UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION IN RESPONSE TO NOTICE OF INQUIRY

Pursuant to the Commission's Notice of Inquiry ("NOI") in the referenced proceeding,[1] the Natural Gas Supply Association ("NGSA") respectfully submits the following comments in response to the Commission's renewed request for comments on its policy statement on the certification of new natural gas transportation facilities. For the reasons discussed below, NGSA supports the Commission retaining its current policy statement, which continues to provide a flexible and balanced framework for assessing whether a proposed pipeline project is in the public interest. However, if the Commission chooses to move forward with making significant changes to its 1999 Certificate Policy Statement, we strongly encourage the Commission to take interim steps first, such as issuing a proposed policy statement, in order to allow stakeholders to weigh in on more specific proposals.

I. Interest of NGSA

Founded in 1965, NGSA represents integrated and independent energy companies that produce, transport and market domestic natural gas and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact and invest in the U.S. natural gas market in a range of different

[1] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2021) ("NOI").

manners. NGSA members transport and/or supply billions of cubic feet of natural gas per day on interstate pipelines and could be greatly impacted by the outcome of this proceeding.

NGSA encourages the use of natural gas within a balanced national energy policy and supports the benefits of competitive markets. NGSA is dedicated to achieving a cleaner future through strong partnerships with renewables and supporting innovative technologies and market solutions that reduce emissions, such as a price on carbon. Our companies are committed to reducing methane emissions as an essential component of achieving a clean energy future. NGSA has consistently advocated for well-functioning natural gas markets, policies that support market transparency, efficient nomination and scheduling protocols, just and reasonable transportation rates, non-preferential terms and conditions of transportation services and the removal of barriers to developing needed natural gas infrastructure.

II. Executive Summary

In 2018, the Commission issued a Notice of Inquiry ("2018 NOI") seeking stakeholder input to help the Commission explore whether, and if so how, it should revise its approach under the 1999 Policy Statement on the certification of new interstate natural gas transportation facilities.[2] NGSA submitted comments in response to the 2018 NOI advocating that the Commission retain its policy and affirming the ways that the Commission's policy statement is still effective.[3] Subsequently, in early 2021, the Commission issued a supplemental Notice of Inquiry ("2021 NOI") seeking additional stakeholder perspectives and information in light of regulatory changes that have taken effect since 2018.

[2] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) (2018 NOI).

[3] *See Comments of the Natural Gas Supply Association in Response to Notice of Inquiry*, Docket No. PL18-1-000, July 25, 2018.

While we agree with the Commission that it is good governance to take a fresh look at older policies, we believe the 1999 Certificate Policy Statement remains effective. It provides the Commission with the flexibility it needs to appropriately balance the public benefits against any potential adverse consequences in order to determine if a proposed project is in the public interest. Any changes to the 1999 Certificate Policy Statement that would create a higher hurdle to permitting projects could have unintended consequences for the natural gas industry and its customers. NGSA's member companies are committed to a lower emission energy economy and support various regulatory and federal actions to achieve this goal, including a well-designed price on carbon at the national, regional, or state level, as the best approach to achieving a lower emission energy future while allowing markets to incentivize investment in needed infrastructure. Natural gas is a key building block to attaining a lower emission future and adequate gas infrastructure is critical to ensuring consumers can access the benefits of natural gas, including its affordability, reliability, and lower carbon footprint.

In the 2021 NOI, the Commission cites the regulatory changes and executive actions that have taken effect since 2018 as the basis for exploring the new questions and issues raised in the 2021 NOI. However, the 2021 NOI does not recognize the anticipated changes to regulations and guidance from the Biden Administration that will significantly impact the issues the 2021 NOI is asking stakeholders to weigh in on. It would be premature for the Commission to address these issues in an updated Certificate Policy Statement, particularly expanding its environmental considerations, until these processes are completed.

If FERC is compelled to take any action in this proceeding, we request FERC take interim steps, such as issuing a proposed policy statement, enabling stakeholders to weigh in.

Given the significance of this proceeding, stakeholders should have the opportunity to comment on any concrete changes the Commission is considering.

