169 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tennessee Gas Pipeline Company, L.L.C. Docket No. CP19-7-000

ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT

(Issued December 19, 2019)

1. On October 19, 2018, Tennessee Gas Pipeline Company, L.L.C. (Tennessee) filed an application pursuant to sections 7(b) and 7(c) of the Natural Gas Act[1] (NGA) and Part 157 of the Commission's regulations[2] to construct and operate a new 2.1-mile-long, 12-inch-diameter pipeline loop and replace two compressor units at Compressor Station 261 (CS 261) in Hampden County, Massachusetts (261 Upgrade Project). The 261 Upgrade Project will enable Tennessee to provide an additional 72,400 dekatherms per day (Dth/day) of firm transportation service on its pipeline system.

2. For the reasons stated below, we grant the requested authorizations, subject to conditions.

I. Background and Proposal

3. Tennessee, a Delaware limited liability company, is a natural gas company as defined by section 2(6) of the NGA[3] engaged in the transportation of natural gas in interstate commerce. Tennessee's pipeline system extends from Texas, Louisiana, and the Gulf of Mexico, through Mississippi, Alabama, Arkansas, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and New Hampshire.

4. The 261 Upgrade Project is designed to provide up to 72,400 Dth/day of firm transportation service on Tennessee's system from existing interconnections with Maritimes & Northeast Pipeline, LLC (Maritimes) and Portland Natural Gas

[1] 15 U.S.C. § 717f(b), (c) (2018).

[2] 18 C.F.R. pt. 157 (2019).

[3] 15 U.S.C. § 717a(6).

Transmission System's (Portland) Joint Facilities in Dracut, Massachusetts, and Iroquois Gas Transmission System's facilities in Wright, New York, to the discharge side of CS 261[4]. Tennessee estimates the cost of the project to be $52 million.

5. Specifically, Tennessee proposes to construct an approximately 2.1-mile-long, 12-inch-diameter pipeline loop located adjacent to Tennessee's existing 8-inch-diameter 261BP-100 pipeline and 10-inch-diameter 261B-100 pipeline in Hampden County, Massachusetts. Tennessee states that it will remove a previously abandoned 6-inch-diameter pipeline where the pipeline loop will be installed adjacent to the 261B-100 pipeline (approximately 1.1 miles of the total pipeline loop length).[5]

6. Tennessee also proposes to abandon two compressor units, one 5,490 horsepower (hp) unit and one 1,199 hp unit, at CS 261 in Hampden County, Massachusetts, and replace those units with a single new 11,107 hp natural gas-fired turbine compressor unit. Tennessee states that the new compressor unit will provide new firm transportation service and replace existing horsepower at CS 261 required to meet current and anticipated operational needs. Specifically, 6,689 hp of compression will be used to maintain existing service and 4,418 hp will be used to provide the new firm transportation service created by the project. Tennessee states that the replacement will result in more reliable service for existing shippers and allow Tennessee to reduce emissions at CS 261.

7. Tennessee conducted an open season for the 261 Upgrade Project from May 23, 2017, to June 30, 2017.[6] Tennessee entered into a 20-year binding precedent agreement for firm transportation service with Bay State Gas Company d/b/a Columbia Gas of Massachusetts (CMA) for 96,400 Dth/day, of which 40,400 Dth/day will be served by capacity created by the 261 Upgrade Project.[7] Tennessee also entered into a 20-year

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[4] Tennessee has also reserved 45,400 Dth/day of existing mainline capacity on its system from the interconnect with Maritimes and Portland's Joint Facilities in Dracut, Massachusetts, to CS 261. Tennessee states that reservation of the existing capacity has enabled Tennessee to reduce the facilities that need to be constructed to meet project shippers' specific market needs.

[5] The 6-inch-diameter pipeline was abandoned in 1958. *Tennessee Gas Transmission Co.*, 20 FPC 441 (1958).

[6] The open season also solicited offers to turn back capacity, but no bids were received.

[7] Tennessee will provide firm transportation service to CMA through reserved capacity on Tennessee's system and new capacity created by the 261 Upgrade Project. Initially, using existing reserved capacity, Tennessee will provide CMA with 50,000 Dth

binding precedent agreement for firm transportation service with Holyoke Gas and Electric Department (Holyoke) for 5,000 Dth/day.[8] Both CMA and Holyoke are local distribution companies. The expansion facilities will also make available 27,000 Dth per day of firm transportation service from Tennessee's interconnection with Iroquois in Wright, New York to CS 261. This service is not currently subscribed.

II. Procedural Issues

A. Notice, Interventions, Protests, and Comments

8. Notice of Tennessee's application in Docket No. CP19-7-000 was published in the *Federal Register* on November 8, 2018, with comments, interventions, and protests due November 23, 2018.[9] The parties listed in Appendix A filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[10] Mary Babinski, Jesse Ladner, and Alex B. Morse filed late motions to intervene, which were granted.[11]

9. Numerous entities and individuals filed protests and adverse comments raising concerns over the need for and the environmental impacts of the proposed project. We also received numerous comments in support of the proposed project. These issues are addressed in the Environmental Assessment (EA) and below.

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per day of firm transportation service from Dracut to Tennessee's Agawam, Lawrence, and East Longmeadow delivery points. Subsequently, again using existing reserved capacity, Tennessee will provide CMA an additional 6,000 Dth per day of firm transportation service from Dracut to the new Longmeadow Meter Station that Tennessee is constructing on its 200 Line under the automatic provisions of its blanket certificate. Finally, for the instant proposal, Tennessee will use existing reserved capacity, to provide 40,400 Dth per day of firm transportation service from Dracut to CS 261. The expansion facilities will provide the capacity to provide the service to the Agawam delivery point.

