

**ORAL ARGUMENT HAS NOT YET BEEN SCHEDULED**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 07-1065**

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**DOMINION TRANSMISSION, INC.,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**CYNTHIA A. MARLETTE  
GENERAL COUNSEL**

**ROBERT H. SOLOMON  
SOLICITOR**

**HOLLY E. CAFER  
ATTORNEY**

**FEDERAL ENERGY REGULATORY  
COMMISSION  
WASHINGTON, DC 20426**

**DECEMBER 5, 2007**

## CIRCUIT RULE 28(a)(1) CERTIFICATE

A. Parties and Amici:

All parties appearing before the Commission and this Court are listed in Petitioner's Rule 28(a)(1) certificate. There are no amici.

B. Rulings Under Review

The rulings under review appear in the following orders issued by the Federal Energy Regulatory Commission:

1. *Dominion Transmission, Inc.*, 113 FERC ¶ 61,302 (December 21, 2005) ("Initial Order"), JA 304; and
2. *Dominion Transmission, Inc.*, 118 FERC ¶ 61,036 (January 19, 2007) ("Rehearing Order"), JA 329.

C. Related Cases:

This case has not previously been before this Court or any other court. Counsel is not aware of any other related cases pending before this Court of any other court.

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Holly E. Cafer  
Attorney

December 5, 2007

## TABLE OF CONTENTS

	<b>PAGE</b>
STATEMENT OF THE ISSUE.....	1
STATUTES AND REGULATIONS .....	1
COUNTERSTATEMENT OF JURISDICTION .....	2
INTRODUCTION .....	2
STATEMENT OF FACTS .....	3
I. Statutory Framework.....	3
II. The Commission Proceeding And Orders.....	4
A. Dominion’s Tariff And The Settlements.....	4
B. Events Leading To The Orders On Review.....	6
C. The Orders On Review.....	8
SUMMARY OF ARGUMENT .....	12
ARGUMENT .....	14
I. THE PETITION FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION.....	14
A. Standard Of Review.....	14
B. Dominion Lacks Standing To Challenge The Orders On Review And Its Claim Is Not Ripe.....	15
II. THE COMMISSION REASONABLY INTERPRETED THE SETTLEMENTS AND DETERMINED THAT IT DID NOT MODIFY THE SETTLEMENTS, AND, IN ANY EVENT, THE STATUTORY “JUST AND REASONABLE” STANDARD APPLIES.....	19

## TABLE OF CONTENTS

	<b>PAGE</b>
A. Standard Of Review.....	19
B. The Commission Reasonably Concluded That The Additional Reporting Requirements Do Not Constitute A Modification To The Settlements.....	21
1. The Settlements Do Not Preclude The Reporting Of Additional Information.....	21
2. The Reporting Of Additional Information Advances The Purpose Of The Settlements.....	23
C. The Commission Reasonably Concluded That The Statutory “Just And Reasonable” Standard Applies To Its Order Imposing Additional Reporting Requirements.....	28
1. NGA Section 5 Applies To The Commission’s Addition Of Requirements To Dominion’s Tariff.....	28
2. Even If The Commission Modified The Settlements, It Reasonably Interpreted The Settlements, Concluding That The NGA Section 5 “Just And Reasonable” Standard Applies.....	29
III. THE COMMISSION SATISFIED THE NGA SECTION 5 “JUST AND REASONABLE” STANDARD.....	33
A. Standard Of Review.....	33
B. Substantial Evidence Supports The Commission’s Conclusions That Dominion’s Tariff, Absent Modification, Is Unjust And Unreasonable And That The Additional Reporting Requirements Are Just And Reasonable.....	35
CONCLUSION.....	42

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Abbott Labs. v. Gardner</i> , 387 U.S. 136 (1967).....	15
<i>Ala. Mun. Distribs. Group v. FERC</i> , 312 F.3d 470 (D.C. Cir. 2002).....	15, 18-19
<i>Algonquin Gas Transmission Co. v. FERC</i> , 948 F.2d 1305 (D.C. Cir. 1991).....	40
<i>Ameren Servs. Co. v. FERC</i> , 330 F.3d 494 (D.C. Cir. 2003).....	20, 29, 33
* <i>American Gas Ass’n v. FERC</i> , 428 F.3d 255 (D.C. Cir. 2005).....	25, 26
<i>ANR Pipeline Co. v. FERC</i> , 771 F.2d 507 (D.C. Cir. 1985).....	16
<i>Appalachian Power Co. v. FERC</i> , 101 F.3d 1432 (D.C. Cir. 1996).....	33
<i>Appalachian Power Co. v. FERC</i> , 529 F.2d 342 (D.C. Cir. 1976).....	30
<i>Ass’n of Oil Pipe Lines v. FERC</i> , 83 F.3d 1424 (D.C. Cir. 1996).....	35
<i>Atlantic City Elec. Co. v. FERC</i> , 295 F.3d 1 (D.C. Cir. 2002).....	26
<i>Brooklyn Union Gas Co. v. FERC</i> , 409 F.3d 404 (D.C. Cir. 2005).....	27

---

\* Cases chiefly relied upon are marked with an asterisk.

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Cajun Elec. Power Coop. v. FERC</i> , 924 F.2d 1132 (D.C. Cir. 1991).....	20, 21, 32
<i>Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.</i> , 467 U.S. 837 (1984).....	20
<i>Consolidated Edison Co. v. FERC</i> , 165 F.3d 992 (D.C. Cir. 1999).....	4
<i>Consolidated Gas Transmission Corp. v. FERC</i> , 771 F.2d 1536 (D.C. Cir. 1985).....	28
<i>El Paso Natural Gas Co. v. FERC</i> , 50 F.3d 23 (D.C. Cir. 1995).....	14
<i>Florida Mun. Power Agency v. FERC</i> , 315 F.3d 362 (D.C. Cir. 2003).....	34
<i>FPC v. Sierra Pacific Power Co.</i> , 350 U.S. 348 (1956).....	30
<i>Kansas Cities v. FERC</i> , 723 F.2d 82 (D.C. Cir. 1983).....	31
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	14, 18
<i>Midcoast Interstate Transmission, Inc. v. FERC</i> , 198 F.3d 960 (D.C. Cir. 2000).....	16
<i>Mississippi Valley Gas v. FERC</i> , 68 F.3d 503 (D.C. Cir. 1995).....	16

---

**\* Cases chiefly relied upon are marked with an asterisk.**

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>National Fuel Gas Supply Corp. v. FERC</i> , 468 F.3d 831 (D.C. Cir. 2006).....	21, 41
<i>N.Y. State Electric &amp; Gas Corp. v. FERC</i> , 177 F.3d 1037 (D.C. Cir. 1999).....	19
* <i>Papago Tribal Util. Auth. v. FERC</i> , 723 F.2d 950 (D.C. Cir. 1983).....	28, 30, 31
<i>Petal Gas Storage, L.L.C. v. FERC</i> , 496 F.3d 695 (D.C. Cir. 2007).....	4
* <i>Pub. Util. Dist. No. 1 of Snohomish County v. FERC</i> , 272 F.3d 607 (D.C. Cir. 2001).....	2, 14, 18
<i>Sea Robin Pipeline Co. v. FERC</i> , 795 F.2d 182 (D.C. Cir. 1989).....	34
<i>Sierra Club v. Env'tl. Prot. Agency</i> , 292 F.3d 895 (D.C. Cir. 2002).....	14-17
<i>Sithe/Independence Power Partners, L.P. v. FERC</i> , 165 F.3d 944 (D.C. Cir. 1999).....	20
<i>Texaco Inc. v. FERC</i> , 148 F.3d 1091 (D.C. Cir. 1998).....	30
<i>Texas v. United States</i> , 523 U.S. 296 (1998).....	19
<i>Toca Producers v. FERC</i> , 411 F.3d 262 (D.C. Cir. 2005).....	15

---

\* Cases chiefly relied upon are marked with an asterisk.

