178 FERC ¶ 61,107
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

[Docket No. PL18-1-000]

Certification of New Interstate Natural Gas Facilities

(Issued February 18, 2022)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Updated Policy Statement on Certification of New Interstate Natural Gas Facilities.

SUMMARY: This Updated Policy Statement describes how the Commission will evaluate all factors bearing on the public interest in determining whether a new interstate natural gas transportation project is required by the public convenience and necessity under the Natural Gas Act.

DATES: Comments that pertain to the Paperwork Reduction Act are due [60 days after publication in the *Federal Register*].

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SUPPLEMENTARY INFORMATION:

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Before Commissioners: Richard Glick, Chairman;
James P. Danly, Allison Clements,
Mark C. Christie, and Willie L. Phillips.

Certification of New Interstate Natural Gas Facilities Docket No. PL18-1-000

UPDATED POLICY STATEMENT ON CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES

(Issued February 18, 2022)

1. On April 19, 2018, and February 18, 2021, the Commission issued Notices of Inquiry (NOI)[1] to help the Commission explore whether, and if so how, it should revise the approach established by its currently effective policy statement on the certification of new interstate natural gas transportation facilities (1999 Policy Statement)[2] to determine whether a proposed natural gas project "is or will be required by the present or future public convenience and necessity," as that standard is established in section 7 of the Natural Gas Act (NGA).[3]

[1] *Certification of New Interstate Natural Gas Facilities*, 83 FR 18020 (Apr. 25, 2018), 163 FERC ¶ 61,042 (2018); *Certification of New Interstate Natural Gas Facilities*, 86 FR 11268 (Feb. 24, 2021), 174 FERC ¶ 61,125 (2021).

[2] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Policy Statement).

[3] 15 U.S.C. 717f(e).

2. Based on the comments received in this proceeding and the significant changes that have occurred since issuance of the 1999 Policy Statement, and in order to provide stakeholders with more clarity on the Commission's decision-making process, we are issuing this Updated Certificate Policy Statement (Updated Policy Statement).

3. This Updated Policy Statement does not establish binding rules and is intended to explain how the Commission will consider applications to construct new interstate natural gas transportation facilities.

I. Background

A. Statutory Authority and Obligations

4. Section 7 of the NGA authorizes the Commission to issue certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce.[4] Under section 7(e), the Commission shall issue a certificate to any qualified applicant upon finding that the construction and operation of a proposed project "is or will be required by the present or future public convenience and necessity."[5] The public convenience and necessity standard encompasses all factors bearing on the public interest.[6]

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[4] *Id.* 717f.

[5] *Id.* 717f(e).

[6] *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) ("This is not to say that rates are the only factor bearing on the public convenience and necessity, for [section] 7(e) requires the Commission to evaluate all factors bearing on the public interest.").

5. The NGA authorizes the Commission to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require."[7] The Commission can also deny an application for a certificate if a balancing of all public interest factors weighs against authorization of the proposed project.[8] If an applicant receives a certificate from the Commission, section 7(h) of the NGA authorizes the certificate holder to acquire the property rights necessary to construct and operate its project by use of eminent domain if it cannot reach an agreement with a landowner.[9]

6. The Commission's consideration of an application generally triggers environmental review under the National Environmental Policy Act of 1969 (NEPA).[10] NEPA and its implementing regulations require that, before taking or authorizing a major federal action that may significantly affect the quality of the human environment, federal agencies take a "hard look" at the environmental consequences of the proposed action and disclose their analyses to the public.[11] NEPA also requires that agencies consider

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[7] 15 U.S.C. 717f(e).

[8] *See, e.g.*, *FPC v. Transcon. Gas Pipe Line Corp*., 365 U.S. 1, 17 (1961) (the Commission "can only exercise a veto power over proposed transportation . . . when a balance of all the circumstances weighs against certification").

[9] 15 U.S.C. 717f(h).

[10] 42 U.S.C. 4321-4370j.

[11] *Id.* 4332(2)(C); 40 CFR 1500.1-1508.1; *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc*., 462 U.S. 87, 97 (1983) (discussing the twin aims of NEPA—to consider environmental impacts and to disclose the agency's consideration to the public).

whether there are steps that could be taken to mitigate any adverse environmental consequences.[12] While NEPA is a procedural statute and does not require an agency to reject a proposed project based on its adverse effects or to take action to mitigate those effects,[13] an agency may require mitigation measures as a condition of its approval under the NGA,[14] or withhold approval based on significant adverse effects.[15]

B. Historical Context and the 1999 Certificate Policy Statement

7. From the enactment of the NGA in 1938 to the 1990s, as a result of statutory and regulatory revisions, the natural gas industry evolved away from a system of limited competition among vertically integrated companies selling bundled commodity and transportation services at Commission-regulated prices to one where pipelines provide open-access transportation of gas supplies purchased pursuant to non-Commission

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[12] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989) ("To be sure, one important ingredient of an [environmental impact statement] is the discussion of steps that can be taken to mitigate adverse environmental consequences.").

[13] *Id.* at 352 ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other."); *see also Baltimore Gas & Elec. Co.*, 462 U.S. at 97 (citing *Stryckers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)).

[14] *Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate use of Mitigated Findings of No Significant Impact*, 76 FR 3843, 3848 (Jan. 21, 2011).

[15] *See, e.g.*, *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*) (explaining that the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment").

regulated agreements between producers and other parties. Consequently, consumers benefitted from competition among non-pipeline entities in an unregulated commodity market and from competition among pipeline companies providing open-access, unbundled transportation services at Commission-regulated rates or, if authorized under certain circumstances, market-based rates.

8. At the same time that natural gas commodity and transportation markets were becoming more competitive, the 1990s saw significant growth in natural gas consumption in the industrial and electric generation sectors. The resultant expansion of the pipeline system to meet this demand raised issues as to who should bear the costs of new construction. Before the Commission adopted the 1999 Policy Statement, the Commission's pricing policy for new construction generally allowed for the costs of expansion projects to be rolled into a pipeline company's existing system costs to derive rolled-in rates in a future rate case under section 4 of the NGA.[16] All shippers bore some burden of the expansion project's cost, regardless of whether they would benefit from the project. Local distribution companies (LDC) and other parties believed that this pricing policy sent the wrong price signals by masking the real costs of an expansion project and

[16] *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 (1995), *order on reh'g*, 75 FERC ¶ 61,105 (1996). Under this pricing policy, expansion projects received a determination for rolled-in pricing upon a showing that the new costs would not increase existing rates by more than five percent.

could result in overbuilding and subsidization of expansion by a pipeline's existing shippers.

9. In response to these and other concerns, in 1998, the Commission issued a Notice of Proposed Rulemaking[17] and an NOI[18] to explore issues related to its policies on the certification and pricing of new pipeline projects. Based on the information received from stakeholders in response to these notices, the Commission issued the 1999 Policy Statement "to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas."[19] These objectives were realized primarily by a shift from a presumption of rolled-in pricing to a presumption of incremental pricing.[20] Under incremental pricing, existing customers using only existing facilities do not subsidize the cost of constructing and operating new projects.[21]

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[17] *Regulation of Short-Term Natural Gas Transportation Services*, Notice of Proposed Rulemaking, 63 FR 42,982 (July 29, 1998), FERC Stats. & Regs. ¶ 32,533 (1998) (cross-referenced at 84 FERC ¶ 61,085).

[18] *Regulation of Interstate Natural Gas Transportation Services*, NOI, 63 FR 42974 (Aug. 9, 1998), FERC Stats. & Regs. ¶ 35,533 (1998) (cross-referenced at 84 FERC ¶ 61,087).

[19] 1999 Policy Statement, 88 FERC at 61,743.

[20] Although incremental pricing was presumed, an applicant could demonstrate that a proposed project qualified for a pre-determination of rolled-in rate treatment through showing that inexpensive expansibility was made possible because of earlier, costly construction or that the project was designed to improve existing service for existing customers. *Id.* at 61,746 and n.12.

[21] *Id.* at 61,746.

10. Pursuant to the 1999 Policy Statement, when reviewing applications to construct new interstate transportation facilities the Commission would first determine whether a threshold requirement of no financial subsidization from existing customers was met. If so, the Commission would next consider whether the applicant eliminated or minimized any residual adverse effects the project might have on: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the proposed project.[22] Any residual adverse effects would be balanced against the anticipated benefits from the project.[23] The Commission allowed an applicant to rely on a variety of factors to demonstrate that its proposed project was needed,[24] but, in practice, applicants generally elected to submit, and the Commission accepted, precedent agreements with prospective customers for long-term firm service as the principal factor in demonstrating project need.

11. The 1999 Policy Statement introduced a sliding scale approach to balance public benefits with adverse effects, where the "more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of

[22] *Id.* at 61,745.

[23] *Id.* at 61,748.

[24] *Id.* at 61,747.

public benefits from the project required to balance the adverse impact."[25] The 1999 Policy Statement provided that, if the Commission found that project benefits outweighed adverse impacts on economic interests, then the Commission would proceed to consider the environmental impacts of the project.[26]

C. Developments after Issuance of the 1999 Certificate Policy Statement

12. Much has changed since the Commission issued the 1999 Policy Statement. In the last decade, increases in both domestic and international demand for natural gas produced in the United States, combined with the available supply of competitively-priced gas from shale reserves, have reduced prices and price volatility and have resulted in more proposals for natural gas transportation and export projects.[27] Much of the increased production is attributable to the development of the Marcellus and Utica shale formations in Pennsylvania, West Virginia, Ohio, and New York; shale formations in the Permian Basin in West Texas and Eastern New Mexico; Eagle Ford Shale in South Texas; and

[25] *Id.* at 61,749.

[26] *Id.* at 61,745-46. While the Commission only moved to the stage of balancing environmental impacts and other considerations if a proposed project passed this economic test established by the 1999 Policy Statement, Commission staff would begin review of the environmental impacts following the filing of an application. If a project did not pass this economic test, it could be rejected without further consideration of environmental factors.

[27] In the early 2000s, there were a number of proposals for natural gas import projects. However, as natural gas supplies increased and prices decreased, the Commission began to see more proposals for natural gas export projects.

Bakken Shale Formation in North Dakota, among others; as well as associated new extraction technologies.

13. Contracting patterns are changing significantly as a result of this supply growth. In the past, LDCs contracted for a large percentage of interstate pipeline capacity, obtaining supplies from the production area for their customers. Increasingly, however, LDCs are purchasing gas supplies further downstream at market area pooling points or at their city gates as other parties increasingly contract for pipeline capacity. Natural gas producers are now contracting for a significant amount of firm pipeline capacity on expansion projects in an effort to provide a secured commercial outlet for their gas.

14. Over the past decade, there has been greater interest and participation by affected landowners and communities, Tribes, environmental organizations, and others in natural gas project proceedings. Part of this may be attributable to the increase in proposals for new natural gas infrastructure in more densely populated areas of the eastern half of the nation. These stakeholders have raised various concerns with, among other things, the use of eminent domain, the need for new projects, and the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities.

15. The Commission's consideration of climate change and greenhouse gas emissions (GHG) has also evolved since issuance of the 1999 Policy Statement. In the last decade, the Commission began including estimates of GHG emissions from project construction (e.g., tailpipe emissions from construction equipment) and operation (e.g., fuel combustion

at compressor stations and gas venting and leaks) in its NEPA documents.[28] Then, starting in late 2016, the Commission began to estimate GHG emissions from downstream combustion and upstream production.[29] In 2018, however, the Commission reversed this practice,[30] resulting in a number of judicial decisions finding fault with the Commission's approach.[31] Concurrent with this Updated Policy Statement, the Commission is issuing a new policy statement to explain how it will assess project impacts on climate change in its NEPA and NGA reviews going forward (GHG Policy Statement).[32]

16. Another development since issuance of the 1999 Policy Statement is an increasing recognition of the need for federal agencies to focus on environmental justice and equity. In 1994, under Executive Order 12898, agencies were directed to identify and address "disproportionately high and adverse human health or environmental effects" of their actions on minority and low-income populations (i.e., environmental justice

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[28] *See, e.g.*, Environmental Assessment for the Philadelphia Lateral Expansion Project, Docket No. CP11-508-000, at 24 (Jan. 18, 2012) (construction emissions); Environmental Assessment for the Minisink Compressor Project, Docket No. CP11-515-000, at 29 (Feb. 29, 2012) (operation emissions).

[29] *See, e.g.*, *Columbia Gas Transmission, LLC*, 158 FERC ¶ 61,046, at PP 116-120 (2017); *Tex. E. Transmission, LP*, 157 FERC ¶ 61,223, at P 41 (2016), *reh'g granted*, 161 FERC ¶ 61,226 (2017).

[30] *Dominion Transmission*, *Inc.*, 163 FERC ¶ 61,128 (2018), *pet. dismissed*, *Otsego 2000 v. FERC*, 767 F.App'x 19 (D.C. Cir. 2019) (unpublished opinion).

[31] *See infra* P 75.

[32] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (GHG Policy Statement).

communities).[33] In 2021, President Biden issued two executive orders to renew and expand upon this directive. Specifically, Executive Order 13985, issued on January 20, 2021, requires agencies to conduct Equity Assessments to identify and remove barriers to underserved communities and "to increase coordination, communication, and engagement with community-based organizations and civil rights organizations."[34] And Executive Order 14008, issued on January 27, 2021, directs agencies to develop "programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts."[35]

II. Notices of Inquiry and Comments

17. As noted above, on April 19, 2018, the Commission issued an NOI (2018 NOI) seeking information and stakeholder perspectives to help the Commission explore whether, and if so how, it should revise the approach established by the 1999 Policy Statement. The Commission identified four general areas for examination in the 2018

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[33] E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, 59 FR 7629, at 7629, 7632 (Feb. 11, 1994).

[34] E.O. 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 FR 7009, 7010-11.

[35] E.O. 14008, *Tackling the Climate Crisis at Home and Abroad*, 86 FR 7619, 7629; *see also* The White House, *Fact Sheet: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government* (2021).

NOI: (1) the reliance on precedent agreements to demonstrate need for a proposed project; (2) the potential exercise of eminent domain and landowner interests; (3) the Commission's evaluation of alternatives and environmental effects under NEPA and the NGA; and (4) the efficiency and effectiveness of the Commission's certificate processes. In response to the 2018 NOI, the Commission received more than 3,000 comments from a diverse range of stakeholders.

18. On February 18, 2021, the Commission issued another NOI (2021 NOI) seeking to build upon the existing record established by the 2018 NOI. The 2021 NOI noted that a number of changes had occurred since the Commission issued the 2018 NOI, including regulatory changes, the issuance of new executive orders, and increased stakeholder interest in certain topics. Accordingly, the 2021 NOI provided stakeholders with an opportunity to refresh the record and provide updated information and additional viewpoints to help the Commission assess its policy.

19. The 2021 NOI included the four general areas of examination identified in the 2018 NOI, with modifications to the specific questions asked, including new questions on how the Commission should assess and consider the impacts of proposed projects on climate change. The 2021 NOI also identified a fifth area of examination—the Commission's identification and consideration of disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on environmental justice communities and the mitigation of those adverse impacts and burdens, as well as the Commission's identification of potentially affected environmental justice communities and measures for ensuring effective participation by these

communities in the certificate review process. In response to the 2021 NOI, the Commission received more than 35,000 comments, including more than 150 unique comment letters, from a diverse range of stakeholders.

20. The comments received in response to the 2018 and 2021 NOIs are summarized at a high level below. Comments related to GHG emissions are summarized in the aforementioned GHG Policy Statement.[36] The considerable number of comments submitted in this proceeding indicates substantial public interest in the Commission's policy for reviewing proposed interstate natural gas facilities.

A. The Commission's Determination of Need

21. A wide range of commenters request that the Commission change how it makes its public need determination. Many of these commenters argue that the Commission should rely less on precedent agreements.[37] Additionally, commenters request that, in assessing need, there be greater consideration of climate change impacts,[38] increased

[36] GHG Policy Statement, 178 FERC ¶ 61,108.

[37] *E.g.*, Public Interest Organizations (PIO) 2021 Comments at 12; Delaware Riverkeeper Network 2018 Comments at 67; Friends of the Central Shenandoah 2018 Comments at 36-38. The PIO 2021 Comments represent 54 entities from around the country that advocate for the protection of environmental resources, including Natural Resources Defense Council, Sierra Club, Public Citizen, Conservation Law Foundation, and Southern Environmental Law Center.

[38] *See, e.g.*, Environmental Protection Agency (EPA) 2021 Comments at 1-2.

transparency,[39] and an enlarged participatory role for stakeholders.[40] Some commenters recommend that applicants be required to provide specific evidence that need exists, the proposed facilities serve that need, and the asserted need cannot be met by existing infrastructure.[41] In contrast, regulated companies and industry trade organizations are nearly unanimous in their general support of the 1999 Policy Statement as it relates to the public need determination.[42]

22. Several commenters argue that the public benefits recognized in the 1999 Policy Statement are skewed, overly narrow, and outdated.[43] Additionally, some commenters recommend that the Commission create clear guidelines for benefits like reliability and resilience.[44] Some commenters suggest that the Commission consider additional factors in its benefits analysis, such as infrastructure security and how an applicant's proposal

[39] *E.g.*, New Jersey Conservation Foundation, Sabin Center for Climate Change Law, Watershed Institute, Clean Air Council, PennFuture, and New Jersey League of Conservation Voters (collectively, New Jersey Conservation Foundation et al.) 2021 Comments at 31-32.

[40] *E.g.*, Ann W. Woll 2021 Comments at 1; Jessica Greenwood 2021 Comments at 1; Rev. Betsy Sowers 2021 Comments at 1.

[41] *E.g.*, Environmental Defense Fund (EDF) 2021 Comments at 8-12.

[42] *See, e.g.*, American Gas Association (AGA) 2021 Comments at 10-11.

[43] *See, e.g.*, Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 4.

[44] *E.g.*, EDF 2021 Comments at 18.

fits with, or advances, new federal and state policies and goals.[45] In contrast, industry trade organizations generally support the Commission's existing benefits analysis under the 1999 Policy Statement, arguing that the Commission's responsibilities under the NGA have not changed, and, thus, any changes to the Commission's review of public benefits should not impede those responsibilities.[46] However, some regulated companies recommend that the Commission more heavily weigh certain benefits, such as reliability and resilience, in light of recent extreme cold weather events and ransomware attacks.[47]

23. Regarding what evidence the Commission should examine to determine project need, many non-governmental organizations (NGO), individual commenters, and other entities argue that the Commission should analyze factors beyond precedent agreements, such as future markets, opportunity costs, federal and state public policies, and effects on competition.[48] NGOs request that the Commission take a more "holistic" approach and assess proposed projects in conjunction with other projects that are designed to serve the same market, serve similar markets, or pass through the same region,[49] and that there be

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[45] *See, e.g.*, New Jersey Division of Rate Counsel 2021 Comments at 4-8.

[46] *See, e.g.*, Natural Gas Supply Association (NGSA) 2021 Comments at 23.

[47] Iroquois Gas Transmission System, L.P. (Iroquois) 2021 Comments at 10-11.

[48] *See, e.g.*, Niskanen Center, Hopewell Township, Horizons Village Property Owners Association, Inc., and 28 affected landowners (collectively, Niskanen Center et al.) 2021 Comments at 18; Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 9; New Jersey Division of Rate Counsel 2021 Comments at 8-9; Carolyn Elefant 2021 Comments at 2-3.

[49] PIO 2018 Comments at 10. The PIO 2018 Comments represent 64 entities from

increased coordination with state agencies, including allowing state regulators to review and approve precedent agreements prior to the Commission making a need determination.[50] In contrast, regulated companies and industry trade organizations state that precedent agreements remain powerful indicators of need, as they represent long-term, binding contractual and financial commitments to a project and are more objective evidence than market studies.[51]

24. Several commenters recommend that when applicants provide precedent agreements with affiliates as evidence of need, the Commission look beyond those agreements, given that companies with common profit interests might have incentives to inflate costs which can then be passed on to captive ratepayers.[52] Additionally, several commenters argue that the terms of precedent agreements should be subject to close

around the country that advocate for the protection of environmental resources; many of these entities also signed on to the PIO 2021 Comments.

[50] Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 18.

[51] *See, e.g.*, WBI Energy Transmission, Inc. (WBI Energy) 2021 Comments at 3; National Fuel Gas Supply Corporation (National Fuel) 2021 Comments at 9; Energy Transfer LP 2021 Comments at 4-5; Interstate Natural Gas Association of America (INGAA) 2021 Comments at 17-19; Boardwalk Pipeline Partners LP (Boardwalk) 2021 Comments at 28.

[52] *See, e.g.*, Natural Resources Defense Council, Sierra Club, Earthjustice, GreenFaith, Southern Environmental Law Center, Conservation Law Foundation, Public Citizen, Catskill Mountainkeeper, New Jersey Conservation Foundation, Riverkeeper, Inc., and Acadia Center (collectively, Joint NGOs) April 2018 Comments at 2; Jim Steitz 2018 Comments at 2.

scrutiny[53] and that the Commission should consider the potential for an asset to be rendered obsolete before the end of its useful life, as well as the length of time over which an asset's costs are recovered.[54] In contrast, regulated companies and industry trade organizations argue that the Commission should not distinguish between affiliate and non-affiliate agreements, as standards of conduct and nondiscrimination require pipeline companies to treat all customers equitably, regardless of whether the customer is an affiliate or a non-affiliate.[55] These entities allege that economic risk, financial obligation, and oversight by state and local regulators associated with precedent agreements demonstrate that they are clear evidence of need, regardless of whether the shipper is an affiliate.[56]

25. A wide range of commenters assert that the Commission must consider the end use of the natural gas to be transported in its assessment of need, even if end use could change over time.[57] Some commenters also note that climate change issues cannot be

[53] *See, e.g.*, Friends of the Central Shenandoah 2018 Comments at 47-49; Upstate Forever 2018 Comments at 2.

[54] New Jersey Division of Rate Counsel 2021 Comments at 10.

[55] *See, e.g.*, WBI Energy 2021 Comments at 5; INGAA 2021 Comments at 19-20; DTE Energy Company 2018 Comments at 5; Iroquois 2018 Comments at 12-13.

[56] *E.g.*, WBI Energy 2021 Comments at 5.

[57] *See, e.g.*, Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 29-32; Deb Evans and Rob Schaaf 2018 Comments at 3-5.

appropriately addressed without a firm understanding of end use.[58] However, regulated companies and industry trade organizations argue against consideration of expected end use given the practical challenges of dynamic gas markets,[59] the Commission's regulations prohibiting pipelines from unduly discriminating among shippers based on end use,[60] and the fact that regulating end use is outside the scope of the Commission's statutory authority.[61]

26. Many commenters recommend that the Commission assess need in a regional planning context, including consideration of existing infrastructure, in order to avoid unnecessary environmental harm, "underutilized or stranded" assets, and needlessly higher rates for captive consumers.[62] Regulated companies and industry trade organizations, however, generally oppose the Commission using a regional approach to review natural gas pipeline projects, asserting that this could needlessly delay construction,[63] the proximity of pipeline projects does not necessarily indicate that

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[58] *E.g.*, Fore River Residents Against the Compressor Station, Inc. (FRRACS) 2021 Comments at 2.

[59] Enbridge Gas Pipelines (Enbridge) 2021 Comments at 46; WBI Energy 2021 Comments at 6.

[60] INGAA 2021 Comments at 22 (citing 18 CFR 284.7(b)).

[61] Cheniere Energy, Inc. (Cheniere) 2018 Comments at 6.

[62] *See, e.g.*, EPA 2021 Comments at 1-3; New Jersey Division of Rate Council 2018 Comments at 13-15; Friends of Central Shenandoah 2018 Comments at 57-59.

[63] *E.g.*, INGAA 2021 Comments at 23.

projects serve the same need in a region,[64] and the open season process already serves to ensure duplicative projects are not constructed.[65] Also, these entities do not support the Commission further examining whether existing infrastructure could sufficiently meet demand.[66]

27. Additionally, several commenters assert that the Commission must consider future demand as facilities age, as well as national and state decarbonization policies and targets.[67] In contrast, regulated companies and industry trade organizations contend that assessment of future demand is not necessary or prudent, given that sophisticated market participants already make these calculations, and do not support the Commission performing a comparative or future-looking analysis of energy sources.[68] These entities emphasize that demand for natural gas projects will be correlated with demand for, and deployment of, variable energy resources.[69]

28. Generally, commenters are split on whether, and if so how, the Commission should consider the economic, energy security, and social attributes of domestic

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[64] *E.g.*, INGAA 2021 Comments at 24.

[65] *E.g.*, Cheniere 2018 Comments at 8.

[66] *See, e.g.*, Energy Transfer LP 2021 Comments at 6; Iroquois 2021 Comments at 12.

