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Statement of Commissioner Cheryl A. LaFleur on Dominion Transmission, Inc.

Date: May 18, 2018

Docket No.: CP14-497-001

"Today's order denies rehearing of the order on Dominion's New Market Project. I supported our original authorization of this project because I believed that the project was in the public interest. I write separately to comment on the policy change announced in this order limiting the Commission's review and disclosure of upstream and downstream greenhouse gas (GHG) impacts as part of our responsibilities under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). I am particularly troubled that this policy shift is occurring a few weeks after we initiated a generic proceeding to look broadly at the Commission's pipeline review, and more specifically at the Commission's current policy regarding consideration of upstream and downstream impacts.¹ If not for this policy shift that has little bearing on the record developed in this case, I would support today's order as I continue to believe that this project is in the public interest. However, for the reasons set forth below, I am dissenting in part.

"As I have said repeatedly, deciding whether a project is in the public interest requires a careful balancing of the economic need for the project and all of its environmental impacts.² Climate change impacts of GHG emissions are environmental effects of a project and are part of my public interest determination.

"Since late 2016, the Commission has included increasing amounts of information on upstream and 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. This downstream information was included in certificate orders in instances when a project's environmental impact statement (EIS) or environmental assessment (EA) was already finalized without that information, and in later cases was both detailed in NEPA documents and discussed in orders.³ The Commission placed caveats on the information and analysis, stating generally that the downstream impacts do not meet the definition of an indirect impact and are not mandated as part of the

¹ *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,042 (2018).

² See, e.g., *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, dissenting).

³ Recent Commission orders include 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).



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Commission's NEPA review.⁴ The Commission nonetheless made a full-burn calculation to determine an upper-bound GHG emissions amount, unless it had specific information to calculate net and gross GHG emissions.

"With respect to upstream impacts, the Commission has relied on recent DOE studies⁵ to provide generic estimates of impacts associated with upstream natural gas production, including production related GHG emissions.⁶ Commission orders that contained this generic upstream information acknowledged the limitations of providing such data since we did not have more detailed information like the number, location, and timing of the wells, roads, and gathering lines as well as details about production methods.

"The landscape changed in 2017 when the United States Court of Appeals for the District of Columbia Circuit in *Sabal Trail* found that the downstream GHG emissions that result from burning the natural gas transported by the Commission authorized SMP Project are an indirect impact of the project.⁷ This decision clearly signaled that the Commission should be doing more as part of its environmental reviews.

"Today, however, the majority has changed the Commission's approach for environmental reviews to do the exact opposite. Rather than taking a broader look at upstream and downstream impacts, the majority has decided as a matter of policy to remove, in most instances, any consideration of upstream or downstream impacts associated with a proposed project. The majority's reasoning for excluding the information and calculations is generally that it is inherently speculative and does not meaningfully inform the Commission's project-specific review. I disagree.

"Prior to *Sabal Trail*, I strongly supported the Commission's efforts to disclose upstream and downstream information in response to increased concerns cited in our dockets regarding the climate change impacts associated with pipeline infrastructure. As I said in my dissent from the *Sabal Trail* remand order, I believe that, given *Sabal Trail*'s finding that downstream GHGs in that case were indirect impacts, the Commission must now quantify and consider those impacts as part of its NEPA review.⁸

More broadly, pipelines are driving the throughput of natural gas, connecting increased upstream resources to downstream consumption. With respect to downstream impacts, I believe it is reasonably foreseeable, in the vast

⁴ See, e.g., *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046, at P 116 (2017).

⁵ Dep't of Energy and Nat'l Energy Tech. Laboratory, *Life Cycle Analysis of Natural Gas Extraction and Power Generation*, DOE/NETL-2015/1714 (Aug. 30, 2016) (2016 DOE/NETL Study); U.S. Energy Info. Admin., *The Growth of U.S. Natural Gas: An Uncertain Outlook for U.S. and World Supply* (June 15, 2015), <http://www.eia.gov/conference/2015/pdf/presentations/staub.pdf>; Dep't of Energy and Nat'l Energy Tech. Laboratory, *Environmental Impacts of Unconventional Natural Gas Development and Production*, DOE/NETL-2014/1651, (May 29, 2014) (2014 DOE/NETL Study).

⁶ Recent Commission orders used the DOE studies to identify potential environmental impacts associated with unconventional natural gas production related to the proposed project. E.g., *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017); *National Fuel Gas Supply Corporation*, 158 FERC ¶ 61,145 (2017); *Tennessee Gas Pipeline Company, LLC*, 158 FERC ¶ 61,110 (2017); *Rover Pipeline LLC*, 158 FERC ¶ 61,109 (2017); *Algonquin Gas Transmission, LLC*, 158 FERC ¶ 61,061 (2017); and *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046 (2017).