## TABLE OF AUTHORITIES

<b>COURT CASES:</b>	<b>PAGE</b>
<i>Trunkline LNG Co. v. FERC</i> , 194 F.3d 68 (D.C. Cir. 1999).....	4
<i>United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.</i> , 350 U.S. 332 (1956).....	30
<i>Va. State Corp. Comm’n v. FERC</i> , 468 F.3d 845 (D.C. Cir. 2006).....	16
<i>Williston Basin Interstate Pipeline Co. v. FERC</i> , 358 F.3d 45 (D.C. Cir. 2004).....	40
* <i>Wisconsin Public Power, Inc. v. FERC</i> , 493 F.3d 239 (D.C. Cir. 2007).....	14, 17, 25, 26, 34
<b>ADMINISTRATIVE CASES:</b>	
<i>CNG Transmission Corp.</i> , 85 FERC ¶ 61,261 (1998).....	32
<i>Columbia Gas Transmission Corp.</i> , 79 FERC ¶ 61,044 (1997).....	32
<i>Dominion Transmission, Inc.</i> , Letter Order re: Settlement Proposal, Docket No. RP00-632-003 (Sept. 13, 2001).....	6
<i>Dominion Transmission, Inc.</i> , 111 FERC ¶ 61,285 (2005).....	5, 6
<i>Dominion Transmission, Inc.</i> , 113 FERC ¶ 61,302 (2005).....	2, 8, 9, 24, 36, 38, 39

---

\* Cases chiefly relied upon are marked with an asterisk.



## TABLE OF AUTHORITIES

<b>ADMINISTRATIVE CASES:</b>	<b>PAGE</b>
<i>Dominion Transmission, Inc.</i> , 118 FERC ¶ 61,036 (2007).....	2, 9-12, 17-18, 21-25, 27, 29, 34-41
<i>Equitrans, L.P.</i> , 104 FERC ¶ 61,008 (2003).....	27
<i>Equitrans, L.P.</i> , 106 FERC ¶ 61,013 (2004).....	27
<b>STATUTES:</b>	
Administrative Procedure Act	
5 U.S.C. § 706(2)(A).....	20
Natural Gas Act	
Section 4, 15 U.S.C. § 717c.....	4, 5
Section 5, 15 U.S.C. § 717d(a).....	3, 4, 5, 28, 30, 31
Section 10, 15 U.S.C. § 717i.....	4, 11, 35
Section 19(b), 15 U.S.C. § 717r(b).....	14, 35

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**\* Cases chiefly relied upon are marked with an asterisk.**

## GLOSSARY

Br.	Petitioner Dominion’s Brief
Commission, FERC	Federal Energy Regulatory Commission
Dominion	Petitioner Dominion Transmission, Inc.
Fuel Report(s)	The annual reports required by Tariff § 16.5, JA 115-117
Initial Order	Order Accepting Fuel Reports Subject to Conditions, <i>Dominion Transmission, Inc.</i> , 113 FERC ¶ 61,302 (2005), JA 304
JA	Joint Appendix
KeySpan	KeySpan Delivery Companies
National Fuel	National Fuel Gas Distribution Corporation
NGA	Natural Gas Act, 15 U.S.C. § 717, <i>et seq.</i>
P	Refers to the Paragraph number in Commission orders
Rehearing Order	Order on Rehearing, Compliance Filing, and Fuel Report, <i>Dominion Transmission, Inc.</i> , 118 FERC ¶ 61,036 (2007), JA 329
Settlements	The 2001 Settlement and 2005 Settlement
SJA	Supplemental Joint Appendix
2001 Settlement	Offer of Settlement and Explanatory Statement, Docket Nos. RP00-632-003, <i>et al.</i> (filed June 22, 2001), JA 70
2004 Fuel Report	Dominion’s Fuel Report, Docket No. RP00-632-000 (filed June 30, 2004), JA 184
2005 Fuel Report	Dominion’s Fuel Report, Docket No. RP00-632-000 (filed June 30, 2005), JA 204
2005 Settlement	Offer of Settlement and Explanatory Statement, Docket Nos. RP97-406-033, <i>et al.</i> (filed April 1, 2005), JA 139

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**STATEMENT OF THE ISSUE**

Assuming jurisdiction, whether the Federal Energy Regulatory Commission (“Commission”), in interpreting the language and purpose of a settlement that obligates Dominion Transmission, Inc. (“Dominion”) to file certain information concerning fuel use, reasonably directed Dominion to file additional information.

**STATUTES AND REGULATIONS**

The relevant statutes are contained in the Addendum to this brief.

## COUNTERSTATEMENT OF JURISDICTION

Petitioner Dominion invokes this Court’s jurisdiction under section 19(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b). Br. at 1-2. As demonstrated in section I of the Argument below, however, Dominion fails to establish standing in its opening brief. Because Dominion in fact lacks constitutional standing and its claim is not ripe, its petition for review should be dismissed for lack of jurisdiction. *See, e.g., Pub. Util. Dist. No. 1 of Snohomish County v. FERC*, 272 F.3d 607, 617 (D.C. Cir. 2001) (dismissing petition for lack of standing despite mandatory filing requirement).

## INTRODUCTION

This case concerns Dominion’s obligation to file certain informational fuel reports as a requirement of its tariff. The reporting requirement originated in a settlement among Dominion and its customers and was subsequently continued in a later settlement. When Dominion filed its 2004 and 2005 fuel reports, the Commission, over the objections of Dominion and at the urging of certain customers, directed Dominion to file additional information. Order Accepting Fuel Reports Subject to Conditions, *Dominion Transmission, Inc.*, 113 FERC ¶ 61,302 (2005) (“Initial Order”), JA 304; Order on Rehearing, Compliance Filing, and Fuel Report, *Dominion Transmission, Inc.*, 118 FERC ¶ 61,036 (2007) (“Rehearing Order”), JA 329. In so doing, the Commission relied upon its statutory

responsibility to ensure just and reasonable rates, as well as its interpretation of the settlements as both intending for the Commission to monitor Dominion’s rates – and change them if necessary – in this manner, and allowing the Commission to require additional information to fulfill this responsibility. Moreover, the Commission found that a potential subsidy exists on Dominion’s system, and requiring the additional information would aid in identifying any such subsidy.

Before this Court, Dominion continues to claim that the Commission modified the settlements by requiring additional information in the fuel reports. As the Commission explained in the orders on review, although its action touched upon issues addressed by the settlements, it did not modify – and, indeed, actually helped promote – those settlements. Regardless, however, the Commission reasonably interpreted the settlements and concluded that they preserve the Commission’s ability to change the reporting requirements under the “just and reasonable” standard. 15 U.S.C. § 717d(a).

## **STATEMENT OF FACTS**

### **I. Statutory Framework**

The NGA grants the Commission jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce. “The Commission has a duty under [section] 4 of the [NGA] to ensure ‘just and reasonable’ rates in the natural

gas industry.” *Petal Gas Storage, L.L.C. v. FERC*, 496 F.3d 695, 698 (D.C. Cir. 2007) (quoting NGA section 4, 15 U.S.C. § 717c (governing pipeline rate filings)).

NGA section 5, 15 U.S.C. § 717d(a), provides that when the Commission finds that any existing rate, term or condition or contract affecting such rate is unjust or unreasonable, it must impose, prospectively only, a replacement rate, term or condition, or contract, that is just and reasonable. The Commission has the burden of proving both that the existing rate, term or condition, or contract is unjust and unreasonable, and that the replacement is just and reasonable. *See, e.g., Consolidated Edison Co. v. FERC*, 165 F.3d 992, 1000-01 (D.C. Cir. 1999).

Under NGA section 10, “[e]very natural-gas company shall file with the Commission such . . . reports as the Commission may . . . prescribe as necessary or appropriate to assist the Commission in the proper administration of” the NGA. 15 U.S.C. § 717i; *see, e.g., Trunkline LNG Co. v. FERC*, 194 F.3d 68, 99 (D.C. Cir. 1999) (finding that, under NGA section 10, Commission may require a report that could later provide a basis for Commission action under NGA section 5).

## **II. The Commission Proceeding And Orders**

### **A. Dominion’s Tariff And The Settlements**

Dominion is an interstate natural gas pipeline company whose rates, terms and conditions for transportation and sales of natural gas are subject to the NGA and set forth in its tariff, many provisions of which derive from Commission-

approved settlements predating this proceeding. *See Dominion Transmission, Inc.*, 111 FERC ¶ 61,285, at P 2 (2005) (describing prior settlements).

