UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Updated Policy Statement on Certification of New Interstate Natural Gas Facilities	)	**Docket No. PL18-1-000**
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Reviews Interim Policy Statement	)	**Docket No. PL21-3-000 (not consolidated)**

REQUEST FOR REHEARING AND CLARIFICATION OF THE U.S. CHAMBER OF COMMERCE

Pursuant to Section 19(a) of the Natural Gas Act ("NGA")[1] and Rule 713 of the Rules of Practice and Procedure[2] of the Federal Energy Regulatory Commission ("FERC" or "Commission"), the U.S. Chamber of Commerce ("the Chamber") hereby requests rehearing and clarification of the Updated Policy Statement on Certification of New Interstate Natural Gas Facilities[3] and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Reviews Interim Policy Statement[4] (collectively, the "2022 Policy Statements") issued February 18, 2022 in the above-captioned proceedings ("Rehearing Request"). The Commission has given the 2022 Policy Statements immediate legal effect and will apply both orders to pending and future applications for certificates of public convenience and necessity.[5]

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[1] 15 U.S.C. § 717r(a) (2018).

[2] 18 C.F.R. § 385.713 (2021).

[3] *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) ("Updated Certificate Policy Statement").

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

[5] *See* Updated Certificate Policy Statement at P 100; Interim Policy Statement at P 1. The Interim Policy Statement is currently open to public comments until April 4, 2022. The Chamber reserves the right to file additional comments on the Interim Policy Statement in accordance with the procedures set forth therein.

The Chamber is participating in these proceedings because energy infrastructure, including interstate natural gas pipelines, is an essential element of a productive and competitive economy. The development of new infrastructure to expand and modernize existing energy systems is a long and capital-intensive process, which requires an environment of regulatory predictability to allow businesses to plan and invest with confidence.

The Chamber actively participated in the Updated Certificate Policy Statement's underlying docket because it agreed that there was room to modernize and improve the Commission's prior policies governing the certification and authorization of new pipeline infrastructure. However, the Commission's actions far exceeded the types of reforms supported by the Chamber. With the issuance of the 2022 Policy Statements, FERC—an economic regulator with no statutory environmental protection mandate—became the first federal agency to assign a significance threshold to greenhouse gas emissions for National Environmental Policy Act ("NEPA")[6] purposes. The firm, yet arbitrary threshold of 100,000 metric tons per year ("tpy") of carbon dioxide equivalent ("CO2e") will be based upon a 100% utilization or "full burn" rate for natural gas supplies delivered by the proposed project, and will require the preparation of an Environmental Impact Statement ("EIS") for any FERC-regulated natural gas project that transports at least 5,200 dekatherms per day, operates one or more compressor stations, or is a liquefied natural gas ("LNG") facility.[7] As recognized by Commissioner Christie, an EIS "is no small matter – completion of an EIS is extremely cost-intensive and time-consuming and, in addition, creates a plethora of opportunities for opponents of the project who otherwise lack meritorious objections to it, to run up the costs, to cause delays, and to create new grounds for the

[6] 42 U.S.C. §§ 4321 *et seq*.

[7] Interim Policy Statement at PP 79, 89.

inevitable appeals challenging the certificate even if the applicant does manage to obtain it."[8] This is just one of several examples of changes through which the Commission has chosen to make the development of natural gas facilities more difficult, more expensive, and less certain. FERC is not only without statutory authority to act in this manner, it is acting entirely outside of the "public interest," contrary to what Congress intended in the NGA.

The 2022 Policy Statements, as written, exceed the Commission's authority under this key enabling statute. Moreover, the Commission unreasonably blurs the lines between the NGA and NEPA when it uses that procedural statute to impose substantive obligations on natural gas pipeline developers. In addition, these two policy statements, purportedly in furtherance of the Commission's obligations under both of these statutes, are legislative rules enacted without notice and comment, and are also not the product of reasoned decisionmaking, and therefore violate the Administrative Procedure Act ("APA")[9] on several grounds. On all of these bases, rehearing is warranted.

The Chamber is also seeking clarification on three points: (1) that the Commission does not have the authority to, and will not require, the mitigation of upstream and downstream emissions associated with an authorization request under NGA section 3 or a certificate request under NGA section 7; (2) the timeline and processes the Commission will abide by and use to expedite the issuance of decisions for outstanding applications filed under the prior certificate policy; and (3) whether the Commission will consider reliability and resiliency needs in its public interest determination, especially given recent energy security concerns driven by geopolitical instability.

[8] Interim Policy Statement, (Christie, dissenting) at P 37.

[9] 5 U.S.C. §§ 551 *et seq*.

I. EXECUTIVE SUMMARY

Over the past decade, the interstate natural gas pipeline network, and the ability to invest in its development with confidence, has helped to support a transformation in the way the United States develops, transports, and uses energy. This transformation has led to a dramatic increase in domestic manufacturing and improved the country's international competitiveness. The increased reliance on natural gas has also resulted in reduced greenhouse gas emissions. In fact, natural gas has been the biggest domestic driver of such emission reductions. Low-cost, secure, and abundant natural gas has played a key role in this energy revolution, and natural gas pipelines serve as the critical link between producers and consumers.

Energy infrastructure is an essential element of a productive and competitive economy. Enhancing the development of America's natural gas transportation network is an essential component of the broader infrastructure reform needed to create jobs and promote economic growth. The Updated Certificate Policy Statement and Interim Policy Statement, as currently constituted, will do the opposite. Application of the 2022 Policy Statements to pending and future projects will actively discourage new uses of natural gas, increase costs for manufacturers and consumers, and create both regulatory uncertainty and additional litigation that will jeopardize access to low-cost, domestically produced energy.

Historically, the Commission has furthered the construction and operation of pipeline infrastructure through its policies implementing section 7(e) of the NGA, which require such facilities to be constructed when required by "the present or future public convenience and necessity." Now, the Commission has reversed course. The Commission's action is unlawful, as demonstrated below.

First, the 2022 Policy Statements are inconsistent with the NGA for multiple reasons. *Infra*, Part IV A.

(A) The Commission's authority is limited by the NGA's "principal purpose" to "encourage the orderly development of plentiful supplies of … natural gas at reasonable prices."[10] The Commission has repeatedly agreed that it is constrained by this purpose and previously declined to elevate environmental concerns as an equal factor in considering the public interest. Now, the Commission will create barriers to accessing natural gas that do not meet the NGA's "public interest" purpose by revising its prior interpretation of the statute's "public need" test, thereby erecting barriers to the construction of critical energy infrastructure and raising costs to consumers. The Commission failed even to address the impact of its new rules on the NGA's principal purpose.

(B) The Commission ignores the consumer protection purpose of the NGA and its obligation to protect consumers from unreasonable rates, without explanation, effectively abandoning its prior incremental pricing and competition policies.

(C) The NGA is not an environmental protection statute and does not give the Commission authority to engage in environmental regulation. Yet, the Commission now claims the authority not only to deny permits based on a wide range of environmental factors—apparently including upstream and downstream indirect greenhouse gas emissions—but also to require applicants to propose mitigation measures and to condition certificates on additional mitigation measures. The Commission has gone far beyond the task Congress assigned it.

[10] *See NAACP v. Fed. Power Comm'n,* 425 U.S. 662, 669-70 (1976) ("*NAACP*").

Second, NEPA does not provide the Commission with independent authority to issue the 2022 Policy Statements. *Infra*, Part IV B. NEPA is a procedural statute which requires only that an agency examine the environmental consequences of a proposed action. It is not a substantive environmental protection statute, and it does not dictate decisional outcomes.[11] Indeed, no other federal agency has relied on NEPA as a basis to assert authority to require greenhouse gas emission mitigation.

Third, the Commission cannot arrogate to itself the power it claims in its 2022 Policy Statements without clear congressional authorization. *Infra*, Part IV C. Congress is expected "to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[12] It is difficult to overstate the significance of the 2022 Policy Statements, which establish unprecedented rules governing greenhouse gas emissions and "will have enormous implications for the lives of everyone in this country."[13] Congress has said nothing to suggest that the Commission is authorized to regulate greenhouse gas emissions *at all*, much less at this scope. Instead, the courts have found that Congress tasked another agency, the U.S. Environmental Protection Agency ("EPA"), with determining whether and how to regulate greenhouse gasses. Even EPA has not gone so far. Further, by reaching out to regulate production, gathering, and local distribution, the Commission is altering the balance between state and federal power, which is not permissible in the absence of exceedingly clear direction from Congress.

[11] *Sierra Club v. U.S. Army Corps of Eng'rs,* 803 F.3d 31, 37 (D.C. Cir. 2015) ("*Sierra Club*").

[12] *Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 324 (2014) (internal citations omitted).

[13] Updated Certificate Policy Statement (Christie, dissenting) at P 23.

Fourth, the Commission was required by the APA to use notice-and-comment rulemaking to impose the changes set forth in the 2022 Policy Statements.[14] *Infra* Part IV D. The 2022 Policy Statements are legislative rules. They impose binding legal obligations on the Commission and Commission staff, as well as regulated entities. Most notably, the Commission establishes a numerical significance threshold for greenhouse gas emissions, a "consistent standard" which Commission staff "will" apply in evaluating all applications. The 2022 Policy Statements also impose requirements on the way applicants structure their projects and the information they include in applications. Not only do these changes impose binding legal obligations, they also amend regulations that were issued pursuant to notice-and-comment rulemakings and therefore must themselves be issued via notice and comment.

Finally, the 2022 Policy Statements are not the product of reasoned decisionmaking. *Infra*, Part IV E.

As an initial matter, the Commission departed from its prior longstanding position in three unreasonable ways, without providing adequate explanation for any of its about-faces.

(A) The Commission has long taken the position that precedent agreements support a finding of project need without looking beyond the agreements themselves. Now, the Commission says that it "cannot adequately assess project need without also looking at evidence beyond precedent agreements."[15] *Infra*, Part IV E 1. By specifying that end-use will become a project need factor, the Commission has exceeded its statutory authority, intruded on the province of the states, and unreasonably departed from prior policy without reasonable explanation.

[14] 5 U.S.C. §§ 551 *et seq*.

[15] Updated Certificate Policy Statement at P 54.

(B) The Commission departed from its prior analytical framework for evaluating the effects of certificating new projects on economic interests to include "the balancing of economic and environmental interests." *Infra*, Part IV E 2. By prioritizing environmental effects, the Commission exceeds its statutory authority. By treating numerous attenuated policy goals as potential inputs, the Commission's approach provides no guidance at all. Neither the Commission's requirement that applicants propose mitigation of environmental impacts nor its statement that it may deny an application based on what it views to be excessive adverse impacts is accompanied by any discernable standard. In short, the Commission has developed a framework that sets applicants up to fail.

(C) The Commission moves its consideration of a project's potential impact on environmental justice communities out of its NEPA review process and into its public interest balancing test under the NGA, and requires applicants to propose measures to mitigate adverse impacts. *Infra*, Part IV E 3. Among other things, the Commission's new standard is so vague as to be incomplete. A project developer has no way of knowing what the Commission will consider an "environmental justice community"; how to determine whether a project will impact such a community; how to determine which members of that community it will need to consult prior to proposing mitigation; or how adverse impacts will be measured.

Further, the Commission also entirely failed to address comments—including detailed comments from the Chamber—on how to improve efficiencies in the certificate process. *Infra*, Part IV E 4.

In addition to seeking rehearing, the Commission should provide clarification in three areas: (1) whether the Commission intends to require mitigation for "reasonably foreseeable" greenhouse gas emissions occurring either upstream or downstream of the FERC-regulated

facilities; (2) the timeline and processes the Commission will abide by and use to expedite the issuance of decisions for outstanding applications filed under the prior certificate policy; and (3) how the Commission will take account of reliability and resiliency concerns in its public interest determination, especially given energy security concerns arising from recent international events. *Infra*, Part V.

II. BACKGROUND

Congress delegated to the Commission the authority to authorize, under section 7 of the NGA, the siting, construction, and operation of interstate natural gas pipeline facilities when they are "required by the present or future public convenience and necessity."[16] The "public convenience and necessity" is not expressly defined by the NGA, but its meaning is informed by language elsewhere in the statute's text. Specifically, section 1 of the NGA declares that the "business of transporting and selling gas for ultimate distribution to the public" is "affected with a public interest," and that federal regulation pertaining to natural gas's transportation and sale in interstate and foreign commerce is "necessary in the public interest."[17] This has been interpreted by the U.S. Supreme Court, and the Commission itself, to be consistent with NGA section 7's original text, which concerned the provision of adequate service at the lowest possible rates.[18] Since the early days of the NGA, the Commission has used economic principles of consumer

[16] 15 U.S.C. § 717f(e).

[17] *Id.* § 717(a).

[18] *See e.g., NAACP*, 425 U.S. at 669-70 (holding that the Commission's authority under the NGA is to promulgate regulations and policies that "encourage the orderly development of plentiful supplies of…natural gas at reasonable prices"); *In re Kan. Pipe Line & Gas Co.*, 2 FPC 29, 32 (1939) ("*Kansas Pipeline*") (giving effect to the original wording of 15 U.S.C. § 717f, which required the Commission to "give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being 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…").

protection to guide its interpretation of section 7 in determining whether proposed pipeline projects are in the "public interest."[19] For twenty-three years, the 1999 Certificate Policy Statement served as the compass for how the Commission applied its certificate authority. Its application provided reasonable levels of regulatory certainty for regulated pipelines and the ratepayers that rely upon the essential services they provide.

