

155 FERC ¶ 61,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Texas Gas Transmission, LLC

Docket No. CP14-553-001

ORDER DENYING REHEARING

(Issued April 27, 2016)

1. On August 28, 2015, the Commission issued an order authorizing Texas Gas Transmission, LLC (Texas Gas) under section 7 of the Natural Gas Act (NGA) to construct and operate its Ohio-Louisiana Access Project.¹ On September 28, 2015, Allegheny Defense Project, the Ohio Valley Environmental Coalition, Heartwood, and the Freshwater Accountability Project (collectively, Allegheny) jointly filed a timely request for rehearing of the 2015 Order. For the reasons discussed below, this order denies Allegheny's request for rehearing.

I. Background

2. The Ohio-Louisiana Access Project is designed to enable Texas Gas to flow natural gas on its system bi-directionally to meet customer demand for new capacity to transport natural gas supplies being produced near the northern end of its system to additional market destinations in the Midwest and South. The 2015 Order authorized Texas Gas to modify its existing pipeline system, with limited construction of new facilities, to enable it to provide up to 758,000 million British thermal units (MMBtu) per day of firm transportation service from receipt points in Lebanon, Ohio, in a north-to-south direction, while retaining its current capability to flow gas in a south-to-north direction. Specifically, Texas Gas will: (1) construct and operate a new compressor station in Ouachita Parish, Louisiana, consisting of one 10,915 horsepower (hp) Solar Taurus 70 turbine compressor unit (Bosco Compressor Station); (2) modify the existing pipeline interconnection between Texas Gas and Gulf South Pipeline Company, LP

¹ *Texas Gas Transmission, LLC*, 152 FERC ¶ 61,160 (2015) (2015 Order).

(Gulf South) adjacent to the proposed Bosco Compressor Station to allow bi-directional flow (the Gulf South-Bosco Meter Station); and (3) make certain yard and station modifications to provide for bi-directional flow capabilities at four existing compressor stations: the Dillsboro Compressor Station in Dearborn County, Indiana, and the Columbia, Pineville, and Eunice Compressor Stations in Caldwell, Rapides, and Acadia Parishes, Louisiana, respectively.² The total estimated cost of the proposed facilities is approximately \$51.9 million.³

3. Approximately 83 percent of the 758,000 MMBtu per day maximum firm service capability of the project (626,000 MMBtu per day) is subscribed by seven shippers under binding long-term precedent agreements, with Sabine Pass Liquefaction, LLC (Sabine) as the anchor shipper subscribing 300,000 of the 626,000 MMBtu per day of firm transportation service.⁴

4. The 2015 Order authorized Texas Gas to charge its existing system rates under its Rate Schedule FT as the recourse rates for the proposed project and granted Texas Gas's request for a predetermination that it may roll the costs associated with the project into its system rates in a future NGA general section 4 rate case. All of the project shippers signing precedent agreements have elected to pay a negotiated rate.

5. None of the proposed facility modifications at the existing Gulf South-Bosco Meter Station or the four existing compressor stations will result in permanent land impacts since no new physical facilities will be placed outside of the existing meter station or compressor station yards.

6. In the 2015 Order, the Commission found that the benefits to the market of the Ohio-Louisiana Access Project will outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and on landowners and surrounding

² See the 2015 Order for a full description of all proposed facilities associated with the new Bosco Compressor Station and the modifications to the existing Gulf South-Bosco Meter Station and four compressor stations. 152 FERC ¶ 61,160 at PP 5-8.

³ Texas Gas September 25, 2014 Application at Exhibit K.

⁴ The six additional shippers are: R.E. Gas Development, LLC (R.E. Gas), Gulfport Energy Corporation, DTE Energy Trading, Inc., Public Energy Authority of Kentucky, Louisville Gas and Electric Company, and Jay-Bee Production Co., by its agent DMRB Services, LLC. See Texas Gas Application at 6-7. In addition, a portion of the remaining 132,000 MMBtu per day of service was subsequently subscribed after the open season by SABIC Innovative Plastics Mt. Vernon, LLC (SABIC).

communities. After preparing an Environmental Assessment (EA) for the Ohio-Louisiana Access Project to satisfy the requirements of the National Environmental Policy Act (NEPA), the Commission concluded that with the adopted mitigation measures, the project would not constitute a major federal action significantly affecting the human environment.⁵ Allegheny's rehearing request raises issues related to the environmental analysis in the EA and the 2015 Order.

II. Discussion

A. Procedural Issues

7. On October 14, 2015, Texas Gas filed a motion to answer and answer to Allegheny's request for rehearing limited to addressing an issue Texas Gas alleges Allegheny has raised for the first time on rehearing. On December 3, 2015, Allegheny filed a motion to answer and answer to Texas Gas's October 14, 2015 answer. Answers to requests for rehearing are prohibited by Rule 713(d)(1) of the Commission's Rules of Practice and Procedure,⁶ and in light of our rejection of Allegheny's new issue raised on rehearing as improper, we find it unnecessary to grant an exception to this rule. Accordingly, we reject Texas Gas's answer and dismiss Allegheny's subsequent response as moot.

B. Environmental Analysis

1. Programmatic Environmental Impact Statement

8. The Council on Environmental Quality's (CEQ) regulations do not require broad or "programmatic" NEPA reviews. The CEQ has stated, however, that such a review may be appropriate where an agency: (1) is adopting official policy; (2) is adopting a formal plan; (3) is adopting an agency program; or (4) is proceeding with multiple projects that are temporally and spatially connected.⁷ The Supreme Court has held that a NEPA review covering an entire region (that is, a programmatic review) is required only "if there has been a report or recommendation on a proposal for major federal action"

⁵ 2015 Order, 152 FERC ¶ 61,160 at P 124. The environmental conditions are listed in Appendix B.

⁶ 18 C.F.R. § 385.713(d)(1) (2015).

⁷ See Memorandum from CEQ to Heads of Federal Departments and Agencies, *Effective Use of Programmatic NEPA Reviews* at 13-15 (Dec. 18, 2014) (citing 40 C.F.R. § 1508.18(b) (2015)) (CEQ 2014 Programmatic Guidance).

with respect to the region,⁸ and the courts have concluded that there is no requirement for a programmatic EIS where the agency cannot identify the projects that may be sited within a region because individual permit applications will be filed at a later time.⁹

9. We have explained that there is no Commission plan, policy, or program for the development of natural gas infrastructure.¹⁰ Rather, the Commission acts on individual applications filed by entities proposing to construct interstate natural gas pipelines. Under NGA section 7, the Commission is obligated to authorize a project if it finds that the construction and operation of the proposed facilities “is or will be required by the present or future public convenience and necessity.”¹¹ What is required by NEPA, and what the Commission provides, is a thorough examination of the potential impacts of specific projects. In the circumstances of the Commission’s actions, a broad, regional analysis would “be little more than a study . . . concerning estimates of potential development and attendant environmental consequences,”¹² which would not present “a credible forward look and would therefore not be a useful tool for basic program planning.”¹³ As to projects that are closely related in time or geography, the Commission may, however, prepare a multi-project environmental document, where that is the most efficient way to review project proposals.¹⁴

⁸ *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (*Kleppe*) (holding that a broad-based environmental document is not required regarding decisions by federal agencies to allow future private activity within a region).

⁹ *See Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 316-17 (4th Cir. 2009) (*Piedmont*).

¹⁰ *See, e.g., Texas Eastern Transmission, LP*, 149 FERC ¶ 61,259, at PP 38-47 (2014); 2015 Order, 152 FERC ¶ 61,160 at P 51.

