

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

In the Matter of

NEXUS GAS TRANSMISSION, LLC
TEXAS EASTERN TRANSMISSION, LP
DTE GAS COMPANY
VECTOR PIPELINE, L.P.

Docket Nos. CP16-22-000
CP16-23-000
CP16-24-000
CP16-102-000

REQUEST FOR REHEARING OF CERTIFICATE FOR THE NEXUS PIPELINE AND
MOTION FOR STAY OF PROJECT

Introduction

In accordance with 15 U.S.C. § 717r and 18 C.F.R. § 385.713, the Sierra Club hereby requests rehearing, rescission, and stay of the Commission’s Order Issuing Certificates and Granting Abandonment entered on August 25, 2017 (“Order”) in favor of NEXUS Gas Transmission (“NEXUS”), Texas Eastern Transmission (“Texas Eastern”) DTE Gas Company (“DTE Gas”), and Vector Pipeline (“Vector”). We request that the Certificate Order and deficient final environmental impact statement (“FEIS”) be withdrawn and the environmental analysis and public convenience and necessity analysis be redone in a manner that complies with FERC’s obligations pursuant to the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., and the Natural Gas Act (“NGA”), 15 U.S.C. § 717 et seq.

Sierra Club moved to intervene in the proceedings below, and the Commission granted its late-filed motion in the August 25, 2017 Order. Sierra Club is thus a party to this proceeding, 18 C.F.R. § 385.214(c), and has standing to file this request for rehearing. *See* 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713(b).

The Commission’s Order authorizes NEXUS to construct and operate: (i) 257.5 miles of new 36-inch-diameter natural gas pipeline in Ohio and Michigan to transport natural gas from

the Kensington Processing Plant in Hanover Township, Ohio to DTE Gas in Ypsilanti Township, Michigan; (ii) four compressor stations in Ohio, totaling about 182,000 horsepower; (iii) six new metering and regulation stations; and (iv) sixteen new mainline valves. The pipeline is designed to transport 1.5 billion cubic feet of natural gas per day (“Bcf/d”).

NEXUS has agreed to lease capacity on Texas Eastern’s system, on which the Order also authorized Texas Eastern to expand capacity to transport 950,155 dekatherms per day (“Dth/d”) to supply the NEXUS pipeline from Texas Eastern’s Appalachian Basin pipeline.

All communications regarding this request should be addressed to and served upon the Sierra Club counsel listed below:

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Concise Statement of Alleged Errors

As discussed below, Sierra Club contends that the Commission’s Order and underlying Environmental Impact Statement:

1. violated the Natural Gas Act (“NGA”) by failing to adequately evaluate the public need for the pipeline;

2. violated the National Environmental Policy Act (“NEPA”) by failing to properly consider the need for and alternatives to the project and;
3. violated NEPA by failing to properly evaluate the effects of increased greenhouse gas (“GHG”) emissions as a result of the project.

Background

The NEXUS pipeline is the result of a joint venture between DTE Energy and Spectra Energy. DTE Energy is a 50% shareholder in the pipeline project.¹ DTE Energy is a holding company and parent of Michigan’s largest electric utility, DTE Electric Company (“DTE Electric”) and DTE Gas Company (“DTE Gas”), a gas utility operating in eastern Michigan.² Both DTE Electric and DTE Gas have contracted to buy natural gas over the pipeline for use to generate retail electricity and for delivery to retail gas users.³ At the time DTE Electric entered into the sale agreement with NEXUS, six alternative sources of gas were available to transport the needed supply at lower rates than those agreed to by DTE Gas and DTE Electric.⁴

DTE Gas contracted to buy 75,000 Dth/d and DTE Electric contracted to buy 8,000 Dth/d beginning in November 2017, increasing to 75,000 Dth/d beginning in either May 2020 or whenever DTE Electric has built sufficient gas-fired generating capacity to consume that amount.⁵ In August 2015, DTE Electric amended its agreement, increasing its initial commitment from 8,000 Dth/d to 30,000 Dth/d until November 2017.⁶ DTE Electric explained that “an increased commitment is necessary in order to ensure that the project has sufficient

¹ Sierra Club Comments 3, Nov. 17, 2016, 20161117-5034.

² Nexus Gas Transmission, LLC, 160 FERC ¶ 61,022, (2017) [hereinafter “Order”].

³ *Id.*

⁴ Sierra Club Comments 17–21, Nov. 17, 2016.

⁵ *Id.* 12.

⁶ *Id.* 13.

customer commitment to justify proceeding with construction.”⁷ DTE Electric also extended the term of the agreement to thirty-five years with an option to extend for an additional ten. The agreement is contingent on DTE Electric receiving permission from the Michigan Public Service Commission (“MPSC”) to increase rate on its ratepayers to cover its costs and expenses related to the project.

The Michigan Public Service Commission has yet to approve DTE Electric’s rate increase request.⁸ Other pipeline operators in the area and the Michigan Attorney General have objected to DTE Electric’s request.⁹ The Attorney General expects the rate increase to cost DTE Electric’s ratepayers an additional \$355 million to cover the costs of the NEXUS project.¹⁰

NEXUS claims that it has precedent agreements representing 885,000 Dth/d—inclusive of the agreements with DTE Energy subsidiaries—which represents 59% of the total capacity of the pipeline.¹¹ Canadian entities have subscribed to 260,000 Dth/d, which will be delivered from the end point of the NEXUS pipeline in Ypsilanti Township to the Dawn Hub in Ontario, Canada through existing pipelines.¹² The remainder of the subscribed gas (475,000 Dth/d) will go to various domestic entities in the Midwest.¹³ There is no indication that the remaining 41% of capacity will be subscribed anytime soon.

In addition to NEXUS, two other pipelines, Rover and ANR East, will deliver gas from the Appalachian basin to markets in Michigan and Ontario, Canada.¹⁴ The Rover pipeline is

⁷ *Id.*

⁸ *See In re DTE Electric Co.*, No. U-18143 (Mich. P.S.C.).

⁹ Sierra Club Comments 7, Nov. 16, 2017; Attorney General’s Reply Br., No. U-17920 (MPSC).

¹⁰ *Id.*

¹¹ Order ¶ 9.

¹² *Id.*

¹³ *Id.*

¹⁴ OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION, FINAL ENVIRONMENTAL IMPACT STATEMENT, NEXUS GAS TRANSMISSION PROJECT AND TEXAS EASTERN APPALACHIAN LEASE PROJECT 3-5-3-7 (Nov. 2016) [hereinafter “FEIS”].

designed to carry 1.3 Bcf/d, while the ANR East pipeline will carry up to 2 Bcf/d.¹⁵ Including NEXUS, Michigan inflow capacity from the Appalachian basin will increase by 4.8 Bcf/d as a result of these projects.

Statement of Issues

1. FERC Violated the NGA by Failing to Consider the Demand for Natural Gas in the Markets to be Served by Nexus When it Determined NEXUS is a Public Necessity

Under Section 7(c) of the NGA, a proponent of a natural gas pipeline must first obtain a “certificate of public convenience and necessity” from the Federal Energy Regulatory Commission (“FERC”).¹⁶ “The statute provides that a certificate shall be issued to any qualified applicant upon a finding that . . . the proposed service and construction is or will be required by the present or future public convenience and necessity.”¹⁷ Because such certificates confer federal eminent domain power upon the applicant, they may only be issued for projects that serve a “public use” in accord with the Fifth Amendment to the United States Constitution.¹⁸

FERC’s inquiry with regard to whether there is a public necessity for the pipeline will first confirm “whether the project can proceed without subsidies from [the] pipeline’s existing customers.”¹⁹ Then, it will “balance[e] the evidence of the project’s public benefits against its . . . adverse effects.”²⁰ “FERC will approve a project only where the public benefits of the project outweigh the project’s adverse impacts.”²¹

¹⁵ Sierra Club Comments 11, Nov. 17, 2016.

