

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

Tennessee Gas Pipeline (TGP), a wholly)	
owned subsidiary of Kinder Morgan)	Docket CP16-21
Northeast Energy Direct Pipeline)	

**PETITION OF THE FRANKLIN REGIONAL COUNCIL OF GOVERNMENTS
(FRCOG) FOR A FORMAL EVIDENTIARY HEARING ON NEED FOR THE
NORTHEAST ENERGY DIRECT PIPELINE**

Pursuant to Rules 157.10 and 212 of the Commission’s Rules of Practice and Procedure (18 C.F.R. §157.10 and 18 C.F.R. §212), the Franklin Regional Council of Governments (FRCOG), respectively petitions the Commission to conduct a formal evidentiary hearing¹ to resolve disputed material issues of fact concerning the present and future need for the Northeast Energy Direct Pipeline Project (NED) proposed by Tennessee Gas Pipeline (Tennessee Gas or Applicant) in its application for a certificate under Section 7 of the Natural Gas Act, 15 U.S.C. §717f(e). As described in its Motion to Intervene filed on January 4, 2016, FRCOG is the Regional Planning Commission for 26 communities in Franklin County, Massachusetts, of which eight will be directly impacted by the proposed NED Project. FRCOG has not yet taken a position on the Project, but will do so

¹ This Petition uses the terms “formal hearing” or “evidentiary hearing” interchangeably to refer to an on-the-record hearing conducted before an administrative law judge in accordance with the Subpart E of Part 385 of the Commission’s Rules of Practice and Procedure, and with an opportunity for discovery, presentation of testimony and evidence and cross-examination.

once it has completed its review of the NED application - but seeks a formal hearing as a forum to resolve the conflicting positions on project need and to enable the public to better understand the project.²

The question of need for the NED project is particularly controversial. Currently, the NED Project is substantially undersubscribed, even after Tennessee Gas' decision to downsize the pipeline from 36 inches to 30 inches.³ In addition, Tennessee Gas' assessment of future demand directly conflicts with a study on need for gas commissioned by the Massachusetts Attorney General⁴ and other credible industry studies.⁵

² See *Louisiana Assoc. of Indep. Producers v. FERC*, 958 F.2d 1101, 1109 (1992) (referencing Commission's position that "a trial-type hearing would help citizens to better evaluate" a pipeline project).

³ *Kinder Morgan Board Okays Scaled Back Version of NED Pipeline*, MassLive.com, July 16, 2015, online at http://www.masslive.com/news/index.ssf/2015/07/kinder_morgan_to_scale_back_ca.html.

⁴ See *Power Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas*, Analysis Group (November 2015) <http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf>. Several intervenors have referenced this report which has also been filed with the Commission by the Massachusetts Attorney General and made part of the record in this proceeding.

⁵ *Solving New England's Deliverability problems using storage and market incentives*, sponsored by Conservation Law Foundation (Skipping Stone 2015) (taking position that large scale pipeline is not necessary to address peak needs that occur seasonally only).

Moreover, EPA's recent release of its final Clean Power Plan regulations injects additional uncertainty into the already complicated process of forecasting future power need and raises the stakes on the importance of accuracy. On the one hand, some take the position that underestimating future gas demand may contribute to reliability problems or increased electric costs as fossil-fuel plants are taken off-line under the Clean Power Plan without adequate gas supply for substitute generation.⁶ On the other hand, equally troubling results flow from overbuilding, since excess pipeline capacity may lock states into reliance on gas-fired generation to the detriment of renewables⁷ and burden impacted landowners with abandoned pipeline infrastructure and higher rates associated with excess capacity. Given the sharp controversy over whether the NED Project is actually needed, and in light of the pipeline's long-term impacts on landowners and ratepayers and potential consequences for regional energy

⁶ See, e.g., *New England Energy Market Outlook Demand for Natural Gas Capacity and Impact of the Northeast Energy Direct Project*, Commissioned by Kinder-Morgan (2015), online at http://www.kindermorgan.com/content/docs/NED_CapacityOutlook.pdf (contending that need for gas will grow as nuclear and coal-fired plants are taken offline).