¹¹ 15 U.S.C. § 717f(e) (2012).

¹² *Kleppe*, 427 U.S. at 402.

¹³ *Piedmont*, 558 F.3d at 316.

¹⁴ *See, e.g., Environmental Assessment for the Monroe to Cornwell Project and the Utica Access Project*, Docket No. CP15-7-000 & CP15-87-000 (filed Aug. 19, 2015); *Final Multi-Project Environmental Impact Statement for Hydropower Licenses: Susquehanna River Hydroelectric Projects*, Projects Nos. 1888-030, 2355-018, and 405-106 (filed Mar. 11, 2015).

10. As it has in other proceedings, Allegheny contends that the Commission violated NEPA by failing to prepare a programmatic EIS for natural gas infrastructure projects related to natural gas development in the Marcellus and Utica shale formations.¹⁵ Allegheny continues to claim that the Commission is engaged in regional development and planning with the gas industry to construct natural gas infrastructure to bring shale gas supplies to market. In support of this claim, Allegheny points to various statements by the Commission, presentations, and documents discussing natural gas infrastructure and the Commission's role in ensuring that the nation's energy infrastructure adapts to support compliance with the Environmental Protection Agency's (EPA) Clean Power Plan.¹⁶

11. In addition, Allegheny argues that the Commission erred in declining to prepare a programmatic EIS for natural gas infrastructure projects because "interstate natural gas infrastructure is proposed and developed by private industry."¹⁷ Allegheny asserts that there is no requirement in the CEQ regulations or guidance or in the case law that suggests that a programmatic EIS is only appropriate for proposals that originate within the federal government.¹⁸ Allegheny states that the Court in *Kleppe* recognized that NEPA may require a programmatic EIS "in certain situations where "several proposals... that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency"¹⁹ Allegheny asserts that the Commission cannot escape the existence of a comprehensive program with cumulative environmental effects by "disingenuously describing it as only an amalgamation of unrelated smaller projects."²⁰

¹⁵ Rehearing Request at 20-22.

¹⁶ *Id.* at 21-22

¹⁷ *Id.* at 20 (citing 2015 Order, 152 FERC ¶ 61,160 at P 51).

¹⁸ *Id.* at 20.

¹⁹ *Id.* (citing *Kleppe*, 427 U.S. at 409-10).

²⁰ *Id.* at 4 (citing *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1076 (9th Cir. 2001)).

12. The documents and presentations cited by Allegheny do not show that the Commission is engaged in regional planning. The Commission did not develop the Clean Power Plan, nor does the Commission have the authority to implement it.²¹ Rather, state compliance with the Clean Power Plan may drive the need for natural gas infrastructure, potentially resulting in individual proposals on which the Commission will be called upon to act.

13. As explained in the 2015 Order, the mere fact that there are a number of approved, proposed, or planned infrastructure projects to increase infrastructure capacity to transport natural gas from the Marcellus and Utica Shale does not establish that the Commission is engaged in regional development or planning. Instead, this information confirms that pipeline projects to transport Marcellus and Utica Shale gas are initiated solely by a number of different companies in private industry, influenced by the market and state policies. We reaffirm our finding, based on *Kleppe*, that an agency is not required to prepare a programmatic EIS to evaluate the regional development of a resource by private industry if the development is not part of, or responsive to, that agency's federal plan or program in that region.²²

14. Nor does the Commission's acknowledgement that the construction of additional natural gas infrastructure will be important to bringing new gas supplies to market or meeting the specific goals of the Clean Power Plan, or general climate or environmental goals, demonstrate that the Commission is undertaking regional planning or programming to facilitate or encourage the construction of infrastructure to transport shale natural gas. The Commission's siting decisions regarding pending and future natural gas pipeline facilities will be in response to proposals by private industry, and the Commission has no way to accurately predict the scale, timing, and location of projects, much less the type of facilities that will be proposed. Any broad, regional environmental analysis would "be little more than a study . . . containing estimates of potential

²¹ The relevant guidelines, the Clean Power Plan, were issued by the EPA as a Final Rule on August 3, 2015. See Environmental Protection Agency, *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, Final Rule, Docket No. EPA-HG-OAR-2013-0602 (Aug. 3, 2015).

²² *Kleppe*, 427 U.S. at 401-02 ("[The District Court] found no evidence that the individual coal development projects undertaken or proposed by private industry and public utilities in that part of the country are integrated into a plan or otherwise interrelated Absent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region identified by respondents, and thus impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to, such activity.").

development and attendant environmental consequences,”²³ and could not present “a credible forward look” that would be “a useful tool for basic program planning.”²⁴ In these circumstances, the Commission’s longstanding practice to conduct an environmental review for each proposed project, or a number of proposed projects that are interdependent or otherwise interrelated or connected, “should facilitate, not impede, adequate environmental assessment.”²⁵ Thus, here, the Commission’s environmental review of Texas Gas’s actual proposed pipeline project in a discrete EA is appropriate under NEPA.

15. In sum, there is no support for Allegheny’s assertion that Texas Gas’s proposed Ohio-Louisiana Access Project is part of, or in response to, a comprehensive federal program, plan, or policy. Therefore, we find a programmatic EIS is neither required nor useful under the circumstances here.

2. Segmentation

16. CEQ regulations require the Commission to include “connected actions,” “cumulative actions,” and “similar actions” in its NEPA analyses.²⁶ “An agency impermissibly ‘segments’ NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration.”²⁷ “Connected actions” include actions that: (a) automatically trigger other actions, which may require an EIS;

²³ *Id.*

²⁴ *Piedmont*, 558 F.3d at 316.

²⁵ *Id.*

²⁶ 40 C.F.R. § 1508.25(a)(1)-(3) (2015).

²⁷ *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (*Delaware Riverkeeper Network*). Unlike connected and cumulative actions, analyzing similar actions is not always mandatory. See *San Juan Citizens’ Alliance v. Salazar*, CIV.A.00CV00379REBCBS, 2009 WL 824410, at *13 (D. Colo. Mar. 30, 2009) (citing 40 C.F.R. § 1508.25(a)(c) for the proposition that “nothing in the relevant regulations compels the preparation of a single EIS for ‘similar actions’”).

(b) cannot or will not proceed without previous or simultaneous actions; (c) are interdependent parts of a larger action and depend on the larger action for their justification.²⁸

17. In evaluating whether multiple actions are, in fact, connected actions, courts apply a “substantial independent utility” test. The test asks “whether one project will serve a significant purpose even if a second related project is not built.”²⁹ For proposals that connect to or build upon an existing infrastructure network, this standard distinguishes between those proposals that are separately useful from those that are not. While the analogy between the two is not apt in many regards, similar to a highway network, “it is inherent in the very concept of” the interstate pipeline grid “that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility.”³⁰

18. In *Delaware Riverkeeper Network*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in “a single pipeline” that was “linear and physically interdependent” and where those projects were financially interdependent.³¹ The court put a particular emphasis on the four projects’ timing, noting that, when the Commission reviewed the proposed project, the other projects were either under construction or pending before the Commission.³² Subsequently, the same court in another case indicated that, in considering a pipeline application, the Commission need not jointly consider projects that are unrelated and do not depend on each other for their justification.³³

²⁸ 40 C.F.R. § 1508.25(a)(1)(i)-(iii) (2015).

