UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	)	Docket No. PL18-1-001
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews	)	Docket No. PL21-3-001

SUPPLEMENTAL REPLY COMMENTS OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America ("INGAA") moves for leave to submit and submits these supplemental reply comments on the Federal Energy Regulatory Commission's ("FERC" or "Commission") draft Updated Policy Statement on Certification of New Interstate Natural Gas Facilities ("Updated CPS") and Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews ("GHG Statement" and, collectively with the Updated CPS, "Draft Policy Statements").[1] Although the Commission's order soliciting comment on the Draft Policy Statements did not provide for supplemental replies,[2] the Commission should nonetheless consider INGAA's comments because, as discussed further below, the comments will assist the Commission in understanding the issues raised.

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

[1] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) ("Updated CPS"); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) ("GHG Statement").

[2] Order on Draft Policy Statements, *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197, P 2 (2022) ("March 24 Order").

26 members represent the majority of interstate natural gas transmission pipeline companies in the United States. 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 members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA").[3]

COMMENTS

I. Motion for Leave to Submit Supplemental Reply Comments

INGAA moves to file these comments pursuant to Rule 212 of the Commission's Rules of Practice and Procedure.[4] The Commission's March 24 Order did not provide for supplemental reply comments, but the Commission should nonetheless consider these supplemental comments because they will assist the Commission in understanding and ensure a more complete record of the legal issues raised in the Draft Policy Statements.

The Draft Policy Statements explain that decisions from the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") motivated the Commission's changes to its certificate policy.[5] Following the release of the Draft Policy Statements, individual Commissioners stated that the Draft Policy Statements reflected a belief that court decisions called into question the Commission's prior policy on certificate application review.[6] Chairman Glick reiterated his belief that the Commission's proposed

[3] 15 U.S.C. §§ 717-717w.

[4] 18 C.F.R. § 385.212.

[5] *See, e.g.*, Updated CPS at PP 60, 75; GHG Statement at PP 35-36, 40, 103.

[6] *See, e.g.*, Letter from Chairman Glick to Sen. Mitch McConnell (Apr. 14, 2022) ("[The Draft Policy Statements] were in large part a reflection of the fact that a series of appellate court rulings called into question FERC's previous approach to siting interstate natural gas pipelines and liquefied natural gas facilities."); Letter from Chairman Glick to Sens. Marco Rubio and Rick Scott (Apr. 18, 2022) (same); Letter from Chairman Glick to Rep. Michael C. Burgess, M.D. (May 26, 2022) (same); Letter from Comm'r Clements to Reps. Cathy McMorris Rodgers and Fred Upton (Mar. 9, 2022) ("[The Draft Policy Statements']

"revisions to [its] 1999 Policy Statement are in order so as to provide greater certainty than now exists because of the Commission's poor record on appeal of natural gas infrastructure proceedings."[7]

Claims of the Commission's "poor record on appeal" are exaggerations; in the past three months, the D.C. Circuit has *affirmed* the Commission's issuance of three certificates—and the environmental analysis on which the issuances relied—under the 1999 Policy Statement.[8] The Court's reasoning in each case addresses issues in the Draft Policy Statements for which the Commission sought comment and, in multiple respects, calls into question the Commission's rationale for the changes proposed in the Draft Policy Statements. These cases and the Supreme Court's decision in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), make clear that the law does not compel (and in some respects does not permit) the Commission's contemplated changes with respect to determining project need, thresholds for requiring an environmental impact statement ("EIS") rather than an environmental assessment ("EA"), consideration of a pipeline's indirect greenhouse gas ("GHG") emissions, and mitigation of a pipeline's indirect GHG emissions.

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issuance is a precursor to providing project sponsors with increased confidence that the certificates they are granted will hold up to judicial scrutiny."); *id.* ("[T]he courts have found the Commission's decision-making during the certificate process deficient, including for inadequate consideration of GHGs and environmental justice concerns, and failure to examine project need closely enough."); Letter from Comm'r Phillips to Sen. John Barrasso, M.D. (Mar. 1, 2022) ("I voted on [the Draft Policy Statements] so the Commission could act on, and defend, needed infrastructure projects consistent with current law and as quickly as possible."); *id.* ("Our guidance is intended to bring our authorizations into compliance with federal court mandates and provide clarity on our decision-making."); *id.* ("[T]he Interim GHG Policy Statement is intended to help ensure authorizations withstand judicial scrutiny.").

[7] Letter from Chairman Glick to Sen. Sheldon Whitehouse (Aug. 24, 2022).

