rate zone and initial recourse rates for the Southgate Project facilities.[5] MVP proposed an annual cost of service for the recourse rates for the Southgate System of approximately $84 million.[6]

On December 10, 2018, the NCUC protested MVP's application on the grounds that the two largest components of MVP's proposed recourse rates—*i.e.*, the proposed 14% ROE and the proposed 5% depreciation rate—had not been adequately supported and appeared to be overstated.[7] As a result, there is no basis in the record for finding that the

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2 Following a January 2, 2019 merger, Dominion Energy acquired PSNC and changed the company name to Dominion Energy North Carolina. *See Certificate Order* at n.16.

3 Application at 2.

4 *Id*., Exhibit P (Part I), Schedule 5.

5 *Id*. at 15.

6 *Id*., Exhibit K.

7 Docket No. CP19-14, NCUC's Notice of Intervention and Protest (December 10, 2018 ("NCUC Protest"). Of the estimated $84 million annual cost of service, pretax return made up

rates in MVP's precedent agreement with PSNC were not tainted by the exercise of market power by the pipeline at the time it entered into the precedent agreement and thus was inconsistent with FERC's Alternative Rates Policy Statement and Negotiated Rate Policy Statement, which protect shippers by requiring that pipelines permit shippers to opt for use of the traditional cost-of-service recourse rates in the pipeline's tariffs, instead of requiring them to negotiate rates for any particular service.[8] Given the high, unsupported ROE and depreciation rates used to calculate the proposed recourse rates, the NCUC asserted that there was no basis to assume that the recourse rates provided the necessary check on the market power of the pipeline at the time the pipeline entered into those negotiated rate agreement, as required by FERC's policy.[9]

In the *Certificate Order*, FERC agreed with the NCUC and found that MVP's proposed depreciation rates were overstated by 100%.[10] But the Commission rejected the NCUC's arguments as to the 14% ROE determination.[11] It issued a certificate to MVP to construct and operate the Southgate Project and approved use of a 14% ROE to develop recourse rates for the project without any analysis considering, or establishing any

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$54,928,427 and depreciation expense at 5% made up $23,413,307. *Id*. at 4 (citing Application, Exhibit P (Part 1), Schedule 2).

8 *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines, Regulation of Negotiated Transportation Services*, 74 FERC ¶ 61,076 at p. 61,240 (1996), *order on clarification*, 74 FERC ¶ 61,194 (1996), *reh'g denied*, 75 FERC ¶ 61,024 (1996), *petitions for review denied sub nom. Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) ("Alternative Rates Policy Statement"). *Natural Gas Pipelines 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) ("Negotiated Rate Policy Statement").

9 NCUC Protest at 5-13.

10 *Certificate Order* at P 61.

11 *Id*. at P 57.

procedures to ensure, that the 14% ROE provided the necessary check on the exercise of market power at the time the precedent agreement containing negotiated rates was negotiated. The NCUC hereby seeks timely rehearing of that decision.

II. SPECIFICATION OF ERRORS

Pursuant to 18 C.F.R. § 385.713(c)(1) (2020), the NCUC respectfully submits that the *Certificate Order* contains the following errors:

1) It was error, and not the product of reasoned decision making, for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates without determining whether the recourse rates provided the necessary check on the market power of the pipeline at the time the negotiated rate agreements were negotiated.

2) It was error, and not the product of reasoned decision making, for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates relying solely on the fact that FERC has allowed other pipelines to use that rate of return without identifying those pipelines or explaining how the risks of those other, unidentified, pipelines are the same as those facing MVP's Southgate Project.

3) It was error, and not the product of reasoned decision making, for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates without addressing the fact that FERC's Alternative Rates Policy Statement requires that before a pipeline can charge a negotiated rate that capacity must be made available at a recourse rate that is not stagnant or outmoded and that Commission precedent recognizes the importance of using current market conditions to develop capital costs.

4) It was error and not the product of reasoned decisionmaking for FERC to rely on MVP filing a future section 4 rate case and "hold the line" by approving use of a 14% ROE without ensuring that any such rate case will happen, or otherwise ensuring that the recourse rates at the time the negotiated rates agreements were entered into by the pipeline provided the necessary check on market power.