III. Comments

A. The Purpose of the Natural Gas Act and the Commission's Role in Permitting Natural Gas Infrastructure.

NGSA offers these comments against the backdrop of the statutory framework of the Natural Gas Act (NGA), which fundamentally serves as the touchstone for any proposed changes in the Commission's policies. In the opening section of the NGA, Congress "declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest."[4]

The origins of the NGA date back to the 1920s when the U.S. Supreme Court ruled that states lacked authority to regulate the interstate transportation or sale for resale of natural gas because regulation of interstate commerce was the province of the federal government.[5] Ultimately, Congress passed the NGA, which among other things, made it illegal to: "engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company

[4] 15 U.S.C. § 717(a).

[5] *See e.g., Missouri v. Kan. Nat. Gas Co*., 265 U.S. 298, 309-10 (1924); *Pub. Utils. Comm'n of R.I. v. Attelboro Steam & Elec. Co*., 273 U.S. 83 (1927).

a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."[6]

The NGA directs the Commission to issue such certificates of public convenience and necessity:

> to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, 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.[7]

However, the NGA does not define "public convenience and necessity" and leaves it up to the Commission to interpret it.

At the time the NGA was enacted, a number of other statutes required regulatory agencies to issue certificates based on a determination of the "public convenience and necessity." The legislative history of the NGA notes that, "[t]here are similar provisions requiring certificates of public convenience and necessity for extensions of service in the Interstate Commerce Act (U.S.C. 1934 title 40 sec. 1 (18-20)); the Communications Act of 1934 (U.S.C. 1934 title 47 sec. 214) and the Motor Carriers Act U.S.C. 1934 title 49 secs. 306, 307, 308)."[8]

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[6] 15 U.S.C. § 717f(c).

[7] 15 U.S.C. § 717(e).

[8] Committee on Interstate Commerce, Interstate Transportation and Sale of Natural Gas, S. Rep. No. 75-1162, at 5 (Aug. 9, 1937). It should be noted that Section 7(h) of the NGA, which conveys eminent domain authority to holders of certificates of public convenience and necessity, was enacted by Congress to ensure the Commission's exercise of its "exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce" would not be "nullified" by states. S. Rep. No. 429, 80th Cong., 1st Sess. 1, at 3 (Apr. 29, 1947).

Congress further acknowledged during the consideration of the NGA that pipelines are the only method of large-scale transportation of natural gas from supply basins to demand centers.[9]

The Commission interpreted public convenience and necessity soon after the enactment of the NGA. Applicants were required to show that: (1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; (6) the rates proposed to be charged are reasonable; and (7) the anticipated fixed costs or the amount of such fixed costs (such as operating and maintenance expenses, depreciation, taxes, and return) must be reasonable.[10] None of these considerations were environmental in nature.

As the natural gas industry evolved, so too did the Commission's regulation of the industry. A maturing pipeline industry led to a nationwide pipeline grid, which allowed increasingly efficient transportation transactions (e.g., through backhauls, displacement, and exchanges) that were not previously possible. The Commission believed that pipeline-on-pipeline competition altered its regulatory role. As a result, the Commission issued Order No. 436 in 1985 to adapt its regulatory framework to the changed circumstances of the industry.[11]

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[9] *See To Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes: Hearing on H.R. 11662 Before Subcomm. on Interstate and Foreign Commerce*, 74th Cong. 57 (1936) (Statement of Col. William T. Chantland, Attorney in Charge of Legal Work, FTC Utilities Division) ("As pipe lines are the only present method of transportation of natural gas, and as the principal markets, actual and potential, are at long distances and across many State lines from the big reserve areas, the States have been helpless to cope with such transportation problem.").

[10] *In re Kan. Pipe Line & Gas Co*., 2 F.P.C. 29, 56 (1939).

[11] 33 FERC ¶ 61,007, at P 61,815.

The goal of Order No. 436 was to retain utility-type regulation over interstate transportation, while allowing the natural gas commodity market to develop competitively.

