157 FERC ¶ 61,210
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. PL17-1-000

Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs

(December 15, 2016)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Inquiry.

SUMMARY: Following the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *United Airlines, Inc., et al. v. Federal Energy Regulatory Commission*, 827 F.3d 122 (D.C. Cir. 2016), the Commission seeks comment regarding how to address any double recovery resulting from the Commission's current income tax allowance and rate of return policies.

DATES: Initial Comments are due **[Insert date 45 days after publication in the Federal Register]**, and Reply Comments are due **[Insert date 65 days after publication in the Federal Register]**.

ADDRESSES: Comments, identified by docket number, may be filed in the following ways:

- Electronic Filing through http://www.ferc.gov. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

- Mail/Hand Delivery: Those unable to file electronically may mail or hand-deliver comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE, Washington, DC 20426.

- *Instructions*: For detailed instructions on submitting comments, see the Comment Procedures Section of this document.

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SUPPLEMENTARY INFORMATION:

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Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs | Docket No. PL17-1-000

NOTICE OF INQUIRY

(December 15, 2016)

1. The Commission seeks comments regarding how to address any double recovery resulting from the Commission's current income tax allowance and rate of return policies. This Notice of Inquiry (NOI) follows the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) holding in *United Airlines, Inc., et al. v. Federal Energy Regulatory Commission* that the Commission failed to demonstrate that there is no double recovery of taxes for a partnership pipeline as a result of the income tax allowance and return on equity (ROE) determined pursuant to the discounted cash flow (DCF) methodology.[1] Accordingly, the Court remanded the decisions to the Commission to develop a mechanism "for which the Commission can demonstrate that there is no double recovery" of partnership income tax costs.[2]

[1] *United Airlines Inc., et al. v. FERC*, 827 F.3d 122, 134, 136 (D.C. Cir. 2016) (*United Airlines*).

[2] *Id.* at 137.

2. The Commission recognizes the potentially significant and widespread effect of this holding upon the oil pipelines, natural gas pipelines, and electric utilities subject to the Commission's regulation. The importance of the income tax policy for partnership entities extends well-beyond the particular interests of the parties to the *United Airlines* proceeding. The Commission also recognizes that additional industry comment may provide further insight into the relationship between a partnership's income tax allowance and the Commission's DCF methodology. Accordingly, this NOI seeks further information as the Commission re-evaluates its policies following the *United Airlines* decision. Initial Comments are due **[Insert date 45 days after publication in the Federal Register]**, and Reply Comments are due **[Insert date 65 days after publication in the Federal Register]**.

I. BACKGROUND

3. This proceeding involves the relationship between the Commission's income tax allowance and ROE policies. Both have evolved in the past two decades to address the emergence of partnership entities in FERC-regulated industries, particularly Master Limited Partnerships (MLPs) that own oil and natural gas pipeline assets.[3]

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[3] *See Composition of Proxy Groups for Determining Gas and Oil Pipeline Return on Equity*, 123 FERC ¶ 61,048 (2008) (*Proxy Group Policy Statement*); *Inquiry Regarding on Income Tax Allowances*, 111 FERC ¶ 61,139 (2005) (*Income Tax Policy Statement*).

A. The MLP Business Model

4. An MLP is a publicly traded partnership.[4] In order to be treated as an MLP for Federal income tax purposes, an MLP must receive at least 90 percent of its income from certain qualifying sources, including natural gas and oil pipelines.[5]

5. MLPs consist of a general partner, that manages the partnership, and limited partners, that provide capital and receive cash distributions. MLP limited partner units are traded on public exchanges, just like corporate stock shares.[6] Based upon the MLP's partnership agreement, MLPs generally (a) distribute most "available cash flow" to the general and limited partners in the form of quarterly distributions, and, in a separate calculation, (b) allocate to the general and limited partners net partnership income for income tax purposes.[7]

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[4] The Internal Revenue Service defines a "publicly traded partnership" as any partnership if its interests are traded on an established securities market or are readily tradable on a secondary market or the substantial equivalent thereof. 26 U.S.C. § 7704; 26 CFR § 1.7704-1.