¹⁶ 15 U.S.C. § 717f(c)(1)(A); *Minisink Residents for Env'tl. Preservation and Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014).

¹⁷ *Minisink*, 762 F.3d at 101 (quoting 15 U.S.C. § 717f(e)) (internal quotation marks and ellipses omitted).

¹⁸ See *Kelo v. City of New London*, 545 U.S. 469 (2005).

¹⁹ Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (Sept. 15, 1999), *clarified*, 90 FERC ¶ 61,128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61,094, 61,373 (Jul. 28, 2000).

²⁰ *Id.*

²¹ *Minisink*, 762 F.3d at 102 (quoting 90 FERC ¶ 61,128 at 61,396).

That the public benefit of a project outweighs adverse impacts is instrumental to abiding by the constitutional imperative that private property only be taken for the public benefit. Where FERC disregards this solemn constitutional duty repeated in both the NGA and its own regulations and authorizes a private corporation to take private property, FERC indulges the grasping desires of industry at the expense of the public whose interests Congress entrusted to FERC to protect. Thus, the polaris of FERC's review, as it has stated, is to ensure that the right to private property remains untrammelled by the acquisitive impulses of private industry and further to only transgress that right upon finding a legitimate public benefit.

FERC's Order certifying the public need for the NEXUS pipeline contains serious flaws that overlook DTE Energy's manufacture of demand for the project through affiliate precedent agreements, and overestimates the market demand for natural gas in the markets NEXUS seeks to serve.

FERC's Order accepts without reservation NEXUS' assertion that customers have agreed to purchase 885,000 Dth/d for at least fifteen years.²² There is ample reason in the record to doubt this conclusion. A significant portion of the subscribed gas, 17%, will be bought by DTE Energy's wholly owned subsidiaries DTE Electric and DTE Gas.²³ DTE Electric, which will use the NEXUS pipeline to feed its gas-fired power plants, is currently seeking a rate increase before the Michigan Public Service Commission.²⁴ That rate increase, if approved, would transfer the cost of the project to DTE Electric's captive ratepayers and permit DTE Energy shareholders to realize profits from the rate increase.²⁵ With guaranteed rates, DTE Energy, and by extension

²² Order ¶ 9.

²³ *Id.*

²⁴ Sierra Club Comments 12, Nov. 17, 2016; *In re DTE Electric Co.*, No. U-18143 (Mich. P.S.C.).

²⁵ Sierra Club Comments 12, Nov. 17, 2016; Zaski Comments, Jan. 29, 2017, 20170130-5029.

NEXUS, are able to reallocate the financial risk of the NEXUS pipeline from the owners of the project to captive ratepayers.²⁶

While FERC determined that NEXUS is a new company, and therefore has no existing customers who could be used to subsidize the project, this conclusion elevates corporate form over function.²⁷ DTE Energy is a 50% shareholder in the NEXUS pipeline and wholly owns DTE Electric and DTE Gas.²⁸ This ownership structure creates a perverse incentive for DTE Energy to steer its wholly owned subsidiaries to become customers of the project in which it has a significant stake and use captive ratepayers to subsidize the above-market costs of the project.²⁹ In fact, DTE Electric increased its expected initial consumption of gas from 8,000 Dth/d to 30,000 Dth/d “in order to ensure that the project has sufficient customer commitment to justify proceeding with construction.”³⁰

FERC has previously recognized the risk of anticompetitive effects from the type of transactions used to justify the pipeline in this case. FERC explained, “[i]n transactions combining electric generation assets with inputs to generating power (such as natural gas transportation or fuel) . . . , competition can be harmed if the transaction increases a firm’s ability or incentive to exercise vertical market power in wholesale electricity markets.”³¹

In its Order here, however, FERC ignored the perverse incentives that DTE Energy has to manufacture a market for NEXUS gas. DTE Electric and DTE Gas completely disregarded cheaper sources for the gas they have agreed to purchase from NEXUS.³² DTE Gas estimated the

²⁶ Sierra Club Comments 12, Nov. 17, 2016.

²⁷ Order ¶ 33.

²⁸ Sierra Club Comments 3, Nov. 17, 2016.

²⁹ *Id.* 14–21.

³⁰ *Id.* 21; Zaski Comments, Jan. 29, 2017.

³¹ EDF Development, Inc., 126 FERC ¶ 61,140, 61,849 (Feb. 19, 2009).

³² Sierra Club Comments 17–21, Nov. 17, 2017.

pipeline’s costs to alternative sources and concluded that for all but one year, transporting gas through NEXUS would be costlier than transporting it through an alternative route.³³ DTE Electric conducted a similar study and came to the same conclusion.³⁴ According to DTE Electric, transport on NEXUS, instead of the existing Kensington-MichCon Route, would cost ratepayers an additional \$54 million.³⁵

A third study conducted by DTE Electric contradicted the earlier two studies, but was based on highly unrealistic assumptions.³⁶ In this most recent study, DTE Electric found that NEXUS created a net cost savings over its entire operational lifespan in comparison with the Kensington-MichCon Route.³⁷ This result, however, was justified by a mistaken assumption that no new pipeline infrastructure would be built after 2028, even though it projected that natural gas prices would skyrocket well above what the U.S. Energy Information Administration (“EIA”) projects.³⁸ The EIA projects natural gas prices to remain stable under a “business-as-usual” assumption from 2025 through 2040.³⁹ Still, if prices did skyrocket, as DTE Electric assumes, it is extremely unlikely that no new capacity would be built to take advantage of the increased prices. The results of this flawed study thus cannot overcome the findings of the two previous analyses.

Moreover, three other existing sources besides the Kensington-MichCon Route can deliver gas cheaper. The Lebanon Lateral Reversal Project modified existing facilities to provide an additional 350,000 Dth/d of Appalachian basin natural gas to the same terminus as the

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ Zaski Comments, May 29, 2017, 20170530-5012; ENERGY INFORMATION ADMINISTRATION, ANNUAL ENERGY OUTLOOK 2017 56 (Jan. 5, 2017), [https://www.eia.gov/outlooks/aeo/pdf/0383\(2017\).pdf](https://www.eia.gov/outlooks/aeo/pdf/0383(2017).pdf).

NEXUS project with an in-service date of March 2014.⁴⁰ The combined rate for that project would have been \$0.52/Dth.⁴¹ By contrast, DTE Electric agreed to \$0.695/Dth with NEXUS.⁴² The story is much the same with the Sulphur Springs Project. That project involved facility enhancements to provide 400,000 Dth/d of capacity from Glen Karn, Ohio to ANR's Southeast line which terminates in southeast Michigan.⁴³ The Sulphur Springs Project had a November 2015 in-service date and the combined rate would have been \$0.50/Dth.⁴⁴

Finally, the Utica Marcellus to Market Project was available to provide existing capacity from Ohio and Indiana that allowed shippers to deliver Utica and Marcellus gas to Michigan on any pipeline in the Appalachian basin that connects with ANR lines.⁴⁵ The project had a November 2015 in-service date and would have provided a \$0.20.Dth rate for use of the ANR pipeline plus the interconnecting pipeline's rate, if DTE Electric chose to subscribe for upstream service.⁴⁶ This latter project would have provided DTE Electric with access to gas from Appalachia, the Gulf Coast, Fayetteville, Barnett, and Haynesville shale gas regions.⁴⁷ DTE Electric did not evaluate any of these cheaper sources for gas, and neither did FERC.⁴⁸

In addition to the four existing sources of low-cost natural gas, two new pipelines which largely track the source and terminus of the NEXUS pipeline have been proposed by ANR (ANR East) and Energy Transfer Partners (Rover), respectively.⁴⁹ DTE Electric did not participate in

⁴⁰ Sierra Club Comments 19, Nov. 17, 2016.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* 20.