Order No. 436 included Optional Certificate Procedures, which allowed an applicant to institute new jurisdictional services and to construct and operate facilities for the new service and established a rebuttable presumption that, subject to review under the National Environmental Policy Act (NEPA), a project would be required by the public convenience and necessity subject to the condition that the applicant must accept the full risk of its proposal. While optional certificates were not very popular, the Commission began to apply an "at risk" condition in projects that were not filed under the optional certificate procedures. It became clear, however, that analysis under the *Kansas Pipe Line* factors no longer made sense for the industry and the Commission. This led directly to the Commission's formulation of the 1999 Certificate Policy Statement.[12] The Commission explained that "it was considering how best to balance demonstrated market demand against potential adverse environmental impacts and private property rights in weighing whether a project is required by the public convenience and necessity."[13]

Under the Certificate Policy Statement, the Commission adopted a new test to determine whether a project was required by the public convenience and necessity standard. Under this new test, the Commission explained "the threshold question applicable to existing pipelines is whether the project can proceed without subsidies from their existing customers."[14] Once a project meets this threshold question, the "next step is to determine whether the applicant has

[12] *Statement of Policy 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) ("Certificate Policy Statement").

[13] *Id*.

[14] *Id*. 88 FERC ¶ 61,227 at p. 61,745.

made efforts to eliminate or minimize any adverse effects the project might have on the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline."[15] If the project would have no adverse effects on those identified constituents, "then no balancing of benefits against adverse effects would be necessary" and the Commission is to proceed to the environmental review and final order for the project.[16]

If residual adverse effects exist after efforts to minimize them, then the Commission "will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects."[17] The Commission made clear: "This is essentially an economic test."[18] The Commission will proceed with the environmental review only "when the benefits outweigh the adverse effects on economic interests."[19] The Commission explained that at this point, the Commission could "identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects."[20] If the Commission concludes the public benefits outweigh the adverse effects, then the Commission will continue its environmental review under NEPA and proceed to a final order.[21] Informed by this NEPA analysis, the Commission may mitigate environmental impacts by, for example, directing the consideration of

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

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

[21] *Id.*

alternatives and pipeline route alterations, and by imposing conditions on the certificate order requiring certain practices or procedures that minimize or eliminate adverse impacts.[22]

B. The Role of Environmental Impacts in the NGA and the Commission's Review Process

As noted above, under the Commission's current Certificate Policy Statement, if the Commission finds the public benefits outweigh the adverse effects on economic interests, then the Commission will complete the environmental analysis required by NEPA. However, each statute has different mandates for FERC and different goals.

The NGA, originally enacted in 1938, long preceded the enactment of NEPA in 1969. The two statutes, of course, have different purposes. The NGA is designed to ensure that the public's need for natural gas is met in an economical and reasonable manner. The NGA is the "action statute," the authority pursuant to which the Commission acts on certificate applications. On the other hand, NEPA is designed to ensure that the Commission is aware of the environmental impacts of its decisions and can consider taking measures to avoid, reduce, or mitigate environmental impacts resulting from that decision.[23]

NEPA requires informed decision-making, however, "NEPA itself does not mandate particular results."[24] Rather, "NEPA imposes only procedural requirements on federal agencies

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[22] *Id*. at p. 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. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis. If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.").

[23] *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004) (NEPA "was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States. 42 U.S.C. § 4321.").

[24] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989).

with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."[25] Accordingly, NEPA provides additional information to inform the Commission as it executes its responsibility under the NGA. In practice, the Commission often goes to great lengths to address in its certificate order the main findings of the NEPA analysis and address comments raised during its NEPA process.

The sequential steps of balancing public need against residual adverse impacts, followed by consideration of environmental impacts, are regularly reflected in the structure of the Commission's orders evaluating certificate applications, wherein the Commission first conducts an analysis of whether the proposed facilities are in the public convenience and necessity, and then evaluates the environmental impacts.[26]

The Certificate Policy Statement's primary focus on economic balancing is supported by the NGA, which was intended to be an economic regulatory statute. The Supreme Court has affirmed that the Commission's public interest evaluation is not a license to promote the general welfare and that the Commission's powers under NGA Section 7 are limited.[27] Similarly, the Court of Appeals for the District of Columbia Circuit has followed this precedent:

> 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

[25] *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 350.

