CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

May 26, 2021

Ms. Kimberly Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

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

Dear Secretary Bose:

The U.S. Chamber of Commerce ("the Chamber"), appreciates the opportunity to respond to the Notice of Inquiry ("NOI")[1] issued by the Federal Energy Regulatory Commission ("FERC" or "Commission") on February 18, 2021, to review the Commission's current policy framework for the certification of new natural gas transportation facilities (the "Certificate Policy Statement").[2]

The Chamber's Global Energy Institute previously submitted comments in this docket on July 25, 2018[3] in response to the Commission's initial NOI of April 25, 2018.[4] These new comments address changed circumstances occurring since our 2018 comments were filed. Hence, they supplement but do not replace our prior statements. These comments also address additions and revisions to the questions posed by FERC since 2018, including but not limited to the additional category of questions added to the NOI on the potential impacts of pipeline certifications on environmental justice communities.[5] We hope to be of service to the Commission as it considers whether modifications to its 1999 Certificate Policy Statement are necessary to ensure that FERC's regulatory interpretations continue to align with its statutory mandates under the Natural Gas Act ("NGA").[6]

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[1] *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021) (published in the Federal Register at 86 Fed. Reg. 11,268 (Feb. 24, 2021)) ("NOI").
[2] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) ("Certificate Policy Statement").
[3] *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000, Comments of Global Energy Institute, U.S. Chamber of Commerce (filed Jul. 25, 2018) ("Chamber 2018 Comments") *available at* https://www.globalenergyinstitute.org/sites/default/files/USCC%20Comments%20--%20PL18-1-000.pdf.
[4] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) (published in the Federal Register at 83 Fed. Reg. 18,020 (Apr. 25, 2018)) ("2018 NOI").
[5] In addition to the new category on environmental justice community impacts, FERC modified some or added additional questions concerning: (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.
[6] 15 U.S.C. §§ 717 *et seq.* (2018).

As background, our 2018 comments focused on ensuring that low-cost, abundant, domestic natural gas resources continue to play a key role in supporting the U.S. economy. We provided comments to ensure that FERC continues to impartially evaluate the development of the nation's natural gas transportation network as a means of creating jobs and promoting economic growth. We also 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 remains committed to the principles we outlined in our 2018 comments. However, we recognize that changes in our economy, how energy is produced and consumed, and the growing awareness of climate impacts on resiliency and reliability support the need for a modernized approach to the certification of gas pipeline infrastructure. Along these lines, the role of natural gas in reducing carbon emissions from the electric power sector cannot be overstated. We also agree with the sentiments raised in public statements by Commissioner Allison Clements that the Commission's certificate process can be strengthened to make certificate orders more durable and less litigious.[7]

Since 2018, a number of high profile pipeline projects found by the Commission to be required by the public convenience and necessity under the NGA ultimately were cancelled or have been significantly delayed due at least in part to post-certificate order litigation creating heightened risks to the projects' viability.[8] The Commission has itself created additional uncertainty with a series of orders issued over the past several months that undermine regulatory certainty for pipeline developers.[9] While the fundamental architecture of the Certificate Policy Statement remains relevant and viable, we agree that continuation of the *status quo* is unsustainable for any project developer seeking to move forward with the planning and development of costly critical energy infrastructure.

As the Commission considers ways to strengthen its Certificate Policy Statement, its overriding aim, flowing from Congress's command to the agency, should be to make pipeline certification more reliable and predictable, as opposed to more difficult. It is Congress who has decided that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest,"[10] and the U.S. Supreme Court which has held that the purpose of the NGA is to "encourage the orderly development of plentiful supplies of . . . natural

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[7] M. Weber & C. Paul, New FERC Commissioner Clements Targets Revamping 'Outdated' Pipeline Policy, S&P Global Market Intelligence, Feb. 3, 2021, *available at* https://www.spglobal.com/platts/en/market-insights/latest-news/natural-gas/020321-new-ferc-commissioner-clements-targets-revamping-outdated-pipeline-policy
(Commissioner Clements stating: "What we need to do is to modernize the policy in a manner that considers the reality of large infrastructure investment and considers the interests of individuals and communities affected by those investments, such that when it comes time to consider a new gas pipeline there, there's some credibility to the need determination.").

