171 FERC ¶ 61,032
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Transcontinental Gas Pipe Line Company, LLC Docket No. CP18-18-001

ORDER DENYING REHEARING AND STAY

(Issued April 16, 2020)

1. On December 12, 2018, the Commission issued an order pursuant to section 7 of the Natural Gas Act (NGA)[1] authorizing the Transcontinental Gas Pipe Line Company, LLC (Transco) to modify, construct, and operate compressor stations and meter regulation facilities, known as the Gateway Expansion Project, in Essex and Passaic Counties, New Jersey.[2] The Gateway Expansion Project will enable Transco to provide an additional 65,000 dekatherms (Dth) per day of firm natural gas transportation service for PSEG Power LLC (PSEG) and UGI Energy Services (UGI).[3]

2. On January 11, 2019, Food and Water Watch, Essex Greens Renewable Energy Campaign, 350NJ, the Borough of Roseland, and Roseland Against the Compressor Station (collectively, the Community Groups) sought rehearing of the Certificate Order. The Community Groups allege that the Commission violated the NGA by failing to adequately assess whether the project was needed and violated the National Environmental Policy Act (NEPA) by failing to adequately consider the project's greenhouse gas (GHG) emissions and cumulative environmental impacts.[4]

[1] 15 U.S.C. § 717f(c), (e) (2018).

[2] *Transcon. Gas Pipe Line Co., LLC*, 165 FERC ¶ 61,221 (2018) (Certificate Order).

[3] *Id.* P 4.

[4] Rehearing and Stay Request at 3-4.

I. Discussion

A. The Natural Gas Act: The Certificate Order Complied with the Certificate Policy Statement

3. The Community Groups allege that the Commission erred by relying on the project's precedent agreements as evidence of project need.[5] According to the Community Groups, the project will not benefit end users in New Jersey, but will provide Marcellus Shale natural gas with access to out-of-state markets and export facilities.[6] The Community Groups claim the entire purpose of the project is to support the natural gas production industry in the Marcellus Shale, which, according to the Community Groups, is financially unstable due to rising interest rates and high well depletion rates.[7] Furthermore, the Community Groups argue that a real market for the project's capacity does not exist because, when the project's energy output is considered with other regional projects, these projects will provide far more energy than what is needed to replace all oil and propane electricity generation with natural gas electricity generation in the New York metropolitan area.[8]

4. We disagree. As we explained in the Certificate Order, Transco entered into long-term precedent agreements with PSEG and UGI for all the project's capacity.[9] Although the Community Groups claim that the Commission cannot rely on precedent agreements,[10] our decision is consistent with Commission and court precedent. The Commission's Certificate Policy Statement indicates that the Commission allows an applicant to rely on a variety of relevant factors to demonstrate need and makes clear that precedent agreements are significant evidence of project need.[11] Although Community Groups fail to acknowledge this precedent, multiple courts have confirmed that nothing in the Certificate Policy Statement, nor any precedent construing it, indicates that the

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[5] *Id.* at 6.

[6] *Id.* at 8-10.

[7] *Id.* at 6-8.

[8] *Id.* at 5-6, 9, 17-18.

[9] Certificate Order, 165 FERC ¶ 61,221 at P 21.

[10] Rehearing and Stay Request at 6.

[11] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748 (explaining that "contracts or precedent agreements always will be important evidence of demand for a project").

Commission must look beyond the market need reflected by the applicant's precedent agreements with shippers.[12]

5. Nonetheless, the Community Groups argue that the project will serve the natural gas production industry, not end users, and contend that there is already a glut of natural gas in the region, while regional consumption is projected to decline.[13] Although the Commission need not look beyond the precedent agreements, we note that the Community Groups are mistaken. As the Commission explained in the Certificate Order, the project is designed to provide natural gas capacity to PSEG and UGI between receipt points on the Transco mainline and the PSEG city gates, which will connect the project to end users in New Jersey.[14] According to Transco, the project will provide PSEG and UGI with incremental supply needs beginning with the 2020-2021 winter heating season.[15]

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[12] *See, e.g., Twp. of Bordentown, N.J. v. FERC*, 903 F.3d 234, at 262-63 (3d Cir. 2018) ("A contract for a pipeline's capacity is a useful indicator of need because it reflects a 'business decision' that such a need exists. If there were no objective market demand for the additional gas, no rational company would spend money to secure the excess capacity."); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (*Sierra Club*) (explaining that an applicant can make a showing of market need "by presenting evidence of preconstruction contracts for gas transportation service" (internal quotation marks omitted)); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (rejecting the argument that precedent agreements are inadequate to demonstrate market need); *Minisink Residents for Envtl. Pres. and Safety v. FERC*, 762 F.3d 97, 112 n.10 (D.C. Cir. 2014) (noting that FERC need not "look beyond the market need reflected by the applicant's existing contracts with shippers").

[13] Rehearing and Stay Request at 6-8.

[14] Certificate Order, 165 FERC ¶ 61,221 at PP 4, 6, 21. Specifically, the project would enable Transco to deliver an additional 10,000 Dth per day from project receipt points to the existing Paterson interconnection with PSEG in Passaic County, New Jersey for PSEG, and an additional 55,000 Dth per day from project receipt points to the Ridgefield interconnection with PSEG in Bergen County, New Jersey, including 44,000 Dth per day for PSEG and 11,000 Dth per day for UGI. The project receipt points include the existing Station 210 pooling point and a proposed interconnection with PennEast Pipeline Company LLC, both of which are or will be located on Transco's mainline in Mercer County, New Jersey. *Id.* P 4.

[15] *Id.* P 4.

6. The Community Groups next claim that the Gateway Expansion Project and other natural gas infrastructure projects in the region would supply three times the natural gas needed to replace all oil and propane electricity generation in the New York metropolitan area.[16] The Commission explained in the Certificate Order that the Commission is not obligated to examine the need for the project on a regional basis when specific shippers have entered into precedent agreements for project-specific service.[17] Moreover, this comparison is irrelevant. PSEG and UGI serve end users for natural gas and intend to use capacity created by the project for incremental heating needs beginning with the 2020-2021 heating season;[18] there is no evidence in the record related to converting oil and propane electricity generation to natural gas generation.

II. The National Environmental Policy Act

A. Climate Change

1. Upstream and Downstream Greenhouse Gas Emissions

7. The Community Groups allege that the Gateway Expansion Project Environmental Assessment (EA) failed to account for the project's contribution to climate change from the indirect emissions associated with upstream gas production and downstream gas consumption.[19] NEPA requires agencies to consider indirect effects or impacts that are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[20] With respect to causation, "NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause"[21] in order "to make an agency responsible for a particular effect under NEPA."[22] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish

[16] Rehearing and Stay Request at 6, 9, 17-18.

[17] Certificate Order, 165 FERC ¶ 61,221 at P 22.

[18] *Id.* P 4.

[19] Rehearing and Stay Request at 10-16.

[20] 40 C.F.R. § 1508.8 (2019).

[21] *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, at 767 (2004) (*Pub. Citizen*) (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, at 774 (1983)).

[22] *Pub. Citizen*, 541 U.S. at 767.

cause for purposes of NEPA]."[23] Thus, "[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation" will not fall within NEPA if the causal chain is too attenuated."[24] Further, the Court has stated that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[25]

8. Community Groups claim the Commission's refusal to consider these indirect emissions runs counter to court rulings in *Barnes v. U.S. Department of Transportation*,[26] *Sierra Club v. FERC*,[27] and *Mid States Coalition for Progress v. Surface Transportation Board*,[28] which they claim support their assertion that pipeline projects have the unique potential to spur natural gas consumption and production, resulting in both upstream and downstream GHG emissions as indirect project effects.[29]

9. We disagree.[30] None of the cases Community Groups rely upon is determinative here. In *Barnes*, the Ninth Circuit Court of Appeals noted that the Federal Aviation Administration had acknowledged that runway expansion projects have the unique potential to spur demand, but the agency failed to explain and support with record evidence its conclusion that the proposed project, the addition of a third runway at a

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[23] *Id*.

[24] *Metro. Edison*, 460 U.S. at 774.

[25] *Pub. Citizen*, 541 U.S. at 770.

[26] *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1138 (9th Cir. 2011) (*Barnes*).

[27] *Sierra Club*, 867 F.3d 1357.

[28] *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (*Mid States*).

[29] Rehearing and Stay Request at 11 ("The D.C. Circuit has made it excessively clear that GHG emissions from the downstream combustion of natural gas is 'an indirect effect of authorizing' a pipeline project, which the Commission can reasonably foresee, and which the agency has a legal authority to consider and mitigate."); *see also id*. at 15.

[30] In addition to the reasoning below, see generally Commissioner McNamee's concurrence in *Adelphia Gateway LLC,* 169 FERC ¶ 61,220 (2019), elaborating on the purpose of the NGA and that one of its purposes is to facilitate the development and access to natural gas, and providing an analysis of indirect effects under NEPA.

two-runway airport, was unlikely to attract more private aircraft.[31] The court thus held that it was reasonably foreseeable that the addition of third runway would have a growth-inducing effect on aviation demand because airport capacity is primarily a factor of runway capacity.[32] In contrast, with the Gateway Expansion Project, which is adding a small amount of incremental capacity on Transco's existing 10,000-mile interstate pipeline system, there is no evidence that the project will spur additional production or downstream consumption. And reliance on *Mid States* in this context is "misplaced since the agency in *Mid States* stated that a particular outcome was reasonably foreseeable and that it would consider its impact, but then failed to do so," but here the Commission did neither of those things.[33]

10. Regarding upstream emissions from natural gas production, there is no record evidence that would help the Commission determine the origin of the natural gas that will be transported on the project, let alone predict the number and location of any additional wells that would be drilled as a result. The Community Groups contend that NEPA compels the Commission to examine emissions from upstream production, noting that in *Mid States*, the U.S. Court of Appeals for the Eighth Circuit warned that even "if the nature of the effect is reasonably foreseeable but its extent is not…the agency may not simply ignore the effect."[34] But here, the nature of the effect – increased natural gas production – is not reasonably foreseeable. Courts have found that an impact is reasonably foreseeable if it is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[35] Although courts have held that NEPA requires "reasonable forecasting," an agency is not required "to engage in speculative analysis" or "to do the impractical, if not enough information is available to permit meaningful consideration."[36] There is no record evidence that would help the Commission determine the origin of the natural gas that will be transported on the

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[31] *See Barnes*, 655 F.3d at 1137-38.

[32] *Id.* at 1138.

[33] *Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1102 (8th Cir. 2005).

[34] *Mid States*, 345 F.3d at 549-550 (holding that that the Surface Transportation Board must examine increase in coal usage associated with the construction and rehabilitation of railroad lines for the transportation of coal from a mining area).

[35] *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[36] *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011).

project, let alone predict the number and location of any additional wells that would be drilled as a result.[37] Because the project will receive natural gas from other interstate pipelines,[38] the specific source of natural gas to be transported via the project is currently unknown and will likely change throughout the project's operation. Thus, Commission was not required to address the effects of increased natural gas production because there is no evidence that the project will increase production.

11. As to downstream emissions from gas consumption, the U.S. Court of Appeals for the D.C. Circuit in *Sierra Club v. FERC* held that where it is known that the natural gas transported by a project will be used for a specific end-use combustion, the Commission should "estimate[] the amount of power-plant carbon emissions that the pipelines will make possible."[39] However, outside the context of known specific end use, the D.C. Circuit held in *Birckhead v. FERC*, that "emissions from downstream gas combustions are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project."[40] The court in *Birckhead* also noted that "NEPA . . . requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities," but citing to *Delaware Riverkeeper Network*, the court acknowledged that NEPA does not "demand forecasting that is not meaningfully possible."[41]

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[37] *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019) (ruling that the Commission was not obliged by NEPA to assess impacts of upstream gas production simply because there is a market need for a given project); *see also Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 199 (D.C. Cir. 2017) (accepting the U.S. Department of Energy's explanation that "it would be impossible to identify with any confidence the marginal production at the wellhead or local level" that would be induced by a specific natural gas export project, given that every natural-gas-producing region across the lower 48 states is part of the interconnected pipeline system and may respond in unpredictable ways to prices that rise or fall with export demand).

[38] Certificate Order, 165 FERC ¶ 61,221 at P 4 (explaining that the project will receive natural gas from a proposed interconnection with PennEast Pipeline Company, LLC and an existing Station 210 pooling point).

[39] *Sierra Club*, 867 F.3d at 1371.

[40] *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (citing *Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1122).

[41] *Id.* at 520 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014).