⁴⁸ *Id.*; *See* Order.

⁴⁹ Sierra Club Comments 20, Nov. 17, 2016.

either ANR East's or Rover's open bidding.⁵⁰ DTE Electric claims that in declining to participate in negotiations with ANR and Rover, it relied on a cost comparison between the three projects.⁵¹ But this comparison was made after both DTE Gas and DTE Electric had executed precedent agreements with NEXUS.⁵² Further, the cost comparison was between the negotiated rate offered by NEXUS and the unnegotiated rates posted by ANR and Rover.⁵³ The comparison between negotiated and unnegotiated rates reveals nothing about the true costs of transporting gas on either the Rover or ANR East pipelines and demonstrates DTE Energy's superficial attempts to justify its self-dealing.

FERC provides no explanation for its perfunctory conclusion that NEXUS has no existing customers to subsidize the construction of the pipeline. It is FERC's stated position that absent evidence of anti-competitive or other inappropriate behavior, it would take the precedent agreements with affiliates DTE Electric and DTE Gas at face value.⁵⁴ In the main, FERC ought to be suspect of ownership structures like that of NEXUS where a significant shareholder is both the purveyor of natural gas and a regulated utility with a captive market that can be used to subsidize increased rates to finance infrastructure to deliver gas.⁵⁵ That alone should prompt FERC to conduct a more searching investigation into the affiliate precedent agreements. Yet, FERC refuses, stating that "[i]ssues related to [affiliates'] ability to recover costs associated with its decision to subscribe to service on NEXUS involve matters determined by the Michigan Public Service Commission; those concerns are beyond the scope of the Commission's

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Order ¶ 47.

⁵⁵ Sierra Club Comments 17–21, Nov. 17, 2016; Zaski Comments, Jun. 22, 2017, 20170622-5184.

jurisdiction.”⁵⁶ In the same discussion, FERC also stated NEXUS has no customers that could be made to subsidize the project.⁵⁷ There is no reason for FERC to end its investigation of the financial structure of the pipeline’s ownership with a woodenly applied fiction that NEXUS is the only entity with a financial stake in the outcome of the pipeline. Certainly, that is true in the most absolute and explicit sense, but it fails to take account of the obvious incentives for self-dealing and the resulting distortion of the natural gas market made plain by the ownership structures of NEXUS and its affiliates. While there is no dispute that FERC lacks jurisdiction over the MPSC’s decision to permit DTE Gas and DTE Electric to raise rates to cover the cost of the NEXUS project, that should not stop FERC from at least considering the implications of basing its finding of public necessity, at least in part, on a self-dealing transaction. Again, FERC has an independent duty to assure that any project it certifies provides a public benefit.

Moreover, in this case, the affiliates’ decision to buy more expensive natural gas when there were numerous other options for delivery, and thereby subsidize those costs with captive ratepayers, is the very evidence of anti-competitive behavior that should have compelled FERC to conduct an independent inquiry into the true market demand claimed by the affiliates. Without a meaningful review of the efficacy of the affiliate precedent agreements, FERC cannot know whether the affiliate precedent agreements were entered to manufacture a market to capture returns for affiliate shareholders by using captive ratepayers, a likely explanation for the above-market agreements given DTE Electric’s admission that it increased its subscription to ensure there was sufficient market demand for NEXUS to go forward.

The NGA was enacted, and FERC created, to prevent this very scenario—utilities using their monopoly power to extract above-market rates and returns on equity for unnecessary

⁵⁶ Order ¶ 48, fn. 38.

⁵⁷ *Id.*

infrastructure.⁵⁸ FERC surrenders its congressionally mandated duty when it ignores NEXUS' ownership structure and consequently disregards a meaningful review of the true necessity of the pipeline.

The recently approved Sabal Trail pipeline is an instructive cautionary example of this type of self-dealing and its attendant effects. FERC justified the need for the pipeline on the basis that it was required to supply Florida's growing economy and population. It based its determination on precedent agreements between the pipeline owners and affiliate utilities. Yet, when the pipeline became operational, it operated at just 25% of capacity and transmission costs of the gas through Sabal Trail are higher than other alternatives in Florida.⁵⁹ At the same time FERC ignored market data that showed that the demand for natural gas in Florida was diminishing. Year over year gas consumption declined 4% despite Florida's growing economy and swelling population.⁶⁰ As a result, Florida rate payers are paying much more to transport gas using Sabal Trail than they did to use the perfectly adequate existing pipelines. The parent companies that own a portion of the pipeline have forced the customers of their captive utilities to pay billions of dollars unnecessarily over the next twenty-five years that is not currently needed and may never be needed given the strong growth of renewables in the region.

Based on published rates, Florida Power & Light ratepayers could be obligated to pay up to \$9 billion over the next twenty-five years for the firm transportation agreement with Sabal Trail. Duke Energy Florida's ratepayers could pay up to \$6 billion over the same term. The full amount of these contracts would be due whether or not all of the capacity is used. Numerous

⁵⁸ *Natl. Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 832 (D.C. Cir. 2006) (citing *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 995 (D.C. Cir. 1987)) ("The [NGA's] fundamental purpose is to protect natural gas consumers from the monopoly power of natural gas pipelines.").

⁵⁹ Sabal Trail Adding Pipeline Capacity but Not Demand, Andrew Bradford, BTU Analytics (Jun. 20, 2017) <https://btuanalytics.com/sabal-trail-pipeline-capacity/>.

⁶⁰ *Id.*

pipeline projects have been proposed to FERC that involve self-dealing contracts with affiliates of the pipeline owners. In many cases, billions of dollars of unnecessary costs are foisted upon the customers of the affiliates of the pipeline owners. In this way, the risks and costs of the pipeline are subsidized by the customers of the affiliates of the pipeline developers. NEXUS is intending to use the same scheme. The only end-user contract, besides the suspect DTE agreements, is the Columbia Gas contract, representing just 3% of NEXUS capacity. All other Shippers are marketing companies in search of customers. FERC must begin to evaluate the true market need for a project and its economic effect on ultimate consumers. Relying solely on precedent agreements, especially self-dealing agreements, does not allow an accurate determination of whether a pipeline is needed.

Indeed, Former FERC Commissioner Norman Bay recently explained that FERC's policy for evaluating need in certificate proceedings is outdated and lacking. According to Mr. Bay, while the policy "lists a litany of factors for the Commission to consider in evaluating need . . . in practice, the Commission has largely relied on the extent to which potential shippers have signed precedent agreements for capacity on the proposed pipeline."⁶¹ By fixating on precedent agreements, Commissioner Bay says FERC:

[M]ay not take into account a variety of other considerations, including, among others: whether the capacity is needed to ensure deliverability to new or existing natural gas-fired generators, whether there is a significant reliability or resiliency benefit; whether the additional capacity promotes competitive markets; whether the precedent agreements are largely signed by affiliates; or whether there is any concern that anticipated markets may fail to materialize.⁶²

⁶¹ National Fuel Gas Supply Corp., 158 FERC ¶ 61,145 at 3 (Feb. 3, 2017) (Bay, Commissioner, Separate Statement).