[8] Some of the more high-profile impacted projects include the Atlantic Coast Pipeline (Docket Nos. CP15-554, CP15-555, and CP15-556), Mountain Valley Pipeline (Docket Nos. CP16-10, CP21-57), Constitution Pipeline (Docket No. CP13-499), and PennEast Pipeline (Docket No. CP15-558).

[9] *See e.g.*, *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020), 85 Fed. Reg. 40113 (July 6, 2020) (Order No. 871), Order No. 871-A, 174 FERC ¶ 61,050, 86 Fed. Reg. 7643 (Feb. 1, 2021), *order on reh'g and clarification, and setting aside, in part, prior order*, Order No. 871-B, 175 FERC ¶ 61,098 (2021); *N. Natural Gas Co.*, 174 FERC ¶ 61,189 (2021); *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021).

[10] 15 U.S.C. § 717(a).

gas at reasonable prices."[11] The mandate Congress has handed 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. Rather, the Commission must 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.

Hence, the Chamber supports the Commission's efforts to modernize the Certificate Policy Statement and appreciates the delicate balance it must undertake to be responsive to a diverse array of stakeholders. It is clear from the Commission's technical conferences on the creation of an Office of Public Participation in Docket No. AD21-9, its creation of a new senior-level environmental justice position, and its recent orders implicating intervention deadlines and project timelines,[12] that the Commission is already seeking to expand public access to its proceedings. The extension of these efforts to certificate review proceedings can strengthen the outcomes, provided the process remains orderly and promotes the finality of issued certificates and regulatory certainty for project development.

The Chamber is pleased to offer these additional comments in response to the Commission's NOI that focus on maintaining and improving its framework for pipeline certification.

I. The Commission's Statutory Obligations Under the Natural Gas Act and the National Environmental Policy Act Control the Policies the Commission Can Enact to Analyze and Address Environmental Impacts, Including Potential Project Impacts to Environmental Justice Communities and the Evaluation of Greenhouse Gas Emissions.

As a creature of statute, any action that the Commission undertakes to reform the Certificate Policy Statement must align with "those authorities delegated to it by Congress."[13] Thus, a revised policy, as well as its application, must comport with FERC's NGA authorities, in addition to its obligations under the National Environmental Policy Act ("NEPA"), which ensure the Commission considers the environmental impacts of its certificate decisions. These two statutes are distinct, however, and the lines between their applications should not be blurred. The NGA mandates that the Commission approve the construction and operation of natural gas pipeline infrastructure if it finds that it "is or will be required by the present or future public convenience and necessity."[14] Moreover, NGA section 1(a) provides that "it is declared that the business of

[11] *Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976) ("*NAACP*"); *see also New Fortress Energy LLC*, 174 FERC ¶ 61,207 at P 11 (2021) (C. Danly, dissenting) (providing that prudence counsels the Commission to avoid "creat[ing] obstacles to the development of the very industries we are charged with encouraging and overseeing").

[12] *See N. Natural Gas Co.*, 175 FERC ¶ 61,052 (2021) (granting late motions to intervene); Order 871-B, 175 FERC ¶ 61,098 (prohibiting authorizations to proceed with construction of pipeline and LNG facilities under certain scenarios).

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

[14] 15 U.S.C. § 717f(e).

transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[15]

In contrast, NEPA is a purely procedural statute and "does not dictate particular decisional outcomes."[16] Instead, it mandates that federal agencies properly identify and evaluate the environmental effects of their proposed actions,[17] thereby prescribing processes, but not particular substantive results.[18] Hence, the Commission is within its statutory rights 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 decisionmakers the qualitative and quantitative tools they need[] to make an informed choice for themselves…[and] nothing more."[19]

In particular, while the Commission may consider mitigation measures, the Supreme Court has confirmed that NEPA does not require a "mitigation plan be actually formulated and adopted."[20] Consistent with the limits of agencies' substantive authorities, the mitigation of environmental impacts can assist agencies and applicants in the regulatory process. For example, the consideration of otherwise lawful mitigation measures to lessen or avoid potentially significant environmental effects may allow an agency to proceed based on an environmental assessment or a categorical exclusion, rather than an environmental impact statement.[21] At the same time, it deserves emphasis that although NEPA requires agencies to analyze mitigation in certain

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

[16] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

[17] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does not 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 Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("*Methow Valley*") ("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."); *id.* at 351.