[67] *See, e.g.*, New Jersey Division of Rate Counsel 2021 Comments at 13-14.

[68] *See, e.g.*, Williams Companies, Inc. (Williams) 2021 Comments at 14; Enbridge 2021 Comments at 51; INGAA 2021 Comments at 25-26.

[69] INGAA 2021 Comments at 25-26; Boardwalk 2021 Comments at 38.

production and use of natural gas in reviewing proposed projects. Some regulated companies state that consideration of these factors should be limited;[70] however, others argue that the Commission should consider attributes such as job creation and tax revenues.[71] Several individuals and NGOs state that the Commission could consider these attributes for particular projects, but that the Commission should then also consider the costs of natural gas projects associated with increased noise, lowered property values, lowered air quality, a lowered tax base, and the loss of landowners' potential use of their land.[72] Commenters also recommend that any need analysis be focused on the specific benefits of a proposed project rather than hypothetical or general benefits[73] and that the Commission assess the magnitude or extent of both the benefits and burdens of a

[70] *E.g.*, Southern Company Services, Inc. 2021 Comments at 4.

[71] *See, e.g.*, Williams 2021 Comments at 11-12; Boardwalk 2021 Comments at 39-40; *see also* American Forest & Paper Association, Industrial Energy Consumers of America, Process Gas Consumers Group, and the Fertilizer Institute (collectively, American Forest & Paper Association et al.) 2021 Comments at 17; INGAA 2021 Comments at 26-28; AGA 2021 Comments at 32; United Association of Journeymen and Apprentices of the Plumbing, Pipe Fitting and Sprinkler Fitting Industry of the United States and Canada, AFL-CIO (United Association) 2021 Comments at 26-28; NGSA 2021 Comments at 16.

[72] *See, e.g.*, PIO 2021 Comments at 12-13; Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 42; Edward Woll 2021 Comments at 2; William F. Limpert 2021 Comments at 7-8; Massachusetts PipeLine Awareness Network (PLAN) 2021 Comments at 2; Rev. Betsy Sowers 2021 Comments at 2.

[73] EDF 2021 Comments at 50.

proposed project, including whether the jobs created are temporary or permanent, as well as the proportion of the jobs that will be filled by low- to middle-income local workers.[74]

B. The Exercise of Eminent Domain and Landowner Interests

29. Many commenters suggest that the Commission adjust its approach to considering the possible use of eminent domain. For example, some commenters assert that eminent domain should only be an option for projects that can guarantee domestic use or local benefit, or that the Commission should deny certificates that would rely on eminent domain for more than twenty percent of the proposed route.[75] In contrast, regulated companies and industry trade organizations state that the Commission should maintain its current approach, as it adequately protects landowners from the unnecessary use of eminent domain by ensuring that only projects that are needed and that do not require subsidization from existing customers are approved.[76] These entities also note that it is not possible for the Commission to reliably estimate the amount of eminent domain that will ultimately be used prior to issuance of a certificate.[77]

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[74] EPA 2021 Comments at 4.

[75] *See, e.g.*, Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 43; Upstate Forever 2018 Comments at 3; Jane Twitmyer 2018 Comments at 2; Franklin Regional Council of Gov'ts 2018 Comments at 2.

[76] *See, e.g.*, Boardwalk 2021 Comments at 61-63; TC Energy Corporation 2021 Comments at 16; INGAA 2018 Comments at 56.

[77] *See, e.g.*, TC Energy Corporation 2021 Comments at 19; Spectra Energy Partners LP (Spectra) 2018 Comments at 54; American Petroleum Institute (API) 2018 Comments at 13.

30. Some commenters assert that additional measures should be taken to minimize the use of eminent domain for projects, including routing pipelines in existing utility corridors when possible, requiring proof that an applicant's efforts to negotiate with landowners have failed, or reporting to the Commission each easement as it is agreed upon.[78] However, many regulated companies state that additional measures to minimize the use of eminent domain are unnecessary, as companies have already taken steps to ensure it is used infrequently.[79]

31. Several commenters recommend that the Commission give greater weight to the concerns of impacted landowners and communities.[80] Some assert that landowners have unequal bargaining power with applicants and that the Commission should consider whether an applicant's pre-certificate actions related to landowners demonstrate that the applicant acted in good faith.[81] Additionally, some commenters argue that the

[78] *See, e.g.*, William F. Limpert 2021 Comments at 9; Tom Russo 2021 Comments at 12; Friends of the Central Shenandoah 2018 Comments at 67.

[79] *See, e.g.*, Cheniere 2021 Comments at 9-10; Kinder Morgan Entities (Kinder Morgan) 2021 Comments at 18-20; API 2021 Comments at 11-13; INGAA 2021 Comments at 29.

[80] EDF 2021 Comments at 5; Dr. Susan F. Tierney 2018 Comments at 8, 46-48.

[81] *See, e.g.*, New Jersey Conservation Foundation, Watershed Institute, and Sierra Club 2018 Comments at 35-36; Jody McCaffree 2018 Comments at 7.

Commission should expand the regulatory definition of "affected landowners" to ensure all impacted landowners and residents are included in the Commission's consideration.[82]

32. Multiple commenters state that it is the Commission's responsibility to explain the certificate process to landowners and to ensure that they have the necessary tools to fully participate.[83] Regulated companies and industry trade organizations support the creation of the Commission's Office of Public Participation (OPP) to guide landowners' understanding of, and participation in, the pipeline development and review process.[84] Several commenters recommend that the Commission designate certain staff as non-decisional to act as official procedural case managers.[85]

33. Numerous commenters also recommend changes to the Commission's process and resources to assist landowners, including incorporating non-traditional outreach methods to notify and engage stakeholders early and throughout the process, improving the Commission's website and eLibrary system, conducting public meetings and site visits focused on landowner issues, and providing longer public comment periods.[86] Some

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[82] *See, e.g.*, Sari DeCesare 2021 Comments at 1; Gary Salata 2021 Comments at 1.

[83] *See, e.g.*, Duke Energy Corporation 2018 Comments at 45; Upstate Forever 2018 Comments at 3.

[84] *See, e.g.*, Kinder Morgan 2021 Comments at 20-21; BHE Pipeline Group 2021 Comments at 6-8; INGAA 2021 Comments at 31-32.

[85] Tom Russo 2021 Comments at 13; American Midstream Partners LP, Canyon Midstream Partners LLC, and Cureton Midstream LLC 2018 Comments at 7-8; Giles County and Roanoke County, Virginia 2018 Comments at 13-14.

[86] *See, e.g.*, Carolyn Elefant 2021 Comments at 5-6; Niskanen Center et al. 2021

commenters propose that the Commission automatically grant all affected landowners party status to project proceedings, or, at a minimum, provide an updated step-by-step guide for landowners on how to intervene.[87] Industry trade organizations support longer intervention periods for landowners,[88] while some regulated companies argue that the Commission should limit interventions to entities that have a direct interest in a specific project.[89]

34. A wide range of commenters argue that, in order to prevent needless condemnations while routes are still subject to change and it is uncertain if a project will be authorized, the Commission could defer issuing a certificate or condition a certificate holder's exercise of eminent domain until an applicant obtains all final federal and state permits and issuance of such permits is sustained if appeal is filed.[90] In contrast, many regulated companies and industry trade organizations assert that the Commission has no authority under the NGA to condition a certificate holder's exercise of eminent domain

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Comments at 36-38; Kinder Morgan 2021 Comments at 22-26; Friends of Central Shenandoah 2018 Comments at 69; Spectra 2018 Comments at 5.

[87] *See* Niskanen Center et al. 2021 Comments at 28; Deb Evans and Ron Schaaf 2021 Comments at 13; Carolyn Elefant 2018 Comments at 2-3.

[88] *See* INGAA 2021 Comments at 32.

[89] *See* Adelphia Gateway LLC 2018 Comments at 13-14.

[90] *See, e.g.*, Land Trust Alliance 2021 Comments at 9; Jackie Freedman 2021 Comments at 1; Pipeline Safety Trust 2021 Comments at 2; Terese and Joseph Buchanan May 18, 2021 Comments at 1; Gary Salata 2021 Comments at 1.

because eminent domain is a right that arises directly from the NGA.[91] These commenters express concern that if the Commission defers issuing a certificate until an applicant has all authorizations needed to commence construction, it would create practical challenges and could result in unintended consequences (e.g., a pipeline may need survey access in order to obtain information necessary for another permit).[92]

C. The Commission's Consideration of Environmental Impacts

35. Many commenters suggest that the Commission revise its approach to analyzing alternatives under NEPA. Some commenters recommend that the Commission consider a broader scope of alternatives (e.g., modifications to existing infrastructure, co-location with existing infrastructure, and alternative sources of energy generation)[93] or a broader range of factors to compare alternatives (e.g., the quantified and monetized impact of GHG emissions; impact of natural gas exports on domestic energy prices; and cost-effectiveness when accounting for all significant health, productivity, and opportunity costs).[94] Additionally, commenters assert that the Commission should not blindly adopt a

[91] *See, e.g.*, INGAA 2021 Comments at 36-38; API 2021 Comments at 15-16; Enbridge 2021 Comments at 70; Cheniere 2021 Comments at 9.

[92] *See, e.g.*, API 2021 Comments at 17-18; Boardwalk 2021 Comments at 63-65.

[93] *See* Friends of the Central Shenandoah 2018 Comments at 75; EPA June 21, 2018 Comments at 1; Leslie Sauer 2018 Comments at 2.

[94] *See* New Jersey Conservation Foundation et al. 2021 Comments at 21-22; Institute for Policy Integrity at New York University School of Law (Policy Integrity) 2018 Comments at 16, 23-24; Pennsylvania Departments of Environmental Protection, Conservation and Natural Resources, and Community and Economic Development 2018

project sponsor's project purpose and, consistent with *Citizens Against Burlington, Inc. v. Busey*,[95] must evaluate alternatives to achieve the Commission's goals, shaped by the application before it and the Commission's function in the decisional process.[96] In contrast, regulated companies and industry trade organizations state that the current scope of the Commission's alternatives analysis is appropriate and consistent with NEPA, and has been upheld by the courts.[97] These entities also assert that *Busey* prohibits the Commission from considering alternatives that would not meet the purpose and need of the proposed federal action.[98]

36. Many commenters request that the Commission change how it conducts its cumulative effects analysis under NEPA. For example, NGOs and other commenters recommend that the Commission conduct regional evaluations[99] and prepare programmatic environmental impact statement (EIS)[100] to address cumulative effects. To

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Comments at 6; Carolyn Sellars 2018 Comments at 6.

[95] 938 F.2d 190, 199 (D.C. Cir. 1991).

[96] *See, e.g.*, PIO 2021 Comments at 21-22.

[97] *E.g.*, INGAA 2021 Comments at 39-41.

[98] INGAA 2021 Comments at 41; Iroquois 2021 Comments at 13-14; API 2021 Comments at 19-20; Competitive Enterprise Institute 2021 Comments at 2-3; *see also* Kinder Morgan 2021 Comments at 26-28.

[99] *See, e.g.*, Joint NGOs April 2018 Comments at 2.

[100] *E.g.*, Nature Conservancy 2018 Comments at 2-3; Appalachian Trail Conservancy 2018 Comments at 3.

determine the geographic scope for regional evaluations, commenters recommend that the Commission use a radius around the proposed project (e.g., 100 miles)[101] or consider the project scale, gas source, and end-use location.[102] In contrast, industry trade organizations and regulated companies recommend that the Commission continue to use a project-specific geographic scope for its cumulative effects analysis.[103] These entities assert that the Commission does not have the authority under section 7 of the NGA to conduct regional evaluations, as the Commission only reviews individual pipeline applications, not broader federal programs or regional actions where a programmatic review might be appropriate.[104]

37. NGOs and individual commenters state that how the Commission balances environmental impacts against favorable economic impacts is unclear, lacks transparency, and requires updating.[105] Several commenters request that the Commission give environmental impacts greater weight.[106] Other commenters criticize the

[101] Kirk Frost May 26, 2021 Comments at 8.

[102] Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 57.

[103] *See*, *e.g.*, INGAA 2018 Comments at 75; Duke Energy Corporation 2018 Comments at 51-53; Edison Electric Institute 2018 Comments at 16.

[104] *E.g.*, Williams 2021 Comments at 34; INGAA 2021 Comments at 44-45; Boardwalk 2021 Comments at 73.

[105] *See, e.g.*, Delaware Riverkeeper Network 2018 Comments at 92-93; Friends of the Central Shenandoah 2018 Comments at 92-94; Deb Evans and Rob Schaaf 2018 Comments at 12.

[106] *E.g.*, PIO 2021 Comments at 56; Elaine Mroz 2018 Comments at 4.

Commission's phased approach to addressing project impacts under the 1999 Policy Statement, and recommend that the Commission balance economic and environmental impacts together.[107] In contrast, industry trade organizations state that the Commission's approach under the 1999 Policy Statement properly balances economic and environmental impacts, giving proportionate consideration to all impacted stakeholders.[108] These entities contend that broadening the balancing would exceed the Commission's discretion under the NGA[109] and that the NEPA requirement to take a "hard look" at environmental consequences should remain separate from consideration of economic impacts.[110]

38. Regulated companies and industry trade organizations support the adoption of other agencies' categorical exclusions under NEPA, including those referenced in Commission staff's presentation at the January 19, 2021 Commission meeting (Docket No. RM21-10-000).[111] Additionally, these entities state that a categorial exclusion should apply to certain actions that do not currently qualify for the Commission's blanket certificate authority (e.g., project amendments that would result in no, or minimal,

[107] *See, e.g.*, New Jersey Conservation Foundation et al. 2021 Comments at 18-22; Policy Integrity 2021 Comments at 4; Chesapeake Bay Foundation 2018 Comments at 4.

[108] *E.g.*, API 2021 Comments at 23.

[109] Williams 2021 Comments at 39.

[110] INGAA 2018 Comments at 85-89.

[111] INGAA 2021 Comments at 83-85; Enbridge 2021 Comments at 149-150.

changes to the environment).[112] In contrast, NGOs suggest that there is no need for the Commission to expand its existing categorical exclusions, and they request that the Commission provide a public notice and comment period for all projects in which an applicant proposes to use a categorical exclusion.[113]

D. The Efficiency and Effectiveness of the Commission's Review Process

39. Many commenters recommend changes to the Commission's application review process. For example, some commenters recommend that all affected stakeholders be brought into the process as early as possible,[114] that decisions regarding information requirements be summarized in a comprehensive application completeness checklist, and that the Commission's regulations be amended to encourage applicants to submit complete applications at the outset.[115] Additionally, several commenters recommend changes to the Commission's environmental review process, including that the Commission not prepare a NEPA document absent substantive environmental data for the entirety of the proposed route,[116] that the Commission consider issuing final EISs and certificates at the same time,[117] or, alternatively, that the Commission issue certificates

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[112] *E.g.*, INGAA 2021 Comments at 84; Enbridge 2021 Comments at 150.

[113] PIO 2021 Comments at 72-76.

[114] PIO 2021 Comments at 78; *see also* Dr. Susan F. Tierney 2021 Comments at 41-42.

[115] New Jersey Conservation Foundation et al. 2021 Comments at 30-31.

[116] New Jersey Conservation Foundation et al. 2021 Comments at 31.

[117] Energy Infrastructure Council (EIC) 2021 Comments at 33; Spectra 2018

within 90 days of issuance of a final NEPA document.[118] Some commenters also state that the Commission should not inject additional regulatory uncertainty into its review process by requiring open-ended or unduly expansive environmental reviews.[119]

40. Commenters also make a variety of recommendations to increase transparency in the Commission's review process and schedules. For example, some commenters propose that the Commission issue a public notice when a draft order has been circulated by Commission staff to the Commissioners,[120] establish "permitting timetables" for NGA section 7(c) projects,[121] and clarify deadlines for parties to intervene or submit studies.[122] Some commenters also recommend that there be a "cooling off" period after the issuance of a draft EIS to resolve disputes between an applicant and stakeholders with assistance from the Commission's Dispute Resolution Service.[123]

41. Several commenters recommend changes to the duration of the pre-filing process. Recommendations include shortening the pre-filing process and extending the application

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Comments at 95.

[118] WBI Energy 2021 Comments at 11; INGAA 2018 Comments at 94.

[119] *See, e.g.*, GPA Midstream Association 2021 Comments at 1; Laborers' International Union of North America 2021 Comments at 2.

[120] Kinder Morgan 2021 Comments at 46.

[121] WBI Energy 2021 Comments at 11.

[122] Carolyn Elefant 2021 Comments at 7; Spectra 2018 Comments at 94-95; INGAA 2018 Comments at 96.

[123] Tom Russo 2021 Comments at 23.

review process,[124] collapsing pre-filing into the post-filing process to eliminate lengthy processing times,[125] and condensing the application review process by consolidating as much activity as possible in the pre-filing process and requiring all interested parties planning to object to a project to do so during pre-filing.[126]

42. Many commenters also propose ways to make stakeholder participation more effective. For example, some commenters propose that applicants provide transportation or access to public transportation to public meetings, adequate parking at venues, and options for remote participation.[127] Several commenters also recommend that the Commission provide notices and related materials in multiple languages[128] and issue guidance to ensure that pipeline project developers provide sufficient and timely information.[129] Additionally, some commenters recommend that the Commission's new OPP be a neutral resource to landowners and other stakeholders seeking more

[124] Carolyn Elefant 2021 Comments at 6.

[125] American Forest & Paper Association et al. 2021 Comments at 26-27; Spectra 2018 Comments at 98-99.

[126] United Association 2021 Comments at 35-36; INGAA 2018 Comments at 102.

[127] *E.g.*, PLAN 2021 Comments at 3; Edward Woll 2021 Comments at 4; Rev. Betsy Sowers 2021 Comments at 3; Kim Robinson 2021 Comments at 2; Surfrider Foundation 2018 Comments at 2; Delaware Riverkeeper Network 2018 Comments at 57.

[128] Egan Millard 2021 Comments at 3; Robert Kearns 2021 Comments at 3; Inbal Goldstein 2021 Comments at 4.

[129] Dr. Susan F. Tierney 2021 Comments at 42.

information on the Commission's review process.[130] Other commenters recommend that staff prioritize input provided by stakeholders that will be directly impacted by a project,[131] and that all comments submitted to a docket receive a response or some other indication that a member of Commission staff has read the comments.[132]

43. Several commenters note the importance of transparency and coordination in the interagency review process. Some regulated companies recommend that the Commission strengthen its role as the lead agency under NEPA by focusing on educating and training cooperating agencies to be better prepared to meet their own statutory deadlines.[133] Other commenters suggest that the Commission consider standardized schedules for its review processes, such as publishing timelines that include pre-filing, preparation of the NEPA document, and issuance of final orders and authorizations by other agencies,[134] and that the Commission create a dedicated task force for coordinating with other agencies.[135]

44. Many commenters support the separate treatment of different classes of projects, recommending that the Commission provide more timely review of projects with

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[130] WBI Energy 2021 Comments at 10.

[131] Kinder Morgan 2021 Comments at 47-48.

[132] *See, e.g.*, Kim Robinson 2021 Comments at 2; Leslie Sauer Jones and Stephanie Jones June 2021 Comments at 1; James and Kathy Chandler 2018 Comments at 1.

[133] *E.g.*, Kinder Morgan 2021 Comments at 42-43.

[134] Enbridge 2021 Comments at 157.

[135] Kirk Frost May 26, 2021 Comments at 13.

minimal impacts and certain qualifying benefits,[136] or expedite approvals for projects where only an environmental assessment is required and there is no opposition.[137] However, other commenters oppose the separate treatment of different classes of projects, expressing concern that separate treatment would be arbitrary or discriminatory[138] and that some projects would be left in limbo while the Commission takes action on what it perceives as priority projects.[139] Some commenters also suggest changes to the Commission's blanket certificate program, including changing the filing requirements to reduce the number of required resource reports, eliminating the need for weekly reports,[140] increasing both the automatic and prior notice cost limits,[141] and adding consideration of other factors such as a project's acreage to determine eligibility for blanket certificate authority.[142]

[136] Iroquois 2021 Comments at 18-19.

[137] Kinder Morgan 2021 Comments at 44.

[138] Americans for Prosperity 2021 Comments at 2.

[139] AGA 2021 Comments at 39.

[140] EIC 2021 Comments at 34; TransCanada Corporation 2018 Comments at 32.

[141] API 2021 Comments at 36.

[142] WEC Energy Group, Inc. 2018 Comment at 6-7.

E. The Commission's Consideration of Effects on Environmental Justice Communities

45. Many commenters suggest that the Commission revise its approach for identifying environmental justice communities in certificate proceedings. For example, some commenters recommend that the Commission use census block-level data;[143] on-the-ground surveys;[144] social, environmental, and health indicators;[145] and other data and tools to identify such communities.[146] Additionally, several commenters recommend that the Commission consult with other federal and state agencies for assistance with identifying environmental justice communities[147] or allow communities to identify themselves as environmental justice communities.[148]

46. Many commenters also recommend changes to how the Commission evaluates project impacts on environmental justice communities. For example, NGOs assert that

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[143] *See, e.g.*, PIO 2021 Comments at 86-87; New Jersey Conservation Foundation et al. 2021 Comments at 38-40.

[144] *See, e.g.*, Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 69; Tom Russo 2021 Comments at 24-25; William F. Limpert 2021 Comments at 19.

[145] New Jersey Conservation Foundation et al. 2021 Comments at 35-38; North Carolina Department of Environmental Quality 2021 Comments at 2; EDF 2021 Comments at 57.

[146] Quincy Democratic City Committee 2021 Comments at 1-2; Natural Resources Defense Council May 2021 Comments at 14-15.

[147] EPA 2021 Comments at 7; Jeannie Ambrose 2021 Comments at 2.

[148] *See* Save Our Illinois Land (SOIL) 2021 Comments at 1; William F. Limpert 2021 Comments at 19; Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 69.

the Commission should always use a reference or comparison group when evaluating disproportionately high and adverse impacts on such communities[149] and ensure that such a group is neither too geographically narrow nor too demographically similar to avoid masking disproportionate impacts.[150] NGOs and individual commenters recommend that the Commission consider the existing burden from specific environmental and health indicators when it evaluates cumulative and historic exposures, including the presence of other infrastructure and existing pollution levels in the project area.[151] Additionally, these commenters recommend changes to how the Commission evaluates the impacts of direct and indirect air pollution on environmental justice communities.[152] In contrast, regulated companies and industry trade organizations state that the Commission should not make substantive changes to how it evaluates impacts on environmental justice communities at this time, and recommend that the Commission wait for further guidance from the White House, EPA, and the Council on Environmental Quality (CEQ) to ensure consistency across the federal government.[153]

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[149] New Jersey Conservation Foundation et al. 2021 Comments at 39-40.

[150] Policy Integrity 2021 Comments at 49-52.

[151] *See, e.g.*, New Jersey Conservation Foundation et al. 2021 Comments at 36-37; Ann W. Woll 2021 Comments at 5; SOIL 2021 Comments at 3.

[152] Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 77-82; EDF 2021 Comments at 58.

[153] API 2021 Comments at 37-39; Enbridge 2021 Comments at 167-168.

47. Many commenters state that there are barriers to the participation of environmental justice communities in Commission proceedings, including inadequate translation services and the Commission's reliance on electronic media.[154] Other commenters state that Commission proceedings can be highly technical in nature, rendering them inaccessible to the general public unless a participant can invest significant time and resources.[155] A wide range of commenters recommend changes to the Commission's public notice and outreach processes to ensure meaningful engagement with environmental justice communities,[156] including the Commission's process for consulting with Tribes.[157] Many commenters also support the Commission's formation of OPP[158] and recommend that the Commission coordinate with community-based organizations and institutions to further encourage the participation of environmental justice communities in Commission proceedings.[159]

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[154] Terese and Joseph Buchanan May 18, 2021 Comments at 1; PIO 2021 Comments at 87-89; Robert Kearns 2021 Comments at 4; Jackie Freedman 2021 Comments at 1; Deborah Brown 2021 Comments at 1.

[155] New Jersey Conservation Foundation et al. 2021 Comments at 34.

[156] *See, e.g.*, Kinder Morgan 2021 Comments at 58-59; Ohio Environmental Council 2021 Comments at 3.

[157] Coharie Intra-Tribal Council, Haliwa-Saponi Indian Tribe, Lumbee Tribe of North Carolina, Meherrin Indian Nation of North Carolina, Nottoway Indian Tribe of Virginia, and Occaneechi Band of Saponi Nation 2021 Comments at 2; Haliwa-Saponi Indian Tribe 2021 Comments at 2; Delaware Riverkeeper Network & Berks Gas Truth 2021 Comments at 71.

[158] *See, e.g.*, API 2021 Comments at 41; EPA 2021 Comments at 8; National Fuel 2021 Comments at 22.

