

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Tennessee Gas Pipeline Co., LLC

Docket No. CP16-21-000

**MOTION TO INTERVENE, INITIAL COMMENTS, AND REQUEST FOR
PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT OF THE
NATURAL RESOURCES DEFENSE COUNCIL**

On November 20, 2015, the Tennessee Gas Pipeline Company, LLC (“Tennessee Gas”), a subsidiary of the Kinder Morgan corporation, submitted an application to the Federal Energy Regulatory Commission (the “Commission”) under Sections 7(b) and 7(c) of the Natural Gas Act requesting, among other things, that the Commission issue a certificate of public convenience and necessity authorizing the construction and operation of the proposed Northeast Energy Direct Pipeline (the “Application”). The project is proposed to extend from Pennsylvania to Wright, New York and from there to Dracut, Massachusetts, at a total estimated cost of \$5.2 billion. As authorized by: 18 C.F.R. §§ 157.10, 385.211, 385.212, and 385.214; the Commission’s Notice of Application dated December 11, 2015; and the Commission’s Notice of Extension of Comment Date dated January 4, 2015, the Natural Resources Defense Council (“NRDC” or “Proposed Intervenor”) moves to intervene with full rights as a party in the above-captioned proceeding and protest the application. NRDC also provides the following initial comments on the Application.

All communications related to this proceeding should be addressed to:

Daniel Raichel
Natural Resources Defense Council
40 W. 20th St., 11th Fl.
New York, NY 10011
Phone: 212-727-4455
Fax: 212-727-1773
Email: draichel@nrdc.org

In support of its motion and as required by 18 C.F.R. § 385.214(b), Proposed Intervenor states its interests, positions, and the basis in fact and law for each position “to the extent known.” Proposed Intervenor may develop additional facts, arguments, and positions during the proceeding and reserves the right to bring those before the Commission when they are known and at the appropriate time.

I. STATEMENT OF INTEREST

NRDC is a non-profit environmental membership organization with more than 440,000 members throughout the United States. More than 35,000 of these members reside in the New York/New England Region. As required by 18 C.F.R. § 385.214(b)(2)(ii), NRDC has interests that will be directly affected by the outcome of this proceeding. Thousands of NRDC members live, work, and/or recreate in or near the communities and natural areas within the proposed pathway of the Northeast Energy Direct Pipeline, and may suffer injuries as a result of its construction or operation—such as impact on their property, interference with the quiet enjoyment and/or the conservation of natural areas, and the pollution of vital natural resources such as clean air and clean water. NRDC also has a longstanding and active interest regionally in the protection of wild and scenic areas and local communities as well as in the expansion and prioritization of clean energy resources. As such, NRDC has a direct interest in this proceeding both on behalf of its members and on its own organizational behalf.

Additionally, the interests that NRDC represents here are shared by the public at large. Therefore, the NRDC’s intervention is also warranted as in the public interest under 18 C.F.R. § 385.214(b)(2)(iii).

II. THE POSITION OF NRDC

A. Introduction

Under the Natural Gas Act, FERC must determine whether the proposed Northeast Energy Direct Pipeline “is or will be required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(e). Initially, FERC determines, as a threshold matter, that “the project can proceed without subsidies from [the applicant’s] existing customers.” *Myersville Citizens for a Rural Community, Inc. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) (quoting Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61227, 61745 (Sep. 15, 1999), *clarified*, 90 FERC ¶ 61128 (Feb. 9, 2000), *further clarified*, 92 FERC ¶ 61094 (Jul. 28, 2000) (internal alterations omitted)). In order to determine whether this standard is met, FERC performs a balancing test, “approv[ing] an application for a certificate only if the public benefits from the project outweigh any adverse effects.” 88 FERC ¶ 61227, 61750.

