THE UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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

COMMENTS OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America ("INGAA") submits these comments in response to the Federal Energy Regulatory Commission's ("FERC" or "Commission") notice of inquiry ("NOI") on its currently effective policy statement[1] on the certification of new interstate natural gas transportation facilities, issued April 19, 2018.[2] As further discussed herein, the Commission's Certificate Policy Statement has provided a durable framework to review certificate applications in a reasoned, consistent, and predictable manner. While incremental improvements may be achieved through this proceeding from incorporating stakeholder suggestions, including INGAA's suggestions detailed below, there is no evidence to suggest the need for wholesale policy changes. To the contrary, wholesale policy changes likely would result in problematic consequences to the detriment of domestic consumers.

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's 28 members represent the vast majority of interstate natural gas transmission pipeline companies in the U.S. INGAA's members, which operate approximately 200,000 miles of interstate natural gas pipelines, serve as an indispensable link between natural gas producers and consumers. Its

[1] *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) ("Certificate Policy Statement").
[2] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018).

members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA").[3]

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[3] 15 U.S.C. §§ 717-717w.

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I. Executive Summary

The Certificate Policy Statement has provided the Commission with a durable framework to review and address all issues raised in certificate proceedings in a reasoned, consistent, and predictable manner. The Certificate Policy Statement has achieved the Commission's stated goals, including benefitting U.S. consumers and the economy, fostering competitive markets, protecting captive customers, and avoiding unnecessary environmental and community impacts. Moreover, the ability to certificate new interstate natural gas transportation facilities in a market-responsive manner, as contemplated by the Certificate Policy Statement, contributes to achieving Congress's goals in wellhead decontrol and the Commission's goals in its landmark natural gas restructuring orders by creating additional pathways for delivering affordable, domestic natural gas to consumers. The fundamental architecture of the Certificate Policy Statement is consistent with the NGA and remains sound, and the Commission should reaffirm its enduring principles. The Commission should avoid making wholesale policy changes that may result in problematic consequences to the detriment of natural gas consumers.

A. FERC's Determination of Need

Precedent agreements are the best and most objective demonstration of public need because they represent long-term financial commitments by pipeline companies and their prospective shippers. The Commission's Certificate Policy Statement, including its prohibition of subsidization by a pipeline's existing customers, ensures that sophisticated market participants bear the financial risk associated with proposed projects. Proposed projects do not move forward unless prospective shippers contract for pipeline capacity, and shippers would not make such a commitment absent strong evidence of market need for additional natural gas in the market to be served by a proposed project.

The Commission should avoid establishing rigid criteria for reviewing specific provisions or characteristics of precedent agreements. The Commission's no-subsidy policy effectively ensures that pipelines do not shift the financial burden associated with unsubscribed capacity to customers that do not benefit from the proposed project. Thus, unless the totality of circumstances merit additional analysis or explanation, it is unnecessary for the Commission to request additional information about specific provisions in precedent agreements.

The Commission also should not distinguish between precedent agreements with affiliates and non-affiliates when considering the need for proposed projects. Both types of precedent agreements evidence market need. It is unnecessary for the Commission to duplicate the analysis conducted by state regulators or corporate management, who are best positioned to weigh the merits of committing ratepayer dollars or shareholder dollars to subscribing capacity on a proposed pipeline. Both state regulatory oversight and market discipline prevent affiliated shippers from purchasing unneeded capacity. Each state's regulatory oversight body reviews the contracting decisions of entities subject to its jurisdiction and ensures the prudence of decisions to execute precedent agreements. Affiliated shippers that are not subject to state regulation lack any assurance of cost recovery and can ill-afford to subsidize less competitive alternatives due to the intensely competitive natural gas commodity markets in which they operate. Much of the recent increase in affiliated shippers on proposed pipeline projects can be attributed to the legitimate business reasons for forming joint ventures between pipeline companies and prospective shippers.

There is no reason within the context of the need analysis for the Commission to consider the intended or expected end use of the natural gas to be transported by proposed pipeline projects. Nor should the Commission require differing demonstrations of need depending upon

the type of shipper contracting for pipeline capacity or the intended or expected end use of the natural gas to be transported. Such considerations and demonstrations would be contrary to years of FERC policy restructuring the interstate natural gas pipeline industry to achieve the Congressional intent of the Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Decontrol Act of 1989. These policies have worked to facilitate benefits to domestic consumers. Moreover, any analysis of intended or expected end uses during the certificate review process would require great speculation, since the end use of natural gas transported by a shipper can evolve constantly over the duration of a shipper's contractual commitment.

The Commission should consider all identified benefits of a proposed project when reviewing certificate applications and should expressly discuss its consideration of these benefits when addressing project need in certificate orders. The public benefits highlighted in the Certificate Policy Statement remain relevant today, and some are even more relevant today than they were in 1999 (e.g., increasing electric reliability). As part of this process, the Commission should consider the economic and national security benefits stemming from exports of natural gas via cross-border pipelines and in the form liquified natural gas ("LNG") that are facilitated by natural gas pipeline infrastructure.

There are no benefits to the Commission using a regional approach to making need determinations. The market, not the Commission, should determine winners and losers among competing projects. Any project for which a certificate application is filed already has proven its commercial viability through the open season process in which prospective shippers have committed to purchase capacity. Prospective shippers are sophisticated and make informed decisions, which account for the possibility, or lack thereof, that an existing pipeline or a different proposed pipeline may be able to provide the desired transportation service. Thus, the

open season process disciplines pipeline development, thereby making it unnecessary for the Commission to attempt to determine exactly how much capacity is needed in a specific geographic region.

INGAA supports the Commission's decision to refrain from conducting hearings to determine how much pipeline capacity is needed to satisfy demand within a given region. The Commission should not revert to this discredited approach, which was unwieldy, time-consuming and produced few, if any, consumer benefits. Such a process would frustrate the timely development of market-responsive projects.

The Commission should not speculate about the sufficiency of existing infrastructure or whether demand will materialize in markets to be served by proposed projects. Measures already in place prevent overbuilding. In addition to the discipline provided by shareholders and capital markets, the Commission's existing policies discourage overbuilding. These include the no-subsidy rule and the requirement that pipelines solicit offers to "turn back" or permanently release unneeded capacity during an open season.

The Commission also should not examine speculative questions such as whether market demand for a proposed pipeline will materialize or whether gas-fired generators to be served by a proposed pipeline will be affected by the emergence of other technologies to generate electricity. Such a "crystal ball" analysis is unnecessary in light of the open season process, which ensures sufficient market demand before a project moves forward. Moreover, such analyses would create for the Commission the risk of overstepping the role given it by Congress in the NGA, which clearly did not contemplate FERC being a comprehensive federal energy policy maker.

B. Landowner Interests and the Exercise of Eminent Domain

Current Commission policies, as set forth in the Certificate Policy Statement, appropriately consider how natural gas projects affect landowners and the potential exercise of eminent domain. INGAA does not recommend any changes to this approach. The Certificate Policy Statement provides that "[l]andowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace." The Certificate Policy Statement identifies the interests of landowners whose land could be condemned, and those of the surrounding communities, as a key factor in the Commission's balancing of the benefits of a project against any residual adverse interests. It properly recognizes that landowner property right issues are different in character from other environmental issues considered under the National Environmental Policy Act of 1969 ("NEPA").

Moreover, "[a]s part of its environmental review of pipeline projects, the Commission's environmental staff works to take [affected] landowners' concerns into account, and to mitigate adverse impacts where possible and feasible." This, in fact, occurs. INGAA members have agreed to thousands of pipeline relocations and route changes during the project development process in an effort to minimize the use of eminent domain while also balancing landowner preferences with environmental resource, safety, and constructability considerations. Pipeline certificates routinely include conditions designed to mitigate adverse impacts on affected landowners by addressing noise issues, esthetic concerns and the like.

The Certificate Policy Statement also encourages pipeline applicants to minimize the adverse impacts on affected landowners and to acquire as many rights-of-way through negotiation as possible. This is in the pipeline developer's best interest, because the

condemnation process can delay construction, add significant cost to the project, and harm landowner relations.

Pipelines endeavor to acquire necessary property rights without resorting to eminent domain; but if a pipeline cannot, it must resort to using eminent domain in order to construct the Commission-authorized facilities. The Certificate Policy Statement itself recognizes that "[i]n most cases it will not be possible to acquire all the necessary right-of-way by negotiation." Thus, eminent domain is a necessity in certain circumstances. Once the Commission grants an NGA certificate, it has no discretion to deny the certificate holder the statutorily-granted power of eminent domain. Allowing a few holdout landowners to veto the Commission's decisions regarding needed pipeline infrastructure would contravene the purposes of the NGA.

In recognition of the growing importance of landowner relations, INGAA has updated and revised its "Commitments to Landowners" document by explaining more fully the pledge made by its members. A copy of the updated commitments is attached to these comments. INGAA's members commit to providing affected landowners with a copy of this Commitments to Landowners document, as well as to provide training on the Commitments to employees and contractors who will interact directly with landowners (i.e., land agents, company point of contact(s), and company personnel working on the right-of-way).

INGAA's comments provide additional suggestions for improved landowner engagement. These additional measures, some of which could be taken by pipelines and others by the Commission, will help inform landowners about the Commission's certificate process and promote better relations between pipelines and landowners. For example, INGAA encourages the Commission to revise its July 2015 "Staff's Suggested Best Practices for Industry Outreach Programs to Stakeholders," as part of a new policy statement, to adopt these suggestions.

Improved relations and access to information may help reduce the need to resort to eminent domain.

The Commission should not establish a specific threshold of acquired right-of-way prior to issuance of a certificate. Such a requirement would be unworkable and likely would frustrate the ability to construct needed infrastructure. As a practical matter, pipeline applicants often do not know prior to the issuance of a certificate the extent to which eminent domain may be necessary to construct a project.

No change in the Commission's policy is warranted to address situations when a pipeline cannot access a landowner's property for survey access. Pipelines work extensively and cooperatively with landowners to obtain agreements for survey access. The Commission's regulations expressly provide that an application will not be rejected due to incomplete environmental surveys if the surveys are incomplete because the pipeline lacks access. This regulation ensures that reluctant landowners cannot veto necessary pipeline infrastructure by simply denying survey access – a result that would be contrary to Congress's intent in enacting the NGA.

Where survey access cannot be obtained, pipeline applicants should provide the Commission with the best available information. Recent advances in remote sensing, digital imagery interpretation, and geographical information systems make it increasingly possible for applicants to develop detailed information that can provide a basis for the Commission to make informed decisions. The Commission should continue to utilize publicly-available data or data gathered by remote sensing techniques, and should be open to accepting supplemental information developed by pipeline applicants, when it is deemed reliable. No changes in existing policies are needed in this area.

C. Consideration of Environmental Impacts

Since the issuance of the Certificate Policy Statement nearly two decades ago, the Commission has been successful in fulfilling its dual statutory mandates under NEPA and the NGA by addressing both the economic and environmental aspects of proposed pipeline projects. The goal of NEPA is informed decision-making intended to make federal agencies like FERC aware of the environmental impacts associated with the major federal action that they are considering. FERC properly undertakes its NEPA review consistent with the bounding principles established under NEPA regulations, guidance, and court precedent (i.e., causality, the agency's statutory jurisdiction, reasonable foreseeability, the reasonable availability of probative information, etc.). This environmental review is robust and includes the devotion of significant resources to assess, mitigate and avoid environmental impacts. For example, the Commission staff regularly utilizes its pre-filing process and data requests to seek additional information as part of an iterative process to review and shape the proposed project to avoid or minimize environmental impacts. This iterative process results in a robust NEPA document that evaluates the potential environmental impacts of the proposed project. Ultimately, the Commission ensures that remaining environmental impacts are minimized by imposing environmental conditions in the certificate order.

The enactment of NEPA did not change the fundamental analysis in the action statute, the NGA, which Congress passed to ensure that the public need for natural gas is fulfilled in an economical and reasonable manner. The Commission must respect Congress's decisions concerning the national priorities identified in the NGA. Thus, the Commission's public convenience and necessity review undertaken under the NGA is primarily an economic test. The economic benefit/adverse impact balancing required in the Commission's public interest

determination should continue to be separately considered from the adverse environmental effects of a proposed project, consistent with the current Certificate Policy Statement and the Commission's existing process to review environmental impacts.

The Commission should refrain from broadening the scope of the alternatives analysis required under NEPA. The Commission currently looks at (1) the no-action alternative, (2) alternatives available from other systems, (3) alternatives in the design of the proposed project, and (4) alternatives in the routing of the proposed project and the location of above-ground facilities like compressor stations. This scope fully informs the Commission about the potential range of impacts associated with the proposed project as well as the reasonable alternatives that would achieve the purpose of the proposed project. As the Commission considers these four types of alternatives, it should focus on alternatives that more precisely match (a) the purpose and need for the agency's action and (b) the extent of the Commission's authority under the NGA. Alternatives that do not achieve the purpose and need of the proposed project should not be part of the NEPA review because they fail to inform the Commission about its pending decision under the NGA. The NEPA alternatives analysis should not be used as a vehicle to broadly weigh disparate environmental policies that are beyond the Commission's Congressional mandate to review and certificate jurisdictional facilities that meet the public convenience and necessity.

The Commission should not conduct or require regional analyses of cumulative impacts. Regional analyses are informative only when Congress tasks an agency with making regional decisions. However, in Section 7 of the NGA, Congress tasked the Commission with responding to individual certificate applications. Congress did not authorize the Commission to consider regional infrastructure needs or speculate on whether the demand could be satisfied by other

energy alternatives. Consequently, a regional analysis is neither required under NEPA nor would it contribute meaningfully to the Commission's review of environmental impacts.

The purpose of a cumulative impacts analysis is not to consider regional needs, but rather, to inform the Commission about how the effects of its decision could aggregate with other impacts on the same resource in the same time and place, thereby contributing to greater or different effects on the resource. To identify the geographic and temporal scope of the cumulative impacts analysis required under NEPA, the Commission should identify the resources and geographic area likely to be impacted by a decision, as well as the time frame over which its decision will likely have impacts. While doing so, the Commission should refrain from engaging in speculation and instead focus on "truly meaningful effects" that can be analyzed confidently based primarily on quantitative information, which can be supplemented where necessary by qualitative information.

The Commission's existing policy statement and current approach to analyzing upstream GHG emissions are consistent with NEPA and the bounding principles of causality, reasonable foreseeability and the reasonable availability of probative information suitable for decision-making. The Commission has appropriately excluded upstream impacts associated with natural gas production, including GHG emissions, from the Commission's NEPA analyses of natural gas infrastructure projects because, as a general matter, (1) upstream activities are not sufficiently causally related to the Commission's jurisdictional decision and (2) the indirect impacts arising from these upstream activities are too uncertain to avoid speculation and inform the Commission's decision under the NGA.

Similarly, the Commission should continue to analyze GHG emissions related to downstream uses of natural gas on a case-by-case basis and according to the bounding principles

of causality, reasonable foreseeability, and the reasonable availability of probative information suitable for decision-making. While in certain cases, downstream GHG emissions can be legally caused by the Commission's decision, in general, downstream activities are not caused by the Commission's decision. In the limited circumstances where the jurisdictional transportation of natural gas is demonstrably the cause of downstream activity, the depth of the analysis should depend on the availability of sufficient information to permit meaningful analysis relevant to the Commission's decision. In the case of GHG emissions, the Commission also should focus on whether a meaningful judgment can be formed about whether the contribution of GHGs is likely to have a significant impact on the resource as a whole.

Additional information related to GHG impacts would not contribute meaningfully to the Commission's decision on an application under NGA Section 7. A causal link between the Commission's decision under NGA Section 7 and non-jurisdictional GHG emissions is generally non-existent for upstream and downstream GHG emissions. Furthermore, because neither the applicant nor the Commission has legal authority over the activities in question, it is unlikely that detailed information regarding upstream and downstream GHG emissions or controls would be available to the applicant or the Commission. Where reliable information is inaccessible or incomplete, there is little value in considering such information as part of the Commission's analysis.

The Commission has properly declined to employ the Social Cost of Carbon ("SCC") tool to assist in its decision-making under NGA Section 7. The SCC is an algorithm driven by and infused with policy judgments that lie well beyond the policy authority of the Commission. The SCC calculation is hypersensitive to certain inputs that lack empirical or widely accepted theoretical bases, which casts heavy doubt on the quantitative results and its function as a tool for

quantitative comparison. As the National Academies of Science has noted, assessments that utilize the SCC are prone to suffer from uncertainty, speculation and insufficient information. For these reasons, the Commission should continue refraining from using the SCC.

D. Improvements to The Certificate Application Review Process

INGAA offers various suggestions to amend existing regulations, modify guidance, and alter FERC's practices to improve the certificate review process. Implementing these suggestions will make the certificate process more efficient and effective by streamlining requirements, improving participation by other federal and state agencies, and implementing FERC's commitments under the One Federal Decision Memorandum of Understanding, executed in compliance with Executive Order 13807.

COMMENTS

II. Introduction

INGAA supports many of the enduring principles set forth in the Certificate Policy Statement and urges the Commission to reaffirm them. These principles were sound in 1999 and remain sound today. The Certificate Policy Statement has provided a durable framework for analyzing applications to construct new interstate natural gas pipeline facilities in a reasoned, consistent, and predictable manner. This durability is attributable to the enduring goals the Commission sought to achieve in issuing the Certificate Policy Statement, which included (1) fostering competitive markets, protecting captive customers, and avoiding unnecessary environmental and community impacts while serving increased natural gas demand[4] and (2) providing transparency and clarity in the timing and predictability of the Commission's certification process.[5] As administered by the Commission, the Certificate Policy Statement has achieved its stated goals. The ability to expand the nation's interstate natural gas pipeline systems under the Certificate Policy Statement[6] has contributed to the creation of the most competitive natural gas commodity market in the world. American consumers and industry have benefitted greatly from the timely addition of pipeline infrastructure that has made it possible to capitalize on the United States' natural gas abundance. Additions to our nation's interconnected natural gas pipeline network have increased access to competitive natural gas supplies and have resulted in more affordable energy and energy-based products for American consumers.

[4] Certificate Policy Statement, *supra* n.1, at p. 61,743.
[5] *Id*.
[6] For instance, FERC authorized 2,739 miles of interstate natural gas pipelines in 2017, although the number of miles authorized per year varies. *See* NOI, *supra* n.2, at n.3; *see also* Federal Energy Regulatory Commission, Approved Major Pipeline Projects (July 15, 2018) (providing details, including mileage, by year, of approved major pipeline projects, which summed results in 20,252 miles of pipelines approved between 2000 and 2017), *available at* https://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp.

FERC's natural gas policies, including the currently effective Certificate Policy Statement, have facilitated fulfilling the purposes of the Congressional mandates of wellhead decontrol and integration of the nation's natural gas pipeline network. FERC's landmark restructuring orders, Order Nos. 436[7] and 636[8], sought to ensure that all natural gas suppliers:

> will compete for gas purchasers on an equal footing…this promotion of competition among gas suppliers will benefit all gas consumers and the nation by ensuring adequate and reliable supply of clean and abundant natural gas at the lowest reasonable price.[9]

Consumers continue to benefit from the market model created by competition at the wellhead, non-discriminatory open access transportation and market-responsive infrastructure expansion. These policies have created a highly efficient natural gas market. For example, the secondary market for natural gas pipeline capacity, and the ability for pipeline shippers to segment their contracted pipeline capacity, promotes efficiency in the market by allowing natural gas to move to where it is valued most. Similarly, market centers, or trading hubs, benefit both natural gas producers and marketers as well as natural gas consumers and those obligated to serve natural gas consumers. Trading hubs enable producers and marketers to sell natural gas at the nearest liquid trading point without having to hold pipeline capacity further downstream. Trading hubs also free natural gas distribution companies and other downstream natural gas purchasers from the obligation to hold pipeline capacity back to the wellhead.

The Commission's natural gas policies are complementary. On the one hand, the Commission's certificate policy has promoted and perpetuated competitive natural gas commodity markets by ensuring timely, efficient, predictable and market-responsive

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[7] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 33 FERC ¶ 61,007 (1985) ("Order No. 436").
[8] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, Regulation of Natural Gas Pipelines*, 59 FERC ¶ 61,030 (1992) ("Order No. 636").
[9] *Id*. at p. 61,030.

development of natural gas pipelines. On the other hand, competition and the ability to utilize existing pipeline capacity in a flexible and efficient manner ensures that new pipelines are developed only if shippers conclude that their needs cannot be met with existing pipeline capacity.

Siting interstate natural gas pipelines is central to the purpose of the NGA. The federal siting authority conferred by the NGA is unique among FERC-administered statutes. Neither the Federal Power Act, nor the surviving portions of the Interstate Commerce Act give FERC the authority to site interstate electric transmission lines or oil pipelines. The legislative history of the NGA acknowledged the uniqueness of natural gas transportation by recognizing that: (1) pipelines are the only practical means to transport natural gas long distances, (2) the principal markets for natural gas were often far away from production areas, and (3) individual states lacked the authority to address the need for interstate natural gas transportation.[10] Any impairment to the Commission's ability to site interstate natural gas pipelines in a timely, efficient, predictable and market-responsive manner will be an impairment to the Commission's ability to fulfill its statutory mandate.