12. Here, Community Groups fail to point to any evidence in the record to demonstrate that downstream emissions qualify as a reasonably foreseeable indirect effect, nor do they argue that the Commission failed to adequately develop the record. Commission staff specifically asked where the gas would be delivered[42] and Transco repeated what is in its application – that the project would enable gas deliveries to existing interconnects – without providing more detailed information on exactly how the gas would be used by PSEG and UGI beyond serving incremental supply needs during the winter heating season.[43] Even with these generalized statements, there remains a range of possible uses for the gas to be delivered by the project, including home heating use, substitution for higher-emitting fuels, industrial feedstock for existing or potentially new customers, or other combustion. Further, by contrast to these generalized statements, in *Sierra Club v. FERC*, the court relied on record evidence that the gas would be used in identified power plants.[44] Moreover, the consumed volume is also unknown because the project's transportation capacity is designed for intermittent peak use.[45] Accordingly, we find these generalized statements insufficient to render the emissions associated with any consumption of the gas to be transported a reasonably foreseeable indirect effect of the project.[46]

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[42] Data Request to Transco from the Office of Energy Projects, FERC, at Enclosure 1 (March 22, 2018).

[43] Transco Response to Environmental Information Requests, at 7 (Apr. 11, 2018).

[44] *Sierra Club*, 867 F.3d at 1372 ("What are the "reasonably foreseeable" effects of authorizing a pipeline that will transport natural gas to Florida power plants? First, that gas will be burned in those power plants.").

[45] Transco Application at Exhibit Z-1.

[46] We note that the EA quantified the GHG emissions directly related to the construction and operation of the project. *See* EA at Tables 6 and 7, pages 43-44. In an effort to provide context, we compared the total direct operational emissions of GHGs of the project to the New Jersey and National GHG Inventories. *See id.* at Table 7, page 44 (Corrected calculation of total GHG emissions to 4,405.25 tons (equivalent to 3,996 metric tons)). Operation of the project will result in about a 0.004 percent annual increase of GHG emissions in New Jersey based upon the 2017 GHG Inventory. *See* U.S. Energy Information Administration, State Carbon Dioxide Emissions Data, State of New Jersey grand total data for 2017 (Oct. 23, 2019). From a national perspective, direct operational GHG emissions would result in an increase of 0.00007 percent. *See* U.S. Environmental Protection Agency, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990 - 2017, 2017 Data, Table ES-2 (Apr. 2019).

2. Significance and Mitigation

13. The dissent argues the Commission violated NEPA by failing to consider whether the project's GHG emissions have a significant impact on climate change. The dissent claims that the Commission has several tools to assess the harm from the project's contribution to climate change, including the Social Cost of Carbon. In the alternative, the Commission could quantitatively or qualitatively assess significance, as it does for other resources, including farmland, groundwater, and surface water. The dissent further contends that the Commission's failure to establish a metric to assess the significance of GHG emissions contributes to the Commission's failure to adequately consider GHG mitigation, particularly when project GHG emissions may require that the Commission complete an Environmental Impact Statement (EIS), not an EA.

14. As an initial matter, the EA discussed the significance of the project's direct GHG emissions by quantifying those emissions,[47] and, as discussed above, those emissions were placed in the context of cumulative emissions from other sources.[48] NEPA requires nothing more.

15. As for the dissent's claim that the Commission has other tools at its disposal to assess significance, including the Social Cost of Carbon, we disagree. The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change. The Commission has provided extensive discussion on why the Social Cost of Carbon is not appropriate in project-level NEPA review and cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.[49] It is not appropriate for use in any project-level NEPA review for the following reasons:

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[47] EA at 43-44.

[48] *Supra* note 46.

[49] *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 296 (2017), *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd, Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (*Mountain Valley*) ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes."); *see also EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); *350 Montana v. Bernhardt*, No. CV 19-12-M-DWM, 2020 WL 1139674, *6 (D. Mont. March 9, 2020) (upholding the agency's decision to not use the Social Cost of Carbon because it is too uncertain and indeterminate to be useful); *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's

> (1) EPA states that "no consensus exists on the appropriate [discount] rate to use for analyses spanning multiple generations"[50] and consequently, significant variation in output can result;[51]
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> (2) the 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.[52]

We have also repeatedly explained that while the methodology may be useful for other agencies' rulemakings or comparing regulatory alternatives using cost-benefit analyses where the same discount rate is consistently applied, it is not appropriate for estimating a specific project's impacts or informing our analysis under NEPA.[53]

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decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon).

[50] *See* Fact Sheet: *Social Cost of Carbon* issued by EPA in November 2013, https://19january2017snapshot.epa.gov/climatechange/social-cost-carbon_.html.

[51] Depending on the selected discount rate, the tool can project widely different present-day cost to avoid future climate change impacts. *See generally Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (McNamee Comm'r, concurring at n.139) ("The Social Cost of Carbon produces wide-ranging dollar values based upon a chose discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from $12 to $123.").

[52] *See generally Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (McNamee, Comm'r, concurring at P 65) ("When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost for a discount rate of 5 percent), agency decision-makers and the public have no objective basis or benchmark to determine whether the cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.") (emphasis in original) (footnote omitted). The dissent has not specifically explained how to ascribe significance to calculated Social Cost of Carbon numbers.

[53] *Mountain Valley*, 161 FERC ¶ 61,043 at P 296. Moreover, Executive Order 13783, Promoting Energy Independence and Economic Growth, has disbanded the Interagency Working Group on Social Cost of Greenhouse Gases and directed the

16. We also disagree with the dissent's claim that the Commission can establish its own methodology for determining significance as we do for other resources. The Commission applies standard methodologies and established metrics for assessing the significance of the environmental impacts on these resources. For example, to assess the project's impacts to wetlands, Commission staff quantified the acreage and types of wetlands using: field surveys; the applicant's wetland delineation performed in accordance with the U.S. Army Corps of Engineers' Wetlands Delineation Manual and the 2012 Regional Supplemental to the U.S. Army Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region, Version 2.0; aerial photographs; and New Jersey state wetland mapping.[54] Based on this data developed using the identified methodologies, staff explained in the EA that the proposed project would not directly impact any wetlands. The project would result in both temporary and permanent impacts to New Jersey state regulated wetland transition areas, but, based on Transco's proposed project construction practices and mitigation measures, impacts to these transition areas would be relatively minor or would be restored after construction ended.[55]

17. In contrast, here the Commission has no benchmark to determine whether a project has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions, but it has no way to then assess how that amount contributes to climate change. For example, that calculated number cannot inform the Commission on climate change effects caused by the project, *e.g.*, increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular GHG emissions amounts.

18. We also disagree that we were obliged to prepare an EIS, rather than an EA. Under Commission regulations, if the Commission believes that a proposed action may not be a major Federal action significantly affecting the quality of the human environment,

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withdrawal of all technical support documents and instructions regarding the methodology, stating that the documents are "no longer representative of governmental policy." Exec. Order No. 13,783, 82 Fed. Reg. 16093 (2017).

[54] EA at 24-26.

[55] *Id.* at 26.

the Commission first prepares an EA, rather than an EIS.[56] Accordingly, Commission staff prepared an EA and found that approval of the project would not constitute a major Federal action significantly affecting the quality of the human environment.[57] As discussed, the Commission determined that it cannot adequately assess the significance of GHGs. In addition, the EA described the federal and state general air emission regulatory regimes that will control the project's direct emission sources.[58] The EA stated there are no applicable ambient standards or significance thresholds for GHGs,[59] and did not identify any state GHG emission targets. The EA also discussed Transco's proposed mitigation measures for construction equipment exhaust[60] and clarified that the project's electric driven compressor unit would not result in any fuel combustion operational emissions at the existing Compressor Station 303.[61] These findings do not require us to prepare an EIS. If the Commission were to prepare an EIS, the EIS would reiterate the discussion of GHG emissions and climate change set forth in the EA. This would neither enhance agency decision making nor result in more meaningful public comment. As the Council on Environmental Quality has explained, "NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."[62]

B. Cumulative Impacts

19. Community Groups allege that the Commission failed to take a hard look at the cumulative impacts of the Gateway Expansion Projects along with other past, present, and reasonably foreseeable natural gas infrastructure projects on the east coast of the United States.[63] Specifically, Community Groups claim the Commission failed to

[56] *See* 18 C.F.R. § 380.6(b) (2019).

[57] EA at 58.

[58] *Id.* at 41-44.

[59] *Id.* at 41.

[60] *Id.* at 42.

[61] *Id.* at 43-44.

[62] 40 C.F.R. § 1500.1(c) (2019).

[63] Rehearing and Stay Request at 4.

consider impacts associated with the Riverdale South to Market Project[64] and Northeast Supply Enhancement Project,[65] both of which expanded capacity on the Transco mainline in New Jersey.[66] Community Groups contend that the Commission also failed to review the proposed North Bergen Liberty Generating Project, which will receive natural gas from the Transco mainline in Bergen County, New Jersey.[67]

20. CEQ defines cumulative impacts as "the impact on the environment that results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions."[68] A cumulative environmental impact results from the effect of the current project along with any other actions "*in the same geographic area* as the project under review."[69]

21. The EA disclosed impacts associated with the Gateway Expansion Project and identified the geographic scope of the cumulative impacts analysis based on the resources affected by project construction. Specifically, Commission staff defined the geographic scope for its analysis of cumulative impacts to include projects or actions within 0.25 mile of construction activities for impacts to air quality and noise; and within same HUC-12 subwatershed area for water resources and wetlands.[70] The EA explained that the Riverdale South to Market Project and the Northeast Supply Enhancement Project are

[64] *Transcon. Gas Pipe Line Co., LLC*, 164 FERC ¶ 61,101 (2018).

[65] *Transcon. Gas Pipe Line Co.*, *LLC* 167 FERC ¶ 61,110 (2019).

[66] Rehearing and Stay Request at 17.

[67] *Id.*

[68] 40 C.F.R. § 1508.7 (2019).

[69] *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016) (*Freeport LNG*) (citations omitted); *see also* 40 C.F.R. § 1508.7.

[70] EA at 53.

located outside the geographic scope of the Gateway Expansion Project.[71] We note that the proposed North Bergen Liberty Generating Plant, or the Meadowlands Plant, in Bergen County, New Jersey, would also be located outside this region.[72]

22. The Community Groups next claim that the Commission must consider these projects on a regional basis because they will deplete the natural and scenic resources of the region.[73] But the Community Groups do not identify any information that was overlooked in the Commission's analysis of cumulative impacts or point to any concerns with specific environmental resources. As discussed, the cumulative impacts analysis in the EA was appropriate and we affirm that the project will not result in any significant environmental impacts.

23. Finally, Community Groups again claim that, had the Commission examined these projects' cumulative energy output together with other area projects, it would become evident that the project is not necessary because these projects will provide far more energy than what is needed to convert all oil and propane generation to natural gas in the region.[74] Community Groups' assertion, based, as they state, on an assumption,[75] is far too speculative, and appears to disregard several relevant factors, including non-generation uses of natural gas. But, even if accurate, this is not a basis to expand the scope of the Gateway Expansion Project's cumulative impacts analysis. The cumulative impacts analysis applies to environmental impacts in the same area as the project under consideration. Absent any reasonably foreseeable effects of the Gateway Expansion Project on the broader region, the EA appropriately delineated the area in which the environmental effects of the proposed project will be felt.[76]

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[71] *Id*.

[72] The proposed Meadowlands Plant in North Bergen, Bergen County, New Jersey, is over 10 miles from the Patterson interconnection, the closest Gateway Expansion Project facility, and is also outside of the HUC-12 subwatershed area. *See* North Bergen Liberty Generating Questions and Answers, http://www.libertygenerating.com/q-a/ (last visited July 8, 2019).

[73] Rehearing and Stay Request at 18.

[74] *Id.* 5-6, 17-18.

[75] *Id*. at 17-18.

[76] *See*, *e.g*., *Freeport LNG*, 827 F.3d 36, 50 (D.C. Cir. 2016) (rejecting claim that NEPA requires FERC to undertake a nationwide analysis of all applications for liquefied natural gas export facilities when conducting a cumulative impacts analysis).

III. Motion for Stay

24. The Community Groups request that the Commission stay the Certificate Order pending issuance of an order on rehearing.[77] This order addresses and denies their requests for rehearing; accordingly, we dismiss the requests for stay as moot.

The Commission orders:

(A) The Community Groups' request for rehearing is hereby denied, as discussed in the body of this order.

(B) The Community Groups' request for stay is hereby dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attached.
Commissioner McNamee is concurring with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[77] Rehearing and Stay Request at 19-21.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC Docket No. CP18-18-001

(Issued April 16, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order on rehearing because I believe that the Commission's action violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order, the Commission denies rehearing of its order authorizing Transcontinental Gas Pipe Line Company's (Transco) proposed Gateway Expansion Project (Project),[3] and continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantified the direct GHG emissions from the Project's construction and operation.[4] That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to misleadingly state that "approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment," [5] and, as a result, conclude that the Project is required by the public convenience and necessity.[6] Claiming

[1] 15 U.S.C. § 717f (2018).