[26] *See, e.g., Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (analyzing the public need for the project and balancing such benefits against impacts to existing pipelines and their customers and to landowners and communities, then analyzing the environmental impacts associated with the proposal).

[27] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-90 (1976) ("*NAACP v. FPC*"); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp*., 365 U.S. 1 (1961) ("*FPC v. Transco*"); *accord Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("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 purpose for which FERC was given certification authority.").

> authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful. In carrying out its statutory certification task FERC must recognize that "a need for federal regulation does not establish FPC jurisdiction that Congress has not granted.[28]

The Commission's review determining whether a proposed jurisdictional facility is required by the present or future public convenience and necessity is meant to occur sequentially. This analysis, based on the plain language of the statute, legislative history, case law, and Commission precedent, is fundamentally economic, weighing the public need and benefits of a proposed project against the adverse impacts to the pipeline applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities. In accordance with NEPA, the Commission looks to the environmental impacts of the proposed project only after confirming that the public benefits outweigh the adverse effects on economic interests protected by the NGA. While the Commission's environmental review is related to and informs its decision under the NGA, the primary focus of the NGA is on economic regulation.

C. Putting a National Price on Carbon is the Most Efficient, Effective, Market-based Approach to Help the U.S. Achieve a Long-term, Lower Emission Energy Future.

NGSA is a strong proponent of a national carbon price, or, absent a national program, state and regional efforts to adopt a price on carbon. We believe a well-designed carbon price is the most efficient, effective, market-based approach to achieving lower emissions across the entire energy industry and economy, as it provides the right incentives for everyone – energy producers, transporters, and consumers alike – to play their part in reducing emissions and developing new low emission energy technologies. Carbon pricing allows all resources to

[28] *Office of Consumers' Counsel v. Fed. Energy Regulatory Comm'n*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (citations omitted).

compete, including natural gas, which is critical to, *inter alia,* enable intermittent energy resource support as more renewable resources are integrated into the power grid.

Fuel-neutral, market-based approaches are the best means to address environmental challenges rather than piecemeal regulation that targets one specific fuel. FERC's long-standing position and precedent is to let markets work; there is no reason to depart from this position when there are viable, market solutions that can accomplish more than project-specific reviews.

While FERC does not have the authority to direct markets to adopt a carbon price, it serves an important role in facilitating a climate conducive for policymakers to seriously consider adoption of sustainable market-based approaches that will help meet long-term environmental policy objectives. The Commission's recently-adopted policy statement on carbon pricing in organized wholesale electricity markets, which NGSA supported, is a significant first step (Carbon Pricing Policy Statement). In its Carbon Pricing Policy Statement, the Commission states "it is the policy of this Commission to encourage efforts of RTOs/ISOs and their stakeholders—including States, market participants, and consumers—to explore and consider the value of incorporating state-determined carbon prices into RTO/ISO markets."[29] We applaud FERC for affirming its authority and willingness to be receptive to carbon pricing submissions from states and/or organized markets in its Carbon Pricing Policy Statement. We encourage FERC to pursue more direct engagement with states to explore additional steps required to develop broad national, regional, or state carbon pricing proposals. This is by far the best means of addressing carbon emissions rather than singling out specific pipeline projects.

[29] *See Carbon Pricing in Organized Wholesale Electricity Markets*, Docket No. AD20-14-000, p. 16, April 15, 2021.