III. STATEMENT OF ISSUES

Pursuant to 18 C.F.R. § 385.713(c)(2) (2020), the NCUC respectfully provides the following Statement of Issues:

1) Whether it was error, and not the product of reasoned decision making, for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates without determining whether the recourse rates provided the necessary check on the market power of the pipeline at the time the negotiated rate agreements were negotiated.[12]

2) Whether it was error, and not the product of reasoned decision making for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates relying solely on the fact that FERC has allowed other pipelines to use that rate of return without identifying those pipelines or explaining how the risks of those other, unidentified, pipelines are the same as those facing MVP's Southgate Project.[13]

3) Whether it was error, and not the product of reasoned decision making for the Commission to approve MVP's use of a proposed 14% ROE to develop recourse rates without addressing the fact that FERC's Alternative Rates Policy Statement requires that before a pipeline can charge a negotiated rate that capacity must be made available at a recourse rate that is not stagnant or outmoded and that Commission precedent recognizes the importance of using current market conditions to develop capital costs.[14]

4) Whether it was error and not the product of reasoned decisionmaking for FERC to rely on MVP filing a future section 4 rate case and "hold the line" by approving use of a 14% ROE without ensuring that any such rate case will happen, or otherwise ensuring that the recourse rates at the time the

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[12] Alternative Rates Policy Statement, 74 FERC at p. 61,240.

[13] *N.C. Utils. Comm'n v. FERC*, 42 F.3d 659, 664 (D.C. Cir 1994) ("FERC's use of a particular percentage in a ratemaking calculation was not adequately justified by citation of a prior use of the same percentage without further reasoning or explanation.")

[14] Alternative Rates Policy Statement, 74 FERC at p. 61,240. *Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm's of W.Va*, 262 U.S. 679, 693 (1923) (holding that a return "may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally"); *FPC v. Hope Natural Gas Co*., 320 U.S. 591, 603 (1944); *Portland Nat. Gas Transmission Sys.*, 142 FERC ¶ 61,198 at P 233 (2013) (finding that "on balance . . . the use of the most recent data in the record consistent with long standing policy outweighed any adjustment to reflect purportedly anomalous results"), *order on request for reh'g and refund report*, 150 FERC ¶ 61,106 (2015).

negotiated rates agreements were negotiated by the pipeline provided the necessary check on market power.[15]

5) Whether it was error for FERC to refuse to establish any procedures to ensure that the ROE used to establish recourse rates provided the necessary check on market power at the time the pipeline entered into the negotiated rate agreements.[16]

IV. REQUEST FOR REHEARING

The Commission's primary obligation under the NGA is to ensure that consumers do not pay excessive rates.[17] The NGA's certificate provisions "form the 'heart of the Act' and are the means by which [FERC] effectuates the purposes of the Act, 'to underwrite just and reasonable rates to the consumers of natural gas and to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges."[18] FERC has established a number of policies to help it undertake the obligations imposed by the NGA. Two such policies are relevant to this protest.

One important policy is the one governing negotiated rates. FERC's traditional methodology for establishing rates for interstate natural gas pipeline transportation service is to base rates on the cost of providing the service, *i.e.*, cost-of-service ratemaking.[19] Cost-of-service ratemaking establishes the "recourse" rates, which are the maximum and

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[15] The possibility of a future section 4 proceeding does not absolve FERC of its obligation to ensure that initial rates approved in a Section 7 proceeding are not excessive. *See Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 588 (D.C. Cir. 2010).

[16] *Id.* (rejecting FERC's arguments that the potential that a section 7 proceeding would have involved procedures associated with a trial-type hearing justified refusing to ensure that initial rates set in the section 7 proceeding are not excessive).

[17] *See, e.g.*, *Cal. Gas Producers Ass'n v. FPC*, 421 F.2d 422, 428 (9th Cir. 1970).

[18] *Great Lakes Gas Transmission Ltd. P'ship v. FERC*, 984 F.2d 426, 431-32 (D.C. Cir. 1993) (quoting *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) ("*CATCO*")).