[8] *See Sierra Club v. FERC*, 38 F.4th 220 (D.C. Cir. 2022) ("*Southgate*"); *City of Oberlin v. FERC*, 39 F.4th 719 (D.C. Cir. 2022) ("*NEXUS*"); *Delaware Riverkeeper Network v. FERC*, 45 F.4th 104 (D.C. Cir. 2022) ("*Adelphia*").

Although these decisions are relevant to this proceeding, INGAA could not discuss their implications for the Draft Policy Statements during the comment period established by the Commission because the Supreme Court and the D.C. Circuit did not issue the decisions until after the deadline for reply comments. The Commission should accept these supplemental comments to ensure that it has a more fulsome discussion and better understanding of the law on which it purports to rely in revising *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999) ("1999 Certificate Policy Statement").[9]

II. Supplemental Reply Comments

The D.C. Circuit in recent years has vacated or remanded some Commission orders issuing certificates under NGA Section 7, prompting a debate among the Commissioners as to whether the Commission failed to discharge its duties under the NGA or National Environmental Policy Act ("NEPA")—and thus needed to overhaul the 1999 Certificate Policy Statement—or rather that the Commission failed to discharge its duties under the Administrative Procedure Act ("APA")—and needed only to offer a better explanation of how application of the 1999 Certificate Policy Statement led to issuance of a certificate.[10]

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[9] *See Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 141 FERC ¶ 61,236, P 30, n.27 (2012) ("Although the NOPR did not allow for reply comments, we will accept these pleadings because they have assisted our understanding of NERC's proposal in this Final Rule."); *see also Equitrans, LP*, 152 FERC ¶ 61,103, P 10, n.4 (2015) ("[T]he Commission accepts Equitrans' Reply since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record."); *Seaway Crude Pipeline Co.*, 142 FERC ¶ 61,201, P 10, n.8 (2013) ("The Commission grants leave and accepts Seaway's reply comments, as they provide the Commission a full understanding of the issues in this proceeding and will assist in our decision making."). *Cf. Equitrans, L.P.*, 179 FERC ¶ 61,204 at P 39 (2022) (Commission grants motions to lodge when courts or other agencies issue opinions relevant to a proceeding because such opinions "ensure a more complete record.").

[10] *Compare* United States Senate Committee on Energy and Natural Resources, Sept. 28, 2021 Hearing: *A Review of the Administration of Laws under the Jurisdiction of the Federal Energy Regulatory Commission*, Questions for the Record Submitted to the Honorable James Danly, Question 5 from Ranking Member Barasso (quoting testimony from Chairman Glick) ("[T]he courts keep on telling us that we keep on getting it wrong . . . [W]e are . . . delaying things because every time we're supposed to perform an EIS and we

The former view appears to have prevailed; a majority of Commissioners believe that the D.C. Circuit demands the changes set forth in the Draft Policy Statements.[11]

The D.C. Circuit's recent affirmation of Commission orders issuing certificates under the 1999 Certificate Policy Statement should dispel this belief. These decisions demonstrate that the D.C. Circuit's jurisprudence does not compel the significant changes to the Commission's NGA and NEPA analyses set forth in the Draft Policy Statements. Instead, the Draft Policy Statements are the result of *voluntary policy choices* by the Commission. As the Enbridge Gas Pipelines explained, *West Virginia v. EPA* demonstrates that the Commission lacks the authority to make many of these choices.[12] Even if the Commission could make these choices, it would be poor policy to do so for the reasons

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prepare an EA, we just ignore climate change altogether. The courts say you got it wrong, you've got to do it all over again.") *with id.* (quoting testimony from Commissioner Danly) ("[T]here is a difference between a failure by an agency to properly conduct a NEPA review, which would be in the [Environmental Assessment] or the [Environmental Impact Statement], and a problem from the agency from an [APA] standpoint, to properly explain the decisions that it made, partially informed by that NEPA document. In almost all of the cases where FERC has been, in one way or another, remanded, those cases are not because of failures in the NEPA document. They are failures of reasoning under the [APA]. Basically, the Court is saying you did not sufficiently explain the reason why you made this choice: connecting the choice made to the facts found. And so saying that we can fix that problem of APA violations by having different, or more robust, NEPA review is simply not the reality of the remands we have gotten from the courts.").

