



STATEMENT

Dissent in Part of Commissioner Cheryl A. LaFleur on NEXUS Gas Transmission Project

Date: July 25, 2018

Docket No.: CP16-22-001, CP16-23-001, CP16-24-001, CP16-102-001

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 since the *Sabal Trail* remand order³ 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 Order⁶ disclosed the full-burn estimate of

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*).

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).



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downstream GHG emissions associated with the project.⁷ While that approach has its 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) 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

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 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 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



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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 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

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 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.



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could be netted to account for the reduction in GHG emissions associated with the retirement of coal-fired plants.¹⁹ This approach is 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 arguments relied upon by the majority to attack the usefulness of the Social Cost of Carbon.²⁴

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, 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. & 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*).



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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.

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.