[8] Tennessee will also use existing reserved capacity to provide Holyoke with 5,000 Dth per day of firm transportation service on the mainline with the expansion facilities providing service to the specific delivery point.

[9] 83 Fed. Reg. 55,879 (2018).

[10] 18 C.F.R. § 385.214(c) (2019).

[11] *See* Secretary's December 19, 2018, and May 21, 2019 Notices Granting Late Intervention.

B. Request to Delay the Proceeding

10. The Pipeline Awareness Network for the Northeast (PLAN) states that CMA is under investigation by the National Transportation Safety Board (NTSB) for a September 13, 2018 explosion that occurred on CMA's distribution system, and argues that the Commission should not process Tennessee's application until the investigation is complete.[12] CMA's distribution system is not under our jurisdiction and the NTSB investigation does not impact our evaluation of the 261 Upgrade Project. Therefore, we will not hold this proceeding in abeyance until completion of the NTSB investigation.

III. Discussion

11. Because the proposed facilities will be used to transport natural gas in interstate commerce subject to the Commission's jurisdiction, the construction and operation of the facilities are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.[13] Additionally, Tennessee's proposed abandonment is subject to subsection (b) of section 7 of the NGA.[14]

A. Certificate Policy Statement

12. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new pipeline construction.[15] The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

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[12] *See* PLAN December 27, 2018 Comment at 1-2.

[13] 15 U.S.C. § 717f((c), (e).

[14] *Id*. § 717f(b).

[15] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

13. Under this policy, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. Subsidization and Impact on Existing Customers

14. As stated above, the threshold requirement is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Certificate Policy Statement further provides that it is not a subsidy for existing customers to pay for projects designed to replace existing capacity or improve the reliability or flexibility of existing service.[16]

15. Tennessee proposes to recover the costs for the 261 Upgrade Project through a combination of incremental rates and system rates.[17] The Commission has determined, in general, that where a pipeline proposes to charge incremental rates for expansion services that are higher than the company's existing system rates, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.[18] As discussed below, we are approving an incremental recourse rate designed to recover the costs of the expansion facilities that is higher than Tennessee's existing system rates. With respect to the replacement of existing compression at CS 261, existing shippers will benefit from the enhanced reliability and flexibility the new compressor unit will

[16] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,746 n.12.

[17] Approximately $31.7 million is supported by 261 Upgrade Project shippers and $20.3 million is borne by Tennessee's existing shippers. Specifically, existing shippers will be allocated a portion of costs associated with the replacement of compression at CS 261.

[18] *See, e.g.*, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, at P 22 (2017).

provide.[19] Therefore, we find there will be no subsidization of the project by existing shippers.

2. Existing Pipelines and Their Customers

16. The 261 Upgrade Project is not designed to replace service on existing pipelines, and no pipelines or their customers have filed adverse comments regarding Tennessee's proposal. Thus, we find that the project will not adversely affect other pipelines or their captive customers.

3. Landowners and Communities

17. We are additionally satisfied that Tennessee has taken appropriate steps to minimize adverse impacts on landowners. Tennessee proposes to co-locate 100 percent of the proposed new pipeline loop on land adjacent to Tennessee's existing right-of-way or other utility and transportation corridors.[20] Moreover, the replacement of the compressor units at CS 261 will occur entirely within the fence line of the existing compressor station. Accordingly, we find that Tennessee has taken sufficient measures to minimize the impacts of the project on landowners and communities.

4. Project Need

18. Several intervenors and commenters challenge the need for the 261 Upgrade Project. They assert that project demand can be satisfied by renewable energy alternatives, such as solar and wind power, or energy efficiency gains.[21] Commenters also question whether future market demand supports the need for the project.[22]

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[19] Tennessee notes that new compressor unit will have a greater operating range particularly during periods of peak flows. See page 7 of Tennessee's application.

[20] *See* EA at 7-8.

[21] *See, e.g.,* 2degrees November 13, 2018 Motion to Intervene; Climate Action Group November 13, 2018 Motion to Intervene; Food & Water Watch November 21, 2018 Motion to Intervene; Darcy DuMont November 23, 2018 Motion to Intervene; Tina Ingmann November 23, 2018 Motion to Intervene; Alex Morse May 3, 2018 Motion to Intervene; City of Holyoke June 17, 2019 Comment at 2 (noting that the City intends to utilize existing infrastructure and energy conservation initiatives to meet future heating needs in order to obtain 100 percent renewable energy).

[22] *See* Massachusetts Attorney General June 17, 2019 Comment.

19. It is well established that precedent agreements are significant evidence of demand for a project.[23] As the court stated in *Minisink Residents for Environmental Preservation & Safety v. FERC*, and again in *Myersville Citizens for a Rural Community, Inc., v. FERC*, nothing in the Certificate Policy Statement or in any precedent construing it suggest that the policy statement requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's precedent agreements with shippers.[24] Given the substantial financial commitment required under these agreements by project shippers, we find that these agreements are the best evidence that the service to be provided by the project is needed in the markets to be served. Moreover, it is current Commission policy to not look beyond precedent or service agreements to make judgments about the needs of individual shippers.[25]

20. Here, Tennessee entered into precedent agreements for approximately 63 percent of the incremental capacity to be made available by the 261 Upgrade Project. Moreover, Ordering Paragraph (C) of this order requires that Tennessee file a written statement

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[23] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,748 (precedent agreements, though no longer required, "constitute significant evidence of demand for the project"); *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (affirming Commission reliance on preconstruction contracts for 93 percent of project capacity to demonstrate market need); *Twp. of Bordentown v. FERC*, 903 F.3d 234, 263 (3d Cir. 2018) ("As numerous courts have reiterated, FERC need not 'look[] beyond the market need reflected by the applicant's existing contracts with shippers.'") (quoting *Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 183 F.3d 1301, 1311 (D.C. Cir. 2015)); *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *1 (D.C. Cir. Feb.19, 2019) (unpublished) (precedent agreements are substantial evidence of market need). *See also Midship Pipeline Co., LLC*, 164 FERC ¶ 61103, at P 22 (2018) (long-term precedent agreements for 64 percent of the system's capacity is substantial demonstration of market demand); *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098, at P 16 (2018) (affirming that the Commission is not required to look behind precedent agreements to evaluate project need); *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 41 (2017), *order on rehearing*, 164 FERC ¶ 61,054 (2018), *aff'd*, *City of Oberlin v. FERC*, 937 F.3d 599, 605 (2019) (finding need for a new pipeline system that was 59 percent subscribed).