The tariff provisions at issue in this case originate in the 2001 Settlement which, as relevant here, fixed Dominion's fuel retention percentages for recourse shippers for a period of time and extended a prior moratorium on the effective date of general NGA section 4 and 5 rate changes, 15 U.S.C. §§ 717c, 717d, for certain purposes. *See* 2001 Settlement, Art. XI, JA 95-98. In the event that Dominion had not filed, under NGA section 4, to change its rates by the close of the moratorium, section 16.5 of the tariff, as established by the 2001 Settlement, directed Dominion to submit an annual Fuel Report to the Commission. Section 16.5 of the tariff specified the following 16 items to be included in the Fuel Report:

- (1) the volume of fuel purchased;
- (2) the cost of fuel;
- (3) the source from which Pipeline purchased the fuel;
- (4) the amount of fuel retained by service;
- (5) actual fuel usage by function and station;
- (6) information detailing any adjustments made to inventory related to storage gas losses;
- (7) the fuel requirements of each third-party pipeline transporter;
- (8) the month-end balance in Account No. 117.4 attributable to Non-Purchased Supply . . . ;
- (9) System Lost and Unaccounted For Gas broken out by month and function;
- (10) aggregate customer storage inventory, by month, and physical storage inventory levels, by month;
- (11) aggregate injections and withdrawals, by month and broken out by customer activity and physical activity;
- (12) monthly values used for storage valuation purposes pursuant to the Valuation Method;
- (13) monthly balances in system gas accounts . . . ;
- (14) cumulative . . . parks and loans, by month;
- (15) monthly breakdown of a) exchange imbalance volumes, b) transportation imbalance volumes, and c) net storage volumes and
- (16) throughput and billing determinant information . . . .

Tariff § 16.5, JA 115-117 (emphasis omitted); *see also* 2001 Settlement § 11.6, JA 96. The Commission approved the 2001 Settlement and accepted the proposed tariff revisions. Letter Order re: Settlement Proposal, *Dominion Transmission, Inc.*, Docket No. RP00-632-003 (Sept. 13, 2001).

On April 1, 2005, Dominion filed an offer of settlement (“2005 Settlement”) proposing, in relevant part, to amend the 2001 Settlement. The 2005 Settlement further extends the moratorium on certain NGA section 4 and 5 proceedings, preventing Dominion from initiating a general rate case until 2010. 2005 Settlement §§ 4.2, 4.5, JA 159-60; *see also Dominion Transmission, Inc.*, 111 FERC ¶ 61,285, at PP 12-14 (approving 2005 Settlement). With regard to the Fuel Reports, the 2005 Settlement continues to require Dominion to submit the annual Fuel Reports until it submits its next general rate case. 2005 Settlement § 4.3, JA 159; *see also Dominion Transmission, Inc.*, 111 FERC ¶ 61,285, at P 13 (“The informational fuel filing requirements established by [the 2001 S]ettlement will remain in place.”). The Commission approved the 2005 Settlement on May 27, 2005. *Dominion Transmission, Inc.*, 111 FERC ¶ 61,285, at P 28.

#### **B. Events Leading To The Orders On Review**

Dominion filed its 2004 and 2005 Fuel Reports – the Reports that gave rise to this proceeding – on June 30, 2004 and June 30, 2005, respectively. In response to the 2004 Fuel Report, KeySpan, a Dominion customer and party to the



Settlements, expressed concern regarding whether Dominion is “requiring system shippers to subsidize negotiated fuel rates” and requested that the Commission require Dominion to provide additional information regarding fuel quantities waived by or collected or credited under negotiated rate agreements. KeySpan Motion to Intervene and Comment at 4 (filed July 12, 2004), SJA 347.<sup>1</sup> National Fuel, another Dominion customer, supported KeySpan’s request, noting that the submission of additional fuel information would not be burdensome. National Fuel Motion for Leave to Reply and Reply at 3-4 n.6 (filed July 30, 2004), SJA 358-59. Dominion opposed KeySpan’s request, asserting that KeySpan’s concern should have been raised as part of the Settlement proceedings. Dominion Motion for Leave to Answer and Answer at 2-3 n.5 (filed July 23, 2004), SJA 350-51.

In response to Dominion’s 2005 Fuel Report, KeySpan submitted similar comments, explaining that “[t]he ostensible purpose of [the Fuel Reports] is to permit parties to compare the amount of fuel being retained by Dominion to the pipeline’s actual fuel use so that the parties can evaluate whether Dominion’s fuel retention percentage continue[s] to be just and reasonable.” Request of the KeySpan Delivery Companies for Further Information at 2, JA 226 (filed July 12, 2005). KeySpan argued that the Fuel Report “may be presenting a somewhat

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<sup>1</sup> “SJA” refers to the Supplemental Joint Appendix.

misleading comparison of fuel retention and fuel use,” *id.*, and therefore requested that the Commission direct Dominion

to identify (1) the quantity of fuel waived by Dominion by function, (2) the quantity of fuel collected or credited under negotiated rate agreements that reflect negotiated fuel retention percentages, and (3) the amounts of fuel that should be reflected in Dominion’s fuel retainage accounts as a result of the Commission’s orders that require Dominion to credit fuel retainage levels to its retainage accounts for any negotiated transaction.

*Id.* at 4, JA 228.

Dominion again responded in opposition to KeySpan, arguing that the “components of the informational fuel report were a negotiated part of the [2001] Settlement” and were an “integral part” of the 2005 Settlement. Answer of Dominion at 2, 3, JA 299, 300 (filed July 27, 2005).

### **C. The Orders On Review**

In its Initial Order, issued December 21, 2005, the Commission found that Dominion’s Fuel Reports satisfied the existing requirements, and accepted the Reports subject to conditions. Initial Order at P 11, JA 307. But, acting under NGA section 5 and agreeing with Dominion’s customers, the Commission determined that Dominion’s tariff is unjust and unreasonable because “it fails to require additional information regarding waivers and discounting and should be revised to require such information to be just and reasonable.” *Id.* at P 12, JA 307. In support, the Commission explained that its “policy prohibits one class of

customer from subsidizing another class of customer,” and that the submission of additional information would enhance transparency and “assure all parties and the Commission that there is no cost-shifting or subsidization on Dominion’s system.” *Id.* at P 11, JA 307. The Commission directed Dominion to revise its tariff to require all Fuel Reports, including the 2004 and 2005 Fuel Reports, to include the three additional pieces of information sought by Dominion’s customers:

- 1) the quantity of fuel waived by Dominion in the relevant annual period by function;
- 2) the quantity of fuel collected or credited under negotiated rate agreements where the fuel retention quantities differ from Dominion’s maximum recourse rate retainage; and,
- 3) the amounts that should be collected or credited pursuant to the Commission’s [prior order] requiring Dominion to credit maximum rate retainage levels to its retainage accounts for any negotiated transactions.

*Id.* at P 13, JA 308.

Dominion sought rehearing of the Initial Order. Request for Rehearing of Dominion Transmission, Inc., JA 309 (filed January 20, 2006). In its Rehearing Order, issued on January 19, 2007, the Commission granted rehearing to the extent that it agreed with Dominion that the tariff changes can only be implemented prospectively. Rehearing Order at P 24, JA 338. In all other respects the Commission denied rehearing.

First, the Commission explained that, contrary to Dominion’s argument, the Commission “has not modified the terms of the” Settlements, and “[n]one of the 16

enumerated informational filing requirements . . . is modified or eliminated.”

Rehearing Order at P 14, JA 334. Supporting this conclusion, the Commission interpreted the language and purpose of the Settlements, and found that the new requirements do not undermine the bargain reflected in the Settlements and are otherwise consistent with the intent of the Settlements. *Id.* at P 15, JA 334.

Reviewing the provisions of the Settlements (1) requiring Dominion to continue filing the Fuel Reports until it submits its next general rate case, and (2) reserving the Commission’s review authority under NGA section 5, the Commission determined that *both* the existing and new reporting requirements serve the purpose of the Settlements by providing “information the Commission could use to modify the fuel retention rates in a section 5 proceeding.” *Id.* at P 16, JA 335.

In the alternative, the Commission explained that “even if . . . the Commission’s action modified the 2005 Settlement, the standard the 2005 Settlement applies to Commission-directed changes is the ‘just and reasonable’ standard under NGA section 5,” not the more restrictive public interest standard advocated by Dominion. Rehearing Order at P 17, JA 335. The Commission based its interpretation on section 4.6 of the 2005 Settlement, which provides that the Settlement “shall not purport to preclude the Commission from initiating an NGA section 5 proceeding on its own volition.” *Id.* at P 17, JA 335-336 (quoting 2005 Settlement § 4.6, JA 160).