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

[19] *Sierra Club v. FERC*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) ("*Sabal Trail*").

[20] *Methow Valley,* 490 U.S. at 352-53.

[21] *See* 40 C.F.R. § 1501.6(c) ("The finding of no significant impact [FONSI] shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts."); CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304, 43324-25 (Jul. 16, 2020) ("The second sentence [of § 1501.6(c)] codifies the practice of mitigated FONSIs, consistent with CEQ's Mitigation Guidance [Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact, 76 Fed. Reg. 3843 (Jan. 21, 2011), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf]. … When preparing an EA, many agencies develop, consider, and commit to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require preparation of an EIS. An agency can commit to mitigation measures for a mitigated FONSI when it can ensure that the mitigation will be performed, when the agency expects that resources will be available, and when the agency has sufficient legal authorities to ensure implementation of the proposed mitigation measures.") (footnote omitted).

circumstances, NEPA is not a substantive statute that requires agencies to mitigate environmental impacts.[22]

NEPA cannot be used to broaden the Commission's substantive authority under the NGA.[23] 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."[24] The D.C. Circuit identified the statute's "principal purpose" as "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[25]

We note that the D.C. Circuit also has observed that "FERC will 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 court added that the Commission may "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.[27] However, as the Commission weighs a potential project's benefits against its environmental impacts, FERC's concept of benefits is informed by the "principal purpose" of the NGA, not an environmental benefit that may be within the purview of another agency under another statutory scheme. Thus, while environmental impacts identified during the NEPA process must be carefully considered by the Commission, their existence does not portend, nor dictate, the downfall of a particular project. The NGA simply does not authorize the Commission to deny a project on the basis of policy considerations outside of its statutory authority or expertise.

Moreover, while FERC has delegated authority to interpret the NGA, the Council on Environmental Quality ("CEQ"), "established by NEPA with authority to issue regulations interpreting it," oversees federal agency implementation of NEPA.[28] FERC, therefore, must comply with CEQ's NEPA regulations when applying its own.[29] Hence, the Commission's application of NEPA also must align with the CEQ's regulations implementing the statute, which

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[22] Consistent with *Methow Valley*, the CEQ NEPA regulations confirm this proposition, stating that "[w]hile NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation." 40 C.F.R. § 1508.1(s). *See also* 85 Fed. Reg. 43350 ("NEPA does not require adoption of any particular mitigation measure") (citing *Methow Valley*, 490 U.S. at 352-53).

[23] *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.").

[24] *Atlantic Refining Co. v. Pub. Serv. Comm'n of State of N.Y.*, 360 U.S. 378, 389 (1959).

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

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

[27] *Id*.

[28] *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 757 (2004); *see also* 40 C.F.R. § 1500.1(b); *id.* § 1500.3(a).

[29] *See* 18 C.F.R. § 380.1 (explaining that FERC regulations implementing NEPA comply with the CEQ regulations except when they are "inconsistent with the statutory requirements of the Commission.") (citing 40 C.F.R. parts 1500 through 1508).

were revised last year.[30] The Chamber was supportive of the updates to CEQ's NEPA implementing regulations in support of more effective and transparent agency decision-making.[31] While the CEQ is considering revising its NEPA regulations in the near future, any non-trivial changes to the regulations would be subject to notice and comment rulemaking, which could take at least several months, if not much longer, to complete.[32] Compliance with the existing regulations, which are currently in force and binding on agencies, is essential for regulatory certainty. Moreover, the regulations in place today reflect a lengthy, thorough, and careful process of CEQ review, interagency discussion, and extensive public input and align with the Chamber's 2018 comments supporting NEPA reviews that are more efficient and consistent with that statute's core requirements. The Chamber thus urges the Commission to perform its NEPA reviews consistent with the regulations as they presently exist, as required by law and as a matter of policy.

As explained below, the Commission's authorities under the NGA and NEPA inform how it can and should consider the environmental impacts of its certificate decisions on environmental justice communities and on the propagation of greenhouse gas emissions, two important topics raised in the NOI and by President Biden.