FERC's natural gas policies are a creature of its authority under the NGA. While there may be some latitude in interpreting "public convenience and necessity" within the context of contemporary market conditions, the Commission has noted that the NGA does not authorize it to become a comprehensive energy or environmental policymaker with regard to all issues

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

related to natural gas production and consumption.[11] This is consistent with the Supreme Court's recognition that the principal purpose of the NGA was "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[12] Consequently, while some encourage a dramatic expansion of the subject matter to be examined within the scope of determining whether a proposed natural gas pipeline is in the public convenience and necessity, it remains important for the Commission's review to be grounded in the purposes of the NGA.

Development of FERC-jurisdictional gas pipeline projects, including the preparation of a certificate application and all associated permit applications, is a time-consuming and cost-intensive process that is not undertaken lightly. Because the interstate pipeline industry is highly competitive, there often is more than one pipeline competing to serve any given market. This allows pipeline customers to determine which pipeline, including existing pipelines, can offer the most competitive deal for the transportation services they require. Many projects do not proceed past the open season process in which pipelines measure customer demand and ensure that customers with the greatest economic interest secure the capacity that will be created by a project through binding precedent agreements. If a pipeline does not secure contractual commitments, the project sponsor often will abandon the project before filing a request to initiate the pre-filing process or a formal certificate application.[13] Thus, a proposed project will have survived the economic gauntlet of an open season and the project developer will have invested time and resources before any formal proceeding is initiated at the Commission.

[11] *See Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233 at P 29 (2018) ("The Commission believes that it is for Congress or the Executive Branch to decide national policy on the use of natural gas and that the Commission's job is to review applications before it on a case-by-case basis.") (internal citations omitted).
[12] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976).
[13] According to an INGAA survey, 65 member-company open seasons conducted from 2008-2017 did not result in the filing of a certificate application due to inadequate customer demand.

Proposed projects also can undergo significant modifications once the formal Commission proceeding is initiated during the pre-filing process or with the filing of a certificate application. The applicant works constructively with FERC, other permitting agencies, landowners, and all other stakeholders to identify and mitigate environmental issues. This exercise can result in route modifications when appropriate and the utilization of construction techniques that often eliminate, or substantially mitigate, many of the identified issues. Consequently, it should be no surprise that most proposed pipeline projects that reach the point of a final Commission determination result in a certificate of public convenience and necessity.

The fundamental architecture of the Certificate Policy Statement is consistent with the NGA and remains sound. While freshening certain elements may be appropriate, as noted herein, wholesale changes are unnecessary and likely would be counterproductive. Rather, INGAA asserts that the Certificate Policy Statement continues to remain sound and its certificate approvals utilizing the policy statement as the framework for review have been upheld consistently by the courts. The Commission should reaffirm its policy statement subject to these comments.

III. The Existing Certificate Policy Statement Framework

The Certificate Policy Statement outlines four steps the Commission undertakes in determining whether to issue a certificate. These steps demonstrate that the heart of the public convenience and necessity analysis required under NGA Section 7 is an economic one, weighing the public need and benefits of a proposed project against the adverse impacts to the project sponsor's existing customers, existing pipelines in the market and their captive customers, landowners, and communities.[14] The Certificate Policy Statement also explains that

[14] Certificate Policy Statement, *supra* n.1, at p. 61,745.

consideration of environmental impacts follows this step and is separate from the balancing of public benefits and residual adverse effects.[15]

After evaluating whether a proposal can pass the threshold determination of proceeding without subsidies from existing customers, the Certificate Policy Statement explains that the Commission determines whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on (1) the existing customers of the pipeline; (2) existing pipelines in the market and their captive customers; or (3) economic interests of landowners and communities affected by the route of the new pipeline. This is not a decisional step but is the point where the Commission will review the efforts made by the applicant and will assist in finding ways to mitigate adverse economic effects. Notably, other interests, such as environmental impacts, are considered separately during the NEPA analysis in the certificate proceeding.[16]

In the next step, if the Commission finds no adverse effects on the three identified interests, then no balancing of benefits against adverse effects is necessary, and the Commission proceeds to complete the environmental review required by NEPA.[17] However, if the Commission concludes that there will be "residual adverse effects" on the three identified interests (after minimization efforts), then the Commission will evaluate the project by balancing

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[15] *Id*.

[16] *Id*. at p. 61,747 ("Depending on the type of project, there are three major interests that may be adversely affected by approval of major certificate projects, and that must be considered by the Commission. These are: the interests of the applicant's existing customers, the interests of competing existing pipelines and their captive customers, and the interests of landowners and surrounding communities. There are other interests that may need to be separately considered in a certificate proceeding, such as environmental interests.").

[17] *Id.* at p. 61,747 ("If the proposed project will not have any adverse effect on the existing customers of the expanding pipeline, existing pipelines in the market and their captive customers, or the economic interests of landowners and communities affected by the route of the new pipeline, then no balancing of benefits against adverse effects would be necessary. The Commission would proceed, as it does under current practice, to a preliminary determination or a final order depending on the time required to complete an environmental assessment (EA) or environmental impact statement (EIS) (whichever is required in the case).").

the evidence of public benefits against the residual adverse effects. "This is essentially an economic test."[18] The Commission will consider "the effects of the project on all the affected interests; this means more than the interests of the applicant, the potential new customers, and the general societal interests."[19] The Certificate Policy Statement notes that "[t]here are other interests that may need to be *separately* considered in a certificate proceeding, such as environmental interests."[20]

In the final step, if the public benefits outweigh the adverse effects on economic interests, then the Commission will complete the environmental analysis required by NEPA.[21] Informed by this NEPA analysis, the Commission may mitigate environmental impacts by, for example, directing the consideration of alternatives and pipeline route alterations, and by imposing conditions on the certificate order requiring certain practices or procedures that minimize or eliminate adverse impacts.[22]

These steps properly reflect that the Commission's consideration of environmental impacts follows the balancing of economic interests protected by the NGA.[23] The role of

[18] *Id.* at p. 61,745.
[19] *Id*. at p. 61,747.
[20] *Id*. (emphasis added).
[21] *Id*. at p. 61,745 ("Only when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered. It is possible at this stage for the Commission to identify conditions that it could impose on the certificate that would further minimize or eliminate adverse impacts and take those into account in balancing the benefits against the adverse effects. If the result of the balancing is a conclusion that the public benefits outweigh the adverse effects then the next steps would be the same as for a project that had no adverse effects.").
[22] *Id*. at p. 61,749 ("The balancing of interests and benefits that will precede the environmental analysis will largely focus on economic interests such as the property rights of landowners. The other interests of landowners and the surrounding community, such as noise reduction or esthetic concerns will continue to be taken into account in the environmental analysis. If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route.").
[23] Identification and evaluation of environmental impacts associated with a proposed project generally (and properly) begins well in advance of the Commission's ultimate *consideration* of these impacts after it completes balancing the evidence of public benefits against the residual adverse effects. *See* 18 C.F.R. Part 157 (detailing certificate application process and necessary information and describing the pre-filing process, where FERC holds

environmental impacts in the Commission's review of certificate applications has been consistent and in conformance with the Certificate Policy Statement. For instance, when responding to arguments by landowners that the Commission should weigh adverse environmental impacts against the public benefits, the Commission stated:

> Under the Certificate Policy Statement, the Commission will not authorize the construction of a project unless it first finds that the overall public benefits of the project outweigh the potential adverse consequences. The Certificate Policy Statement explains that the "[s]trength of the benefits showing will need to be proportional to the applicant's proposed exercise of eminent domain procedures." However, this balancing analysis is essentially an economic test that focuses on the Landowners' property rights and precedes an environmental analysis. The Commission performed this balancing test and thus did not err by failing to balance project need and benefits against adverse environmental impacts.[24]

In other words, "[t]his essentially means that it is Commission policy not to authorize a project that does not pass scrutiny on an economic basis, notwithstanding that a project's potential effects on the environment might prove minimal."[25]

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

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scoping meetings to identify relevant issues, pursuant to NEPA); 18 C.F.R § 380.12 (detailing the resource reports that must be attached to certificate applications).

[24] *Midwestern Gas Transmission Co*., 116 FERC ¶ 61,182, at P 37 (2006) (footnotes omitted); *see also National Fuel Gas Supply Corp*., 139 FERC ¶ 61,037, at P 12 (2012) ("The balancing of adverse impacts and public benefits under the Commission's Certificate Policy Statement is not an environmental analysis process, but rather an economic test that we undertake prior to our environmental analysis.").

[25] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 287, n.784 (2018).

[26] *See, e.g., Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (analyzing the public need for the project and balancing such benefits against impacts to existing pipelines and their customers and to landowners and communities, then analyzing the environmental impacts associated with the proposal). Generally, the Commission's orders reviewing certificate applications first proceed to evaluate the demonstrated public need for the proposed project, then weigh those benefits against the adverse effects from the project. In a subsequent section, the Commission's orders then review the NEPA document evaluating the environmental impacts from the project.

balancing is supported by the NGA, which was intended to be a consumer protection statute that was fundamentally economic in nature.[27] The Supreme Court has affirmed that the Commission's public interest evaluation is not a license to promote the general welfare and that the Commission's powers under NGA Section 7 are limited.[28] The D.C. Circuit has followed this precedent:

> Any such authority to consider all factors bearing on the "public interest" must take into account what the "public interest" means in the context of the Natural Gas Act. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful. In carrying out its statutory certification task FERC must recognize that "a need for federal regulation does not establish FPC jurisdiction that Congress has not granted."[29]

Further, the Commission's earlier practice was to issue a preliminary determination on non-environmental issues, then to issue a subsequent order reviewing the environmental impacts identified in the NEPA document. *See, e.g., Empire Pipeline, Inc.*, 116 FERC ¶ 61,074 (2006) (order on a certificate application making preliminary determination on non-environmental issues).

[27] *See Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591, 610 (1944) (stating that the "primary aim of [the Natural Gas Act] was to protect consumers against exploitation at the hands of natural gas companies."); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959) ("The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. As the original section 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension, or acquisition will be required by the present or future public convenience and necessity,' and that all rates and charges 'made, demanded, or received' shall be 'just and reasonable.'" (citations omitted)); *Sunray Mid-Con. Oil Co. v. Fed. Power Comm'n*, 364 U.S. 137, 147 (1960) (purpose of NGA is to protect consumers against exploitation at the hands of natural gas companies and afford consumers protection from excessive rates and charges); *Pub. Serv. Comm'n of N. Y. v. Fed. Power Comm'n*, 467 F.2d 361, 370 (D.C. Cir. 1972) ("The Federal Power Commission's primary mission under the Natural Gas Act is to protect the consumer, though it must also strive to reach a balance between the consumer, producer, and those whose interests fall in between.").

[28] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-90 (1976) ("*NAACP v. FPC*"); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.,* 365 U.S. 1 (1961) ("*FPC v. Transco*"); *accord Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purpose for which FERC was given certification authority.").

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

In sum, the Commission proceeds stepwise in determining whether a proposed jurisdictional facility will serve the public convenience and necessity. The analysis is fundamentally economic, weighing the public need and benefits from a proposed project against the adverse impacts to the pipeline applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities. In accordance with NEPA, the Commission looks to the environmental impacts of the proposed project only after confirming that the public benefits outweigh the adverse effects on economic interests protected by the NGA.

IV. FERC's Determination of Need

Precedent agreements are the best and most objective demonstration of public need. Under the Certificate Policy Statement, to demonstrate that its proposal is in the public convenience and necessity, an applicant must show that the public benefits that would be achieved by its proposed project outweigh the proposed project's potential adverse impacts.[30] The Certificate Policy Statement identifies the types of public benefits that an applicant could show, including meeting unserved demand, eliminating bottlenecks, accessing new supplies, lowering costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.[31] The Certificate Policy Statement states that, "[a]ny relevant evidence could be presented to support any public benefit the applicant may identify."[32] In recent certificate proceedings, the Commission has found precedent agreements, or contracts executed by

[30] *See* Certificate Policy Statement, *supra* n.1, at 61,748 ("The objective is for the applicant to create a record that will enable the Commission to find that the benefits to be achieved by the project will outweigh the potential adverse effects, after efforts have been made by the applicant to mitigate these adverse effects.").
[31] *Id*.
[32] *Id*.

prospective shippers, to be "the best evidence that additional gas will be needed in the markets" to be served by the proposed project.[33] The Commission also noted in the NOI that, "[i]n practice, the Commission does not look 'behind' or 'beyond' precedent agreements when making a determination about the need for new projects or the needs of the individual shippers."[34]

The Commission asks in this NOI whether precedent agreements remain an appropriate indicator of need and whether the Commission should examine additional information in evaluating the need for proposed pipeline infrastructure projects.[35] Specifically, the Commission asks:

> A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?
>
> A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

INGAA agrees that binding precedent agreements remain the most objective and best demonstration of public need under NGA Section 7. In the Certificate Policy Statement, the Commission stated that it would consider precedent agreements to be significant evidence of demand for proposed projects.[36] Precedent agreements remain the most reliable evidence of project need because they represent long-term financial commitments by sophisticated market

[33] *E.g.*, *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at P 55 (2017).
[34] NOI, *supra* n.2, at P 52.
[35] *Id*. at P 54.
[36] Certificate Policy Statement, *supra* n.1, at p. 61,748.

participants. These financial commitments are often substantial, depending upon the quantity of contracted pipeline capacity and the size of the project in question. As an example, INGAA found the net present value of a shipper commitment for 100,000 Dth/day on a recently certificated pipeline project for a 15-year term at the stated initial recourse rate to be greater than $200 million.[37] Sophisticated shippers bear the financial risk that a proposed pipeline will be able to meet their supply and demand projections and would not purchase the capacity if it were not in their economic interest to do so.

Prospective shippers purchasing interstate gas pipeline capacity fall into three broad categories: (1) end users (i.e., natural gas-fired generators and industrial customers); (2) parties that have a state-mandated obligation to serve end users (i.e., local gas distribution companies and electric utilities); and (3) parties that produce gas or sell gas into the market or repackage gas supply and transportation (i.e., producers, marketers and asset managers) either under a long-term commitment or on a shorter-term or spot market basis. Regardless of the type of shipper, all shippers utilize their contracted pipeline capacity to satisfy market demand for natural gas and thereby provide a public benefit.

As the Commission noted in Order No. 636, its policy of non-discriminatory open access to pipeline transportation sought to promote "competition among gas suppliers [and] will benefit all gas consumers and the nation by ensuring an adequate and reliable supply of clean and abundant natural gas at the lowest reasonable price.[38] The ability to certificate new interstate natural gas transportation facilities in a market-responsive manner pursuant to the current Certificate Policy Statement contributes to achieving the goals of wellhead decontrol and open access transportation by creating additional pathways for delivering competitive gas supplies to

[37] *See PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018).
[38] Order No. 636, *supra* n.8, at 61,030 (internal citations omitted).

consumers. Thus, there is a direct linkage between the need for pipeline capacity evidenced by precedent agreements with shippers and the public benefit of providing consumers the benefits of the competitive natural gas commodity market. Satisfying a private need – the need for a pathway to transport natural gas between two points – provides a public benefit because the public will have additional access to competitively-priced natural gas supplies. This public benefit can occur directly, as in the case of natural gas delivered to a local distribution company that serves residential and commercial consumers, or indirectly, as in the case of the enhanced competition resulting from a producer/marketer delivering natural gas to a trading hub and providing competitively priced gas to willing buyers. Consumers in turn benefit when access to competitively-priced natural gas results in more affordable home heating, electricity, lower-priced inputs for industrial and petrochemical processes, and ultimately lower-priced consumer goods. Accordingly, precedent agreements reflect the public benefit of providing consumers with the advantages of the competitive natural gas commodity market and remain the strongest evidence of public need.

In addition, the Commission's incremental pricing policy prevents both a pipeline and its shippers from entering into contracts for unneeded pipeline capacity. As the Commission notes in the NOI,

> Under incremental pricing, existing customers using existing facilities do not contribute to, and thereby do not subsidize, the cost of constructing and operating new projects. Applicants can recover the costs of the new facilities only from shippers who use them, and are fully at risk for the cost of the new facilities and will bear the financial burden of any unsubscribed capacity. In the Policy Statement, the Commission reasoned that incremental pricing would send the proper price signals for new construction and indicate whether a project is financially viable.[39]

[39] NOI, *supra* n.2, at P 17 (internal citations omitted).

The Commission's no-subsidy policy ensures that shippers and pipeline project sponsors bear the financial risk associated with a proposed project.[40] A pipeline project will not proceed unless it is financially viable. The project will be financially viable only if its shippers believe that the value that can be realized from holding the pipeline capacity exceeds the cost of the multi-year commitment to be a firm shipper. That value is contingent on the strength of the market for the natural gas to be transported using the capacity created by the project. In short, absent strong evidence of a market need for the natural gas to be transported, shippers would not contract for pipeline capacity and pipeline companies would not develop projects. Consequently, binding precedent agreements remain the most objective and strongest demonstration of need for a proposed pipeline.

Shipper commitments for the capacity to be created by a pipeline project, as evidenced by executed precedent agreements, and the commitment to pay millions of dollars (and typically much more) in demand charges, reflects careful consideration by corporate management who have determined that the natural gas capacity and commodity markets will allow for recovery of their investment. Pipeline project sponsors also will not commit to financing projects without executed binding precedent agreements with creditworthy shippers. These shipper commitments demonstrate to the project sponsor's corporate management that there is sufficient market demand to provide for the long-range cash flow required to earn an adequate return on the substantial capital invested in each pipeline construction project. Thus, FERC's policy, which relies upon the sophisticated and informed judgement of both pipeline project sponsors and shippers, ensures that projects are developed only after public need is confirmed.

[40] NOI, *supra* n.2, at P 26.

It also bears noting that interstate natural gas pipelines are financed entirely with private capital. As noted by Dr. Jeff Makholm in his book, *The Political Economy of Pipelines*:

> The most defining characteristic of US oil or gas pipelines is that they all have been financed by investor-owners under the assumption that each pipeline would pay for itself. Having a payment scheme in place from creditworthy parties for a new pipeline is a very big deal. It is the capital market's independent check on the wisdom of the line, its route, and size.[41]

FERC's incremental pricing policy complements and reinforces the discipline imposed by private capital markets. Investors in gas pipeline projects understand that they bear the risk of the cost of new facilities as well as any unsubscribed capacity, and they act accordingly when determining whether to deploy their capital. This is yet another method in which the market disciplines itself against overbuilding, which naturally reduces unnecessary impacts to landowners and the environment.

Accordingly, the Commission should continue to enable market-responsive pipeline development by applying its incremental pricing policy and relying upon precedent agreements as the best and most objective evidence of need in individual certificate proceedings. The Commission's policies have worked as intended and have benefitted consumers and the nation's economy. The Commission must continue allowing market forces to choose winners and losers.

A. Precedent Agreements Must Continue to Be Considered Strong Evidence of Public Need.

Executed precedent agreements are the best and most objective way to demonstrate public need for proposed interstate natural gas pipeline facilities. The Commission should not look behind precedent agreements, nor should it require applicants to provide additional evidence of public need. Such an analysis would introduce uncertainty into the certificate process and would certainly increase the likelihood of protracted proceedings at the Commission

[41] Dr. Jeff Makholm, *The Political Economy of Pipelines* 22 (2012).

and subsequent litigation. While alternate forms of evidence can be helpful and are occasionally provided by project sponsors to bolster the demonstration of need evidenced by executed precedent agreements, overreliance on other forms can be problematic. Protracted analysis of alternate forms of evidence, which are more subjective, could result in proceedings rife with uncertainty. Other forms of evidence, such as studies and expert testimony, require the Commission to make credibility determinations and a host of other assumptions. Consequently, final Commission decisions in certificate proceedings based primarily upon such subjective forms of alternate evidence would make FERC's decisions more vulnerable to reversal on judicial review. In fact, the Commission would open itself up to additional allegations of arbitrary and capricious decision-making by those looking to impede infrastructure projects if it were to rely too heavily upon such subjective evidence as a demonstration of public need. The reliance on more subjective evidence of project benefits – as the Commission did in the past to the detriment of the development of natural gas markets and consumers enjoying lower natural gas commodity prices – would lead to protracted proceedings and ultimate delay in meeting the needs of the market similar to the extraordinary delays experienced prior to the Certificate Policy Statement. One particularly troubling example involved competing certificate applications that took seven years to reach a full resolution.[42] The Commission should not abandon its successful approach for determining market need for projects in favor of a flawed approach that will only harm consumers.

Moreover, the courts have repeatedly upheld FERC's policy to decline to look beyond precedent agreements, with the D.C. Circuit finding that there is "nothing in the policy statement

[42] *See generally Boundary Gas, Inc.,* 40 FERC ¶ 61,088 (1987), *amended by* 41 FERC ¶ 61,375 (1987), *rev'd and remanded sub. nom*, *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688 (D.C. Cir. 1989), *on remand*, *Tenn. Gas Pipeline Co.*, 49 FERC ¶ 61,038 (1989). (Boundary Gas filed its initial application in 1980).

or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers."[43] Thus, the Commission should continue its policy, because it provides the project sponsor, the shippers, and the Commission with a bright-line test that the courts have approved as a valid demonstration of need under NGA Section 7.