[2] National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*

[3] *Transcontinental Gas Pipe Line Company, LLC*, 165 FERC ¶ 61,221 (2018) (Certificate Order), *order on reh'g*, 171 FERC ¶ 61,032 (2020) (Rehearing Order).

[4] Gateway Expansion Project Environmental Assessment (EA) at 43-44 & Tables 6-7; Rehearing Order, 171 FERC ¶ 61,032 at n.46.

[5] Certificate Order, 165 FERC ¶ 61,221 at P 53; *see also* EA at 58.

[6] Certificate Order, 165 FERC ¶ 61,221 at P 23.

that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

3. Making matters worse, the Commission again refuses to make a serious effort to assess the indirect effects of the Project. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has repeatedly criticized the Commission for its stubborn refusal to identify and consider the reasonably foreseeable GHG emissions caused by the downstream combustion of natural gas transported through an interstate pipeline. But even so, today's order doubles down on approaches that the D.C. Circuit has already rejected. So long as the Commission refuses to heed the court's unambiguous directives, I have no choice but to dissent.

I. The Commission's Public Interest Determination Is Not the Product of Reasoned Decisionmaking

4. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that GHG emissions "occur in the atmosphere both naturally and as a result of human activities, such as the burning of fossil fuels" and that these GHG emissions "endanger public health and welfare by contributing to human-induced global climate change."[7] In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is required by the public convenience and necessity.[8]

[7] EA at 40.

[8] Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of

5. Today's order on rehearing falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the Project's impact on climate change.[9] That is now clearly established D.C. Circuit precedent.[10] And yet the Commission continues to insist that it need not consider whether the Project's contribution to climate change is significant because it does not have a "standard methodology" to consider the impacts.[11] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission

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the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)). The majority argues that the Commission can consider a project's direct GHG emissions under NEPA and in its public convenience and necessity determination (while ignoring the project's indirect GHG emissions) without actually determining whether the GHG emissions are significant. Rehearing Order, 171 FERC ¶ 61,032 at P 14; *see also* Rehearing Order, 171 FERC ¶ 61,032 (McNamee, Comm'r, concurring at P 15). This argument defies logic and reason and has no basis in a proceeding entirely devoid of even the affectation that the Commission is factoring the Project's GHG emissions in its decisionmaking. The argument is particularly problematic in this proceeding given the conclusion that the Project will not have any significant impact on the environment. Certificate Order, 165 FERC ¶ 61,221 at P 53. How the Commission can rationally conclude that a project has no significant impacts, refuse to assess the significance of what might be the project's most significant impact, and then claim to have adequately considered that impact is beyond me. *C.f. infra* nn. 12-13 and accompanying text.

[9] *See Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); *see also Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

[10] *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72.

[11] *See* EA at 55 ("Currently, there is no standard methodology to determine how a project's relatively small incremental contribution to GHGs would translate into physical effects on the global environment.").

concludes that the Project will not "significantly affect" the environment.[12] Think about that. The Commission is simultaneously stating that it cannot assess the significance of the Project's impact on climate change, while concluding that all environmental impacts are acceptable to the public interest.[13] That is unreasoned and an abdication of our responsibility to give climate change the "hard look" that the law demands.[14]

6. It also means that the Project's impact on climate change does not play a meaningful role in the Commission's public interest determination, no matter how often the Commission assures us that it does. Using the approach in today's order, the Commission will always conclude that a project will not significantly affect the environment irrespective of that project's actual GHG emissions or those emissions' impact on climate change. If the Commission's conclusion will not change no matter how many GHG emissions a project causes, those emissions cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

7. Commissioner McNamee argues that the D.C. Circuit cases cited above[15] were wrongly decided.[16] Although that is his prerogative, it is irrelevant to the task before us.

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[12] *See, e.g.*, Certificate Order, 165 FERC ¶ 61,221 at P 53; EA at 58.

[13] Certificate Order, 165 FERC ¶ 61,221 at P 23.

[14] *E.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) ("[A]gencies cannot overlook a single environmental consequence if it is even "arguably significant."); *see Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation marks omitted)); *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

[15] *Supra* notes 9-10.

[16] *See* Rehearing Order, 171 FERC ¶ 61,032 (McNamee, Comm'r, concurring at PP 13-14) ("However, I respectfully disagree with the court's finding that the Commission can, pursuant to the NGA, deny a pipeline based on environmental effects stemming from the upstream production or downstream use of natural gas, and that the

As he has explained, we are called on to apply the law and the facts, not our personal policy preferences. But surely, implicit in that statement, is a recognition that we must apply the law as it is, not as we wish it were. The D.C. Circuit has unambiguously interpreted the "public convenience and necessity" standard in section 7 of the NGA to encompass the authority to consider and, if appropriate, act upon "the direct and indirect environmental effects" of a proposed pipeline.[17] As Commissioners, our job is to apply that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.[18]

II. The Commission's NEPA Analysis of the Project's Contribution to Climate Change Is Deficient

8. The Commission's NEPA analysis is similarly flawed. When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration.[19] While the Commission quantifies the direct GHG emissions related to Project's construction and operation,[20] it fails to consider the indirect GHG emissions resulting from the incremental natural gas capacity facilitated by the Project.[21] The D.C. Circuit has repeatedly instructed the Commission that the GHG emissions caused by the reasonably foreseeable combustion of natural gas transported through a

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Commission is therefore required to consider such environmental effects under the NGA and NEPA.").

[17] *E.g., Sabal Trail*, 867 F.3d at 1373.

[18] *Id.*; *see Birckhead*, 925 F.3d at 519 (explaining that in "the pipeline certification context the Commission does have statutory authority to act" on the reasonably foreseeable GHG emissions caused by the pipeline (citing *Sabal Trail*, 867 F.3d at 1373)).

[19] 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

[20] *See supra* note 4.

[21] Rehearing Order, 171 FERC ¶ 61,032 at P 1 ("The Gateway Expansion Project will enable Transco to provide an additional 65,000 dekatherms (Dth) per day of firm natural gas transportation service . . . .").

pipeline are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.[22] It is past time for the Commission to learn that lesson.

9. Beginning with *Sabal Trail*, the D.C. Circuit has held unambiguously that the Commission must identify and consider reasonably foreseeable downstream GHG emissions as part of its NEPA analysis.[23] Shortly after that decision, the Commission attempted to cabin *Sabal Trail* to its facts, taking the position that it was required to consider downstream GHG emissions *only* under the exact facts presented in *Sabal Trail—i.e.*, where the pipeline was transporting natural gas for combustion at a particular natural gas power plant (or plants).[24] In *Birckhead*, the D.C. Circuit rejected that argument, admonishing the Commission that it must examine the specific record before it and that it may not categorically ignore a pipeline's downstream emissions just because it does not fit neatly within the facts of *Sabal Trail*. Indeed, the Court expressly rejected the Commission's argument "that downstream emissions are an indirect effect of a project only when the project's 'entire purpose' is to transport gas to be burned at 'specifically-identified' destinations"—i.e., the facts of *Sabal Trail*.[25] Since *Birckhead*, the court has continued to turn aside the Commission's efforts to ignore reasonably foreseeable downstream GHG emissions.[26]

10. Nevertheless, the Commission refuses to calculate or consider the downstream GHG emissions that will likely result from natural gas transported by the Project. Instead, the Commission takes the position that if it does not know the specific volume and end-use of the natural gas, any associated downstream GHG emissions are

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[22] *See Allegheny Def. Project*, 932 F.3d at 945-46; *Birckhead*, 925 F.3d at 518-19; *Sabal Trail*, 867 F.3d at 1371-72.

[23] *Sabal Trail*, 867 F.3d at 1371-72; *see also id.* at 1371 ("Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'" (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016))).

[24] *Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

[25] *Birckhead*, 925 F.3d at 519 (citing the Commission's brief in that case).

[26] *See Allegheny Def. Project*, 932 F.3d at 945-46 (holding that the petitioners are "correct that NEPA required the Commission to consider both the direct and indirect environmental effects of the Project, and that, despite what the Commission argues, the downstream greenhouse-gas emissions are just such an indirect effect").

not reasonably foreseeable.[27] That is nothing more than a warmed-over version of the policy that the D.C. Circuit rejected in *Birckhead—i.e.*, that the Commission will ignore downstream GHG emissions "without . . . more detailed information on exactly how the gas would be used."[28] Today's holding means that, almost by definition, the Commission will never consider the GHG emissions resulting from the downstream gas consumption by customers of distribution utilities, even when the record indicates that the gas will be used in combustion, as it does here.[29]

11. Under the current set of fact presented in today's record, there are plenty of steps that the Commission could take to consider the GHGs associated with the Project's incremental capacity if it were actually inclined to take a 'hard look' at climate change. At a minimum, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted[30]—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. Moreover, the record here makes this a relatively easy case: The stated purpose for the Project's expansion capacity is to serve shippers' growing market demand[31] and enable their customers to receive an incremental supply of natural gas at three delivery points in New Jersey.[32] Specifically, the two shippers that subscribed to the Project's entire capacity "intend to use capacity created by the project for incremental heating needs

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[27] Rehearing Order, 171 FERC ¶ 61,032 at PP 11-12.

[28] *Id.* P 12. The Commission notes that *Birckhead* held that downstream GHG emissions are not categorically reasonably foreseeable. *Id.* P 11. That's true. But the fact that the Commission does not have to consider downstream GHG emissions in *every* case hardly explains why it was justified in ignoring those emissions in *this* particular case. *See Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1122 (D.C. Cir. 1971) ("NEPA compels a case-by-case examination . . . of discrete factors.") (quoted in *Birckhead*, 925 F.3d at 519).

[29] *See infra* P 11.

[30] U.S. Energy Info. Admin., *September 2019 Monthly Energy Review* 22, 97 (2019) (reporting that, in 2018, 778 Bcf of natural gas had a non-combustion use compared to 29,956 Bcf of total consumption), https://www.eia.gov/totalenergy/data/monthly/archive/00351908.pdf; *see also* Jayni Hein *et al.*, Institute for Policy Integrity, *Pipeline Approvals and Greenhouse Gas Emissions* 25 (2019) (explaining that, in 2017, 97% of all natural gas consumed was combusted).

[31] Transco Application at 4.

[32] EA at 1.

beginning with the 2020-2021 heating season."[33] Using that information, the Commission could have easily engaged in a little "'reasonable forecasting'" aided by "'educated assumptions'"—which is precisely what NEPA requires—in order to develop an estimate or a range of estimates of the likely emissions caused by the Project.[34] It is hard to imagine what would cause the Commission to try so hard to ignore these reasonably foreseeable downstream GHG emissions other than its lingering inability to take the *Sabal Trail* line of cases seriously and its apparent belief that those decisions can still essentially be cabined to its facts. Until the majority starts taking the D.C. Circuit's holding seriously, I will have no choice but to continue to dissent from Commission orders that ignore reasonably GHG emissions.

12. In addition, even where the Commission quantifies the Project's direct GHG emissions,[35] it fails to "evaluate the 'incremental impact' that [those emissions] will have on climate change or the environment more generally."[36] In *Sabal Trail*, the court explained that the Commission was required "to include a discussion of the 'significance'

[33] Rehearing Order, 171 FERC ¶ 61,032 at P 6; *see also* Transco Application at 1 ("The Project will enable Transco to provide an additional 65,000 dekatherms per day [] of firm transportation service to PSEG Power LLC (PSEG) and UGI Energy Services, LLC (UGI) . . . to serve their incremental supply needs beginning with the 2020/2021 winter heating season." (internal quotation marks omitted)).

[34] *Sabal Trail*, 867 F.3d at 1374 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)); *see id.* ("We understand that emission estimates would be largely influenced by assumptions rather than direct parameters about the project, but some educated assumptions are inevitable in the NEPA process. And the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt." (internal citations and quotation marks omitted)).

[35] *See supra* note 4.

[36] *See Ctr. for Biological Diversity,* 538 F.3d at 1216 ("While the [environmental document] quantifies the expected amount of CO2 emitted . . . , it does not evaluate the 'incremental impact' that these emissions will have on climate change or on the environment more generally . . . ."); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 995 (9th Cir. 2004) ("A calculation of the total number of acres to be harvested in the watershed is a necessary component . . . , but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.").

of" the indirect effects of the Project, including its GHG emissions.[37] That makes sense. Identifying and evaluating the consequences that a project's GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.[38] But in today's order on rehearing, the Commission refuses to provide that discussion or even attempt to assess the significance of the Project's direct GHG emissions, let alone indirect emission, or how they contribute to climate change.[39] It is hard to see how hiding the ball by refusing to assess the significance of the Project's climate impacts is consistent with either of those purposes.