D. Natural Gas Serves a Critical Role in Achieving a Lower Emission Energy Future and Enhancing Grid Reliability.

NGSA is committed to a lower-carbon energy future and understanding the impact of greenhouse gas (GHG) emissions and their contribution to climate change. Our member companies are actively working to address environmental challenges and advocate for policies that protect the environment, including rejoining the Paris agreement, supporting a price on carbon, and committing to reductions in methane emissions, while meeting growing energy demand. Natural gas is a building block of a lower carbon energy future and is an integral partner with renewables in enabling affordable energy growth with fewer emissions. In fact, U.S. electric power sector emissions have fallen 33% from their peak in 2007 because less electricity has been generated from coal and more electricity has been generated from natural gas (which emits less CO2 when combusted) and non-carbon sources.[30] An effective Certificate Policy Statement is crucial to permitting the infrastructure needed to allow consumers to reap the benefits of natural gas resources, while also ensuring lower energy costs for consumers as we transition to a lower carbon energy economy.

Natural gas also serves a critical role in maintaining electric power grid reliability. Over the past decade, natural gas production has become increasingly diversified across the country bringing supply closer to the market area and end-users. Yet insufficient infrastructure can limit consumers' ability to tap into supplies that are close to their market areas and that enhance the reliability of the electric grid. NERC has recognized that, "additional pipeline infrastructure is needed to reliably serve [electricity] load."[31] Pipeline expansions are recognized as

[30] *See* EIA's 'U.S. energy-related carbon dioxide emissions fell in 2019, mainly in electric generation,' November 10, 2020, found here.

[31] NERC, Long-Term Reliability Assessment at 38 (Dec. 2020) https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf

"mechanisms promoting fuel assurance," and that "[p]ipeline expansion into constrained areas significantly promotes [bulk power system] fuel assurance."[32]

As recent weather-related events have highlighted, maintaining a reliable supply of natural gas and sufficient pipeline infrastructure is critical to providing the reliability consumers depend on for home use and for electricity. Further, even as more intermittent energy resources are integrated into the grid, many of those resources are dependent on having a flexible, fast-ramping resource, such as natural gas generation plants, to provide back-up generation and frequency stability. In 2020, wind and solar accounted for 10.3% of the grid's electricity generation.[33] EIA forecasts that in 2050, wind and solar are together expected to provide 34.02% of the electricity generation to the grid.[34] While this is significant growth, it also illustrates that natural gas will continue to play a key role in meeting increasing demand for electricity.

E. FERC's 1999 Policy Statement is an Effective and Flexible Framework to Determine Whether a Project is in the Public Interest.

As detailed below, we continue to believe the 1999 Certificate Policy Statement remains sound and effective and provides the Commission with the flexibility it needs to appropriately balance the public benefits against any potential adverse impacts to determine if a proposed project is in the public interest. NGSA recognizes there have been several changes to regulations and new issues raised that are worth exploring in the 2021 NOI. However, the Certificate Policy Statement was purposefully developed with a high degree of flexibility to adapt to a changing

[32] *Id*. at 34.

[33] EIA 'Electricity explained: electricity generation, capacity, and sales in the United States,' March 18, 2021, see here.

[34] *See EIA Annual Electricity Outlook 2021,* Renewable Electricity Generation, including end-use generation, by year, found here.

and evolving natural gas market. The policy continues to achieve FERC's stated goals of "foster[ing] competitive markets, protect[ing] captive customers, and avoid[ing] unnecessary environmental and community impacts while serving increasing demands for natural gas."

i. The Commission's needs determination appropriately balances project benefits and adverse impacts.

The Commission has long acknowledged that a mandated one-size-fits-all standard (which would create a higher threshold for public need) would not take into account the different benefits that each proposed project offers, nor would it be flexible enough for each case. Instead, the sliding-scale approach effectively balances benefits versus adverse impacts: the more adverse impact a project would have, the more public benefits must be demonstrated to offset or mitigate those impacts. We agree this flexible approach works well and that imposing more stringent standards has not worked in the past. For example, the Commission moved away from its initial policy of requiring an applicant to present contracts for a specific percentage of the new capacity since it no longer reflected the reality of the natural gas industry's market operations.

