



By U.S. Mail and Email

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To: Office of Policy and Coordination
Room CC5422
Bureau of Competition
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
antitrust@ftc.gov

Citizen Complaint Center
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3322
Washington, DC 20530
antitrust.complaints@usdoj.gov

From: Pat Gallagher
Legal Director
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5500
pat.gallagher@sierraclub.org

**Re: Antitrust Issues Raised by the NEXUS Gas Transmission Project, FERC
Docket No. CP-16-22-000.**

To Whom It May Concern:

I am writing in my capacity as Director of the Sierra Club's Environmental Law Program to alert the Department of Justice and the Federal Trade Commission (the Agencies) to important antitrust and competition policy issues arising from the NEXUS Project, a natural gas pipeline proposed to be built in the states of Ohio and Michigan.

As explained in detail below, the NEXUS Project uses an electric utility's monopoly over the retail sale of electricity to gain a monopoly in the market for the generation of electric power.¹ The Project is a proposal to build and operate an approximately 250-mile large-diameter pipeline that will transport natural gas from Ohio to a delivery point in eastern Michigan. The Project is 50% owned by a holding company for Michigan's largest electric utility, DTE Electric Company (DTE Electric). DTE Electric has contracted to buy delivery of natural gas over the pipeline for use in generating electricity for resale to Michigan retail customers. When DTE Electric entered into this contract, at least six alternative sources of

¹ *Infra* pt. II-IV.

gas were available to transport the needed supply.² All six offered transportation services at *lower* rates than NEXUS.³ Nonetheless, DTE Electric contracted to buy gas from its parent's proposed pipeline, despite the availability of these less-costly alternatives. According to internal documents, DTE Electric did so "in order to ensure that the project has sufficient customer commitment to justify proceeding with construction."⁴

DTE Electric intends to finance the above-market costs of the NEXUS Project by passing off its expenses associated with purchasing NEXUS gas to Michigan ratepayers.⁵ Consistent with DTE Electric's plan, an Administrative Law Judge entered an order on October 28, 2016, recommending that the Michigan Public Service Commission (MPSC) approve DTE Electric's request to include the Project's costs in its retail electricity rates.⁶ In contrast, a different hearing officer expressed "significant trepidation" about a DTE Electric affiliate's request to charge a similar pass-through of NEXUS costs to ratepayers and conditioned approval on the affiliate submitting "a full cost-benefit analysis prior to allowing any form of cost recovery . . . that relate[s] to the NEXUS project."⁷ The Michigan Attorney General estimates that Electric will charge Michigan ratepayers an additional \$355 million to pay for the Project.⁸

DTE Electric already controls 47% of installed generating capacity owned by Michigan utilities. Through the NEXUS Project, Electric exploits its monopoly position in the retail electricity market to expand its control over the market for installed capacity to generate electricity by using its ratepayer base to subsidize an unnecessary and inefficient natural gas pipeline.⁹ The Project harms competition and consumers by diverting demand from more-efficient suppliers of utility-scale electricity, locking Michigan's largest electric utility into a thirty-five year contract with an inefficient supplier, and raising the rates charged to ratepayers above what would be charged if DTE Electric had decided to buy from available, lower-cost alternatives.¹⁰

² *Infra* pt. III.

³ *Id.*

⁴ Exhibit MEC 16, *In re Application of DTE Electric Co.*, Michigan Public Services Comm'n No. U-17920 at 34 of 34. Hereinafter, all exhibit references are to exhibits entered in the *In re Application of DTE Electric Co.* proceeding (the Michigan PSC Proceeding) unless otherwise stated. The Michigan PSC Proceeding concerns DTE Electric's request to recover certain costs from Michigan ratepayers, including costs associated with the NEXUS Project. *See generally* DTE Electric Company's Initial Brief, *In re Application of DTE Electric Co.*, Michigan Public Services Comm'n No. U-17920.

⁵ *See In re Application of DTE Electric Co.*, Michigan Public Services Comm'n No. U-17920.

⁶ Proposal for Decision, *In re: DTE Electric Co. for Authority to Implement a Power Supply Cost Recovery Plan*, Michigan Public Services Comm'n Docket No. U-17920 (Oct. 28, 2016) [hereinafter, Proposal for Decision].

⁷ Proposal for Decision, *supra* n. 6 at 25.

⁸ Attorney General's Reply Brief, *In re: Application of DTE Electric Company*, Michigan Public Services Commission No. U-17920 at 17.

⁹ *Infra* pt. IV.

¹⁰ *Infra* pt. IV.E.

Section 2 of the Sherman Antitrust Act prohibits the use of monopoly power in a primary market to gain market power in a related secondary market.¹¹ Similarly, Section 5 of the Federal Trade Commission Act empowers the Commission to prohibit “not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.”¹² Pursuant to the Agencies’ authority to enforce these provisions, the Agencies should investigate DTE Electric’s abuse of its monopoly in the retail electricity market to subsidize an unnecessary and inefficient natural gas pipeline, with the goal of gaining a monopoly in the market for utility-scale electricity generating capacity.

The NEXUS Project is the subject of pending proceedings before the Federal Energy Regulatory Commission.¹³ The matters raised below may be appropriate for comment by the Agencies in the FERC proceedings or through litigation.

I. Direct and Indirect Ownership of Natural Gas Pipeline Capacity by Electric Utilities is Driving a Nationwide Trend Toward Pipeline Overexpansion and Distortion of the Electric Power Markets

The nationwide context of natural gas pipeline overexpansion may be useful to the Agencies in evaluating the NEXUS Project’s competitive impacts, as well as the need for intervention. According to statistics published by the United States Department of Energy, the nation’s pipeline infrastructure is overbuilt. Only 54% of the nation’s existing natural gas pipeline capacity was used between 1998 and 2013.¹⁴ This overexpansion is due in part to incentives created when public utilities subsidize the cost of pipelines owned by their affiliates.¹⁵ As the Institute for Energy Economics and Financial Analysis explains,

[a] regulated electric or gas utility that is purchasing natural gas for power generation or for use as a heating fuel passes the cost of its pipeline contracts, which include a FERC-approved profit for the pipeline developer, on to its customers. If the regulated utility’s parent company can build its own pipeline for use by its regulated subsidiary, it can capture this profit,

¹¹ See, e.g., *Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 951-52 (9th Cir. 1996) (denying motion to dismiss claims alleging that regulated utility violated Sherman Act §2 by using its monopoly in the market for natural gas distribution to gain market power over gas sales); *Florida Mun. Power Agency v. Florida Power & Light Co.*, 81 F. Supp. 2d 1313, 1333 (M.D. Fla. 1999) (finding triable issues of fact on claims that electric utility used its monopoly position in electricity transmission markets to obtain market power in bulk electricity sales); *Grason Elec. Co. v. Sacramento Mun. Util. Dist.*, 571 F. Supp. 1504 (E.D. Cal. 1983) (finding triable issues of fact on claims that electrical utility used its monopoly over retail electricity to gain market power in market for electrical distribution systems).

¹² *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

¹³ *NEXUS Gas Transmission LLC*, Federal Energy Regulatory Commission Docket No. CP16-22-000.

¹⁴ U.S. Dep’t of Energy, *Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector* 22 (Feb. 2015), available at www.energy.gov.