On February 18, 2022, the Commission issued the 2022 Policy Statements, purportedly to update the 1999 Certificate Policy Statement to permit the Commission's policy to better withstand judicial review in light of decisions issued by federal courts.[20] Taken together, the 2022 Policy Statements represent a fundamental departure from the Commission's prior natural gas infrastructure review policies. For the first time, the Commission announced that the statute's "public interest" standard incorporates climate change considerations outside the scope of the Commission's statutory purview. Further, rather than evaluate a project's merit on economic consumer protection grounds, FERC announced that it has the right and the power to deny a certificate of public convenience and necessity if it deems greenhouse gas emissions attributable to the ongoing operations of the project to be too high, and if it deems the project sponsor's proposed mitigation of those emissions to be insufficient.

Instead of "provid[ing] more regulatory certainty in the Commission's review process and public interest determinations,"[21] which is the Commission's stated intent, the 2022 Policy

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[19] *See Kansas Pipe Line*; *see also Certification of New Interstate Natural Gas Pipeline Facilities*, Statement of Policy, 88 FERC ¶ 61,227 ("1999 Certificate Policy Statement"), modified by, 89 FERC ¶ 61,040 (1999), *Order Clarifying Statement of Policy*, 90 FERC ¶ 61,128, *Order Further Clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000) (noting the policy statement's limited application beyond newly constructed facilities).

[20] *See e.g.*, Updated Certificate Policy Statement at P 75.

[21] Updated Certificate Policy Statement at P 51.

Statement's effect is quite the opposite. By expanding the scope of "public interest" to both permit and require the mitigation of a project's purported effect on global climate change, the Commission has injected considerable uncertainty into its review process and has undermined investor confidence otherwise necessary to ensure "just and reasonable rates."

A. The 1999 Certificate Policy Statement

In 1999, the Commission issued its prior policy to govern how it would review applications for certificates of public convenience and necessity. The 1999 Certificate Policy Statement was consistent with and complementary to the Commission's other policies that relied on competition to promote just and reasonable rates and non-discriminatory open-access to the interstate pipeline network.[22] Price signals, primarily in the form of incremental rates, were relied upon to inform the market whether a project was needed to serve the public interest, and to discipline overbuilding that could otherwise result in economic harm to landowners and surrounding communities along a pipeline right of way.[23] Hence, the Commission focused on economic criteria to determine whether a proposed interstate pipeline project is "required by the present or future public convenience and necessity," in accordance with NGA section 7.

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[22] *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* FERC Stats. & Regs. ¶ 30,665 (1985), *vacated and remanded*, *Associated Gas Distribs. v. FERC,* 824 F.2d 981 (D.C. Cir. 1987), *readopted on an interim basis*, Order No. 500, FERC Stats. & Regs. ¶ 30,761 (1987), *remanded*, *Am. Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, FERC Stats. & Regs. ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, FERC Stats. & Regs. ¶ 30,880 (1990), *aff'd in part and remanded in part*, *Am. Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *order on remand*, Order No. 500-J, FERC Stats. & Regs. ¶ 30,915, *order on remand*, Order No. 500-K, FERC Stats. & Regs. ¶ 30,917, *reh'g denied*, Order No. 500-L (1991); *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, at 393, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[23] 1999 Certificate Policy Statement at p. 61,747.

Because the Commission relied upon the market to determine project need, it set out a threshold requirement of ensuring that existing shippers did not subsidize the rates for shippers seeking new capacity on new facilities. Contracts with new customers, primarily in the form of precedent agreements indicating a long-term commitment to ship on the new facilities, helped to demonstrate both the market need for a project and that the project would not be subsidized by existing customers. The Commission then performed a balancing test to consider whether the proposed project's benefits outweighed any adverse effects. This too was an economic test:

> If residual adverse effects on the three interests are identified, after efforts have been made to minimize them, then the Commission will proceed to evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test.[24]

The Commission considered environmental impacts on a secondary basis: "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."[25] If the threshold requirement was met, the Commission would then "balance 'the public benefits against the adverse effects of the project,' including adverse environmental effects," when assessing whether a project is required by the public convenience and necessity.[26]

The success of the 1999 Certificate Policy Statement has been remarkable. Since its implementation twenty-three years ago, the Commission has certificated nearly 23,000 miles of

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[24] *Id*. at 61,745. These three interests are those of "the existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers," and "landowners and communities affected by the route of the new pipeline." *Id*.

[25] *Id*. The Commission's environmental staff performed reviews of the documents submitted with a pipeline's application to comply with the Commission's obligations under NEPA, in conformance with FERC's NEPA regulations located at 18 C.F.R. Part 180.

[26] *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*") (quoting *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) ("*Minisink*") *and Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) ("*Myersville*")).

interstate pipelines capable of transporting nearly 300 billion cubic feet per day, all of which has been constructed without the need for subsidization by captive customers or government funding.[27] Pipeline construction approved by FERC has flattened differentials between markets, lowering the price of gas to U.S. consumers while increasing reliability and resilience of the natural gas pipeline network. Moreover, among the thousands of certificates granted by the Commission, which have resulted in several dozen challenges before the federal courts, our research has revealed only two instances in which a FERC certificate order issued pursuant to the 1999 Certificate Policy Statement has been vacated.[28] Otherwise, in a handful of cases, the courts have remanded matters to FERC to revise its NEPA documents without vacating the underlying certificate order or issuing any ruling that questioned the sufficiency or legality of the 1999 Certificate Policy Statement.[29]

B. The Initiation of Docket Nos. PL18-1-000 and PL21-3-000

In the spring of 2018, the Commission initiated Docket No. PL18-1-000 through the issuance of a Notice of Inquiry to seek comment on whether, and if so how, the Commission should revise its policy in light of changes to the natural gas industry.[30] The 2018 NOI noted that the Commission had processed an increased number of certificate applications since 2010 that corresponded with natural gas market changes—from the development of new technologies to extract the resource, to increased uses of natural gas as a fuel to generate electricity. With this increased regulatory activity, the Commission had also experienced an uptick in public interest

[27] Approved Major Pipeline Projects, https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-1997-present (data as of July 2021).

[28] *Sabal Trail* at 1373; *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

[29] *See, e.g., Food & Water Watch*, 2022 WL 727037 (D.C. Cir. Mar. 11, 2022) ("*Food & Water Watch*"); *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014).

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

surrounding landowner and eminent domain issues and how the Commission evaluated environmental impacts and factored global climate change into its project reviews. The Commission therefore sought comments in four general areas: (1) potential adjustments to the Commission's determination of need; (2) the exercise of eminent domain and landowner interests; (3) the Commission's consideration of environmental impacts; and (4) improvements to the efficiency of the Commission's review process.

The 2018 NOI did not portend that FERC was considering any radical changes in how it would assess whether a project was required by the "public interest" or how it would interpret Congress's directive that it certificate projects required by the "public convenience and necessity." To the contrary, the Commission noted that while "[t]he public convenience and necessity standard encompasses all factors bearing on the public interest," "[t]he words 'public interest[]' … are 'not a broad license to promote the general public welfare.'"[31] It quoted the Supreme Court's holding that the clear "principal purpose" of the NGA "was to encourage the orderly development of plentiful supplies of…natural gas at reasonable prices."[32]

The Commission's statements in the 2018 NOI also drew a clear line between its jurisdiction over facilities used for the transportation of natural gas in interstate commerce and facilities used for intrastate transportation, or for the production, gathering, or local distribution of natural gas.[33] In addition, the Commission clearly distinguished its obligations under the NGA

[31] 2018 NOI at P 6 (citing *Atl. Refining Co. c. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) ("*Atlantic Refining*") and quoting *NAACP*, 425 U.S. at 669-70).

[32] *Id.* (quoting *NAACP*, 425 U.S. at 669-70).

[33] 2018 NOI at P 8 (citing 15 U.S.C. 717(b) and 16 U.S.C. 824).

from those under NEPA.[34] The Commission explained that FERC has no authority under NEPA "to require the construction of any alternative other than the project proposed, nor does it have authority to require the development of non-jurisdictional actions or projects (e.g. renewable projects or energy conservation measures)."[35] In addition, the Commission made strong statements about its role with respect to greenhouse gas emissions. It stated that "given the information available to date, any attempt by the Commission to create a significance threshold would be arbitrary."[36] It also explained why the Commission historically had declined to consider upstream or downstream greenhouse gas emissions.[37]

In February 2021, well after the comment period for the 2018 NOI had closed, the Commission issued a supplemental NOI.[38] The 2021 NOI noted "a range of changes" since the Commission had issued the 2018 NOI, including the promulgation by the Council on Environmental Quality ("CEQ") in 2020 of new regulations implementing NEPA[39] and the issuance of executive orders that had directed federal agencies to consider the impact of their

[34] *Id.* at P 9 (explaining that review of an application under the NGA triggers NEPA, the requirements of which "are procedural: they are intended to disclose the impacts and allow for informed decision-making, but do not mandate a particular result or give preeminent weight in environmental considerations.") (citing *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 350 (1989) ("*Methow Valley*"); *see also Baltimore Gas & Elec. Co. v. Nat. Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Stryckers' Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam))). The 2018 NOI also refers to regulations implementing NEPA that were revoked in 2020 following the issuance by the Council on Environmental Quality on new NEPA regulations. *See id.* at P 11.

[35] *Id.* at P 42.

[36] *Id.* at P 46 (citing *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at PP 26-27 (2018)).

[37] *Id.* at P 48 (citing *Cent. N.Y. Oil & Gas Co.*, 137 FERC ¶ 61,121, at PP 95-105, on reh'g, 138 FERC ¶ 61,104, at PP 46-48 (2012), *aff'd sub nom. Coal. For Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472 (2d Cir. 2012) (unpublished opinion)).

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

[39] Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (2020). The Commission's regulations provide that "[t]he Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission." 18 CFR 380.1.

policies on environmental justice communities. The Commission accordingly updated the 2018 NOI's questions about the consideration of environmental impacts and its implementation of NEPA,[40] and added a new category of questions about the Commission's consideration of effects on environmental justice communities.[41] The Commission directed stakeholders to submit new or modified comments, as necessary, on May 26, 2021.

The Commission took no further action in Docket No. PL18-1-000 in advance of the issuance of the 2022 Policy Statements. On September 16, 2021, it initiated Docket No. PL21-3-000 by scheduling a Commissioner-staff led technical conference in November 2021 to discuss methods natural gas companies may use to mitigate the effects of direct and indirect greenhouse gas emissions resulting from NGA sections 3 and 7 authorizations ("GHG Mitigation Technical Conference").[42] The Commission made no announcements prior to, during, or after the technical conference that it would be proposing a significance threshold for greenhouse gas emissions and requiring related mitigation in the underlying docket.

The Chamber submitted comments through its Global Energy Institute in response to the 2018 NOI on July 25, 2018,[43] and in response to the 2021 NOI on May 26, 2021.[44] The Chamber's Initial Comments encouraged the Commission to streamline its certificate review process and to ensure that its environmental reviews performed under NEPA were efficient and consistent with

[40] 2021 NOI at P 17.

[41] *Id.* at PP 20-22.

[42] Notice of Technical Conference, Docket No. PL21-3-000, dated September 16, 2021.

[43] The comments were submitted by the Global Energy Institute, an affiliate of the Chamber. *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000, Comments of the U.S. Chamber of Commerce Global Energy Institute (filed Jul. 25, 2018) ("Initial Comments").

[44] *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000, Comments of the U.S. Chamber of Commerce (filed May 26, 2021) ("Supplemental Comments").

NEPA's statutory requirements. The Chamber was supportive of the Commission's consideration of upstream and downstream greenhouse gas emissions and climate change impacts, provided it was within NEPA's boundaries of foreseeability and causation. The Chamber also explained why greenhouse gas emissions and climate change are fundamentally different from other types of emissions and environmental impacts that agencies are required to evaluate in NEPA analyses. Thematically, the Initial Comments highlighted how the 1999 Certificate Policy Statement successfully resulted in the build-out of efficient, market-driven natural gas infrastructure, and why the bedrock principles of increased competition, access, reliability, and decreased costs must be affirmed and retained.

The Chamber's Supplemental Comments built upon the Chamber's prior statements and encouraged the Commission to strengthen its certificate policies to make pipeline certification more reliable and predictable, as opposed to more difficult. The Chamber urged the Commission to continue to act in a manner that is consistent with its statutory authorization and regulatory mission to evaluate and support necessary infrastructure development, while minimizing reasonably avoidable adverse impacts, subject to the guardrails put in place by Congress and the courts. In furtherance of the 2021 NOI's revised consideration of environmental impacts related to greenhouse gas emissions and environmental justice communities, the Chamber proposed reforms that the Commission could properly engage in under NEPA. However, it urged the Commission to continue to rely on market forces to determine project need and to remain a leader on infrastructure development. The Chamber commented that actions by the Commission that inject uncertainty into the permitting process would have a detrimental impact on the nationwide energy transition.

