164 FERC ¶ 61,054
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

NEXUS Gas Transmission, LLC	Docket No. CP16-22-001
Texas Eastern Transmission, LP	Docket No. CP16-23-001
DTE Gas Company	Docket No. CP16-24-001
Vector Pipeline L.P.	Docket No. CP16-102-001

ORDER ON REHEARING

(Issued July 25, 2018)

1. In an August 25, 2017 order,[1] the Commission granted four separate applications pursuant to section 7 of the Natural Gas Act (NGA).[2] First, the August 2017 Order authorized NEXUS Gas Transmission, LLC (NEXUS) pursuant to NGA section 7(c)[3] to construct and operate a new interstate pipeline system designed to provide up to 1,500,000 dekatherms (Dth) per day of firm transportation service from supply areas in the Appalachian Basin to consuming markets in northern Ohio and southeastern Michigan, and near the Dawn Hub in Ontario, Canada (NEXUS Project). In particular, the August 2017 Order authorized NEXUS to: (1) construct and operate 257.5 miles of new natural gas pipeline; and (2) acquire capacity by lease from Texas Eastern Transmission, LP (Texas Eastern), DTE Gas Co. (DTE Gas), and Vector Pipeline L.P. (Vector Pipeline) to complete its intended transportation pathway. Second, the August 2017 Order authorized Texas Eastern to: (1) construct and operate natural gas pipeline facilities sufficient for the provision of 950,155 Dth per day of incremental firm transportation service (TEAL Project);

[1] *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017) (August 2017 Order).

[2] 15 U.S.C. § 717f (2012).

[3] 15 U.S.C. § 717f(c) (2012).

and (2) abandon by lease to NEXUS pursuant to NGA section 7(b)[4] that capacity. Third, the August 2017 Order authorized DTE Gas pursuant to NGA section 7(c) to lease capacity on its intrastate system to NEXUS for the purpose of allowing NEXUS to provide firm transportation service in interstate commerce along its intended transportation pathway. Finally, the August 2017 Order authorized Vector Pipeline pursuant to NGA section 7(b) to abandon by lease to NEXUS existing capacity on two of its pipeline segments.

2. Seven requests for rehearing were filed by interested parties, challenging most aspects of the Commission's review of the applicants' proposals, with a focus on the NEXUS Project.

3. Sierra Club asserts the Commission misevaluated the public need for the pipeline under the NGA, failed to consider alternatives under the National Environmental Policy Act (NEPA),[5] and failed to consider greenhouse gas (GHG) emissions under NEPA.[6]

4. Coalition to Reroute Nexus (Coalition) filed two separate rehearing requests.[7] In the Eminent Domain Rehearing Request, Coalition asserts: (1) the project is an export pipeline; (2) the Commission should have analyzed NEXUS's proposal under NGA section 3,[8] not NGA section 7; and (3) as an export pipeline, section 7(h)[9] eminent domain authority is not constitutional. In the Environmental Rehearing Request, Coalition advances various arguments why the Commission's NEPA analysis was flawed.

5. The City of Oberlin, Ohio, argues: (1) the Commission violated its ex parte rule and deprived the City of Oberlin of due process rights by relying on evidence that was withheld from the public; (2) the Commission made a flawed finding of need under NGA section 7; (3) the return on equity component of the recourse rates was excessive; (4) the Commission failed to select the environmentally preferable alternative; (5) the August 2017 Order

[4] 15 U.S.C. § 717f(b) (2012).

[5] 42 U.S.C. § 4321-4370f (2012).

[6] Sierra Club September 22, 2017 Rehearing Request.

[7] Coalition September 22, 2017 Rehearing Requests (Accession Nos. 20170922-5161 (Coalition Eminent Domain Rehearing Request) and 20170922-5162 (Coalition Environmental Rehearing Request)).

[8] 15 U.S.C. § 717b (2012).

[9] 15 U.S.C. § 717f(h) (2012).

ignored or minimized safety concerns; and (6) the exercise of eminent domain by NEXUS would violate the Fifth Amendment Takings Clause.[10]

6. Communities for Safe and Sustainable Energy, Inc. argues the certificate should not have been granted because (1) the project is primarily for exporting natural gas; (2) the project is prohibited by a City of Oberlin local zoning ordinance; and (3) the City of Oberlin has the authority under Ohio law to prevent pollution of certain streams.[11]

7. Sustainable Medina County, Neighbors Against NEXUS, and Freshwater Accountability Project (collectively, Sustainable Medina) argue that: (1) the Commission failed to address a motion for summary disposition alleging that the Commission colluded with NEXUS to abuse the power of eminent domain;[12] and (2) the Commission failed to properly notify all landowners affected by a route alternative, the Chippewa Lake D alternative.[13]

8. NEXUS sought clarification or, in the alternative, rehearing,[14] asserting that the August 2017 Order required the wrong billing determinants to calculate recourse rates.

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[10] City of Oberlin September 25, 2017 Rehearing Request.

[11] Communities for Safe and Sustainable Energy September 25, 2017 Rehearing Request.

[12] *See* Sustainable Medina November 3, 2016 Motion for Summary Disposition. Summary disposition is appropriate when, among other requirements, "the filing contravenes valid and explicit Commission policy and regulations." *Columbia Gulf Transmission Co.*, 79 FERC ¶ 61,351, at 62,501 (1997). Given the August 2017 Order's explicit findings that the applications were fully consistent with Commission policy, the order did not err by failing to address explicitly a motion for summary disposition. The August 2017 Order addressed assertions regarding the misuse of eminent domain raised by Sustainable Medina. August 2017 Order, 160 FERC ¶ 61,022 at PP 49-50. Further, as discussed below, we again find that Sustainable Medina's eminent domain arguments are not availing. Thus, we find the August 2017 Order did not err by failing to address explicitly the motion for summary disposition. To the extent necessary, we note that the August 2017 Order, which *granted* the certificate with detailed responses to Sustainable Medina's concerns, effectively denied the motion seeking summary *denial* of the certificate.

[13] Sustainable Medina County September 25, 2017 Rehearing Request.

[14] NEXUS September 22, 2017 Rehearing Request.

I. Background

9. NEXUS will construct two main pipeline facilities: (1) approximately 256.6 miles of 36-inch-diameter new mainline from the Kensington Processing Plant in Hanover Township, Columbiana County, Ohio, to an interconnection with DTE Gas in Ypsilanti Township, Washtenaw County, Michigan; and (2) approximately 0.9 miles of new 36-inch-diameter pipeline to connect to Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee Gas) mainline in Columbiana County, Ohio.[15] NEXUS will also construct and operate four new compressor stations in Columbiana, Medina, Sandusky, and Lucas Counties, Ohio.

10. Texas Eastern will construct and operate two main pipeline facilities: (1) approximately 4.4 miles of 36-inch-diameter loop pipeline in Monroe County, Ohio; and (2) approximately 0.3 mile of new 30-inch-diameter interconnecting pipeline in Columbiana County, Ohio. The TEAL Project would also include one new compressor station in Columbiana County, Ohio and modification of one compressor station in Belmont, Ohio.

11. As described in more detail in the August 2017 Order, NEXUS entered into lease agreements with Texas Eastern, DTE Gas, and Vector Pipeline to form a seamless transportation path from the Appalachian Basin to consuming markets in Northern Ohio and Southeastern Michigan as well as the Dawn Hub in Ontario, Canada.[16] Through interconnections with other pipelines, "[s]upply also would be able to reach the Chicago Hub in northern Illinois and other Midwestern markets."[17] The Final EIS described "the need for the Projects [as originating] from an increase in demand for natural gas in the region for electric generation, home heating, and industrial use, coupled with a decrease of imports of natural gas to the region by traditional supply sources, mainly western Canada

[15] For a more detailed description of the NEXUS Project and TEAL Project facilities, see the August 2017 Order, 160 FERC ¶ 61,022 at PP 6-11 (NEXUS Project) and PP 12-17 (TEAL Project), and November 30, 2016 Final Environmental Impact Statement (Final EIS) at 2-1 to 2-7 (NEXUS Project) and 2-8 to 2-9 (TEAL Project). For a more detailed description of the lease arrangements between NEXUS and Texas Eastern, DTE Gas, and Vector Pipeline, see the August 2017 Order, 160 FERC ¶ 61,022 at PP 15-24.

[16] Final EIS at ES-2. *See* NEXUS Application, Resource Report 1, Figure 1.1-2 (map showing the proposed NEXUS mainline pipeline along with the contracted capacity on Texas Eastern, DTE Gas, and Vector Pipeline).

[17] Final EIS at ES-2.

and the Gulf Coast," which would be met "by importing natural gas to the region from newly available sources, mainly the Appalachian Basin."[18]

II. Procedural Issues

12. Pursuant to NGA section 19(a), an aggrieved party must file a request for rehearing within 30 days after the issuance of the Commission's order.[19] In this case, the deadline to seek rehearing was 5:00 p.m. U.S. Eastern Time, September 25, 2017.[20] United Communities for Protecting Our Water and Elevating Rights (UC4POWER) filed a request for rehearing after the 5:00 p.m. deadline on September 25, 2017;[21] therefore, they effectively sought rehearing on September 26, 2017.[22] Because UC4POWER failed to meet the deadline, their rehearing request must be dismissed as untimely.[23]

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[18] *Id.*

[19] 15 U.S.C. § 717r(a) (2012) ("Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order"). The Commission has no discretion to extend this deadline. *See, e.g., North Amer. Elec. Reliability Corp.*, 147 FERC ¶ 61,140 (2014) (rejecting untimely request for rehearing); *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985) ("The 30-day time requirement of [the analogous provision in the Federal Power Act] is as much a part of the jurisdictional threshold as the mandate to file for a rehearing."); *Boston Gas Co. v. FERC*, 575 F.2d 975, 977-98, 979 (1st Cir. 1978) (describing section 19(a) of the NGA as "a tightly structured and formal provision. Neither the Commission or the courts are given any form of jurisdictional discretion."); *Tennessee Gas Pipeline Co.*, 95 FERC ¶ 61,169 (2001) ("Both the Commission and the courts have consistently held that the thirty-day requirement in section 19(a) is a jurisdictional requirement that the Commission does not have the discretion of waiving, even for good cause.").

[20] The Commission's regular business hours end at 5:00 p.m., U.S. Eastern Time. 18 C.F.R. § 375.101(c) (2017).

[21] UC4POWER filed their rehearing request on September 25, 2017, at 9:29:23 p.m.

[22] Documents received after regular business hours are deemed filed on the next regular business day. 18 C.F.R. § 385.2001(a)(2) (2017) (rule for off-the-record communications).

[23] *See Cameron LNG, LLC*, 148 FERC ¶ 61,237, at P 19 (2014) ("It is clear that the

III. Discussion

A. Ex Parte Rules

13. The City of Oberlin argues the Commission violated its ex parte rules[24] and denied due process when the Commission issued the August 2017 Order without granting participants access to precedent agreements filed as privileged pursuant to 18 C.F.R. § 388.112 and Exhibit G diagrams filed as Critical Energy Infrastructure Information (CEII) pursuant to 18 C.F.R. § 388.113.[25] The City of Oberlin explains that denying it access to the precedent agreements and Exhibit G diagrams deprived it and the public at large an opportunity to challenge NEXUS's assertions of need for the project.

14. The Commission's regulations provide avenues specifically intended for parties to a proceeding who desire access to privileged documents and CEII. Parties to a proceeding, like the City of Oberlin, that desire access to such documents may seek access to the documents directly from the applicant.[26] Based on the record in this proceeding, it appears that the City of Oberlin did not avail itself of these opportunities.[27] Rather, counsel for the City of Oberlin sought access to the privileged and CEII materials using processes outside of these proceedings. First, counsel for the City of Oberlin requested access to the precedent agreements filed as privileged using the Commission's Freedom of Information

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Commission cannot waive the 30-day statutory deadline for filing requests for rehearing.").

[24] *See* 18 C.F.R. § 385.2201 (2017) (Rule 2201).

[25] Oberlin Rehearing Request at 12-16. The City of Oberlin also cites the Administrative Procedure Act's (APA) ex parte prohibition; however, the APA's prohibition of ex parte communications, 5 U.S.C. § 557 (2012), does not apply here. Instead of the APA's ex parte rule, Rule 2201, which the Commission has described as "more stringent than the APA," is the Commission's ex parte rule. *National Grid plc*, 122 FERC ¶ 61,096, at P 20 (2008).

[26] Section 388.112(b)(2) of the Commission's regulations provides a process for parties to gain access to privileged material directly from the applicants. Section 388.113(g)(4) provides a process for parties to gain access to CEII material directly from the applicants. Section 388.113(g)(4) provides that "[a]ny person who is a participant in a proceeding or has filed a motion to intervene or notice of intervention in a proceeding may make a written request *to the filer* for a copy of the complete CEII version of the document without following the procedures outlined in paragraph (g)(5) of this section." 18 C.F.R. 388.113(d)(4) (2017) (emphasis added).

[27] *But see infra* note 30.

Act (FOIA) procedures.[28] On September 12, 2017, Commission staff denied the FOIA request, finding the contracts exempt from disclosure requirements.[29] Commission staff informed counsel for the City of Oberlin of the right to appeal within 90 days of the date of the letter. The City of Oberlin did not file an appeal, and may not do so in the context of this proceeding. Thus, even if the FOIA request were somehow implicated in these proceedings, counsel for the City of Oberlin failed to exhaust available remedies.[30]

15. Second, the City of Oberlin similarly invoked a process outside these proceedings when it asked the Commission's CEII Coordinator for access to CEII material on May 26, 2017, pursuant to the provisions of 18 C.F.R § 388.113(g)(5).[31] In a letter dated March 13, 2018, the Commission's CEII Coordinator forwarded the materials the City sought (Exhibit G diagrams filed by NEXUS in Docket No. CP16-22-000) to counsel for the City of Oberlin.

16. Further, the City of Oberlin is mistaken that reliance on the precedent agreements, filed as privileged, and the Exhibit G diagrams, filed as CEII, violate the Commission's

[28] 18 C.F.R. § 388.108 (2017) (FOIA requests). *See* City of Oberlin Rehearing Request, Attachment (Carolyn Elefant Letter, dated May 13, 2017).

[29] *See* City of Oberlin Rehearing Request, Attachment, Commission Staff September 12, 2017 Letter (FOIA Request No. FY17-103).

[30] We note that the September 12, 2017 letter denying counsel for the City of Oberlin's FOIA request stated that, according to NEXUS, counsel for the City of Oberlin had been "provided the Precedent Agreements directly on May 5, 2017 pursuant to the protective agreement in the docket." The City of Oberlin's rehearing request, which does not address this fact, is misleading. *See* City of Oberlin Rehearing Request at 14 ("Without access to the Precedent Agreements and the Exhibit G diagrams, neither the City nor any other parties can offer a meaningful rebuttal. The Commission's reliance on materials unavailable to the parties, and subsequent refusal to disclose them deprives the City of due process rights and violates the Sunshine Act and Commission regulations."). The September 12, 2017 letter from Commission staff, which the City of Oberlin attached to its rehearing request, suggests the City of Oberlin had access to the precedent agreements pursuant to Commission rules and regulations in time to craft any arguments in a rehearing request of the August 2017 Order.

[31] The process outlined at section 388.113(g)(5) is reserved for "any requester not described above in paragraphs (g)(1) through (4) of this section." As the City of Oberlin is a "participant in a proceeding" as described in section 388.113(g)(4), the section 388.113(g)(5) process, pursued outside these proceedings by counsel for the City of Oberlin, was not applicable or required.

ex parte rules. The Commission's ex parte rule, Rule 2201,[32] defines an off-the-record written communication as any communication that "is not filed with the Secretary and not served on the parties to the proceeding in accordance with Rule 2010."[33] Thus, Rule 2201 does not apply to the precedent agreements and Exhibit G diagrams because those documents were filed on the record with the Commission's Secretary. The City of Oberlin's arguments based on a violation of ex parte rules is therefore denied.

17. The City of Oberlin maintains the burden is on the Commission to release the documents that the City of Oberlin mistakenly assumes are ex parte communications. However, the Commission's regulations set forth procedures that allow parties to Commission proceedings to gain access to materials filed as privileged (section 388.112(b)(2)) and CEII (section 388.113(g)(4)), and the City of Oberlin chose not to follow these procedures.

18. The City of Oberlin's due process argument is similarly flawed. Section 388.112(b)(2) (pertaining to privileged documents) seeks to balance the applicants' interest in protecting "trade secrets and commercial or financial information obtained from a person and privileged or confidential,"[34] and the interest a party has to fully participate in Commission proceedings. Similarly, section 388.113 pertaining to CEII documents is crafted to strike a balance between preventing the risk of harm if sensitive materials are disclosed to bad actors and allowing parties to fully participate in Commission proceedings.[35] The availability of these procedures assures parties the opportunity to access materials, consistent with this balance. Where the parties did not attempt to avail themselves of the full extent of the Commission's available procedures, there can be no demonstration that the procedures themselves, or the Commission's implementation of them, violates due process.

19. The Commission's findings here are consistent with *Myersville Citizens for a Rural Community, Inc. v. FERC (Myersville)*[36] and *Minisink Residents for Environmental*

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[32] 18 C.F.R. § 385.2201(a) (2017).

[33] *Id*. § 385.2201(c)(4).

[34] 5 U.S.C. § 552(b)(4) (2012).

[35] *See, e.g.*, Regulations Implementing FAST Act Section 61003 – Critical Electric Infrastructure Information Availability of Certain North American Electric Reliability Corp. Databases to the Commission, Order No. 833, FERC Stats. & Regs. ¶ 31,389, at P 26 (2016) (cross-referenced at 157 FERC ¶ 61,123). *See* Final EIS at 4-252.

[36] 783 F.3d 1301, 1327 (D.C. Cir. 2015).

Preservation and Safety v. FERC (Minisink Residents).[37] There the court explained that "[d]ue process requires only a 'meaningful opportunity' to challenge new evidence."[38] In those cases, the court found no due-process violations because the parties had access to all record evidence filed by the applicants and relied on by the Commission, including confidential filings, prior to the filing due dates for requests for rehearing. The parties in *Minisink Residents* and *Myersville* properly sought access to CEII material from the applicant through a non-disclosure agreement in compliance with our regulations.[39] The City of Oberlin had the opportunity to obtain the materials, but did not follow the prescribed procedures.

20. In any event, the court in *Minisink Residents* held that "to the extent Petitioners assert that other potentially relevant documents were improperly withheld as confidential, the contention that such documents might support [their] position [is] far too speculative to provide a basis for setting aside [the Commission's] judgment."[40] The City of Oberlin does not adequately explain how it was harmed by failing to gain access to the materials, nor does it explain how that information might bear on its rehearing request.[41] The City of Oberlin explains that it wants access to the precedent agreements and Exhibit G diagrams to independently verify the need for the project.[42] NEXUS has entered into long-term, firm precedent agreements with eight shippers for 885,000 Dth per day of firm transportation service.[43] The City of Oberlin has not explained what additional information, which might have been included in the precedent agreements, it believes would have helped develop its

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[37] 762 F.3d 97 (D.C. Cir. 2014).

[38] *Myersville*, 783 F.3d at 1327; *see also Minisink Residents*, 762 F.3d at 115.

[39] *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at PP 50-52 (2013); *Millennium Pipeline Co. L.L.C.*, 141 FERC ¶ 61,198, at PP 71-73 (2012).

[40] *Minisink Residents*, 762 F.3d at 115 (quoting *B & J Oil*, 353 F.3d 71, 78 (D.C. Cir. 2004)) (internal quotations omitted).

[41] We further note that the documents to which the City of Oberlin seeks access were filed with the Commission on November 20, 2015. The City of Oberlin has not explained why it did not seek access to the documents until May 2017.

[42] City of Oberlin Rehearing Request at 12.

[43] *See, e.g.* NEXUS March 21, 2016 Data Request Response, Attachment 1A (table showing seven shippers, amount, and term); NEXUS September 14, 2016 Filing (announcing additional precedent agreement with Columbia Gas of Ohio for an additional 50,000 Dth per day).

arguments regarding need. Further, there is substantial detail in the public record about the facilities to be built as a result of these proceedings;[44] yet, as discussed below in the next section of this order on need, the City of Oberlin does not advance a credible argument that the facilities are overbuilt, and therefore does not adequately explain why the information in the record and available to the public was insufficient for this purpose or how it would have used the Exhibit G engineering data it believed would be provided by the flow diagrams to aid their assessment. Thus, the City of Oberlin has not established, in light of their decision not to use the defined procedures for obtaining the precedent agreements and the Exhibit G flow diagrams, any violation of their due process rights.[45]

B. Evidence of Need

21. Sierra Club argues the Commission failed to consider demand when it found need for the project.[46] Sierra Club argues NEXUS manufactured demand for the project through precedent agreements with affiliates and overestimated the market demand for natural gas in the markets NEXUS plans to serve.[47] In support of its assertions that the demand for additional pipeline transportation capacity is lacking, Sierra Club says demand for electricity in Ontario will remain flat because of energy efficiency gains and a shift toward a less energy intensive economy. Sierra Club evaluates the basis differentials between various hubs in the region and the Henry Hub, maintaining that low spreads between the hubs in the region and the Henry Hub show little justification for the pipeline. Similarly, Sierra Club maintains that demand in Michigan will similarly remain soft. Sierra Club states that the purpose of the project is to attract customers from other pipelines, citing statements of DTE Energy executives in support.

