UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities;	**)**	**Docket No. PL18-1-000**
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews	**)**	**Docket No. PL21-3-000**

REQUEST FOR REHEARING AND CLARIFICATION OF THE NATURAL GAS SUPPLY ASSOCIATION AND CENTER FOR LIQUEFIED NATURAL GAS

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Pursuant to Section 19(a) of the Natural Gas Act ("NGA")[1] and Rule 713 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[2] the Natural Gas Supply Association ("NGSA") and Center for Liquefied Natural Gas ("CLNG") request rehearing and clarification of the Commission's Updated Policy Statement on Certification of New Interstate Natural Gas Facilities ("Updated Certificate Policy Statement")[3] and Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews ("Interim GHG Policy Statement")[4] (collectively, the "Policy Statements").

I. EXECUTIVE SUMMARY

NGSA and CLNG support reasonable efforts by the Commission to update its Policy Statements and to work with industry stakeholders to reduce greenhouse gas ("GHG") emissions associated with natural gas infrastructure subject to the Commission's

[1] 15 U.S.C. § 717r(a).
[2] 18 C.F.R. § 385.713 (2021).
[3] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (Feb. 18, 2022) ("Updated Certificate Policy Statement").
[4] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (Feb. 18, 2022) ("Interim GHG Policy Statement").

jurisdiction. But Commission policies must provide the industry with regulatory certainty to allow it to plan natural gas infrastructure projects predictably and efficiently. Despite purporting to provide "more regulatory certainty in the Commission's review process,"[5] the Policy Statements do the opposite.

The Updated Certificate Policy Statement provides industry without a predictable framework on which to build natural gas infrastructure, having eliminated the concrete benchmarks that have allowed the industry to expand over the last 20 years and facilitate major reductions in GHG emissions. Instead, the Commission now requires pipeline applicants to take new costly and time-consuming steps in preparing their applications, without any assurance of whether an application will be accepted, whether a project will be approved, how it will be conditioned, or whether it will remain economically viable following Commission review. This is a path to a potential future with no new pipeline construction, which can reduce the reliability of the electric grid and create the need for residential, commercial, and industrial customers to be compelled to curtail their use of natural gas.

The Commission is a creature of statute. It is charged with administering the NGA, the purpose of which is to "encourage the orderly development of plentiful supplies of natural gas . . . at reasonable prices."[6] The new Policy Statements will *impede*—not "encourage"—development of natural gas infrastructure, and will drive up costs for proposed projects and reduce production. This is contrary to broader U.S. policy meant to encourage greater production to satisfy growing domestic demand and intensify efforts to export reliable natural gas supplies to our foreign allies, particularly in response to the

[5] Updated Certificate Policy Statement at P 51.
[6] *NAACP v. FPC*, 425 U.S. 662, 670 (1976).

current war in Ukraine. On January 28, 2022, in response to the escalating conflict in Ukraine, U.S. President Biden and European Commission President von der Leyen issued a joint statement committing the United States to intensifying strategic energy cooperation for the security of supply of natural gas to the European Union in order to avoid "supply shocks" that could result from a further Russian invasion of Ukraine.[7] On March 8, 2022, President Biden Issued Executive Order 14006 prohibiting the importation of Russian energy products, including oil and liquefied natural gas."[8] Secretary of Energy Granholm told industry that to offset this supply loss, "right now, we need oil and gas production to rise to meet current demand."[9] The Policy Statements are in direct conflict with these policies; they will stifle development of gas infrastructure needed to meet these commitments and help stabilize global markets.

NGSA recognizes the importance of emissions mitigation; however, the Policy Statements overstep the jurisdictional bounds of the NGA by attempting to regulate, or "encourage,"[10] mitigation of GHG emissions upstream and downstream of the projects the Commission regulates. The Commission's jurisdiction under the NGA specifically excludes local distribution, production, and gathering.[11] Emissions from those activities are subject to the jurisdiction of other federal and state agencies, not the Commission.

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[7] The White House, Joint Statement by President Biden and President von der Leyen on U.S.-EU Cooperation on Energy Security (Jan. 28, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/28/joint-statement-by-president-biden-and-president-von-der-leyen-on-u-s-eu-cooperation-on-energy-security/.

[8] Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine, Executive Order 14066, 87 Fed. Reg. 13,625 (Mar. 10, 2022), https://www.federalregister.gov/documents/2022/03/10/2022-05232/prohibiting-certain-imports-and-new-investments-with-respect-to-continued-russian-federation-efforts.

[9] Dep't of Energy, Remarks as Prepared for Delivery by Secretary of Energy Jennifer Granholm at CERA week 2022 (Mar. 9, 2022), https://www.energy.gov/articles/secretary-granholm-ceraweek-keynote-luncheon-and-11-fireside-chat-sp-globals-dan-yergin.

[10] Interim GHG Policy Statement at PP 98, 104, 106.

[11] 15 U.S.C. § 717(b).

Regulation of GHG emissions cannot be done haphazardly. Attempts by the Commission—an economic, not an environmental regulator—to implement GHG policies will have unpredictable and undesired results.

NGSA stated in its comments in response to the Commission's Notice of Inquiry ("NOI")[12] that the Commission should have issued a proposed policy statement, giving stakeholders the opportunity to comment on specific proposals, before implementing any changes.[13] NGSA also urged the Commission to consider the voluntary efforts of NGSA members and project sponsors to reduce environmental impacts and not to create inefficient regulations that would impede the success of GHG reduction efforts its members were pursuing.[14] The Commission has done the opposite, immediately implementing binding rules that impose additional substantive and procedural requirements on all pending and future applications. By issuing these binding rules without providing stakeholders notice and the opportunity to comment, the Commission violated the Administrative Procedure Act ("APA").

The Commission has implemented a policy that is arbitrary and capricious, and will need to be revisited. In addition to seeking rehearing of both Policy Statements, NGSA and CLNG seek clarification. NGSA and CLNG's requests for clarification offer the Commission an opportunity to craft clearer and more predictable policy statements to govern the construction of natural gas infrastructure.

[12] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2021) ("2018 NOI").
[13] *See* Comments of the Natural Gas Supply Association in Response to Notice of Inquiry at 22-23, Docket No. PL18-1-000 (May 26, 2021) ("NGSA 2021 Comments").
[14] Post-Technical Conference Comments of NGSA, Docket No. PL21-3-000 (Jan. 7, 2022).

II. COMMUNICATIONS

The names, titles, and mailing addresses of the persons upon whom all communications concerning this proceeding should be sent are as follows:

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III. INTEREST IN THIS PROCEEDING

A. NGSA

NGSA represents integrated and independent energy companies that produce 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, as well as supply, and ship billions of cubic feet of natural gas per day on interstate pipelines. NGSA members are often anchor shippers on pipeline projects. Therefore, NGSA members are significantly impacted by the outcome of this proceeding.

NGSA's members are leading the transition to a reliable and low-emissions energy future by investing billions of dollars in new technologies and practices to continue to the momentum of innovation. Since 2006, switching to natural gas in the electric power sector has helped reduce carbon dioxide ("CO_2") by nearly 3.4 billion metric tons in the United States, which equates to a 58% decrease over what has been achieved during the same time frame by all zero-carbon emission sources.[15] In large part, due to the shift from coal to natural gas as the leading fuel for electric generation, total GHG emissions generated by the electric sector is at its lowest level since 1987.[16]

NGSA supports the ambition of achieving economy-wide net-zero GHG emissions by 2050 and supported the United States rejoining the Paris Agreement.[17] In 2020, NGSA publicly announced its members' commitment to achieving significant mitigation of methane emissions.[18] NGSA's member companies have been instrumental in developing

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[15] U.S. Energy Info. Admin., *U.S. Energy-Related Carbon Dioxide Emissions, 2019* (Sept. 30, 2020), https://www.eia.gov/environment/emissions/carbon/archive/2019/; *see also* U.S. Energy Info. Admin., *Electricity energy-related carbon dioxide emissions, Fuel specific emission tables by state*, line 55 (last accessed Mar. 18, 2022), https://www.eia.gov/environment/emissions/state/excel/electricity.xlsx.

[16] *See generally id.* (using data from 2018, the most recent year available).

[17] NGSA, *Reaching Climate Goals with Natural Gas and LNG* (Fall 2021), https://www.ngsa.org/wp-content/uploads/sites/3/2021/10/Reaching-Climate-Goals-with-Natural-Gas-LNG-Fall-2021.pdf.

[18] Press Release, NGSA, *Addressing Methane Emissions Essential to Achieving Cleaning Environment, America's Natural Gas Suppliers Say* (Oct. 5, 2020), https://www.ngsa.org/wp-content/uploads/sites/3/2020/10/10.5.2020-Addressing-Methane-Emissions-Essential-Says-NGSA.pdf.

new technologies to better detect and prevent methane emissions and to build on our industry's existing record of substantially reducing carbon emissions.

NGSA's members are actively developing new emerging technologies such as Carbon Capture, Utilization, and Storage ("CCUS") and hydrogen to meet energy demand while further reducing emissions.[19] In pursuit of lower GHG emissions, several NGSA member companies have developed and launched CCUS techniques and technologies, ranging from CCUS hubs to fuel treatments that reduce emissions from wellhead to end use. In fact, through NGSA members' commitments to the Oil and Gas Climate Initiative, its Climate Investments group has been able to invest billions across the globe to identify and produce the best CCUS solutions. NGSA's members are at different phases of hydrogen development, yet all see the fuel as an important part of the energy mix moving forward. Some members are already utilizing the fuel in pilot power plants to help reduce CO_2 emissions by four million tons a year.[20] Additionally, NGSA member companies are partnering with certification providers to provide customers with certified or responsibly sourced natural gas.

B. CLNG

The CLNG advocates for public policies that advance the use of liquefied natural gas ("LNG") in the United States, and its export internationally. A committee of the NGSA, CLNG represents the full value chain, including LNG producers, shippers, terminal operators, and developers, providing it with unique insight into the ways in which the vast potential of this abundant and versatile fuel can be fully realized.

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[19] Press Release, NGSA, *NGSA Members are Innovating for a Clean Energy Future for All* (Fall 2021), https://www.ngsa.org/wp-content/uploads/sites/3/2022/02/NGSA-Members-Are-Innovating-for-a-Clean-Energy-Future-for-All.pdf.

[20] *Id*.

When countries increase their use of natural gas for power generation, not only will they reduce their GHG emissions through fuel switching from higher-emitting fuels to natural gas, they also will gain the opportunity to increase their use of renewable energy, thus reducing emissions even further. This is because natural gas is an ideal partner to renewable energy resources. Natural gas makes a perfect ally to ramp up and support renewable resources, allowing for more generation to be powered by renewables. In fact, for every 1% increase in natural gas-powered electric generation, renewable power generation increases by 0.88%.[21] The natural gas industry is a partner in transitioning to a lower-carbon future and exporting U.S. LNG is one of the ways that NGSA and CLNG are working together to reduce emissions on a global scale, while meeting the energy demand for a growing population. LNG exports also provide secure, stable, reliable gas supplies to our allies in Europe and throughout the world.[22]

Domestically, the LNG industry is also taking an active approach to reducing emissions through innovative technologies and practices at the facilities, in the field, as well as in the transportation of LNG. CLNG member companies are using electric motors to minimize air emissions, utilizing natural gas recycling to eliminate flaring, using drone technologies to detect leakage, and providing LNG customers with GHG emission data associated with LNG cargos produced—to name just a few innovative practices. As the world evolves with the energy transition, natural gas and LNG are key to a clean energy future for all.

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[21] INGAA, *Natural Gas & Renewables: Working Together*, at 1, https://www.ingaa.org/File.aspx?id=38583#:~:text=For%20every%201%2Dpercent%20increase,generation%20increases%20by%200.88%20percent.&text=Renewable%20Energy%20and%20Environment%20found,could%20benefit%20solar%20energy%20growth.%E2%80%9D (last accessed Mar. 18, 2022).

[22] *See* CLNG, *U.S. LNG Exports: Delivering Certainty in a Time of Crisis*, https://www.lngfacts.org/wp-content/uploads/sites/2/2022/02/CLNG_EU_LNG_Exports_EnergySecurity-0218.pdf (last accessed Mar. 18, 2022) (summarizing recent U.S. LNG exports).