[11] *See supra* notes 5-7. *See also* Chairman Glick, Written Testimony for March 3, 2022 Senate Energy and Natural Resources Committee Hearing at 9, https://tinyurl.com/2m9uaj7c ("The principal purpose of the [GHG Statement] is to provide a framework for considering reasonably foreseeable [GHG] emissions in our analysis under NGA sections 3 and 7 that is consistent with binding court precedent."); FERC, Transcript of the 1087th Meeting at 36-37 (Feb. 17, 2022), https://tinyurl.com/ycyra9rr (statement of Comm'r Clements) ("I think [the Updated CPS] is an important step towards establishing a framework for making wise and legally durable decisions that account for the complexities of an energy system undergoing profound transformation."); Comm'r Phillips, Written Testimony for March 3, 2022 Senate Energy and Natural Resources Committee Hearing at 1-2, https://tinyurl.com/3arxnx8v ("Our failure to comply with court precedent interpreting the NGA and NEPA risks possible remand or vacatur . . . I believe [FERC's] recently issued guidance is a first step in addressing the uncertainty and delay associated with [FERC's] review of proposed natural gas infrastructure projects.").

[12] *See* Supplemental Comments of Enbridge Gas Pipelines, FERC Docket Nos. PL18-1-000, PL21-3-000 (Aug. 12, 2022). INGAA agrees with Enbridge's analysis of the major questions doctrine and its implications for the Draft Policy Statements and supports Enbridge's requests of the Commission based on that analysis. *See id.* at 20.

discussed herein. The Commission should abandon its overhaul of the 1999 Certificate Policy Statement in favor of, at most, limited changes aimed at addressing discrete issues.

A. The Commission should continue to find that precedent agreements with non-affiliates, standing alone, are sufficient to establish project need.

The Updated CPS acknowledges the Commission's well-established "practice"—affirmed by the D.C. Circuit—of "rel[ying] almost exclusively on precedent agreements to establish project need," but nonetheless claims that the Commission now "cannot adequately assess project need without also looking at evidence beyond precedent agreements."[13] No court decision mandates that the Commission depart from its longstanding practice of finding need based on precedent agreements ("PAs") with unaffiliated entities absent plausible evidence of impermissible preferential treatment. The D.C. Circuit recently reiterated that the Commission "is not ordinarily required to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers"[14] and upheld multiple recent Commission orders finding need based on PAs.[15] There is no reason that the Commission *must* go "beyond" PAs when assessing project need, and several reasons why the Commission *should not* do so.

The Commission's current practice utilizes a clear test for need based on measurable, objective, and probative evidence, and the Commission's consistent application of this test has brought a level of certainty and predictability to the Commission's certificate review that is

[13] Updated CPS at P 54, *id.* at n. 173 (citing *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014)).

[14] *Adelphia*, 45 F.4th at 114.

[15] *Id.* at 114-15; *Southgate*, 38 F.4th at 230 ("Here, the long-term agreement shows an actual need for the Project, not an attempt on Mountain Valley's part to overbuild purely for profit."); *NEXUS*, 39 F.4th at 729-30 ("FERC explained that, in light of the other benefits of the Nexus Project and the small adverse impacts of the project, the need demonstrated by the 42% subscription rate was enough to justify the pipeline. . . . We find FERC's independent and alternative reasons for approving the pipeline without considering the export precedent agreements to be reasonable. There is no floor on the subscription rate needed for FERC to find a pipeline is or will be in the public convenience and necessity.").

essential to the development of natural gas infrastructure.[16] Although there are circumstances in which certificate applicants might submit additional evidence of market need, the Commission should not modify its practice to require or expect the submission of such information. This modification would impose substantial burden on applicants but offer little, if any, benefit to the Commission. Evidence like market studies inevitably rely on assumptions or speculation and so cannot displace (and may offer little-to-nothing more than) PAs, which remain the best and sufficient evidence of market need. As the Commission "reasonably conclud[ed]," "concrete obligations to purchase natural gas (as demonstrated by [PAs]) were better evidence of market need than more speculative reports regarding overbuilding and future demand."[17]

The Commission in particular should avoid requiring projections of the effects of state policies on the demand for natural gas or relying on such projections when determining project need. The entities that execute PAs for transportation of natural gas over proposed facilities are aware of the laws governing the markets in which they operate and are much better able to determine the effect of those laws on demand for the natural gas that they purchase than consultants who are retained in certificate proceedings to project the future state of markets in which they do not operate. These projections are inherently speculative, and the Commission rightfully concluded that they are insufficient to undermine a finding of project need based on PAs.[18]

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[16] Comments of the Interstate Natural Gas Association of America at 56-63, FERC Docket Nos. PL18-1-000, PL21-3-000 (Apr. 25, 2022) ("INGAA Initial Comments").