22. Sierra Club argues that other pipeline projects will also deliver gas from the Appalachian Basin to markets in Michigan and Ontario, Canada, which, when combined with the NEXUS Project, will add 4.8 billion cubic feet (Bcf) per day of inflow to

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[44] *See* NEXUS Application, Resource Report 1 and Texas Eastern Application, Resource Report 1.

[45] *Minisink Residents*, 762 F.3d at 115 (holding that "to the extent Petitioners assert that other potentially relevant documents were improperly withheld as confidential, the contention that such documents might support [their] position [is] far too speculative to provide a basis for setting aside [the Commission's] judgment") (quoting *B & J Oil v. FERC*, 353 F.3d 71, 78 (D.C. Cir. 2004)) (internal quotations omitted).

[46] Sierra Club Rehearing Request at 5-20.

[47] *Id*. at 6.

Michigan from the Appalachian Basin.[48] Specifically, Sierra Club asserts alternatives can deliver gas cheaper for DTE Electric Company (DTE Electric), a future customer on the NEXUS Project, and an entity regulated by the Michigan Public Service Commission (Michigan PSC). Sierra Club complains that DTE Electric did not explore any of these alternatives, and neither did the Commission.

23. On rehearing, the City of Oberlin argues: (1) there is currently a shortage of subscribers for the project; (2) there are alternatives for gas transportation available; (3) the purpose of the pipeline is to displace capacity on other pipelines, not service new demand; and (4) there is a weak market for gas in the future. The City of Oberlin attacks the probative value of affiliate contracts, explaining that NEXUS faces no risk with these contracts and that contracts with unaffiliated entities represent stronger evidence of market demand.[49] The City of Oberlin also argues, like Sierra Club, that the capacity will serve customers that are already being served by other pipelines rather than serving new demand.[50]

24. Communities for Safe and Sustainable Energy also questions the need for the pipeline facilities.[51]

25. The August 2017 Order correctly found sufficient evidence that there is need for the proposed project and that the project is in the public interest.[52] NEXUS, as a new company

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[48] *Id.* at 4-5 ("In addition to NEXUS, two other pipelines, Rover and ANR East, will deliver gas from the Appalachian basin to markets in Michigan and Ontario, Canada."). Sierra Club also mentions the Leach XPress Project, but acknowledges that it "will not travel anywhere near the delivery points for the NEXUS pipeline." *Id.* at 24-25.

[49] *Id.* at 4 and 16 (citing Certificate of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, at 61,748 (1999) *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) ("A project that has precedent agreements with multiple new customers may present a greater indication of need than a project with only a precedent agreement with an affiliate."). *See Atlantic Coast Pipeline, LLC,* 161 FERC ¶ 61,042, at P 44 (2017).

[50] *Id.* at 17 ("More disturbing, the Rehearing Request filed by the Sierra Club in this docket cites evidence that the NEXUS Project will not create new capacity, but merely displace capacity from other systems.").

[51] Communities for Safe and Sustainable Energy Rehearing Request at 1 (agreeing with the City of Oberlin's characterization of the project as undersubscribed and likely to be rendered obsolete).

[52] Certificate Policy Statement, 88 FERC ¶ 61,227, *clarified*, 90 FERC ¶ 61,128,

with no existing customers, is not calling on existing customers to subsidize the project, and therefore passes the threshold inquiry.[53] Further, the August 2017 Order, as discussed in further detail below, correctly found that the project will not have an adverse impact on other pipelines or their captive customers."[54]

26. The Certificate Policy Statement established a policy under which the Commission will allow an applicant to rely on a variety of relevant factors to demonstrate need, rather than continuing to require that a certain percentage of the proposed capacity be subscribed under long-term precedent or service agreements.[55] These factors might include, but are not limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[56] The Commission will consider all such evidence submitted by the applicant regarding need. Nonetheless, the Certificate Policy Statement made clear that, although precedent agreements are no longer required to be submitted, they are still significant evidence of demand for the project.[57] "[N]othing in the policy statement or in any precedent construing it . . . suggest[s] that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing

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further clarified, 92 FERC ¶ 61,094. *See* August 2017 Order, 160 FERC ¶ 61,022 at PP 33-54.

[53] August 2017 Order, 160 FERC ¶ 61,022 at P 35 ("Thus, there is no potential for subsidization on NEXUS's system or degradation of service to existing customers.").

[54] *Id.* P 35. The order noted that no other pipeline company or captive customers of a pipeline company protested. *Id*. Similarly, no such entity has filed a request for rehearing of the August 2017 Order.

[55] Certificate Policy Statement, 88 FERC at 61,747. Prior to the Certificate Policy Statement, the Commission required a new pipeline project to have contractual commitments for at least 25 percent of the proposed project's capacity. *See* Certificate Policy Statement, 88 FERC at 61,743.

[56] *Id.* at 61,747.

[57] *Id.* at 61,748. *See also id.* at 61,747 ("In sum, if an applicant can show that the project is financially viable without subsidies, then it will have established the first indicator of public benefit. Companies willing to invest in a project, without financial subsidies, will have shown an important indicator of market-based need for a project.").

contracts with shippers."[58] Moreover, it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[59]

27. NEXUS entered into long-term, firm precedent agreements with eight shippers for 885,000 Dth per day of firm transportation service, which is 59 percent of the project's capacity.[60] The August 2017 Order required NEXUS to file a written statement "affirming that it has executed contracts for the volumes and terms equivalent to those in its precedent agreements" prior to commencing construction.[61] The NEXUS Project shippers have determined, based on their assessment of the long-term needs of their particular customers and markets, that there is a market for the natural gas to be transported and that NEXUS is the preferred means for delivering or receiving that gas. Given the substantial financial commitment required under these contracts by project shippers, we find that these contracts are the best evidence that the service to be provided by the project is needed in the markets to be served. In any event, NEXUS, which anticipates growing demand in the region,[62] continues to market the unsubscribed capacity. NEXUS's recourse rates are derived using billing determinants based on overall capacity, not subscribed capacity, meaning any particular customer paying the recourse rate is responsible for paying its share of the overall capacity, not the subscribed capacity.[63] This rate design, which is consistent with Commission policy, provides NEXUS an incentive to market the unsubscribed capacity.[64]

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[58] *Minisink Residents*, 762 F.3d at 112 n.10. *See also Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 783 F.3d 1301, 1311.

[59] Certificate Policy Statement, 88 FERC at 61,744 (citing *Transcontinental Gas Pipe Line Corp*., 82 FERC ¶ 61,084, at 61,316 (1998)).

[60] August 2017 Order, 160 FERC ¶ 61,022 at P 41 (noting that these customers include LDCs, an electric utility, and producers); Final EIS at 1-3 ("Approximately 885,000 Dth/d of this capacity (59 percent) has been signed in precedent agreements by NEXUS, as summarized in table 1.1.1-1.").

[61] August 2017 Order, 160 FERC ¶ 61,022 at ordering para. (B)(4).

[62] *Id.* P 38; NEXUS January 12, 2016 Motion for Leave to Answer and Answer at 6 ("NEXUS has held three open seasons and has executed precedent agreements for 835,000 Dth/d of NEXUS's total available capacity of 1.5 million Dth/d."). NEXUS explained in its answer that it continues to market the unsubscribed capacity. NEXUS January 12, 2016 Motion for Leave to Answer and Answer at 6-7.

[63] NEXUS Application at 36.

[64] August 2017 Order, 160 FERC ¶ 61,022 at P 48. Using a billing determinant based on subscribed capacity would shift risk from NEXUS to the shippers and thereby

Under these circumstances, the August 2017 Order reasonably found that the project would not go forward unless it is financially viable.[65]

28. The rehearing requesters overlook an important finding in the August 2017 Order about the amount of subscribed capacity. When the August 2017 Order acknowledged that not all the capacity is subscribed,[66] it also observed that a downsized pipeline matching the current subscribed amount would not result in a significant reduction in impacts to landowners and communities.[67]

29. Sierra Club and the City of Oberlin also overlook the fact that there are several reasons other than load growth for entering into precedent agreements with NEXUS to source gas from the Marcellus Shale region.[68] Further, the project will provide a reliable,

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reduce NEXUS's incentive to market successfully the unsubscribed capacity. *Penneast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 34 (2018) (observing that a recourse rate based on design capacity places pipeline "at risk for costs associated with any unsubscribed capacity"). The Certificate Policy Statement described how incremental pricing, a rate mechanism that prevents existing customers from subsidizing the cost of new capacity, "will also lead to the correct price signals for the new project and provide the appropriate incentive for the optimal level of construction." Certificate Policy Statement, 88 FERC at 61,747. We similarly find that recourse rates based on subscribed capacity provide the right incentive to optimize construction.

[65] August 2017 Order, 160 FERC ¶ 61,022 at P 48 ("These factors operate to place all risk for any unsubscribed capacity solely upon NEXUS, assuring the Commission that the project will not go forward unless it is financially viable. Under these circumstances, we find NEXUS has sufficiently demonstrated a need for the project.").

[66] *See, e.g., id*. P 41 (acknowledging that a "significant portion of [the NEXUS pipeline] remains unsubscribed").

[67] *Id*. P 37. *See also id*. P 46 ("Moreover, the Commission has recognized that constructing a larger capacity pipeline than immediately necessary in a location where there is potential for future growth in demand for service on the pipeline is appropriate as it will minimize potential environmental and landowner impacts that could occur in the future were a smaller pipeline constructed now.").

[68] NEXUS Application, Resource Report 1, Appendix 1C4, Ohio Natural Gas Market Study, Analysis Group. *See* Final EIS at 1-5 ("NEXUS points to letters filed with the Commission by Dominion East Ohio (DEO) and NRG Energy, Inc. indicating that the tee-taps would enhance natural gas supply in the area. NEXUS states that the Projects would help ensure that northern Ohio markets would be served more economically and without the environmental impacts associated with lateral pipelines that would be necessary if the

flexible, and diverse supply of natural gas that will lead to increased price stability, and the opportunity to expand natural gas service in the future.[69] Based on the record, we find no reason to second guess the business decisions of these shippers that they need the service to which they have subscribed.

30. We find persuasive the analysis of NEXUS demonstrating a substantial bottleneck of available capacity for natural gas from the Marcellus and Utica production regions caused by a lack of adequate infrastructure to transport that gas to markets where gas is higher-priced.[70] We also affirm the finding in the August 2017 Order that "[t]here is also no evidence that available capacity exists on other pipelines to provide the 885,000 Dth per day of service currently subscribed by the NEXUS shippers."[71]

31. The City of Oberlin asserts a Department of Energy study[72] demonstrates that existing infrastructure is underutilized and that more infrastructure is therefore not needed.[73]

Projects were authorized along a route further to the south."). *See* Ohio Gas Association July 14, 2016 Comments (organization whose members serve more than 3.6 million Ohio customers stating in support of applications that "our nation currently lacks the infrastructure necessary to take full advantage of the abundant supplies of Utica and Appalachian shale gas").

[69] *See* East Ohio Gas Company d/b/a Dominion East Ohio August 25, 2016 Comments ("Additional interconnections in those areas would enhance supply diversity and reliability, provide an additional outlet for low-cost, Ohio-produced natural gas, expand opportunities for siting natural gas-fired generation, and support much-needed economic development in the region."); NRG Energy, Inc. August 17, 2016 Comments ("As noted in NRG Power's September 17, 2015 Comments, the proposed NEXUS pipeline would run in close proximity to the Avon Lake Generating Station ("Avon Lake Facility"), which is owned by NRG Power. The proposed path of the Project is an optimal location and would provide a reliable fuel source for the Avon Lake Facility in the event natural gas is added as a fuel at the Facility. As such, NRG Power offers its continued support of the Nexus Project."); Nexus August 26, 2016 Comments on Draft EIS at 3. NRG has not, to date, subscribed to firm service on the NEXUS Project.

[70] NEXUS Application, Resource Report 1 at 1-3 to 1-4.

[71] August 2017 Order, 160 FERC ¶ 61,022 at P 40.

[72] U.S. DEP'T OF ENERGY, NATURAL GAS INFRASTRUCTURE IMPLICATIONS OF INCREASED DEMAND FROM THE ELECTRIC POWER SECTOR (issued Feb. 2015) (DOE Infrastructure Report).

[73] City of Oberlin Rehearing Request at 18 ("According to a 2015 Department of

Yet the report observed that regions face different circumstances and that "[i]n the Marcellus, growth in natural gas production is projected to require additional expansion of pipeline takeaway capacity from the region" in order to "integrate Marcellus production with regional markets and interstate pipelines."[74] Furthermore, the Commission has previously addressed the DOE Infrastructure Report and concluded that it does not support allegations of overbuilding:

> The DOE study does not demonstrate that pipelines are currently overbuilt. Rather, it concludes that demand for natural gas from the electric power sector will only result in modest additions of new pipeline capacity between 2015 and 2030 (34 to 38 billion cubic feet (Bcf) per day) compared to historical capacity additions between 1998 and 2013 (127 Bcf per day). The study explains that natural gas production and natural gas demand are geographically dispersed and natural gas companies are increasingly utilizing underutilized capacity on existing pipelines, re-routing natural gas flows, and expanding existing pipeline capacity.[75]

32. Sierra Club and the City of Oberlin claim that the Commission's approval of other pipeline projects, such as the Rover Pipeline Project,[76] support their claim of overbuilding.[77] Sierra Club and the City of Oberlin provide no compelling evidence of overbuilding in the face of compelling evidence of need in the form of substantial customer support. None of the existing or proposed natural gas pipeline systems alternatives "have the capacity

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Energy Report, only 54 percent of current pipeline capacity is being used – and higher utilization of existing interstate natural gas pipelines will additionally reduce the need for new pipelines. Moreover, while the DOE Report finds that at most, 8.4 bcf/d are needed, as of 2015, the Commission had pending applications for at least 48 bcf/d.").

[74] DOE Infrastructure Report at 22.

[75] *Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,314, at P 38 (2017).

[76] *See Rover Pipeline LLC*, 158 FERC 61,109, *order on clarification and denying reh'g*, 161 FERC ¶ 61,244 (2017).

[77] *See* Certificate Policy Statement, 88 FERC at 61,737.

available for transporting the required volumes of natural gas proposed by the applicants, nor do they service all the required receipt and delivery points."[78]

33. We disagree with Sierra Club's arguments that NGA section 7 requires the Commission to look at alternatives to NEXUS that would have been less costly to DTE Electric ratepayers. The NGA requires the Commission to consider reasonable alternatives as part of its section 7 analysis.[79] We note that the question of how DTE Electric procures fuel for providing retail electricity service is a question for the Michigan PSC, not the Commission.[80] In any event, however, the Final EIS fully discussed alternatives such as the potential for renewable energy and energy conservation, and the availability of capacity on existing or proposed natural gas systems, to serve as alternatives to the project. The Final EIS concluded that alternatives such as renewable energy and energy conservation are not reasonable alternatives because they do not meet the purpose of providing natural gas transportation service along the proposed pathway.[81] Moreover, the Final EIS found that there is not sufficient available capacity on existing pipeline systems to transport all of the volumes contemplated to be transported by the NEXUS Project to the range of delivery points proposed by NEXUS, and that expansion of existing pipeline systems was not a feasible alternative.[82]

34. We are unpersuaded by the studies cited by Sierra Club and by the City of Oberlin in their attempt to show that there is insufficient demand for the NEXUS Project. To the extent Sierra Club and City of Oberlin would have the Commission look at information beyond precedent agreements, we would note that countering the position advanced by the studies urged by the Sierra Club and City of Oberlin, the record also contains evidence of

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[78] Final EIS at 5-17.

[79] *Minisink Residents*, 762 F.3d at 107.

[80] The August 2017 Order similarly found that "[i]ssues related to DTE Gas's ability to recover costs associated with its decision to subscribe to service on NEXUS involve matters to be determined by the Michigan Public Service Commission; those concerns are beyond the scope of the Commission's jurisdiction." August 2017 Order, 160 FERC ¶ 61,022 at P 48 n.38.

[81] Final EIS at 3-4.

[82] *Id*. at 3-5 ("Conceivably, these six systems could be used in various combinations to transport natural gas to and from the markets served by the Projects; however, the main constraint limiting the viability of these systems is that none of these existing pipelines have capacity available for transporting the required volumes of natural gas needed by the Projects and subsequently would also require expansion of facilities.").

growing demand for natural gas pipeline transportation capacity.[83] NEXUS appended studies appended to Resource Report 5,[84] in addition to referencing comments in support of the project by local distribution companies and others.[85] Commission policy is to examine the merits of individual projects and assess whether each project meets the specific need demonstrated. Projections regarding future demand often change and are influenced by a variety of factors, including economic growth, the cost of natural gas, environmental regulations, and legislative and regulatory decisions by the federal government and individual states. Given this uncertainty associated with long-term demand projections, where an applicant has precedent agreements for long-term firm service, the Commission deems the precedent agreements to be the better evidence of demand. Where, as here, it is demonstrated that specific shippers have entered into precedent agreements for project

[83] NEXUS Application, Resource Report 1, 1-5 to 1-6 and Appendix 1C4, *Ohio Natural Gas Market Study* (June 2015); Final EIS at 1-3 ("NEXUS indicates that the need for the [project] originates from an increase in demand for natural gas in the region for electric generation, home heating, and industrial use, coupled with a decrease of imports of natural gas by traditional supply sources, mainly from western Canada and the Gulf Coast. The [project] would meet this need by importing natural gas to the region from newly available sources, mainly in the Appalachian Basin."); Columbia Gas of Ohio, Inc. and Columbia Gas of Pennsylvania, Inc. December 23, 2015 Filing (local distribution companies that serve 1.8 million residential, commercial, and industrial customers in Ohio and Pennsylvania stating in support of applications that the projects "will make additional gas supplies available in or near their service territories, which will benefit both the companies and their customers"); Consumers Energy Company December 18, 2015 Motion to Intervene and Comments (local distribution company that serves over 1.7 million residential, commercial, and industrial customers stating in support of applications that the project "will increase transportation capacity, particularly from the Marcellus and Utica shale producing regions to the Midwest").

[84] *See, e.g.* NEXUS Application, Resource Report 5, Appendix 5B, Economic Impacts of the NEXUS Gas Transmission Project in Michigan at 5 ("There is a growing demand for clean-burning natural gas in the upper Midwest United States and eastern Canadian regions, as well as a decline in supply from western Canada, which traditionally served these markets.").

[85] NEXUS October 10, 2017 Answer at 9 n.34. *See* NEXUS March 21, 2016 Answer at 10-11 ("Indeed, eight different parties with whom NEXUS has executed memoranda of understanding and/or agreements for tap and/or meter facilities have filed comment letters with the Commission expressing their support and expected demand for the NEXUS Project."). *See also* NEXUS Application, Resource Report 1 at 1-6 (table listing planned generating units in Ohio).

service, the Commission places substantial reliance on those agreements to find that the project is needed.[86]

35. Beyond serving the customers that have already subscribed for service, we find the NEXUS Project will also benefit end users because the project would develop gas infrastructure that will serve to ensure future domestic energy supplies and enhance the pipeline grid.[87] Interconnections with other pipelines will enable northern Illinois and other Midwestern markets to access additional supplies of natural gas.[88] Finally, we note that NEXUS continues to market the unsubscribed capacity.[89]

36. We disagree with the assertions of Sierra Club and the City of Oberlin that NEXUS will inappropriately pull customers from other pipelines. The Certificate Policy Statement requires the Commission to evaluate how a proposed project will affect competing pipelines and their captive customers.[90] However, as stated in the August 2017 Order, "no pipeline company or their captive customers have protested NEXUS's application."[91] Those with interests the City of Oberlin purports to represent, i.e., pipelines that might compete with the NEXUS Project, have not protested. Accordingly, we reject this argument.

37. We disagree that the affiliate relationship between NEXUS and its shippers DTE Gas and DTE Electric means the contracts with those affiliates are not good evidence of need.[92] The Certificate Policy Statement ended the policy of requiring pipelines to show that some percentage of proposed capacity was subscribed under long-term firm contracts to support need and even observed that by doing so, it was reducing "the significance of whether the

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[86] *See Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 42 (2017).

[87] NEXUS November 20, 2015 Application, Resource Report 1 at 1-3 to 1-6. *See ETC Tiger Pipeline, LLC*, 131 FERC ¶ 61,010, at P 20 (2010).

[88] Final EIS at 1-3 ("According to NEXUS, part of the purpose of the NGT Project is also to supply natural gas to northern Illinois and other Midwestern markets through interconnections with other pipelines.").

[89] NEXUS October 10, 2017 Answer at 10.

[90] Certificate Policy Statement, 88 FERC at 61,745.

[91] August 2017 Order, 160 FERC ¶ 61,022 at P 35.

[92] Subsidiaries of DTE Energy, DTE Gas and DTE Electric, both subscribed to 75,000 Dth/d of firm transportation service. August 2017 Order, 160 FERC ¶ 61,022 at P 9.

contracts are with affiliated or unaffiliated shippers."[93] "[A]bsent evidence of anti-competitive or other inappropriate behavior, the Commission views service agreements with affiliates like those with any other shipper for purposes of assessing the demand for capacity."[94]

38. In *Constitution Pipeline Co.*,[95] the Commission addressed concerns about contracts with affiliates and found that in the absence of evidence of self-dealing, protections such as requiring the certificate holder to execute firm contracts prior to commencing construction and calculating recourse rates based on the designed capacity rather than the subscribed capacity, renders such precedent agreements good sources of evidence of need.[96] There is no evidence of self-dealing in these proceedings as discussed in *Constitution Pipeline*, and the calculation of NEXUS rates based on design capacity means NEXUS will be at risk for unsubscribed capacity, thereby giving it a powerful incentive to market the remaining unsubscribed capacity. Also, the August 2017 Order requires NEXUS to file "a written

[93] Certificate Policy Statement, 88 FERC at 61,748 ("The new focus, however, will be on the impact of the project on the relevant interests balanced against the benefits to be gained from the project. As long as the project is built without subsidies from existing ratepayers, the fact that it would be used by affiliated shippers is unlikely to create a rate impact on existing ratepayers.").