C. The Updated Certificate Policy Statement

On February 18, 2022, the Commission issued the Updated Certificate Policy Statement in conjunction with the Interim Policy Statement. The Commission announced that market forces would no longer guide the Commission's determination of whether a project was in the "public interest" and required by the "public convenience and necessity." The Commission still required the use of incremental pricing to protect existing shippers from subsidizing new facilities. However, the "no financial subsidies" threshold was replaced with an undefined "project need" threshold.[45] Thus, the very purpose of the prior threshold was neutralized, with pricing no longer able to provide accurate market signals supportive of a project. Precedent agreements, once the incremental pricing policy's gold standard, were deemed insufficient to support a finding of project need "without looking at evidence beyond precedent agreements," such as gas end-use.[46] In place of the prior market-forces analysis, the Commission instead provided a lengthy, but potentially non-exhaustive, list of what it would consider probative of project need.[47]

The Commission also changed its balancing test to make environmental impacts primary, as opposed to secondary, when evaluating whether a project is in the public interest: "the consideration of environmental impacts is an important part of the Commission's responsibility under the NGA to evaluate all factors bearing on the public interest."[48] In particular, the Commission announced a new initiative to consider (1) reasonably foreseeable greenhouse gas emissions that contribute to climate change; and (2) impacts on environmental justice

[45] Updated Certificate Policy Statement at P 63.

[46] *Id.* at P 55.

[47] *See id.* at PP 55-59.

[48] *Id.* at P 72 (citing *Atlantic Refining*, 360 U.S. at 391 and *Sabal Trail*, 867 F.3d at 1373).

communities, including cumulative impacts, as "adverse effects" that could outweigh the demonstrated need for a proposed pipeline project or LNG facility.[49] The Commission also reserved the right to condition a certificate to require additional environmental mitigation if proposed mitigation of environmental impacts is deemed inadequate to support a public interest determination, or to deny an application if adverse environmental impacts "as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[50]

D. The Interim Policy Statement

In the Interim Policy Statement, a companion order that remains open for comment until April 4, 2022, but is declared applicable immediately, the Commission described the procedures it will follow for evaluating climate impacts under NEPA in relation to pipeline certificate applications filed under NGA section 7 and import and export facility authorizations filed under NGA section 3. These climate considerations would then be integrated into the Commission's public interest determinations under the NGA.[51] As explained above, the Commission established a greenhouse gas emissions significance level of 100,000 tpy of CO_2E that rebuttably presumes all downstream emissions are project-induced.[52] Applying this "significance" threshold, the Commission then proclaimed authority to impose conditions under NGA section 7(e) to mitigate a project's adverse environmental effects, including "all, or a portion of, the impacts related to a proposed project's GHG emissions," including those associated with predicted upstream and

[49] *Id.* at P 90.

[50] *Id.* at P 74.

[51] Interim Policy Statement at P 3.

[52] *Id.* at P 79.

downstream GHG emissions impacts relating to the production and use of natural gas.[53] No particular form of mitigation is mandated, but the Commission encouraged project sponsors to voluntarily propose mitigation that is real, verifiable, and results in measurable reductions.[54] The Commission did not account for what such mitigation proposals might cost or say whether a pipeline would be able to recover any of its mitigation proposals in customer rates.[55]

III. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

In accordance with Rule 713(c)(1) and (2) of the Commission's Rules of Practice and Procedure,[56] the Chamber submits the following specifications of error and statement of issues:

A. Specification of Errors

1. The Commission erred by issuing the 2022 Policy Statements because they exceed the Commission's statutory authority under the NGA.

2. The Commission erred by issuing the 2022 Policy Statements because they exceed the Commission's statutory authority under NEPA.

3. The Commission erred by issuing the 2022 Policy Statements because they confer on the Commission new powers "of vast economic and political significance" never before asserted in violation of the major questions doctrine of statutory interpretation, and in excess of the Commission's statutory authority.

4. The Commission erred by issuing the 2022 Policy Statements because they constitute legal legislative rules with binding, substantial legal effects on the agency and regulated persons, and they were promulgated without notice and comment rulemaking in violation of the APA.

[53] *Id.* at P 98.

[54] *Id.* at P 109.

[55] *Id.* at P 128.

[56] 18 C.F.R. §§ 385.713(c)(1), 713(c)(2).

5. The Commission erred by issuing the 2022 Policy Statements because they contain numerous instances of arbitrary and unreasonable decisionmaking that depart from past practice, without adequate explanation and without adequate consideration of relevant factors, to impose new rules that contradict and undermine the purposes of the NGA, that improperly further goals that are not in the Commission's purview, and that create uncertainty about the legal standards that will govern the certification of NGA projects.

B. Statement of Issues

1. The Commission failed to engage in reasoned decisionmaking when it issued decisions that exceeded its authority under the NGA through misinterpretation and misapplication of the statute's term "public interest." *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) ("*NAACP*"); *Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959) ("*Atlantic Refining*").

2. The Commission failed to engage in reasoned decisionmaking and took action that was arbitrary and capricious when it exceeded its authority under NEPA by conflating its obligation to consider the environmental effects of a proposed action with its obligation to certificate pipeline projects under the NGA, and by considering effects that NEPA does not authorize the Commission to consider. 40 C.F.R. § 1508.1; *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015) ("*Sierra Club*"); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("*Methow Valley*").

3. The 2022 Policy Statements violate the Supreme Court's major questions doctrine by reading extraordinary authorities into the NGA and NEPA that were never intended by Congress. *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) ("*Realtors*"); *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

4. The Commission violated the APA when it issued the 2022 Policy Statements, which set out legislative rules, without following notice-and-comment procedures. 5 U.S.C. § 553; *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022–23 (D.C. Cir. 2000); *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014); *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002).

5. The 2022 Policy Statements violate the APA's requirements that agency orders be the product of reasoned decisionmaking both by failing to supply a reasoned analysis for changes in Commission policy and by being impermissibly vague. *Am. Fed'n of Gov't Emps., AFL-CIO v. FLRA*, 25 F.4th 1, 7-12 (D.C. Cir. 2022); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) ("*State Farm*"); *Am. Trucking Ass'n v. U.S. Dep't of Transp.*, 166 F.3d 374, 379 (D.C. Cir. 1999); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1149–50 (D.C. Cir. 2002).

IV. REQUEST FOR REHEARING

As a creature of statute, all of the Commission's actions must align with "those authorities delegated to it by Congress."[57] An agency's actions will be found unlawful if they exceed those delegated authorities.[58] Accordingly, the Commission's certificate policies and their application must comport with FERC's primary authorities under the NGA, which mandate that the Commission approve the construction and operation of natural gas pipeline infrastructure if it finds that such infrastructure "is or will be required by the present or future public convenience and necessity."[59] Moreover, NGA section 1(a) provides that "it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[60] The Commission's application of the "public interest" standard must comport with Congress's intent. The Commission's assertion that it may consider "all factors be[ar]ing on the

[57] *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002) (internal quotation omitted).

[58] *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (OSHA exceeded its statutory authority by issuing vaccine mandate because "[p]ermitting OSHA to regulate the hazards of daily life … would significantly expand OSHA's regulatory authority without clear congressional authorization").

[59] 15 U.S.C. § 717f(e).

[60] *Id.* § 717(a) (referencing the reports provided by the Federal Trade Commission pursuant to Senate Resolution No. 83 (1936)).

public interest" when evaluating a certificate application under NGA section 7(e) must be read in context.[61]

The Commission's authority and obligations under NEPA are also constrained. The statute's purpose is to ensure that the Commission considers the environmental impacts of its certificate decisions under NGA section 7 and import and export authorizations under NGA section 3, but it does not require that the Commission approve or reject a proposal because of the identified environmental impacts. NEPA is thus distinct from the NGA, and the lines between their applications should not be blurred. NEPA cannot be used to broaden the Commission's substantive authority under the NGA.[62] Further, the courts have been clear that the "public convenience and necessity" language in section 7 of the NGA is not a one-for-one stand-in for environmental effects that may be identified during the NEPA process. Rather, the "public convenience and necessity" determination must be made in view of the "framework in which the Commission is authorized and directed to act."[63] The Supreme Court identified the statute's "principal purpose" as "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[64]

When the Commission attempts to exercise authority not permitted by the NGA or NEPA, it acts unlawfully and in violation of the Supreme Court's major questions doctrine. When the

[61] *See* Updated Certificate Policy Statement at P 72 and n. 188 (quoting *Atlantic Refining*, 360 U.S. at 391).

[62] *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever the action the agency chooses to take must, of course, be within its province in the first instance.") (internal citations omitted); *see also Cape May Green, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute.").

[63] *Atlantic Refining*, 360 U.S. at 389.

[64] *NAACP*, 425 U.S. at 670.

Commission issues legislative rules in the form of a "policy statement," as it did with the establishment of the new significance threshold and other binding pronouncements that change its preexisting regulations, its actions are also in violation of the APA and cannot be permitted to stand. Furthermore, when the Commission engages in unreasoned decisionmaking, its actions also are arbitrary and capricious, in violation of the APA.[65] Rehearing is necessary to permit the Commission to correct both of these decisions, the Updated Certificate Policy Statement and the Interim Policy Statement, on each of these grounds.

A. The Commission Exceeded Its Authority Under the NGA When It Issued Decisions That Are Not In the "Public Interest" Because They Will Unreasonably Raise Costs And Discourage Natural Gas Development.

As the statutory text commands and the Supreme Court has emphasized, the NGA's primary purpose is ensuring access to reliable supplies of natural gas at reasonable rates. Section 1 of the NGA declares that the "business of transporting and selling gas for ultimate distribution to the public" is "affected with a public interest," and that federal regulation pertaining to natural gas's transportation and sale in interstate and foreign commerce is "necessary in the public interest." The statute incorporates a report of the Federal Trade Commission ("FTC") that clarifies the Act's purpose:

> [a]ll communities and industries within the capacity and reasonable distance of existing or future transmission facilities should be assured a natural-gas supply and receive it at fair, nondiscriminatory prices.[66]

[65] 5 U.S.C. § 706.

[66] *See* 15 U.S.C. § 717(a); *see also* S. Doc. No. 92, Pt. 84-A, 70th Cong., 1st Sess., Utility Corporations, Final Report of the Federal Trade Commission at 609 (1936) ("FTC Report"), https://babel.hathitrust.org/cgi/pt?id=ien.35556021351598&view=1up&seq=718 (last visited March 16, 2022).

Most relevant here, section 7(e) of the NGA mandates that the Commission permit the construction and operation of interstate natural gas pipeline facilities if it deems that the project "is or will be required by the present or future public convenience and necessity." The statute does not explicitly define "public convenience and necessity," leaving interpretation of that phrase to the Commission. For over eighty years, the Commission has consistently interpreted this phrase based on its core statutory obligation to make natural gas available and accessible at just and reasonable rates.

This long-standing interpretation has proven to be effective in ensuring that there is natural gas infrastructure capable of evolving and growing to meet changing needs on the part of the energy industry, including both the natural gas and electric industries, and the consuming public. In 2018, the DOE Office of the Inspector General found that the Commission had executed its responsibilities in a manner consistent with its statutory directives.[67] Therefore, without clear congressional mandates or Court findings requiring a significant shift from this interpretation, the Commission's interpretation should not change, and certainly not without proper notice procedures or the reasonable explanation required by the APA.[68] Moreover, an agency is afforded no deference when its interpretation of its enabling statute is unlawful or unreasonable, as is the case with the Commission's new interpretation as set forth in the 2022 Policy Statements.

[67] Audit Report – The Federal Energy Regulatory Commission's Natural Gas Certification Process," DOE-OIG-18-33, May 2018 ("DOE Audit Report").

[68] 5 U.S.C. § 553; *see* Section IV.D, *infra*.

Throughout the 2022 Policy Statements, the Commission adopts policy positions that are at odds with the NGA's purpose.[69] The Commission's new policy directives now include in its consideration of public need greenhouse gas emissions from upstream and downstream sources. The Commission also highlights the possibility of protecting landowners and environmental justice communities from pipeline construction in ways that can only be described as aspirational because it provides no discernable standard for the pipelines to avoid or mitigate any perceived harms. These changes have the combined effect of overriding the NGA's consumer protection edicts and the Commission's role as an economic regulator.

In interpreting its enabling statute, an agency must always "be true to the congressional mandate from which it derives authority."[70] Agency action will be set aside if there has been a clear error of judgment.[71] Agency rules are arbitrary and capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[72] Further, an agency that changes course must supply a reasoned decision for doing so, "including a 'rational connection between the facts found and the choices made.'"[73]

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[69] *See* Updated Certificate Policy Statement (Christie, dissenting) at P 16 (observing that the Commission's "analysis of the public convenience and necessity as a license to prohibit the development of needed natural gas resources using the public interest language in the NGA" has "negat[ed] the very legislative purpose of the statute.").

[70] *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1500 (D.C. Cir. 1984).

[71] *State Farm*, 463 U.S. at 43.