[159] New Jersey Conservation Foundation et al. 2021 Comments at 33-35; Delaware

48. Several commenters assert that section 7(e) of the NGA provides the Commission with broad conditioning authority to address project impacts on environmental justice communities in its certificates.[160] Some commenters state that the Commission should use its NEPA alternatives analysis to identify and evaluate ways to mitigate impacts on environmental justice communities.[161] If mitigating adverse impacts on environmental justice communities is not possible, other commenters assert that the Commission should deny a certificate.[162]

49. In contrast, many regulated companies and industry trade organizations state that no federal statute requires the Commission to implement specific remedial measures to address project impacts on environmental justice communities, but they assert that NEPA provides an appropriate framework in which to analyze such impacts.[163] These entities

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Riverkeeper Network & Berks Gas Truth 2021 Comments at 73-74.

[160] New Jersey Division of Rate Counsel 2021 Comments at 23; PIO 2021 Comments at 105.

[161] INGAA 2021 Comments at 98-99; EPA 2021 Comments at 8-9.

[162] *See, e.g.*, Attorneys General of Massachusetts, Connecticut, Maryland, Minnesota, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia 2021 Comments at 32-33 (Attorneys General of Massachusetts et al.); *see also* PLAN 2021 Comments at 5; Katherine Manuel 2021 Comments at 5; Elizabeth Moulds 2021 Comments at 4; Jessica Greenwood 2021 Comments at 4; Shayna Gleason 2021 Comments at 3; Rick Mattila 2021 Comments at 3.

[163] *See, e.g.*, Williams 2021 Comments at 60-62, 65; Enbridge 2021 Comments at 178-180, 186; Kinder Morgan 2021 Comments at 48, 57; INGAA 2021 Comments at 88-90.

also contend that that the Commission's conditioning authority under section 7(e) of the NGA is limited to direct project impacts and the Commission could not require measures to redress prior industrial impacts on environmental justice communities or impacts outside of the Commission's jurisdiction.[164]

III. Goals and Objectives of the Updated Certificate Policy Statement

50. While significant changes have occurred in the past 23 years, the Commission's goals and objectives with this Updated Policy Statement remain consistent with those of the 1999 Policy Statement, including to: (1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain;"[165] (2) "provide appropriate incentives for the optimal level of construction and efficient customer choices;"[166] and (3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project."[167]

51. As discussed above, the 1999 Policy Statement included an analytical framework for how the Commission would evaluate the effects of certificating new projects on economic interests. With this Updated Policy Statement, the Commission intends to

[164] *See, e.g.*, Enbridge 2021 Comments at 181; API 2021 Comment at 44-45.

[165] 1999 Policy Statement, 88 FERC at 61,737.

[166] *Id.* at 61,743.

[167] *Id.*

provide a more comprehensive analytical framework for its decision-making process. Specifically, we provide clarity on how the Commission will evaluate all factors bearing on the public interest, including the balancing of economic and environmental interests in determining whether a project is required by the public convenience and necessity, thus providing more regulatory certainty in the Commission's review process and public interest determinations.

IV. Updated Certificate Policy Statement

A. Factors to be Balanced in Assessing the Public Convenience and Necessity

52. In determining whether to issue a certificate of public convenience and necessity, the Commission will weigh the public benefits of a proposal, the most important of which is the need that will be served by the project, against its adverse impacts.

1. Consideration of Project Need

53. To demonstrate that a project is required by the public convenience and necessity, an applicant must first establish that the proposed project is needed. As indicated above, the Commission's expectations and requirements for how applicants should demonstrate project need have evolved over time. In the 1999 Policy Statement, the Commission noted concerns associated with relying "primar[ily]"[168] or "almost exclusively"[169] on contracts to establish need for a new project. Those concerns included the "additional

[168] *Id.* at 61,744.

[169] *Id.*

issues [that arise] when the contracts are held by pipeline affiliates"[170] and the difficulty such a policy creates for "articulat[ing] to landowners and community interests why their land must be used for a new pipeline project."[171] Thus, the 1999 Policy Statement provided that:

> [r]ather than relying only on one test for need, the Commission will consider *all relevant factors* reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[172]

54. However, in practice, the Commission has relied almost exclusively on precedent agreements to establish project need. Although courts have upheld the Commission's practice in certain contexts,[173] we find that we cannot adequately assess project need without also looking at evidence beyond precedent agreements. After all, as the Commission's 1999 Policy Statement noted, many different factors may indicate the

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[170] *Id.*

[171] *Id.*

[172] *Id.* at 61,747 (emphasis added).

[173] *See, e.g.*, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014) (noting that the 1999 Policy Statement "permits" but does not "require[]" the Commission to " look[] beyond the market need reflected by the applicant's existing contracts with shippers"). *But see Environmental Defense Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021) (finding that is was arbitrary and capricious for the Commission to rely solely on a single precedent agreement with an affiliate shipper to establish need when demand for natural gas in the area was flat and the Commission neglected to make a finding as to whether the proposed pipeline would result in a more economical alternative to existing pipelines).

need—or lack thereof—for a new interstate pipeline. While precedent agreements may indicate one or more shipper's willingness to contract for new capacity, such willingness may not in all circumstances be sufficient to sustain a finding of need—e.g., in the face of contrary evidence or where there is reason to discount the probative value of those precedent agreements. Accordingly, we find that looking only to precedent agreements, and ignoring other, potentially contrary, evidence may cause the Commission to reach a determination on need that is inconsistent with the weight of the evidence in any particular proceeding, in violation of both the NGA and the Commission's responsibilities under the Administrative Procedure Act.[174] We reaffirm the Commission's commitment to consider *all* relevant factors bearing on the need for a project. Although precedent agreements remain important evidence of need, and we expect that applicants will continue to provide precedent agreements, the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project. The Commission will also consider, as relevant, the circumstances surrounding the precedent agreements (e.g., whether the agreements were entered into before or after an open season and the results of the open season, including the number of bidders, whether the agreements were entered into in response to LDC or generator requests for proposals (RFP) and, if so, the details around that RFP process, including the length of

[174] Under the Administrative Procedure Act, an agency cannot ignore substantial evidence bearing on the agency decision. *See* 5 U.S.C. 706; *see also, e.g.*, *Motor Vehicles Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that an agency decision is arbitrary and capricious if it "entirely fail[s] to consider an important aspect of the problem").

time from RFP to execution of the agreement), as well as other evidence of need, as discussed below.

55. For all categories of proposed projects, we encourage applicants to provide specific information detailing how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project. To the extent applicants do not have information on the end use of the gas, they are encouraged to work with their prospective shippers to obtain it. The absence of this information may prevent an applicant from meeting its burden to demonstrate that a project is needed.

56. For a market-driven project that is responding to increased natural gas demand, the evidence relating to the need for the project could include a market study that projects volumetric or peak day load growth. An applicant may rely on publicly available analyses by the Energy Information Administration or other third parties showing projections of market growth. The applicant could also provide its best assessment, based on publicly available information or data, of whether other transportation suppliers may be able to meet the incremental demand with existing capacity to demonstrate why new pipeline construction is necessary. For individual shippers, load growth profiles, gas supply portfolios, and any advanced approval of contracts by state public service commissions would also be helpful in showing evidence of project need.

57. Some projects may not directly serve a customer but rather are being undertaken to add supplies of natural gas to the market. Such projects may be driven by natural gas producers or natural gas utilities attempting to provide supply at lower cost or support

reliability by increasing the volumes of natural gas available to customers. For these projects, evidence to demonstrate consumer benefits may include projections of the net benefits, for example projected lower natural gas prices for consumers due to increased supply competition, compared to the incremental costs of transportation on the new pipeline. The Commission will consider record evidence of regional projections for both gas supply and market growth, as well as pipeline-specific studies in these areas.

58. Other pipeline projects may be intended to support more efficient system operations by replacing older and inefficient facilities (e.g., compressors and leak-prone pipes) and performing other infrastructure improvements, or to respond to changing state and federal government pipeline safety or environmental requirements. For these projects, applicants may document how proposed facilities, for example pipeline or compressor replacements, provide expected system benefits, such as reduced operating costs, improved pipeline integrity, or reduced natural gas leaks. In addition, an applicant may document how a project avoids adverse impacts or satisfies any changing state or federal government regulations.

59. The Commission will consider both current and projected future demand for a project based on the evidence in the record. Applicants are encouraged to submit analyses showing how market trends as well as current and expected policy and regulatory developments would affect future need for the project. Applicants are also encouraged to provide a thorough assessment of alternatives, including supporting data, to facilitate the Commission's review. In assessing the strength of the applicant's need showing, the Commission will consider record evidence of alternatives to the proposed

project. The Commission's evaluation will include information indicating that other suppliers would be able to meet some or all of the needs to be served by the proposed project on a timely, competitive basis or whether other factors may eliminate or curtail such needs.

60. As the Commission noted in the 1999 Policy Statement, projects supported by precedent agreements with affiliates raise unique concerns regarding need for the project.[175] And, as the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) recently held in *Environmental Defense Fund v. FERC*, "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement."[176] Given those concerns, affiliate precedent agreements will generally be insufficient to demonstrate need. Instead, where projects are backed primarily by precedent agreements with affiliates, the Commission will consider additional information, such as the evidence outlined above.[177] We will determine how much additional evidence is required on a case-by-case determination.

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[175] 1999 Policy Statement, 88 FERC at 61,739-40 (noting that the "use of contracts with affiliates to demonstrate market support for projects has generated opposition from affected landowners and competitor pipelines who question whether the contracts represent real market demand") and 61,744 (stating that "[u]sing contracts as the primary indicator of market support for the proposed pipeline project also raises additional issues when the contracts are held by pipeline affiliates.").

[176] 2 F.4th at 973.

[177] *See supra* P 54.

61. To the extent the Commission receives information in the record from third parties addressing the need for a project, that too will be considered in our analysis. Where an applicant fails to carry its burden of demonstrating the proposed project is needed, the Commission will not undertake any further consideration of the project's benefits or adverse effects.

2. Consideration of Adverse Effects

62. In determining whether to issue a certificate of public convenience and necessity, the Commission will consider four major interests that may be adversely affected by the construction and operation of new projects: (1) the interests of the applicant's existing customers; (2) the interests of existing pipelines and their captive customers; (3) environmental interests; and (4) the interests of landowners and surrounding communities, including environmental justice communities. The Commission may deny an application based on any of these types of adverse impacts.

a. Impacts on Existing Customers of the Pipeline Applicant

63. Existing customers of the pipeline applicant may be adversely affected if a proposed project causes an increase in rates or a degradation in service. Regarding potential rate increases, although we are no longer characterizing this issue as a "threshold question" in this Updated Policy Statement, our policy of no financial subsidies remains unchanged.[178] That is, the pipeline applicant must be prepared to

[178] 1999 Policy Statement, 88 FERC at 61,746-47, *clarified*, 90 FERC at 61,391-96.

financially support its proposed project without relying on subsidization by its existing customers. As to other potential impacts to existing customers, like a degradation in service, we will consider the applicant's efforts to eliminate or minimize any such impacts.

64. As the Commission stated in the 1999 Policy Statement, the policy of no financial subsidies does not mean that a project sponsor has to bear all the financial risk of the project; the risk can be shared with new customers, but it generally cannot be shifted to existing customers.[179] One of the Commission's regulatory goals is to protect captive customers from rate increases during the terms of their contracts that are unrelated to the costs associated with their service. And existing customers of the expanding pipeline should not have to subsidize a project that does not serve them.

65. The 1999 Policy Statement also stated that the requirement that a new project must be financially viable without subsidies does not eliminate the possibility that, in some instances, project costs should be rolled into the rates of existing customers.[180] In most instances, incremental pricing will avoid subsidies for the new project, but the situation may be different in cases of inexpensive expansibility that is made possible because of earlier, costly construction.[181] In that instance, because the existing customers bear the

[179] 1999 Policy Statement, 88 FERC at 61,746. For new pipeline companies, without existing customers, this requirement has no application.

[180] *Id.*

[181] *Id.*

cost of the earlier, more costly construction in their rates, incremental pricing could result in the new customers receiving a subsidy from the existing customers because the new customers would not face the full cost of the construction that makes their new service possible.

66. Additionally, expansion costs could still be included in existing shippers' rates when proposed projects are designed to improve service for existing customers.[182] Increasing the rates of existing customers to pay for projects designed to benefit those customers (i.e., by replacing existing capacity, improving reliability, or providing flexibility) is not a subsidy.[183]

b. Impacts on Existing Pipelines and Their Customers

67. As the Commission stated in the 1999 Policy Statement, existing pipelines that already serve the market to be served by the proposed new capacity may be affected by the potential loss of market share and the possibility that they may be left with unsubscribed capacity investment.[184] Additionally, captive customers of existing pipelines may be affected if they must pay for the resulting unsubscribed capacity in their rates. These remain important concerns.

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[182] *Order Clarifying Statement of Policy*, 90 FERC at 61,391.

[183] *Id.* at 61,393.

[184] 1999 Policy Statement, 88 FERC at 61,748.

68. It has been the Commission's long-standing position that it has an obligation to ensure fair competition, but that it is not the role of the Commission to protect existing pipelines from the effects of competition.[185] While we continue to maintain this position, we also emphasize that it is not just unfair competition that can harm captive customers. The Commission must consider the possible harm to captive customers that can result from a new pipeline, regardless of whether there is evidence of unfair competition.

69. Congress enacted the NGA "with the principal aim of encouraging the orderly development of plentiful supplies of . . . natural gas at reasonable prices, and protecting consumers against exploitation at the hands of natural gas companies."[186] Ensuring the orderly development of natural gas supplies includes preventing overbuilding. One way that the Commission can prevent overbuilding is through careful consideration of a proposed project's impacts on existing pipelines. To the extent that a proposed project is designed to substantially serve demand already being met on existing pipelines, that could be an indication of potential overbuilding. Nevertheless, in such instances, the Commission will also consider whether the proposed project would offer certain advantages (e.g., providing lower costs to consumers or enhancing system reliability).

70. Comments from existing pipelines and their captive customers about the potential impacts from a proposed project will be an important piece of our review. Additionally,

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[185] *See Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at PP 37-39 (2009); *see also* 1999 Policy Statement, 88 FERC at 61,748.

[186] *City of Clarksville, Tennessee v. FERC*, 888 F.3d at 479 (quoting *NAACP v. FPC*, 425 U.S. at 669-70 and *FPC v. Hope Nat. Gas Co.*, 320 U.S. at 610).

comments from state utility or public service commissions as to how a proposed project may impact existing pipelines will be particularly useful.

c. Environmental Impacts

71. As noted above, the 1999 Policy Statement included an analytical framework for how the Commission would evaluate the effects of certificating new projects on economic interests. However, the 1999 Policy Statement did not describe how the Commission would consider environmental interests in its decision-making process and, more specifically, how it would balance these interests with the economic interests of a project. Instead, it stated that environmental interests would be "separately considered" in a certificate proceeding after the balancing of public benefits against the residual adverse effects on economic interests.[187]

72. While the 1999 Policy Statement focused on economic impacts, the consideration of environmental impacts is an important part of the Commission's responsibility under the NGA to evaluate all factors bearing on the public interest.[188] In the years immediately following issuance of the 1999 Policy Statement, the Commission would sometimes issue a preliminary determination on the non-environmental issues associated

[187] 1999 Policy Statement, 88 FERC at 61,747.

[188] *See Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. at 391 (holding that the NGA requires the Commission to consider "all factors being on the public interest"); *see also Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment").

with a proposed project, and then issue a subsequent decision on the certificate application following the environmental review process; however, in practice, Commission staff would begin review of both the economic and environmental impacts following the filing of an application. Today, the Commission no longer issues preliminary determinations on non-environmental issues, and the Commission and staff continue to review the economic and environmental impacts of projects concurrently. Thus, the sequential framing of these analyses in the 1999 Policy Statement has created some confusion and incorrectly conveyed how the Commission considers environmental impacts. In addition to questions about sequencing, we have seen a significant increase in comments from a range of stakeholders expressing concerns about how the Commission considers environmental impacts, including impacts on climate change and environmental justice communities, in its public interest determinations.

73. To provide more clarity and regulatory certainty to all participants in certificate proceedings, we explain here how the Commission will consider environmental impacts.[189] The Commission will balance all impacts, including economic and environmental impacts, together in its public interest determinations under the NGA. As discussed further below, the potential adverse impacts will be weighed against the evidence of need and other potential benefits of a proposal in determining whether to issue a certificate of public convenience and necessity.

[189] Recognizing that CEQ is in the process of revising its NEPA regulations, the Commission will consider the comments in this docket regarding NEPA in our future review of our regulations, procedures, and practices for implementing NEPA.

74. We will consider environmental impacts and potential mitigation in both our environmental reviews under NEPA and our public interest determinations under the NGA. The Commission expects applicants to structure their projects to avoid, or minimize, potential adverse environmental impacts. Additionally, we expect applicants to propose measures for mitigating impacts, and we will consider those measures—or the lack thereof—in balancing adverse impacts against the potential benefits of a proposal. Further, the NGA grants the Commission broad authority to attach reasonable terms and conditions to certificates of public convenience and necessity.[190] Should we deem an applicant's proposed mitigation of impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation. We may also deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized.

75. As noted above, since issuance of the 1999 Policy Statement, the Commission's policy for considering climate impacts has evolved.[191] In addition to the significant increase in comments from stakeholders, the courts have issued several decisions addressing the Commission's evaluation of GHG emissions in certificate proceedings. The D.C. Circuit recently held that reasonably foreseeable downstream GHG emissions

[190] 15 U.S.C. 717f(e); *see also, e.g.*, *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (noting the Commission's "extremely broad" conditioning authority).

[191] *Supra* P 15.

are an indirect effect of the Commission authorizing proposed projects[192] and are relevant to the Commission's determination of whether proposed projects are required by the public convenience and necessity.[193]

76. Concurrently with this Updated Policy Statement, we are issuing a separate policy statement to explain how the Commission will assess project impacts on climate change in certificate proceedings going forward.[194] This separate policy statement describes Commission procedures for evaluating climate impacts under NEPA and explains how the Commission will integrate climate considerations into its public convenience and necessity findings under the NGA, including how the Commission will consider measures to mitigate climate impacts. When making public interest determinations, we intend to fully consider climate impacts, in addition to other environmental impacts.

[192] *Sabal Trail*, 867 F.3d at 1374.

[193] *Id.* at 1373. In *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019), the D.C. Circuit rejected the Commission's position that *Sabal Trail* is limited to the narrow facts of that case. While the court in *Birckhead* acknowledged that downstream emissions may not always be a foreseeable effect of natural gas projects, it rejected the notion that downstream GHG emissions are a reasonably foreseeable indirect effect of a natural gas project only if a specific end destination is identified. The court further noted that the Commission should attempt to obtain information on downstream uses to determine whether downstream GHG emissions are a reasonably foreseeable effect of the project. *Birckhead*, 925 F.3d at 518-19.

[194] GHG Policy Statement, 178 FERC ¶ 61,108.

d. Impacts on Landowners and Surrounding Communities

77. The construction and operation of new natural gas infrastructure has the potential to result in adverse impacts on the landowners and communities surrounding a project. As the Commission stated in the 1999 Policy Statement:

> [l]andowners whose land would be condemned for the new pipeline right-of-way, under eminent domain rights conveyed by the Commission's certificate, have an interest as does the community surrounding the right-of-way. The interest of these groups is to avoid unnecessary construction, and any adverse effects on their property associated with a permanent right-of-way.[195]

In the over 20 years that have passed since issuance of the 1999 Policy Statement, the Commission has seen an increase in proposals for projects in more densely populated areas, as well as a significant increase in comments from landowners raising a multitude of economic, environmental, and others concerns with proposed projects.

78. While the 1999 Policy Statement focused primarily on the economic impact associated with a permanent right-of-way on a landowner's property,[196] going forward, and as discussed below, our analysis of impacts to landowners will be more expansive. This fuller consideration of landowner impacts is consistent with the Commission's approach in recent years of more fully engaging with landowners to ensure that their concerns are properly considered in our proceedings. For example, in June 2021, the

[195] 1999 Policy Statement, 88 FERC at 61,748.

[196] *Id.* at 61,749 ("The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners.").

Commission established OPP, in part, to facilitate public participation in Commission proceedings.

79. In addition to the increase in comments from landowners since issuance of the 1999 Policy Statement, the Commission has also seen a significant increase in comments raising environmental justice concerns. In recent years, issues surrounding environmental justice and equity have received increased focus and attention at both the state and federal levels, as demonstrated by the recent issuance of Executive Orders 13985 and 14008, referenced above.[197] The Commission is committed to ensuring that environmental justice and equity concerns are better incorporated into our decision-making processes. Accordingly, we clarify that our consideration of impacts to communities surrounding a proposed project will include an assessment of impacts to any environmental justice communities and of necessary mitigation to avoid or lessen those impacts.

80. The Commission and applicants have a shared responsibility to engage communities that may be impacted by a proposed project. This responsibility includes ensuring effective communication with landowners and environmental justice communities about potential impacts and giving careful consideration to the input of such parties during the agency proceeding. Below, we further discuss our expectations for how pipeline applicants will engage with landowners, steps the Commission has taken to

[197] *Supra* P 16.

protect landowner interests, and how the Commission will consider potential impacts to landowners and environmental justice communities.

i. Impacts on Landowners

81. As noted above, once the Commission grants a certificate of public convenience and necessity, section 7(h) of the NGA authorizes a certificate holder to acquire the necessary land or property to construct the approved facilities by exercising the right of eminent domain for those lands for which it could not negotiate an easement with landowners.[198] As the Commission has previously recognized:

> [t]here is no question that eminent domain is among the most significant actions that a government may take with regard to an individual's private property. And the harm to an individual from having their land condemned is one that may never be fully remedied, even in the event they receive their constitutionally-required compensation.[199]

Thus, looking only at the economic impacts associated with eminent domain does not sufficiently account for the full scope of impact on landowners. Landowners whose property is subject to eminent domain often experience intangible impacts, which cannot always be monetized. Our consideration of landowner impacts will be based upon robust early engagement with all interested landowners, as well as continued evaluation of input from such parties during the course of any given proceeding. And we will, to the extent possible, assess a wider range of landowner impacts.

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[198] 15 U.S.C. 717f(h).

[199] *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order 871-B, 86 FR 26150 (May 13, 2021), 175 FERC ¶ 61,098, at P 47 (2021).

82. Given the serious impacts associated with the use of eminent domain, we expect pipeline applicants to take all appropriate steps to minimize the future need to use eminent domain. This includes engaging with the public and interested stakeholders during the planning phase of projects to solicit input on route concerns and incorporate reroutes, where practicable, to address landowner concerns, as well as providing landowners with all necessary information. Additionally, we expect pipelines to take seriously their obligation to attempt to negotiate easements respectfully and in good faith with impacted landowners. The Commission will look unfavorably on applicants that do not work proactively with landowners to address concerns.

83. Additionally, we note that that, while a certificate provides the holder with significant rights and privileges, it also imposes concomitant responsibilities, including complying with all certificate conditions. Specifically, certificate holders must comply with requirements regarding restoration of the pipeline right-of-way. Failure to comply with such requirements could mean that a pipeline is out of compliance with its certificate, and could lead to compliance action by the Commission, including referral to the Commission's Office of Enforcement for further investigation and potential civil penalties.[200]

84. Although the Commission does not have the authority to deny or restrict the power of eminent domain in a section 7 certificate,[201] or to oversee the acquisition of property

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[200] *See, e.g.*, *Midship Pipeline Co., LLC*, 177 FERC ¶ 61,187 (2021).

[201] *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C.

rights through eminent domain, including issues regarding the timing of and just compensation for the acquisition of property rights,[202] the Commission has recently taken steps within its authority to protect landowner interests. Specifically, the Commission issued Order No. 871-B, which precludes authorization of construction during the rehearing period for certificate orders and pending resolution of rehearing requests reflecting opposition to project construction, operation, or need (subject to a time limitation), and which establishes a general policy, subject to a case-by-case determination, of staying certificate orders during the rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners (also subject to a time limitation).[203]

85. We acknowledge that in many cases pipeline applicants will not be able to acquire all the necessary right-of-way by negotiation and in such instances may need to use eminent domain. In assessing potential impacts to landowners, the Commission will consider the steps a pipeline applicant has already taken to acquire lands through

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Cir. 2000) ("The Commission does not have the discretion to deny a certificate holder the power of eminent domain.").

[202] *PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, at P 10 (2021) (citing *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 88 (2018); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 76 (2018); *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, at P 33 n.82 (2018)).