IV. BACKGROUND

A. The Updated Certificate Policy Statement

On April 19, 2018, and again on February 18, 2021, the Commission issued NOIs[23] to explore whether, and if so how, it should revise the approach established by its 1999 policy statement on the certification of new interstate natural gas transportation facilities ("1999 Policy Statement")[24] to determine whether a proposed project "is or will be required by the present or future public convenience and necessity."[25] The Commission received thousands of comments. NGSA and CLNG submitted comments in response to both NOIs, encouraging the Commission to explore changes that would improve the transparency, timing, and predictability of the Commission's permitting process, and urging caution in ensuring that new policies would not hinder the development of new infrastructure.[26]

On February 18, 2022, the Commission issued the Updated Certificate Policy Statement, which made substantial changes to its longstanding policy for evaluating certificate applications.[27] While the Commission's Updated Certificate Policy Statement continues to weigh a project's benefits against its adverse effects to determine whether a project is required by the present or future public convenience or necessity, the Updated Certificate Policy Statement significantly alters the inputs into this formulation.[28] The Updated Certificate Policy Statement now requires the Commission to make a "threshold"

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[23] 2018 NOI, 163 FERC ¶ 61,042; *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021).
[24] *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) (collectively, "1999 Certificate Policy Statement").
[25] 15 U.S.C. § 717f(e).
[26] *See* Comments of the Natural Gas Supply Association in Response to Notice of Inquiry, Docket No. PL18-1-000 (July 25, 2018); Comments of the Center for Liquefied Natural Gas in Response to Notice of Inquiry, Docket No. PL18-1-000 (July 25, 2018); NGSA 2021 Comments; Comments of the Center for Liquefied Natural Gas in Response to Notice of Inquiry, Docket No. PL18-1-000 (May 26, 2021).
[27] Updated Certificate Policy Statement, 178 FERC ¶ 61,107.
[28] *Id.* at P 52.

determination that a project is needed before analyzing the application.[29] In assessing whether there is need for a project, the Commission recognizes that precedent agreements remain important evidence of need, but, in a departure from past precedent, declares that precedent agreements "may not be sufficient in and of themselves to establish need for the project."[30] The Commission found that it "cannot adequately assess project need without looking at evidence beyond precedent agreements."[31] The Updated Certificate Policy Statement further determines that precedent agreements involving affiliates "will generally be insufficient to demonstrate need."[32]

The Commission also announced that it will weigh the need for a proposed project against four major interests that may be adversely affected by the Commission's approval of the project:

(1) the interests of the applicant's existing customers;
(2) the interests of existing pipeline and their captive customers;
(3) environmental interests; and
(4) the interests of landowners and surrounding communities, including environmental justice communities.[33]

The Updated Certificate Policy Statement provides that the Commission may deny an application based on any of these types of adverse impacts.[34] With respect to environmental interests, the Updated Certificate Policy Statement requires the Commission to consider environmental impacts and potential mitigation not only as part of its environmental review under the National Environmental Policy Act ("NEPA"), but also in its determination under the NGA of whether a project is "required by the public

[29] *Id.* at P 53.
[30] Updated Certificate Policy Statement at P 54.
[31] *Id.*
[32] *Id.* at P 60.
[33] *Id.* at P 62.
[34] *Id.*

convenience and necessity."[35] The Commission "expects applicants to structure their projects to avoid, or minimize, potential adverse environmental impacts."[36] The Updated Certificate Policy Statement further provides that the Commission "expect[s] applicants to propose measures for mitigating impacts" and, should the Commission deem an applicant's proposed mitigation measures inadequate, the Commission "may condition the certificate to require additional mitigation."[37] The Updated Certificate Policy Statement provides that the Commission may deny an application where any adverse impacts of a project cannot be mitigated or minimized.[38] The Updated Certificate Policy Statement applies to all pending applications.

B. Interim GHG Policy Statement

On November 19, 2021, the Commission held a Technical Conference discussing methods natural gas companies may use to mitigate the effects of direct and indirect GHG emissions from NGA Sections 3 and 7 authorizations.[39] NGSA submitted post-Technical Conference comments on January 7, 2022.[40] NGSA explained in its comments that if the Commission moved forward with a policy on GHG emissions mitigation, it should not dictate mitigation for upstream or downstream facilities and activities.[41] NGSA urged the Commission to consider voluntary efforts to reduce environmental impacts and not to create inefficient regulations that would impede the success of ongoing GHG reduction

[35] *Id.* at P 75.
[36] *Id.* at P 74.
[37] Updated Certificate Policy Statement at P 74.
[38] *Id.*
[39] Notice of Technical Conference on Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations, Docket No. PL21-3-000 (Sept. 16, 2021); Notice Inviting Technical Conference Comments, Docket No. PL21-3-000 (Nov. 16, 2021).
[40] Post-Technical Conference Comments of the Natural Gas Supply Ass'n, Docket No. PL21-3-000 (Jan. 7, 2022).
[41] *Id.* at 3-4.

efforts. NGSA further stated that if the Commission pursued mitigation requirements, it should accommodate the broadest set of mitigation measures and offsets possible, prioritize cost-effective measures, and avoid creating a threshold that prevents projects from moving forward.[42]

On February 18, 2022, concurrently with the Updated Certificate Policy Statement, the Commission issued the Interim GHG Policy Statement, explaining how it will evaluate and act on pending applications and assess natural gas infrastructure projects' impacts on climate change.[43] In a major departure from past practice, the Interim GHG Policy Statement requires Commission Staff to prepare an environmental impact statement ("EIS") for any project proposed under NGA Sections 3 or 7 that is estimated to emit 100,000 metric tons per year ("tpy") or more of carbon dioxide equivalent ("CO_2e"), assuming the project is operated at 100% utilization 24 hours per day, 365 days per year, and all gas transported is combusted downstream.[44] However, during the actual preparation of the EIS, the Interim GHG Policy Statement directs Commission Staff to calculate the GHG emissions from a proposed project using "projected utilization rate[s]."[45] The Interim GHG Policy Statement creates a presumption that emissions resulting from the downstream combustion of transported natural gas will be considered indirect impacts and will need to be quantified by Commission Staff in the EIS.[46] The Interim GHG Policy Statement further states that the Commission "may consider the end

[42] *Id.* at 7-8.
[43] *See* Interim GHG Policy Statement at P 1; *see also* Updated Certificate Policy Statement at P 76.
[44] Interim GHG Policy Statement at PP 3, 49, 79 (explaining that "full burn" assumes "the maximum capacity is transported 365 days per year, 24 hours per day and fully combusted downstream.").
[45] *Id.* at PP 29, 44-46; *see also id.* at P 50 (explaining that "in most instances a 100% utilization rate estimate does not accurately capture the project's climate impacts").
[46] *Id.* at P 28 (explaining that Commission Staff's review will include "GHG emissions resulting from construction and operation of the project as well as, in most cases, GHG emissions resulting from the downstream combustion of transported gas") (internal footnote omitted).

use of gas and the impact of natural gas combustion on air pollution as a factor in assessing the public interest."[47] The Interim GHG Policy Statement states that upstream emissions from induced natural gas production will be considered on a case-by-case basis.[48] For authorizations under NGA Section 3, however, the Interim GHG Policy Statement provides that neither upstream nor downstream emissions will be considered by the Commission.[49]

The Interim GHG Policy Statement states that the Commission's priority is for project sponsors to mitigate, "to the greatest extent possible," a project's direct GHG emissions.[50] The Commission states that, when making the public interest determination, it will assess the adequacy of the applicant's proposed mitigation on a case-by-case basis and will consider the project's impact on climate change.[51] Although the Commission stated that it only "encourages" applicants to propose mitigation measures, the Commission nevertheless states that it "may require additional mitigation of a project's direct GHG emissions as a condition of the authorization," if the Commission believes the mitigation proposed by the applicant is inadequate.[52]

The Interim GHG Policy Statement is not limited to a project's *direct* emissions. It "encourage[s] project sponsors to propose[] measures to mitigate the reasonably foreseeable *upstream or downstream* emissions associated with their projects."[53] While the Interim GHG Policy Statement declines to mandate any particular mechanism of mitigation, any form of verification for mitigation, or any level of GHG reduction achieved by mitigation, it states that the Commission may require additional mitigation as a

[47] *Id.* at P 105.
[48] *Id.* at P 31.
[49] Interim GHG Policy Statement at P 31.
[50] *Id.* at P 105.
[51] *Id.* at P 107.
[52] *Id.*
[53] *Id*. at P 106 (emphasis added).

condition of its authorization, or deny an application where mitigation of adverse impacts is not possible.[54]

The Commission states it is seeking comments on "all aspects of the interim policy statement, including, in particular, on the approach to assessing the significance of the proposed project's contribution to climate change."[55] Although the Commission stated that the Interim GHG Policy Statement is subject to revision based on comments, the Commission is applying this policy immediately.[56]

V. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Section 713(c)(1) of the Commission's Rules of Practice and Procedure,[57] NGSA and CLNG provide the following statement of issues and specification of errors:

1. **The Commission erred by requiring applicants for authorization under NGA Sections 3 and 7 to mitigate indirect GHG emissions associated with a project.** Updated Certificate Policy Statement at PP 74-75, 98; Interim GHG Policy Statement at P 106. Neither the NGA nor NEPA authorizes Commission to require mitigation of environmental impacts outside its jurisdiction. The Commission cannot do indirectly that which it lacks authority to do directly. *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (quoting *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"); *cf. 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 ("FPA") what it is otherwise prohibited from achieving directly)).

2. **The Commission erred in the Updated Certificate Policy Statement and the GHG Policy Statement by creating impediments to the development of natural gas infrastructure, in violation of the NGA.** *See NAACP v. FPC*,

[54] *Id.* at PP 111-13.
[55] Interim GHG Policy Statement at P 1.
[56] *Id.*
[57] 18 C.F.R. § 385.713(c)(1).

425 U.S. 662, 669 (1976) (the purpose of which is to "encourage the orderly development of plentiful supplies of natural gas . . . reasonable prices.").

3. **The Commission also violates the "major questions" doctrine by asserting authority to regulate an area outside its jurisdiction.** *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring); *Whitman v. Am. Trucking Ass'ns, Inc.,* 531 US 457, 468 (2001). To the extent Congress has granted authority to regulate GHG emissions, it is to the EPA, not the Commission. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

4. **The Commission erred in the Updated Certificate Policy Statement and Interim GHG Policy Statement by effectively modifying regulations without undertaking notice-and-comment rulemaking, in violation of the APA.** 5 U.S.C. § 553(b)(1)-(3). *See Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (In determining whether a policy statement is a reviewable final rule under the APA, courts look to whether the "rights or obligations have been determined" by the policy statement, or whether "legal consequences flow from it.") (citation omitted). The Policy Statements are arbitrary and capricious, effectively modify regulations governing when the Commission will prepare an EIS on a project application, and requiring applicants to mitigate GHG emissions in order to have their applications approved.

5. **The Commission erred by failing to engage in reasoned decision making in setting the "significance threshold" for preparing an EIS at 100,000 tpy CO_2e without providing any scientific or evidentiary basis.** *See Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983) (The APA requires an agency to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made.").

6. **The Commission erred by arbitrarily and capriciously modifying its policy and finding that precedent agreements with affiliated shippers are not probative of need for a project.** Updated Certificate Policy Statement at P 60. The Commission failed to respond to comments demonstrating that different types of affiliate precedent agreements differ in their probative value, misapplying case law, and failing to provide a reasoned explanation for its decision. *See Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (an agency order is "legally infirm" if it "misreads our judicial precedent"); *Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (An agency's failure to respond to relevant and significant public comments generally "demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'") (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36

(D.C. Cir. 1977); *Pub. Citizen, Inc. v. FERC*, 7 F.4th 1177, 1199-200 (D.C. Cir. 2021) (agency action is arbitrary and capricious if it "'fail[s] to consider an important aspect of the problem'") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

NGSA and CLNG also provide the following statement of issues and specification of errors on which NGSA and CLNG seek rehearing or, in the alternative, clarification:

7. The Commission erred by improperly relying on a significance determination, a concept from NEPA used to determine the appropriate level of NEPA review, *see* 40 C.F.R. § 1501.3 (2021), for GHG emissions as part of its substantive decision making under the NGA. *See* Interim GHG Policy Statement at P 79.

8. The Commission erred by determining to apply a so-called "full-burn" analysis to calculate indirect GHG emissions attributable to a project to determine whether it has a "significant" effect on the environment and, therefore, requires preparation of an EIS, rather than considering the anticipated level of indirect GHG emissions based on actual usage of the project or other offsets when it evaluates a project's actual environmental impacts. Interim GHG Policy Statement at PP 3, 49-50. This analysis is internally inconsistent and not the product of reasoned decision-making.

9. The Commission erred by failing to clearly state whether it will require mitigation of GHG emissions that occur upstream or downstream of a jurisdictional project. Interim GHG Policy Statement at P 106. The Commission lacks jurisdiction to require mitigation of these "indirect" GHG emissions. The Commission should state that it will not impose conditions that require an authorization holder to mitigate indirect GHG emissions or require the applicant to propose such mitigation measures.

10. The Commission erred by failing to identify what level of mitigation of GHG emissions will be required to approve applications for pipeline and LNG projects. Interim GHG Policy Statement at P 104. The Commission should clarify its statement that its "priority is for project sponsors to mitigate, to the greatest extent possible, a project's direct GHG emissions" (*id.* at P 105) does not mean it expects applicants to mitigate all or nearly all direct GHG emissions for every project, or that it will deny applications that do not include measures to mitigate GHG emissions.

11. The Commission erred by failing to explain what it means that a pipeline company may recover the cost for GHG mitigation measures in its rates. The Commission should clarify the extent of the allowable recovery for these costs,

and the mechanism the Commission expects applicants to propose to recover these costs. Interim GHG Policy Statement at P 128.

12. The Commission erred by creating a threshold question asking whether a project is "needed," before it applies the statutory question of whether a project "is or will be required by the present or future public convenience and necessity," without explaining what evidence satisfies this threshold. Updated Certificate Policy Statement at P 61; 15 U.S.C. § 717f(e).

13. The Commission erred by devaluing precedent agreements between pipeline companies and unaffiliated shippers in its test for evaluating project applications. Updated Certificate Policy Statement at P 54. The Commission failed to provide reasoned explanation for this policy.

14. The Commission erred by requiring project applicants to provide information concerning "circumstances surrounding the precedent agreements," as part of its determination of need for a project. Updated Certificate Policy Statement at P 54. The Commission failed to provide a reasoned explanation for this policy, and it is irrelevant to whether a project is required by the present or future public convenience and necessity.

15. The Commission erred by determining it will consider alternatives to projects in assessing the strength of applications for new project applications. Updated Certificate Policy Statement at P 59. Alternatives to the end-use of a project are beyond the Commission's jurisdiction and irrelevant to whether a project is required by the present or future public convenience and necessity.

16. The Commission erred by implementing new requirements for the consideration of environmental justice for evaluating project applications without explaining how they will inform its determination of whether a project is required by the present or future public convenience and necessity. Updated Certificate Policy Statement at PP 86-93.

VI. REQUEST FOR REHEARING

A. The Commission Lacks Authority to Attach Conditions to Require Mitigation of Upstream and Downstream Indirect GHG Emissions.

The Commission is a creature of statute.[58] The NGA defines the boundaries of the Commission's jurisdiction. "[I]f there is no statute conferring authority, FERC has none."[59] The NGA authorizes the Commission to regulate the transportation of natural gas in interstate commerce. "Congress deliberately chose not to regulate 'the entire natural-gas field to the limit of constitutional power' but instead designated the areas to be regulated and the areas in which FERC cannot regulate."[60] The NGA expressly precludes the Commission from regulating local distribution or production and gathering.[61] Thus, the Commission lacks authority under the NGA to attach conditions on Section 3 and Section 7 authorizations to mitigate upstream and downstream indirect GHG emissions. The Commission's actions in the Policy Statements are outside its statutory authority and *ultra vires*.