[72] *Id.*

[73] *Id.*

1. Commission policies that create barriers to accessing natural gas do not meet the NGA's "public interest" purpose.

As the Commission itself acknowledged *in this very docket*, the clear "principal purpose" of the NGA was to "encourage the orderly development of plentiful supplies of…natural gas at reasonable prices."[74] There were no intervening events between the issuance of the 2018 NOI in April 2018 and the 2022 Policy Statements in February 2022 that altered this principal purpose or transformed the NGA away from what it has always been—a consumer protection statute.[75] The Supreme Court's directive that the Commission evaluate "all factors bearing on the public interest"[76] was in the context of ensuring that the Commission "underwrite just and reasonable rates to the consumers of natural gas."[77]

However, "just and reasonable" rates in the context of the NGA extend beyond low prices for consumers, and encompass the opportunity for the regulated entity to earn a reasonable rate of return.[78] Hence, as the Commission itself has reasoned, while "[t]he public convenience and necessity standard encompasses all factors bearing on the public interest," "[t]he words 'public

[74] 2018 NOI at P 6 (quoting *NAACP*, 425 U.S. at 669-70); *see also City of Clarksville, Tenn. v. FERC*, 888 F.3d 477, 479 (D.C. Cir. 2018) ("*City of Clarksville*") (Stating that Congress enacted the Natural Gas Act with the principal aim of encouraging the orderly development of plentiful supplies of natural gas at reasonable prices, and protecting consumers against exploitation at the hands of natural gas companies).

[75] *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.").

[76] *Id.* at 390.

[77] *Atlantic Refining*, 360 U.S. at 388.

[78] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

interest[]' … are 'not a broad license to promote the general public welfare.'"[79] Certainly, enacting policies that will raise costs to consumers by making it harder for pipelines to attract capital and layer new uncertainties on top of those already present with pipeline construction does not further the relevant "public interest" as Congress intended.

In the 2022 Policy Statements, the Commission upends its prior "public interest" test, which relied heavily, but not exclusively, on precedent agreements as a proxy for project need, by proposing the types of "evidence" that could be provided in addition to precedent agreements to meet the new test.[80] It is nearly impossible to decode any meaning from the list of suggestions that could support project need; some of it is duplicative of existing Commission policies and the precedent agreement process currently followed by regulated companies.[81] Furthermore, because of the constraints of the Commission's incremental pricing policies, pipelines do not propose projects for unneeded pipeline capacity.[82] The new information gathering that would be required by the 2022 Policy Statements may ultimately serve to be an expensive road to nowhere without enhancing any of the price signals that the market relied on previously to price natural gas transportation. Again, however, the 2022 Policy Statements never discuss the cost increases that will be associated with the new policies, or who is expected to bear them.

Raising costs to construct critical energy infrastructure, and making the investments needed to support that construction more difficult, has significant negative implications for the very

[79] 2018 NOI at P 6 (citing *Atlantic Refining*, 360 U.S. at 391 and quoting *NAACP*, 425 U.S. at 669-70).

[80] *See* Updated Certificate Policy Statement at PP 55-59.

[81] For example, the Commission already has a policy that requires a pipeline to conduct a reverse open season and an additional open season prior to constructing new facilities. *See e.g.*, *Prairie Energy Center, LLC*, 135 FERC ¶ 61,168 at P 30 (2011), *reh'g denied*, 137 FERC ¶ 61,060 (2011).

[82] *See e.g.*, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000, Comments of the Interstate Natural Gas Association of Am. at 28 (filed Jul. 25, 2018) (citing 2018 NOI at P 17).

consumers the Commission's NGA policies should be designed to protect. Commissioner Danly highlights the very real reliability concerns that the 2022 Policy Statements create. "Natural gas is the reliability 'fuel that keeps the lights on,' and natural gas policy must reflect this reality."[83] Interstate pipelines play a critical part in the supply chain because the natural gas flowing through those pipelines is ultimately used to heat homes, support businesses, and enable industrial facilities and manufacturing.

In addition to public comments filed by the Chamber,[84] numerous pipeline developers have already informed the Commission how damaging the 2022 Policy Statements are to investment decisions already made, and the tremendous uncertainty these decisions have inserted into the planning process for projects which have lead times of several years.[85] It bears emphasis that these entities are regulated companies that cannot provide their essential services without prior Commission authorization.[86]

[83] North American Electric Reliability Corporation (NERC) Long Term Reliability Assessment, at 5 (Dec. 2021), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf.

[84] Letter from Martin J. Durbin, Senior V.P., Policy, U.S. Chamber of Commerce, to The Hon. John Barrasso, Ranking Member, Comm. on Energy and Natural Resources, United States Senate (Mar. 2, 2022).

[85] *See e.g.*, Preliminary Comments of Energy Transfer LP, Docket Nos. PL18-1-000 and PL21-3-000 (Mar. 2, 2022); Motion for Reconsideration of Kinder Morgan, Inc. and Boardwalk Pipelines, LP, Docket Nos. PL18-1-000 and PL21-3-000 (Mar. 14, 2022) ("Kinder's Motion"); Enbridge Gas Pipeline Comment in Support of Kinder's Motion, Docket Nos. PL18-1-000 and PL21-3-000 (Mar. 15, 2022); *see also* Updated Certificate Policy Statement (Danly, dissenting) at P 43 ("Further, we leave the public and the regulated community—including investors upon whom we rely to provide billions of dollars for critical infrastructure—with profound uncertainty regarding how the Commission will determine whether a proposed project is required by the public convenience and necessity.").

[86] 15 U.S.C. § 717f(c).

2. The 2022 Policy Statements ignore the very purpose of the NGA without explanation.

"[I]f an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."[87] Such is the case with the 2022 Policy Statements, which neither address the consumer protection crux of the NGA nor explain why the Commission has chosen not to be guided by economic consumer protection principles. The Updated Certificate Policy Statement makes one reference to *NAACP*'s finding that the purpose of the NGA is to support the orderly development of natural gas supplies.[88] However, rather than refer to this as a congressional instruction to protect consumers, the Commission suggests that it is a directive to protect landowners and environmental interests: "[e]nsuring the orderly development of natural gas supplies includes preventing overbuilding."[89] Specifically, the Commission indicates that it will consider overbuilding first, and then may consider "whether the proposed project would offer certain advantages (e.g., providing lower costs to consumers or enhancing system reliability)."[90]

Like many of the positions espoused in the 2022 Policy Statements, the Commission has taken an approach that is the opposite of the one it took in the 1999 Certificate Policy Statement.[91] It does so without any explanation, much less a reasonable one that addresses all factors relevant to the decision whether to embark on such a dramatic departure. Also missing from the Commission's 2022 Policy Statements is any discussion of how the elevation of environmental

[87] *Greater Boston Tele. Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

[88] *See* Updated Certificate Policy Statement at P 69.

[89] *Id.*

[90] *Id.*

[91] 1999 Certificate Policy Statement at p. 61,749.

factors within the Commission's public interest balancing test will protect consumers. The Commission's reference to "a more comprehensive analytical framework for its decision-making process" lacks any reference to the consumer protection interests that the NGA protects.[92]

Nor does the Commission explain why principles of competition, which had allowed the market to discipline overbuilding, are insufficient to meet the NGA's public interest purpose. For example, the Commission states: "It has been the Commission's long-standing position that it has an obligation to ensure fair competition, but that it is not the role of the Commission to protect existing pipelines from the effects of competition."[93] The Commission goes one step further, "we also emphasize that it is not just unfair competition that can harm captive customers. The Commission must consider the possible harm to captive customers that can result from a new pipeline, regardless of whether there is evidence of unfair competition."[94] This remark is without elaboration, apart from the following paragraph's announcement that the Commission can achieve orderly development by preventing construction. Indeed, it is unclear how the availability of additional capacity can harm captive customers apart from the Commission's prior considerations of unfair subsidization, which had previously served as the threshold requirement for certification under the 1999 policy. In the past, the Commission had determined that customers benefit from supply diversity, and permitted pipelines to discount their rates to meet competition.[95]

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[92] *See* Updated Certificate Policy Statement at P 51.

[93] Updated Certificate Policy Statement at P 68 (citing *Ruby Pipeline, L.L.C.*, 128 FERC ¶ 61,224, at PP 37-39 (2009) *and* 1999 Certificate Policy Statement, 88 FERC at p. 61,748).

[94] *Id.*

[95] *See Tennessee Gas Pipeline Co.*, 135 FERC ¶ 61,208 at PP 186-189 (2011) ("*Tennessee*") (providing a history of the Commission's discount policies, beginning in Order 436 in 1985, through *Associated Gas Distributers v. FERC*, 824 F.2d 981, 1010-12 (D.C. Cir. 1987), and the Commission's 1989 Rate Design Policy Statement at *Interstate Natural Gas Pipeline Rate Design*, 47 FERC ¶ 61,295, *order on reh'g*, 48 FERC ¶ 61,122 (1989) (1989 Rate Policy Statement)).

By ignoring the purpose of the NGA's "public interest" test, the 2022 Policy Statements implement rules that will increase consumer costs, contravening the statute's legislative intent.

3. The Commission exceeds its authority in the 2022 Policy Statements by treating the NGA as an environmental protection statute.

The mandate Congress gave the Commission to determine what "is or will be required by the present or future public convenience and necessity" is not a blanket authorization to codify novel interpretations of the NGA that are driven by political winds. With adoption of the 2022 Policy Statements, the Commission seeks to transmute the NGA from a consumer protection statute to an environmental protection mandate – and, moreover, an unfocused and undisciplined mandate, without clear and predictable criteria for determining how environmental factors are now to affect substantive decisions. The Commission makes sweeping assertions about its authority to regulate the climate change impacts from projects certificated or rejected under NGA sections 3 and 7. Most surprisingly, the Commission interprets its public interest authority under the NGA as permitting consideration of "the end use of gas and the impact of natural gas combustion on air pollution."[96] From this novel interpretation, the Commission goes further than any other federal agency, including CEQ and the EPA, and sets a "significance" threshold for greenhouse gas emissions for NEPA purposes to inform how it may condition certificates under NGA section 7(e).[97] The Commission does so on the presumption that the Supreme Court's edict to "evaluate

[96] Interim Policy Statement at P 105 (citing *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004) ("*Public Citizen*")).

[97] Even CEQ has declined to establish a greenhouse gas emissions "significance" test. *See* CEQ, Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews 11, 13 (Aug. 1, 2016) ("When considering GHG emissions and their significance, agencies should use appropriate tools and methodologies for quantifying GHG emissions and comparing GHG quantities across alternative scenarios. . . . The determination of the potential significance of a proposed action remains subject to agency practice for the consideration of context and intensity, as set forth in the CEQ Regulations."); *see also* CEQ, Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions (June 26, 2019; rescinded Feb. 19, 2021) (not addressing significance); CEQ, Revised Draft Guidance

all factors bearing on the public interest" and other inapposite caselaw provides the Commission with this authority.[98]

These decisions, from which the Commission selectively quotes, do not permit the Commission to invent an affirmative right not found in the NGA. Relatedly, the Commission suggests that its authority to regulate environmental impacts under the NGA is found in a trio of recent D.C. Circuit decisions.[99] This is also an unreasonable stretch. These decisions have questioned the sufficiency of certain aspects of specific past NEPA reviews by the Commission, either in holdings or dicta, and have discussed whether the Commission must consider the indirect effects of upstream or downstream emissions under NEPA. However, these decisions neither interpret the Commission's obligations under the NGA nor mandate that the Commission take any action under the NGA. Pointedly, nothing about the court's decisions directs the Commission to mitigate upstream or downstream greenhouse gas emissions related to a proposed natural gas project in conducting its analysis under the NGA. To the contrary. In *Food & Water Watch*, the portion of the court's decision that was adverse to the Commission held only that the agency's explanation of its decision was unreasonable and required a supplemental environmental

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for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in NEPA Reviews (Dec. 24, 2014) (clarifying that the proposed and later abandoned 25,000 MT CO2e/year reference point for quantitative disclosure was "not a substitute for an agency's determination of significance").

[98] Interim Policy Statement at P 82 (citing *Atlantic Refining*, 360 U.S. at 391; and *Hope Nat. Gas Co.,* 4 FPC 59, 59, 66-67 (1944); *Transwestern Pipeline Co.*, 36 FPC 176, 185-186, 189-191 (1966) (citing *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1 (1961) ("*Transco*")).

[99] *See* Updated Certificate Policy Statement at P 75 (referring to holdings of the D.C. Circuit that "reasonably foreseeable downstream GHG emissions are an indirect effect of the Commission's authorizing proposed projects and are relevant to the Commission's determination of whether proposed projects are required by the public convenience and necessity.") (citing *Sabal Trail*, 867 F.3d at 1373; and *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019) ("*Birckhead"*); *id.* at P 86 ("The Commission's public interest responsibility demands that we seriously evaluate [greenhouse gas emissions and environmental justice community impacts] and incorporate them into the balancing test outlined below.") (citing *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021))). A fourth decision decided after the 2022 Policy Statements were issued elaborates on *Sabal Trail* and *Birckhead. See Food & Water Watch v. FERC*, No. 20-1132, 2022 WL 727037 (D.C. Cir. Mar. 11, 2022).

assessment, and did not hold or imply that NEPA requires mitigation.[100] The cases the Commission cites simply do not support its new 2022 Policy Statements' positions that require emission mitigation under the NGA. Certainly, the decisions relied upon by the Commission do not permit it to effectively mandate the mitigation of upstream and downstream greenhouse gas emissions potentially attributable to a project, a right it does not have under NEPA, into a condition under NGA section 7(e).[101] The entire "public interest" purpose of the NGA would be lost if the Commission could deny a certificate based upon the downstream combustion of natural gas.[102]

Nothing in the NGA authorizes the Commission to broaden its statutory role either to: (1) "integrate climate considerations into its public convenience and necessity findings under the NGA, including how the Commission will consider measures to mitigate climate impacts"[103]; or (2) "consider the project's impact on climate change, including the project sponsor's mitigation proposal, as part of its public interest determination under NGA section 3 or 7."[104] The Commission's rhetorical device of "encouraging" applicants to voluntarily propose mitigation for upstream and downstream sources does not save the Commission's actions from violating the statute. The Commission suggests that it can deny a proposed project if it deems the project

[100] *Food & Water Watch*, 2022 WL 727037, at *7.