²⁹ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). See also *O’Reilly v. U.S. Army Corps of Eng’rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project “can stand alone without requiring construction of the other [projects] either in terms of the facilities required or of profitability”).

³⁰ *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

³¹ *Delaware Riverkeeper Network*, 753 F.3d at 1314.

³² *Id.*

³³ See *Myersville Citizens for a Rural Cmty. Inc. v. FERC*, 783 F.3d 1301, 1326 (D.C. Cir. 2015) (*Myersville*).

19. In the 2015 Order, we rejected Allegheny's arguments that the Commission improperly segmented its environmental review of the Ohio-Louisiana Access Project from Texas Gas's Southern Indiana Market Lateral Project (Docket No. CP15-14-001), Western Kentucky Market Lateral Project (Docket No. CP15-105-000), and Northern Supply Access Project (CP15-513-000), and from Rockies Express Pipeline LLC's Zone 3 East-to-West Project (Docket No. CP14-498-000).³⁴ The Commission found that the Ohio-Louisiana Access Project is not connected to the projects listed, because each project has substantial independent utility and each, in its own way, is not functionally or financially dependent upon the Ohio-Louisiana Access Project, and vice versa.³⁵ The Commission also found that the Ohio-Louisiana Access Project and the other four projects are neither cumulative actions nor similar actions that would require joint consideration in one environmental analysis.³⁶ Allegheny does not seek rehearing of these findings.

20. Rather, Allegheny argues for the first time on rehearing that the Commission improperly segmented its review of the Ohio-Louisiana Access Project from Dominion Transmission, Inc.'s (Dominion) Lebanon West II Project in Docket No. CP14-555-000, which was pending Commission review at the same time as the Ohio-Louisiana Access Project.³⁷ Allegheny asserts that the Commission should have considered these two projects together in the same environmental analysis because they are connected, cumulative, and similar actions.³⁸

21. Allegheny argues that the Ohio-Louisiana Access Project and the Lebanon II West Project are "closely related connected actions" because the two projects share a common shipper, R.E. Gas Development, L.L.C. (R.E. Gas). R.E. Gas subscribed to the total amount of additional capacity made available from the Lebanon West II Project to transport natural gas from its production area in Butler County, Pennsylvania, to Dominion's interconnection with Texas Gas at Lebanon, Ohio (the Lebanon-Texas Gas Interconnect), and capacity on the Ohio-Louisiana Access Project to then transport its gas

³⁴ 2015 Order, 152 FERC ¶ 61,160 at PP 108-115.

³⁵ *Id.* PP 108, 110, 112-13, and 115.

³⁶ *Id.* PP 116 and 117.

³⁷ *See Dominion Transmission, Inc.*, 153 FERC ¶ 61,203 (2015). Allegheny states that it "only recently became aware of the relatedness of these two proceedings." Rehearing Request at 3.

³⁸ *Id.* at 19.

from the Lebanon-Texas Gas Interconnect to natural gas markets in the Midwest and Gulf Coast. Specifically, Allegheny relies on a 2014 Rex Energy Corporation (Rex Energy) press release³⁹ announcing the execution of “two separate binding Precedent Agreements with [Dominion] and [Texas Gas], respectively, to transport natural gas volumes from Rex’s Butler Operated Area in Butler County, Pennsylvania to the Midwest and Gulf Coast,” that will “establish takeaway capacity for all of our expected production from the upcoming Bluestone II processing facility and a portion of the production expected from the future Bluestone III and Bluestone IV processing facilities in our Butler Operated Area.”⁴⁰

22. Allegheny argues that the Ohio-Louisiana Access Project and the Lebanon II West Project are similar actions because both projects were under Commission review at the same time and the Commission “knew that one project involved connecting Rex Energy’s production to the Lebanon Interconnect while the other project involved sending Rex Energy’s production from that interconnect to the Gulf Coast.”⁴¹ Allegheny further argues that the two projects are cumulative actions because they will have cumulatively significant impacts on the environment from past, present, and reasonably foreseeable future shale gas development, which, it claims, will be ignored since the region of influence for the Ohio-Louisiana Access Project is only five miles, while the region of influence for the Lebanon West II Project is only one mile.⁴²

23. Allegheny’s argument that the Commission improperly segmented its environmental analysis of the Ohio-Louisiana Access project from its review of Dominion’s Lebanon West II Project is a new argument raised for the first time on rehearing of the 2015 Order. As a rule, we reject requests for rehearing that raise a novel issue, unless we find that the issue could not have been previously presented, e.g., claims

³⁹ R.E. Gas, a subsidiary of Rex Energy Corporation (Rex Energy) engaged in drilling for oil and gas, is the shipper on both projects, notwithstanding Allegheny’s reference to Rex Energy.

⁴⁰ Rehearing Request at 19(quoting Rex Energy’s April 29, 2014 press release, “Rex Energy Secures Gas Transportation Agreements to Midwest and Gulf Coast,”) included as Attachment 1 to Allegheny’s Rehearing Request.

⁴¹ *Id.* “Similar actions” are those which, when viewed with other reasonably foreseeable or proposed agency actions, provide a basis for evaluating their environmental consequence together, such as common timing, location, impacts, alternatives, or implementation methods. 40 C.F.R. § 1508.25(a)(3) (2015).

⁴² *Id.*

based on information that only recently became available or concerns prompted by a change in material circumstances.⁴³ Rule 713(c)(3) of our Rules of Practice and Procedure states that any request for rehearing must “[s]et forth the matters relied upon by the party requesting rehearing, if rehearing is sought, based on matters not available for consideration by the Commission at the time of the final decision or final order.”⁴⁴ Allegheny does not explain why it could not have raised this new argument earlier, and we find no reason that Allegheny could not have raised this argument before the issuance of our 2015 Order. For these reasons, Allegheny’s request for rehearing on this issue is denied.

24. In any event, were we to consider Allegheny’s argument that the Ohio-Louisiana Access Project and Lebanon West II Project are connected, cumulative, or similar actions whose impacts should have been analyzed in the same environmental document, we would conclude, as discussed below, that the Commission staff did not improperly segment the environmental analysis of the two projects.

25. With respect to Allegheny’s argument that the Ohio-Louisiana Access Project and the Lebanon West II Project are connected actions, first, it is clear that the Ohio-Louisiana Access Project has substantial independent utility regardless of whether the Lebanon West II Project is constructed. As stated, *supra*, the purpose of the Ohio-Louisiana Access Project is to allow portions of Texas Gas’s system to operate bi-directionally in order to accommodate customers wishing to obtain north-to-south transportation service to serve new markets. By installing the new Bosco Compressor Station and modifying the existing interconnection between Texas Gas and Gulf South, both in Louisiana, and making other system modifications, virtually all of which are also in Louisiana, the project will provide up to 758,000 MMBtu per day of firm transportation service from various receipt points at Lebanon, Ohio, in a southerly direction to serve new markets in the Midwest and South. The Ohio-Louisiana Access Project has six other shippers who have contracted for capacity on the project, and Texas Gas is connected to multiple pipelines at the Lebanon Hub. R.E. Gas has subscribed to ship only 100,000 MMBtu per day, out of the Ohio-Louisiana Access Project’s total subscribed firm service potential of 626,000 MMBtu per day. Thus, the Ohio-Louisiana Access Project would still have substantial independent utility without receiving gas from Dominion’s Lebanon West II Project.

⁴³ See *Texas Eastern Transmission, LP*, 141 FERC ¶ 61,043, at P 19 (2012), *appeal dismissed, NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014).