A. The Commission's consideration of effects on environmental justice communities.

The NOI asks a series of questions on how the Commission can incorporate considerations of potentially affected environmental justice communities into its certificate review process. It references Executive Orders ("EOs") 12,898 and 14,008,[33] along with concerns raised in previous certificate orders, as factors driving its decision to focus on the potential impacts of pipeline projects on environmental justice communities. The questions raised include interpretations of the Commission's statutory authority, including whether "the NGA, NEPA, or other federal statutes set forth specific duties for the Commission to fulfill regarding environmental justice analyses in certificate proceedings under the NGA?"[34]

The Chamber agrees that environmental justice impacts could be considered, and are considered today, as part of any certificate application. However, no court has ever deemed environmental justice to be central to the NGA's "public interest" determination.[35] Instead,

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[30] *See* 40 C.F.R. § 1507.3(b) (explaining that agencies are not permitted to "impose additional procedures or requirements beyond those set forth" in the current NEPA regulations, which would include "cumulative" and "indirect" effects now excluded from the definition of "Effects" at 40 C.F.R. § 1508.1(g)).

[31] Letter from Marty Durbin, U.S. Chamber of Commerce, to Hon. Mary Neumayr, White House Council on Envtl. Quality, Mar. 10, 2020, *available at* https://www.globalenergyinstitute.org/sites/default/files/2020-03/us_chamber_of_commerce_comments_on_ceq_nepa_proposed_rule_-_3_10_2020.pdf.

[32] The newly revised CEQ NEPA regulations resulted from an extensive process of review and public input, including an advance notice of proposed rulemaking, that took about three years to complete. *See* 85 Fed. Reg. 43312-13 (discussing, *inter alia*, CEQ, Initial List of Actions To Enhance and Modernize the Federal Environmental Review and Authorization Process, 82 Fed. Reg. 43226 (Sept. 14, 2017)).

[33] Exec. Order 12,898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994); Exec. Order 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 2, 2021).

[34] *See* NOI, Question E5.

[35] *See e.g.*, *Sabal Trail*, 867 F.3d at 1367-71 (reviewing an environmental justice analysis based on NEPA and the Administrative Procedure Act, not the NGA); *see also id.* at 1368 n.5 ("Because FERC voluntarily performed an environmental-justice review, we need not decide whether Executive Order 12,898 is binding on FERC.").

environmental justice has been considered in performing analyses within the NEPA framework consistent with EO 12898,[36] pursuant to Title VI of the 1964 Civil Rights Act,[37] and under the Equal Protection Clause of the 14th Amendment.[38] Hence, the NGA, without a specific directive to consider environmental justice impacts pursuant to that statute's "public interest" framework,[39] is an inappropriate vehicle to consider environmental justice.

The Commission, however, may continue use of the NEPA process to consider potential impacts to environmental justice communities. Environmental justice is already part of the Commission's NEPA review process, as FERC follows the directives in EO 12898 encouraging independent agencies to consider "disproportionately high and adverse human health or environmental effects" of their actions on minority and low-income populations.[40] NEPA does not obligate the Commission to choose a course of action that has the least-harmful effects, or to take any action that would have the least disproportionate burden on potentially affected environmental justice communities.[41] However, the Commission does have discretion, consistent with NEPA, to choose a course of action that appropriately reduces environmental impacts while still meeting a project's purpose and need.

When applying NEPA analysis to identify environmental justice communities, the Commission traditionally has followed the U.S. Environmental Protection Agency's ("EPA's") lead and used tools created by the EPA. As the Commission considers whether it needs to update or establish its methodologies for identifying environmental justice communities and evaluating potential impacts, the Chamber asks that the Commission defer to agencies with more expertise in this area. It is clear by the statements made in EO 14,008 and the ongoing actions by CEQ, the EPA, and the White House Environmental Justice Interagency Council (the "Interagency Council") and White House Environmental Justice Advisory Council ("Advisory Council"), which were created by EO 14008, that the Biden Administration is moving forward with considering changes to how the federal government should approach environmental justice analyses. The appropriate course of action is for FERC to let the expert agencies, such as CEQ and EPA, lead in this area as they consider interagency and council recommendations. They are already working on updates to various environmental justice tools and metrics, including the EJSCREEN tool. If and when new tools are finalized, the Commission can consider whether it is appropriate, and consistent with its statutory authority, to refer to them as part of its pipeline certificate evaluation.