[17] *Adelphia*, 45 F.4th at 114. *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) ("*Spire*") does not mandate a different approach because that decision arose from "significantly different facts" than the D.C. Circuit's decisions affirming the Commission's findings of project need based on PAs. As INGAA has explained, *Spire*'s reach is intentionally narrow and only stands for the basic principle that plausible evidence of impermissible preferential treatment was "enough to require the Commission to 'look behind' the precedent agreement in determining whether there was market need." *See* INGAA Initial Comments at 57-58 (quoting *Spire*, 2 F. 4th at 975).

[18] *See Tennessee Gas Pipeline Co.*, 179 FERC ¶ 61,041, P 17 (2022) ("[C]laims that [a] project is not needed because of [state] legislation related to reducing GHG emissions are not sufficient to undermine [a] finding that [the applicant] has demonstrated a need for the project through a precedent agreement for 100% of the project.").

Federalism concerns also arise from reliance on speculation regarding the effect of state policies on future demand for natural gas to determine need. Projects that require authorization under NGA Sections 3 or 7 necessarily involve multiple states, each with their own energy and climate policies, which might or might not include goals or targets for the volume of GHG emissions produced within the state. As the Commission has observed, even those states that have GHG emissions targets will not always have a defined pathway for achieving those targets.[19] And changes in each state's political leadership might lead to multiple changes in climate policies over the life of a proposed project.[20] Under these circumstances, the Commission cannot deny or condition a certificate without (1) adopting a single state's policies over the conflicting policies of the other states associated with the proposed project; (2) assuming the "winning" state's policies and targets will remain the same over the entire life of the proposed project; (3) selecting a specific pathway toward meeting the "winning" state's emissions target; and (4) determining the proposed project would be incompatible with that pathway.

A recent Joint Motion to Intervene and Protest by the States of Washington, Oregon and California illustrates this problem.[21] The Motion argues that "[t]he Commission must consider the interests of a community surrounding a proposed project," that "[s]tate and local governments often represent those community interests," and that the Commission should reject the certificate

[19] *See id.* ("The NY Climate Act does not ban ConEd from providing natural gas to meet end-use demand. Instead, it establishes statewide GHG emissions reductions targets and prescribes goals for electricity generation from renewable energy sources. The Climate Action Council, created by the NY Climate Act, is tasked to develop a scoping plan to assist New York with meeting the goals and is scheduled to issue the final scoping plan later this year. The New York Department of Environmental Conservation is responsible for enforcing the prescribed emissions targets.") (parentheticals omitted).

[20] *See, e.g.*, New Jersey Dep't of Envtl. Protection, *Air Quality, Energy & Sustainability: Regional Greenhouse Gas Initiative*, https://www.nj.gov/dep/aqes/rggi.html (stating that New Jersey signed memorandum of understanding to establish Regional Greenhouse Gas Initiative in 2005, withdrew from Initiative in 2012, and adopted rules enabling reentry into Initiative in 2019); Robert Walton, *Virginia report lays groundwork for state's exit from regional emissions trading group*, Utility Dive (Mar. 18, 2022), https://tinyurl.com/bdd98324 ("Virginia Gov. Glenn Youngkin, R, . . . is considering emergency regulations to withdraw from the 11-state carbon trading network.").

[21] Joint Motion to Intervene and Protest by the States of Washington, Oregon and California, *Gas Transmission Nw., LLC*, Docket No. CP22-2-000 (Aug. 22, 2022).

application because "the attorneys general from three of the four states the project intends to serve oppose this project" based on their states' policies.[22] If the Commission accepts these arguments, it will be a gross overreach of its authority. As the intervening states concede, state and local governments "often"—but not always—"represent" the interests of a community surrounding a proposed project. To adopt the intervening states' approach, the Commission must first determine whether a state's elected or appointed officials "represent" the relevant community, or, where multiple officials offer differing views, *which* state officials "represent" the relevant community.[23] Then, the Commission must conclude that the interests of some states (as expressed by the Commission-selected representatives of those states) outweigh the interests of other states—in this case, that the interests of Washingtonians, Oregonians, and Californians outweigh the interests of Idahoans—as well as any national interests advanced by the proposed project. The merits of "the needs of the many outweigh the needs of the few" as a governing philosophy are debatable,[24] and "[t]he basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself."[25]

The NGA did not establish the Commission as a vehicle for individual states to block projects that are in the public interest based on their self-interest or to impose their climate policies on other states. Congress in fact sought to *avoid* interstate conflicts regarding transportation of natural gas by directing the Commission to consider the *national* public interest when exercising

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[22] *Id.* at 25.