[24] *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 110 n.10 (D.C. Cir. 2014); *see also Myersville Citizens for a Rural Cmty., Inc., v. FERC*, 183 F.3d 1301, 1311 (D.C. Cir. 2015).

[25] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

affirming that it has executed final contracts for service at the levels provided for in its precedent agreements. This is persuasive evidence of market need for the project.[26]

21. We also disagree with commenters' assertions that project demand can be satisfied by renewable energy. Renewable energy sources would not accomplish the project purpose of providing natural gas transportation service. The Commission cannot require individual energy users to use different or specific energy resources.[27]

22. In addition to the general challenges to project need addressed above, PLAN filed comments arguing that the precedent agreement with CMA is insufficient to establish need for the project. PLAN speculates that an underlying purpose for CMA's precedent agreement with Tennessee no longer exists.[28] Specifically, PLAN states that the main purpose of the precedent agreement was CMA's plan to construct an intrastate pipeline through West Springfield to Holyoke. CMA no longer plans to construct this pipeline, and PLAN asserts that, consequently, CMA no longer needs the capacity that the 261 Upgrade Project will provide.[29] PLAN further states that Holyoke will no longer be a shipper for the 261 Upgrade Project based on unspecified conditions of Holyoke's precedent agreement that PLAN claims cannot be met if CMA does not construct the intrastate pipeline.[30] Since CMA is not constructing the pipeline, PLAN states that CMA is now the 261 Upgrade Project's sole shipper.[31]

23. PLAN also argues that CMA does not need the new capacity created by the project because CMA can receive additional gas from the Longmeadow Meter Station.[32] PLAN

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[26] *See Midship Pipeline Co.*, 164 FERC ¶ 61,103, at P 22 (2018) (finding precedent agreements for 64 percent of capacity to be a substantial demonstration of market demand).

[27] *Rh Energytrans, LLC*, 165 FERC ¶ 61,218, at P 21 (2018); *see also* 15 U.S.C. 717f(e) ("a certificate *shall be issued* to any qualified applicant therefore . . . .").

[28] *See* PLAN April 18, 2019 Comment at 2-3; PLAN May 9, 2019 Comment at 3-4; PLAN June 10, 2019 Comment at 2-4; PLAN June 28, 2019 Comment at 2-4; PLAN October 17, 2019 Comment at 1.

[29] PLAN October 17, 2019 Comment at 3-4.

[30] PLAN November 18, 2019 Comment at 2.

[31] *Id.*

[32] PLAN June 28, 2019 Comment at 3-4.

notes that CMA's precedent agreement with Tennessee already includes 6,000 Dth/day to be delivered at the Longmeadow Meter Station. PLAN states that the Massachusetts Department of Public Utilities will review CMA's new long-range forecast and supply plan and speculates that the Department might reexamine CMA's precedent agreement for the 261 Upgrade Project, despite approving it previously.[33]

24. CMA filed comments in response to PLAN's arguments stating that it needs the capacity from the project to provide reliable service to its existing customers.[34] CMA states that the 261 Upgrade Project and CMA's canceled plan to build a pipeline to Holyoke were not interdependent.[35] Similarly, CMA states that the need for the capacity at the Longmeadow Meter Station is independent from the need for capacity created by the project.[36] Finally, CMA notes that the Massachusetts Department of Public Utilities, the regulator with jurisdiction over CMA, approved CMA's precedent agreement with Tennessee for the 261 Upgrade Project based on demonstrated need for the new capacity.[37]

25. In response to PLAN's comments, Tennessee notes that because it does not have control over the gas downstream of its system, discussion of potential projects proposed by Tennessee's shippers, including CMA, is outside the Commission's scope of review for the 261 Upgrade Project.[38] Tennessee reiterates CMA's statement that the Longmeadow Meter Station is separate and distinct from the 261 Upgrade Project and has an independent utility.[39] Tennessee states that it will proceed with the Longmeadow Meter Station even in the event that Tennessee does not proceed with the 261 Upgrade Project.[40]

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[33] PLAN November 18, 2019 Comment at 1-2.

[34] CMA April 29, 2019 Comment at 1; CMA June 25, 2019 Comment at 3.

[35] CMA June 25, 2019 Comment at 3.

[36] *Id.* at 4.

[37] *Id.* at 1-2 (citing *Bay State Gas Company d/b/a/ Columbia Gas of Massachusetts*, DPU 17-172 (May 31, 2018)).

[38] Tennessee April 23, 2019 Data Response at 3.

[39] Tennessee July 17, 2019 Comment at 2.

[40] *Id.*

26. As noted above, it is current Commission policy to not look beyond precedent or service agreements to make judgements about the needs of individual shippers.[41] Looking behind the precedent agreements entered into by state-regulated utilities, such as CMA, would infringe upon the role of state regulators in determining the prudence of expenditures by the utilities they regulate.[42] While noting that the Massachusetts Department of Public Utilities approved CMA's precedent agreement with Tennessee for this project based on demonstrated need,[43] we will not speculate on the conclusion of the Massachusetts Department of Public Utilities' upcoming review of CMA's new long-range forecast and supply plan.