Assessing the need for a proposed pipeline is critical to avoid significant harms, such as “overbuilding, the . . . unnecessary disruption of the environment, and the unneeded exercise of eminent domain.” 88 FERC ¶ 61227, 61737. Accordingly, the Commission has charged itself with considering “all relevant factors reflecting on the need for the project,” as well as all adverse impacts of the project, specified as those affecting “existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities.” 88 FERC ¶ 61227, 61747. In an early decision regarding Section 7(c) by the Commission’s predecessor, the Federal Power Commission, the agency acknowledged that “[i]n determining what is the ‘public’ whose convenience and necessity are the subjects of inquiry, we have conceived of that public as the public which exists in the area or territory proposed to be served, *not merely the applicants nor those persons or towns who believe*

they would benefit from the proposed construction.” *Kansas Pipe Line and Gas Co.*, 2 F.P.C. 29, 56 (1939) (emphasis added). FERC must therefore focus its evaluation of need on those members of the public who would be directly affected by the new pipeline infrastructure, and not just on the certificate applicant who would economically benefit from the certificate approval.

While full evaluation of the environmental impacts of a project pursuant to the National Environmental Policy Act (“NEPA”) occurs after the Commission has made an initial “essentially . . . economic” determination of need, *id.* at 61745, environmental review begins at the time of the filing of the application and plays an important role throughout the Commission’s decision making process. *See id.* at 61745-46; 90 FERC ¶ 61128, 61397-98. Ultimately, the Commission evaluates whether a project “can be constructed and operated in an environmentally acceptable manner,” and it has discretion to deny a certificate where it cannot. *See Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61198, 61976 (Dec. 7, 2012).

Proposed Intervenor takes the following positions regarding the Northeast Energy Direct Pipeline:

1. New information, as well as shifts in regional energy policy and consumption trends, suggest that the Northeast Energy Direct Pipeline may not be needed and that the project’s benefits do not outweigh its likely harms; and
2. The Commission must prepare a region-wide environmental impact statement that includes analysis of not only the Northeast Energy Direct Pipeline, but other pending or reasonably foreseeable pipelines in the New York/New England Region.

As required by 18 C.F.R. § 385.214(b)(1), the Proposed Intervenor provides the basis in fact and law for these positions below.

B. New Evidence Regarding Project Need and Shifts in Regional Energy Policy and Trends Suggest that the Project May Not Be Needed and that Its Benefits Do Not Outweigh Its Likely Harms

Tennessee Gas claims in the Application that the Northeast Energy Direct Pipeline reduces high costs for both electric and thermal uses of natural gas in the region and addresses reliability concerns, contending that these benefits outweigh the projects likely impacts. *See* Application at 58-90. Reliability and affordability are important energy issues. But new information regarding the costs and benefits that such a project would entail, including a recent study commissioned by the Massachusetts Attorney General suggest that there are lower-cost and lower-impact alternatives to meeting reliability and affordability in the New York/New England Region. The project's costs may thus outweigh its benefits to the detriment of the energy consumers who would bear the costs, risks, and impacts of potential overbuilding. The Commission's review of the Northeast Energy Direct Pipeline proposal must thoroughly review these issues.

1. The Massachusetts Attorney General's Report Provides Evidence that Additional Natural Gas Pipeline Capacity Is Not Needed to Meet New England Electric Reliability Needs and Is Not Cost Efficient

Protecting electricity reliability and preventing spikes in consumer electricity and natural gas bills during the coldest days of winter are vitally important energy policy goals. However, the results of a study commissioned by the Massachusetts Attorney General strongly suggest that there are other, lower-cost solutions to these issues than building the Northeast Energy Direct Pipeline. On November 18, 2015, the Massachusetts Attorney General's Office released the results of this study (the "Attorney General Report"), which evaluates options to address electricity reliability in the New England Region, including new natural gas pipeline capacity,

through 2030.¹ Analysis Group, *Power System Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas* (Nov. 2015).² In summary, the report concludes that, under existing and expected future market conditions through 2030, “power system reliability will be maintained with or without electric ratepayer investment in new natural gas pipeline capacity.” *Id.* at vi. The report, however, also identifies that under an unlikely worst-case, “stressed” scenario an electric reliability deficiency of 1,675 MW would arise in 2024, and ultimately increase to 2,400 MW by 2030. *Id.* at iii.