The Interim GHG Policy Statement "encourages each *project sponsor* to propose measures to mitigate the impacts of reasonably foreseeable GHG emissions associated with its proposed project."[62] The Commission, for its part, "will consider such mitigation proposals in assessing the extent of a project's adverse impacts."[63] This statement is not as innocuous as it may seem. Coupled with the Commission's declaration in the Updated

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[58] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) ("As a federal agency, FERC is a 'creature of statute,' having 'no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress.'" (quoting *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis added)).
[59] *Id*. (citing *Michigan*, 268 F.3d 1075; *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).
[60] *Tex. Pipeline Ass'n v. FERC*, 661 F.3d 258, 259 (5th Cir. 2011) (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 510 (1989) (quoting *FPC v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 502-03 (1949)).
[61] 15 U.S.C. § 717(b).
[62] Interim GHG Policy Statement at P 104.
[63] *Id.*

Certificate Policy Statement that it "may deny an application based on any . . . adverse impacts," including GHG impacts, this is properly viewed as a directive and not a mere suggestion.[64] The Commission does not state the consequences of a failure to mitigate, but they are all too obvious: the Commission will find that the project has unmitigated adverse environmental impacts, and may deny its authorization on these grounds alone. But, "[t]his is not encouragement. This is command."[65] Why else would the Commission devote such a substantial portion of its Interim GHG Policy Statement to discussing and describing mitigation methods?[66] The clear purpose and structure of the NGA and the courts' interpretations do not grant the Commission the power to impose such conditions far outside its jurisdiction. More to the point, other federal and state agencies, pursuant to other federal and state statutes, are actively engaged in assessing and regulating the sources of GHG emissions; it is not the job of the Commission.

1. The Commission Lacks Authority to Order Mitigation of Indirect GHG Emissions.

The plain language of the NGA and longstanding court interpretations of the statute make clear that the Commission lacks authority to condition its certificate authorizations on mitigating or compensating for indirect GHG emissions. The NGA's genesis is in 1927, when the U.S. Supreme Court ruled that the 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.[67] As a result, interstate pipelines were entirely unregulated. At the direction of Congress, and after seven years of study and 84 monthly

[64] Updated Certificate Policy Statement at P 62.
[65] Interim GHG Policy Statement, Danly Dissent at P 47.
[66] Interim GHG Policy Statement at PP 113-28.
[67] *See Pub. Utils. Comm'n of R.I. v. Attelboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

reports to Congress, the Federal Trade Commission ("FTC") laid out its summaries and conclusions on the interstate natural gas pipeline industry. The FTC identified several concerns with the industry and recommended federal regulation of interstate natural gas pipelines.[68] The result was 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."[69] However, the Commission's authority was limited. Section 1(b) of the NGA explicitly rejects regulation by the Commission of "the local distribution of natural gas or to the facilities used for such distribution or to the production and gathering of natural gas."[70] Section 1(c) further circumscribes the Commission's jurisdiction by exempting from NGA jurisdiction certain natural gas transportation and facilities in interstate commerce, declaring such activities and facilities to be "matters primarily of local concern," so long as they were regulated under state law.[71]

The Supreme Court has explained the purpose of the NGA "was to protect consumers against exploitation at the hands of natural gas companies,"[72] and "to underwrite

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[68] *See* Final Report of the Federal Trade Commission to the Senate of the United States, Report 84-A, 70th Cong. 609-12 (1st Sess. 1936).
[69] 15 U.S.C. § 717(a).
[70] *Id.* § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce . . . 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.").
[71] *Id.* § 717(c) ("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.").
[72] *FPC v. Hope Nat. Gas Co*., 320 U.S. 591, 610 (1944).

just and reasonable rates to the consumers of natural gas."[73] Courts have recognized that with the NGA, "[t]hree things and three only Congress drew within its own regulatory power. . . . 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."[74] In *NAACP v. FPC*, the Supreme Court—in an 8-0 opinion—discussed, in more general terms, the "public interest" in the context of the NGA.

> [I]n order to give content and meaning to the words "public interest" as used in the Power and Gas Acts, it is necessary to look to the purposes for which the Acts were adopted. In the case of the Power and Gas Acts it is clear that ***the principal purpose of those Acts was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.*** While there are undoubtedly other subsidiary purposes contained in these Acts, the parties point to nothing in the Acts or their legislative histories to indicate that the elimination of employment discrimination was one of the purposes that Congress had in mind when it enacted this legislation. The use of the words "public interest" in the Gas and Power Acts is not a directive to the Commission to seek to eradicate discrimination, but, rather, is a charge ***to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates.***[75]

While the Court acknowledged there were subsidiary purposes of the NGA and the FPA, including "conservation, environmental, and antitrust questions," these issues remain subsidiary to the primary purposes of the NGA.[76]

The regulation of upstream and downstream GHG emissions associated with interstate pipeline facilities is clearly outside the jurisdiction of the Commission. NGA Section 7(e) authorizes the Commission to issue a "certificate of public convenience and

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[73] *Atl. Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959).
[74] *Tex. Pipeline*, 661 F.3d at 263 (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 516 (1947)).
[75] *NAACP*, 425 U.S. at 669-70 (emphasis added) (citations omitted).
[76] *Id*. at n.6. Notably, the statutory provisions and cases cited by the Supreme Court do not support the proposition that "environmental questions" are one of the NGA's "subsidiary purposes." The only environmental provisions cited by the Court are from Part I of the FPA, which regulations pertain to non-federal hydropower facilities, not the NGA. *Id*. (citing 16 U.S.C. § 803(a)).

necessity" 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 that the activity proposed "is or will be required by the present or future public convenience and necessity."[77] In addition, Section 7(e) provides that "[t]he Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the *public convenience and necessity may require*."[78] The Commission's NGA conditioning authority, therefore, is directly tied to the purpose and intent of the NGA and the Commission's inherent authority thereunder.

Recent cases from the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") do not alter the extent of the Commission's jurisdiction and its lack of authority to mitigate indirect emissions. The Commission cites *Sabal Trail* for the proposition it has authority to impose conditions to mitigate indirect GHG emissions.[79] In that case, the D.C. Circuit was presented with the question of "whether, and to what extent, the EIS for [the] pipeline project needed to discuss [the] "downstream" effects of the pipelines and their cargo."[80] The court held that GHG emissions were an indirect effect of authorizing the project and "conclude[d] that at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible."[81] The court's statement that the Commission had "legal authority to mitigate" those emissions, which the Commission unduly relies upon in the Policy Statements, did not form a necessary part of the court's conclusion.[82] It was *dicta*. The entire case was framed around

[77] 15 U.S.C. § 717f(e).
[78] *Id.* (emphasis added).
[79] Interim GHG Policy Statement at P 23 n.52 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("*Sabal Trail*").
[80] *Sabal Trail*, 867 F.3d at 1371.
[81] *Id.*
[82] *Id.* at 1374.

the Commission's responsibilities under NEPA, and not its statutory authority under the NGA. Dissenting, Judge Brown pointed out, "nothing in the text of [the NGA or NEPA] 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."[83] The U.S. Court of Appeals for the Eleventh Circuit also heavily criticized the D.C. Circuit's analysis in *Sabal Trail*, noting the court "fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision" and "breez[es] past other statutory limits and precedents."[84] The Commission therefore unreasonably relies on an expansive interpretation of *Sabal Trail*.

Other cases have more directly addressed the extent of the Commission's conditioning authority under NGA Section 7. The D.C. Circuit has explained that "[t]he 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 unconditional form, already in the public convenience and necessity."[85] Because the Commission's direct authority under the NGA does not extend upstream to natural gas production and gathering or downstream to local distribution and end-use, the Commission is powerless to mandate conditions upon upstream production and downstream consumption of gas as part of its certificate authorizations. Requiring the pipeline operator to mitigate those impacts is

[83] *Id.* at 1382 (J. Brown, concurring in part and dissenting in part).
[84] *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) (citing *Sabal Trail*, 867 F.3d at 1380-81.)
[85] *Nat'l Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (quoting *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"); *cf. Richmond Power & Light v. FERC*, 574 F.2d 610, 620 (D.C. Cir. 1978) (the Commission may not achieve indirectly through conditioning power of the FPA what it is otherwise prohibited from achieving directly)).

clearly inconsistent with the powers granted to the Commission by Congress and the purpose and intent of the NGA.[86]

No other sections of the NGA otherwise invest the Commission with this conditioning authority. NGA Section 16, which describes the administrative powers of the Commission, does not grant the Commission any independent authority that it does not already have under the substantive sections of the NGA or authorize the Commission to take actions that it otherwise may not do under other sections of the NGA. Rather, Section 16 merely provides a vehicle by which the Commission may perform its express regulatory functions—which is to provide for plentiful supplies of natural gas at reasonable prices—and it grants no substantive authority to require mitigation or compel project applicants to propose voluntary mitigation.[87] Therefore, nothing in the NGA authorizes the Commission to attach conditions to mitigate for GHG emissions.

2. NEPA Does Not Authorize the Commission to Mitigate Indirect GHG Emissions.

Nor does NEPA provide statutory authority for the Commission to attach conditions to mitigate for GHG emissions, absent enabling authority in the NGA. The NGA preceded the enactment of NEPA in 1969 by over 30 years, and the two statutes have very different purposes. As explained above, the purpose of the NGA is "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[88] NEPA is a disclosure statute that, as the Supreme Court explained, "has twin aims. First, it 'places upon an agency the obligation to consider every significant aspect of the environmental

[86] While Section 3(e)(3)(A) allows the Commission to attach conditions to its approval of LNG terminal facilities, this authority is likewise limited by the authority granted to the Commission in the NGA. *See* 15 U.S.C. § 717b(e)(3)(A).
[87] *See FPC v. Texaco Inc*., 417 U.S. 380 (1974); *United Gas Pipe Line Co. v. FPC*, 385 U.S. 83 (1966).
[88] *NAACP*, 425 U.S. at 670.

impact of a proposed action.' . . . Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decision making process."[89]

While NEPA requires informed decision-making, "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[90] "NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."[91] As Chairman Glick recognized, NEPA "does not dictate particular decisional outcomes."[92] Rather, NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[93]

Significantly, "NEPA does not mandate action which goes beyond the agency's organic jurisdiction."[94] NEPA requires agencies only to consider those impacts that have "'a reasonably close causal relationship' between the environmental effect and the alleged cause," similar to the "familiar doctrine of proximate cause in tort law."[95] Significantly, "courts 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."[96]

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[89] *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (quoting *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 553 (1978)).
[90] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).
[91] *DOT v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004).
[92] *Annova LNG Common Infrastructure, LLC*, 170 FERC ¶ 61,140 (2020) (Glick Dissent at P 28) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015)), *pet. for review denied*, *Ecinos Para El Bienestar De La Comunidad Costera v. FERC*, Nos. 20-1045, *et al.*, 2021 WL 3716769 (D.C. Cir. Aug. 3, 2021).
[93] *Id*. (quoting *Robertson*, 490 U.S. at 351).
[94] *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973).
[95] *Pub. Citizen*, 541 U.S. at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)).
[96] *Id*. (quoting *Metro. Edison*, 460 U.S. at 774).

The Commission's new Policy Statements fail this test. As explained above, Congress expressly limited the Commission's authority to the sale and transportation of natural gas in interstate and foreign commerce, and explicitly carved out production, gathering, and local distribution from Commission jurisdiction. NEPA cannot be used to expand the Commission's powers—and allow it to impose conditions to mitigate GHG emissions—that the Commission does not otherwise have under the NGA.

Participants in the Commission's Technical Conference on GHG Emissions made this clear, but the Commission's Policy Statements failed to address these arguments. Former Chairman Joseph T. Kelliher expressed this view at the Technical Conference, explaining that it cannot "reasonably be argued that the Commission's conditioning authority is unlimited. It is too cabined by the purposes of the [NGA]."[97] Chairman Kelliher also pointed out the inherent inconsistency between imposing conditions that require pipeline companies to mitigate for GHG emissions and the very purpose of the NGA, explaining that "[i]mposing mitigation discourages or forestalls pipeline development, the policy is directly contrary to the principal purpose of the [NGA] and must be set aside."[98]

The Policy Statements not only fail to grapple with these arguments; they go to great lengths to avoid them. According to the Commission, "[t]he question is not whether the Commission has regulatory authority over downstream emissions."[99] Rather, the Commission flips the analysis on its head, arguing that because, under NEPA, the Commission has an obligation to look at indirect emissions as an effect of a project, it must

[97] Greenhouse Gas Mitigation: Natural Gas Act Sections 3 and 7 Authorizations, Docket No. PL21-3-000, Transcript of Technical Video Conference, at 22:11-14 (Nov. 19, 2021; Dec. 22, 2021).
[98] *Id*. at 22:9-11.
[99] Interim GHG Policy Statement at P 39.

be empowered to act on that information.[100] According to the Commission, it must, *ipso facto*, have authority to regulate these indirect GHG emissions. But that logic is circular, and sidesteps the valid questions of the extent of Commission jurisdiction. Under this rubric, any potential direct or indirect effect the Commission looks at under NEPA may be used as a justification for denying or conditioning a proposed project. In other words, under this interpretation, the Commission may ignore the dictates of Congress and its narrow authority under the NGA and deny projects on any unwarranted grounds. That is wholly inconsistent with the purpose and intent of the NGA, as detailed above, and further inconsistent with the "major questions" doctrine, as explained below.