¹⁵ Institute for Energy Economics and Financial Analysis, *Risks Associated with Natural Gas Pipeline Expansion in Appalachia* (April 2016) [hereinafter, *IEEFA*], available at www.ieefa.org.

giving a utility holding company an incentive to prioritize building its own pipeline rather than utilizing that of another company.¹⁶

The effect of this structure is to “shift[] some of the risk of pipeline development from the developer and its shareholders to the regulated utility’s ratepayers.”¹⁷ In addition to giving pipeline developers a mechanism to externalize project risks, this structure offers outsized returns: FERC typically authorizes a 14% profit margin on natural gas pipelines, which is “high relative to returns that one could expect to receive by investing capital elsewhere in the utility business.”¹⁸ Even so, “many pipelines appear to be earning *higher* returns than authorized by their recourse rates.”¹⁹ The combination of abnormally high profit margins with the ability to shift project risks to ratepayers creates a powerful incentive to overbuild natural gas pipelines.²⁰

In addition to creating incentives to overbuild, utility indirect ownership of interstate natural gas pipelines can have significant anti-competitive effects. In testimony before the Senate Energy and Natural Resources Committee, the Environmental Defense Fund’s Director for Energy Market Policy N. Jonathan Peress highlights that the “disturbing trend of utilities pursuing a capacity expansion strategy by imposing transportation contract costs on state-regulated retail utility ratepayers” may “undermine market drivers for more efficient solutions[.]”²¹ The NEXUS Project demonstrates that utilities’ use of their ratepayer bases to subsidize affiliate-owned interstate gas pipelines provides a vehicle for the utilities to monopolize the market for generating capacity and force ratepayers to bear the associated above-market costs.

II. Background of the NEXUS Project

A. Project Overview

The NEXUS Project is a proposal to build and operate an approximately 250-mile large-diameter pipeline that will carry 1.5 billion cubic feet per day of natural gas from a processing plant in Kensington, Ohio, to a delivery point in Ypsilanti Township, Michigan.²² The Project is owned by NEXUS Gas Transmission, LLC (NEXUS), a joint venture of DTE Energy Company (DTE Energy) and Spectra Energy Corporation (Spectra).²³

¹⁶ *Id.* at 5.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 9 (emphasis added).

²⁰ *IEEFA, supra* n. 3 at 5-6 (describing the incentives toward pipeline overexpansion).

²¹ Jonathan Peress, Testimony Before the Senate Energy and Natural Resources Committee at 4, 5 (June 14, 2016), *available at* <http://www.energy.senate.gov>.

²² Direct Testimony of Matthew T. Paul, *In re Application of DTE Electric Co.*, Michigan Public Services Comm’n No. U-17920 [hereinafter, “Paul Direct”] at MTP-8:7-16.

²³ DTE Energy Co., Form 10-Q (June 30, 2016) at 50; Spectra Energy Corp., Form 10-Q at 16 (June 30, 2016).

B. The Project's Primary Utility Customers—DTE Gas and DTE Electric—Are Highly Integrated With the Project's Owners

DTE Energy and Spectra's interests in NEXUS are divided 50% and 38.3%, respectively.²⁴ DTE Energy is a holding company and parent of DTE Gas Company (DTE Gas) and DTE Electric.²⁵ DTE Gas and DTE Electric are gas and electric utilities operating in eastern Michigan.²⁶

Figure 1 illustrates the Project's proposed route.



C. DTE Gas and DTE Electric's Purchasing Commitments

Both DTE Gas and DTE Electric have contracted to buy natural gas transported on the NEXUS pipeline. DTE Gas has committed to buying 75,000 dekatherms/day (dth/day).²⁷ DTE Electric entered into a Precedent Agreement with NEXUS in July 2014 to buy 8,000 dth/day beginning in November 2017, increasing to 75,000 dth/day beginning either in May 2020 or whenever DTE Electric has built sufficient gas-fired generating capacity to consume

²⁴ DTE Energy Co., Form 10-Q (June 30, 2016) at 50; Spectra Energy Corp., Form 10-Q at 16 (June 30, 2016).

²⁵ DTE Energy Co., Form 10-K (December 31, 2015) at 1 & 21.

²⁶ *Id.* at 6 & 10.

²⁷ Paul Direct at MTP-12:2-MTP-13:4.

that amount.²⁸ Electric’s contract with NEXUS will have a monthly reservation charge of \$0.695 per dth, plus an estimated fuel charge of 1.9%.²⁹

Electric amended the Precedent Agreement in August 2015 to increase its initial commitment from 8,000 dth/day to 30,000 dth/day until November 2017.³⁰ The term of the amended agreement is thirty-five years, with an optional ten year extension.³¹ The Agreement is contingent on Electric receiving permission from the Michigan Public Service Commission (PSC) to charge ratepayers with its costs and expenses related to the Project.³²

III. The NEXUS Project is Less Cost-Effective Than Available Alternatives

The Project history demonstrates that Electric committed to buying NEXUS gas despite its own conclusions that NEXUS would be less cost-effective than other available means of obtaining the same supply. In deciding to buy gas delivery from NEXUS, DTE Electric refused to consider existing pipeline infrastructure that could have satisfied its demand more cheaply, and failed to negotiate with the sponsors of other new pipeline projects that were proposed to supply the region.³³ In proceedings before the Michigan Public Service Commission (PSC), the Attorney General of Michigan urged the PSC to deny Electric’s request to buy gas from NEXUS in part because Electric had not adequately investigated these less-costly alternative sources of supply.³⁴

A. The NEXUS Project is Less Cost-Effective Than Delivering Gas Over the Kensington-MichCon Route

DTE Electric executed a Precedent Agreement with NEXUS in July 2014³⁵. In anticipation of amending the Precedent Agreement in August 2015, Electric compared the cost of buying gas from NEXUS with the cost of purchasing gas over an existing alternative route running from a receipt point near Kensington, Ohio, to the Michigan Consolidated CityGate delivery point, located northeast of Detroit (the Kensington-MichCon Route).³⁶ This study (the August Analysis) concluded that NEXUS was *less* cost-effective than the

²⁸ *Id.*

²⁹ *Id.* at MTP-12:11-13.

³⁰ *Id.* at 12:15-22.

³¹ *Id.* at 12:15-13:4.

³² Exhibit MEC 12 at 10 of 39.

³³ *Id.* at 644:14-645:10.

³⁴ Attorney General’s Initial Brief, *In re Application of DTE Electric Co.*, Michigan Public Services Comm’n No. U-17920 [hereinafter, “Michigan AG Br.”] at 1 (requesting that the Commission deny DTE Electric’s request to purchase NEXUS transportation capacity until Electric “demonstrate[s] clear and sufficient evidence that it has fully explored all options . . . , include[ing] proof of having into serious negotiations with alternative suppliers to determine the best available terms and rates”).

³⁵ Exhibit MEC 12 at 1.

³⁶ Exhibit MEC 16 at 27 of 34.

Kensington-MichCon Route in all Project years except one.³⁷ The August Analysis projected that buying gas from NEXUS would cost \$54 million more than buying from the Kensington-MichCon Route.³⁸

DTE Electric identified two reasons to increase its commitment to buying NEXUS gas. First, Electric cited its acquisition of two gas-fired power plants.³⁹ However, Electric does not appear to have analyzed whether these plants can be supplied adequately with the cheaper gas available over Kensington-MichCon.⁴⁰ Second, Electric concluded that

[b]ased on recent discussions with NEXUS, we believe that an increased commitment is necessary **in order to ensure that the project has sufficient customer commitment to justify proceeding with construction.**⁴¹

In other words, Electric decided to purchase from NEXUS to ensure the necessary approvals to build the Project, notwithstanding its own conclusion that NEXUS was less cost-effective than the Kensington-MichCon Route.

B. Electric Commissions a Second Study that Finds Cost-Benefits Only After the First Thirteen Years of Project Operation

Electric commissioned another analysis of the Project that was completed in November 2015 (the “November Analysis”).⁴² Like the August Analysis, the November Analysis concluded that NEXUS is costlier than Kensington/MichCon until at least 2024.⁴³ The November Analysis also acknowledges that the project will remain a *net* cost until at least 2030.⁴⁴ However, the November Analysis departed from the August Analysis in concluding that NEXUS will recoup the losses incurred in previous years after 2030.⁴⁵ Contrary to the August Analysis’s finding of \$54 million in net costs, the November Analysis projected \$79 million in net *savings* of using NEXUS over Kensington-MichCon.⁴⁶

³⁷ See *id.* (finding a negative “basis spread”—i.e., cost comparison—in sixteen out of seventeen Project years).