13. In addition, under NEPA, a finding of significance informs the Commission's inquiry into potential ways of mitigating environmental impacts.[40] An environmental review document must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[41] "Without such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[42]

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[37] *Sabal Trail,* 867 F.3d at 1374.

[38] *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purposes is to ensure that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

[39] Rehearing Order, 171 FERC ¶ 61,032 at PP 7-17 (omitting any consideration of the significance of the environmental impact from the Project's GHG emissions despite a rehearing party's claim that the EA failed to account for the project's contribution to climate change from the indirect emissions); *see also* EA at 55.

[40] 40 C.F.R. § 1502.16 (2018) (NEPA requires an implementing agency to form a "scientific and analytic basis for the comparisons" of the environmental consequences of its action in its environmental review, which "shall include discussions of . . . [d]irect effects and their significance.").

[41] *Robertson*, 490 U.S. at 351

[42] *Id.* at 352. The discussion of mitigation is especially critical under today's circumstances where the Commission prepared an EA instead of an Environmental

14. Instead, the Commission continues to insist that it need not assess the significance of the Project's GHG emissions because it lacks a "standard methodology" to "determine how the Project's "contribution to GHGs would translate into physical effects on the global environment."[43] But that does not excuse the Commission's failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project's contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Project's environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a project's climate change impacts into concrete and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however, continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.[44]

15. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely

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Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project "would not . . . significantly affect[] the quality of the human environment." EA at 58. Absent these mitigation requirements, the Project's environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) ("If *any* 'significant' environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared *before* the action is taken.").

[43] *See* EA at 55 ("Currently, there is no standard methodology to determine how a project's relatively small incremental contribution to GHGs would translate into physical effects on the global environment.").

[44] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,110 (2019) (Glick, Comm'r, dissenting in part at P 6 & n.11) (noting that the Social Cost of Carbon "gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms"); *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on issues such as "farmland,"[45] "groundwater,"[46] and "surface waters."[47] Notwithstanding the lack of any "standard methodology" to assess these impacts, the Commission uses its judgment to conduct a qualitative review, and assess the significance of the Project's effect on those considerations.[48] The Commission's refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.[49]

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[45] EA at 17 ("Based on the above analysis, we conclude that permanent impacts to prime and unique farmland would not be significant.").

[46] *Id.* at 23 ("We find that implementation of the above construction procedures, mitigation measures, and our recommendations would adequately protect groundwater resources and water wells. In conclusion, the Project would not result in any significant long-term or permanent impacts on groundwater.").

[47] *Id.* at 24 (Although the EA finds that "[p]roject construction could disturb and suspend existing sediments in surface waterbodies, temporarily degrading water quality and redistributing contaminants downstream," it ultimately concludes that with mitigation measures "the Project would not significantly impact surface waters.").

[48] The Commission directly responds to this argument by countering that it does apply "standard methodologies and established metrics" to assess significance, pointing to wetlands as an example where the project does "not directly impact" the resource. Rehearing Order, 171 FERC ¶ 61,032 at P 16. However, what the Commission fails to explain are the numerous other instances in which there are no established metrics for assessing significance but where the Commission seems to conjure up the ability to make a significance determination such as the referenced environmental impacts on farmland, groundwater, and surface waters. *See supra* notes 45-47.

[49] After all, the standard the Commission typically uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical environment. *See e.g.* Adelphia Gateway Project Environmental Assessment, Docket No. CP18-46-000 at 33 (Jan 1, 2019). Surely that standard is open to some subjective interpretation by each Commissioner. What today's order does not explain is why it is appropriate to exercise subjective interpretation and judgment when it comes to some environmental impacts, but not climate change.

16. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[50] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[51] In other words, taking the matter seriously—and rigorously examining a project's impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

17. Even if the Commission were to determine that a project's GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must "contain a detailed discussion of possible mitigation measures" to address adverse environmental impacts.[52] The Court explained that, "[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects" of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a "hard look" at the environmental consequences of the action at issue.[53] The Commission not only has the obligation to discuss mitigation of adverse environmental impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,[54] which could encompass measures to mitigate a project's GHG emissions.

18. Furthermore, a rigorous examination and determination of significance regarding climate change impacts would bolster any finding of public interest by providing the Commission a more complete set of information necessary to weigh benefits against adverse effects. By refusing to assess significance, however, the Commission short

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

[51] *Id.* (quoting *Robertson*, 490 U.S. at 351).

[52] *Robertson*, 490 U.S. at 351.

[53] *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures).

[54] 15 U.S.C. § 717f(e); Certificate Order, 165 FERC ¶ 61,221 at P 54 ("[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary . . . .").

circuits any discussion of mitigation measures for the Project's GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

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19. Today's order on rehearing is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that GHG emissions contribute to climate change, but refuses to consider whether the Project's contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record simply cannot support the Commission's conclusion that there will be no significant environmental impacts. Simply put, the Commission's analysis of the Projects' consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC Docket No. CP18-18-001

(Issued April 16, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order denies Food and Water Watch, Essex Greens Renewable Energy Campaign, 350NJ, the Borough of Roseland, and Roseland Against the Compressor Station's (collectively, the Community Groups) joint request for rehearing of the Commission's certificate order authorizing the construction and operation of Transcontinental Gas Pipe Line Company, LLC's (Transco) Gateway Expansion Project (Project).[1] The Project will provide 65,000 dekatherms per day of natural gas transportation service for PSEG Power LLC and UGI Energy Services, LLC.

2. I agree with today's order that, contrary to the Community Groups' contentions, the Commission's certificate order complies with both the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). Among other findings, today's order concludes that the Commission was not required to consider environmental effects related to upstream production or downstream use of natural gas because those effects are not reasonably foreseeable effects caused by the construction or operation of the Project.[2] Consistent with the holding in *Sierra Club v. FERC* (*Sabal Trail*),[3] the Commission quantified and considered the greenhouse gas (GHG) emissions directly associated with the construction and operation of the Project.[4] The Commission also found that there is no standard methodology to determine the Project's effect on climate change.[5]

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[1] *Transcontinental Gas Pipe Line Co., LLC*, 170 FERC ¶ 61,032 (2020) (Rehearing Order).

[2] Rehearing Order, 170 FERC ¶ 61,032 at PP 7-12.

[3] 867 F.3d 1357 (D.C. Cir. 2017). This case is commonly referred to as "Sabal Trail" because the Sabal Trail Pipeline is one of the three pipelines making up the Southeast Market Pipelines Project.

[4] Environmental Assessment at 43, 44, 55 (EA).

[5] *Id.* at 55.

3. Although I fully support today's order, I write separately to further address arguments that the Commission can deny a certificate application based on environmental effects related to the upstream production or downstream use of natural gas, or that the Commission can mitigate such effects. As in this case, there have been contentions in certificate proceedings that the NGA authorizes the Commission to deny a certificate application based on the environmental effects that result from the upstream production and downstream use of natural gas.[6] There have also been contentions that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment. I disagree.

4. A close examination of the statutory text and foundation of the NGA demonstrates that the Commission does not have the authority under the NGA or NEPA to deny a pipeline certificate application based on the environmental effects of the upstream production or downstream use of natural gas, nor does the Commission have the authority to unilaterally establish measures to mitigate GHG emissions. Further, the Commission has no reasoned basis to determine whether GHG emissions will have a significant effect on climate change nor the authority to establish its own basis for making such determination.

5. It is my intention that my discussion of the statutory text and foundation will assist the Commission, the courts, and other parties in their arguments regarding the meaning of the "public convenience and necessity" and the Commission's consideration of a project's effect on climate change. Further, my review of appellate briefs filed with the court and the Commission's orders suggests that the court may not have been presented with the arguments I make here. Before I offer my arguments, it is important that I further expound on the current debate.

I. Current debate

6. When acting on a certificate application, the Commission has two primary statutory obligations: (1) to determine whether the project is required by the "public convenience and necessity" as required by the NGA;[7] and (2) to take a "hard look" at the

[6] Community Groups January 11, 2019 Request for Rehearing at 10-16 (arguing the Commission should have considered environmental effects related to upstream production and downstream use of natural gas).

[7] 15 U.S.C. § 717f(e) (2018).

direct,[8] indirect,[9] and cumulative effects[10] of the proposed action as required by NEPA and the Council on Environmental Quality's (CEQ) implementing regulations. Recently, there has been much debate concerning what factors the Commission can consider in determining whether a proposed project is in the "public convenience and necessity," and whether the effects of upstream production and downstream use of natural gas are indirect effects of a certificate application as defined by NEPA.

7. Equating NGA section 7's "public convenience and necessity" standard with a "public interest" standard, my colleague has argued that NGA section 7 requires the Commission to weigh GHGs emitted from project facilities and related to the upstream production or downstream use of natural gas.[11] In support of his contention, my colleague has cited the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York* (*CATCO*).[12] My colleague has argued that the NGA requires the Commission to determine whether GHG emissions have a significant impact on climate change in order for climate change to "play a meaningful role in the Commission's public interest determination."[13] And he argues that by not determining the significance of those emissions, the "public interest determination [] systematically

[8] Direct effects are those "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (2019).

[9] Indirect effects are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2019). The U.S. Supreme Court held that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause; "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

[10] Cumulative effects are those "which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (2019).

[11] *See, e.g.*, *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (Glick, Comm'r, dissenting at P 3) (Adelphia Dissent); *Cheyenne Connector, LLC*, 168 FERC ¶ 61,180 (2019) (Glick, Comm'r, dissenting at P 4) (Cheyenne Connector Dissent).

[12] Adelphia Dissent P 4 n.7 (citing *CATCO*, 360 U.S. 378, 391 (1959)). The case *Atlantic Refining Co. v. Public Service Commission of State of New York* is commonly known as "*CATCO*" because the petitioners were sometimes identified by that name.

[13] Adelphia Dissent P 5.

excludes the most important environmental consideration of our time" and "is contrary to law, arbitrary and capricious" and is not "the product of reasoned decisionmaking."[14]

8. My colleague has also argued that the emissions from all downstream use of natural gas are indirect effects of a project and must be considered in the Commission's NEPA environmental documents.[15] In other proceedings, he has argued that the Commission must also consider as indirect effects GHG emissions from upstream natural gas production.[16] He has asserted that NEPA requires the Commission to determine whether GHG emissions will have a significant effect on climate change and that the Commission could make that determination using the Social Cost of Carbon or its own expertise.[17] Further, he has contended that the Commission could mitigate any GHG emissions in the event that it made a finding that the GHG emissions had a significant impact on climate change.[18]

9. Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission's obligations under NGA section 7 and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.[19] In *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission's order issuing a certificate for the Southeast Market Pipelines Project, finding that the Commission inadequately assessed GHGs emitted from downstream power plants in its

[14] *Id.*

[15] *Id.* P 6.

[16] Cheyenne Connector Dissent P 10.

[17] Adelphia Dissent PP 8-10.

[18] *Id.* P 12.

[19] The courts have not explicitly opined on whether the Commission is required to determine whether GHG emissions will have a significant impact on climate change or whether the Commission must mitigate GHG emissions. The D.C. Circuit, however, has suggested that the Commission is not required to determine whether GHG emissions are significant. *Appalachian Voices v. FERC*, 2019 WL 847199, *2 (D.C. Cir. Feb. 19, 2019) (unpublished) ("FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioner's preferred metric, the Social Cost of Carbon, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

Environmental Impact Statement (EIS) for the project. [20] The court held that the downstream GHG emissions resulting from burning the natural gas at the power plants were a reasonably foreseeable indirect effect of authorizing the project and, at a minimum, the Commission should have estimated those emissions.

10. Further, the *Sabal Trail* court found the Commission's authorization of the project was the legally relevant cause of the GHGs emitted from the downstream power plants "because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment."[21] The court stated the Commission could do so because, when considering whether pipeline applications are in the public convenience and necessity, "FERC will balance 'the public benefits against the adverse effects of the project,' *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) (internal quotation marks omitted), including adverse environmental effects, *see Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015)."[22] Relying on its finding that the Commission could deny a pipeline on environmental grounds, the court distinguished *Sabal Trail* from the Supreme Court's holding in *Public Citizen,* where the Court held "when the agency has no *legal* power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review"[23] and the D.C. Circuit's decision in *Sierra Club v. FERC* (*Freeport*), where it held "that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports."[24]

11. Based on these findings, the court concluded that "greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."[25] The court also held "the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions . . . or explained more specifically why it could not have done so."[26] The court impressed that "[it did] not hold that quantification of

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[20] *Sabal Trail*, 867 F.3d 1357.

[21] *Id.* at 1373.