⁶² *Id.*

Mr. Bay further warned FERC against aiding industry “boom-and-bust cycles” and overbuilding pipelines, which could leave ratepayers subject to increased costs.⁶³

Discounting the affiliates’ precedent agreements, only 43% of NEXUS pipeline capacity is subscribed.⁶⁴ Even this admittedly paltry demonstration of demand may overstate the true demand of NEXUS’ receiving markets.

A large portion of the gas to be shipped on the NEXUS pipeline is destined for the Dawn Hub in Ontario, Canada. Two Canadian entities have entered precedent agreements for 260,000 Dth/d collectively.⁶⁵ Yet, there is every indication in the record before FERC that demand is softening generally in Ontario, and specifically for gas through the route proposed by NEXUS.

The Ontario Provincial Government’s Long-Term Energy Plan explained that energy demand in Ontario has declined in recent years because of reductions by residential, industrial, and business users.⁶⁶ The Provincial Government ascribed the observed reduction to increases in energy efficiency, fostered in part by Ontario’s updated Building Code, which requires the construction of more energy efficient homes, offices, and industrial facilities.⁶⁷ The Province’s shift away from heavy industry and toward an economy based on an advanced technology sector has also reduced demand for electricity.⁶⁸ As a result, Ontario predicts demand for electricity to remain flat for the next decade.⁶⁹

To ensure a continued supply of low cost energy, Ontario has implemented a conservation first strategy that seeks to meet the modest growth in demand predicted by

⁶³ *Id.*

⁶⁴ *See* Order ¶ 9.

⁶⁵ *Id.*

⁶⁶ Sierra Club Comments 10, Nov. 17, 2016; ONTARIO MINISTRY OF ENERGY, ACHIEVING BALANCE: ONTARIO’S LONG-TERM ENERGY PLAN 11 (2013), http://www.energy.gov.on.ca/en/files/2014/10/LTEP_2013_English_WE.pdf. [hereinafter “Long-Term Energy Plan”].

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Sierra Club Comments 10, Nov. 17, 2016; *Id.*

prioritizing energy efficiency and conservation over investments in new generation or transmission.⁷⁰ Ontario expects that it will be able to meet all of the growth in electricity demand by 2032 through conservation efforts, and through those efforts estimates that it will reduce forecasted demand by 16%.⁷¹ While Ontario will continue to generate electricity through gas-fired power plants, the share of electricity generated through such means will remain flat at 10%.⁷²

As energy demand in Ontario is expected to remain flat, exports of natural gas to Ontario through Michigan have fallen dramatically, with some of the demand shifting to exports from northern New York.⁷³ Gas exports through Detroit have fallen 32.9% from their peak in 2014, 79.8% from their peak in 2012 through Marrysville, Michigan, and 47% from their peak in 2011 through St. Clair, Michigan.⁷⁴

The clearing price of gas on the Dawn Hub in Ontario tells a similar story of soft demand. After enjoying a significant premium over the Henry Hub in 2014, the Dawn Hub premium evaporated by 2016, commanding only an additional \$0.08 per million British thermal units (“MMBtu”)—down from its peak of \$1.81 per MMBtu over the Henry Hub price in 2014.⁷⁵ Thus far in 2017, the Dawn price has stretched its premium to only \$0.13 per MMBtu over the Henry Hub price.⁷⁶ Even compared to the MichCon Hub, Dawn held just a \$0.09 per MMBtu

⁷⁰ Long-Term Energy Plan 4.

⁷¹ *Id.*

⁷² *Id.* 24.

⁷³ Gas exports through Niagara Falls, New York and Grand Island, New York have seen marked increases since the beginning of the decade, at the same time exports through Michigan have been falling. U.S. ENERGY INFORMATION ADMINISTRATION, NATURAL GAS EXPORTS AND RE-EXPORTS BY POINT OF EXIT, https://www.eia.gov/dnav/ng/ng_move_poe2_a_EPG0_ENP_Mmcf_a.htm.

⁷⁴ Zaski Comments, May 29, 2017; *Id.*

⁷⁵ Sierra Club Comments 10, Nov. 17, 2016; FERC, MARKET OVERSIGHT: MIDWEST NATURAL GAS MARKET: ANNUAL HUB PRICES (Aug. 2017) <https://www.ferc.gov/market-oversight/mkt-gas/midwest/ngas-mw-yr-pr.pdf>.

⁷⁶ *Id.*

premium in 2016, and a \$0.15 per MMBtu premium so far for 2017. This is down from a premium of \$0.38 in 2014.⁷⁷

The small spread between the Dawn Hub price and the Henry Hub and MichCon Hub prices indicates weak demand for gas through the Dawn Hub and should have given FERC pause before it determined that a need exists for the pipeline. A strong indicator of demand for natural gas is “basis differential” at different hubs. “Basis differentials provide an incentive for prospective pipeline shippers . . . to request that a pipeline company . . . construct new pipeline capacity and enter into long-term contracts for firm pipeline transportation service sufficient to enable the pipeline operator to proceed with the project.”⁷⁸ Once the pipeline is constructed, the pipeline company can capture the basis differential.⁷⁹ Here there is little differential to be realized, especially compared with the historic premium the Dawn Hub commanded only three years ago.⁸⁰ FERC ignored the data indicating that the Ontario energy market is softening and demand is not expected to rebound for decades, if ever.⁸¹ Instead, FERC relied solely on precedent agreements without explanation for why it believes those agreements are the only indicator of market demand given other contrary information in the FERC record.⁸²

Ontario has also seen a decline in capacity factors of its natural gas-fired power generating stations. Ontario’s peaking generating stations have an average capacity factor of 1%

⁷⁷ *Id.*

⁷⁸ DEP’T OF ENERGY, NATURAL GAS INFRASTRUCTURE IMPLICATIONS OF INCREASED DEMAND FROM THE ELECTRIC POWER SECTOR 3 (Feb. 2015), https://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf; *see also* Zaski Comments, May 29, 2017; Sierra Club Comments 10, Nov. 17, 2016.

⁷⁹ *Id.*

⁸⁰ *See* FERC, MARKET OVERSIGHT: MIDWEST NATURAL GAS MARKET: ANNUAL HUB PRICES (Aug. 2017) <https://www.ferc.gov/market-oversight/mkt-gas/midwest/ngas-mw-yr-pr.pdf>.

⁸¹ *See* Long-Term Energy Plan 4.

⁸² Order ¶ 47.

where generally a peaking generating station would have a capacity factor of 8% to 10%.⁸³ Moreover, Ontario's combined cycle natural gas generating stations have an average capacity factor of only 10%. Again, generally combined cycle generating stations have an average capacity factor of 65% to 85%. The Ontario Provincial Government explained in its Long-Term Energy Plan that the majority of its power generating capacity comes from nuclear and hydroelectric and a larger and larger share is coming from renewables. With a heavy reliance on "must run" nuclear units, their gas-fired counterparts are relatively underused. The result is that ratepayers are heavily penalized because they have to subsidize the underused natural gas-fired units. With natural gas units sidelined in Ontario in favor of other generating capacity, there is little need for additional natural gas in Ontario.