³⁸ *Id.*

³⁹ See *id.* at 34 of 34 (identifying “[t]wo major factors,” including acquisition of two “existing gas fired CTs”).

⁴⁰ See generally Exhibit MEC 16.

⁴¹ *Id.* at 34 of 34.

⁴² Exhibit A-25.

⁴³ See *id.* at 64 of 75 ex. 4-6.

⁴⁴ 4 Transcript, *In re Application of DTE Electric Co.*, Michigan Public Services Comm’n No. U-17920 at 961:21-962:2 (testimony of James F. Wilson) (“[E]ven under this estimate, the cumulative impact is a net cost, not benefit, through 2030.”).

⁴⁵ See *id.* at 962:1-2; Exhibit A-25 at 64 of 75 ex. 4-6.

⁴⁶ 2 Transcript, *In re Application of DTE Electric Co.*, Michigan Public Services Comm’n No. U-17920 at 143:21-24 (testimony of Michael D. Sloan).

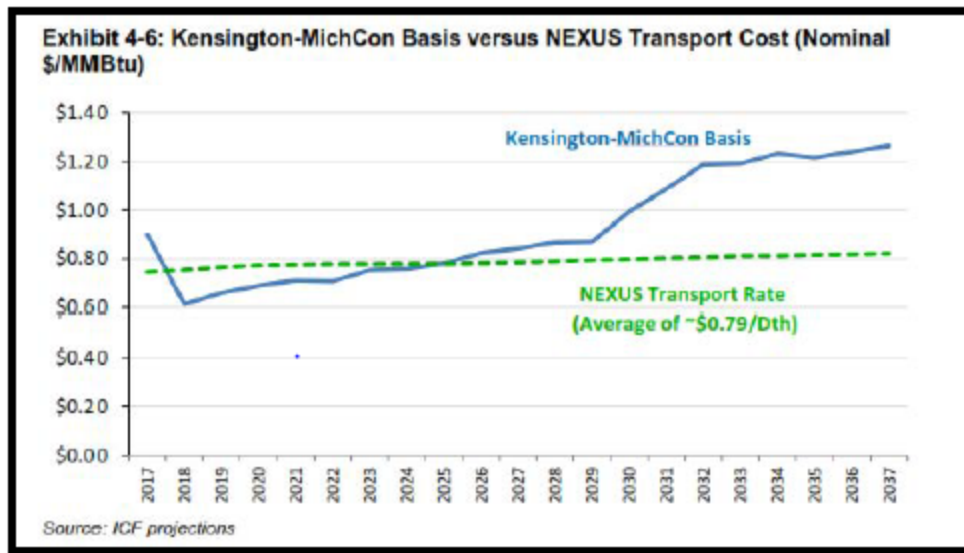
C. Electric's Calculation of the Project's Purported Cost Savings Over Kensington/MichCon is Flawed

Even on its own terms, the November Analysis fails to demonstrate overall cost-effectiveness until at least 2030.⁴⁷ Assuming that comparative efficiencies realized after 2030 explain why Electric agreed to inefficient purchases over the first thirteen years of the proposed NEXUS Project, Electric's conclusion about post-2030 cost-savings is based on unrealistic assumptions that are skewed to provide a justification for building the Project.

The November Analysis projects that the cost of buying gas over Kensington-MichCon will increase beginning in 2017 and will continue to increase through at least 2037.⁴⁸ The increase in Kensington-MichCon prices will result in DTE Electric's cost of supplying gas from Kensington-MichCon converging with its cost of supplying from NEXUS in 2024.⁴⁹ Most of the cost savings are projected to occur after 2030, when Electric forecasts that the cost of the Kensington/MichCon Route will increase by roughly 50% from the beginning of 2028 until the beginning of 2031, and will continue to increase thereafter:

November Analysis' Transport Cost Projections, 2017-2037

Source: Exhibit A-25, *In re Application of DTE Electric Co.*, Michigan Public Service Comm'n No. U-17920



The November Analysis' assumption that natural gas transport costs will increase steadily through 2028, experience dramatic increases of approximately 50% between 2028 and 2031, and sustain those increases throughout the coming decade, is implausible. First, the November Analysis' assumption of ever-increasing gas prices ignores the likely impact of increasingly cost-effective renewable energy supplies on demand for natural gas. Wind and utility-scale solar electricity are already cost-competitive with natural gas, despite recent

⁴⁷ *Supra* n. 44.

⁴⁸ Exhibit A-25 at 64 of 75 ex. 4-6.

⁴⁹ *Id.*

decreases in natural gas prices.⁵⁰ Indeed, the average and median utility-scale levelized cost of solar energy alone is projected to enter the fuel cost range of natural gas in 2020, to reach the reference case for natural gas by 2030, and to continue declining below the reference case after 2034—precisely the period in which DTE assumes gas prices are likely to *increase*.⁵¹ Utility-scale wind and solar generation accounted for 43% and 41% of all new generating capacity installed in the United States in 2014 and 2015, respectively.⁵² Since utilities will likely continue to adopt these cheaper renewable sources of energy instead of more costly generation methods using fossil fuels, the continuing reduction in the price of utility-scale renewables is incompatible with the dramatic and sustained price increases that DTE Electric relies on to justify NEXUS.

Second, Electric’s price increase assumptions are inconsistent with the U.S. Energy Information Administration’s projections, which forecast natural gas prices to remain stable under “business-as-usual” assumptions from 2025 through 2040.⁵³

⁵⁰ Lazard Freres & Co., LLC, *Levelized Cost of Energy Study—Version 9.0*, Executive Summary at 1 (Nov. 18, 2015) (finding that “[c]ertain Alternative Energy technologies (e.g., wind and utility-scale solar) continue to be cost-competitive with conventional generation technologies in some scenarios, despite large decreases in the cost of natural gas”), available at www.lazard.com; *see* Lazard Freres & Co., LLC, *Levelized Cost of Energy Study—Version 9.0* at 2 (2015) (finding lower levelized energy costs for utility-scale wind and solar in comparison to combined cycle natural gas at both the bottom and the top of the levelized cost dispersion), available at www.lazard.com.

⁵¹ M. Bolinger & J. Seel, *Utility-Scale Solar 2015: An Empirical Analysis of Project Cost, Performance, and Pricing Trends in the United States*, 34-35 (Lawrence Berkeley National Laboratory, Aug. 2016).

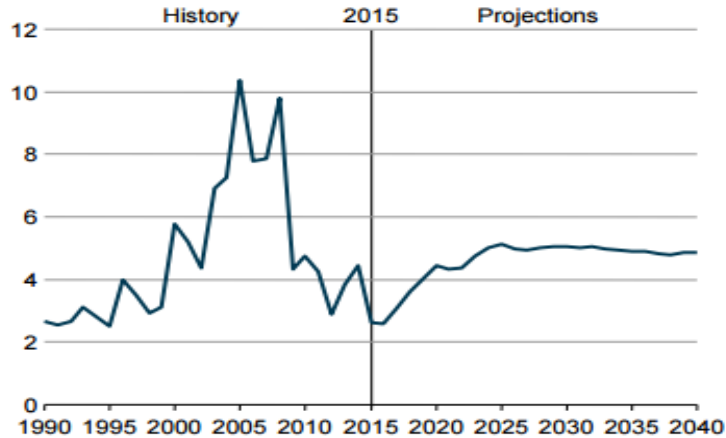
⁵² United States Department of Energy, *Revolution . . . Now: The Future Arrives for Five Clean Energy Technologies – 2016 Update* (U.S. Dep’t of Energy, September 2016).