[22] *Id.*

[23] *Id.* at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

[24] *Id.* at 1373 (citing *Freeport*, 827 F.3d 36, 47 (D.C. Cir. 2016)) (emphasis in original).

[25] *Id.* at 1374 (citing 15 U.S.C. § 717f(e)).

[26] *Id.*

greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action" and recognized that "in some cases quantification may not be feasible."[27]

12. More recently, in *Birckhead v. FERC*,[28] the D.C. Circuit commented in dicta on the Commission's authority to consider downstream emissions. The court stated that because the Commission could "'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is the legally relevant cause of the direct and indirect environmental effects of pipelines it approves'—even where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline."[29] The court also examined whether the Commission was required to consider environmental effects related to upstream gas production, stating it was "left with no basis for concluding that the Commission acted arbitrarily or capriciously or otherwise violated NEPA in declining to consider the environmental impacts of upstream gas production."[30]

13. I respect the holding of the court in *Sabal Trail* and the discussion in *Birckhead*, and I recognize that the *Sabal Trail* holding is binding on the Commission. However, I respectfully disagree with the court's finding that the Commission can, pursuant to the NGA, deny a pipeline based on environmental effects stemming from the upstream production or downstream use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.[31]

14. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause.[32] Whether there is a reasonably close causal relationship depends on "the underlying policies or legislative

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[27] *Id.* (emphasis in original).

[28] 925 F.3d 510 (D.C. Cir. 2019).

[29] *Id.* at 519 (citing *Sabal Trail*, 867 F.3d at 1373) (internal quotations omitted).

[30] *Id.* at 518.

[31] Though the D.C. Circuit's holding in *Sabal Trail* is binding on the Commission, it is not appropriate to expand that holding through the dicta in *Birckhead* so as to establish new authorities under the NGA and NEPA. The Commission is still bound by the NGA and NEPA as enacted by Congress, and interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony. This concurrence articulates the legal reasoning by which to do so.

[32] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).

intent" of the agency's organic statute "to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[33] Below, I review the text of the NGA and subsequent acts by Congress to demonstrate that the "public convenience and necessity" standard in the NGA is not so broad as to include environmental effects of the upstream production or downstream use of natural gas, and that the Commission cannot be responsible for those effects.

15. As for GHGs emitted from pipeline facilities themselves, I believe that the Commission can consider such emissions in its public convenience and necessity determination and is required to consider them in its NEPA analysis. As I set forth below, however, the Commission cannot unilaterally establish measures to mitigate GHG emissions, and there currently is no suitable method for the Commission to determine whether GHG emissions are significant.

II. The NGA does not permit the Commission to deny a certificate application based on environmental effects related to the upstream production or downstream use of natural gas

16. To interpret the meaning of "public convenience and necessity," we must begin with the text of the NGA.[34] I recognize that the Commission[35] and the courts have equated the "public convenience and necessity" standard with "all factors bearing on the public interest."[36] However, the phrase "all factors bearing on the public interest" does not mean that the Commission has "broad license to promote the general public

[33] *Id.* at 774 n.7.

[34] 15 U.S.C. § 717f(e) (2018). *See infra* PP 42-48. It is noteworthy that the phrase "public interest" is not included in NGA section 7(c)(1)(A) (requiring pipelines to have a certificate) or NGA section 7(e) (requiring the Commission to issue certificates). Rather, these provisions use the phrase "public convenience and necessity." NGA section 7(c)(1)(B) does refer to public interest when discussing how the Commission can issue a temporary certificate in cases of emergency. *Id.* § 717f(c)(1)(B). Congress is "presumed to have used no superfluous words." *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878); *see also U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) ("It is, of course, a 'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, n.13 (2004))).

[35] *See, e.g.*, *North Carolina Gas Corp.*, 10 FPC 469, 475 (1950).

[36] *CATCO*, 360 U.S. at 391 ("This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest."). The Court never expounded further

welfare"[37] or address greater societal concerns. Rather, the courts have stated that the words must "take meaning from the purposes of regulatory legislation."[38] The Court has made clear that statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[39] The Court has further instructed that one must "construe statutes, not isolated provisions."[40]

17. Indeed, that is how the Court in *CATCO* – the first U.S. Supreme Court case including the "all factors bearing on the public interest" language – interpreted the phrase "public convenience and necessity." In that case, the Court held that the public convenience and necessity requires the Commission to closely scrutinize initial rates *based on the framework and text* of the NGA.[41]

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on that statement.

[37] *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

[38] *Id.*; *see also Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("Any such authority to consider all factors bearing on the 'public interest' must take into account what the 'public interest' means in the context of the Natural Gas Act. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful.").

[39] *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989).

[40] *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

[41] *CATCO*, 360 U.S. 378, 388-91. The Court stated "[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Id.* at 388. The Court found that the text of NGA sections 4 and 5 supported the premise that Congress designed the Act to provide complete protection from excessive rates and charges. *Id.* ("The heart of the Act is found in those provisions requiring . . . that all rates and charges 'made, demanded, or received' shall be 'just and reasonable.'"); *id.* at 389 ("The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act . . . ."). The Court recognized that the Commission's role in setting initial rates was a critical component of providing consumers complete protection because "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable" and "would provide a windfall for the natural gas company

18. Following this precedent, the phrase "public convenience and necessity" must therefore be read within the overall statutory scheme of the NGA. As set forth below, construing the NGA *as a statute* demonstrates that Congress determined the public interest required (i) the public to have access to natural gas and (ii) economic regulation of the transportation and sale of natural gas to protect such public access.

A. The text of the NGA does not support denying a certificate application based on the environmental effects of the upstream production or downstream use of natural gas

1. NGA section 1(a)—limited meaning of "public interest"

19. Section 1 of the NGA sets out the reason for its enactment. NGA section 1(a) states, "[a]s disclosed in reports of the Federal Trade Commission [(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public *is affected with a public interest,* and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*."[42]

20. A review of the FTC Report referred to in NGA section 1 demonstrates that the NGA was enacted to counter activities that would limit the public's access to natural gas and subject the public to abusive pricing. Specifically, the FTC Report states "[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."[43]

21. The FTC Report further states "[a]ny proposed Federal legislation should be premised, in part at least, on the fact that natural gas is a valuable, but limited, natural resource in Nation-wide demand, which is produced only in certain States and limited

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with a consequent squall for the consumers," which "Congress did not intend." *Id.* at 389-90.

[42] 15 U.S.C. § 717(a) (2018) (emphasis added).

[43] FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS FINAL REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES PURSUANT TO SENATE RESOLUTION NO. 83, 70TH CONGRESS, 1ST SESSION ON ECONOMIC, CORPORATE, OPERATING, AND FINANCIAL PHASES OF THE NATURAL-GAS-PRODUCING, PIPE-LINE, AND UTILITY INDUSTRIES WITH CONCLUSIONS AND RECOMMENDATIONS NO. 84-A at 609 (1936) (FTC Report), https://babel.hathitrust.org/cgi/pt?id=ien.35556021351598&view=1up&seq=718.

areas, and the conservation, production, transportation, and distribution of which, therefore, under proper control and regulation, are matters charged with high national public interest."[44]

22. The text of NGA section 1(a) and its reference to the FTC Report make clear that "public interest" is directly linked to ensuring the public's access to natural gas through regulating its transport and sale. Moreover, the NGA is designed to promote the "public interest" primarily through economic regulation. This is apparent in the text of the NGA and by its reference to the FTC Report that identifies the concern with monopolistic activity that would limit access to natural gas.[45]

23. Therefore, there is no textual support in NGA section 1 for the claim that the Commission may deny a pipeline application due to potential upstream and downstream effects of GHG emissions on climate change. But, this is not the end of the analysis. We must also examine the Commission's specific authority under NGA section 7.

[44] *Id.* at 611.

[45] 15 U.S.C. § 717(a) (2018) ("Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest"). The limited, economic regulation meaning of "public interest" was clear at the time the NGA was adopted. The NGA's use of the phrase "affected with the public interest" is consistent with the States' use of this phrase when enacting laws regulating public utilities. Historically, state legislatures used the phrase "affected with the public interest" as the basis of their authority to regulate rates charged for the sale of commodities, rendered services, or use of private property. *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876). The Court found that businesses affected with a public interest or "said to be clothed with a public interest justifying some public regulation" include "[b]usinesses, which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation." *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923). In essence, these businesses became quasi-public enterprises and were determined to have an "indispensable nature." *Id.* at 538. Such a conclusion also meant that if these businesses were not restrained by the government, the public could be subject to "the exorbitant charges and arbitrary control to which the public might be subjected without regulation." *Id.*

2. NGA section 7—Congress grants the Commission and pipelines authority to ensure the public's access to natural gas

24. Like NGA section 1, the text of NGA section 7 makes clear that its purpose is to ensure that the public has access to natural gas. A review of the various provisions of NGA section 7 make this point evident:

- Section 7(a) authorizes the Commission to "direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas . . . to the public . . . ."[46] The Commission has stated that "[s]ection 7(a) clearly established the means whereby the Commission could secure *the benefits* of gas service for certain communities, markets and territories adjacent to those originally established by the gas industry, where in the public interest."[47]

- Section 7(b) requires Commission approval for a natural gas pipeline company to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities."[48] That is, Congress considered access to natural gas to be so important that it even prohibited natural gas pipeline companies from abandoning service without Commission approval.

- Section 7(c)(1)(B) authorizes the Commission to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate."[49] The underlying presumption of this section is that the need for natural gas can be so important that the Commission can issue a certificate without notice and hearing.

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[46] 15 U.S.C. § 717f(a) (2018).

[47] *Arcadian Corp. v. Southern Nat. Gas Co.*, 61 FERC ¶ 61,183, at 61,676 (1992) (emphasis added). The Commission's analysis in this regard was unaffected by the opinion in *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998) (vacating the Commission's 1991 and 1992 orders on other grounds).

[48] 15 U.S.C. § 717f(b) (2018).

[49] *Id.* § 717f(c)(1)(B).

- Section 7(e) states "a certificate *shall* be issued" when a project is in the public convenience and necessity,[50] leaving the Commission no discretion after determining a project meets the public convenience and necessity standard.

- Section 7(h) grants the pipeline certificate holder the powers of the sovereign to "exercise of the right of eminent domain in the district court of the United States."[51] By granting the power of eminent domain, Congress made clear the importance of ensuring that natural gas could be delivered from its source to the public by not allowing traditional property rights to stand in the way of pipeline construction. Furthermore, the sovereign's power of eminent domain must be for a public use[52] and Congress considered natural gas pipelines a public use.

25. Each of these textual provisions illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.[53] To now interpret "public convenience and necessity" to mean that the Commission has the authority to deny a certificate for a pipeline due to upstream or downstream emissions because the pipeline may result in access to, and the use of, natural gas would radically rewrite the NGA and undermine its stated purpose.

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[50] *Id.* § 717f(e) (emphasis added).

[51] *Id.* § 717f(h).

[52] *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government.").

[53] This interpretation is also supported by the Commission's 1999 Certificate Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,743 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) ("[I]t should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts *while serving increasing demands for natural gas*.") (emphasis added); *id.* at 61,751 ("[T]he Commission is urged to authorize new pipeline capacity to meet an anticipated increase in demand for natural gas . . . .").

3. NGA section 1(b) and section 201 of the Federal Power Act (FPA)—authority over environmental effects related to the upstream production and downstream use of transported natural gas reserved to States

26. Statutory text also confirms that control over the physical environmental effects related to the upstream production and downstream use of natural gas are squarely reserved for the States. NGA section 1(b) provides that "[t]he provisions of this chapter . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities for such distribution or to the production or gathering of natural gas."[54] The Ninth Circuit and the D.C. Circuit have interpreted the reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.[55] Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.[56]

27. U.S. Supreme Court precedent and legislative history confirm that the regulation of the physical upstream production and downstream use of gas is reserved for the

[54] 15 U.S.C. § 717(b) (2018); *see Pennzoil v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981) (holding that FERC lacks the power to even interpret gas purchase agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

[55] *See 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 . . . 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."). I note that the court in *Sabal Trail* did not discuss or distinguish *Public Utilities Commission of State of Cal v. FERC*.

[56] 16 U.S.C. § 824(b)(1) (2018) ("The Commission . . . shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . . ."). Despite Congress explicitly denying the Commission jurisdiction over generation decisions in the FPA, some argue that the Commission has the authority to prevent natural gas generation through general language in the NGA regarding public convenience and necessity. Such an approach violates the principle that explicit language trumps general provisions. *See, e.g.*, *Passamaquoddy Tribe v. State of Me.*, 897 F. Supp. 632, 635 ("In this case, the unequivocal language in the Maine Settlement Act clearly trumps the Gaming Act's general provisions that are silent as to Maine.").