[94] August 2017 Order, 160 FERC 61,022 at P 47 (citing *Transcontinental Gas Pipe Line Company, LLC*, 141 FERC ¶ 61,091, at P 21 (2012)).

[95] 149 FERC ¶ 61,199, at P 28 (2014) (disagreeing that contracts between affiliates are speculative by observing that (1) there is "no evidence of self-dealing;" (2) the pipeline will be required "to execute firm contracts for the capacity levels and terms of service represented; and (3) recourse rates will be calculated based on designed capacity, not subscribed capacity, thereby placing pipeline at risk for unsubscribed capacity").

[96] *Constitution Pipeline*, 149 FERC ¶ 61,199 at P 28. We also note that NEXUS will be required to comply with the Commission's Part 358 Standards of Conduct, which require NEXUS to treat all customers, whether affiliated or non-affiliated, on a non-discriminatory basis. 18 C.F.R. Part 358 (2017). NEXUS's tariff incorporates these requirements. *See* NEXUS Application, Exhibit P, Pro Forma FERC NGA Gas Tariff, General Terms and Conditions, Section 24, Standards of Conduct Compliance Procedures ("All terms and conditions contained in this Tariff shall be applied in a uniform and nondiscriminatory manner without regard to affiliation of any entity to Pipeline.").

statement affirming that it has executed firm contracts for the volumes and service terms equivalent to those in its precedent agreements" prior to commencement of construction.[97]

39. Sierra Club questions the probative value of contractual relationships between NEXUS and its shippers by pointing out that DTE Electric, for example, will seek recovery of its NEXUS-related costs from "captive ratepayers," resulting in "guaranteed rates," and the ability to "reallocate the financial risk of the NEXUS pipeline from the owners of the project to captive ratepayers."[98] On rehearing, Sierra Club glosses over the important role played by the Michigan PSC, which is responsible for setting retail rates for DTE Electric and DTE Gas. The Michigan PSC will disallow costs that are not justified according to Michigan state law after considering, in the judgment of the Michigan PSC, the interests of Michigan ratepayers, among other interests.[99] To the extent Sierra Club's arguments represent dissatisfaction with proceedings DTE Gas and DTE Electric had before the Michigan PSC and in which Sierra Club was a participant,[100] we reiterate that matters relating to DTE Gas and DTE Electric retail rates are matters for the Michigan PSC and are beyond the scope of a NGA section 7 proceeding.[101] Therefore, it is reasonable for the Commission to have confidence that the contracts between NEXUS and affiliates DTE Electric and DTE Gas are good evidence of need and good evidence that the project is in the public interest.[102]

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[97] August 2017 Order, 160 FERC ¶ 61,022 at Ordering Paragraph (B)(4).

[98] Sierra Club Rehearing Request at 6-7.

[99] The Michigan Public Service Commission (Michigan PSC) has the jurisdiction and authority to control and regulate rates, charges, and conditions of service for the retail sale of natural gas to consumers within Michigan. *See* Michigan PSC December 20, 2015 Notice of Intervention.

[100] Much of Sierra Club's rehearing request references its November 17, 2016 comments, which, in turn, refer to Sierra Club testimony before the Michigan PSC. *See, e.g.,* Sierra Club November 17, 2016 Motion at 17-21.

[101] *See* August 2017 Order, 160 FERC ¶ 61,022 at P 48 n.38 ("Issues related to DTE Gas's ability to recover costs associated with its decision to subscribe to service on NEXUS involve matters to be determined by the Michigan Public Service Commission; those concerns are beyond the scope of the Commission's jurisdiction.").

[102] The Michigan PUC's supervision of the contracts boosts their probative value. *See Guardian Pipeline, L.L.C*, 91 FERC ¶ 61,285, at 61,966-67 (2000) ("It is also the Commission's preference not to second guess the business decisions of end users or challenge the business decision of an end user on whether it is economic to undertake direct

40. Further, the August 2017 Order found no evidence of affiliate abuse or anti-competitive or other inappropriate behavior, and none has been provided on rehearing. Sierra Club errs in assuming that DTE Electric has a "perverse incentive" to "manufacture a market" for transportation service on the NEXUS pipeline.[103] We further note that the collective capacity subscribed by DTE Energy affiliates DTE Gas and DTE Electric only amounts to 150,000 Dth per day of the 885,000 Dth per day subscribed. This demonstrates that the project has a diversity of subscribers.[104]

41. Finally, Sierra Club's citation to *EDF Development Inc*.[105] is unavailing. In *EDF Development*, the Commission addressed the disposition and acquisition of jurisdictional facilities under the Commission's Merger Policy Statement pursuant to Federal Power Act section 203.[106] Sierra Club asserts *EDF Development* demonstrates the concern the Commission should have for vertical market power that might exist between DTE Energy affiliates. The Commission recognized in *EDF Development* that an entity gaining control over generation assets and inputs such as natural gas transportation or electric transmission assets could harm competition. But, *EDF Development* does not apply to an NGA section 7 proceeding. In any event, the concern that DTE Energy will be able to exercise vertical market power in the wholesale natural gas sales market is unfounded. Sierra Club overstates the involvement of DTE Energy affiliates in the subscribed capacity of the NEXUS project facilities. As noted above, the diversity of subscribed capacity shows a more robustly competitive market than implied by Sierra Club.

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service from a pipeline supplier, *particularly when that decision has been approved by the appropriate state regulatory body*.") (emphasis added) (citing *Southern Natural Gas Co.*, 76 FERC ¶ 61,122, at 61,635 (1996)).

[103] Sierra Club Rehearing Request at 7.

[104] August 2017 Order, 160 FERC ¶ 61,022 at P 9.

[105] 126 FERC ¶ 61,140, at P 35 (2009) ("In transactions combining electric generation assets with inputs to generating power (such as natural gas transportation or fuel) or electric transmission assets, competition can be harmed if the transaction increases a firm's ability or incentive to exercise vertical market power in wholesale electricity markets.")). *See* Sierra Club Rehearing Request at 7.

[106] 16 U.S.C. § 824b (2012).

C. Commission Approval of the Application under NGA Section 7 and Exercise of Eminent Domain

42. Coalition states the August 2017 Order violated the NGA because the project is an export pipeline that should have been filed under NGA section 3, not section 7. Coalition also argues that only transportation of gas in interstate commerce "for ultimate distribution to the public," was designated by Congress as being affected with the public interest.[107] Coalition asserts that it is unconstitutional to take private property for private use, regardless of compensation,[108] and that the taking that would occur here is not for public use, even under the expansive rule articulated in *Kelo v. City of New London*.[109] In contrast to *Kelo*, Coalition asserts that the beneficiaries in these proceedings are the ultimate owners of NEXUS and the citizens of Canada and other nations that purchase natural gas from Canada.[110]

43. The City of Oberlin asserts that substantial demand for the capacity will be for export to Canada and that the NEXUS pipeline "will not transport natural gas for delivery to the public."[111] The City of Oberlin disputes that demand for export capacity can be used to support a section 7 certificate, and, even if it could, the eminent domain power based on such a certificate would run afoul of the Fifth Amendment because the authorization would be one for exports rather than one for the public use.

44. Communities for Safe and Sustainable Energy likewise takes the position that the primary driver of the project is the export of natural gas.[112]

45. The arguments by Coalition, the City of Oberlin, and Communities for Safe and Sustainable Energy are underpinned by the mistaken assumption that the capacity on the NEXUS Project is not for domestic consumption. As this is a mistaken assumption, we therefore disagree that the applications should have been or could have been analyzed under

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[107] NGA section 1(a), 15 U.S.C. § 717 (2012).

[108] Coalition Eminent Domain Rehearing Request at 6 (citing *Hairston v. Danville & W.R. Co.*, 208 U.S. 598, 606 (1908)).

[109] 545 U.S. 469 (2005). *See* Coalition Eminent Domain Rehearing Request at 6.

[110] Coalition Eminent Domain Rehearing Request at 7. Enbridge, Inc. and DTE Energy are joint owners of NEXUS. August 2017 Order, 160 FERC ¶ 61,022 at P 6 & n.4.

[111] City of Oberlin Rehearing Request at 31.

[112] Communities for Safe and Sustainable Energy Rehearing Request at 1-2.

NGA section 3. On the contrary, a substantial amount of the firm commitments supporting the NEXUS project is for firm delivery points within the U.S.[113] Further, all shipper commitments have secondary firm delivery rights within the U.S.[114] In addition, NEXUS's application listed 11 interconnections, representing approximately 1.4 million Dth per day of market interconnectivity with "municipal entities, local distribution companies, electric generating facilities, and industrial users whose facilities or properties are in the expected path of the NEXUS Project."[115] The project is not an export facility.

46. The Commission has fully addressed the Fifth Amendment issues raised by Coalition and the City of Oberlin in other proceedings.[116] For the reasons set forth in those orders, rehearing is denied.

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[113] Of the 885,000 of Dth per day subscribed capacity, three directly serve domestic end users for 200,000 Dth per day: DTE Gas (75,000 Dth per day), DTE Electric (75,000 Dth per day), and Columbia Gas of Ohio (50,000 Dth per day). Four are domestic producers and marketers for 425,000 Dth per day: CNX Gas Company (150,000 Dth per day), Noble Energy (75,000 Dth per day), and Chesapeake Energy Marketing (200,000 Dth per day) may also serve domestic end users. But only two shippers, Canadian companies, subscribed for 260,000 Dth per day, are anticipated to possibly supply gas to Canadian customers: Union (150,000 Dth per day) and Enbridge Gas Distribution (110,000 Dth per day). *See* August 2017 Order, 160 FERC ¶ 61,022 at P 9. Both Coalition and the City of Oberlin acknowledge that that some of the gas to be transported will be supplied to residents of Ohio and Michigan. Coalition Eminent Domain Rehearing Request at 7; City of Oberlin Rehearing Request at 31.

[114] NEXUS March 18, 2016 Data Request Response, Attachment 1A. *See* NEXUS November 18, 2016 Answer at 2.

[115] NEXUS Application at 7-8 (listing eleven interconnections). *See* Final EIS at 2-7 (Table 2.1.1-3, NGT Project Tee-Taps) ("The tee-tap locations on the NGT Project represent locations where NEXUS is presently negotiating gas delivery contracts with potential customers. These locations do not necessarily represent the locations where gas will eventually be delivered because negotiations may not be successful and result in a gas delivery contract."); Final EIS at 1-4 ("In the draft EIS, we considered the 6 definitive receipt and delivery points on the NGT Project to be essential to the Project's objective, whereas we did not consider the 13 tee-tap sites to be essential.").

[116] *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250, at PP 30-35 (2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at PP 76-81; *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at PP 58-63. *See Delaware Riverkeeper Network v. FERC*, No. 17-5084 (D.C. Cir. July 10, 2018) (rejecting Fifth Amendment Due Process challenge to (1) statutory scheme for Commission recovery of expenses from the regulated industry; and

D. Propriety of Blanket Certificate Conferring Eminent Domain Authority

47. The City of Oberlin states the Part 157, Subpart F blanket certificate for the construction, acquisition, abandonment, and replacement and operation of pipeline facilities[117] violates NGA section 7 because it authorizes activity that actually requires specific authorization under NGA section 7. The City of Oberlin also argues the exercise of eminent domain as part of the blanket construction certificate is not legal. The City of Oberlin states that companies have engaged in activities that cannot be categorized as "routine," including approvals for lateral lines, compressor stations, and other facilities.[118]

48. The City of Oberlin does not argue that NEXUS failed to satisfy the provisions of the Commission's blanket certificate program; therefore, the City of Oberlin's arguments amount to a collateral attack on a long-standing feature of the Commission's certificate program. Therefore, we decline to grant rehearing.[119]

49. Even if the City of Oberlin's arguments did not amount to a collateral attack, we would still deny rehearing. The blanket certificate program is consistent with the NGA. In 1982, the Commission created the blanket certificate program, citing its authority vested in section 7(c) of the NGA.[120] The blanket certificate authorization was created because the Commission found that a limited set of activities did not require case-specific scrutiny as they would not result in a significant impacts on rates, services, safety, security, competing

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(2) Commission use of tolling orders to satisfy deadlines for acting on requests for rehearing).

[117] *See* August 2017 Order, 160 FERC ¶ 61,022 at PP 77-78.

[118] Oberlin Rehearing Request at 33-34.

[119] *See Texas Gas Transmission Corp.*, 65 FERC ¶ 61,275, at 62,625 (1993).

[120] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, FERC Stats. & Regs. ¶ 30,665 (1985) (cross-referenced at 33 FERC ¶ 61,007). *See also ANR Pipeline Co*., 50 FERC ¶ 61,140 at 61,427 (1990) ("blanket and individual certificates are issued under section 7 of the Natural Gas Act (NGA) and, as such, are subject to the same statutory requirements. Accordingly, any terms and conditions imposed by the Commission, whether they are imposed on a case-specific basis or through a blanket certificate, must conform to section 7(e) of the NGA which requires that the terms and conditions be 'reasonable' and 'required' by the 'public convenience and necessity.'").

natural gas companies or their customers, or on the environment.[121] Blanket authority is issued pursuant to the public convenience and necessity standard.[122]

50. A blanket certificate authorizes routine activities on a self-implementing basis – that is – a blanket certificate relieves natural gas companies from the requirement of having to obtain a certificate of public convenience and necessity for certain covered activities. The rationale for offering a blanket certificate is that there are certain activities that natural gas pipeline operators must undertake in maintaining and operating facilities for which they have already received a certificate of public convenience and necessity. The blanket certificate increases administrative efficiencies for the Commission and companies subject to its jurisdiction by reducing the filing requirements for those activities.[123] In some instances, these activities are so well understood as an established industry practice that little scrutiny is required to determine their compatibility with the public convenience and necessity.[124] For other types of activities, the Commission requires that companies notify the public in advance and provides an opportunity to protest.[125]

51. Because all the activities permitted under the blanket certificate regulations must satisfy our environmental requirements and meet certain cost limits, they have minimal impacts; thus, the close scrutiny involved in considering applications for case-specific certificate authorization is not necessary to ensure compatibility with the public convenience and necessity. Concerns that a company will acquire and construct facilities beyond the scope of the Commission approved certificate authority are misplaced, because the financial

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[121] *Revisions to the Blanket Certificate Regulations and Clarification Regarding Rates*, Order No. 686, FERC Stats. & Regs. ¶ 31,231, at P 7 (2006) (cross-referenced at 117 ¶ 61,074), *order on reh'g*, Order No. 686-A, FERC Stats. & Regs. ¶ 31,249, *order on reh'g*, Order No. 686-B, FERC Stats. & Regs. ¶ 31,255 (2007), explaining that "[t]he blanket certificate program was designed to provide an administratively efficient means to authorize a generic class of routine activities, without subjecting each minor project to a full, case-specific NGA section 7 certificate proceeding." (October 2006 Final Rule).

[122] 18 C.F.R. § 157.208 (c)(7) (2017).

[123] *Meridian Oil, Inc.*, 58 FERC ¶ 61,002, at 61,004 (1992). *See also Mountain Valley Pipeline*, 161 FERC ¶ 61,043 at P 74.

[124] *Interstate Pipeline Certificates for Routine Transactions*, Order No. 234, FERC Stats. & Regs. ¶ 30,368 (1982) (crossed-referenced at 19 FERC ¶ 61,216). These types of blanket certificate project activities are known as Automatic.

[125] These types of blanket certificate project activities are known as Prior Notice.

and environmental thresholds inherent in the blanket certificate program are intended to preclude the type of work petitioners envision.

52. Blanket authority enables a company to undertake activities that go beyond those described in a case-specific application. However, as noted above, blanket authority is limited to activities that the Commission has found do not result in significant adverse impacts, and thus do not require the same scrutiny as activities subject to case-specific certificate review. Thus, a blanket certificate is intended to serve as adjunct authority to enable a company to make certain relatively minor, cost-constrained modifications to a larger system that has been separately scrutinized and approved under case-specific certificate authorization. To ensure projects with potentially significant impacts are not constructed under blanket authority, companies are prohibited from dividing larger projects into multiple smaller blanket-eligible segments.[126]

53. Before acting under blanket authority, a company must provide notice to all affected landowners at least 45 days in advance.[127] In many cases, landowners must receive notice 60 days in advance, accompanied by an opportunity to protest the proposed project.[128] Exceptions to this notification are limited.[129] In establishing this notice period, the Commission considered the needs of landowners and the nature of permitted projects.[130] Additionally, holders of blanket certificate authority must document minor actions performed under the blanket certificate program in either annual reports or as Prior Notice applications,[131] subject to the Commission's environmental review in accordance with section 157.206 of the Commission's regulations.[132] For these reasons, we find our blanket

[126] 18 C.F.R. § 157.208(b) (2017) states a blanket certificate holder "shall not segment projects in order to meet the [blanket program] cost limitation."

[127] 18 C.F.R. § 157.203(d).

[128] *Id*. § 157.205.

[129] *Id*. § 157.203(d)(3).

[130] Order No. 686, FERC Stats. & Regs. ¶ 31,231, *order on reh'g*, Order No. 686-A, FERC Stats. & Regs. ¶ 31,249 at P 16, *order on reh'g*, Order No. 686-B, FERC Stats. & Regs. ¶ 31,255.

[131] Prior Notice applications are those types of blanket certificate program activities which are not deemed automatic and require 60-day notice of publication in the Federal Register. https://www.ferc.gov/industries/gas/indus-act/blank-cert.asp.

[132] Final EIS at 1-2.

certificate process in full compliance with the NGA and consistent with our notice and comment requirements.

54. Receipt of a Part 157 blanket certificate does confer the right of eminent domain authority under section 7(h) of the NGA.[133] However, Commission regulations require companies to include information on relevant eminent domain rules in notices to potentially affected landowners.[134] The compensation landowners receive for property rights is a matter of negotiation between the gas company and landowner, or is determined by a court in an eminent domain proceeding.[135] In view of the above-noted blanket program procedures and protections, we expect landowners will have the opportunity to raise specific concerns and seek specific relief regarding NEXUS's reliance on blanket authority in undertaking any future activity.

E. Return on Equity

55. As part of a NGA section 7 proceeding, the Commission reviews initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard.[136] Unlike NGA sections 4 and 5, NGA section 7 does not require the Commission to make a determination that an applicant's proposed initial rates are or will be just and reasonable before the Commission certificates new facilities, expansion capacity, and/or services.[137] Recognizing that full evidentiary rate proceedings can take a significant amount of time, Congress gave the Commission the discretion in section 7 certificate proceedings to approve initial rates that will "hold the line" and "ensure that the consuming public may be protected" while awaiting adjudication of just and reasonable rates under the more time-

[133] *See* 15 U.S.C. § 717f(h) (2012); *also Columbia Gas Transmission, LLC v. 1.01 Acres*, 768 F.3d 300, 314 (3rd Cir. 2014) (finding that the plain meaning of the Commission's Part 157 blanket certificate regulations grants the holder of a blanket certificate the right of eminent domain to obtain easements from landowners).

[134] 18 C.F.R. § 157.203(d)(2)(v) (2017).

[135] *Delaware Riverkeeper Network, supra* n.116, 2018 WL 3352897, at *5 (noting that, in an eminent domain action arising under the Natural Gas Act, "the landowner will be entitled to just compensation, as established in a hearing that itself affords due process").

[136] *See* August 2017 Order, 160 FERC ¶ 61,022 at PP 79-90.

[137] *See Atl. Refining Co. v. Pub. Serv. Comm'n of New York*, 360 U.S. 378, 390 (1959) (*CATCO*).

consuming ratemaking sections of the NGA.[138] The August 2017 Order applied the Commission's established policy, which balances both the consumer and investor interests, in establishing NEXUS's initial rates. Specifically, the Commission approved NEXUS's proposed 14 percent return on equity but required that NEXUS design its cost-based rates on a capital structure that includes no more than 50 percent equity, rather than 60 percent equity proposed by NEXUS.[139]

56. On rehearing, the City of Oberlin argues the 14 percent return on equity (ROE) is unsupported by substantial evidence and will result in excessive rates.[140] The City of Oberlin acknowledges that NGA section 7 does not require a comprehensive rate case; however, it compares the 14 percent ROE determined in these proceedings to an average of state approved ROEs for gas utilities (9.6 percent at a 49.93 percent equity ratio in 2015 and 9.45 percent at a 50.42 percent equity ratio in 2016) to support its position that the Commission determined ROE was excessive.[141]

57. NEXUS originally proposed an overall rate of return of 10.7 percent, using a 40/60 percent debt/equity structure with a 5.75 percent cost of debt and a 14 percent return on equity.[142] The August 2017 Order allowed NEXUS to retain the 14 percent return on equity; however, it required NEXUS to reduce the equity component of its capital structure from 60 percent to 50 percent and required NEXUS to recalculate its rates accordingly.[143] This requirement reduces the overall maximum recourse rate, which acts as a cap on a

[138] *See id.* at 392.

[139] August 2017 Order, 160 FERC ¶ 61,022 at P 81.

[140] City of Oberlin Rehearing Request at 20-25.