Under the Commission's new view, its authority is virtually unlimited. For example, the Commission's NEPA regulations require a project sponsor to disclose whether existing housing is sufficient to meet the needs of any additional population that would relocate to the area temporarily to construct the project.[101] Under the Commission's rationale, because it considers impacts on housing under NEPA, it must have authority to order mitigation, so it could presumably order the pipeline to construct new permanent housing instead of the ordinary practice of housing pipeline workers in hotels temporarily. The Commission's jurisdiction cannot be so broadly construed.[102]

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[100] *Id*. (citing *Sabal Trail*, 867 F.3d at 1372-73).

[101] *See* 18 C.F.R. § 380.12(g)(4) and (5) requiring applicants to "[d]etermine whether existing housing within the impact area is sufficient to meet the needs of the additional population" and "[d]escribe the number and types of residences and businesses that would be displaced by the project, procedures to be used to acquire these properties, and types and amounts of relocation assistance payments."

[102] *See Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) (holding that EPA's new interpretation of the Prevention of Significant Deterioration ("PSD") and Title V was "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

To support this broad expansion of its conditioning authoring, the Commission cites cases in which it has imposed mitigation.[103] But the citations do not support the mitigation of indirect GHG emissions. All of the cases cited by the Commission require mitigation of the *direct* effects from project construction and operation, and not upstream or downstream impacts. There is a significant difference between requiring mitigation of impacts directly associated with the jurisdictional pipeline and mitigation of impacts from non-jurisdictional facilities, which the Commission lacks the authority to regulate.

3. EPA and States Already Regulate Upstream and Downstream GHG Emissions Under the CAA and Other Statutes.

Indirect upstream and downstream emissions are already regulated by multiple layers of federal and often state regulation. The Commission's attempt to influence and regulate these emissions is far outside its jurisdiction. Congress imbued the Environmental Protection Agency ("EPA") and states with limited authority to regulate air emissions, including GHGs, through the Clean Air Act ("CAA").[104] The CAA establishes an all-encompassing regulatory program, supervised by the EPA, to address comprehensively interstate air pollution.[105] As the Supreme Court explained, "Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."[106] Congress recently reaffirmed the EPA's authority to regulate methane

[103] *See* Interim GHG Policy Statement at P 27 n.69.
[104] NGSA and CLNG note that EPA recently filed comments as part of the Commission's NEPA review of pipeline and LNG projects, urging the Commission to, among other things, consider practicable mitigation measures to reduce GHG emissions. *See* Comments of EPA, Docket Nos. CP22-21-000; CP22-22-000 (Mar. 10, 2022). Such comments do not confer jurisdiction on FERC.
[105] *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) ("EPA has the statutory authority to regulate the emission of such gases from new motor vehicles").
[106] *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011).

emissions from the oil and gas sector by disapproving a previous EPA rule that would have rolled back EPA's methane regulation.[107]

States also play an important role in regulating air emissions under the CAA. Congress intended that states would have a significant role in establishing measures to mitigate emissions from stationary sources.[108] The CAA acknowledges state authority to issue permits to regulate stationary sources related to upstream and downstream activities.[109] CAA Section 111(f) also dictates that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the [EPA] Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[110] The Commission, on the other hand, has no role to play in the CAA permitting process, other than its general evaluation of environmental impacts of pipeline projects under NEPA. Pursuant to the CAA, states have developed specific standards regulating sources of emissions, including from FERC-regulated compressor stations and LNG facilities. The Commission's "encouragement" of mitigation measures fails to acknowledge the role of EPA and the states in regulating these sources of emissions. The Commission's authority to assess environmental impacts generally under NEPA and to determine whether a project is in the public interest under the NGA does not provide it with jurisdiction Congress did not grant it by statute.[111]

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[107] Joint Resolution Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Environmental Protection Agency relating to "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," Pub. L. No. 117-23, 135 Stat. 295 (June 30, 2021).

[108] 42 U.S.C. § 7401(a)(3) ("air pollution control at its source is the primary responsibility of States and local governments").

[109] *See id.* § 7661e(a).

[110] *Id.* § 7411(f)(3).

[111] *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("[I]t is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'") (quoting *Townsend v. Little*, 109 U.S. 504, 512 (1883)).

EPA has already taken significant steps to regulate GHG emissions from pipeline facilities and other sources. EPA recently announced a proposed rule under the CAA to limit emissions of methane from facilities in the oil and natural gas sector.[112] The proposed regulations would reach hundreds of thousands of new and existing facilities in production, gathering, processing, and transmission and storage.[113] EPA is exercising this authority under Section 111 of the CAA through the routine rulemaking process in order to establish New Source Performance Standards for new and modified stationary sources of air pollutants and emission guidelines for existing sources.[114] If enacted, EPA estimates the rule would result in significant reductions in methane emissions from the oil and natural gas sectors, including emissions from activities upstream and downstream of Commission-jurisdictional pipeline projects.

Many states have also taken significant steps to regulate GHG emissions by enacting laws aimed at reducing GHG emissions. Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, and Virginia participate in the Regional Greenhouse Gas Initiative ("RGGI"), which is a state-led effort to cap and reduce power sector CO_2 emissions. Participating states have established a regional cap on CO_2 emissions from power plants and over time the cap declines, reducing emissions. As part of joining RGGI, each member state passed laws or promulgated regulations to implement certain portions of the RGGI programs. Since its inception, CO_2 emissions in RGGI states have been reduced by more than 50 percent, which

[112] Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021).
[113] *Id*. at 63,117 ("The proposed [New Source Performance Standards] described above would apply to new, modified, and reconstructed emission sources across the Crude Oil and Natural Gas source category, including the production, processing, transmission, and storage segments . . . .").
[114] *Id*. at 63,113.

is twice as fast as the nation as a whole.[115] Many Commission-regulated pipelines operate extensive facilities in RGGI states and serve customers that are subject to the RGGI cap and trade program.

In addition, New York recently passed its Climate Leadership and Community Protect Act of 2019 ("CLCPA"), which requires New York to reduce economy-wide GHG emissions 40 percent by 2030 and no less than 85 percent by 2050 from 1990 levels.[116] New York recently announced proposed changes in its air permitting process that requires the state permitting agencies to consider these emissions targets in whether to issue permits.[117] Under the CLCPA, New York is moving to enforce comprehensively its GHG emissions reductions targets through its air permitting process, which includes regulating direct emissions from pipeline facilities and other sources of air emissions.

These are just some examples of federal and state laws that specifically regulate GHG emissions, both directly from Commission-jurisdictional pipeline facilities and from sources upstream and downstream of the pipeline facilities. These facilities' emissions are subject to extensive regulation in one form or another from the EPA and states. Clearly the Commission lacks authority to step in and regulate activities and facilities upstream and downstream of the pipeline facilities under its jurisdiction. This is consistent with the arrangement Congress envisioned when it limited the jurisdiction of the Commission.

Moreover, the Commission's existing NEPA regulations, which are not discussed in the Interim GHG Policy Statement, explicitly recognize the role of state and local

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[115] *See* Regional Greenhouse Gas Initiative Fact Sheet, at 1 (updated Sept. 2021), https://www.rggi.org/sites/default/files/Uploads/Fact%20Sheets/RGGI_101_Factsheet.pdf.

[116] *See* N.Y. State Sen. Bill S6599, https://legislation.nysenate.gov/pdf/bills/2019/S6599.

[117] N.Y. State Dep't of Envtl. Conservation, DEC Program Policy, DAR-21, The Climate Leadership and Community Protection Act and Air Permit Applications (last accessed Mar. 18, 2022), https://www.dec.ny.gov/docs/air_pdf/dar21.pdf.

governments to regulate emissions.[118] In preparing Resource Report 9, which addresses air quality impacts and is required for all pipeline and LNG projects, applicants are required to estimate the impact of their proposed facilities on air quality and "how existing regulatory standards would be met."[119] In other contexts besides GHG emissions, the Commission regularly acknowledges that operating facilities in compliance with EPA or state air quality permits means that projects do not significantly impact air quality.[120] The Policy Statements are devoid of discussion as to why the Commission recognizes the authority of other agencies in all matters except for GHG emissions. While other agencies or state governments may not regulate GHG emissions in a manner satisfactory to the Commission, that does not create jurisdiction for the Commission.

4. The Commission's Attempt to Regulate Upstream and Downstream GHG Emissions Violates the Major Questions Doctrine.

As Commissioner Christie points out in his dissent, the Policy Statements also violate the "major questions" doctrine.[121] Regulation of GHG emissions is a major question of public policy, and if Congress intended to grant the Commission jurisdiction in this area, it would have said so explicitly.[122]

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[118] *See* 18 C.F.R. Part 380.
[119] *Id.* § 380.12(k)(3).
[120] *See Transcon. Gas Pipe Line Co.*, 167 FERC ¶ 61,110, at P 34 (2019), *reh'g denied*, 171 FERC ¶ 61,031 (2020); *Midship Pipeline Co.*, 164 FERC ¶ 61,103, at P 77 (2018).
[121] *Nat'l Fed. of Indep. Bus. v. DOL*, ___ U.S. ___, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring). *See also Whitman v. Am. Trucking Ass'ns.*, 531 US 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.").
[122] *See Am. Elec. Power*, 564 U.S. at 426; *id.* at 428 ("Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions"). *See also U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 422 (Kavanaugh, J., dissenting) ("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").

The purpose and structure of the NGA illustrates that Congress did not give the Commission authority to regulate upstream and downstream GHG emissions. The NGA was passed to encourage the orderly development of the interstate natural gas pipeline industry.[123] For over 80 years, under multiple Commissions, that goal has been paramount. However, the Commission's jurisdiction is limited to regulating the transportation of gas in interstate commerce.[124] Before and after the gas enters interstate commerce, the Commission has no authority.[125] Thus, attempts to require mitigation measures of upstream and downstream facilities are beyond this Commission's jurisdiction.

NGSA and CLNG do not oppose efforts to reduce GHG emissions. However, as John Adams was the first to point out, we are "a government of laws, not of men."[126] The Commission's enabling legislation does not authorize it to regulate or compel mitigation of upstream or downstream GHG emissions. It is up to Congress to determine national policy on this major question and until Congress authorizes the Commission to regulate GHG emissions, it cannot do so.

B. The Policy Statements Have the Effect of Final Rules Issued Without Notices of Proposed Rulemakings, in Violation of the APA, and Are Arbitrary and Capricious.

The Commission impermissibly promulgated new substantive rules impacting pending and future applicants seeking to construct natural gas infrastructure under the NGA. In particular, the Commission's Interim GHG Policy Statement has an immediate binding effect on all stakeholders in Section 3 and 7 proceedings by mandating time-

[123] *NAACP*, 425 U.S. at 669-70.
[124] 15 U.S.C. § 717(b).
[125] *See id*. § 717(c).
[126] IV, Charles Francis Adams, *The Works of John Adams: Second President of the United States*, "Novanglus Papers," No. 7, p. 106 (Charles C. Little and James Brown eds., 1851).

consuming and expensive EISs for nearly all Commission-regulated LNG and pipeline projects. Furthermore, the Commission's essential requirement that applicants propose measures to mitigate GHG emissions adds new layers of costly, substantive, and binding requirements on applicants. The Certificate Policy Statement applies to all pending applications. Properly viewed in this way, these are not mere "press release[s],"[127] but are substantive rulemakings by another name. Such actions violate the APA and are "deeply unfair" to pending and future applicants.[128]

The APA requires that in promulgating new rules, the Commission must publish a notice of proposed rulemaking in the *Federal Register*, containing:

> (1) a statement of the time, place, and nature of public rule making proceedings;
> (2) reference to the legal authority under which the rule is proposed; and
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.[129]

After providing notice, the agency must "give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments."[130] In contrast to rulemakings, an agency is not required to undertake notice-and-comment procedures to issue "general statements of policy."[131] As described by the courts, policy statements are "like a press release, [which] presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications."[132] The notice and comment requirements are not "mere procedural

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[127] *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974).
[128] Interim GHG Policy Statement, Christie Dissent at P 49; *see also Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2421 (2019) (noting that, as it relates to deference to an agency's interpretation of its own regulations, "deference turns on whether an agency's interpretation creates unfair surprise or upsets reliance interests").
[129] 5 U.S.C. § 553(b)(1)-(3).
[130] *Id.* § 553(c).
[131] *Id.* § 553(b)(A).
[132] *Pac. Gas & Elec.*, 506 F.2d at 38.

niceties,"[133] but serve the important purpose of "reintroduc[ing] public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies."[134]

In determining whether a policy statement establishes a binding precedent and is a reviewable final agency action under the APA, courts look to whether the "rights or obligations have been determined" by the policy statement, or whether "legal consequences flow from it."[135] Stated differently, courts will ask whether the policy statement "genuinely leaves the agency and its decision-makers free to exercise discretion."[136] While the courts will consider an agency's own characterization of a particular action, the primary focus is whether the action "has binding effect on agency discretion or severely restricts it."[137] Further, courts have looked for mandatory language to determine whether an agency's action binds it and accordingly gives rise to legal consequences. In some cases, "the mandatory language of a document alone can be sufficient to render it binding."[138]

While the Commission's "normal practice is to dismiss requests for rehearing of policy statements," the Commission must grant rehearing here because it has impermissibly engaged in substantive rulemaking, and the Commission's traditional approach to review with respect to policy statements does not apply.[139] In past policy

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[133] *Florida v. Dep't of Health & Human Servs.*, 19 F.4th 1271, 1304 (11th Cir. 2021) (Lagoa, J., dissenting).
[134] *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980).
[135] *Texas v. EEOC*, 933 F.3d 433, 441 (5th Cir. 2019) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).
[136] *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015) (citations omitted).
[137] *Id.* ("While mindful but suspicious of the agency's own characterization, we . . . focus[ ] primarily on whether the rule has binding effect on agency discretion or severely restricts it.") (citations omitted).
[138] *Texas v. EEOC*, 933 F.3d at 441-42 (quoting *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002)); *Cf. Cement Kiln Recycling Coal. v. EPA*, 493 F.3d 207, 227 (D.C. Cir. 2007) (noting that the policy's "pages are replete with words of suggestion: its provisions are described as 'recommendations,' [ ] that permitting authorities are 'encouraged' to 'consider.'") (internal alterations and citations omitted); *see also Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) ("[A] document that reads like an edict is likely binding, while one riddled with caveats is not.").
[139] *See, e.g.*, *Inquiry Regarding Income Tax Allowance*, 112 FERC ¶ 61,203, at P 4 (2005); *see Project Decommissioning at Relicensing*, 70 FERC ¶ 61,151, at p. 61,449 (1995).

statements, the Commission has "provide[d] only notice of the Commission's general views and intentions" and "[did] not apply those views and intentions to the specific facts of any particular case" or "resolve any specific case or controversy."[140] Here, by contrast, the Commission has set a threshold for determining whether GHG emissions are significant under NEPA, and imposed new requirements on applicants to build pipeline and LNG projects that apply to all pending and future applications. The Commission should grant rehearing of these Policy Statements immediately; there is no reason to wait until they have been applied in specific cases because the Commission has left no room for discretion. Indeed, Chairman Glick has stated that some aspects of the Policy Statements require reconsideration and clarification.[141] The recognized need to issue clarifications demonstrates that these are not "policies;" they are requirements effective from the date of the Policy Statements.