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[36] *See e.g.*, 85 Fed. Reg. 43308 n.29 (citing Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf).

[37] *See e.g.*, *Guardians Ass'n v. Civil Service Commission*, 463 U.S. 582 (1983) (explaining that Title VI requires proof of intentional discrimination); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (holding that Title VI extends only to "intentional discrimination," does not create a private right of action to enforce regulations based on disparate impact).

[38] 42 U.S.C. § 2000d *et seq.*; *see e.g.*, *E. Bibb Tiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*, 706 F. Supp. 880 (M.D. Ga. 1989) (considering environmental justice under the 14th Amendment).

[39] *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).

[40] *See* NOI at P 20 (referencing E.O. No. 12,898, §§ 1-101, 6-604, 59 Fed. Reg. 7629, at 7629, 7632).

[41] *Sabal Trail*, 867 F.3d at 1368 (citing *Communities Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004)) (stating, in reviewing environmental justice analysis, that "[t]he analysis must be 'reasonable and adequately explained,' but the agency's 'choice among reasonable analytical methodologies is entitled to deference,'" and that "[a]n agency is not required to select the course of action that best serves environmental justice, only to take a 'hard look' at potential environmental justice issues").

It would be inappropriate for FERC to delve outside of its statutory authority under the NGA and to risk duplication or inconsistency with regard to the ongoing work at the expert agencies.

While the Commission awaits action by the EPA and others, it can continue to improve its NEPA process to ensure that impacts to environmental justice communities are considered. Such improvements may include prioritizing early engagement with the public, focusing the NEPA analysis on the significant impacts to make agency documentation more accessible to the public, and evaluating alternatives that reduce environmental justice impacts. This can include working with project applicants to examine routes that avoid or reduce impacts on particular communities before a particular route is locked-in, or considering construction methodologies that have a lower emissions profile. The Commission also can improve its public participation to allow environmental justice communities to more meaningfully engage in the certificate process. This can be accomplished through the newly staffed Office of Public Participation, through the adoption of more user-friendly communications systems for project information, and through the dissemination of such communications in additional languages.

NEPA offers a number of pathways for FERC to consider that could improve environmental analyses performed during the certificate process. However, whatever actions the Commission decides to take, it must ensure that it provides clear guidance to all impacted stakeholders well in advance so that applicants and the public can respond accordingly. In order to ensure regulatory certainty, no policies should be permitted to be made piecemeal, or applied retroactively.

B. The Commission's consideration of environmental impacts.

As stated in our 2018 comments, the Chamber supports FERC's efforts to improve its environmental review process within the boundaries of its statutory authorities under the NGA and NEPA. Several of the questions posed in the 2018 NOI, and then added or revised in the most recent 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. Moreover, as with issues concerning incorporation of environmental justice into project reviews, the Biden Administration has launched a whole-of-government approach to addressing climate change. While the Commission is an integral part of the government, it must also be mindful that it is acting within an evolving landscape, and with agencies such as CEQ and EPA taking lead roles on issues with which they have particular expertise. Hence, several of the questions posed within the NOI may be premature. This is particularly true with respect to the consideration of greenhouse gas emissions under NEPA, on which official federal government guidance is currently being reviewed for potential revision.[42]

To the extent the Commission continues to include greenhouse gas emissions in its consideration of the reasonably foreseeable environmental effects of projects, the proper and relevant statutory framework is the NEPA framework, not the NGA.[43] It is under NEPA that the

[42] For example, in February 2021, CEQ rescinded draft guidance issued in 2019 that in turn followed the rescission of draft guidance issued in 2016 on how to consider greenhouse gas emissions.