⁴⁴ 18 C.F.R. § 385.713(c)(3) (2015).

26. Nor is the Ohio-Louisiana Access Project operationally or financially dependent on the Lebanon West II Project. The proposed facilities of each project, on different pipelines, are geographically remote, located in different states, hundreds of miles apart: the Ohio-Louisiana Access Project facilities are all in Louisiana, except for a compressor station reversal in Indiana, while the Lebanon West II facilities are in Ohio and Pennsylvania. The Commission notes that the Lebanon West II Project involves no new facilities for or modifications to Dominion's Lebanon-Texas Gas Interconnect, and the closest facilities of the two projects are Dominion's Washington Compressor Station in Washington, Ohio, and Texas Gas's Dillsboro Compressor Station in Dillsboro, Indiana, approximately 100 miles apart. Thus, the operation of Texas Gas's project facilities does not depend on, and would proceed without, the facilities of Dominion's Lebanon West II Project. In fact, the timing of the Ohio-Louisiana Access Project's in-service date is not dependent on the in-service date or approval of Dominion's project, as the proposed in-service date of the Ohio-Louisiana Access Project is June 1, 2016, five months before the November 1, 2016 in-service date of the Lebanon West II Project.

27. Second, Dominion's Lebanon West II Project also has substantial independent utility apart from the Ohio-Louisiana Access Project. The purpose of the Lebanon West II Project, as stated in both Dominion's application and a Rex Energy press release, is to provide Rex Energy access to both Midwest and Gulf Coast natural gas markets.⁴⁵ While this may be accomplished by utilizing Texas Gas's Ohio-Louisiana Access Project, as well as Texas Gas's proposed Northern Supply Access Project, these are not the only interconnections through which Dominion could provide R.E. Gas with access to these markets. Operationally, the Lebanon West II Project does not depend on the Ohio-Louisiana Access Project to reach the Lebanon Hub. At the Lebanon Hub, Dominion interconnects with several pipelines, many of which could transport R.E. Gas's product to markets in the Midwest and Gulf Coast. The presence of additional capacity on Texas Gas's system due to the Ohio-Louisiana Access Project is not the sole factor making Dominion's Lebanon West II Project viable. R.E. Gas may be taking advantage of the presence of additional capacity made available by the two projects; however this should not be equated with NEPA's more stringent connected action requirement.

28. Ultimately, each project will be built without the presence of the other. Further, as the *Delaware Riverkeeper* court recognized in its decision in *Myersville*,⁴⁶ when projects are neither functionally nor financially interdependent, they do not become connected actions as contemplated by NEPA simply because shippers that will use capacity to be

⁴⁵ Dominion Application at 2; Rex Energy's April 29, 2014 Press Release at 1.

⁴⁶ *Myersville*, 783 F.3d 1301.

created by one project may also use capacity that will be created by the other project.⁴⁷ Given the significant independent utility of the Ohio-Louisiana Access and Lebanon West II projects, as well as their physical and temporal differences, the two projects are not connected actions.

29. The Ohio-Louisiana Access Project and Lebanon West II Project are also not similar or cumulative actions for purposes of environmental review. Allegheny makes an unsupported allegation that the two projects are cumulative actions, because they will have “cumulatively significant impacts.”⁴⁸ Allegheny fails to show how the impacts of the two projects will be “cumulatively significant” and we reiterate our previous finding that the limited geographic scope and minor impacts of the two projects do not merit expanding our environmental review of the Ohio-Louisiana Access Project to include the impacts of the Lebanon West II Project.

30. Allegheny’s argument that the two projects are similar actions is based solely on their purported common timing and fails to address the considerable distance between the two projects.⁴⁹ While the applications for the two projects were being considered at approximately the same time, as mentioned above the Ohio-Louisiana Access Project has a requested in-service date a full five months before the Lebanon West II Project. Further, as noted, the project facilities are located on different pipeline systems, hundreds of miles away from one another and in different states. The vast distance between the project works and their minor environmental impacts render considering the impacts of the projects together as similar actions both unnecessary and unhelpful.⁵⁰

⁴⁷ *Id.* at 1326-27.

⁴⁸ Rehearing Request at 19.

⁴⁹ CEQ regulations state that “common geography” is a factor to be considered in whether or not two separate projects may be seen as “similar.” 40 C.F.R. § 1508.25(a) (3) (2015).

⁵⁰ 40 C.F.R. § 1508.25(a)(3) (2014); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 1000-1001 (9th Cir. 2004) (similarly emphasizing that agencies are only required to assess similar actions programmatically when such review is necessarily the *best way* to do so.).

3. Indirect Effects of Natural Gas Production

31. Allegheny asserts that the Commission's environmental analysis of the Ohio-Louisiana Access Project violated NEPA by failing to consider the indirect effects of gas drilling in the Marcellus and Utica shale formations.

32. CEQ regulations direct federal agencies to examine the direct, indirect, and cumulative impacts of proposed actions.⁵¹ Indirect impacts are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."⁵² Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it: (1) is caused by the proposed action; and (2) is reasonably foreseeable.

33. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"⁵³ in order "to make an [agency] responsible for a particular effect under NEPA."⁵⁴ As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."⁵⁵ Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation," will not fall within NEPA if the causal chain is too attenuated.⁵⁶ Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."⁵⁷ An effect is "reasonably foreseeable" if it is "sufficiently likely to occur that a person of ordinary prudence would

⁵¹ See 40 C.F.R. § 1508.25(c) (2015).

⁵² See 40 C.F.R. § 1508.8(b) (2015).

⁵³ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (*Public Citizen*) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (*Metro Edison*)).

⁵⁴ *Id.* (quoting *Metro. Edison*, 460 U.S. at 774 n.7).

⁵⁵ *Id.*

⁵⁶ *Metro. Edison*, 460 U.S. at 774.

⁵⁷ *Public Citizen*, 541 U.S. at 770.

take it into account in reaching a decision.”⁵⁸ NEPA requires “reasonable forecasting,” but an agency is not required “to engage in speculative analysis” or “to do the impractical, if not enough information is available to permit meaningful consideration.”⁵⁹

34. The Commission does not have jurisdiction over natural gas production. The potential impacts of natural gas production, with the exception of greenhouse gases and climate change, would be on a local and regional level. Each locale includes unique conditions and environmental resources. Production activities are thus regulated at a state and local level. In addition, deep underground injection and disposal of wastewaters and liquids are subject to regulation by the Environmental Protection Agency under the Safe Drinking Water Act. The Environmental Protection Agency also regulates air emissions under the Clean Air Act. On public lands, federal agencies are responsible for enforcing regulations that apply to natural gas wells.

35. As we have previously concluded in natural gas infrastructure proceedings, the environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline (or other natural gas infrastructure) project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations.⁶⁰ A causal relationship sufficient to warrant Commission analysis of the non-pipeline activity as an indirect impact would only exist if the proposed pipeline would transport new production from a specified production area and that production would not occur in the absence of the proposed pipeline (i.e., there would be no other way to move the gas).⁶¹ To date, the Commission has not been

⁵⁸ *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992). See also *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005).

⁵⁹ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (*Northern Plains*).

⁶⁰ See, e.g., *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth and Resource Conservation v. FERC*, 485 F. App’x. 472, 474-75 (2d Cir. 2015) (unpublished opinion).