[101] Interim Policy Statement at P 105 (citing *Public Citizen*, 541 U.S. at 767).

[102] *See* 15 U.S.C. § 717(a) (declaring "that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.").

[103] Updated Certificate Policy Statement at P 76.

[104] Interim Policy Statement at P 107.

sponsor's "proposed mitigation inadequate to support the public interest determination."[105] In doing so, the Commission acts far outside its statutory authority "without clear congressional authorization."[106]

As the Chamber stated in its Initial and Supplemental Comments, the Chamber supports the Commission's efforts to improve its environmental review process, provided it is within the boundaries of its statutory authorities under the NGA and NEPA. The Chamber prophetically observed that the questions poised in the Commission's 2018 and 2021 NOI could give rise to comments or suggestions that exceed the bounds of the Commission's statutory authority and expertise, particularly in reference to the consideration of greenhouse gas emissions and climate change. The Interim Policy Statement is replete with examples of the Commission's passing judgment on matters far outside its expertise as an economic regulator.[107] The Commission's legitimate concerns about greenhouse gas emissions do not permit it to reject a project otherwise in the public interest based upon greenhouse gas emissions that may occur upstream or downstream of the regulated pipeline project, nor do they permit the Commission to ignore the

[105] *Id.* (emphasis added). The Interim Policy Statement cannot reasonably be read as doing anything but requiring mandatory mitigation measures. The Commission's equivocating attempt to refute Commissioner Danly's dissent on this point, *id.* at n.6, only appears to confirm that project applicants must be prepared to either mitigate all, or significant portions, of the direct and indirect greenhouse gas emissions or face denial of their applications.

[106] *Supra* n. 58, and *infra* n. 140.

[107] *See e.g.*, Interim Policy Statement at PP 88-89 (referencing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, UNITED NATIONS, Summary for Policymakers of CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS SPM-5 (Valerie Masson-Delmotte et al. eds.) (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (IPCC Report)) (providing a summary discussion of the Intergovernmental Panel on Climate Change Report).

statutory authority it does have, and act as it is *required* to do, to certificate interstate natural gas facilities required by the public convenience and necessity.[108]

B. The Commission Exceeded Its Authority Under NEPA When It Issued Decisions that Purport to Broaden the Commission's Substantive Authority Under the NGA.

The same principles of statutory construction and administrative law that govern the Commission's authority under the NGA, and which are described in Part IV.A, *supra*, apply to its application, or misapplication, of NEPA. In its Supplemental Comments, the Chamber provided a detailed discussion of the limits of NEPA to help remind the Commission of the extent of its authority, as requested in the 2021 NOI. The Chamber explained that NEPA is a purely procedural statute and "does not dictate particular decisional outcomes."[109] NEPA exists so that agencies can make "a fully informed and well-considered decision."[110] The agency must consider the "environmental consequences" of its proposed action.[111] However, NEPA "does not dictate particular decisional outcomes"[112] or that "an agency, in selecting a course of action, must elevate

[108] *See, e.g.*, *Columbia Gas Transmission, LLC,* 158 FERC ¶ 61,046, P 123 (2017) ("To the extent that Oil Change International suggests an alignment of project permitting with national climate change goals, we note that it is for Congress, the Executive Branch, and agencies with jurisdiction over broad environmental issues to establish such goals, our role under the NGA is considerably more limited, and we have no authority to establish national environmental policy."). The Supreme Court specifically held in *American Electric Power Co. v. Connecticut,* 564 U.S. 410, 426 (2011), that, "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants" under the Clean Air Act, and that this delegation, in turn, displaced federal common law.

[109] *Sierra Club*, 803 F.3d at 37.

[110] *Vt. Yankee Nuc. Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).

[111] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

[112] *Sierra Club*, 803 F.3d at 37.

environmental concerns over other appropriate considerations."[113] Instead, NEPA "focus[es] the agency's attention on the environmental consequences of a proposed project" to ensure "that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[114] NEPA does not authorize agencies to require any form of mitigation.[115] Indeed, the Supreme Court has rejected the argument that NEPA imposes on agencies an affirmative duty to create or impose mitigation plans to offset a project's environmental effects.[116] Instead, NEPA mandates that federal agencies properly identify and evaluate the environmental effects of their proposed actions,[117] thereby prescribing processes, but not particular substantive results.[118]

Hence, the Commission has statutory authority to approve a pipeline project as required by the public convenience and necessity even if it also finds that the project will have high or adverse effects on an environmental resource without violating NEPA, provided that it appropriately considered the impacts to the resource. The NEPA review process provides "the public and agency

[113] *Strycker's Bay*, 444 U.S. at 227 ("*Vermont Yankee* cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations" (referencing *Vt. Yankee Nuc. Power Corp.,* 435 U.S. at 558)).

[114] *Methow Valley*, 490 U.S. at 349.

[115] 40 C.F.R. § 1508.1 ("While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.").

[116] *Methow Valley*, 490 U.S. at 347, 353.

[117] *Vt. Yankee Nuc. Power Corp.*, 435 U.S. at 558 ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural."). Even if the Commission identifies significant environmental harms in its NEPA analysis, it can still approve the project, *see also Methow Valley*, 490 U.S. at 350 ("If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.").

[118] *Methow Valley*, 490 U.S. at 350.

decisionmakers the qualitative and quantitative tools they needed to make an informed choice for themselves. NEPA requires nothing more."[119]

This does not mean that NEPA forbids the Commission from requiring mitigation, pursuant to its authority under the NGA, as informed by its NEPA review. CEQ provides guidance on what types of mitigation would be appropriate, such as: (1) a component of project design (*e.g.*, a smaller facility that fills in fewer acres of wetlands); (2) an alternative considered in an Environmental Assessment or EIS (*e.g.*, a different pipeline route that minimizes stream crossings); or (3) enforceable mitigation measures required to support a mitigated "Finding of No Significant Impact."[120] The Commission's decision to impose what is essentially a mandatory greenhouse gas mitigation policy through the Interim Policy Statement is not supported by the text of NEPA or its implementing regulations (or, for that matter, by CEQ guidance). For this reason, it is not surprising that the Interim Policy Statement's effective mandatory mitigation approach is not authorized by the Commission's own NEPA regulations, either.[121] Such a requirement would be an unprecedented departure from NEPA and is not required by any other federal agency.

The Commission is entirely without authority, either to set a greenhouse gas emissions significance threshold under NEPA (or under some inchoate combination of the NGA and NEPA),

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[119] *Sabal Trail*, 867 F.3d at 1371.

[120] CEQ, Nancy H. Sutley, Memorandum for Heads of Federal Departments and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact at 5 (Jan. 14, 2011) ("CEQ Mitigation Guidance").

[121] The only Commission regulations discussing mitigation measures are found in 18 C.F.R. § 380.15, concerning siting and maintenance requirements. These generally require the avoidance or minimization of "effects on scenic, historic, wildlife, and recreational values," *id.* § 380.15(a), the desires of landowners with respect to rights-of-way, *id.* § 380.15(b), places listed on, or eligible for, the National Register of Historic Landmarks, natural landmarks listed on the National Register of Natural Landmarks, designated parks, wetlands, scenic, recreational, and wildlife lands, and "the character and existing environment of the area." *Id.* § 380.15(e)(2). Nothing in the Commission's NEPA regulations requires the consideration of GHG emission mitigation measures, much less requires them.

or to require mitigation when greenhouse gas emissions are deemed to be an indirect effect under NEPA (or under the same inchoate reading).[122] Just as the federal court decisions relied upon by FERC do not amend the NGA, neither do they amend NEPA. Specifically, the *Sabal Trail* and *Public Citizen* decisions do not stand for the proposition that a project sponsor is required to mitigate greenhouse gas emissions.[123]

The Commission read *Sabal Trail* to enable them to "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment," provided the pipeline is the "legally relevant cause" of the environmental effects.[124] However, the question before the court was limited to the amount of information that the Commission should consider under NEPA, and did not extend to whether any effects should, or could be, mitigated.[125] The Interim Policy Statement thus rests its entire weight on *dicta* which presumed (without analysis) that the Commission could require greenhouse gas emission mitigation.[126]

The Interim Policy Statement also stretches the interpretation of *Public Citizen*, asserting that the Court's decision in that case "does not preclude the Commission from requiring project

[122] CEQ is the federal agency charged with implementing NEPA. *Sugarloaf Citizens Ass'n v. FERC*, 959 F.2d 508, 512 (4th Cir. 1992).

[123] *See* Interim Policy Statement (Danly, dissenting) at P 29.

[124] Interim Policy Statement at P 105.

[125] *Id.* at 1374 ("We conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so.").

[126] Interim Policy Statement at P 103 ("The D.C. Circuit stated in *Sabal Trail*, that 'the [Commission] has legal authority to mitigate' greenhouse-gas emissions that are an indirect effect of authorizing a pipeline project." (quoting *Sabal Trail*, 867 F.3d at 1374)). The question whether the Commission had the authority to mitigate greenhouse gas emissions was not presented to the court or briefed. Nor was the assumption that the Commission had the legal authority to mitigate greenhouse gas emissions material or necessary to the court's holding.

sponsors to mitigate reasonably foreseeable upstream or downstream emissions."[127] Like *Sabal Trail*, however, *Public Citizen* deals only with what *information* must be *considered* by an agency under NEPA, not mitigation. Nor does *Public Citizen* consider the Commission's authority to deny a certificate. Thus, nothing in *Public Citizen* supports the Interim Policy Statement. To the contrary, *Public Citizen* sought to limit the universe of effects for which an agency could be considered to be the "legally relevant 'cause'," and certainly did not expand the range of activities that an agency is permitted to regulate.[128]

Finally, the 2022 Policy Statements seem to conflate the Commission's NEPA obligation to consider the environmental impacts of a proposed project with its obligations under the NGA.[129] As stated above, the duties under each statute are distinct, and the Commission cannot enlarge its NGA authority by reference to NEPA or to *Sabal Trail*'s holding as to what information should be considered in an EIS. Neither NEPA nor the NGA authorizes greenhouse gas emission mitigation as part of the Commission's "public interest" analysis;[130] and, contrary to the Commission's reading of *Public Citizen*, when one "'look[s] to the underlying policies or legislative intent'" of the NGA,[131] there is no justification for imposing greenhouse gas emission mitigation measures under that statute, either.

Given the principal purpose of the NGA as set forth above, it is improper for the Commission to use NEPA to assert substantive regulatory authority not otherwise available to it.

[127] Interim Policy Statement at P 105.

[128] *See Public Citizen*, 541 U.S. at 770.

[129] Interim Policy Statement at PP 103-105.

[130] *See* Section IV A, *supra*.

[131] Interim Policy Statement at P 105.

The Commission may rely on NEPA to consider the reasonably foreseeable greenhouse gas emissions attributable to a proposed project, but neither NEPA nor the NGA authorizes mandatory mitigation, let alone consideration and mitigation of effects outside the Commission's jurisdiction. It is therefore unreasonable for the Commission to rely on its conditioning authority under NGA section 7(e) to assert an authority to mitigate effects in a manner never contemplated by NEPA.

C. By Construing the NGA and NEPA to Permit the Regulation and Mitigation of Greenhouse Gas Emissions, the 2022 Policy Statements Violate the Supreme Court's Major Questions Doctrine.

Congress is expected "to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[132] The Commission makes pronouncements in the 2022 Policy Statements that it may regulate indirect greenhouse gas emissions upstream or downstream from a regulated interstate pipeline facility, or that it may "deny a certificate to facilities whose construction and operation would be in the public convenience and necessity, simply because the construction and operation of such infrastructure may result in some amount of greenhouse gas emissions."[133] Without question, Congress did not clearly authorize the monumental, and unprecedented, action the Commission has taken either under the NGA and NEPA, which "would bring about an enormous and transformative expansion in [the agency's] regulatory authority without clear congressional authorization."[134]

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[132] *Realtors*, 141 S. Ct. at 2489 (citing *Util. Air Regulatory Group v. EPA,* 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (internal quotation marks removed)).

[133] *See* Updated Certificate Policy Statement (Christie, dissenting) at P 25.

[134] *Util. Air Regulatory Group*, 573 U.S. at 324. And Congress has taken note. *See* Full Committee Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines, Senate Energy and Natural Resources Committee, held March 3, 2022. https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines The Senate Energy and Natural Resources Committee has oversight over the Commission.