In a staff report to the Ontario Energy Board,⁸⁴ as part of the 2015 Natural Gas Market Review, it was noted that "several stakeholders expressed concern that assets added to increase capacity to deliver gas to Ontario generally, or to Dawn specifically, could become underutilized before the end of their expected service life." Moreover, the projected reduction in tolls on the TransCanada mainline, below the negotiated rate for NEXUS, could limit further subscriptions on NEXUS. Industry analysts are concerned that if NEXUS and Rover are both built, the Dawn market could become oversupplied.⁸⁵

Thus, discounting both the affiliate agreements and the subscriptions placed by Canadian entities, capacity on the NEXUS pipeline stands at 32%. Most, if not all, of the remaining capacity is slated for delivery to the northern Ohio and Michigan markets. Again, FERC ignored

⁸³ Ontario Planning Outlook, IESO (Mar. 23, 2016) <http://www.ieso.ca/Documents/consult/sac/SAC-20160323-Ontario-Planning-Outlook.pdf>.

⁸⁴ ONTARIO ENERGY BOARD, STAFF REPORT TO THE BOARD ON THE 2015 NATURAL GAS MARKET REVIEW (Apr. 6, 2016) https://www.oeb.ca/oeb/_Documents/EB-2015-0237/Staff_Report_to_the_Board_2015_NGMR_20160406.pdf.

⁸⁵ Dawn Hub Pressure Grows with TransCanada Toll Decreases, Marissa Anderson, BTU Analytics (Oct. 21, 2016) <https://btuanalytics.com/dawn-hub-transcanada-toll/>.

indications of weak demand for natural gas and increasing inflow capacity in the Michigan market in its Order.

Much as it is in Ontario, so it is in Michigan. Energy demand has been falling for all rate classes in Michigan since 2005.⁸⁶ In testimony before the MPSC, DTE Gas explained that increasing energy efficiency as a result of gas price spikes related to the 2005 hurricane season permanently reduced load in Michigan by driving customers to adopt permanent energy conservation techniques, like better insulation.⁸⁷ DTE Gas further explained that increased energy efficiency has also been driven by updated building codes, more energy efficient appliances, such as electronic energy management systems, and customer awareness, even in light of low gas prices.⁸⁸ DTE Gas' observations of its market largely track Michigan's total gas consumption since 1998. The state's total gas consumption in 2015 was 14% below its 1998 high, and while consumption increased slightly from its low in 2010, by 2015 consumption resumed its downward trend.⁸⁹ DTE Electric similarly expects electricity use to decline for at least the next decade in Michigan, projecting a 0.2% annual decline from 2016 to 2026.⁹⁰

Even while energy demand is forecasted to decline, gas-fired electricity generation⁹¹ will confront greater competition from renewables. In 2016, Michigan amended its energy laws. The new laws require energy producers to generate at least 15% of their power from renewables by

⁸⁶ Sierra Club Comments 9, Nov. 17, 2016.

⁸⁷ Testimony of George H. Chapel 28, No. U-17999 (MPSC) <http://efile.mpsc.state.mi.us/efile/docs/17999/0114.pdf>.

⁸⁸ *Id.* 28–29.

⁸⁹ U.S. ENERGY INFORMATION ADMINISTRATION, NATURAL GAS, MICHIGAN NATURAL GAS TOTAL CONSUMPTION (Aug. 31, 2017) https://www.eia.gov/dnav/ng/hist/na1490_smi_2a.htm.

⁹⁰ Sierra Club Comments 9, Nov. 17, 2016.

⁹¹ This includes DTE Electric's planned gas-fired power plant slated to come online in 2022.

the end of 2021, up from 10% currently.⁹² The new laws also created new incentives for power generators to save energy through greater use of conservation and energy efficiency.⁹³

At the same time as demand is diminishing in the markets to be served by NEXUS, 4.8 Bcf/d of inflow capacity will be added. The surfeit of capacity and fragility of demand in these markets is further underscored by shippers redirecting existing gas requirements to other pipelines instead of increasing their call for more gas.⁹⁴ In a conference call with investors DTE Energy president and COO Jerry Norcia explained that the NEXUS pipeline is not intended to add capacity but rather to displace capacity coming from western Canada on the TransCanada mainline through Chicago.⁹⁵ Chairman and CEO of DTE Energy Gerard Anderson confirmed NEXUS' purpose stating, "We've been asked this question many times on what NEXUS and Rover had been bringing a lot of incremental volume. The answer is no. It's displacement. [T]hose two don't bring any incremental."⁹⁶ Anderson went on to observe that as Rover and then NEXUS began soliciting shippers those same shippers declined to continue purchasing gas through the TransCanada mainline.⁹⁷

NEXUS affiliates will likewise follow suit. In a rate case before the MPSC, a DTE Gas spokesperson described DTE Gas' shipment strategy once NEXUS comes online. At the moment DTE Gas has 50,000 Dth/d of capacity on the Vector Pipeline and 75,000 Dth/d on the ANR Pipeline.⁹⁸ Both agreements are scheduled to expire on October 31, 2017. Beginning November

⁹² Zaski Comments, Jan. 29, 2017; David Eggert, *Legislature Oks Rewrite of Michigan Energy Law*, CRAIN'S DETROIT BUSINESS (Dec. 16, 2016) <http://www.crainsdetroit.com/article/20161215/NEWS01/161219886/legislature-oks-rewrite-of-michigan-energy-law>

⁹³ *Id.*

⁹⁴ Zaski Comments, May 26, 2017.

⁹⁵ *Id.*; *DTE Energy (DTE) Q1 2017 Results - Earnings Call Transcript*, SEEKING ALPHA (Apr. 26, 2017) <https://seekingalpha.com/article/4065656-dte-energy-dte-q1-2017-results-earnings-call-transcript?page=10>

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Zaski Comments, May 26, 2017; Suppl. Test. of Robert G. Lawshe 6, No. U-18152 (MPSC) <http://efile.mpsc>.

1, 2017, DTE Gas will reallocate 75,000 Dth/d of capacity from the Vector and ANR pipelines to the NEXUS pipeline.⁹⁹ DTE Gas has no plans to expand its capacity above what it had been receiving on the Vector and ANR pipelines.

FERC's blind faith in the ability of precedent agreements to predict the market demand for natural gas has obscured its investigation of the public need for this pipeline. A significant portion of the capacity on this pipeline appears to have been manufactured by affiliates of the owners of NEXUS. These affiliates chose to buy more costly gas through NEXUS and pass those higher costs on to their captive ratepayers when there are viable lower cost alternatives to serve the needs of current shippers. The lack of need and manufactured demand for NEXUS is further underscored by the market trends in NEXUS' service area that indicate that demand for natural gas is declining and may continue to decline for the foreseeable future. Given the unnecessary transport capacity NEXUS will bring along with higher costs FERC's Order cannot be said to be in the public benefit. Rather it will result in the taking of private property for the private gain of the proponents of the NEXUS pipeline.

2. FERC Violated NEPA by Failing to Consider Alternatives to the NEXUS Pipeline in Light of the Eroding Demand for Gas in the Markets NEXUS Seeks to Serve

FERC's reliance on untested, inaccurate, and incomplete information about the market demand for the NEXUS pipeline permeates its Final Environmental Impact Statement ("FEIS") and undermines its NEPA review. Far from harmless, this flaw allows the agency to brush aside serious environmental impacts as insignificant and ignore alternatives to the proposed project that would cause significantly less damage.¹⁰⁰ FERC relies on the untested, inaccurate, and incomplete information on market demand for the pipeline to give terse treatment to important

state.mi.us/efile/docs/18152/0019.pdf.