To resolve this possible (if unlikely) deficiency, the Attorney General Report evaluated six “solution sets,” one of which was the construction of additional natural gas pipeline capacity. When compared to the other alternatives, the analysis shows that new pipeline capacity represents neither the cheapest, nor the most cost-efficient solution to reliability issues under the “stressed” scenario. *Id.* at 31. For example, a solution comprised of energy efficiency and demand response resources was considerably more cost-effective than building new pipeline capacity. Moreover, the report concludes that new pipeline construction is associated with potential negative long-term economic and environmental consequences because it imposes “up-front costs and risk on ratepayers through significant long-term commitments to pay for the associated infrastructure” and will result in a net increase of greenhouse gas emissions. *Id.* at iv, 31-32. In other words, the Attorney General Report suggests that the project may not be needed and thus may harm energy consumers. The report also suggests that the purported benefits of the Northeast Energy Direct Pipeline are overstated, because other solutions could better address electric reliability issues than the construction of additional pipeline capacity. This evidence

¹ While the aim of the study was to assess the region’s electricity reliability needs and not its thermal gas capacity needs, it did assume a generous rate of growth in thermal demand in its deficiency analysis. *See* Analysis Group Study at 8, n.25.

² Available at <http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf>.

stresses the importance in the environmental review process of thoroughly examining the project's need and the potential for overbuilding.

2. Current or Emerging Policies and Shifts in Regional Energy Trends Undercut the Need For the Northeast Energy Direct Pipeline, Especially in the Context of Other Regional Infrastructure Projects

We also note that the degree to which the Northeast Energy Direct Pipeline is needed depends, in great part, on current and emerging carbon reduction and clean energy policies and the current or foreseeable shifts in regional electricity and natural gas trends. Policies are already in place in the region aimed at reducing carbon pollution and moving to clean energy sources, including the nine-state Regional Greenhouse Gas Initiative and state energy efficiency and renewable energy policies—such as New York's newly announced Clean Energy Standard that will require that 50% of the state's electricity come from renewable sources by 2030 and the greenhouse gas emissions targets outlined in the 2008 Massachusetts Global Warming Solutions Act. In addition, as the states submit plans and adopt complimentary programs to cost-effectively comply with EPA's recently finalized Clean Power Plan additional energy efficiency and renewable energy initiatives are expected in the New York/New England Region.

Accordingly, the Commission must take a critical look at whether the construction of the Northeast Energy Direct Pipeline is needed and in the best interest of energy consumers. Importantly, this analysis must also include consideration of this project in the context of other recently approved or proposed infrastructure projects in the region, such as the Constitution Pipeline (which has substantial overlap with the proposed route of the Northeast Energy Direct Pipeline), the Access Northeast Project, and the Atlantic Bridge Project, Algonquin Incremental Market Project, and the Connecticut Expansion Project. The proliferation of these projects, combined with the ability of existing infrastructure and alternatives to satisfy what is likely to be

diminishing fossil fuel demand in the region over the medium to long-term, suggest that approval the Northeast Energy Direct Pipeline may not only fail to serve the public interest, but, in fact, is likely to become a long-term liability for energy consumers. These risks suggest that the benefits of building the Northeast Energy Direct Pipeline do not outweigh its likely harms. Again, the Commission’s review should thoroughly examine these issues.