Both Policy Statements have the impact of legislative rules, modify existing regulations, disregard decades of precedent, and lack any reasoned connection between the facts found and the choices made. In addition to being an arbitrary and capricious exercise of executive power, the Commission's decision to issue these binding mandates in the absence of notice-and-comment rulemaking renders these rules *per se* invalid.

1. The Policy Statements Have the Effect of Binding Final Rules.

The two Policy Statements are substantive final rules because they are binding upon all NGA Section 3 and 7 applicants. Despite attempting to hide behind "encouragements"

[140] *Project Decommission at Relicensing*, 70 FERC at p. 61,450.
[141] *See, e.g.*, S&P Global, *New FERC gas policy creates confusion for developers; Senate to review* (Feb. 28, 2022) ("S&P Global Feb. 2022 Press Release"), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/new-ferc-gas-policy-creates-confusion-for-developers-senate-to-review-69023143.

to certificate applicants, the Policy Statements establish mandatory directives and modify the Commission's existing regulations and long-standing precedent.

The Interim GHG Policy Statement provides that "Commission staff *will* apply the 100% utilization or 'full burn' rate" in determining whether to prepare an EIS;[142] that "Commission staff *will* proceed with the preparation of an EIS, if the proposed project may result in 100,000 [tpy] of CO_2e or more[]";[143] that "the Commission *is establishing* a significance threshold of 100,000 [tpy] of CO_2e";[144] and that "[a] project with estimated emissions of 100,000 [tpy] of CO_2e or greater *will be presumed* to have a significant effect[.]"[145] These clear pronouncements leave no room for discretion by Commission Staff, for example, to prepare anything other than an EIS for a project exceeding the 100,000 tpy CO_2e threshold—which, by the Commission's own admission, includes the vast majority of projects.[146] No entity reading these pronouncements would believe that they "are free to ignore it."[147] The Commission does this without any effort to reconcile these requirements with its existing environmental regulations, which already discuss when an EIS is required.

With respect to mitigation of GHG emissions, the Interim GHG Policy Statement repeatedly "encourages"[148] project applicants to propose mitigation of GHG impacts, but

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[142] Interim GHG Policy Statement at PP 3, 79 (emphasis added).
[143] *Id.* (emphasis added).
[144] *Id.* at P 79; *see also id.* at P 87 ("We are establishing a uniform GHG emissions threshold . . . .").
[145] Interim GHG Policy Statement at P 81 (emphasis added).
[146] *See id.* at P 89.
[147] *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (noting that a Final Guidance from EPA "does not impose any requirements in order to obtain a permit or license," that it "imposes no obligations or prohibitions on regulated entities" and that "[s]tate permitting authorities are 'free to ignore it'."); *see also Ass'n of Flight Attendants*, 785 F.3d at 717 (finding that the challenged notice was a general statement of agency policy because "airlines 'are free to ignore' the Notice.") (quoting *Nat'l Mining Ass'n*, 758 F.3d at 252).
[148] *See, e.g.*, Interim GHG Policy Statement at PP 106, 111.

it is clear from the Policy Statements that applicants must heed this directive. After stating that applicants are encouraged to propose mitigation of GHG and climate impacts, the Interim GHG Policy Statement goes on to state that "the Commission *may require additional* mitigation of a project's direct GHG emissions as a condition of the authorization, should the Commission deem a project sponsor's proposed mitigation inadequate to support the public interest determination."[149]

However, contradicting the "optional" language the Commission used in the Interim GHG Policy Statement, the Updated Certificate Policy Statement provides that the Commission will "*expect* applicants to propose measures for mitigating impacts" and "may also *deny* an application" if the adverse impacts cannot be mitigated.[150] The Commission then devotes pages of discussion to describing acceptable mitigation measures. Because the Commission *expects* applicants to propose mitigation measures, may *require* additional mitigation, and may *deny* an application where mitigation is not possible, the Policy Statements cannot be considered non-binding general statements of policy that applicants are, in any way, "free to ignore."

Similar disguised requirements appear elsewhere throughout the Updated Certificate Policy Statement.[151] The Commission "encourage[s] applicants to provide information detailing how the gas transported by the project will be used."[152] Yet the Commission immediately follows this by stating that "[t]he absence of this information may prevent an applicant from meeting its burden to demonstrate that a project is

[149] *Id.* at P 107 (emphasis added).
[150] Updated Certificate Policy Statement at P 74 (emphasis added).
[151] *See, e.g.*, Updated Certificate Policy Statement at P 55.
[152] *Id.*

needed."[153] However, numerous pipelines are constructed to move gas from producing areas to market hubs. From these hubs, the gas can move to multiple locations and end users far removed from the original pipeline. Yet if the proposed pipeline cannot provide information on how the gas will be used, the Commission may deny the application on that ground alone. That is not a "press release"—it is a rule.

The Policy Statements are replete with these kinds of statements, which essentially render project applicants with no real choice. No entities reading either of the Policy Statements would believe that they "are free to ignore" them.[154] In fact, for the applicants whose projects are currently pending before the Commission, the Policy Statements verify this. The Commission ordered that both Policy Statements be effective immediately and apply to all current and future project applicants, including projects that have now completed both an Environmental Assessment ("EA") and a supplemental EIS. However, the Policy Statements "give[] the opportunity" to all pending applicants to "supplement the record and explain how their proposals are consistent" with the new requirements.[155] If the Policy Statements were in fact non-binding "general statement[s] of policy" under the APA, then such supplements would be unnecessary.

The Policy Statements, while providing myriad concrete grounds to deny a certificate application, fail to provide a clear avenue for approval. It appears from these Policy Statements that no project could satisfy all of the Commission's suggestions, encouragements, expectations, and requirements.

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[153] *Id.*
[154] *Nat'l Min. Ass'n*, 758 F.3d at 252; *Ass'n of Flight Attendants*, 785 F.3d at 717.
[155] Interim GHG Policy Statement at P 129; Updated Certificate Policy Statement at P 100.

2. The Interim GHG Policy Statement Unlawfully Amends Validly Promulgated Commission Regulations.

The Interim GHG Policy Statement impermissibly makes substantive changes to the Commission's regulations implementing NEPA and providing requirements for certificate applications. The Commission's regulations provide that an EIS will be normally prepared for particular categories of projects.[156] Importantly, the regulations specify that an EIS will normally be prepared for "*Major* pipeline construction projects under section 7 of the [NGA] using rights-of-way in which there is no existing natural gas pipeline[.]"[157] In promulgating this regulation, the Commission expressly declined to impose hard-and-fast criteria to define what is a "major pipeline" that normally requires preparation of an EIS.[158] Instead, the Commission decided that it "must determine whether a project involves major pipeline construction on a case-by-case basis."[159] As required by the regulation, Commission practice has been to consider unique components of individual pipelines in making these decisions.[160]

In the Interim GHG Policy Statement, the Commission ignored the rule it promulgated following its previous notice-and-comment rulemaking, and declared that the Commission "*will* proceed with the preparation of an EIS, if the proposed project may result in 100,000 [tpy] of CO_2e or more[]" under a 100% utilization scenario.[161] This is

[156] 18 C.F.R. § 380.6(a).
[157] *Id.* § 380.6(a)(3) (emphasis added).
[158] *Regulations Implementing National Environmental Policy Act of 1969*, Order No. 486, 1986–1990 FERC Stats. & Regs., Regs. Preambles 30,783, at pp. 30,930-31 (1987), *order on reh'g*, Order No. 486- A, 1986–1990 FERC Stats. & Regs., Regs. Preambles ¶ 30,799 (1988).
[159] Order No. 486 at p. 30,930.
[160] *See, e.g.*, *Nat'l Fuel Gas Supply Corp.*, 164 FERC ¶ 61,084, at P 71 (2018) ("[A] pipeline with 69 percent of its length co-located along existing pipeline or utility rights of way, one new and one modified gas-fired compressor station, and one new dehydration facility[] normally would not fall under the 'major' category for which an EIS is automatically prepared.").
[161] Interim GHG Policy Statement at PP 3, 79 (emphasis added).

plainly inconsistent with the Commission's regulations, under which it determines on a case-by-case basis whether a project involves "major pipeline construction."[162]

The Interim GHG Policy Statement explains that the 100,000 CO_2e threshold will "cover the vast majority" of natural gas projects, including "projects transporting an average of 5,200 dekatherms per day and projects involving the operation of one or more compressor stations or LNG facilities."[163] This conflicts with longstanding Commission precedent and practice on what constitutes a "major pipeline construction" project, without so much as an acknowledgement by the Commission that it is changing decades of Commission precedent and practice.[164] By dramatically expanding the category of projects for which it will prepare an EIS versus an EA, the Commission has improperly rewritten its NEPA regulations, in violation of the APA's notice-and-comment requirements.[165]

In addition, the requirements for certificate applications are provided in Section 157.6(b) of the Commission's regulations.[166] These regulations do not include requirements for mitigation of GHG emissions, or anything of the sort. But in the Policy Statements, the Commission declares that applicants that fail to meet these new non-

[162] *See* 18 C.F.R. § 380.6(a)(3).
[163] *Id.* at P 89; *see also id.* at 95 (explaining that the Commission's "proposed threshold of 100,000 metric tons per year would deem nearly three-quarters of Commission-regulated natural gas project, which collectively account for roughly 99% of GHG emissions from Commission-regulated natural gas projects, to have a significant impact on climate change").
[164] *See, e.g.*, *Nat'l Fuel Gas Supply*, 164 FERC ¶ 61,084 at P 73 (finding an EIS was not required under 18 C.F.R. § 380.6(a)(3) for project expanding company's existing system capacity by 497,000 Dth/d); *Tenn. Gas Pipeline Co.*, 139 FERC ¶ 61,161, at P 151 (2012) (finding that a project transporting 636,000 Dth per day was not a "[m]ajor pipeline construction project"), *order on reh'g*, 142 FERC ¶ 61,025 (2013), *remanded sub nom. on other grounds*, *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014); *Transcon. Gas Pipe Line Corp.*, 126 FERC ¶ 61,097, at P 22 (2009) (finding that a project designed to create 142,000 Dth per day of expansion capacity was not a "major pipeline construction project" requiring an EIS).
[165] *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1296 (D.C. Cir. 2004) (per curiam) ("If an agency decides to change course, however, we require it to supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.") (internal quotation marks and citation omitted).
[166] Updated Certificate Policy Statement, Danly Dissent at P 42 (citing 18 C.F.R. § 157.6(b)).

regulatory requirements are likely to be denied. Again, the Commission is modifying its existing regulations *sub silento*.

3. The Decision to Require an EIS for Any Project with Estimated Full-Burn Emissions of 100,000 tpy CO_2e Is Arbitrary and Capricious.

The Commission failed to engage in reasoned decision-making and acted arbitrarily and capriciously by requiring the preparation of an EIS for any project estimated to transport natural gas that, if the full capacity of the project is transported and combusted, could release 100,000 tpy CO_2e or more of GHG emissions. First, the Commission failed to articulate any rational basis for its decision to use the 100% utilization rate or "full burn" for the preparation of an EIS. Second, setting the threshold at 100,000 tpy CO_2e lacked any scientific or evidentiary support.

In determining whether a project's emissions will exceed the 100,000 tpy CO_2e threshold and thus require an EIS rather than EA, the Commission will assume the project is operating at a 100% utilization rate every day, year-round.[167] The Commission states, without support, that this "full burn" analysis "is appropriate because it captures Commission projects that may result in incremental GHG emissions that may have a significant effect upon the human environment."[168] The Commission knows that natural gas pipelines are generally constructed to meet peak demand.[169] Interstate pipelines and LNG facilities that operate at a 100% load factor all the time are few and far between, if they exist at all. As the Commission also is aware, preparation of an EIS requires applicants, and the Commission, to expend significant resources and time. Many of the

[167] Interim GHG Policy Statement at P 3.
[168] *Id.*
[169] *Id.* at P 49 ("[M]ost projects do not operate at 100% utilization at all times. In fact, many projects are designed to address peak demand.").

projects that will be swept up in the Commission's newly imposed EIS threshold are minor expansion or upgrade projects that previously were subject to the less costly and time-consuming EA due to their lack of significant impacts.

When quantifying GHG and climate impacts actually attributable to a project under review, however, the Commission changes course and states that it will not use a "full-burn" estimate, but instead will estimate the impacts based on the project's actual utilization rate. The Commission properly concedes that "most projects do not operate at 100% utilization at all times" and that "many projects are designed to address peak demand."[170] The Commission further explains that "*in most instances a 100% utilization rate estimate does not accurately capture the project's climate impacts*."[171]

The Commission provides no explanation why it applies this reasoning to its environmental analysis, but not when making the threshold decision of whether to prepare a costly and time-consuming EIS in the first place. By the Commission's own admission, the full-burn estimate is inaccurate "in most instances."[172] Why then is the Commission applying this clearly incorrect standard and calculation to its critical decision of whether to prepare an EIS or an EA?[173] Such a baseless distinction is in and of itself arbitrary and capricious.