[19] *See Alternatives to Traditional Cost of Service Ratemaking for Natural Gas Pipelines*, Request for Comments, 70 FERC ¶ 61,139 at p. 61,393 (1995).

minimum rates that a pipeline may charge for open access transportation service.[20] In 1996, as an alternative to cost-of-service rates, FERC began permitting pipelines to negotiate individualized rates with shippers. Because negotiated rates are not constrained by the maximum and minimum rates in the pipeline's tariff, they have the potential to expose shippers to improper exercises of market power by pipelines. FERC's Alternative Rates Policy Statement serves to protect shippers from that risk by requiring that pipelines permit shippers opt to use traditional cost-of-service recourse rates in the pipeline's tariffs, instead of requiring them to negotiate rates for any particular service.[21] The availability of recourse rates thus prevents 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.[22] In establishing this policy, FERC explained that it is "particularly concerned" with maintaining the integrity of pipelines' recourse rates.[23]

> In order to be successful, the recourse service must remain a viable alternative to negotiated service. Otherwise, if the service remains stagnant, in time, the recourse service will become outmoded and cease to be a viable alternative to negotiated service. Since the purpose of the recourse service is to act as a check against pipeline market power, such a result is impermissible.[24]

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[20] Consistent with FERC's open access policy, 18 C.F.R. § 284.10(c)(5)(i) requires pipelines to file maximum and minimum transportation rates. "[T]he pipeline may charge an individual customer any rate that is neither greater than the maximum rate nor less than the minimum rate on file for that service." 18 C.F.R. § 284.10(c)(5)(ii)(A) (2020).

[21] *N. Natural Gas Co.*, 105 FERC ¶ 61,299 at P 3 (2003).

[22] Alternative Rates Policy Statement, 74 FERC at pp. 61,240-41.

[23] *Id*. at p. 61,240.

[24] *Id.*

The second policy allows new greenfield pipelines to use a 14% ROE to develop recourse rates.[25] As explained below, the *Certificate Order* erred because it uncritically applied this policy and failed to analyze whether calculating recourse rates using a 14% ROE would satisfy the Alternative Rates Policy Statement's requirement to demonstrate that recourse rates are not tainted by pipeline market power.

A. FERC Erred in Failing to Address, Much Less Comply With the Requirements of its Alternative Rates Policy Statement When It Approved Use of a 14% ROE For Calculating MVP's Recourse Rates.

The Commission's Alternative Rates Policy Statement is clear. The availability of recourse rates prevents 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.[26] Significantly, in order "to be a viable alternative to negotiated service," FERC's policy prohibits recourse rates from becoming "stagnant" or "outmoded."[27] In keeping with the requirement to ensure that the needed check on the exercise of pipeline market power exists at the time the pipeline is entering into negotiated rate agreements, the Commission has found that a pipeline "**may not offer a negotiated rate service without an approved recourse service**."[28] The NCUC clearly raised the issue that use of a 14% ROE would result in recourse rates that failed to ensure the requisite check on pipeline market power at the time MVP entered into the precedent agreement

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[25] *See, e.g.*, *MarkWest Pioneer, L.L.C.*, 125 FERC ¶ 61,165 at P 27 (2008).

[26] Alternative Rates Policy Statement, 74 FERC at pp. 61,240-41.

[27] *Id.* at p. 61,240.

[28] *N. Natural Gas Co.*, 101 FERC ¶ 61,203 at P 133 (2002) (emphasis added).

containing negotiated rates.[29] The *Certificate Order* fails to respond at all, much less meaningfully, to that argument.

FERC certainly can choose to change its policies. But, if it chooses to do so, it is required to recognize that it is changing its policies and provide a rationale for the change.[30] Rather than recognizing what the Alternative Rates Policy requires, and explaining how the recourse rates it approved fulfill the requirements of that policy, FERC simply ignored its Alternative Rates Policy Statement, and approved use of the 14% ROE without recognition let alone explanation.[31] That error should be remedied on rehearing.

