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

Subject: *Certification of New Interstate Natural Gas Facilities* and *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews* (Docket Nos. PL18-1-001 and PL21-3-001)

Dear Secretary Bose:

The U.S. Chamber of Commerce ("the Chamber") hereby responds to the Federal Energy Regulatory Commission's ("FERC" or "Commission") invitation to comment on two policy statements it issued on February 18, 2022, and then deemed to be drafts on March 24, 2022,[1] the *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*[2] and *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews Interim Policy Statement* (collectively, the "2022 Draft Policy Statements").[3] Without modification, the 2022 Draft Policy Statements dilute, and indeed are inconsistent with, the Commission's statutory mandate under section 7(e) of the Natural Gas Act ("NGA")[4] to certificate interstate natural gas pipeline facilities "required by the present or future public convenience and necessity."[5] By expanding the scope of the statute's "public interest" purpose to stretch the Commission's certification considerations into areas beyond those authorized by Congress, including the apparent requirement to mitigate upstream and downstream greenhouse gas impacts not connected to the infrastructure under review, the 2022 Draft Policy Statements would depart fundamentally from the Commission's statutory

[1] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022) ("Draft Policy Statement Order").
[2] 178 FERC ¶ 61,107 (2022) ("Updated Certificate Policy Statement").
[3] 178 FERC ¶ 61,108 (2022) ("Interim Policy Statement").
[4] 15 U.S.C. §§ 717 *et seq.* (2018).
[5] *Id.* § 717f(e).

role as an economic regulator tasked with protecting consumers by "encourag[ing] orderly development of plentiful supplies of . . . natural gas at reasonable prices."[6]

Finalization and implementation of the proposals set forth in the 2022 Draft Policy Statements would unreasonably impose upward pressure on natural gas prices by injecting considerable uncertainty into the Commission's review process and undermining investor confidence otherwise necessary to ensure "just and reasonable rates." Hence, the Commission should take this opportunity to course-correct. It can revise the 2022 Draft Policy Statements to align with its statutory mission while still being responsive to federal appellate decisions that concern the agency's obligations under the NGA and the National Environmental Policy Act ("NEPA").[7]

The Chamber is encouraged by the Commission's demonstrated ability to certificate new pipeline infrastructure in a bipartisan fashion, pursuant to its existing 1999 Certificate Policy Statement,[8] and in accordance with recent court decisions, while the 2022 Draft Policy Statements remain in draft form.[9] Continuing to do so will allow the Commission to regain its reputation as an agency that impartially evaluates the development of critical energy infrastructure at a time when resiliency and reliability are as crucial as ever to the American economy and national security.

I. Background

The Chamber, either directly or through its Global Energy Institute,[10] submitted comments in this docket on July 25, 2018[11] in response to the Commission's initial NOI of April 25, 2018,[12] and on May 26, 2021,[13] in response to the Commission's subsequent

[6] *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976) ("*NAACP*").

[7] 42 U.S.C. §§ 4321 *et seq.*

[8] *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).

[9] *See e.g.*, *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) ("*Columbia Gulf*"); *Tennessee Gas Pipeline, L.L.C.*, 178 FERC ¶ 61,199 (2022) ("*Tennessee*"); *Iroquois Gas Transmission Sys., LP*, 178 FERC ¶ 61,200 (2022) ("*Iroquois*").

[10] The mission of the Chamber's Global Energy Institute is to unify policymakers, regulators, business leaders, and the American public behind a common-sense energy strategy to help keep America secure, prosperous, and clean.

[11] *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) ("2018 Comments") *available at* https://www.globalenergyinstitute.org/sites/default/files/USCC%20Comments%20--%20PL18-1-000.pdf.

[12] *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").

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

NOI issued on February 18, 2021.[14] The comments endorsed proposals that would strengthen and modernize FERC's existing 1999 Certificate Policy Statement. They focused on the essential role that low-cost, abundant, domestic natural gas resources play in supporting the U.S. economy. Additionally, the Chamber offered constructive suggestions for an improved certificate policy that were reflective of FERC's obligations under the NGA and NEPA, while being attentive to FERC's concerns regarding the consideration of the interests of landowners, greenhouse gas emissions, and impacts to environmental justice communities in agency decisionmaking.

On March 18, 2022, prior to the Commission's order deeming the 2022 Draft Policy Statements to be drafts, the Chamber filed a Request for Rehearing and Clarification of the 2022 Draft Policy Statements. Among other things, the Chamber (along with many other stakeholders) argued that the Commission exceeded its statutory authority under the NGA and NEPA and violated the Administrative Procedure Act ("APA") when it issued the statements.[15] The Chamber raised legitimate concerns with the Commission's proposals to shift from evaluating a project's merit on economic consumer protection grounds to a new position that would permit denial of a NGA section 7 certificate of public convenience and necessity if FERC deems greenhouse gas emissions attributable to the project (and the project's customers) to be too high, and if it deems the project sponsor's proposed mitigation of those emissions to be insufficient. While the Chamber appreciates the Commission's decision to pull the 2022 Draft Policy Statements back from any immediate application, many of the substantive concerns that the Chamber raised in the Rehearing Request have not been abated. The Chamber incorporates its previous filings in this docket and supplements these points here for the Commission's ongoing consideration.[16]

II. Comments

For over eighty years, the Commission has consistently interpreted the phrase "public convenience and necessity" based on its core statutory obligation to make natural gas available and accessible at just and reasonable rates. This was primarily an economic test. The 2022 Draft Policy Statements fundamentally diverge from that position by importing non-economic considerations -- including concerns regarding global climate change -- into the public convenience and necessity test.