[23] This is not a theoretical concern. *See* Press Release, Leader Rodgers Statement on Washington's Attorney General Saying No to Energy Security (Aug. 24, 2022), https://tinyurl.com/yttuvk2k ("I urge these attorneys general, including Attorney General Ferguson, to abandon this misguided effort. President Biden's own Department of Energy Secretary said that pipelines are the best way to transport energy. We should be building pipelines and expanding natural gas infrastructure across the country to lower costs, ensure reliable, affordable energy, lower emissions, and help our allies around the world.").

[24] *Cf. West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) 2618 (Gorsuch, J., concurring) ("The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority.").

[25] *Id.* at 2613; *see also id.* at 2616 ("A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.").

its authority under the NGA. The Commission should not abdicate its duty to consider the *entire* nation's interest by basing its determination of need in whole or in part on the policies of a single, "winning" state.

The Commission should also exclude consideration of the end use of natural gas transported by the proposed project from its analysis of project need. As INGAA explained, consideration of end use would contravene the Commission's governing statutes and longstanding precedent, particularly its orders regarding open access, by assigning values to specific end uses based on pure policy judgments.[26] Moreover, information on the end use of gas transported by a proposed project often will be unavailable,[27] and so, like an analysis that considers projections regarding the effects of state policies on future gas demand, an analysis that considers end use will involve significant speculation. The Commission should not replace an analysis of concrete, objective evidence with subjective policy judgments and speculation by requiring submission of information on end use.

The Commission's current approach does not mean climate change will go unaddressed, that states are unable to ensure compliance with their climate policies, or that end users' GHG emissions will be unregulated. States can and have enforced compliance with their emissions targets using the legal tools available to them.[28]

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The Commission's current policy ensures that its decisions are based on the best objective evidence of market need available. The Draft Policy Statements, by contrast, require certificate applicants and other stakeholders to submit reams of additional, speculative evidence regarding

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[26] INGAA Initial Comments at 63-68.

[27] *Id.* at 68-69.

[28] *See, e.g.*, Press Release, NYSDEC, *Statement from the New York State Department of Environmental Conservation on Denial of the Title V Permit Renewal for Greenidge Generation, LLC* (June 30, 2022), https://www.dec.ny.gov/press/125678.html ("Based on DEC's review of the specific facts and circumstances presented, this natural gas-fired facility's continued operations would be inconsistent with the statewide greenhouse gas emission limits established in the Climate Act.").

factors that the Commission cannot consider without contravening the purpose of the NGA or the tenants of federalism. This change benefits consultants but will not improve the Commission's decision-making. Because no court compels this—or any—change to the Commission's process for determining market need, the Commission should maintain its longstanding practice of finding binding, long-term PAs with unaffiliated parties for a substantial portion of the pipeline's capacity sufficient to demonstrate need for the project.[29]

B. The Commission need not—and should not—adopt the overhaul of its environmental review set forth in the Draft Policy Statements

1. *Recent decisions make clear that Sabal Trail does not compel the Draft Policy Statements' sweeping changes to the Commission's environmental review.*

The Draft Policy Statements reflect a belief that D.C. Circuit jurisprudence—specifically *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*")—require substantial changes to the Commission's consideration of indirect GHG emissions under the NGA and NEPA.[30] Recent D.C. Circuit decisions, however, make clear that *Sabal Trail* is a narrow decision, not the sea change that the Draft Policy Statements describe.

Sabal Trail only states that the Commission "must either quantify and consider the project's downstream carbon emissions *or explain in more detail why it cannot do so*."[31] Citing *Sabal Trail*, the D.C. Circuit has since explained that "all that is required for NEPA purposes" is "an estimate of the upper bound of emissions resulting from end-use combustion" and an explanation why any proffered metrics are "not an appropriate measure of project-level climate change impacts and their

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[29] As INGAA previously explained, there are circumstances in which PAs with affiliates are sufficient, standing alone, to establish project need. Specifically, affiliate precedent agreements are sufficient to establish market need when a state public service commission approves (or does not oppose) the agreement, when the agreement is with a joint venturer with an equity stake in the project, or when the agreement is part of a traditional LNG sales project. *See* INGAA Initial Comments at 60-63.