[203] *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order 871-B, 86 FR 26150 (May 13, 2021), 175 FERC ¶ 61,098, *order on reh'g*, Order 871-C, 86 FR 43077 (Aug. 6, 2021), 176 FERC ¶ 61,062 (2021).

respectful and good faith negotiation, as well as the applicant's plans to minimize the use of eminent domain upon receiving a certificate. And, as discussed further below, the potential adverse impacts to landowners, along with other adverse impacts, will be weighed against the evidence of need and potential benefits of a proposal in determining whether to issue a certificate of public convenience and necessity.

ii. Impacts on Environmental Justice Communities

86. Our evaluation of the impacts of a proposed interstate natural gas pipeline will include a robust consideration of its impacts on environmental justice communities.[204] We recognize that environmental justice communities have long borne a disproportionate share of the impacts associated with industrial development near their residences, workplaces, religious institutions, and schools. That history often comes with significant, deleterious consequences. For example, environmental justice communities frequently experience health disparities, such as higher rates of asthma and certain cancers relative to society at large, which can render individuals in those communities particularly susceptible to incremental pollution and other adverse impacts that may be caused by a new project.[205] The Commission's public interest responsibility demands that we

[204] We recognize that the Commission's environmental justice analysis will also apply to the Commission's authorization of liquefied natural gas facilities, pursuant to section 3 of the NGA. While those authorizations are not the subject of this Updated Policy Statement, this commitment is worth noting in this discussion of impacts on environmental justice communities.

[205] Policy Integrity 2021 Comments at 46-47, 55-56.

seriously evaluate these considerations and incorporate them into the balancing test outlined below.[206]

87. For the Commission to adequately evaluate the impacts of a proposed project on environmental justice communities, it is essential to promptly and properly identify such communities. Commenters noted the insufficiency of relying only on initial screening tools to identify environmental justice communities.[207] While data from screening tools such as the EPA's EJSCREEN may be useful, additional data collection methods may be necessary to properly identify environmental justice communities. We encourage applicants to consult with guidance provided by EPA, CEQ, and other authoritative sources,[208] to ensure that the Commission has before it all the data needed to adequately identify environmental justice communities potentially affected by a proposed project. We will evaluate and incorporate, as appropriate, any subsequently issued guidance when considering how to identify environmental justice communities affected by a proposed project. We encourage project developers to do the same.

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[206] *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (*Vecinos*) (remanding a Commission order based in part on a "deficient" environmental justice analysis).

[207] For example, screening tool data "may need to be supplemented with additional or more localized information and/or ground truthing." EPA 2021 Comments at 7, 9.

[208] This may include, for example, relevant state or local agencies. We also note that federal agencies, including EPA and CEQ, are in the process of updating their guidance regarding environmental justice.

88. Many commenters encourage the Commission to factor in demographic considerations—such as disability, age, household income, pre-existing health conditions, and level of education.[209] We recognize that such demographic considerations may be appropriate to consider on a project-by-project basis or as federal guidance evolves.

89. Additionally, we recognize that proper selection of both the geographic unit of analysis (e.g., census block group) within the affected environment and the reference community (e.g., county/parish, or state) is necessary to ensure that affected environmental justice communities are properly identified for consideration in the Commission's analysis.[210] The affected environment for environmental justice analysis purposes may vary according to the characteristics of the particular project and the surrounding communities.[211] Accordingly, the Commission will ensure that the delineation of the affected area, selected geographic unit of analysis, and reference

[209] North Carolina DEQ 2018 Comments at 8. *See also* Niskanen Center 2018 Comments at 17-19.

[210] An overly broad geographic unit of analysis, for example, could dilute the presence of environmental justice communities. *See* Policy Integrity 2021 Comments at 46-48; *see also* Federal Interagency Working Group on Environmental Justice & NEPA Committee, *Promising Practices for EJ Methodologies in NEPA Reviews* at 21, 26 (March 2016), https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf (EJ IWG & NEPA Committee).

[211] *See Vecinos*, 6 F.4th at 1330 ("When conducting an environmental justice analysis, an agency's delineation of the area potentially affected by the project must be 'reasonable and adequately explained,' . . . and include 'a rational connection between the facts found and the decision made.'" (citations omitted)).

community are consistent with best practices and federal guidance and will not be limited to a one-size-fits-all approach.[212]

90. The consideration of cumulative impacts[213] is particularly important when it comes to conducting an environmental justice analysis.[214] An environmental analysis that, for example, considers incremental impacts of a project in isolation will, almost by definition, fail to adequately consider the project's impact on a community that already experiences elevated levels of pollution or other adverse impacts. To adequately capture the effects of cumulative impacts, it is essential that the Commission consider those pre-existing conditions and how the adverse impacts of a proposed project may interact with and potentially exacerbate them. To that end, several commenters provide recommendations for specific health and environmental indicators that the Commission should consider when it evaluates cumulative exposures. These include factors such as air pollution, heat vulnerability, as well as the effects of pre-existing infrastructure (e.g.,

[212] *See* EJ IWG & NEPA Committee at 21-28.

[213] "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR 1508.7 (1978).

[214] *See* EDF 2021 Comments at 58; Attorneys General of Massachusetts et al. 2021 Comments at 31; Delaware Riverkeeper & Berks Gas Truth 2021 Comments at 78 and 83; and SOIL 2021 Comments at 3.

bus depots, highways, and waste facilities).[215] That analysis can be informed by a wide range of data, including, for example, health statistics such as cancer clusters, asthma rates, social vulnerability data, and community resilience data.[216] We will carefully examine cumulative impacts on environmental justice communities and encourage applicants to identify and submit any such data that may be relevant for the particular environmental justice communities affected by their proposed project.

91. The Commission will also consider measures to eliminate or mitigate a project's adverse impacts on environmental justice communities. We recognize that mitigation must be tailored to the needs of different environmental justice communities. This will require close consultation between the project developer, the communities in question, and the Commission, consistent with our *ex parte* regulations.[217] We will look with disfavor on mitigation proposals that are proposed without sufficient community input. In addition, we note that effective mitigation will require the Commission to consider, among other things, the feasibility of proposed mitigation and methods for ensuring compliance, the timing of proposed mitigation, and, where useful, a range of potential mitigation options.

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[215] New Jersey Conservation Foundation et al. 2021 Comments 2021 at 36-37.

[216] EPA, *EnviroAtlas Interactive Map*, https://www.epa.gov/enviroatlas/enviroatlas-interactive-map (last visited Feb. 1, 2022); Centers for Disease Control and Prevention, *Social Vulnerability Index Interactive Map*, https://svi.cdc.gov/map.html (last visited Feb. 1, 2022).

[217] 18 CFR 385.2201.

92. As described above, in June 2021, the Commission established OPP to help facilitate public participation in Commission proceedings. We anticipate that OPP will similarly play an important role in ensuring that environmental justice communities are able to participate meaningfully in section 7 certificate proceedings that affect their interests. We also recognize the adverse impacts that natural gas infrastructure can have on Native American Tribes and Tribal resources, and we will continue to review our existing processes to ensure that the Commission is engaging in effective government-to-government consultation with Tribes and receiving and considering Tribal input on proposals.

93. In sum, we recognize that "environmental justice is not merely a box to be checked"[218] and we commit to ensuring that such concerns are fully considered in our public interest analysis under NGA section 7. We expect the principles and concerns outlined above will guide that consideration as the Commission continues to develop its environmental justice precedent. Finally, as noted above, we recognize that federal agencies, including EPA and CEQ, are in the process of updating their guidance regarding environmental justice and we will review and incorporate, as appropriate, any future guidance in our case-by-case decision-making process.

[218] *Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 92 (4th Cir. 2020).

B. Assessing Public Benefits and Adverse Effects

94. In deciding whether to issue a certificate of public convenience and necessity, the Commission must decide whether, on balance, the project will serve the public interest. In order to make such a determination, the Commission must consider all of the benefits of a proposal together with all of the adverse impacts, including the economic and environmental impacts.

95. As discussed above, under the 1999 Policy Statement, the Commission would first determine whether, given an applicant's efforts to mitigate or minimize impacts, there would be any residual adverse effects on the economic interests of the existing customers of the pipeline applicant, existing pipelines in the market and their captive customers, or landowners and communities affected by the proposal. If so, the Commission would balance the evidence of public benefits to be achieved by the project against those residual adverse effects on economic interests. If the benefits outweighed the adverse economic effects, the Commission would then consider the environmental impacts associated with the proposal.[219]

96. As noted above, today, the Commission and staff review the economic and environmental impacts of projects concurrently. Thus, the sequential framing of these analyses in the 1999 Policy Statement has created some confusion and incorrectly conveyed how the Commission considers economic and environmental impacts. Accordingly, to provide clarity regarding our decision-making process, we explain that,

[219] 1999 Policy Statement, 88 FERC at 61,745-46.

in order to determine whether a proposed project is in the public interest, we must look at the entirety of a proposal and balance all its benefits against all of its adverse impacts.

97. In assessing the public benefits of a project, the Commission intends to consider all benefits that will be provided by the project. The most important consideration in assessing benefits will be the evidence demonstrating that a project is needed, as discussed in more detail above. The Commission will also consider any benefits beyond demand that are alleged by the applicant and supported in the record, which may include evidence that the project will displace more pollution-heavy generation sources, facilitate the integration of renewable energy sources, and/or result in a significant source of jobs or tax revenues (we note that temporary impacts associated with a proposal will generally be given less weight).

98. In assessing the adverse impacts of a proposal, we will consider the range of impacts to: (1) existing customers of the pipeline applicant; (2) existing pipelines in the market and their captive customers; (3) environmental resources; and (4) landowners and surrounding communities, including environmental justice communities. In reviewing those adverse impacts, the Commission will carefully consider the extent to which an applicant will be able to mitigate any adverse impacts through applicant-proposed measures or additional measures that the Commission could require.

99. Consistent with the 1999 Policy Statement, we believe that "[t]he more interests adversely affected or the more adverse impact a project would have on a particular interest, the greater the showing of public benefits from the project required to balance

the adverse impact."[220] And, as the Commission did in the 1999 Policy Statement, we decline to adopt any bright-line standards for how we will carry out this balancing;[221] rather, the approach must remain flexible enough for the Commission to resolve specific cases and take into account the different interests that must be considered. We do make clear, however, that there may be proposals denied solely on the magnitude of a particular adverse impact to any of the four interests described above if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized. On the other hand, there may be proposals that have significant impacts but are still found to be in the public interest if the public benefits outweigh those impacts.

V. Applicability of the Updated Certificate Policy Statement

100. A major purpose of this Updated Policy Statement is to provide clarity and regulatory certainty regarding the Commission's decision-making process. Therefore, the Updated Policy Statement will not be applied retroactively to cases where a certificate has already been issued and investment decisions have been made. However, the Commission will apply the Updated Policy Statement to any currently pending applications for new certificates. Applicants will be given the opportunity to supplement the record and explain how their proposals are consistent with this Updated Policy Statement, and stakeholders will have an opportunity to respond to any such filings.

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[220] *Id.* at 61,749.

[221] *Id.*

VI. Information Collection Statement

101. The collection of information discussed in the Updated Policy Statement is being submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the Paperwork Reduction Act of 1995[222] and OMB's implementing regulations.[223] OMB must approve information collection requirements imposed by agency rules.[224] Respondents will not be subject to any penalty for failing to comply with a collection of information if the collection does not display a valid OMB control number.

102. The Commission solicits comments from the public on the Commission's need for this information, whether the information will have practical utility, the accuracy of the burden estimates, recommendations to enhance the quality, utility, and clarity of the information to be collected, and any suggested methods for minimizing respondents' burden, including the use of automated information techniques. **PUBLIC COMMENTS ARE DUE [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].** The burden estimates are focused on implementing the voluntary information collection pursuant to this Updated Policy Statement. The

[222] 44 U.S.C. 3507(d).

[223] 5 CFR 1320.

[224] This Updated Policy Statement does not require the collection of any information, but rather discusses information that entities may elect to provide. The Commission is following Paperwork Reduction Act procedures to ensure compliance with that act.

Commission asks that any revised burden estimates submitted by commenters include the details and assumptions used to generate the estimates.

103. The following estimate of reporting burden is related only to this Updated Policy Statement.

104. **Public Reporting Burden**: The collection of information related to this Updated Policy Statement falls under FERC-537 and impacts the burden estimates associated with the "Interstate Certificate and Abandonment Applications" component of FERC-537. The Updated Policy Statement will not impact the burden estimates related to any other component of FERC-537.[225] The estimated annual burden[226] and cost[227] follow.

[225] The Updated Policy Statement will not impact burden estimates to the following components of FERC-537: Pipeline Purging/Testing Exemptions, Blanket Certificates Prior Notice Filings, Blanket Certificates-Annual Reports, Section 311 Construction-Annual Reports, Request for Waiver of Capacity Release Regulations, Interstate and Intrastate Bypass Notice, Blanket Certificates, or Hinshaw Blanket Certificates.

[226] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. *See* 5 CFR 1320 for additional information on the definition of information collection burden.

[227] Commission staff estimates that the industry's average hourly cost for this information collection is approximated by the Commission's average hourly cost (for wages and benefits) for 2021, or $87.00/hour.

Modifications to FERC-537 (Gas Pipeline Certificates: Construction, Acquisition, and Abandonment) as a result of PL18-1-000						
	Number of Respondents (1)	**Annual Number of Responses per Respondent (2)**	**Total Number of Responses (1)*(2)=(3)**	**Average Burden & Cost Per Response (4)**	**Total Annual Burden Hours & Total Annual Cost (3)*(4)=(5)**	**Cost per Respondent ($) (5)÷(1)**
Interstate Certificate and Abandonment Applications	40	1	40	880 hours; $76,560 Increase	35,200 hours; $3,062,400 Increase	$76,560 Increase

105. **Title**: FERC-537, Gas Pipeline Certificates: Construction, Acquisition and Abandonment.

106. **Action**: Proposed revisions to an existing information collection.

107. **OMB Control No.**: 1902-0060.

108. **Respondents**: Entities proposing natural gas projects under section 7 of the NGA.

109. **Frequency of Information Collection**: On occasion.

110. **Necessity of Voluntary Information Collection**: The Commission's existing FERC-537 information collection pertains to regulations implementing section 7 of the NGA, which authorizes the Commission to issue certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce. The information collected pursuant to this Updated Policy Statement should help the Commission in making its public interest determinations.

111. **Internal Review**: The opportunity to file the information conforms to the Commission's plan for efficient information collection, communication, and management within the natural gas pipeline industry. The Commission has assured itself, by means of its internal review, that there is specific, objective support for the burden estimates associated with the opportunity to file the information.

112. Interested persons may provide comments on this information collection by one of the following methods:

- Electronic Filing (preferred): Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- USPS: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426.
- Hard copy other than USPS: Federal Energy Regulatory Commission, Office of the Secretary, 12225 Wilkins Avenue, Rockville, Maryland 20852.

VII. Document Availability

113. In addition to publishing the full text of this document in the *Federal Register*, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through the Commission's Home Page (http://www.ferc.gov). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

114. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

115. User assistance is available for eLibrary and the Commission's website during normal business hours from the Commission's Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.
Commissioner Christie is dissenting with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities Docket No. PL18-1-000

(Issued February 18, 2022)

DANLY, Commissioner, *dissenting*:

1. I dissent from the issuance of the *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*.[1] Before I explain my reasons for dissenting, I would like to state from the outset that I voted for the Commission's most recent revised Notice of Inquiry[2] considering changes to its Original Policy Statement.[3]

2. I cannot, however, support today's issuance because it will, in combination with the Interim Greenhouse Gas (GHG) Policy Statement,[4] have profound implications for the ability of natural gas companies to secure capital, on the timelines for Natural Gas Act (NGA) section 7[5] applications to be processed, and on the costs that a pipeline and its customers will bear as a result of the potentially unmeasurable mitigation that the majority *expects* each company to propose when filing its application[6] and the possibility

[1] *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Policy Statement).

[2] *Certification of New Interstate Nat. Gas Facilities*, 174 FERC ¶ 61,125 (2021).

[3] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Original Policy Statement).

[4] *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement). I note that today's issuance in Docket No. PL21-3-000 "is subject to revision" and is described as an "interim" policy statement. *Id*. P 1.

[5] 15 U.S.C. § 717f.

[6] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 74 ("[W]e expect applicants to propose measures for mitigating impacts, and we will consider those measures—or the lack thereof—in balancing adverse impacts against the potential benefits of a proposal.").

of further mitigation measures added unilaterally by the Commission. As I explain in more detail below, this policy statement contravenes the purpose of the NGA which, as the Supreme Court has held, is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[7]

I. The Commission's Jurisdiction and the Public Convenience and Necessity Standard are Not as Broad as the Updated Policy Statement Suggests

3. As an initial matter, the Commission "is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'"[8] The applicable statute is the NGA, and the statutory standard applicable to NGA section 7(c) certificate applications[9] is whether a proposed project "is or will be required by the present or future public convenience and necessity."[10]

4. Notably, *public convenience and necessity* is not anywhere defined in the language of the NGA.[11] That phrase is famously ambiguous, and the statute fails to provide factors

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[7] *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (citations omitted) (*NAACP*); *accord Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70) (*Myersville*).

[8] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)) (emphasis in original).

[9] 15 U.S.C. § 717f(c).

[10] *Id.* § 717f(e) ("[A] certificate shall be issued to any qualified applicant therefor, . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity*; otherwise such application shall be denied.") (emphasis added); *see Okla. Nat. Gas Co. v. FPC*, 257 F.2d 634, 639 (D.C. Cir. 1958) ("The granting or denial of a certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission.").

[11] *Cf. ICC v. Parker*, 326 U.S. 60, 65 (1945) ("Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation."); *see generally* S. Rep. No. 75-1162 at 5 (1937) (recognizing similarities in the provisions requiring certificates for public convenience and necessity under the

to be weighed in arriving at a determination that a proposed project "is or will be required by the present or future public convenience and necessity."[12] Accordingly, "the Natural Gas Act 'vests the Commission with broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines.'"[13] This does not, of course, mean that we are wholly without guideposts in construing the meaning of the public convenience and necessity standard. As recognized by my colleagues, the Supreme Court has found that NGA section "7(e) requires the Commission to evaluate all factors bearing on the public interest."[14] This finding, however, cannot not be read in a vacuum. The Court has explained that the inclusion of the phrase "public interest" in a statute is not "a broad license to promote the general public welfare"—instead, it "take[s] meaning from the purposes of the regulatory legislation."[15] Thus, we turn, as we must, to the purpose of the NGA: "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[16] Any balancing under the public convenience and necessity standard should "take meaning" from that purpose.

5. We also know that "[n]othing contained in [NGA section 7] shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."[17] Therefore, the Commission is not barred from finding a proposed project

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other statutes, e.g., the Interstate Commerce Act).

[12] 15 U.S.C. § 717f(e).

[13] *Envtl. Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021) (internal quotation marks omitted).

[14] Updated Policy Statement, 178 FERC ¶ 61,107 at P 4 n.6 (quoting *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959)).

[15] *NAACP*, 425 U.S. at 669.

[16] *Id.* at 669-70; *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider "other subsidiary purposes," such as "conservation, environmental, and antitrust questions." *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute's primary purpose.

[17] 15 U.S.C. § 717f(g).

required by the public convenience and necessity when it is in an area that is already served by another company.[18]

6. Another consideration relevant to the Commission's evaluation of the public interest is our jurisdiction and, specifically, which areas of regulation Congress identified as being reserved to states—and thus outside of our jurisdiction. NGA section 1(b) sets forth that division of jurisdiction, providing that,

> [t]he provisions of [the NGA] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but *shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas*.[19]

The Commission's authority therefore extends to: (1) the "transportation of natural gas in interstate commerce," (2) the "sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale."[20] Exempted from our jurisdiction are production, gathering and local distribution.[21] From these exemptions, it may be gleaned that the Commission does not have jurisdiction over the "gas once it moves beyond the high-pressure mains into the hands of an end user."[22] Another exemption from federal regulation is contained in NGA section 1(c), which states:

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[18] *See Panhandle E. Pipe Line Co. v. FPC*, 169 F.2d 881, 884 (D.C. Cir. 1948) ("[N]othing in the Natural Gas Act suggests that Congress thought monopoly better than competition or one source of supply better than two, or intended for any reason to give an existing supplier of natural gas for distribution in a particular community the privilege of furnishing an increased supply.").

[19] 15 U.S.C. § 717(b) (emphasis added).

[20] *Id*.

[21] *See id*.

[22] *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 277 (D.C. Cir. 1990).

> The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission.[23]

By declaring the foregoing exemptions from federal regulation, Congress has carefully delineated the limits of the Commission's jurisdiction.[24]

7. These limits on the Commission's jurisdiction are not extended by the National Environmental Policy Act (NEPA).[25] In fact, NEPA cannot extend our jurisdiction because NEPA is not a means of "mandating that agencies achieve particular substantive environmental results";[26] rather, it serves to "impose[] only procedural requirements on

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[23] 15 U.S.C. § 717(c).

[24] *See FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (*Transco*) ("Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation, and sale. Rather, Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field leaving the residue for state regulation.") (citation omitted); *see also FPC v. Panhandle E. Pipe Line Co.* 337 U.S. 498, 502-03 (1949) ("[S]uffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution.") (footnote omitted).

[25] *See Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers.") (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) ("The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute.") (citations omitted); *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) ("NEPA does not mandate action which goes beyond the agency's organic jurisdiction.") (citation omitted).

[26] *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989); *accord Robertson v.*

federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."[27] Indeed, "NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any."[28] It is necessary to acknowledge the limited, procedural nature of NEPA's requirements since it almost appears as though some of my colleagues have become convinced that it is necessary to ensure that environmental impacts are mitigated before one can make a finding that a proposed project is required by the public convenience and necessity.[29] Neither NEPA nor the NGA establishes such a requirement.

8. And, any attempt to justify such action through the Commission's conditioning authority is unsupported.[30] Under its conditioning authority, "[t]he Commission shall

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Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (*Methow Valley*) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) ("Congress in enacting NEPA . . . did not require agencies to elevate environmental concerns over other appropriate considerations.").

[27] *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004) (citation omitted); *accord Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008) ("NEPA imposes only procedural requirements to 'ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.'") (quoting *Methow Valley*, 490 U.S. at 349); *see also Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc*., 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.") (citations omitted).

[28] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991) (citing *Methow Valley*, 490 U.S. at 353 & n.16).

[29] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 74 ("We will consider environmental impacts and potential mitigation in both our environmental reviews under NEPA and our public interest determinations under the NGA. The Commission expects applicants to structure their projects to avoid, or minimize, potential adverse environmental impacts."); *id*. ("Should we deem an applicant's proposed mitigation of impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation."); *id*. P 79 ("[W]e clarify that our consideration of impacts to communities surrounding a proposed project will include an assessment of impacts to any environmental justice communities and of necessary mitigation to avoid or lessen those impacts.").

[30] *But see id*. P 74 (concluding the because the Commission's conditioning

have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."[31] But the Commission's conditioning authority cannot be used to impose conditions beyond the Commission's jurisdiction.[32] Nor can the Commission find support under NEPA for its expectation that applicants propose mitigation measures in order for a project to be deemed required by the public convenience and necessity.[33]

II. A Number of the Changes to the Certificate Policy Statement are Misguided

- **Changes in the Commission's Need Determination**

9. In the Original Policy Statement, the Commission stated that, in evaluating the need for a project, it would:

> consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient

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authority is broad, if the Commission determines that the applicant's proposed mitigation of impacts are inadequate, the Commission has the authority to condition the certificate to require additional mitigation).

[31] 15 U.S.C. § 717f(e).

[32] *See Richmond Power & Light of City of Richmond, Ind. v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) ("What the Commission is prohibited from doing directly it may not achieve by indirection.") (footnote omitted).

[33] *See Methow Valley*, 490 U.S. at 352-53 ("There is a fundamental distinction, however, between a requirement that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated, on the one hand, and a substantive requirement that a complete mitigation plan be actually formulated and adopted, on the other. . . . Even more significantly, it would be inconsistent with NEPA's reliance on procedural mechanisms—as opposed to substantive, result-based standards—to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act.") (citing *Baltimore Gas & Elec. Co.*, 462 U.S.at 100 ("NEPA does not require agencies to adopt any particular internal decisionmaking structure")).

> showing of the public benefits of its proposed project to outweigh any residual adverse effects discussed below.[34]

Although the Commission stated in its Original Policy Statement that it would consider other factors, the Commission has also "explained that the [Original] Policy Statement does not require a certain percentage of a proposed project's capacity be subscribed, and that with respect to affiliate shippers, 'it is . . . Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.'"[35]

10. In the Updated Policy Statement, the Commission now is revising how it determines need. The Updated Policy Statement explains that "[i]n determining whether to issue a certificate of public convenience and necessity, the Commission will weigh the public benefits of a proposal, *the most important of which is the need that will be served by the project*, against its adverse impacts."[36] The Commission acknowledges that its prior reliance on precedent agreements to determine need has been upheld by courts,[37] but then proclaims that "we cannot adequately assess project need without also looking at evidence beyond precedent agreements."[38] An expectation is then established that applicants continue to provide precedent agreements but "the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project."[39]

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[34] Original Policy Statement, 88 FERC ¶ 61,227 at 61,747.