The Commission asks in the NOI whether it should consider specific provisions or characteristics of executed precedent agreements when considering need for the project.[44] Specifically, the Commission asks:

> A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission's consideration of need or should the Commission consider whether the contracts are subject to state review?

The Commission should avoid establishing rigid criteria regarding the analysis of specific provisions or characteristics of precedent agreements. The Commission's no-subsidy policy is effective in ensuring that pipelines do not shift the financial burden associated with unsubscribed capacity to customers that do not benefit from the expansion project. This removes the need to examine specific provisions of precedent agreements. It may occasionally be reasonable, however, for the Commission to request additional information in specific certificate proceedings if the totality of the circumstances merits additional analysis or explanation.

[43] NOI, *supra* n.2, at P 52 (*citing Myersville Citizens of Rural Cmty., Inc. v. FERC*, 783 F. 3d 1301, 1311 (D.C. Cir. 2015)).
[44] NOI, *supra* n.2, at P 54.

B. The Commission Should Not Distinguish between Precedent Agreements with Affiliates and Non-Affiliates.

In the NOI, the Commission asks:

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

The Commission should not distinguish between precedent agreements with affiliates and non-affiliates when considering the need for a proposed project, because both appropriately represent market need. While FERC has the authority to investigate allegations of undue discrimination in favor of an affiliated entity if it has any concerns,[45] it is unnecessary for the Commission to distinguish between precedent agreements with affiliated and unaffiliated entities.

Much of the recent increase in affiliated shippers on new pipeline projects can be attributed to joint ventures between pipeline companies and either their shippers or corporate affiliates of their shippers. There are legitimate business reasons why this phenomenon is becoming more common for larger pipeline projects. Interstate gas pipeline project development has become increasingly expensive and time-consuming. In response to this new reality, natural gas pipeline companies are seeking joint venture partners to help finance large projects and to share project execution risks. Parent companies of prospective shippers on a new project are the most logical partners when forming these joint ventures. Under these circumstances, it is the significant stake that the joint venture partners have taken in the capacity on the pipeline that incentivizes investment by the shippers' parent companies in the pipeline – not the other way around. A policy that discourages this type of arrangement could deprive the market of an

[45] *See* 18 C.F.R. § 284.7(b) (2017) (requiring transportation services to be provided on a non unduly discriminatory basis).

efficient vehicle for raising capital for new projects with no countervailing benefit to the public interest. In addition to the investment opportunity for shippers and their affiliates, partnering on pipeline projects provides other benefits, including the ability to have additional insight and direct input into the project development process. It is not necessary, nor would it be prudent, for the Commission to question the business decisions made by these sophisticated private parties.

Additionally, both state regulatory oversight and market discipline prevent affiliated shippers from purchasing unneeded capacity. Affiliated shippers that are subject to state regulation, such as local distribution companies and electric utilities, must receive approval of their contracting decisions from the relevant state regulator. In cases where state approval of precedent agreements is pending, the shippers are at risk for recovering their costs.[46] In recent certificate proceedings, the Commission has rightfully declined to question the prudence of shipper contracting decisions if the affiliated shipper was a state-regulated entity.[47] Such an analysis would infringe upon the authority of state regulators, who are best situated to evaluate contracting decisions within their jurisdiction, and would be redundant. Accordingly, the Commission should continue to defer to state regulators to determine the prudence of shipper contracting decisions by entities under their jurisdiction.

Affiliated shippers that are not subject to state regulation, such as natural gas producers and marketers, lack any assurance of cost recovery. These entities operate in intensely competitive commodity markets, which compels them to identify and secure the most cost-effective transportation options. These entities can ill-afford to subsidize a less competitive alternative because their profitability depends on their ability to compete favorably with other

[46] *See Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at P 60 (2017).
[47] *See id*. *See also PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 at P 34 (2018).

marketers and producers. An affiliated entity's corporate management would not approve a precedent agreement with an affiliated pipeline if more advantageous economic alternatives existed. Therefore, it also would be unnecessary and redundant for the Commission to analyze the contracting decisions of affiliated shippers not subject to state regulation.

In addition, some commercial structures require shippers to hold capacity on affiliated interstate pipelines. For example, in connection with traditional LNG sales projects,[48] the affiliates of LNG project companies are responsible for purchasing, owning, and managing feedstock gas supplies and arranging for pipeline transportation and gas storage capacity, including capacity on affiliated interstate pipeline facilities, that is necessary to provide feedstock gas supply for liquefaction terminal operations. This feedstock gas is used to produce LNG sold from the liquefaction facility.[49] A policy that scrutinized the contracting decisions of such entities would discourage them from holding and managing pipeline capacity on affiliated interstate facilities to transport feedstock gas. Similarly, a policy that required non-affiliates to hold such capacity would fundamentally impede the ability of the operator of a traditional LNG sales project to manage its facilities. This could interfere with the Commission's general policy and Congress's expressed intentions about how those LNG facilities should be regulated,[50] and could deprive the nation of the benefits those projects provide, as discussed further below.

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[48] Such a facility is distinguished from a "tolling" facility, in which the customer of the LNG liquefaction facility is responsible for arranging the pipeline transportation, underground gas storage capacity, supply of feedstock gas, and lifting of LNG cargoes from such liquefaction facility. The tolling customer bears the commercial risk of the gas and LNG throughout the value chain.

[49] *See* Michael D. Tusiani and Gordon Shearer, *LNG: Fuel for a Changing World, A Nontechnical Guide*, 34-35, 159, 161-62,405-08, 420-22, 435-38 (PennWell Corp. 2d ed. 2017).

[50] *See* NGA § 3(e)(3)(B), 15 U.S.C. § 717b(e)(3)(B) (prohibiting the Commission from conditioning approval of an LNG terminal on the applicant's provision of services to third-parties). Although Section 3(e)(3)(B) of the NGA partially sunset in 2015, its principles regarding the regulation of LNG was based upon pre-existing Commission policy, which still remains applicable. *Hackberry LNG Terminal, L.L.C.*, 101 FERC ¶ 61,294 (2002), *reh'g granted sub nom.*, *Cameron LNG, LLC,* 104 FERC ¶ 61,269 (2003); *see also Dominion Cove Point, LP*, 160 FERC ¶ 61,134 (2017).

Moreover, every corporate entity is legally separate, with distinct rights and obligations.[51] Each corporate entity must operate under its distinct legal structure, which includes separate directors and officers possessing distinct obligations and fiduciary duties to shareholders.[52] Corporate directors and officers would not approve a precedent agreement with either an affiliated or non-affiliated pipeline if they did not believe that the entity negotiated a sound and commercially favorable deal, because doing so would not be in the corporation's best interests or in the interests of its shareholders. Corporate management's fiduciary responsibilities and obligations to investors remain stringent regardless of whether the transaction is with an affiliated or unaffiliated entity.[53] Thus, shippers affiliated with a pipeline project sponsor will not enter into binding precedent agreements any differently than their unaffiliated counterparts. An affiliated shipper cannot afford to enter into an uneconomic contract that will cause it to become unprofitable regardless of whether an affiliated pipeline entity may profit from the contract. For these reasons, no shipper, regardless of affiliation, will enter into a precedent agreement that it believes is uneconomic.

[51] "[D]istinct corporations, even parent and subsidiary corporations, are presumed separate." *Greater Hammond Cmty. Servs., Inc. v. Mutka*, 735 N.E.2d 780, 784 (Ind. 2000) (*citing McQuade v. Draw Tite Inc.*, 659 N.E.2d 1016, 1020 (Ind. 1995)).

[52] Under general principles of corporate law and generally accepted accounting principles, "two separate corporations are regarded as distinct legal entities even if the stock of one is owned wholly or partly by the other." William Meade Fletcher, 1 FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 43 (perm. Ed., rev. vol. 2006).

[53] In addition, affiliate relationships are subject to change in the current business climate as assets are spun off or sold to other corporate entities. Therefore, while the precedent agreement may be with an affiliate when the precedent agreement is executed, the shipper may become a non-affiliated shipper when the pipeline goes into service or during the term of its service agreement for the project.

C. The Commission Must Avoid Considering End Uses when Making its Need Determination.

The Commission in its NOI asks the following questions on the consideration of end uses when reviewing certificate applications:[54]

A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission's determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?

A7. Should the Commission consider requiring additional or alternative evidence of need for different end uses? What would be the effect on pipeline companies, consumers, gas prices, and competition? Examples of end uses could include: LDC contracts to serve domestic use; contracts with marketers to move gas from a production area to a liquid trading point; contracts for transporting gas to an export facility; projects for reliability and/or resilience; and contracts for electric generating resources.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?

Raising questions on whether the Commission should consider the end use of natural gas suggests that the Commission would prioritize some shippers over others. This should not be the case. The Commission must avoid considering the intended or expected end use of the natural gas to be transported by proposed projects when considering project need. Likewise, it should not require differing demonstrations of need depending upon the expected or intended end use of the natural gas to be transported. Such considerations would be contrary to years of FERC policy restructuring the interstate natural gas pipeline industry to achieve the Congressional intent of the Natural Gas Policy Act of 1978 and the Natural Gas Wellhead Decontrol Act of 1989. FERC's landmark restructuring orders, Order Nos. 436,[55] 636,[56] and 637[57] facilitated the

[54] NOI, *supra n.2*, at P 54.
[55] Order No. 436, *supra* n.7.
[56] Order No. 636, *supra* n.8.
[57] *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, 90 FERC ¶ 61,109 (2000).

availability of pipeline transportation service on an open access, non-unduly discriminatory basis. Considering end use as part of its need determination for pipeline projects would undermine these goals and run counter to the Commission's policies to ensure that the interstate pipeline network is open to all creditworthy shippers who are willing to pay for pipeline transportation. The Commission should not change its policies to prioritize some shippers over others.

From awarding capacity in an open season through the operational allocation of capacity via the scheduling and curtailment process, the Commission's natural gas transportation program is premised on contracts. Pipeline capacity is allocated based on the priority of the contractual commitment rather than the intended use of the natural gas to be transported or the identity of the shipper. The Commission does not require shippers to be end-use consumers of natural gas.[58] Moreover, any new FERC policy that values certain types of shippers on proposed projects more than others would introduce substantial uncertainty into the certificate review process. Pipeline project sponsors would no longer be able to rely confidently upon executed precedent agreements with certain types of shippers to demonstrate project need, because questions would remain regarding whether the right kind of prospective shipper purchased the capacity. This uncertainty would discourage investment in much-needed gas pipeline infrastructure, and it would deprive natural gas consumers, regardless of specific end use, of the associated economic benefits. FERC must avoid these problematic consequences by refusing to consider end uses when determining need under NGA Section 7.

FERC must avoid undermining its successful policies by beginning to consider intended or expected end use of the natural gas to be transported by proposed interstate pipeline projects.

[58] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 43.

As discussed above, FERC's restructuring of the natural gas industry has worked effectively to foster well-functioning, competitive commodity and capacity markets. FERC's open access transmission regulatory model, which requires pipelines to allocate capacity following an open season without undue discrimination or preference,[59] has allowed for the market-responsive development of new pipeline infrastructure to satisfy the needs of natural gas producers and consumers. FERC must not undermine its long-standing and successful policy by valuing certain types of prospective shippers more than others.

Further, the Commission's policies have encouraged shippers to subscribe only to capacity they deem to be necessary, rather than requiring each shipper to purchase capacity from the wellhead to ultimate consumption. This has led to the creation of vibrant market centers and hubs.[60] Often, producer/marketers subscribe for pipeline capacity only to the first liquid trading hub. The Commission's policies have resulted in tangible consumer benefits through greater competitive supply alternatives at hubs and ultimately lower consumer prices. Consumers would be harmed if the Commission were to determine that precedent agreements with producer/marketers are less probative of need, with no offsetting benefits from making such a determination.

Any analysis of intended or expected end uses in FERC's certificate application review process also would be hampered by the reality that the end use of natural gas to be transported by shippers over a proposed pipeline can change, sometimes substantially, over time. Both the identity and the type of customer that ultimately consumes the natural gas transported by a pipeline can change over time. Natural gas marketers and producers sell gas into the

[59] 15 U.S.C. § 717c(b). *See also* 18 C.F.R. § 157.35(a).
[60] *See* FERC Energy Primer 22 (Nov, 2015) *available at* https://www.ferc.gov/market-oversight/guide/energy-primer.pdf (last visited July 21, 2018).

marketplace to those that value gas the most at the point of sale. It is the very nature of the natural gas marketing business to transact with those that need gas the most and consequently are willing to pay the highest price at the point of sale regardless of the purchaser's ultimate end use of the natural gas (e.g., natural gas-fired generator, LDC, industrial customer). End user demand varies month-to-month, depending on seasonal factors and other contingencies, and marketers shift who they sell to in response to these changes. For example, marketers and asset managers supply natural gas to merchant generators in restructured electric markets that may not know they need natural gas until and unless they are dispatched. For purposes of determining need under NGA Section 7, the need of natural gas producers and marketers for pipeline capacity is no less important than the need of any other class of shippers.

The end use of natural gas transported using contracted pipeline capacity also changes, in part, as a result of the Commission's segmentation policy and the vibrant capacity release market, which allows firm shippers to transport gas to numerous delivery points within their transportation path and release their capacity to the pipeline for reassignment to a willing replacement shipper.[61] Shipper behavior is affected by countless factors, and any predictions regarding how individual shippers will react in future hypothetical situations would require the Commission to engage in never-ending speculation. End uses can also change due to natural gas market dynamics. Nobody could have predicted the effects of the shale boom. Yet, interstate pipelines adapted to the changed market dynamics by altering portions of their systems in order to allow for bi-directional natural gas flows that facilitated deliveries of gas produced in Pennsylvania, Ohio, and West Virginia. Domestic consumers have benefitted from the

[61] 18 C.F.R. § 284.8(e). *See also Promotion of a More Efficient Capacity Release Market*, 123 FERC ¶ 61,286 at P 2 (2008) (In Order No. 636, the Commission sought to ensure: (1) all shippers had meaningful access to the pipeline transportation grid and (2) consumers had access to adequate gas supplies at reasonable prices) (internal citations omitted).

flexibility of the interstate pipeline grid fostered by the Commission's post-restructuring policies. A policy that implicitly or explicitly values certain end uses of natural gas over others in certificating new natural gas facilities would diminish this benefit.

D. FERC Should Consider All Evidence of Project Benefits Supplied by Applicants.

In the NOI, the Commission asks:[62]

> A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider? For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

Precedent agreements should continue to be considered the best and most objective evidence of project need. As noted earlier, there is a direct linkage between the need for pipeline capacity, evidenced by precedent agreements with shippers, and the public benefit of bringing consumers the benefits of the competitive natural gas commodity market. The public benefits highlighted in the Certificate Policy Statement illustrate the reasons that shippers enter precedent agreements for capacity on new or expanded interstate natural gas pipelines: (1) meeting unserved demand; (2) eliminating bottlenecks; (3) access to new supplies; (4) lowering costs to consumers; (5) providing new interconnects to improve the interstate grid; (6) providing competitive alternatives; (7) increasing electric reliability; and (8) advancing clean air objectives. These benefits remain relevant today, and some of the examples identified in the Certificate Policy Statement are even more relevant today than they were in 1999. It is important, however, for the Commission to continue allowing applicants to provide evidence of any public benefit that will be achieved by a proposed project.[63] Project applicants often discuss numerous benefits that will be achieved by their respective projects when submitting their certificate applications

[62] NOI, *supra* n.2, at P 54.
[63] Certificate Policy Statement, *supra* n.1, at 61,748.

and supporting materials. The Commission should consider this evidence and should expressly include this evidence when discussing project need in certificate orders where appropriate. This will help FERC develop a more fulsome rationale for why projects are needed, which will provide additional certainty.

While the United States' network of over 200,000 miles of interstate natural gas transmission pipelines is the envy of the rest of the world, bottlenecks still exist today, some of which directly harm consumers by increasing costs. The situation in New England this past winter is a prime example. Despite being a few hundred miles away from some of the largest natural gas production basins in the world, New England was compelled to import LNG from Russia on two separate occasions in 2018 due to inadequate pipeline capacity.[64] Capacity limitations also caused the spot price of natural gas delivered to Boston to skyrocket to $78.80 per million Btus (MMBtu) during the severe cold weather in January 2018. Meanwhile, the price of delivered natural gas in Leidy, Pennsylvania was $4.20 per MMBtu. This unfortunate situation resulted from inadequate pipeline capacity to move produced natural gas from Pennsylvania, Ohio, and West Virginia to consuming areas in New England, and consumers ultimately bore the weight of the higher gas prices.

Another illustration of how the Commission's exemplary list of benefits continues to be relevant today is its recognition of increasing electric reliability. Natural gas-fired generation has increased substantially in the period since the issuance of the Certificate Policy Statement.[65] According to the U.S. Energy Information Administration, natural gas-fired generation

[64] *See, e.g.,* "Our Russian 'pipeline,' and its ugly toll," Boston Globe, Feb. 13, 2018 *available at* https://www.bostonglobe.com/opinion/editorials/2018/02/12/our-russian-pipeline-and-its-ugly-toll/K0wQ7FBTGR756DqorYkwxN/story.html (last visited July 25, 2018).
[65] NOI, *supra* n.2, at P 2.

accounted for 31.7 percent of the nation's total electricity generation in 2017.[66] Moreover, natural gas-fired generators have demonstrated the ability to excel in each key generator reliability attribute and performance metric, including dispatchability, short startup times, fast ramp rates, frequency response, black start capability, and proximity to load.[67]

In addition to the explicit examples listed in the Certificate Policy Statement, the Commission also could identify and consider the economic and national security benefits of exporting natural gas by pipeline to Mexico or by shipping LNG facilitated by increased pipeline infrastructure when evaluating certificate applications for projects that will enhance natural gas export capabilities. In 2017, the U.S. became a net exporter of natural gas for the first time since 1958.[68] This has led to significant benefits to the national economy, which will continue to increase. In a Department of Energy ("DOE") report examining the macroeconomic impacts of various LNG export scenarios, DOE noted that the national economy benefits from increased LNG exports due to corresponding increases in "investment in the liquefaction process, export revenues, resource income, and additional wealth transfer in the form of tolling charges."[69] Ultimately, the report found that "overall U.S. economic output is higher whenever global markets call for higher levels of LNG exports, assuming that exports are allowed to be

[66] U.S. Energy Information Administration "Electricity Data Browser", https://www.eia.gov/electricity/data/browser/#/topic/0?agg=2,0,1&fuel=vtvv&geo=g&sec=g&linechart=ELEC.GEN.ALL-US-99.A~~ELEC.GEN.NG-US-99.A~~~~ELEC.GEN.TSN-US-99.A~~&columnchart=ELEC.GEN.ALL-US-99.A~ELEC.GEN.COW-US-99.A~ELEC.GEN.NG-US-99.A~ELEC.GEN.NUC-US-99.A~ELEC.GEN.HYC-US-99.A~ELEC.GEN.WND-US-99.A&map=ELEC.GEN.ALL-US-99.A&freq=A&start=2001&end=2017&ctype=linechart&ltype=pin&rtype=s&pin=&rse=0&maptype=0 (last visited July 25, 2018).

[67] The Brattle Group, *Diversity of Reliability Attributes* (2017) at 21, Table 1 (giving natural gas generators a rating of "Relatively Advantaged" for each of these reliability attributes, as compared to other generating technologies including coal and nuclear).

[68] U.S. Energy Information Administration "The United States is projected to become a net energy exporter in most AEO2018 cases" https://www.eia.gov/todayinenergy/detail.php?id=34912 (last visited July 25, 2018).

[69] NERA Economic Consulting, Macroeconomic Outcomes of Market Determined Levels of U.S. LNG Exports 67 (2018).

determined by market demand."[70] In addition to deepening and diversifying the market for U.S.-produced natural gas, LNG exports stimulate local, regional, and national economies through direct and indirect job creation, increased economic activity, and tax revenues. Interstate gas pipelines are playing a crucial role in facilitating LNG exports and thereby achieving the benefits of such exports.

LNG exports also stand to provide substantial benefits to the U.S. internationally. In addition to significantly improving the U.S. balance of trade these geopolitical benefits include reducing other countries' reliance on energy from suppliers unfriendly to the United States as well as the global environmental benefits of displacing less benign sources of energy. As the DOE has recognized, "[t]o the extent U.S. exports can diversify global LNG supplies, and increase the volumes of LNG available globally, it will improve energy security for many U.S. allies and trading partners."[71] The Commission should therefore consider all potential benefits stemming from the increased ability to export natural gas to Mexico by pipeline or by shipping LNG worldwide when making its public need determination under NGA Section 7(c) for proposals that will facilitate natural gas exports.

E. <u>There Are No Benefits to FERC Changing its Analysis to Make Need Determinations Based on a Regional Approach.</u>

In the NOI, the Commission asks:[72]

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

[70] *Id*. at 14.
[71] *Cheniere Marketing, LLC*, DOE/FE Order No. 3638 at 191 (May 12, 2015).
[72] NOI, *supra* n.2, at P 54.