[30] *See, e.g.*, GHG Statement at PP 35-39. This belief assumes the validity of the legal analysis in *Sabal Trail*, which the Eleventh Circuit has described as "questionable at best." *Center for Biological Diversity v. U.S. Army Corps of Engineers*, 941 F.3d 1288, 1300 (11th Cir. 2019). INGAA continues to urge the Commission to adopt the Eleventh Circuit's guidance when considering indirect GHG emissions. *See* Comments of the Interstate Natural Gas Association of America at 51-53, Docket No. PL18-1-000 (May 26, 2021).

[31] *Sabal Trail*, 867 F.3d at 1375 (emphasis added).

significance under NEPA or the Natural Gas Act."[32] Although "[g]reenhouse gas emissions are reasonably foreseeable effects of a pipeline project when the project is known to transport natural gas to particular power plants,"[33] the D.C. Circuit has held that, with adequate explanation, the Commission might find that the emissions from other end uses are *not* foreseeable.[34] The D.C. Circuit's focus on the adequacy of the Commission's explanation of its decisions in *Sabal Trail* and subsequent cases belie the contention that the D.C. Circuit has mandated drastic changes such as mitigating significant indirect GHG emissions associated with the proposed project and denying certificate applications where the unmitigated indirect emissions exceed some threshold. Indeed, the Court has since affirmed multiple Commission orders that better explain how the Commission applied the 1999 Certificate Policy Statement and why the agency issued a certificate.[35] And the Court notably affirmed those orders despite vigorous partial dissents raising many of the same concerns now motivating the Draft Policy Statements.[36] The D.C. Circuit's post-*Sabal Trail* jurisprudence demonstrates that the Draft Policy Statements' overhaul of the Commission's environmental review is an attempt to comply with a mandate that does not exist.

Some aspects of the GHG Statement are in fact *inconsistent* with D.C. Circuit precedent:

Draft Interim GHG Policy Statement	**D.C. Circuit Court of Appeals**
"For purposes of assessing the appropriate level of NEPA review, [FERC] staff will apply the 100% utilization or 'full burn' rate for the proposed project's emissions to determine whether to prepare an [EIS] or an [EA]." GHG Statement at P 3.	Court dismissed calls for use of the "so-called full-burn analysis" as "foreclosed by *Birckhead*, which rejected the contention that emissions from downstream gas combustion are, as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project." *Adelphia*, 45 F.4th at 110.

[32] *Appalachian Voices v. FERC*, 2019 WL 847199, at *2 (Feb. 19, 2019).

[33] *Adelphia*, 45 F.4th at 109.

[34] *Food & Water Watch v. FERC*, 28 F.4th 277, 289 (D.C. Cir. 2022) ("On remand, the Commission remains free to consider whether there is a reasonable end-use distinction based on additional evidence, but it has not carried its burden before us at this stage.").

[35] *See supra* note 8.

[36] *See Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, P 4, 6-8 (2019) (Glick, Comm'r, dissenting in part); *Adelphia Gateway, LLC*, 171 FERC ¶ 61,049, P 3 (2020) (Glick, Comm'r, dissenting in part); *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, P 3, 6, 9, 12 (2020) (Glick, Comm'r, dissenting in part).

Draft Interim GHG Policy Statement	D.C. Circuit Court of Appeals
"[FERC] staff will proceed with the preparation of an EIS, if the proposed project may result in 100,000 metric tons per year of CO2e or more. . . . [FERC] believes this estimate is appropriate because it captures [FERC] projects that may result in incremental GHG emissions that may have a significant effect upon the human environment." GHG Statement at P 3.	Court dismissed objections to FERC's decision to proceed by EA for project with approximately 521,000 metric tons per year CO2e in construction, operation, and partial downstream emissions[37]: "The [EA] thoroughly considered the environmental impacts of the Project and reasonably concluded that the Project . . . was not likely to have a significant impact on the environment. The record demonstrates that [FERC] was justified in its decision to proceed by [EA]." *Adelphia*, 45 F.4th at 113.

2. *Sound policy dictates abandonment of the discretionary changes to the Commission's environmental review set forth in the Draft Policy Statements.*

The significant changes to the Commission's environmental review described in the Draft Policy Statements are discretionary, and, to the extent the Commission could implement the changes, the Commission should decline to do so because they reflect poor policy.