C. FERC Must Prepare a Region-Wide Programmatic Environmental Impact Statement that Includes the Northeast Energy Direct Pipeline and Other Pending or Reasonably Foreseeable Infrastructure in the New York/New England Region

The Commission must take advantage of its existing authority to evaluate the need for the Northeast Energy Direct Pipeline, identify and evaluate alternatives that would avoid or minimize harm to natural and cultural resources, and responsibly plan for pipeline development in the New York/New England Region. NEPA authorizes—and in our view, requires—a region-wide programmatic environmental impact statement (“EIS”) for proposed pipelines or expansion projects now pending before the agency, including the Northeast Energy Direct Pipeline, the Access Northeast Project, and the Atlantic Bridge Project. Given the Commission’s recent action on several other projects in the region, any region-wide EIS should also include a detailed cumulative impacts analysis that evaluates the collective environmental impacts of pending projects in conjunction with those newly approved or pending final approval, including the Algonquin Incremental Market Project, the Connecticut Expansion Project, and the Constitution Pipeline.

NEPA requires that federal agencies prepare an EIS for all major actions significantly affecting the quality of the human environment. *See* 42 U.S.C. § 4332(2)(C). The Supreme Court has held that “[a] comprehensive impact statement may be necessary in some cases for an agency to meet this duty.” *See Kleppe v. Sierra Club*, 427 U.S. 390, 409-410 (1976). Thus,

“when several proposals for . . . actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.” *Id.* at 410; *see also Churchill Cnty. v. Norton*, 276 F.3d 1060, 1077 (9th Cir. 2001) (“[A]n agency must prepare both a programmatic EIS and a site-specific EIS where there are large scale plans for regional development. At least when the projects in a particular geographical region are foreseeable and similar, NEPA calls for an examination of their impact in a single EIS.”) (internal quotations and citations omitted); *Nat’l Wildlife Fed’n v. Appalachian Reg’l Comm’n*, 677 F.2d 883, 888 (D.C. Cir. 1981) (“the environmental consequences of proposed actions must all be considered together in a single, programmatic EIS when their impacts will have a compounded effect on a region.”). FERC itself has also recognized that “[p]roposed actions with potential cumulative impacts may mandate the preparation of a regional or comprehensive impact statement.” *Columbia Gas Transmission, LLC*, 148 FERC ¶ 61138, 61733 (Aug. 22, 2014) (emphasis, citations, and quotations omitted).

Support for region-wide consideration of multiple correlated proposals is found in NEPA’s implementing regulations, which define the scope of government actions requiring review to include both “[c]umulative actions”—defined as those with “cumulatively significant impacts” when considered with “other proposed actions”—as well as “[s]imilar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography.” 40 C.F.R. § 1508.25(a)(2), (3). Accordingly, the Council on Environmental Quality has determined that a regional or programmatic EIS is appropriate where there are “[s]everal similar actions or projects in a region or nationwide (e.g., a large scale utility

corridor project),” or where “[a] suite of ongoing, proposed or reasonably foreseeable actions . . . share a common geography or timing.” Michael Boots, CEQ, *Memorandum: Effective Use of Programmatic NEPA Reviews*, 14, 15 (Dec. 18, 2014).³

A key purpose of NEPA’s requirement for a comprehensive, regional EIS is the identification and evaluation of alternatives that lessen cumulative impacts for an entire region. *See Kleppe*, 427 U.S. at 410. In order to fully comply with the Congressional intent of NEPA, FERC should evaluate all pending new natural gas infrastructure proposals within the New York/New England Region together in a single regional programmatic EIS in order to identify and evaluate alternatives that would lessen the cumulative environmental impacts of new infrastructure on the entire region. Among others, the Commission should consider “potentially lower-cost alternatives to building new [gas pipeline] infrastructure,” such as “increasing utilization of capacity that is not fully utilized in existing interstate natural gas pipelines, re-routing natural gas flows, and expanding existing pipeline capacity.” U.S. Dep’t of Energy, *Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector*, 31 (Feb. 2015).⁴

Here, adequate assessment of the significant potential environmental harms of the Northeast Energy Direct Pipeline must account for the fact that Commission is considering several proposals in the New York/New England Region—including the Access Northeast Project and the Atlantic Bridge Project—all of which impact the same geographic area within roughly the same timeframe. *See Peshlakai v. Duncan*, 476 F. Supp. 1247, 1258 (D.D.C. 1979) (recognizing that “space and time” are important considerations in evaluating a request for a

³ Available at https://www.whitehouse.gov/sites/default/files/docs/effective_use_of_programmatic_nepa_reviews_18dec2014.pdf.