[43] *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 43 (2018) (providing that there is no requirement for the Commission "to consider environmental effects that are outside of our NEPA analysis of the proposed action" in determining "whether a project is in the public convenience and necessity under [S]ection 7(c)"); *see also id.* at n.96

CEQ has advised agencies to "consider all available tools and resources in assessing GHG emissions and the climate change effects of their proposed actions."[44] This directive does not change the Chamber's position set forth in its 2018 comments that the Commission's evaluation of greenhouse gas emissions and climate change impacts should adhere to the fundamental principles of NEPA. As we stated previously, NEPA does not create special tests or standards for greenhouse gas emissions or climate change as compared with other environmental impacts and sources of impacts. Hence, the boundaries of foreseeability and causation apply as they do to all other project impacts. Moreover, the Chamber continues to maintain that any attempt by the Commission to create a significance threshold would be arbitrary. Even CEQ has declined to establish a greenhouse gas emissions "significance" test.[45]

Another important series of questions posed by the Commission concerns the Social Cost of Carbon ("SCC") and its applicability in pipeline certificate reviews. In 2018, the Chamber offered comments stating that the SCC is not an appropriate tool for FERC's toolbox. The Chamber's views on the SCC's application to certificate reviews remain as they were in 2018. The SCC tool was developed to serve as a benchmark for calculating the potential benefits of curbing carbon emissions in "regulatory actions"—as defined in EO 12,866[46]—in a regulatory cost-benefit analysis performed within the confines of the EO 12,866 regulatory development process.[47] While the estimates of the SCC have fluctuated since its inception, the underlying methodology and models remain unchanged and should not be applied beyond their designed use for regulatory cost-benefit analysis. Not only is a certificate proceeding not a "regulatory action," the SCC was not designed to be applied in project-level decision-making.[48] The Commission historically also has taken the view that while the SCC may be appropriate to use in cost-benefit analysis associated with certain rulemakings, it is not useful or appropriate to apply in NEPA documents.[49] The D.C.

("Nothing in *Sierra Club v. FERC*[, 867 F.3d 1357 (D.C. Cir. 2017),] requires the Commission to consider environmental effects beyond that which is required by NEPA.").

[44] 86 Fed. Reg. 10,252.

[45] *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 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").

[46] Exec. Ord. 12,866, Regulatory Planning and Review, 58 Fed. Reg. 190 (Oct. 4, 1993).

[47] U.S. Gov't Interagency Working Group on Social Cost of Carbon, Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis – Under Executive Order 12866, Feb. 2010, https://obamawhitehouse.archives.gov/sites/default/files/omb/inforeg/for-agencies/Social-Cost-of-Carbon-for-RIA.pdf ("The purpose of the "social cost of carbon" (SCC) estimates presented here is to allow agencies to incorporate the social benefits of reducing carbon dioxide (CO2) emissions into cost-benefit analyses of regulatory actions.").

[48] *Fla. Se. Connection*, 162 FERC ¶ 61,233 at PP 37-38 (2018) (LaFleur and Glick, Comm'rs, dissenting).

[49] *See*, *e.g., Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (explaining that the SCC is not appropriate for project-level NEPA review because: "(1) EPA states that 'no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations' and consequently, significant variation in output can result; (2) the

Circuit has upheld the Commission's rationale for excluding use of the SCC from project approvals.[50]

Were the Commission inclined to change its historical viewpoint on the SCC, it should proceed cautiously given that the CEQ's NEPA regulations and greenhouse gas guidance, as well as the federal government's SCC estimates, are all under review and subject to change. As required by EO 13990, an interagency working group ("IWG") has reconvened to update the SCC estimates by January 2022.[51] The IWG, co-led by the White House Council of Economic Advisers and Office of Management and Budget ("OMB") and including experts from more than a dozen federal agencies and offices, was created to attempt to develop a uniform government-wide estimate. On May 7, 2021, OMB published a notice in the Federal Register soliciting comment on interim SCC values, among other questions, which coincides with this NOI docket.[52] The technical elements of the SCC (e.g., discount rates and global vs. domestic figures) discussed by the IWG in years past are largely based on OMB's Circular A-4.[53] Separately, President Biden directed OMB to begin a process to review Circular A-4 on January 20, 2021.[54] Indeed, the Commission should follow OMB guidance and await the outcome of OMB's Circular A-4 review and the SCC updates.[55] The Commission's foray into this area as these efforts are pending would be premature, while also residing well outside of FERC's statutory authority or expertise.

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tool does not measure the actual incremental impacts of a project on the environment; and (3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA reviews.") (footnotes omitted).

[50] *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019); *EarthReports, Inc. v. FERC*, 828 F. 3d 949, 956 (D.C. Cir. 2016).