[141] *Id*. at 23. We note an incongruence between the City of Oberlin's argument on one hand that the pipeline is not needed and its assertion on the other hand that "[a] greenfield interstate pipeline is a fairly safe bet, and faces far fewer risks than any other type of utility project." City of Oberlin Rehearing Request at 16-20, 24. The better view is to recognize that there is risk and uncertainty involved in the decision to support a project of this magnitude, which both lends credibility to the contracts underlying the project and supports the ROE determination.

[142] August 2017 Order, 160 FERC ¶ 61,022 at P 80.

[143] *Id*. P 81.

pipeline's rate of return.[144] The August 2017 Order cited favorably several previous Commission orders accepting a 14 percent ROE in these circumstances reflects the increased business risks (regulatory, contractual, and construction) that new pipeline companies like NEXUS face.[145] Because new entrants building greenfield natural gas pipelines do not have an existing revenue base, they face greater risks constructing a new pipeline system and servicing new routes than established pipeline companies do when adding incremental capacity to their systems.[146] This is the reason why Commission policy requires existing pipelines that provide incremental services through an expansion to use the ROE underlying their existing system rates and last approved in a section 4 rate case proceeding when designing the incremental rates. This tends to yield a return lower than 14 percent, reflecting the lower risk existing pipelines face when building incremental capacity.[147]

58. We disagree that the treatment of ROE in these proceedings was flawed. The approach here was consistent with recent Commission practice.[148] The City of Oberlin's comparison to allowed returns in state proceedings is unpersuasive because the state proceedings are evaluating established utilities with captive ratepayers, whereas the pipeline here is a newly conceived, greenfield pipeline that will be required to survive in a competitive environment, which includes bearing the risk of unsubscribed capacity. As such, NEXUS faces higher risk than the utilities in the state proceedings.

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[144] The maximum recourse rate is the maximum rate the pipeline allowed to charge for firm transportation service.

[145] August 2017 Order, 160 FERC ¶ 61,022 at P 80 and n.64.

[146] *See, e.g., Rate Regulation of Certain Natural Gas Storage Facilities*, Order No. 678, FERC Stats & Regs. 31,220, at P 127 (2006) (explaining that existing pipelines who need only acquire financing for incremental expansions face less risk than "a greenfield project undertaken by a new entrant in the market").

[147] *See, e.g., Gas Transmission Northwest, LLC,* 142 FERC ¶ 61,186 at P 18 (requiring use of 12.2 percent ROE from recent settlement rather than the proposed 13.0 percent).

[148] *See Sabal Trail Transmission,* 154 FERC ¶ 61,080, *reh'g denied,* 156 FERC ¶ 61,160 (2016), *aff'd in relevant part sub nom. Sierra Club v. FERC,* 867 F.3d 1357 (D.C. Cir. 2017) (finding that the Commission "adequately explained its decision to allow Sabal Trail to employ a hypothetical capital structure" of 50 percent debt and 50 percent equity, with a 14 percent return on equity).

59. The City of Oberlin cites *First ECA Midstream*[149] to demonstrate that the Commission failed to adequately probe the cost of debt component of the overall return.[150] However, *First ECA Midstream*, does not apply here because it is a case involving existing facilities, not substantial new construction like in these proceedings.

60. NEXUS will be required to file a cost and revenue study at the end of three years of actual operation,[151] and interested parties will have an opportunity at that time to consider further action.[152] This filing will be required to be consistent with the requirements of a cost of service filing at section 154.313 of the Commission's regulations.[153] This data will provide the Commission and interested parties with actual cost and revenue data they can use to fully assess NEXUS's maximum recourse rates and "investigate whether the rates remain just and reasonable rates."[154]

61. The City of Oberlin states NEXUS does not face risk for the unsubscribed pipeline capacity "since that cost will eventually be passed on to ratepayers."[155] We disagree that NEXUS faces no risk because it is assured of receiving a certificate and assured of using the power of eminent domain to obtain the necessary property rights. Even with the section 7 certificate and concomitant authority of eminent domain, NEXUS is still responsible for unsubscribed capacity. As described above,[156] the recourse rates are derived using billing

[149] 155 FERC ¶ 61,222 at PP 22-23 (2016) (requiring applicant in NGA section 7(c) proceeding involving existing gathering facilities to use the ROE approved in applicant's most recently litigated NGA section 4, 15 U.S.C. § 717c (2012), rate case). *See* City of Oberlin Rehearing Request at 4, 24 (citing *First ECA Midstream*).

[150] City of Oberlin Rehearing Request at 24.

[151] August 2017 Order, 160 FERC ¶ 61,022 at ordering para. (F).

[152] *Id*. P 91.

[153] 18 C.F.R. § 154.313 (2017). Subsection 154.313(e)(8) requires the filing of a "rate of return claimed with a brief explanation of the basis."

[154] August 2017 Order, 160 FERC ¶ 61,022 at P 91.

[155] City of Oberlin Rehearing Request at 24 n.26 (citing Sierra Club Rehearing Request).

[156] *See supra* P 27.

determinants based on overall capacity, not subscribed capacity.[157] Therefore, NEXUS faces a very real risk that any unsubscribed capacity will reduce its ability to meet its revenue requirement.

62. Although we allowed NEXUS to use a 14 percent ROE, we only did so after imposing a hypothetical capital structure that raised the debt level to 50 percent and dropped the equity level to 50 percent. This policy reduces the impact of NEXUS's ROE and ensures that NEXUS's rates are on a level playing field with other new greenfield pipelines. The D.C. Circuit has ruled that the Commission is permitted to use a hypothetical capital structure to decrease a pipeline's proposed rates, as we did here, in the interest of consumer protection.[158]

63. The Commission reviewed and approved NEXUS's initial rates for service using proposed new pipeline capacity under the public convenience and necessity standard, which is a less rigorous standard than the just and reasonable standard under NGA sections 4 and 5.[159] The approved initial rates will "hold the line" and "ensure that the consuming public may be protected," until just and reasonable rates can determined through the more thorough and time-consuming ratemaking sections of the NGA.[160] Here, the Commission and interested parties will have the opportunity to fully assess NEXUS's rates after receiving actual cost and revenue data no later than three years after the in-service date for NEXUS's proposed facilities.[161]

F. Voluntary Easements

64. Coalition states that the Commission has provided misleading or false information in its pamphlet entitled "An Interstate Natural Gas Facility on My Land? What do I Need to

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[157] NEXUS Application at 36.

[158] *Sabal Trail*, 867 F.3d at 1378; *see also Commc'ns Satellite Corp. v. FCC*, 611 F.2d 883, 904 (D.C. Cir. 1977) ("Perhaps the ultimate authority for imputing debt when necessary to protect rate-payers from excessive capital charges is the Supreme Court's statement in Hope Natural Gas, that '[t]he rate-making process under the [Natural Gas] Act . . . involves a balancing of the investor and consumer interests.'") (quoting *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)).

[159] *CATCO*, 360 U.S. at 390-92. *See Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61197, at P 62 (2018).

[160] *CATCO*, 360 U.S. at 392.

[161] August 2017 Order, 160 FERC ¶ 61,022 at P 91.

Know?"[162] Coalition asserts that the Commission pamphlet is flawed in four ways.[163] In particular, the Coalition states that the pamphlet: (1) fails to inform the public that the applicants cannot begin construction until after the Commission issues the certificate; (2) does not advise property owners to obtain an attorney or get legal advice on a variety of topics; (3) fails to advise the public that only an intervenor may request rehearing and subsequently appeal a Commission order; and (4) "suggests that the property owner is obligated to mow and maintain the easement at their expense."[164]

65. Sustainable Medina states the threat of eminent domain was illegally invoked to compel negotiations, and that the Commission's information pamphlet includes "express advice . . . that [landowners] should commence negotiations months or years before issuance of the Certificate."[165]

66. The Commission has found that this particular pamphlet provides "sufficient information and sources for additional information,"[166] and none of Coalition's arguments that the pamphlet is flawed have merit. Noting that the pamphlet states that "the company will contact [the landowner] to discuss obtaining an easement prior to filing the application," Coalition claims that the Commission "fails to inform [the landowner] that the federal appellate courts have held that the Applicant cannot develop the pipeline until after the Certificate is issued by FERC."[167] Coalition is mistaken. The pamphlet explains that voluntary negotiations might fail and that a court would be called upon to address the issue.[168] These statements accurately convey the message that voluntary transfer of

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[162] Coalition Environmental Rehearing Request at 19.

[163] *Id*. at 19-20.

[164] City of Oberlin Rehearing Request at 19-20.

[165] Sustainable Medina Rehearing Request at 3.

[166] *Transcon. Gas Pipe Line Corp.*, 115 FERC ¶ 61,200, at 61,715 (2006) ("Transco notified all landowners in accordance with 18 CFR § 157.6, which included, among other things, a copy of the Commission's pamphlet 'An Interstate Natural Gas Facility on My Land? What do I Need to Know?' The pamphlet explains the Commission's process and addresses the basic concerns of landowners, including safety and environmental issues.").

[167] Coalition Environmental Rehearing Request at 19.

[168] Pamphlet at 4 ("If [the section 7 application] is approved and you fail to reach an easement agreement with the company, access to and compensation for use of your land will be determined by a court."); *id.* at 8 ("If the Commission approves the project and no agreement with the landowner is reached, the company may acquire the easement under

easement is not required. The decision to seek legal advice is one only a landowner can make, and the Commission is in no position to advise landowners on this question. Although the pamphlet may not discuss the legal rights of intervenors to Commission proceedings, the notices issued for these applications indicated that "[o]nly parties to the proceeding can ask for court review of Commission orders in the proceeding."[169] Finally, we have reviewed the pamphlet and do not believe it suggests the landowner must maintain the right-of-way. Rather, the pamphlet discusses what the pipeline operator may do as part of its maintenance of the pipeline.

67. Sustainable Medina asserts that language in the Commission pamphlet can be interpreted as improperly advising landowners to enter into negotiations with an applicant for a section 7 certificate. Further, Coalition appears to complain that the pamphlet did not give property owners legal advice. The encouragement of voluntary transactions is not improper in any way. Indeed, it is Commission policy to encourage settlements, in general, and voluntary acquisition of property rights in advance of application, specifically, in order to avoid the unnecessary use of eminent domain.[170] Moreover, landowners are responsible for protecting their legal rights; it is not the Commission's role to provide them, or any other participant in a Commission proceeding, with legal advice.

68. There is nothing improper about a certificate applicant seeking voluntary easements and, in the absence of specific misconduct on the part of an applicant, the extent to which an applicant has obtained by voluntary means the necessary property rights for a project can serve as a useful measure of local concern about a project.

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eminent domain (a right given to the company by statute to take private land for Commission-authorized use) with a court determining compensation.").

[169] *See e.g.* December 7, 2015 Notice of Applications at 3.

[170] *See* August 2017 Order, 160 FERC ¶ 61,022 at P 33. We note that such voluntary negotiations are not only not nefarious, but also may yield benefits such as helping pipeline project sponsors and land owners reach agreement on issues such as modifications to the proposed route based on landowner input. *See id.* P 37 ("NEXUS incorporated 259 route variations into its proposed route for various reasons, including landowner requests, avoidance of sensitive resources, or engineering considerations"); *see also* NEXUS December 2, 2016 Answer at 11-12.

G. Alternatives under NEPA

1. Range of Alternatives Based on Application for NGA Certificate

69. Sierra Club argues the Commission failed to consider alternatives to the project in light of the eroding demand for gas in the markets to be served. Sierra Club also argues the Commission failed to acknowledge the existence of contrary information about projections of demand growth, overlooked alternatives that would have caused significantly less environmental damage, and thereby failed to independently evaluate the need for the pipeline. Sierra Club claims it is "highly likely that much less than 885,000 Dth/d will be transported through the pipeline if it becomes operational."[171]

70. Sierra Club claims the primary purpose of NEXUS is to "steal capacity away from other pipelines."[172] As such, Sierra Club claims the no-action alternative is therefore viable. Sierra Club points to environmental documents in other proceedings that considered "energy conservation, efficiency, and renewable energy alternatives."[173] Sierra Club acknowledges that the Commission considered six existing pipeline systems; however, Sierra Club explains that the Commission's "uncritical and unthinking acceptance of precedent agreements from affiliate utilities has infected its NEPA review."[174]

71. Sustainable Medina states the Commission did not consider reasonable alternatives when it defined the project purpose too narrowly.[175]

72. We find that the Final EIS thoroughly examined alternatives to the certificated route. NEPA requires the Commission to identify and analyze reasonable alternatives during its review of a proposed action.[176] Under NEPA, alternatives are reasonable if they can

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[171] Sierra Club Rehearing Request at 20-26.

[172] *Id*. at 22 ("DTE Gas' decision to reallocate its gas use from ANR and Vector pipelines to NEXUS without increasing its use, is a stark example of the missing net increase in gas demand.").

[173] Sierra Club Rehearing Request at 23.

[174] *Id*. at 23.

[175] Sustainable Medina Rehearing Request at 5.

[176] *See* 42 U.S.C. § 4332(2)(C) (2012); 40 C.F.R. §§ 1502.1, 1502.14, and 1502.16 (2017). *See also Minisink Residents*, 762 F.3d at 102.

feasibly achieve the project's aims.[177] "The agency must consider a reasonable range of alternatives, but it need not consider options that are inconsistent with the action's purpose."[178] NEPA requires the Commission to "'identify the reasonable alternatives to the contemplated action' and 'look hard at the environmental effects of [its] decision[ ].'"[179] CEQ regulations implementing NEPA explicitly permit the Commission, in rejecting alternatives, merely to "briefly discuss the reasons for their having been eliminated."[180]

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[177] *See, e.g., Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.). *See also City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999); 43 C.F.R. § 46.420(b) (2017) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action"). When considering the purpose of a proposal under NEPA, "the agency should take into account the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). It is also appropriate to consider "the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Id*. Here, "the public interest that the Commission must protect always includes the interest of consumers in having access to an adequate supply of gas at a reasonable price." *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1003 (D.C. Cir. 1990). *See also FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944) ("[T]he Commission was told by section 7(c) [of the NGA], as originally enacted, that it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.'"); *Atl. Ref. Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 388 (1959) (quoting same, also noting that the 1942 amendments to the NGA, which broadened section 7(c), were not intended to change this declaration of purpose).

[178] *Oceana, Inc. v. Ross*, 275 F. Supp. 3d 270, 294 (D.D.C. 2017).

[179] *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 967 (D.C. Cir. 2000) (quoting *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 374 (D.C.Cir.1999)) (alterations in original).

[180] *City of Rockingham, N. Carolina v. FERC*, 702 Fed.Appx. 106, 112 (4th Cir. July 6, 2017) (quoting 40 C.F.R. § 1502.14(a) (2017)).

73. The Final EIS discussion of alternatives, which spanned 143 pages,[181] sought to "determine whether the alternatives would be reasonable and environmentally preferable to the proposed action while still meeting project objectives."[182] To those ends, the Final EIS evaluated the "no-action alternative, system alternatives, major route alternatives, aboveground facility site alternatives, minor route variations, and alternative compressor station locations as alternatives to the proposed action."[183]

74. Sierra Club's assertion that there are alternatives to the NEXUS Pipeline that would not require additional pipeline construction is unfounded. Sierra Club's relies mainly on the fact that there are nearby pipelines. For example, Sierra Club states the Columbia Gas Transmission (Columbia Gas) pipeline is within a half-mile of a receipt point on the NEXUS pipeline. Sierra Club points out that Columbia Gas network also connects to Panhandle Eastern Pipe Line Company LP and ANR Pipeline Company (ANR). Sierra Club even states, without any support, that using Columbia Gas and ANR would "require very little expansion of the existing system."[184] "[H]owever, the main constraint limiting the viability of these systems is that none of these existing pipelines have capacity available for transporting the required volumes of natural gas needed by the Projects and subsequently would also require expansion of facilities."[185] The Final EIS also observed that alternative pipelines do not serve all of the proposed receipt and delivery points, meaning the nearby pipelines would have to construct additional lateral facilities.[186] Ironically, the Final EIS estimated "that about 300 miles of new pipeline or pipeline loop would be required to achieve the Projects' objectives, which is substantially more than the proposed Projects."[187]

75. The purpose of the NEXUS Project is to transport natural gas and the Commission therefore was not required to evaluate alternatives that do not meet this purpose.[188]

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[181] Final EIS at 3-1 to 3-143.

[182] *Id*. at 3-1.

[183] *Id*. at ES-17.

[184] Sierra Club Rehearing Request at 24.

[185] Final EIS at 3-5.

[186] *Id*. at 3-5.

[187] *Id*. at 3-5.

[188] August 2017 Order, 160 FERC ¶ 61,022 at P 143 ("Because the proposed projects' purpose is to transport natural gas, and electric generation from renewable energy

Alternatives advocated by Sierra Club such as renewable energy sources or energy efficiency and improved technology are not transportation alternatives under NEPA.[189] We agree with the determination in the Final EIS and need not consider renewable and conservation alternatives any further.

2. Predetermination Resulting from Voluntary Easements

76. Sustainable Medina asserts that NEXUS's practice of seeking voluntary easements prior to issuance of the NGA section 7 certificate, allegedly with the "use of the pressure and threat of eminent domain in negotiations with landowners," violated NEPA, which calls for an environmental review prior to the "irretrievable commitments of resources," and caused the Commission to engage in a predetermination of the company's preferred route.[190]

77. NEPA regulations place limits on actions taken while a proposal is pending review to ensure that alternatives are not prematurely eliminated from consideration.[191] However, Sustainable Medina's argument is built on the mistaken premise that NEXUS's seeking of voluntary easements is the type of irretrievable commitment of resources or prejudgment NEPA seeks to prevent. This is incorrect and we note the route has continued to change throughout these proceedings. NEXUS has incorporated 239 route variations resulting from

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resources is not a natural gas transportation alternative, it was not considered in the EIS.").

[189] *Transcontinental Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 at P 50 ("Although the EIS noted that renewable energy and energy conservation could potentially provide equivalent amounts of energy, neither were transportation alternatives and thus would not meet the project's objectives. Moreover, renewable energy and energy conservation measures could not provide additional natural gas supplies for residential and commercial uses, including heating and cooking, without extensive conversion of existing systems to electric-based systems."). Similarly, the Final EIS observed that "because the purpose of the Projects is to transport natural gas, and the generation of electricity from renewable energy resources or the gains realized from increased energy efficiency and conservation are not transportation alternatives, they are not considered or evaluated further in this analysis." Final EIS at 3-4.

[190] Sustainable Medina Rehearing Request at 4-5.

[191] *See* 40 C.F.R. § 1502.2(f) (2017) ("Agencies shall not commit resources prejudicing selection of alternatives before making a final decision"); *see also* 40 C.F.R. § 1506.1 (2017) (pending final decision, "no action concerning the proposal shall be taken which would . . . [l]imit the choice of reasonable alternatives").

"landowner requests, avoidance of sensitive resources, or engineering considerations."[192] These route changes resulted in changes to about 91 percent of the original route design.[193] Thus, while the final route was well-defined in the Final EIS, it was not determined until the August 2017 Order.

78. Commission staff thoroughly reviewed the environmental consequences of the NEXUS proposal, including reasonable alternatives and variations thereto, without regard to whether NEXUS had already secured easements by voluntary means. Further, the Commission continues to have full authority under the NGA to approve, approve with conditions, or deny the applications according to the principles established in the Certificate Policy Statement. Throughout these proceedings, NEXUS bears the risk that a certificate will be denied, or that the route will be changed notwithstanding NEXUS's acquisition of property rights. The Commission's retention of this authority rebuts any suggestion regarding prejudgment of the final decision or undue narrowing of alternatives.[194] Although

[192] August 2017 Order, 160 FERC ¶ 61,022 at P 141.

[193] August 2017 Order, 160 FERC ¶ 61,022 at P 141. For example, the Final EIS recommended and the August 2017 Order adopted an approximately 6.8-mile route adjustment, the Chippewa Lake D Route Variation. Final EIS at 3-94 (Table 3.4.11-5, Analysis of the Chippewa Lake D Route Variations); August 2017 Order, 160 FERC ¶ 61,022 at P 152.

[194] The cases Sustainable Medina cites in support of the predetermination argument are distinguishable. *See* Sustainable Medina Rehearing Request at 4. The court in *Forest Guardians v. U.S. Fish & Wildlife Serv*., 611 F.3d 692, 714-15 (10th Cir. 2010), explained that a finding of predetermination would require a finding that the agency "irreversibly and irretrievably committed itself to a plan of action." *Forest Guardians* further explained that it would not find predetermination "simply because the agency's planning, or internal or external negotiations, seriously contemplated, or took into account, the possibility that a particular environmental outcome would be the result of its NEPA review of environmental effects." *Id.* at 715. In *Save the Yaak Committee v. Block*, 840 F.2d 714, 717-19 (9th Cir. 1988), the Forest Service's decision to reconstruct a road had been made and contracts awarded prior to preparation of the environmental documents. *Id.* at 718. In *Fund for Animals v. Norton*, 281 F. Supp. 2d 209, 229-30 (D.D.C. 2003), the court rejected the argument that possible revocation of permits prevented a finding of predetermination, finding that the occurrence of environmental impacts while the permits were pending but before the NEPA environmental assessment was issued amounted to an irreversible and irretrievable commitment of resources. Each of these cases involved environmental impacts that occurred before issuance of the environmental document. Here, there have been no environmental consequences prior to the August 2017 Order that were attributable to Commission action. The voluntary acquisition of property by NEXUS is only possible with

the section 7 applicant holding property rights to complete a project may be a factor to consider in approving an application,[195] that factor is not determinative: the Commission is not *compelled* to approve a project *because* the applicant has property rights. Finally, any arguments regarding alleged abuse by applicants related to the acquisition of property rights may be advanced before a court of competent jurisdiction.[196] For now, however, the record demonstrates that Commission staff thoroughly evaluated the environment and had full latitude to consider reasonable alternatives.

