



June 9, 2020

Hon. Michelle L. Phillips
Secretary to the Commission
New York State Public Service Commission
Three Empire State Plaza
Albany, NY 12223

Re: Case No. 17-G-0610 – Petition for a Declaratory Ruling that Natural Gas Precedent Agreements and Transportation Agreements are Subject to Review under Public Service Law Section 110(4)

Dear Secretary Phillips:

Environmental Defense Fund (“EDF”) respectfully requests that the New York State Public Service Commission (“Commission” or “NYSPSC”) act on our petition for declaratory ruling in the above-captioned proceeding. The petition for declaratory ruling has been pending before the Commission since October 2, 2017. EDF submitted this petition in order to confirm the scope of Section 110(4) of the Public Service Law and to ensure a forum would be available for Commission review of the affiliate agreement entered into by Consolidated Edison Company of New York, Inc. (“Consolidated Edison” or “Company”) with Mountain Valley Pipeline, LLC. Commission action in this docket will provide needed clarity regarding the applicability of Section 110(4) to natural gas precedent and transportation agreements. Ruling on this petition will also confirm a forum will be available for review of Consolidated Edison’s actions regarding the Mountain Valley Pipeline (“MVP”) transaction, which is critical in light of significant changed circumstances described below.

I. Background

EDF submitted a petition for declaratory ruling on October 2, 2017, requesting that the Commission issue a ruling to clarify that natural gas precedent agreements and transportation agreements are contracts for gas subject to review under Public Service Law Section 110(4). Section 110 sets forth a comprehensive framework for the Commission’s review of transactions between affiliated interests as well as its review of certain other contracts.¹ Section 110(4) provides that the Commission may disapprove a contract if it is found not in the public interest.

As EDF detailed in its petition, several recent greenfield pipelines have been supported in whole or in part by affiliate precedent agreements, whereby pipeline developers and the regulated utilities

¹ Section 110(4) extends the Commission’s review to include all written contracts for the purchase of electric energy, gas (natural or manufactured or a mixture of both), and water and establishes that “no charge for such electric energy, gas and/or water...shall exceed the just and reasonable charge....”

contracting for that capacity are part of the same corporate group.² This financial structure raises the concern that affiliates may be able to transact in ways that transfer benefits from the captive customers of the public utility to the midstream affiliate and its shareholders. The Commission is obligated to scrutinize transactions to ensure that rates are just and reasonable, including transactions between a utility and its affiliates.³ In its petition, EDF demonstrated that given the recent trend of affiliate-backed infrastructure projects, including Consolidated Edison’s interest in MVP,⁴ the proper application of Section 110(4) to precedent and transportation agreements will help to ensure that ratepayers are not subjected to unjust and unreasonable costs.⁵

II. Addressing EDF’s Petition Will Ensure a Forum is Available to Challenge Affiliate Arrangements, including MVP

Since November 2016, EDF has raised concerns regarding Consolidated Edison’s MVP affiliate arrangement.⁶ The Applied Economics Clinic conducted an assessment of the ratepayer impacts of the MVP contract, commissioned by EDF, and concluded that the nominal costs of the MVP contract—\$1.2 billion over 20 years—would be shouldered by New York ratepayers, regardless of whether Consolidated Edison uses the pipeline capacity.⁷ EDF filed the Applied Economics Clinic report with the Commission, and EDF has met repeatedly with Staff and Consolidated Edison on this issue. EDF has stated to the Commission that “[u]nless and until Con Ed can demonstrate that its affiliate transaction and precedent agreement complies with the statutory public interest standard,

² *Petition for a Declaratory Ruling that Natural Gas Precedent Agreements and Transportation Agreements are Subject to Review under Public Service Law Section 110(4)*, EDF Petition, Case No. 17-G-0610 at page 7, n.12 (October 2, 2017) (“EDF Petition”).

³ *Rochester Tel. Corp. v. Pub. Serv. Comm’n*, 201 A.D.2d 31, 35-36 (N.Y. App. Div. 3d Dep’t 1994) (“The PSC’s broad authority to determine just and reasonable rates includes not only the right but the duty to scrutinize transactions between a utility and its affiliates . . .”).