Next, the Commission denied rehearing on the issue of whether the Commission satisfied the “just and reasonable” standard. The Commission explained that in the Initial Order it made the requisite NGA section 5 findings based on its determination that the new requirements, like the existing requirements, provide information useful to examining Dominion’s fuel retention percentage, are important to enhance transparency and will assure all parties that there is no subsidization in a subsequent proceeding. Rehearing Order at P 21, JA 337. On rehearing, the Commission additionally found, using its expertise and judgment in determining what information it requires in fulfilling its statutory mandate, that all the information required, including the new information, “has value *now* in that it provides the Commission with the ability to oversee Dominion’s fuel retention rates and potentially take section 5 action.” *Id.* (emphasis added). Further, the Commission reasoned that it is “granted express authority under section 10 of the NGA to require reports.” *Id.*; *see* 15 U.S.C. § 717i.

Finally, the Commission confirmed that there is a need for additional information (*i.e.* transparency) due to the existence of a potential subsidy, as recognized by Dominion’s customers, and that the new reporting requirements will satisfy that need:

The purpose is to obtain information regarding the quantities of gas that, in the absence of waiver of the fuel retention percentage, would

have been extracted from volumes to be delivered to the shippers who receive the waivers. . . . These volumes that otherwise would be extracted and burned as fuel to transport that shipper's gas are potentially subsidized by other shippers through the settled fuel retention percentage. *An unjust and unreasonable subsidy, therefore could potentially exist even though the settled fuel percentage cannot change until at least 2010.*

Rehearing Order at P 22, JA 337 (emphasis added).

### **SUMMARY OF ARGUMENT**

The Commission and Dominion fundamentally agree on the value of encouraging and protecting settlements. Indeed, in this case the Commission took reasonable actions intended to support the very purpose of the Settlements – to allow monitoring of Dominion's fuel retention percentage to ensure just and reasonable rates. Dominion attempts to cast the Commission's action as setting aside the fundamental bargain struck by the parties in a rate case settlement; however, this is not the case.

This Court need not reach the reasonableness of the Commission's interpretation of the Settlements or the basis for its directive because Dominion has failed to demonstrate, and indeed does not have, standing to pursue this appeal. Dominion has not objected to the burden of complying with new reporting requirements and any other harm arising from the orders on review is purely speculative. For this reason as well, Dominion's claim is not ripe.

As for the merits, in the orders on review the Commission reviewed and interpreted the Fuel Report requirements of Dominion's tariff and the Settlements to determine the parties' intent, and reasonably concluded that requiring additional information does not modify the Settlements. The Commission's action is both consistent with the purpose of the Settlements and necessary in light of the Commission's duty, under the NGA, to monitor Dominion's rates to ensure that they are just and reasonable. Even if the Commission's action could be construed as modifying the Settlements, it reasonably interpreted the Settlement language to conclude that it has the ability to require additional information, advancing the purpose of the Settlements without undermining the fundamental bargain, upon finding that the existing informational filing requirements are no longer just and reasonable.

Responding to concerns raised by Dominion's customers, the orders on review reflect that a potential unlawful subsidy could exist on Dominion's system. The new reporting requirements allow the Commission to identify such a subsidy. Accordingly, the Commission's determination that the tariff, absent the new informational reporting requirements, is unjust and unreasonable is supported by substantial evidence in the record.

## ARGUMENT

### I. THE PETITION FOR REVIEW SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

#### A. Standard Of Review

Section 19(b) of the NGA, 15 U.S.C. § 717r(b), requires a party seeking judicial review to be “aggrieved.” *El Paso Natural Gas Co. v. FERC*, 50 F.3d 23, 26 (D.C. Cir. 1995) (“Only a party that is ‘aggrieved’ by an order issued under the Act may obtain judicial review thereof.”). “A party is aggrieved . . . if it can establish both the constitutional and prudential requirements for standing.” *Pub. Util. Dist. No. 1 of Snohomish County*, 272 F.3d at 613. Petitioners are required to set forth the basis for a claim of standing, including, where not self-evident, arguments and evidence to support such a claim, at the earliest opportunity. *See* Circuit Rule 28(a)(7); *Sierra Club v. Env'tl. Prot. Agency*, 292 F.3d 895, 900 (D.C. Cir. 2002).

To establish constitutional standing, the petitioner “must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Wisconsin Public Power, Inc. v. FERC*, 493 F.3d 239, 267 (D.C. Cir. 2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal marks omitted)).



A petitioner must also show that its claim “meets the requirements of a ‘Case’ or a ‘Controversy’ within the meaning of Article III of the Constitution,” including “the requirement that [petitioner’s] claim be ripe for judicial resolution.” *Toca Producers v. FERC*, 411 F.3d 262, 265 (D.C. Cir. 2005). In reviewing ripeness, the court “evaluate[s] the ‘fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.’” *Ala. Mun. Distribs. Group v. FERC*, 312 F.3d 470, 471 (D.C. Cir. 2002) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

**B. Dominion Lacks Standing To Challenge The Orders On Review And Its Claim Is Not Ripe.**

Dominion’s opening brief fails to establish Article III standing. Dominion states that the Commission’s orders “impose a concrete, actual injury by altering the terms of its Settlement Agreements,” but does not explain how, even assuming that the Commission did alter the Settlements, the Commission’s action harms Dominion. Br. at 23 (“Standing”). Thus, although Dominion is the object of the Commission’s orders on review, its entitlement to judicial review is not “self-evident.” *Sierra Club*, 292 F.3d at 899-900. The single sentence Dominion devotes to explaining its basis for standing leaves unclear whether its alleged injury derives from: 1) the precedent set by the Commission’s addition of filing requirements to the tariff or Settlements; 2) the filing requirement itself; 3) the

potential for future changes to Dominion's rates based upon the informational filings; or something else.

Thus, Dominion's attempt to demonstrate standing, whether as self-evident or not, necessarily fails because a "concrete and particularized" and "actual or imminent" injury cannot be identified from Dominion's brief or the record. *See Va. State Corp. Comm'n v. FERC*, 468 F.3d 845, 849 (D.C. Cir. 2006) (dismissing petition for review where petitioner failed to demonstrate injury in fact). Precedent cited by Dominion does not assist in divining the nature of Dominion's injury, but only further suggests, by comparison, that any alleged injury is much too speculative to establish standing. Br. at 23 (citing *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 969 (D.C. Cir. 2000) (pipeline had standing based upon the imminent loss of a customer "as a direct consequence of the agency's action and irrespective of the outcome of a future rate proceeding"); *Mississippi Valley Gas Co. v. FERC*, 68 F.3d 503, 508 (D.C. Cir. 1995) (standing was uncontested where petitioner "clearly demonstrated 'injury in fact' because the FERC orders it challenge[d] affect the rates it will pay"); *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 516 (D.C. Cir. 1985) (pipeline had standing based upon the immediate prospect of a future rate increase)). An "argument first made in reply comes too late;" therefore, Dominion's petition should be dismissed for lack of standing. *Sierra Club*, 292 F.3d at 900.

Elsewhere in its brief, Dominion appears to rest its claim of injury upon the precedent set by the Commission's orders. *See* Br. at 4 (“The challenged modifications to the settlement agreements may appear to be relatively minor; but the precedent the Commission has set is broad and dangerous. Dominion accordingly has sought review of the Commission’s carelessly expansive ruling.”). Dominion’s “interest in the Commission’s legal reasoning and its potential precedential effect does not by itself confer standing where, as here, it is ‘uncoupled’ from any injury in fact caused by the substance of [FERC’s] adjudicatory action.” *Wisconsin Public Power*, 493 F.3d at 268 (internal quotation marks omitted) (finding the petitioner lacked standing even if the Commission’s reasoning in the orders on review would govern subsequent proceedings); *see also Ala. Mun. Distribs. Group*, 312 F.3d at 473 (“In so far as petitioners rely on precedential effect *within the Commission*, they assert a type of ‘injury’ that is clearly insufficient.”) (emphasis in original) (citation omitted).