As a result, FERC failed to ensure that recourse rates provide the necessary check on the exercise of pipeline market power at the time the pipeline is entering into the precedent agreements containing negotiated rates. Instead, the Commission simply "held the line" until MVP's next general NGA section 4 rate case.[32] That refusal to take a hard look at the recourse rates was made without any analysis of previous holdings that the Commission is "particularly concerned" with maintaining the integrity of pipelines' recourse rates.[33] Furthermore, the Commission has emphasized:

> In order to be successful, the recourse service must remain a viable alternative to negotiated service. Otherwise, if the service remains stagnant,

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[29] NCUC Protest at 5-8. The failure to respond meaningfully to the NCUC's arguments renders FERC's decision arbitrary and capricious. *See, e.g., PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005).

[30] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co*., 463 U.S. 29, 57 (1983) ("an agency changing is course must supply a reasoned analysis") (quoting *Greater Boston Television Corp. v. FCC*, 444 F. 2d 841, 852 (1970)); *Comm. for Cmty. Access v. FCC*, 737 F.2d 74, 77 (D.C. Cir. 1984) (an agency is bound by its prior position unless and until it reaches an alternative conclusion based on a reasoned analysis indicating proper grounds for deliberately changing prior policies and standards).

[31] *Certificate Order* at P 57.

[32] *Id.* at P 63.

[33] Alternative Rates Policy Statement, 74 FERC at p. 61,240.

> in time, the recourse service will become outmoded and cease to be a viable alternative to negotiated service. Since the purpose of the recourse service is to act as a check against pipeline market power, such a result is impermissible.[34]

Under these policies, it is not sufficient that a shipper, i.e., PSNC, agreed to the negotiated rate. The basis for PSNC's agreement is its claim that the rate "was the best rate being offered for similar capacity in the marketplace at the time it was negotiated" and that PSNC "understood at that time its negotiated rate would be lower than the Southgate Project recourse rate."[35] PSNC's claims are undermined by its assertion that it would be an "incorrect assumption that PSNC was aware of MVP's proposed recourse rates, as well as the return on equity and depreciation rates underlying it at the time PSNC negotiated the Precedent Agreement" containing the negotiated rates.[36] PSNC's admission that it was not aware of the recourse rates at the time it negotiated its precedent agreement demonstrates that those negotiations were unlikely to comply with the explicit consumer protections in the Alternative Rates Policy Statement.[37]

Any understanding by PSNC that its negotiated rate would be lower than the Southgate Project recourse rate is further undermined by the fact that the Commission, in its *Certificate Order*, established the depreciation rate at half of MVP's as-filed proposal, thereby reducing the initial annual cost of service by approximately $11.7 million – a decrease of nearly 15%.[38] Use of a reasonable ROE, for example the 10.55% ROE

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[34] *Id.*

[35] PSNC's Motion for Leave to Answer, Answer, and Motion to Lodge at 7 (December 28, 2018).

[36] *Id.*

[37] Alternative Rates Policy Statement, 74 FERC at p. 61,240

[38] As noted, *supra*, of the estimated $84 million annual cost of service, pretax return made up $54,928,427 and depreciation expense at 5% made up $23,413,307. Exhibit P (Part 1),

established in the last litigated pipeline case before FERC,[39] would have further reduced the rate that PSNC was able to compare during negotiations. It is that transparency of a non-excessive recourse rate that provides the necessary check of the potential exercise of market power by a pipeline during those negotiations.

Furthermore, regardless of whether the shipper believed the negotiated rates where in their economic interests, and regardless too of whether the shipper believes it needs protecting,[40] FERC is not absolved from its obligation to protect against the potential exercise of pipeline market power by ensuring that recourse rates are not overstated or stale.[41] As the D.C. Circuit has explained, FERC's independent obligation "means that before relying on existing contracts between a pipeline and its customers to show that rates

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Schedule 2. Thus, reducing the depreciation rate from 5% to 2.5% would reduce cost of service by approximately $11.7 million.