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[14] *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)) ("2021 NOI").

[15] *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, Docket Nos. PL18-1-000 *et al.*, Request for Rehearing and Clarification of the U.S. Chamber of Commerce (filed Mar. 18, 2022) ("Rehearing Request").

[16] *See Certification of New Interstate Natural Gas Facilities*, 179 FERC ¶ 61,012 at P 4 n. 8 (2022) (the Commission in rejecting the requests for rehearing explained that it "will consider the dismissed pleadings as comments on the draft policy statements, as appropriate.").

The Chamber is concerned that the proposed 2022 Draft Policy Statements, if finalized as written, would result in statutory overreach, while jumbling the Commission's certificate policy in a way that would make project development cost prohibitive, if not impossible. For the reasons provided in more detail below, the following proposals should each be revised, reformed, or removed (as appropriate) from a final updated certificate policy statement:

- Muddling the "threshold question" for public need by moving a "no subsidization" test to an unspecific "project need" test;
- Establishing a "significance" threshold of 100,000 metric tons per year ("mty") of carbon dioxide equivalent (CO_2e) based upon a "full burn" analysis for Environmental Impact Statement ("EIS") preparation under NEPA;
- Effectively requiring mitigation of upstream and downstream greenhouse gas emissions to meet the NGA "public interest" standard;
- Making gas end-use determinative of project need; and
- Making consideration of environmental justice community impacts part of the NGA "public interest" determination as opposed to a component of NEPA review.

The Chamber understands that the Commission is seeking to be responsive to recent lower court decisions through issuance of a new certificate policy statement. However, no federal court has ever questioned the sufficiency of the existing 1999 Certificate Policy Statement as an appropriate proxy for interpreting section 7(e) of the NGA.[17] The relatively small number of certificate orders that have been subjected to judicial review—of the countless certificate orders issued pursuant to the 1999 Certificate Policy Statement without incident—focus primarily on FERC's application of NEPA.[18] Therefore, FERC can abide by its statutory mandates and appropriately take into account recent court decisions without making the significant policy changes proposed in the 2022 Draft Policy Statements.

The Chamber's 2021 Comments explained that FERC has several pathways to improve environmental analyses performed during the certificate process consistent

[17] The Chamber is aware of only two instances in which a FERC certificate order issued pursuant to the 1999 Certificate Policy Statement has been vacated, and in neither instance did the court order changes to the 1999 Certificate Policy Statement. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) ("*Sabal Trail*"); *Environmental Defense Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021). To the contrary, the court's view of the 1999 Certificate Policy Statement has been entirely neutral. *See e.g.*, *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) ("*Minisink*"); *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015) ("*Myersville*").

[18] *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) (remanding case to FERC for further NEPA analysis without vacating underlying certificate).

with NEPA that do not require wholesale reinterpretations of the NGA.[19] However, the Chamber also cautioned that any action the Commission decides to take must provide clear guidance to all impacted stakeholders well in advance so that applicants and the public can respond accordingly. As explained below, the 2022 Draft Policy Statements, as written, do not accomplish this important goal and, among other things, are arbitrary and capricious and are not accompanied by an adequate and reasonable explanation for the changes proposed therein.

A. FERC Policy Must Align With Its Statutory Purpose Under the NGA.

As the Chamber explained in its prior comments, the Commission is a creature of statute and must abide by "those authorities delegated to it by Congress."[20] Any certificate policy, as well as its application, must comport with FERC's NGA authorities. The NGA at its core is a consumer protection statute.[21] The 2022 Draft Policy Statements appear to misunderstand that proposition. They do so by misinterpreting what the Commission can permissibly regulate under the NGA based on one line from *Atlantic Refining Co. v. Public Service Commission of New York*, which states that NGA section 7(e) "requires the Commission to evaluate *all factors* bearing on the public interest."[22] Using an expansive reading of "all factors," the Commission proposes to balance environmental interests with economic interests to determine whether a project is required by the public convenience and necessity. This forms the basis for the Commission's proposal to deny certificate applications if adverse impacts, including greenhouse gas emissions from unregulated upstream or downstream sources, "as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[23] *Atlantic Refining* also purportedly provides the foundation for the Commission to establish a set numerical significance threshold for greenhouse gas emissions necessitating an environmental impact statement ("EIS") under NEPA,[24] and possible certificate denial under the NGA.[25] FERC augments its interpretation of *Atlantic*

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[19] *See e.g.*, 2021 Comments at 11.

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

[21] *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.").

