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DIVISION OF SOCIAL JUSTICE
ENVIRONMENTAL PROTECTION BUREAU

July 10, 2018

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: *Dominion Transmission, Inc.*, Docket No. CP14-497-001
Order Denying Rehearing issued May 18, 2018

Dear Ms. Bose:

On May 18, 2018, the Federal Energy Regulatory Commission (FERC), by a 3-2 vote, issued an Order Denying Rehearing of a certificate of public convenience and necessity issued to Dominion Transmission, Inc. pursuant to Natural Gas Act § 7(c). *See* 163 FERC ¶ 61,128 (the Rehearing Denial). The majority opinion announced a sudden and unprompted departure from FERC's practice of evaluating the environmental impact of downstream greenhouse gas emissions from natural gas infrastructure projects, and announced a new policy of not evaluating upstream or downstream greenhouse gas emissions in the vast majority of cases. The Rehearing Denial is procedurally and substantively wrong, and FERC should not adhere to it in the future.

I. The Rehearing Denial Announced a Major Policy Change in a Manner Designed to Frustrate Judicial Review

The Rehearing Denial announced a major policy change on an issue of nationwide concern in a context that makes it virtually impossible to review. The FERC majority concluded that it was not required to evaluate upstream or downstream greenhouse gas emissions caused by the project as cumulative impacts pursuant to the National Environmental Policy Act (NEPA), because such emissions were not “reasonably foreseeable” project effects and would not be limited to the precise “geographic scope” of the project. *Id.* at ¶¶30-41. The FERC majority then noted that “[n]o party” raised the issue of indirect upstream or downstream greenhouse gas emissions. 164 FERC ¶61,128, at ¶41. Nonetheless, the FERC majority took a further step – completely unnecessary to resolving the rehearing petition at issue – by ending its policy of quantifying downstream greenhouse gas emissions for *future* projects. *Id.* at ¶¶ 41-44. The Rehearing Denial also announced a cramped understanding of FERC's obligation to evaluate upstream greenhouse gas emissions, making it unlikely that FERC will evaluate such emissions in future proceedings. *Id.* at ¶¶37-38.

The Rehearing Denial announced a policy change with far-reaching ramifications. As one of the dissenting FERC Commissioners put it, “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.” 163 FERC ¶ 61,128, Dissent of Commissioner LaFleur, at 3. Indeed, the same FERC majority has already relied on the Rehearing Denial in justifying its refusal to consider the impacts of greenhouse gas emissions in the Mountain Valley Pipeline proceeding. *See* Order on Rehearing, *Mountain Valley Pipeline, LLC*, Docket Nos. CP16-10-001, CP16-13-001, 163 FERC ¶61,197, at ¶271 n.740.

By interjecting and resolving an issue that no one raised, the Rehearing Denial appears designed to avoid judicial review of the FERC majority’s decision. Only one party sought rehearing of the FERC certificate of public convenience and necessity at issue. 163 FERC ¶ 61,128, ¶1. Accordingly, only that party – Otsego 2000, Inc. – can seek judicial review of the Rehearing Denial under Natural Gas Act § 19(b). *See* 15 U.S.C. §717r(b). Otsego 2000, Inc. represents just one set of interests. The State of New York and others that will be affected by the policy change have therefore had their rights to seek review of this broad policy change curtailed.

The State of New York has consistently taken the position that the environmental evaluation of the construction and operation of facilities and infrastructure designed to increase the supply of natural gas must take into account greenhouse gas emissions. In *Millennium Pipeline Company, L.L.C.*, FERC Docket No. CP16-17-001, the State declined to issue a Clean Water Act section 401 certification to the applicant until FERC re-opened its environmental review of the project to include an evaluation of downstream greenhouse gas emissions. *See* Motion for Reopening and Stay or, in the Alternative, Request for Rehearing and Stay (Aug. 30, 2017). FERC denied the State’s motion to reopen the environmental review without reaching the merits of the State’s position. *See* 161 FERC ¶61,194, ¶13. The Rehearing Denial appears to address the merits of the State’s request in *Millennium*, but in a manner that impairs the State from obtaining review.

Likewise, in *Transcontinental Gas Pipe Line Company, LLC*, FERC Docket No. CP17-101, DEC submitted a comment letter on FERC’s Draft Environmental Impact Statement, urging FERC to consider upstream and downstream greenhouse gas emissions. *See* DEC Comments on Draft Environmental Impact Statement, at 8-9 (May 14, 2018). DEC noted that upstream and downstream emissions were reasonably foreseeable effects of the construction of natural gas pipeline infrastructure. *Id.* With respect to downstream emissions, DEC also noted that such an evaluation appeared to be required by *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). Again, the Rehearing Denial here announced a policy change that directly impacts the *Transcontinental Gas Pipe Line* proceeding, but in a manner that restricts the State’s effective participation.