[39] In his dissent on the issue of using the 14% ROE, Commissioner Glick points to three recent cases where the Commission required recourse rates for pipeline extensions to be calculated that 10.55% ROE. Those cases are: *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 at PP 51-52 (2019) (rejecting Rockies Express's proposal to use a 13 percent ROE approved as part of its greenfield certificate authorization to an incremental pipeline expansion project, and instead requiring Rockies Express to revise its incremental recourse rates to reflect a 10.55 percent ROE from the last litigated rate case); *see also Gulfstream Natural Gas Sys., L.L.C.*, 170 FERC ¶ 61,199 at P 19 (2020) (rejecting Gulfstream Natural's proposal to use a 14 percent ROE, found to be appropriate for its greenfield project, to an incremental pipeline expansion project, and instead requiring use of use the most recent ROE approved by the Commission in a litigated NGA section 4 rate case, 10.55 percent); *Cheniere Corpus Christi Pipeline, LP,* 169 FERC ¶ 61,135 at PP 34-35 (2019) ("It is not appropriate to use the 14 percent ROE approved in Cheniere Pipeline's initial certificate authorizations in determining the cost of service for [an incremental expansion project] because it would not adequately reflect the lower risks associated with expanding an existing pipeline system"). *Certificate Order*, (Comm'ner Glick, dissenting at P 22 and n.75).

[40] "Even when customer support is unanimous[,] FERC retains the responsibility of making an 'independent judgment[.]'" *Laclede Gas Co. v. FERC*, 997 F.2d 936, 946 (D.C. Cir.1993).

[41] If pipelines "have significant market power with which to extract an unfavorable agreement[,] it would not require much imagination for the pipeline to also require that [shippers] support the agreement . . . ." *See Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990); *id*. (FERC "may not be so complacent about the possibility that [an agreement] is so structured as to enable the pipeline, through the exercise of market power, to impose unreasonable terms that will likely be paid for by end-users that were not parties to the [agreement].")

are reasonable, FERC must 'first determin[e], upon the basis of substantial evidence, that the pipeline lacks significant market power.'"[42] Instead of satisfying that obligation, FERC erred by assuming away market power.

Any reliance on court cases approving the 14% ROE for other pipelines is also misplaced. The Certificate Order notes MVP's reliance on *Sabal Trail*, as upholding approval of a 14% ROE for a new pipeline.[43] The NCUC cautions against placing too much reliance on the holdings in that case. Contrary to FERC's prior reliance on that case,[44] *Sabal Trail* was not a blanket affirmation of use of a 14% ROE for new pipelines. Rather, the holdings in that case are quite narrow and none of the other cases cited by MVP raised, much less addressed, whether recourse rates calculated using a 14% ROE provide the needed check on the potential exercise of market power when the pipeline was entering into precedent agreements containing negotiated rates.

Sabal Trail also provides valuable direction as to what constitutes "substantial evidence" for rate setting purposes under section 7 of the NGA. In particular, the D.C. Circuit noted FERC's explanation that a 14% ROE, combined with a 50% equity/50% debt capital structure was justified because FERC had approved the same combination of capital structure and ROE in prior cases. In response to that argument, the D.C. Circuit "confess[ed] to being skeptical that a bare citation to precedent, derived from another case

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[42] *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003) (citing *Tejas Power*, 908 F.2d at 1003-04).

[43] *Certificate Order* at P 56 (discussing *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) ("*Sabal Trail"*)).

[44] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 at P 80 (2017).

and another pipeline, qualifies as the requisite 'substantial evidence.'"[45] Yet here, all FERC relies on in adopting the 14% ROE is the fact that it has treated other, unidentified pipelines in the same manner in the past.[46]

Ensuring that the recourse rates are appropriately established is also important because only 300,000 of the 375,000 dth per day of firm service on the Southgate Project is currently under contract.[47] Absent a new negotiated rate agreement that remaining capacity will be used at the recourse rates established in this section 7 proceeding. Alternatively, if that unsubscribed capacity is contracted for under negotiated rates, the recourse rates must be set in such a manner to provide the appropriate check on the pipeline's exercise of market power during those negotiations. Additionally, the proposed revisions to MVP's Rate Schedule Firm Transportation Service ("FTS") provide that all Customers under that Rate Schedule are permitted to nominate receipts and deliveries at any point on the MVP system on a secondary (capacity available) basis. "However, to the extent that Customers nominate on a secondary point within a different rate zone, Customers will also pay the applicable rates for service on the Mainline System and the Southgate System."[48] Therefore, to comply with its statutory obligations to protect consumers, the Commission must ensure that the rates for FTS Service on a secondary basis, which will be provided under the recourse rates established herein, are not excessive.