[5] 26 U.S.C. § 7704. Qualifying sources include natural resource activities such as exploration, development, mining or production, processing, refining, transportation, storage and marketing of any mineral or natural resource, including gas and oil. *Id.*

[6] *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 10.

[7] *Id.* at P 11; Master Limited Partnership Association (MLPA), *MLP-101, Basic Tax Principles*, https://www.mlpassociation.org/mlp-101/basic-tax-principles/ (last visited Nov. 29, 2016) (*MLPA Basic Tax Principles*). Most MLP agreements define "available cash flow" as (1) net income (gross revenues minus operating expenses) plus (2) depreciation and amortization, minus (3) capital investments the partnership must make to maintain its current asset base and cash flow stream. Depreciation and amortization may be considered a part of "available cash flow," because depreciation is an accounting charge against current income, rather than an actual cash expense. Thus, depreciation does not reduce the MLP's current cash on hand. *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 11.

6. Quarterly cash distributions received by a partner are not equivalent to the partner's share of the MLP's taxable income. MLPs are pass-through entities and each partner is personally responsible for paying income taxes on the partnership's net taxable income.[8] For tax purposes, the partnership agreement allocates to each partner a share of the partnership's taxable income.[9] Deductions, including depreciation, losses, and credits, may substantially offset the taxable income. As a result, a partner may have no net taxable income in a given year.[10]

7. In contrast, the partner may receive a quarterly distribution whether or not it is allocated a positive net income tax liability for that period. The quarterly distributions are considered to be a return of capital, which reduces the partner's basis in the MLP units and

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[8] *Income Tax Policy Statement*, 111 FERC ¶ 61,139 at P 33; *MLPA Basic Tax Principles*; *see also ExxonMobil Oil Corp. v. FERC*, 487 F.3d 945, 954 (D.C. Cir. 2007) (*ExxonMobil*) (noting that "investors in a limited partnership are required to pay tax on their distributive shares of the partnership income, even if they do not receive a cash distribution"). In contrast, corporations pay entity-level income taxes, and corporate dividends are second tier income to a common stock investor, not analogous to partnership distributions. *SFPP, L.P.*, Opinion No. 511, 134 FERC ¶ 61,121, at PP 223, 253 (2011) (Opinion No. 511).

[9] The partner reports this taxable income and its components (*e.g.*, gain, deductions, losses, credits) to the Internal Revenue Service on the K-1. *See* Dep't of Treasury, Internal Revenue Service, *Partner's Instructions for Schedule K-1 (Form 1065)* (2015), https://www.irs.gov/instructions/i1065sk1/index.html (*IRS Instructions for K-1*).

[10] *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 14.

is only taxed at the time of distribution if the partner's adjusted basis falls to zero.[11] The investor's original basis (the price paid for the units) is adjusted downwards by cash distributions and allocations of deductions, and is adjusted upwards by allocations of income. When the units are sold, the taxable gain is the sales price minus the adjusted basis.[12] The portion of the gain attributable to basis reductions for prior depreciation deductions is "recaptured" and taxed as ordinary income rather than capital gain.[13]

B. Return on Equity Policies

8. In *Hope*,[14] the Supreme Court stated that "the return to the equity owner should be commensurate with the return on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[15] Since the 1980s, the Commission has used the DCF model to develop a range of returns earned on

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[11] *Id.* P 15; *MLPA Basic Tax Principles*. Provided that the partner's adjusted basis is above zero, tax on distributions is deferred until the investor sells the units. If the basis falls to zero, future cash distributions are taxed as capital gain in the year received. *MLPA Basic Tax Principles*.

[12] *MLPA Basic Tax Principles*; *IRS Instructions for K-1*.