By unilaterally announcing a major policy change that affects the rights of States and members of the public in this manner, FERC has violated the Administrative Procedure Act (APA). FERC has improperly grafted a major policy change onto its fact-based resolution of a rehearing petition brought by just one party, thus minimizing the opportunity for affected parties to challenge – or even comment upon – the change. *See generally N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294-95 (1974) (noting that an agency’s discretion to announce a new policy in an adjudicatory hearing under 5 U.S.C. § 554 is limited). If FERC wishes to modify

its policy regarding upstream and downstream greenhouse gas emissions, it should do so with notice and an opportunity for comment under 5 U.S.C. § 553(b), as it has already tacitly acknowledged by raising the issue in its Notice of Inquiry regarding possible changes to FERC's Natural Gas Act certification procedures. *See* Notice of Inquiry, Docket No. PL18-1-000, 83 Fed. Reg. 18,020, 18,032.

II. Upstream and Downstream Greenhouse Gas Emissions from Natural Gas Facilities Are Reasonably Foreseeable Environmental Impacts under NEPA

Not only is the Rehearing Denial procedurally improper, it is legally wrong. Federal courts have repeatedly held that increases to greenhouse gas emissions are a reasonably foreseeable environmental impact of projects dedicated to the production or transportation of fossil fuels. *See, e.g.,* Memorandum Opinion and Order, *San Juan Citizens Alliance v. U.S. Bureau of Land Management*, Slip Op. at 21-24, 2018 WL 2994406 (D. N.M. June 14, 2018) (collecting cases and concluding greenhouse gas emissions are reasonably foreseeable effect of oil and gas leases on federal land); *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074, 1097-99 (D. Mt. Aug. 14, 2017) (concluding greenhouse gas emissions are reasonably foreseeable indirect and cumulative effect of a coal mine expansion).

Just last year, the D.C. Circuit Court of Appeals rejected FERC's long-standing position that greenhouse gas emissions are not a reasonable foreseeable effect of the transportation of natural gas. *See Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). The Court concluded that it was reasonably foreseeable that natural gas transported by the project at issue would be burned in power plants "generating both electricity and carbon dioxide" and contributing to global climate change. *Id.* at 1371-72. The Court rejected FERC's arguments that (1) greenhouse gas emissions were outside of its control, (2) the quantity of emissions would be "impossible" to predict, (3) emissions would be partially offset by reductions elsewhere, and (4) other entities would regulate the power plants that would actually emit greenhouse gases. *Id.* at 1372-75. As noted by a dissenting Commissioner, the *Sierra Club v. FERC* decision "clearly signaled that [FERC] should be doing more as part of its environmental reviews." 163 FERC ¶ 61,128, Dissent of Commissioner LaFleur, at 3.

Notwithstanding the wealth of recent Court decisions holding that an evaluation of greenhouse gas emissions from fossil-fuel production and transportation projects is required under NEPA, the FERC majority in the Rehearing Denial refused to conduct such an evaluation. 163 FERC ¶ 61,128, ¶40. The FERC majority offered a variety of excuses for not conducting such an evaluation. *See, e.g.,* 164 FERC ¶61,128, ¶38 (declining to consider upstream greenhouse gas emissions because FERC "does not have more detailed information" regarding those emissions); *id.* ¶41 (asserting that greenhouse gas emission increases would not be "causally related to our action in approving the Project"). These are largely the same excuses considered and rejected by the D.C. Circuit in *Sierra Club v. FERC*.

Conclusion

In the Rehearing Denial, the FERC majority announced a major policy shift and rejected recent judicial precedent in a manner designed to insulate that decision from judicial review.

Coming only a few weeks after FERC initiated an open-ended proceeding soliciting comments on how it should consider upstream and downstream greenhouse gas emissions in its review of pipeline applications, the Rehearing Denial suggests that the agency has pre-judged the outcome of that proceeding. *Compare* 83 Fed. Reg. 18,020, 18,032 (asking how FERC should consider upstream and downstream greenhouse gas emissions from natural gas projects), *with* 163 FERC ¶61,128, ¶¶38-40 (stating that FERC is not required to consider upstream or downstream impacts of the project). To preserve the integrity of the certification policy change proceeding, and mitigate the violation of the APA, FERC should disavow the majority opinion of the Rehearing Denial and limit the determination to the instant proceeding.

DATED: July 10, 2018
Albany, New York

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Document Content(s)

2018 07 10 FINAL Dominion Comment Letter.PDF.....1-4