FERC should not assess need differently if multiple certificate applications are filed to provide transportation service in the same geographic area. The market, not FERC, should determine winners and losers among competing projects. There is no convincing reason why a decision premised on a regional study performed by a federal agency will produce better results than due diligence by sophisticated investors who choose to put their own capital at risk. In reality, a process for ascertaining the regional need for pipeline infrastructure will provide opponents with nearly endless opportunities for delay and litigation and ultimately lead to paralysis by analysis.

FERC must continue allowing the market to determine winners and losers among competing projects, and the Commission should not question whether multiple projects are needed in the same geographic area when the projects in question are supported by shippers. Individual shippers are in the best position to determine whether, and if so how much, capacity to purchase during the open season process. These sophisticated shipper parties make informed decisions, which account for the possibility, or lack thereof, that a different project in the vicinity may be able to provide the desired transportation service. It would be antithetical to FERC's policies promoting competition if the Commission were to insert itself into the decisions of sophisticated private parties. These parties would not execute the precedent agreements needed to support the project if they did not believe doing so was in their best interest. If a project is not commercially viable due to lack of market support, it will not move forward. As noted above, in a recent INGAA survey, for the period 2008-2017, 65 projects proposed by member companies did not proceed past the open season. This confirms that the open season process disciplines pipeline development, thereby making it unnecessary for the Commission to attempt to determine exactly how much capacity is needed in a specific geographic region. The Certificate

Policy Statement was issued to ensure efficient, market responsive interstate pipeline project development. Incorporating regional market analyses into the process would be a substantial step back with no countervailing benefit.

Before the Commission issued the Certificate Policy Statement, heavily contested certificate applications could take years to resolve. For example, Millennium Pipeline Co., L.P. filed a highly-contested certificate application in December 1997. A certificate was not issued until September 2002.[73] The process sometimes took even longer if the Commission was required to choose among projects competing to serve a given market. These so-called "*Ashbacker*" proceedings were not identical to the type of regional studies currently suggested, but they were analogous. They required the Commission to conduct hearings to determine how much capacity would be needed in a given area and then decide which of the various competing projects was best able to fulfill those needs.[74]

As an example of the *Ashbacker* proceedings, in 1980, Boundary Gas, Inc. filed an application with the Commission for authorization to import gas from Canada and resell it to

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[73] *Millennium Pipeline Co.*, *L.P.,* 100 FERC ¶ 61, 277 (2002). *See also Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987)).

> Historically, the Commission's approach to certification has entailed an elaborate effort to predict the likely consequences of allowing the proposed service or act. This included the Commission's foretelling—or, more realistically, attempting to foretell—the impact of certification on, for example, shareholders and customers of both the applicant firm and those of any firm whose sales would be displaced. [Citations omitted.] The process has been time consuming, *see, e.g., Natural Gas Pipeline Co.*, 30 F.E.R.C. p 61,017 (1984) (Commission approval on January 14, 1985 of application filed June 1, 1982), and costly; it also utterly stifles the sort of quick responsiveness to demand that is associated with competition.

Id. at 1030. *Associated Gas Distribs.*, 824 F.2d at 1030 (citations omitted).

[74] The "*Ashbacker* doctrine" requires that where two *bona fide*, timely-filed applications are pending before an agency and the grant of one would foreclose the other or place it under a greater burden than if it were considered at the same time as the first application, a comparative hearing on the merits of the two applications is required. *See Ashbacker Radio Corp. v. FCC*, 326 US. 327, 329-31 (1945). The hearing need not always be a trial type, evidentiary proceeding, however. Where the *Ashbacker* doctrine applies, "the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license." *Maxell Telecom Plus, Inc. v. FCC*, 815 F. 2d 1551, 1555 (D.C. Cir. 1987) (citing *Multi-State Commc'ns Inc. v. FCC*, 728 F.2d 1519, 1525-26 (D.C. Cir. 1984)).

distributors serving the Northeast United Sates. A year later, Tennessee Gas Pipeline Company also filed an application to import and resell gas in the Northeast. Tennessee also applied to construct facilities to transport its imported gas as well as the gas imported by Boundary. Two other companies then filed applications to serve markets that appeared to overlap with the Boundary and Tennessee proposals. Noting "the interdependent relationship of the applications" before it, the Commission consolidated the dockets for evaluation at a single hearing.[75] Ultimately, the certificates were finally issued in 1987 following numerous hearings and settlements, *seven years* after Boundary filed its initial application.[76]

The Commission was called on to consider competing applications filed in 1985 by Mojave Pipeline Company and Kern River Gas Transmission Company. Following an evidentiary hearing, the applications were later superseded by other applications filed under the Commission's "Optional Certificate" procedures (later repealed), which required an applicant to assume all the economic risk of a project. The Commission took the position that the assumption of risk eliminated the need for a comparative hearing. Mojave and Kern River's "optional certificates" were issued in 1990 and their original applications were dismissed in 1991, six years after their initial filings.

Because these contested proceedings were so unwieldly and time-consuming, the Commission moved away from setting competitive applications for hearing. Instead, the Commission concluded that "[a]llowing market forces to determine the success or failure of the projects is the most efficient mechanism to assure the maximum use of facilities."[77] This

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[75] *Boundary Gas, Inc.,* 18 FERC ¶ 61,298 (1982).
[76] *Boundary Gas, Inc.,* 40 FERC ¶ 61,088 (1987), *amended by* 41 FERC ¶ 61,375 (1987), *rev'd and remanded sub. nom*, *Tenn. Gas Pipeline Co. v. FERC*, 867 F.2d 688 (D.C. Cir. 1989), *on remand*, *Tenn. Gas Pipeline Co.*, 49 FERC ¶ 61,038 (1989).
[77] *ANR Pipeline Co.*, 78 FERC ¶ 61,326 at p. 62,406 (1997); *see also Islander East Pipeline Co.*, 100 FERC ¶ 61,276 at P 51 (2002).

rejection of past practice is reflected in the Certificate Policy Statement, where the Commission points to precedent agreements as significant evidence of market need and allows competing projects to be considered separately based on their own merits.[78]

Accordingly, FERC must avoid reverting to the era of "*Ashbacker*" proceedings wherein FERC conducted drawn out hearings to determine how much pipeline capacity was needed to satisfy demand within a given area. The Commission must not assume that two pipelines located within the same region serve the exact same market, because each project likely serves distinct customers, for shippers that wish to diversify their risk profile by contracting for capacity on multiple pipelines, or is developed in a certain way to meet prospective shippers' specific needs.

The Commission also need not change its analysis with regard to captive customers on existing pipelines in the region where projects are proposed. The Certificate Policy Statement already requires the Commission to consider the impact of the proposed project on "existing pipelines in the market and their captive customers".[79] The Commission reasoned that captive customers on competing pipelines in a market should not "have to shoulder the costs of unused capacity that results from competing projects that are not financially viable."[80] The Commission should not revise this sound approach.

[78] Certificate Policy Statement, *supra* n.1, at p. 61,748.
[79] *Id*. at 61,745.
[80] *Id*. at 61,746.

F. The Commission Should Not Alter its Analysis to Require Speculation Regarding the Sufficiency of Existing Infrastructure and Whether Demand Will Materialize.

In the NOI, the Commission asks:[81]

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission's environmental review); (2) if demand in a new project's markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

The Commission should not alter its analysis to speculate about the sufficiency of existing infrastructure and whether demand will materialize. With respect to the sufficiency of existing infrastructure, both the competitive market and the Commission's no-subsidy policy, which ensures that only customers that benefit from a proposed pipeline project are financially responsible, disciplines against over-building. A new pipeline entrant will be competing against both other potential new entrants and possibly incumbent pipelines to serve the customers targeted by its project. Incumbent pipelines have an incentive to retain existing shippers and attract incremental shippers that might be served by an expansion of their facilities, and will compete on both price and services. Customers also can ill-afford to make commitments to hold firm pipeline capacity if it is not in their economic interest to do so. Furthermore, given the time and capital needed to develop a FERC-regulated project, interstate natural gas pipeline companies will not proceed with developing and filing an application for a certificate of public convenience and necessity absent strong evidence of market demand. In sum, FERC's existing policies discipline the process to discourage overbuilding, which is exactly what FERC intended when issuing the Certificate Policy Statement.[82]

[81] NOI, *supra* n.2, at P 54.
[82] Certificate Policy Statement, *supra* n.1, at 61,737.

Additional insurance against overbuilding is provided by the Commission's requirement that pipelines solicit offers to "turn back" or release unneeded capacity permanently during the open season process in connection with an expansion project.[83] As the Commission has noted, this policy promotes "the proper sizing of new facilities and mitigating the potential for overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain."[84]

FERC also should not engage in speculation to determine whether demand will materialize in a given market or to determine how future demand may change if other technologies for generating electricity, such as renewables, become more widespread. First, it is important to recognize the diversity of end use natural gas consumption and that, while significant, electric generation accounts for only approximately one third of domestic natural gas consumption. The remainder of domestic natural gas consumption occurs primarily in the industrial, commercial, and residential sectors.[85] Indeed, much of the natural gas pipeline network was constructed to serve these needs. Consequently, the future of demand for U.S. natural gas production, and the resulting demand for natural gas pipeline capacity, cannot be

[83] *Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines*, 71 FERC ¶ 61,241 at p. 61,917 (1995); *reh'g denied*, 75 FERC ¶ 61,105 (1996).
[84] *Pine Prairie Energy Center, LLC*, *Order on Rehearing and Compliance Filing*, 137 FERC ¶ 61,060 at P 25 (2011).
[85] In 2017, the industrial sector accounted for about 35% of U.S. natural gas consumption. Industrial facilities use natural gas as a fuel for heating; for combined heat and power systems; and as a process fuel or feedstock to produce chemicals, fertilizer, automobiles and many other products. Commercial users accounted for about 12% of U.S. natural gas consumption in 2017 to cook; heat buildings and water; operate refrigeration and cooling equipment; dry clothes; and provide outdoor lighting. There are more than 5.4 million commercial natural gas customers who have benefitted from lower prices resulting from the growth in domestic natural gas production since 2007. These customers include schools, colleges and universities; hospitals and health care providers; laboratories; hotels; warehouses and storage facilities; professional offices; government buildings; and various other kinds of commercial businesses. In 2017, the residential sector used approximately 17% of all natural gas consumed in the U.S. Homeowners have seen their heating bills decline significantly in the last 10 years due to the abundance of affordable, domestically produced natural gas. Electricity generation accounted for approximately 34% of U.S. natural gas consumption in 2017, and one third of electricity consumed in the U.S. is supplied by natural gas-fired generators.

viewed solely through the lens of gas consumption for electric generation. Regardless of any change in the electric generation mix, interstate natural gas pipelines will be needed to serve a diverse array of shippers meeting the needs of a diverse array of end use markets. Furthermore, in addition to the demand created by domestic end use consumption, pipeline capacity will be needed to serve the needs of growing export markets for U.S. natural gas production.

Second, binding precedent agreements remain the most objective and best demonstration that market demand for natural gas will materialize. Both pipeline developers and prospective shippers actively study market trends affecting the demand for natural gas within the market to be served by a pipeline, including state policies that may affect the overall demand for energy and the mix of fuels and technologies used to satisfy the needs of energy consumers. Both shippers and project sponsors incorporate this analysis into their final decisions as to whether to sign precedent agreements and whether to commit private capital to build the pipeline. Neither a pipeline nor its shippers will enter these commitments without concluding that the pipeline capacity is needed over the life of their commitments. For a shipper, the duration of this commitment is the term of its multi-year obligation to pay firm demand charges to the pipeline, and for the pipeline, it is the economic life of the facility which extends far beyond the shippers' initial precedent agreements. The ability of a pipeline and its shippers to recoup their investments and to earn an acceptable return on those investments is contingent on the long-term need for the pipeline capacity to be constructed. Similarly, in the case of a shipper that is a regulated utility, the determination of prudence by the public service commission depends on a demonstration that the pipeline capacity will be utilized over the term of the utility's commitment to the pipeline. In either case, whether it is the recoupment of the investment by the pipeline or the realization of value by the shipper, confidence in the long-term utilization of the

pipeline capacity is a prerequisite for making the commitment. Furthermore, since a pipeline often does not recoup the full cost of its investment through the term of its initial shippers' contracts, a pipeline sponsor will not choose to build if it does not believe that it will be able to recontract its capacity.

Similarly, pipeline project sponsors, marketers and electric generators will react to the realities of the fuel generation mix in each region. If the time comes when the demand for natural gas-fired generation diminishes within a region, those shipping natural gas to satisfy the needs of gas-fired generators will no longer execute precedent agreements during the open season process. This will cause natural gas pipeline companies to forego developing projects to serve natural gas-fired generators, because they will have no financial incentive to build such projects. Thus, as intended, FERC's rules send the signals needed to discourage the development of unneeded pipeline capacity. Any FERC analysis of these issues would be unnecessary, would require too much speculation, and would second guess those who are in the best position to analyze the market and conclude whether a project is needed. This was the flawed approach to determining market need that the Commission wisely rejected decades ago.

Further, the Commission should not consider adjusting its assessment of need to examine whether market demand will materialize or if reliance on other energy sources to meet future demand for electricity would impact natural gas projects designed to supply natural gas-fired generators. Under Section 7 of the NGA, Congress authorized the Commission to certificate proposed projects pending before it; Congress did not provide the Commission the authority to be a comprehensive energy policymaker that considers, and to some degree determines, the future energy and technology mix in its decisionmaking. Asking the Commission to incorporate

a “crystal ball” analysis into its certificate review is unrealistic and could potentially lead to a role far beyond that contemplated by the Congress in enacting the NGA.

V. Landowner Interests and the Exercise of Eminent Domain

One of the Commission's aims in this proceeding, just as it was in the Certificate Policy Statement, is the avoidance of "the unneeded exercise of eminent domain."[86] The Certificate Policy Statement describes how pipelines and the Commission seek to limit the impact of constructing pipeline infrastructure on affected landowners, as well as how the Commission takes into account the extent to which an applicant expects to acquire property rights through eminent domain in its certificate proceedings. In the NOI, the Commission presented a series of questions related to the consideration of landowner interests and the exercise of eminent domain.

In general, INGAA believes that current Commission policies appropriately consider the impact of natural gas projects on landowners and the potential exercise of eminent domain. Throughout the project development process, INGAA members often agree to pipeline route changes to try to minimize the use of eminent domain, while seeking to balance landowner preferences with environmental resource, safety, and constructability considerations. As set forth herein, certain minor changes in Commission practices, and those of the interstate natural gas pipeline industry, may help ensure that the consideration of landowner concerns is more transparent and well-understood. Before INGAA responds to the Commission's inquiries in this area and presents some specific suggestions, however, a reminder of the important and necessary role that the right of eminent domain plays in the construction of needed pipeline infrastructure may be useful.

The Congressionally-granted right of eminent domain under NGA Section 7(h) accompanies a certificate of public convenience and necessity.[87] This right to exercise eminent

[86] NOI, *supra* n.2, at P 3 (*quoting* Certificate Policy Statement at 61,737).
[87] 15 U.S.C. § 717f(h).

domain was not an original part of the NGA, but rather was added by amendment to the NGA in 1947.[88] The Senate Report accompanying that amendment explained that certain States crossed by interstate pipelines would not grant the right of eminent domain to pipelines that did not distribute gas in the State and that conferring that right by Federal law along with a certificate would "correct this deficiency and omission in the [NGA]."[89] The Report further explained that "the right of an interstate natural gas pipe line to cross intervening States in which no service is performed is a necessary protection of the free flow of commerce among the States and which can only be furnished by the Congress under its paramount jurisdiction to regulate interstate commerce."[90] When the Court of Appeals for the Fifth Circuit soon thereafter upheld the constitutionality of the amendment adding eminent domain authority to the NGA, it further explained:

> Implicit in the provisions of the statute are the facts, among others, that vast reserves of natural gas are located in States of our nation distant from other States which have no similar supply, but do have a vital need of the product; and that the only way this natural gas can be feasibly transported from one State to another is by means of a pipe line…. Consideration of the facts, and the legislative history, plan and scope of the Natural Gas Act, and the judicial consideration and application of the Act has received, leaves us in no doubt that the grant by Congress of the power of eminent domain to a natural gas company, within the terms of the Act, and which in all its operations is subject to the conditions and restrictions of the statute, is clearly within the constitutional power of Congress to regulate interstate Commerce…. [I]t was proper to make provision whereby the full statutory scheme of control and regulation could be made effective, by the grant to such company of the right of eminent domain. The possession of this right could well be considered necessary to insure ability to comply with the Commission's requirements as well as with all phases of the statutory scheme of regulation.[91]

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[88] 52 Stat. 824 (1947).
[89] "Amending the Natural Gas Act," Senate Report No. 429 (80th Cong., 1st Session) (July 3, 1947) at 2-3.
[90] *Id.* at 3.
[91] *Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir. 1950), *cert. denied*, 340 U.S. 829 (1951).

The considerations that led Congress to add the right of eminent domain to Section 7 of the NGA remain equally important today. Pipelines remain essential and are often the only way to transport America's abundant natural gas supplies in interstate commerce to markets in other States, and the Commission determines when the pipelines are required by the public convenience and necessity. Once the Commission grants a Section 7 certificate, it has no discretion to deny the certificate holder the statutorily-granted power of eminent domain.[92] Pipelines endeavor to acquire the necessary property rights through mutual agreement without resorting to eminent domain, but if they cannot, they must have available the right of eminent domain to construct the Commission-authorized facilities. If required, the courts then ensure that any landowners of property for which an easement is acquired through eminent domain receive just compensation. That protection does not mean, however, that the Commission should not consider the impacts on landowners and the potential use of eminent domain as part of its certificate policies, just as it currently does.

B1. Should the Commission consider adjusting its consideration of the potential exercise of eminent domain in reviewing project applications? If so, how should the Commission adjust its approach?

The Commission's current framework for evaluating pipeline certificate applications, as set forth in the Certificate Policy Statement, appropriately considers the potential exercise of eminent domain. No changes to this approach are needed.

The Certificate Policy Statement provides that "[l]andowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace."[93] The goal of preventing *unneeded* exercise of eminent domain helped lead to Commission adoption of its "threshold requirement" that the pipeline must financially support a

[92] *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000).
[93] Certificate Policy Statement, *supra* n.1, at 61,745.

proposed project without relying on subsidization from its existing customers – a central component of the Certificate Policy Statement that has not been questioned in the NOI. The Commission's determination that a project is needed when determining whether its construction is in the present or future public convenience and necessity (discussed in the previous section of these comments) is another important safeguard for landowners.

Furthermore, the Certificate Policy Statement identifies the interests of landowners whose land could be condemned, and those of the surrounding communities, as a key factor in the Commission's balancing of the benefits of a project against any residual adverse interests.[94] It properly recognizes that landowner property right issues are different in character from other environmental issues considered under the NEPA.[95] Moreover, "[a]s part of its environmental review of pipeline projects, the Commission's environmental staff works to take [affected] landowners' concerns into account, and to mitigate adverse impacts where possible and feasible."[96] Landowner concerns often lead pipelines to adjust their proposed route. Indeed, INGAA members have been encouraged or required by the Commission to make thousands of route changes on various projects since 2008. And pipeline certificates routinely include conditions designed to mitigate adverse impacts on affected landowners, to address noise issues, esthetic concerns and the like.[97]

The Certificate Policy Statement also encourages pipeline applicants to minimize the adverse impacts on affected landowners and to acquire as much right-of-way through negotiation as possible.[98] Yet, the Certificate Policy Statement also recognizes that "[i]n most cases it will

[94] *Id.* at 61,748.
[95] *Id.*
[96] *Id.* at 61,744.
[97] *See e,g., Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 at P 4 (2017) (The Commission granted the requested certificate authorization subject to the 73 environmental conditions detailed in Appendix A attached to the certificate order.).
[98] Certificate Policy Statement, *supra* n.1, at 61,749.

not be possible to acquire all the necessary right-of-way by negotiation" and provides that "[a] few holdout landowners cannot veto a project…if the applicant provides support for the benefits of its proposal that justifies the issuance of a certificate and the exercise of the corresponding eminent domain rights."[99] This conclusion, of course, is consistent with, and indeed necessarily follows from, the decision of Congress to amend NGA Section 7 to add the right of eminent domain. Allowing a few holdout landowners, or local or State interests, to veto the Commission's decisions regarding needed pipeline infrastructure would be contrary to the purposes of the NGA.

B2. Should applicants take additional measures to minimize the use of eminent domain? If so, what should such measures be? How would that affect a project's overall costs? How could such a requirement affect an applicant's ability to adjust a proposed route based on public input received during the Commission's project review?

The Commission's Certificate Policy Statement already encourages pipeline applicants to minimize the use of eminent domain, as noted above. INGAA members already do so and employ eminent domain to acquire needed land only as a last resort. In preparation for these NOI comments, INGAA surveyed 18 of its member companies regarding their use of eminent domain. The survey covered a total of 81 NGA Section 7(c) projects of greater than 10 miles in length that were certificated and placed in service during the last 10 years. The projects covered by the survey included 15,694 individual tracts of land requiring easements. Condemnation proceedings were initiated on approximately 10% of these individual tracts, and just over 5% of the total tracts involved condemnation proceedings that remained unsettled long enough to require a hearing for access. Only 1.67% of the individual tracts needed to construct the projects covered by the survey were acquired after a judicial determination of just compensation.