The NGA statutory text upon which the Commission relied—"public convenience and necessity"—simply cannot bear the weight of the Commission's expansive interpretation. The Supreme Court recently rejected an attempt by an agency to enact a broad regulation based upon similar statutory language.[135] The "sheer scope of the [agency's] claimed authority"—that the [agency] was limited only by what it deemed "necessary"—undermined its interpretation.[136] Here, regulation of greenhouse gases "is simply not part of what the agency was built for," as demonstrated by the fact that the Commission's new rules are "strikingly unlike" those the Commission has followed up until now.[137] "It is telling that" the Commission "has never before adopted a … regulation of this kind."[138] The Commission's position on greenhouse gas emissions "will have enormous implications for the lives of everyone in this country, given the inseparability of energy security from economic security."[139] It is self-evident that these significant impacts require clear congressional direction.[140]

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[135] *See Realtors*, 141 S. Ct. at 2489 (rejecting the position of the Centers for Disease Control and Prevention (CDC) that a provision authorizing the Surgeon General to make "such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases" could be read to authorize a moratorium on evictions in response to the Covid-19 pandemic).

[136] *Id.*; *see also Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665 (2022) (OSHA exceeded its statutory authority by issuing vaccine mandate because "[p]ermitting OSHA to regulate the hazards of daily life … would significantly expand OSHA's regulatory authority without clear congressional authorization").

[137] *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 665.

[138] *Id.* at 666 ("This 'lack of historical precedent,' coupled with the breadth of authority that the [Commission] now claims, is a 'telling indication' that the [rules] extend[] beyond the agency's legitimate reach.").

[139] Updated Certificate Policy Statement (Christie, dissenting) at P 23.

[140] *See Realtors*, 141 S. Ct. at 2489 (major questions doctrine applied when "[a]t least 80% of the country… f[ell] within the moratorium"); *Util. Air Regulatory. Grp.*, 573 U.S. at 324 ("The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text."); *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc) (explaining that under Supreme Court precedent, "[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity—… regulating greenhouse gas emitters, for example—an

The Commission's overreach extends to its interpretation under the NGA and NEPA, and ignores that courts have held that Congress has tasked another agency, the EPA, with determining whether and how to regulate greenhouse gases.[141] Unlike the EPA, FERC possesses no expertise that would support its claim to regulate in this space.[142] And "Congress established in the NGA a regulatory regime to address entirely different problems, namely, the need to develop the nation's natural gas resources and to protect ratepayers from unjust and unreasonable rates for gas shipped in the flow of interstate commerce."[143] In short, courts have concluded that Congress "created a distinct regulatory scheme" for regulation of greenhouse gas emissions, and thus Congress "could not have intended to delegate a decision of such economic and political significance to [a different] agency in so cryptic a fashion."[144] The Commission's attempt to assert this authority under NEPA is even more problematic: NEPA is not a substantive environmental protection statute. NEPA "simply prescribes the necessary process" for considering environmental values in agency decisionmaking.[145]

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ambiguous grant of statutory authority is not enough. Congress must clearly authorize an agency to take such a major regulatory action.").

[141] *See* Updated Certificate Policy Statement (Christie, dissenting) at P 24; *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 959 (D.C. Cir. 2021), *cert. granted*, 142 S. Ct. 417 (2021) (holding major questions doctrine not implicated by EPA regulation of greenhouse gasses because "there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse").

[142] The exposition on greenhouse gas emissions and climate change found in the 2022 Policy Statements notwithstanding, FERC's opinions on this issue of national and global importance are afforded no deference.

[143] *See* Updated Certificate Policy Statement (Christie, dissenting) at P 24.

[144] *See Brown & Williamson*, 529 U.S. at 160. On their face, the 2022 Policy Statements go way beyond the regulation of emissions from power plants to capture the emissions from any downstream sources.

[145] *Methow Valley*, 490 U.S. at 350.

Finally, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power…"[146] Any downstream emissions created by LDCs and their customers are subject to state authority. As Commissioner Danly explained, the Commission intrudes on state authority if it seeks to regulate production, gathering and local distribution.[147] Nothing in the NGA makes "exceedingly clear" a congressional intent to change the balance of federal and state power.

The Chamber strongly supports greenhouse gas emission reduction efforts that are consistent with the pace of innovation and legally sound, but that is not what the 2022 Policy Statements accomplish. The Commission has been very public about its desire to reduce greenhouse gas emissions, but "our system does not permit agencies to act unlawfully even in pursuit of desirable ends."[148] "It is up to Congress … to decide whether the public interest merits further action here."[149] Congress has not clearly granted the Commission authority to address this important question, and FERC has therefore gone beyond the bounds of its authority under the NGA and NEPA.

D. The Commission Failed to Abide by the APA When it Issued the 2022 Policy Statements, Which Are Legislative Rules that Required Notice-And-Comment Procedures Under the APA.

Both the Interim Policy Statement and Updated Policy Statement are legislative rules which should have been subject to notice-and-comment procedures.[150] Where an agency statement

[146] *Realtors*, 141 S. Ct. at 2489 (citing *U.S. Forest Service v. Cowpasture River Assoc.*, 140 S.Ct. 1837, 1849-1850 (2020)).

[147] Updated Certificate Policy Statement (Danly, dissenting) at P 6.

[148] *Realtors*, 141 S. Ct. at 2490.

[149] *Id.*

[150] *See* 5 U.S.C. § 553.

creates "obligations on the part of … regulators and those they regulate," it is legislative.[151] In particular, an agency action that establishes "legally binding requirements for a private party to obtain a permit or license is a legislative rule."[152] Here, both decisions impose binding obligations on the Commission and the parties it regulates.[153] A pronouncement is binding "if it either appears on its face to be binding, or is applied by the agency in a way that indicates it is binding."[154] Both decisions are replete with commands that the Commission and its staff "will" review applications in a particular way, including by according particular significance to identified factors.[155] The decisions have not "genuinely left the agency and its decisionmakers free to exercise discretion."[156] Nothing in the 2022 Policy Statements suggests that the Commission may deviate from the formulas and factors the agency has now specified it will apply in every case.[157] "If an agency acts as if a document … is controlling in the field," the document is a legislative rule.[158]

The 2022 Policy Statements' legislative character is most obvious in the Interim Policy Statement's establishment of a rule that for *all* NGA section 7 certificate applications:

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[151] *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

[152] *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251–52 (D.C. Cir. 2014).

[153] *See* Interim Policy Statement (Danly, dissenting) at PP 46-49 ("[T]he Interim Policy Statement is a substantive, binding rule"); Certificated Update Policy Statement (Danly, dissenting) at PP 39-42 ("Question[ing]" the agency's assertion that the Updated Policy Statement "is not binding").

[154] *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 383 (D.C. Cir. 2002) (internal citations omitted).

[155] *See Appalachian Power Co.*, 208 F.3d at 1023 (a document is legislative where it "commands, it requires, it orders, it dictates").

[156] *Clarian Health W., LLC v. Hargan*, 878 F.3d 346, 357 (D.C. Cir. 2017) (internal citations omitted).

[157] *Contrast Clarian Health W.*, 878 F.3d at 358 (finding an agency statement was not legislative when the agency "ha[d] expressly retained discretion to deviate from … criteria where it determine[d] that doing so would further the aims of the statute."). Indeed, the Commission did not previously deviate from the standards set out in the 1999 Certificate Policy Statement, instead treating the document as binding.

[158] *Appalachian Power Co.*, 208 F.3d at 1021.

> For purposes of assessing the appropriate level of NEPA review, Commission staff *will* apply the 100% utilization or "full burn" rate for the proposed project's emissions to determine whether to prepare an Environmental Impact Statement (EIS) or an environmental assessment (EA). Commission 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.[159]

This command unambiguously "binds Commission staff."[160] And the Updated Certificate Policy Statement also requires the Commission to use this threshold to assess whether to require greenhouse gas emissions "mitigation measures as a condition of its approval under the NGA, or withhold approval based on significant adverse effects."[161] Because this is the Commission's "settled position" which the Commission and staff "are bound to apply," it is a legislative rule.[162]

It does not matter whether elements of the Interim Policy Statement may change if FERC takes new action at a later date to modify the statement. The Commission has declared that it "will begin applying the framework established in this policy statement in the interim" to "evaluate and act on pending applications under sections 3 and 7 of the NGA without undue delay…"[163] In other words, the "interim resolution is the final word from the agency on what will happen up to the time of any different permanent decision," and it is therefore final and subject to review.[164]

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[159] Interim Policy Statement at PP 2-3 (emphasis added).

[160] *See* Interim Policy Statement at P 87 (proclaiming that "a numerical threshold is a clear, consistent standard that can be easily understood and applied by the regulated community and interested stakeholders."); (Danly, dissenting) at P 49.

[161] *See* Updated Certificate Policy Statement at P 6 (citing *Sabal Trail*, 867 F.3d at 1373, for the proposition that "the Commission may 'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.'").

[162] *Appalachian Power Co.*, 208 F.3d at 1022; *see also Gen. Elec. Co.*, 290 F.3d at 384. In addition to binding the agency, this determination creates a significant incentive for applicants to propose projects which will not reach the 100,000 metric ton threshold when calculated in this manner in order to avoid the significant burdens that flow from an EIS.

[163] Interim Policy Statement at P 1.

[164] *Nat'l. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020) (finding an "interim" rule was a final legislative rule which should have been issued pursuant to notice and comment).

The 2022 Policy Statements also impose obligations on applicants. A "document will have practical binding effect before it is actually applied if the affected private parties are reasonably led to believe that failure to conform will bring adverse consequences, such as ... denial of an application."[165] "To the applicant reading the [Updated Certificate Policy Statement] the message is clear: in reviewing applications the Agency will not be open to considering approaches other than those prescribed in the Document."[166] The Updated Certificate Policy Statement "details the types of information that [the Commission] expects to be included in applications,"[167] as well as the way it "expects applicants to structure their projects."[168] Indeed, the Updated Certificate Policy Statement makes clear that an applicant's failure to meet the Commission's "expectations" jeopardizes an applicant's chance of success.[169] No such "expectation" language was present in the 1999 Certificate Policy Statement.

The Interim Policy Statement imposes similar obligations on applicants. Among other things, it "list[s] … six items project sponsors are 'encouraged' to include in their applications in light of the new policy statement," including "estimates of the proposal's cumulative direct and indirect emissions and what mitigation measures the project sponsors propose, as well as a

[165] *Gen. Elec. Co.,* 290 F.3d at 383 (quoting *Interpretive Rules, Policy Statements, Guidances, Manuals, And The Like – Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311, 1328-29 (1992).

[166] *Id.* at 384.

[167] Updated Certificate Policy Statement (Danly, dissenting) at P 42.

[168] Updated Certificate Policy Statement at P 74. As Commissioner Danly explained, "expect" here means "require." Updated Certificate Policy Statement (Danly, dissenting) at P 42.

[169] *See, e.g.*, Updated Certificate Policy Statement at P 74 ("Should we deem an applicant's proposed mitigation of impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation. We may also deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."); P 82 ("The Commission will look unfavorably on applicants that do not work proactively with landowners to address concerns."); and P 91 ("We will look with disfavor on mitigation proposals that are proposed without sufficient community input.").

'detailed cost estimate' of the proposed mitigation and a 'proposal for recovering those costs.'"[170] As Commissioner Danly observed, "This is not encouragement. This is command."[171] Applicants will understand from the language of the Interim Policy Statement that they must provide this information to receive a certificate.[172]

In addition to being binding on their face, the Commission's new requirements substantively amend regulations issued pursuant to notice-and-comment rulemaking. It is blackletter law that an agency may not "amend[]" an "earlier rule without adhering to notice-and-comment procedures."[173] "[A]n amendment to a legislative rule must itself be legislative."[174] The 2022 Policy Statements effectively rewrite the Commission's regulations implementing NGA section 7 and NEPA. The Commission has already specified, by regulation, what applicants are required to include in an application.[175] Indeed, the Commission has comprehensive regulations that set forth what is required of pipeline applicants to make a showing that the project is required by the public convenience and necessity.[176] Yet, the policy statements would require applicants to provide substantial materials in addition to those required by regulation—something the existing regulations do not contemplate—and to make a different showing regarding public convenience

[170] Interim Policy Statement (Danly, dissenting) at P 46.

[171] *Id.* at P 47.

[172] *See id.* (Danly, dissenting) PP 46-49.

[173] *Nat'l. Res. Def. Council*, 955 F.3d at 74.

[174] *Id.* at 84 (quoting *Sabal Trail*, 873 F.3d at 952).

[175] *See* 15 C.F.R. pt. 157, subpart A.

[176] *See e.g.*, 18 C.F.R. §§ 157.14 (describing the exhibits required to be attached to each NGA section 7 application) and 157.21 (describing pre-filing procedures to assist the Commission in its public interest review, during which time the applicant and Commission staff can work in partnership to ensure a full record without triggering *ex parte* concerns).

and necessity. Indeed, applicants with pending applications are given an opportunity to revise their applications to be "consistent" with the Updated Certificate Policy Statement.