[22] 360 U.S. 378, 391 (1959) ("*Atlantic Refining*") (emphasis added) (referenced in the Updated Certificate Policy Statement at PP 4, 51, 72 and in the Interim Policy Statement at P 82).

[23] Updated Policy Statement at P 74.

[24] Interim Policy Statement at PP 82, 87.

[25] Updated Policy Statement at P 6 (citing *Sabal Trail*, 867 F.d at 1373) (explaining that NEPA does not require rejection or mitigation of a proposed project based on adverse effects, but that, at the same time, "an agency may require mitigation measures as a condition of its approval under the NGA, or withhold approval based on significant adverse effects.").

Refining with one line from *Sabal Trail* stating that, through the application of the 1999 Certificate Policy Statement, "FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment."[26]

Relying upon attenuated and incorrect readings of these two cases, among others,[27] the 2022 Draft Policy Statements would require significant changes to the Commission's certificate policy that ignore the full context of the NGA. In this very *same* docket, the Commission itself already has reasoned, 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.'"[28] Indeed, what is meant by the "public interest" under the NGA is found in the statute's opening clauses. Section 1 of the Act declares "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 pertaining to the transportation and sale of natural gas in interstate and foreign commerce is "necessary in the public interest."[29] It also incorporates a report of the Federal Trade Commission 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.[30]

It is on this basis that *Atlantic Refining* interprets the NGA. 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." This is part of the statute's larger context of ensuring "just and reasonable rates to the consumers of

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[26] *Sabal Trail,* 867 F.3d at 1373.

[27] *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; *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) ("*Vecinos*")).

[28] 2018 NOI at P 6 (citing *Atlantic Refining*, 360 U.S. at 391 and quoting *NAACP*, 425 U.S. at 669-70).

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

[30] *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).

natural gas."[31] As the Supreme Court also has found, the concept of "just and reasonable" extends beyond low prices for consumers and encompasses the opportunity for the regulated entity to earn a reasonable rate of return.[32]

The *Sabal Trail* decision that forms the other cornerstone of the 2022 Draft Policy Statements did not alter the Commission's statutory obligations under the NGA, nor re-write the statute's consumer protection purpose. If anything, *Sabal Trail* was opining on the type of analysis that FERC performed under its existing 1999 Certificate Policy framework, which would consider a project's environmental effects.[33] It did not require wholesale changes to the methodology used to certificate projects, nor reform the NGA's "public interest" mandate. Nor did it require the Commission to mitigate or minimize upstream or downstream effects, including greenhouse gas emissions, in order to certificate a pipeline project as being in the public interest.

It would be antithetical to the NGA for the Commission to use the statute's "public interest" mandate as a reason to prohibit the development of needed natural gas resources. To the extent the Commission intends to finalize the 2022 Draft Policy Statements, they must be revised to align with the NGA's primary purpose.

B. NEPA is Purely Procedural and Does Not Alter FERC's Substantive Statutory Authority.

In its 2021 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."[34] NEPA exists so that agencies can make "a fully informed and well-considered decision."[35] The agency must consider the "environmental consequences" of its proposed action.[36] However, NEPA "does not dictate particular decisional outcomes"[37] or that "an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations."[38] NEPA "focus[es] the agency's attention on the environmental consequences of a

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[31] *Atlantic Refining*, 360 U.S. at 388.
[32] *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).
[33] *See Sabal Trail*, 867 F.3d at 1373 (citing *Minisink* and *Myersville*'s discussion of the 1999 Certificate Policy Statement's balancing test).
[34] *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 37 (D.C. Cir. 2015).
[35] *Vt. Yankee Nuc. Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978).
[36] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).
[37] *Sierra Club*, 803 F.3d at 37.
[38] *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam) ("*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." (citing *Vt. Yankee Nuc. Power Corp.,* 435 U.S. at 558)).

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."[39] NEPA does not authorize agencies to require any form of mitigation.[40] 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.[41] Instead, NEPA mandates that federal agencies properly identify and evaluate the environmental effects of their proposed actions,[42] thereby prescribing processes, but not particular substantive results.[43]

The courts have been clear that the environmental effects that may be identified during the NEPA process are not commensurate with, nor a replacement for, the "public convenience and necessity" considerations central to NGA section 7. 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."[44] Given that NEPA is purely a procedural statute, NEPA analysis does nothing to alter the Commission's statutory authority to approve a pipeline project as required by the public convenience and necessity. It follows that the Commission may approve such a project even if it finds that the project will have high or adverse effects on an environmental resource. NEPA simply requires the Commission to appropriately consider the impacts to the resource.