27. With regard to PLAN's claim that Holyoke is no longer a shipper for the 261 Upgrade Project, nothing in the record indicates that Holyoke has terminated its precedent agreement. In any event, Ordering Paragraph (C) requires Tennessee to file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in the signed precedent agreements, prior to commencing construction.

28. We are also unpersuaded by PLAN's speculation that CMA might not configure its system in a way that will require capacity created by the project. With respect to the Longmeadow Meter Station, both Tennessee and CMA make clear that it is separate and distinct from the 261 Upgrade Project and is not designed to replace capacity created by the project. Further, as noted above, Tennessee is required to file a written statement affirming that it has executed final contracts for service at the levels provided for in its precedent agreements prior to receiving authorization to commence construction.

5. Conclusion

29. In view of the considerations above, we find that Tennessee has demonstrated a need for the 261 Upgrade Project and that the project's benefits to the market outweigh any adverse effects on other pipelines and their captive customers, and on landowners and surrounding communities. Additionally, we find that Tennessee's proposed abandonment of facilities is permitted by the public convenience and necessity.[44]

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[41] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,744 (citing *Transcontinental Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at 61,316 (1998)).

[42] *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 40 (2018).

[43] *Bay State Gas Company d/b/a/ Columbia Gas of Massachusetts*, DPU 17-172 (May 31, 2018).

[44] 15 U.S.C. § 717f(b).

Tennessee's project will replace two older compressor units with one new, more efficient and reliable unit, in addition to providing incremental firm transportation service to subscribing shippers. Consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, we find that the public convenience and necessity requires approval of Tennessee's proposal, as conditioned in this order.

B. Design of the Facilities

30. PLAN states that the pipeline looping component of the project is not necessary to meet CMA's capacity requirements, because CMA's needs can be fulfilled by the replacement of the compressor units alone.[45] Thus, PLAN reasons that because the project is not fully subscribed, the looping portion is superfluous and should not be approved. PLAN provides no evidence to support this allegation. CMA comments that the looping component of the project is necessary for it to receive its transported gas at the delivery pressure required to provide reliable service to its customers.[46] Tennessee responds that it cannot provide CMA the capacity contracted for in the precedent agreement without completing both the looping portion and the compressor replacement portion of the project.[47] Commission staff has independently examined the submitted pipeline flow models and determined that the looping component of the project is necessary to make deliveries at the contractually agreed upon delivery pressure.

C. Rates

1. Initial Recourse Rates

31. Tennessee proposes to charge an incremental recourse reservation charge under its Rate Schedule FT-A for the new firm transportation service made possible by the 261 Upgrade Project. In calculating the incremental rate, Tennessee proposes to allocate all the pipeline costs and a portion of the new compression based on the horsepower requirements for creating new capacity and maintaining the existing capacity. More specifically, Tennessee allocates approximately 39.8 percent (4,418 hp out of the 11,107 hp of the new compressor unit to be installed) of the costs to the incremental rate for the new capacity. Tennessee also requests a predetermination that it may roll the remaining 60.2 percent of the costs, that portion related to the replacement of the existing

[45] PLAN June 10, 2019 Comment at 4.

[46] CMA June 25, 2019 Comment at 3.

[47] Tennessee August 27, 2019 Comment at 1-2.

compression at CS 261, into its general system rates in its next NGA section 4 general rate proceeding.

32. Tennessee proposes to charge an incremental monthly recourse reservation charge of $6.7515 per Dth, which reflects a first year cost of service of $5,866,000 and annual billing determinants of 868,800 Dth.[48] Tennessee proposes an incremental usage charge of $0.0054 per Dth, which reflects an 84 percent load factor utilization rate.[49] The proposed cost of service reflects: (a) the income tax rates,[50] capital structure, and rate of return approved in Tennessee's rate settlement in Docket Nos. RP95-112-000, et al.;[51] (b) a straight-line depreciation rate of 3.33 percent, based on an estimated useful life of the facilities of thirty years; and (c) projected operation and maintenance expenses based on historical cost factors on the Tennessee system for similar facilities. In addition to the incremental rates described above, project shippers will also be subject to any applicable general system reservation and usage surcharges.

33. Tennessee states that its proposed 3.33 percent depreciation rate is based on an estimated useful life of the facilities of thirty years and is consistent with the Commission's Uniform System of Accounts and Commission precedent.[52] The Commission's general policy with regard to depreciation for integrated incremental expansion projects, such as Tennessee's, is to use the pipeline's last stated and approved

[48] Exhibit N at 3.

[49] This load factor is based on historical load factor levels on the Tennessee system.

[50] For purposes of deriving the incremental recourse rate, the federal income tax rate has been adjusted to reflect the reduction in federal corporate income tax rates to 21 percent as a result of the Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

[51] *Tennessee Gas Pipeline Co*., 94 FERC ¶ 61,117 (2001), *reh'g denied*, 95 FERC ¶ 61,034 (2001); *Tennessee Gas Pipeline Co.*, 77 FERC ¶ 61,083 (1996), *reh'g denied*, 78 FERC ¶ 61,069 (1997), *pet. for review denied sub nom. NorAm Gas Transmission Co. v. FERC*, 148 F.3d 1158 (D.C. Cir. 1998). The income tax rates, capital structure, and rate of return were reaffirmed in Tennessee's last rate settlement in Docket No. RP15-990-000. *Tennessee Gas Pipeline Co., L.L.C.*, 152 FERC ¶ 61,009 (2015).