[13] *MLPA Basic Tax Principles.*

[14] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (*Hope*).

[15] *Id.* at 603; *see also Bluefield Waterworks & Improvement Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692-693 (1923); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989).

investments in companies with corresponding risks for purposes of determining the ROE for regulated entities.

9. Under the Commission's cost-of-service ratemaking methodology, the DCF model is used to determine a reasonable ROE that a regulated entity may recover in rates in addition to its costs. The purpose of the DCF methodology is to estimate the return required by investors in order to invest in the pipeline or utility whose rates are at issue.[16] To do this, the DCF model considers the range of returns that the market provides investors in a proxy group of publicly-traded entities with similar risk profiles.[17]

10. The DCF model was originally developed as a method for investors to estimate the value of securities, including common stocks. It is based on the premise that "a stock's price is equal to the present value of the infinite stream of expected dividends discounted at a market rate commensurate with the stock's risk."[18] With simplifying assumptions, the DCF model results in the investor using the following formula to determine share price:

$$P = D/(k-g)$$

where P is the price of the stock at the relevant time, D is the current dividend, k is the discount rate (or investors' required rate of return), and g is the expected growth rate in

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[16] *Martha Coakley, Mass. Attorney Gen. v. Bangor Hydro-Elec. Co.*, Opinion No. 531, 147 FERC ¶ 61,234, at P 14 (2014) (Opinion No. 531).

[17] *See Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 293-294 (D.C. Cir. 2001).

[18] *Id.*; *see also Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 58.

dividends. For ratemaking purposes, the Commission rearranges the DCF formula to solve for "k", the discount rate, which represents the rate of return that investors require to invest in the firm.[19] Under the resulting DCF formula, the required rate of return is estimated to equal current dividend yield (dividends divided by share price) plus the projected future growth rate of dividends:

$$k = D/P + g$$

11. The Commission compares the returns of proxy group entities on an after-entity-level-tax basis, rather than before-tax basis, because most comparable securities trade on the basis of an entity's after-tax return on its public utility income.[20] Based typically upon the median of the range of returns in the proxy group, the Commission determines the regulated entity's allowed ROE,[21] although the ROE may sometimes be adjusted upwards or downwards within the zone of reasonableness.[22]

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[19] Opinion No. 531, 147 FERC ¶ 61,234 at P 15. In contrast, "r" represents the regulated entity's rate of return. Although the Commission has at times used the terms "r" and "k" interchangeably, the Commission intends to apply these terms more precisely and requests that the participants in this proceeding do so also unless quoting a prior Commission order.

[20] Brief of Respondent Federal Energy Regulatory Commission, at 8, Case No. 11-1479 (D.C. Cir., filed Feb. 5, 2016).

[21] *See Southern California Edison Co. v. FERC*, 717 F.3d 177, 182-183 (D.C. Cir. 2013).

[22] *See, e.g.*, Opinion No. 531, 147 FERC ¶ 61,234 at PP 150-151. The zone of reasonableness is defined by the low and high estimates of the market cost of equity for the members of the proxy group. *Id.* P 23.

12. The Commission's proxy group criteria is based on the principle that entities included in the proxy group must be of comparable risk to the firm whose ROE is being determined in a particular rate proceeding.[23] As entities narrowly focused on providing oil and natural gas pipeline transportation have increasingly adopted the MLP business form, the Commission has included MLPs in the proxy group for natural gas and oil pipelines because those MLPs are likely more representative of predominantly pipeline firms than the diversified corporations otherwise available for inclusion in a proxy group.[24] The Commission uses the same DCF analysis for MLPs as for corporations, except that the Commission uses a lower long-term growth projection for MLPs than for corporations.[25] The Commission concluded that an MLP's quarterly distributions could be used to measure cash flows from the investment without any adjustment to remove return of capital.[26] The Commission explained that "since the DCF model uses the total unadjusted cash flows to determine the stock's value, it is theoretically inconsistent [with the DCF model] to use

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[23] *Petal Gas Storage*, *L.L.C. v. FERC*, 496 F.3d 695, 699 (D.C. Cir. 2007) (*Petal*); *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at PP 24, 29.