3. City of Green Alternative Route

79. Coalition asserts that the Commission erroneously refused to choose an alternate route, which was known as the City of Green Alternative Route, that would have minimized the adverse effects discussed in a study by the Cleveland State University such as "damages due to loss of tax revenues to local governments," and loss in property values and loss of commercial areas."[197] Coalition asserts that the Commission should have chosen an alternative that avoids these areas. Coalition disputes the cost of the City of Green Alternative Route, saying it would be $10 million, not $28 million, and, in any event, states that even the high estimate is much less than the $123 million in lost tax revenue to be lost as a result of the pipeline.

80. In particular, Coalition disputes the observation in the Final EIS that that the City of Green Alternate Route would have impacted the Amish community. First, Coalition questions whether the Amish community would have been disproportionately affected, and second, Coalition asserts that the Commission failed to mention impacts to the Amish community in another proceeding that routed a pipeline through Amish territory.[198] Coalition also rejects the analysis in the Final EIS that evaluated the City of Green Alternate Route by looking at both the number of dwellings affected and the intensity of the impact, measured by determining "if the impact is concentrated in a small area, or if it is diluted

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the cooperation of landowners and is not something that this Commission can prevent. Further, there was no irreversible and irretrievable commitment to a plan of action prior to the issuance of the August 2017 Order.

[195] *See* August 2017 Order, 160 FERC ¶ 61,022 at P 49.

[196] Whether the parties have negotiated in good faith is an issue for the court. *CenterPoint Energy Gas Transmission Co.*, 109 FERC ¶ 61,197, at P 24 (2004).

[197] Coalition Environmental Rehearing Request at 10.

[198] *Id.* at 11.

over a large expanse."[199] Coalition asserts that intensity was "without any basis, legal precedent and or logic."[200]

81. Coalition states the City of Green Alternative Route would have resulted in a pipeline route with fewer residential dwellings within the "blast zone or impact radius" of the pipeline. Coalition asserts the City of Green Alternative Route would have resulted in fewer greenfield miles of pipeline construction, including fewer forest land crossings, and wetland crossings, and fewer conflicts with state and local parks, and conflicts with residential structures.

82. On rehearing, the City of Oberlin also challenges the evaluation of the City of Green Alternative Route. As factors in favor of the City of Green alternative, the City of Oberlin cites: (1) co-location with the Rover Pipeline Project; (2) reduction in impacts on landowners; and (3) the assertion that the NEXUS Project does not meet a crucial need that justifies heightened environmental and landowner impacts.[201]

83. We disagree that the August 2017 Order failed to adequately consider the City of Green Alternative Route. In the Final EIS, Commission staff thoroughly evaluated the City of Green Alternative Route.[202] The August 2017 Order reasonably rejected the City of

[199] Final EIS at 3-44.

[200] Coalition Environmental Rehearing Request at 11.

[201] City of Oberlin Rehearing Request at 25-26.

[202] *See* Final EIS at 3-23 to 3-46. Final EIS at 3-33 (Table 3.3.3-1 providing a route evaluation of the NEXUS proposal and the City of Green Alternative Route by looking at length, greenfield construction length, wetland acres affected, number of perennial waterbody crossings, number of wellhead protection areas, acres of agricultural land affected, acres of forested land affected, state parks and forest affected, county/metro parks affected, miles of steep slopes, miles of sidehill construction, dwellings within 50 feet, 100 feet, 150 feet, and other residential-type structures within 150 feet); Final EIS at 3-35 (Table 3.3.3-2 showing compressor station site alternatives of NEXUS proposal and City of Green Alternative Route by looking at property size, number of wetland acres affected, linear feet of waterbodies affected, acres of agricultural land, forested land, open land affected, distance to nearest noise sensitive area, number of noise sensitive areas within a half mile, the potential for purchase; and other residential-type structures within 150 feet).

Green Alternative Route based on that analysis.[203] In comments on the Draft EIS, both the City of Green and NEXUS proposed variations to the City of Green Alternative Route.[204]

84. The City of Green submitted a route alternative that it asserts would have minimized the impacts of the pipeline on development in the vicinity of the city.[205] In an analysis spanning 24 pages, the Commission staff took a hard look at each City of Green Alternative Route variation and concluded that each was environmentally acceptable; however, "none of [them] would offer a major environmental advantage over the proposed route," therefore Commission staff "eliminated them from further consideration."[206] In any event, we disagree with Coalition's assertion that the Commission mistakenly refused to choose the City of Green Alternative Route. NEPA does not require the selection of the least damaging alternative;[207] rather, we are required to "[r]igorously explore and objectively evaluate all reasonable alternatives."[208] Although Coalition may disagree with the recommendation in the Final EIS and the decisions made in the August 2017 Order, Coalition cannot say that these documents failed to follow the process required by NEPA.

85. We disagree with Coalition's assertion that once the Commission issued a certificate for Rover, it "became federal land," thereby requiring the Commission to co-locate the NEXUS Project with the Rover Project pursuant to section 368 of EPAct 2005.[209] Section 368 of EPAct 2005, which requires the Secretaries of Agriculture, Commerce, Defense, Energy, and Interior to designate corridors for, among other things, natural gas pipelines, does not apply here. The August 2017 Order also observed that 45 percent of the facilities

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[203] August 2017 Order, 160 FERC ¶ 61,022 at PP 144-147.

[204] City of Green August 29, 2016 Comments. The City of Green's March 23, 2015 filing in PF15-10-000, Accession No. 20150323-5188, evaluated impacts to wetlands and land use for the NEXUS proposal and its alternative. *See* also Final EIS, Appendix R at R-72.

[205] *See* Final EIS at 3-23 to 3-46.

[206] *Id.* at ES-18, 5-17 to 5-18.

[207] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.").

[208] 40 C.F.R. § 1502.14 (2017).

[209] 42 U.S.C. § 15926 (2012).

to be constructed by NEXUS would be located on existing rights-of-way and 94 percent of the facilities to be constructed by Texas Eastern would be located on existing rights-of-way and on previously disturbed property.[210]

86. The Final EIS thoroughly considered co-locating the proposed pipeline with the Rover Pipeline.[211] The Final EIS agreed that co-location was possible and considered advantages[212] and disadvantages[213] of co-location. Ultimately, however, the Final EIS concluded that the disadvantages outweighed the advantages, especially in light of the need for an additional 137 miles of lateral pipeline required to deliver natural gas to three delivery points along the pathway.[214] The Final EIS also considered and rejected the idea of a single pipeline to serve the need identified for the Rover and NEXUS Pipelines.[215]

87. We disagree with Coalition that the Final EIS's treatment of the Cleveland State University report was flawed. The Commission satisfied NEPA by considering economic impacts, including impacts on the City of Green;[216] it was not required to adopt the Cleveland State analysis, which it found flawed. In that regard, the Final EIS found multiple flaws in the Cleveland State report, including reliance on studies of property value impacts not relevant to new pipeline construction, statistical flaws resulting in unsupported conclusions, and reliance on the flawed assumption that certain development could not occur after construction of the pipeline.[217]

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[210] August 2017 Order, 160 FERC ¶ 61,022 at PP 36 and 53.

[211] *See* Final EIS at 3-11 to 3-18.

[212] *Id.* ("The primary advantages of the route alternative is that it would not cross any wildlife management areas or state parks/forests, and 5 fewer county/metro parks.).

[213] *Id.* ("Conversely, the major disadvantages of the alternative are that it is 129.3 miles longer, has 132 miles more of greenfield construction, 71.8 acres more wetlands crossed, 24 more perennial waterbodies crossed, 25 more wellhead protection areas (WHPA) crossed, 1,398.5 acres more agricultural land, 130.0 acres more forested land, and is near 248 more residential-type structures.").

[214] *Id.*

[215] *Id.* at 3-12.

[216] Final EIS at 3-39.

[217] *See* Final EIS at 3-36 to 3-37.

88. The discussion of impacts to the Amish community in the Final EIS was appropriate. The Final EIS, in response to comments received during the Draft EIS comment period,[218] generally addressed impacts to the Amish community.[219] The Final EIS briefly described the Amish community and then concluded that project impacts to the Amish community would resemble impacts to other farming communities, with the exception of impacts to traffic. The Final EIS generally observed that conflicts between the Amish community traffic and faster moving construction-related traffic could occur. NEPA requires the Commission to engage in exactly this kind of consideration, and "the Commission is not required to reject the environmentally acceptable route NEXUS proposed."[220] Coalition's arguments rely on NEPA imposing a substantive, rather than a procedural, obligation.[221] Even if Coalition is right that the City of Green Alternative Route would have fewer environmental impacts for certain resource areas, Coalition is not correct that the Final EIS failed to take a hard look at those alternatives. Thus, we deny rehearing.

4. Chippewa Lake D Minor Route Variation

89. Sustainable Medina argues that the notice period for the Chippewa Lake D alternative, which was issued on October 6, 2016, providing for a comment deadline by November 7, 2016, was too short. Further, Sustainable Medina points out that the Chippewa Lake D alternative was not included in the Draft EIS, but was rather first mentioned in NEXUS' response to the Draft EIS.[222] Sustainable Medina asserts that Commission staff should have formally supplemented the Draft EIS, including reopening the comment period and circulating the supplement to interested federal and state agencies for comment.

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[218] *See, e.g.*, Wayne County, Ohio Agriculture Success Team August 29, 2016 Letter (expressing concern about City of Green Alternative Route's impacts to Amish community); Nelson Miller August 22, 2016 Comments (opposing City of Green Alternative Route in part because of potential impacts to slower-moving horse-drawn traffic).

[219] Final EIS at 3-41.

[220] August 2017 Order, 160 FERC ¶ 61,022 at P 146.

[221] *See Robertson*, 490 U.S. at 350 ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

[222] Sustainable Medina Rehearing Request at 7. *See* Accession No. 20160726-5168.

90. A purpose of a Draft EIS is to elicit suggestions for change.[223] A supplemental Draft EIS is required if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or "there are significant new circumstances or information relevant to environmental concerns."[224] Under the "rule of reason," "an agency need not supplement an [EIS] every time new information comes to light after the EIS is finalized."[225] Further, NEPA only requires agencies to employ proper procedures to ensure that environmental consequences are fully evaluated, not that a complete plan be presented at the outset of environmental review.[226] "[I]f every aspect of the project were to be finalized before any part of the project could move forward, it would be difficult, if not impossible, to construct the project."[227] Thus, the relevant question is whether the new information will affect the environment "in a significant manner or to a significant extent not already considered."[228]

91. The Final EIS thoroughly evaluated four versions of the Chippewa Lake Route Variation,[229] and recommended the fourth version, known as Chippewa Lake D Route

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[223] *See City of Grapevine, Tex. v. U.S. DOT*, 17 F.3d 1502, 1507 (D.C. Cir. 1994) ("[t]he very purpose of a [draft EIS] is to elicit suggestions for change.").

[224] 40 C.F.R. § 1502.9(c)(1) (2017).

[225] *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).

[226] *See Robertson*, 490 U.S. at 352.

[227] *National Committee for New River v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004) (citing *East Tennessee Natural Gas Co*., 102 FERC ¶ 61,225, at 61,659 (2003)). *See Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,314.

[228] *Marsh*, 490 U.S. at 374 ("In this respect the decision whether to prepare a supplemental EIS is similar to the decision whether to prepare an EIS in the first instance: If there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared."). *See Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984) ("We hold, therefore, that an agency cannot have acted arbitrarily or capriciously in deciding not to file a [supplemental EIS] unless the new information provides a seriously different picture of the environmental landscape such that another hard look is necessary.").

[229] Final EIS at 3-88 to 3-95 (Section 3.4.11, Chippewa Lake Route Variations), 5-17.

Variation.[230] Five landowners filed comments on the Chippewa Lake D Route Variation after the November 7, 2016 deadline.[231] These letters were addressed in the Final EIS despite their having been filed beyond the deadline set forth in the October 6, 2016 notice.[232] The August 2017 Order found that the comments filed did not provide any additional information about the Chippewa Lake D Route Variation that would have changed the analysis regarding environmental advantage,[233] and nothing filed by Sustainable Medina on rehearing changes this conclusion. In its assertion that landowners should have been given more time to comment on the Chippewa Lake D Route Variation, Sustainable Medina does not reveal the nature of substantive comments that the Final EIS allegedly overlooked. Therefore, we find that the August 2017 Order was correct to find that the Commission had provided adequate opportunity to comment on the Chippewa Lake D Route Variation.[234] Therefore, rehearing is denied, and NEXUS will incorporate Chippewa Lake D Route Variation as ordered in the August 2017 Order.[235]

H. Downstream Greenhouse Gas Emissions

92. Sierra Club argues the Commission erroneously failed to consider the climatological effects of downstream natural gas usage from the NEXUS Pipeline. Although Sierra Club acknowledges Commission staff's quantification of greenhouse gas (GHG) emissions that may result from the combustion of natural gas transported by the project,[236] Sierra Club

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[230] *Id*. at 3-95. *See also* August 2017 Order, 160 FERC ¶ 61,022 at PP 149, 151-152.

[231] August 2017 Order, 160 FERC ¶ 61,022 at P 151.

[232] Final EIS, Appendix R.

[233] August 2017 Order, 160 FERC 61,022 at P 152. *See* Final EIS at 3-95 ("Overall, it appears that the Chippewa Lake D Route Variation offers a substantial environmental advantage in comparison to the corresponding segment of the proposed route.").

[234] "[D]ue process requires 'only a "meaningful opportunity" to challenge new evidence,'" which is satisfied by providing a party the opportunity to raise on rehearing concerns about the Commission's environmental review. *Tennessee Gas Pipeline Co.*, 156 FERC ¶ 61,007, at P 20 (2016).

[235] August 2017 Order, 160 FERC ¶ 61,022 at P 152; Appendix B, Environmental Conditions for the NEXUS Gas Transmission (NEXUS) Project and Texas Eastern Appalachian Lease (TEAL) Project, Condition 13.

[236] Sierra Club Rehearing Request at 26 ("FERC acknowledges that the project may result in the release of as much as 17,900,878 metric tons of CO2 into the atmosphere per

alleges that the Commission was required to analyze the effect of those emissions on the climate because downstream natural gas combustion is reasonably foreseeable, as either indirect or cumulative impacts of the project.[237]

93. We disagree and affirm our prior conclusion that, with respect to the NEXUS project, the GHG emissions from the downstream use of the transported gas do not fall within the definition of either indirect or cumulative impacts because the impacts are not reasonably foreseeable.[238]

94. Indirect impacts are "caused by the [proposed] action and are later in time or farther removed in distance, but are still reasonably foreseeable."[239] CEQ defines cumulative impacts as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[240] The requirement that an impact must be "reasonably foreseeable" to be considered in a NEPA analysis applies to both indirect and cumulative impacts.

95. The dissent cites various filings as "evidence of downstream end use." We do not dispute that there will be general downstream use of the gas to be transported by the project. However, where, as here, the Commission lacks meaningful information about downstream use of the gas; i.e., specific information about identified and planned future power plants,[241]

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year as a result of combusting 925,000 Dth/d.").

[237] Sierra Club Rehearing Request at 26.

[238] August 2017 Order, 160 FERC ¶ 61,022 at n.191.

[239] 40 C.F.R. § 1508.8(b).

[240] *Id*. § 1508.7 (2017).

[241] We note that shipper DTE has publicly announced plans to retire coal-fired plants to be replaced by natural gas-fired plants as well as an increase in solar and wind generation. References to potential plans to replace coal-fired generation with natural gas combined cycle generation, where no applications have been filed for a specific facility, do not constitute a reasonably foreseeable end use. *See generally Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 513 (D.C. Cir. 2010) (agency's issuance of a notice of intent to prepare an EIS merely reflects the "incipient notion" of a project, and "did not establish reasonable foreseeability"). Regardless, if natural gas will ultimately be transported on the Project facilities to serve new gas-fired power plants that replace coal-fired plants, the new power plants would not represent incremental GHG emissions, instead there would be a net decrease in the GHG emissions. *See* Final EIS at 4-279, 5-16. *See* Dep't of Energy and Nat'l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas*

storage facilities, or distribution networks, then these impacts are not reasonably foreseeable for inclusion as an indirect impact or in the cumulative impacts analysis.[242] As explained in the August 2017 Order, the project will enable natural gas transportation service from supply areas in the Appalachian Basin to consuming markets in northern Ohio, southeastern Michigan, and to the Dawn Hub in Ontario, Canada.[243] There is no evidence in the record of reasonably foreseeable end-use combustion of the gas transported by the Projects; therefore, the potential impacts from the end-use of the transported gas do not meet the definitions of indirect or cumulative impacts.[244]

Extraction and Power Generation, at 76 DOE/NETL-2014/1646 (May 29, 2014) ("Natural gas-fired electricity has a 44 percent to 66 percent lower climate impact than coal-fired electricity. Even when fired on 100 percent unconventional natural gas, from tight gas, shale and coal beds, and compared on a 20-year GWP, natural gas-fired electricity has 51 percent lower GHGs than coal.").

[242] *See, e.g., Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 34 (2018).

[243] August 2017 Order, 160 FERC ¶ 61,022 at P 1. The dissent disputes that any additional specificity is required to make it reasonably foreseeable that transported natural gas will be combusted at natural gas generating facilities. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*), is an example of a case with project shippers that had specific information about identified and planned future power plants. *See* December 18, 2015 Final Environmental Impact Statement, Docket Nos. CP15-17-000, CP15-16-000, CP14-554-000 at 3-291 to 3-292 (*Sabal Trail* Final EIS) (explaining that Duke Energy Florida had received a determination of need from the Florida Public Service Commission for natural gas generation facility adjacent to its Crystal River Energy Complex). Given the advanced stage of planning, the *Sabal Trail* Final EIS could quantify the acres to be affected by the generation facility, including acres of forest, wetland, and freshwater marsh. *Sabal Trail* Final EIS at 3-292. However, *Sabal Trail* and this case are factually distinct, in that the record in *Sabal Trail* showed that the natural gas to be transported on the new project would be delivered to specific destinations – power plants in Florida – such that the court concluded that the burning of the gas in those plants was reasonably foreseeable and the impacts of that activity warranted environmental examination. In contrast, the gas to be transported by the NEXUS Project will be delivered on behalf of eight separate shippers, consisting of LDCs, marketers, and producers, into the interstate natural gas pipeline grid, resulting in a variety of end-uses.

[244] The downstream emissions from consumption also do not meet the definition of cumulative impacts because there is no evidence in the record that such downstream consumption will occur within the geographic scope of the NEXUS and TEAL Projects. *See* August 2017 Order, 160 FERC ¶ 61,022 at PP 177-182 (addressing the adequacy of the

96. The dissent cites *Mid States Coalition for Progress v. Surface Transp. Bd.*[245] to argue that the end use of the gas being transported by a pipeline is reasonably foreseeable and the GHG emissions associated with the end-use combustion should have been more fully considered beyond merely quantifying the GHG emissions. In *Mid States*, petitioners argued that the projected availability of 100 million tons of low-sulfur coal per year at reduced rates would increase the consumption by existing power plants of low-sulfur coal vis-à-vis other fuels (e.g., natural gas).[246] The court found that the likely increased consumption of low-sulfur coal by power plants would be an indirect impact of construction of a shorter, more direct rail line to transport the low-sulfur coal from the mining area to existing coal-burning power plants.[247] Thus, the Surface Transportation Board was required to consider the effects on air quality of such consumption. In *Mid States* it was undisputed that the proposed project would increase the use of coal for power generation. Here, it is unknown where and how the transported gas will be used and there is no identifiable end-use as there was in *Mid States*.[248] Further, unlike the case here, the Surface Transportation Board had stated that approval of the rail line would lead to increased coal production.[249] It is primarily for this reason that reliance on *Mid States* is "misplaced since the agency in *Mid States* stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so," and the Commission did neither of those things.[250]

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cumulative impacts analysis); *see also Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976) (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.").

[245] 345 F.3d 520 (8th Cir. 2003).

[246] *Id.* at 548.

[247] *Id.* at 550 (finding compelling the fact that while the Board's draft EIS had stated that it would consider potential air quality impacts associated with the anticipated increased use of the transported coal, the final EIS failed to do so).

[248] Further, although it may be foreseeable, as some suggest, that the gas transported on the expansion will be burned, there is no information in the record as to the extent such consumption will represent incremental consumption above existing levels, as opposed to substitution for existing sources of supply.

[249] *Mid States*, 345 F.3d at 549.

[250] *See Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th

97. Nonetheless, the Final EIS reasonably quantified downstream emissions.[251] The D.C. Circuit Court of Appeals has held that where it is known that the natural gas transported by a project will be used for end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."[252] This is exactly what the Final EIS did: the Final EIS estimated the amount of GHG emissions from construction and operation,[253] and the cumulative effects section included a lengthy discussion of climate change that quantified the amount of carbon that could be emitted per year from end-use combustion.[254]

98. The dissent approves the finding of need but believes it was error to find that downstream GHG emissions related to natural gas to be transported by the NEXUS Project are not reasonably foreseeable. NEPA analysis, however, is not simply an academic exercise. If information does not bear on the substantive outcome, NEPA does not require its consideration.[255] The Final EIS estimated the potential downstream emissions, and no

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Cir. 2005).

[251] Final EIS at 4-278.

