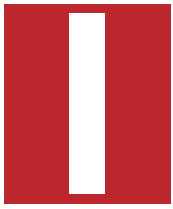


Energy Company's Pipe Dream

Why \$3.3 Billion Northeast Energy Direct
Pipeline Was Defeated

BY VINCENT DEVITO



It's a David and Goliath story. But instead of a slingshot, David in this case fired off a stiff legal challenge to defeat the giant.

Kinder Morgan, Inc. is North America's largest energy infrastructure company. In late May, it withdrew an application to the Federal Energy Regulatory Commission. Kinder Morgan will apparently not proceed with the \$3.3 billion Northeast Energy Direct natural gas pipeline project.

The pipeline was originally slated to become operational in November 2018. It would have had the capacity of handling 1.3 billion cubic feet a day, and was intended to boost the output of natural gas from Pennsylvania's Marcellus Shale deposits. The gas would have been conducted via a 188-mile mainline pipeline through rural areas of New York State, Massachusetts, and New Hampshire.

Kinder Morgan said it was cancelling Northeast Energy Direct strictly because of the failing economics of the project, and cited "inadequate capacity commitments from prospective customers." To the casual observer, it probably seems that plunging commodity prices, a competitor's pipeline project, and political notice of broad opposition formed a serious counterweight to the proposed pipeline.

However, the project's derailment did not occur in the court of public opinion. But rather through a multi-jurisdictional regulatory strategy waged by a coalition of impacted towns, land owners, and natural resources groups. They used sophisticated legal arguments and data analysis that exposed the defective application presented to FERC for certification.

The outcome, rare in regulatory history, is particularly dramatic. And arguably it may be seen as an object lesson in how to defeat, or conversely defend, economically and environmentally challenging and otherwise troublesome pipeline proposals.

Contesting project approval in this case was Northeast Energy Solutions. NEES was a coalition of not-for-profit organizations, towns, and land trusts that would have been impacted by the socioeconomic impression of Northeast Energy Direct on natural resources in Massachusetts.

Early on, the coalition recognized that the applicant, Kinder Morgan, needed approval for its pipeline from FERC. It is an overworked government bureaucracy. The commission had seen only nine pipeline applications nationwide from 2003 to 2013. In two recent years, 2014 and 2015, the number of applications swelled to seventy-two.

FERC was constrained by rules permitting little discretion in considering pipeline applications. And it was statutorily susceptible to approving those applications, as it had been encumbered by antiquated laws enacted by Congress in the 1930s.

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The coalition pounced with a bill of economic, environmental and procedural particulars asking FERC to reject the developer's application.

As such, the coalition recognized and quickly dispelled with the notion that the usual not-in-my-backyard strategy was worth its resources. It instead focused on a pure regulatory strategy that fit neatly between the parallel lines of FERC's statutory jurisdiction.

For instance, the coalition did not ignore the pre-filing phase of the process. Understanding that this is a valuable part of the process for FERC staff, NEES fully engaged in the pre-filing process directly with FERC staff and through public comments.

This succeeded on several counts. Primarily by educating FERC staff on dynamics outside of Washington, D.C. And by developing sophisticated analysis of the developer's filings that thoroughly dissected project deficiencies and defects.

With NEES's regulatory strategy nipping at their heels, the coalition was surprised when the ultimate formal filing by the developer was no better fleshed out than the few versions of the pre-filing documents. This gave NEES a wide-open opportunity. Immediately, the coalition pounced with a bill of economic, environmental and procedural particulars in documents ultimately asking FERC to reject the developer's application. Within a mere ten days of the filing, FERC issued a request for additional information that included the full text of NEES' filings. In the end, the developer never responded to FERC's request.

NEES strategically participated in regulatory proceedings involving Northeast Energy Direct in Massachusetts, Maine, New York, as well as before FERC and the U.S. Department of Energy.

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This meant that NEES was uniquely positioned along with the developer to wade into the stream of information with regard to the entire project. The strategy armed the coalition with information that was shared by the developer with certain regulatory agencies and not others.

and challenged the application's deficiencies. Such as required data that was missing and outdated information that was included.

Publically, Kinder Morgan would state that Northeast Energy Direct was not an export project. But, NEES contradicted that claim with assertions in other documents filed at FERC and other regulatory bodies, by potential off-takers.

Without NEES' FERC filings, regulators may not have had access to critical information. And provided government approval without this information.

With regard to future pipelines in the Northeast or anywhere in the country, it is reasonable to say that brownfield projects that meet local generation needs will be easier to develop, than those that are greenfield projects designed to serve foreign markets. The latter is akin to trying to build a highway through several communities without their having the benefit of an exit ramp.

Continued energy efficiency that has enabled Massachusetts and New England in general to reduce energy demand, better planning by utilities to meet winter spikes in demand, and Canadian hydropower, among other alternative sources, paint a fairly bright

energy picture in the region. So lessened need for a project like Northeast Energy Direct.

Perhaps the lesson learned from the Northeast Energy Direct debacle is that future applicants should go to state and federal officials only with ready-made solutions. Kinder Morgan's approach of, if we build it, they will come, was handedly illegitimized when faced with sophisticated scrutiny by a sophisticated opponent. [PDF](#)



NEES was sure to undertake a detailed analysis of the developer's energy and environmental data. And package them in a legal format that was of use to regulators. This was NEES' vessel to inform regulators of information that was decidedly not shared earlier with those regulators.

Continually, NEES questioned before regulators whether Northeast Energy Direct was needed and financially viable, discredited the applicant's claims that the natural gas would not be exported,

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