[24] *See Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at PP 47-50.

[25] The long-term growth projection for corporations is projected growth in Gross Domestic Product (GDP) and for MLPs one half that projection. *Id.* P 106.

[26] *See Id.* PP 57-63.

lower adjusted cash flows when using the DCF model to determine the return required by investors purchasing the stock.” [27]

C. <u>Income Tax Policy</u>

13. In May 2005, the Commission issued an Income Tax Policy Statement[28] permitting an income tax allowance for all regulated entities (including corporations and partnerships), provided that the owners can show an actual or potential income tax liability to be paid on income from the regulated assets. The Commission continued its longstanding policy of permitting corporations to recover an income tax allowance because corporations themselves incur a corporate income tax liability. The Commission reasoned that while a partnership or other pass-through entity does not pay taxes, the partners incur an income tax liability on the partnership income. Accordingly, those income tax costs are appropriately included in rates.[29] The D.C. Circuit upheld this policy, in *ExxonMobil*,[30] explaining that the income tax liability of partners is attributable to the regulated entity and may be

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[27] *See Id.* P 58.

[28] *See Income Tax Policy Statement*, 111 FERC ¶ 61,139. The Policy Statement was issued in response to *BP West Coast Products, LLC v. FERC*, 374 F.3d 1263 (D.C. Cir. 2004) (*BP West Coast*). That decision held that the Commission failed to justify its then existing policy of affording partnership entities an income tax allowance for income attributable to interests held by corporations, but not for income attributable to interests held by individuals.

[29] *Id.* P 34.

[30] *ExxonMobil*, 487 F.3d 945.

recovered in pipeline rates, provided that the partners have an actual or potential income tax liability.[31]

14. In July 2016, in *United Airlines*,[32] the D.C. Circuit, reviewing a series of orders involving SFPP, L.P.,[33] held that the Commission failed to demonstrate that there is no double recovery of taxes for a partnership pipeline as a result of awarding that pipeline both an income tax allowance and a pre-investor-tax ROE pursuant to the DCF methodology.[34] The Court upheld *ExxonMobil*'s finding that a pipeline may recover partnership income tax costs so long as the partners have an actual or potential income tax liability,[35] but concluded that allowing partnerships to double recover those tax costs would be inconsistent with the Supreme Court's mandate in *Hope*.[36]

15. The Court remanded the decisions to the Commission to develop a mechanism "for which the Commission can demonstrate that there is no double recovery" of partnership income tax costs.[37] The Court noted that the Commission may consider the options of

[31] *Id.* at 953-955.

[32] *United Airlines*, 827 F.3d 122.

[33] Opinion No. 511, 134 FERC ¶ 61,121, *order on reh'g*, Opinion No. 511-A, 137 FERC ¶ 61,220 (2011), *order on reh'g*, Opinion No. 511-B, 150 FERC ¶ 61,096 (2015).

[34] *United Airlines*, 827 F.3d at 134, 136.

[35] *Id.* at 135 (citing *ExxonMobil*, 487 F.3d at 954-955); *id.* at 137.

[36] *Id.* at 137 (citing *Hope*, 320 U.S. at 603).

[37] *Id.*

removing any duplicative tax recovery for partnerships directly from the DCF ROE, or eliminating all income tax allowances and setting rates based on pre-tax returns.[38]

16. The Court also directed the Commission to ensure parity between equity owners in partnership and corporate pipelines.[39] The Court did not find persuasive the Commission's argument that "any disparate treatment between partners in partnership pipelines and shareholders in corporate pipelines is the result of the Internal Revenue Code, not FERC's tax allowance policy."[40]

II. Commission Questions

17. The Commission seeks comment regarding methods to allow regulated entities to earn an adequate return consistent with *Hope*[41] that do not result in a double recovery of investor-level taxes for partnerships or similar pass-through entities.