Just as *Sabal Trail* did not expand the Commission's statutory authority under the NGA, it did not grant the agency any new authorities to require mitigation under NEPA. The Interim Policy Statement argues that *Sabal Trail* provides it with "'legal authority to mitigate' greenhouse-gas emissions that are an indirect effect of authorizing a pipeline project," provided the pipeline is the "legally relevant cause" of the environmental effects based upon a combinations of its NGA and NEPA authorities.[45] 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

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[39] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) ("*Methow Valley*").
[40] 40 C.F.R. § 1508.1 ("While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation.").
[41] *Methow Valley*, 490 U.S. at 347, 353.
[42] *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.").
[43] *Methow Valley*, 490 U.S. at 350.
[44] *Atlantic Refining*, 360 U.S. at 389.
[45] Interim Policy Statement at P 105 (quoting *Sabal Trail*, 867 F.3d at 1374).

whether any effects should, or could be, mitigated.[46] The Interim Policy Statement thus rests its entire weight on *dicta* that presumed (without analysis) that the Commission could require greenhouse gas emissions mitigation.[47] Additional cases issued since *Sabal Trail*, including *Food & Water Watch v. FERC*,[48] are similarly limited. 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 assessment, and did not hold or imply that NEPA requires mitigation.[49]

Making mitigation of indirect greenhouse gas emissions a requirement for a NGA pipeline certificate would be an unprecedented departure from Supreme Court case law, CEQ's NEPA regulations, and the Commission's own NEPA regulations,[50] and would go further that what is required by any other federal agency. As the Chamber stated in its 2018 Comments, the Commission's evaluation of greenhouse gas emissions and climate change impacts should adhere to the fundamental principles of NEPA. The boundaries of foreseeability and causation apply as they do to all other project impacts.[51]

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[46] *Sabal Trail*, 867 F.3d 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.").

[47] 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.

[48] No. 20-1132, 2022 WL 727037 (D.C. Cir. Mar. 11, 2022).

[49] *Id.* at *7.

[50] 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 emissions mitigation measures, much less requires them.

[51] CEQ's recently issued Phase 1 NEPA final rule, which makes specific changes to three of the NEPA regulations that CEQ had overhauled in 2020, does not change our analysis herein. For these three provisions, the phase 1 rule generally reverts to the approach in CEQ's 1978 regulations while making non-substantive changes to the 1978 regulatory text. National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,457 (2022) ("CEQ intends for the Phase 1 final rule provisions to have the same meaning as the corresponding provisions in the regulations in effect from 1978 to September 2020").

C. FERC Has No Authority To Regulate Greenhouse Gas Emissions From Upstream or Downstream Sources.

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 Draft Policy Statements propose. Throughout the 2022 Draft Policy Statements, the Commission appears to consider itself a *de facto* regulator of global climate change by assuming the existence of statutory authority to *prevent* the certification of natural gas infrastructure. This is evident in the Commission's stated intention "to fully consider climate impacts, in addition to other environmental impacts," when "making public interest determinations" under the NGA.[52] The Commission would then rely on the NGA to do what NEPA does not permit, effectively requiring the full mitigation of greenhouse gas impacts in order to certificate a project, even if those impacts occur outside of the Commission's jurisdiction. However, the NGA and NEPA provide FERC with no statutory authority to broadly regulate the greenhouse gas emissions associated with climate change.

The Chamber recognizes that FERC has been very public about its desire to address climate change. However, Congress has not clearly granted the Commission authority to address this important question. Instead, courts have held that Congress has tasked another agency, the U.S. Environmental Protection Agency ("EPA"), with determining whether and how to regulate greenhouse gases.[53] Unlike the EPA, FERC possesses no expertise that would support its claim to regulate in this space.[54] Its attempts to do so here may result in duplicative and inconsistent regulation of downstream or upstream emission sources without any congressional authorization for FERC to play such a role. Indeed, "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."[55]

Given the limits of its statutory authority, the Commission should revise its 2022 Draft Policy Statements. As explained below, this is necessary to: (i) prevent FERC from violating clear federalism principles; (ii) remove the arbitrary "significance" threshold

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[52] Updated Certificate Policy Statement at P 76.

[53] *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) (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"), *cert. granted*, 142 S. Ct. 417 (2021).

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

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

currently proposed; and (iii) ensure that FERC consumer protection policies remain consistent with the NGA. However, as also explained below, the Commission can consider mitigation of a regulated project's direct greenhouse gas emissions without running afoul of its statutory limitations.

i. The Commission's greenhouse gas mitigation proposals result in statutory overreach and violate clear federalism principles.

As written, the 2022 Draft Policy Statements would essentially mandate project sponsors to mitigate upstream and downstream greenhouse gas emissions to satisfy the public convenience and necessity test. This is because the Updated Certificate Policy Statement would allow FERC to "deny an application based on any of the types of adverse impacts…including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[56] To avoid such a denial, the Commission "expects" project sponsors "to propose measures for mitigating impacts."[57] However, 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.[58] As elaborated upon in the Interim Policy Statement, the effects to be mitigated are "to the greatest extent possible, a project's direct GHG emissions," while the Commission "also encourages project sponsors to propose mitigation of reasonably foreseeable indirect emissions, and will take such proposals into account in assessing the extent of a project's adverse impacts."[59] Thus, the Updated Certificate Policy Statement, when read in conjunction with the Interim Policy Statement, would implicitly require mitigation measures against a project's third-party upstream and downstream emissions.[60]