[99] *Id.*

As explained above, the right of eminent domain is necessary for interstate pipeline development, and its use can rarely be eliminated completely despite pipelines' best efforts. In some instances, use of eminent domain is required by the status of particular property (e.g., the property is in probate, the landowner is absent, owners are getting a divorce, title is clouded, etc.). In other cases, certain landowners such as railroads and municipalities may prefer the use of eminent domain as it may be more efficient than other processes. Resorting to exercising eminent domain also may be necessary when a pipeline and a landowner cannot resolve dramatically different views of the "just compensation" for an easement. Finally, some landowners may oppose a project entirely and therefore refuse to grant a needed easement – requiring the exercise of eminent domain to prevent the sort of veto of Commission-authorized infrastructure by narrow interests that would be contrary to the purposes of the NGA.

The Commission has noted that condemning private property generally is not in a pipeline's best interest and that the condemnation process can delay construction and add significant costs to a project.[100] INGAA members certainly recognize that the exercise of eminent domain generally adds significant time and costs in legal expenses to a pipeline project and is harmful to their relations with landowners. The cost to acquire right-of-way is not measured by financial compensation alone. In addition to paying fair market value for easements, INGAA members include terms and conditions in easements that address landowners' concerns, where appropriate. Pipeline members may also make local donations as needs are identified, including donating new fire equipment, playgrounds, and the like, to demonstrate their commitment to working constructively with communities.

[100] *E.g., Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 70 (2018); *Midwestern Gas Transmission Co*., 114 FERC ¶ 61,257 at P 29 (2006).

Furthermore, the development of a new pipeline project – from initial surveys to final construction and beyond – often takes place over multiple years. Accordingly, INGAA members view landowner relationships as a long-term commitment requiring transparency and trust. Successful development of such relationships is the best way to minimize the need to utilize eminent domain. To this end, INGAA members comply with the landowner notification requirements set out in the Commission's regulations [101] and engage in significant outreach efforts. For example, in addition to the required outreach to landowners and other project stakeholders (federal, state, county, and municipal governmental officials, tribes, and regulatory agencies), INGAA members routinely engage in additional outreach activities prior to filing the certificate application and throughout the certificate and implementation processes. Depending on the scope, location, and interests expressed in a particular project, a project sponsor's outreach program can include presentations, meetings, and/or discussions with landowners and other affected stakeholders, and written outreach and notifications to affected landowners (e.g., periodic newsletters or project websites that are updated throughout the duration of a project). The meetings provide community stakeholders the opportunity to learn more about the project, to ask questions about the project, and to provide comments, concerns, and overall feedback regarding the project. In response, applicants may, and often do, adjust their proposed pipeline routes based on such feedback while seeking to balance landowner preferences with environmental resource, safety, and constructability considerations as evidenced by INGAA members adopting thousands of route changes on various projects since 2008.

INGAA members also fully support the very useful "Suggested Best Practices for Industry Outreach Programs to Stakeholders" issued by the staff of the Commission's Office of

[101] 18 C.F.R. § 157.6(d).

Energy Projects ("OEP") in July 2015.[102] The "Staff Best Practices" guidance expressly references the following eight commitments that INGAA members have made to landowners:[103]

1. Respect and Trust
2. Accurate and Timely Information
3. Negotiate in Good Faith
4. Respect the Regulatory Compact
5. Respond to Issues
6. Outreach
7. Industry Ambassadors
8. Ongoing Commitment to Training

In preparation of these NOI comments and in recognition of the growing importance of landowner relations, INGAA has updated and revised its explanation of these commitments as reflected in the "Commitments to Landowners" document attached included as an attachment to these comments. INGAA members commit to provide landowners affected by their proposed pipeline projects with this Commitments to Landowners document, as well as to train their employees and contractors who will interact directly with landowners (i.e., land agents, company point of contact(s), and company personnel working on the right-of-way) on the Commitments.

INGAA's response to item B4 below identifies additional suggestions for steps that may be taken by pipelines, and by the Commission, to promote improved landowner engagement. These additional measures should support enhanced understanding by landowners of the Commission's certificate process and help promote better relations between pipelines and landowners. In so doing, it is INGAA members' hope that adherence to the Commitments will help minimize the necessity to resort to eminent domain to the greatest extent possible.

[102] This staff guidance document – which was cited in the NOI at P 38 & note 99 – is available on the Commission's web site at: https://ferc.gov/industries/gas/enviro/guidelines/stakeholder-brochure.pdf
[103] *Id.* at 9.

B3. For proposed projects that will potentially require the exercise of eminent domain, should the Commission consider changing how it balances the potential use of eminent domain against the showing of need for the project? Since the amount of eminent domain used cannot be established with certainty until after a Commission order is issued, is it possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use such that the Commission could use that information during the consideration of an application?

The Certificate Policy Statement provides that the strength of the showing of the benefits of a proposed project needs to be proportional to the applicant's "proposed exercise of eminent domain procedures."[104] The Commission indicated that when a pipeline company is able to acquire all, or substantially all, of the necessary right-of-way by negotiation prior to filing an application, the requirement to demonstrate the need for the project is lessened.[105] In cases where the need for a project has not been demonstrated, such as instances where there is a lack of binding precedent agreements, and the Commission determines that significant exercise of eminent domain will be required for construction, the Commission may deny a certificate application.[106]

Other than the extreme cases of (1) no need for eminent domain or (2) no precedent agreements and an expectation of significant exercise of eminent domain, balancing the potential use of eminent domain against the need for a project is very difficult, and indeed often impossible. However, to the extent that they are known when the Commission is evaluating an application, the Commission can continue to consider the extent to which eminent domain may be factored into its evaluation of the public convenience and necessity.

[104] Certificate Policy Statement, *supra* n.1 at 61,749.
[105] *Id.*
[106] *See, e.g.*, *Pacific Connector Gas Pipeline,* 154 FERC ¶ 61,190 at P 41 (2016) ("We find the generalized allegations of need proffered by Pacific Connector do not outweigh the potential for adverse impact on landowners and communities").

During the certificate process, neither the Commission nor pipeline sponsors can estimate reliably the amount of eminent domain a proposed project may require. At times, opposition to a project may be significant initially, or even up to the time of the certificate application or order, but easement negotiations are still successful for the vast majority of landowners – as reflected in the results of the survey of INGAA members described above. The Commission's decision to grant an NGA Section 7 certificate may change the status of negotiations. And successful negotiations often occur even after condemnation proceedings begin. The Commission has observed that the initiation of eminent domain proceedings does not preclude further negotiations and mutually-agreed upon settlements with landowners.[107] This observation is confirmed by the INGAA survey results set forth above, showing condemnation proceedings were initiated for approximately 10% of the individual tracts but just 1.67% of the needed tracts across a wide range of projects proceeded all the way to a compensation judgment.

Therefore, pipeline applicants often do not know prior to the issuance of the certificate how much eminent domain ultimately will be necessary to construct a project. Any possible suggestion that the Commission should establish some specific threshold of acquired right-of-way prior to certificate issuance would be unworkable and likely to frustrate efforts to construct needed infrastructure. The likely result of such an approach would be to encourage landowners that fundamentally oppose any project – and project opponents that may organize or influence landowners – to prevent a pipeline developer from acquiring the specified amount of right-of-way. This process might therefore result in increased project opposition and worsened relations between pipelines and landowners. It also would allow localized interests to veto a project that

[107] *E.g., Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197 at P 69 (2018); *Midwestern Gas Transmission Co*., 114 FERC ¶ 61,257 at P 66 (2006).

is needed in the national public interest – contrary to the purposes of the NGA and well-established and highly successful Commission policies.

B4. Does the Commission's current certificate process adequately take landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

The Commission's current certificate process is as well-designed as any federal administrative process to take landowner interests into account. As explained in the response to B2 above, pipeline applicants ensure that landowners are afforded the opportunity to learn the details of proposed projects, following both Commission-required means like the landowner notification requirements set forth in the regulations and measures like open houses and updates for governmental officials undertaken voluntarily by pipelines to further community understanding. To address landowner input, proposed pipeline routes are often adjusted while seeking to balance landowner preferences with environmental resource, safety, and constructability considerations, and protective certificate conditions are adopted. In addition, the Certificate Policy Statement expressly recognizes the role of landowner interest in the Commission's analysis of the public convenience and necessity. This is very appropriate and an important consideration in making final routing decisions.

Given the increased landowner interest in pipeline projects and the Commission's processes for authorizing needed infrastructure, however, both pipelines and the Commission could do more. To that end, INGAA suggests below a number of steps for the Commission's consideration. INGAA members believe that the best procedural approach to adopt these types of proposals would be through issuance of a revision to July 2015 Staff Best Practices guidance, which should be approved by the Commission as part of a new policy statement.

To Improve Landowner Engagement, Pipeline Applicants Should be Encouraged to Adopt the Following Steps Commensurate with the Type, Scope and Location of Each Project:

- Provide, for all NGA Section 7(c) projects, affected landowners with application status updates periodically (perhaps quarterly) via U.S. mail, email, social media, other electronic means, or posting on pipeline websites.

- Create a location on pipelines' websites, or a link to the FERC website, for landowners to access major NGA Section 7(c) project-related materials (e.g., application, draft environmental assessment ("EA") or draft environmental impact statement ("EIS"), EA/EIS, certificate) in one place, rather than having to search through the FERC website.

- Instruct landowners on how to receive notifications from FERC regarding new filings made by the applicant to the project docket (as a smaller subset of the established "e-subscribe" process). The Commission should facilitate this idea by creating a sub-category of subscriptions for landowners that includes only FERC issuances and project filings that are not Critical Energy/Electric Infrastructure Information (i.e., non-CEII) or documents that are confidential, attorney-client privileged, or attorney work product.

- Increase landowner access to resource reports, EISs or other large documents that may be difficult to download by providing electronic copies of these documents upon request. Affected landowners could submit a request to their land agent contact or through the project website (if one is developed) or portal for access to resource reports in a format that works for the landowner.

- Provide hardcopy or electronic (e.g., GIS-based) mapping at the request of an affected landowner during the pre-filing process or after the certificate application has been filed showing the location of the proposed facilities vis-a-vis each landowner's property (recognizing that one map may have the location of multiple landowners' properties).

- Notify affected landowners whenever a proposed pipeline route moves onto, or off, their property as soon as reasonably practical after the pipeline determines that the planned route will change.

- Develop a land-agent training program in conjunction with INGAA and the Commission staff and, after its development, make the FERC-approved training program publicly available.

To Promote Effective Landowner Participation, The Commission Itself Should Consider the Following Additional Steps:

- The Commission should identify a staff point of contact for every pipeline certificate proceeding who would function as an information source, within FERC's Office of Secretary, to ensure landowners understand technical procedures (e.g., how to file comments electronically in a certificate proceeding docket). This function would be different than the Commission's Landowner Helpline.

- To ensure that landowners are appropriately informed, improve and expand the explanation of the right of eminent domain for certificate holders, as well as the rights of landowners in eminent domain proceedings, provided in the Commission's brochure, "An Interstate Natural Gas Facility on My Land?"[108]

- Modify the Commission's brochure to educate landowners on the importance and value of conducting surveys and of cooperating with applicants in the preliminary survey process to help ensure completeness of the environmental record and review for a given project. The brochure should better describe the benefits to the Commission and to landowners of allowing survey access, such as ensuring that potential environmental resources on the landowner's property are identified timely, allowing impacts to sensitive resources to be appropriately avoided, minimized, or mitigated. The Commission also should inform landowners about the importance of granting survey access through communications with landowners during the pre-filing process (e.g., via letter or in its communications in other settings, such as during public scoping meetings).

- Allow pipelines, following the issuance of a certificate, to conduct limited-scope work outside of approved work areas to accommodate landowners' requests for non-pipeline related work. For instance, pipelines should be allowed to add fences, fix walls, etc. outside the right-of-way upon landowner request, assuming the landowner would legally be able to do the work itself without additional environmental permits or approvals. The Commission should establish procedures or guidelines to govern such minor activity for the benefit of affected landowners.

- Update the Commission's regulations for landowner notification and communications to reflect currently available technology – allowing for the activities suggested above for pipelines to communicate using social media and other electronic means.

- Modernize the FERC website to improve usability, content, navigation, and design, bearing in mind the need for landowners not generally familiar with Commission processes and policies to utilize the website.[109]

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[108] The brochure is available on the Commission's website at: https://ferc.gov/resources/guides/gas/gas.pdf In its Management Response to the Department of Energy, Inspector General Audit Report regarding the Commission's Natural Gas Certification Process (DOE-OIG-18-33), the Commission stated that it will update this brochure by December 2018.

[109] The Commission also committed to such an update of its website in its response to the DOE Inspector General report noted in the prior footnote.

B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

INGAA does not believe that any change in Commission policy is needed in this area. Absent agreements with landowners for survey access, state law governs whether applicants can access private property for surveying prior to the issuance of a certificate and this varies from state to state. Pipelines work extensively and cooperatively with landowners to obtain agreements for survey access. While INGAA believes that the Commission should encourage landowners to grant survey access for proposed projects (as suggested above), the Commission certainly cannot ensure this result. The NOI explains that "the Commission has been seeing more proposed projects where applicants are unable to access potential rights-of-way prior to the Commission's decision on an application, which limits the information that can be included in an application."[110] Unfortunately, this trend is likely to continue. Entities opposed to pipeline projects are already using denial of access as a tool to thwart projects. The Commission's policies should not unintentionally encourage this practice.

Current Commission regulations expressly provide that an application will not be rejected for incomplete environmental surveys *if* the surveys are incomplete as a result of lack of access.[111] This regulation ensures that reluctant landowners cannot simply deny survey access and thus obtain an early veto power over needed pipeline infrastructure, contrary to the purposes of the NGA. This clearly is not what Congress intended in enacting the NGA or by amending it to add Section 7(h).

[110] NOI, *supra* n.2, at P 56.
[111] 18 C.F.R. § 157.8(a)(1).

Where survey access cannot be obtained, pipeline applicants should provide the best available information in its place. A large amount of information is often publicly available. In addition, recent advances in remote sensing, digital imagery interpretation, and geographical information systems increasingly enable applicants to develop detailed information that provide an adequate basis for the Commission to make informed decisions.

To address the situations of limited survey access, the Commission should continue to utilize publicly available data or data gathered by remote sensing techniques, and be open to accepting supplemental information developed by pipeline applicants, whenever it is deemed reliable. The Commission's existing practices to address this situation are well-explained in the NOI.[112] NEPA documents are based on the best data available at the time. Where needed and appropriate, the Commission can impose certificate conditions requiring applicants to provide additional information prior to construction. The Commission's established construction mitigation, restoration and rehabilitation procedures applicable to wetlands and waterbodies, and other statutory requirements for protection of cultural resources, and endangered, threatened, and special concern species provide significant protections on all these resources regardless of whether surveys have been done. Thus, the Commission is doing all that it can to proceed with its work of evaluating and authorizing needed pipeline infrastructure even when survey access is unavailable. No changes in existing policies in this area are needed.

[112] NOI, *supra* n.2, at P 57.

VI. Consideration of Environmental Impacts

As a starting point, the Commission should acknowledge that its existing environmental review is robust.[113] Through extensive practices and procedures, input from stakeholders, state and federal agencies, voluminous resource reports and data responses generated by project sponsors, the Commission identifies an exhaustive list of environmental impacts for projects. FERC staff and project sponsors then devote significant resources to working through each identified environmental issue and coming up with a comprehensive mitigation and avoidance plan that the project sponsor receives as a condition of its certificate. By successfully developing this program to assess, mitigate, and avoid environmental impacts, the Commission manages these issues within the NEPA guidelines and legal precedent, while recognizing that the public convenience and necessity review is primarily an economic test.[114] While the Commission has been successful in its consideration of environmental impacts, it should resist creating additional obligations or paperwork unless there is a clear purpose and benefit and should not establish mitigation measures that are not carefully matched to the particular impacts of the project under review.

The NGA, originally enacted in 1938, long preceded the enactment of NEPA in 1969.[115] The two statutes, of course, have different purposes. The NGA is designed to ensure that the public's need for natural gas is met in an economical and reasonable manner.[116] The NGA is the

[113] *See* 18 C.F.R. Part 380 (setting forth FERC's NEPA implementation regulations). FERC's final environmental impact statements ("EIS") run over 1,000 pages and are based on thousands of pages of resource reports prepared by the application, which in turn are based on studies, surveys, and analyses. FERC also takes on average 663 days to prepare an FEIS after it has published its notice of intent to prepare an EIS. National Association of Environmental Professionals, *Annual NEPA Report 2016* (June 2017).
[114] *See, e.g., Dominion Transmission, Inc*., 163 FERC ¶ 61,128, at P 43 (2018).
[115] The National Environmental Policy Act of 1969 was signed into law on Jan. 1, 1970.
[116] *Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591, 610 (1944); *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 388 (1959).

"action statute," the authority pursuant to which the Commission acts on certificate applications. On the other hand, NEPA is designed to ensure that the Commission is aware of the environmental impacts of its decisions and can consider taking measures to avoid, reduce, or mitigate environmental impacts resulting from that decision.[117] In support of this purpose, NEPA requires an analysis and documentation of environmental impacts to "ensure that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts."[118] Doing so also "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision."[119]

While NEPA requires informed decision-making, "NEPA itself does not mandate particular results."[120] Rather, "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."[121] Accordingly, NEPA provides additional information to inform the Commission as it executes its responsibility according to the requirements of the NGA,[122]

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[117] *See Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 756-57 (2004) (NEPA "was intended to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States. 42 U.S.C. § 4321."); *see also* 40 C.F.R. § 1500.1(c) ("The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

[118] *Public Citizen*, 541 U.S. at 756. *See also* 40 C.F.R. § 1502.1 ("The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government").

[119] *Public Citizen*, 541 U.S. at 756.

[120] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). FERC has issued a certificate for a project over an environmentally preferable alternative because of other considerations, such as increasing competition. *See Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 964, 968 (D.C. Cir. 2000) (affirming certificate order and FERC's determination that other factors, like competition, outweighed environmental issues and where FERC gave careful consideration to environmental impacts).

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

[122] *See id.* at 353; *see also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (finding that NEPA imposes only a procedural requirement, not a substantive one (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 (1976) and *FPC v. Transco)*).

and in practice (as noted), the Commission often takes great pains to address in its certificate order all findings of the NEPA analysis.[123]

In conducting its review of environmental impacts under NEPA, the Commission should continue to bear in mind that its NEPA analysis is bounded by the purpose of the agency's decision, the range of likely impacts from the discretionary aspects of the agency's decision as defined under the NGA, reasonable foreseeability, and reasonable availability of probative information.[124] These should continue to be the Commission's guideposts in defining the boundaries of a NEPA analysis.

Beginning with the pre-filing period (if used) and well before final decision-making, the Policy Statement should describe how the Commission staff will guide the applicant's environmental analysis as part of initial NEPA scoping efforts and stakeholder outreach efforts. The applicant may adjust the proposed project in light of identified environmental impacts.

After the applicant submits its certificate application, FERC continues (or commences, if pre-filing was not used) the NEPA review, resulting in the draft and final NEPA documents, either an EA or EIS (unless the Commission applies a categorical exclusion under NEPA). The applicant may further adjust the proposal in light of environmental and other findings uncovered in the ongoing NEPA review. As a result of this iterative process, the Commission will ultimately review a project that has been shaped and modified to minimize environmental impacts. NEPA's role in shaping the project and in minimizing environmental impacts should be reflected in the Policy Statement.

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[123] *See, e.g., WBI Energy Transmission Inc.,* 162 FERC ¶ 61,126 (2018) (requiring further geotechnical investigation for stream crossing, additional investigation into cultural resource impacts, etc.); *National Fuel Gas Supply Corp*., 158 FERC ¶ 61,145 (2017) (requiring use of alternative temporary workspace, requiring further investigation of possible karst topography, etc.); *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017) (requiring the applicant to incorporate various route alternatives).

[124] 40 C.F.R. § 1502.

Accordingly, the Certificate Policy Statement would continue to provide for ongoing environmental review while remaining principally an economic test, respecting the primary purpose of the NGA to provide reliable and economic supplies of natural gas to consumers.[125] FERC's primary focus in its public convenience and necessity analysis would continue to focus on the economic nature of the Section 7 analysis while separately ensuring that the Commission meets its obligations under NEPA.

This analytical process has successfully addressed both the economic and environmental aspects of pipeline projects for nearly two decades. This approach has also proved effective in relation to emerging environmental precedent, such as regarding GHGs, while staying true to FERC's limited jurisdiction and primary purpose under the NGA, which is to facilitate needed pipeline infrastructure. The evaluation of a project's adverse environmental effects should continue to be undertaken separately from the economic benefit/adverse impact balancing that is at the heart of the Commission's public interest determination. In addition, the project's adverse environmental effects should continue to be evaluated within the limiting principles of the Commission's NEPA review.