[52] Tennessee Application at 18 (citing *See Tennessee Gas Pipeline Co*., 136 FERC ¶ 61,173, at P 19 (2011); *Millennium Pipeline Co.,* 117 FERC ¶ 61,319, at P 130 (2006)).

depreciation rate.[53] We recognize, however, that the Commission has inconsistently applied this policy[54] and on multiple occasions has approved Tennessee's request to use a 3.33 percent depreciation rate instead of its last stated and approved rate.[55] Because Tennessee has likely relied on this precedent to determine its revenue requirement for the proposed project, we will allow Tennessee to use its proposed depreciation rate here.[56]

34. Going forward, however, pipelines should use their last stated and approved depreciation rate to establish their initial incremental rates. Applying this policy allows the Commission to expediently review NGA section 7 certificate applications whereas reviewing depreciation rates on a case-by-case basis may cause undue delay. This practice is consistent with the NGA section 7's requirement for initial rates to "hold the line" until just and reasonable rates are adjudicated under NGA section 4 or 5.[57]

35. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental

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[53] *Gulf South Pipeline Co., LP,* 163 FERC ¶ 61,124, at P 23 (2018), *reh'g denied*, 166 FERC ¶ 61,089, at P 30 (2019); *Wyoming Interstate Co.*, 119 FERC ¶ 61,251, at P 22 (2007) (stating that the Commission's general policy with respect to pipeline expansions is to use the depreciation rate approved in the pipeline's last NGA section 4 general rate proceeding).

[54] *Gulf South Pipeline Co., LP,* 166 FERC ¶ 61,089 at P 30; *Wyoming Interstate Co.*, 119 FERC ¶ 61,251 at P 22. *C.f. Northwest Pipeline LLC*, 164 FERC ¶ 61,038, at P 14 (2018) (approving higher straight-line depreciation rate).

[55] *Tennessee Gas Pipeline Co., L.L.C.*, 158 FERC ¶ 61,110, at PP 22-25 (2017); *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,254, at PP 42-44 (2016); *Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,157, at P 23 (2016); *Tennessee Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,156, at P 25 (2016); *Tennessee Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,191, at PP 19-21 (2016); *Tennessee Gas Pipeline Co.*, 136 FERC ¶ 61,173, at PP 19, 45 (2011).

[56] The Commission has found that the use of 3.33 percent depreciation rate based on a straight-line method was a "systematic and rational method consistent with the Commission's Uniform System of Accounts." *Millennium Pipeline Co.,* 117 FERC ¶ 61,319, at P 130 (2006). Going forward, pipelines with incremental expansions should not rely on Millennium Pipeline as that case involved establishing initial rates for a new natural gas company.

[57] *Atlantic Refining Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391-392 (1959).

rate exceeds the maximum system recourse rate.[58] Tennessee's proposed incremental reservation charge of $6.7515 per Dth will be higher than Tennessee's system rate. Further, Tennessee's 100 percent load factor incremental rate will be higher than Tennessee's combined weighted average system daily rate[59] for Zone 5-6 and Zone 6-6.[60] Therefore, we will approve Tennessee's incremental reservation and usage charge.

36. As noted, Tennessee contemplates rolling the portion of the costs related to the replacement of existing compression at CS 261 into its general system rates in its next NGA section 4 general rate proceeding and requests a predetermination favoring rolled-in rate treatment for the 60.2 percent of costs associated with that replacement. Tennessee states that this approach ensures that both existing and new customers share the benefits and costs of the larger compressor unit on a pro-rata basis. Tennessee contends that it is appropriate to seek rolled-in rate treatment for the costs associated with maintaining existing service, stating that the two existing compressor units at CS 261 will be replaced with a new and more efficient compressor unit, allowing Tennessee to improve system reliability to the benefit of all of its shippers.

37. The proposal to seek rolled-in rate treatment for a portion of the cost of the new compressor unit is consistent with Commission policy, which permits the roll in of costs of projects designed to improve reliability or flexibility of service for existing customers.[61] As discussed above, the Commission's no-subsidy policy recognizes that existing customers should pay the costs of projects designed to improve their service by replacing existing capacity, improving reliability, or providing additional flexibility. Therefore, the Commission will grant a predetermination favoring rolled-in rate treatment in a future NGA section 4 general rate proceeding, absent any significant change in circumstances.

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[58] Certificate Policy Statement, 88 FERC ¶ 61,227 at 61,746.

[59] *See Tennessee Gas Pipeline Company, L.L.C.*, 167 FERC ¶ 61,169 (2019) at Appendix A-2. On April 4, 2019, Tennessee filed a settlement reflecting a tiered reduction to its base rates. Using Appendix A-2, page 1 of the settlement in Docket No. RP19-351-000, a weighted average combined system rate based on the 10.5 percent reduction for comparison to the incremental combined rate was developed. These rates will go into effect November 1, 2020, the day Tennessee proposes to place this project into service.

[60] The capacity for the project is created in Zones 5-6 and 6-6.

[61] Certificate Policy Statement, 88 FERC at 61,746 n.12.

2. Fuel

38. Tennessee proposes to roll the project's fuel and electric power costs into its fuel tracker and assess to the project's shippers the applicable general system fuel rate and electric power cost rate. Tennessee asserts that Exhibit Z-4 demonstrates that rolling the fuel and electric power costs into Tennessee's fuel tracker will not negatively impact Tennessee's existing shippers and will result in a decrease in fuel consumption. Based on Tennessee's fuel study, we approve Tennessee's proposal to charge its generally applicable system fuel and electric power rates for new transportation capacity created by the project.