Even more troubling, the Commission's new 100,000 tpy CO_2e threshold itself is not the result of any scientific or factual analysis. The Commission admits in the Interim GHG Policy Statement that it has chosen the threshold not by its ability to accurately

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[170] *Id.*
[171] *Id.* at P 50 (emphasis added).
[172] Interim GHG Policy Statement at P 50.
[173] As Commissioner Christie succinctly puts it: "The delay is clearly part of the point. Why else funnel virtually every certificate applicant into the EIS process?" Interim GHG Policy Statement, Christie Dissent at n.490.

forecast significance, but because it "captures the majority of annual emissions generated by Commission authorized projects."[174] But, this is inconsistent with NEPA, and the Commission's responsibilities thereunder. NEPA requires the Commission disclose *significant* impacts of a project.[175] The Commission's new policy has pre-judged that virtually any level of GHG emissions from a project are significant impacts under NEPA *before it even considers those impacts*.[176] The Interim GHG Policy Statement unnecessarily fly-specks and enlarges the review of even minor projects, which could have a severe deterrent effect on the proposals and funding for new natural gas infrastructure needed to assure the reliability of the grid or offset GHG emissions from more polluting fuel sources.

Further, the Commission failed to put forward any rational basis to justify its 100,000 tpy threshold. The Commission fails to explain why it relies upon an estimate of the alleged indirect emissions associated with a project, which are outside the Commission's jurisdiction and control, for the purposes of a significance threshold. Far from explaining how the 100,000 tpy at full burn is significant and triggers the requirement to prepare an EIS, the Commission simply claims the threshold is justified through an unrelated discussion of EPA's thresholds under the CAA PSD and Title V permitting programs.[177] However, the EPA is charged with directly regulating those emissions

[174] *Id.* at P 80; *see also id.* at P 89.
[175] *Balt. Gas & Elec.*, 462 U.S. at 106-07 ("NEPA requires an EIS to disclose the *significant* health, socioeconomic, and cumulative consequences of the environmental impact of a proposed action.") (emphasis added); *see also Vt. Yankee Nuclear Power*, 435 U.S. at 553 ("NEPA places upon an agency the obligation to consider every *significant* aspect of the environmental impact of a proposed project.") (emphasis added).
[176] Interim GHG Policy Statement at P 95 (concluding that the Commission's "proposed threshold of 100,000 [tpy] would deem nearly three-quarters of Commission-regulated natural gas project[s], which collectively account for roughly 99% of GHG emissions from Commission-regulated natural gas projects, to have a significant impact on climate change").
[177] *See* Interim GHG Policy Statement at PP 90-95.

through its programs under the CAA. This is not comparable to FERC's disclosure responsibilities under NEPA.

Moreover, the Commission fails to state what, if any, evidence it relied upon in arriving at the 100,000 tpy threshold for significance. The Commission states that it determined the threshold based not on sound scientific principles, but on the bare assertion that it "will capture all natural gas projects that have *what we believe* to be the potential for causing significant impacts on climate."[178] To engage in reasoned decision-making, the Commission is required to "consider[] the relevant factors and articulate[] a rational connection *between the facts found and the choice made*,"[179] not base its decisions on mere "belief." Ultimately, the Commission's rationale boils down to nothing more than an *ipse dixit* explanation. The APA does not empower the "expert branch" to substantively regulate based on belief.

C. The Commission Erred by Making a Blanket Decision That Precedent Agreements with Affiliates Are Insufficient to Demonstrate Need.

The Commission erred by reversing decades of precedent to decide that "affiliate precedent agreements will generally be insufficient to demonstrate need."[180] Despite having received numerous comments discussing the probative value of precedent agreements between affiliates, the Commission made this determination in a single paragraph, ignoring these comments and providing little support and no reasoned explanation for its significant change in policy. Precedent agreements have been a bedrock of the determination of need since the inception of the NGA.[181]

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[178] *Id.* at P 88 (emphasis added).
[179] *Balt. Gas & Elec.*, 462 U.S. at 105 (emphasis added).
[180] Updated Certificate Policy Statement at P 60.
[181] *See* Robert Christin, Paul Korman, and Michael Pincus, *Considering the Public Convenience and Necessity in Pipeline Certificate Cases under the Natural Gas Act*, 38 Energy L.J. 115, 120 (2017) (describing legislative history and historic use of precedent agreements as evidence of project need).

Prior to issuing the 1999 Certificate Policy Statement, the Commission's practice was to give "equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties."[182] After considering whether to modify this policy in the 1999 Certificate Policy Statement, the Commission decided to continue ascribing equal weight to affiliate and non-affiliate precedent agreements. The Commission stated that it would continue to avoid "looking behind contracts," and instead would focus on ensuring that projects are not subsidized by existing customers.[183]

Since issuing the 1999 Certificate Policy Statement, the Commission consistently has found affiliate and non-affiliated contracts equally probative of need. The Commission maintained that the "mere fact" that some of a project's shippers are affiliates "does not call into question their need for the new capacity or otherwise diminish the showing of market support."[184] The Commission emphasized that regardless of an affiliate relationship between the pipeline and a shipper, the shipper must still offer the commodity at competitive prices in competitive environments.[185] The Commission also recognizes that due to the massive financial commitment required to construct and operate a pipeline, it is unlikely that a project sponsor would commit to construct a pipeline for which there

[182] 1999 Certificate Policy Statement, 88 FERC at p. 61,744 (citing *Transcon. Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at p. 61,316 (1998)). *See, e.g.*, *Tex. E. Transmission Corp.*, 84 FERC ¶ 61,044, at p. 61,191 (1998) ("It is not the Commission's policy to disregard contracts between affiliates in establishing need for projects.").

[183] 1999 Certificate Policy Statement, 88 FERC at pp. 61,739-40, 61,744.

[184] *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 34 (2018). *See also Greenbrier Pipeline Co.*, 103 FERC ¶ 61,024, at P 17 ("The fact that the marketers are affiliated with the project sponsor does not lessen the marketers' need for the new capacity or their obligation to pay for it under the terms of their contracts."), *reh'g denied*, 104 FERC ¶ 61,145, *reh'g denied*, 105 FERC ¶ 61,188 (2003).

[185] *Millennium Pipeline Co.*, 100 FERC ¶ 61,277, at P 57 (2002); *see also E. Tenn. Nat. Gas Co*., 98 FERC ¶ 61,331, at p. 62,398 ("[T]he Commission does not distinguish between contracts with affiliates and non-affiliates, as long as the contracts are binding. The fact that the two power plants are affiliates of the project sponsor does not lessen their need for the new capacity or their obligation to pay for it") (internal citation omitted), *reh'g denied*, 101 FERC ¶ 61,188 (2002), *order on reh'g*, 102 FERC ¶ 61,225 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

was not actual need, regardless of whether the sponsor was affiliated with the project's shippers.[186] The Commission seems to assume that vertical integration between a pipeline and its customers is *per se* unreasonable, but that is not the law: "vertical integration produces permissible efficiencies that 'cannot by themselves be considered uses of monopoly power.'"[187]

This is not to say Commission practice was, or should be, to blindly accept any contract. In the event the Commission had concerns of improper self-dealing between the pipeline and its affiliated shipper, the Commission would seek additional evidence of pipeline need.[188] But the Commission's practice was not to presume, without evidence, that mere affiliation between a project sponsor and its customer lessened the actual need for the project.[189]

The Commission swept decades of policy and precedent aside in the Updated Certificate Policy Statement, and stated that "affiliate precedent agreements will generally be insufficient to demonstrate need."[190] To support this decision, the Commission relied almost entirely on *dicta* from a single case, *Environmental Defense Fund v. FERC*.[191] In that case, the D.C. Circuit vacated a certificate approving a pipeline

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[186] *See, e.g.*, *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, at P 35 (2019) ("Given the substantial financial commitment required under these agreements by [affiliated] project shippers, we find that these agreements are the best evidence that the service to be provided by the project is needed in the markets to be served.") (internal footnote omitted), *order on reh'g*, 171 FERC ¶ 61,049 (2020).

187 *Tenneco Gas v. FERC*, 969 F.2d 1187, 1201 (D.C. Cir. 1992) (quoting *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980)).

[188] *See, e.g.*, Spire STL Pipeline LLC, Response to Data Request, Docket Nos. CP17-40-000 and -001 (Mar. 13, 2018).

[189] *Transcon. Gas Pipe Line Co.*, 141 FERC ¶ 61,091, at P 21 (2012) ("Absent evidence of affiliate abuse, we see no reason not to view marketing affiliates like any other shipper for purposes of assessing the demand for capacity . . . ."), *reh'g denied*, 143 FERC ¶ 61,132 (2013).

[190] Updated Certificate Policy Statement at P 60.

[191] *Id.* (citing *Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) ("*EDF v. FERC*")). Aside from quoting *EDF v. FERC*, the Commission's only other support for its finding were quotes from the 1999 Certificate Policy Statement in a footnote, in which the Commission had summarized arguments made opposing the

> in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline.[192]

The court found that the Commission had "refused" to consider any additional evidence of need, or lack thereof, beyond the single precedent agreement.[193] Citing only to this decision, the Commission declared in the Updated Certificate Policy Statement that ***any*** precedent agreement between affiliates, regardless of the circumstances, would not demonstrate project need.[194]

1. The Commission Applied EDF v. FERC *Too Broadly.*

The Commission made far too much of *EDF v. FERC*, which vacated a single certificate order under very narrow facts. The D.C. Circuit did not determine that all affiliate precedent agreements have no probative value. Indeed, the D.C. Circuit has upheld numerous orders in which the Commission granted certificates based on precedent agreements with affiliated shippers.[195] The court did not overturn the decades of judicial precedent upholding this reliance. While the court in *EDF v. FERC* found that the Commission should have scrutinized project need more closely in that specific case, the

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reliance on affiliate precedent agreements, but in which the Commission had ultimately decided that affiliate agreements were equally probative of need as non-affiliate agreements. *Id.* at P 60 n.175.

[192] *EDF v. FERC*, 2 F.4th at 973.

[193] *Id*.

[194] Updated Certificate Policy Statement at P 60.

[195] *See, e.g.*, *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 605 (D.C. Cir. 2019) ("The Commission rationally explained that it fully credited Nexus's precedent agreements with affiliates because it found no evidence of self-dealing . . . . "); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb. 19, 2019) ("The fact that Mountain Valley's precedent agreements are with corporate affiliates does not render FERC's decision to rely on these agreements arbitrary or capricious; the Certificate Order reasonably explained that '[a]n affiliated shipper's need for new capacity and its obligation to pay for such service under a binding contract are not lessened just because it is affiliated with the project sponsor.'") (citation omitted).

court never held the Commission should grant zero weight to any affiliate precedent agreements.

The courts have explained that an agency violates the APA if, in relying on case law to support its orders, it "misapprehended the underlying substantive law."[196] The Commission ignores other D.C. Circuit decisions, its own precedents, and misinterprets *dicta* from *EDF v. FERC*. Basing a policy change *entirely* on misinterpretation of *dicta* from a single case is arbitrary and capricious, and not reasoned decision making.

2. The Commission Failed to Consider Comments That Explained Why Affiliate Precedent Agreements Demonstrate Need for a Pipeline.

The Commission ignored myriad circumstances in which affiliate agreements are equally indicative of need for a project as agreements with non-affiliated shippers. These other circumstances were presented directly to the Commission in response to its inquiry on the subject in the NOI. In the 2018 NOI, the Commission expressly asked the public, "Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?"[197]

In response, numerous stakeholders explained why affiliate precedent agreements are equally probative of need as non-affiliate precedent agreements. Commentors explained that there are countless different types of arrangements that support development of a new pipeline project, and that to discount the value of a precedent agreement merely because of the shipper's affiliation with the pipeline would ignore its actual evidentiary value. Commentors explained that some commercial structures require shippers to hold

[196] *Bartko v. SEC*, 845 F.3d 1217, 1226 (D.C. Cir. 2017) (citation omitted). *See also Global Tel*Link v. FCC*, 866 F.3d 397, 412 (D.C. Cir. 2017) (an agency order is "legally infirm" if it "misreads our judicial precedent"); *Am. Fed. of Gov't Emps., AFL-CIO, Local 1929 v. Fed. Labor Relations Auth.*, 961 F.3d 452, 458-59 (D.C. Cir. 2020) (rejecting agency decision that "misreads" Supreme Court precedent).
[197] 2018 NOI at P 54 (Q.A4).

capacity on affiliated pipelines; for instance, operators or customers of LNG terminals commonly purchase feed gas supply directly from a producer and ship the supply on an affiliated pipeline.[198] Other commentors explained that LNG terminals or their customers may execute precedent agreements with affiliated pipelines, then assign or release the capacity to customers, asset managers, or others to handle gas deliveries.[199] Commentors explained that these arrangements are critical to the success of their projects.

Commentors also explained that when a state-regulated local distribution company ("LDC") or electric generation service works with an affiliated company to develop a pipeline project, the shipper is subject to prudence review by its state public utilities commission.[200] In this case, because the state-regulated company passes along the costs of the pipeline capacity to its customers, the state regulator would not permit it to enter into an uncompetitive contract for pipeline capacity, particularly if the pipeline was affiliated with the shipper.

In other cases, a marketer may purchase volumes produced in a production area, and contract with an affiliated pipeline to ship the supply to a market hub.[201] In other scenarios, an affiliated shipper works with an existing pipeline company to construct new facilities to meet the shipper's needs.[202] In yet other cases, a joint venture partner might

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[198] *See* Comments of the Interstate Natural Gas Ass'n of America at 35-36, Docket No. PL18-1-000 (July 25, 2018) ("INGAA 2018 Comments"); Comments of Rio Bravo Pipeline Company, LLC and Rio Grande LNG, LLC at 5-6, Docket No. PL18-1-000 (July 25, 2018) ("RG Developers' Comments"); Comments of Cheniere Energy, Inc. to Notice of Inquiry Concerning Certification of New Interstate Natural Gas Facilities at 5-6, Docket No. PL18-1-000 (July 25, 2018).