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[45] *Sabal Trail*, 867 F.3d at 1378. The court also noted its prior rulings in *North Carolina Utilities Commission v. FERC*, 42 F.3d at 664 "for the proposition that 'FERC's use of a particular percentage in a ratemaking calculation was not adequately justified by citation of a prior use of the same percentage without further reasoning or explanation.'"

[46] *Certificate Order* at P 57.

[47] *Id.* at PP 1, 29.

[48] Application, Exhibit P (Part II), Rate Schedule FTS, Section 5.1(2)(e).

FERC uncritically applied its policy to allow MVP to use a 14% ROE, doing so without any analysis of whether that policy was justified, much less whether that ROE should be used in this instance,[49] and without any consideration of the requirements of the Alternative Rates Policy Statement's that the recourse rates must provide that necessary check on the potential exercise of the pipeline's market power if the recourse rates are outmoded or stale. This error should be rectified on rehearing.

B. FERC Policy Dictates that the Proper Time to Analyze Whether Negotiated Rate Agreements are Tainted by Market Power is When the Pipeline is Negotiating Those Agreements.

FERC claimed that the NCUC requested a "full evidentiary, trial-type hearing" and denied that request.[50] That ruling suffers from several flaws. First, the NCUC recognizes that FERC has significant discretion to fashion how it decides to address issues before it.[51] Mindful of that discretion, in this proceeding, the NCUC asked the Commission to "establish the procedures necessary" to ensure that MVP's rates comply with the Alternative Rates Policy Statement and Negotiated Rates Policy Statement.[52] The NCUC never requested a "full evidentiary, trial-type proceeding." Clearly, FERC's denial of a request that was not made is not the product of reasoned decisionmaking. More importantly, the Commission's refusal to undertake **any** process for ensuring compliance

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[49] *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014) ("When the agency applies [a general statement of] policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued") (quoting *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)).

[50] *Certificate Order*, Ordering P (H).

[51] *See, e.g., Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,200 at P 15 (2017) (citing *Stowers Oil and Gas Co*., 27 FERC ¶ 61,001 (1984); *PJM Transmission Owners*, 120 FERC ¶ 61,013 (2007)).

[52] NCUC Protest at 17.

with the Alternative Rates Policy Statement and Negotiated Rates Policy Statement is an abdication of its responsibilities to ratepayers that should be rectified on rehearing.[53]

The cases cited by Commissioner Glick in his dissent demonstrate that FERC need not hold "full evidentiary, trial-type hearing" in order to ensure that recourse rates established in section 7 certificate proceedings are not excessive. In each of those cases, the Commission simply used the last litigated ROE of 10.55%.[54] Doing nothing, when it certainly has the authority, and the obligation, to do something, is error that should be rectified on rehearing.

Consistent with its own policy statements, FERC must ensure that negotiated rate shippers were protected from the exercise of pipeline market power at the time the negotiated rate agreements are being negotiated.[55] Otherwise, the legitimacy of the negotiated rate agreements is called into question, which is significant given that FERC relied on the existence of the precedent agreement containing negotiated rates to make the public interest findings for the Southgate Project.[56] It simply makes no sense to rely on precedent agreements containing negotiated rates as the basis for public interest findings in certificate proceedings but then wait until the project has been certificated, and millions of dollars of new pipeline facilities have been constructed, to determine whether those negotiated rate agreements were tainted by the exercise of market power by the pipelines. But by refusing to address the NCUC's concerns about the use of a 14% ROE, and instead

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53 *See Mo. Pub. Serv. Comm'n*, 601 F.3d at 588.

54 *See Certificate Order*, ("Comm'ner Glick, dissenting at P 22 n.75 (citing *Cheyenne*, 168 FERC ¶ 61,180 at PP 51-52; *Gulfstream.*, 170 FERC ¶ 61,199 at P 19; *Cheniere*, 169 FERC ¶ 61,135 at PP 34-35)).

55 Alternative Rates Policy Statement, 74 FERC at p. 61,240.

56 *Certificate Order* at P 40.

deferring to MVP's next general rate case,[57] that is exactly what FERC did in the *Certificate Order*.