[35] *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199, at P 5 (2020) (citation omitted).

[36] Updated Policy Statement, 178 FERC ¶ 61,107 at P 52 (emphasis added).

[37] *See id*. P 54 (citing *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014) (noting that the 1999 Policy Statement "permits" but does not "require[]" the Commission to "look[] beyond the market need reflected by the applicant's existing contracts with shippers")).

[38] *Id*.

[39] *Id*. P 54 (listing other considerations that it views as relevant to a need determination, including whether the agreements were entered into before or after an open season, the results of the open season, the number of bidders, whether the agreements were entered into in response to a local distribution company or generator request for proposals (RFP), the details of any such RFP process, demand projections underlying the capacity subscribed, estimated capacity utilization rates, potential cost savings to customers, regional assessments, and filings or statements from state

11. The Commission underscores what it views as necessary for the Commission to determine need for all categories of proposed projects: "specific information detailing how the gas to be transported by the proposed project will ultimately be used," i.e., the end use and, "why the project is needed to serve that use."[40] And if the applicant does not have information regarding the intended end use? Applicants are "encouraged" to turn to their shippers to obtain it.[41] In the absence of such information, the Commission suggests that the applicant may not satisfy its burden to demonstrate need for the proposed project.[42] The projected end use and an explanation of the reasons *why* the project is needed to serve that use are not the only information the Commission requests—"[f]or all categories of proposed projects," the majority also "encourage[s] applicants to provide specific information detailing . . . the expected utilization rate of the proposed project."[43] The majority also suggests types of "evidence" for various categories of projects.[44]

12. And when precedent agreements are with an affiliate of the applicant, the majority states that those precedent agreements, will generally not be sufficient to demonstrate need.[45]

13. I agree that, as a legal matter, the Commission may take into account considerations other than precedent agreements in its need determination. I also agree that there may be circumstances—such as when there is evidence of self-dealing in the execution of a precedent agreement with an affiliated shipper—where "the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project."[46]

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regulatory commissions or local distribution companies regarding the proposed project).

[40] *Id*. P 55.

[41] *Id*.

[42] *See id*.

[43] *Id*.

[44] *See id*. PP 55-59.

[45] *Id*. P 60.

[46] *Id*. P 54. I am generally skeptical of affiliate transactions and think that in most circumstances, the Commission should scrutinize agreements with an affiliate. As I have previously explained, I agree with the U.S. Court of Appeals for District of Columbia

14. To the extent, however, that today's order suggests that the Commission must look beyond precedent agreements in every circumstance to determine need, I disagree. In my view, precedent agreements are strong evidence of need and the Commission need not look further in most circumstances. As my colleagues acknowledge, courts have upheld on numerous occasions the Commission's application of its Original Policy Statement and the Commission's reliance on precedent agreements to support multiple findings of market need.[47]

15. In terms of precedent agreements with affiliates, the Commission recently received guidance in the form of the narrow holding in *Environmental Defense Fund v. FERC*.[48] There, the court found the Commission's public convenience and necessity determination to be arbitrary and capricious due to the Commission's

> rel[iance] solely on a precedent agreement to establish market need for a proposed pipeline when (1) there was a single precedent agreement for the pipeline; (2) that precedent agreement was with an affiliated shipper; (3) all parties agreed that projected demand for natural gas in the area to be served by the new pipeline was flat for the foreseeable future;

Circuit's decision to remand the Commission's orders and the court's explanation for doing so in *Environmental Defense Fund v. FERC*, 2 F.4th 953. *See Spire STL Pipeline LLC*, 176 FERC ¶ 61,160 (2021) (Danly, Comm'r, dissenting at P 9).

[47] *See, e.g.*, *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019) ("[T]his Court has also recognized that 'it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.'") (citation omitted); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d at 111 ("Petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers. To the contrary, the policy statement specifically recognizes that such agreements 'always will be important evidence of demand for a project.'") (quoting Original Policy Statement, 88 FERC ¶ 61,227 at 61,748); *see also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (explaining that "[f]or a variety of reasons related to the nature of the market, 'it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.' . . . In keeping with its policy, the Commission concluded that the evidence that the Project was fully subscribed was adequate to support the finding of market need.") (citation omitted).

[48] *Envtl. Def. Fund v. FERC*, 2 F.4th 953.

> and (4) the Commission neglected to make a finding as to whether the construction of the proposed pipeline would result in cost savings or otherwise represented a more economical alternative to existing pipelines.[49]

That case does not stand for the proposition that in every circumstance, the Commission must always look beyond the precedent agreements. Instead, that case should be read as a failure on the part of the Commission to engage in reasoned decision making based on the facts presented.

16. Next, I disagree with the majority's position that the Commission should weigh end use in its determination of need. I agree with Enbridge Gas Pipeline that "[p]rioritizing certain end uses in determining project need would be inconsistent with the Commission's policies of open access, open seasons and awarding capacity to those that value the capacity the most."[50] More importantly, the Commission does not have jurisdiction over the end use of the gas and has been purposefully deprived of its upstream and downstream authorities by Congress. The breadth of the subject matters that inform our public interest determinations must be informed by the limits of our jurisdiction.

17. I recognize that in *Transco* the Supreme Court stated that "'end-use' . . . was properly of concern to the Commission."[51] As commenters observe,[52] however, the

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[49] *Id.* at 976.

[50] Enbridge Gas Pipelines May 26, 2021 Comments at 42. "[U]nder the Commission's open-access regulatory regime, pipelines must provide transportation service without 'undue discrimination or preference of any kind.'" *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199, at P 17 (2020) (quoting 18 C.F.R. § 284.7(b)). The Commission's new consideration of the intended end use of the gas and why the gas is needed to serve that use may also cause tension with NGA section 4. Updated Policy Statement, 178 FERC ¶ 61,107 at P 52. NGA section 4(b) states that "[n]o natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b).

[51] *Transco*, 365 U.S. at 22.

[52] *See, e.g.*, TC Energy Corporation May 26, 2021 Comments at 12-13 (explaining that after the Supreme Court's *Transco* decision "was issued in 1961, Congress passed the NGPA, the Wellhead Decontrol Act, EPAct 1992, and the Commission issued Orders

Transco decision was made prior to Congress' enactment of the Natural Gas Policy Act of 1978 (NGPA)[53] and the Natural Gas Wellhead Decontrol Act of 1989 (Wellhead Decontrol Act).[54] These later enactments are instructive as to whether the Commission should consider end use as part of its public convenience and necessity determination.

18. The NGPA "was designed to phase out regulation of wellhead prices charged by producers of natural gas, . . . to 'promote gas transportation by interstate and intrastate pipelines' for third parties"[55] and also "to provide investors with adequate incentives to develop new sources of supply."[56] Later, the enactment of the Wellhead Decontrol Act resulted in deregulating upstream natural gas production, and the legislative history suggests the enactment would serve to encourage competition of natural gas at the wellhead.[57] In combination, these acts effectively deprived the Commission of authority upstream of the jurisdictional pipeline.

Nos. 636 and 637. These statutes and regulatory orders fundamentally altered the natural gas markets by acting to facilitate the development of competitive natural gas markets served by competitive interstate natural gas transportation."); *id*. ("Under the current regulatory framework, there is no basis for the Commission to deny a certificate application based on end use, because the current framework requires equal access to a plentiful gas supply for all buyers and sellers. The end use of natural gas is outside the objectives of the current statutory framework, and the Commission should not take end use into consideration when assessing the public need for a pipeline project under the NGA."); Boardwalk Pipeline Partners, LP May 26, 2021 Comments at 34 ("*FPC v. Transco* was decided prior to the NGPA's and Wellhead Decontrol Act's creation of a competitive natural gas market that allows all consumers to benefit from the United States' plentiful gas supplies . . . . [G]iven all of the changes that have occurred over the past 60 years" and "[u]nder the current open-access regime, there is no legal basis for the Commission to deny a certificate application based on end use.") (emphasis omitted).

[53] 15 U.S.C. §§ 3301-3432.

[54] Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (1989).

[55] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 283 (1997) (quoting 57 Fed. Reg. 13271 (1992)).

[56] *Pub. Serv. Comm'n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

[57] *See* S. Rep. No. 101-39, at 1 (1989) ("[T]he purpose . . . is to promote competition for natural gas at the wellhead in order to ensure consumers an adequate and

19. In 1987, Congress repealed sections of the Power Plant and Industrial Fuel Use Act of 1978 (Fuel Use Act), further deregulating downstream considerations. My former colleague, Commissioner McNamee previously explained that the Fuel Use Act had "restricted the use of natural gas in electric generation so as to conserve it for other uses" and "[w]ith the repeal of the Fuel Use Act, Congress made clear that natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary."[58] A House report stated:

> By amending [the Fuel Use Act], H.R. 1941 will remove artificial government restrictions on the use of oil and gas; allow energy consumers to make their own fuel choices in an increasingly deregulated energy marketplace; encourage multifuel competition among oil, gas, coal, and other fuels based on their price, availability, and environmental merits; preserve the 'coal option' for new baseload electric powerplants which are long-lived and use so much fuel; and provide potential new markets for financially distressed domestic oil and gas producers.[59]

These later, deregulatory enactments were not at play in *Transco*. And I agree that "the current framework requires equal access to a plentiful gas supply for all buyers and sellers."[60] Taking the foregoing into account, I am not convinced that the Commission has authority to deny a certificate of public convenience and necessity on the basis of end use, and the Commission should not consider end use in its need determination.

b. Consideration of Adverse Effects

20. The Commission explains in its Updated Policy Statement that it will consider four categories of adverse impacts from the construction and operation of new projects: (1) the interests of the applicant's existing customers; (2) the interests of existing

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reliable supply of natural gas at the lowest reasonable price."); H.R. Rep. No. 101-29, at 6 (1989) ("All sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other supplies.").

[58] *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (McNamee, Comm'r, concurring at P 36).

[59] H.R. Rep. 100-78, at 2 (1987).

[60] TC Energy Corporation May 26, 2021 Comments at 13.

pipelines and their captive customers; (3) environmental interests; and (4) the interests of landowners and surrounding communities, including environmental justice communities.[61] The Commission also states that it may deny an application based on any of the foregoing types of adverse impacts.[62] Further, the Commission will "consider environmental impacts *and potential mitigation* in both our environmental reviews under NEPA and our public interest determinations under the NGA."[63] And the Commission "expects applicants to structure their projects to avoid, or minimize, potential adverse environmental impacts."[64]

21. First, regarding the interests of the applicant's existing customers, the Commission announces that while our policy of no financial subsidies remains unchanged, the Commission will no longer treat this as a threshold requirement.[65] This reprioritization is fine; it is merely a policy choice with no obvious legal infirmity.

22. Next, the Commission turns to its considerations of existing pipelines and their customers with an emphasis on the prevention of overbuilding. In an order clarifying the Original Policy Statement, the Commission discussed the consideration of overbuilding and explained that "[s]ending the wrong price signals to the market can lead to inefficient investment and contracting decisions which can cause pipelines to build capacity for which there is not a demonstrated market need," and that "[s]uch overbuilding, in turn, can exacerbate adverse environmental impacts, distort competition between pipelines for new customers, and financially penalize existing customers of expanding pipelines and customers of the pipelines affected by the expansion."[66] I agree that the concern of overbuilding is worthy of consideration in the Commission's balancing and consistent with the purpose of "encourag[ing] the *orderly development* of plentiful supplies of . . . natural gas at reasonable prices."[67]

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[61] Updated Policy Statement, 178 FERC ¶ 61,107 at P 62.

[62] *Id*.

[63] *Id*. P 74 (emphasis added).

[64] *Id*.

[65] *Id*. P 63.

[66] *Certification of New Interstate Nat. Gas Pipeline Facilities*, 90 FERC ¶ 61,128, at 61,391.

[67] *NAACP*, 425 U.S. at 670 (emphasis added).

23. The Commission also states that "[t]o the extent that a proposed project is designed to substantially serve demand already being met on existing pipelines, that could be an indication of potential overbuilding."[68] In my view, the Commission should weigh this consideration with NGA section 7(g) in mind, which provides that "[n]othing contained in [NGA section 7] shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."[69] In considering whether a proposed project is designed to substantially serve demand that is already met, the Commission should also consider whether the proposed project would allow for further competition, send appropriate price signals and improve the efficiency or reliability of service to existing customers. This is worth noting because of the statement in today's order that states that "[t]he Commission may deny an application based on *any* of these types of adverse impacts,"[70] including impacts to existing pipelines and their customers.

24. Third, the majority addresses environmental impacts, stating: "While the 1999 Policy Statement focused on economic impacts, the consideration of environmental impacts is an important part of the Commission's responsibility under the NGA to evaluate all factors bearing on the public interest."[71] As explained by the majority, the Original Policy Statement "included an analytical framework for how the Commission would evaluate the effects of certificating new projects on economic interests," and it "did not describe how the Commission would consider environmental interests in its decision-making process and, more specifically, how it would balance these interests with the economic interests of a project."[72] The Commission now adjusts that framework to include environmental impacts as a consideration in its Updated Policy Statement.

25. The Commission explains that it will consider environmental impacts and potential mitigation in both our environmental reviews under NEPA and our public

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[68] Updated Policy Statement, 178 FERC ¶ 61,107 at P 69.

[69] 15 U.S.C. § 717f(g).

[70] Updated Policy Statement, 178 FERC ¶ 61,107 at P 62 (emphasis added); *see also id*. P 99 ("[T]here may be proposals denied solely on the magnitude of a particular adverse impact to any of the four interests described above if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized.").

[71] *Id*. P 72 (citation omitted).

[72] *Id*. P 71.

interest determinations under the NGA.[73] The majority "expect[s] applicants to propose measures for mitigating impacts," for consideration in the Commission's balancing of adverse impacts against the potential benefits of a proposal.[74] The Commission may condition the certificate with further mitigation.[75] Moreover, the Commission states that it may "deny an application based on . . . environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[76] Finally, the majority indicates its intent when making its public convenience and necessity determination to fully consider climate impacts.[77]

26. I discuss the reasons why I disagree with the majority's Interim GHG Policy Statement in my dissent to that order.[78] In terms of the change from an economic focus in the Original Policy Statement, my view is that the Commission should retain its economic framework as the basis of its policy statement. I am concerned that several of the changes made in today's Updated Policy Statement include issues outside the scope of that which the Commission is able to consider under the NGA. Though time has passed since the NGA's enactment, it is Congress' role to amend the statute should it see fit to include in the Commission's authority matters such as the conditioning of certificates to mitigate GHG emissions. Congress has done so before and could do so again.[79] To restate the approach that should be taken to determine the public convenience and necessity: any balancing under that standard must "take meaning" from the interests articulated in the NGA.

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[73] *Id*. P 74.

[74] *Id*.

[75] *Id*.

[76] *Id*.

[77] *Id*. P 76.

[78] *See* Interim GHG Policy Statement, 178 FERC ¶ 61,108 (Danly, Comm'r, dissenting).

[79] *See Whitman v. Am. Trucking Ass'ns*, *Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.") (citations omitted).

27. Although courts have recognized that the Commission's NGA section 7(e) "conditioning authority is 'extremely broad,'"[80] such authority is not without limit. "The Commission may not, however, when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in unconditional form, already in the public convenience and necessity."[81] There have been circumstances where the courts have found the Commission exceeded its conditioning authority.[82] Its use must be consistent with the other provisions of the NGA and the Commission may not use conditions under the guise of acting in the public interest in order to do something it would otherwise not have authority to do.

28. There are also practical considerations in the Commission finding in today's policy statement that "[s]hould [the Commission] deem an applicant's proposed mitigation of impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation."[83] The costs that attend the

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[80] *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (citation omitted).

[81] *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (citing *Sunray Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960) ("once want of power to do this directly were established, the existence of power to achieve the same end indirectly through the conditioning power might well be doubted"); *Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (the Commission may not achieve indirectly through conditioning power of Federal Power Act what it is otherwise prohibited from achieving directly)); *see also Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir. 1990) ("[T]he Commission may not use its § 7 conditioning power to do indirectly . . . things that it cannot do at all.").

[82] *See, e.g.*, *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d at 1520, 1522 (D.C. Cir. 1990) (finding that the Commission exceeded the scope of its NGA section 7(e) authority in conditioning the approval of an off-system sales certificate upon certificate holder's acceptance of a blanket transportation certificate because "the Commission squarely found that National's proposed 'sales are required by the public convenience and necessity,' quite apart from conditioning their certification upon the pipeline's filing for a blanket transportation certificate."); *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 827 F.2d 779, 792-93 (D.C. Cir. 1987) (granting rehearing en banc, reaffirming the holding in *Panhandle E. Pipe Line Co. v. FERC*, 613 F.2d 1120, 1133 (D.C. Cir. 1979), which provides "that 'the Commission does not have authority under section 7 to compel flow-through of revenues to customers of services not under consideration in that proceeding for certification,'" and vacating a condition that violates that holding).

[83] Updated Policy Statement, 178 FERC ¶ 61,107 at P 74.

proposed mitigation of GHG emissions may be unmeasurable, may not be readily apparent, and may also be more than the natural gas companies and its shippers are willing or able to bear. There will perhaps be difficulty in measuring the costs of conditions, such as market-based mitigation,[84] when the costs are determined based on a changing market. For instance, the cost of purchasing renewable energy credits may be different at the time an application is filed in comparison to when the certificate is issued. And there is no guarantee that the potentially extraordinary costs incurred by a pipeline to comply with the Commission's public interest determination will be recovered in the pipeline's rates.[85] These practical considerations have not been taken into account by the Commission. Without these considerations, I am not convinced that the Commission has engaged in reasoned decision making.

29. Turning to the Commission's consideration of impacts on landowners and surrounding communities, as the majority recognizes, the Original Policy Statement's primary focus was on economic impacts associated with a permanent right-of-way on a landowner's property.[86] Going forward, the consideration "of impacts to landowners will be more expansive."[87] The majority clarifies that the "consideration of impacts to communities surrounding a proposed project will include an assessment of impacts to any environmental justice communities and of necessary mitigation to avoid or lessen those

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[84] *See* Interim GHG Policy Statement, 178 FERC ¶ 61,108 at PP 114-115 (encouraging project sponsors to propose mitigation measures, stating that project sponsors "are free to propose any type of mitigation mechanism," and providing the following examples of market-based mitigation: "[the] purchase [of] renewable energy credits, participat[ion] in a mandatory compliance market (if located in a state that requires participation in such a market), or participat[ion] in a voluntary carbon market").

[85] *See id*. P 129 ("Pipelines may seek to recover GHG emissions mitigation costs through their rates, similarly to how they seek to recover other costs associated with constructing and operating a project, such as the cost of other construction mitigation requirements or the cost of fuel. Additionally, the Commission's process for section 7 and section 4 rate cases is designed to protect shippers from unjust or unreasonable rates and will continue to do so with respect to the recovery of costs for mitigation measures.").

[86] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 78 (citing Original Policy Statement, 88 FERC ¶ 61,227 at 61,749 ("The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners.")

[87] *Id*.

impacts."[88] And "expectations" are established "for how pipeline applicants will engage with landowners."[89]

30. The majority also commits itself to "robust early engagement with all interested landowners, as well as continued evaluation of input from such parties during the course of any given proceeding" and states that the Commission "will, to the extent possible, assess a wider range of landowner impacts."[90] Further, the majority states that it "expect[s] pipeline applicants to take all appropriate steps to minimize the future need to use eminent domain," including "engage[ment] with the public and interested stakeholders during the planning phase of projects to solicit input on route concerns and incorporate reroutes, where practicable, to address landowner concerns, as well as providing landowners with all necessary information."[91]

31. The majority states that it "expect[s] pipelines to take seriously their obligation to attempt to negotiate easements respectfully and in good faith with impacted landowners" and indicates that "[t]he Commission will look unfavorably on applicants that do not work proactively with landowners to address concerns."[92] Does this mean that the majority plans to weigh, in its balancing of interests, allegations concerning whether the applicant has engaged in good faith negotiation of easements and collaboration with landowners to address concerns? It appears so. The Commission later states that "[i]n assessing potential impacts to landowners, the Commission will consider the steps a pipeline applicant has already taken to acquire lands through respectful and good faith negotiation, as well as the applicant's plans to minimize the use of eminent domain upon receiving a certificate."[93]

32. It is worth reminding my colleagues that on the very same meeting that this order is issued, the Commission also issues an order[94] that reaffirms a decision to deny

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[88] *Id*. P 79.

[89] *Id*. P 80.

[90] *Id*. P 81.

[91] *Id*. P 82.

[92] *Id*.

[93] *Id*. P 85.

[94] *See Spire STL Pipeline LLC*, 178 FERC ¶ 61,109 at P 10 (2022) (citation omitted).

landowners' request for the Commission to interpret the scope of NGA section 7(h) because, in my colleagues' view, NGA section 7(h) is "a provision that gives courts a particular implementing role" and therefore "is better resolved by the courts than the Commission."[95] And yet here, the Commission contemplates considering in its balancing whether applicants have engaged in good faith negotiations for easements pursuant to NGA section 7(h).

33. Finally, the Commission discusses how it will consider impacts to environmental justice communities. In explaining its objectives, the majority states that "[t]he consideration of cumulative impacts is particularly important when it comes to conducting an environmental justice analysis."[96] In support, the Commission has the following footnote:

> "'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 CFR 1508.7 (1978).[97]

34. There is no problem with announcing the paradigm by which a particular type of analysis will be conducted, but this looks very much as though my colleagues have decided that they can disregard currently-effective regulations and adopt their own definition of the "effects" that should be considered in the Commission's analysis.[98] The *current* NEPA regulations repealed the definition of "Cumulative impact" previously

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[95] *Spire STL Pipeline LLC*, 177 FERC ¶ 61,147, at P 70 (2021) (citation omitted); *see id*. (Danly, Comm'r, concurring in part and dissenting in part) (disagreeing with the Commission's decision to not interpret NGA section 7(h) in the first instance and to leave the interpretation to the courts).

[96] Updated Policy Statement, 178 FERC ¶ 61,107 P 90 (relying on a repealed definition for "cumulative impacts," formerly 40 CFR 1508.7 (1978), in the Council on Environmental Quality's (CEQ) regulations) (citations omitted).

[97] *Id*. P 90 n.213.

[98] *Cf*. Updated Policy Statement, 178 FERC ¶ 61,107 at P 74 n.189 ("Recognizing that CEQ is in the process of revising its NEPA regulations, the Commission will consider the comments in this docket regarding NEPA in our future review of our regulations, procedures, and practices for implementing NEPA.)

contained in 40 C.F.R. § 1508.7.[99] The Commission, in attempting to go farther than the CEQ's regulations, reasons that "[t]o adequately capture the effects of cumulative impacts, it is essential that the Commission consider those pre-existing conditions and how the adverse impacts of a proposed project may interact with and potentially exacerbate them."[100]

35. I disagree with the Commission's decision to disregard CEQ's regulations.[101] The Commission, in its *own* regulations, states that it "will comply with the regulations of the [CEQ] except where those regulations are inconsistent with the statutory requirements of the Commission."[102] Regardless of the latitude the majority thinks we may enjoy when conducting our analyses, it is a matter of black letter law that we are constrained by our regulations which adopt CEQ's regulations; we are also unable to conjure rubrics out of thin air without explanation.

III. The Commission's Approach of "Expecting" Self-Imposed Mitigation Appears Calculated To Circumvent Statutory Limits on the Commission's Authority

36. In the Updated Policy Statement, as well as in the Interim GHG Policy Statement, the Commission has asserted a dramatic expansion of its conditioning authority. As explained above, the Commission likely does not have the statutory authority to enter this new territory. It is not surprising, therefore, to see a consistent theme in the Updated Policy Statement that the Commission has expectations of applicants.[103] The Commission *expects* more of applicants going forward. Should those expectations not be met to the Commission's satisfaction, the Commission suggests that it will weigh that against finding that the project is required by the public convenience and necessity.[104]

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[99] *See* 40 C.F.R. § 1508.1(g)(3) ("An agency's analysis of effects shall be consistent with this paragraph (g). Cumulative impact, defined in 40 CFR [§] 1508.7 (1978), is repealed.").

[100] Updated Policy Statement, 178 FERC ¶ 61,107 at P 90.

[101] *See* 40 C.F.R. § 1508.1(g) (defining "effects or impacts").

[102] 18 C.F.R. § 380.1.

[103] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 53 (stating that "the Commission's expectations and requirements for how applicants should demonstrate project need have evolved over time").