⁷ See J. Peress, *How to Ensure that New Natural Gas Infrastructure Doesn't Lock Out Renewables*, July 2015, online at <http://www.forbes.com/sites/edfenergyexchange/2015/06/05/how-to-ensure-new-natural-gas-infrastructure-doesnt-lock-out-renewables/#2715e4857a0b5a6e5461345f>.

choices, if the Commission is inclined to approve the pipeline, a formal hearing is required to resolve the factual dispute over the need for the NED Project ⁸

II. THE COMMISSION MUST HOLD A HEARING TO EVALUATE THE NEED FOR THE NED PROJECT, BECAUSE NEED IS A MATERIAL ISSUE OF DISPUTED FACT.

The Natural Gas Act contemplates the possibility of formal evidentiary hearings in Section 7 certificate proceedings. The Natural Gas Act expressly provides that the Commission “shall” set certificate matters for hearing (15 U.S.C. §717f(c)(1)(B), while Rule 157.10(a)(1) instructs persons seeking intervention to “specifically state” whether a formal hearing is sought on the application. 18 C.F.R. §157.10(a)(1). The Commission must hold a hearing where there are material issues of disputed fact inappropriate for resolution based on paper submissions⁹ -- and can expect reversal on appeal for failure to do so.¹⁰ As

⁸ *See, e.g., Cajun Elec. Power Coop v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)(requiring hearing to resolve disputed factual issues that cannot be resolved based on written submissions).

⁹ *Moreau v. FERC*, 982 F. 2d 556, 568 (D.C. Cir. 1993)(“ Furthermore, we have held...that FERC need not conduct an evidentiary hearing when there are no disputed issues of material fact, and that even where there are such disputed issues, FERC need not conduct such a hearing if they may be adequately resolved on the written record.”)(citations omitted).

¹⁰ *See, e.g., General Motors v. FERC*, 656 F.2d 791, 795 (D.C. Cir. 1981)(reversing FERC for failure to hold a formal hearing on issue of adequate need to support increase in peak day service under certificate where issue is disputed).

discussed next, the question of project need satisfies that criteria for an evidentiary hearing.

A. The Issue of Need Is Material to the Commission's Certificate Decision.

First, a hearing is required only for resolution of disputed facts material to the Commission's decision.¹¹ The issue of project need is not merely material, but absolutely essential to the Commission's decision on the certificate.

Under the Natural Gas Act, the Commission must determine that a project "is or will be required by the present or future public convenience and necessity;" otherwise, it must deny the certificate application. 15 U.S.C. §717f(e). Similarly, the Commission's Policy Statement requires applicants to demonstrate a need for the proposed project.¹² As the Commission itself explains:

[W]e do not believe the public interest is served by granting a section 7 certificate for construction where no market is in evidence. A section 7 certificate confers powers of eminent domain on the recipient, and construction of facilities necessarily will result in some environmental disturbance.¹³

¹¹ *ANR Pipeline Co. v. FERC*, 870 F.2d 717, 723 (D.C Cir. 1989)(finding no need for FERC to hold a hearing on the point at which company learned the source of new gas since issue is not material to FERC's resolution of company's entitlement to incentive pricing).

¹² *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), order on clarification, 90 FERC ¶ 61,128, order on clarification, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) at 25.

¹³ *Questar Pipeline*, 67 FERC ¶61,145 (1994)(dismissing application for pipeline that lacks showing of project need under standards predating the Certificate Policy Statement).

Accordingly, because a finding of need is a pivotal factor to granting a certificate, the question of need for the NED Project is a material issue.