This framework, which would effectively make upstream and downstream greenhouse gas mitigation mandatory, would unlawfully extend the Commission's regulatory purview to include state-regulated facilities in violation of the NGA. The NGA limits federal regulation to "matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce."[61] Activities preceding or succeeding jurisdictional transportation are left to the states. The NGA specifically excludes

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[56] Updated Certificate Policy Statement at P 7.
[57] *Id.* at P 74.
[58] *Id.*
[59] Interim Policy Statement at P 105.
[60] Further, in making this announcement, the Commission provides "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. Thus, the Chamber is concerned that the Commission has developed a framework that sets applicants up to fail, and is itself set up to generate arbitrary and unpredictable outcomes.
[61] 15 U.S.C. § 717(a).

production and gathering from FERC jurisdiction.[62] Courts have repeatedly held that the regulation of the physical upstream production and downstream use of gas rests with the states.[63] FERC must respect that the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way."[64] The Commission simply cannot require mitigation premised on offsetting upstream or downstream greenhouse gas emissions, or weigh whether a project is needed based on their mitigation (potentially down to zero emissions).

As Commissioner Danly explains, the Commission intrudes on state authority if it seeks to regulate production, gathering, and local distribution.[65] The Supreme Court recently opined that Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power…"[66] Absolutely nothing in the NGA makes "exceedingly clear" a congressional intent to change the balance of federal and state power in this context.

The 2022 Draft Policy Statements should be revised to ensure that FERC does not impose conditions on a certificate to mitigate upstream or downstream greenhouse gas emissions arising from non-jurisdictional activities.

ii. The Commission's proposed "significance" threshold is arbitrary.

In the 2022 Draft Policy Statements, the Commission goes further than any other federal agency has gone, 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).[67] The Commission does so on the

[62] NGA Section 1(b) states (emphasis added): "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale…*but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas*."

[63] *See, e.g., Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 510 (1989); *see also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002); *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010). *See also PUC of California v. FERC*, 900 F.2d 269, 277 (D.C. Cir. 1990) ("[T]he state . . . has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user.").

[64] *General Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997) (*quoting Panhandle E. Pipeline Co. v. PSC of Indiana*, 332 U.S. 507, 516-22 (1947)).

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

[66] *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (citing *U.S. Forest Service v. Cowpasture River Assoc.*, 140 S.Ct. 1837, 1849-1850 (2020)).

[67] After careful consideration, 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

presumption that the Supreme Court's edict to "evaluate all factors bearing on the public interest" and other inapposite statements in case law provide the Commission with this authority.[68] Specifically, the Interim Policy Statement proposes that for all NGA section 7 certificate applications:

> 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.[69]

This threshold rebuttably presumes that all downstream emissions are project-induced.

The Updated Certificate Policy Statement would have the Commission 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."[70] The practical application of this proposal would require the preparation of an EIS for any pipeline project that transports at least 5,200 dekatherms per day or uses one compressor station, effectively amending FERC's existing regulations that specify only three types of NGA projects that require an EIS: (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."[71]

The Chamber believes that it is inappropriate for the Commission to establish any significance threshold for greenhouse gas emissions. FERC has no statutory

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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").

[68] 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*")).

[69] Interim Policy Statement at PP 2-3.

[70] *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'").

[71] 18 C.F.R. §§ 380.6(a)(1)-(3).

authority or substantive expertise that would justify its setting a significance threshold, and none of the recent D.C. Circuit decisions cited in the 2022 Draft Policy Statements require or empower FERC to do so.[72] Indeed, CEQ has declined to establish a greenhouse gas emissions "significance" test for NEPA purposes.[73] As Commissioners Christie and Phillips recently opined, the Commission has no "analytical tool or framework to estimate the extent of [an individual project's] emission impacts' on the environment."[74] The Commissioners also explained that creating "an undue focus on drawing a bright line between 'significance' and 'insignificance' would appear to elevate form over substance."[75]

The particular bright line proposed in the Interim Policy Statement is also arbitrary. The 100,000 mty CO_2e proposal was offered without any scientific basis linking it to climate change. Moreover, FERC's decision to base a significance threshold on a project's "full burn" as opposed to expected utilization is also arbitrary. The proposed threshold's arbitrary nature is even more apparent given FERC's recent *Columbia Gulf* order authorizing the construction and operation of the East Lateral Xpress Project in Louisiana to transport 183,000 Dth/d of natural gas to a liquefied natural gas terminal. The Commission estimated the project's direct operational greenhouse gas emissions to be 165,830 tpy CO2e based on 100% utilization, but explained that it would not characterize the emissions as significant or insignificant.[76] Chairman Glick concluded in his concurrence that "the relevant 165,000 metric tons per year of GHG emissions are not significant."[77] Chairman Glick limited his significance

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[72] The Interim Policy Statement cites *Vecinos* to suggest that a federal court has required a significance determination. Interim Policy Statement at P 14 (citing *Vecinos*, 6 F. 4th at 1328). However, *Vecinos* found that the Commission "failed to respond to significant opposing viewpoints" regarding its analysis of greenhouse gas emissions. 6 F. 4th at 1329. *Vecinos* did not require a significance determination.

[73] *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").