[104] *See, e.g.*, *id*. P 74 ("Should we deem an applicant's proposed mitigation of

37. Instead of saying that it is imposing or requiring the legally dubious conditions itself, the Commission is *expecting* the natural gas companies to play a game of "sentence first—verdict afterwards,"[105] where the applicants choose their own sentence—their proposed mitigation measures—in an effort to guess at the Commission's expectations. Only then will the Commission rule on whether the project is required by the public convenience and necessity and reveal whether the proposed mitigation is sufficient.

38. It works in the Commission's favor for applicants to impose their own mitigation measures. If the applicant proposes the mitigation instead of having it imposed by the Commission, it is less likely that a court would deem such condition unreasonable or beyond the Commission's authority should it come to be challenged at all.[106] How can a condition be unreasonable or beyond the Commission's jurisdiction if it is imposed at the suggestion of the applicant—the party who needs to satisfy such conditions?

IV. It is Unclear Whether the Updated Policy Statement is Actually Binding and Whether the Commission Should Have Proceeded Through Rulemaking

39. Whether the Commission can impose mitigation as contemplated here, or whether the Commission lacks authority to do so with its conditioning authority will ultimately be

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impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation. We may also deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."); *id*. P 82 ("[W]e expect pipelines to take seriously their obligation to attempt to negotiate easements respectfully and in good faith with impacted landowners. The Commission will look unfavorably on applicants that do not work proactively with landowners to address concerns.").

[105] Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass* 107 (Hugh Haughton ed., Penguin Classics 1998).

[106] *See* 15 U.S.C. § 717f(e) ("The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such *reasonable terms and conditions* as the public convenience and necessity may require.") (emphasis added).

addressed by the courts. I recognize the Commission's assertion that the Updated Policy Statement is not binding.[107] I question whether that is actually the case.[108]

40. Given the non-binding designation, there may indeed be well-founded concerns by parties seeking to challenge the Updated Policy Statement.[109] But as explained above, the Commission has established its *expectations* regarding what information it wants included in certificate applications and plans to apply the Updated Policy Statement to both currently-pending[110] and future applications for a certificate of public convenience and necessity. For parties hesitant to challenge a "non-binding" policy statement, I submit that a court may perhaps be receptive to arguments of aggrievement based on the interests of shippers who will now likely have to renegotiate their agreements for proposed projects with currently-pending certificate applications.

41. Moreover, natural gas companies[111] and their shippers likely have not contemplated the increased costs that will come with the Commission's new policies. It is likely that companies with pending applications have not yet presented proposals for

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[107] Updated Policy Statement, 178 FERC ¶ 61,107 at P 3 (stating that the Updated Policy Statement does not establish binding rules, but rather it is intended to explain how the Commission will consider NGA section 7 certificate applications).

[108] *See Interstate Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 59 (D.C. Cir. 2002) ("The distinction between substantive rule and policy statement is said to turn largely on whether the agency position is one of 'present binding effect,' i.e., whether it 'constrains the agency's discretion.'") (citations omitted); *Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979) ("An announcement stating a change in the method by which an agency will grant substantive rights is not a 'general statement of policy.'").

[109] *See Panhandle E. Pipe Line Co. v. FERC*, 198 F.3d 266, 270 (D.C. Cir. 1999) (denying the petition for review because "[t]he challenged opinions [were] non-binding policy statements" and therefore, the court found that the party petitioning for review was "not aggrieved and has not suffered an injury-in-fact.").

[110] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 100 ("[T]he Commission will apply the Updated Policy Statement to any currently pending applications for new certificates. Applicants will be given the opportunity to supplement the record and explain how their proposals are consistent with this Updated Policy Statement, and stakeholders will have an opportunity to respond to any such filings.").

[111] "'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. § 717a(6).

mitigation of the proposed project's GHG emissions. But the need for developing such proposals will arise—the Commission has requested that companies with pending applications supplement their applications.[112] The resulting cost increases will, at a minimum, make these projects more expensive and thus increase pipeline rates that may ultimately be passed on to consumers. But it is entirely possible that, in at least some cases, applicants will not accept the certificate.

42. One final thought is that it may have been more appropriate for the Commission to have proceeded through rulemaking instead of through a policy statement. The Commission details the types of information that it expects to be included in applications. However, the Commission's regulations already address what the "General content[s] of [an] application" should include in 18 C.F.R. § 157.6(b). Nothing in that section supports the Commission's *expectation* for information regarding end use and proposals for mitigation measures.[113] Our regulations do state that "[a]pplications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested . . . ."[114] But nowhere do our regulations permit the Commission to add to the requirements set forth therein regarding the contents necessary for an NGA section 7(c) application. The Commission may, of course, request information from an applicant through a data request to assist with its determination of whether the project is required by the public convenience and necessity. But to *expect* (in other words require) information, such as that regarding end use and proposals for mitigation of impacts, is perhaps something that should have been done through a rulemaking. Can a party ignore the Commission's requests for additional information? Yes, but the cost would be the potential further delay to the issuance of already stalled certificates and perhaps the ultimate rejection of a proposal that fails to meet the Commission's expectations.

V. Today's Decision will Have Profound Reliability Implications

43. I cannot overstate the implications of the Updated Policy Statement.[115] It will subvert the purpose of the NGA: to "encourage the orderly development of plentiful

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[112] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 100.

[113] *See* 18 C.F.R. § 157.6(b) ("Each application filed other than an application for permission and approval to abandon pursuant to section 7(b) shall set forth the following information . . . .").

[114] *Id*. § 157.5(a).

[115] *Cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 228 (1994) ("It might be good English to say that the French Revolution 'modified' the status of the

supplies of . . . natural gas at reasonable prices."[116] Further, we leave the public and the regulated community—including investors upon whom we rely to provide billions of dollars for critical infrastructure—with profound uncertainty regarding how the Commission will determine whether a proposed project is required by the public convenience and necessity. With that uncertainty comes reliability concerns.

44. The North American Electric Reliability Corporation (NERC) recently highlighted just how important natural gas is to our electric system when it explained in its most recent Long Term Reliability Assessment that "[n]atural gas is the reliability 'fuel that keeps the lights on,' and *natural gas policy must reflect this reality*."[117] Today's issuance is unlikely to allay NERC's reliability concerns. I began this statement with the consequences that could attend today's issuance of the Updated Policy Statement. As a reminder those consequences include, but are not limited to, further delay in the issuance of certificates, the incurrence of unmeasurable and unrecoverable costs that may result from the Commission's imposition of mitigation measures to address GHG and environmental justice impacts (which are now both considered in the Commission's balancing), and difficulty in securing capital for proposed projects. It is foreseeable that the result will be to cause a reliability crisis in areas that need the gas the most. This arises because of the uncertain criteria to be applied by the Commission, the delays in obtaining the Commission's approval, and the resulting increases in costs—including the cost of mitigation. Individually and collectively, these could be so severe that a natural gas company might be unable to accept the conditions of its certificate and proceed with a project that otherwise is needed to maintain reliability.

VI. Conclusion

45. Many in the industry have asked for certainty. The majority says that they have provided it.[118] Regrettably, the majority is wrong on that point, as well. The only

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French nobility—but only because there is a figure of speech called understatement and a literary device known as sarcasm.").

[116] *NAACP*, 425 U.S. at 669-70 (citations omitted); *accord Myersville*, 783 F.3d at 1307 (quoting *NAACP*, 425 U.S. at 669-70).

[117] NERC, Long Term Reliability Assessment, at 5 (Dec. 2021), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf (emphasis added).

[118] *See* Updated Policy Statement, 178 FERC ¶ 61,107 at P 51 (asserting that the Commission is "providing more regulatory certainty in the Commission's review process and public interest determinations"); *id*. P 73 ("To provide more clarity and regulatory certainty to all participants in certificate proceedings, we explain here how the

certainty to be found in the Updated Policy Statement is that confusion will reign hereafter, at the expense of those who depend on natural gas.

For these reasons, I respectfully dissent.

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James P. Danly
Commissioner

Commission will consider environmental impacts."); *id*. P 100 ("A major purpose of this Updated Policy Statement is to provide clarity and regulatory certainty regarding the Commission's decision-making process.").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities Docket No. PL18-1-000

(Issued February 18, 2022)

CHRISTIE, Commissioner, *dissenting*:

1. Last year I voted to re-issue this Notice of Inquiry (NOI) for another round of comment[1] because I believed – and still do – that there are reasonable updates to the 1999 policy statement that would be worthwhile.[2] For example, I agree that precedent agreements between corporate affiliates, because of the obvious potential for self-dealing, should not, in and of themselves and without additional evidence, prove need.[3] I also believe that the Commission's procedures for guaranteeing due process to affected property owners, which, as Justice Frankfurter taught, consists of the two core elements of notice and opportunity to be heard,[4] could be strengthened.

2. Unfortunately, the new certificate policy the majority approves today[5] does not represent a reasonable update to the 1999 statement. On the contrary, what the majority

[1] *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021).

[2] I also voted for the 2021 changes to the procedures for imposing a stay on the certificate and use of eminent domain during periods when petitions for reconsideration and appeals were pending. *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-B, 175 FERC ¶ 61,098 (2021). These changes were largely opposed by the pipeline industry, but in my opinion represented a reasonable approach to bring more certainty and fairness to our procedures for handling petitions for reconsideration and the use of eminent domain during the pending period.

[3] *See Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Certificate Policy Statement) at PP 53-57. The need for enhanced scrutiny of contracts among corporate affiliates is recognized in state utility regulation. *See, e.g.*, Va. Code § 56-76 *et seq*., known as the "Virginia Affiliates Act."

[4] *See Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

[5] *Certificate Policy Statement*; *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (GHG Policy

does today is arrogate to itself the power to rewrite both the Natural Gas Act (NGA)[6] and the National Environmental Policy Act (NEPA),[7] a power that *only* the elected legislators in Congress can exercise. Today's action represents a truly radical departure from decades of Commission practice and precedent implementing the NGA.

3. The fundamental changes the majority imposes today to the Commission's procedures governing certificate applications are wrong as both law *and* policy. They clearly exceed the Commission's legal authority under the NGA and NEPA and, in so doing, violate the United States Supreme Court's major questions doctrine.[8]

4. The new policy also threatens to do fundamental damage to the nation's energy security by making it even more costly and difficult to build the infrastructure that will be critically needed to maintain reliable power service to consumers as the generation mix changes to incorporate lower carbon-emitting resources such as wind and solar. And as recent events in Europe and Ukraine graphically illustrate, America's energy security is an inextricable part of our national security.[9] The majority's proposal on GHG impacts

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Statement). Although styled as an "interim" policy statement, it goes into effect immediately and will inflict major new costs and uncertainties on certificate applications that have been pending with the Commission for months or years. *Id*. at PP 1, 130. I consider both policy statements to be indivisible parts of a new policy governing certificates. Thus, my statement applies to both, and I am entering this dissent in both dockets.

[6] 15 U.S.C. § 717 *et seq*. *See, e.g*., Certificate Policy Statement at P 62.

[7] 42 U.S.C. § 4321 *et seq*.

[8] *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, OSHA*, 142 S. Ct. 661 (2022) (*NFIB*); *Alabama Ass'n. of Realtors v. Dep't of Health and Human Services,* 141 S. Ct. 2485 (2021) (*Ala. Ass'n.*); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) (*UARG*); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (*Brown & Williamson*). I discuss this doctrine in Section I.B., *infra*.

[9] *See*, *e.g*., Natasha Bertrand, *US putting together 'global' strategy to increase gas production if Russia invades Ukraine, officials say*, CNN (Jan. 24, 2022), available at https://www.cnn.com/2022/01/23/politics/us-gas-production-strategy-russia-ukraine-invasion/index.htmlhttps://www.cnn.com/2022/01/23/politics/us-gas-production-strategy-russia-ukraine-invasion/index.html; *and,* Stephen Stapczynski and Sergio Chapa, *U.S. Became World's Top LNG Exporter, Spurred by Europe Crisis*, BLOOMBERG (Jan 4, 2022), available at https://www.bloomberg.com/news/articles/2022-01-04/u-s-lng-exports-top-rivals-for-first-time-on-shale-revolution.

is obviously motivated by a desire to address climate change, but will actually make it *more* difficult to expand the deployment of low or no-carbon resources, because it will make it more difficult to build or maintain the gas infrastructure essential to keep the lights on as more intermittent resources are deployed.[10] In addition to the essential need for natural gas to keep our power supply reliable, a dependable and adequate natural gas supply is critically needed for our manufacturing industries and the millions of jobs for American workers in those industries.[11]

5. And while I agree that reducing carbon emissions that impact the climate is a compelling policy goal,[12] this Commission – an administrative agency that only has the

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[10] *See NERC December 2021 Long-Term Reliability Assessment*, at 5 (Dec. 2021) ("Natural gas is the reliability 'fuel that keeps the lights on,' and *natural gas policy must reflect this reality*.") (emphasis added) (available at https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf); *id.* at 6 ("Sufficient flexible [dispatchable] resources are needed to support increasing levels of variable [intermittent] generation *uncertainty.* Until storage technology is fully developed and deployed at scale, (which cannot be presumed to occur within the time horizon of this LTRA), natural gas-fired generation will remain a necessary balancing resource to provide increasing flexibility needs.") (emphasis added); *NERC 2020 Long-Term Reliability Assessment, December 2020*, at 7 (Dec. 2020) ("As *more solar and wind* generation is added, *additional* flexible resources are needed to offset their resources' variability. This is placing *more* operating pressure on those (*typically natural gas*) resources and makes them *the key to* securing [Bulk Power System] reliability." (emphases added) (available at https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf).

[11] Letter from Industrial Energy Consumers of America to Sen. Joe Manchin III, Sen. John Barrasso, Sen. Frank Pallone, Jr., Sen. Cathy McMorris Rodgers, *Lack of Interstate Natural Gas Pipeline Capacity Threatens Manufacturing Operations, Investments, Jobs, and Supply Chain* (Feb. 9, 2022).

[12] Since we are regulators with an advisory role, not Article III judges, my personal view is that the most politically realistic and sustainable way to reduce carbon emissions significantly without threatening the reliability of our grid and punishing tens of millions of American workers and consumers with lost jobs and skyrocketing energy prices (*see, e.g.*, Europe) is by massive *public* investment in the research, development and deployment of the technologies that can achieve that goal economically and effectively. *See, e.g.*, Press Release, Bipartisan Policy Center, *New AEIC Report Recommends DOE Combine Loan and Demonstration Offices, Jumpstart American Clean Energy Deployment* (Jan. 21, 2022), available at https://bipartisanpolicy.org/press-

powers Congress has explicitly delegated to it – has no open-ended license under the U.S. Constitution or the NGA to address climate change or any other problem the majority may wish to address.

I. Legal Questions

6. The long-running controversy over the role and use of GHG analyses in natural-gas facility certificate cases raises two central questions of law and a third that flows from the first two:

7. *First*, whether the Commission can use a GHG analysis to *reject* a certificate – or attach conditions (including the use of coercive deficiency letters) amounting to a *de facto* rejection by rendering the project unfeasible – based on the NGA's "public convenience and necessity"[13] provision, even when the evidence otherwise supports a finding under the NGA that the facility is both "convenient and necessary" to provide the public with essential gas supply? Today's orders assume that the answer is yes.[14]

8. *Second*, whether the Commission can, or is required to, *reject* a certificate – or attach conditions (including the use of coercive deficiency letters) amounting to a *de facto* rejection by rendering the project unfeasible – based on a GHG analysis conducted as part of an environmental review under NEPA,[15] when the certificate application would

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release/new-aeic-report-recommends-doe-combine-loan-and-demonstration-offices-jumpstart-american-clean-energy-deployment/ (citing to AMERICAN ENERGY INNOVATION COUNCIL, SCALING INNOVATION: A PROPOSED FRAMEWORK FOR SCALING ENERGY DEMONSTRATIONS AND EARLY DEPLOYMENT (Jan. 2022)). Once developed to commercial scale, marketable technologies will roll out globally on their own, without the market-distorting mandates and subsidies that only enrich rent-seekers and impoverish consumers. More specifically with regard to natural gas facilities, there is also the potential with available technology to reduce direct methane emissions from the existing oil and gas system within existing legal authority. And such initiatives do not obviate the need for near-term mitigation measures, such as preparing the electric grid to maintain power during extreme weather events.

[13] 15 U.S.C. § 717f.

[14] Certificate Policy Statement at P 62; GHG Policy Statement at PP 4, 99.

[15] *See* Certificate Policy Statement at P 6, GHG Policy Statement at P 27.

otherwise be approved as both "convenient and necessary" under the NGA? Again, today's orders assume the answer is yes.[16]

9. *Third*, which, if any, conditions related to a GHG analysis may be attached to a certificate under NGA § 7(e),[17] or demanded through the use of deficiency letters? Today's orders seem to assume that there is essentially no limit to the conditions the Commission can impose.[18]

10. As discussed below, today's orders get each of these questions wrong.

A. The "Public Interest" in the Natural Gas Act

11. The starting point for answering all of these questions must be what "public interest" analysis the NGA empowers the Commission to make. Can the Commission's statutory responsibility to determine the "public convenience and necessity" be used to *reject* a project otherwise needed by the public based *solely* on adverse impacts to "environmental interests"[19] (a term today's orders leave undefined but which could be reduced to an unspecified level of GHG emissions) as the Commission today asserts?[20] Or can the Commission reject a project *solely* due to "the interests of landowners and environmental justice communities" as the majority also asserts?[21] The short answer is

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[16] Certificate Policy Statement at P 62; GHG Policy Statement at PP 27, 99.

[17] 15 U.S.C. § 717f(e).

[18] *See* Certificate Policy Statement at P 74; GHG Policy Statement at P 99.

[19] Certificate Policy Statement at P 62.

[20] *Id.*

[21] *Id*. The notion that a certificate could be rejected based solely on the interests of "landowners" or "environmental justice communities" (a term the majority leaves largely undefined) illustrates the radical divergence from both law and long Commission practice of what the Commission purports to do today. While a regulatory commission should always be mindful of and sensitive to the impacts on affected property owners and communities in every case involving the potential use of eminent domain – particularly on the question of the project's route or siting – and should generally seek wherever possible to reduce or minimize such impacts, specific measures to reduce or minimize such impacts are governed by the statutes applicable to each proceeding. Under both the Constitution and the NGA, if a project is needed for a public purpose, then landowners are made whole through just compensation. U.S. Const. amend. V. Questions of compensation are adjudicated in state or federal court – not by this Commission. NGA

no. There is nothing in the text or history of the NGA to support such a claim about, or application of, the Commission's public interest responsibilities under the NGA.

12. As discussed herein, any claim that a "public interest" analysis under the NGA gives FERC the authority to reject a project based solely on GHG emissions is specious and ahistorical. The history of the NGA indicates that Congress intended the statute to *promote* the development of pipelines and other natural-gas facilities. As one federal judge has observed, "nothing in the text of [the NGA] . . . empowers the Commission to entirely deny the construction of an export terminal or the issuance of a certificate based solely on an adverse indirect environmental effect regulated by another agency." [22]

13. I recognize that the Commission and the courts have construed "public convenience and necessity" to require the Commission to consider "all factors bearing on the public interest,"[23] but the Supreme Court has been very clear that any public interest analysis undertaken in the course of determining "public necessity and convenience" is constrained by the purposes and limitations of the statute.[24] It is not an open-ended

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§ 7(h), 15 U.S.C. § 717f(h). Bringing such extra-jurisdictional considerations into the Commission's public convenience and necessity analyses under NGA § 7 is just another expansion of Commission power far beyond anything justified in law.

[22] *Sabal Trail*, 867 F.3d 1357, 1382 (D.C. Cir. 2017) (*Sabal Trail*) (Brown, J., dissenting in part and concurring in part).

[23] *Atl. Refining Co. v. Pub. Serv. Comm'n of State of N.Y.,* 360 U.S. 378, 391 (1959) ("This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest."); *N.C. Gas Corp.*, 10 FPC 469, 476 (1950) ("Public convenience and necessity comprehends a question of the public interest. Or, stated another way: Is the proposal conducive to the public welfare? Is it reasonably required to promote the accommodation of the public? The public interest we referred to has many facets. *To the limit of our authority under the law* our responsibility encompasses them all") (emphasis added) (quoting *Commonwealth Nat. Gas Corp.*, 9 FPC 70 (1950)).

[24] *NAACP v. FPC*, 425 U.S. 662, 669 (1976) ("This Court's cases have consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation."). Where the Supreme Court has permitted the Commission to consider end use, those considerations have related directly to its core statutory responsibilities under the NGA, namely, ensuring adequate supply at reasonable rates. *See FPC v. Transcontinental Pipe Line Co*., 365 U.S. 1 (1961) (permitting the Commission to consider whether the end use was "wasteful" of limited

license to use this Commission's certificating authority to promote whatever a majority of Commissioners from time to time may happen to view as the "public interest."

14. With regard to GHG emissions that may be associated with upstream production activities or downstream distribution to, or consumption by, retail consumers, the Commission simply has *no* authority over such activities. That authority was left to the states.[25] Congress intended for the NGA to fill "a regulatory gap" over the "*interstate* shipment and sale of gas."[26]

15. Even if the Commission were to undertake some estimate of the indirect GHG impacts of third-party activities that it has no authority to regulate, it does not follow that the Commission can then reject a certificate based on those impacts.[27] To do so would be to ignore the undeniable purpose of the NGA, which was enacted to facilitate the development and bringing to market of natural gas resources. The Commission's role under the NGA is to *promote* the development of the nation's natural gas resources and to

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gas resources).

[25] NGA § 1(b), 15 U.S.C. § 717(b).

[26] *ONEOK, Inc. v. Learjet, Inc*., 575 U.S. 373, 378 (2015) (emphasis added); *see also*, *FPC v. Panhandle E. Pipe Line Co.,* 337 U.S. 498, 502-503 (1949) ("suffice it to say that the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to *complement* that of the state regulatory bodies.") (emphasis added) (footnotes omitted); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1315 (D.C. Cir. 2015) ("the Commission's power to preempt state and local law is circumscribed by the Natural Gas Act's savings clause, which saves from preemption the 'rights of States' under the Clean Air Act and two other statutes.") (citations omitted).

[27] *Ofc. of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1142 (D.C. Cir. 1980) ("We bear in mind the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by violating its statutory mandate.") (citations, quotation marks, ellipsis omitted).

safeguard the interests of ratepayers.[28] Any consideration of environmental impacts, while important, is necessarily subsidiary to that role.[29]

16. It is a truism that FERC is an economic regulator, *not* an environmental regulator. This Commission was not given certification authority in order to advance environmental goals;[30] it was given certification authority to *ensure the development* of natural gas resources and their availability – this includes pipeline infrastructure – at just and reasonable rates. To construe the Commission's analysis of the public convenience and

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[28] *City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) (*City of Clarksville*) ("Congress enacted the Natural Gas Act with the principal aim of 'encouraging the orderly development of plentiful supplies of natural gas at reasonable prices,' and 'protect[ing] consumers against exploitation at the hands of natural gas companies,'") (citations omitted); *see also* Alexandra B. Klass & Danielle Meinhardt, *Transporting Oil and Gas: U.S. Infrastructure Challenges*, 100 IOWA L. REV. 947, 990-99 (Mar. 2015).

[29] *City of Clarksville*, 888 F.3d. at 479. ("Along with those main objectives, there are also several 'subsidiary purposes including conservation, environmental, and antitrust issues.'") (quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990)) (cleaned up). This does not mean that the Commission cannot properly impose conditions or mitigation to address environmental impacts *directly* related to the jurisdictional project; it merely recognizes that the Commission's main objective is to facilitate the expansion and preservation of natural gas service at just and reasonable rates and that doing so will inevitably entail some measure of environmental costs. These can sometimes be reduced or minimized, but never completely eliminated. Every project ever built has some degree of environmental impacts. The standard under the NGA cannot be zero impacts.

[30] Congress could easily have conferred that authority if it had wanted to. There is no indication that Congress intended or expected FERC to perform any environmental regulation when it created the agency. *See generally*, Clark Byse, *The Department of Energy Organization Act: Structure and Procedure*, 30 ADMIN. L. REV. 193 (1978). This Commission's predecessor, the Federal Power Commission, existed for decades before EPA was created in 1970. And Congress began enacting legislation bearing on emissions decades before then as well. *See* Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENVTL. L. 75 (2015). Nor were the effects of GHG emissions unknown at that time. *See* Danny Lewis, *Scientists Have Been Talking About Greenhouse Gases for 191 Years*, SMITHSONIAN MAGAZINE (Aug. 3, 2015) (citing to Nobel Laureate Svante Arrhenius' 1896 paper "On the Influence of Carbonic Acid in the Air upon the Temperature of the Ground").

necessity as a license to *prohibit* the development of *needed* natural gas resources using the public interest language in the NGA would be to negate the very legislative purpose of the statute.[31] Put another way, the premise of the NGA is that the production and transportation of natural gas for ultimate consumption by end users is socially valuable and should be promoted, not that the use of natural gas (which inevitably results in some discharge of GHGs) is inherently destructive and must be curbed, mitigated, or discouraged.