B. The Issue Of Future Need Is Disputed In This Proceeding.

Second, the requirement for a hearing is triggered only when a material involves questions of disputed facts.¹⁴ A party requesting a hearing must identify the factual issues in dispute with specificity, as the Commission may disregard a hearing request based solely on “allegations or speculations without an adequate [factual] proffer to support them.”¹⁵

In this proceeding, the record is rife with factual disputes concerning both the need for, and benefits of the NED project. Set forth below is a list of disputed facts that require resolution through an evidentiary hearing:

Disputed Fact No. 1: Whether current precedent agreements show a need for the project.

The Commission’s Certificate Policy Statement allows applicants to demonstrate project need based on a showing of contracts to support the project. Consistent with the Certificate Policy Statement, Tennessee Gas claims that its current long-term contracts are proof of regional need for the project.¹⁶

¹⁴ *ANR Pipeline Co. v. FERC*, 870 F.2d 717, 723 (D.C Cir. 1989)(affirming FERC’s decision to forego a hearing on the source and timing of company’s information regarding location of new gas where issue is not material to FERC’s decision regarding company’s entitlement to incentive pricing).

¹⁵ *General Motors v. FERC*, 656 F.2d 791, at n. 20.

¹⁶ NED Application at 77-78.

At best, project is only partially subscribed – with only 61 percent of the supply path capacity and 41 percent of the market path capacity committed under precedent agreements.¹⁷ And the percentage of committed capacity may shrink further if pending challenges to the Massachusetts Department of Public Utilities decision approving precedent agreements with Boston Gas, Bay State Gas and Berkshire Gas succeed.¹⁸ The Commission should therefore set for hearing the disputed issue of whether the partially subscribed projects are adequate to show a need for the project, as Tennessee Gas claims.

Disputed Fact No. 2: Whether Tennessee Gas’ claims of future subscriptions show a need for the project.

Perhaps recognizing that a 41 percent subscription rate will not support a finding of need, Tennessee Gas also asserts that “it is confident” that it will attract additional contractual commitments for the pipeline from electric distribution companies.¹⁹ The Commission is also required to evaluate both the present and future need for a project.

Not only is there a factual dispute over whether there is a current need for the project, but also, whether there will ever be a future need. Although

¹⁷ NED Application at 24.

¹⁸ See MassLive (September 21, 2015)(reporting appeals of Mass. DPU approval of precedent agreements, online at http://www.masslive.com/news/index.ssf/2015/09/plan-ne_files_lawsuit_naming_dpu.html.

¹⁹ NED Application at 7-8.

Tennessee Gas expresses confidence over future prospects, the reality is that in the two years that the project has been in the works, Tennessee Gas was unable to fully subscribe the project. In fact, Tennessee Gas was forced to downsize the project from 36 inches to 30 inches because of insufficient demand. Thus, the Commission should set for hearing the issue of whether there is a future need for the project, as well as the likelihood that Tennessee Gas will ever fully subscribe the project.²⁰

Disputed Fact No. 3: The project is needed to ensure electric reliability and reduce electric costs.

Tennessee Gas also attempts to justify project need by claiming that it will contribute to reliability of the electric system at a time when more stringent emissions requirements are giving rise to plant shut downs and help reduce electric costs.²¹ At least three reports directly dispute Tennessee Gas' claims.

- The Massachusetts AG Report, *Power System Reliability in New England: Meeting Electric Resource Needs in an Era of Growing Dependence on Natural Gas* released in November 2015,²² which concluded that “the region is

²⁰ *City of Pittsburgh v. FPC*, 237 F.2d 741 (D.C Cir. 1956)(finding that FERC erred in failing to consider issue of future need for project at hearing).

²¹ Tennessee Gas proffered a study prepared by ICF to support these conclusions, available online at <http://ir.kindermorgan.com/press-release/all/new-study-outlines-new-englands-need-additional-natural-gas-capacity-37-billion-com>.

²² Online at <http://www.mass.gov/ago/docs/energy-utilities/reros-study-final.pdf>.