[74] *Tennessee Gas Pipeline*, 178 FERC ¶ 61,199 (Christie and Phillips Concurrence at P 3); *Columbia Gulf*, 178 FERC ¶ 61,198 (Christie and Phillips Concurrence at P 3).

[75] *Id.*

[76] *Id.* at P 47.

[77] *Id.* (Glick Concurrence at P 5).

determination to the "evidence in the record."[78] It is unclear how the Commission has here proposed to draw the significance line at 100,000 mty CO_2e while elsewhere finding 165,000 mty CO_2e not to be significant. Certainly, Commissioners Christie and Phillips were unclear as to how the Commission would be able to make a finding of "significance" as to greenhouse gas emissions, and were also unclear as to how such a finding would affect the Commission's "duties and authority under the Natural Gas Act."[79]

Thus, the proposed significance threshold for greenhouse gas emissions should be removed from any final update to the Commission's certificate policies. FERC is able to issue certificates while being responsive to court decisions, as it did in *Columbia Gulf*, *Tennessee*, and *Iroquois*, without setting a significance threshold for greenhouse gas emissions.

iii. The Commission would contradict its own policies were it to make end-use determinative of public need.

The 2022 Draft Policy Statements raise additional concerns with their proposals to consider end use as part of the Commission's public need consideration. Not only has the Commission recognized previously in this very docket that it lacks jurisdiction to consider end use,[80] but doing so would be inconsistent with the Commission's decades-old policies that require the non-discriminatory transportation of natural gas.[81] End-use 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

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[78] *Id.*

[79] *Id.* (Christie and Phillips Concurrence at P 2) (citing *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021), a proceeding in which FERC made a significance determination for greenhouse gas emissions).

[80] 2018 NOI at P 8. *See also S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) ("In sum, the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas—such as passing tariffs that set the quality of gas to be burned by direct end-users—remain within the exclusive purview of the states."); *Pub. Utils. Comm'n. of Cal. v. FERC*, 900 F.2d 269, 277 (D.C. Cir. 1990) ("[T]he state . . . has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user.").

[81] *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).

as envisioned by the NGPA and the Decontrol Act."[82] If anything, the Commission's policy concerning end-use is entirely agnostic, to ensure that pipeline capacity is utilized by the shipper that values it the most. This policy is reflected in the Commission's extensive regulations governing pipeline capacity release.[83]

The Commission's non-discriminatory, open-access, and capacity-release regulations also ensure flexibility in the gas market such that even if a pipeline project is anchored by a particular type of end-user, the end-user can change. Specifically, once the commodity enters the pipeline network, it can be bought or sold on a vibrant secondary market. Because pipeline utilization often changes on a daily basis, any change as to how FERC considers market need may disrupt short- or long-term market pricing in the primary and secondary markets. This in turn would lead to increased prices for consumers.

Making consideration of end use a NGA section 7 public interest consideration, therefore, would undercut a well-functioning market that has been deemed to further the public interest under NGA sections 4 and 5. The 2022 Draft Policy Statements thus should be revised to remove any consideration of end use.

iv. The Commission may consider direct GHG emissions and their impact under the NGA.

As the Chamber explained previously, to the extent that 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 procedural NEPA framework, not the NGA.[84] In practice, the Chamber believes that the Commission can obtain reasonably available data from project developers that will enable the Commission to obtain a fuller understanding of the reasonably foreseeable emissions effects from the construction and operation of a project. In addition, the Commission can create appropriate market incentives that may

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[82] *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).

[83] *See, e.g., Promotion of a More Efficient Capacity Release Market*, Order No. 712, 123 FERC ¶ 61,286 (2008).

[84] *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 ("Nothing in [*Sabal Trail*] requires the Commission to consider environmental effects beyond that which is required by NEPA.").

promote the proposal and construction of incrementally lesser-emitting facilities, such as through the implementation of return on equity adders.

However, to the extent the Commission can require mitigation from a project developer through the inclusion of conditions on a NGA section 7 certificate, the scope of any such required mitigation is limited. The Chamber agrees with Commissioner Christie:

> [T]he Commission can consider the direct GHG impacts of the specific facility for which a certificate is sought, just as it analyzes other direct environmental impacts of a project, and can attach reasonable and feasible conditions to the certificate designed to reduce or minimize the direct GHG impacts caused by the facility, just as it does with other environmental impacts.[85]

Any mitigation that the Commission requires must be reasonable, and must not be unduly costly or otherwise inappropriately burdensome. Such mitigation must be met with opportunities for cost recovery to ensure that the pipeline operator has an opportunity to earn a just and reasonable rate of return. The Interim Policy Statement suggests that the opportunity for cost recovery is not guaranteed, thereby undermining the economic fundamentals of prospective projects.

D. The Commission Should Provide Additional Clarity On How Impacts to Environmental Justice Communities Will Be Considered in the NEPA Process.