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[38] *Id*. As noted by the Court, the Commission previously considered the option of setting rates based on pre-investor level and pre-entity level tax returns in its 2005 policy statement and concluded this approach would be impracticable. *See Income Tax Policy Statement*, 111 FERC ¶ 61,139 at P 40.

[39] *United Airlines*, 827 F.3d at 137.

[40] *Id.* at 136; *see also BP West Coast*, 374 F.3d at 1293 ("The mandate of Congress in the tax amendment was exhausted when the pipeline limited partnership was exempted from corporate taxation. It did not empower FERC to do anything, let alone to create an allowance for fictitious taxes.").

[41] 320 U.S. at 603.

18. Comments should consider the fundamental concerns presented by *United Airlines* and shipper litigants that permitting a partnership entity to have an income tax allowance results in a double recovery of investor-level tax costs because:

- The DCF methodology estimates the rate of return that an investor requires in order to invest in the regulated entity.[42]

- As a general matter, potential investors evaluate whether to invest in an entity based on the returns they expect to receive after paying any applicable taxes on the investment income,[43] and thus, to attract capital, entities in the market must provide investors a return that covers investor-level taxes and leaves sufficient remaining income to earn their required after-tax return.[44]
- Because the return estimated by the DCF methodology includes the cash flow

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[42] *United Airlines*, 827 F.3d at 136; Opinion No. 531, 147 FERC ¶ 61,234 at P 14.

[43] *Kern River Gas Transmission Co.*, Opinion 486-B, 126 FERC ¶ 61,034, at P 114 (2009) ("investors invest on the basis of after-tax returns and price an instrument accordingly").

[44] *United Airlines*, 827 F.3d at 136. In finding that "the [DCF ROE] determines the pre-tax investor return required to attract investment, irrespective of whether the regulated entity is a partnership or a corporate pipeline," the Court relied on Opinion No. 511, 134 FERC ¶ 61,121 at PP 243, 244, which included the following example:

> The investor desires a 6 percent after-tax return and has a 25 percent marginal tax rate. Thus, the security must have an ROE of 8 percent to achieve an after-tax yield of 6 percent. Assume that the distribution or dividend is $8. The investor will price the security at $100. Conversely, if the security price is $100 and the yield is $8, the Commission determines that the required return is 8 percent. If the dollar distribution increases to $10, the investor will price the security at $125 because $10 is 8 percent of $125. The Commission would note that the security price is $125 and that the yield is $10, or a return of 8 percent. If the distribution is $6, the security price will drop to $75, a return of 8 percent. The Commission would observe a $75 dollar security price, a $6 yield, and a return of 8 percent. In all cases the ROE is 8 percent and the after-tax return is 6 percent based on the market-established return.

Although the concept may be more complex for an MLP, this proposition is also evidenced in the fact that the yields on bonds that pay taxable interest income are higher than the yields on bonds of state and local governments that pay tax-exempt income. Joint Initial Brief of Shipper Petitioners, at 20, Case No. 11-1479 (D.C. Cir., filed Feb. 5, 2016).

necessary to cover investors' income tax liabilities and earn a sufficient after-tax return, the Commission's policy of allowing partnership entities to recover a separate income tax allowance may result in a double recovery.[45]

- While allowing a partnership entity to recover the partner-investors' tax costs is reasonable,[46] allowing a partnership to double recover those tax costs is not.[47]

- Changes in the share price do not resolve the double recovery issue. MLP investors will demand the same percentage return on the share price whether or not a pipeline receives an income tax allowance. If an MLP obtains a new revenue source that increases its distributions to investors (such as an income tax allowance that increases its rates), the share price will rise until, once again, the investor receives the cash flow necessary to cover investors' income tax liabilities and earn a sufficient after-tax return.[48]

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[45] *United Airlines*, 827 F.3d at 137 (remanding for the Commission to consider "mechanisms for which the Commission can demonstrate that there is no double recovery").