[252] *Sabal Trail*, 867 F.3d at 1371. The Commission's environmental review of the NEXUS Project is distinguishable from its environmental review of Sabal Trail. In *Sabal Trail*, the court determined that the Commission should have examined the GHG impacts of burning the natural gas to be delivered by that project because the that gas will be burned in power plants, which is the "project's entire purpose." *Id.* at 1372. In this case, as discussed above, the Commission has estimated the GHG emissions associated with burning the gas to be transported by the NEXUS Project, consistent with the quantification that the *Sabal Trail* court required.

[253] Final EIS at 4-211. *See generally*, Final EIS, Section 4.12 (Air Quality and Noise) and Section 4.14.8.9 (Potential Cumulative Impacts of the Proposed Action, Air Quality and Noise).

[254] *Id*. at 4-275 to 4-279; Final EIS at 4-278 ("Therefore, avoiding the double counting of volumes, the Projects combined can deliver up to 925,000 Dth/d of new volumes, which can produce 17,900,878 metric tons of CO2 per year from end-use combustion.").

[255] *See* 40 C.F.R. § 1500.1(c) (2017) ("Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

new evidence was provided on rehearing that challenges those downstream emission quantities. Further, even if additional record evidence about the downstream uses of the natural gas had been provided after the Commission issued the Final EIS or the Certificate Order, the Commission would not be required to supplement its Final EIS. The Final EIS's estimation of the downstream emissions produced a worst-case, full-burn scenario—and no party disputes the validity of that full-burn estimate. Therefore, new information indicating that the actual downstream emissions ultimately might prove to be lower than under the worst-case scenario would have no bearing on the Commission's substantive determination.[256] The market for natural gas is ever-changing. If we were to require additional information and reassess our earlier decision every time we suspected that some additional information about the downstream end-uses might be available, our review of a pipeline certificate application would continue indefinitely.[257]

99. The Final EIS identified the potential harm caused by those emissions. The analysis included a qualitative discussion that addressed various effects from GHG emissions including: rising average temperatures; increased health risks from additional heat stress and poor air quality; altered agricultural crop growing season; increased temperature stress, wetter springs, and the continued occurrence of springtime cold air outbreaks causing reduced crop yields overall in the long term, particularly for corn and soybeans; change in range and elevation for many tree species; increased insect outbreaks, forest fires, drought-induced tree mortality, and the reduction in beneficial carbon sinks; increase in annual precipitation, particularly from increased high-intensity rainfall events; increase in surface water temperatures in the Great Lakes; and increase in blue-green and toxic algae in the Great Lakes, harming fish and reducing water quality. Lastly, the Final EIS addressed the projects in comparison to GHG and climate goals,[258] citing the U.S. Global Change Research Program's *Third National Climate Assessment* which found that in the

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[256] *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373-74 (1989) (whether to supplement an EIS is within agency's discretion, applying a "rule of reason" standard, which "turns on the value of the new information to the still pending decisionmaking process"); *cf. id.* at 385 ("Even if another decisionmaker might have reached a contrary result, it [is] surely not 'a clear error of judgment' for the [agency] to [find] that the new and accurate information contained in the documents [is] not significant and that the significant information [is] not new and accurate.").

[257] *See, e.g., Friends of the River v. FERC*, 720 F.3d 93, 109 (D.C. Cir. 1983) (where energy "forecasts and predictions" change "every few months, each soon to be superseded by the next," requiring the Commission to reassess its decisions in response to such changes "would risk immobilizing the agency").

[258] Final EIS at 4-279.

Midwest region "per capita GHG emissions are 22 percent higher than the national average due, in part, to the reliance on fossil fuels, particularly coal for electricity generation," and observing that the report notes that increased use of natural gas in the Midwest may reduce emissions of GHGs by displacing coal use or encouraging the use of lower carbon fuel for new growth areas. No more was required.[259]

100. Sierra Club nevertheless asserts the Commission should have done more, i.e., adopt "valid and reliable means to measure the effects of climate change."[260] Sierra Club implies the Social Cost of Carbon tool, which seeks to estimate the monetized climate change damage associated with an incremental increase in CO2 emissions in a given year, is such a tool for evaluating the effects of carbon emissions. For the reasons stated in prior decisions, the Commission declines to adopt the Social Cost of Carbon tool.[261]

101. Although now withdrawn, previous CEQ guidance[262] "[r]ecommend[ed] that agencies use projected GHG emissions . . . *as a proxy* for assessing potential climate change

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[259] *See, e.g., Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 99-101 (2011) (holding that the extent and location of shale gas production development were not reasonably foreseeable with respect to a proposed 39-mile long pipeline located in Pennsylvania, in the heart of Marcellus Shale development), *on reh'g*, 138 FERC ¶ 61,104 (2012), *aff'd, Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (Commission's cumulative impact analysis sufficient where it included a short summary discussion of shale gas production activities). *See also Sierra Club v. DOE*, 867 F.3d 189, 202 (D.C. Cir. 2017) (holding that DOE's generalized discussion of the impacts associated with non-conventional natural gas production fulfill its obligations under NEPA; DOE need not make specific projections about environmental impacts stemming from specific levels of export-induced gas production).

[260] Sierra Club Rehearing Request at 31.

[261] *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at PP 30-51 (2018); *see also Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at PP 275-297.

[262] *See* Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews (Aug. 1, 2016), Notice of Availability, 81 Fed. Reg. 51,866 (Aug. 5, 2016) (Final Guidance). The Final Guidance, which is "not a rule or regulation" and "does not change or substitute for any law, regulation, or other legally binding requirement, and is not legally enforceable," was subsequently withdrawn. Withdrawal of Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, 82 Fed. Reg. 16,576 (Apr. 5, 2017).

effects when preparing a NEPA analysis for a proposed agency action."[263] This is exactly what the Final EIS did. The Final Guidance recommended that "where agencies do not quantify" GHG emissions, "agencies include a qualitative analysis."[264] In this case, the Final EIS did both: (1) The Final EIS quantified downstream GHG emissions; and (2) it included a qualitative analysis of the link between GHG emissions and their climate impacts, both on a global scale and a regional scale. Finally, with regard to a methodology of monetizing costs and benefits such as the Social Cost of Carbon, the Final Guidance notes that "NEPA does not require monetizing costs and benefits,"[265] in part explaining that this should not be done "when there are important qualitative considerations."[266] With regard to the quantification of downstream emissions provided in the Final EIS, the dissent acknowledges that quantification but then adds that this is just a first step, and a determination of significance must be made. We have set forth our reasons why the Social Cost of Carbon is not an appropriate indicator of significance,[267] and we find that analysis applicable here. The challenging question of significance of GHG emissions is not solved by transforming a quantity into a monetized form.[268] Further, we note the question of

[263] *Id*. at 4 (emphasis added).

[264] *Id*. at 4.

[265] *Id*. at 32.

[266] *Id.* at 32 (citing 40 C.F.R. 1502.23).

[267] *Florida Southeast Connection*, 162 FERC 61,233 at PP 50-51.

[268] In support of its argument in favor of monetizing the impacts from GHG emissions, the dissent cites comments that the EPE filed in the Commission's pending Notice of Inquiry on the Certification of New Interstate Natural Gas Pipeline Facilities, Docket No. PL18-1-000. However, the EPA comments do not support the dissent in this case. The EPA recommended using standard practices "[i]n cases where [the Commission] determines that a monetary comparison of the benefits received by society to the costs imposed on society is appropriate." June 21, 2018 EPA Comments, Docket No. PL18-1-000 at 3. However, such a comparison is not appropriate here because monetizing GHG emissions transforms a quantity that can be compared to state-wide emissions, *see* FEIS at 4-277, to a monetized figure that cannot be meaningfully compared to anything in the record. Further, the EPA comments state that "[i]f it is not possible to develop a reasonable estimate of the net change in emissions due to the proposed project (e.g., that reflects how carbon-based energy production and demand from competing markets might change), then [Social Cost of Carbon and other greenhouse gas] estimates will not be useful for assessing the value to society of GHG changes in the [benefit-cost analyses]." *Id*. at 4. The dissent cites the last sentence of these EPA comments for the proposition that the monetized cost of

significance has less practical meaning in a case like this one where the decision has already been made to prepare a comprehensive EIS.[269]

102. Sierra Club complains that the comparison of emissions from the project to state-wide emissions was useless.[270] This argument is unavailing. Sierra Club does not explain how the discussion is wrong, and, in any event, it ignores the bulk of the information provided by the Final EIS on GHG emissions. Accordingly, rehearing is denied with respect to downstream GHG emissions.

I. Pipeline Safety

103. Coalition argues that the Final EIS inadequately considered safety and ignored the safety of people and business that could be affected by a catastrophic pipeline failure.[271] Coalition claims, citing U.S. Department of Transportation (DOT) Pipeline and Hazardous Materials Safety Administration (PHMSA) incident data, that there have been 833 deaths from pipeline incidents over the past 20 years, 30 of which occurred in Ohio. Coalition states that, rather than considering safety, the Final EIS defers to PHMSA safety standards, without discussion of how those standards are sufficient.

104. The City of Oberlin similarly argues the Commission failed to consider the heightened risk associated with siting a pipeline close to heavily populated areas. The City of Oberlin states it was illogical to state that proximity to heavily populated areas is not a factor. The City of Oberlin states that local zoning laws are a backstop guard against safety concerns, and the siting of an interstate pipeline in violation of such local zoning laws upsets

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carbon may be nevertheless helpful even absent a full cost-benefit analysis. We disagree for the reasons stated in *Florida Southeast Connection*, 162 FERC ¶ 61,233 at PP 50-51.

[269] *See National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at n.104 (2017) (citing 40 C.F.R. §§ 1501.4(e), 1508.13 for the proposition that "CEQ regulations state that, where an EA results in a finding of no significant impact, an agency may proceed without preparing an EIS").

[270] *See* Final EIS at 4-277 ("Although the GHG emissions from construction and operation of the Projects appear large, the emissions are small in comparison to the GHGs from each state (162,000,000 and 229,000,000 metric tpy of CO2 in Michigan and Ohio, respectively).").

[271] Coalition Environmental Rehearing Request at 4-6. The Final EIS explained that there is a potential impact radius of 1,100 feet for the pipeline and 943 feet for the compressor stations. Final EIS at ES-15; 4-243.

the balance between PHMSA's role in setting pipeline safety standards and state and local governments' role in ensuring safety through prudent siting.

105. Communities for Safe and Sustainable Energy also refer to safety in their rehearing request.

106. We disagree that the Final EIS failed to consider safety.[272] Coalition incorrectly cites PHMSA incident data. The data from PHMSA indicates that there have been over 800 serious incidents in the past 20 years, encompassing all categories of pipeline infrastructure that PHMSA regulates, including natural gas gathering, distribution, and transmission pipelines, as well as hazardous liquid pipelines. Of those serious incidents, approximately 300 resulted in a fatality, with 11 fatalities in Ohio. However, the Final EIS carefully explained that "the majority of fatalities from natural gas pipelines are associated with local distribution pipelines… these distribution lines are smaller-diameter pipelines and/or plastic pipes and are more susceptible to damage"[273] Using the same source of data cited by Coalition, the Final EIS contained pipeline incident statistics[274] specific to natural gas *transmission* pipelines that support the finding that natural gas transmission pipelines have a low likelihood of incident and are considered a safe and reliable means of transporting natural gas.[275] The Final EIS explained that incidents on a natural gas transmission pipeline have resulted in a nationwide average of two fatalities per year, with no fatalities occurring in Ohio in the past 20 years.[276] For reference, there are annually 14 deaths from natural gas distribution lines[277] and over 33,000 deaths from motor vehicles and 30,000 from falls.[278] The low number of significant incidents distributed over the more than 300,000 miles of natural gas transmission pipelines indicates that the risk is minimal for an incident at any given location. The Final EIS concluded, and we agree, that the projects provide a safe, reliable means of transporting natural gas and the projects do not represent a significant safety risk to the public.[279] No party on rehearing asserts that the incident statistics

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[272] August 2017 Order, 160 FERC ¶ 61,022 at PP 137-140.

[273] Final EIS at 4-251.

[274] Final EIS, Section 4.13, Reliability and Safety.

[275] Final EIS at 4-252.

[276] Final EIS at 4-250.

[277] Final EIS at 4-251 (Table 4.13.3-2).

[278] *Id*.

[279] *Id.* at 5-18 ("Further, we find that the likelihood of an incident is very low at any

disclosed in the Final EIS are flawed. That analysis demonstrates that the Commission took a hard look at safety and satisfies NEPA's twin purposes of informing agency decisions and providing adequate disclosure to allow public participation in those decisions.[280]

107. The Final EIS also discussed the role PHMSA plays in the regulation of natural gas and other hazardous materials transported by pipeline.[281] NEXUS will design, construct, operate, and maintain the proposed facilities to meet or exceed the PHMSA's Minimum Federal Safety Standards.[282] PHMSA's Office of Pipeline Safety administers the national regulatory program to ensure the safe transportation of natural gas and other hazardous materials by pipeline.[283] The Commission appropriately relies on PHMSA to monitor the pipeline's construction and operation of natural gas facilities to determine compliance with

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given location, regardless of population density.").

[280] *See Robertson*, 490 U.S. at 349 ("[An EIS] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."). *See also Marsh*, 490 U.S. at 371 ("NEPA does not work by mandating that agencies achieve particular substantive environmental results. Rather, NEPA promotes its sweeping commitment to 'prevent or eliminate damage to the environment and biosphere' by focusing Government and public attention on the environmental effects of proposed agency action.").

[281] Final EIS at 4-238.

[282] 49 C.F.R pt. 192.

[283] August 2017 Order, 160 FERC ¶ 61,022 at P 137 n.128. *See also* 49 U.S.C. § 60112 (2012) (authorizing DOT to determine that a pipeline facility is hazardous and order the operator of the facility to take corrective action).

its design and safety standards.[284] Commission regulations require that applicants certify compliance with PHMSA standards.[285]

108. We disagree with the City of Oberlin's argument that the Final EIS ignored population density.[286] The Final EIS discussed how the PHMSA regulations use pipeline classifications that are "based on population density in the vicinity of pipeline facilities, and specifies more rigorous safety requirements for populated areas," meaning "[c]lass locations representing more populated areas require higher safety factors in pipeline design, testing, and operation."[287] The Final EIS discussed four classes of locations that can be affected by a pipeline: Class 1 (location with 10 or fewer buildings intended for human occupancy); Class 2 (location with more than 10 but less than 46 buildings intended for human occupancy); and Class 3 (Location with 46 or more buildings intended for human occupancy or where the pipeline lies within 100 yards of any building, or small well-defined outside area, occupied by 20 or more people on at least 5 days a week for 10 weeks in any 12-month period; and Class 4 (location where buildings with four or more stories aboveground are prevalent).[288] The Final EIS categorized each part of the pipeline project

[284] *See EarthReports, Inc. v. FERC*, 828 F.3d 949, 959 (D.C. Cir. 2016) (the "opinions and standards of – and [LNG operator's] future coordination with – federal and local authorities" were a reasonable component of the Commission's public safety evaluation); *City of Pittsburgh v. FPC*, 237 F.2d 741, 754 (D.C. Cir. 1956) (explaining that the Commission "would . . . do well to respect the views of . . . other agencies as to those problems" for which those other agencies "are more directly responsible and more competent than this Commission").

[285] Section 157.14(a)(9)(vi).

[286] Final EIS at ES-15 ("DOT safety standards specify more rigorous safety requirements for populated areas and areas where a gas pipeline accident could do considerable harm to people and their property (e.g., near multiple residences, schools, churches, retirement homes, airports).") 5-18 ("DOT safety standards are intended to ensure adequate protection of the public, including more stringent design requirements in increasingly populated areas."). *See id*. at 3-42 ("With regard to safety, we reiterate that DOT safety standards are intended to ensure adequate protection of the public regardless of where the pipeline is routed, therefore, there is no basis to adjust the corridor for safety reasons.").

[287] *Id*. at 4-238 to 4-239.

[288] *Id*. at 4-238 to 4-239.

in each of these classes,[289] and discussed how the different classes can affect the safety requirements.[290] In the event population density changes during the life of the pipeline, applicants would be required to "reduce the [maximum allowable operating pressure] or replace the segment with pipe of sufficient grade and wall thickness, if required to comply with DOT requirements for the new class locations."[291]

109. The applicants are also required to "develop and follow a written Integrity Management Program (IMP) that contains all the elements described in 49 CFR 192.911 and addresses the risks on each transmission pipeline segment."[292] "Specifically, the rule establishes an IMP that applies to all [high consequence areas]."[293] With regard to issues raised by Coalition, City of Oberlin, and Communities, the Final EIS discussed rules[294] that apply to high-consequence areas "where a gas pipeline accident could do considerable harm to people and their property."[295] The Final EIS listed the high consequence areas for the NEXUS pipeline.[296] Thus, the Final EIS explained how the PHMSA regulations account for population density, and we therefore disagree that the environmental review's safety discussion ignored population density.

110. The Final EIS discussed how the applicants would be required to meet with local first responders and officials to "learn the resources and responsibilities of each organization that may respond to a natural gas pipeline emergency and to coordinate mutual assistance."[297] The Final EIS also identified a number of voluntary safety measures that would be more stringent than the PHMSA regulations.[298]

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[289] *Id*. at 4-239 to 4-242 (Table 4.13.1-1).

[290] *Id*. at 4-239.

[291] *Id*. at 4-239.

[292] *Id*. at 4-242.

[293] *Id*. at 4-242.

[294] *See* 49 C.F.R. § 192.903 (2017).

[295] Final EIS at 4-242.

[296] *Id*. at 4-243 to 4-244 (Table 4.13.1-2).

[297] *Id*. at 4-246.

[298] *Id*. at 4-245.

111. Coalition cites no authority for the proposition that the Commission improperly delegated authority over safety to PHMSA. To the contrary, as in *EarthReports, Inc. v. FERC*, "the Commission conducted an extensive independent review of safety considerations; the opinions and standards of—and [the applicants'] future coordination with—federal and local authorities were one reasonable component."[299] Accordingly, rehearing is denied on this issue.

112. Finally, we note that there is no record basis to support the City of Oberlin's suggestion that the safety analysis or applicable standards for the Reserve Avenue Area are inadequate.[300] The Final EIS considered the Reserve Avenue Route Variation, which would avoid the Reserve Avenue Area, and found it "would conflict with the existing pipelines in several areas and require multiple pipeline crossovers, whereas the proposed route would be more suitable for a new pipeline."[301] Accordingly, the Commission reasonably rejected the Reserve Avenue Route Variation.

J. Local Ordinances

113. Coalition alleges the Commission ignored the conflict between the pipeline route and established land use restrictions. Coalition states that residents may have relied on these local land use restrictions when making decisions about where to live. Coalition explains that the local governments are exercising their rightful police powers reserved to them by the Tenth Amendment. Coalition also cites a lack of due process in violation of the Fifth Amendment. Coalition cites *American Energy Corp. v. Texas Eastern Transmission, LP*,[302] for the proposition that courts have determined that the NGA does not preempt local property laws. The City of Oberlin states that CEQ regulations[303] "require an agency to consider both the context and intensity of a project's impacts,"[304] and argues that the intensity of the environmental impacts is increased as a result of the violation of the City of

[299] *EarthReports*, 828 F.3d at 959. *See Murray Energy Corp. v. FERC*, 629 F.3d 231, 240 (D.C. Cir. 2011) ("FERC's repeated declarations that REX must comply with PHMSA requirements indicate that FERC took seriously—and addressed—the need for post-construction mitigation measures."); *see also City of Pittsburgh*, 237 F.2d at 754.

[300] City of Oberlin Rehearing Request at 27.

[301] Final EIS at 3-99.

[302] 701 F.Supp. 2d 921 (E.D. Ohio 2010).

[303] 40 C.F.R § 1506.26(a).

[304] City of Oberlin Rehearing Request at 30.

Oberlin's ordinance. Communities for Safe and Sustainable Energy also cites the conflict between the pipeline and the City of Oberlin zoning ordinance. Communities references an Ohio statute that it says gives City of Oberlin the power to prevent pollution of a running stream. As stated in the August 2017 Order,[305] the Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[306]

114. Coalition does not address the well-established authorities cited in the August 2017 Order for the proposition that the NGA preempts local zoning laws.[307] Therefore, we do not find any error in the August 2017 Order with respect to preemption. We also find that the Tenth Amendment is not implicated here because the NGA is a valid exercise of powers the Constitution has assigned to Congress.[308] Notably, no state asserts the Tenth Amendment bars issuance of the NGA section 7 certificate. Accordingly, rehearing is denied on this point.

[305] August 2017 Order, 160 FERC ¶ 61,022 at P 184.

[306] *See* 15 U.S.C. § 717r(d) (2012) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

[307] *See* August 2017 Order, 160 FERC ¶ 16,022 at P 184 n.218. *See also Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,157, at P 128 (2016) ("As we have stated previously, the Commission's authority under the NGA preempts county zoning ordinances.") (citing *Dominion Transmission, Inc.*, 143 FERC ¶ 61,148, at P 64 (2013)).

[308] *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300–301 (1988) ("The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale"); *East Tennessee Natural Gas Co.*, 102 FERC ¶ 61,225 at P 68.

K. Direct Impacts

1. Class I Dams

115. Coalition asserts the Commission failed to properly analyze two dams (Comet Lake Dam and Nimisila Reservoir Dam) affected by the pipeline.[309] Coalition argues that "vibration alone" from the pipeline will affect these nearby dams, which the City of Green Alternate Route would have avoided.