States.[57] The Court has observed that Congress enacted the NGA to address "specific evils" related to non-transparent rates for the interstate transportation and sale of natural gas and the monopoly power of holding companies that owned natural gas pipeline company stock.[58] The Court has also found that Congress enacted the NGA to

> fill the regulatory void created by the Court's earlier decisions prohibiting States from regulating interstate transportation and sales for resale of natural gas, while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers. Thus, the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap it any way."[59]

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[57] Some will argue that the Court's dicta in *FPC v. Hope Natural Gas Co.* (*Hope*)—"[t]he Commission is required to take account of the ultimate use of the gas," 320 U.S. 591, 639 (1944)—means that the Commission can consider environmental effects related to the downstream use of natural gas. However, such argument takes the Court's statement out of context. In fact, that Court makes that statement in support of its argument that while the 1942 amendments to the NGA eliminated the language, "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest," "there is nothing to indicate that it was not and is still not an accurate statement of purpose of the Act." *Id.* at 638. Such argument further supports that Congress enacted the NGA to provide access to natural gas and to protect consumers from monopoly power.

[58] *Id.* at 610 ("state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states"); *id.* ("[T]he investigations of the Federal Trade Commission had disclosed the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies."). Senate Resolution 83, which directed the FTC to develop the report that the NGA is founded on, also demonstrates that Congress was only concerned with consumer protection and monopoly power. The resolution directed the FTC to investigate capital assets and liabilities of natural gas companies, issuance of securities by the natural gas companies, the relationship between company stockholders and holding companies, other services provided by the holding companies, adverse impacts of holding companies controlling natural gas companies, and potential legislation to correct any abuses by holding companies. FTC Report at 1.

[59] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997) (internal citations

28. In *Transco*,[60] the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."[61] Thus, the Court held that where congressional authority is not explicit and States cannot practicably regulate a given area, the Commission can consider the issue in its public convenience and necessity determination.[62]

29. Based on this rule, and legislative history,[63] the *Transco* Court found that in its public convenience and necessity determination, the Commission appropriately considered whether the end-use of the gas in a non-producing state was economically wasteful as there was a regulatory gap and no State could be expected to control how gas is used in another State.[64] The Court also impressed that

> The Commission ha[d] not attempted to exert its influence over such "*physically*" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are properly of concern to the producing State; nor has the Commission attempted to regulate the

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omitted) (quoting *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516-22 (1947) (*Panhandle*)); *see also Nw. Cent. Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989) ("The NGA 'was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.'" (quoting *Panhandle*, 332 U.S. at 513)); *Panhandle*, 332 U.S. at 520 (In recognizing that the NGA articulated a legislative program recognizing the respective responsibilities of federal and state regulatory agencies, the Court noted that the NGA does not "contemplate ineffective regulation at either level as Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority."). Congress continued to draw the NGA with meticulous regard to State power when it amended the NGA in 1954 to add the Hinshaw pipeline exemption so as "to preserve state control over local distributors who purchase gas from interstate pipelines." *Louisiana Power & Light Co. v. Fed. Power Comm'n*, 483 F.2d 623, 633 (5th Cir. 1973).

[60] *Transco*, 365 U.S. 1 (1961).

[61] *Id.* at 19.

[62] *Id*. at 19-20.

[63] *Id.* at 10-19.

[64] *Id.* at 20-21.

"economic" aspects of gas used within the producing State.[65]

30. In contrast, there is no legislative history to support the Commission considering environmental effects related to the upstream production or downstream use of gas. Furthermore, the field of environmental regulation of such activities is not one that has been left unregulated.[66] Unlike in *Transco*, States can reasonably be expected to regulate air emissions from the upstream production or downstream use of natural gas: "air pollution control at its source is the primary responsibility of States and local governments."[67] The Clean Air Act vests States with authority to issue permits to

[65] *Id.* at 20 (emphasis added).

[66] I note that the Federal Power Commission, the Commission's predecessor, at times previously considered environmental impacts in its need analysis when weighing the beneficial use of natural gas between competing uses. The Federal Power Commission did not consider negative environmental impacts of downstream end use as a reason to deny the use of natural gas. *See, e.g.*, *El Paso Natural Gas Co.*, 50 FPC 1264 (1973) (denying a certificate because the proposed project would impact existing customers dependent on natural gas and use of gas was not needed to keep sulfur emissions within the national ambient air quality standards); *Transwestern Pipeline Co.*, 36 FPC 176 (1966) (discussing use of gas instead of oil or coal and noting potential air pollution benefits); *El Paso Nat. Gas Co.*, 22 FPC 900, 950 (1959) ("[T]he use of natural gas as boiler fuel in the Los Angeles area should be considered as being in a different category than gas being used for such a purpose in some other community where the smog problem does not exist and that the use of gas for boiler fuel in this area should not be considered an inferior use."); *see also* FPC ANNUAL REP. at 2 (1966) ("Any showing that additional gas for boiler fuel use would substantially reduce air pollution merits serious consideration. Important as this factor may be, however, it cannot be considered in isolation."). Often these orders discussed sulfur and smog air pollution that occurred in the area where the natural gas would be transported when determining need as compared to the need or use of natural gas somewhere else. All of this was premised on the Commission's NGA authority to use its public convenience and necessity authority to provide access to natural gas and to conserve gas by preventing economic waste. The Commission appears to have stopped this analysis in the late-1970s. It is noteworthy that the U.S. Environmental Protection Agency (EPA) was established in 1970, Congress established more comprehensive air emissions regulation by amending the Clean Air Act in 1970 and 1977 (Pub. L. 91-604, 84 Stat. 1676 (1970); Pub. L. 95-95, 91 Stat. 685 (1977)), and Congress enacted the Department of Energy Organization Act, which replaced the Federal Power Commission with the Federal Energy Regulatory Commission, 42 U.S.C. §§ 7101 *et seq*.

[67] 42 U.S.C. § 7401 (2018).

regulate stationary sources related to upstream and downstream activities.[68] In addition, pursuant to their police powers, States have the ability to regulate environmental effects related to the upstream production and downstream use of natural gas within their jurisdictions.[69] The FTC Report referenced in NGA section 1(a) recognizes States' ability to regulate the use of natural gas.[70] And, various States have exercised this ability. For example, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont participate in the Regional Greenhouse Gas Initiative (RGGI), which requires power plants with a capacity over 25 megawatts to hold allowances equal to their CO_2 emissions over a three-year control period.[71]

31. Some may make the argument that "considering" the environmental effects related to upstream production and downstream use is hardly "regulating" such activities. I disagree. For the Commission to consider such effects would be an attempt to exert influence over States' regulation of physical upstream production or downstream use of natural gas, which the Court in *Transco* suggested would be encroaching upon forbidden ground. If, for example, the Commission considered and denied a certificate based on the GHG emissions released from production activities, the Commission would be making a judgment that such production is too harmful for the environment and preempting a State's authority to decide whether and how to regulate upstream production of natural gas. Furthermore, for the Commission to consider and deny a project based on emissions from end users, the Commission would be making a judgment that natural gas should not be used for certain activities.[72] Such exertion of influence is impermissible: "when the

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[68] *Id.* § 7661e ("Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter."). The Act defines "permitting authority" as "the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter." *Id.* § 7661.

[69] *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the more traditional concept of what is compendiously known as the police power.").

[70] FTC Report at 716 (describing Louisiana) ("The department of conservation be, and it is hereby, given supervision over the production and use of natural gas in connection with the manufacture of carbon black in other manufacturing enterprises and for domestic consumption.").

[71] REGIONAL GREENHOUSE GAS INITIATIVE, https://www.rggi.org/program-overview-and-design/elements (LAST ACCESSED NOV. 18, 2019).

[72] *See also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1320 (D.C. Cir. 2015) ("The Commission's power to preempt state and local regulation

Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to 'induc[e] a change [of state] policy' with respect to that matter."[73]

32. Hence, there is no jurisdictional gap in regulating GHG emissions for the Commission to fill. The NGA reserves authority over the upstream production and downstream use of natural gas to the States, and States can practicably regulate GHGs emitted by those activities. And, even if there were a gap that federal regulation could fill, as discussed below, it is nonsensical for the Commission to attempt to fill a gap that Congress has clearly meant for the EPA to occupy.[74] Therefore, because GHG emissions from the upstream production and downstream use of natural gas are not properly of concern to the Commission, the Commission cannot deny a certificate application based on such effects.

B. Denying a pipeline based on upstream or downstream environmental effects would undermine other acts of Congress

33. Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the production and use of natural gas and limiting the Commission's authority over the natural gas commodity. Each of these legislation enactments indicates that the Commission's authority over upstream production and downstream use of natural gas has been further limited by Congress. Arguments that the Commission can rely on the NGA's public convenience and necessity standard and NEPA to deny a pipeline application so as to prevent the upstream production or downstream use of natural gas would undermine these acts of Congress.

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by approving the construction of natural gas facilities is limited by the Natural Gas Act's savings clause, which provides that the Natural Gas Act's terms must not be construed to 'affect[] the rights of States' under the Clean Air Act. 15 U.S.C. § 717b(d)(2)."); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) ("But Congress expressly saved states' [Clean Air Act] powers from preemption.").

[73] *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *see ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (D.C. Cir. 1989) ("We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.").

[74] *See infra* PP 53-58.

1. Natural Gas Policy Act of 1978

34. Determining that federal regulation of natural gas limited interstate access to the commodity, resulting in shortages and high prices, Congress passed the Natural Gas Policy Act of 1978 (NGPA). The NGPA significantly deregulated the natural gas industry.[75] Importantly, NGPA section 601(c)(1) states, "[t]he Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section."[76]

35. Besides using price deregulation to promote access to natural gas, Congress gave explicit powers to the President to ensure that natural gas reached consumers. NGPA section 302(c) explicitly provides, "[t]he President may, by order, require any pipeline to transport natural gas, and to construct and operate such facilities for the transportation of natural gas, as he determines necessary to carry out any contract authorized under subsection (a)."[77] Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.[78]

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[75] Generally, the NGPA limited the Commission's authority over gas that is not transported in interstate commerce, new sales of gas, sales of gas and transportation by Hinshaw pipelines, and certain sales, transportation and allocation of gas during certain gas supply emergencies. *See, e.g.*, NGPA sections 601(a)(1)(A)-(D), 15 U.S.C. § 3431(a)(1)(A)-(D) (2018).

[76] *Id.* § 3431(c)(1) (2018). In addition, section 121(a) provides, "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985." 15 U.S.C. § 3331(a), *repealed by* the Wellhead Decontrol Act of 1989, Pub. L. 101-60 § 2(b), 103 Stat. 157 (1989).

[77] *Id.* § 3362.

[78] *See id.* § 3391(a) ("[T]he Secretary of Energy shall prescribe and make effective a rule . . . which provides . . . no curtailment plan of an interstate pipeline may provide for curtailment of deliveries for any essential agricultural use . . . ."); *id.* § 3392(a) ("The Secretary of Energy shall prescribe and make effective a rule which provides that notwithstanding any other provisions of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use . . . ."); *id.* § 3392(a) ("The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock uses (other than those referred to in section 3391(f)(1)(B))."); *id.* § 3393(a) ("The Secretary of Energy shall prescribe the

36. There can be no doubt about the plain language of the NGPA: the Court observed that Congress passed the NGPA to "promote gas transportation by interstate and intrastate pipelines."[79] Furthermore, the NGPA was "intended to provide investors with adequate incentive to develop new sources of supply."[80]

2. Powerplant and Industrial Fuel Use Act of 1978

37. With respect to natural gas as a fuel source for electric generation, in 1987 Congress repealed sections of the Powerplant and Industrial Fuel Use Act of 1978 (Fuel Use Act),[81] which had restricted the use of natural gas in electric generation so as to conserve it for other uses. With the repeal of the Fuel Use Act, Congress made clear that natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.[82]

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rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.").

[79] *Gen. Motors Corp. v. Tracy*, 519 U.S. at 283 (quoting 57 Fed. Reg. 13271 (Apr. 16, 1992)).

[80] *Pub. Serv. Comm'n of State of N.Y. v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 334 (1983).

[81] 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

[82] The Commission need not look any further than the text of the statutes to determine its authority. In the case of the repeal of the Fuel Use Act, the legislative history is informative as to Congress's reasoning. *See* H.R. Rep. 100-78 *2 ("By amending [Fuel Use Act], H.R. 1941 will remove artificial government restrictions on the use of oil and gas; allow energy consumers to make their own fuel choices in an increasingly deregulated energy marketplace; encourage multifuel competition among oil, gas, coal, and other fuels based on their price, availability, and environmental merits; preserve the 'coal option' for new baseload electric powerplants which are long-lived and use so much fuel; and provide potential new markets for financially distressed oil and gas producers."); *id.* *6 ("Indeed, a major purpose of this bill is to allow individual choices and competition and fuels and technologies . . . ."); *see also* President Ronald Reagan's Remarks on Signing H.R. 1941 Into Law, 23 WEEKLY COMP. PRES. DOC. 568, (May 21, 1987) ("This legislation eliminates unnecessary restrictions on the use of natural gas. It promotes efficient production and development of our energy resources by returning fuel choices to the marketplace. I've long believed that our country's natural gas resources should be free from regulatory burdens that are costly and counterproductive.").