[46] *Id.* at 135, 137 (noting that the Commission had a reasoned basis for granting an income tax allowance to partnership pipelines); *ExxonMobil*, 487 F.3d at 951-953 (concluding that the Commission provided a reasonable justification for its policy of allowing partnership pipelines an income tax allowance to the extent that the partners incur actual or potential tax liability); *see also City of Charlottesville v. FERC*, 774 F.2d 1205, 1207 (D.C. Cir. 1985) ("cost-of-service ratemaking principles" require "rates yielding sufficient revenue to cover all proper costs, including federal income taxes, plus a specified return on invested capital"); *BP West Coast*, 374 F.3d 1263 at 1286 ("There is no question that as a general proposition a pipeline that pays income taxes is entitled to recover the costs of the taxes paid from its ratepayers"); *Pub. Serv. Comm'n of N.M. v. FERC*, 653 F.2d 681, 683 (D.C. Cir. 1981).

[47] *United Airlines*, 827 F.3d at 136 (finding that "[b]ecause the Supreme Court has instructed that 'the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks,' FERC has not shown that the resulting rates under FERC's current policy are 'just and reasonable.'") (quoting *Hope*, 320 U.S. at 603).

[48] Opinion No. 511, 134 FERC ¶ 61,121 at PP 243-44; Joint Initial Brief of Shipper Petitioners, at 34-35, 39-40, Case No. 11-1479 (D.C. Cir., Feb. 5, 2016); *id.* at Attachment 3 (SFP-98 and SFP-99); *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 58 ("under the DCF model, all cash flows, whatever their source, contribute to the value of stock"); *see also United Airlines*, 827 F.3d at 136-137. Although the Court did not directly address this particular aspect of the Shippers' argument, the Shippers have repeatedly raised it in their claims that this income results in a double recovery. *See* Opinion No. 511, 134 FERC

- As opposed to an MLP pipeline, the double recovery issue does not arise for a corporation's income tax allowance. The corporation pays its corporate income taxes itself. Accordingly, although a return to investors must cover investor-level taxes and sufficient remaining income to earn their required after-tax return, the corporate income tax is not an investor level tax.[49] Thus, the corporate income tax cost recovered in the income tax allowance is not reflected in the return estimated by the DCF methodology.[50]

19. In light of the above, the Commission invites comments regarding any proposed methods to adjust the income tax allowance policy or current ROE policies to resolve any double recovery of investor-level tax costs for partnerships or similar pass-through entities. Comments should provide a detailed explanation of any proposal, including evidentiary support and how any adjustment to the Commission's tax allowance and/or ROE policies should be specifically implemented. Comments should explain how the proposed approach would (a) resolve any double recovery of investor-level income tax costs for partnership entities, and (b) allow regulated entities to earn a sufficient return consistent with the capital attraction standard in *Hope.*[51] Comments should support any proposed methods with data, theoretical analyses, empirical studies, or any other evidence relevant to demonstrating the

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¶ 61,121 at PP 238-239. Further, citing to the same passage in Opinion No. 511 as the Shippers, the Court did acknowledge that "the [DCF ROE] determines the pre-tax investor return required to attract investment, irrespective of whether the regulated entity is a partnership or a corporate pipeline." *United Airlines*, 827 F.3d at 136 (citing Opinion No. 511, 134 FERC ¶ 61,121 at PP 243-244).

[49] *Income Tax Policy Statement*, 111 FERC ¶ 61,139 at P 38.

[50] *United Airlines*, 827 F.3d at 136 (finding that "unlike a corporate pipeline, a partnership pipeline incurs no taxes, except those imputed from its partners, at the entity level" and that the facts "support the conclusion that granting a tax allowance to partnership pipelines results in inequitable returns for partners in those pipelines as compared to shareholders in corporate pipelines.").