⁶¹ Cf. *Sylvester v. U.S. Army Corps of Engin’rs*, 884 F.2d 394, 400 (9th Cir. 1989) (*Sylvester*) (upholding the environmental review of a golf course that excluded the impacts of an adjoining resort complex project). See also *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 580 (9th Cir. 1998) (concluding that increased air traffic resulting from airport plan was not an indirect, “growth inducing” impact); *City of Carmel-by-the-Sea v. U.S. Dept. of Transp.*, 123 F.3d 1142, 1162 (9th Cir. 1997)

(continued...)

presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas. It would make little economic sense to undertake construction of a pipeline in the hope that production might later be determined to be economically feasible and that the producers will choose the previously-constructed pipeline as best suited for moving their gas to market.

36. Even accepting, *arguendo*, that a specific pipeline project will cause natural gas production, we have found that the potential environmental impacts resulting from such production are not reasonably foreseeable. As we have explained, the Commission generally does not have sufficient information to determine the origin of the gas that will be transported on a pipeline. It is the states, rather than the Commission, that have jurisdiction over the production of natural gas and thus would be most likely to have the information necessary to reasonably foresee future production. We are aware of no forecasts by such entities, making it impossible for the Commission to meaningfully predict production-related impacts, many of which are highly localized. Thus, even if the Commission knows the general source area of gas likely to be transported on a given pipeline, a meaningful analysis of production impacts would require more detailed information regarding the number, location, and timing of wells, roads, gathering lines, and other appurtenant facilities, as well as details about production methods, which can vary per producer and depending on the applicable regulations in the various states. Accordingly, the impacts of natural gas production are not reasonably foreseeable because they are “so nebulous” that we “cannot forecast [their] likely effects” in the context of an environmental analysis of the impacts related to a proposed interstate natural gas pipeline.⁶²

37. Allegheny argues that there is a causal link between the Ohio-Louisiana Access Project and shale gas production in the Marcellus and Utica shale formations strong enough for the impacts of the gas production to be considered an indirect effect of our approving the project. In support of this assertion, Allegheny calls into question the Commission’s reliance on both *Metro. Edison* and *Public Citizen*, stating that the Commission’s ability to mitigate environmental harm in this scenario is greater than in either of those decisions. Allegheny further contends that the Commission erred in citing

(acknowledging that existing development led to planned freeway, rather than the reverse, notwithstanding the project’s potential to induce additional development).

⁶² *Habitat Educ. Ctr. v. U.S. Forest Service*, 609 F.3d 897, 902 (7th Cir. 2010) (finding that impacts that cannot be described with sufficient specificity to make their consideration meaningful need not be included in the environmental analysis).

Sylvester to demonstrate where two related projects are not necessarily “links of a single chain”⁶³ because the factual circumstances here and in *Sylvester* are not identical. Allegheny also claims that Commission staff conducted its environmental analysis using “tunnel vision” similar to the U.S. Army Corps of Engineers’ (Corps) environmental analysis rejected by a district court in *Colorado River Indian Tribes v. Marsh (Colorado River)*.⁶⁴

38. Allegheny also argues against the Commission’s claim that the causal link between the project and shale drilling in the Marcellus and Utica regions is insufficient because, despite the Commission’s contentions that this project is not an “essential catalyst” per *City of Davis*,⁶⁵ shale extraction in these regions would actually slow were it not for the interstate pipelines to transport the gas to market.

39. Allegheny further states that the impacts of shale drilling in the Marcellus and Utica shale formations are reasonably foreseeable, positing that the Commission is attempting to “shirk” its responsibility to examine the environmental impacts of such drilling as “crystal ball inquiry” and placing the burden of gathering the information needed to make such a determination on the public.

Causation

40. The record in this proceeding, including reports and statements cited by Allegheny, does not demonstrate the requisite reasonably close causal relationship between the impacts of future natural gas production and the Ohio-Louisiana Access Project that would necessitate further analysis. The fact that natural gas production and transportation facilities are all components of the general supply chain required to bring domestic natural gas to market is not in dispute. This does not mean, however, that the Commission’s approval of this particular pipeline project will cause or induce the effect of additional or further shale gas production. As stated in the 2015 Order, the Ohio-Louisiana Access Project is responding to the need for transportation, not creating it.⁶⁶

⁶³ Rehearing Request at 6 (citing *Sylvester*, 884 F.2d 394, 400).

⁶⁴ *Colorado River*, 605 F. Supp. 1425 (C.D. Cal. 1985).

⁶⁵ *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975) (*City of Davis*).

⁶⁶ 2015 Order, 152 FERC ¶ 61,160 at P 70.

41. As we have explained in other proceedings, a number of factors, such as domestic natural gas prices and production costs drive new drilling.⁶⁷ If the Ohio-Louisiana Access Project was not constructed, it is reasonable to assume that any new production spurred by such factors would reach intended markets through alternate pipelines or other modes of transportation.⁶⁸ Again, any such production would take place pursuant to the regulatory authority of state and local governments.⁶⁹

42. Allegheny's arguments with respect to the Court's rationale in, and the Commission's subsequent reliance on the *Metro. Edison* and *Public Citizen* decisions are misplaced. The Court in *Metro. Edison* required a "reasonably close causal relationship" be made between the government action and the resulting effect to the physical environment.⁷⁰ Allegheny makes no such causal connection. Allegheny further notes that compared to the Federal Motor Carrier and Safety Administration's (FMCSA)

⁶⁷ *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161, at P 39 (2015) (*Rockies Express*). See also *Sierra Club v. Clinton*, 746 F. Supp. 2d 1025, 1045 (D. Minn. 2010) (holding that the U.S. Department of State, in its environmental analysis for an oil pipeline permit, properly decided not to assess the transboundary impacts associated with oil production because, among other things, oil production is driven by oil prices, concerns surrounding the global supply of oil, market potential, and cost of production); *Florida Wildlife Fed'n v. Goldschmidt*, 506 F. Supp. 350, 375 (S.D. Fla. 1981) (ruling that an agency properly considered indirect impacts when market demand, not a highway, would induce development).

⁶⁸ *Rockies Express*, 150 FERC ¶ 61,161 at P 39.

⁶⁹ As reflected in an attachment to Allegheny's request for rehearing, there are more than 217,000 miles of existing interstate gas transmission pipeline in the United States, and the Marcellus shale area is one of the regions with the greatest concentrations of interstate pipelines facilities. See Allegheny Request for Rehearing at Attachment 1 "Natural Gas in the U.S.: Supply and Infrastructure = Security" at page 3 (slide presentation by Michael McGhee, Director of the Commission's Division of Pipeline Certificates, at October 2010 8th EU-US Energy Regulators Roundtable). Further, in some instances, producers proceed with the development of new wells that produce both oil and gas based on oil prices, and the associated gas production is flared because it is not economical to construct gathering lines to transport the gas to the pipeline grid.

⁷⁰ *Metro. Edison*, 460 U.S. 766, 774.

complete lack of authority to prevent Mexican motor carriers from crossing the border in *Public Citizen*, the Commission “has far more discretion since it may attach conditions to a certificate and can deny an application...”⁷¹

43. However, production and gathering is exempted from the NGA, reserving jurisdiction over the siting, permitting and construction of production and gathering facilities to the states.⁷² Thus, the Commission has no jurisdiction to require mitigation of the effects of production or gathering. As the Court held in *Public Citizen* “where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect.”⁷³ Contrary to Allegheny’s allegations, denial of Texas Gas’s application would not have stopped natural gas drilling in the Marcellus and Utica; it would only have required the shippers to seek out alternative projects or interconnects for getting their gas to the market.