3. Natural Gas Wellhead Decontrol Act of 1989

38. If there were any remaining doubt that the Commission has no authority to consider the upstream production of natural gas and its environmental effects, such doubt was put to rest when Congress enacted the Wellhead Decontrol Act.[83] In this legislation, Congress specifically removed the Commission's authority over the upstream production of natural gas.[84]

39. But the Wellhead Decontrol Act was not merely about deregulating upstream natural gas production. Congress explained that the reason for deregulating natural gas at the wellhead was important to ensuring that end users had access to the commodity. The Senate Committee Report for the Wellhead Decontrol Act states "the purpose (of the legislation) is to promote competition for natural gas at the wellhead *to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price*."[85] Similarly, the House Committee Report to the Wellhead Decontrol Act notes, "[a]ll sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to them on even terms with other suppliers."[86] The House Committee Report also states the Commission's "current competitive 'open access' pipeline system [should be] maintained."[87] With this statement, the House Committee Report references Order No. 436 in which the Commission stated that open access transportation "is

[83] Pub. L. 101-60, 103 Stat. 157 (1989).

[84] The Wellhead Decontrol Act amended NGPA section 601(a)(1)(A) to read, "[f]or purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas." 15 U.S.C. § 3431(a)(1)(A), *amended by*, Pub. L. 101-60 § 3(a)(7)(A), 103 Stat. 157 (1989). *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996) ("That enactment contemplates a considerably changed natural gas world in which regulation plays a much reduced role and the free market operates at the wellhead.").

[85] S. Rep. No. 101-39 at 1 (emphasis added).

[86] H.R. Rep. No. 101-29 at 6.

[87] *Id.* at 7.

designed to remove any unnecessary regulatory obstacles and to facilitate transportation of gas to any end user that requests transportation service."[88]

4. Energy Policy Act of 1992

40. In the Energy Policy Act of 1992 (EPAct 1992), Congress also expressed a preference for providing the public access to natural gas. EPAct section 202 states, "[i]t is the sense of the Congress that natural gas consumers and producers, and the national economy, are best served by a competitive natural gas wellhead market."[89]

41. The NGA, NGPA, the repeal of the Fuel Use Act, the Wellhead Decontrol Act, and EPAct 1992 each reflect Congressional mandates to promote the production, transportation, and use of natural gas. None of these acts, and no other law, including NEPA, modifies the presumption in the NGA to facilitate access to natural gas. And, it is not for the Commission to substitute its judgment for that of Congress in determining energy policy.

C. "Public convenience and necessity" does not support consideration of environmental effects related to upstream production or downstream use of natural gas

42. In addition to considering the text of the NGA as a whole and subsequent-related acts, we must interpret the phrase "public convenience and necessity" as used when enacted. As discussed below, "public convenience and necessity" has always been understood to mean "need" for the service. To the extent the environment is considered, such consideration is limited to the effects stemming from the construction and operation of the proposed facilities and is not as broad as some would believe.[90]

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[88] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42,408, 42,478 (Oct. 18, 1985) (Order No. 436).

[89] Pub. L. No. 102-486, 106 Stat. 2776 (1992).

[90] Some will cite the reference to environment in footnote 6 in *NAACP v. FPC* to argue that the Commission can consider the environmental effects of upstream production and downstream use of natural gas. *NAACP v. FPC*, 425 U.S. 662, 670 n.6. The Court's statement does not support that argument. The Court states that the environment could be a subsidiary purpose of the NGA and FPA by referencing FPA section 10, which states the Commission shall consider whether a hydroelectric project is best adapted to a comprehensive waterway by considering, among other things, the proposed *hydroelectric project's effect* on the adequate protection, mitigation, and enhancement of fish and wildlife. Nothing in the Court's statement or the citation would support the consideration of upstream and downstream impacts. *See supra* note 66

43. When Congress enacted the NGA, the phrase "public convenience and necessity" was a term of art used in state and federal public utility regulation.[91] In 1939, one year after the NGA's enactment, the Commission's predecessor agency, the Federal Power Commission, defined public convenience and necessity as "a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both, without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated."[92] To make such showing, the Commission required certificate applicants to demonstrate that the public needed its proposed project, the applicant could perform the proposed service, and the service would be provided at reasonable rates.[93]

44. To the extent that public convenience and necessity included factors other than need, they were limited and directly related to the proposed facilities, not upstream or downstream effects related to the natural gas commodity. Such considerations included the effects on pipeline competition, duplication of facilities, and social costs, such as misuse of eminent domain and environmental impacts resulting from the creation of the right-of-way or service.[94] For example, the Commonwealth of Massachusetts considered environmental impacts resulting from the creation of the right-of-way and service in denying an application to build a railroad along a beach. The Commonwealth found that "the demand for train service was held to be outweighed by the fact the beach traversed

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(explaining that the Federal Power Commission previously considered environmental impacts of downstream end use when weighing the beneficial use of natural gas between competing uses).

[91] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427-28 (1979) (Jones).

[92] *Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939).

[93] *See* Order No. 436, at 42,474 (listing the requirements outlined in *Kan. Pipe Line & Gas Co.*: "(1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; and (6) the rates proposed to be charged are reasonable.").

[94] Jones at 428.

'will cease to be attractive when it is defaced and made dangerous by a steam railroad.'"[95]

45. The Commission's current guidance for determining whether a proposed project is in the public convenience and necessity is consistent with the historic use of the term. As outlined in its 1999 Certificate Policy Statement, the Commission implements an economic balancing test that is focused on whether there is a need for the facilities and adverse economic effects stemming from the construction and operation of the proposed facilities themselves. The Commission designed its balancing test "to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas."[96] The Commission also stated that its balancing test "provide[s] appropriate incentives for the optimal level of construction and efficient customer choices."[97] To accomplish these objectives, the Commission determines whether a project is in the public convenience and necessity by balancing the public benefits of the project against the adverse economic impacts on the applicant's existing shippers, competitor pipelines and their captive customers, and landowners.[98]

46. Although the Certificate Policy Statement also recognizes the need to consider certain environmental issues related to a project, it makes clear that the environmental impacts to be considered are related to the construction and operation of the pipeline itself and the creation of the right-of-way.[99] As noted above, it is the Commission's objective to avoid *unnecessary* environmental impacts, meaning to route the pipeline to avoid environmental effects where possible and feasible, not to prevent or mitigate environmental effects from the upstream production or downstream use of natural gas. This is confirmed when one considers that, if the project had unnecessary adverse environmental effects, the Commission would require the applicant to reroute the pipeline: "If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into

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[95] *Id.* at 436.

[96] Certificate Policy Statement, 88 FERC ¶ at 61,743.

[97] *Id.*

[98] *Id.*

[99] *See also Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1299 (11th Cir. 2019) ("Regulations cannot contradict their animating statutes or manufacture additional agency power.") (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000)).

account the adverse effects on landowners who would be affected by the changed route."[100]

47. Further, the Certificate Policy Statement provides, "[i]deally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or other effects on the relevant interests from the construction of the new project."[101] And that is what occurred in this case. In the certificate order, the Commission stated "[i]n order to minimize impacts on landowners, construction will occur primarily on existing rights-of-way and within the footprint of Transco's existing facilities."[102] Further, the EA noted that the project will temporarily impact 9.43 acres of land and will not permanently impact any land.[103]

48. In sum, the meaning of "public convenience and necessity" does not support weighing the public need for the project against effects related to the upstream production or downstream use of natural gas.

D. NEPA does not authorize the Commission to deny a certificate application based on emissions from the upstream production or downstream use of transported natural gas

49. The text of the NGA, and the related subsequent acts by Congress, cannot be revised by NEPA or CEQ regulations to authorize the Commission to deny a certificate application based on effects from the upstream production and downstream use of natural gas.

50. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.[104] Nor does NEPA repeal by implication any other

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[100] Certificate Policy Statement, 88 FERC ¶ at 61,749.

[101] *Id.* at 61,747.

[102] *Transcontinental Gas Pipe Line Co., LLC*, 165 FERC ¶ 61,221, at P 18 (2018).

[103] EA at 9.

[104] *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 action the agency chooses to take must, of course, be within its province in the first instance.") (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute."); *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) ("NEPA does not mandate action which goes beyond the agency's organic jurisdiction."); *see also Flint*

statute.[105] Rather, NEPA is a merely procedural statute that requires federal agencies to take a "hard look" at the environmental effects of a proposed action before acting on it.[106] NEPA also does not require a particular result. In fact, the Supreme Court has stated, even if a NEPA analysis identifies an environmental harm, the agency can still approve the project.[107]

51. Further, CEQ's regulations on indirect effects cannot make the GHG emissions from upstream production or downstream use part of the Commission's public convenience and necessity determination under the NGA. As stated above, an agency's obligation under NEPA to consider indirect environmental effects is not limitless. Indirect effects must have "a reasonably close causal relationship" with the alleged cause, and that relationship is dependent on the "underlying policies or legislative intent."[108] NEPA requires such reasonably close causal relationship because "inherent in NEPA and its implementing regulations is a 'rule of reason,'"[109] which "recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent."[110] Thus, "where an agency has no ability to

Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla., 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way").

[105] *U.S. v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 694 (1973).

[106] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

[107] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

[108] *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 n.7 (1983).

[109] *Pub. Citizen*, 541 U.S. at 767.

[110] *Ctr. for Biological Diversity*, 941 F.3d at 1297; *see also Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("NEPA's 'rule of reason' does not require the FAA to prepare an EIS when it would 'serve no purpose.'").

prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[111]

52. The Commission has no power to deny a certificate for effects related to the upstream production or downstream use of natural gas. As explained above, the Commission's consideration of adverse environmental effects is limited to those effects stemming from the construction and operation of the pipeline facility and the related right-of-way. For the Commission to deny a pipeline based on GHGs emitted from the upstream production or downstream use of natural gas would be contrary to the text of the NGA and subsequent acts by Congress. The NGA reserves such considerations for the States, and the Commission must respect the jurisdictional boundaries set by Congress. Suggesting that the Commission can consider such effects not only risks duplicative regulation but in fact defies Congress.

III. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from pipeline facilities

53. My colleague has also suggested that the Commission should require the mitigation of GHG emissions from the certificated pipeline facilities and the upstream production and downstream use of natural gas transported on those facilities. I understand his suggestions as proposing a carbon emissions fee, offsets or tax (similar to the Corps' compensatory wetland mitigation program), technology requirements (such as scrubbers or electric-powered compressor units),[112] or emission caps. Some argue that the Commission can require such mitigation under NGA section 7(e), which provides "[t]he Commission shall have the power to attach to the issuance of the certificate . . .

[111] *Pub. Citizen,* 541 U.S. at 770; *see also Town of Barnstable*, 740 F.3d at 691 ("Because the FAA 'simply lacks the power to act on whatever information might be contained in the [environmental impact statement ('EIS')],' NEPA does not apply to its no hazard determinations.") (internal citation omitted); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the U.S. Army Corps of Engineers (Corps) was not required to consider the valley fill projects because "[West Virginia Department of Environmental Protection], and not the Corps, [had] 'control and responsibility' over all aspects of the valley fill projects beyond the filling of jurisdictional waters.").

[112] It is also important to consider the impact on reliability that would result from requiring electric-compressor units on a gas pipeline. In the event of a power outage, a pipeline with electric-compressor units may be unable to compress and transport gas to end-users, including power plants and residences for heating and cooking.

such reasonable terms and conditions as the public convenience and necessity may require."[113]

54. I disagree. The Commission cannot interpret NGA section 7(e) to allow the Commission to unilaterally establish measures to mitigate GHG emissions because Congress, through the Clean Air Act, assigned the EPA and the States exclusive authority to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," [114] not the Commission.

55. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[115] Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[116] and to establish standards of performance for the identified stationary sources.[117] The Clean Air Act requires the Administrator to conduct complex balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard.[118]

56. In addition, the Clean Air Act allows the Administrator to "distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards."[119] The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements "to

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[113] *Id.* § 717f(e) (2018).

[114] *American Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

[115] *See id.* at 419.

[116] 42 U.S.C. § 7411(b)(1)(A) (2018).

[117] *Id.* § 7411(b)(1)(B).

[118] *Id.* § 7411(a)(1).