[51] 320 U.S. at 603.

level of partner-investor tax costs reflected in the ROE estimated by the DCF methodology. Comments should address how these proposals apply to publically traded pass-through entities, such as MLPs and real estate investment trusts (REITS), as well other pass through entities, including closely held partnerships and joint ventures.

20. Comments should also address the practical application of their proposals. For example, to the extent a commenter advocates eliminating the income tax allowance for partnerships and relying on the ROE awarded the pipeline for the recovery of investor-level tax costs, its comments should address whether any changes to the Commission's ROE policies are necessary to ensure that the ROE reflects appropriate tax costs for the particular entity whose rates are at issue.[52] Alternatively, commenters could propose reducing the DCF return to remove all investor-level tax costs and rely on an income tax allowance to recover the investor-level tax costs. Commenters advocating this latter approach should explain how an adjustment to the DCF return could be made to remove investor-level tax

[52] For example, investors in an MLP incur different investor-level taxes than investors in a corporation. Commenters could propose adjustments to equalize the after-investor-level tax returns for each entity in the proxy group or explain why such adjustments are not necessary. Alternatively, commenters could propose a means for including only entities in the proxy group that incur similar investor-level tax costs. To the extent any commenter advocates the latter approach, that commenter should address how the composition of the proxy group and the availability of companies for the proxy group in a given rate case could be affected if the composition of the proxy group is changed to account for the different investor-level taxes of different business forms. *See Petal*, 496 F.3d 695 at 698-700; *Proxy Group Policy Statement*, 123 FERC ¶ 61,048 at P 9 (explaining that an insufficient number of pipelines using the corporate business form are available for the formation of a natural gas pipeline proxy group).

costs for each entity in the DCF proxy group.[53] In addition, those commenters should describe how to determine the level of the income tax allowance for partnership entities.[54] As stated above, commenters should ensure that their proposals do not result in a double recovery of investor level income tax costs for partnership entities as required by *United Airlines*.

III. Procedure for Comments

21. The Commission invites interested persons to submit written comments on the issue identified in this Notice of Inquiry as discussed above. **Comments are due [45 days from the date of publication in the Federal Register] and reply comments are due [65 days from the date of publication in the Federal Register].** Comments must refer to Docket No. PL17-1-000, and must include the commenter's name, the organization it represents, if applicable, and its address. To facilitate the Commission's review of the comments, commenters are requested to provide an executive summary of their position. Additional issues the commenters wish to raise should be identified separately. The commenters should double space their comments.

22. The Commission encourages comments to be filed electronically via the eFiling link on the Commission's web site at http://www.ferc.gov. The Commission accepts most standard word processing formats. Documents created electronically using word processing

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[53] *See* n.52.

[54] Currently, the Commission uses the weighted marginal tax rate of the MLP's partners. *Income Tax Policy Statement*, 111 FERC ¶ 61,139 at P 32; *SFPP, L.P.*, 121 FERC ¶ 61,240, at P 35 (2007).

software should be filed in native applications or print-to-PDF format and not in a scanned format. Commenters filing electronically do not need to make a paper filing.

23. Commenters that are not able to file comments electronically must send an original of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

24. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters on this proposal are not required to serve copies of their comments on other commenters.

IV. Document Availability

25. The Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, NE, Room 2A, Washington DC 20426.

26. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits) in the docket number field.

27. User assistance is available for eLibrary and the Commission's web site during normal business hours. For assistance, please contact the Commission's Online Support

at 1-866-208-3676 (toll free) or 202-502-6652 (e-mail at FERCOnlineSupport@ferc.gov) or the Public Reference Room at 202-502-8371, TTY 202-502-8659 (e-mail at public.referenceroom@ferc.gov).

By direction of the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.