⁵³ United States Energy Information Administration, *Annual Energy Outlook 2016*, Figure ES-6 (August 2016). The U.S. EIA describes the “Reference Case” scenario as its “business-as-usual trend estimate, given known technology and technological and demographic trends.” *Id.* at iii. Natural gas prices remain lower than the November Analysis’ projection in two out of four of EIA’s alternative scenarios to the Reference Case projection. *See id.* at Figure MT-42.

U.S. Energy Information Administration Reference-Case Gas Prices

Source: Figure ES-6, United States Energy Information Administration, Annual Energy Outlook 2016, Figure ES-6 (August 2016)

Figure ES-6. Annual average Henry Hub natural gas spot market prices in the Reference case, 1990–2040 (2015 dollars per million Btu)



Third, the November Analysis underestimates the expansion of natural gas pipeline capacity that would occur in response to the dramatic and sustained price increases that it forecasts after 2030—the period in which the largest cost savings are achieved according to Electric’s estimate.⁵⁴ When pipeline capacity expands, the price differentials between delivery locations on the new and existing pipelines moderate as the market begins to absorb the new capacity.⁵⁵ Electric’s model assumes that *no* new pipelines from the Marcellus-Utica basin serving the Michigan region will be built after 2028, even under a model assuming dramatic and sustained price increases.⁵⁶ In the November Analysis, this assumed freeze in new capacity causes the increase in the transport cost of Kensington-MichCon, which causes Electric’s agreement to buy from NEXUS to become economic.

Electric’s assumption that new pipeline construction will stop after 2028 in the face of assumed (and unrealistic) rapid and sustained price increases is unjustified. Conventional forecasting methods predict that pipeline capacity expands to meet demand when prices increase.⁵⁷ In contrast, Electric’s model predicts that no new capacity will be added to serve the Michigan markets after 2028, even as the transport prices charged by the Kensington/MichCon transit route increase rapidly. Basic economic logic and conventional modeling suggest that if prices began to show the rate of increase that Electric projects during this period, the increases would attract additional capacity that would mitigate or

⁵⁴ 4 Transcript at 960:23-961:4 (testimony of James F. Wilson); *see generally id.* at 952-61 (describing the impact of DTE Electric’s pipeline capacity assumptions on its cost projections).

⁵⁵ *Id.* at 952:15-23.

⁵⁶ *Id.* at 956:4-14.

⁵⁷ *Id.* at 953:13-954:11. For example, the Deloitte MarketPoint Integrated North American Model expands capacity endogenously when it is economic, given the computed supply-demand dynamics as well as infrastructure restraints and costs. *See id.*

eliminate further increases in the price differentials. Indeed, the Interstate Natural Gas Association of America (INGAA) views the Marcellus/Utica shale gas production region from which the NEXUS Project originates as particularly *likely* to experience pipeline capacity expansion.⁵⁸

Electric's projection that no new capacity will be added after 2028 even in the face of Electric's assumed price increases is contradicted by the following additional considerations:

- By projecting that production of natural gas in the Marcellus/Utica shale region will grow by an additional 13 billion cubic feet (bcf) between 2019 and 2037⁵⁹ but only 2.85 billion bcf in additional transport capacity from the region will come online over the same period, Electric forecasts an unrealistically low proportion of new supply in relation to transport capacity;⁶⁰
- The United States Department of Energy (DoE) estimates that production growth in the Marcellus/Utica shale region will grow at a rate that is 3 billion cubic feet/day (bcf/day) *less* than what Electric forecasts between 2015 and 2030.⁶¹ Despite having a lower production forecast, DoE estimates between 1 and 4 bcf/day *more* in additional transport capacity from the Marcellus/Utica Shale regions and the region including NEXUS's service area than Electric;⁶² and
- Electric's estimate of capacity changes between 2019 and 2037 is unresponsive to capacity created by NEXUS and another regional pipeline project (the "Rover Project"). In particular, Electric's model assumes that the NEXUS and Rover Projects will have *no* effect on the building of pipeline capacity by other developers.⁶³ If, as Electric asserts, the NEXUS Project were necessary to satisfy demand for gas-fired electricity in Michigan, other suppliers would likely step in to meet demand if one or both projects does not go forward.⁶⁴

Contrary to the welter of evidence undermining Electric's projection, the Administrative Law Judge presiding over Electric's cost recovery case accepted Electric's model on the basis that it was "unrealistic" to forecast "that pipeline capacity out of the production region will

⁵⁸ See Exhibit DTE A-35 at 43 of 118 (INGAA Report) (noting that unlike other production regions, "[i]n the rapidly growing areas like the Marcellus and Utica . . . there is likely to be sufficient supply and demand driven motivation to build new capacity" and "producers are likely to view the cost of pipeline transport to be relatively small compared with the revenues lost" if new capacity is not built).

⁵⁹ Exhibit MEC 2.

⁶⁰ 4 Transcript at 956:4-14 (testimony of James F. Wilson); Exhibit MEC 14 (DTE Electric's assumed pipeline expansion projects).

⁶¹ 2 Transcript at 272:5-9 (testimony of Michael D. Sloan).

⁶² *Id.* at 268-69 (Electric witness agreeing that DoE transport capacity forecasts are higher than Electric's).

⁶³ 4 Transcript at 958:22-959:6 (testimony of James F. Wilson).

⁶⁴ *Id.* at 959:7-969:5.

match production growth[.]”⁶⁵ However, the rebuttal to Electric’s model does not require that pipeline growth “match” increases in *production capacity*, rather, it forecasts that pipeline capacity will respond more quickly to increases in *demand* for natural gas than Electric supposes.⁶⁶ Moreover, the ALJ acknowledged that “projecting natural gas costs over a 20 year period” is “problematic,” “[e]ven more so” when it comes to “projecting pipeline expansions,” which “is ‘difficult’ because for [sic] a number of economic and non-economic considerations.”⁶⁷ Of course, *Electric* relies on these admittedly “problematic” and “difficult” projections to argue in favor of the NEXUS Project, since it relies on post-2030 cost savings projections to argue that the pipeline can be economical. At the same time, Electric *concedes* that the pipeline will be cost-ineffective in comparison to Kensington-Michcon in the short term.⁶⁸ Thus, regardless of the exact timing of when new pipeline capacity will be added, the ALJ’s finding that the projections that Electric uses to argue for cost-efficiency are “difficult” and “problematic” supports the conclusion that Electric’s forecast is not a reliable basis to decide that NEXUS is cost-effective.

In sum, Electric’s analysis simulates cost-savings only by assuming increases in natural gas prices that are unlikely to take place. The implausible price increases skew Electric’s model toward finding long-term cost effectiveness, even while conceding short-term inefficiency. Moreover, Electric’s conclusion is contradicted by the August Analysis (completed only three months earlier), which did not include the November Analysis’s unrealistic pricing assumptions and found that NEXUS is less cost effective in all project years save one.

D. NEXUS is Less Cost-Effective Than Pre-Existing Pipeline Routes Besides Kensington-MichCon

In addition to the Kensington-MichCon alternative, at least three additional pipeline routes existed at the time of Electric’s decision to buy NEXUS gas that could have delivered the same amount of gas at less cost with minor facility enhancements. Before the Michigan PSC, DTE Electric admitted that it *did not consider* purchasing gas from any of these existing routes before committing to buy from NEXUS.⁶⁹ The Michigan Attorney General criticized Electric’s cost evaluation as “clearly deficient for not considering alternative pipeline suppliers.”⁷⁰

First, the Lebanon Lateral Reversal Project involved facility modifications to provide 350,000 dth/day of additional capacity on existing pipelines co-owned by pipeline operators ANR and TetCo. ANR held open bidding for the additional capacity in September and October 2013 for an in-service date of March 2014. This pipeline system could have brought

⁶⁵ Proposal for Decision, *supra* n. 6 at 91.