⁷ *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*).

⁸ *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 (2018) (LaFleur, Comm'r, *dissenting in part*).



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majority of cases, that the gas being transported by pipelines 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. We simply cannot ignore the environmental impacts associated with those downstream emissions. Yet, that is precisely what the majority is choosing to do with its new policy regarding downstream impacts.

"I agree that an identified end-use would enable the Commission to more accurately assess downstream GHG emissions by calculating gross and net GHG emissions as we did in *Sabal Trail*.⁹ However, I reject the view that if a specified end-use is not discernible, we should simply ignore such environmental impacts.¹⁰ In that case, we should disclose what we can, such as a full-burn calculation of GHG emissions.

"While the majority attempts to distinguish *Mid States Coalition for Progress v. Surface Transportation Board*¹¹ to justify its new approach regarding consideration of upstream and downstream impacts, I believe that the majority misapplies *Mid States*, which in fact supports my view. In *Mid States*, the Court considered whether the Surface Transportation Board performed a sufficient environmental review associated with the construction of rail lines intended to transport coal. 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 transported coal would be burned, the Court concluded that the nature of the impact was clear. Similarly, I believe we simply cannot ignore the downstream GHG emissions associated with the burning of natural gas, even in those circumstances where the record is incomplete regarding a specific end-use.¹²

"As the majority correctly notes, in *Mid States* the Court's primary basis for requiring the Surface Transportation Board to consider downstream emissions associated with the rail lines was that the Surface Transportation Board had concluded that the rail lines would increase coal production and usage. While the Commission has historically not found that new pipeline infrastructure increases production and/or consumption, if the facts present themselves, there is nothing preventing the Commission from doing so. The majority's reasoning becomes somewhat circular here, as they are essentially arguing that we are not obligated to consider upstream and downstream impacts because there is a lack of causation and reasonable foreseeability of the effects. However, a key reason the Commission lacks the

⁹ See *Sabal Trail* Supplemental Environmental Impact Statement (SEIS) at 4-5. Commission staff quantified the gross, net, and full burn of downstream GHG emissions. The gross total represents the expected use of the downstream power plant facilities. The net total includes the gross total minus the offset from coal-fired generating facility retirements. The full burn estimate is the calculation of the complete combustion of the total pipeline capacity.

¹⁰ 40 C.F.R. § 1502.22 (2017) (explaining what an agency shall include in an EIS when there is incomplete or unavailable information relevant to reasonably foreseeable significant adverse impacts).

¹¹ 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*). I recognize that I have voted for past orders that distinguish *Mid States* in order to justify limiting the Commission's NEPA responsibilities. Upon further reflection, and after *Sabal Trail*, I believe my views articulated above are a better reading of *Mid States*.

¹² *Id.*



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specificity of information to determine causation and reasonable foreseeability is because we have not asked applicants to provide this sort of detail in their pipeline applications.¹³

“The majority states that if upstream and downstream effects are not indirect or cumulative as contemplated by CEQ’s regulations, then they are not environmental effects of the proposed project, and thus the Commission is not required to consider them under NEPA’s hard look or the NGA’s public interest standard. I disagree. I consider the downstream information relevant to our public interest determination under the NGA.¹⁴ NEPA does not circumscribe the public interest standard under the NGA. Even assuming that the majority is correctly interpreting the Commission’s NEPA responsibilities, I believe the Commission has broad discretion in considering factors bearing on our public interest determination.

“As for the majority’s announcement of a change in policy on upstream impacts, I also do not support the decision to simply exclude all generic upstream information by deeming this information as irrelevant. While it is less clear that upstream effects are caused by the pipeline, I would respond to upstream GHG comments by disclosing whatever data we have using the best available information, such as the DOE studies cited in past orders.

“At a time when we are grappling with increasing concern regarding the climate impacts of pipeline infrastructure projects, the Commission should not change its policy on upstream and downstream impacts to provide less information and be less responsive. Rather, I believe the Commission should proactively seek and disclose in pipeline proceedings more information regarding both upstream production and downstream end-use. I hope that the ongoing generic inquiry on the Certificate Policy Statement will provide an opportunity for additional consideration of what information the Commission should require in its pipeline applications and how it should factor into our analysis. In this way, we can work to ensure that our environmental reviews and public interest determinations, including consideration of climate change impacts, are robust and complete.

“For all of these reasons, I respectfully dissent in part.”

¹³ I note that some of the questions in the notice of inquiry on pipeline review ask commenters to weigh in on the types of information the Commission should seek as part of its pipeline review process. I am hopeful we will have more information included in the record to consider when reviewing a project proposal.

¹⁴ See *NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to “encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices,” the Commission has the authority to consider “conservation, environmental, and antitrust” concerns as relevant to the Commission’s statutory authority”).