ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDERS TO AID PUBLIC COMMENT
In the Matter of DTE Energy Company, Enbridge Inc., and NEXUS Gas Transmission, LLC
File No. 191-0068

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from DTE Energy Company ("DTE"), Enbridge Inc. ("Enbridge"), and NEXUS Gas Transmission, LLC ("Nexus") (collectively, the "Respondents"). Nexus is a 50/50 joint venture between DTE and Enbridge. The Consent Agreement would remedy the anticompetitive effects stemming from a January 2019 transaction (the "Transaction") in which Nexus intends to purchase Generation Pipeline LLC ("Generation") from a group of sellers including North Coast Gas Transmission LLC ("NCGT").

Generation's primary asset is a 23-mile intrastate natural gas pipeline serving the Toledo, Ohio area. NCGT also owns another natural gas transportation pipeline in Ohio (the "North Coast System"), which includes a spur running slightly east of Toledo, and which Nexus is not acquiring. The Transaction's sale agreement prohibited NCGT from competing to provide natural gas pipeline transportation within a restricted area encompassing parts of Lucas, Ottawa, and Wood counties in Ohio (the "Restricted Area") for a period of three years post-closing (the "Non-Compete"). Under the terms of the proposed Consent Agreement, and to maintain competition in the affected market post-merger, Respondents are required to strike the Non-Compete from the purchase agreement and are prohibited from entering similarly anticompetitive agreements with their pipeline competitors in this market.

At the time of the Transaction, Generation and NCGT were two of a small number of natural gas pipeline transportation options capable of serving customers in the Restricted Area. The Commission's Complaint alleges that the Transaction violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating actual and potential competition between NCGT and any other pipeline competitor in a market no broader than the pipeline transportation of natural gas to Lucas, Ottawa, and Wood counties in Ohio.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and any comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent DTE Energy Company is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Michigan with its executive offices and principal place of business located at One Energy Plaza, Detroit, Michigan, 48226.

Respondent Enbridge Inc. is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada with its executive offices and principal place of business located at 200 Fifth Avenue Place, Calgary, Alberta, T2P 3L8.

Respondent NEXUS Gas Transmission LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware with its executive offices and principal place of business located at 5400 Westheimer Court, Houston, Texas, 77056. Nexus is a 50/50 joint venture between DTE and Enbridge.

III. Relevant Markets and Market Structure

The relevant product market at issue is the pipeline transportation of natural gas. Even if pipeline transportation rates increased slightly, natural gas shippers would continue to use pipelines, as no economic or practical alternative exists. Other natural gas delivery methods (such as boat, rail, or truck) are far more costly, less reliable, and potentially more hazardous than pipeline transportation. Moreover, particularly given low natural gas prices, a small increase in natural gas pipeline transportation rates would not lead customers to switch to other (more costly) fuels.

A relevant geographic market within which to analyze the effects of the Transaction is an area no broader than Lucas, Ottawa, and Wood counties in Ohio (the "Relevant Area"), which contains the closest geographic overlaps between the Generation Pipeline and the North Coast Pipeline. Although pipeline options may vary by customer delivery location, any customer for whom the Generation Pipeline and the North Coast pipeline are both competitive options are located within the Relevant Area.

Market concentration in this industry is location-specific and depends on the pipeline options available near a given delivery point. Many customers connect only to one pipeline and cannot economically connect to any other. For large industrial customers looking to establish a direct connection to a natural gas pipeline system, concentration is a factor of how many suppliers are close enough to connect economically, while also meeting the customer's volume and service requirements. The Commission's Complaint alleges that the Generation pipeline and the NCGT pipeline may be the best alternatives for a subset of large non-residential customers in the Toledo area who are located reasonably close to both pipelines.

IV. Effects of the Transaction

The Commission's Complaint alleges that, absent the proposed Consent Agreement, the Transaction would result in competitive harm in the natural gas pipeline transportation market in the Relevant Area. By prohibiting NCGT from competing to provide natural gas transportation within the Restricted Area, the Non-Compete would harm customers who would otherwise benefit from competition from NCGT. The Non-Compete is not reasonably limited in scope to protect a legitimate business interest. In this instance, the provision does not protect any significant intellectual property, goodwill, or customer relationship necessary to protect Nexus' investment. A mere general desire to be free from competition following a transaction is not a legitimate business interest. Moreover, even if a legitimate interest existed, the geographic scope of the Non-Compete would be broader than reasonably necessary, because, in part, it prevents NCGT from competing for any opportunity in the restricted area, even for opportunities that were unforeseen at the time of the Transaction.

V. Entry Conditions

Entry into the relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Merger. Entry into the pipeline transportation of natural gas is a complicated, expensive, and time-consuming endeavor. In addition to completing a lengthy regulatory review and approval process, an entrant would need to secure sufficient precedent agreements by shippers, obtain rights of way, and overcome environmental or landowner hurdles.

VI. The Proposed Consent Agreement

The proposed consent order ("Order") effectively resolves the competitive concerns raised by the Sale Agreement's Non-Compete. First, the Order requires the parties to execute a revised Sale Agreement that eliminates the Non-Compete and associated language.

Next, Section II.B of the Order prohibits Nexus and its parents, DTE and Enbridge, (collectively "Respondents"), from entering into, enforcing, or soliciting any written or oral agreement that restricts competition between one or more Respondents and a "Pipeline Competitor" to provide natural gas pipeline transportation to the Relevant Area, without prior Commission approval. The Order defines "Pipeline Competitor" as a firm that owns, operates, or markets capacity on a natural gas pipeline. This definition would include NCGT and other pipeline companies, as well as a situation where a customer with long-term capacity rights might resell its capacity and effectively act as a competitor.

In an industry where joint ventures and other competitor collaborations frequently occur, some arrangements that the Order might capture could advance legitimate purposes. The Order's prior approval provision gives Respondents the opportunity to advocate for these arrangements and the Commission to evaluate any attendant restrictions on a case-by-case basis.

The Order also requires Respondents to provide prior notice of intent to acquire the North Coast System or any other natural gas pipeline in the Relevant Area. It also requires Respondents to file annual compliance reports with the Commission for 10 years following the Order's issuance.