The Commission's regulations governing certificate applications also incorporate, by reference, the Commission's regulations implementing NEPA at 18 C.F.R, Part 380 and provide detailed instructions for how an applicant must comply with NEPA.[177] The Commission's NEPA regulations specify when the Commission will prepare an environmental assessment, not an EIS, for a natural gas project proposed under NGA sections 3 and 7.[178] The regulations, as written, specify that actions that require an EIS are limited to three types of new projects regulated under the NGA: (1) LNG terminal facilities; (2) certain underground gas storage facilities; and (3) major pipeline construction projects "using right-of-way in which there is no existing natural gas pipelines."[179]

The Commission's new command that an EIS must be prepared whenever a project "may result in 100,000 metric tons per year of CO2e or more" amends that rule without notice and comment, expanding the universe of projects that would be subject to an EIS to include any pipeline project that transports at least 5,200 dekatherms per day or uses one compressor station. Completion of an EIS is "no small matter," but a "cost intensive and time-consuming" endeavor that provides "opportunities for opponents of the project who otherwise lack meritorious objections to it, to run up costs, to cause delays, and to create new grounds for the inevitable appeals challenging the certificate even if the applicant does manage to obtain it."[180]

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[177] *Id.* § 157.14(a)(7) (explaining that an environmental report must comply with 18 C.F.R. §§ 380.3 and 380.21).

[178] *Compare* 18 C.F.R. §§ 380.5(b) *with* 380.6.

[179] *Id.* §§ 380.6(a)(1)-(3).

[180] Updated Certificate Policy Statement (Christie, dissenting) at P 37.

The 2022 Policy Statements' "boilerplate" disclaimers asserting that they do "not establish binding rules" do not control the question.[181] An "agency's characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise."[182] Here, the 2022 Policy Statements' mandatory language, and the way the agency has treated them—including publishing both in the Federal Register—shows that they in fact create binding rules.[183] The 2022 Policy Statements can therefore only be issued following notice-and-comment rulemaking, which unequivocally did not occur here.

The Commission's failure to comply with the required procedures was not harmless. "The entire premise of notice-and-comment requirements is that an agency's decision making may be affected by concerns aired by interested parties through those procedures."[184] Courts have not looked kindly on agency assertions that ignoring these procedural requirements is harmless.[185] While the Commission solicited comment on the general topics the 2022 Policy Statements address, regulated parties were not permitted to address the particulars of the rule the agency adopted, including, critically, the new greenhouse gas emissions significance level. The Commission's issuance of the Policy Statements without notice-and-comment rulemaking was unlawful.

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[181] *See* Updated Certificate Policy Statement at P 3; Interim Policy Statement and P 5.

[182] *CropLife Am. v. E.P.A.,* 329 F.3d 876, 883 (D.C. Cir. 2003).

[183] *See Clarian Health*, 878 F.3d at 357 (publication in the Federal Register is a factor indicating a rule is legislative).

[184] *Nat'l. Res. Def. Council*, 955 F.3d at 85.

[185] *Id.*

E. The 2022 Policy Statements Violate the APA's Requirements that Agency Orders Be the Product of Reasoned Decisionmaking.

The 2022 Policy Statements violate the APA because they are not the product of reasoned decisionmaking.[186] Like all administrative agencies subject to the APA, the Commission is permitted to change its course, but only within permissible bounds, and only if it provides a reasoned rationale for doing so that considers all factors relevant to the decision.[187] The agency must "show that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better than the previous policy."[188] A decision is arbitrary and capricious if it contradicts or undermines the purposes of the agency's enabling statute,[189] or improperly furthers goals that are not in the agency's purview at the expense of the statutory purpose.[190] An agency decision also cannot be so impermissibly vague as to be incomplete, particularly if the stated purpose of the decision was to provide clarity and guidance to the community it regulates.[191]

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[186] *See Am. Fed'n of Gov't Emps., AFL-CIO*, 25 F.4th at 7-12.

[187] *See State Farm*, 463 U.S. at 41-42; *Am. Fed'n of Gov't Emps., AFL-CIO*, 25 F.4th at 4-12; *Panhandle E. Pipe Line Co. v. FERC*, 196 F.3d 1273, 1275 (D.C. Cir. 1999); *Ass'n of Priv. Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 448-449 (D.C. Cir. 2012).

[188] *Am. Fed'n of Gov't Emps., AFL-CIO*, 25 F.4th at 5 (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[189] *See Gresham v. Azar*, 950 F.3d 93, 104 (D.C. Cir. 2020).

[190] *Id.* ("While we have held that it is not arbitrary or capricious to prioritize one statutorily identified objective over another, it is an entirely different matter to prioritize non-statutory objectives to the exclusion of the statutory purpose.").

[191] *See Am. Trucking Ass'n v. U.S. Dep't of Transp.*, 166 F.3d 374, 379 (D.C. Cir.) (explaining that "when a regulation intended to apply a standard 'contribute[s] no extra specificity or clarity to the standard it implements, the agency has failed [to do] the intended job.'").

1. The Commission failed to adequately explain why gas end use is determinative of project need.

Since adoption of the 1999 Certificate Policy Statement, and for decades preceding its issuance, the Commission relied on private contracts between the pipeline and shippers, or precedent agreements, to support a finding of project need without looking beyond the agreements themselves. The D.C. Circuit has upheld this practice,[192] except on an occasion where the project's primary support came from a precedent agreement between affiliates.[193] The Commission has consistently declined to "look[] beyond the market need reflected by the applicant's precedent agreements with shippers."[194] Now, however, without reasonable explanation, the Updated Certificate Policy Statement finds that the Commission "cannot adequately assess project need without also looking at evidence beyond precedent agreements."[195] The Commission will now consider the circumstances surrounding the precedent agreements.

While there may be times when consideration of additional circumstances is warranted,[196] the Chamber is particularly troubled by the Commission's pronouncement that it will make the end use of the transported gas part of its project need assessment. The Updated Certificate Policy Statement encouraged applicants to "provide specific information detailing how the gas to be transported by the project will ultimately be used," and if the applicant is unable to supply that

[192] *See Minisink*, 762 F.3d 97 *and Myersville*, 783 F.3d 1301.

[193] *See Envtl. Defense Fund v. FERC,* 2 F.4th 953 (D.C. Cir. 2021).

[194] *See e.g.*, Adelphia Gateway, LLC, 169 FERC ¶ 61,220 at P 35 (2019) (adding "[g]iven the substantial financial commitment required under these agreements by project shippers…[precedent] agreements are the best evidence that the service to be provided by the project is needed in the markets to be served.").

[195] Updated Certificate Policy Statement at P 54.

[196] *See* Chamber Supplemental Comments at 11-12.

information, it may be deemed to have failed "to demonstrate that a project is needed."[197] As the Chamber noted previously in its Supplemental Comments, the Commission historically has been agnostic as to the particular end users who transport gas on a regulated pipeline. The Commission failed to explain why it has authority to effectively regulate end use; why end use is relevant to project need; or how such relevance can be sustained in light of the open-access policies that the Chamber highlighted in its Supplemental Comments. These policies, particularly the Commission's capacity release regulations, have supported a vibrant secondary market for pipeline capacity. As noted by the Chamber, "the Commission's policies already take into account that the end uses for gas may – and most likely will – change over time."[198] Moreover, the Commission's open-access policies were designed to ensure that pipeline capacity is utilized by the shippers that value it the most. Hypothetically, if one end user—a combined cycle power plant—values capacity more than another—a wind turbine operator—the Commission should be supportive of allocating capacity to the emitting end-user. As the Commission itself acknowledged, it lacks jurisdiction over the end use of the gas.[199]

To the extent the Commission believed that information on end use is required to comport with federal court decisions, it is mistaken. As discussed above, *Sabal Trail*, *Birckhead*, and now *Food & Water Watch*, concern calculating indirect emissions from end users, if known or knowable, for *NEPA* purposes. There is nothing in these decisions that would permit the Commission to reject a project under the NGA because of the end-user. Any preference by the Commission for certain end-uses would be inconsistent with the Commission's policy since the

[197] *Id.* at P 55.

[198] Supplemental Chamber Comments at 11.

[199] *See e.g.*, 2018 NOI at P 8.

issuance of Order No. 436 to require the non-discriminatory transportation of natural gas.[200] Such preferences would also violate Order No. 636, which requires pipelines to establish a level playing field for all shippers on the interstate pipeline system so that "no gas seller has an advantage over another gas seller," and to "ensure that the benefits of [wellhead] decontrol redound to the consumers of natural gas to the maximum extent as envisioned by the NGPA and the Decontrol Act."[201] Any change in how FERC considers market need may also disrupt short- or long-term market pricing in the primary and secondary markets, which could in turn lead to increased prices for consumers and contravene the purpose of the NGA.

2. The Updated Certificate Policy Statement's new approach to analyzing the effects of a project is arbitrary and unreasonable.

In the Updated Certificate Policy Statement, the Commission departed from its prior analytical framework for evaluating the effects of certificating new projects on economic interests to include "the balancing of economic and environmental interests."[202] In addition to the economic interests of the pipeline's customers, the captive customers of other pipelines, and landowners and communities seeking to avoid economic injury to their property interests, the Commission will weigh the adverse effects on environmental interests and impacts on environmental justice

[200] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* FERC Stats. & Regs. ¶ 30,665 (1985), *vacated and remanded*, *Associated Gas Distribs. v. FERC,* 824 F.2d 981 (D.C. Cir. 1987), *readopted on an interim basis*, Order No. 500, FERC Stats. & Regs. ¶ 30,761 (1987), *remanded*, *Am. Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, FERC Stats. & Regs. ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, FERC Stats. & Regs. ¶ 30,880 (1990), *aff'd in part and remanded in part*, *Am. Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *order on remand*, Order No. 500-J, FERC Stats. & Regs. ¶ 30,915, *order on remand*, Order No. 500-K, FERC Stats. & Regs. ¶ 30,917, *reh'g denied*, Order No. 500-L (1991).

[201] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, at 393, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[202] Updated Certificate Policy Statement at P 51.

communities in its public interest determination.[203] The Commission asserted that it may "deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[204] This consideration of climate change impacts is particularly troubling given that the Commission, as explained above, lacks the statutory authority to rely on such grounds to deny an application for a project that is otherwise needed to ensure reliable gas supply.

Neither the Commission's requirement that applicants propose mitigation of environmental impacts nor its further statement that it may deny an application based on its view of excessive adverse impacts is accompanied by any discernable standard. The Commission offered no guideposts to allow an applicant (or any other interested party) to do anything more than speculate about what adverse impacts could derail a project that will otherwise meet known needs for natural gas and what mitigation is enough to overcome those impacts. The Commission also contemplated the need for cooperation between a pipeline and its shippers to gather the inputs required to determine the level of mitigation necessary to support approval for the project, but it is not clear what participation level the Commission is requiring from shippers in certificate dockets, as they generally are not subject to the Commission's regulations.

The Commission provided "no standard against which to measure the impact of natural gas production upstream or use downstream of the facilities," and there is no intelligible principle to follow in assessing how to present a project to satisfy the Commission's concerns.[205] Thus, the

[203] *Id.* at P 62.

[204] *Id.* at P 74.

[205] Updated Certificate Policy Statement (Christie, dissenting) at P 26.

Chamber is concerned that the Commission has developed a framework that sets applicants up to fail. Rehearing is necessary to protect consumers from the unintended consequences of vague and uncertain processes stymying the construction of needed natural gas pipeline infrastructure and undermining the purposes of the NGA.

3. The Updated Certificate Policy Statement's new approach to environmental justice communities is arbitrary and capricious.

In the Updated Certificate Policy Statement, the Commission moves its consideration of a project's potential impact on environmental justice communities out of its NEPA review process and into its public interest balancing test under the NGA.[206] The Commission now requires project sponsors to consider the cumulative impacts of their projects on environmental justice communities and to propose mitigation of adverse impacts.[207] A project sponsor may be penalized for proposing mitigation if it is deemed to have done so without good faith negotiation or "without sufficient community input."[208]

The Chamber continues to be supportive of the Commission's efforts to consider the impacts of its certificate order on environmental justice communities in the context of NEPA, or on members of such communities as landowners in the same manner as the Commission has considered the economic interests of all landowners. However, as the Chamber explained in its Supplemental Comments, no court has ever deemed environmental justice to be central to the NGA's "public interest" determination.[209] Hence, the NGA, without a specific directive to

[206] Updated Certificate Policy Statement at PP 86-93.

[207] *Id.* at PP 90-91.

[208] *Id.* at P 91 ("We will look with disfavor on mitigation proposals that are proposed without sufficient community input.")

[209] *See e.g.*, *Sabal Trail*, 867 F.3d at 1368-71 (conducting an environmental justice analysis based on NEPA, not the NGA).

consider environmental justice impacts pursuant to that statute's "public interest" framework,[210] is an inappropriate vehicle to consider environmental justice. The NGA's "public interest" meaning was not altered by the issuance of an executive order asking federal agencies to consider the impact of their actions on environmental justice communities.[211] Like all Executive Orders, E.O. 14,008 must be "implemented consistent with applicable law" and does not affect "the authority granted by law to an executive department or agency."[212] E.O. 14,008 did not alter the NGA, nor change what Congress intended when it required the Commission to issue certificates required by the public convenience and necessity.