The 2022 Draft Policy Statements would expand the Commission's prior public interest balancing test to incorporate impacts to environmental justice communities.[86] 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 proposes to weigh the adverse effects on environmental interests and impacts on environmental justice communities in its public interest determination.[87] As written, this proposed change to the NGA public interest balancing test is untenable. For one, the Commission does not define what constitutes an "environmental justice community." Indeed, the Updated Certificate Policy Statement notes that FERC is continuing "to develop its environmental justice precedent."[88] Based on the Updated Certificate Policy Statement's language, a project developer has no way of knowing whether its project will impact an environmental

[85] Updated Certificate Policy Statement (Christie Dissent at P 59).
[86] *Id.* at P 51.
[87] *Id.* at P 62.
[88] *Id.*

justice community and which members of that community it will need to consult prior to proposing mitigation. It is also uncertain how adverse impacts will be measured.

The Chamber continues to support the Commission's efforts to consider the impacts of its certificate order on environmental justice communities in the context of appropriate analysis under 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, no court has analyzed environmental justice under the NGA's "public interest" determination.[89] The NGA, without a specific directive to consider environmental justice impacts pursuant to that statute's "public interest" framework,[90] is an inappropriate vehicle to consider environmental justice.[91] As CEQ recently reiterated, "it is in the agency implementation of NEPA when conducting reviews of proposed agency actions" where any appropriate consideration of environmental justice issues occurs.[92]

The Commission should clarify that any authority it has to consider impacts to environmental justice communities is exercised as part of the NEPA process, and does not arise under the NGA. As stated above, there are scenarios under which FERC could use its NGA section 7 authority to provide for mitigation that could be applied in an environmental justice context. The Chamber also continues to believe that there is room for improvement in FERC's NEPA process to better ensure that impacts to environmental justice communities are considered. Such improvements may include prioritizing early engagement with the public, focusing the NEPA analysis on significant impacts to make agency documentation more accessible to the public, and evaluating lawful and feasible alternatives that reduce impacts on environmental justice communities. This can include working with project applicants to examine routes that

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[89] *See, e.g.*, *Sabal Trail*, 867 F.3d at 1368-71 (conducting an environmental justice analysis based on NEPA, not the NGA). *See also Vecinos*, 6 F. 4th 1321 (remanding a Commission order, in part, due to the environmental justice analysis performed under NEPA).

[90] *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).

[91] The NGA's "public interest" standard was not altered by the issuance of an executive order directing federal agencies to consider the impact of their actions on environmental justice communities. 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."). 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." *Id.* at Sec. 301.

[92] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,469 (2022); *see also* Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85. Fed. Reg. 43,304, 43,356 (2020).

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, for example, through the newly staffed Office of Public Participation, through the adoption of more user-friendly communications systems for sharing project information, and through the dissemination of such communications in additional languages.

E. Without Modification, the 2022 Draft Policy Statements Will Disincentivize Pipeline Infrastructure Investment and Construction Because They Undermine Regulatory Certainty.

"Natural gas is the reliability 'fuel that keeps the lights on,' and natural gas policy must reflect this reality."[93] Interstate pipelines play a critical part in the supply chain because the natural gas flowing through those pipelines is ultimately used to heat homes, cook meals, support businesses, and enable industrial facilities and manufacturing. Every interstate natural gas pipeline project that furthers that supply chain requires Commission leadership to move forward. Given this public interest in access to natural gas, Congress clarified that the Commission's obligation to certificate projects required by the public convenience and necessity is time sensitive. FERC must discharge its statutory duties under the NGA to "ensure expeditious completion of" its pipeline certification authorizations.[94] Honoring this congressional mandate necessitates policies that enable processes that are efficient, streamlined, and transparent.

The 2022 Draft Policy Statements, if implemented, would have the opposite effect because they provide no regulatory certainty with respect to what a project sponsor must present to be deemed "required by the public convenience and necessity," and how long an approval process may take. As written, the policies would make the certificate approval process less reliable, increase uncertainty and cost, and endanger the American public's access to safe, affordable natural gas. These delays, moreover, would be counterproductive to the Commission's interest in responding to global climate change. Natural gas has actually driven the greenhouse gas emissions reductions achieved over the last decade and supports the increased integration of renewable resources on our power grid. Injecting uncertainty into the certificate process only delays the ongoing energy transition. Moreover, increasing the risk to

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[93] 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.
[94] 15 U.S.C. § 717n(c)(1)(A).

construct results in increased prices that ultimately will be borne by the natural gas consumer in contravention of the NGA.

One of the 2022 Draft Policy Statements' most damaging proposals is to replace the "no financial subsidies" threshold with an undefined "project need" threshold.[95] Without considering the consequences, FERC proposes to keep the requirement that pipelines use incremental pricing to protect existing shippers from subsidizing new facilities. However, the very purpose of the prior threshold is neutralized if pricing is no longer able to provide accurate market signals supportive of a project. The "no subsidization" requirement of the 1999 Certificate Policy Statement, and the market principles that it stands for, is what has made that policy so successful. Since 1999, the existing policy has allowed for the construction of 23,000 miles of interstate pipelines, capable of transporting nearly 300 billion cubic feet per day without the need for subsidization by captive customers or government funding.[96] The Chamber believes it is a mistake for the Commission to propose certificate policies that mask these market forces by taking away the pricing signals that allowed earlier projects to be built.