- unlikely to face electric reliability issues in the next 15 years and additional energy needs can be met more cheaply and cleanly through energy efficiency and demand response;
- A report by Skipping Stone entitled *Solving New England's Deliverability Problems Using Storage and Market Incentives* (2015)²³ which concluded that a “big pipeline” solution to the region’s winter deliverability problems – would result in dramatic underutilization of the pipeline the large majority of the year, and would not be cost effective. The Skipping Stone report instead recommends use of LNG capacity and gas demand response measures to address electric reliability;
 - The Department of Energy’s Report on Natural Gas Infrastructure (February 2015), which noted that “Policy changes [to relieve high electric costs] underway include modifications to ISO forward capacity market incentives to better align resource performance and flexibility and FERC’s proposed reforms to improve the coordination and scheduling of natural gas pipeline capacity with electricity markets.”²⁴

²³ Online at <http://www.skippingstone.com/New-England-Gas-Deliverability.pdf>

²⁴ DOE Report on Natural Gas at n. 22, online at http://energy.gov/sites/prod/files/2015/02/f19/DOE%20Report%20Natural%20Gas%20Infrastructure%20V_02-02.pdf.

In light of the significant – and complex -- factual dispute over whether the NED Pipeline is needed to reduce electric costs and improve reliability, the Commission must hold a hearing to resolve this issue.

C. A Paper Hearing Is Not Appropriate for Resolution of the Issue Of Need

Even where material issues of fact are in dispute, the Commission is not required to hold a hearing if it can resolve the disputes based on paper submissions.²⁵ Here, a paper hearing will not suffice for several reasons.

First, an assessment of Tennessee Gas' need for the project will inevitably involve determinations regarding the credibility of several claims – such as its “confidence” in its ability to fully subscribe the project. Credibility determinations are typically reserved for adjudicative fact-finders²⁶ and appropriately resolved through live testimony.²⁷ Second, given the level of public participation in this matter, “a trial-type hearing would help citizens to better evaluate this project.”²⁸ In fact, in one controversial matter involving the proposed Iroquois Pipeline, the Commission convened an evidentiary hearing to

²⁵ See *Moreau v. FERC*, 982 F. 2d 556, 568.

²⁶ *Trimmer v. United States DOL*, 174 F.3d 1098 (10th Cir. 1999)(according deference to credibility determinations by ALJ).

²⁷ *Smith v. Zant*, 887 F.2d 1407, 1433 (11th Cir. 1989)(questioning whether credibility determination could be made without live testimony).

²⁸ See *Louisiana Assn. of Independent Producers v. FERC*, 958 F. 2d 1101 at 1109 (D.C. Cir. 1992).

address both the need for the project and expected rates based on “the unprecedented level of public comment, input and concern” and a desire “for public policy reasons, to give all parties in the proceeding another opportunity to air their concerns.”²⁹ These same considerations apply with equal force here.

III. CONCLUSION

There are substantial factual disputes regarding the need for the NED Project – either to serve present and future customers or to reduce electric rates and enhance reliability. Meanwhile, the pipeline’s long-term impacts on the environment, landowners and ratepayers in FRCOG member communities and throughout the region and potential consequences for regional energy choices are substantial. Accordingly and for the reasons discussed in this Petition, FRCOG petitions the Commission to hold a formal hearing to resolve the factual dispute over the need for the NED Project prior to granting a certificate for the project.³⁰

Respectfully submitted,



Linda Dunlavy, Executive Director

²⁹ *Id.*

³⁰ *See, e.g., Cajun Elec. Power Coop v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994)(requiring hearing to resolve disputed factual issues that cannot be resolved based on written submissions).

CERTIFICATE OF SERVICE

Wherefore on this 15th day of January 2016 I caused to be served the foregoing Petition for a Formal Evidentiary Hearing electronically on all parties on the Commission's electronic service list in this proceeding, in accordance with Commission regulations.

A handwritten signature in black ink, appearing to read "Linda L. Dunlavy". The signature is written in a cursive, flowing style.

Linda Dunlavy, Executive Director