When the Commission adopted the 1999 Certificate Policy Statement, it greatly expanded the public benefits that a pipeline could show in the record to establish that a proposed project would be in the public convenience and necessity. These public benefits are diverse and could include: meeting unserved demand; eliminating bottlenecks; need for access to new supply basins; lower costs to consumers; providing new interconnects that improve the interstate grid; providing competitive alternatives; increasing electric reliability and advancing clean energy objectives.[35] If the Commission is considering any changes that would result in higher hurdles to finding a project in the public interest, it should balance that with broadening the types of

[35] Policy Statement, 88 FERC at 61,748.

benefits it considers in its overall cost-benefit analysis. For example, if the Commission assesses upstream emissions, it is also appropriate to consider the economic benefits, including tax revenue and jobs, energy security and social attributes of domestic production, particularly for low to middle-income communities.

ii. Precedent agreements are binding contracts that represent strong and objective evidence of public need for a pipeline project.

FERC has historically relied on precedent agreements as an indicator for market need and for good reason: they unequivocally establish binding customer commitments for capacity at the early stages of a project, with long-term financial commitments from shippers. NGSA agrees that this approach provides the most objective and straight-forward evidence for determining whether a project is in the public interest. Financial commitments by private customers through firm service agreement demand charges are a crucial step for ensuring a project is financially viable and that those with a high level of experience in understanding the natural gas market see a future market for the new capacity. The terms of precedent agreements vary; however, they establish transparent, contract terms including the duration of the commitment (often 10 to 15 years), rate, and details of the service provided. Given the financial commitment that precedent agreements represent that often amount to tens of millions of dollars, these agreements are not entered into lightly and remain the best indicator of true need for a particular project.

Project applications filed by pipeline companies that are either fully or nearly fully subscribed demonstrate that the market is functioning properly – natural gas customers are signaling that more capacity is needed to meet demand for service. In addition to identifying precedent agreements, many applicants include studies that provide evidence of market growth,

or other evidence such as testimony from an expert.[36] Moreover, pipeline projects are either funded privately or through project financing, with neither the federal/local governments nor consumers directly bearing the financial costs of a project. Thus, executed precedent agreements, regardless of whether made by an affiliate, attest to the financial viability of a project with the project developer and contracting parties taking on significant financial risk. A precedent agreement between a pipeline and shipper(s) is ***binding***.

Taking a look "behind" or "beyond" the precedent agreement does not change the contractual terms being applied and the party, regardless of affiliation, is taking on a substantial financial risk. As a safeguard, should a shipper or other interested party have concerns with an affiliate entering into a precedent agreement to support a proposed pipeline project, the shipper can file to intervene at FERC to request that FERC take a closer look. FERC already has the authority and responsibility to investigate any allegations of undue discrimination with respect to a pipeline favoring an affiliate. This safeguard strikes the right balance between regulation and letting the market work. FERC should honor the sanctity of contracts and should not second guess a business decision between private parties.

iii. The natural gas market is a dynamic, competitive market.

While the 2021 NOI contemplates requiring information on the origin or end-use of natural gas supply to assess potential downstream impacts, applicants are often unable to provide this data because of how the natural gas market operates. In most instances, because natural gas is fungible and can be displaced, it does not physically flow from a contractual receipt point to a contractual delivery point. Furthermore, once natural gas is delivered into the market, it can be

[36] For example, the EIA models projections of energy markets through 2050 by incorporating energy supply, demand and prices, technological progress and energy policies, which gives industry a view of anticipated future growth.

bought and sold numerous times, as such, it can be almost impossible to track where each molecule is ultimately consumed. Marketers are balancing all components of supply and demand in each region, including several hundred pipelines, 50,000+ natural gas receipt and delivery points, pools, storage caverns, and pricing points across the United States. Furthermore, changes to supply basins and emerging markets have led to flow pattern changes, shifts in directional flows and changed the traditional ways in which gas is being transported.