[199] *See* Initial Comments of Enbridge Gas Pipelines at 35-39, Docket No. PL18-1-000 (May 26, 2021).

[200] INGAA 2018 Comments at 34 (citing *Atl. Coast Pipeline*, 161 FERC ¶ 61,042, at P 60 (2017), *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 34 (2018)); Initial Comments of Spectra Energy Partners, LP at 20-22, Docket No. PL18-1-000 (July 25, 2018) ("Spectra 2018 Comments"); Comments of the Interstate Natural Gas Ass'n of America at 19-20, Docket No. PL18-1-000 (May 26, 2021) ("INGAA 2021 Comments").

[201] RG Developers' Comments at 5-6. *See, e.g.*, *Double E Pipeline, LLC*, 173 FERC ¶ 61,074 (2020).

[202] Spectra 2018 Comments at 20-22 (describing NEXUS pipeline).

have an equity stake in a pipeline and hold capacity as a shipper. Under those circumstances, the joint venture partner's decision to acquire an equity stake in the pipeline would be particularly strong evidence of need, because it would demonstrate the shipper's financial commitment to the project.[203] These joint ventures and other similar ownership structures provide pipeline companies with access to capital and share risk with project customers.[204]

The Commission unreasonably failed to consider these comments and other relevant circumstances, all of which were presented to it during its nearly-four-year NOI process. Instead, it based its new policy only on the scenario described in *EDF v. FERC*. This course of action—issuing two NOIs, ignoring the responsive comments, and basing a policy decision on a single case—is arbitrary and capricious. It is a basic tenet of administrative law that an agency may not ignore relevant comments submitted by the public.[205] Likewise, agency action is arbitrary and capricious if it "'fail[s] to consider an important aspect of the problem.'"[206] Here, the Commission ignored myriad circumstances presented to it in response to a specific inquiry on the subject, in which pipelines may develop new projects in reliance on precedent agreements with affiliated customers. The Commission's decision to treat all precedent agreements with affiliates as equally lacking

[203] INGAA 2021 Comments at 19-20.
[204] *See* Spectra 2018 Comments at 3-4.
[205] *See Lilliputian Sys., Inc. v. PHMSA*, 741 F.3d 1309, 1312 (D.C. Cir. 2014) (An agency's failure to respond to relevant and significant public comments generally "demonstrates that the agency's decision was not 'based on a consideration of the relevant factors.'") (quoting *Thompson v. Clark*, 741 F.2d 401, 409 (D.C. Cir. 1984)); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977) (An agency also violates this standard if it fails to respond to "significant points" and consider "all relevant factors" raised by the public comments).
[206] *Pub. Citizen, Inc. v. FERC*, 7 F.4th 1177, 1199-200 (D.C. Cir. 2021) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

probative value regarding need was arbitrary and capricious because it ignored the meaningful differences between different types of precedent agreements.

The Commission's sweeping ruling is particularly important in the context of LNG export terminals in today's world. The business model of many LNG export terminals requires the LNG company to obtain natural gas, transport it to the export terminal on pipelines subject to the Commission's jurisdiction and liquefy it for sale to a third party. In most cases, these functions are carried out by affiliates of pipelines constructed for the purpose of transporting natural gas to the LNG terminal. The mere fact that such entities are affiliated does not undermine the demonstrated need for the pipeline transportation. The Commission's new determination that affiliate precedent agreement are, essentially, worthless in the certificate process, has the potential to upend this business model. The Commission's action comes at a particularly inappropriate time when it is the national security policy of the United States to assist its North Atlantic Treaty Organization (NATO) allies, and others, to reduce their reliance on Russian natural gas.

3. The Commission Failed to Provide a Reasoned Explanation for Brushing Aside Decades-Old Policy.

The Commission also violated another cornerstone of administrative law which requires that when an agency changes positions, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[207] An "[u]nexplained inconsistency" in agency policy is arbitrary and capricious.[208] The Commission failed to explain why its longstanding position that affiliate precedent agreements are equally probative of need as non-affiliate precedent

[207] *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 516 (2009).
[208] *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

agreements—reiterated as recently as 2020[209]—is no longer valid. Instead, the Commission cited to one court decision that applied to a narrow set of facts. The Commission must grant rehearing to rectify this "unexplained inconsistency."

VII. ADDITIONAL REQUESTS FOR REHEARING, OR IN THE ALTERNATIVE, CLARIFICATION

The Commission should grant rehearing of both Policy Statements in their entirety because they violate the NGA by undercutting the ability to construct new natural gas infrastructure, and because they are final rules that were issued without notice-and-comment procedures. To the extent the Commission declines to rescind the Policy Statements and undertake notice-and-comment procedures, it should grant rehearing, or in the alternative, clarification of the specific errors described below.

As the Commission knows, the Policy Statements have generated confusion across the industry.[210] If the Commission declines to grant rehearing, to reduce the level of uncertainty, the Commission should grant clarifications on these issues. Further, should the Commission issue clarifications that modify the Policy Statements, NGSA and CLNG retain the right to seek rehearing of those modifications and to challenge them in court.

A. Clarifications to the Interim GHG Policy Statement.

The Interim GHG Policy Statement raises more questions than it answers. This confusion is compounded by recent public statements by the Commissioners, including

[209] *See Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, at P 43 (2020) (rejecting environmental group's argument that affiliate precedent agreement was not probative of project need, explaining that "[a]ffiliation with a project sponsor does not lessen a shipper's need for capacity and its contractual obligation to pay for its subscribed service," and reiterating that "[A]s long as the precedent agreements are long term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing market need for a proposed project."), *order vacating authorization*, 177 FERC ¶ 61,198 (2021).

[210] *See, e.g.*, S&P Global Feb. 2022 Press Release, *supra*, note 142.

Chairman Glick's admission that there is language in the Interim GHG Policy Statement that "confused people."[211] The Commission should grant the following clarifications.

1. Significance of GHG Emissions in the Certificate Analysis.

The Commission states in the Updated Certificate Policy Statement that proposals may be "denied solely on the magnitude of a particular adverse impact . . . if the adverse impacts, as a whole, outweigh the benefits of the project and cannot be mitigated or minimized."[212] It is unclear how this relates to a project's GHG emissions and effects on climate change. Specifically, the Commission states that any project with associated GHG emissions of 100,000 tpy of CO_2e will have a significant impact on global climate change.[213] How does this significance determination—a concept from NEPA used to determine whether an EA or an EIS is prepared[214]—relate to the Commission's evaluation of whether a project is required by the public convenience and necessity?[215] Further, is there a maximum level of unmitigated GHG emissions that will cause the Commission to deny an application? If so, what is that level?

The Commission's approach is also internally inconsistent. It establishes a threshold of 100,000 tpy of CO_2e based on a "full burn" analysis as the level requiring a full EIS.[216] Yet the Commission also states that in evaluating a project's environmental

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[211] S&P Global, *CERAWEEK: Glick says FERC permitting does not limit more LNG exports to Europe* (Mar. 11, 2022) ("S&P Global Mar. 2022 Press Release"), https://www.spglobal.com/commodity-insights/en/market-insights/latest-news/natural-gas/031122-ceraweek-glick-says-ferc-permitting-does-not-limit-more-lng-exports-to-europe. *See also* Testimony of Commissioner Phillips, Senate Hearing at 2:11:30 (Mar. 3, 2022) ("As we go forward, I'm committed to making sure that, if there's a better framework, if there are reasonable, legally durable modifications we can make to these policies, I'm committed to doing so."), https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines (emphasis added).
[212] Updated Certificate Policy Statement at P 99.
[213] Interim GHG Policy Statement at P 79.
[214] *See* 40 C.F.R. § 1501.3.
[215] *See* Interim GHG Policy Statement, Danly Dissent at P 9.
[216] Interim GHG Policy Statement at P 79.

impacts, it will consider the actual anticipated level of usage of the project.[217] Since the Commission knows that pipelines are constructed to meet peak demand,[218] why is the significance threshold for GHG emissions set at a different level than that which will be used to analyze the project's environmental impacts? The Commission should use an actual estimate of GHG emissions attributable to a project—not a "full burn" calculation—or explain why it cannot.

2. Consideration of Upstream and Downstream Emissions Associated with Pipeline Projects.

It is unclear how the Commission intends to consider upstream and downstream GHG emissions in its evaluation of pipeline projects, including mitigation of such emissions. The Interim GHG Policy Statement provides, "[t]he Commission also *encourages* project sponsors to propose mitigation of reasonably foreseeable indirect emissions, and will take such proposals into account in assessing the extent of a project's adverse impacts."[219] At the March 3, 2022, Senate Hearing, at which U.S. Senators from both parties questioned how the Commission would apply the Policy Statements, Chairman Glick stated:

> There's two types of mitigation that we're talking about. There's mitigation of ***direct emissions*** – construction and operation, and yes, . . . the [Interim GHG] Policy Statement says you have to propose it if it's going to be significant, as we require of all these other environmental impacts. But if it's ***downstream emissions***, you do not have to propose it, and we say that explicitly in the [Interim GHG] Policy Statement.[220]

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[217] *Id.* at P 50.
[218] *Id.* at P 49 ("[M]ost projects do not operate at 100% utilization at all times. In fact, many projects are designed to address peak demand.").
[219] Interim GHG Policy Statement at P 105 (emphasis added).
[220] Senate Committee on Energy & Natural Resources, Full Committee Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines at 1:46:36 (Mar. 3, 2022), https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines (emphasis added).

To compound the confusion, Chairman Glick told an interviewer, "I think there was some other language in there that confused people. We are not going to require mitigation of downstream emissions."[221] Chairman Glick continued that this is an aspect of the policies that "we probably need to further clarify."[222]

Which is it? Does the Commission intend to require (or "encourage") mitigation of downstream GHG emissions or not? The Chairman's own statements demonstrate the need for clarification or rehearing. The Commission should clarify that it will not consider upstream or downstream GHG emissions, or mitigation thereof, in its determination of whether a pipeline project is required by the public convenience and necessity.

The Commission's approach to considering and requiring mitigation for indirect emissions from the combustion of natural gas transported by Section 7 and 3 projects may lead to a perverse policy result that is clearly contrary to the NGA's statutory purpose of providing for plentiful supplies of natural gas. Under the Commission's proposed analysis, which appears to consider direct and indirect emissions equally in its public interest determination, a proposed project with *lower direct emissions* that transports a *greater* quantity of natural gas may be disfavored in comparison to another project with relatively *higher direct emissions*, but which transports a *lesser* quantity of natural gas. Unlike direct emissions, over which a project proponent may have some degree of control based upon the technologies and practices it utilizes in the construction and operation of its facilities, the emissions profile of indirect downstream emissions is entirely beyond the control of a project sponsor or the Commission. Because every incremental combustible molecule that a project transports would effectively be weighed against it in the Commission's analysis,

[221] S&P Global Mar. 2022 Press Release, *supra*, note 212.
[222] *Id*.

this policy would effectively discourage the development of infrastructure designed to transport natural gas merely because that gas will ultimately be consumed. This cannot be the result that Congress intended in vesting the Commission with authority to authorize natural gas pipeline and LNG infrastructure under the NGA. It discourages exactly the activity that Congress intended the Commission to promote—the orderly development of natural gas infrastructure to transport gas from production to market. This perverse policy result is compounded by the fact that the indirect emissions that the Commission would consider arise from activities that Congress excluded from the Commission's jurisdictional and regulatory scope.

3. Consideration of GHG Mitigation Measures.

The Commission suggests that it has the authority to condition certificates to reduce GHG emissions, stating "[s]hould 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."[223] Again, this statement in the Commission's order conflicts with what the Chairman has been saying the order means.

If mitigation is required, the Commission leaves it unclear if there is any threshold level of mitigation. For instance, does the Commission expect applicants to mitigate a fixed percentage of the GHG emissions that would occur without mitigation? Is an applicant required to propose mitigation for 100% of a project's direct emissions, or is 10% sufficient? Is there a sliding scale of mitigation the Commission will require based on the demonstrated need and other project benefits? Is there a predictable level of unmitigated

[223] Updated Certificate Policy Statement at P 74; *see also* Interim GHG Policy Statement at PP 98, 107.

GHG emissions that will cause the Commission to deny an application? The Policy Statements leave these questions unanswered.

The Commission states that its "priority is for project sponsors to mitigate, to the greatest extent possible, a project's direct GHG emissions."[224] It is unclear what this means. For instance, if the project sponsor does not mitigate direct GHG emissions "to the greatest extent possible," will that be grounds for denial of its application? And who ultimately makes the determination of whether a project's GHG emissions has been mitigated to the greatest extent possible? What if the project sponsor feels a project's GHG emissions has been mitigated to the greatest extent possible, but intervenors or the Commission disagrees? Because GHG emissions can be offset through renewable energy credits ("RECs") and other carbon-offset measures; in theory, it is always possible for a project to achieve net-zero emissions. The Commission must clarify how it will determine the required level of GHG mitigation.

4. Relationship Between GHG Mitigation and Transportation Rates.

The Interim GHG Policy Statement creates enormous questions concerning how mitigation of GHG emissions will affect pipelines' transportation rates. The Commission provides that pipelines may propose to recover the costs of GHG mitigation measures through their rates, similarly to how they recover other costs.[225] However, the Commission provides little more information on how it will ensure that new GHG mitigation requirements will not result in unjust and unreasonable rates.