Contrary to its principal obligations under the NGA, FERC's refusal to take a hard look at whether the use of a 14% ROE in calculating recourse rates allowed for the potential of the exercise of market power to go unchecked, also deprives shippers of any meaningful remedy. FERC has not explained why it is reasoned decisionmaking to wait years after the underlying negotiations are completed, and after millions of dollars in new facilities are constructed, to evaluate whether the negotiated rate agreements were tainted by market power. It simply makes no sense to conclude that the review of MVP's current recourse rates in some future rate case under section 4 of the NGA will ensure that the recourse rates provided the necessary check on the potential exercise of market power by MVP years earlier when it agreed to the negotiated rates. Furthermore, as the Commission has explained, "[c]hanges to a pipeline's recourse rates occurring under NGA sections 4 and 5 do not affect a customer's negotiated rate, because that rate is negotiated as an alternative to the customer taking service under the recourse rate."[58] Thus the negotiated rate agreements will not be at issue in a future section 4 rate case.

FERC's actions in other proceedings demonstrate the *Certificate Order's* flaws. For example, in Docket No. CP02-391, Natural Gas Pipeline Company of America ("Natural") filed an application under NGA section 7(c). Encana Gas Storage, Inc. ("Encana") protested Natural's application on the grounds "that the open season held prior to the filing of the application was conducted in an unlawful and improper manner contrary

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[57] *Id*. at P 63.

[58] *Interstate and Intrastate Natural Gas Pipelines, Rate Changes Relating to Fed. Income Tax Rate*, Order No. 849, 164 FERC ¶ 61,031 at P 14 (2018).

to Commission policy and Natural's tariff."[59] Relying on the Alternative Rates Policy Statement, Encana argued that shippers must have the option of submitting a bid based on a negotiated rate or the recourse rate.[60] Encana asked FERC to defer action on Natural's application pending a new open season.[61] Consistent with the NCUC's arguments in this proceeding, FERC cited the Alternative Rates Policy Statement and affirmed that "the availability of a recourse service would prevent pipelines from exercising market power by assuring that the customer can fall back to cost-based, traditional service if the pipeline unilaterally demands excessive prices or withholds service."[62] Agreeing with Encana, FERC deemed Natural's open season to be invalid.[63] Significantly, FERC "**require[d] Natural to hold another open season that conforms to the Commission's negotiated rate policy** . . . ."[64] There would be no basis for this requirement if the appropriate time to challenge whether the negotiated rate shippers were protected from the exercise of pipeline market power was at/in a future rate case that may never occur.[65] Yet, consistent with the Negotiated Rate Policy Statement, FERC imposed that requirement on Natural. Its failure to ensure a similar check on MVP's potential exercise of market power at the time it agreed

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[59] *Natural Gas Pipeline Co. of America*, 101 FERC ¶ 61,125 at P 27 (2002).

[60] *Id*. at P 29.

[61] *Id*.

[62] *Id*. at P 38.

[63] *Id*. at P 39.

[64] *Id*. (emphasis added).

[65] The history of the three pipelines cited by Commissioner Glick in support of his proposal that a 10.55% ROE be used to calculate recourse rates for MVP's Southgate Project vividly demonstrates the unreasonableness of relying on the possibility of future rate cases to ensure that recourse rates are not overstated. Rockies Express Pipeline LLC went into service in 2007. Gulfstream Natural Gas System, LLC went into service in 2002. Cheniere Corpus Christi Pipeline, LP went into service in May 2018. None of those pipelines has ever filed an NGA section 4 rate case.

to the negotiated rates in the precedent agreements relied on by the *Certificate Order*, constitutes reversible error.

V. CONCLUSION

WHEREFORE, the North Carolina Utilities Commission respectfully requests that the Federal Energy Regulatory Commission grant rehearing and require that MVP Valley Pipeline, LLC, to comply with FERC's policies and demonstrate that the recourse rates it offered at the time it entered into the negotiated rates in the precedent agreements for service over the MVP Southgate Project provided the necessary check on its exercise of market power.

Date: July 20, 2020

Respectfully Submitted,

The 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 (2019), 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 20th day of July, 2020.

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