Dominion has not asserted an injury “caused by the substance of [FERC’s] adjudicatory action” – the new reporting requirements – and should not be permitted to assert this injury at this late date. *Wisconsin Public Power*, 493 F.3d at 268 (internal quotation marks omitted); *see* Rehearing Order at P 21, JA 337 (“Dominion never claims that the requirement to file the additional information is unduly burdensome.”); *see also Sierra Club*, 292 F.3d at 900. Indeed, this Court

has declined to validate a claim of standing based upon a mandatory filing requirement where the petitioners, who, like Dominion, were the direct objects of the Commission's orders on review, did not specifically claim an injury arising from the filing requirement. *Pub. Util. Dist. No. 1 of Snohomish County*, 272 F.3d at 617 (dismissing petition of transmission-owning utilities for lack of standing where they did not allege an injury arising from the mandatory filing requirement). The Commission's "add[ition of] a few more terms to the mix," Br. at 28, as Dominion characterizes the filing requirement, therefore cannot be a basis for Dominion's standing.

Nor can Dominion establish standing if, perhaps, it is motivated by the potential use of the required information in a future rate case. *See* Br. at 23 (and rate cases cited therein) cited *supra* at 16. As the Commission explained in the Rehearing Order, the additional reporting requirements "are important to *possible future* [NGA] section 5 action by the Commission in fulfilling the Commission's statutory role to monitor the justness and reasonableness of Dominion's fuel percentages," but the Commission "has not modified any of the rates, or terms and conditions" at this time. Rehearing Order at P 21, 16, JA 337, 335 (emphasis added). As such, the Commission's use of the information required by the orders on review in a future proceeding is neither "actual" nor "imminent" and therefore cannot support a claim of standing. *Lujan*, 504 U.S. at 560; *Ala. Mun. Distribs.*

*Group*, 312 F.3d at 473 (“The effect that the [approved] transaction will have on petitioners’ rates will be decided in Southern’s next rate case . . . . The injury has not yet materialized . . . .”).

For this same reason, Dominion’s claim is not ripe for review. *Ala. Mun. Distribs. Group*, 312 F.3d at 474. “A claim is unripe for review when it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *N.Y. State Elec. & Gas Corp. v. FERC*, 177 F.3d 1037, 1040 (D.C. Cir. 1999) (quoting *Texas v. United States*, 523 U.S. 296, 299 (1998)). It remains to be seen whether the additional information to be reported will be relied upon as precedent or used to support a rate change in a future proceeding; therefore, Dominion’s injury rests upon purely hypothetical future implications of the Commission’s decision. The interests of administrative efficiency favor delay here, in order to determine whether a cognizable interest materializes, while Dominion, which has not objected to the filing requirement itself, will not suffer if the Court withholds consideration.

**II. THE COMMISSION REASONABLY INTERPRETED THE SETTLEMENTS AND DETERMINED THAT IT DID NOT MODIFY THE SETTLEMENTS, AND, IN ANY EVENT, THE STATUTORY “JUST AND REASONABLE” STANDARD APPLIES.**

**A. Standard Of Review**

The Court reviews Commission action under the Administrative Procedure Act, overturning the disputed orders only if they are “arbitrary, capricious, an

abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see also, e.g., Sithe/Independence Power Partners, L.P. v. FERC*, 165 F.3d 944, 948 (D.C. Cir. 1999). Although “the Commission must be able to demonstrate that it has made a reasoned decision based upon substantial evidence in the record,” the Court’s review is “highly deferential.” *Sithe/Independence*, 165 F.3d at 948 (internal quotation marks omitted).

In reviewing the Commission’s interpretation of a Commission-approved settlement agreement, this Court “employ[s] a variation of the now familiar ‘two-step’ first performed by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*” *Ameren Servs. Co. v. FERC*, 330 F.3d 494, 498 (D.C. Cir. 2003) (affirming the Commission’s determination that the contract unambiguously prohibits Ameren from adjusting certain charges) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The Court “first consider[s] *de novo* whether the settlement agreement unambiguously addresses the matter at issue.” *Id.* “If so, the language of the agreement controls . . .” *Id.* (quoting *Chevron*, 467 U.S. at 843).

“If the settlement agreement is ambiguous, however, [the Court] examine[s] the Commission’s interpretation of that agreement ‘under the deferential ‘reasonable’ standard.’” *Ameren*, 330 F.3d at 498 (quoting *Cajun Elec. Power Coop. v. FERC*, 924 F.2d 1132, 1136, 1137 (D.C. Cir. 1991) (finding agreement is

ambiguous and remanding for the Commission “to place its own construction on the ... ambiguity – so long as it is reasonable.”)). An “agency to which Congress entrusted the protection and discharge of the public interest is entitled to just as much benefit of the doubt in interpreting such an agreement as it would in interpreting its own orders.” *Cajun*, 924 F.2d at 1135.

Dominion’s reliance on *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 839 (D.C. Cir. 2006), is unwarranted here. Br. at 24. In *National Fuel*, this Court determined that

where FERC has relied on multiple rationales (*and has not done so in the alternative*), and we conclude that at least one of the rationales is deficient, we will ordinarily vacate the order unless we are certain that FERC would have adopted it even absent the flawed rationale.

*Id.* at 839 (emphasis added). Here, the Commission’s order provides alternative bases supporting the addition of requirements to Dominion’s tariff. *See* Rehearing Order at P 17, JA 335 (“[E]ven if it were held that the Commission’s action modified the 2005 Settlement . . .”); *see also* Br. at 33 (“The Rehearing Order asserts in the alternative that . . .”). Only one of these bases need be upheld.

**B. The Commission Reasonably Concluded That The Additional Reporting Requirements Do Not Constitute A Modification To The Settlements.**

**1. The Settlements Do Not Preclude The Reporting Of Additional Information.**

In the orders on review, the Commission reasonably interpreted the Settlements at issue and concluded that the addition of reporting requirements to

Dominion's tariff was not only consistent with Dominion's existing Settlements, but actually furthered the purpose of both NGA sections 4 and 5, as well as the Settlements, by ensuring that the Commission has adequate information to ensure just and reasonable rates. That the Commission's action may bear upon issues addressed in the Settlements does not render the Commission's action a modification of the Settlements.

The Commission's imposition of the new reporting requirements changed Dominion's tariff, but not the Settlements. As an initial matter, "[n]one of the 16 enumerated informational filing requirements . . . is modified or eliminated." Rehearing Order at P 14, JA 334 ("The Commission has merely directed that the tariff be revised . . ."). The informational items required by the Settlements to be included in the Fuel Reports "will still be filed." *Id.* at P 16, JA 334. And, contrary to Dominion's claim, Br. at 18 n.8, the requirement for the additional information to be submitted *with* the Fuel Report merely reflects the Commission's "efficient administration" and cannot reasonably be relied upon to support a conclusion that the new requirements are inconsistent with the Settlements. *Id.* at P 16, JA 334.

Further, the Commission found that the Settlements do not provide an exclusive list of the information necessary to allow the Commission to fulfill its statutory responsibilities. Contrary to Dominion's bald assertion that the Fuel



Report was to contain “16 discrete items – no more and no less,” Br. at 29, neither the Settlements nor the tariff contain any limiting language or otherwise contradict the Commission’s reasonable conclusion that “[t]he purpose [of the Settlements] clearly was not to blind the Commission to additional information if such information were deemed important to fulfill the Commission’s oversight responsibilities under the NGA.” Rehearing Order at P 15, JA 334 (noting also that the Settlements were not intended to “*preclude* other information from ever being required for that same purpose”) (emphasis in original). Finally, the Commission determined that no inconsistency arises because the new Fuel Report requirements do not undermine the “bargain struck by the settling parties,” which “relates to the rates.” *Id.* at P 15, JA 334.

**2. The Reporting Of Additional Information Advances The Purpose Of The Settlements.**

Interpreting the Settlements at issue, the Commission reasonably concluded that their purpose is to provide the Commission with information necessary to satisfy its responsibilities under the NGA. First, the Commission noted that the plain language of the Settlements requires Dominion to continue to file the Fuel Reports until it initiates an NGA section 4 general rate case. Rehearing Order at PP 15, 16, JA 334-35 (citing 2001 Settlement § 11.6, JA 96; 2005 Settlement § 4.3, JA 159). Second, the 2005 Settlement reserves the Commission’s authority to “initiat[e] an NGA section 5 proceeding,” thereby confirming the Commission’s

role in ensuring just and reasonable rates. *Id.* at P 16, JA 335. Reading these two provisions together, the Commission concluded that “the purpose and intent [of the Fuel Reports] was to provide a minimum set of information to be used to determine whether section 5 action adjusting the settled fuel retention percentage would be appropriate.” *Id.* at P 15, JA 334.