⁹⁹ *Id.*

¹⁰⁰ FEIS 3-1.

alternatives, including the “no action” alternative and the use of available capacity in existing pipeline infrastructure. Under NEPA, the alternatives analysis is the “heart of the environmental impact statement,”¹⁰¹ and requires that agencies “rigorously explore and objectively evaluate” all reasonable alternatives.¹⁰² Here, FERC rejected the “no action alternative,” seemingly concluding that it must approve the project because the pipeline is necessary to meet growing gas demand and to avoid supply constraints.¹⁰³ Yet nowhere has FERC independently evaluated those claims of necessity from NEXUS, or even acknowledged the existence of contrary information.

FERC’s blind acceptance of NEXUS’ claims that its pipeline is needed also allows it to dismiss existing infrastructure system alternatives with little or no analysis. Its “no action alternative” determination that without the NEXUS pipeline, shippers would be required to place shipments with other natural gas suppliers, therefore prompting those suppliers to build a pipeline substantially similar to the NEXUS pipeline disregards the flimsy manufactured demand for a significant portion of the subscribed capacity of NEXUS.¹⁰⁴ FERC’s “no action alternative” should account for the decreased demand demonstrated by the evidence in the record. It is highly likely that much less than 885,000 Dth/d will be transported through the pipeline if it becomes operational. The “no action alternative” should consider the likely outcome that a fraction of the capacity subscribed on paper will flow through the pipeline. In that analysis FERC may find that existing infrastructure combined with soon to be operational infrastructure could deliver the gas that will actually be needed.

¹⁰¹ 40 C.F.R. § 1502.14(a).

¹⁰² *Id.*

¹⁰³ FEIS 3-3, 3-4.

¹⁰⁴ *Id.*

DTE Gas' decision to reallocate its gas use from ANR and Vector pipelines to NEXUS without increasing its use, is a stark example of the missing net increase in gas demand.¹⁰⁵ DTE Energy executives admitted as much.¹⁰⁶ The NEXUS pipeline is not creating incremental capacity but rather is competing for the same capacity that already exists on other pipelines.¹⁰⁷ If NEXUS' primary goal, as stated by DTE Energy executives, is to steal capacity away from other pipelines, by definition the subscribed capacity could be transported by existing natural gas infrastructure and the "no action alternative" becomes a viable alternative that FERC failed to consider in a meaningful way.

As stated above, the alternatives section "is the heart of the environmental impact statement."¹⁰⁸ FERC must "[r]igorously explore and objectively evaluate all reasonable alternatives[.]"¹⁰⁹ This includes "reasonable alternatives not within the jurisdiction of the lead agency."¹¹⁰

By relying almost exclusively on NEXUS' ambitions for the project to frame its statement of purpose, FERC impermissibly "restrict[ed] its analysis to just those 'alternative means by which a particular applicant can reach his goals.'"¹¹¹ For example, FERC says that "because the purpose of the Projects is to transport natural gas," the consideration of alternatives that do not transport natural gas "are not considered or evaluated further in this analysis."¹¹² As a result, FERC excluded consideration of meeting any of the Project's purpose from the generation

¹⁰⁵ See Zaski Comments, May 26, 2017.

¹⁰⁶ Zaski Comments, May 26, 2017.

¹⁰⁷ *Id.*

¹⁰⁸ 40 C.F.R. § 1502.14.

¹⁰⁹ *Id.*

¹¹⁰ § 1502.14(c).

¹¹¹ *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (D.C. Cir. 1991) (Buckley, J., dissenting))

¹¹² FEIS 3-4.

of electricity from renewable energy sources or the gains realized from increased energy efficiency and conservation.

FERC's categorical refusal to consider alternative energy and increased energy efficiency alternatives is at odds with other recent statements. For example, in the Constitution Pipeline DEIS, FERC considered energy conservation, efficiency, and renewable energy alternatives.¹¹³ While FERC ultimately decided against considering these alternatives in greater detail, it at least considered them in some detail.¹¹⁴ That is a distinct contrast to the NEXUS FEIS where alternatives that would not transport Marcellus and Utica shale gas were excluded from any analysis. FERC's narrowing of the range of alternatives to just those alternatives that would transport natural gas as NEXUS wants means that energy conservation and renewable energy alternatives will never be considered, even if they are economically and technologically feasible and serve the broader public interest.

FERC also did not adequately consider system alternatives. FERC briefly considered six existing pipeline systems (ANR, Columbia Gas, Dominion, Panhandle Eastern, Rockies Express, and Texas Eastern) alone or in combination as a means to transport natural gas from the Appalachian Basin to northern Ohio and southeastern Michigan.¹¹⁵ For all the pipelines or any combination thereof, FERC determined that none have the capacity to deliver as much gas as NEXUS claims is needed by its customers.¹¹⁶ Yet again, however, FERC's uncritical and unthinking acceptance of precedent agreements from affiliate utilities has infected its NEPA review. Without conducting an independent examination of market need, FERC cannot

¹¹³ See Constitution Pipeline DEIS at 3-3 – 3-12 (Docket CP13-499-000).

¹¹⁴ *Id.*

¹¹⁵ FEIS 3-4-3-5.

¹¹⁶ *Id.*

determine with any certainty how the quantity of natural gas actually needed in the markets NEXUS will serve.

FERC went on to determine that the existing pipelines do not service the same receipt and delivery points and therefore additional facilities would need to be built.¹¹⁷ FERC estimates that 300 miles of new pipeline or pipeline loop would need to be constructed to use the existing system as NEXUS intends its pipeline to be used.¹¹⁸ There is no support for FERC's determination. In a map included in the FEIS, the Columbia Gas pipeline network comes within half a mile from the receipt point of the NEXUS pipeline and has a line that extends to one of NEXUS' northern Ohio delivery points and another line only 4.7 miles from another delivery point also in Ohio.¹¹⁹ The Columbia network also interconnects with both the Panhandle Eastern Pipeline which transports gas to southeastern Michigan, but more importantly the network connects with the ANR pipeline that has its terminus 0.2 miles from the proposed terminus of NEXUS.¹²⁰ Leaving the capacity issue aside, use of the Columbia and ANR network appears to both receive and deliver the gas to the very same locations as the NEXUS pipeline and would require very little expansion of the existing system. The FEIS contains no explanation for why this alternative is not feasible other than a conclusory statement that no alternative it examined can transport the amount of gas that the NEXUS pipeline is designed to transport.

FERC's analysis of proposed system alternatives is similarly flawed. It considered the recently permitted Rover pipeline, the Leach XPress project, and the ANR East pipeline.¹²¹ While the Leach XPress project will not travel anywhere near the delivery points for the NEXUS

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* Figure 3.2.1-1.

¹²⁰ *Id.*

¹²¹ FEIS 3-5.

pipeline, both the ANR and Rover projects will largely track the route of NEXUS.¹²² Nonetheless, FERC determined that none have the capacity required to fulfill the role NEXUS is intended to fill and they do not serve the same receipt and delivery points.¹²³ In the case of the Rover pipeline all the receipt and delivery points could be served by connections with the existing Columbia Gas pipeline network.¹²⁴ Thus, no, or very little, additional pipeline infrastructure would need to be added to the Rover project. The same is true for the ANR East pipeline.¹²⁵ Any connections not made by the ANR East pipeline can be served with interconnections to the existing Columbia Gas network.¹²⁶ Still, FERC fell back on its determination that neither of these two pipelines or a combination of them have enough capacity to fulfill the designed capacity of the NEXUS pipeline.¹²⁷ FERC's determination rests on the faulty assumption that affiliate precedent agreements represent true market demand—a topic treated extensively above. FERC thus abdicates its responsibility to independently assess the purpose of the project, instead choosing to impermissibly limit itself to consideration of alternatives that perfectly track the desires of the applicant.