⁴ Available at http://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf.

regional EIS). Standing alone, these projects, and those that are “reasonably foreseeable,” will have the “cumulative or synergistic environmental impact upon [the New York/New England] region” that warrants their review as either a cumulative or similar action. *See Kleppe*, 427 U.S. at 410. It is also critical, however, for the Commission to recognize that these projects come on the heels of several more projects within the same geographic area that have been recently approved by or are awaiting final approval of the agency, including the Algonquin Incremental Market Project, the Connecticut Expansion Project, and the Constitution Pipeline. Indeed, the Constitution Pipeline runs on a parallel and often nearly identical course with the Northeast Energy Direct Pipeline for more than a hundred miles. Under these circumstances, the required regional-wide EIS should also have a thorough cumulative impacts analysis that considers the combined impacts of these projects in the context of all recent or anticipated Commission-approved infrastructure in the region. *See U.S. Env’tl. Protection Agency, EPA Comments in Response to FERC Notice of Intent for the Northeast Energy Direct Project, Docket No. FP14-22-000*, at 19 (Oct. 16, 2015) (recommending FERC perform a “detailed account of cumulative impacts that will occur due to the construction and operation of both [the] Constitution Pipeline and the [Northeast Energy Direct Pipeline]”).⁵

Holistic consideration of the environmental impacts of proposed and approved infrastructure is also critical to adequate identification and evaluation of alternatives that minimize cumulative impacts for the entire region. *Cf. Churchill Cnty*, 276 F.3d at 1080 (stating that the purpose of the cumulative impacts analysis is “to assist the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts”) (quotations omitted). As the Supreme Court recognized in *Sierra Club v. Kleppe*, “[o]nly through

⁵ Available at <http://www.nofrackedgasinmass.org/notgp/wp-content/uploads/2015/10/EPA-Ferc-Comments-Oct-16-2015.pdf>.

comprehensive consideration of pending proposals can the agency evaluate different course of action.” *Kleppe* 427 U.S. at 410 (emphasis added). When multiple proposals are pending for the same region, separate environmental review for each project presents the serious risk that a federal agency will overlook important alternatives that could avoid or minimize impacts for the region as a whole. The Commission can only rationally evaluate any viable alternative in the context of a complete understanding of the demand for natural gas, the capacity of existing pipelines, and the proposed capacity of new pipelines—in other words, a region-wide programmatic EIS.

The existence of alternatives that could avoid or minimize the impacts to the New York/New England Region as a whole is also closely tied to the need for the project, which, as detailed above, is questionable given the existence of other recently approved infrastructure, existing and native capacity, and the availability of more cost-efficient means to meet peak regional electricity demand during the coldest winter months. Regional consideration of pending projects in light of recently approved infrastructure will enable the agency to identify alternatives that minimize environmental impacts through elimination of projects or project-components that are simply unneeded. Accordingly, such consideration would not only assist in appropriate assessment of a “no-action” alternative for a particular project, but would also allow the agency to consider alternatives such as co-location of elements of proposed projects with existing infrastructure or other proposed projects. Proposed Intervenor urges the Commission to comprehensively examine these alternatives in a region-wide programmatic EIS that incorporates all recently approved, pending, and reasonably foreseeable pipelines in the New York/New England Region.

III. CONCLUSION

For the reasons stated above, the Commission should grant this motion to intervene and confer party status on NRDC. The Commission should also accept the foregoing statements as the protests of the Proposed Intervenor under 18 C.F.R. § 385.211(a).

Respectfully submitted,



Daniel Raichel
Natural Resources Defense Council
40 W. 20th St., 11th Fl.
New York, NY 10011
Phone: 212-727-4455
Fax: 212-727-1773
Email: draichel@nrdc.org

Counsel for Proposed Intervenor

January 15, 2016