3. Reporting Incremental Costs

39. Tennessee must keep separate books and accounting of costs and revenues attributable to the incremental services and capacity created by the project as required by section 154.309 of the Commission's regulations.[62] The books should be maintained with applicable cross-reference as required by section 154.309.[63] This information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.[64]

4. Negotiated Rates

40. Tennessee proposes to provide service to the project's shippers under negotiated rate agreements. Tennessee must file either negotiated rate agreements or tariff records setting forth the essential elements of the agreements in accordance with the Alternative Rate Policy Statement[65] and the Commission's negotiated rate policies.[66] Tennessee

[62] 18 C.F.R. § 154.309 (2019).

[63] *Id.*

[64] *See Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 112 FERC ¶ 61,262, FERC Stats. & Regs ¶ 31,267 (2008).

[65] *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines,* 75 FERC ¶ 61,024, *reh'g denied,* 75 FERC ¶ 61,066 (1996), *petition for review denied sub nom. Burlington Resources Oil & Gas Co. v. FERC,* 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

[66] *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy,* 104 FERC ¶ 61,134 (2003), *order on reh'g and clarification,*

must file the negotiated rate agreements or tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.[67]

5. Non-Conforming Provisions

41. In Exhibit I of the application, Tennessee provides copies of its firm transportation agreements with CMA (CMA Agreement) and Holyoke (Holyoke Agreement). Tennessee states that the proposed agreements include certain provisions that deviate from its *pro forma* Rate Schedule FT-A transportation service agreement and requests the Commission approve these non-conforming provisions.

42. Tennessee proposes to include the following non-conforming provisions in both its CMA Agreement and Holyoke Agreement:

- Commencement date provisions that account for the new construction;
- Language clarifying that the rates, charges, and surcharges to be paid by the project's shippers will commence upon the effective date of the respective agreements;
- Language specifying that all upstream and downstream transportation arrangements be in place as of the requested effective date of service;
- Term language stating that the agreements will be in effect for 20 years, and then on a month-to-month basis thereafter unless terminated by either party upon at least 30 days prior written notice to the other party;
- Creditworthiness provisions requiring certain standards, or to provide Tennessee with credit support in the form of a guaranty, letter of credit, or a cash security deposit; and
- Contractual right-of-first-refusal provisions to extend the respective Gas Transportation Agreements beyond the Extended Term.

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114 FERC ¶ 61,042, *dismissing reh'g and denying clarification,* 114 FERC ¶ 61,304 (2006).

[67] Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a precedent agreement that survives the execution of the service agreement. *See, e.g., Texas Eastern Transmission, LP,* 149 FERC ¶ 61,198, at P 33 (2014). *See also* 18 C.F.R. § 154.112(b) (2019).

43. Tennessee proposes to include the following additional non-conforming provisions specific to its CMA Agreement:

- Language specifying that Tennessee will construct, install, own, and operate, or otherwise acquire access to the facilities necessary for Tennessee to receive and deliver the gas as contemplated in the precedent agreement at the point of receipt and the points of delivery; and

- A minimum pressure requirement that will allow CMA to meet its delivery obligations to customers on its distribution system.

44. Tennessee proposes to include the following additional non-conforming provisions specific to its Holyoke Agreement:

- Provisions allowing Holyoke to terminate the agreement if Tennessee does not obtain necessary approvals, authorizations, and consents for the project's construction from particular entities by specific dates; and

- Language clarifying that Holyoke and Tennessee may execute an amendment to the agreement omitting any precedent conditions that have been satisfied or completed, leaving the remaining provisions of the agreement unchanged.

45. In *Columbia Gas Transmission Corp*., the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff; and (2) affects the substantive rights of the parties.[68] However, not all material deviations are impermissible. As explained in *Columbia*, provisions that materially deviate from the corresponding *pro forma* service agreement fall into two general categories: (1) provisions the Commission must prohibit because they present significant potential for undue discrimination among shippers; and (2) provisions the Commission can permit without a substantial risk of undue discrimination.[69]

46. The Commission finds that the non-conforming provisions delineated above in both the CMA Agreement and Holyoke Agreement constitute material deviations from Tennessee's *pro forma* firm transportation agreement. However, in other proceedings, the Commission has found that non-conforming provisions may be necessary to reflect

[68] *Columbia Gas Transmission Corp.,* 97 FERC ¶ 61,221, at 62,002 (*Columbia*); *ANR Pipeline Co*., 97 FERC ¶ 61,224, at 62,022 (2001).

[69] *Columbia*, 97 FERC ¶ 61,224 at 62,003.

the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of a project.[70] We find that the aforementioned non-conforming provisions identified by Tennessee are permissible because they do not present a risk of undue discrimination, do not affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service.

47. At least 30 days, but not more than 60 days, before providing service to a project shipper under these non-conforming agreements, Tennessee must file executed copies of the non-conforming agreements as part of its tariff, disclosing and reflecting all non-conforming provisions. Tennessee must also file a tariff record identifying the agreements as non-conforming, consistent with section 154.112 of the Commission's regulations.[71] When Tennessee files its non-conforming service agreements, we require Tennessee to identify and disclose all non-conforming provisions or agreements affecting the substantive rights of the parties under the tariff or service agreements.[72] This required disclosure includes any such transportation provisions or agreements detailed in a precedent agreement that survives the execution of the service agreements.

D. Environmental Analysis

48. On December 6, 2018, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed 261 Upgrade Project and Request for Comments on Environmental Issues (NOI). The NOI was published in the Federal Register on December 12, 2018, and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.[73]

49. We received several comments in response to the NOI, including from the Massachusetts Attorney General Office (AGO), the Commonwealth of Massachusetts

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[70] *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 82 (2008); *Rockies Express Pipeline LLC*, 116 FERC ¶ 61,272, at P 78 (2006).

[71] 18 C.F.R. § 154.112 (2019).