In so concluding, the Commission relied upon a settling party’s comments on the 2001 Settlement explaining that the Fuel Report requirement serves the purpose of “assist[ing] the customers and the Commission in monitoring the appropriateness of the fixed fuel percentages.” Rehearing Order at P 15, JA 335 (quoting comments of East Coast Distributors Group). The Commission also reasonably relied upon the comments of Dominion’s customer in response to the Fuel Reports, referencing the same purpose of the Settlements and requesting additional information to satisfy that purpose. *See, e.g.*, Request of the KeySpan Delivery Companies for Further Information, *supra* at 7-8.

Next, the Commission determined that the new reporting requirements would advance the purpose of the Settlements. Initial Order at P 11, JA 307 (the new reporting requirements are “no less important than the other information required by” the Settlements and tariff); Rehearing Order at P 21, JA 337 (same). Both the existing and new reporting requirements “provide[] the Commission with the ability to oversee Dominion’s fuel retention rates and potentially take section 5

action.” *Id.* at P 21, JA 337. Accordingly, based upon its reasonable interpretation of the language and intent of the Settlements, the Commission concluded that its “action is consistent with the intent of the [2001] Settlement’s informational filing requirement and also with the intent of the subsequent 2005 Settlement which includes the informational reporting requirements of the [2001] Settlement.” *Id.* at P 15, JA 334.

This Court has confirmed that the Commission can “affect” a jurisdictional contract without “modifying” that contract. *American Gas Ass’n v. FERC*, 428 F.3d 255, 263 (D.C. Cir. 2005) (affirming that the Commission did not modify the contracts, even if it affected them, where the directive related to a different type of service than that covered by the contracts). In *American Gas Ass’n*, this Court concluded that “[b]ecause the terms of primary service for which the parties have bargained remain unchanged, FERC’s decision does not modify contracts, even if it affects them.” *Id.* at 263 (*cited in Wisconsin Public Power*, 493 F.3d at 273 (affirming the Commission’s conclusion that imposing additional charges on contract parties “would have not only affected the contracts but modified them”)). In the Rehearing Order, the Commission reasonably concluded that “Dominion’s claim that any addition to the settlements’ informational filing requirements ‘severely undermined the benefit of the settling parties’ bargain’ is unsupported” because the “bargain struck . . . relates to the rates.” Rehearing Order at P 15, JA

334. For this reason, as well, Dominion’s attempt to analogize this situation to a “builder add[ing] to a house” is unavailing. Br. at 29. Dominion’s logic, contrary to *American Gas Ass’n* and *Wisconsin Public Power*, fails to recognize a distinction between actions modifying or abrogating settlements and those merely affecting settlements.

This case, where the Commission’s action may relate to the Settlements but does not modify the Settlements, is readily distinguishable from those where a court or the Commission found a modification of a settlement. In *Wisconsin Public Power*, for example, this Court, affirming the Commission, found that a proposed modification would require the contract parties to adopt “utterly foreign” scheduling practices that would “pervasively disrupt[]” the existing contract requirements, resulting in a “direct collision” with the primary function of the contract. 493 F.3d at 272, 273; *see also Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 15 (D.C. Cir. 2002) (vacating Commission order generically reforming contracts to substitute a new transmission pricing scheme where Commission did not make required findings). Distinguishing *American Gas Ass’n*, the Court concluded that the proposed action “would have not only *affected* the contracts but *modified* them.” *Wisconsin Public Power*, 493 F.3d at 273 (emphasis added). The instant case reasonably falls nearer “affect” than “modify” based upon the distinction reflected in *American Gas Ass’n* and *Wisconsin Public Power*.

Contrary to Dominion’s contentions, the Commission’s action here confirms and promotes its policy of encouraging and protecting settlements. Br. at 25-30. Dominion is correct that *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404 (D.C. Cir. 2005), exemplifies the Commission’s and this Court’s support for preserving settlements, Br. at 26-27, but it is factually inapposite. In *Brooklyn Union*, the Commission, citing its settlements policy, refused to modify a settlement over the objection of a party where the proposed change and objection went to “the very heart of the prior settlement.” *Equitrans, L.P.*, 106 FERC ¶ 61,013, at P 12 (2004) (affirmed in *Brooklyn Union*). This Court saw “nothing unreasonable in FERC’s decision” refusing to adopt a proposal that ““would by its terms declare a previously approved settlement of no force and effect.”” *Brooklyn Union*, 409 F.3d at 407 (quoting *Equitrans, L.P.*, 104 FERC ¶ 61,008, at P 32 (2003)). Here, the Commission reasonably concluded that the new reporting requirements do not upset the primary bargain of the Settlements – the rates – nor do they modify or eliminate the reporting requirements reflected in the Settlements. Rehearing Order at PP 14-16, JA 334-35. The Commission’s policy supporting settlements remains the same; it is simply “not implicated here.” *Id.* at P 16, JA 335.

The orders on review are not inconsistent with the preservation of settlements because they ensure that the purpose of the Fuel Report requirement in the Settlements – providing the Commission with information allowing it to

monitor Dominion’s fuel retention percentage – can be effectively carried out, thereby allowing the Commission to continue to ensure that Dominion’s rates under the Settlements are just and reasonable. Accordingly, in light of the “appropriate deference” this Court affords the Commission’s reasonable interpretation of Commission-approved settlements, this Court should not disturb the Commission’s finding that the additional reporting requirements do not constitute a modification of the Settlements. *Consolidated Gas Transmission Corp. v. FERC*, 771 F.2d 1536, 1544 (D.C. Cir. 1985) (quoting *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 953 (D.C. Cir. 1983)).

**C. The Commission Reasonably Concluded That The Statutory “Just and Reasonable” Standard Applies To Its Order Imposing Additional Reporting Requirements.**

**1. NGA Section 5 Applies To The Commission’s Addition Of Requirements To Dominion’s Tariff.**

As set forth above, the Commission reasonably concluded that it changed the tariff and not the Settlements when it established new reporting requirements for Dominion. There is no disagreement that tariff changes invoke the “just and reasonable” standard under NGA section 5, 15 U.S.C. § 717d(a). Request for Rehearing of Dominion Transmission, Inc. at 12, JA 320 (arguing that the Commission failed to satisfy the standard required to support tariff changes, the NGA section 5 standard). The only remaining question, then, is whether the Commission satisfied this standard, addressed *infra* in section III.

**2. Even If The Commission Modified The Settlements, It Reasonably Interpreted The Settlements, Concluding That The NGA Section 5 “Just And Reasonable” Standard Applies.**

If the Court concludes that the Commission’s action modified the Settlements, the Commission’s reasonable conclusion that the 2005 Settlement requires application of the NGA section 5 “just and reasonable” standard in these circumstances warrants deference. *Ameren*, 330 F.3d at 498.

The 2005 Settlement provides the Commission with the authority to change the Settlement, but it does not directly set forth the applicable standard. The controlling provision, section 4.6, of the 2005 Settlement provides as follows:

“This Article IV shall not purport to preclude the Commission from initiating an NGA Section 5 proceeding on its own volition.” 2005 Settlement § 4.6, JA 160.

Reviewing section 4.6 of the 2005 Settlement, the Commission determined that:

By referring only to proceedings initiated under ‘NGA section 5,’ we interpret section 4.6 of the 2005 Settlement to apply the ‘just and reasonable’ standard of review set forth in NGA section 5 to the Commission.

Rehearing Order at P 17, JA 336. The Commission inferred from the reference to NGA section 5 that the settling parties intended the Commission to act pursuant to its NGA section 5 authority in making any changes to the Settlement. NGA section 5, in turn, calls for the Commission to set new rates, terms and conditions upon a finding that the existing rate, term or condition is unjust and unreasonable,

and the replacement is “just and reasonable.” 15 U.S.C. § 717d(a); *see supra* at 3-4 (discussing statutory framework). The Commission did not find intent to apply any other standard reflected in the Settlement. Thus, the Commission determined that section 4.6 permits it to initiate proceedings under NGA section 5 and requires it to apply the “just and reasonable” standard in any such proceeding.