C1. The National Environmental Policy Act of 1969 ("NEPA") and its implementing regulations require an agency to consider reasonable alternatives to the proposed action. Currently the Commission considers the no-action alternative, system alternatives, design alternatives, and route alternatives. Should the Commission consider broadening its environmental analysis to consider alternatives beyond those that are currently included? If so, what specific types of additional alternatives should the Commission consider?

The Commission should not broaden its environmental analysis to consider alternatives beyond those already being analyzed. The scope of the alternatives analysis is set by NEPA, not

[125] Certificate Policy Statement, *supra* n.1 at p. 61,745; *Midwestern Gas Transmission Co*., 116 FERC ¶ 61,182, at P 37 (2006); *Fed. Power Comm'n v. Hope Nat. Gas. Co.*, 320 U.S. 591, 609 (1944).

the NGA, and the spectrum of alternatives regularly analyzed in detail by the Commission is more than adequate under NEPA and has been upheld time and again in the courts.[126] Most important, the existing scope of analysis fully informs the Commission about the potential impacts of its decision in comparison to the impacts of reasonable alternatives that would achieve the purpose of the proposed action. Neither NEPA nor good governance requires more.

The Commission's NEPA analysis in general, and its alternatives analysis in particular, are among the most comprehensive and structured of any federal agency. For a major new interstate gas pipeline project, it is not uncommon for the Commission's staff to prepare a NEPA analysis spanning hundreds of pages, including over a hundred pages devoted to the no-action alternative, system alternatives, design alternatives, and route alternatives. Route alternatives and major and minor route variations may number in the dozens or even hundreds for a major new pipeline project, and each one is documented in the record and addressed in the NEPA document for review by the Commission.[127]

NEPA does not require such extensive analysis, although it has become the custom at the Commission.[128] Under NEPA, the range of alternatives to be considered "depends on the nature of the proposal and the facts in each case," and "only a reasonable number" should be

[126] *See, e.g., Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1324 (D.C. Cir. 2015) (upholding FERC's consideration and rejection of alternatives to a compressor station); *Fuel Safe Washington v. FERC*, 389 F.3d 1313, 1327 (10th Cir. 2004) (upholding FERC's review of system and route alternatives); *Nat'l Comm. for the New River v. FERC.*, 373 F.3d 1323, 1331 (D.C. Cir. 2004) (upholding FERC's alternatives analysis); *Midcoast Interstate Transmission, Inc. v. FERC.*, 198 F.3d 960, 968 (D.C. Cir. 2000) (affirming FERC's review of alternatives and its decision to approve the proposed project over an alternative with less environmental impacts); *La. Ass'n of Indep. Producers & Royalty Owners v. FERC,* 958 F.2d 1101, 1117 (D.C. Cir. 1992) (upholding FERC's alternatives analysis).

[127] For instance, a recent FEIS addressed alternatives in 142 pages plus 7 appendices, covering 6 existing-system alternatives, 3 proposed-system alternatives, 15 major route alternatives, 27 minor route variations, and 239 route changes (affecting 91% of the pipeline route). Federal Energy Regulatory Commission, *Final Environmental Impact Statement for NEXUS Gas Transmission Project* at ES-17, Docket No CP16-22 (Nov. 30, 2016).

[128] *See* 40 C.F.R. § 1502.7 (EISs "shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.").

considered, sufficient to cover the spectrum of options.[129] The Commission accomplishes this by looking at (1) the no-action alternative, (2) alternatives available from other systems, (3) alternatives in the design of the proposed project, and (4) alternatives in the routing of the proposed project and the location of above-ground facilities like compressor stations. These four dimensions cover the spectrum and allow the Commission to understand the consequences of its actions.

While these four dimensions of alternatives are appropriate and sufficient, the Commission should streamline its standard analysis to focus on a smaller number of alternatives that more precisely match (1) the purpose and need for the agency's action and (2) the extent of the Commission's authority under the NGA. These are the touchstones for alternatives analysis under NEPA. Alternatives that do not achieve the purpose and need should not be part of the NEPA review because analyzing them is ineffectual: they fail to inform the agency about its pending decision under the action statute.

For example, where the Commission's action under NGA Section 7 relates to a project whose purpose is to transport natural gas in interstate commerce from a gas production area to a connection on the pipeline grid for further transportation as dictated by the market, it is ineffectual for the Commission to consider, as an alternative under NEPA, the environmental impacts of hauling coal of equivalent BTU value between these two nodes, or of installing solar generation to serve equivalent power to some nearby part of the United States, or of proscribing energy use across the United States in order to reduce demand for the power to be obtained from combusting the transported natural gas.

[129] Council on Environmental Quality, *Memorandum: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations* at Question No. 1b, 46 Fed. Reg. 18,026 (Mar. 23, 1981) ("Forty Questions"), *available at* http://energy.gov/sites/prod/files/G-CEQ-40Questions.pdf.

These "alternatives" fail to inform the Commission meaningfully about its decision, because they neither fulfill the purpose and need driving the Commission's decision nor do they recognize that the Commission *must* act on the proposal before it. Under Section 7 of the NGA, the Commission is required to act in response to applications filed at the Commission.[130] The Commission cannot avoid its Congressional responsibility to review and certificate jurisdictional facilities that meet the public convenience and necessity.[131] No part of its authority under NGA Section 7 relates to considering coal, solar, or demand-reduction schemes, and the Commission lacks the expertise to evaluate such possibilities meaningfully and without speculation. Fundamentally, NEPA does not alter an agency's statutory mandate, and the Commission should not permit its analysis of alternatives under NEPA to become the vehicle for a broad-based analysis of environmental policies or of alternatives that are beyond the Commission's mandate from Congress.

C2. Are there any environmental impacts that the Commission does not currently consider in its cumulative impact analysis that could be captured with a broader regional evaluation? If so, how broadly should regions be defined (e.g., which states or geographic boundaries best define different regions), and which environmental resources considered in NEPA would be affected on a larger, regional scale?

The Commission should not conduct regional analyses under NEPA because they would not contribute meaningfully to the Commission's decision under NGA Section 7 and are not required by NEPA. A regional analysis is informative where an agency makes regional decisions under its governing action statute. However, NGA Section 7 requires the Commission

[130] *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1332 (D.C. Cir. 2004); *Fuel Safe Wash. v. FERC,* 389 F.3d 1313, 1324 (10th Cir. 2004).
[131] 15 U.S.C. § 717f(e) ("a certificate *shall be issued* to any qualified applicant . . . if it is found that the applicant is able and willing to do the act and to perform the service proposed . . . and that the proposed . . . construction, extension, or acquisition . . . is or will be required by the present or future public convenience and necessity" (emphasis added)).

to respond to individual applications concerning specific projects. It has no authority to authorize jurisdictional facilities on a regional basis.[132]

With respect to cumulative impacts, setting a default regional boundary for the analysis misconceives the purpose and method of cumulative impacts analysis. Cumulative impacts refer to direct and indirect impacts on the same environmental resource that overlap geographically and temporally with impacts from multiple past, present and reasonably foreseeable future projects.[133] The analysis is meant to ensure that the Commission is aware of how the effects of its decision could aggregate with other impacts on the same resource in the same time and place, thereby contributing to greater or different effects on the resource than the Commission's own decision would account for in isolation.

NEPA provides the geographic, temporal, and analytical bounding principles for investigating the scope of the impacts from the proposed action and other, cumulative actions.[134] To identify the geographic and temporal scope of the cumulative impacts analysis, the Commission should identify the resources and geographic area likely to be impacted by a decision, as well as the time frame over which its decision will likely have impacts.[135]

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[132] Other agencies, in contrast to the Commission, are instructed by Congress to make regional decisions as well as project-specific decisions. For example, under the Outer Continental Shelf Lands Act, the U.S. Department of the Interior's Bureau of Ocean Energy Management ("BOEM") prepares a Five Year Program for oil and gas leasing on the U.S. outer continental shelf. In doing so, BOEM prepares a programmatic NEPA analysis. In subsequent regulatory stages, BOEM decides to hold lease sales consistent with the Five Year Program, and thus prepares a regional NEPA analysis pertinent to the lease areas. In due course, BOEM reviews and as appropriate authorizes individual well operations, informed by a well-specific NEPA analysis. At each decision-making stage, BOEM is informed by a suitably scaled NEPA analysis. In contrast, the Commission responds only to individual applications for specific projects. Accordingly, regional or other programmatic analyses are not informative to the decisions it is authorized to make.

[133] 40 C.F.R. § 1508.

[134] *Id*.; *see* also 18 C.F.R. § 380.12(b)(3); Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997) ("CEQ Guidance"), *available at* https://ceq.doe.gov/publications/cumulative_effects.html; Federal Energy Regulatory Commission, *Guidance Manual for Environmental Report Preparation for Applications Filed Under the Natural Gas Act*, Docket No. AD16-3, Vol.1 at 4-7 *et seq*. (Feb. 2017) ("FERC Guidance Manual"), *available at* https://www.ferc.gov/industries/gas/enviro/guidelines/guidance-manual-volume-1.pdf.

[135] CEQ Guidance, *supra* n.134, at 15.

Thereafter, the Commission should identify other actions that would reasonably be expected to occur and which would impact the same resources within the identified geographic and temporal scope in a manner that compounds the impacts of the Commission's decision. In identifying other relevant actions and assessing their potentially cumulative impacts, the Commission is analytically bounded by what is known and reasonably foreseeable and by what would be significant to the human environment.[136]

While charged with considering the reasonably foreseeable impacts, the Commission is not tasked with engaging in speculation. In fact, speculation is inconsistent with the purpose of NEPA because speculation is too uncertain to improve decision-making. Moreover, FERC's recently updated guidance document for preparing cumulative effects analyses also focuses on "truly meaningful effects" that can be analyzed confidently based primarily on quantitative information (e.g., acreages subject to impact) supplemented by qualitative information where necessary.[137] In sum, the goal of NEPA is to inform and reach "a better decision, rather than a perfect cumulative effects analysis[.]"[138]

C3. In conducting an analysis of a project, should the Commission consider calculating the potential greenhouse gas ("GHG") emissions from upstream activities (e.g., the drilling of natural gas wells)? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these upstream impacts? If so, what criteria would be used to determine the significance of these impacts?

The Commission's existing policy statement and current approach to analyzing upstream GHG emissions are consistent with NEPA and are appropriately flexible to account for the facts and circumstances of particular projects. NEPA requires federal agencies to identify the significant effects of their actions on the human environment. Specifically, agencies must

[136] 40 C.F.R. § 1508.7.
[137] FERC Guidance Manual, *supra* n.134, at 4-11.
[138] CEQ Guidance, *supra* n.134, at vii.

consider the direct and indirect impacts of a proposed action, in addition to considering the cumulative effects of that action with the impacts of past, present, and reasonably foreseeable other actions affecting the same resource.[139] Indirect impacts are those impacts that are "caused by the [agency] action and are later in time or farther removed in distance, but are still reasonably foreseeable."[140] To satisfy the reasonable foreseeability requirement, the impact "must be sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[141] With respect to the causation requirement, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect."[142] Rather, NEPA "requires a reasonably close causal relationship between the environmental effect and the alleged cause, which is analogous to the familiar doctrine of proximate cause from tort law."[143] Accordingly, as the Supreme Court has explained in *Department of Transportation v. Public Citizen*, where an agency "has no ability categorically to prevent" an environmental effect, the agency is not "the legally relevant cause" of that effect.[144] The Commission's current approach is consistent with these requirements, analyzing the direct, indirect, and cumulative effects of its actions according to the bounding principles of causality, reasonable foreseeability and the reasonable availability of probative information suitable for decision-making.

Guided by these principles, the Commission has stated that upstream impacts associated with natural gas production, including GHG emissions, are appropriately excluded from the Commission's NEPA analyses of natural gas infrastructure projects. This is so because, as a general matter, (a) upstream activities are not sufficiently causally related to the jurisdictional

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[139] *Metro. Edison Co. v. People Against Nuclear Energy,* 460 U.S. 766, 774 (1983).
[140] *Public Citizen*, 541 U.S. at 764; *Sierra Club v. FERC (Freeport LNG)*, 827 F.3d 36, 46-47 (D.C. Cir. 2016).
[141] *Sierra Club v. FERC (Freeport LNG)*, 826 F.3d at 47.
[142] *Id.* at 46 (quoting *Village of Bensenville v. FAA*, 457 F.3d 52, 65 (D.C. Cir. 2006)).
[143] *Id.* at 47 (quoting *Public Citizen*, 541 U.S. at 764).
[144] *Public Citizen*, 541 U.S. at 769.

decision and (b) the indirect impacts arising from these upstream activities cannot be known with the requisite confidence to avoid speculation and aid the Commission's understanding of the effects of its own action.[145]

Emissions from upstream activities are not caused by the Commission's approval in part because they are not within the scope of the Commission's authority under NGA Section 7,[146] which means that the Commission has "no ability categorically to prevent" upstream activities.[147] Further, as the Commission has repeatedly and correctly recognized, the transportation of natural gas via a jurisdictional facility is generally a *response to* market demand for accessible supplies of natural gas, rather than a cause of such demand.[148] Thus, the causal vector generally runs toward, not from, the Commission's action, making it inappropriate to analyze upstream impacts as an indirect effect of the Commission's actions. This is consistent with the case law, which has concluded that the issuance of a certificate by the Commission did not proximately cause any reasonably foreseeable impacts relating to upstream natural gas production, including GHG emissions.[149]

If it were otherwise—if the Commission's decision under NGA Section 7 controlled whether, where, and how natural gas were produced upstream of the jurisdictional facility under decision—then the Commission would need to decide which upstream resources will or will not be developed. This was not Congress's intention in the NGA, no part of which authorizes the

[145] Indeed, the Commission has stated that upstream impacts "are generally neither caused by a proposed [natural gas infrastructure project] nor are they reasonably foreseeable." *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, P 59 (2018).
[146] *See, e.g., id.* at P. 43 ("[T]he Commission does not control the production . . . of natural gas.").
[147] *See Public Citizen*, 541 U.S. at 769.
[148] *See, e.g., Tennessee Gas Pipeline Co., L.L.C.*, 163 FERC ¶ 61,190, at P 59 (2018) (explaining that factors, such as domestic natural gas prices and productions costs, drive new drilling, not FERC's approval of a pipeline project).
[149] *See Sierra Club (Freeport LNG)*, 827 F.3d at 47.

Commission to substitute its judgment for the judgment of the states, which generally regulate oil and natural gas production.[150]

Moreover, the specific impacts from these upstream activities are generally not discernible with the specificity needed to support meaningful analysis. For example, an interstate natural gas pipeline may not know the source of the natural gas to be transported, such as when a new pipeline connects points on the existing pipeline grid and, consequently, may transport natural gas between various sources and users. Or the proposed pipeline could originate in a natural gas production basin, yet not be causally or reliably linked to particular wells and production locations, which likely would change through the lifetime of the proposed facility, if certificated.

The inability to identify the particular sources of natural gas to be transported precludes a meaningful analysis of the specific impacts from production at the source location. Meaningful analysis would generally require, among other things, particular information about the specific environmental resources affected by the production—water resources, flora and fauna, cultural and historical resources, geology and soils, and air quality, for example. A generalized sense that various impacts tend to arise from natural gas production activities is not compatible with analyzing other particular, often quantitative direct and indirect impacts to specific resources arising from the Commission's decision. Such vagueness provides the Commission little assistance in making its decision under the NGA. NEPA requires information of sufficient specificity and reliability to merit analysis.

[150] Some upstream production is conducted on federal lands, which are typically regulated by the U.S. Department of the Interior under a variety of land-use statutes, but the point is the same: governmental entities other than the Commission hold the power to authorize upstream production.

In short, the Commission should continue to recognize that its impact analysis—of air emissions or anything else—is bounded by the principles of causality, reasonable foreseeability, and the reasonable availability of probative information suitable for decision-making. As a general matter, analysis of GHG emissions from natural gas production is unlikely to be meaningful because FERC-jurisdictional projects are not the cause of upstream production and the particulars of upstream production are often far too uncertain to permit analysis that informs the Commission's decision under the NGA.

C4. In conducting an analysis of a project, should the Commission consider calculating the potential GHG emissions from the downstream consumption of the gas? If so, should the Commission base this calculation on total consumption, or some other amount? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these downstream impacts? If so, what criteria would be used determine the significance of these impacts?

As was true for GHG emissions resulting from upstream production of natural gas, the Commission should continue to analyze GHG emissions related to downstream consumption according to the bounding principles of causality, reasonable foreseeability, and the reasonable availability of probative information suitable for decision-making.

Interstate natural gas facilities regulated under the NGA transport natural gas to one or more endpoints under commercial contracts, subject to Commission-approved rates. The fate of the gas after transportation lies outside the scope of the Commission to regulate or the facility operator to control. Typical fates include further transportation on downstream interstate or intrastate lines, movement through local distribution lines to a variety of consumers, and in some instances, direct delivery of the natural gas to the end consumer, who might use it as a feedstock for chemical production or as a fuel for combustion in non-jurisdictional facilities.

As with upstream production, downstream activities are generally not caused by the Commission's decision. The D.C. Circuit recently held in *Sierra Club v. FERC (Sabal Trail)*,

however, that downstream GHG emissions can be legally caused by the Commission's decision in certain circumstances where there is a sufficient causal link beyond "but for" causality.[151] As the Commission has explained, the pipeline at issue in *Sierra Club v. FERC (Sabal Trail)* is distinguishable from most of the projects before the Commission.[152] In most cases, the consumption/demand is the cause of additional transport capacity, rather than the reverse, or the causal link will be too tenuous to merit analysis. It remains a case-specific inquiry.

Where jurisdictional transportation of natural gas is demonstrably the cause of downstream activity, the Commission's analysis of the indirect impacts is still bounded by reasonable foreseeability and the reasonable availability of probative information suitable for decision-making. The Commission could analyze the environmental impacts of the downstream activities to the extent the activities, their impacts, and the affected resources are known or reasonably foreseeable. In those limited circumstances, the air quality impacts of GHG and other air emissions are one potential area for attention if, for example, the downstream use is combustion for power generation.[153] However, a meaningful analysis would require understanding: (1) the reasonably foreseeable quantity and type of emissions and (2) the character of the atmosphere (the resource) affected by the emissions. The depth of the analysis should depend on the availability of sufficient information to permit meaningful analysis relevant

[151] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017).
[152] *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, P at 62 (2018). Moreover, *Sierra Club v. FERC (Sabal Trail)* is inconsistent with the Supreme Court's holding in *Public Citizen* that agencies are not the legally relevant cause of environmental effects "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions." *See Public Citizen*, 541 U.S. at 769. As the Commission has explained on multiple occasions, the Commission cannot prevent emissions from downstream activities because the "Commission does not control the . . . consumption of natural gas," which "will occur regardless of whether [a] project before [the Commission] is approved." *Dominion Transmission, LLC*, 163 FERC ¶ 61,128, at PP 43, 63 (2018).
[153] *See Sierra Club v. FERC (Sabal Trail)*, 867 F.3d at 1373-74.

to the Commission's decision.[154] Where the facts bear out the volume of natural gas to be combusted as well as the resulting GHG emissions based on the equipment and operating parameters of the combustion facility, the Commission could probe the magnitude of the emissions and the potential impact to the atmospheric resource.

However, reasonably foreseeing the magnitude of downstream emissions (from uses causally related to the Commission's decision) still leaves open the question of significance. The Commission should not presume that all GHG emissions are significant, any more than it should assume that all effects on other environmental resources are significant. As decades of NEPA analyses for NGA Section 7 projects have shown, most impacts are *not* significant, or can be mitigated appropriately.

In the case of atmospheric impacts caused by GHG emissions, the relevant geographic scope of the environmental resource is global, unlike the more local and regional atmospheric impacts associated with the emission of particulate matter or nitrous oxide (which in any event are regulated under the Clean Air Act to ensure that environmental effects are acceptable). Accordingly, when considering GHG emissions from causally-related downstream uses of natural gas, the Commission would appropriately consider the scale and complex nature of the global resource and its billions of anthropogenic and non-anthropogenic sources of GHGs. This analysis is fraught with scientific complexity and exceeds the scope of analysis customarily applied to other impacts. None of this is to say that GHGs in the global atmosphere are inconsequential, or that their presence does not foster global climate change. Rather, it is

[154] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (NEPA does not require the impractical where there is not enough information for meaningful analysis); *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (stating that an "EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible," and finding that the agency's failure to consider any cumulative impacts was deficient under NEPA).

important for the Commission to focus on making a reasoned judgment whether (1) a meaningful assessment can be made with reasonable effort based upon available information and (2) if so, whether a meaningful judgment can be formed regarding whether the contribution of GHGs is likely to have a significant impact on the resource as a whole.

C5. How would additional information related to the GHG impacts upstream or downstream of a proposed project inform the Commission's decision on an application? What topics or criteria should be included in this additional information?

Additional information related to GHG impacts should not be included because it is not required by NEPA and would not contribute meaningfully to the Commission's decision under NGA Section 7. It is not clear how upstream and downstream GHG emissions calculations would inform the Commission's decision on an application for authorization under NGA Section 7. As explained above, a causal link between the Commission's decision under NGA Section 7 and the non-jurisdictional emission of GHGs is generally non-existent for upstream and downstream GHG emissions.