116. We disagree. The August 2017 Order adequately addressed the Comet Lake and Nimisila Reservoir dams.[310] The Comet Lake Dam is located about 550 feet south of the pipeline and the Nimisila Reservoir Dam, which would be crossed by horizontal directional drilling in order to avoid direct impacts on the reservoir, is located about 830 feet north of the pipeline, meaning they are "outside the project area."[311] Thus, it is not true, as Coalition asserts, that the Commission simply ignored the issue. In support of its theory, Coalition cites "[c]oncern raised by residents,[312] but, Coalition does not assert facts that are sufficient to call the Final EIS's conclusion into question. Issues related to vibration arise surrounding construction locations where blasting occurs or from operating compressor stations. However, the Final EIS included a Blasting Plan, which explains that "[c]ontrolled blasting techniques have been effectively employed… to protect active gas pipelines up to within 25 feet of trench excavation."[313] Controlled blasting techniques typically involve a small scale, controlled, rolling detonation procedure resulting in limited ground upheaval. These blasts do not result in large, aboveground explosions. The resultant blasting energy is focused to within the trench and is designed to limit ground accelerations outside the trench. As noted above, the dams are at much further distances and would not be structurally affected by blasting during construction. In addition, the proposed project compressor stations are located even further from the Comet Lake and Nimisila Reservoir dams than the closest points indicated above. Further, as stated in the Final EIS, the Commission requires

[309] Coalition Environmental Rehearing Request at 12.

[310] August 2017 Order, 160 FERC ¶ 61,022 at P 126.

[311] *Id.* P 126 ("Neither the pipeline's construction nor operation, however, will affect the dams because both dams are outside the project area.").

[312] Coalition Environmental Rehearing Request at 12.

[313] Final EIS, Appendix E at E-1-5.

that compressor station operation result in no perceptible increase in vibration.[314] Accordingly, we deny rehearing on this issue.

2. Old Growth Forests and Singer Lake Preserve

117. Coalition also argues the Final EIS ignored the impact the pipeline facilities will have on Singer Lake Preserve and old growth forests. Coalition also states the Commission exhibited disregard for old growth forests and failed to take a hard look before stating that it did not identify large contiguous old-growth forests. Coalition states that Ariss Park, "which is targeted to be destroyed" by the project, has trees as old as 250 years. Coalition states that the Final EIS ignored reports filed by a biologist from Akron University.

118. We disagree with Coalition. The Final EIS thoroughly evaluated the wetland impacts at Singer Lake Bog.[315] The Final EIS explained that the Singer Lake Bog is a 343.9-acre nature preserve owned by the Cleveland Museum of Natural History.[316] Although the NEXUS Project will not cross the Singer Lake Bog, it will be within 450 feet.[317] The Final EIS therefore determined that the project would have no direct impacts to the Singer Lake Bog,[318] but acknowledged that the project would "cross several wetlands . . . that may be associated with Singer Lake Bog."[319] However, the Final EIS determined that mitigation measures would avoid adverse effects to wetland hydrology and existing flows.[320]

119. The Final EIS comprehensively addressed vegetation, and recognized that the "primary impact from construction and operation would be on forested lands."[321] The Final EIS included a detailed table that provided the acreage affected by the project, specifically

[314] Final EIS at 4-236.

[315] Final EIS, Section 4.4.3.1.

[316] *Id.* at 4-44.

[317] *Id.* at 4-66.

[318] *Id.* at 4-66.

[319] *Id.* at 4-66.

[320] *Id*. ("Implementation of special construction techniques described in NEXUS' [Erosion and Sediment Control Plan], such as installation of trench plugs, and restoration of wetland soils, vegetation, and contours following the completion of construction, would minimize impacts on wetlands that may be associated with Singer Lake Bog.).

[321] *Id.* at 4-81. *See id.* at 4-68 to 4-81.

describing impacts, separately from construction and operation, on upland forest, forested wetlands, upland open land, emergent wetland, scrub-shrub wetland, agriculture, and other (including developed land and open water).[322] Thus, it is patently untrue that the Final EIS ignored vegetation.

120. On rehearing, Coalition disputes how the Final EIS described "old growth" forest as a subjective term,[323] and states that old growth forest is "well defined within federal law."[324] The Final EIS explains that old-growth forest has the "presence of large trees of late-successional (climax) species; living trees of multiple ages; decaying and large dead standing trees; and downed trees in various stages of decay (Shifley, 2016)."[325] In the Final EIS, Commission staff noted that it "observed isolated mature forested areas and older trees, but did not identify large contiguous old-growth forests; therefore, [Commission staff] determined that constructing and operating the [project] would not impact old-growth forest."[326] In its rehearing request, Coalition does not assert that the forested areas were not included in Table 4.5.2-1, and, even assuming the term old-growth is less subjective than stated in the Final EIS, Coalition does not explain why it was important to segregate and analyze separately "old-growth" from the other types of vegetation listed. Accordingly, rehearing is denied on this issue.

3. Property Values

121. Coalition asserts the analysis of property values in the Final EIS was arbitrary, capricious, and unsupported. In support, Coalition cites the opinion of a Medina County, Ohio tax official and a study by the Cleveland State University.[327]

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[322] *Id.* at 4-73 to 4-74.

[323] *See id.* at 4-72.

[324] Coalition Environmental Rehearing Request at 15. In support, Coalition cites *Miller v. United States*, 620 F.2d 812, 817 (Fed. Cir. 1980), which uses the phrase "old-growth redwood timber," but does not provide a definition.

[325] Final EIS at 4-72.

[326] *Id.* at 4-72.

[327] Coalition Environmental Rehearing Request at 13. *See* City of Green April 26, 2016 Letter, Accession No. 20160426-5064.

122. The Final EIS thoroughly evaluated effects on property values.[328] The Final EIS discussed five studies,[329] in addition to the environmental review in the Constitution Pipeline Project and Wright Interconnect Project.[330] Based on this analysis, the Final EIS determined that there was "no conclusive evidence indicating that natural gas pipeline easements would have a negative impact on property values."[331] The Final EIS took a hard look at how the project would affect existing residences, and concluded that "[a]ll residential lands would be restored to pre-construction conditions."[332] Further, the Final EIS recommended and the August 2017 Order adopted a condition that required NEXUS to file a site-specific Residential Construction Plan for residences within 10 feet of the construction work area.[333]

123. Coalition accuses the Commission of only looking at studies that are favorable to the industry's perspective. However, the Final EIS discussed the Cleveland State study, which was sponsored by the City of Green.[334] The Final EIS recognized that the study "identified

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[328] Final EIS at 4-191 to 4-193 (Section 4.10.8, Property Values).

[329] *See, e.g.*, Pipeline Impact Study: Study of a Williams Natural Gas Pipeline on Residential Real Estate: Saddle Ride Subdivision, Dallas Township, Luzerne County, Pennsylvania, *cited in* Final EIS at 4-192. The study concluded that "when the sales prices of the encumbered residences were compared with the sales prices of the unencumbered residences, there was no indication that the pipeline easement had any effect on the sales prices of homes in Saddle Ridge." *Id.*

[330] *See* Docket Nos. CP13-499-000 and CP13-502-000. In those proceedings, Commission staff issued the final environmental document on October 24, 2014. (Accession No. 20141024-4001). *See Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 95 (2014) (observing that environmental document looked at values of properties encumbered by pipeline easements, responsibility for payment of property taxes, and possibility of increased insurance premiums and concluded that "a significant loss of property value due to construction of a pipeline is not supported by the literature"), *reh'g denied*, 154 FERC ¶ 61,046 (2016).

[331] Final EIS at 3-40, 4-193.

[332] Final EIS at 4-124.

[333] August 2017 Order, 160 FERC ¶ 61,022, Appendix B, Environmental Conditions, Condition 27. NEXUS will use a 100-foot-wide construction right-of-way. *See* Final EIS at 2-10.

[334] Final EIS at 4-193.

the economic impacts the [NEXUS Project] would have on the [City of Green] including impacts to property values, commercial growth and tax revenues."[335] The Final EIS explained that for the reasons stated in the analysis of the City of Green Alternative Route,[336] the study was not particularly compelling.[337] Accordingly, we deny rehearing on this issue.

L. Rates

124. NEXUS seeks clarification that it may calculate its Supply Zone rates based on the quantity of capacity created by the TEAL Project that will be available in the Supply Zone for transportation service under the NEXUS FERC Gas Tariff (626,051 Dth/day for Market Zone 1 and 933,005 Dth per day for Market Zone 2), rather than calculating the Supply Zone rates based on the Maximum Daily Quantity under the Texas Eastern Lease (637,559 Dth per day for Market Zone 1 and 950,155 Dth per day for Market Zone 2). NEXUS explains that the Maximum Daily Quantity under the Texas Eastern Lease includes a quantity of capacity necessary to transport the fuel associated with service in Market Zones 1 and 2 on the NEXUS system, which is not available for transportation service in the Supply Zone. NEXUS reasons that designing recourse rates with a billing determinant based on quantities that will be available under the tariff -- rather than a billing determinant that includes a quantity of capacity necessary to transport the fuel and therefore is not available for transportation service -- will allow NEXUS to recover its cost of service. Citing *Gulf Crossing Pipeline Company LLC*,[338] NEXUS states that "[p]ipelines are permitted to calculate transportation rates based on the quantity of capacity available for transportation service, exclusive of fuel."[339] In the alternative, NEXUS seeks rehearing.

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[335] *Id.*

[336] *Id.* at 3-23 to 3-46 (Section 3.3.3, City of Green Route Alternative).

[337] *Id.* at 4-193.

[338] 123 FERC ¶ 61,100, at PP 10, 48 (2008) (approving a rate design wherein the pipeline calculated rates based on total available firm capacity of the project, including available transportation capacity under a lease, exclusive of fuel).

[339] NEXUS also cited *Cameron Interstate Pipeline, LLC*, 160 FERC ¶ 61,009, at P 11 (2017) ("This approach ensures that a pipeline constructing facilities is placed at risk for underutilization of the facilities if it does not contract with customers for the full capacity of the pipeline."); *Kinder Morgan Interstate Gas Transmission LLC*, 122 FERC ¶ 61,154, at P 28 (2008) ("The Commission's general policy is to design initial firm rates assuming billing determinants equal to maximum design capacity of the system and to design interruptible rates based on the 100 percent load factor equivalent of the firm rate.").

125. NEXUS is correct that the amount of service actually offered to customers is the proper billing determinant. The August 2017 Order erroneously selected a billing determinant that was inclusive of fuel. This was in error because that capacity associated with the fuel could not be offered to customers. Therefore, we grant rehearing, and order NEXUS to design its recourse rates using the capacity of service offered to customers as the billing determinant. We note that, as discussed above, the billing determinants as modified herein continue to place the risk of unsubscribed capacity on NEXUS.

The Commission orders:

(A) The rehearing request filed by UC4POWER is dismissed.

(B) The rehearing requests filed by Sierra Club, Coalition to Reroute Nexus, the City of Oberlin, Communities for Safe and Sustainable Energy, and Sustainable Medina County are denied.

(C) The rehearing request filed by NEXUS is granted.

(D) In accordance with section 154.207 of the Commission's regulations, NEXUS must file actual tariff records that comply with the requirements contained in the body of this order no less than 30 days and no more than 60 days prior to the commencement of interstate service.

By the Commission. Commissioner LaFleur is dissenting in part with a separate statement attached.
Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NEXUS Gas Transmission, LLC	Docket No.	CP16-22-001
Texas Eastern Transmission, LP	Docket No.	CP16-23-001
DTE Gas Company	Docket No.	CP16-24-001
Vector Pipeline, L.P.	Docket No.	CP16-102-001

(Issued July 25, 2018)

LaFLEUR, Commissioner, *dissenting in part*:

Today's order denies rehearing of the order approving the NEXUS Pipeline Project.[1] I supported our original authorization of this project by finding that, on balance, the project was in the public interest. I still believe the project is needed. However, I am dissenting in part from today's order because I believe that the Commission erred by finding that downstream GHG emissions in this case are not indirect impacts that must be quantified and considered as part of our responsibilities under the National Environmental Policy Act (NEPA).

As I explained in my concurrence in *Broad Run*,[2] despite my ongoing disagreement with the Commission's approach to its environmental review of proposed pipeline projects, I have attempted to address each case based on the facts in the record and the governing law as I read it. I do believe that many pipelines are needed and in the public interest, and I have been focusing my efforts on determining if, and how, I can support these projects despite my strong disagreements on the Commission's policy and practice on addressing climate change impacts of pipeline projects. This has become particularly difficult in recent months

[1] NEXUS Gas Transmission, LLC, 164 FERC ¶ 61,054 (2018) (NEXUS Rehearing Order).

[2] *Tennessee Gas Pipeline Company*, 163 FERC ¶ 61,190 (2018) (LaFleur, Comm'r, *concurring*) (*Broad Run*).

since the *Sabal Trail* remand order[3] and the subsequent decision in *New Market*[4] to change our policy on disclosure and consideration of downstream and upstream GHG emissions impacts in our pipeline review.

In this case, I supported the original authorization of the NEXUS Pipeline Project. At that time, the Commission's policy approach to evaluating downstream GHG emissions was largely reliant on full-burn estimates of downstream GHG emissions for proposed projects.[5] Indeed, the NEXUS Certificate Order[6] disclosed the full-burn estimate of downstream GHG emissions associated with the project.[7] While that approach has its

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[3] *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018) (LaFleur, Comm'r, *dissenting in part*) *(Sabal Trail*).

[4] *Dominion Transmission Inc.*, 163 FERC ¶ 61,128 (2018) (LaFleur, Comm'r, *dissenting in part*) (*New Market*).

[5] Since late 2016, the Commission has included increasing amounts of information on downstream GHG emissions in our pipeline orders. Initially, the Commission estimated downstream GHG emissions by assuming the full combustion of the total volume of gas being transported by the project, which was what was done in this case. Commission orders that included the full-burn calculation. *E.g*., *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046, at P 120 (2017); *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061, at P 121 (2017); *Rover Pipeline LLC*, 158 FERC ¶ 61,109, at P 274 (2017); *Tennessee Gas Pipeline Co., L.L.C.*, 158 FERC ¶ 61,110, at P 104 (2017); *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at P 189 (2017); *Dominion Carolina Gas Transmission, LLC*, 158 FERC ¶ 61,126, at P 81 (2017); *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 173 (2017); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 298 (2017); *Millennium Pipeline Co., L.L.C.*, 161 FERC ¶ 61,229, at P 164 (2017); *Penneast Pipeline Co., LLC*, 162 FERC ¶ 61,053, at P 208 (2018); *Florida Southeast. Connection, LLC*, 162 FERC ¶ 61,233, at P 22 (2018); and *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at P 56 (2018).

[6] NEXUS Gas Transmission, LLC, 160 FERC ¶ 61,022 (2017) (NEXUS Certificate Order).

[7] *Id*. at P 173. I note that the Commission's original authorization of the NEXUS Pipeline Project was issued three days after the U.S. Court of Appeals for the D.C. Circuit vacated and remanded the Commission's authorization of the Southeast Market Pipelines (SMP) Project, directing the Commission to address two issues. First, the Commission was directed to both quantify and consider the project's downstream GHG emissions or explain in more detail why it cannot do so; and second, the Commission was directed to explain whether it still adhered to its prior position that the Social Cost of Carbon tool is not useful

limitations, I have viewed that full-burn estimate of downstream GHG emissions as important to our environmental review,[8] and necessary for my public interest determination under the Natural Gas Act (NGA).

However, on rehearing, I disagree with the majority's assertion that "there is no evidence in the record of reasonably foreseeable end-use combustion of the gas transported by the Projects; therefore, the potential impacts from the end-use of the transported gas do not meet the definitions of indirect or cumulative impacts."[9] I believe there is information in the record demonstrating that it is reasonably foreseeable that natural gas transported on the NEXUS Pipeline Project will be combusted at natural-gas fired generating facilities. Therefore, consistent with *Sierra Club*, the downstream GHG emissions are indirect impacts of the project that must be quantified and considered as part of our NEPA responsibilities.[10]

As I examined the record to determine whether there is evidence of downstream end use, I was persuaded by: (1) amendment No 1. to DTE precedent agreement;[11] (2) comments filed by the Michigan Agency for Energy and the Michigan Economic Development Corporation which indicate that the NEXUS pipeline will be utilized by DTE, a Michigan utility, for "meeting Michigan's clean power generation transition;"[12] (3)

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in performing its NEPA review. *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sierra Club*). I dissented in the *Sabal Trail* remand order, issued March 14, 2018, because I agreed with the Court that the downstream GHG emissions that resulted from burning the natural gas transported by the SMP Project were an indirect impact of the project and did not support the majority's response to the Court on this issue. I also could not support the Commission's response to the Court regarding the use of Social Cost of Carbon as part of its pipeline environmental review. *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

[8] As I have said repeatedly, this upper-bound GHG quantification and analysis is the bare minimum we should be doing as part of our environmental review of pipeline projects when we do not have more evidence in the record to calculate the gross and net GHG emissions. *See, Broad Run,* 163 FERC ¶ 61,190 (LaFleur, Comm'r, *concurring*); *Millennium Pipeline Company, L.L.C.*, 164 FERC ¶ 61,039 (2018) (LaFleur, Comm'r, *concurring in part and dissenting in part*).

[9] NEXUS Rehearing Order at P 95.

[10] *Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*).

[11] Filed November 20, 2015.

[12] Michigan Agency for Energy and Michigan Economic Development Corporation

NEXUS Answer to City of Green Comments;[13] (4) Sierra Club, June 3, 2016 Comments, quoting DTE filing at the Michigan Public Services Commission;[14] and (5) the NEXUS Certificate Order stating that NEXUS asserts many new gas-fired plants are planned, including three power generator entities that filed letters of support.[15] In my view, this evidence demonstrates that it is reasonably foreseeable that transported gas will be combusted at natural-gas fired generating facilities.[16] I note that DTE has publically

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June 6, 2016 Comments (noting Michigan's "transition from coal-fired generation to newer, cleaner and more diverse generation").

[13] NEXUS March 31, 2016 Answer (argues that NRG Energy, Inc. plans to convert Avon Lake Generating Station from coal to gas, and utilize the NEXUS project as a source for fuel).

[14] "DTE Electric does not expect to fully utilize the capacity contracted on the NEXUS Pipeline during the first few years of the contract (through 2021). Capacity utilization will increase to approximately 40% after the first new combined cycle plant is brought into service, and the NEXUS Pipeline capacity is expected to be fully utilized once a second combined cycle unit is brought online. Until the second combined cycle facility is brought on-line, DTE Electric will not be using all of the available NEXUS Pipeline capacity to meet DTE Electric natural gas load requirements." *See also*, the Michigan Public Service Order, April 27, 2018, "DTE Electric's agreement with NEXUS is for 30,000 Dth per day of transportation capacity, increasing to 75,000 Dth per day upon in-service of gas-fired generation facilities."

[15] NEXUS Certificate Order, 160 FERC ¶ 61,022 at P 38. In support, order cited: (1) NRG Power Midwest GP LLC August 17, 2016 Comments; (2) Oregon Clean Energy, LLC August 29, 2016 Comments; and (3) GDF SUEZ Energy Marketing North America, Inc. February 18, 2016 Comments. NEXUS Certificate Order, 160 FERC ¶ 61,022 at P 38 n.26. *See also*, NEXUS March 21, 2016 Answer at 14 ("three separate Ohio power generators are among the planned NEXUS market connections, and they have all filed letters in support of the Project with the Commission").

[16] While there is no specific evidence of identified natural-gas fired generation facilities with precedent agreements for capacity on the proposed pipeline, at this time, I do not believe that such specificity is required in order to find it reasonably foreseeable that transported natural gas from this project will be combusted at natural-gas fired generating facilities and the GHG emissions from that combustion are indirect impacts, consistent with *Sierra Club*. *See Mid States Coalition for Progress v. Surface Transportation Board*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*). In *Mid States*, the Court concluded that the Surface Transportation Board erred by failing to consider the downstream impacts of the burning of transported coal. Even though the record lacked specificity regarding the extent

announced plans to retire coal-fired plants to be replaced by natural-gas fired plants.[17]

The majority flatly concludes that downstream GHG emissions in this case do not constitute indirect impacts. I believe that this finding ignores the evidence in the record that suggests otherwise. The majority seems to be reading the *Sierra Club* Court's instruction to consider indirect impacts in an unsustainably narrow way. The words "reasonably foreseeable" do not mean "known with certainty and precision." I believe that the record in this case demonstrates that downstream GHGs from power plants are reasonably foreseeable and must be assessed as indirect impacts under *Sierra Club*.

Further, even assuming arguendo that the Commission did not have sufficient information about the natural gas-fired power plants to calculate the gross and net GHG emissions, I believe the Commission would then have an affirmative duty to seek the additional information to clarify the record regarding the identified end uses, before simply concluding that there are no indirect impacts from the project.[18] I also note that, given the expected substitution of natural-gas fired generation facilities for the retiring coal facilities, the calculation of downstream GHG emissions could be netted to account for the reduction in GHG emissions associated with the retirement of coal-fired plants.[19] This approach is

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to which the transported coal would be burned, the Court concluded the nature of the impact was clear. As Commissioner Glick noted in his dissent of today's order, "when the record does not have precise end use and location of natural gas deliveries, the Commission must consider the likely use of gas transported through the Project. NEPA, after all, does not require exact certainty; instead, it requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action …"

[17] For example, https://www.freep.com/story/news/local/michigan/2017/05/16/dte-plans-coal-plants-carbon/324991001/

[18] I believe that it is reasonably foreseeable in the vast majority of cases that the gas being transported by a pipeline we authorize will be burned for electric generation or residential, commercial, or industrial end uses. In those circumstances, there is a reasonably close causal relationship between the Commission's action to authorize a pipeline project that will transport gas and the downstream GHG emissions that result from burning the transported gas.