The Commission’s interpretation of section 4.6 of the 2005 Settlement is consistent with this Court’s precedent. Specifically, application of the *Mobile-Sierra*<sup>2</sup> public interest standard is unwarranted here where there is “contractual language ‘susceptible to the construction that the rate may be altered while the contract[] subsists.’” *Texaco Inc. v. FERC*, 148 F.3d 1091 (D.C. Cir. 1998) (quoting *Appalachian Power Co. v. FERC*, 529 F.2d 342, 348 (D.C. Cir. 1976)); *contra* Br. at 30-35. The 2005 Settlement explicitly acknowledges the potential for the Commission to change the settled rates, terms and conditions and authorizes it to do so by initiating an NGA section 5 proceeding. As this Court has held, “specific acknowledgement of the possibility of future rate change is virtually meaningless unless it envisions a just-and-reasonable standard. . . . Future rate changes would be a dim prospect, hardly worthy of recognition, if the parties did not intend the just-and-reasonable standard to govern.” *Papago Tribal Util. Auth.*,

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<sup>2</sup> This doctrine derives from the following cases: *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).



723 F.2d at 954 (finding that the Commission properly applied the “just and reasonable” standard where contract permitted the Commission to change the rates, but did not specify the applicable standard); *see also Kansas Cities v. FERC*, 723 F.2d 82, 88 (D.C. Cir. 1983) (“To assume that a contractual provision pertaining to rate adjustment refers to [the public interest] standard is to assume that it was intended to be virtually inoperative; whereas to interpret it as referring to the just-and-reasonable standard is to give it a content that is both substantial and fair to both sides.”).

Dominion banks its argument that the Commission must apply the *Mobile-Sierra* public interest standard solely on the phrase “on its own volition” in section 4.6 of the 2005 Settlement. Br. at 34. To be sure, the Commission relied upon Dominion’s customers’ comments, distinguishable from complaints under NGA section 5, 15 U.S.C. § 717d(a) (“after a hearing had upon its own motion or upon complaint of” a third-party), in reviewing Dominion’s Fuel Reports. *See supra* at 7-8 (noting comments of KeySpan and National Fuel). However, the Commission, “drawing upon its view of the public interest,” reasonably interpreted the Settlement as not obliging it to disregard comments from parties – regardless of their own rights to request changes under NGA section 5 – particularly when those comments urge the Commission to take action that advances the purpose of the Settlements and the Commission makes its own findings as to the necessity of the

action sought. *Cajun*, 924 F.2d at 1135. *See supra* section II.B.2 (new requirements advance the purpose of the Settlements), *infra* section III.B (substantial evidence supports the Commission’s action).

The Commission has previously interpreted provisions like section 4.6 in a similar manner. Specifically, the Commission determined that similar language does “not limit the Commission’s authority to take future action under Section 5 of the NGA, including, but not limited to, action as a result of rulemaking proceedings,” or a complaint by a non-settling new customer, or as a result of other actions. *CNG Transmission Corp.*, 85 FERC ¶ 61,261, at 62,054 (1998) (interpreting the same settlement provision; “Nor shall this Article X preclude the Commission from initiating a similar Section 5 proceeding on its own volition”); *Columbia Gas Transmission Corp.*, 79 FERC ¶ 61,044, at 61,203 (1997) (“[W]hile the Commission intends at this time to allow Columbia’s settlement to run its course as intended by the parties, the Commission will not limit the circumstances in which it might take section 5 action in the future to the particular circumstances specifically identified in” the settlement). Thus, the Commission has consistently concluded that the phrase “on its own volition” does not have the preclusive meaning Dominion urges. *Contra* Br. at 34.

While Dominion ostensibly argues that section 4.6 of the 2005 Settlement is unambiguous, it elsewhere concedes that the provision is in fact ambiguous. Br. at

34-35. Considering the phrase “on its own volition,” Dominion first asserts that “[w]hatever that provision might mean” it is inapplicable here, and then goes on to conclude that “this clause *equally could be read to*” require application of the restrictive *Mobile-Sierra* public interest standard. Br. at 33-34 (emphasis added). The Commission does not concur with the latter reading of this provision; however, the Commission likewise concludes that the provision, if not unambiguous in favor of the Commission’s interpretation, is at least sufficiently ambiguous so as to require interpretation. Dominion’s proffered interpretation, which disregards the reference to “NGA Section 5” in the 2005 Settlement, 2005 Settlement § 4.6, JA 160, fails “to give meaning to all of the [contract’s] express terms.” *Ameren*, 330 F.3d at 499. The Commission’s interpretation, which gives meaning to the only language in the agreement that speaks to the applicable standard, is “amply supported both factually and legally,” and so warrants deference. *Appalachian Power Co. v. FERC*, 101 F.3d 1432, 1437 (D.C. Cir. 1996).

### **III. THE COMMISSION SATISFIED THE NGA SECTION 5 “JUST AND REASONABLE” STANDARD.**

#### **A. Standard Of Review**

The Commission’s factual findings are conclusive if supported by substantial evidence. 15 U.S.C. § 717r(b). The substantial evidence standard “requires more than a scintilla, but can be satisfied by something less than a

preponderance of the evidence.” *Florida Mun. Power Agency v. FERC*, 315 F.3d 362, 365-66 (D.C. Cir. 2003) (citations omitted); *Wisconsin Public Power*, 493 F.3d at 273 (“[A] reviewing court will not upset the decision . . . if the agency’s path may reasonably be discerned.”) (citations omitted).

As the Commission indicates in the Rehearing Order, the evidentiary support required depends upon the nature of the action. Rehearing Order at P 21, JA 337 (“The Commission is not required to prove through record evidence that information might be of value in a future proceeding.”). Dominion errs in relying upon cases resulting in a rate change because here the Commission has “*not* modified any of the rates, or terms and conditions of service approved by the settlements.” *Id.* at P 16, JA 335 (emphasis added); *see* Br. at 38-39 (citing, *e.g.*, *Sea Robin Pipeline Co. v. FERC*, 795 F.2d 182 (D.C. Cir. 1989) (vacating order requiring a pipeline to change its rate calculation method for transportation service it provided to shippers where evidentiary record was insufficient)). Such cases are factually inapposite. Here, the Commission need not demonstrate that subsidies are occurring; it need only demonstrate, as it has, that the Commission needs information to “*determine* whether section 5 action . . . would be appropriate” and that the additional information satisfied this need. Rehearing Order at P 15, JA 334 (emphasis added). Inasmuch as determining the information necessary to assess Dominion’s fuel retention percentages is a matter of technical expertise and

judgment, the Commission's decision warrants deference. *See, e.g., Ass'n of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1431 (D.C. Cir. 1996).

**B. Substantial Evidence Supports The Commission's Conclusions That Dominion's Tariff, Absent Modification, Is Unjust And Unreasonable And That The Additional Reporting Requirements Are Just And Reasonable.**

The Commission reasonably concluded that “the existing tariff is unjust and unreasonable and the replacement tariff provision with the additional reporting requirements is just and reasonable” based upon substantial evidence in the record. Rehearing Order at P 21, JA 337. In support of its conclusions, the Commission relied upon its “expertise in determining what information it requires in fulfilling its statutory mandate to ensure just and reasonable rates.” *Id.* Moreover, the Commission reasonably exercised its broad authority under NGA section 10, 15 U.S.C. § 717i, to require regulated entities to file such reports “as necessary or appropriate to assist the Commission in the proper administration of” the NGA. Rehearing Order at P 21, JA 337 (citing NGA section 10). As further described below, the Commission determined, using its expertise and judgment, that the additional reporting requirements are helpful in monitoring Dominion's rates to ensure they are just and reasonable – part of the Commission's “proper administration of” the NGA.

The Commission's finding that a potential subsidy could exist on Dominion's system supports its section 5 findings. In the Initial Order, the

Commission explained that it “prohibits one class of customer from subsidizing another class of customer, as might happen if one class of customer were exempt from paying for fuel retainage, or paid a lower rate for fuel retainage, than another class of customer.” Initial Order at P 11, JA 307 (citing Commission policy).