⁴ On February 29, 2016, Consolidated Edison filed with the Commission in Case No. 93-G-0932 a pipeline precedent agreement with MVP, committing to receive from and pay MVP for 250,000 Dt/d of firm transportation service capacity for a term of 20 years. Con Edison Gas Midstream, LLC (later renamed Con Edison Gas Pipeline and Storage, LLC), a subsidiary of Consolidated Edison, Inc., acquired a 12.5% ownership interest in Mountain Valley Pipeline, LLC in January 2016 at the same time that its retail affiliate contracted for transportation service. For the years ended December 31, 2019 and 2018, CECONY incurred no costs under the contract. Consolidated Edison, Inc., United States Securities and Exchange Commission Form 10-K at page 169.

⁵ *Petition for a Declaratory Ruling that Natural Gas Precedent Agreements and Transportation Agreements are Subject to Review under Public Service Law Section 110(4)*, EDF Petition at page 8.

⁶ Letter from EDF Requesting Heightened Scrutiny of Precedent Agreements Supported by Affiliates, Case No. 93-G-0932 (November 29, 2016).

⁷ Applied Economics Clinic, Ratepayer Impacts of ConEd’s 20-Year Shipping Agreement on the Mountain Valley Pipeline (Sept. 2017), https://static1.squarespace.com/static/5936d98f6a4963bcd1ed94d3/t/59d7e57329f187b71a721378/1507321204234/Final+Report+EDF+MVP_20170922.pdf.

costs associated with the MVP pipeline project should not be included in rates and/or imposed on retail ratepayers.”⁸ Natural Resources Defense Council and others have supported our requests.⁹

Section 110(4) establishes that the Commission may disapprove contracts for the purchase of natural gas if such contracts are not in the public interest, and the history of the natural gas industry and Commission precedent—as detailed in EDF’s petition—indicate that this language includes precedent and transportation agreements. Clarity on this point from the Commission is needed. Consolidated Edison has stated that “it would respond to” EDF’s request for a demonstration that its agreement with MVP is in the public interest, “if the NYSPSC opened a proceeding to consider this request.”¹⁰ The path to opening such a Commission proceeding will be clarified by a declaratory ruling in this proceeding.

III. Significant Changed Circumstances Compel Commission Review of the Consolidated Edison-MVP Contract

A. The MVP Project has Been Plagued by Delay and Excessive Costs

Despite an anticipated service date of November 2018, the MVP project is not yet in operation, lacks the required regulatory approvals, and was recently described as “troubled.”¹¹ The project faces significant legal challenges as well as an investigation of potential criminal and/or civil violations of the Clean Water Act and other federal statutes.¹² For example, pursuant to a consent decree reached with Virginia’s Department of Environmental Quality and the State Water Control Board, MVP was required to pay a \$2.15 million civil penalty for asserted violations of the Clean Water Act and corollary state laws.¹³ The pipeline’s official projected in-service date is now nearly two years beyond the original expected in-service date, with developers stating there is a “narrow

⁸ Letter from EDF Requesting Heightened Scrutiny of Precedent Agreements Supported by Affiliates, Case No. 93-G-0932 at page 2 (June 19, 2017).

⁹ Letter from Natural Resources Defense Council Requesting Heightened Scrutiny of Precedent Agreements Supported by Affiliates, Case No. 93-G-0932 (October 2, 2017); *Petition for a Declaratory Ruling that Natural Gas Precedent Agreements and Transportation Agreements are Subject to Review under Public Service Law Section 110(4)*, Comments of Acadia Center, Alliance for a Green Economy, Catskill Mountainkeeper, Pace Energy and Climate Center, and Sierra Club in Support of Environmental Defense Fund’s Petition for Declaratory Ruling (October 23, 2017).

¹⁰ Consolidated Edison 2019 Annual Report at page 169 (Feb. 20, 2020), <https://investor.conedison.com/static-files/3b97b264-e5de-4ac3-95a4-57b19a9e0109>.

¹¹ Kallanish Energy Daily News & Analysis, *ConEd capping investment in Mountain Valley Line* (Nov. 6, 2019), <https://www.kallanishenergy.com/2019/11/06/coned-capping-investment-in-mountain-valley-line/>.

¹² Consolidated Edison 2019 Annual Report at page 170.

¹³ Consent Decree at 11, *David K. Paylor v. Mountain Valley Pipeline, LLC*, Case No. CL18006874-00 (Va. Cir. Ct. Oct. 2019), <https://www.virginiamercury.com/wp-content/uploads/2019/10/MVP-Consent-Decree.pdf>.

path” to the extended in-service date and independent analysts projecting later dates.¹⁴ In addition, the costs of the MVP project have soared from \$3.6 billion to an estimated \$5.5 billion, a 52.8% increase.¹⁵

Consolidated Edison’s midstream affiliate, Con Edison Gas Pipeline and Storage, LLC, recently decreased its investment in MVP. In February 2020, the company stated that it has “limited its cash contributions to the joint venture to approximately \$530 million, which will reduce its ownership interest in the joint venture to approximately 10 percent based on the current project cost estimate.”¹⁶ But while its midstream affiliate has reduced its financial investment in the pipeline, Consolidated Edison and its ratepayers remain committed to paying for 20 years of capacity on MVP.

