

Concurring Statement of Christine S. Wilson

In the Matter of DTE Energy Co., Enbridge Inc.,

and NEXUS Gas Transmission LLC

File No. 191-0068

September 12, 2019

The proposed consent order settles the Commission’s allegation that the proposed acquisition of Generation Pipeline LLC by NEXUS Gas Transmission LLC may substantially lessen competition in the market for natural gas pipeline transportation in the Toledo, Ohio area. Pursuant to the consent agreement, the parties will strike an overly broad non-compete clause between the buyer (NEXUS) and the seller (North Coast Gas Transmission LLC, or NCGT) in the purchase agreement. Both NEXUS and NCGT will continue to compete for natural gas sales in the Toledo area after the transaction closes.

I voted to accept the proposed consent agreement because I believe that this particular non-compete was broader than necessary to protect the legitimate interests of the parties. I write separately to reiterate, however, that many non-compete clauses are lawful and enforceable.

“[M]ost modern courts will uphold a covenant [not to compete] to the extent that a breach of the covenant has occurred within a reasonable geographic area and time period, and, where applicable, with respect to a product reasonably related to the legitimate purpose of the restraint.”¹ And it has long been so. In 1898, then-Judge (and future President and Chief Justice) William Howard Taft explained that “covenants in partial restraint of trade are generally upheld as valid when they are agreements ... by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold.”² This principle stretches back at least as far as 18th Century England,³ and today continues to protect the trade secrets, customer lists, and other goodwill a purchaser acquires with a business.⁴

Therefore, although the Commission will continue to scrutinize non-compete agreements to ensure that they are no broader than necessary to protect the legitimate interests of the parties, I believe that many of these agreements are – and will continue to be – lawful.

¹ *Lektro-Vend Corp. v. Vendo Corp.*, 660 F.2d 255, 267 (7th Cir. 1981) (citing, e.g., *Alders v. AFA Corp. of Florida*, 353 F. Supp. 654, 658 (S.D. Fla. 1973), *aff’d without opinion*, 490 F.2d 990 (5th Cir. 1974); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 674 (1960); Robert Bork, *Ancillary Restraints and the Sherman Act*, 15 ABA SECTION OF ANTITRUST LAW PROCEEDINGS 211, 223-24 (1959)).

² *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.), *aff’d in relevant part*, 175 U.S. 211 (1899).

³ *Id.* at 279-282 (beginning with *Mitchel v. Reynolds*, 1 P. Wms. 181 (1711)).

⁴ *See, e.g., Lektro-Vend*, 660 F.2d at 266 (affirming a district court order finding a non-compete ancillary to the sale of a business lawful because, in part, it appropriately served the purchaser’s “interests in protecting its (1) acquired goodwill, and (2) any trade secrets or clientele to which [the seller] might potentially have access”).