To: The Federal Trade Commission

From: Michael J. Hirrel
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I am a recently retired trial attorney for the Antitrust Division, and am effectively a customer of Dominion Virginia Power, a subsidiary of Dominion Resources, through my membership in a condominium association at the above address that purchases power from Dominion for its own use and for the use of its residents. I would like to call the Commission's attention to a substantial antitrust issue concerning Dominion. The issue involves both competition policy, which might appropriately be articulated in comments to the Federal Energy Regulatory Commission (the FERC), and prospective monopolization, which would violate both Section 2 of the Sherman Act and Section 5 of Federal Trade Commission Act.

Dominion Resources, together with Duke Energy, Piedmont Natural Gas (which Duke has agreed to acquire), and AGL Resources, proposes to construct a 599.7 mile, 42 inch diameter, high pressure gas pipeline from points within the Marcellus Shale Formation in West Virginia and Pennsylvania to points within the states of Virginia and North Carolina. The venture is called the Atlantic Coast Pipeline, LLC (ACP). ACP has filed an application to the FERC for approval of this project, in FERC Docket No. CP15-554-001.

ACP will acquire natural gas at Marcellus wellheads and transport that gas through the proposed pipeline to new electricity generation plants which Dominion and Duke propose to build. The electricity thus generated will then be distributed to the retail electricity customers of Dominion and Duke subsidiaries. Natural gas will be distributed directly to the retail customers of PSNC Energy and Piedmont.

Dominion and Duke hold effective monopolies over the retail distribution of electricity in their service areas. Piedmont holds an effective monopoly over the retail distribution of natural gas in its service areas. (PSNC does as well, but inasmuch as it isn't an owner of ACP, my concerns do not extend to it.) ACP states that 96% of the gas acquired and transported by ACP will be sold to Dominion, Duke, PSNC and Piedmont. It is reasonable to assume that the overwhelming proportion of this gas will be sold to Dominion and Duke, and to Duke's soon to be acquired subsidiary, Piedmont.

The competition policy and prospective monopolization problems involved in ACP's plan will be obvious to the Commission. The vertical merger guidelines, by analogy, make it clear that where a party exercises market power in one market, that party may not acquire another party in an upstream input market that currently is competitive. I discuss the problem regarding ACP below to reinforce what the Commission already knows.

If Dominion, Duke and Piedmont were to acquire their gas and its transportation, plus electricity generation, in competitive markets, they would, the Commission must suppose, engage in a very

different decision making process. But that process will be rendered moot when they acquire and transport their own natural gas, and generate their own electricity. They will distribute the electricity and gas to their own monopoly retail customers, who have no alternative. Those customers must pay the costs of Dominion, Duke and Piedmont's decisions, whether the costs were efficiently assumed or not.

If, in an alternative universe, Dominion, Duke and Piedmont were planning their prospective energy needs without also planning to monopolize the means to acquire that energy, their decisions would be affected by several variables. To the extent they actually needed natural gas, as Piedmont does, they would figure out how to acquire and transport that gas at the lowest long term cost. ACP proposes to construct an entirely new pipeline over a 96% virgin route, i.e. a route that uses essentially no existing rights of way.

Such new construction may not be the most efficient means to transport the gas, as a competitive market might determine. Two existing pipelines could carry the gas from the Marcellus to Virginia and North Carolina with relatively modest modifications. The Columbia pipeline might need to increase capacity, perhaps simply by increasing pressure. The Transco pipeline is seriously underutilized, as it carries gas from south to north. Its directional flow need only be reversed. In an alternative competitive universe, Dominion, Duke and Piedmont surely would request bids from Columbia and Transco.

If Dominion, Duke and Piedmont thought that a new pipeline might actually be needed, they also would put out a request for proposals to the many companies who build and operate pipelines. At least some of those firms, such as Columbia and Transco, might be able to build the pipeline more cheaply than ACP by using existing rights of way. Our firms probably would insist that the bidders themselves bear the risks, thus that the pipeline companies themselves build, own and operate the pipeline at their own expense. Our firms' only obligation would be to buy the resultant gas, at prices set by formulas the pipeline companies would propose.

Conceivably, our firms would receive no acceptable bids on their request for proposals for new pipeline construction. The reason why not might tell them that a new pipeline would not be an economically efficient investment. ACP's proposed pipeline will cost about $6 Billion to construct. But most current science suggests that natural gas production from the Marcellus Shale Formation will peak at about 2018. Firms operating in a competitive environment might be reluctant to sink so much money into a project whose useful life may be quite limited. Marcellus shale gas could become extremely scarce before they could recover their investments. Potential bidders might decline the opportunity altogether. Or they might set pricing formulas for the requirements purchases that made the last remaining gas prohibitively expensive.

In the alternative competitive universe, an additional set of considerations would govern the decision making of Dominion and Duke, who very probably will be buying most of this gas. They now propose to convert the gas into electricity by building their own new electricity generation plants. Those plants will cost about $1 Billion each to construct, and will have useful lives of 30 to 40 years. Thus in the alternate universe, Dominion and Duke presumably would

consider whether electricity or electricity generation could be acquired over the long term at cheaper cost.

With no additional infrastructure investment, for example, Dominion and Duke could enter into reciprocal supply and demand agreements with other electricity generators to meet each other's peak needs. They could provide incentives for reduction of customer demand, yielding net additional electricity. With perhaps relatively minor infrastructure investment, they might consider carbon dioxide recapture from their existing coal fired electricity generation plants. They also would want to consider whether over the long term investments in wind and solar generation would yield electricity at cheaper cost.

If they believed nevertheless that new gas fired generation plants were necessary, Dominion and Duke presumably would put out requests for bids for the construction, operation and ownership of those plants. Again, however, potential bidders would be concerned about the possibility of stranded investment. If the plants were to be fired by Marcellus shale gas, they may outlive the time in which their anticipated fuel is economically available. If the bids were sufficiently high to reflect a serious concern in this regard, Dominion and Duke presumably would reconsider wind and solar sources. Investments in those sources will never be stranded.

But in the present universe, the one in which Dominion, Duke and Piedmont propose to become the monopoly suppliers of the inputs for their own monopoly customers, they need not engage in any such economically efficient decision making process. If they make bad decisions, they will not suffer. The costs of those bad decisions will be borne by the monopoly customers of their retail electricity and natural gas distribution systems.

Now, it's perfectly true that ACP's rates will be regulated by the FERC. The FERC clearly does keep consumers' interests in mind. But, as the FERC itself has many times acknowledged, regulation is only an imperfect substitute for competition. Regulation cannot possibly replicate the efficient decision making process which competition imposes.

I believe that the Commission should file comments in the FERC's proceeding, expressing, much better than I have been able to, the competitive concerns. The Commission should also consider a proceeding of its own to examine whether ACP's project constitutes a prohibited monopolization by Dominion, Duke and Piedmont, under Section 2 of the Sherman Act, and an unfair method of competition, under Section 5 of the Federal Trade Commission Act.

Please let me know if I can provide any further information, or be of other assistance. My contact information is provide above.

Cc: Kathleen O'Neill, Robert Lepore, William Martin, USDOJ Antitrust Division

Federal Energy Regulatory Commission, FERC Docket CP15-554-001.

Document Content(s)