[72] A Commission ruling on non-conforming provisions in a certificate proceeding does not waive any future review of such provisions when the executed copy of the non-conforming agreement(s) and a tariff record identifying the agreement(s) as non-conforming are filed with the Commission consistent with section 154.112 of the Commission's regulations. *See Tennessee Gas Pipeline Co., L.L.C.*, 150 FERC ¶ 61,160, at P 44 (2015).

[73] 83 Fed. Reg. 63,853 (2018).

Energy Facilities Siting Board, the City of Northampton, Columbia Gas Resistance Campaign, PLAN, Berkshire Environmental Action Team (BEAT), and several members of the public. The primary issues raised by the commenters included segmentation, project need, alternatives, impacts to wetlands and waterbodies, invasive species, impacts to threatened and endangered species, impacts to soils, land use impacts, air quality impacts, noise impacts, cumulative impacts, climate change, and safety.

50. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA), our staff prepared an Environmental Assessment (EA) for Tennessee's proposal. The U.S. Army Corps of Engineers participated as a cooperating agency in the preparation of the EA. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. All substantive environmental comments received in response to the NOI were addressed in the EA. The EA was issued for a 30-day comment period and placed into the public record on May 17, 2019. The Commission received comments on the EA from the Massachusetts AGO, the City of Holyoke, PLAN, BEAT, and the Planning Board of the Town of Longmeadow (Town of Longmeadow). In addition, Tennessee filed responses to the EA comments on July 17, 2019, and August 27, 2019. These comments are addressed below.

1. Request for an Environmental Impact Statement

51. PLAN requests an environmental impact statement (EIS) be prepared for the project, citing concerns regarding project need, segmentation, and alternatives.[74]

52. Under NEPA, agencies must prepare an EIS for major federal actions that may significantly impact the environment.[75] If an agency determines that a federal action is not likely to have significant adverse effects, it may prepare an EA. Additionally, the Commission's regulations state that even for major construction projects under section 7 of the NGA, an EA may be prepared first if the Commission believes that a proposed action may not be a major federal action significantly affecting the quality of the human environment.[76]

[74] PLAN June 10, 2019 Comment at 1.

[75] *See* 42 U.S.C. § 4332(2)(C) (2018); 40 C.F.R. § 1502.4 (2019).

[76] 18 C.F.R. § 380.6(b) (2019); *see also Coal. for Responsible Growth & Res. Conservation v. FERC*, 485 F. App'x 472, 474 (2d Cir. 2012) (EIS not required for 39 mile long greenfield pipeline project).

53. Here, Commission staff prepared an EA to determine whether the project would have a significant impact on the human environment, which would then require the preparation on an EIS. The EA assesses the potential effects of the project on a variety of resources. Based on the findings in the EA, we agree with its conclusion that approval of the project will not constitute a major federal action significantly affecting the quality of the human environment. Therefore, preparation of an EIS is not required.

2. Environmental Protection Agency is not a Cooperating Agency

54. BEAT states that the U.S. Environmental Protection Agency (EPA) should have been included as a cooperating agency in preparation of the EA.[77] Under the NGA, the Commission is designated as the federal agency responsible for authorizing the siting of interstate natural gas transmission facilities, and is the lead federal agency for the preparation of the EA in compliance with the requirements of NEPA. The NOI invited all agencies with jurisdiction and/or special expertise to cooperate in the EA process. The U.S. Army Corps of Engineers was the only agency that responded to the NOI and participated as a cooperating agency.

3. Compliance with State Statutes

55. The Massachusetts AGO contends that the Commission should not authorize the 261 Upgrade Project until all federally required state approvals are issued, including a Massachusetts Water Quality Certification under the Clean Water Act section 401.[78] The Massachusetts AGO also states that any authorization from the Commission should be conditioned on full compliance with the Massachusetts Wetlands Protection Act, Massachusetts Endangered Species Act, and any conservation and management permits issued by the Massachusetts Division of Fisheries and Wildlife.[79] The City of Holyoke notes that under Massachusetts state law, the 261 Upgrade Project would be subject to limited review by local entities with regards to impact on wetlands.[80]

56. The Commission is the federal agency with siting authority under the NGA. Any state or local permits issued with respect to the jurisdictional facilities authorized herein

[77] *See* BEAT June 17, 2019 Comment at 1.

[78] Massachusetts AGO June 17, 2019 Comment at 9.

[79] *Id.* at 9-10.

[80] City of Holyoke June 17, 2019 Comment at 3.

must be consistent with the conditions of this authorization.[81] We encourage our applicants to file for and receive the local and state permits, in good faith, as stewards of the community in which the facilities are located. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction of facilities approved by the Commission.[82] With respect to needed federal authorizations, Environmental Condition 9 requires Tennessee to receive all applicable authorizations required under federal law prior to construction.

4. Indirect Impacts of Upstream and Downstream Greenhouse Gas Emissions

57. Commenters argue that the EA failed to properly evaluate the indirect and cumulative greenhouse gas impacts of upstream natural gas production and downstream natural gas combustion-related activities in combination with the impacts of the 261 Upgrade Project.[83] Specifically, commenters argue that it is foreseeable that an expansion in natural gas transportation capacity would impact production of natural gas upstream in the supply chain.[84] Additionally, commenters argue that a lack of information about the end use of natural gas does not excuse the Commission from analyzing indirect downstream greenhouse gas emission impacts, and the Commission should seek information from Tennessee about the gas's likely end use in order to

[81] *Dominion Transmission, Inc. v. Summers,* 723 F.3d 238, 243 (D.C. Cir. 2013) (holding state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

[82] *See, e.g., Schneidewind v. ANR Pipeline Co*., 485 U.S. 293 (1988); *Dominion Transmission, Inc. v. Summers,* 723 F.3d at 243 (holding state and local regulation is preempted by the NGA to the extent they conflict with federal regulation, or would delay the construction and operation of facilities approved by the Commission); *Iroquois Gas Transmission System, L.P.,* 52 FERC ¶ 61,091 (1990), *order on reh'g*, 59 FERC ¶ 61,094 (1992).