Specifically, the Chamber is concerned by the Commission's proposal to always look behind a precedent agreement, which the Commission historically relied upon as the primary indication of market need and thus of public need. In place of the market-forces analysis, the Commission instead provides a lengthy, but potentially non-exhaustive, list of what it would consider probative of project need.[97] It is nearly impossible to decode any meaning from the list of suggestions that could support project need; some of the suggestions are duplicative of existing Commission policies and the precedent agreement process currently followed by regulated companies.[98] Furthermore, because of the constraints imposed by the Commission's incremental pricing policies, developers do not propose projects for unneeded pipeline capacity.[99] The new information gathering that would be required by the 2022 Draft Policy Statements may ultimately serve to be an expensive road to nowhere, without enhancing any of the price signals that the market has relied on to price natural gas transportation. Yet, the 2022 Draft Policy Statements never acknowledge or discuss the cost increases that will result from the new policies, or who is expected to bear them. The statements thus are arbitrary in this respect, as well as inadequately explained.

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[95] Updated Certificate Policy Statement at P 63.

[96] Approved Major Pipeline Projects, https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-1997-present (data as of April 6, 2022).

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

[98] 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).

[99] *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).

While the Chamber's 2021 Comments were supportive of the Commission's requesting additional information in a certificate proceeding beyond precedent agreements, this was in the context of demonstrating *market* need for a project. It is not clear that the Commission now remains sensitive to market need, as the Commission currently appears willing to deny a pipeline project even if the market requires it. It is not necessary to require additional information in every application if the precedent agreement clearly indicates demand. The standardless standards set forth in the Updated Certificate Policy Statement, setting forth additional information that may be required, denies project developers and their shippers any regulatory certainty. After all, the incremental rates memorialized in precedent agreements were more than a way for a pipeline to demonstrate to investors that it would have the opportunity to earn a reasonable rate of return; these rates also provided project shippers with the rate certainty necessary for their own internal project approvals. This is why precedent agreements typically reflect a negotiated long-term rate of service, and why the Commission has consistently declined to look "beyond the market need reflected by the applicant's precedent agreements with shippers."[100]

The Commission's stance in the 2022 Draft Policy Statements concerning mitigation measures causes the same serious concern about regulatory certainty. The 2022 Draft Policy Statements "encourage project sponsors to propose[] measures to mitigate the reasonably foreseeable upstream or downstream emissions associated with their projects."[101] As Commissioner Danly observes, "This is not encouragement. This is command."[102] Applicants will understand from the language of the Interim Policy Statement that they must provide this information, and make the associated mitigation commitments, to receive a certificate.[103] This requirement, however, may contradict a fundamental principle of public utility regulation. Public utilities have a right to earn a just and reasonable rate of return on their prudent investments.[104] This right is what provides a public utility the ability to attract private capital to undertake the necessary projects to furnish reliable, resilient, and cost-efficient service. By requiring mitigation measures without providing practical guidance on what measures would be deemed sufficient or excessive, the Commission adds additional risk to pipeline projects. Added risk will translate into the need for higher rates of return and higher costs for

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[100] *See e.g.*, Adelphia Gateway, LLC, 169 FERC ¶ 61,220 at P 35 (2019) ("Given 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.").
[101] Interim Policy Statement at P 106.
[102] *Id.* at P 47.
[103] *See id.* (Danly, dissenting) PP 46-49.
[104] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944); *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923).

consumers. Alternatively, if cost recovery is not assured, higher risk will negatively impact the ability to pursue future projects.

In addition to public comments filed by the Chamber,[105] numerous pipeline developers have already informed the Commission how damaging the 2022 Draft Policy Statements are to investment decisions already made, and the tremendous uncertainty these decisions – and now proposals – have inserted into the planning process for projects which have lead times of several years.[106] It bears emphasis that these entities are regulated companies that cannot provide their essential services without prior Commission authorization.[107] As the Chamber emphasized in its 2021 Comments, FERC must strive for a policy that improves efficiencies in the permitting process and promotes regulatory certainty.

IV. Conclusion

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. 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. As written, the 2022 Draft Policy Statements would make the development of new pipeline and LNG facilities less certain and more expensive without adhering to the strictures of the NGA and NEPA. The Commission has the opportunity now to revise the policies and improve upon its existing framework, based on market and competition principles, while

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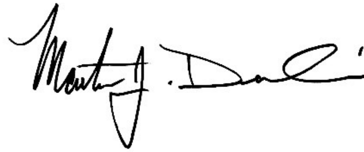
[105] Letter from Martin J. Durbin, Senior V.P., Policy, U.S. Chamber of Commerce, to The Hon. John Barrasso, Ranking Member, Comm. on Energy and Natural Resources, United States Senate (Mar. 2, 2022).

[106] *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.").

[107] 15 U.S.C. § 717f(c).

simultaneously promoting equity for all stakeholders, consistent with applicable legal and regulatory requirements.

Sincerely,



Martin J. Durbin
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