Given how dynamic and fluid the market is, if FERC were to require information on the end-use of natural gas in order to analyze downstream impacts, it could force speculative analysis with arbitrary results. While some reference the decision in *Sierra Club et al v. Federal Energy Regulatory Commission* as the basis for needing to calculate downstream impacts, this case should not be interpreted as a sweeping mandate to change FERC policy. Quite the opposite, the court's decision is narrow in scope and should not be interpreted to apply to all pipeline project applications. The holding in this particular court case hinges on the fact that in this rare case, the project proponents were able to identify specifically the end-use customers (four power plants) that would use the natural gas shipped on the proposed Sabal Trail project and provide a quantitative estimate of the downstream GHG emissions.[37] In most instances, this is not the case and specifically tagging natural gas from production to end-use simply is not feasible as a matter of generic policy. An attempt to do so does not further the Commission's ability to engage in reasoned decision-making.

[37] *Sierra Club v. FERC* - 432 U.S. App. D.C. 326, 867 F.3d 1357 (2017)

F. Any Action to Modify FERC's Consideration of Environmental Impacts is Premature.

In the 2021 NOI, the Commission is seeking feedback on whether, and if so how, it could expand its environmental review under NEPA, including consideration of impacts beyond direct effects and use of a Social Cost of Carbon (SCC). While NGSA is open to further exploration of these concepts, it is premature to assess these issues given that the Biden Administration is currently undertaking a federal review of the NEPA regulations and SCC tool. FERC should refrain from taking any actions to modify its current procedures until these processes complete, then determine how to apply any updated regulations and tools within their statutory authority.

First, the White House Council on Environmental Quality (CEQ) asked the U.S. District Court for the Western District of Virginia to remand the 2020 NEPA regulations so that the agency can reconsider the regulations through an administrative process.[38] The 2020 NEPA regulations, which were updated by CEQ in July 2020, adopted several modifications and clarifications, including striking references to direct, indirect and cumulative effects and replacing with just 'effects.' CEQ adopted the definition for effects as "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives."[39] Later in July, seventeen environmental groups challenged the final rule in district

[38] *See* Defendants' Motion for Remand Without Vacatur, *Wild Virginia v. Council on Envtl. Quality*, W.D. Va., No. 3:20-cv-00045, motion filed March 17, 2021.

[39] *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, Council on Environmental Quality, 40 C.F.R. § 1508.1(g) (2020).

court. Now the Biden Administration has asked the court to return the rule to the agency since they are already reconsidering changes. Given that NEPA regulations and complementary guidance on environmental reviews for infrastructure projects fall under CEQ's jurisdiction, FERC should defer to CEQ's process instead of creating its own framework for evaluating direct, indirect or cumulative impacts.

Moreover, until CEQ acts, it is inconsistent with current NEPA regulations to expand FERC's environmental analysis of a proposed project. For example, if FERC attempts to quantify upstream activities, such as an increase in natural gas production based on a particular project, it would not be a reasonably foreseeable effect of the pipeline project because it is not known where, when, and what volume of natural gas might be produced across the lifetime of the pipeline. Further, under the NGA, FERC also lacks jurisdiction over natural gas development and production activities. State agencies and the Bureau of Land Management are better positioned to address any effects of production because those agencies are tasked with regulating upstream natural gas and will have accurate information related to drilling activity. Only after CEQ issues revised NEPA regulations should FERC consider how to apply any new direction on assessing environmental impacts to its analysis of proposed projects.

Second, the Interagency Work Group (IWG), established under Executive Order 13990, is working to update the SCC with a target deadline of June 2022.[40] As the group charged with developing a federally-accepted methodology for monetizing the social costs and benefits of GHG emissions, it would be prudent for FERC to await the outcome of those deliberations, as

[40] Executive Order No. 13990, 86 FR 7037, January 20, 2021.

well as wait until any proposed rulemakings instructing agencies where to incorporate SCC analyses into their decision-making are completed. It would be inappropriate to attempt to develop duplicative and likely conflicting approaches to utilizing SCC.