Pursuant to its precedent agreement with MVP, if service on the pipeline has not commenced by June 1, 2020, Consolidated Edison may terminate the precedent agreement if it gives the requisite notice.¹⁷ There is no indication that the utility has sought to activate this provision—despite the challenges faced by the project and its ballooning cost estimates. And to date, Consolidated Edison has not been required to demonstrate the prudence of this investment before the Commission. Thus, after the Commission has acted on EDF’s petition in this proceeding to clarify the applicability of Section 110(4) to natural gas precedent and transportation agreements, it should open a proceeding to assess whether or not Consolidated Edison’s actions regarding the MVP agreement are in the public interest.

¹⁴ Consolidated Edison 2019 Annual Report at page 170; “EQM Sees U.S. Mountain Valley Pipeline Service in 2020, Analysts Unconvinced,” *Pipeline & Gas Journal* (May 14, 2020) <https://pgjonline.com/news/2020/05-may/eqm-sees-us-mountain-valley-pipeline-service-in-2020-analysts-unconvinced>.

¹⁵ Consolidated Edison 2019 Annual Report at page 170.

¹⁶ *Id.* For the years ended December 31, 2019 and 2018, Consolidated Edison’s retail utility has incurred no costs under the contract. *Id.*

¹⁷ Precedent Agreement between Mountain Valley Pipeline, LLC and Consolidated Edison Company of New York, Inc. at Section 5(b), <http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={10E87149-AC09-4F6B-8BB4-96132436170D}> (“If the condition precedent set forth in Section 5(a) is not satisfied or waived by the date set forth therein, or if the Service Commencement Date has not occurred by June 1, 2020, Shipper shall have the right to provide written notice to Transporter of its intention to terminate this Precedent Agreement, the Service Agreement and the Credit Agreement, as applicable; provided however, that, with respect to such condition precedent or obligation, unless the right to terminate is exercised by written notice provided within thirty (30) days of the date on which such right to terminate for failure of such condition precedent or obligation first becomes effective, any such right to terminate shall be deemed to have been waived. Such notice shall designate the condition precedent or obligation giving rise to the right to provide such notice of termination. Unless all such conditions or obligations are satisfied within thirty (30) days after the receipt of such notice from Shipper or the Parties mutually agree otherwise in writing, this Precedent Agreement, the Service Agreement and the Credit Agreement shall terminate effective upon the expiration of said thirty (30) day period, without any liability on the part of Shipper to Transporter.”).

EDF suggests that administrative efficiency would dictate that any review of whether the MVP agreement is in the public interest should also include review of the Company's actions related to its option to terminate that agreement. A decision to not exercise the option is, in essence, a decision to commit to the transaction under the facts known in June 2020. This Commission has regularly reviewed utility decisions to terminate or not terminate utility supply related agreements or projects as part of its traditional utility regulation.¹⁸ Thus, its review of the Company's option to terminate is as important as the Company's initial decision to execute the precedent agreement.

B. New York is Moving Forward with Bold Climate Commitments

As MVP's troubles continue to mount, New York has further solidified its commitment to climate protection. The Climate Leadership and Community Protection Act ("CLCPA") was signed into law by Governor Cuomo on July 18, 2019 and took effect January 1, 2020.¹⁹ The CLCPA mandates that the State of New York adopt measures to reduce statewide greenhouse gas ("GHG") emissions by 40% by 2030 and 85% by 2050 (from 1990 levels), with an additional goal of achieving net zero emissions across all sectors of the economy by 2050 (the remaining 15 percent can come from carbon offsets).²⁰ Specifically, the CLCPA recognizes the importance of addressing emissions of the greenhouse gas methane, which causes 84 times as much global warming as the equivalent amount of carbon dioxide over a twenty-year horizon.²¹

Section 7 of the CLCPA states that "all state agencies," "[i]n considering and issuing . . . administrative approvals and decisions, . . . shall consider whether such decisions are inconsistent with or will interfere with the attainment of the statewide greenhouse gas emissions limits established in article 75."²² The Commission must not only now confirm that the MVP