As a practical matter, it is open to doubt whether detailed upstream and downstream information is available to the certificate applicant or the Commission. Upstream producers of natural gas closely guard their business strategies on where and when to drill and what technologies and operational methods to use. Downstream activities such as local distribution can lead to numerous different kinds of end-uses of diminishing transparency and foreseeability. Even where the transported natural gas directly feeds an existing power plant, the availability of information about heat rates, operational efficiency programs, and the like may vary. Where information is inaccessible or incomplete, the reliability of the calculations diminishes.

Moreover, neither the applicant nor the Commission has legal authority over the activities in question. The Commission has no authority to decide whether a given upstream or downstream activity should occur. Upstream production of natural gas is regulated by the states

(or by federal or tribal entities other than the Commission), and downstream uses vary widely and are subject to a variety of state and federal authorities other than the Commission's.[155] The Commission should be cautious about adopting policies that encroach upon the authority of other governmental entities and that impose norms outside the policy frameworks that Congress provided to the Commission.

With these points in mind, the Commission may reasonably conclude that seeking detailed information about GHG emissions from non-jurisdictional facilities (upstream and downstream) will not meaningfully inform its decision as to alternatives (which must meet the purpose and need of transporting natural gas), route or location, or methods and practices of constructing and operating an interstate natural gas pipeline. The amount of GHG emissions from upstream and downstream activities is largely independent of these aspects of the jurisdictional facility and, therefore, the Commission's decision.

C6. As part of the Commission's public interest determination, should the Commission consider changing how it weighs a proposed project's adverse environmental impacts against favorable economic benefits to determine whether the proposed project is required by the public convenience and necessity and still provide regulatory certainty to stakeholders?

As explained above, consistent with the current Certificate Policy Statement and given the Commission's existing robust review of environmental impacts, the public convenience and necessity determination should remain fundamentally an economic analysis. The Commission should continue balancing the public need and benefits of a project against the residual adverse impacts to existing pipeline customers and pipelines in the market, and landowners and

[155] Notably, air emissions (including GHG emissions) from upstream and downstream activities are regulated under the Clean Air Act, which is administered by the U.S. Environmental Protection Agency and analogous agencies of authorized tribes and states. *See Mass. v. EPA*, 549 U.S. 497, 534 (2007).

communities, and the Commission should continue to give environmental impacts a separate hard look pursuant to the Commission's NEPA obligations.

Under the NGA, by which Congress intended to ensure reliable and economic supplies of natural gas are provided to consumers, the Commission is charged with performing an evaluation of whether approving a certificate application is in the public convenience and necessity.[156] The Commission has long considered this analysis to be predominantly economic in character, as reflected in the Certificate Policy Statement where the Commission balances the demonstrated public need for the project against the residual adverse economic effects (after such effects have been minimized) to customers of existing pipelines, landowners, and communities.[157] The Commission's balancing analysis has, and should continue to be, primarily economic in nature.

The Commission presently conducts—and should continue to conduct—a robust analysis of environmental impacts that informs its decision on a certificate application, as reflected in the Commission's regulations governing environmental analysis. Specifically, applicants must supply detailed and comprehensive information addressing the potential environmental impacts of their proposal on a variety of resources. The Commission staff regularly issues data requests seeking additional information, and through stakeholder input, the route of a proposed project is

[156] *See Fed. Power Comm'n v. Hope Nat. Gas Co*., 320 U.S. 591, 611 (1944) (stating that NGA is "plainly designed to protect the customer interests against exploitation at the hand of private natural gas companies"); *accord Sunray Mid-Con. Oil Co. v. Fed. Power Comm'n*, 364 U.S. 137, 147 (1960) ("The Act was so framed as to afford consumer a complete, permanent and effective bond of protection from excessive rates and charges."); *Pub. Serv. Comm'n of N. Y. v. Fed. Power Comm'n*, 467 F.2d 361, 370 (D.C. Cir. 1972) ("The Federal Power Commission's primary mission under the Natural Gas Act is to protect the consumer, though it must also strive to reach a balance between the consumer, producer, and those whose interests fall in between."); *Amendments to the Natural Gas Act: Hearing on H.R. 5249 Before the H. Comm. on Interstate and Foreign Commerce*, 77th Cong. (July 10 and 11, 1941) (statement of Fed. Power Commissioner Manly summarizing the FPC's review of Section 7 applications and explaining that amendments will give FERC an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, market studies, and the characteristics of the rate structure to prevent wasteful competition between natural gas companies); H.R. Rep. No. 1290 at 2-3 (Oct. 21, 1941) (same).

[157] Certificate Policy Statement, *supra* n.1 at 61,745.

often modified to reduce landowner and community impacts.[158] Further, pipeline applicants can use the pre-filing process to define the scope and seek public input on the project's potential environmental impacts before submitting a certificate application.[159] Through iterative review, including multiple public and stakeholder comment opportunities, the Commission produces a robust NEPA document evaluating the potential environmental impacts of the proposal. Then, in a certificate order, the Commission addresses comments and concerns with the environmental impacts analysis, and the Commission ensures that impacts are minimized through environmental conditions in the certificate order.

As is evident from the foregoing, the Commission ultimately applies the public convenience and necessity standard to a project proposal that typically has had extensive adjustments in light of the environmental analyses. The Commission's robust NEPA analysis also informs its consideration of alternatives and route variations of the pipeline. For instance, the Commission can—and has—required pipelines to use route variations where such alternatives would result in lesser impacts to landowners, important natural resources, and communities.[160] Further, the Commission regularly imposes conditions on certificates to ensure that impacts to landowners and various resources are mitigated. These outcomes demonstrate that the Commission has sufficient information from the NEPA analysis to meaningfully inform its decision-making.

When conducting an environmental review under NEPA, the Commission should continue to recognize that this review is bounded by the purpose of the agency's decision as

[158] *See* 18 C.F.R. § 380.12.
[159] 18 C.F.R. § 157.21.
[160] *See, e.g., Columbia Gas Transmission, LLC*, 161 FERC ¶ 61,314, at P 119 (2017) (requiring the use of certain minor route variations); *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 152 (2017) (requiring the use of a minor route alternative); *Transcontinental Gas Pipe Line Co*., 158 FERC ¶ 61,125, at P 153 (2017) (requiring five different minor route variations).

defined under the NGA, the range of likely impacts from discretionary aspects of the agency's decision, reasonable foreseeability, and the reasonable availability of probative information. The enactment of NEPA did not change the fundamental analysis in the action statute (the NGA); NEPA requires the Commission to consider the environmental impacts of its decision. "Although [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process."[161] Moreover, "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."[162] Thus, as the Supreme Court has made clear, the results of the Commission's NEPA analysis do not require the Commission to reach a particular result or to deny a certificate application.[163]

Further, the Commission's authority over interstate natural gas pipeline facilities is limited to denying, approving, or conditionally approving certificate applications. This authority does not include broad authority to fashion unrelated alternatives to the proposed transportation project, such as requiring that downstream consumers meet their energy needs through energy efficiency programs or to utilize a different fuel source for energy generation or heating.[164] To do so would be an attempt to implement broader energy or environmental policies; it is also contrary to the fundamental purpose of the NGA, which is to ensure economic and reliable

[161] *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350.
[162] *Id*.
[163] *Id.*
[164] The Commission lacks jurisdiction over the end-use of natural gas, and Congress has left to the States the authority to establish power generation policies. *See* 15 U.S.C. § 717; 16 U.S.C. § 824 (stating that FERC has no jurisdiction over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind*., 332 U.S. 507, 520 (1947) (stating that under the NGA "Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority." (citations omitted)).

natural gas supplies are provided to consumers.[165] The Commission's focus on the economic balancing, the heart of the public convenience and necessity analysis has withstood the test of time and court review.

In sum, the Commission should continue its practice of ongoing, comprehensive environmental review while remaining fundamentally an economic test, respecting that the primary purpose of the NGA is to provide reliable and economic supplies of natural gas to consumers. The NGA reflects Congress' legislative policy decisions concerning the delivery of economic and reliable natural gas supplies to consumers, and the Commission's analysis of certificate applications should respect these legislative priorities. This approach will ensure the Commission is properly evaluating a certificate application while ensuring the Commission also meets its obligations under NEPA.

C7. Should the Commission reconsider how it uses the Social Cost of Carbon tool in its environmental review of a proposed project? How could the Commission use the Social Cost of Carbon tool in its weighing of the costs versus benefits of a proposed project? How could the Commission acquire complete information to appropriately quantify all of the monetized costs/negative impacts and monetized benefits of a proposed project?

To date, the Commission has properly declined to employ the SCC tool to assist in its decision-making under NGA Section 7.[166] The Commission's position is sound, for several reasons. To begin, it is important to recognize that acquiring complete information to quantify and balance the monetized equivalents of all benefits and detriments associated with a proposed project is neither the Commission's mandate under the NGA nor appropriate or required under NEPA. Even in the largely economic analysis of the public convenience of necessity—the core

[165] *See, e.g., Cameron LNG, LLC*, DOE/FE Order No. 3391-A at 76, FE Docket No. 11-162-LNG (Sept. 10, 2014) (discussing DOE's obligation to approve or disapprove an application to export liquefied natural gas as being "too blunt an instrument" to address environmental concerns efficiently).

[166] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 270 (2018); *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at PP 80-82 (2018); *Millennium Pipeline Company, L.L.C.*, 161 FERC ¶ 61,229, at PP 171-72 (2017).

determination under NGA Section 7—the Commission does not and is not required to conduct its evaluation on the basis of monetized, or even quantified, costs and benefits. Similarly, under NEPA, the analysis of environmental impacts from an agency's decision may (but need not always) draw upon quantitative *data*—e.g., acres of wetlands affected—but does not depend on reducing the significance of impacts to a number for the sake of completing the analysis.[167]

Where quantification is straightforward and readily allows comparisons of identical or highly similar matters, it can be an important aid to decision-making, like comparing acreage impacts for the proposed route and an alternative route. The acreages are directly comparable because they rely upon the same gauge for quantification. Climate change, however, is an entirely different matter, vastly more complex than simply comparing acreages.

The SCC was intended to provide a numerical present value, in dollars, of the global detriments—extrapolated to the year 2300—that are attributable to the addition of a metric ton of carbon dioxide to the atmosphere.[168] It attempted to integrate impacts across "net agricultural productivity, human health, property damages from increased flood risk, and the value of ecosystem services,"[169] using assumptions for population growth rates and GDP/per capita growth rates for the next few hundred years,[170] among many other assumptions.

The SCC is an algorithm driven by and infused with policy judgments that lie well beyond the policy authority of the Commission. To use the SCC is to adopt and enforce the

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[167] *See* 40 C.F.R. § 1502.23 (agencies need not conduct a monetary cost-benefit analysis when weighing the merits of alternatives and "should not be when there are important qualitative considerations"); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 112 (D.C. Cir. 2014) (rejecting claim that FERC should have conducted a monetary cost-benefit analysis of several proposals); *Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974) (EIS need not contain a quantified cost-benefit analysis).

[168] *See* Interagency Working Group on Social Cost of Carbon, *Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order* 12866 at 1 (Feb. 2010) ("SCC Technical Document"), *available at* https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/scc_tsd_2010.pdf

[169] *Id.* at 2.

[170] *See id.* at 43.

policy judgments embedded in it. The SCC is hypersensitive to certain inputs reflecting normative preferences, including the discount rate and the damage function method used in the integrated assessment of models that underlie the SCC.[171] Small changes in discount rate—a few percentage points—swing the results astronomically. Since there is no empirical foundation for the choice of discount rate in the SCC, the SCC's monetized value mainly reflects a normative choice, not a quantitative measurement or estimated measurement such as would be a reliable basis for decision-making by the Commission.[172] The integrated assessment models underlying the SCC use damage functions that essentially "aggregate relationships between global temperature change and GDP losses" but that "do not describe the specific impacts that lead to damages due to temperature change."[173] Without clarity about these connections, and without empirical or even widely accepted theoretical bases for them, the damage functions become arbitrary normative choices. The sensitivity to normative inputs, rather than objective inputs, casts heavy doubt on the meaning of the quantitative outputs of using the SCC. These attributes of the SCC deeply undermine its utility as a tool for quantitative comparison and, ultimately, as an aid in the largely non-quantitative decisions to be made by the Commission under NGA Section 7.

[171] *See generally Impacts of U.S. Environment Protection Agency Regulations Before the H. Comm. on Oversight and Government Reform* (Feb. 26, 2015) (Prepared Statement of Anne E. Smith, Ph.D.) ("Smith Testimony"), *available at* http://www.nera.com/content/dam/nera/publications/2015/PUB_Smith_EPA_Testimony_0215.pdf; NERA Economic Consulting, *A Review of the Damage Functions Used in Estimating the Social Cost of Carbon* (Feb. 20, 2014) ("NERA Review"), *available at* https://www.afpm.org/WorkArea/DownloadAsset.aspx?id=4111.
[172] Smith Testimony, *supra* n.171, at 4.
[173] NERA Review, *supra* n.171, at p. 1.

The currently available SCC methodology falls far short of the reliability and solidity required for data-driven environmental assessments under NEPA.[174] As EPA observed at the very beginning of its technical support document:

> When attempting to assess the incremental economic impacts of carbon dioxide emissions, the analyst faces a number of serious challenges. A recent report from the National Academies of Science (NRC 2009) points out that any assessment will suffer from uncertainty, speculation, and lack of information about (1) future emissions of greenhouse gases, (2) the effects of past and future emissions on the climate system, (3) the impact of changes in climate on the physical and biological environment, and (4) the translation of these environmental impacts into economic damages. As a result, any effort to quantify and monetize the harms associated with climate change will raise serious questions of science, economics, and ethics and should be viewed as provisional.[175]

The Administration has since abandoned the SCC.[176] The SCC, especially in its highly normative and unreliable structure, does not add meaningfully to the Commission's decision under NGA Section 7.

[174] It bears noting that the SCC was not intended for use under NEPA but rather in the analysis impacts from regulatory rulemaking. Env. Protection Agency, *The Social Cost of Carbon – Estimating the Benefits of Reducing Greenhouse Gas Emissions* (Jan. 19, 2017) ("EPA and other federal agencies use estimates of the social cost of carbon (SC-CO_2) to value the climate impacts of *rulemakings*." (emphasis added)), *available at* https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html. The many differences between rulemaking decisions and project-specific decisions further erode the basis for using SCC in the Commission's review of natural gas facilities under Section 7 of the NGA.

[175] SCC Technical Support Document, *supra* n.168, at 2.

[176] Exec. Order No. 13,783 at § 5, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

VII. Improvements to the Certificate Application Review Process

INGAA welcomes the opportunity to offer improvements to the Commission's certificate process to encourage as many federal and state agencies to participate in the FERC environmental review process.

D1. Should certain aspects of the Commission's application review process (i.e., pre-filing, post-filing, and post-order-issuance) be shortened, performed concurrently with other activities, or eliminated, to make the overall process more efficient? If so, what specific changes could the Commission consider implementing?

There are many ways the Commission can improve its certificate review process while simultaneously implementing recent executive directives. Pursuant to Executive Order 13807, the Commission recently executed the One Federal Decision MOU with various agencies.[177] This MOU outlines several key concepts and principles that can improve and streamline the certificate review process, such as establishing a two-year goal to complete the NEPA review and issue a certificate order, emphasizing concurrent reviews, improving the input and participation of cooperating agencies, and establishing permitting timetables.

Permitting Timetables. One key area where the Commission can make meaningful strides in implementing the requirements and principles of Executive Order 13807 and the One Federal Decision MOU is by establishing permitting timetables for all NGA Section 7(c) projects. This will bolster the Commission's lead federal permitting agency status as defined by EPAct 2005.[178] Shorter and more focused attention on the impact analysis is appropriate and workable, and can be accomplished by standardizing the Commission's basic approach to reviewing certificate applications, such as by designing two or three standard, expected permitting timetables and publishing those on the FERC website. When developing a Notice of

[177] Memorandum of Understanding Implementing One Federal Decision Under Executive Order No. 13807 (Apr. 10, 2018) ("One Federal Decision MOU").
[178] 15 U.S.C. § 717n(b).

Schedule, the Commission could select from, and apply, one of these standardized permitting timetables based on the complexity and scale of the proposed action. Providing standardized schedules also would assist applicants, cooperating agencies, and stakeholders by providing increased certainty of anticipated milestone dates and comment opportunities, which would assist all with planning efforts.

The Commission should factor into its standardized timelines whether it can issue its certificate within 90 days of issuance of the final environmental document, as contemplated by Section 157.22 of the Commission's regulations, "Schedule for final decisions on a request for a Federal authorization," which provides that:

> For an application under section 3 or 7 of the Natural Gas Act that requires a Federal authorization – i.e., a permit, special use authorization, certification, opinion, or other approval – from a Federal agency or officer, or State agency or officer acting pursuant to delegated Federal authority, a final decision on a request for a Federal authorization is due *no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by Federal law.*[179]

The Commission should strive to issue its certificate within 90 days of its issuance of the final environmental document, just as it requires other federal agencies to issue their final decisions no later than 90 days after the Commission issues its final environmental document (unless a schedule is otherwise established by federal law).

As compared to the Commission's current bespoke approach, standardized permitting timetables would give applicants, cooperating agencies, and stakeholders better expectations of when key milestones in the review process will be reached.[180] The permitting timetables also should articulate milestone dates by which stakeholders (including the public) are expected to have identified concerns around particular kinds of issues. The Commission staff's timeline

[179] 18 C.F.R. § 157.22 (emphasis added).
[180] The permitting timetable could be updated during the certificate review process to reflect ongoing progress.

should set clear expectations that stakeholders should raise their issues early in the process and adhere to the scoping and comment periods specified by the permitting timetable. This would allow the Commission to identify the range of issues it would need to consider in its draft and final environmental documents.

Standardized timetables also could minimize the potential for NEPA analysis to delay the Commission's review under the NGA because all agencies and stakeholders would be on notice of milestone dates and opportunities for providing environmental input. Further, the standardized permitting timetables can be married with processes for obtaining milestone concurrences—as required by the One Federal Decision MOU—and advance inter-agency coordination to resolve frequently arising issues, such as data gaps from survey access limitations, prioritization and sequencing of agency review actions, multi-agency use of the same administrative record, and efficient management of matters related to states' permitting authorities under Section 401 of the Clean Water Act ("CWA"). In cases where a federal agency does not cooperate consistent with the MOU, FERC should follow the MOU procedures to elevate the issue to the appropriate staff, designated official or leadership personnel within FERC to resolve the inter-agency conflict in a timely manner.

CWA Section 401. Recent appellate court decisions have clarified key principles regarding inter-agency cooperation and the CWA Section 401 water quality certification process. First, the Commission, the lead agency for most interstate pipeline projects, is called upon to make waiver determinations under CWA Section 401.[181] Second, the statutory time period for reviewing a project's CWA Section 401 application begins upon a state's "receipt of such

[181] *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017) ("*Millennium Pipeline"*).

request."[182] The Commission must fully embrace its responsibility to decide whether a state has waived its CWA Section 401 authority failing to act on the water quality certification application within a reasonable period of time, not to exceed one year.

INGAA offers the following additional comments, which could shorten or enhance the efficiency of the overall certificate process while still meeting FERC's statutory obligations under the NGA and NEPA:

1. Deadlines. The Commission should adhere to established public comment periods and intervention deadlines as specified in its Notice of Schedule, and should only allow for exceptions where commenters raise new and substantive issues and/or issues that could not have been anticipated during the timely intervention period. Current Commission policy permits late interventions only when good cause is shown.[183] To ensure that interested stakeholders have an opportunity to raise important issues yet not delay proceedings, INGAA suggests that FERC establish a standard comment/intervention period for new applications of 30 days from the date that the Commission issues the Notice of Application, an extension from the typical 21 days. This time period will provide all stakeholders with sufficient time to review the pipeline's certificate application filing and for the FERC staff to receive a more complete list of stakeholder and environmental issues earlier in the process. Having a standard deadline for comments and interventions also may enable the Commission to enforce its intervention policy and deny late interventions and comments when good cause does not exist.

[182] *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) ("*NYSDEC v. FERC"*).
[183] 18 C.F.R. § 385.214(c)(1) (2017).

2. Increased Reliance on Environmental Assessments ("EAs"). The Commission should also consider and expand the use of EAs, relative to EISs, to ensure that environmental review and NEPA analysis, as well as schedules for completion of such activities, are properly tailored and appropriate to the scope of a given project. Although FERC's OEP staff have utilized EAs to analyze some project proposals of varying scope in recent times, it seems to have become ubiquitous for OEP staff to apply a de facto EIS review standard to NGA Section 7(c) project proposals before the Commission, particularly those that utilize the pre-filing process. Instead, FERC staff should defer and adhere to the existing regulations contained at 18 C.F.R. §§ 380.5 and 380.6 in making determinations as to what level of NEPA environmental review is appropriate for a given project. Section 380.6 of the Commission's regulations defines and limits those NGA projects for which an EIS will normally be prepared to (1) LNG import/export facilities, (2) development of an underground storage facility, and (3) major pipeline construction projects using rights-of-way in which there is no existing natural gas pipeline. In all other instances, additional project types would presumptively qualify for review by EA, consistent with 18 C.F.R. § 380.5. Under such an approach, the outcome of the environmental review for a given project (i.e., the EA itself) will determine whether an EIS should or should not be prepared. Conducting environmental and NEPA reviews according to this model and regulation will help ensure that FERC staff resources are appropriately allocated to projects with greater potential to result in adverse environmental affects, while also helping to ensure a more efficient, timely, and effective NEPA process that is consistent with the national environmental policy stated in NEPA.