Uncertainty as to the nature and magnitude of these costs may be enough to scuttle projects altogether. Even assuming new projects can be built, these GHG mitigation costs

[224] *Id.* at P 105.
[225] Interim GHG Policy Statement at P 128.

will translate into dramatically and unpredictably higher rates for shippers. EPA has begun asserting in certificate dockets that even modest-sized projects would result in tens of billions of dollars of "climate damages."[226] The Policy Statements are arbitrary and capricious because they do not explain how, under its new GHG mitigation policies, these costs will translate into rates paid by shippers.[227] This question cannot be postponed to rate cases. Under Section 7 the Commission sets initial rates and applicants are required to provide detailed cost data so that the Commission can determine if the initial rate is in the public interest.[228] Given that one of the Commission's core responsibilities is to ensure that pipeline rates are "just and reasonable," the Commission must provide more explanation of how it will carry out this responsibility

The Commission references recovery of the fuel costs as an example of a cost "similar" to GHG mitigation costs.[229] Fuel costs are typically recovered through annual tracker filings, which reflect the costs of fuel in the previous year and estimated costs in the upcoming year. But GHG mitigation costs likely differ enormously from fuel costs. Given that mitigation may take many different forms, including the ongoing purchase of RECs or the retirement of carbon credits, these costs are far less predictable. And given the uncertainty as to the level of GHG mitigation the Commission might require from pipeline and LNG companies, mitigation costs have the potential to be substantially higher.

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[226] *See* Comments of Enbridge Gas Pipelines in Support of the Motion for Reconsideration filed by Kinder Morgan Inc. and Boardwalk Pipelines, LP at 3, Docket Nos. PL18-1-000 and PL21-3-000 (Mar. 15, 2022) (noting that EPA estimates that a project designed to transport approximately 1.1M Dth/d of capacity would have $31.2 billion in "climate damages").
[227] *Pub. Citizen*, 7 F.4th at 1199-200 (agency action is arbitrary and capricious if it "'fail[s] to consider an important aspect of the problem.'").
[228] 18 C.F.R. § 157.14(a)(19).
[229] *Id*.

The costs of the GHG mitigation the Commission may require are indeterminable. Yet pipeline projects are required to submit detailed rate data in support of their applications.[230] While pipelines and shippers understand that projected rates may change during or as a result of the certificate process, heretofore pipelines have been able to estimate anticipated rates—and share those rates with their shippers—because they know what is required of them. That is no longer true given the Commission's assertion that it can require unspecified and indeterminate mitigation measures.

B. Clarifications to the Updated Certificate Policy Statement.

1. The Meaning of "Need."

The Updated Certificate Policy Statement requires that an applicant demonstrate that a project is needed as a threshold test before the Commission turns to balancing the project's benefits against its adverse effects.[231] This creates several questions.

- It is unclear what showing an applicant must make to overcome this "threshold" requirement. If this threshold question is binary, once the Commission concludes there is a sufficient level of need to proceed, will this determination be strong evidence of the project's benefits?
- How, if at all, does "need" differ from "project benefits"?
- If a project is "needed," how can the Commission then determine that it is not "required by the public convenience and *necessity*"?

The Commission should clarify the Updated Certificate Policy Statement and eliminate what appears to be a threshold question of whether a project is "needed." Instead, it should simply balance the project's benefits against its adverse effects, as was the practice under the 1999 Certificate Policy Statement.[232]

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[230] *Id*.
[231] Updated Certificate Policy Statement at P 61.
[232] *See* 1999 Certificate Policy Statement, 88 FERC at p. 61,745.

2. The Weight of Non-Affiliate Precedent Agreements.

The Commission created substantial uncertainty as to the weight of non-affiliate precedent agreements in its determination of need.[233] Historically, the Commission has recognized that if a pipeline has executed precedent agreements for most of the capacity on a project, that is sufficient evidence of need for the project. The 1999 Certificate Policy Statement *expanded* its historic reliance on precedent agreements to *allow* project applicants to demonstrate need with other factors, such as market studies. This was meant to provide more *flexibility* to applicants in demonstrating need, not to impose additional evidentiary burdens. An applicant with precedent agreements for the vast majority of its project capacity could expect the Commission to find that its project was needed, even without supplemental market studies or other evidence. This was consistent with the first principle of the Commission's prior certificate policy, which required the pipeline to show that existing customers would not subsidize the project, and thus, that the pipeline would bear the risks of the project.

The Updated Certificate Policy Statement flips this on its head, now appearing to require an applicant to provide market studies and other evidence of need, even when it has executed non-affiliated precedent agreements for the vast majority of its capacity and assumed the risk of the project. The Updated Certificate Policy Statement leaves it unclear whether non-affiliate precedent agreements can suffice independently to demonstrate need.[234] Assuming that additional evidence is needed, what additional evidence is needed to meet the threshold need test? In the event the project sponsor and project opponents

[233] For purposes of this clarification, NGSA sets aside the question of the probative value of precedent agreements with affiliates. NGSA has requested rehearing on this issue in Section VI.C, *supra*.

[234] Updated Certificate Policy Statement at P 54 ("the existence of precedent agreements may not be sufficient in and of themselves to establish need for the project") (citation omitted).

submit dueling market studies, how will the Commission weigh the respective studies' evidentiary value?

The Commission should grant the following clarifications:

- Precedent agreements for most of a project's capacity remain "strong evidence of market demand," as was the case under the 1999 Certificate Policy Statement.[235]

- If an applicant provides non-affiliate precedent agreements for the vast majority of its project capacity, the Commission will find that a project is needed, even without additional support. For instance, if a pipeline shows that it is fully subscribed by non-affiliates, but project opponents submit market studies asserting the project is unneeded, the Commission should clarify that it will still find the project is needed.

3. The Relevance of Circumstances Surrounding Precedent Agreement to Need for a Project.

The Updated Certificate Policy Statement provides that the Commission will consider factors that do not appear relevant to whether a project is needed. NGSA members regularly enter into precedent agreements with pipelines that have heretofore formed a satisfactory basis for determining need. In order to assess the risk of entering into a precedent agreement, which commits production to a certain project, NGSA members need to know if these agreements are worth anything in the certificate process. According to the Commission it will look behind precedent agreements, even agreements with non-affiliates, to determine:

> 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 time from RFP to execution of the agreement).[236]

[235] 1999 Certificate Policy Statement, 88 FERC at p. 61,749.
[236] Updated Certificate Policy Statement at P 54.

The Commission provided no context or explanation why any of these are relevant factors to whether a project is needed. Nor did the Commission explain how it plans to weigh and assess these factors. Clarification is necessary. The Commission should provide additional explanation in response to the following questions:

- What does the pipeline's open season process and results have to do with need?
- Is there a recommended amount of time for a pipeline to hold an open season?
- Is there a threshold number of bidders?
- If a project is developed at the request of one or more shippers, and no other bids are submitted during an open season, would the Commission view this as indicative of lower need?
- If precedent agreements are entered into in response to a shipper's request for proposals ("RFP"), is that more probative of need than a precedent agreement that was not preceded by an RFP? If so, why?
- What is the significance of length of time from an RFP or Open Season to execution of an agreement? Should pipelines strive for a certain amount of time to obtain FERC's approval?
- How would the fact that a precedent agreement was entered into before an open season impact the Commission's need determination?

4. Relevance of Other Factors to Project Need.

Because it has reduced the probative value of precedent agreements and required the consideration of other factors in its evaluation of project need, the Commission must clarify how it will consider these other factors. The Commission should provide additional explanation in response to the following questions.

Market studies. It is likely that in contested proceedings, project supporters will provide market studies demonstrating the need for a project while project opponents will provide market studies asserting that the project is unneeded. The problem of assigning

weight to conflicting testimonies of "battling experts" is well-recognized,[237] and given the Commission's devaluation of precedent agreements, the Commission should address how it will respond to conflicting market studies. The Commission should clarify that, in the event it receives conflicting studies of project need, it will rely heavily on precedent agreements as an objective indictor of need.

End uses. To assist its determination of need, the Updated Certificate Policy Statement encourages project applicants to provide detailed information of how the gas will ultimately be used.[238] This raises numerous questions:

- What does the end-use of gas transported on a project have to do with FERC's determination of need?

- Are certain end uses of the gas transported on a pipeline project accorded higher value than others? If so, which uses?

- How will the Commission weigh need when end uses of a project are unknown, for instance, in the event a project is designed to deliver gas to a natural gas hub and not directly an end use market? How will the Commission weigh the need for projects anchored by natural gas marketers whose end-use customers are varied and are likely to change over time?

- The Commission threatens to deny applications in which the applicant does not provide information about the end use of the gas.[239] What happens if a pipeline is being built from a producing region to a market hub from which gas could travel to multiple destinations, and the exact destinations of the specific molecules are not ascertainable? If the end use is unknowable, will the Commission deny the application?

The existence of these questions demonstrates the problems of the new approach of allowing the end-use of gas to inform the need for the pipeline. A Commission response

[237] *See, e.g.*, *El Paso Nat. Gas*, 78 FERC ¶ 61,318, at p. 62,366 (discussing difficulties that would occur in assessing reasonableness of take-or-pay contracts, when "the Commission would have had to examine the reasonableness of each pipeline's projection of future market conditions, which could easily turn into an extended battle between various experts"), *order on reh'g*, 81 FERC ¶ 61,124 (1997).
[238] Updated Certificate Policy Statement at P 55.
[239] *Id*.

that these questions will be made on a "case-by-case" basis will not provide clarity to industry.

The Commission should clarify that all end-uses of projects will be given equal weight in the Commission's determination of project need and that an inability to specify the end use will not negatively affect the pipelines application. Such clarification is required to provide the certainty needed for pipeline stakeholders to invest in projects, and to avoid violating the non-discrimination requirements at the heart of the NGA.[240]

5. Relevance of Alternatives in Producer-Push and LNG Supply Projects.

The Updated Certificate Policy Statement provides that the Commission will consider alternatives to the project in assessing the strength of the applicant's need showing.[241] It is unclear how the Commission will view alternatives in different types of projects. For instance, natural gas producers often work with pipeline companies to help provide an outlet for natural gas production and access to additional downstream markets. In this case, how will the Commission view the "need" for production that gives rise to the need for the pipeline. Likewise, pipelines may be built to provide sources of natural gas to feed LNG liquefaction terminals, for ultimate export. Will the Commission consider alternatives to the use of LNG in other countries in its authorization of LNG facilities?

The Commission should grant rehearing or clarification that it will not consider alternatives to a pipeline project as part of its assessment of need for a project. Short of

[240] 18 C.F.R. § 284.7(b) (requiring pipelines to provide transportation service without undue discrimination); *Crossroads Pipeline Co.*, 71 FERC ¶ 61,076, at p. 61,264 ("[A]n open access pipeline . . . must provide service to any shipper . . . if it receives a request for service and capacity is available."), *order on reh'g*, 73 FERC ¶ 61,138 (1995). *See generally Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 1991–1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,939, at p. 30,393 (1992) (requiring pipelines to offer service on an open-access basis "to ensure that all shippers have meaningful access to the pipeline transportation grid").

[241] Updated Certificate Policy Statement at P 59.

granting this clarification, the Commission must clarify how it will view alternatives in its evaluation of project need. Does the Commission intend to engage in regional planning, rather than allowing market participants to determine what infrastructure is needed and where? Does the Commission view consideration of downstream uses as part of its jurisdiction to assess need for a jurisdictional project? Will the Commission recognize that there may be independent operational, reliability, and business reasons why a shipper wants an alternative to an incumbent pipeline? Not all "alternatives" to a project will meet the needs for which the project is being proposed. The Commission should clarify that in assessing potential alternatives to proposed projects it will consider the specific purpose or purposes for which the Project is being proposed, similar to the alternatives analysis it performs as part of its NEPA process.[242]

6. The Commission's Consideration of Adverse Impacts.

Under the 1999 Certificate Policy Statement, Commission policy was to balance the Project's public benefits against its adverse effects, including environmental impacts.[243] The Updated Certificate Policy Statement provides that the Commission will "balance all impacts, including economic and environmental impacts, together in its public interest determinations under the NGA."[244] The Commission should clarify that the Updated Certificate Policy Statement does not change the longstanding balancing process or assign greater weight to any factors than it has done under the 1999 Certificate Policy Statement.

[242] *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, at P 84 (2020) ("When an agency is asked to consider a specific plan, the needs and goals of the parties involved in the application should be taken into account.") (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991)).
[243] 1999 Certificate Policy Statement, 90 FERC at p. 61,396.
[244] Updated Certificate Policy Statement at P 73.

If the Commission declines to grant this clarification, it should explain how the balancing process has changed.

7. Role of Environmental Justice.

NGSA and CLNG support greater consideration of impacts natural gas infrastructure has on environmental justice communities. NGSA seek clarification of several points raised in the Updated Certificate Policy Statement.

- How does this guidance comport with Council on Environmental Quality guidance on environmental justice and permitting?

- Co-location of projects. Historically, the Commission has encouraged pipelines to co-locate new projects with existing ones, to avoid burdening new landowners or cause new environmental impacts.[245] How does the Commission's new policy on environmental justice and cumulative impacts relate to its policy on co-location of projects?

- Mitigation of environmental justice impacts. What does the Commission mean when it refers to mitigation of impacts to environmental justice communities?[246] Can the Commission provide examples? Under what circumstances will different mitigation measures be deemed satisfactory? Does the Commission expect applicants to mitigate historical impacts not caused by the Project?

- Role of the Office of Public Participation ("OPP"). The Commission states that it expects the OPP to participate meaningfully in certificate proceedings.[247] How will the OPP be involved in the certificate process, especially as it relates to environmental justice communities?

[245] *See, e.g.*, *Freeport-McMoran Energy*, 115 FERC ¶ 61,201, at P 51 (2006) ("The Commission has encouraged pipelines to co-locate new pipelines within or adjacent to existing easements with the objectives of minimizing environmental impacts and avoiding the establishment of new utility corridors to the extent possible."), *reh'g denied*, 117 FERC ¶ 61,116 (2006).
[246] Updated Certificate Policy Statement at P 91.
[247] *Id.* at P 92.

VIII. CONCLUSION

WHEREFORE, for the reasons herein, the Commission should grant rehearing of both Policy Statements, as requested. Should the Commission decline to grant rehearing, the Commission should grant the clarifications requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in these proceedings.

Dated at Washington, DC this 18th day of March, 2022.

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