44. Allegheny attempts to show that *Sylvester* provides no support for the Commission’s position because unlike *Sylvester*, where the construction of a resort was not seen as an indirect effect of the issuance of a Corps of Engineers permit to fill a wetland to build a golf course, it would make “little sense” for Texas Gas to construct the Ohio-Louisiana Access Project without “some certainty” of sustained future production.⁷⁴ Allegheny then cites Rex Energy’s statement that the project provides them with a “clear path” to Gulf Coast markets as showing that interstate pipelines provide direct incentive to producers.⁷⁵

45. As stated above, the Ohio-Louisiana Access Project is not the sole method for gas to be transported from northern production areas to Midwest and Gulf Coast natural gas markets, nor is the agreement with R.E. Gas, or any other shipper, an essential predicate for the project. While as a filed proposal, the Ohio-Louisiana Access Project is currently the desired alternative for the subscribing shippers, producers have many potential options available to them to ship gas to markets in the Midwest and Gulf Coast; Texas Gas’s system, and the additional capacity created by the Ohio-Louisiana Access Project,

⁷¹ Rehearing Request at 6.

⁷² 15 U.S.C. § 717(b) (2012).

⁷³ *Public Citizen*, 541 U.S. 752, 770.

⁷⁴ Rehearing Request at 7.

⁷⁵ *Id.* at 7-8 (citing Rex Energy’s 2014 Press Release at 1).

is not necessary to accomplish this goal. Further, no specific production has been associated with the Ohio-Louisiana Access Project. As stated in *Sylvester* “...each [ongoing shale production and the Ohio-Louisiana Access Project] could exist without the other...” even though they may “benefit from the other’s presence.”⁷⁶

46. Similarly, we find *Colorado River* distinguishable. In *Colorado River*, a district court held that the Corps violated NEPA by not preparing a final environmental impact statement (EIS) for a permit authorizing a developer to place riprap along a riverbank. The court stated that without the permit, the developer could not have received local government approval for its proposed residential and commercial development project along the riverbank.⁷⁷ The Corps originally prepared a draft EIS because proposed development along the banks would cause significant environmental impacts.⁷⁸ Before completing a final EIS, however, the Corps retracted its draft EIS because it determined that the appropriate scope of its environmental analysis should be limited to the activities within its jurisdiction, i.e., the river and the bank.⁷⁹

47. The court disagreed finding that the Corps violated NEPA because it narrowed the scope of its analysis to primary or direct impacts of its authorization, ignoring the indirect and cumulative effects analysis required by NEPA. Here, Commission staff analyzed the indirect and cumulative effects of the project. Commission staff did not analyze the effects of induced natural gas production because, unlike in *Colorado River*, there is no sufficient causal link between our authorization of the project and any additional production. Further, the 2015 Order noted that Allegheny did not provide any evidence of causally related production facilities, and Allegheny fails to do so here as well.

48. Allegheny calls into the question the Commission’s reliance on *City of Davis* to show the lack of causation between the project and natural gas production because the project is not “indispensable to” or an “essential catalyst” for shale gas production in “any particular region.”⁸⁰ Allegheny states that the project will transport gas primarily

⁷⁶ *Sylvester*, 884 F.2d 394, 400.

⁷⁷ *Colorado River*, 605 F. Supp. 1425, 1428.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Allegheny Rehearing Request at 8 (*City of Davis*).

produced in the “Ohio-Pennsylvania-West Virginia” tri-state area, and actually spurs production, as the lack of interstate transportation options previously threatened to curb shale gas production in the Marcellus and Utica formations.⁸¹

49. As the Commission stated in its 2015 Order, the purpose of the project is to transport natural gas currently in production; although portions of that gas are currently sourced from the Marcellus and Utica Shale regions, the capacity created by the project enables Texas Gas to transport gas from any one of Texas’ several interconnects across several states and multiple shale formations.⁸² The 2015 Order further noted that in *City of Davis*, the purpose of the freeway interchange was to spur development; here, Allegheny fails to show any additional production associated with the project. The production of natural gas will likely continue with or without the Ohio-Louisiana Access Project.

Reasonable Foreseeability

50. Even if a causal relationship between our action and additional production were presumed, the scope of the impacts from any such induced production is not reasonably foreseeable. Knowing the identity of a producer of gas to be shipped on a pipeline, and even the general area where that producer's existing wells are located, does not alter the fact that the number and location of any additional wells are matters of speculation. As we have explained above and in several other proceedings, factors such as market prices and production costs, among others, drive new drilling.⁸³ These factors, combined with the immense size of the Marcellus and Utica Shale formations and the highly localized impacts of production make any forecasting, by a state or federal agency, inherently speculative and impractical. A broad analysis, based on generalized assumptions rather than reasonably specific information of this type, will not meaningfully assist the Commission in its decision making, e.g., evaluating potential alternatives. While *Northern Plains* states that speculation is implicit in NEPA, it also states that agencies are not required “to do the impractical, if not enough information is available to permit meaningful consideration.”⁸⁴

⁸¹ Rehearing Request at 8.

⁸² 2015 Order, 152 FERC ¶ 61,160 at PP 73-74.

⁸³ Supra note 67; *Dominion Transmission, Inc.*, 153 FERC ¶ 61,284 (2015).

⁸⁴ *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (citing *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)). See also *The Fund for Animals v. Kempthorne*, 538 F.3d 124, 137 (2d Cir. 2008)

(continued...)

51. Further, the mere fact that we found that induced natural gas production activities are not causally related to the Ohio-Louisiana Access Project does not mean, as Allegheny asserts, that we shifted our burden to conduct an environmental analysis to Allegheny or the public.

4. Cumulative Impacts

52. CEQ defines “cumulative impact” as “the impact on the environment which results from the incremental impact of the action [being studied] when added to other past, present, and reasonably foreseeable future actions”⁸⁵ The requirement that an impact must be “reasonably foreseeable” to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

53. The “determination of the extent and effect of [cumulative impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”⁸⁶ CEQ has explained that “it is not practical to analyze the cumulative effects of an action on the universe; the list of environmental effects must focus on those that are truly meaningful.”⁸⁷ Further, a cumulative impact analysis need only include “such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well-nigh impossible.”⁸⁸ An agency’s analysis should be proportional to the

(speculation in an EIS is not precluded, but the agency is not obliged to engage in endless hypothesizing as to remote possibilities).

⁸⁵ 40 C.F.R. § 1508.7 (2015).

⁸⁶ *Kleppe*, 427 U.S. at 413.

⁸⁷ CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 8 (January 1997) (1997 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-ConsidCumulEffects.pdf.

⁸⁸ *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975).

magnitude of the environmental impacts of a proposed action; actions that will have no significant direct and indirect impacts usually require only a limited cumulative impacts analysis.⁸⁹

54. As we have explained, consistent with CEQ guidance, in order to determine the scope of a cumulative impacts analysis for each project, Commission staff establishes a “region of influence” in which various resources may be affected by a proposed project and other past, present, and reasonably foreseeable future actions.⁹⁰ While the scope of our cumulative impacts analysis will vary from case to case, depending on the facts presented, we have concluded that, where the Commission lacks meaningful information regarding potential future natural gas production in a region of influence, production-related impacts are not sufficiently reasonably foreseeable so as to be included in a cumulative impacts analysis.⁹¹

55. Allegheny argues that the cumulative impact analysis in the EA did not adequately consider the environmental harms associated with natural gas development activities in the Marcellus and Utica shale formations. Allegheny argues that the Commission intentionally restricted its region of influence to exclude unconventional natural gas production facilities in Ohio, Pennsylvania, and West Virginia as identified in a map published by Penn State University’s Marcellus Center for Outreach and Research. Allegheny states that the Commission could have analyzed the impacts of natural gas production activities using information provided by certain state agencies in Ohio, Pennsylvania, and West Virginia, and Pennsylvania State University’s Marcellus Center for Outreach.