The damaging consequences of the Commission's policy choices are illustrated by the Draft Policy Statements' discussion of indirect GHG emissions. The Commission acknowledges that it "does not have the statutory authority to impose conditions on downstream users or other entities outside [its] jurisdiction" but nonetheless "encourages each project sponsor to propose measures to mitigate the impacts of reasonably foreseeable GHG emissions associated with its proposed project."[38] The Commission "will consider such mitigation proposals in assessing the extent of a project's adverse impacts."[39]

While the Commission claims that "[it is] not mandating [through the GHG Statement] any particular form of mitigation,"[40] the Commission's threat to deny certificate applications that do not propose mitigation of indirect GHG emissions creates a *de facto* requirement to purchase

[37] *See Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, PP 254-55 (2019).

[38] GHG Statement at P 104.

[39] *Id.*

[40] *Id.* at P 109.

offsets. Like the Commission, interstate natural gas pipelines lack the ability to compel unaffiliated upstream and downstream entities to adopt physical mitigation measures. Indeed, pipelines typically will not even be able to *identify* upstream sources and downstream end users of the natural gas transported over their facilities, much less require them to modify their operations. The only way pipelines to "mitigate" the effects of indirect GHG emissions therefore will be to purchase offsets. The efficacy of offsets is debatable, but the obligation to purchase offsets under threat of denial are certain to lead to one of two outcomes.

Outcome 1. The Commission will impose a financial penalty—effectively an unsanctioned tax[41]—on pipeline customers to control for what the agency believes will be the anticipated effects of GHG emissions from sources outside of its jurisdiction. An analysis of the Adelphia and NEXUS projects—both authorized by the Commission, affirmed by the D.C. Circuit, and placed into service—demonstrates that the Commission's *de facto* mandate to purchase offsets, even when only applied to downstream indirect emissions, would add tens to hundreds of millions of dollars in costs to pipeline projects annually and cause a significant increase in the cost of energy over historical averages. *See* Table 1. This tax would be a burden on all Americans, especially low-income households,[42] and the Commission wisely approved these projects without requiring mitigation of indirect GHG emissions under the 1999 Certificate Policy.

[41] *Compare* 26 U.S.C. § 4661 (imposing per ton "environmental tax[]" on the manufacturers, producers, and importers of specific chemicals); 26 U.S.C. § 4681 (imposing per pound "environmental tax[]" on manufacturers, producers, and importers for sale or use of "ozone-depleting chemicals"). *See generally* H. Rep. 96-172(III) (Jan. 1, 1979) ("The Committee on Ways and Means believes that it is important to establish readily available sources of funds to cleanup pollution from designated environmentally hazardous items, and to provide compensation for specified economic losses resulting from such pollution. . . . To accomplish these goals, the Committee has decided that it is appropriate to impose excise taxes on certain items which may result in environmentally hazardous pollution if spilled or discharged or which are used to produce hazardous material.").

[42] *See, e.g.*, Will Wade and Mark Chediak, *A 'Tsunami of Shutoffs': 20 Million US Homes are Behind on Energy Bills*, Bloomberg (Aug. 23, 2022), https://tinyurl.com/4p9wvmcy; Scott Horsley, *Inflation may be easing—but low-income people are still paying the steepest prices*, NPR (May 11, 2022), https://tinyurl.com/4hffckwu.

Table 1 - Analysis of the Adelphia and NEXUS Projects

Project Name	Docket No.	Incremental Capacity Added (Dth per day)	Estimated Downstream Emissions	Annual Cost of Offsets for Estimated Downstream Emissions	FERC "Tax" for Downstream Emissions ($ per Dth)	Increase over Average Residential Price	Increase over Average Industrial Price	Increase over Average Electric Power Price
Adelphia Gateway Project	CP18-46	250,000	4,861,766	$ 121,544,150	$ 1.33	12.6%	32.9%	38.8%
NEXUS TEAL	CP16-22	925,000	17,900,878	$ 447,521,950	$ 1.33	12.5%	32.7%	38.6%

Notes

1) Emissions estimates are expressed in metric tons of CO2e per year.

2) For information on incremental capacity and emissions estimates, see Resource Report No. 1 – General Project Description at 42-43, *Adelphia Gateway, LLC*, Docket No. CP18-46 (Jan. 12, 2018); Final Environmental Impact Statement, *NEXUS Gas Transmission, LLC*, Docket No. CP16-22 (Nov. 30, 2016).

3) The annual cost of offsets assumes an offset price of $25 per metric ton CO2e. Offset prices vary widely, with most estimates ranging from about $1 to $50 per metric ton of CO2. $25 represents an approximate midway point between those values.