[51] Exec. Order 13,990, Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7037 (Jan. 25, 2021).

[52] 86 Fed. Reg. 24669 (e.g., request for comment on "advances in science and economics, including approaches to adequately take account of climate risk, environmental justice," "how best to reflect the latest scientific and economic understanding of discount rates," and "areas of decision-making . . . where the SC-GHG estimates should be applied").

[53] *See* Office of Mgmt. & Budget, Circular A-4: Regulatory Analysis (Sept. 17, 2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf (providing OMB's guidance to Federal agencies on the development of regulatory analysis as required under E.O. 12,866, which continues to be relied upon by the Biden Administration); *see also*, https://www.whitehouse.gov/omb/information-for-agencies/circulars/).

[54] Modernizing Regulatory Review, 86 Fed. Reg. 7223 (Jan. 26, 2021).

[55] While FERC is an independent agency and is not required to abide by E.O. 12,866, OMB has issued guidance requesting that independent agencies follow the E.O. and associated OMB guidance. *See* Memorandum from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, Exec. Order 13579, "Regulation and Independent Regulatory Agencies" (Jul. 22, 2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-28.pdf (requesting that independent agencies follow the key principles and central requirements of E.O. 13,563 on Improving Regulation and Regulatory Review, Jan. 18, 2011, which supplements and reaffirms E.O. 12,866); Memorandum from Cass R. Sunstein, Adm'r, Office of Information & Regulatory Affairs, Exec. Order 13,563, "Improving Regulation and Regulatory Review," at 6 (Feb. 2, 2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2011/m11-10.pdf ("Executive Order 13,563 does not apply to independent agencies, but such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority."); Memorandum from Sally Katzen, Adm'r, Office of Information & Regulatory Affairs, Guidance for Implementing E.O. 12,866, at 1 (Oct. 12, 1993), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/inforeg/eo12866_implementation_guidance.pdf ("The Order as a whole applies to all Federal agencies, with the exception of the independent agencies . . . the independent regulatory agencies are requested on a voluntary basis to adhere to the provisions that may be pertinent to their activities."); *id.* at 2.

The constraints on the Commission's authority that we have noted do not mean that it is without discretion to consider greenhouse gas emissions as part of its NEPA process, and consistent with the hallmarks of NEPA to receive and evaluate: (1) the disclosure of environmental effects; (2) the consideration of alternatives; and (3) public feedback and participation. For example, the Commission can require additional data from project developers to obtain a fuller understanding of the reasonably foreseeable emissions effects from construction and operation of a project. It can also review reasonable project alternatives that may reduce emissions while meeting the proposed action's underlying purpose and need. While the Commission is not permitted to direct pipelines to construct particular facilities,[56] it can create appropriate market incentives that may promote the proposal and construction of incrementally lesser-emitting facilities, such as through the implementation of return on equity adders. Finally, the Commission can improve the public participation process, as it has already begun to do. The Chamber stresses, however, that whatever processes the Commission puts into place, it must do so in a manner that is clear, transparent, and enforced prospectively.

II. Project Need Should Continue to be Informed by Market Forces, Including the Execution of Precedent Agreements for Long-Term Transportation Service.

The success of the Certificate Policy Statement is evident in the nearly 23,000 miles of interstate pipelines, capable of transporting nearly 300 billion cubic feet per day, that has been constructed since 1999 without the need for subsidization by captive customers or government funding.[57] As the Commission moves forward with a modernized certificate policy statement, it should ensure that market forces, as opposed to government or customer subsidies, drive development. Market forces drive whether natural gas will be required to meet a customer's demand, and the Commission historically has been agnostic as to whether that natural gas was required for use by a local distribution company, a marketer, a producer, a generator, or an industrial facility. As FERC is aware, even if a project is anchored by a particular type of end-user, once gas enters the pipeline network, it can be bought or sold on a vibrant secondary market effectuated by the Commission's competitive open-access policies, including its capacity release program, which ensures pipeline capacity is utilized by the shippers that value it the most. Thus, the Commission's policies already take into account that the end uses for gas may – and most likely will – change over time. In fact, pipeline utilization changes on a daily basis, and any change as to how FERC considers market need may disrupt short- or long-term market pricing in the primary and secondary markets, which could in turn lead to increased prices for consumers.