[19] I disagree with the majority's implication that, the simple assertion that "the new power plants would not represent incremental GHG emissions, instead there would be a net decrease in the GHG emissions," obviates the Commission's responsibility to quantify and consider the indirect impacts of downstream GHG emissions. NEXUS Rehearing Order at n. 241. Even if the net GHG emissions were reduced because of the coal to gas conversion,

consistent with the analysis the Commission conducted in *Sabal Trail.*[20]

Additionally, the Commission is obligated under NEPA to reach a determination regarding the significance of all environmental impacts, including the indirect impacts of downstream GHG emissions, and the majority fails to do so here. The majority suggests that because the project is needed, additional information on indirect impacts other than the full-burn estimate would not change the outcome, and NEPA does not require its consideration.[21] I fundamentally disagree. To evaluate indirect impacts the Commission must quantify and determine the significance of those impacts. Thus, a full-burn estimate is not the end of the inquiry.

The majority argues that the Social Cost of Carbon is not an appropriate indicator of significance and "the challenging question of significance of GHG emissions is not solved by transforming a quantity into a monetized form."[22] That is true. It is our obligation to assess significance, and the Social Cost of Carbon is simply a metric to help us evaluate one part of that determination. Deciding how to measure significance would require thoughtful analysis and decision-making by the Commission, such as we apply in many other areas of our work.[23] I continue to disagree with the technical and policy

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the downstream combustion of the gas would still be an indirect impact.

[20] *Sabal Trail* Supplemental Environmental Impact Statement, February 5, 2018.

[21] NEXUS Rehearing Order at P 98.

[22] *Id.* at P 101.

[23] Many of the core areas of the Commission's work have required the development of analytical frameworks, often a combination of quantitative measurements and qualitative assessments, to fulfill the Commission's responsibilities under its broad authorizing statutes. This work regularly requires that the Commission exercise judgment, based on its expertise, precedent, and the record before it. For example, to help determine just and reasonable returns on equity (ROEs) under the Federal Power Act, Natural Gas Act (NGA), and Interstate Commerce Act, the Commission identifies a proxy group of comparably risky companies, applies a discounted cash flow method to determine a range of potentially reasonable ROEs (i.e., the zone of reasonableness), and then considers various factors to determine the just and reasonable ROE within that range. *See also, e.g.*, *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222, *order on reh'g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007) (establishing Commission regulations and policy for reviewing requests for transmission incentives); *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. &

arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon.[24] The Social Cost of Carbon is a scientifically-derived metric to translate tonnage of carbon dioxide or other GHGs to the cost of long-term climate harm.[25]

As the majority observes "NEPA is not an academic exercise"[26] but "is intended to help public officials make decisions."[27] Assessing the public interest is not simply a matter of checking the boxes to ensure the existence of precedent agreements and reciting a series of environmental impacts including a full-burn estimate. Rather, to decide whether the project is in the public interest, we must actually balance the benefits of the project with the environmental impacts, including indirect impacts. We have not correctly done so in this case.

Accordingly, I respectfully dissent in part.

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Cheryl A. LaFleur
Commissioner

Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth.* v. *FERC*, 762 F.3d 41 (D.C. Cir. 2014) (requiring, among other things, the development of regional cost allocation methods subject to certain general cost allocation principles); *BP Pipelines (Alaska) Inc.*, Opinion No. 544, 153 FERC ¶ 61,233 (2015) (conducting a prudence review of a significant expansion of the Trans Alaska Pipeline System).

[24] The majority incorporates arguments raised in prior dockets—many of which I dissented on—to justify its rejection of the Social Cost of Carbon. *See, e.g., Sabal Trail*, 162 FERC ¶ 61,233 (LaFleur, Comm'r, *dissenting in part*); *New Market*, 163 FERC ¶ 61,128 (LaFleur, Comm'r, *dissenting in part*); *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158 (2018) (LaFleur, Comm'r, *concurring*); and *Broad Run*, 163 FERC ¶ 61,190 (LaFleur, Comm'r, *concurring*).

[25] https://www.epa.gov/sites/production/files/2016-12/documents/social_cost_of_carbon_fact_sheet.pdf

[26] NEXUS Rehearing Order at P 98.

[27] *Id*. at n. 255.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

NEXUS Gas Transmission, LLC	Docket Nos. CP16-22-001
Texas Eastern Transmission, LP	CP16-23-001
DTE Gas Company	CP16-24-001
Vector Pipeline, L.P.	CP16-102-001

(Issued July 25, 2018)

GLICK, Commissioner, *dissenting*:

Today's order denies rehearing of the Commission's decision to authorize the NEXUS Project (Project) under section 7 of the Natural Gas Act (NGA).[1] I dissent from the order because it fails to comply with our obligations under the NGA and the National Environmental Policy Act (NEPA).[2] First, I disagree with the Commission's finding that the Project as proposed is needed. The Commission relies on the existence of precedent agreements for less than 60 percent of the Project's proposed transportation capacity, some of which are agreements with affiliates, to make its determination. I do not believe the Commission can depend on this factor alone to find need, particularly when evidence in the record contradicts the Commission's assertion of future growth in demand. Second, the Commission again maintains that it need not consider the harm from the Project's contribution to climate change. While the Commission has quantified the Project's downstream greenhouse gas (GHG) emissions, the Commission nonetheless concludes that these emissions are not reasonably foreseeable and that it is not obligated to determine whether the resulting harm from climate change is significant.[3] I do not

[1] 15 U.S.C. § 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852. Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f (2012). Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

[3] *NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054 at P 95 (2018) (NEXUS Rehearing Order).

believe the Commission can find that the Project is in the public interest without determining the significance of the Project's contribution to climate change.

The Commission Has Not Demonstrated that the Project Is Needed

Section 7 of the NGA requires that, prior to issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline, and that, on balance, the pipeline's benefits outweigh its harms.[4] In today's order, the Commission contends that precedent agreements for 59 percent of the authorized pipeline capacity (only 49 percent excluding affiliated agreements)[5] combined with the applicant's willingness to invest in the full proposed pipeline capacity are sufficient—alone—to demonstrate need for the entire Project. I disagree and believe that the Commission should have considered additional factors to determine whether need has been established for purposes of finding the Project is in the public interest.[6]

The Commission argues that rehearing parties challenging the Project as overbuilt and undersubscribed overlook the Commission's finding that "a downsized pipeline matching the current subscribed amount would not result in a significant reduction in impacts to landowners and communities."[7] But the Commission's finding that it is appropriate to construct a "larger pipeline . . . than immediately necessary" depends on its

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[4] *See Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990) (The public interest standard under the NGA includes factors such as the environment and conservation, particularly as decisions concerning the construction, operation, and transportation of natural gas in interstate commerce "necessarily and typically have dramatic natural resource impacts.").

[5] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 45 n.113. DTE is a partial owner of NEXUS. NEXUS's precedent agreements with DTE Gas and DTE Electric account for 150,000 Dth per day of the 885,000 Dth per day of subscribed capacity and 1,500,000 Dth per day of total project pipeline capacity. As I have stated previously, I believe that affiliate precedent agreements—which, by their very nature, are not necessarily the product of arms-length negotiations—are insufficient by themselves to demonstrate project need.

[6] *Id.* P 26 n.57; *see also NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 41 (2017) (The Commission acknowledges that a "significant portion of [the NEXUS pipeline] remains unsubscribed.").

[7] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 28.

conclusion that there is the "potential for future growth in demand"[8]—the very conclusion that rehearing parties seek to refute by providing evidence of flat demand.[9] While there may be potential benefits to right-sizing pipelines to minimize environmental impacts that otherwise would occur in the future, I do not agree the Commission can justify a larger-than-necessary pipeline solely based on the potential for future growth implied by an applicant's willingness to invest in the additional capacity and their commitment to market the unsubscribed capacity.[10]

Rather, after thoroughly considering the complete record, the Commission must determine whether the weight of the evidence supports the applicant's speculation of growing demand. As the Commission indicated it would do in the Certificate Policy Statement, we should "consider all relevant factors reflecting on the need for the project," including "demand projections, potential cost saving to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[11] Even the applicant contends that under the Certificate Policy Statement "the Commission must consider all relevant factors reflecting on the need for a project, including demand projections and market studies."[12]

Looking beyond precedent agreements to other proof of need is especially critical when nearly half of the Project's capacity as proposed remains unsubscribed and the record contains evidence raising serious questions about the Project's underlying need. Instead, the Commission dismisses the evidence challenging future demand growth out-of-hand, baldly concluding that it is "unpersuaded" by studies submitted to demonstrate insufficient demand because "[p]rojections regarding future demand often change" and "[g]iven this uncertainty associated with long-term demand projections . . . the

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[8] *Id.* P 28 n.67.

[9] *Id.* P 21 ("In support of its assertions that the demand for additional pipeline transportation is lacking, Sierra Club says demand for electricity in Ontario will remain flat" and "that demand in Michigan will similarly remain soft.").

[10] If we were to adopt that standard, every proposed pipeline essentially would automatically be deemed needed simply because a natural gas company applied to construct the pipeline.

[11] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999) (Certificate Policy Statement), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).

[12] Final Environmental Impact Statement at 1-4. (Final EIS).

Commission deems precedent agreements to be the better evidence of demand."[13] While the Commission declines to rely on such record evidence for the purposes of establishing need, it nonetheless points to just such comment letters, memoranda of understanding, and expressions of "expected demand" as "evidence of growing demand" to counter rehearing arguments contending that there is a shortage of subscribers for the Project and a weak market for gas in the future.[14] But the Commission does not explain why the additional evidence in support of the Project is meaningful and the evidence against it is not.[15] Instead, the Commission selectively points to evidence of expected demand *only* in instances where it backs the Commission's conclusions,[16] while *summarily* rejecting the same type of evidence when it does not support the Project. I oppose this inconsistent and arbitrary application of the Certificate Policy Statement for the purposes of evaluating project need.

The Order Does Not Adequately Evaluate the Project's Environmental Impact

The Commission contends that it is not required to consider the Project's contribution to climate change from upstream and downstream GHG emissions because the record in this proceeding does not demonstrate that the emissions are indirect effects of the Project.[17] Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that the Commission carefully consider the Project's contribution to climate change, both in order to fulfill the requirements of NEPA and to determine whether the Project is in the public

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[13] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34.

[14] *Id.* P 34 nn.80-81, 83-85.

[15] The record here suggests there is potential for the Project to lead to an oversupply in the targeted regional markets based on the transportation capacity of other approved pipelines, resulting in overbuilt and underutilized pipeline infrastructure. Sierra Club Rehearing Request at 17.

[16] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34 ("[The Commission] would note that countering the position advanced by the studies urged by the Sierra Club and City of Oberlin the record also contains evidence of growing demand for natural gas pipeline transportation capacity.").

[17] *Id.* P 93.

interest under the NGA.

The Commission has recognized its responsibility to evaluate the Project's contributions to climate change—both by quantifying the direct and indirect effects on GHG emissions and by "linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis."[18] Yet, the Commission again refuses to consider the reasonably foreseeable downstream GHG emissions caused by the Project claiming that it "lacks meaningful information about downstream use of the gas."[19]

While the Commission quantifies the potential downstream GHG emissions associated with combusting the amount of gas that the Project could deliver in the Final Environmental Impact Statement (EIS),[20] it refuses to consider these emissions as an indirect effect, reasoning that there is "[t]here is no evidence in the record of reasonably foreseeable end-use combustion of the gas transported by the Projects."[21] The Commission claims that only where it has definitive information about the specific location and timing of upstream production and downstream consumption can it conclude that GHG emissions from these activities are reasonably foreseeable.[22] But this definition of indirect effects is overly narrow and circular.[23] In adopting it, the

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[18] *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197, at P 270 (2018).

[19] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 95.

[20] Final EIS at 4-278 ("[T]he Projects combined can deliver up to 925,000 Dth/d of new volumes, which can produce 17,900,878 metric tons of CO2 per year from end-use combustion.").

[21] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 95.

[22] *Id.*

[23] *See San Juan Citizens All. et al. v. United States Bureau of Land Mgmt.*, No. 16-CV-376-MCA-JHR, 2018 WL 2994406, at *10 (D.N.M. June 14, 2018) (holding that it was arbitrary for the Bureau of Land Management to conclude "that consumption is not 'an indirect effect of oil and gas production because production is not a proximate cause of GHG emissions resulting from consumption'" as "this statement is circular and worded as though it is a legal conclusion"). The Commission attempts to distinguish the instant case from that in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*), by suggesting that the Commission must consider GHG emissions from end-use combustion only in cases where the "entire purpose" of the project is to serve a natural-gas fired power plant. But, as discussed below, it does not follow that the environmental effects of downstream consumption are not reasonably foreseeable because information

Commission disregards the Project's central purpose—to facilitate natural gas consumption. As the record demonstrates, natural gas transported by the Project will be used for electric generation, home heating and industrial use.[24]

Furthermore, the Commission suggests that it cannot determine whether downstream GHG emissions are reasonably foreseeable because it does not have "information as to the extent such consumption will represent incremental consumption above existing levels."[25] This assertion directly conflicts with the applicant's statement that the "need for the [Project] originates from an increase in demand for natural gas in the region."[26] As a result, it is entirely foreseeable that a significant portion, if not all, of the natural gas transported through the Project will be combusted, resulting in GHG emissions that contribute to climate change.

When the record does not have precise end use and location of natural gas deliveries, the Commission must consider the likely use of gas transported through the Project. NEPA, after all, does not require exact certainty; instead, it requires that the Commission engage in reasonable forecasting and estimation of possible effects of a major federal action where doing so would further the statute's two-fold purpose of ensuring that the relevant agency will "have available, and will carefully consider, detailed information concerning significant environmental impacts" and that this information will also be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[27]

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about the specific destination of natural gas is not specified. The Commission must use its "best efforts" to identify and quantify the full scope of the environmental impacts and *Sabal Trail* acknowledges that educated assumptions are inevitable in the process of emission quantification. *See Sabal Trail*, 867 F.3d at 1374.

[24] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 34 n.83; *see also* Final EIS at 1-3.

[25] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 96 n.248.

[26] Final EIS at 1-3.

[27] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). In order to evaluate circumstances in which downstream impacts of a pipeline facility are reasonably foreseeable results of constructing and operating the proposed facility, I am relying on precisely the sort of "reasonably close causal relationship" that the Supreme Court has required in the NEPA context and analogized to proximate cause. *See id.* at 767 ("NEPA

As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure for transporting fossil fuels—when the "nature of the effect" (end-use emissions) is reasonably foreseeable, but "its extent is not" (specific consumption activity producing emissions), an agency may not simply ignore the effect.[28] Put differently, the fact that an agency may not know the exact location and amount of GHG emissions to attribute to the federal action is no excuse for assuming that impact is zero. Instead, the agency must engage in a case-by-case inquiry into what effects are reasonably foreseeable and estimate the potential emissions associated with that project—making assumptions where necessary—and then give that estimate the weight it deserves.[29] As noted above, the record here is sufficient to demonstrate that the "nature of the effect" is emissions from end-use combustion.

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requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court [has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'") (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); *see also Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003) ("[I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct.") (internal quotation marks and citations omitted).

[28] *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

[29] In comments recently submitted in the Commission's pending review of the natural gas certification process, the current Administration's Environmental Protection Agency recommended a number of tools the Commission can use to quantify the reasonably foreseeable "upstream and downstream GHG emissions associated with a proposed natural gas pipeline." These include "economic modeling tools" that can aid in determining the "reasonably foreseeable energy market impacts of a proposed project." U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 3–4 (filed June 21, 2018) (explaining that the "EPA has emission factors and methods" available to estimate GHG emissions—both net and gross—from activities upstream and downstream of a proposed natural gas pipeline, including the Greenhouse Gas Reporting Program and the U.S. Greenhouse Gas Inventory); *see Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

Quantifying the GHG emissions that result from the Project is a necessary, but not sufficient, step in meeting the Commission's obligations to consider the Project's environmental effects associated with climate change. As required by NEPA, the Commission must also identify, and determine the significance of, the harm caused by those emissions.[30] As the rehearing parties argue,[31] the Social Cost of Carbon does just that, providing a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change. Nevertheless, the Commission again rejects the use of the Social Cost of Carbon, referring to prior orders where the Commission concluded that the Social Cost of Carbon "cannot meaningfully inform the Commission's decisions on natural gas transportation infrastructure projects under the NGA."[32] I disagree and believe, as the courts have found, that the Social Cost of Carbon provides a meaningful approach for considering the effects that the Commission's certificate decisions have on climate change.[33]

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[30] In order to satisfy NEPA, the environmental review documents must disclose direct and indirect impacts as well as their significance, regardless of whether it is an Environmental Assessment and Environmental Impact Statement. In cases where significant impacts are identified, an Environmental Impact Statement is required which must also disclose a means to mitigate such adverse environmental impacts. 40 C.F.R. § 1502.16. The Commission refers to Council on Environmental Quality (CEQ) Guidance stating that quantified GHG emissions can serve as a proxy for assessing potential climate change effects. However, the Commission fails to complete the assessment which requires evaluating the quantified GHG emissions and disclosing whether the harm associated with climate change is significant. NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 101.

[31] Sierra Club Rehearing Requests at 31.

[32] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 100 n.261 (referencing *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197 at P 280).

[33] *See Montana Envt'l Info. Ctr. v. U.S. Office of Surface Mining*, 274 F. Supp. 3d 1074, 1097 (D. Mont. 2017), *amended in part, adhered to in part sub nom. Montana Envtl. Info. Ctr. v. U. S. Office of Surface Mining*, No. CV 15-106-M-DWM, 2017 WL 5047901 (D. Mont. Nov. 3, 2017) (finding it arbitrary and capricious for agency to quantity the benefits of its decision and then explain that a similar analysis of the costs was impossible when such analysis was possible by using the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014) (requiring agency to use the Social Cost of Carbon protocol when calculating costs and benefits of action that would generate GHG emissions).

Congress determined under the NGA that no entity may transport natural gas interstate, or construct or expand interstate natural gas facilities, without the Commission first determining the activity is in the public interest. This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts associated with the project, such as the contribution to climate change. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for "linking GHG emissions to particular climate impacts through a qualitative or quantitative analysis"[34] in order to satisfy our obligation to consider how the Commission's actions contribute to the harm caused by climate change.

The Commission dismisses the Social Cost of Carbon, pointing to CEQ Guidance that "NEPA does not require monetization of costs and benefits" when there are "important qualitative considerations."[35] But the Commission misconstrues the precedent on this issue. The presence of qualitative considerations does not require the Commission to disregard quantitative ones. Instead, the CEQ Guidance recognizes that monetized quantification of an impact is appropriate to be incorporated into the NEPA document, if doing so is necessary for an agency to fully evaluate the environmental consequences of its decisions.[36]

The courts have found that it is arbitrary and capricious to monetize project benefits while ignoring the harm from the project's contribution to climate change and an available tool to quantify this harm—the Social Cost of Carbon.[37] By measuring the

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[34] *Mountain Valley Pipeline LLC*, 163 FERC ¶ 61,197 at P 270.

[35] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 101.

[36] *See* CEQ, *Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews* at 32-33 (Aug. 1, 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf.

[37] *High Country Conservation Advocates*, 52 F. Supp. 3d at 1191 ("Even though NEPA does not require a cost-benefit analysis, it was nonetheless arbitrary and capricious to quantify the benefits of the lease modifications and then explain that a similar analysis of the costs was impossible when such an analysis was in fact possible . . . ."); *see also Montana Envt'l Info. Ctr.*, 274 F. Supp. 3d at 1095-96.

long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon provides a meaningful method for linking GHG emissions to particular climate impacts for quantitative and qualitative analyses. The court's concern that an agency must not "unfairly place a 'thumb on the scale by inflating the benefits of the action while minimizing its impacts,'" is critical regardless of whether the Commission considers these effects quantitatively or qualitatively.[38] The pertinent question is whether the Commission's consideration of the harm caused by the Project's contribution to climate change is consistent with how the Commission considers the Project's other effects, including benefits. In today's order, the Commission fails this test by simultaneously refusing to use the Social Cost of Carbon to monetize the impact of GHG emissions while simultaneously monetizing the Project's long-term socioeconomic effects, including direct, indirect, and induced benefits from employment and local taxes.[39]

Finally, the Commission claims that it has satisfied its obligation to consider the harm caused by the Project's contribution to climate change with a summary discussion of the impacts of GHG emissions while still avoiding making a determination of whether the harm caused by the Project's contribution to climate change is significant.[40] The CEQ regulations expressly outline a framework for determining whether the Project's impacts on the environment will be considered significant.[41] Furthermore, as noted above,
the U.S. Environmental Protection Agency (EPA) recommended an approach for considering the significance of the harm from a project's contribution to climate change in its comments on the Commission's pending review of the natural gas certification process. EPA explains that "even absent a full [cost-benefit analysis]," estimates of the Social Cost of Carbon "may be used for project analysis when [the Commission] determines that a monetary assessment of the impacts associated with the estimated net

[38] *Montana Envt'l Info. Ctr.*, 274 F. Supp. 3d at 1098.

[39] EIS at 4-193–4-196.

[40] NEXUS Rehearing Order, 164 FERC ¶ 61,054 at P 99.

[41] 40 C.F.R. § 1508.27 (2017) (setting forth a list of factors agencies should rely on when determining whether a project's environmental impacts are "significant" considering both "context" and "intensity").

change in GHG emissions provides useful information in its environmental review or public interest determination."[42]

For these reasons, I respectfully dissent.

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Richard Glick
Commissioner

[42] U.S. Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4–5 (filed June 21, 2018).