



STATEMENT

Dissenting in Part Commissioner Richard Glick on Texas Eastern Transmission, LP

Date: July 19, 2018

Item No.: C-2

Docket No.: CP18-10-000

"Today, the Commission issues a certificate to Texas Eastern Transmission, LP to construct and operate the Texas Industrial Market Expansion Project and the Louisiana Market Expansion Project (Projects), concluding that the Projects are required by the public convenience and necessity.¹ The Commission also finds that the Projects will not have a significant effect on the environment.² In reaching these conclusions, the Commission maintains that it need not consider the harm caused by the Projects' contribution to climate change. The Commission's refusal to do so falls well short of our obligations under the Natural Gas Act (NGA)³ and the National Environmental Policy Act (NEPA).⁴ Because I disagree with these conclusions and believe the Commission cannot find that the Projects are in the public interest without first considering the significance of the Projects' contribution to climate change,⁵ I dissent in part from the Commission's action today.

"In today's order, the Commission once again adopts a definition of indirect effects for purposes of analyzing upstream and downstream greenhouse gas (GHG) emissions that is overly narrow and circular.⁶ The Commission quantifies a

¹ *Texas Eastern Transmission, LP*, 164 FERC ¶ 61,037 (2018) (Certificate Order).

² *Id.* P 33.

³ 15 U.S.C. 717f (2012).

⁴ National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852.

⁵ 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). While I cannot support today's order because it fails to meet these standards, I agree with the Commission's conclusion that Texas Eastern has adequately demonstrated a need for the Projects.

⁶ 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"). In adopting this narrow and circular definition, the Commission disregards the Projects' central purpose—to facilitate natural gas consumption by providing new supplies to two identified end-use customers. See EA at 1 (describing the purpose and need for the Project as "provid[ing] an additional 157,500 dekatherms per day of firm capacity . . . to meet its contractual obligations with Entergy Louisiana, LLC and Natgasoline, LLC").



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portion of the Projects' downstream GHG emissions,⁷ but nonetheless fails to recognize that the harm caused by the Projects' contribution to climate change is an indirect effect that the Commission must evaluate and consider under NEPA and the NGA.⁸ The Commission also contends, without further explanation, that it "has not identified a suitable method" for determining the impact from the Projects' contribution to climate change and, absent such a method, it simply "cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment and how that impact would contribute to climate change."⁹

"As I have stated previously,¹⁰ NEPA does not permit agencies to so easily shirk their responsibilities to consider environmental consequences; instead, it requires that the Commission engage in reasonable forecasting and estimation 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 be "available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."¹¹

"As the U.S. Court of Appeals for the District of Columbia Circuit explained in *Sierra Club v. FERC (Sabal Trail)*, in the face of indefinite variables, "agencies may sometimes need to make educated assumptions about an uncertain future."¹² The Commission cannot point to the mere presence of uncertainty over upstream and downstream GHG emissions to excuse it from considering the harm from the Projects' contribution to climate change. In the case of new natural gas pipelines, it is reasonable to assume that building incremental transportation capacity will spur additional production and result in some level of combustion of natural gas, even if the exact details of the method or location are not definite. As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved downstream GHG emissions from new infrastructure for transporting fossil fuels—when the "nature of the

⁷ Certificate Order, 164 FERC ¶ 61,037 at P 32.

⁸ *Id.* P 33. The Commission also ignores the other half of the Projects' incremental transportation capacity, even though Natgasoline LLC, a "greenfield world scale methanol production complex," has subscribed for the entire remainder. Natgasoline LLC, *Fertilizer & Chemicals, Our Facilities*, OCI (July 17, 2018), <http://www.oci.nl/oci-fcg/our-facilities/natgasoline-llc>.

⁹ Certificate Order, 164 FERC ¶ 61,037 at P 33.

¹⁰ See *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at 7 (2018) (Glick, Comm'r, *dissenting*); *Tennessee Gas Pipeline Company, L.L.C.*, 163 FERC ¶ 61,190, at 2 (2018) (Glick, Comm'r, *dissenting in part*); *Florida Southeast Connection, LLC*, 163 FERC ¶ 61,158, at 1-2 (Glick, Comm'r, *dissenting in part*); *Gulf South Pipeline Company, LP.*, 163 FERC ¶ 61,124, at 1-2 (Glick, Comm'r, *dissenting in part*); *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,223, at 6 (2018) (Glick, Comm'r, *dissenting*).

¹¹ *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 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).

¹² 867 F.3d 1357, 1374 (D.C. Cir. 2017).



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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.¹³

“Based on the record here, it is entirely foreseeable that a portion of the natural gas transported through the Projects will be combusted, emitting GHGs that contribute to climate change. As noted above, the Projects are designed to provide firm natural gas transportation capacity to fuel Lake Charles Power Station and to serve Natgasoline, LLC, a new methanol production complex.¹⁴ Under these circumstances, the Commission must consider the harm from the Projects’ contribution to climate change.¹⁵

“Quantifying the Projects’ GHG emissions, including reasonably foreseeable upstream and downstream emissions, is a necessary—but not sufficient—step in meeting the Commission’s obligations to consider the Projects’ environmental effects associated with climate change. NEPA and the NGA’s public interest standard require the Commission to consider not the GHG emissions themselves but the resulting environmental impact. The Commission not only refuses to consider the significance of the Projects’ climate-change impact, but also maintains that it lacks the means to do so.¹⁶

“The Commission is incorrect insofar as it concludes that there is no “suitable method” to consider the harm caused by the Projects’ contribution to climate change.¹⁷ That is precisely what the Social Cost of Carbon provides. It translates the long-term damage done by a ton of carbon dioxide into a monetary value, thereby providing a meaningful and informative approach for satisfying an agency’s obligation to consider how its actions contribute to the harm caused by climate change. The U.S. Environmental Protection Agency recommended this approach in its comments on the Commission’s pending review of the natural gas certification process, explaining that 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 change in GHG emissions provides useful information in its environmental review or public interest determination.”¹⁸ Furthermore, the U.S. Council on Environmental Quality regulations themselves outline a framework for determining whether a project’s impacts on the environment will be considered significant.¹⁹

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“Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens. Unlike many of the challenges that our society faces, we know with certainty what causes climate

¹³ *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003).

¹⁴ See *supra* note 6 (EA at 1).

¹⁵ *Sabal Trail*, 867 F.3d at 1371-72; *id.* at 1374.

¹⁶ Certificate Order, 164 FERC ¶ 61,037 at P 33. Notably, the Environmental Assessment lacks any discussion of climate change.

¹⁷ See *supra* note 9.

¹⁸ United States Environmental Protection Agency, Comments, Docket No. PL18-1-000, at 4-5 (filed June 21, 2018).

¹⁹ 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.”).



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change: It is the result of GHG emissions, including carbon dioxide and methane, which can be released in large quantities through the production and consumption of natural gas. 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.²⁰ This requires the Commission to find, on balance, that a project's benefits outweigh the harms, including the environmental impacts from climate change that result from authorizing additional transportation. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of GHGs, contributing to the existential threat of climate change.

"For these reasons, I respectfully dissent in part."

²⁰ 15 U.S.C. 717f(c)(1)(A).