⁸⁹ See CEQ, *Memorandum on Guidance on Consideration of Past Actions in Cumulative Effects Analysis* at 2-3 (June 24, 2005) (2005 CEQ Guidance), http://energy.gov/sites/prod/files/nepapub/nepa_documents/RedDont/G-CEQ-PastActsCumulEffects.pdf.

⁹⁰ See, e.g., *Columbia Gas Transmission, LLC*, 149 FERC ¶ 61,255, at P 113 (2014).

⁹¹ *Id.* P 120.

56. Allegheny states that the Commission routinely restricts its cumulative impact analysis of proposed natural gas projects, citing various Commission natural gas proceedings.⁹² Allegheny argues that when considering these other projects together with the Ohio-Louisiana Access Project, it is clear that the Commission ignores the majority of the project's impacts.

57. Allegheny asserts that the Commission misreads the 1997 CEQ Guidance to limit the scope of the cumulative impact analysis to an arbitrarily narrow 5-mile radius region of influence.⁹³ Allegheny notes that the 1997 CEQ Guidance contrasts between a project-specific analysis, for which it is often appropriate to analyze effects within the immediate area of the proposed action, and an analysis of the proposed action's contribution to cumulative effects, for which "the geographic boundaries of the analysis almost always should be expanded."⁹⁴

58. Allegheny cites *LaFlamme v. FERC (LaFlamme)*⁹⁵ and *Natural Resources Def. Council, Inc. v. Hodel (Hodel)*⁹⁶ to bolster its claim that the Commission must expand its cumulative impacts analysis and consider inter-regional impacts of Marcellus and Utica shale development activities.

59. In considering cumulative impacts, CEQ advises that an agency first identify the significant cumulative effects issues associated with the proposed action.⁹⁷ The agency should then establish the geographic scope for analysis.⁹⁸ Next, the agency should establish the time frame for analysis, equal to the timespan of a proposed project's direct and indirect impacts.⁹⁹ Finally, the agency should identify other actions that potentially affect the same resources, ecosystems, and human communities that are affected by the

⁹² Request for Rehearing at 14-16.

⁹³ *Id.* at 12.

⁹⁴ *Id.* (citing 1997 CEQ Guidance at 12).

⁹⁵ 852 F.2d 389 (9th Cir. 1988).

⁹⁶ 865 F.2d 288 (D.C. Cir. 1998).

⁹⁷ 1997 CEQ Guidance at 11.

⁹⁸ *Id.*

⁹⁹ *Id.*

proposed action.¹⁰⁰ As noted above, CEQ advises that an agency should relate the scope of its analysis to the magnitude of the environmental impacts of the proposed action.¹⁰¹ The cumulative effects analysis in the Ohio-Louisiana Access Project EA took precisely the approach the CEQ guidance advises.¹⁰² Based on the small scale and minor, temporary and highly localized impacts of the project, Commission staff concluded that a 5-mile radius to assess cumulative impacts was appropriate.¹⁰³ Establishing a 5-mile radius region of potential influence was appropriate to analyze the resource areas including geology and soils, wetlands and waterbodies, consumptive water use, vegetation and wildlife (primarily state and federal threatened and endangered species), cultural resources, geology and soils, land use, air quality, and noise. The EA explained that the project will disturb approximately 120 acres of land in total, with no permanent impacts on wetlands. No forest clearing is necessary, and no new sources of operational noise will occur as a result of the project.

60. Further, the EA explained the air quality modeling results show that the emissions from the Bosco Compressor Stations will not contribute to a violation of the National Ambient Air Quality Standards.¹⁰⁴ The project will have a potential-to-emit less than the thresholds for the Title V Operating Permit Program, as described in Title 40 of the Code of Federal Regulations Part 70, which requires major sources of air emissions and certain

¹⁰⁰ *Id.*

¹⁰¹ See 2005 CEQ Guidance, *supra* at 2-3, n.89, which notes that agencies have substantial discretion in determining the appropriate level of their cumulative impact assessments and that agencies should relate the scope of their analyses to the magnitude of the environmental impacts of the proposed action. Further, the Supreme Court held that determination of the extent and effect of cumulative impacts, “and particularly identification of the geographic area within which they occur, is a task assigned to the special competency of the agenc[y],” and is overturned only if arbitrary and capricious. See *Kleppe*, 427 U.S. at 414-15.

¹⁰² We note that the 1997 Guidance states that the “applicable geographic scope needs to be defined case by case.” 1997 CEQ Guidance at 15.

¹⁰³ EA at 36.

¹⁰⁴ *Id.* at 26.

affected non-major sources to obtain a federal operating permit. Short-term air emissions during construction will be highly localized (i.e., will not spread beyond the immediate area of active construction) and intermittent.¹⁰⁵

61. For water resources and fisheries, the region of influence for analyzing cumulative effects is generally within a watershed, either local or regional. Commission staff, however, concluded that a 5-mile radius was appropriate because project construction through waterbodies will be limited to six man-made, ephemeral ditches (four road drainage ditches and two agricultural irrigation ditches), Texas Gas proposed no surface water withdrawals, and Texas Gas committed to implementing the Commission's Wetland and Waterbody Construction and Mitigation Procedures.¹⁰⁶ We agree that the EA's region of influence for waterbodies was adequate.

62. Based on the region of influence for the project, the EA did not identify any present or reasonably foreseeable future actions whose impacts when added to the impacts of the proposed action could result in cumulative impacts.¹⁰⁷ Contrary to Allegheny's assertions, the EA noted that natural gas wellheads and related infrastructure are located in the same region as the Bosco Compressor Station.¹⁰⁸ The EA recognized the existence of natural gas wellheads and related infrastructure throughout the landscape and considered this as part of the environmental baseline, rather than conducting an evaluation of their impact individually. Focusing on the current aggregate effects of past actions, without delving into the historic details of individual past actions, complies with CEQ Guidance.¹⁰⁹

63. Further, while state agencies provide data on when a majority of well permits are issued, the data does not convey if and when permitted wells would be drilled. Accordingly, the timing of future natural gas is uncertain and there is not enough information available to permit meaningful consideration. Any further detailed analysis of the impacts of current and potential future drilling activity was therefore precluded and appropriately not included in the cumulative impact analysis in the EA.

¹⁰⁵ *Id.* at 29.

¹⁰⁶ *Id.* at 13-14.

¹⁰⁷ *Id.* at 36-38.

¹⁰⁸ *Id.* at 37.

¹⁰⁹ 2005 CEQ Guidance, *supra* at 2, n.89.

64. For these reasons, we find that the EA identified the appropriate geographic scope for considering cumulative effects, and properly excluded from its cumulative impacts analysis the impacts from shale gas drilling in the Marcellus and Utica shale formations. Given the large geographic scope of the Marcellus and Utica shale, the magnitude of the type of analysis requested by Allegheny – of the impacts of gas drilling in the Marcellus and Utica shale formations – bears no relationship to the limited magnitude of Texas Gas’s instant proposal, which involves temporary construction impacts on 120 acres, and permanent impacts to 15 acres, of land within a mixed-use area of mostly industrial, agricultural, and open land. Moreover, even if the Commission were to vastly expand the geographic scope of the cumulative effects analysis, the impacts from such development are not reasonably foreseeable.