4) Baseline residential, industrial, and electric power prices are based on averages over 2017-2021, as reported by the Energy Information Administration. See Natural Gas Prices, U.S. ENERGY INFO. ADMIN. (release date 8/31/2022), https://bit.ly/3IHW0yQ. EIA's price data was converted from $/MCF to $/Dth for comparison purposes.

Outcome 2. The prospect of the Commission's unauthorized tax will render uneconomic projects otherwise required by the public interest. The United States cannot afford to lose its ability to expand natural gas pipeline capacity. All five Commissioners expressed concerns with the reliability of the nation's electric grid in the Commission's July Open Meeting, but, as the North American Electric Reliability Council explained, "[n]atural gas is the reliability fuel that keeps the lights on, and natural gas policy must reflect this reality."[43] Natural-gas-fired generation "has become a necessary balancing resource to reliably integrate [variably energy resources] into the dispatch," and, "[u]ntil storage technology is fully developed and deployed at scale, natural-gas-fired generation will remain essential to providing the grid's rapidly increasing flexibility needs."[44] A lack of adequate natural gas capacity increases the risk of fuel supply disruptions that have widespread reliability impacts during extreme weather events, particularly for generators that do not contract for firm capacity.[45] Moreover, absent new natural gas pipeline capacity, the Energy Information Administration predicts a significant (11%) increase in prices for a "relatively small difference in CO2 emissions."[46] Finally, the Commission's voluntary destruction of the United States' ability to expand its natural gas infrastructure threatens the United States' ability to use its abundant natural gas as a means to advance the country's interests abroad.[47] These outcomes are devastating, and the Commission should abandon its proposed overhaul of its environmental review to avoid them.

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[43] NERC, Long Term Reliability Assessment at 5 (Dec. 2021), https://tinyurl.com/csu6zwsb.

[44] NERC, 2022 State of Reliability: An Assessment of 2021 Bulk Power System Performance at 45 (Jul. 2022), https://tinyurl.com/36pcj7u5.

[45] *See id.*

[46] U.S. Energy Info. Admin., *Exploration of the No Interstate Natural Gas Pipeline Builds Case* 2, 4, 6 (Mar. 2022), https://bit.ly/37JGnZt.

[47] *Compare* The White House, Fact Sheet: United States and European Commission Announce Task Force to Reduce European Dependence on Russian Fossil Fuels (Mar. 25, 2022), https://tinyurl.com/3mcmcutr ("The United States will work with international partners and strive to ensure additional LNG volumes for the EU market of at least 15 bcm in 2022, with expected increases going forward.") *with* Jamison Cocklin, *U.S. LNG Upside Seen Limited by Pipeline Capacity Constraints*, Natural Gas Intelligence (Aug. 17, 2022), https://tinyurl.com/44rsj5ke.

The profound consequences of adopting the Draft Policy Statements also provide evidence that the Commission lacks the authority to adopt the changes.[48] Congress previously used legislation expressly establishing an "environmental tax[]" to fund efforts to address the effects of specific chemicals on the environment.[49] And Congress last month used legislation to establish a Methane Emissions and Waste Reduction Incentive Program for Petroleum and Natural Gas Systems that sets waste emissions thresholds for natural gas production and pipeline facilities and directs the EPA—not the Commission—to "impose and collect a charge on methane emissions that exceed [the] applicable waste emissions threshold."[50] This legislation demonstrates that the Commission needs clear Congressional authorization to establish thresholds for GHG emissions and a program for the mitigation of GHG emissions above those thresholds.[51] The lack of such an authorization in either the NGA or NEPA further counsel abandonment of the Draft Policy Statements' rewrite of the Commission's approach to environmental reviews.

[48] *See West Virginia*, 142 S. Ct. at 2612-13; *id.* at 2622 (Gorsuch, J., concurring).

[49] *See supra* note 41.

[50] Inflation Reduction Act of 2022, Pub. L. 117-169 § 60113 (Aug. 16, 2022).

[51] *See West Virginia*, 142 S. Ct. at 2610 (major questions doctrine applied where agency's assertion of authority "allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself"); *id.* at 2620-21 (Gorsuch, J., concurring) (where "Congress has considered and rejected bills authorizing something akin to the agency's proposed course of action" it "may be a sign that an agency is attempting to work around the legislative process to resolve for itself a question of great political significance.").

CONCLUSION

For the foregoing reasons, INGAA respectfully requests that the Commission grant leave to file these comments and avoid significant changes to the 1999 Certificate Policy Statement that has provided reasoned, consistent, and predictable review of the over 23,000 miles of major pipeline projects issued certificates by the Commission since its adoption.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 2022, caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Christopher Smith
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