⁶⁶ 4 Transcript at 954:5-9 (explaining that the rebuttal to Electric’s assumptions projects that new pipeline capacity will be developed where there are “sufficient after-tax margins to justify the cost of expansion”).

⁶⁷ Proposal for Decision, *supra* n. 6 at 90-91.

⁶⁸ *Supra* pt. III.B.

⁶⁹ 3 Transcript at 503:16-504:2 (testimony of Matthew T. Paul).

⁷⁰ Michigan AG Br. at 13.

Appalachian gas supplies to the same receipt point where NEXUS will terminate.⁷¹ The combined rate for that project would have been \$0.52/dth-- \$0.175/dth less than the \$0.695/dth NEXUS rate agreed to by DTE Electric.⁷²

Second, the Sulphur Springs Project involved facility enhancements to provide 400,000 dth/d of capacity from Glen Karn, Ohio to the interconnection with ANR's Southeast line. ANR held open bidding for this capacity in the fall of 2013, with a November 2015 in-service date. This pipeline system also could have delivered Appalachian gas from the Glen Karn interconnection to Ypsilanti Township, Michigan. The combined rate would have been \$0.50 per dth--\$0.195/dth less than the NEXUS rate accepted by DTE Electric.⁷³

Third, 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. ANR held open bidding for this capacity in February and March 2014, with a November 2015 in-service date. If DTE Electric had subscribed for this capacity, it could have shipped gas from any of the pipelines in the Appalachian Basin that connect with ANR, with the rates based on the \$0.20 per dth rate for ANR plus the interconnecting pipeline's rate if DTE chose to subscribe for upstream service. In fact, signing up for the capacity would have provided DTE Electric with low-cost access not only to Appalachian gas but also to supplies from the Gulf Coast as well as the Fayetteville, Barnett and Haynesville shale gas regions through other interconnections on that line.⁷⁴ However, DTE Electric did not evaluate whether to buy gas from this or any of the other existing routes.⁷⁵

⁷¹ 4 Transcript at 658:4-15 (testimony of Lee Bennett). Each of these cost estimates assumes that DTE would have needed to buy gas delivery along these pipelines from certain upstream sites, which raises the purchase price. These estimates are therefore "high" cost estimates. It is possible that DTE could have avoided purchasing at the upstream sites if sellers began competing to sell supply at downstream locations. In that situation, the price of all three alternatives would have been even lower—only \$0.20 dth/day, or \$0.495 dth/dy less than what Electric paid. *Id.* at 661:3-663:21.

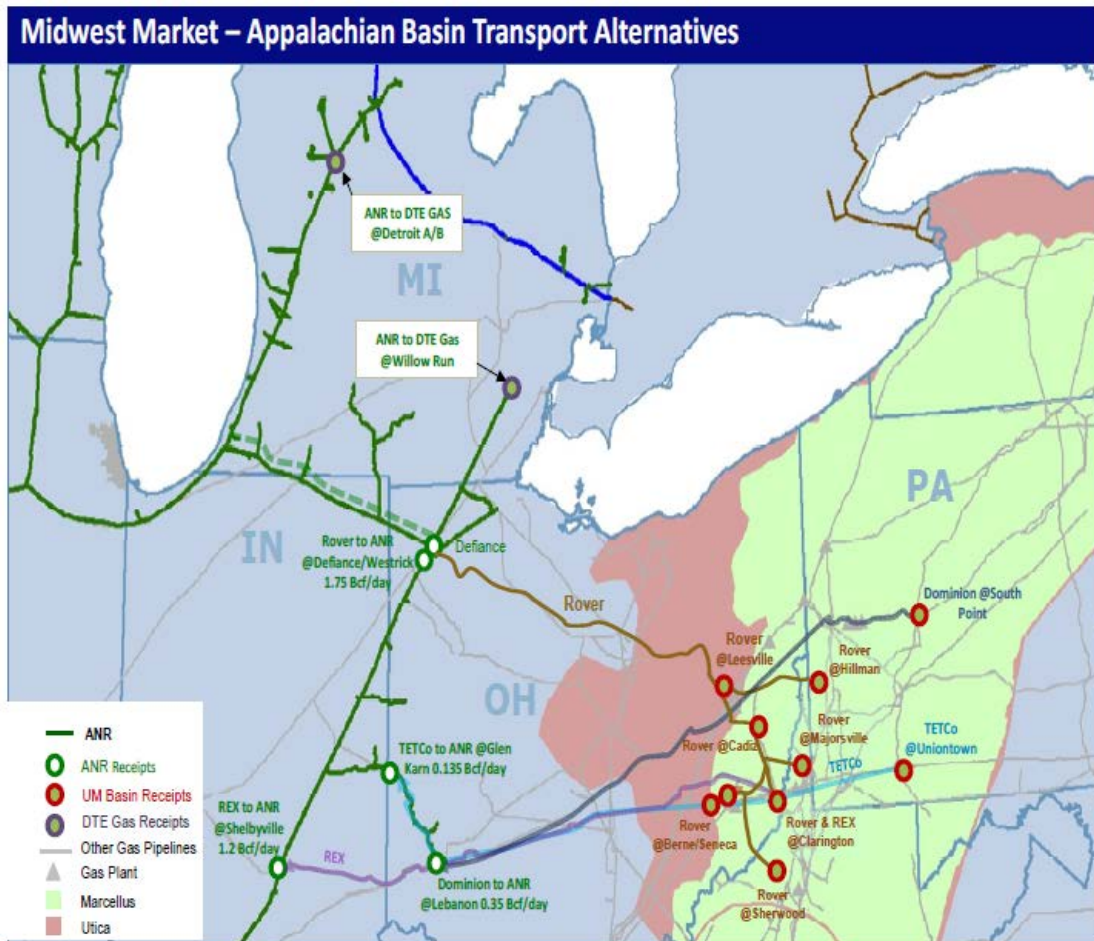
⁷² *Id.* at 658:4-15.

⁷³ *Id.* at 658:16-659:3.

⁷⁴ *Id.* at 659:4-17.

⁷⁵ *Supra* n. 69

All three routes are illustrated in Figure 2.⁷⁶



Despite the lower-cost alternatives to transport gas over existing pipeline routes, the Administrative Law Judge presiding over DTE Electric’s cost-recovery case decided, in a single paragraph of analysis, that purchasing from NEXUS was justified because it enabled DTE Electric to own pipeline capacity running directly to Appalachian wellheads. The ALJ concluded that this feature made NEXUS “preferable, *from a cost perspective*, to securing transportation on [existing] pipelines.”⁷⁷ This determination is clearly erroneous. The cost-computations presented above demonstrate that shipping gas over the existing pipeline networks was less expensive than shipping over NEXUS. Importantly, all three computations *included the costs of contracting to transport the gas from the wellheads*.⁷⁸ Thus, the

⁷⁶ 4 Transcript at 657, Figure 3 (testimony of Lee Bennett).

⁷⁷ *Id.* at 87 (emphasis added).

⁷⁸ 4 Transcript at 658:13-15 & 659:2-3 (testimony of Lee Bennett) (computation of existing pipeline costs “assumes that DTE Electric would have chosen to purchase the upstream portion” running to the wellhead); *see id.* at 659:10-13 (testifying that that DTE Electric

alternatives presented would have enabled DTE Electric to purchase capacity directly from the production regions, at *lower* rates than available on NEXUS. The so-called “opportunity” to pay more for this upstream capacity is no benefit.