Finally, FERC's reliance on NEXUS' claims of necessity misleads the public by framing the project as necessary, when, in fact, no agency—not FERC and not the state public utilities commission of Michigan—has made that finding. Indeed, FERC explicitly states in the FEIS that it did not determine the need for the project as part of the NEPA process.¹²⁸ In doing so, FERC deprives the public of an opportunity to understand and comment on a complete and fair analysis

¹²² *Id.* Figure 3.2.2-2 (Leach XPress), Figure 3.2.2-1 (Rover); Figure 3.2.2-3 (ANR East).

¹²³ *Id.* 3-7.

¹²⁴ *Id.* Figure 3.2.2-1.

¹²⁵ *Id.* Figure 3.2.2-3.

¹²⁶ *Id.*

¹²⁷ *Id.* 3-7.

¹²⁸ *Id.* at 1-3.

of the actual need for the NEXUS pipeline and a robust consideration of its impacts and viable alternatives to the project. The public cannot fairly weigh the need for the project against its environmental impacts because FERC has only told one side of the story in its FEIS.

3. FERC Violated NEPA by Failing to Evaluate the Effects of Greenhouse Gas Emissions

Neither the Final Environmental Impact Statement (“FEIS”) nor FERC’s Order adequately address the climatological effects of downstream natural gas usage from the NEXUS pipeline.¹²⁹ Downstream natural gas combustion is a reasonably foreseeable result of the NEXUS pipeline, and therefore NEPA requires FERC to seriously evaluate the downstream effects or provide an explanation for why it cannot. FERC has quantified some of the downstream emissions but has failed to seriously evaluate the effect of those emissions on the climate or provide an explanation for why it cannot provide a meaningful analysis of those effects.¹³⁰

FERC acknowledges that the project may result in the release of as much as 17,900,878 metric tons of CO₂ into the atmosphere per year as a result of combusting 925,000 Dth/d.¹³¹ FERC calculated the net additional capacity that NEXUS would bring to be 925,000 Dth/d and assumed that this maximum capacity would be combusted each day for a year.¹³² FERC noted that most pipelines are designed for peak usage and it is unlikely that all 925,000 Dth/d of capacity would be used every day.¹³³ FERC declined to evaluate the additional emissions’ effect on climate change, stating that “[c]urrently there is no scientifically-accepted methodology to correlate specific amounts of GHG emissions to discrete changes in average temperature rise,

¹²⁹ See FEIS 4-273–4-280; Order ¶¶ 172–73.

¹³⁰ See *id.*

¹³¹ FEIS 4-278.

¹³² *Id.* FERC, however, failed to quantify or even qualitatively assess the additional GHG emissions associated with leakage along the pipeline route and with the shale gas drilling operations that are necessary to supply to pipeline. Thus, the emissions analyzed by FERC represent only a fraction of the full life-cycle emissions associated with the project.

¹³³ *Id.*

annual precipitation fluctuations, surface water temperature changes, or other physical effects on the environment in the Midwest region.”¹³⁴ In comments to FERC, the Environmental Protection Agency (“EPA”) informed FERC of its disagreement with this statement, notifying FERC that agencies can compare GHG emissions estimates of different alternatives.¹³⁵ FERC also determined, without any concrete evidence, that the NEXUS project may result in a reduction of CO₂ emissions because of displacement of coal use or encouragement of lower carbon fuel for new growth areas.¹³⁶

“An agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration.”¹³⁷ An indirect effect is one that “[is] caused by the project and [is] later in time or farther removed in distance, but [is] still reasonably foreseeable.”¹³⁸ An effect is “reasonably foreseeable” where it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”¹³⁹

The District of Columbia Circuit recently held that combustion of natural gas and the attendant emissions are reasonably foreseeable indirect effects to permitting a pipeline intended to deliver natural gas to a power plant.¹⁴⁰ The court explained that not only could FERC foresee the likely emissions from the combustion of the gas carried on the pipeline it permitted, it also had legal authority to mitigate those emissions.¹⁴¹ Accordingly, the “EIS . . . needed to include a discussion of the significance of this indirect effect . . . as well as the incremental impact of the

¹³⁴ *Id.* 4-277.

¹³⁵ Order ¶ 135.

¹³⁶ FEIS 4-279.

¹³⁷ *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (citing 40 C.F.R. § 1502.16(b)) (emphasis in original) [hereinafter “*Sabal Trail*”].

¹³⁸ *Id.* (quoting 40 C.F.R. § 1508.8(b)).

¹³⁹ *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016).

¹⁴⁰ *Sabal Trail*, 867 F.3d at 1374.

¹⁴¹ *Id.*

action when added to other past, present, and reasonably foreseeable future actions.”¹⁴² Without quantifying and evaluating the effect of the emissions, the court concluded that FERC could not engage in informed decision making with respect to the greenhouse-gas effects of the project, nor could the public participate in “informed public comment”¹⁴³ The court extended its reasoning to comparisons between the emissions expected from the project and those assumed to be offset by the project in the form of shifts away from dirtier forms of energy production.¹⁴⁴ The court observed that without quantification of the emissions and offsetting reductions a decision maker would have no way of knowing the net result and could therefore not properly weigh the beneficial and detrimental effects.¹⁴⁵ “In this respect, then, [an] EIS fails to fulfill its primary purpose.”¹⁴⁶

The court finally decided to remand the EIS back to FERC with a directive for it to explain whether its determination not to use the Social Cost of Carbon to evaluate the effects of greenhouse-gases still holds and why.¹⁴⁷ FERC in an earlier case declined to use the Social Cost of Carbon for NEPA purposes because it believed the method is contested and not all the harm it accounts for is necessarily “significant” as that term is understood in NEPA.¹⁴⁸

In the FEIS and in its Order, FERC calculated what it believed was the greatest possible downstream emissions from the NEXUS pipeline, assuming that all the net capacity was combusted each day. Unlike in the FEIS, in its Order FERC qualified its calculations by declaring that although it had quantified downstream emissions, those emissions were not

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1375.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* (citing *WildEarth Guardians v. Jewell*, 739 F.3d 298, 309 (D.C. Cir. 2013)).

reasonably foreseeable because the capacity on the NEXUS pipeline delivers gas to the interstate pipeline network, not directly to a gas-fired power plant, and therefore FERC cannot predict how the gas will be used.¹⁴⁹ FERC's inability to construct a sensible estimation of the destiny of a substance sought for flammable properties ignores a fact so obvious that it is nearly anodyne. It is reasonably foreseeable, just as it was in *Sabal Trail*, that the majority of the gas shipped on the NEXUS pipeline will be for combustion in either a gas-fired power plant or as a source for heat. EPA concurs in its comments on the FEIS.¹⁵⁰ The fact that the gas will travel through other pipelines to its igneous fate does not remove the ultimate destination from the scope of FERC's NEPA review. Indeed, whether an effect is reasonably foreseeable is not measured by FERC's ability to grasp the obvious.

Still, after it quantified the downstream emissions of the project, FERC then concluded that some of the downstream emissions would be offset through a shift away from coal-generated energy and encouragement of use of cleaner burning fuels in new markets.¹⁵¹ FERC supplied no data to support its conclusion. "The effects an EIS is required to cover include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial."¹⁵² Without a more detailed evaluation of *both* reductions and projected emissions "it is difficult to see how FERC could engage in informed decision making with respect to the greenhouse-gas effects of this project, or how informed public comment could be possible."¹⁵³

¹⁴⁹ Order ¶ 173 fn. 191.