3. Revisions to Guidance. FERC should revise its existing "Guidance for Applicant-Prepared Draft Environmental Assessments for Certain Proposed Natural Gas Projects."[184] This document states that applicant-prepared draft EAs will only be considered as an option for projects that utilize FERC's pre-filing process. Yet, there is no regulatory basis or requirement for that assertion, and the document conflicts with the recently revised and updated FERC Guidance Manual.[185] The FERC Guidance Manual states that the submittal of an applicant-prepared draft EA may be appropriate for projects where environmental issues are known and scoping is not likely to identify new issues or concerns, but that the intent to submit an applicant-prepared EA should be coordinated with OEP staff prior to filing an application. Pipeline sponsors should be allowed to prepare an applicant-prepared draft EA for such projects, regardless of whether they choose to employ the pre-filing process, and such a model would be consistent with the way that other federal agencies (e.g., U.S. Army Corps of Engineers, U.S. Forest Service, and Bureau of Land Management) operate. This model also would allow FERC staff to focus on and make progress on more complex projects where substantive resource issues and stakeholder concerns have been identified, leading to greater efficiencies in the FERC review process.
4. Regulatory Revisions. INGAA advocates that FERC revise its regulations to:
   a) Allow modifications to mainline natural gas facilities under its blanket automatic certificate program procedures, 18 C.F.R. § 157.203(b), if the project falls below the

[184] Federal Energy Regulatory Commission, *Guidance for Applicant-Prepared Draft Environmental Assessments for Certain Proposed Natural Gas Projects*, (Apr. 2011). ("FERC Guidance for Applicant-Prepared EAs"), *available at* https://www.ferc.gov/industries/gas/enviro/draft-ea-guidance.pdf.
[185] FERC Guidance Manual, *supra* n.134.

blanket automatic cost limit. 18 C.F.R. § 157.202(b) currently excludes certain mainline facilities from the eligibility requirement.[186]

b) Provide an exception to the standard environmental conditions at 18 C.F.R. § 157.206(b) to recognize that environmental compliance has already been met for certain projects under the Commission's blanket certificate regulations that involve ground disturbance,[187] but do not require acquisition of new right-of-way or disturbance of areas outside the work space used to construct the original facilities, as is the case with Section 2.55 (auxiliary facilities and replacements) projects. This exception would apply, for example, when a delivery meter station upgrade involves ground disturbance solely within the existing meter station (similar to a Section 2.55(a) project that solely involves yard piping and valve installations within a meter station). Notwithstanding this proposed exception, the pipeline would still report the activity in its annual blanket certificate report.

c) Allow replacements to natural gas facilities under 18 C.F.R. § 2.55(b) if the project falls below the blanket automatic cost limit and the replacement activity would occur within the existing right-of-way or temporary work space used to construct the original facility. Under these limited circumstances, pipeline companies should be allowed to replace smaller diameter pipe with larger diameter pipe or replace smaller compressor engines with larger compressor engines without prior Commission authorization. In such situations, a pipeline company would notify the Commission

[186] There can be minor modifications at compressor station that would be disqualified as work under the blanket automatic authority.

[187] This would be analogous to the exceptions to standard landowner notification requirements contained at 18 C.F.R. § 157.203(d)(3) for minor activities.

about any replacement projects, including demonstration of compliance with noise issues for compression projects, in its annual report.

Section 2.55(b) only allows for replacement projects if the existing facilities "have or will soon become physically deteriorated of obsolete, to the extent that replacement is deemed advisable." The Commission currently requires that replacements will not result in a reduction or abandonment of service and that the replacement facilities will have a substantially equivalent designed delivery capacity. INGAA submits that there is no reason why replacement facilities should not also be able to increase the availability of service if the original project "footprint" does not change and if the project does not exceed the cost limit specified in 18 C.F.R. § 157.208(d). As long as the replacement project occurs within the existing pipeline right-of-way, including temporary workspaces used to construct the existing facility, no additional environmental disturbance and no environmental clearances should be required because the ground has already been disturbed and the pipeline has already received the necessary environmental clearances when the project was initially authorized. In addition, since the replacement project cost would be restricted to the project cost limit in Section 157.208(d) of the Commission's regulations, the Commission could presume that there would be no associated incremental rate for the project and that the replacement cost qualifies for rolled-in rate treatment in a pipeline company's next rate case.

d) Permit storage well activity that may alter the function of a well that is drilled into or is active in the management of the storage facility to proceed under the blanket

certificate's automatic authorization procedures. Section 157.213(a) of the Commission's regulations, as currently written, does not allow this.

Each of these revisions would make the Commission's certificate processes more efficient, while allowing for existing practices and environmental conditions to ensure protection of the environment.

5. *Ex Parte* Rules. The Commission's *ex parte* rules create an unnecessary impediment to the project sponsor, its environmental experts and FERC OEP staff to addressing and resolving NEPA issues efficiently. The *ex parte* rules are triggered once the certificate application becomes contested. It would enhance efficiency tremendously if FERC staff could call the applicant to explain and clarify its need for additional data without having to send formal Environmental Informational Requests, wait for responses, and then sit down with environmental experts to review and discuss the data. Often there is a lag between an initial data request and a second data request for further clarification regarding a pipeline's response to the initial data request. It would be much more efficient if the Commission's regulations allowed an applicant to interact with FERC staff in person or via phone to discuss any necessary environmental or project information with an after the fact, near simultaneous, reporting requirement in the record. Valuable information is not being exchanged in a timely manner between FERC staff and the applicant (and sometimes not at all).

D2. Should the Commission consider changes to the pre-filing process? How can the Commission ensure the most effective participation by interested stakeholders during the pre-filing process and how would any such changes affect the implementation and duration of the pre-filing process?

Earlier State and Federal Engagement. The 2-year timeline for infrastructure reviews contemplated in Presidential Infrastructure Plan (Executive Order 13807, One Federal Decision

MOU) should include the time spent in the pre-filing process. To stay within this 2-year timeline, INGAA recommends that FERC modify its pre-filing process to encourage earlier engagement by state and federal permitting agencies. Some states and federal agencies do not want to spend their time and resources participating in the pre-filing process or reviewing a pipeline's permit application until the pipeline files its formal certificate application (and, in some instances, until the FERC staff issues the final environmental document for a project). The Commission should strongly encourage both state and federal permitting agencies to review information gathered by applicants early in the pre-filing process and to initiate their own review processes concurrently with the pre-filing process. If a federal or state agency opts not participate in the pre-filing process for a given project, FERC should consider whether it has authority through the MOU (or other means) to require agencies to participate in the pre-filing process. In addition, FERC should consider using a permitting dashboard, coordinating with other federal and delegated state agencies, and providing a quarterly update for all projects (similar to the FAST-41 process) to encourage more timely agency participation.

Conduct Multi-Agency Calls. Furthermore, the FERC project manager should identify outstanding environmental issues on multi-agency calls led by FERC staff throughout pre-filing for significant projects. FERC staff should use these inter-agency calls to focus the agencies' attention on the short list of environmental issues that require additional data, analysis, or considerations. This focus is consistent with 40 C.F.R. § 1500.1, which emphasizes that "NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."

Rely on Best Available Scientific Data. To the extent that information based on field data and pedestrian survey is not available during the environmental review process,[188] agencies should be encouraged to rely on and accept desktop evaluations, data gathered via remote sensing, and reliable databases as the best available scientific data in order to move their processes along, so that their analyses are not deferred entirely until the certificate application is filed or later (e.g., where survey permissions may be withheld by landowners).

Avoid Unnecessary Studies and Unnecessary Data Collection. The issuance of some draft EISs have been delayed recently because FERC staff is gathering excessively broad, detailed data that goes beyond what is legally required to meet NEPA's prioritized, narrow focus on significance. While such delays may be caused by increasingly complex issues in certain cases, INGAA believes that the FERC staff is requiring the preparation of potentially unnecessary studies or the collection of unnecessary data on issues that are not "significant to the action in question. . . ."[189] Even if there are data gaps in information that would be relevant to significant issues, NEPA only requires FERC to explain that such information is not available, and the Commission has the legal authority to issue a draft EIS without waiting for additional studies and reports to be created.[190]

Clarifications Regarding Survey Access. The Commission should emphasize the importance of increased survey access during the pre-filing process and address this issue on its

[188] Missing data might include NEPA-significant major environmental resource impacts, major information gaps relating to likely-significant impacts, missing permits, maintaining one federal record, and impending missed deadlines on the Timeline.

[189] 40 C.F.R. § 1500.1(b) and (c) ("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail. . . . Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."). *See also* 40 C.F.R. § 1502.2(a), (b), and (c) (EIS shall be analytical rather than encyclopedic, discussing impacts in proportion to their significance and, where insignificant, with only enough discussion to show why more study is unwarranted; EIS "shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA . . . .").

[190] 40 C.F.R. § 1502.22.

website and in its landowner brochure, "An Interstate Natural Gas Facility on My Land? What Do I Need To Know?" FERC-led education sessions regarding survey access could be helpful to illustrate that surveys are not precursors to condemnation and do not represent the pre-decisional selection of a final pipeline route or facility site. Further, increased survey access allows for a more robust environmental review throughout the pre-filing and certificate application process and could potentially determine whether a facility or pipeline is moved to a different location (e.g., to avoid identified significant environmental resources). The Commission should also emphasize that allowing survey access does not mean that the landowner is granting the pipeline a right-of-way easement.

D3. Are there ways for the Commission to work more efficiently and effectively with other agencies, federal and state, that have a role in the certificate review process? If so, how?

Please see INGAA's responses to questions D1 and D2 above.

Duties as Lead Federal Agency. Per Executive Order 13807 and the One Federal Decision MOU, the Commission should be more assertive in its role as the lead federal agency by: defining and enforcing permitting timetables; defining the scope of the record to be gathered – what is sufficient as opposed to perfect; setting clear expectations of agencies concerning their duty of concurrence under the MOU at defined milestones; and fulfilling its responsibilities under CWA Section 401. FERC should place particular importance on timelines, milestones, and collaborative records of decision. Pursuant to Executive Order 13807, FERC should follow the MOU procedures to elevate issues in instances in which a cooperating agency fails to cooperate or participate in FERC's environmental review.

Improve Engagement with State and Federal Agencies. The Commission should commit to spending more time with both state and federal agencies to ensure they engage in FERC's application review process. Likewise, the Commission must provide sufficient budget and

staffing resources to OEP staff so that they can travel more often to the field to meet with such agencies, participate in interagency and regional agency meetings, and to address stakeholder concerns. Establishing resource agency contacts, conducting regular face-to-face meetings, and scheduling regular communication is vital to improve the efficiency and effectiveness of the review process. If FERC can take these steps, the agencies likely will obtain more value from participation in the environmental review process and, more importantly, ensure the inclusion of necessary information in the EA or EIS. During pre-filing, to minimize delays and avoid the potential for criticism that FERC did not address adequately certain issues, FERC should discuss with the relevant agencies the time needed to review the NEPA documents (EA or EIS). These conversations will reduce the frequency of other agencies claiming they cannot rely on FERC's NEPA document. For example, FERC should cooperate with the U.S. Army Corps of Engineers and ensure that the CWA Section 404(b)(1) analysis is included in the NEPA document and meets the Corps' regulatory requirements. FERC staff should also encourage, and work to accommodate, joint notices of intent to ensure that other agencies are committed to adopting or relying on the FERC NEPA document. Per the MOU, the Commission should develop joint project schedules with other permitting agencies and those schedules should include other agency milestone action dates. FERC and other permitting agencies should commit to biweekly meetings during pre-filing to discuss important topics, such as the alternatives analysis, connected actions, compliance with the Endangered Species Act ("ESA") and the National Historic Preservation Act of 1966 ("NHPA"), wetland impacts and mitigation, and tribal consultation.

Tribal Engagement. As stated in FERC staff's July 2017 "Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects" ("Cultural Resource Guidelines"),

FERC should engage with tribes early to start the NHPA Section 106 consultation process. FERC staff should initiate the consultation process shortly after, if not before, a Notice of Intent to prepare an environmental document is issued.

Blanket Project ESA and NHPA Requirements. FERC's regulations need to be consistent with implementing the ESA and NHPA in connection with blanket projects – Appendices I and II to Subpart F of Part 157. Under Appendix II, for projects constructed on federally-administered land, the land managing agency manages NHPA compliance, and the pipeline does not pursue a separate NHPA Section 106 consultation. Under Appendix I, however, the pipeline is required to pursue a separate ESA clearance even though the land managing agency manages ESA compliance. FERC staff should modify Appendix I to be consistent with Appendix II, so that project proponents can rely on ESA clearances received by the land managing agency for blanket project activities.

Consistency Regarding Cultural Resources. The Commission should clarify its regulations, practices, and Cultural Resource Guidelines to ensure consistency with the Advisory Council on Historic Preservation ("ACHP") regulations implementing the NHPA. Without such changes, applications that should otherwise move forward under the Commission's blanket certificate program will continue to be required to file a full NGA Section 7(c) certificate application, causing unnecessary delays. The Commission's regulations and Appendix II to Subpart F of Part 157 applies the procedures of 36 C.F.R. § 800.5, which indicates that a "no adverse effect" result fulfills the agency officials' responsibility under NHPA Section 106. The Commission requires a company to receive from the SHPO/THPO a "no effect" or "no historic properties affected" determination, as stated in the Cultural Resource Guidelines. Yet these

responses are not options under 36 C.F.R. § 800.5.[191] "No adverse effect" or "adverse effect" are the only determinations a SHPO/THPO can make under Section 800.5. Because of the Commission's current practice, numerous pipeline projects have had to proceed under NGA Section 7(c), rather than the more streamlined blanket certificate program, for no reason other than the Commission's misapplication of Appendix II.

CWA Section 401 Requirements. Regarding CWA Section 401 water quality certifications, FERC should allow an applicant to seek an exception to the requirement to file the application for a water quality certification concurrently with the certificate application, where applicable. The CWA requires that states act on a water quality certification within a reasonable period of time not to exceed one year. In order to ensure that the CWA Section 401 certification review process does not unnecessarily delay pipeline projects, the Commission should:

- Vigorously apply its lead agency responsibility to manage all timelines, including CWA Section 401 water quality certification.
- Continue to enforce that the CWA Section 401 review clock starts upon receipt of the application, consistent with the decision of the U.S. Court of Appeals for the D.C. Circuit in *Millennium Pipeline Co. v. Seggos*, 860 F.3d 696 (D.C. Cir. 2017).

Additionally, if requested, FERC should review CWA Section 401 decisions *procedurally* to ensure that they were based on federally enforceable water quality standards; if not, the state has not taken action under its authority granted under CWA Section 401 and any such decision fails to fulfill the statutory water quality certification requirement.

[191] SHPO/THPO can only issue a "no historic properties affected" determination under 36 C.F.R. § 800.4. Pursuant to Appendix II, "The certificate holder is deemed to be in compliance with 157.206(b)(2)(ii) … if …it complies with …[subsections (4). (6), and (7)]", which subsections apply Sections 800.4 and 800.5.

D4. Are there classes of projects that should appropriately be subject to a shortened process? What would the shortened process entail?

Please see INGAA's responses to question D1.

As discussed above, FERC should accept remote-access information and leverage existing environmental knowledge wherever possible. The Commission should host a forum to discuss the latest available and accuracy of mapping tools, including remote sensing, desktop mapping, digital imagery interpretation, and geographical information systems.

VIII. Conclusion

WHEREFORE, INGAA respectfully requests the Commission reaffirm its Certificate Policy Statement subject to the clarifications herein. INGAA also requests that the Commission adopt INGAA's recommendations to enhance landowner engagement. Finally, INGAA requests the Commission take appropriate steps to implement INGAA's suggestions to improve the efficiency of its certificate program.

Respectfully submitted,

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Attachment

Interstate Natural Gas Association of America

Commitments to Landowners

The Interstate Natural Gas Association of America's member companies are committed to leading the interstate natural gas pipeline industry in building and maintaining strong, positive relationships with affected landowners. We recognize the importance of fair and respectful treatment of landowners impacted by the projects we construct and operate that meet the vital energy needs of our communities and customers. We will work to adhere to the following commitments in a manner commensurate with the type, scope and location of individual interstate projects.

1. Respect and Trust

Positive, lasting relationships are built on mutual respect and trust. We will strive to understand landowners' perspectives and help them understand ours through meaningful engagement.

- Demonstrate respect for those who live on, lease or own property along our pipeline systems.
- Communicate in a timely manner with the goal of developing respectful relationships and building trust.
- Clearly communicate the conditions under which we will access a landowner's property.

2. Accurate and Timely Information

We will answer landowners' questions about the project including the reason and need for the proposed project, the processes in place governing easement acquisition, certification, environmental review/permitting, construction, operation and maintenance of our facilities, safety, and the particulars of individual projects.

- Train land agents and others who will engage landowners.

- Establish a communication plan and provide communication training for those who will engage landowners.
- Ensure company personnel will be able to answer questions regarding basic pipeline construction activities, the need for work space on landowner's property, and other project specifics to foster informative communication with landowners and other stakeholders.
- Establish ongoing communication to solicit and acquire information that can be used to inform the proposed route while striking a balance between the project need, impacts to environmental resources, safety and the landowner's present and future use of the property.
- Create communication channels to convey appropriate information about the project depending on the scope, location, and available technology, such as:
    - Establish toll-free telephone "hotlines" for landowners to ask questions or convey concerns to company representatives;
    - Establish internet websites that are populated with timely general and project information; and/or
    - Consider the use of email and other technologies to improve communication with landowners.

3. Negotiate in Good Faith

It is the responsibility of the project sponsor to work with landowners to attempt to reach a mutually agreeable easement. We will listen and strive to understand landowner concerns, and work to address those concerns in good faith. We will attempt to reach agreement with landowners in an honest, fair and reasonable fashion.

- Ensure land agents listen actively to landowners and strive to reach mutually agreeable solutions.
- Employ appropriate methods (e.g., recent land transactions in the project area, qualified appraisers, or other reliable sources) to assist with developing fair market offers for easement acquisition.
- Work with timber or agricultural experts, or other reliable sources to develop appropriate value for losses to crops and other impacts caused by construction activities.

4. Responding to Issues

We will respond to landowner concerns in a timely fashion. To enhance direct communications and timely responses, we will provide landowners with a point of contact within the company, early in the project, to convey their questions and concerns. This point of contact will answer landowners' questions or concerns, and provide general or project-specific information.

- Establish a toll-free landowner "hotline" to allow landowners to communicate project or construction-related questions and concerns.
- Enact a 3-business day policy on responding to all landowner calls to our established landowner "hotline" or to the project point of contact.

5. Respect the Regulatory Compact

Final approval for a project is not certain, and our interactions with landowners will reflect that understanding. Prior to a Federal Energy Regulatory Commission decision, actions taken to negotiate easements or options are at the company's risk because there is no guarantee the project will be approved.

- Inform landowners of regulatory approval status and other project milestones.

6. Eminent Domain

We will begin every easement negotiation with the expectation that a mutual agreement can be reached and eminent domain rights will not need to be exercised. Further, we will be clear in communicating that federal eminent domain will not be exercised unless the Federal Energy Regulatory Commission grants a certificate. Eminent domain will only be exercised as a means of last resort.

7. Outreach

We will engage with affected stakeholders to garner input early in the project and strive to build relationships. We will introduce our industry to those who might not otherwise know about our industry's benefits to the community and our industry's dedication to safety.

- Recognize that landowners may have questions or concerns about infrastructure projects.
- Tailor outreach efforts to address the size and scope of a project, as well as specific landowner concerns.
- Begin outreach efforts by identifying affected landowners, public officials, responsible agencies, and tribes in the project area.
- Maintain a relationship with stakeholders based upon these commitments throughout the lifespan of the facility.

8. Industry Ambassadors

We recognize that each company employee and representative is viewed as an ambassador for the industry. Our employees and representatives are trained to interact with stakeholders in accordance with these commitments. We will:

- Stress that all members of the project team are "ambassadors" for the entire industry and not just the project sponsor;
- Continue to inform the public on the importance of energy infrastructure and the process required to build that infrastructure; and
- Emphasize in training the importance of listening to and working with landowners to understand matters better from the landowner's perspective and respectfully communicate with them so they better understand ours.

9. Ongoing Commitment to Continuous Improvement

We will routinely evaluate our landowner outreach and communication efforts to drive continuous improvements in our interactions, processes, policies, and procedures. Natural gas will remain a foundation of our energy economy and there will continue to be the need to construct, operate and maintain natural gas pipeline and storage infrastructure to meet the nation's energy demand.

- Train employees and contractors likely to interact with landowners on these INGAA Commitments to Landowners, internal company processes and procedures, and expectations for interacting with landowners.

Adopted: July 19, 2018