Moreover, the Commission's new approach to environmental justice communities is unreasonably vague to the point of being arbitrary and capricious. It is wholly unclear how the Commission will define "environmental justice community." To the extent the Commission intends to rely on definitions created by EPA and CEQ, the Commission recognized that EPA and CEQ "are in the process of updating their guidance regarding environmental justice and [the Commission] will review and incorporate, as appropriate, any future guidance in our case-by-case decision-making process."[213] Indeed, the Commission is continuing "to develop its environmental justice precedent."[214] Based on the Updated Certificate Policy Statement's language, a project

[210] *Cf, Friends of Buckingham v. State Air Pollution Control Bd.*, 947 F.3d 68, 87 (4th Cir. 2020) (describing and applying a specific state statute mandating that a state agency's permitting decision consider the "disproportionate impacts to minority and low income communities" as part of the permit approval process).

[211] Exec. Order. 14,008 at Sec. 219 ("Agencies shall make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.").

[212] *Id.* at Sec. 301.

[213] Updated Certificate Policy Statement at P 91.

[214] *Id.*

developer has no way of knowing whether its project will impact an environmental justice community and which members of that community it will need to consult prior to proposing mitigation—and yet pending applicants must supplement their applications now. It is also uncertain how adverse impacts will be measured. Puzzlingly, the Commission refers to cumulative impacts based upon a definition from a repealed, out-of-date version of the NEPA regulations. The mixing and matching of NEPA concepts in the NGA framework would have the Commission adopt a definition under the NGA that it is prohibited from adopting under NEPA.[215]

4. The Updated Certificate Policy Statement failed to adequately address an entire category of comments sought on how to improve efficiencies in the NGA certificate process.

The Commission acts in a manner that is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem."[216] Both the 2018 and 2021 NOI sought comments on improvements that could be made to the efficiency of the Commission's review process. The Chamber offered detailed comments on ways to improve the Commission review process to benefit all stakeholders. Given that the Commission's new policies, on a whole, make the certificate application process significantly less certain and more risky, it is unreasonable that the Commission failed entirely to address these comments. The Updated Certificate Policy Statement offered a general summary of what was proposed. Then, its inquiry into the matter ends without explanation. Rehearing is necessary to allow the Commission to consider the impact of its new policies on the efficiency of its processes.

[215] 18 C.F.R. § 380.1 (requiring the Commission to follow the CEQ regulations in its implementation of NEPA).

[216] *State Farm*, 463 U.S. at 43.

V. REQUEST FOR CLARIFICATION

Since the 2022 Policy Statements were published, the Commission's five members have made public statements, either to the press and in testimony before Congress, or in written correspondence with members of the U.S. House and Senate committees having oversight over FERC, that concern the 2022 Policy Statements' meaning. With respect, some of these statements appear to contradict the text of the decisions themselves. In light of these statements, the Chamber is seeking additional clarity from the Commission. Specifically, the Chamber seeks clarification on the following three areas: (1) whether the Commission intends to require mitigation for "reasonably foreseeable" greenhouse gas emissions occurring either upstream or downstream of the FERC-regulated facilities; (2) the timeline and processes the Commission will abide by and use to expedite the issuance of decisions for outstanding applications filed under the prior certificate policy; and (3) how the Commission will take account of reliability and resiliency concerns in its public interest determination, especially given energy security concerns arising from recent international events.

A. The Commission Should Clarify Whether it Will Require Mitigation of Upstream or Downstream Emissions.

The Chamber seeks clarification regarding whether the Commission's new requirement for the mitigation of greenhouse gas emissions applies to only those emissions directly attributable to the project, such as greenhouse gas emissions from the project's actual construction and any fugitive greenhouse gas emissions resulting from its operation, or whether it will also include third-party upstream and downstream greenhouse gas emissions indirectly attributable to the project. This clarification is extremely important to pending and future project applicants, as the Commission now "expect[s] applicants to propose measures for mitigating impacts" and, should the Commission "deem an applicant's proposed mitigation of impacts inadequate," the

Commission "may condition the certificate to require additional mitigation" or deny it outright.[217] The vast majority of greenhouse gas emissions that may be attributable to a proposed project will be indirect emissions, meaning they occur either upstream or downstream of a regulated pipeline project. Should a project application include proposed mitigation measures, the project sponsor must first know the scope of the emissions that must be mitigated.

The Updated Certificate Policy Statement is, at best, ambiguous on this question. It stated that "reasonably foreseeable downstream GHG emissions are an indirect effect" of proposed projects and "relevant to the Commission's determination of whether proposed projects are required by the public convenience and necessity."[218] The Interim Policy Statement asserted that the Commission will "assess possible mitigation" based on "a project's reasonably foreseeable GHG emissions," which would appear to include upstream and downstream greenhouse gas emissions.[219] "The Commission expects applicants to structure their projects to avoid, or minimize, potential adverse environmental impacts."[220] Thus, the Updated Certificate Policy Statement, when read in conjunction with the Interim Policy Statement, appears to require mitigation measures accounting for third-party upstream and downstream emissions.

We respectfully submit, however, that recent congressional testimony by FERC Chairman Richard Glick appears to contradict the actual text of the 2022 Policy Statements. At a Senate

[217] Updated Certificate Policy Statement at P 74.

[218] *Id.* at P 75.

[219] Interim Policy Statement at P 3.

[220] Updated Certificate Policy Statement at 74. As discussed in Section IV.D, the Commission's "expectations" are commands in disguise.

committee hearing, Chairman Glick testified as follows in response to questions by Senator Cassidy:

> Chairman Glick: And I want to make it clear that we actually say that for downstream emissions we're not going to require you to do it. To mitigate. And that I said -
>
> Sen. Cassidy: And what about upstream? The guy at the well head is flaring. … [A]re you going to require mitigation for that?
>
> Chairman Glick: Same. We're not going to require that… upstream is very difficult to find… I'm not saying you can't ever do it, because we've just never found upstream emissions -
>
> Sen. Cassidy: So just to put a point on it, the only gas that you're going to require them to mitigate would be the fugitive gas associated with the pipeline operation itself?
>
> Chairman Glick: And construction, yes.[221]

It is difficult to harmonize Chairman Glick's testimony with the 2022 Policy Statements, which appear to require mitigation for all reasonably foreseeable indirect greenhouse gas emissions related to FERC-regulated facilities. The Chamber requests that the Commission clarify its position to state whether all indirect greenhouse gas emissions will require mitigation or, as Chairman Glick testified, mitigation will be limited to those emissions attributable to a project's construction and the fugitive emissions resulting from its operation.

B. The Commission Should Clarify When It Will Re-open the Record for the Projects Currently Pending Before It and Provide a Timeline for Issuing Decisions on These Outstanding Applications.

The Chamber seeks clarification to better understand how the Commission will apply the Updated Certificate Policy Statement to pending cases. On March 9, 2022, Chairman Glick

[221] Senate Committee on Energy & Natural Resources, Full Committee Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines (Mar. 3, 2022) (video) beginning at timecode 1:45:20, *available at*, https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines.

submitted a chart documenting 32 pending projects to Members of the U.S. House Committee on Energy & Commerce.[222] The Chamber is unique among other participants in this proceeding in that its membership encompasses a very broad range of diverse interests, from the regulated pipeline companies to the various classes of customers that rely on those companies and the associated gas infrastructure to meet their end-use natural gas needs. Natural gas is necessary both as an energy source for these companies and as an input for industrial processes required to keep America competitive, particularly during a time of supply chain and inflationary pressures. Hence, its members rely upon the transportation and storage of natural gas from the facilities with applications now pending before FERC. An inefficient regulatory process provides unnecessary delays in access to this critical commodity.

For this reason, the Chamber seeks clarification of: (1) how project sponsors will know if a record needs to be updated; (2) the timeline the Commission will impose to review pending projects; and (3) the standard the Commission will apply to certificates that were granted under the 1999 Certificate Policy Statement, but which may be subject to rehearing or remand before a federal court. Several of these projects are supported by precedent agreements with Chamber member companies and are necessary to support their gas supply and planning needs. The Commission states an intention to reopen the associated records to allow sponsors of pending projects to supplement such records to meet the agency's new certificate requirements. Doing so, especially without further guidance, may undermine existing contracts in addition to and apart from precedent agreements that regulated pipelines and their customers are relying on to manage risk. These could be credit agreements, hedge agreements, asset management agreements and

[222] Letter from Richard Glick, Chairman, Federal Energy Regulatory Commission, to The Hon. Cathy McMorris Rodgers, Ranking Member, Comm. on Energy and Commerce, and The Hon. Fred Upton, Ranking Member, House Energy & Commerce Comm. Subcomm. On Energy, United States House of Representatives (Mar. 9, 2022).

related NAESB contracts for the purchase and sale of gas, material supply contracts, and even organizational documents such as limited liability company agreements. All of the contracts that are considered as part of a pipeline project development are the product of extended negotiation periods. While contracting parties do their best to manage risk, any guidance that the Commission can provide will help with risk mitigation. Otherwise, increased risk will result in increased prices that ultimately will be borne by the natural gas consumer in contravention of the NGA. Moreover, the Commission's decision to change the rules, including retroactively applying these changes to pending certification applications, is causing immediate harm to regulated entities, including applicants that, prior to the issuance of the 2022 Policy Statements, would have met the bar for public need set under the 1999 Certificate Policy Statement, and therefore be entitled to a certificate. The new requirement to supplement their applications deprives such entities of the reasonable certainty provided by the Commission prior to the issuance of the 2022 Policy Statements.

C. The Commission Should Clarify How it Will Account For the Importance of Reliability and Resiliency Concerns in Evaluating the Public Interest.

The Chamber seeks clarification as to how, and to what extent, the Commission will consider reliability and resilience of the gas and electric systems when performing its public interest analysis. A central purpose of the NGA is to distribute natural gas to consumers,[223] particularly to "keep the lights on" and provide heat in the winter and electricity for cooling in the summer.[224] However, the four major interests underlying the Commission's public interest

[223] *See*, *e.g.*, 15 U.S.C. § 717(a) ("it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest").

[224] North American Electric Reliability Corporation (NERC) Long Term Reliability Assessment, at 5 (Dec. 2021), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf.

analysis listed in the order do *not* include reliability or resilience.[225] The Updated Certificate Policy Statement, in particular, suggested that the need for natural gas to meet essential gas residential service and electric reliability demands will be balanced against the Commission's concern about overbuilding and numerous other inchoate and ill-defined interests and potential mitigation proposals.[226] Clarification is therefore necessary so that pipeline customers know how to support those pipelines that file applications to support their needs while meeting the Commission's new "project need" standards.

Further, the Commission has selected perhaps the worst time in recent memory to ignore the need for reliable and resilient natural gas infrastructure. The recent hostilities between Russia and Ukraine have contributed to spikes in energy prices and have underscored the need to limit reliance on energy importation as much as possible, while also ensuring that the United States' abundant supplies of natural gas are available both domestically and for export to our international allies and partners through FERC-regulated LNG terminal facilities. Just a few years ago, the United States became a net total energy exporter – a first since 1952.[227] This energy independence kept prices low, supply steady, and the economy internationally competitive. Energy independence benefits Americans here at home while providing an important counterweight to gas

[225] *See* Updated Certificate Policy Statement at P 69. The only reference to resilience under the Order's analysis section is that "community resilience data" can be helpful when the Commission considers its impact on environmental justice communities. *Id.* at P 61.

[226] *See id.* at PP 69 (potential overbuilding), 74 (environmental impacts and mitigation), 78 ("more expansive" review of impacts to landowners beyond issues raised by permanent rights-of-way), 79 (environmental justice and equity).

[227] *See* https://www.eia.gov/energyexplained/us-energy-facts/imports-and-exports.php (last visited Mar. 17, 2022).

exports from hostile nations.[228] Congress has already determined, through its amendment to section 3 of the NGA in the Energy Policy Act of 2005, that exporting natural gas (i.e., having abundant production and transport capacity for both domestic and international needs) is in the public interest.[229] This makes the reliability and resiliency of natural gas infrastructure vital not just to domestic interests but to American foreign policy.

The Chamber therefore requests clarification from the Commission as to how it will account for the resiliency and reliability of natural gas infrastructure in evaluating the public interest under NGA section 7. The Chamber also requests clarification as to how the Commission will incorporate these resiliency and reliability concerns into its "public interest" reviews under NGA section 3, which explicitly supports the export of natural gas as being in the public interest.

[228] *See, e.g.*, Written Testimony of Richard Click, Chairman, Federal Energy Regulatory Commission, Before the Committee on Energy and Natural Resources, U.S. Senate (Mar. 3, 2022) at 3 (LNG facilities "could, potentially, help to reduce our allies' energy dependence on Russian gas.").

[229] Under 15 U.S.C. § 717b(c), Congress already determined that "exportation of natural gas to a nation with which there is in effect a free trade agreement requiring national treatment for trade in natural gas, *shall be deemed consistent with the public interest*." (emphasis added). Even for countries without a free trade agreement, the NGA presumes exportation is in the public interest unless the Department of Energy "finds that the proposed exportation … will not be consistent with the public interest." *Id.* § 717b(a).

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, the Chamber respectfully requests that the Commission grant rehearing and clarification of the Updated Policy Statement and Interim Policy Statement.

Respectfully submitted,

/s/ Emily Mallen

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Dated: March 18, 2022

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

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

/s/ Jimmie Zhang
Jimmie Zhang