17. To those who say "well, times have changed and Congress was not thinking about climate change when it passed the NGA," here's an inconvenient truth: *If Congress wants to change the Commission's mission under the NGA it has that power; FERC does not.*

18. Any authority to perform a public interest analysis under the NGA must be construed with reference to the animating purposes of the Act. It is not a free pass to pursue any policy objective – however important or compelling it may be – that is related in some way to jurisdictional facilities.[32] As the Court of Appeals for the D.C. Circuit has explained:

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[31] *See United States v. Pub. Utils. Comm'n of Cal*., 345 U.S. 295, 315 (1953) (explaining that recourse to legislative history is appropriate where "the literal words would bring about an end completely at variance with the purpose of the statute.") (citations omitted). The present circumstance is very nearly the opposite: we are urged to pursue "an end completely at variance with the purpose of the statute" and for which there is *no* support in the "literal words." *Id*.; *see also Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019) (*Ctr. for Biological Diversity*) ("Regulations cannot contradict their animating statutes or manufacture additional agency power.") (citing *Brown & Williamson*, 529 U.S. at 125-26).

[32] *NAACP v. FPC,* 425 U.S. at 665-670 (noting that, although "the eradication of discrimination in our society is an important national goal," the Supreme Court has "consistently held that the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purposes of the regulatory legislation" which, for the [Federal Power Act] and [Natural Gas Act], are "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."); *see also Brown & Williamson*, 529 U.S. at 161 ("no matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.") (quotation marks, citation omitted).

> Any such authority to consider all factors bearing on "the public interest" must take into account what "the public interest" means *in the context of the Natural Gas Act*. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. *It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful*.[33]

19. Whereas the Commission's role in certificating facilities under the NGA is explicit,[34] any purported authority for the Commission to regulate GHGs is conspicuously absent. The claim that the Commission can reject a needed facility due to GHG emissions using the public interest component in the NGA seems to be based on the following logic: to ascertain whether a facility serves the public convenience and necessity, the Commission must first determine whether the facility is in "the public interest," which in turn entails considering factors such as "environmental" impacts from construction and operation of the proposed facility, as well as estimating and quantifying greenhouse gas emissions from the proposed facility, including both upstream emissions associated with gathering the gas and downstream emissions associated with its use, which the Commission is somehow empowered to deem to be too excessive to grant the certificate.[35] Suffice it to say, this tortured logic breaks apart in multiple places.[36]

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[33] *Office of Consumers' Counsel v. FERC*, 655 F.2d at 1147 (emphases added).

[34] *See, e.g.*, NGA §§ 7(e), 15 U.S.C. § 717f(e) (apart from statutory exceptions, "a certificate *shall* be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed," and, among other things, to comply with "the requirements, rules and regulations of the Commission . . .") (emphasis added).

[35] Certificate Policy Statement at PP 4-6; GHG Policy Statement at P 39 (citing *Sabal Trail*, 867 F.3d at 1372-73).

[36] I won't belabor the point, but just to reiterate: a "public convenience and necessity" analysis is not a generalized "public interest" analysis, as courts have recognized. *See*, *supra*, P 13 & n.24 and *infra*, P 27. The "environmental" impacts appropriately considered in a certification proceeding must surely be limited in some way to the proposed facility itself since both upstream gathering and downstream use are beyond the Commission's statutory jurisdiction. *See City of Clarksville*, 888 F.3d at 479 (identifying "environmental" concerns as a "subsidiary" purpose of the NGA).

20. Surely if Congress had any intention that GHG analyses should (or could) be the basis for rejecting certification of natural-gas facilities, it would have given the Commission clear statutory guidance as to when to reject on that basis. Instead, those who want the Commission to conjure up a standard on GHG emissions for deciding how much is *too* much are advocating for a standard resembling Justice Stewart's famous method for identifying obscenity, to wit, that he could not describe it, but "I know it when I see it."[37] And the Supreme Court eventually had the good sense to abandon that ocular standard.[38]

21. Using GHG analysis to reject a certificate implicates an important judicial doctrine used in evaluating just how far an administrative agency can go in essentially *creating* public policy without clear textual support in statutory law. Now let's turn to that doctrine in this context.

B. The Major Questions Doctrine and the NGA

22. The Commission's actions today implicate the "major questions doctrine," which Justice Gorsuch has recently explained as follows:

> The federal government's powers . . . are not general, but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other, it must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." We sometimes call this the major questions doctrine.[39]

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[37] *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *see also* Catherine Morehouse*, Glick, Danly spar over gas pipeline reviews as FERC considers project's climate impacts for first time,* UTILITY DIVE (Mar. 19, 2021) (quoting Chairman Glick regarding use of GHG emissions analysis in *N. Natural Gas Co*., 174 FERC ¶ 61,189 (2021): "We essentially used the eyeball test. . . ."). Shorn of its irrelevant disquisition on EPA's stationary source regulations, today's GHG policy statement enshrines an eyeball test as the trigger for subjecting virtually all certificate applicants to the time-consuming and costly EIS process. GHG Statement at PP 88-95.

[38] *Miller v. California*, 413 U.S. 15 (1973).

[39] *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring) (citations omitted).

In short, the major questions doctrine presumes that Congress reserves major issues to itself, so unless a grant of authority to address a major issue is explicit in a statute administered by an agency, it cannot be inferred to have been granted.

23. Whether this Commission can reject a certificate based on a GHG analysis – a certificate that otherwise would be approved under the NGA – is undeniably a major question of public policy. It will have enormous implications for the lives of everyone in this country, given the inseparability of energy security from economic security. Yet the Supreme Court has made it clear that broad deference to administrative agencies on major questions of public policy is *not* in order when statutes are lacking in any explicit statutory grant of authority.[40] "*When much is sought from a statute, much must be shown*. . . . [B]road assertions of administrative power demand *unmistakable legislative* support."[41]

24. There is no "unmistakable legislative support" for the powers the Commission asserts today. A broad power to regulate upstream and downstream GHG emissions and their global impacts has simply *not* been delegated to this Commission.[42] To the extent

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[40] *UARG*, 573 U.S. 302, 324 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' *Brown & Williamson*, 529 U.S. at 159 . . ., we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' *Id*. at 160."); *Gundy v. United States*, 139 S. Ct. 2116, 2141-42 (2019) (*Gundy*) (Gorsuch, J., dissenting) ("Under our precedents, an agency can fill in statutory gaps where 'statutory circumstances' indicate that Congress meant to grant it such powers. But we don't follow that rule when the 'statutory gap' concerns 'a question of deep economic and political significance' that is central to the statutory scheme. So we've rejected agency demands that we defer to their attempts to rewrite rules for billions of dollars in healthcare tax credits, to assume control over millions of small greenhouse gas sources, and to ban cigarettes.) (citations omitted).

[41] *In re MCP No. 165,* 20 F.4th 264, 267-268 (6th Cir. 2021) (Sutton, C.J., dissenting from denial of initial hearing en banc) (emphases added).

[42] *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind*., 332 U.S. 507, 516 (1947) ("three things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."); *cf. Ala. Assn.*, 141 S. Ct. at 2488 (invalidating the CDC's eviction moratorium because the "downstream connection between eviction and the

the federal government has such power, it has been delegated elsewhere. "Of necessity, Congress selects different regulatory regimes to address different problems."[43] The U.S. Environmental Protection Agency (EPA) is charged with regulating greenhouse gas emissions under the Clean Air Act.[44] By contrast, Congress established in the NGA a regulatory regime to address entirely different problems, namely, the need to develop the nation's natural gas resources and to protect ratepayers from unjust and unreasonable rates for gas shipped in the flow of interstate commerce. If it chose, Congress could enact legislation that would invest the Commission with authority to constrain the development and bringing to market of natural gas resources, but the fact is that Congress has chosen *not* to do so. On the contrary, every time Congress has enacted natural gas legislation, it has been to *promote* the development of natural gas resources, not throw up barriers to them.[45]

25. The fact that the NGA requires the Commission to make some form of public interest determination in the course of a certificate proceeding does not furnish a basis for the Commission to arrogate to itself the authority to constrain the development of natural gas resources on the grounds of their potential greenhouse gas emissions. As now-Justice Kavanaugh has explained: "If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . *regulating greenhouse gas emitters, for example* – an ambiguous grant of statutory authority is not enough. Congress must *clearly authorize* an agency to take such a major regulatory action."[46]

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interstate spread of disease is markedly different from the direct targeting of disease that characterizes the measures identified in the statute").

[43] *Am. Elec. Power Co. v. Conn*., 564 U.S. 410, 426 (2011).

[44] *Id*. ("*Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants*") (emphasis added); *Am. Lung Ass'n. v. EPA*, 985 F.3d at 959-60 (D.C. Cir. 2021) ("there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse."). Consider for a moment how strange it would be for Congress to delegate regulation of GHG emissions from electric power plants to EPA, while somehow delegating regulation of GHG emissions from natural gas fired power plants to FERC. Yet that is what today's orders presuppose.

[45] *See Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (2020) (McNamee, Comm'r, concurring at PP 32-40) (discussing decades' worth of legislative enactments, all of which "indicates that the Commission's authority over upstream production and downstream use of natural gas has been further limited by Congress.").

[46] *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422 (Kavanaugh, J. dissenting) (emphases added); *see also NFIB*, 142 S. Ct. at 665 ("the question . . . is whether the Act

Congress has *not* "clearly authorize[d]" this Commission to regulate greenhouse gas emitters, nor to deny certificates to facilities whose construction and operation would be in the public convenience and necessity, simply because the construction and operation of such infrastructure may result in some amount of greenhouse gas emissions.[47] "Even if the text were ambiguous, the sheer scope of the . . . claimed authority . . . would counsel against" such an expansive interpretation.[48]

26. The fact that the Commission has absolutely no standard against which to measure the impact of natural gas production upstream or use downstream of the facilities it certificates is also important. In order for Congress to delegate any authority to an executive agency, it must legislatively set forth an intelligible principle for the agency to follow.[49] There is no such "intelligible principle" for the Commission to follow when it comes to greenhouse gas emissions.

27. Although the NGA requires the Commission to determine whether a proposed facility is in the "public convenience and necessity," the term "has always been understood to mean 'need' for the service. To the extent the environment is considered, such consideration is limited to the effects stemming from the construction and operation of the proposed facilities."[50] The term "public convenience and necessity" has long been understood to refer most essentially to the public's need for service on terms that are just and reasonable, i.e., that are low enough for the public to pay the rates and high enough for the provider to maintain a profitable business.[51] That understanding was reflected in

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plainly authorizes the Secretary's mandate. It does not.").

[47] We cannot assume a Congressional intent to regulate *every* incidence of greenhouse gas emissions. As Justice Ginsberg observed, "we each emit carbon dioxide merely by breathing." *Am. Elec. Power Co. v. Conn*., 564 U.S. at 426.

[48] *Ala. Ass'n.*, 141 S. Ct. at 2489.

[49] Congress may "delegate power under broad general directives" so long as it sets forth "an intelligible principle" to guide the delegee. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). *See Gundy*, 139 S. Ct. at 2129 ("a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority. Or in a related formulation, the Court has stated that a delegation is permissible if Congress has made clear to the delegee the general policy he must pursue and the boundaries of his authority.") (citations, internal quotations omitted).

[50] *Mountain Valley*, 171 FERC ¶ 61,232 (McNamee, Comm'r, concurring at P 41); *see also id.* PP 15-47.

[51] *See generally*, Ford P. Hall, *Certificates of Public Convenience and Necessity*,

various statutes employing the term, including the Natural Gas Act.[52] And it was further reflected in the earliest "public convenience and necessity" analyses under the NGA.[53]

28. To summarize: whether and how to regulate GHG emissions is a major question of vast economic and political significance. Congress has not explicitly authorized the Commission to regulate in this area as required under the major questions doctrine, nor has it laid down an intelligible principle for the Commission to follow as required by the non-delegation doctrine. Moreover, EPA, in coordination with the states, already has authority to regulate in this area as specified in federal statutes, which is far removed from this Commission's core expertise and traditional responsibilities.

29. Let's now turn to the second major question.

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28 MICH. L. REV. 276 (1930) (analyzing the meaning of "public convenience and necessity" in state laws antedating passage of the NGA, and concluding that it is the need of the consuming public, without which it will be inconvenienced, that is the critical question to be answered).

[52] The first such statute appears to have been the Interstate Commerce Act (ICA). The Supreme Court explicitly held that the use of the term "public convenience and necessity" was chosen in the knowledge that it would be understood against the background of its historical usage. *ICC v. Parker*, 326 U.S. 60, 65 (1945) (construing "public convenience and necessity" under the ICA and recognizing that Congress' decision to use a term with such a long history indicated Congress intended "a continuation of the administrative and judicial interpretation of the language.") When it passed the NGA, Congress was similarly cognizant of having employed the same concept as in the ICA. *See*, Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases under the Natural Gas Act*, 38 Energy L.J. 115, 120 (2017) (citing Comm. on Interstate Commerce, Interstate Transportation and Sale of Natural Gas, S. Rep. No. 75-1162, at 5 (Aug. 9, 1937) and noting that "the concept of a regulatory agency determining whether a private entity's proposal was in the public convenience and necessity was an established practice when the NGA was enacted.").

[53] *See In re Kan. Pipe Line & Gas Co*., 2 FPC 29, 56 (1939) ("We view the term [public convenience and necessity] as meaning a public need or benefit without which the public is inconvenienced to the extent of being handicapped in pursuit of business or comfort or both without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated.")

C. GHG Analysis under NEPA

30. Is this Commission required or allowed by NEPA[54] to *reject* a certificate for a natural gas facility – *one that would otherwise be approved under the NGA* – based on a GHG analysis conducted as part of the NEPA environmental review? And rejection includes attaching mitigation conditions so onerous (or coercing through deficiency letters) that they render the project unfeasible.[55]

31. Again, the short answer is no. NEPA does not contain a shred of specific textual authority requiring or allowing the Commission to *reject* based on a NEPA review of

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[54] NEPA, 42 U.S.C. § 4321 *et seq*., requires all federal agencies to undertake an "environmental assessment" of their actions, typically including the preparation of an "environmental impact statement" of proposed "major federal actions." As discussed below, the purpose of the EA and EIS is for the agency to be fully informed of the impact of its decisions. NEPA does not mandate any specific action by the agency in response to an EA or EIS, other than to make an informed decision. *See, e.g*., Steven M. Siros, et al., *Pipeline Projects – The Evolving Role of Greenhouse Gas Emissions Analyses under NEPA*, 41 ENERGY L.J. 47 (May 2020); *see also Sabal Trail*, 867 F.3d at 1367-68 (describing NEPA as "primarily information-forcing" and noting that courts "should not '"flyspeck" an agency's environmental analysis, looking for any deficiency no matter how minor.'") (quoting *Nevada v. Dep't of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).

[55] NGA § 7(e), 15 U.S.C. § 717f(e), authorizes the Commission to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require." There is no analytical difference between the Commission's authority to reject a certificate application and its authority to mitigate it. *See Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) ("The Commission may not, . . . when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in its unconditional form, already in the public convenience and necessity.") (citations omitted). That the Commission may be tempted to abuse its conditioning authority has long been recognized. *See* Carl I. Wheat, *Administration by the Federal Power Commission of the Certificate Provisions of the Natural Gas Act*, 14 GEO. WASH. L. REV. 194, 214-215 (1945) ("It is particularly important that the Commission . . . steel itself against the somewhat natural temptation to attempt to use such 'conditions' as substitutes or 'shortcuts' for other (and more appropriate) methods of regulation prescribed in the statute. . . . . [W]hatever may be said with respect to conditions concerning rates and other matters over which the Commission has specific authority under other provisions of the Act, it would appear clear that the power to prescribe 'reasonable conditions' in certificates cannot be greater in scope than the statutory authority of the Commission.")

estimated GHG impacts (indirect or direct) a certificate application for a facility that otherwise would be found necessary to serve the public under the NGA. Nor would it: as an information-forcing statute, NEPA imposes no substantive obligations.[56]

32. Even conducting an analysis of indirect GHG effects under NEPA goes too far. The Supreme Court has explicitly rejected the idea that an "an agency's action is considered a cause of an environmental effect [under NEPA] even when the agency has no statutory authority to prevent that effect."[57] Rather, NEPA "requires a reasonably close causal relationship between the environmental effect and the alleged cause," that is analogous to "the familiar doctrine of proximate cause from tort law."[58] While this might leave some difficult judgments at the margins, estimates of the potential global impacts of possible non-jurisdictional upstream or downstream activity – as today's orders purport to require[59] – is not a close call.

33. First off, in determining how far an agency's NEPA responsibilities run, one "must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[60] As discussed at length above, there is no way of drawing a plausible line, much less a manageable one, from the Commission's certificating responsibilities

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[56] "[*I*]*t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process*. If the adverse environmental effects of the proposed action are adequately identified and evaluated*, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. . . .* Other statutes may impose substantive environmental obligations on federal agencies*, . . . but NEPA merely prohibits uninformed – rather than unwise – agency action.*" *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) (citations omitted; emphases added). *See also, e.g.*, *Minisink Residents for Envtl. Preserv. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (same).

[57] *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (*Pub. Citizen*). This principle has been incorporated into the implementing regulations of the Council of Environmental Quality (CEQ), an executive branch agency. *See* 40 C.F.R. § 1508.1(g)(2) (2021) ("Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action").

[58] *Pub. Citizen*, 541 U.S. at 767 (citations omitted).

[59] Certificate Policy Statement at PP 73-76; GHG Policy Statement at PP 28-31.

[60] *Pub. Citizen*, 541 U.S. at 767 (citations omitted).

under the NGA and the possible consequences of global climate change – consequences which, however potentially grave, are remote from this agency's limited statutory mission under the NGA.

34. Second, speculating about the possible future impact on global climate change of a facility's potential GHG emissions does not assist the Commission in its decision-making and therefore violates the "rule of reason": where an agency lacks the power to do anything about the possible environmental impacts, it is not obligated to analyze them under NEPA.[61] Again, the Supreme Court has explained, "inherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of any new potential information to the decision-making process. Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of the title would require an agency to prepare an EIS."[62]

35. This conclusion becomes even more obvious when considered alongside the undeniable fact that neither NEPA nor any other statute contains a scintilla of guidance as to which specific metrics are to be used to determine when the Commission can or must reject a project based on a GHG analysis. The Commission today establishes a threshold of 100,000 metric tons of CO_2e of annual project emissions for purposes of its analysis of natural gas projects under NEPA[63] The rationale for establishing this threshold has

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[61] *See, e.g.*, *Sabal Trail*, 867 F.3d at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) ("when the agency has no *legal* power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review.") (emphasis in original); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991) ("an agency need follow only a 'rule of reason' in preparing an EIS . . . and . . . this rule of reason governs both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them.") (internal citations and quotations omitted, emphasis in original). To state the obvious: we have absolutely no way of knowing how much an individual project may or may not contribute to global climate change for any number of reasons, including because there is no way for us to meaningfully evaluate the release of GHG emissions if the facility in question were not to be certificated. Notwithstanding, today, the majority boasts of forcing virtually every certificate applicant into the EIS process. GHG Policy Statement at PP 80, 88.

[62] *Pub. Citizen*, 541 U.S. at 767 (citations omitted).

[63] GHG Policy Statement at P 80, 88. For purposes of determining what emissions count toward the 100,000 metric tons per year threshold, the majority states that this number is measured based on "the construction, operational, downstream, and, where determined to be reasonably foreseeable, upstream GHG emissions that reoccur annually

literally *nothing* to do with the Commission's NGA obligations, or even with its NEPA obligations. It consists of little more than piggybacking on EPA's approach to regulating stationary sources.[64] Today's order boasts that this new threshold will capture projects "transporting an average of 5,200 dekatherms per day and projects involving the operation of *one* or more compressor stations or LNG facilities"[65] and that this threshold "will capture over 99% of GHG emissions from Commission-regulated natural gas projects."[66]

36. These are just arbitrarily chosen numbers. A proliferation of quantification does not constitute reasoned decision-making. All of the important questions about the creation and application of this threshold remain unanswered: is there anything in either the NGA or NEPA to indicate how much is too much and should be rejected? Or how little is low enough to get under the red line? No. If the Commission is attempting to quantify *indirect* global GHG impacts, as EPA now suggests we do,[67] how much global impact is too much and requires rejection of the certificate? How much impact is *not* too much? Should rejection only be based on impacts on the United States? North America? The Western Hemisphere? The planet? Where is the line? Again, there is absolutely no statutory provision that answers these questions as to the application of GHG metrics in a certificate proceeding brought under the NGA. The complete absence of any statutory guidance on the seminal question of "how much is too much?" would render any action by the Commission to reject a certificate based on any metric as "arbitrary and capricious" in the fullest sense.[68]

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over the life of the project." *Id.* P 80 & n.197.

[64] *Id.* PP 88 - 93 (acknowledging that the Supreme Court has partially invalidated EPA's regulatory regime).

[65] *Id.* P 89 (emphasis added).

[66] *Id.* P 95. It appears that the majority's intent is to force all applicants into the EIS process. This will undeniably cause each application to become far more costly and time-consuming, both obvious disincentives to even trying.

[67] EPA Comments, *Iroquois Gas Transmission Sys., L.P.*, Docket No. CP20-48-000 at 1-2 (filed Dec. 20, 2021) (EPA Dec. 20, 2021 Letter).

[68] And yet, as a practical matter, applicants must spend years of work and possibly millions of dollars (or more) in preparatory tasks like lining up financing, securing local political support, obtaining permits, etc. All this extensive legwork is needed just to put an application in to the Commission. Today's orders effectively tell applicants that their application could be rejected for any reason or no reason at all. Nor does the majority

37. I recognize that the 100,000 metric tons marker adopted in today's orders is not a threshold for rejecting a proposed project but only for subjecting it to further scrutiny in the form of an EIS. But this is no small matter – completion of an EIS is extremely cost-intensive and time-consuming and, in addition, creates a plethora of opportunities for opponents of the project who otherwise lack meritorious objections to it, to run up the costs, to cause delays, and to create new grounds for the inevitable appeals challenging the certificate even if the applicant does manage to obtain it.[69]

38. NEPA provides no statutory authority to reject a gas project that would otherwise be approved under the NGA. How could it? As is well-known, the duties NEPA imposes are essentially procedural and informational.[70] The Commission's regulations implementing NEPA reflect its limits by noting that, "[t]he Commission will comply with the regulations of the Council on Environmental Quality *except where those regulations are inconsistent with the statutory requirements of the Commission*."[71]

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even do the courtesy of providing a target for the applicant to aim at.

[69] *See* Bradley C. Karkkainen, *Whither NEPA?*, N.Y.U. ENVTL. L.J. 333, 339 & n.31 (2004) (noting that "Department of Energy EISs produced prior to 1994 had a mean cost of $6.3 million and a median cost of $1.2 million; following an aggressive effort to reduce costs, after 1994 the mean cost fell to $5.1 million, but the median cost rose to $2.7 million.")

[70] *See, Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, *does not work a broadening of the agency's substantive powers*. Whatever action the agency chooses to take must, of course, be within its province in the first instance.") (citations omitted, emphasis added); *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc*., 462 U.S. 87, 97 (1983) (acknowledging NEPA's "twin aims" as obligating an agency "to consider every significant aspect of the environmental impact of a proposed action" and ensuring "that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process," but noting that "Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations.") (citations, alterations omitted).

[71] 18 C.F.R. § 380.1 (2021) (emphasis added); *see also* 40 C.F.R. § 1500.3(a) (2021) (compliance with the CEQ regulations "is applicable to and binding on all Federal agencies . . . except where compliance would be inconsistent with other statutory requirements").

39. It's not actually very difficult to see how the approach the majority adopts today is "inconsistent with the statutory requirements of the Commission."[72] I will repeat that the purpose of the NGA is to *promote* the development, transportation, and sale at reasonable rates of natural gas. I will repeat that the NGA conveys only *limited* jurisdictional authority; that NEPA conveys *no* jurisdictional authority; that a *different* agency is responsible for regulating GHGs; and that such regulation is a *major issue* that Congress would have to speak to *unambiguously*, which it clearly has *not* done. And yet under the analysis embraced by the majority today, this Commission purports to impose onerous – possibly fatal – regulatory requirements on certificate applicants in order to generate reams of highly speculative data that have no meaningful role to play in the execution of this agency's statutory duties.[73] In fact, it contravenes the purposes of the NGA in at least two obvious ways: First, by bringing extrinsic considerations to bear on the Commission's decision-making, and second, by causing needless delay in the process.[74]

40. There is no meaningful way of evaluating any of the critical issues, and no statutory authority to actually do anything about upstream or downstream emissions,[75]

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[72] 18 C.F.R. § 380.1 (2021). *See* The Hon. Joseph T. Kelliher Jan. 7, 2022 Comments, *Technical Conference on Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations*, Docket No. PL21-3-000 at 2 (The Hon. Joseph T. Kelliher Jan. 7, 2022 Comments) ("if imposing mitigation for direct and indirect emissions discourages or forestalls pipeline development, the mitigation policy is directly contrary to the principal purpose of the Natural Gas Act and must be set aside.").