E. NEXUS is Less Cost-Effective Than Alternative New Pipeline Routes That Were Proposed at the Same Time

In addition to these four existing delivery routes, at least two new pipelines (ANR East and Rover) designed to provide the same Michigan and Ontario markets as NEXUS with access to Appalachian gas supply had been proposed by developers ANR and Energy Transfer Partners (ETP) at the time that Electric agreed to buy from NEXUS.⁷⁹ Figure 3 shows the similarity of the proposed ANR East, Rover, and NEXUS pipeline routes.⁸⁰

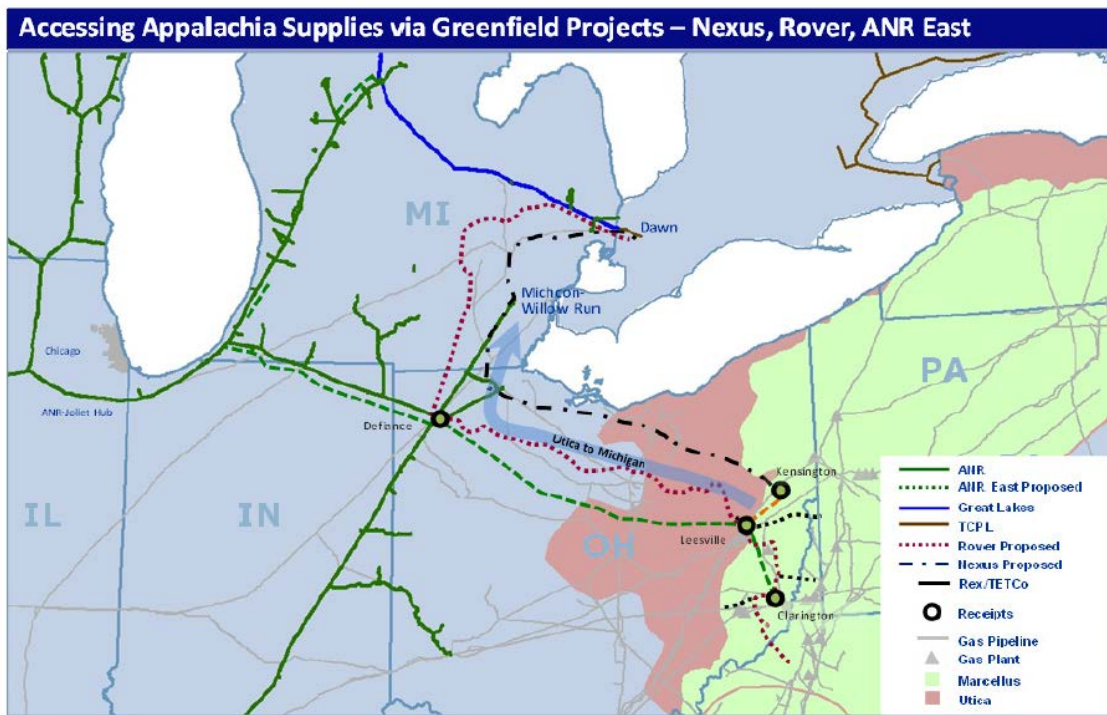


Figure 3

DTE Electric did not submit bids in ANR East or in Rover’s open seasons or otherwise attempt to negotiate for capacity on either of the two proposed routes, notwithstanding their similarity to the NEXUS route.⁸¹ Although DTE Electric claims to have relied on a comparison of the relative costs of the three projects by DTE Gas, the studies Electric identifies were made *after* both Gas and Electric had executed Precedent Agreements with

could have purchased additional capacity on the upstream lines, and the downstream pipeline would have cost \$.40 per dth (i.e., 66%) less than NEXUS).

⁷⁹ *Id.* at 640:7-642:9

⁸⁰ *Id.* at 640.

⁸¹ 4 Transcript at 644:14-645:10.

NEXUS.⁸² Because both studies were completed after the DTE companies were contractually bound, neither study could have contributed to a meaningful cost-comparison. Moreover, both studies compared the *negotiated* rate offered by NEXUS with the *unnegotiated* rates posted by NEXUS and Rover.⁸³ This comparison is meaningless. Negotiated and unnegotiated rates are not commensurate since pipelines typically agree to negotiated rates that are lower than their posted tariffs.⁸⁴

Nonetheless, the Administrative Law Judge presiding over DTE Electric's cost-recovery case concluded that ANR East and Rover did not provide alternative sources of supply available to DTE Electric on grounds that Electric had "decided to negotiate" with NEXUS as of December 2013, which was before ANR East and Rover held open seasons.⁸⁵ This conclusion is a non-sequitur. There is no reason Electric could not have negotiated simultaneously with multiples suppliers and chosen the most cost-competitive alternative. The ALJ's conclusion in this respect is also incompatible with his finding that "any claim that DTE was somehow committed to NEXUS" before July 2014 was "*tenuous*."⁸⁶ The Michigan Attorney General agrees that "without engaging into serious negotiations, it is not possible to determine if those rates and terms could have been modified to suit both DTE Gas' and DTE Electric's needs for transportation capacity at comparable or better rates than NEXUS."⁸⁷

F. NEXUS Does Not Enhance the "Reliability" of Utility-Scale Gas Supply Available to Electric

Electric has asserted the NEXUS pipeline will increase the "reliability" of natural gas supply in Michigan. As a threshold consideration, this assertion proves too much. Every time a new source of a product or input is created it increases the "reliability" of the supply simply by creating another source. However, merely creating another supplier of natural gas available to Electric does not mean the Project makes sense as an economic matter when more cost-effective means of obtaining the same delivery are available through any of the alternative routes discussed above.

In any event, Electric's "reliability" arguments fail on their own terms. Buying gas through any of the three pre-existing ANR pipeline systems would have given Electric access to gas delivered over ANR's existing network of interconnected pipeline routes.⁸⁸ This would have enabled Electric to acquire gas from suppliers at other points along ANR's delivery system, thus increasing Electric's choices and negotiating leverage with other sellers due to ANR's interconnections with multiple pipelines that source supply in Appalachia as well as in other areas.⁸⁹

⁸² 3 Transcript at 499:9-13 (testimony of Matthew T. Paul).

⁸³ 4 Transcript at 648:6-649:2 (testimony of Lee Bennett).

⁸⁴ *Id.*

⁸⁵ Proposal for Decision, *supra* n. 6 at 85.

⁸⁶ *Id.* at 81-82.

⁸⁷ Michigan AG Br at 14.

⁸⁸ 4 Transcript at at 665:13-666:13 (testimony of Lee Bennett).

⁸⁹ *Id.*

Further, Electric’s reliability argument exaggerates the extent to which NEXUS will guarantee an additional source of natural gas. Electric’s Precedent Agreement with NEXUS makes clear that Electric will get an additional 45,000 dth/day out of the 75,000 dth/day that it has contracted to purchase only if someone else does not buy it first:

Additionally, the service Agreement will specify an incremental increase in the [maximum daily quantity of gas delivered] by 45,000 Dth/d (“Increased MDQ”), exclusive of fuel requirements, on the in-service date of Customer Facilities, provided that sufficient unsubscribed capacity is available at the time of the effectiveness of the Increased MDQ. Customer may reserve the Increased MDQ, if available and subject at all times to applicable regulatory requirements, at the time it applies for any regulatory approves [sic] for construction of the Customer Facilities.⁹⁰

Thus, the Agreement treats Electric like any other purchaser that may buy its gas on a first-come, first-served basis.⁹¹ Testifying before the Michigan PSC, an Electric witness confirmed that the Agreement does not actually guarantee additional capacity.⁹²

IV. DTE Electric’s Support for the NEXUS Project is Anti-Competitive and Intended to Monopolize the Market for Electric Power

A firm that “(1) . . .has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power” violates Section 2 of the Sherman Act.⁹³ Section 2 prohibits a monopolist from using its monopoly power in a primary market in an attempt to monopolize a related market.⁹⁴ Here, DTE Electric’s use of its monopoly over the distribution of electricity to transfer the inefficient cost of the Project to its retail customers, for the purpose of expanding its control over the market for installed capacity, satisfies these elements.