¹⁸ In *Proceeding on Motion of the Commission (established in Opinion No. 88-15) as to the Guidelines for Bidding to Meet Future Electric Capacity Needs of Consolidated Edison Company of New York, Inc.*, Case 88-E-246; Opinion No. 89-30 (Sept. 13, 1989), the Commission approved a bidding process for Consolidated Edison to obtain electric capacity, but declined to exempt from the process bids from certain specified ongoing purchases and negotiations to terminate certain contracts. In rejecting the Company's request, it stated that the Company's actions on such purchases and negotiations to terminate contracts would be "subject to our later review, after we have had a full opportunity to ascertain the facts and information required to reach a judgment on prudence." It further stated that such Commission review of purchase, termination, and negotiation decisions was part of "the traditional regulatory regime." *Id.*; see also *Abrams v. Public Service Commission*, 492 N.E.2d 1193, 1195-99 (N.Y. 1986) (finding broad Commission authority to address abandoned facilities and ratemaking for any related costs).

¹⁹ New York State Climate Leadership and Community Protection Act ("CLCPA"), 2019 N.Y. Laws 106, available at <https://legislation.nysenate.gov/pdf/bills/2019/S6599>.

²⁰ CLCPA § 1(4); *id.* § 2 (N.Y. Env'tl. Conservation Law ("ECL") § 75-0107(1)).

²¹ CLCPA § 2 (N.Y. ECL § 75-0101(7)).

²² CLCPA § 7(2). This obligation is further buttressed by the pre-existing requirements of New York Energy Law § 6-104(5)(b) (2017) ("any energy-related action or decision" from the Commission must "be reasonably consistent with the forecasts and the policies and long-range energy planning objectives and strategies contained in the [State Energy Plan], including its most

affiliate transaction satisfies the statutory public interest standard under Section 110(4) of the Public Service Law, but also determine that the transaction will not interfere with attainment of the state's emissions limits. This is particularly critical given the tension between New York's commitment to achieve GHG reduction milestones in the next 10 and 30 years, and the 20-year duration of Con Edison's MVP agreement.

C. The Commission's Recently Initiated Gas Supply Planning Proceeding Recognizes the Need to Carefully Scrutinize Affiliate Transactions

On March 19, 2020, the Commission instituted a new proceeding regarding gas planning procedures. Among other issues to be considered in this proceeding, the Commission has included the need to address affiliate arrangements, stating: "The practice of procuring pipeline supply from affiliated companies should also be examined for incentives that are not aligned with state policies."²³ The Commission's examination of this issue should include not only prospective²⁴ affiliate arrangements but also arrangements such as Consolidated Edison's actions on the MVP contract which have not yet been sufficiently scrutinized.

IV. Conclusion

EDF respectfully requests that the Commission act on its petition for declaratory ruling to confirm that natural gas precedent agreements and transportation agreements are subject to review under Public Service Law Section 110(4). EDF's petition has been pending without Commission action for more than two and a half years. Clarifying this provision of the Public Service Law will ensure a forum is available to review Consolidated Edison's actions related to the MVP, which given significant changed circumstances, demands Commission review. By confirming the applicability of Section 110(4) to precedent and transportation agreements, the Commission will pave the way to ensure that such agreements between New York utilities and affiliated entities will be subject to the appropriate, heightened scrutiny. After the Commission has acted on EDF's pending petition, it should then open a proceeding to assess whether Consolidated Edison's MVP transaction is in the public interest.

recent update.'). The New York State Energy Planning Board adopted an Amendment to the 2015 State Energy Plan at the April 8, 2020 Board Meeting. <https://energyplan.ny.gov/-/media/nysenergyplan/meeting/2015-SEP-Amendment.pdf>. That amendment revises the State Energy Plan to incorporate the goals of the CLCPA.

²³ Order Instituting Proceeding at page 7, *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, Case 20-G-0131 (Mar. 19, 2020).

²⁴ EDF recently suggested a framework that could apply to prospective gas supply decisions made by gas utilities, which included protections to address potential affiliate self-dealing. *Proceeding on Motion of the Commission to Investigate Denials of Service Requests by National Grid USA, The Brooklyn Union Gas Company d/b/a National Grid NY and KeySpan Gas East Corporation d/b/a National Grid*, Case 19-G-0678, Comments of Environmental Defense Fund at pages 11-13 (May 1, 2020).

Sincerely,

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