[73] Bradley C. Karkkainen, *Whither NEPA?*, N.Y.U. ENVTL. L.J. at 345-346 (noting that fear of NEPA challenges has led agencies to "'kitchen sink' EISs" to reduce the risk of reversal, but that almost nobody actually reads them "and those who attempt to do so may find it difficult to separate the good information from the junk. Contrary to conventional wisdom, more information is not always better."); *see also*, *Pub. Citizen,* 541 U.S. at 768-769 ("NEPA's purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action.") (quoting then-in effect 40 C.F.R. § 1500.1(c) (2003)).

[74] The delay is clearly part of the point. Why else funnel virtually every certificate applicant into the EIS process? *See e.g.,* Bradley C. Karkkainen, *Whither NEPA?*, N.Y.U. ENVTL. L.J. at 339-40 (observing that NEPA has become "a highly effective tool that environmental NGOs and others can use to raise the financial and political costs of projects they oppose and stretch out decisions over an extended time frame, giving time to rally political opposition."). *See also* P 47, *infra.*

[75] In fact, even if the Commission had the authority to impose upstream or downstream GHG emissions mitigation, or to deny certificates of public convenience and

but unlimited ways to find fault with any analysis. Even though they aren't supposed to "flyspeck" an agency's NEPA analysis, judges who wish to impose their own policy preferences will be tempted to do exactly that. And once the agency undertakes to address an issue in its NEPA analysis, it is subject to the APA's "reasoned decision-making" standard of review.[76] Thus the effect is to ramp up dramatically the legal uncertainties and costs facing any certificate applicant.

D. The Policy Statements Rest on Inadequate Legal Authority

41. Today's orders rely to a remarkable degree on a smattering of statements from a handful of recent orders. Simply put, these authorities are simply "too slender a reed"[77] to support the great weight today's orders place on them.

necessity on that basis, the majority admits that it is by no means obvious that doing so would actually prevent or even meaningfully reduce global climate change or the problems associated with it. *See* GHG Policy Statement at P 88 (noting that "[e]ven if deep reductions in GHG emissions are achieved, the planet is projected to warm by at least 1.5 degrees Celsius (°C) by 2050;" and that "even relatively minor GHG emissions pose a significant threat").

[76] *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021) (*Vecinos*) ("Because the Commission failed to respond to significant opposing viewpoints concerning the adequacy of its analyses of the projects' greenhouse gas emissions, we find its analyses deficient under NEPA and the APA.").

[77] *Cf.* The Hon. Joseph T. Kelliher Jan. 7, 2022 Comments at 3.

42. Neither *Sabal Trail*[78] nor *Birckhead*,[79] nor the more recent *Vecinos*[80] opinion from the D.C. Circuit changes any of the analysis above. Indeed, to the extent language from those cases is interpreted as requiring the Commission to exercise authority *not* found in statutes – and these opinions are more confusing than clear, as well as inconsistent with the D. C. Circuit's own precedent – then such an interpretation would be contrary to the Supreme Court's major question doctrine. Be that as it may, while I recognize that *Sabal Trail* and *Vecinos* are presently applicable to this Commission, neither of those cases individually nor both of them together provide a lawful basis for *rejecting* a certificate for a facility that is otherwise found to be needed under the NGA solely because of its estimated potential impacts on global climate change.[81]

43. Virtually the entire structure of the majority's fundamental policy changes rests on a single line from *Sabal Trail*.[82] That statement is itself predicated on an idiosyncratic

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[78] *Sabal Trail*, 867 F.3d 1357. In support of its assertion of broad discretion in attaching conditions to a certificate, the majority also cites to *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 129 (D.C. Cir. 1989) (*ANR Pipeline*). Certificate Policy Statement at P 74 & n. 190. Since the Commission's conditioning authority is limited in the same way as its certificating authority, there is little reason to discuss it separately. I will only note in passing that, although the court described the Commission's conditioning authority as "extremely broad," the only issue actually before the court in *ANR Pipeline* was the validity of certificate terms imposed in furtherance of the Commission's core duty to ensure that rates are non-discriminatory. *Id*.

[79] *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019) (rejecting, for failure to raise the issue before the Commission, a claim that NEPA requires FERC to analyze downstream GHG emissions). Since *Birckhead* was decided on jurisdictional grounds, any substantive commentary in that order is mere dicta and I will not discuss it further.

[80] *Vecinos*, 6 F.4th 1321.

[81] Both orders suffer from a number of infirmities that don't bear belaboring in this context. In brief, however, *Sabal Trail* reads the Commission's duty to "balance 'the public benefits against the adverse effects of the project, including adverse environmental effects,'" *Sabal Trail*, 867 F.3d at 1373 (quoting *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97 at 101-02 and citing *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d at 1309), far too expansively, and *Vecinos* compounds that error. Both orders are discussed below.

[82] Namely, "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful for the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines that it approves." *Sabal Trail*, 867 F.3d at 1373. The other orders the majority relies on depend vitally on

reading of *Public Citizen* and the D. C. Circuit's own precedents.[83] *Sabal Trail* rather facilely distinguished existing D.C. Circuit precedent on the grounds that, in contrast to those cases, the same agency that was performing the EIS was also authorized to approve or deny the certificate.[84] It reasoned that because the Commission could take "environmental" issues into account in its public interest analysis, and GHG emissions raise "environmental" issues, it must therefore follow that the Commission could deny a certificate based on projected GHG emissions estimates.

44. *Sabal Trail* acknowledged that "*Freeport* and its companion cases rested on the premise that FERC had no legal authority to prevent the adverse environmental effects of natural gas exports."[85] Specifically, "FERC was forbidden to rely on the effects of gas exports *as a justification for* denying an upgrade license."[86] In contrast with those cases – all of which addressed certification of LNG facilities under NGA § 3 as opposed to interstate transportation facilities under NGA § 7 – the court in *Sabal Trail* concluded that, under NGA § 7, by contrast, "FERC is not so limited. Congress broadly instructed the agency to consider 'the public convenience and necessity' when evaluating applications to construct and operate interstate pipelines."[87] It thus concluded that, "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would

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this statement. *See, e.g.*, Certificate Policy Statement at PP 75 & n. 192 (citing *Birckhead*); 86 & n. 207 (citing *Vecinos*); GHG Policy Statement at PP 13, 36-38 (citing *Birckhead*) and P 14 & n. 38 (citing *Vecinos*).

[83] *See Ctr. for Biological Diversity*, 941 F.3d at 1300 ("the legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents – such as *Metropolitan* [*Edison Co. v. People Against Nuclear Energy*, 460 U.S. 776 (1983)] and *Public Citizen* – clarifying what effects are cognizable under NEPA.").

[84] *Sabal Trail*, 867 F.3d at 1372-1373. In each of the D.C. Circuit orders *Sabal Trail* purported to distinguish, the court had found that FERC did not have to analyze, because it could not regulate, downstream emissions.

[85] *Id.* at 1373 (citing *Sierra Club v. FERC* (*Freeport*), 827 F.3d 36, 47 (D.C. Cir. 2016). The "companion cases" are *Sierra Club v. FERC* (*Sabine Pass*), 827 F.3d 59 (D.C. Cir. 2016) and *EarthReports, Inc. v. FERC*, 828 F.3d 949 (D.C. Cir. 2016).

[86] *Sabal Trail*, 867 F.3d at 1373 (emphasis in original).

[87] *Id.* (citations omitted).

be too harmful for the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines that it approves. *See Freeport*, 827 F.3d at 47. *Public Citizen* thus did not excuse FERC from considering these indirect effects."[88]

45. But the *Sabal Trail* court never considered with reference to the Commission's statutory authority the proper scope of that public interest analysis or the extent to which "environmental" issues could be considered in that context. It simply assumed the Commission's authority to be unlimited. But as discussed above, Congress drafted the NGA for the purpose of filling a specific gap in regulatory authority. The only way *Sabal Trail* would be correct is if Congress had "clearly authorized" the Commission to evaluate geographically and temporally remote impacts of non-jurisdictional activity in its "public convenience and necessity" determinations. As discussed above, that conclusion is clearly, irredeemably, wrong.[89]

46. As for *Vecinos*, there, the court compounds that error both by relying uncritically on *Sabal Trail* and by finding fault with the Commission for failing to connect its decision not to use the Social Cost of Carbon to Petitioners' argument that it was required to do so under 40 C.F.R. § 1502.21(c).[90] That regulation sets forth an agency's obligations when "information relevant to reasonably foreseeable significant adverse impacts cannot be obtained."[91] But global climate change is only a "foreseeable significant adverse impact" of the Commission's action *if* the Commission's authority extends as far as the *Sabal Trail* court said it does. For the reasons set out in this statement, I respectfully disagree. Nor am I alone in my disagreement.[92]

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[88] *Id.*

[89] *Supra*, Section I.B. *Cf. ICC v. Parker*, 326 U.S. 60, 65 (1945) (construing "public convenience and necessity" under the Interstate Commerce Act and recognizing that Congress' decision to use a term with such a long history indicated Congress intended "a continuation of the administrative and judicial interpretation of the language."). Far from being "a continuation of the administrative and judicial interpretation of the language," construing it to extend to an analysis of global GHG emissions is novel and unprecedented.

[90] *Vecinos*, 6 F.4th at 1328-30.

[91] 40 C.F.R. § 1502.21(c).

[92] *See supra,* n. 83.

47. Finally, as to the contention that the Commission is bound to follow *Sabal Trail* notwithstanding its errors, I would simply point out that intervening Supreme Court precedents – such as *NFIB*[93] and *Ala. Ass'n.*[94] – have not just significantly weakened, but utterly eviscerated the conceptual underpinnings of *Sabal Trail*'s limitless construction of the Commission's public interest inquiry under the NGA's "public convenience and necessity" analysis.[95] It is folly for this Commission to proceed heedless of the Supreme Court's recent rulings that agencies may not use ambiguous or limited grants of statutory authority in unprecedented ways to make policy on major questions that Congress has reserved for itself. But that's exactly what the Commission does today.[96]

48. We are indeed bound to follow judicial precedent, but we don't get to "cherry pick" one precedent such as *Sabal Trail* because we like that particular opinion, while ignoring the many other conflicting precedents, especially those more recent rulings from the Supreme Court itself applying the major question doctrine. These more recent opinions light up *Sabal Trail* as a clear outlier.

II. The Real Debate Is about Public Policy not Law.

49. Preventing the construction of each and every natural gas project is the overt public-policy goal of many well-funded interest groups working to reduce or eliminate natural gas usage.[97] Today's orders, whatever the intent, will have the undeniable effect

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[93] *NFIB*, 142 S. Ct. 661.

[94] *Ala. Ass'n*., 141 S. Ct. 2485 at 2489.

[95] *See generally*, *Allegheny Def. Project v. FERC*, 964 F.3d 1, 18 (D.C. Cir. 2020) (noting that circuit court precedent may be departed from "when intervening developments in the law – such as Supreme Court decisions – have removed or weakened the conceptual underpinnings of the prior decision.") (cleaned up, citation omitted).

[96] In his *NFIB* concurrence, Justice Gorsuch states: "Sometimes Congress passes broadly worded statutes seeking to resolve important policy questions in a field while leaving an agency to work out the details of implementation. Later, the agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment. The major questions doctrine guards against this possibility by recognizing that Congress does not usually hide elephants in mouseholes." 142 S. Ct. at 669 (Gorsuch, J., concurring) (citations, alterations omitted). It would be hard to find a better description of the path the Commission has taken to arrive at today's orders.

[97] *See, e.g.*, BLOOMBERG PHILANTHROPIES, https://www.bloomberg.org/environment/moving-beyond-carbon/ ("Launched in 2019

of advancing that *policy* goal, and we should not deny the obvious. Rather than bringing legal certainty to the Commission's certificate orders,[98] today's orders will greatly increase the costs and uncertainty associated with this Commission's own handling of

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with a $500 million investment from Mike Bloomberg and Bloomberg Philanthropies, Beyond Carbon . . . . works . . . to . . . *stop the construction of proposed gas plants*.") (last visited Feb. 8, 2022) (emphasis added); SIERRA CLUB, https://www.sierraclub.org/policy/energy/fracking, ("There are no 'clean' fossil fuels. The Sierra Club is committed to *eliminating the use of fossil fuels*, including coal, *natural gas* and oil, as soon as possible") (emphases added) (last visited Feb. 8, 2022); NATURAL RESOURCES DEFENSE COUNCIL, https://www.nrdc.org/issues/reduce-fossil-fuels ("Oil, *gas*, and other fossil fuels come with grave consequences for our health and our future. . . . *NRDC is pushing America to move beyond these dirty fuels*. *We fight dangerous energy development on all fronts*") (emphases added) (last visited Feb. 8, 2022); Press Release, *NRDC Receives $100 million from Bezos Earth Fund to Accelerate Climate Action* (Nov. 16, 2020), available at https://www.nrdc.org/media/2020/201116 ("The Bezos Earth Fund grant will be used to help NRDC advance climate solutions and legislation at the state level, move the needle on policies and programs focused on *reducing oil and gas production*") (emphasis added) (last visited Feb. 8, 2022); Sebastian Herrera, *Jeff Bezos Pledges $10 Billion to Tackle Climate Change*, WALL STREET JOURNAL (Feb. 17, 2020) ("Mr. Bezos . . . said the *Bezos Earth Fund* would help back scientists, *activists, [non-governmental organizations]*") (emphasis added); *see also*, Ellie Potter, *Environmentalists launch campaign to ban gas from US clean energy program*, S&P GLOBAL PLATTS (Sep. 2, 2021) (quoting Collin Rees, U.S. Campaign Manager for Oil Change International, "Clean energy means *no gas* and no other fossil fuels, period.") (emphases added); Sean Sullivan, *FERC sets sights on gas infrastructure policy in 2022*, S&P CAPITAL IQ (Dec. 31, 2021) (quoting Maya van Rossum, head of Delaware Riverkeeper Network, "we are not changing course at all: We continue to take on *every* pipeline, LNG, and fracked gas project as urgently as we did before, knowing we will have to *invest heavily to stop it* . . .") (emphases added).

[98] *See* Letter of Chairman Richard Glick to Sen. John Barasso, M.D. (Feb. 1, 2022) ("Preparing an EIS to consider the reasonably foreseeable GHG emissions that may be attributed to a project proposed under section 7 of the NGA allows the Commission to issue more legally durable orders on which all stakeholders can depend, including project developers."); Letter of Commissioner Allison Clements to Sen. John Barasso, M.D. (Feb. 1, 2022) ("I will do my part to assure that the updated policy will be a legally durable framework for fairly and efficiently considering certificate applications – one that serves the public interest and increases regulatory certainty for all stakeholders."); *see also*, Corey Paul, *FERC Dems argue legal benefits from climate reviews outweigh gas project delays*, S&P CAPITAL IQ PRO (Feb. 3, 2022).

certificate applications. In fact, by purporting to apply today's new policy retroactively on applications that have already been submitted (and in many instances pending for years), today's action is deeply unfair: it judges by an entirely new set of standards applications that were prepared and submitted to meet the old standards and essentially opens all of them to be relitigated.[99] The undoubted effect of these orders will be to interpose additional months or years of delay on project applicants and to increase exponentially the vulnerability on appeal of any Commission orders that do approve a project.

50. Recently I said the Commission's new rule on unlimited late interventions in certificate cases was "not a legal standard, but a legal weapon."[100] The new certificate policy approved today is the mother of all legal weapons. There is no question that it will be wielded against each and every natural gas facility both at the Commission and in the inevitable appeals, making the costs of even pursuing a natural gas project insuperable.

51. Let me emphasize that every person or organization pursuing the policy goal of ending the use of natural gas by opposing every natural gas facility has an absolute right under the First Amendment to engage in such advocacy. However, whether to end the use of natural gas by banning the construction of all new natural gas projects is a public policy question of immense importance, one that affects the lives and livelihoods of tens of millions of Americans and their communities, as well as the country's national security. In a democracy, such a huge policy question should *only* be decided by legislators elected by the people, not by unelected judges or administrative agencies.[101]

52. This public-policy context is absolutely relevant to these orders because it illustrates that the long-running controversy at this Commission over the use of GHG

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[99] Certificate Policy Statement at P 100 ("the Commission will apply the Updated Policy Statement to any currently pending applications for new certificates. Applicants will be given the opportunity to supplement the record and explain how their proposals are consistent with this Updated Policy Statement, and stakeholders will have an opportunity to respond to any such filings.")

[100] *Adelphia Gateway, LLC*, 178 FERC ¶ 61,030 (2022) (Christie, Comm'r concurring at P 4) (available at: https://www.ferc.gov/news-events/news/item-c-3-commissioner-christies-partial-concurrence-and-partial-dissent-adelphia).

[101] *See Am. Lung Ass'n v. EPA*, 985 F.3d at 1003 (Walker, J., concurring in part and dissenting in part) ("whatever multi-billion-dollar regulatory power the federal government might enjoy, it's found on the open floor of an accountable Congress, not in the impenetrable halls of an administrative agency – even if that agency is an overflowing font of good sense.") (citing U.S. Const. art I, § 1).

analyses in natural-gas certificate cases, whether it's a demand to quantify indirect impacts from upstream production and downstream use,[102] or a demand to apply an administratively-constructed metric such as the Social Cost of Carbon[103] – and then use GHG analyses to *reject* (or mitigate to death, or impose costly delays on) a gas project – has far less to do with the law itself and far more to do with promoting preferred *public policy* goals.

53. EPA admits as much in a remarkably (perhaps unwittingly) revealing passage in a letter to this Commission:

> EPA reaffirms the suggestion that the Commission avoid expressing project-level emissions as a percentage of national or state emissions. Conveying the information in this way *inappropriately diminishes* the significance of project-level GHG emissions. Instead, EPA continues to recommend disclosing *the increasing conflict between GHG emissions and national, state, and local GHG reduction policies and goals . . .*[104]

54. So according to EPA, this Commission – which is supposed to be *independent* of the current (or any) presidential administration, by the way – should literally manipulate how it presents GHG data in order to avoid "inappropriately" diminishing the impact. As EPA reveals, this is really not about data or any specific GHG metric at all, but is really about pursuing *public policy* goals, especially those of the current presidential administration that runs EPA.[105]

55. The EPA's purported guidance to this Commission illustrates that the real debate here is not over the minutiae of one methodology versus another, or whether one

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[102] GHG Policy Statement at PP 27-28, 31, & n.97. *See also*, EPA Dec. 20, 2021 Letter.

[103] GHG Policy Statement at P 96. *See also, e.g.*, *Vecinos,* 6 F.4th at 1328-1329.

[104] EPA Dec. 20, 2021 Letter at 4 (emphases added).

[105] This Commission's independence reflects a conscious choice on Congress' part to insulate certain of its functions from the vicissitudes of political pressure. *See generally*, Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378 (2019) (explaining that some but not all of the Federal Power Commission's authorities were transferred to FERC, which was intended at least in part to counterbalance presidential influence). Succumbing to the pressure of EPA and others would sacrifice that crucial independence in meaningful ways.

methodology is "generally accepted in the scientific community" and another is not,[106] or whether one particular esoteric formula is purportedly required by a regulation issued by the CEQ[107] and another does not meet the CEQ's directives.

56. The real debate over the use of GHG analyses in certificate proceedings is about public policy, not law, and ultimately comes down to these questions: *Who makes major decisions of public policy in our constitutional system?* Legislators elected by the people or unelected administrative agencies or judges? *Who decides?*[108]

III. Conclusions

57. Based on the analysis above the following legal conclusions can be drawn:

58. *First*, the Commission may not reject a certificate based solely on an estimate of the impacts of GHG emissions, indirect or direct. Nor, on the basis of such GHG estimates, may the Commission attach to a certificate (or coerce through deficiency letters) conditions that represent a *de facto* rejection by rendering the project financially or technically unfeasible.

59. *Second*, the Commission can consider the direct GHG impacts of the specific facility for which a certificate is sought, just as it analyzes other direct environmental impacts of a project, and can attach reasonable and feasible conditions to the certificate designed to reduce or minimize the direct GHG impacts caused by the facility, just as it does with other environmental impacts.

60. *Third*, the conditions the Commission can impose are, like its other powers, limited to the authorities granted to it by Congress and the purposes for which they are

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[106] *Cf. Vecinos*, 6 F.4th at 1329.

[107] It has been observed that the values associated with the imputed social costs of GHG emissions have fluctuated dramatically from one administration to the next. *See, e.g.*, Garrett S. Kral, *What's In a Number: The Social Cost of Carbon*, GEO. ENVTL. L. REV. ONLINE 1 (Aug. 19, 2021) (comparing the social cost of GHG emissions under the Trump administration with the interim social cost under the Biden administration and noting "the value of SC-GHGs have fluctuated. A lot."). This degree of abrupt fluctuation – e.g., the social cost of carbon increasing from $7 per ton to $51 per ton – can only be explained by politics, not science.

[108] *NFIB*, 142 S. Ct. at 667 (Gorsuch, J. Concurring). ("The central question we face today is: *Who decides?*") (emphasis added).

given. So, no, the Commission may not impose conditions on a certificate to mitigate upstream or downstream GHG emissions arising from non-jurisdictional activity.

61. These legal conclusions do not mean that responding to climate change is not a compelling policy necessity for the nation. In my view it is, as I stated above.[109]

62. However, neither my policy views – nor those of any other member of this Commission – can confer additional legal authority on FERC.[110] For in our democracy, it is the *elected* legislators who have the exclusive power to determine the major policies that respond to a global challenge such as climate change. Further, the argument that administrative agencies must enact policies to address major problems whenever Congress is too slow, too polarized, or too prone to unsatisfying compromises, must be utterly rejected.[111] That is not how it is supposed to work in a democracy.

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[109] *See* P 5 and n.12, *supra*.

[110] *Office of Consumers Counsel*, 655 F.2d at 1142 ("an agency may not bootstrap itself into an area in which it has no jurisdiction by violating its statutory mandate") (quoting *FMC v. Seatrain Lines, Inc*., 411 U.S. 726, 745 (1973)) (ellipsis omitted); *see also In re MCP No. 165,* 20 F.4th 264, 269 (6th Cir. 2021) (Sutton, C.J., dissenting) ("As the Supreme Court recently explained in invalidating an eviction moratorium promulgated by the Center for Disease Control, 'our system does not permit agencies to act unlawfully even in pursuit of desirable ends.' *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Shortcuts in furthering preferred policies, even urgent policies, rarely end well, and *they always undermine, sometimes permanently, American vertical and horizontal separation of powers, the true mettle of the U.S. Constitution, the true long-term guardian of liberty*.") (emphasis added).

[111] This argument is often put forth by the legal, academic, and corporate elites who assume that an administrative agency will enact the public policies they prefer when Congress will not. Such an expectation is perfectly rational since these elites disproportionately have the resources that are most effective in achieving desired outcomes in the administrative process, which is largely an insiders' game. The body of work on the economic theory of regulatory capture over the past half-century is relevant to this topic. *See generally*, Susan E. Dudley, *Let's Not Forget George Stigler's Lessons about Regulatory Capture*, Regulatory Studies Center (May 20, 2021) (available at https://regulatorystudies.columbian.gwu.edu/let%E2%80%99s-not-forget-george-stigler%E2%80%99s-lessons-about-regulatory-capture). And it is not just for-profit corporate elites at work here, so are other special interests who seek desired policy outcomes from administrative action rather than from the often messy and hard democratic processes of seeking to persuade voters to elect members of Congress who agree with you. *See, e.g.*, n. 97, *supra*.

63. For if democracy means anything at all, it means that the people have an inherent right to choose the legislators to whom the people grant the power to decide the major questions of public policy that impact how the people live their daily lives. Unelected federal judges and executive-branch administrators, no matter how enlightened they and other elites may regard themselves to be, do not have the power to decide such questions; they only have the power to carry out the duly-enacted laws of the United States, including the most important law of all, the Constitution. That is the basic constitutional framework of the United States and it is the same for any liberal democracy worth the name.

For these reasons, I respectfully dissent.

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Mark C. Christie
Commissioner

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