Dominion is permitted to waive or negotiate lower fuel retainage requirements with shippers under certain circumstances. Request for Rehearing of Dominion Transmission, Inc. at 15, JA 323. The purpose of the Commission’s information requirement “is to obtain information regarding the quantities of gas that, in the absence of [such a waiver,] would have been extracted from volumes to be delivered to the shippers who receive the waivers.” Rehearing Order at P 22, JA 337. “These volumes [that would have been extracted as retainage] are potentially subsidized by other shippers through the settled fuel retention percentage.” *Id.* In other words, the Commission found that shippers that are subject to the settled fuel retainage requirement could potentially be bearing the burden of an unjust and unreasonable subsidy to shippers for whom Dominion waives or negotiates the fuel retainage requirement. Thus, in the Rehearing Order, the Commission further explained that in this case “[a]n unjust and unreasonable subsidy . . . could potentially exist *even though* the settled fuel percentage cannot change” until the end of the moratorium. *Id.* (emphasis added).

In this regard, Dominion inaccurately asserts that the Commission failed to respond to its argument that subsidization cannot occur because the fuel retention percentage is fixed. Br. at 40. Dominion’s assertion more likely reflects its disagreement with the Commission’s finding that an “unjust and unreasonable subsidy . . . could potentially exist even though the settled fuel percentage” is fixed. Rehearing Order at P 22, JA 337. Dominion “misconstrues the effect of its waiver,” *id.*, in claiming that an “*increase* [in the] fuel retention percentage” is somehow necessary to “subsidize negotiated rate shippers.” Br. at 40 (emphasis added). The Commission found that the fixed, settled fuel retention percentage could reflect a subsidy. Rehearing Order at P 22, JA 337. For example, if Dominion is waiving or negotiating substantial fuel retention requirements, this could potentially indicate that an adjustment in the settled percentage is warranted. *Id.* at P 22, JA 337 (“These volumes that otherwise would be extracted and burned as fuel to transport that shipper’s gas are potentially subsidized by other shippers through the settled fuel retention percentage.”). Accordingly, the Commission adequately responded to Dominion’s argument.

Next, the Commission reasonably concluded that the new reporting requirements are just and reasonable because, without this information, the Commission would be unable to identify a subsidy until Dominion files its next rate case, which Dominion “has no obligation to file” after the rate moratorium

ends in 2010. Rehearing Order at P 16, JA 335. While, the Commission prohibits subsidies of this type, Initial Order at P 11, JA 307, in this case the Commission reasonably concluded that a potential unjust and unreasonable subsidy could exist and fulfillment of its statutory mandate required it to demand documentation to “*assure* all parties that there is no cost-shifting or subsidization on Dominion’s system.” Rehearing Order at P 16, JA 335 (emphasis added).

Indeed, the Commission reasonably concluded that the new reporting requirements provide such assurance. The additional information allows the Commission to identify the quantities of gas that Dominion would have extracted from a shipper’s transported gas if Dominion had not granted that shipper a variance from the settled retainage requirement. Rehearing Order at P 22, JA 337. This information aids the Commission “in determining the relative impact of the waivers on the volumes used in a calculation of a just and reasonable fuel retention percentage,” whereas the information Dominion offered to substitute did not. *Id.* at P 22, JA 338. In this regard, Dominion’s suggestion that the Commission has conceded that the information lacks utility fails to recognize that *past* information is necessarily of more limited value to the Commission because its authority to change Dominion’s rates under NGA section 5 applies *prospectively* only. Br. at 39; Rehearing Order at P 24, JA 338 (agreeing with Dominion that, under NGA section 5, the Commission can only require the new information prospectively and



concluding that the past information “will be of limited use at this juncture.”). As the Commission found, the additional information “has value now” in supporting the Commission’s oversight responsibility, Rehearing Order at P 21, JA 337, and further could “potentially be[] used in either a future section 4 or 5 proceeding regarding the fuel percentages.” *Id.* at P 16, JA 335.

The Commission’s concerns in this regard were not merely theoretical; they also rested on the comments of Dominion’s customers. As pointed out by KeySpan, Dominion’s Fuel Reports, without the new information, “may be presenting a somewhat misleading comparison of fuel retention and fuel use,” and in particular do not allow identification of the source of an apparent under-retainage on Dominion’s system. Request of the KeySpan Delivery Companies for Further Information at 2-3, JA 226-27 (“[I]t is not clear whether and to what extent this under-retainage arises from fuel waivers and negotiated rate transactions.”); *see also* KeySpan Motion to Intervene and Comment at 3, SJA 346 (expressing desire to “be certain . . . [that Dominion] is not in any way creating circumstances in which system customers will be required to subsidize customers receiving negotiated rates”); *see* Initial Order at PP 6-7, JA 305-06 (discussing same). Indeed, the Commission’s additional reporting requirements imposed by the orders on review closely track those requested by KeySpan, and supported by National Fuel. *See* Initial Order at P 13, JA 308; *see also* Request of the KeySpan Delivery

Companies for Further Information at 4, JA 228; National Fuel Motion for Leave to Reply and Reply at 3-4, SJA 358-59.

Thus, this is not an instance where the Commission is relying solely on policy. *Contra* Br. at 38 (citing *Algonquin Gas Transmission Co. v. FERC*, 948 F.2d 1305, 1313 (D.C. Cir. 1991) (eschewing reliance solely on policy in the absence of substantial evidence); *Williston Basin Interstate Pipeline Co. v. FERC*, 358 F.3d 45, 48-49 (D.C. Cir. 2004) (vacating order relying solely on policy and economic theory to require a pipeline to adopt new practices)). The Commission reasonably concluded that Dominion’s tariff, absent the new reporting requirements, was unjust and unreasonable, whereas the new reporting requirements are just and reasonable because they allow the Commission to adequately monitor Dominion’s rates to determine whether initiation of NGA section 5 action is necessary. *See* Rehearing Order at P 16, JA 335 (noting that purpose of both the existing and additional reporting requirements is to enhance transparency by “provid[ing] information the Commission could use.”).

For this same reason, Dominion’s claim that the Commission failed to respond to its argument on rehearing that concerns for subsidization are unwarranted, because Commission policy requires Dominion to bear the burden of under recovery of its fuel costs, lacks merit. Br. at 40. As above, the Commission concluded that it has a statutory responsibility to ensure just and reasonable rates,

which includes monitoring Dominion's rates. Rehearing Order at PP 21, 22, JA 337, 338 (finding the reporting requirements important "in fulfilling the Commission's statutory role to monitor the justness and reasonableness of Dominion's fuel percentages" and allowing the Commission "to oversee Dominion's fuel retention rates"). As reflected in the Rehearing Order, the Commission cannot abdicate its duty to effectively monitor Dominion's rates simply because it has previously ruled that the conduct of concern – here an unlawful subsidy – is prohibited. *See National Fuel Gas Supply Corp.*, 468 F.3d at 833 (explaining that the "fundamental purpose" of the NGA "is to protect natural gas consumers").

Finally, Dominion questions "what changed" between the Commission's May 2005 approval of the 2005 Settlement, which continued the Fuel Report requirements, and the Commission's Initial Order of December 2005, where the Commission found additional information necessary. Br. at 41. What changed, of course, is that the Commission reviewed the Fuel Reports and considered comments on the Reports. In the course of its review, the Commission, as explained above, determined that the potential for an unjust and unreasonable subsidy exists and the existing Fuel Report requirements were inadequate to allow it to identify such a subsidy or its cause. Rather than reflecting an unexplained departure from precedent, Br. at 41, this simply reflects the Commission's

fulfillment of both its statutory responsibility to ensure just and reasonable rates through oversight as well as the purpose of the Fuel Report requirement.

### **CONCLUSION**

For the foregoing reasons, the petition for review should be dismissed for lack of jurisdiction or, alternatively, denied on the merits.

Respectfully submitted,

Cynthia Marlette  
General Counsel

Robert H. Solomon  
Solicitor

Holly E. Cafer  
Attorney

Federal Energy Regulatory  
Commission  
888 First Street, NE  
Washington, DC 20426  
Phone: (202) 502-8485  
Fax: (202) 273-0901

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**CERTIFICATE OF COMPLIANCE**

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Brief of Respondent Federal Energy Regulatory Commission contains 9,543 words, not including the tables of contents and authorities, the certificates of counsel, or the addendum.

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Holly E. Cafer  
Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
Phone: (202) 502-8485  
Fax: (202) 273-0901  
Email: [holly.cafer@ferc.gov](mailto:holly.cafer@ferc.gov)

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