

I am filing this comment in reference to Kinder Morgan Tennessee Gas Pipeline Company's Northeast Energy Direct Project Docket No. PF14-22-000. I attended several Open Houses for this Project in February 2015. My understanding is that the FERC pre-filing and filing processes are intended to help the Commission assess whether a project meets the appropriate thresholds to justify issuance of a Certificate of Public Convenience and Necessity. I found that these processes omit some important policy issues that have relevance far beyond this particular proposal. I'll share my observations from the Open Houses, describe where the current FERC review policy falls short, and why it is critical that FERC address this situation without delay.

### **Open House Observations**

It was easy to find information at the Open Houses about how the public can participate in Scoping Sessions where environmental considerations to determine "public convenience" will be addressed. But, when I asked about a process for the public to participate in and challenge the "public necessity" test, there was no such information forthcoming. In fact, several FERC representatives encouraged me to file a comment on that very question. A Kinder Morgan representative implied the question of "need" would be determined in a black box of private conversations among Kinder Morgan, natural gas capacity seekers, and state Departments of Public Utilities.

From these discussions, it appears that the process which FERC has established to give the public an opportunity to raise comments and concerns about a proposal addresses only the "public convenience" aspect, in the form of environmental issues and mitigation. There appears to be no such opportunity for the public to review and comment on the question of "public necessity."

### **FERC's Current Certificate Policy Statement**

Literature at the Open House referred citizens to 88 FERC ¶ 61,227 (with clarifications in 90 FERC ¶ 61,128 and 92 FERC ¶ 61,094) for FERC's "criteria for determining whether there is a need for a proposed project and whether the proposed project would serve the public interest." This Policy Statement was adopted over 15 years ago. The nation's energy picture has changed significantly since then, and even more dramatically in the past 5-7 years. Domestic fossil fuel production has increased substantially, and controversially. At the same time, technological advances in solar, wind, battery storage and conservation have radically shifted the public's view of what is possible in the near future. Global warming is increasingly acknowledged as a threat, environmental impacts of shale gas are under question, and many states have adopted their own legislation to address these issues. Yet, FERC policy remains unchanged since 1999.

Page 25 of 88 FERC ¶ 61,227 describes whom FERC viewed as primary stakeholders whose interests should be protected in 1999: *"Depending on the type of project, there are three major interests that may be adversely affected by approval of major certificate projects, and that must be considered by the Commission. These are: the interests of the applicant's existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. There are other interests that may need to be separately considered in a certificate*

*proceeding, such as environmental interests.* “ Most of the Policy Statement focuses on those three “major interests,” and implied that all other interests with potentially adverse affects would be covered by the NEPA Environmental Review Process. If this policy were to be rewritten today, the Commission would surely receive comments to challenge this narrow definition of interests to include renewable energy interests and climate change, at a minimum. It would be hard to argue in this environment that a new pipeline would have NO adverse impact on either of these.

As the current Policy Statement shows a 1999 view of “major interests,” it also gives a 1999 view of “public benefit” against which the adverse impacts must be weighed. It gives a proponent wide latitude: *“ The types of public benefits that might be shown are quite diverse but could include meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.”* Understandably perhaps in 1999’s world, anything that advances use of natural gas appears to be presumed as “public benefit.” Once again, if this policy were to be rewritten today, it would be subject to extensive public debate, particularly when the gas industry seeks to profit from exporting gas overseas, something not envisioned in 1999.

FERC’s 1999 definitions of “need” and “public interest” no longer actually serve the public interest. Changed circumstances of our time demand new approaches. Fortunately, FERC has the authority to create new processes to address the changed landscape of today. In 1999, FERC expressed its intent to be all inclusive in its review of projects. From the same Policy Statement: *“ In deciding whether a proposal is required by the public convenience and necessity, the Commission will consider the effects of the project on all the affected interests; this means more than the interests of the applicant, the potential new customers, and the general societal interests. ”* From this statement, FERC not only has the authority to create a new process, it has an obligation to do so.