¹⁵⁰ EPA Comments, Jan 17, 2017, 20170118-0011 ("It is reasonably foreseeable that the natural gas transported by the Projects would be produced and combusted, and the GHG emissions associated with production and combustion can be estimated, as the FEIS demonstrates.").

¹⁵¹ FEIS 4-279.

¹⁵² *Sabal Trail*, 867 F.3d at 1375 (quoting 40 C.F.R. § 1508.8)

¹⁵³ *Id.* at 1374.

The arbitrariness of FERC’s myopic fixation on the offsetting emissions reductions and concomitant refusal to evaluate the effects of the emissions that are a reasonably foreseeable result of the project is made plain by FERC’s finding that there is no way to correlate emissions to impacts to the Midwest region. In fact, FERC goes so far as to claim unequivocally that “GHG emissions from the proposed Projects . . . *would not have any direct impacts on the environment in the Projects[’] area.*”¹⁵⁴ FERC’s claimed inability to evaluate the effects of climate change on the region is not a basis to claim that there would be no effect on the environment of the region. Assuming *arguendo* that FERC has no method to evaluate the effects of climate change on the region, FERC could make no determination as to the impacts of greenhouse-gases on the region. It certainly could not state, without qualification no less, that there would be no direct impact at all.

FERC’s only evaluation of the emissions from NEXUS is a comparison between the total yearly emissions from Ohio and Michigan and the total estimated downstream emissions from NEXUS per year.¹⁵⁵ FERC concluded that the emissions were small compared to the total emissions from either state but explained that it included the comparison just as a way to provide a reference for the downstream emission expected from NEXUS.¹⁵⁶ In comments on FERC’s DEIS and FEIS, EPA explained to FERC that its comparison is useless “because climate change is the result of large numbers of sources, each of which may be comparatively small, but that collectively lead to huge impacts.”¹⁵⁷ This type of comparison, EPA went on to observe, contributes nothing to the analysis of climate change.¹⁵⁸ EPA’s comments put on display FERC’s

¹⁵⁴ FEIS 4-277 (emphasis added).

¹⁵⁵ FEIS 4-277.

¹⁵⁶ *Id.*

¹⁵⁷ EPA Comments, Jan. 17, 2017.

¹⁵⁸ *Id.*

NEPA violation. The D.C. Circuit was at pains to direct FERC to conduct its NEPA review such that both policy makers and the public have enough information to make informed decisions about the environmental impact of the project.¹⁵⁹ A comparison between total yearly emissions of a state and the yearly emissions from NEXUS does nothing to help inform decision makers and the public about the relative size or effects of the NEXUS' downstream emissions. Accordingly, FERC has failed to abide by NEPA's requirements to provide a meaningful analysis of the climate impacts of the NEXUS project.¹⁶⁰

Moreover, FERC cannot simultaneously claim that the project has emission reduction benefits and also claim that the effects of emissions on the region cannot be measured.¹⁶¹ As an initial matter, FERC provides no explanation for why it believes there is no way to correlate emissions to the effects of climate change.¹⁶² The fact of the matter is that there are valid and reliable means to measure the effects of climate change. The *Sabal Trail* Court notably directed FERC to explain its position on the use of the Social Cost of Carbon and its reasoning supporting its ultimate decision on whether to use it to evaluate the effects of emissions.¹⁶³ FERC has not elaborated in this Order or the FEIS its decision not to apply a methodology to evaluate the effects of emission on the regional environment, nor has it explained why it has not done so—only that no method exists. Regardless of what methodology FERC ultimately uses, it cannot ignore the issue by claiming, without support, that there is no way fulfill its duty committed to it by NEPA.

¹⁵⁹ *Sabal Trail*, 867 F.3d at 1374–75.

¹⁶⁰ *See id.*

¹⁶¹ FEIS 4-279.

¹⁶² *Id.*

¹⁶³ *Sabal Trail*, 867 F.3d at 1375.

As the *Sabal Trail* Court explained, FERC is no more permitted to rely exclusively on the benefits of the project than it is permitted to discount the detriments.¹⁶⁴ NEPA requires it to provide an explanation of both such that the agency can make informed decisions and the public informed comment. Further, if it cannot provide this evaluation, it must explain its inability.¹⁶⁵

The White House Counsel on Environmental Quality (“CEQ”) addresses this very situation in its final guidance, explaining that “when an agency determines that quantifying GHG emissions would not be warranted because tools, methodologies, or data inputs are not reasonably available, the agency should provide a qualitative analysis and its rationale for determining that the quantitative analysis is not warranted.”¹⁶⁶ Thus, if FERC asserts that it is unable to quantify the indirect GHG emissions resulting from its certificate approvals, such as from the gas drilling that would be required to supply the gas for NEXUS, it should, at a minimum, provide a qualitative analysis of the climate change implications of its decision.¹⁶⁷ Because the construction and operation of new interstate natural gas infrastructure approved by FERC results in increased lifecycle GHG emissions to the atmosphere, FERC must evaluate these impacts and compare alternatives and mitigation measures to address such emissions.

4. FERC Should Issue a Stay Prohibiting Applicants from Pursuing Any Action that Might be Authorized by the Certificates Issued in this Matter

Sierra Club has raised substantial questions in this Request for Rehearing related to whether the certificates have been issued based on improper assumptions about the need for the pipeline, whether those assumptions distorted the review of alternatives under NEPA, and

¹⁶⁴ *Id.* at 1374.

¹⁶⁵ *Id.*

¹⁶⁶ THE WHITE HOUSE COUNCIL ON ENVIRONMENTAL QUALITY, FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS 12–13 (2016) (hereinafter, “CEQ FINAL GUIDANCE”), https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

¹⁶⁷ *Id.* at 13.

whether the required environmental review of the effects of increased downstream GHG emissions has taken place under NEPA.

Sierra Club members and the public at large will suffer irreparable harm if NEXUS is allowed to go forward. For example, there is no complete and adequate remedy once trees are cut down and wetlands destroyed. It is contrary to the public interest to permit a pipeline based on speculation and without a proper review of its environmental impacts to result in the irreversible destruction of the environment and the forcible taking of private property.

Under FERC's guidance providing for faster action on motions for rehearing, any delay in proceeding with construction of the Project should be minimal. In weighing the minimal delay against the irreparable harm that will occur to Sierra Club members and the public, the balance tips decisively in favor of issuing a stay until FERC finally decides the issues raised in this Request. Therefore, FERC should issue a stay prohibiting NEXUS from pursuing any action that might be authorized by the Order issued in this matter, including any construction or related activities and any condemnation proceedings until FERC issues a final decision on this Request for Rehearing.

Conclusion and Requested Relief

For the foregoing reasons, Sierra Club respectfully requests the following relief:

- A. Grant Sierra Club's Request for Rehearing;
- B. Stay the Order issued in this matter, thus preventing NEXUS from taking any action authorized by the Order;
- C. Within 30 days of the filing of this Request, rescind the Order issued and the underlying Environmental Impact Statement;
- D. Conduct an analysis under the Natural Gas Act that evaluates the true market and public need for the project as set forth in this request;

- E. Conduct a proper assessment of all reasonable alternatives under NEPA as set forth in this request; and
- F. Conduct a proper assessment of all environmental impacts under NEPA as set forth in this request.

Dated: September 21, 2017.



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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.2010, I hereby certify that I have on this 21st day of September, 2017 served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Respectfully submitted,

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