Evidence of contracts for future service, often referred to as precedent agreements, have long been used by pipelines to obtain outside financing to construct their facilities as a way to demonstrate market need for a pipeline project. It is reasonable for the Commission to request additional information, beyond precedent agreements, to demonstrate market need, such as studies projecting increased gas demand, a retirement of other facilities, or a change in gas flows that requires new infrastructure to maintain reliability. However, it is not reasonable for the

[56] *See Tex. E. Transmission, LP*, 146 FERC ¶ 61,086 at P 46 (2014) (explaining that the Commission does not design projects and "the NGA does not give the Commission authority to direct the development of the gas industry's infrastructure either on a broad regional basis or in the design of specific projects."); *Missouri Gas Energy*, 75 FERC ¶ 61,166 (1996) (stating that the rules "do not require that a pipeline construct facilities').

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

Commission to disqualify any type of precedent agreement, including agreements amongst affiliates, to undermine a finding of market need. Affiliates have legitimate business reasons for seeking new capacity that should not be presumed away solely on the basis of a corporate relationship.

III. The Commission Should Continue to Lead on Infrastructure Development.

The Chamber's 2018 comments highlighted the important role that FERC plays as lead agency for NEPA review of a pipeline project, as directed by statute. As Executive Branch priorities shift to encourage greater consideration of environmental justice and greenhouse gas emissions in the NEPA analysis process, the Commission should not lose sight of its critical leadership role in pipeline approvals. This includes statutory duties in connection with coordinating and "ensur[ing] expeditious completion of" Federal authorizations for pipeline certifications.[58] The Commission must continue to honor Congress's mandate and to enable processes that are efficient, streamlined, and transparent. It is undisputed that a pipeline cannot move forward with any construction of new or replacement facilities to meet market demand without Commission approval. The promotion of policies that make the approval process less reliable, increase uncertainty and cost, and endanger the American public's access to safe, affordable natural gas will be counterproductive. Thus, the Commission's activities should continue to support the lowering of energy prices for consumers through the enactment of policies that promote the efficient construction of new facilities, and market-based principles that govern the competitive use of those facilities.

The Commission must be mindful to not inject uncertainty into its permitting processes, especially given the role that infrastructure development is required to play to support the ongoing energy transition. As Commissioner Mark Christie recently noted in his dissent to the Commission's Order Establishing Briefing in Docket No. CP16-9-012, FERC's actions in pipeline certificate proceedings can reverberate across "investment in *all* infrastructure projects."[59] By maintaining its role as a thoughtful, efficient leader on infrastructure development, the Commission can avoid the outcome that Commissioner Christie predicted could otherwise befall infrastructure projects, by "making them less appealing to engage in by those who normally seek to build the projects and harder to finance or, at the very least, more expensive to finance due to the increased risk created by this specter of uncertainty."[60]

IV. Conclusion

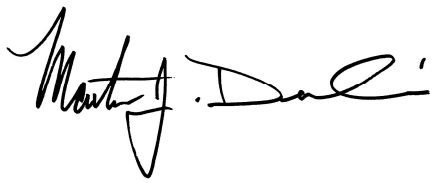
Even as the U.S. economy transitions to the use of lower-carbon fuels, the country continues to benefit from and require natural gas and its necessary transportation infrastructure. Natural gas-fired generation will continue to play an important role in our energy mix and remains an essential tool to balance the intermittent output of renewable resources such as wind and solar. The whole-of-government approach to climate change that has spurred some of the questions in the NOI does not require (or allow) the Commission to throw the baby out with the bathwater when it comes to natural gas pipeline certification decisions. Instead, the Commission should

[58] 15 U.S.C. § 717n(c)(1)(A).
[59] *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126, C. Christie dissent at P 6 (2021).
[60] *Id.*

continue to embrace its statutory mission of promoting the construction of this critical energy infrastructure, which has allowed our country to prosper, transporting low-cost domestic energy to American consumers and businesses alike. The strictures of the NGA and NEPA allow the Commission to maintain its proven framework, based on market and competition principles, while simultaneously improving procedures to ensure equity for all stakeholders, consistent with applicable legal and regulatory requirements.

The Chamber appreciates the opportunity to comment on the NOI.

Sincerely,



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