65. In our view, Allegheny’s arguments regarding the geographic scope of our cumulative impacts analysis are based on their erroneous claim that the Commission must conduct a regional programmatic NEPA review of natural gas development and production in the Marcellus and Utica shale formations, an area that covers potentially thousands of square miles. We decline to do so. As the Commission explained in the 2015 Order,¹¹⁰ there is no Commission program or policy to promote additional natural gas development and production in shale formations.

66. We also disagree with Allegheny’s argument that the Commission’s use of regions of influence is inconsistent with CEQ regulations. Our cumulative impacts analysis considered the additive impact of a proposed action’s direct and indirect effects with other past, present, or reasonably foreseeable actions that have impacts occurring in the same region, and within the same time span, *as the impacts of the proposed action*. We believe this is consistent with the CEQ’s Guidance.¹¹¹

67. Allegheny's reliance on *LaFlamme* is misplaced, as that case in fact supports the Commission's use of a region of influence and an analysis of cumulative impacts limited to those impacts occurring in the area of the project at issue. In *LaFlamme*, the court found that in preparing an EA for the Sayles Flat Project, a hydroelectric project on the American River in California, the Commission failed to consider the cumulative impacts of other projects on the American River because it had relied on a previous EIS for another project on the river, which had limited its review to assessing the impact of that project's diversion dams and other proposed facilities in that project's area. Thus, the court criticized the Commission's use of the “narrow analysis” of another project's EIS as

¹¹⁰ 2015 Order, 152 FERC ¶ 61,160 at P 56.

¹¹¹ EA at 36-38.

a substitute for the analysis required for the Sayles project.¹¹² The court in *LaFlamme* did not fault the Commission for limiting its cumulative impacts analysis for the Sayles Flat Project to the cumulative effects of dams and facilities in the area of the project. If anything, *LaFlamme* supports identifying a region of influence appropriately connected to the location of the project under review.

68. Similarly, Allegheny's reliance on *Hodel* is unavailing. Allegheny interprets this case to mean that the Commission must consider the reasonably foreseeable impacts of shale gas extraction at a broader scale. We disagree. In *Hodel* the court considered the U.S. Department of the Interior's EIS conducted in conjunction with its plan to award five-year leases for hydrocarbon exploration and production on multiple offshore blocks. The court found that the EIS focused primarily on assessing impacts associated with the region proximate to each lease block, and thereby failed to capture potential inter-regional cumulative impacts on migratory species if exploration and production were to take place simultaneously on several lease blocks within the migratory range of a species. However, *Hodel* considered a plan for resource-development leasing over a vast geographic area (including the North Atlantic, North Aleutian Basin, Straits of Florida, Eastern Gulf of Mexico, and waters off California, Oregon, and Washington).

69. In contrast, the 'plan' before us is for the construction of one new compressor station, containing one compressor unit, and modification of an existing pipeline interconnection to allow bi-directional flow. Because we find the proposal will have no reasonably foreseeable impacts on shale development, we find no reason to adopt a region of influence for reviewing cumulative impacts that would include the Marcellus and Utica shale formations. The Department of Interior's leasing of large tracts in federal waters in *Hodel* is dissimilar from the Commission's case-by-case review of individual and independent infrastructure projects. Whereas mineral leases, especially those that cover extensive and contiguous areas, establish the location and time frame for future development, the Commission does not permit, and indeed has no jurisdiction over, activities upstream of the point of interconnection with an interstate pipeline, e.g., leasing, exploration, production, processing, and gathering. To the extent the court in *Hodel* was persuaded by an earlier Supreme Court statement that under NEPA "proposals for . . . related actions that will have cumulative or synergistic environmental impact upon a region *concurrently pending before an agency* must be considered together,"¹¹³

¹¹² *LaFlamme*, 852 F.2d 389 at 401-02. The court stated: "At no point did the [[Upper Mountain Project] EIS analyze the effects other projects, pending or otherwise, might have on this section of the American River Basin," i.e., the Sayles Flat Project section. *Id.* at 399.

¹¹³ 865 F.2d 288 at 297 (citing *Kleppe*, 427 U.S. at 410) (emphasis added).

production and gathering activities in the Appalachian shale areas are not related actions concurrently pending before the Commission. Thus, there is no way to relate any specific production and gathering activities to this project.

C. Natural Gas Act Analysis

70. Allegheny claims that because one of the goals of the Certificate Policy Statement is the avoidance of unnecessary disruption of the environment, the Commission violated the NGA by failing to consider the indirect effects of Marcellus and Utica Shale gas extraction. In addition, Allegheny argues that the Commission prematurely concluded that the Ohio-Louisiana Access Project was required by the public convenience and necessity before the Commission considered the environmental impacts. Allegheny states that the Commission should only determine whether a project is required by the public convenience and necessity after the Commission determines the project is not a major federal action.¹¹⁴

71. We disagree and affirm our finding in the 2015 Order that authorizing the Ohio-Louisiana Access Project is in the public convenience and necessity. As explained in the 2015 Order, under the Certificate Policy Statement the Commission evaluates a proposed project by balancing the evidence of public benefits to be achieved against any residual adverse effects on the economic interests of: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the construction (i.e., eminent domain impacts). The Certificate Policy Statement's balancing of adverse impacts and public benefits is not an environmental analysis process, but rather an economic test that we undertake before our environmental analysis.¹¹⁵

72. The 2015 Order concluded that the Ohio-Louisiana Access Project will have no adverse economic impacts on either Texas Gas's existing customers or on other existing pipelines or their captive customers.¹¹⁶ Further, the Commission found that the project will minimize the impacts to affected landowners as Texas Gas stated in its application that all construction activities and project facilities will be located on lands owned and leased by Texas Gas.¹¹⁷ The 2015 Order also noted that Texas Gas executed a binding

¹¹⁴ Rehearing Request at 22.

¹¹⁵ See *National Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at P 12 (2012).

¹¹⁶ 2015 Order, 152 FERC ¶ 61,160 at PP 20-25.

¹¹⁷ *Id.* PP 26-28.

precedent agreement for firm service utilizing approximately 83 percent of the project's design capacity.¹¹⁸ Based on the strong showing of public benefits (i.e., the creation of capacity to meet the firm contractual commitment of the project shippers) and the minimal impacts the project may have on the economic interests of landowners in the vicinity, the Commission found and continues to find that, the Ohio-Louisiana Access Project is required by the public convenience and necessity pursuant to the criteria set forth in the Certificate Policy Statement, subject to the order's environmental discussion and conditions.¹¹⁹ Thus, contrary to Allegheny's assertions, our issuance of a certificate of public convenience and necessity to Texas Gas for the construction and operation of the Ohio-Louisiana Access Project was based on our finding that the project is required by the public convenience and necessity as informed by our environmental analysis.¹²⁰

73. The 2015 Order then turned to the completion of the analysis and consideration of the environmental impacts of the project pursuant to the requirements of NEPA. The Commission has fully addressed the environmental issues raised by Allegheny in the EA, the 2015 Order, and herein, and we continue to find the project will have no significant impacts.

The Commission orders:

Allegheny Defense Project's request for rehearing of the 2015 Order is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹¹⁸ *Id.* P 9.

¹¹⁹ *Id.* P 28.

¹²⁰ We note that we may find that a project is a federal action significantly affecting the human environment and still determine the project is required by the public convenience and necessity.