[119] *Id.* § 7411(a)(2).

encourage the use of an innovative technological system or systems of continuous emission reduction."[120]

57. Congress also intended that States would have a role in establishing measures to mitigate emissions from stationary sources. Section 111(f) notes that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[121]

58. Thus, the text of the Clean Air Act demonstrates it is improbable that NGA section 7(e) allows the Commission to establish GHG emission standards or mitigation measures out of whole cloth. To argue otherwise would defeat the significant discretion and complex balancing that the Clean Air Act entrusts in the EPA Administrator, and would eliminate the role of the States.

59. Furthermore, to argue that the Commission may use its NGA conditioning authority to establish GHG emission mitigation—a field in which the Commission has no expertise—and address climate change—an issue that has been subject to profound debate across our nation for decades—is an extraordinary leap. The Supreme Court's "major rules" canon advises that agency rules on issues that have vast economic and political significance must be treated "with a measure of skepticism" and require Congress to provide clear authorization.[122] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[123] and "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[124]

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[120] *Id.* § 7411(j)(1)(A).

[121] *Id.* § 7411(f)(3).

[122] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson,* 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see also Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (finding regulation regarding issue of profound debate suspect).

[123] *Whitman v. American Trucking Ass.,* 531 U.S. 457, 468 (2001).

[124] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) ("Major policy questions, major economic

60. Courts would undoubtedly treat with skepticism any attempt by the Commission to establish GHG emission mitigation measures. Congress has introduced climate change bills since at least 1977,[125] over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions—29 of those were carbon emission fees or taxes.[126] For the Commission to suddenly declare such climate mitigation power resides in the long-extant NGA and that Congress's efforts were superfluous strains credibility. Establishing a carbon emissions fee or tax, or GHG mitigation out of whole cloth would be a major rule, and Congress has made no indication that the Commission has such authority.

61. Some may make the argument that the Commission can develop mitigation measures without establishing a standard. I disagree. Establishing mitigation measures requires determining how much mitigation is required – i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the human environment. Some may also argue that the Commission has unilaterally established mitigation in other contexts, including wetlands, soil conservation, and noise. These examples, however, are distinguishable. Congress did not exclusively assign the authority to establish avoidance or restoration measures for mitigating effects on wetlands or soil to a specific agency. The Corps and the EPA developed a wetlands mitigation bank program pursuant to section 404 of the Clean Water Act.[127] Congress endorsed such mitigation.[128] As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its

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questions, major political questions, preemption questions are all the same. Drafters don't intend to leave them unresolved.").

[125] National Climate Program Act, S. 1980, 95th Cong. (1977).

[126] CONGRESSIONAL RESEARCH SERVICE, MARKET-BASED GREENHOUSE GAS EMISSION REDUCTION LEGISLATION: 108TH THROUGH 116TH CONGRESSES at 3 (Oct. 23, 2019), https://fas.org/sgp/crs/misc/R45472.pdf. Likewise, the CEQ issued guidance on the consideration of GHG emissions in 2010, 2014, 2016, and 2019. None of those documents require, let alone recommend, that an agency establish a carbon emissions fee or tax.

[127] 33 U.S.C. § 1344 (2018).

[128] *See* Water Resources Development Act, Pub. L. 110-114, § 2036(c), 121 Stat. 1041, 1094 (2007); National Defense Authorization Act, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430 (2004); Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 103 (b)(6)(M), 112 Stat. 107, 133 (1998); Water Resources Development Act of 1990, Pub. L. 101-640, § (a)(18)(C), 104 Stat. 4604, 4609 (1990).

actions exceed the public nuisance standard.[129] The Commission complies with the Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[130]

62. Accordingly, there is no support that the Commission can use its NGA section 7(e) authority to establish measures to mitigate GHG emissions from proposed pipeline facilities or from the upstream production or downstream use of natural gas.[131]

IV. The Commission has no standard for determining whether GHG emissions significantly affect the environment

63. My colleague has argued that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.[132] He has challenged the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[133] He has argued that the Commission can adopt the Social Cost of Carbon[134] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as geologic resources, soils, and migratory birds.[135] He

[129] 42 U.S.C. § 7641(c) ("In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.").

[130] *See Williams Gas Pipelines Cent., Inc.*, 93 FERC ¶ 61,159, at 61,531-52 (2000).

[131] In addition, requiring a pipeline to mitigate emissions from the upstream production or downstream use of natural gas would not be "a reasonable term or condition as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2018). It would be unreasonable to require a pipeline to mitigate an effect it has no control over. Further, as discussed above, emissions from the upstream production and downstream use of natural gas are not relevant to the NGA's public convenience and necessity determination.

[132] Cheyenne Connector PP 2, 7.

[133] *Id.* PP 12-13.

[134] *Id.* P 13.

[135] *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (2019) (Comm'r,

has suggested that the Commission does not make a finding of significance in order to deceptively find that a project is in the public convenience and necessity.[136]

64. I disagree. The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change, and the Commission has no authority or reasoned basis using its own expertise to make such determination.

A. Social Cost of Carbon is not a suitable method to determine significance

65. The Commission has found, and I agree, that the Social Cost of Carbon is not a suitable method for the Commission to determine significance of GHG emissions.[137] Because the courts have repeatedly upheld the Commission's reasoning,[138] I will not restate the Commission's reasoning here.

Glick, dissenting at P 11).

[136] *Id.* P 2. The dissent uses the phrase "public interest"; however, as noted earlier, the Commission issues certificates when required by the public convenience and necessity. NGA section 7(e) does not include the phrase "public interest." To the extent that the courts and the Commission have equated the "public convenience and necessity" with "public interest," the "public convenience and necessity" is not as broad as some would argue. *See supra* P 16.

[137] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018); *see also PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, at P 123 ("Moreover, EPA recently confirmed to the Commission that the tool, which 'no longer represents government policy,' was developed to assist in rulemakings and 'was not designed for, and may not be appropriate for, analysis of project-level decision-making.'") (citing EPA's July 26, 2018 Comments in PL18-1-000).

[138] *Appalachian Voices*, 2019 WL 847199, *2; *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); *see also 350 Montana v. Bernhardt*, No. CV 19-12-M-DWM, 2020 WL 1139674, *6 (D. Mont. March 9, 2020) (upholding the agency's decision to not use the Social Cost of Carbon because it is too uncertain and indeterminate to be useful); *Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1132 (D. Colo. 2018) vacated and remanded on other grounds 2020 WL 994988 (10th Cir. March 2, 2020) ("[T]he *High*

66. However, I will address the suggestion that the Social Cost of Carbon can translate a project's impact on climate change into "concrete and comprehensible terms" that will help inform agency decision-makers and the public at large.[139] The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"[140] may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.[141] When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost using a discount rate of 5 percent),[142] agency decision-makers and the public have no reasoned basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

Country decision did not mandate that the Agencies apply the social cost of carbon protocol in their decisions; the court merely found arbitrary the Agencies' failure to do so without explanation.").

[139] Cheyenne Connector Dissent P 13 n.27.

[140] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory impact Analysis – Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (2016 Technical Support Document).

[141] In fact, the website for the Climate Framework for Uncertainty Negotiation and Distribution (FUND) – one of the three integrated assessment models that the Social Cost of Carbon uses – states "[m]odels are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models are treacherous, and mis-understood models dangerous." FUND-Climate Framework for Uncertainty, Negotiation and Distribution, http://www.fund-model.org/ (LAST VISITED NOV. 18, 2019).

[142] *See* 2016 Technical Support Document at 4. The Social Cost of Carbon produces wide-ranging dollar values based upon a chosen discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from $12 to $123. *Id.*

B. The Commission has no authority or reasoned basis to establish its own framework

67. Some argue that the lack of externally established targets does not relieve the Commission from establishing a framework or targets on its own. Some have suggested that the Commission can make up its own framework, citing the Commission's framework for determining return on equity (ROE) as an example. However, they overlook the fact that Congress designated the EPA, not the Commission, with exclusive authority to determine the amount of emissions that are harmful to the environment. In addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

68. As I explain above, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that "in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[143] and to establish standards of performance for the identified stationary sources.[144] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

69. Further, the Commission is not positioned to unilaterally establish a standard for determining whether GHG emissions will significantly affect the environment when there is neither federal guidance nor an accepted scientific consensus on these matters.[145] This inability to find an acceptable methodology is not for a lack of trying. The Commission

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[143] 42 U.S.C. § 7411(b)(1)(A) (2018).

[144] *Id.* § 7411(b)(1)(B).

[145] The Council on Environmental Quality's 2019 Draft Greenhouse Gas Guidance states, "[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature." CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019); *see also* 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 at 22 (Aug. 1, 2016) ("agencies need not undertake new research or analysis of potential climate change impacts in the proposed action area, but may instead summarize and incorporate by reference the relevant scientific literature"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

reviews the climate science, state and national targets, and climate models that could inform its decision-making.[146]

70. Moreover, assessing the significance of project effects on climate change is unlike the Commission's determination of ROE. Establishing ROE has been one of the core functions of the Commission since its inception under the FPA as the Federal Power Commission.[147] And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.[148] The Commission's methodology is also founded in established economic theory.[149] In contrast, assessing the significance of GHG emissions is not one of the Commission's core missions and there is no suitable methodology for making such determination.

71. It has been argued that the Commission can establish its own methodology for determining significance, pointing out that the Commission has determined the significance of effects on geologic resources, soils, and migratory birds using its own expertise and without generally accepted significance criteria or a standard methodology.

72. I disagree. As an initial matter, it is important to note that when the Commission states it has no suitable methodology for determining the significance of GHG emissions, the Commission means that it has no reasoned basis for making such finding. The Commission's findings regarding significance for geological resources, soils, and migratory birds have a reasoned basis. For example for geologic resources, the Commission determined seismic risk by referencing the United States Geological Service's (USGS) Seismic Hazard Probability Map and resources prepared by the State

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[146] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 36; *see also WildEarth Guardians*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS.").

[147] *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

[148] *See, e.g., Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (finding New York State must provide "a fair return upon the reasonable value of the property at the time it is being used for the public.").

[149] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (describing the Commission's use of the Discounted Cash Flow model that was originally developed in the 1950s as a method for investors to estimate the value of securities).

of New Jersey, including New Jersey Department of Protection resources.[150] The Commission determined that there is a 2 percent probability of an earthquake with an effective peak ground acceleration (PGA) of 14 to 20 percent g (characterized as strong to very to strong ground shaking and light to moderate structural damage) and a 10 percent probability of an earthquake with an effective PGA of 4 to 5 percent g being exceeded (characterized as moderate perceived ground shaking and minimal potential damage to structures).[151] The Commission also considered the history and size of earthquakes that have occurred in the region.[152] Based on this information, the Commission reasonably found that the Project is not likely to be adversely impacted by seismic events.[153]

73. In contrast, the Commission has no reasoned basis to determine whether a project has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions and compare that number to national emissions to calculate a percentage of national emissions. That calculated number cannot inform the Commission on climate change effects caused by the project, e.g., increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Nor are there acceptable scientific models that the Commission may use to attribute every ton of GHG emissions to a physical climate change effect.

74. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."[154] Simply put, stating that an amount of GHG

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[150] EA at 11-12.

[151] *Id.* 11.

[152] *Id.* 12.

[153] *Id.*

[154] *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) (quoting *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)); *see also American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (". . . the Commission's NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and *non sequiturs*") (italics in original); *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) ("The EA provides no foundation for the inference that a valid comparison may be drawn between the sheep's reaction to hikers and their reaction to large, noisy ten-wheel ore trucks.").

emissions appears significant without any support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

V. Conclusion

75. This concurrence is intended to assist the Commission, courts, and other parties in their consideration of the Commission's obligations under the NGA and NEPA. The Commission cannot act *ultra vires* and claim more authority than the NGA provides it,

regardless of the importance of the issue sought to be addressed.[155] The NGA provides the Commission no authority to deny a certificate application based on the environmental effects from the upstream production or downstream use of natural gas. Congress enacted the NGA, and subsequent legislation, to ensure the Commission provided public access to natural gas. Further, Congress designed the NGA to preserve States' authority to regulate the physical effects from the upstream production and downstream use of natural gas, and did not leave that field unregulated. Congress simply did not authorize the Commission to judge whether the upstream production or downstream use of gas will be too environmentally harmful.

76. Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned that authority to the EPA and the States. Finally, the Commission has no reasoned basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations and survive judicial review.

77. I recognize that some believe the Commission should do more to address climate change. The Commission, an energy agency with a limited statutory authority, is not the appropriate authority to establish a new regulatory regime.

For these reasons, I respectfully concur.

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Bernard L. McNamee
Commissioner

[155] *Office of Consumers' Counsel*, 655 F.2d at 1152 ("[A]ppropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.").