### **FERC’s Critical Challenge**

If FERC does not address the inadequacies of its current review policies, it continues to leave citizens out of the most fundamental question which must be addressed: what is the need for and benefit of a proposal? This is a grave omission if the Commission intends to make decisions which are appropriate and enforceable in the energy, environmental and political landscape of our time. Lacking a revised and transparent process, FERC can expect that activists will continue to disrupt FERC meetings. This unrest reflects an underlying frustration that our government’s regulatory systems, processes and strategies have not been updated to address the 21<sup>st</sup> century landscape.

Although the 1999 Policy Statement may suit the needs of traditional energy interests in the FERC process, larger citizen interests demand a more thorough review of a larger scope of issues than seemed relevant in 1999. These include climate change, shale gas extraction, the potential impact of natural gas exports on the American energy prices, and the efficacy of conservation and renewable technologies to address the nation’s energy needs.

In the face of these uncertainties, the failure of the Commission to address “public necessity” in a public and transparent process is a recipe for frustration, disruption, and increased litigation. But worse than

that, the failure to address these new realities as part of the FERC process puts the Commission at risk of setting the country on a course which may indeed be AGAINST the public interest, and at great cost.

### **What the Public Needs Immediately**

The Commission would be well-advised to initiate its own rulemaking process to ensure its policies address the energy issues of this century rather than wait for litigation to demand such action. As rulemaking is a lengthy endeavor, the Commission must also act now to clarify the standards used *in its current practice* to establish public need and benefit. This is a critical step to enable meaningful public participation in the need and benefit question for projects currently under review. There are at least three areas where clarification for the public is essential.

1. The Commission should clarify how it currently assesses *“the effects of the project on all the affected interests”* as established in 88 FERC ¶ 61,227. Many public activists perceive that FERC does not consider environmental impacts beyond those in the immediate geography of the pipeline itself, nor does it consider any larger issues of energy policy. This perception is reinforced by statements by officials, and appears to be in conflict with the current Policy Statement above. FERC should present evidence of how it reviews adverse impacts on *“all affected interests,”* and spell out what the public process currently is for that review, beyond the narrowly focused EIS.
2. The Commission must do a better job of describing whether and how any set of adverse public impacts can ever outweigh a corporate profit opportunity using today’s Policy Statement. As stated above, 88 FERC ¶ 61,227 gives proponents wide latitude in establishing *“need”* for a project. Indeed, it appears that under the current Policy Statement a project could be approved if it shows it would meet an *“unserved market”* anywhere in the world, so long as it mitigates local environmental damage. Is this truly what FERC intended in 1999? Is this truly what FERC intends in 2015? In addition, the ten year old pre-filing process presupposes need by requiring extensive use of federal, state, and local government resources in advance of need being established.
3. The Commission must make the process for establishing need more open to public challenge. The impression from the Kinder Morgan representatives at NED Open Houses is that private negotiations between Kinder Morgan and potential customers are adequate to establish need, and that there is no public role. If this is indeed the case, FERC should instruct project proponents to spell out the process they use to establish commitments, specifying the role of state public utility commissions and other entities which have oversight. Although FERC environmental consultants at the Open Houses say that the public can make specific comments on need as part of Scoping, it is not at all clear what type of information the public could provide which would counterbalance a set of precedent agreements. The current Policy Statement describes at some length how a proponent can establish need, but gives no guidance as to how the public can present a challenge. FERC should specifically lay out the standards it uses to

determine whether a proponent has met a need threshold, and how the public can influence a decision.

In the 1970's, Congress replaced the 40 year old Federal Power Commission (FPC) with FERC to address the changing energy landscape of that time. Now, another 40 years has passed. The Commission and its staff must immediately find a way to work within its current mission and authority to make decisions in the best public interest of the nation in our 20<sup>th</sup> Century energy environment. If FERC does not rise to this challenge and address the changing needs of the country, it will find itself subject to increasing public protests, increasing scrutiny by congress, and eventual irrelevance.

Thank you for the opportunity to provide these comments.

Document Content(s)

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