⁹⁰ Exhibit MEC-12 (2015 Amendment) at 35 of 39.

⁹¹ This provision also permits Electric to reserve additional supply at the time it applies for regulatory approvals of its yet-unbuilt gas transmission facilities, however, it provides for such reservation only if the reserved capacity is “available” at the time of Electric’s application. *Id.*

⁹² 3 Transcript at 448:24-449:3 (“Q: At least contractually, there exists the potential that the primary objective of entering into this agreement ultimately would not be me, right? A: I guess I would say that, yes, theoretically there’s a chance that [additional capacity] would not be available.”) (testimony of Matthew T. Paul).

⁹³ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

⁹⁴ See e.g., *Cost Mgmt. Servs., Inc.*, 99 F.3d at 952 (allegations that regulated gas utility “has used its monopoly power in the gas delivery market in an attempt to monopolize the market for gas sales” stated violation of Sherman Act § 2.).

A. DTE Electric Dominates the Relevant Product Markets Within its Service Area

Two product markets are relevant here: the retail electricity market within DTE’s service area and the market for installed capacity used to generate electricity for retail consumption in the state of Michigan.

1. *DTE Electric Dominates the Retail Electricity Market in its Service Area*

DTE Electric sells electricity to 2.2 million retail customers in its southeastern Michigan service area.⁹⁵ Electric acknowledges that its competition is “primarily from the on-site generation of industrial customers and from distributed generation applications by industrial and commercial customers.”⁹⁶ It “does not expect significant competition for distribution to any group of customers in the near term.”⁹⁷

2. *DTE Electric Dominates the Market for Installed Capacity*

As the Agencies are aware, “[d]efining a relevant product market is primarily a process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take significant amounts of business away from each other.”⁹⁸ “[C]ross-elasticity of demand—the extent to which consumers demand less of the particular product as the price for its alleged substitute declines”—is the key determinant.⁹⁹

Here, the market for installed capacity for utility-scale generation of electricity is the relevant secondary product market. The installed capacity market is “[t]he capability to generate or transmit electrical power, measured in megawatts (“MW”).”¹⁰⁰ At the peak of its contract with DTE Electric, NEXUS will transport 75,000 dth/day of natural gas for use in DTE Electric’s gas-fired electricity generating plants. The U.S. Energy Information Administration recognizes that demand for natural gas as a generator of bulk electricity is linked to the prices of generation alternatives: “[w]hen the cost of the other fuels falls, demand for natural gas may decrease, which may lead to lower prices for natural gas.”¹⁰¹ By extension, to the degree that the price of generating electricity through non-gas sources declines, demand for the pipelines used to transport the gas will decline correspondingly. Thus, bulk generators of electricity like Electric will “demand less of the particular product”—here, pipelines – as the price for its alleged substitute declines” (i.e., alternative means of generating electricity).¹⁰²

⁹⁵ DTE Electric Co., Form 10-K (Dec. 31, 2015) at 6.

⁹⁶ *Id.* at 9-10.

⁹⁷ *Id.*

⁹⁸ *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*, 797 F.3d 1248, 1263 (11th Cir. 2015) (internal quotation marks omitted).

⁹⁹ *Id.* at 1264 (internal quotation marks omitted).

¹⁰⁰ *New York Indep. Sys. Operator, Inc.*, 122 FERC ¶ 61211, 62212 (Mar. 7, 2008)

¹⁰¹ U.S. Energy Information Administration, Natural Gas Explained, http://www.eia.gov/energyexplained/index.cfm?page=natural_gas_factors_affecting_prices (last accessed September 27, 2016).

¹⁰² *Duty Free Americas*, 797 F.3d at 1264.

DTE Electric dominates the market for installed capacity to generate electricity in Michigan. Electric owned 10,418 MW of generating capacity,¹⁰³ or 34% of all installed capacity in Michigan, and 47% of installed capacity owned by Michigan utilities in 2014, the most recent year data is available from the United States Energy Information Administration.¹⁰⁴ By way of illustration, the next-largest owner of generating capacity in Michigan, Consumers Energy, owned 5,885 MW of generating capacity in 2015,¹⁰⁵ or less than half the 11,907 MW that Electric owned that year.¹⁰⁶

B. DTE Electric Guarantees Project Financing by Michigan Ratepayers

The Project will cost \$ 2.2 billion.¹⁰⁷ DTE Electric has applied to the Michigan Public Service Commission to include costs associated with the Project in its retail rates.¹⁰⁸ According to the Michigan Attorney General, “[t]he cumulative cost of the capacity contracted with NEXUS that the Company plans to charge [ratepayers] will reach approximately \$335 million from 2017 through 2037.”¹⁰⁹ As noted, an ALJ has provisionally recommended that the MPSC approve DTE Electric’s request to include the Project’s costs in its retail electricity rates.¹¹⁰ On October 5, 2016, an Administrative Law Judge provisionally recommended approving a similar request to pass-through NEXUS costs by DTE Gas “with significant trepidation” and subject to DTE Gas submitting “a full cost-benefit analysis prior to allowing any form of cost recovery regarding capital expenditures made that relate to the NEXUS project.”¹¹¹

C. DTE Electric’s Use of its Ratepayer Base to Subsidize the Inefficient Costs of the NEXUS Project Instead of More Cost-Effective Sources is Anticompetitive

DTE Electric’s intent to monopolize may be inferred from its decision to purchase from NEXUS instead of more-efficient suppliers while using its ratepayer base to subsidize the Project’s above-market costs.¹¹² Economic theory assumes that under competitive

¹⁰³ DTE Electric Co., Form 10-K (Dec. 31, 2014) at 6.

¹⁰⁴ U.S. Energy Information Administration, State Electricity Profiles, Michigan Electricity Profile 2014, <https://www.eia.gov/electricity/state/michigan/> (last accessed October 17, 2016).

¹⁰⁵ Consumers Energy Company, Form 10-K (Dec. 31, 2015) at 18.

¹⁰⁶ *Compare id.*, with DTE Electric Co., Form 10-K (Dec. 31, 2015) at 8.

¹⁰⁷ Paul Direct at MTP-14:14-5 (describing the need for “timely support of all stakeholders to make the greenfield construction of this . . . \$2.2 billion pipeline a reality”).

¹⁰⁸ *See id.* at MTP-14:1-3 (“NEXUS gas transportation capacity costs are included” in DTE Electric’s proposed rates).

¹⁰⁹ Attorney General’s Reply Brief, *In re: Application of DTE Electric Company*, Michigan Public Services Commission No. U-17920 at 17.

¹¹⁰ Proposal for Decision, *supra* n. 2.

¹¹¹ *Id.* at 25.

¹¹² *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 101 (2d Cir. 1998) (proof of unlawful conduct may imply specific intent).

conditions, DTE Electric would opt for the most cost-effective methods of achieving the desired natural gas supply. Instead, Electric has chosen the *most* costly available means – constructing hundreds of miles of new pipeline capacity when existing routes or other proposed routes could have been acquired for less.¹¹³ That Electric decided to buy from NEXUS instead of less-costly alternatives strongly suggests that its decision was taken to expand its¹¹⁴ position in the electricity generation markets, *not* to achieve a needed quantity of gas at the best available price.

Unlike normal competitive scenarios, Electric is both the buyer of NEXUS gas and the wholly-owned subsidiary of NEXUS’s 50% owner (DTE Energy).¹¹⁵ Electric’s position on both sides of the transaction gives it good reason *not* to pursue more-efficient alternatives because supporting NEXUS will expand Electric’s control over the market for electric power. Electric’s decision is enabled by the fact that Electric will not internalize the full costs of the Project. Rather, Electric will pass some of these costs off to the public, i.e., the ratepayers in Electric’s retail monopoly.¹¹⁶ Because that retail monopoly can be used to absorb the Project’s inefficient costs, Electric can shift the Project’s costs and risks to ratepayers while expanding its control over the market for capacity to generate utility-scale electricity.