However, even once the IWG has updated the SCC, we do not believe that it is appropriate for FERC to rely on SCC for project-specific reviews because it would be inconsistent with long-standing FERC precedent and its most-recent position at the D.C. Circuit. In *Vecinos Para El Bienestar da la Comunidad Costera, et all v. FERC,* FERC rejected challengers' allegation that it should have used the SCC as a metric for assessing the societal costs of GHG emissions from the projects at issue. FERC Counsel stated, "it's not a generally accepted tool for project-specific analysis… it may be used for global or regional impacts, [but] it's not useful for an individual project; there is no agreement on the appropriate discount rate used."[41] Further, FERC explained that the certificate orders provided a quantitative estimate of project-related GHG emissions consistent with NEPA, but that determining whether these levels are "significant" for purposes of NEPA review is beyond the Commission's jurisdiction because it is not an environmental regulator. FERC argued that that the environmental regulator – the Environmental Protection Agency (EPA) – has not set limits on GHG emissions for FERC or other federal agencies to rely on. NGSA agrees with FERC's position.

Importantly, while we believe many of these issues raised are too premature to consider, as stated earlier in our comments, it is also beyond FERC's jurisdiction under the NGA and NEPA to expand its role in the environmental review process or to create environmental policy absent steps first taken by CEQ or Congress. Ultimately, FERC is an economic regulator – not

[41] *VECINOS PARA EL BIENESTAR DE LA COMUNIDAD COSTERA, ET AL., v. FERC,* U.S. Court of Appeals for the D.C. Circuit, excerpt from oral argument, audio archive of oral argument found here (March 23, 2021).

an environmental regulator – and these functions are more appropriately considered under the jurisdiction of CEQ and the EPA.

G. If FERC Chooses to Move Forward with Significant Changes to its 1999 Certificate Policy, FERC Should Issue a Proposed Policy Statement First.

If FERC is compelled to make changes to its 1999 Certificate Policy Statement, we believe FERC should take interim steps, such as issuing a proposed policy statement, before taking any final action. The Commission's determination in this proceeding will have significant implications for the natural gas industry including consumers and could create uncertainty in future investment. Any modifications to the Certificate Policy Statement, large or small, could change how the Commission evaluates and determines whether a natural gas project is in the public interest for years to come.

Given that the Commission issued two NOIs with 60+ complex, scientific and technical questions and has already received over 3,000 comments with a myriad of suggestions (and many more to come) to date, it is difficult, if not impossible, to anticipate and respond to every position. It would be helpful to know what changes, if any, are being contemplated so that the industry can provide meaningful input on specific proposals, and to participate in an open and transparent public policy-making process. As shippers on, and investors in, Commission-jurisdictional natural gas pipeline facilities, we rely on the certainty and predictability of the FERC rules to enter into multi-year transactions and long-term capital commitments. Issuing a proposed policy statement would allow all stakeholders the opportunity to better understand how the Commission is going to approach its permitting process.

Finally, the Commission should proceed carefully as it assesses suggested changes to its policy statement, as they could have unintended consequences for the entire natural gas industry, as well as other industries regulated by the Commission. The goal should not be to set a

threshold that is so high that pipeline projects will no longer continue to be permitted. Certainly, the Commission needs to ensure that the approval process is a rigorous one in which the costs and benefits are closely examined, but it should not be designed to create obstacles that deter continued investment in pipeline infrastructure needed to reliably serve the needs of this country and the growing economy. On balance, the 1999 Certificate Policy Statement has stood the test of time by supporting adequate infrastructure to meet demand and meaningfully considering environmental impacts without creating unnecessary capacity for two decades. The Commission's responsibility of determining whether a natural gas pipeline project is in the public interest under the NGA has not changed, thus any changes to the 1999 Certificate Policy Statement should not impede this mission.

IV. Conclusion

Given the flexibility and enduring principles on which the 1999 Certificate Policy Statement is founded, NGSA supports the Commission retaining its current approach for the certification of natural gas transportation facilities. FERC should postpone relevant revisions, if any, to the 1999 Certificate Policy Statement until the efforts currently underway by the CEQ and IWG is completed. At that time, FERC should appropriately engage stakeholders and industry for input. We urge the Commission not to impose any additional hurdles to permitting pipeline infrastructure, which can have unintended consequences for natural gas consumers and

electric reliability; and if changes to the 1999 Certificate Policy Statement are contemplated, we urge the Commission to first issue a proposed policy statement for comment on specific proposals.

Respectfully submitted,

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