D. NEXUS is Not a New Entrant and Does Not Create Countervailing Pro-Competitive Benefits

As a newly-formed joint venture that was created for the purpose of developing the NEXUS Project, NEXUS may claim to be a new entrant in the market for interstate natural gas pipelines. As explained, any such claim would mischaracterize the market at issue, which should be defined as the market for capacity to generate utility-scale electric power in which DTE Electric already holds significant market share.¹¹⁷ In any event, this claim would elevate corporate form over substance. NEXUS’s largest shareholders—DTE Energy and Spectra—are among the largest pipeline developers in the nation and have a significant presence in the Midwestern pipeline market.¹¹⁸ Moreover, NEXUS fails to provide the major competitive benefit that is normally associated with new entry—generating the same or

¹¹³ See *supra* pt. III.

¹¹⁴ The fact that DTE Energy and DTE Electric are nominally separate entities is immaterial – as the parent and wholly owned subsidiary of one another, they “have a complete unity of interest” for antitrust purposes “and thus . . . the subsidiary acts for the benefit of the parent, its sole shareholder.” *Am. Needle v. Nat’l Football League*, 560 U.S. 183, 195-96 (2010) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984)).

¹¹⁵ DTE Energy Co., Form 10-K (December 31, 2015) at 1 & 21.

¹¹⁶ See generally Proposal for Decision, *supra* n. 6.

¹¹⁷ *Supra* pt. IV.A.

¹¹⁸ DTE Energy’s wholly-owned subsidiary DTE Gas owns 25%-100% of four interstate pipelines transporting gas to Midwestern and Northeastern markets. DTE Energy Co., Form 10-K (December 31, 2015) at 12. Spectra Energy Corp. owns “approximately 21,000 miles of transmission pipelines” in the United States and Canada, and describes itself as “one of North America’s leading natural gas infrastructure companies.” Spectra Energy Corp. Form 10-K (December 31, 2015) at 4.

greater output at lower prices—because it charges *more* than market price for its transmission services.¹¹⁹ Thus, any claim by NEXUS to be a “new entrant” would ignore its parents’ substantial presence in the interstate pipeline market.

E. DTE Electric’s Participation in the NEXUS Project Distorts the Electric Power Market and Harms Competition and Michigan Ratepayers

Sierra Club believes that DTE Electric’s use of its ratepayer base to subsidize expanding its upstream monopoly over the market for utility-scale electricity generation causes economic harm to both the market for retail electricity and the input market. As the Commission has previously recognized, when, as here, “a firm engages in conduct that is intended to monopolize a market or to leverage market power in one market to gain market power in another market, it can reduce output and increase prices above the competitive level, thereby injuring consumers and misallocating society's resources.”¹²⁰ These are precisely the competitive harms that Sierra Club views as likely to materialize if the Project proceeds.

First, the Project’s inefficiencies raise the retail price of electricity paid by ratepayers above competitive levels, who are overcharged for the electricity they use by having the inefficient costs of the Project built into retail prices. These overcharges are created by the fact that the Project is more costly than available alternatives to meet Electric’s demand.¹²¹ Electric could have transferred the savings achieved by using these more-efficient alternatives to ratepayers in the form of lower rates. Instead of those savings, ratepayers now must pay extra (to the tune of \$335 million, according to the Attorney General) for the cost of funding Electric’s expansion in the installed capacity market.

Second, the Project harms the upstream market for the utility-scale generation of electricity by shifting demand to the ratepayer-subsidized Project, excluding more-efficient suppliers. Specifically, Electric’s use of its ratepayer base to subsidize the Project excludes firms that are capable of providing the same capacity for the generation of bulk electricity through more-efficient means. And the Project stifles the incentive for competing suppliers to enter the market with more-efficient methods of generating bulk electricity by committing Michigan’s largest utility to buying gas from an unnecessary and comparatively inefficient pipeline network for the next thirty-five years.

Third, the Project suppresses demand for energy-efficiency technologies below what would exist absent Electric’s attempted monopoly. By using ratepayers to absorb the cost of building and operating pipeline capacity that is more expensive than what the market had to offer, the Project reduces Electric’s incentive to invest in energy-efficiency measures that it would be incentivized to invest in if it were required to internalize the Project’s above-market costs. By eliminating demand for the energy-efficiency measures that Electric would be incentivized to adopt in a competitive universe, the Project suppresses the market for products and technologies (and related innovation in these technologies) that enhance energy efficiency.

¹¹⁹ *Supra* pt. III.

¹²⁰ Federal Trade Commission, Annual Report - 1994, 1994 WL 16189411, at *12.

¹²¹ *Supra* pt. III.

Electric's efforts to leverage its monopoly over the retail distribution of electricity by using ratepayers to subsidize expanding its share of the market for generating capacity also threatens the transparency and integrity of the ratemaking process. The Department recognizes the potential for competitive harm where, as here, a monopoly public utility acquires upstream capacity for electricity generation and its inputs. Acquiring upstream generating capacity

may be used by monopoly public utilities subject to rate regulation as a tool for circumventing that regulation. **The clearest example is the acquisition by a regulated utility of a supplier of its fixed or variable inputs.** After the merger, the utility would be selling to itself and might be able arbitrarily to inflate the prices of internal transactions. Regulators may have great difficulty in policing these practices, particularly if there is no independent market for the product (or service) purchased from the affiliate. As a result, **inflated prices could be passed along to consumers as "legitimate" costs.** In extreme cases, the regulated firm may effectively preempt the adjacent market, perhaps for the purpose of suppressing observable market transactions, and **may distort resource allocation in that adjacent market** as well as in the regulated market.¹²²

Sierra Club believes that the Project, if approved, will cause these competitive harms by requiring ratepayers to subsidize the higher cost of the Project in comparison to numerous available alternatives while shifting demand away from more-efficient suppliers of utility-scale electricity. While the Department "recognizes that genuine economies of integration may be involved"¹²³ in some vertical merger or development proposals, it is hard to imagine such economies being realized where, as here, an entirely *new* pipeline system is being created instead of leveraging the efficiencies of existing infrastructure by, for example, linking generating facilities to existing capacity or decreasing demand by adopting energy efficiency targets.

IV. CONCLUSION

Sierra Club believes that the NEXUS Project, if allowed to proceed, will cause serious distortions and suppress competition in the market for capacity to generate electricity while raising the electricity rates charged to consumers above competitive levels. If permitted to continue, the Project will likely lock-in inefficient means of producing electricity and suppress practical, more-efficient and environmentally sustainable alternatives.¹²⁴ The Project also threatens to create long-term negative competitive consequences by discouraging

¹²² United States Department of Justice, Antitrust Division, Non-Horizontal Merger Guidelines § 4.23 Evasion of Rate Regulation (emphasis added).

¹²³ *Id.*

¹²⁴ For additional information on how utility investment in natural gas transportation infrastructure suppress investment in other generation technologies, see N. Jonathan Peress, Energy Exchange, *How to Ensure New Natural Gas Infrastructure Doesn't Lock Out Renewables* (June 5, 2015), available at <http://blogs.edf.org/energyexchange/2015/06/05/how-to-ensure-new-natural-gas-infrastructure-doesnt-lock-out-renewables/>.

innovation and entry into the electricity generation market by more-competitive firms. These harms are significant and worthy of the Agencies' intervention.

For the foregoing reasons, Sierra Club respectfully requests that the Agencies investigate the monopolistic effects of the NEXUS Project and take all necessary measures to stay the Project's implementation until such an investigation can be completed.

Very truly yours,

A handwritten signature in black ink, appearing to read "Pat Gallagher", with a stylized flourish at the end.

Pat Gallagher

Cc: Federal Energy Regulatory Commission, FERC Docket No. CP16-22-000.