[83] *See, e.g.,* Massachusetts AGO June 17, 2019 Comment at 6-8; PLAN June 14, 2019 Comment at 2; BEAT June 17, 2019 Comment at 7-8; City of Holyoke June 17, 2019 Comment at 4-5.

[84] *See, e.g.,* Massachusetts AGO June 17, 2019 Comment at 7.

conduct such an analysis.[85] By failing to do this, commenters assert that the Commission's indirect impacts analysis fails to satisfy NEPA.[86]

58. Indirect effects are defined as those "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."[87] Accordingly, to determine whether an impact should be studied as an indirect impact, the Commission must determine whether it is: (1) caused by the proposed action; and (2) reasonably foreseeable.[88]

59. With respect to causation, "NEPA requires 'a reasonably close causal relationship' between the environmental effect and the alleged cause"[89] in order "to make an agency responsible for a particular effect under NEPA[.]"[90] As the Supreme Court explained, "a 'but for' causal relationship is insufficient [to establish cause for purposes of NEPA]."[91] 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."[92] Further, the Court has stated that "where an agency has no ability to

[85] *Id.*

[86] *Id.* at 8.

[87] 40 C.F.R. § 1508.8(b) (2019).

[88] *See id.*; *see also id.* § 1508.25(c).

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

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

[91] *Id.*; *see also Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (*Freeport LNG*) (finding that the Commission need not examine everything that could conceivably be a but-for cause of the project at issue); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (*Sabine Pass LNG*) (recognizing that the Commission's order authorizing the construction of liquefied natural gas export facilities is not the legally relevant cause of increased production of natural gas).

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

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."[93]

60. 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."[94] Although NEPA requires "reasonable forecasting,"[95] an agency "is not required to engage in speculative analysis"[96] or "to do the impractical, if not enough information is available to permit meaningful consideration."[97]

61. Here, the specific source of natural gas to be transported via the 261 Upgrade Project has not been identified with any precision and will likely change throughout the project's operation. As we have previously concluded in other natural gas infrastructure proceedings and affirm with respect to the 261 Upgrade Project, the environmental effects resulting from natural gas production are neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by the Council on Environmental Quality (CEQ) regulations, where the supply source is unknown.[98]

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[93] *Pub. Citizen*, 541 U.S. at 770; *see also Freeport LNG*, 827 F.3d at 49 (affirming that *Public Citizen* is explicit that the Commission need not consider effects, including induced production, that could only occur after intervening action by the DOE); *Sabine Pass LNG*, 827 F.3d at 68 (same); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016) (same).

[94] *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).

[95] *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (quoting *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)).

[96] *Id.* at 1078.

[97] *Id.* (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006) (internal quotation marks and citation omitted)).

[98] *See, e.g.*, *Central New York Oil and Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F.App'x. 472, 474-75 (2d Cir. 2012) (unpublished opinion).

62. The 261 Upgrade Project will receive gas from other interstate pipelines and there is no evidence in the record that would help predict the number and location of any additional wells that would be drilled as a result of any production demand associated with the project. Moreover, there is no evidence demonstrating that, absent approval of the project, this gas would not be brought to market by other means. Therefore, we conclude that the environmental impacts of upstream natural gas production are not an indirect effect of the project.[99] Last, where there is not even an identified general supply area for the gas that will be transported on the project, any analysis of production impacts would be so generalized it would be meaningless.[100]

63. With respect to downstream greenhouse gas emissions, we do not find that approval of the project will spur additional identifiable gas consumption. The D.C. Circuit Court of Appeals 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."[101] However, outside the context of known specific end use, the D.C. Circuit affirmed in *Birckhead v. FERC*, the fact that "emissions from downstream gas combustion are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project."[102]

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[99] *Birckhead v. FERC*, 925 F.3d 510, 517-518 (D.C. Cir. 2019) (holding the Commission did not violate NEPA in not considering upstream impacts where there was no evidence to predict the number and location of additional wells that would be drilled as a result of a project).

[100] *See Sierra Club v. DOE*, 867 F.3d 189, 200 (D.C. Cir. 2017) (accepting DOE's "reasoned explanation" as to why the indirect effects pertaining to induced natural gas production were not reasonably foreseeable where DOE noted the difficulty of predicting both the incremental quantity of natural gas that might be produced and where at the local level such production might occur, and that an economic model estimating localized impacts would be far too speculative to be useful).

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

[102] *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (citing *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission,* 449 F.2d 1109, 1122 (D.C. Cir. 1971)). 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

64. In this case, Tennessee has signed precedent agreements with two local distribution companies. Consistent with the court's directive, the Commission sought out information regarding the end-use of this gas.[103] Tennessee responded that the project will be used to provide gas service to support CMA's and Holyoke's residential and commercial connections in the Greater Springfield service territory.[104] Because the specific volume and end-use of the gas that will be transported under those contracts, as well as the gas that may ultimately be transported using the uncontracted for capacity, is unknown, any potential greenhouse gas emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable, and therefore not an indirect impact of the 261 Upgrade Project.

5. Climate Change Impacts of Greenhouse Gas Emissions

65. Commenters identify climate change as a significant global issue, and state that the greenhouse gas emissions from the project would result in adverse effects on the climate.[105] Commenters assert that methane emissions from the project are not properly analyzed in the EA.[106] The Massachusetts AGO states that it is insufficient for the EA to note that there will be occasional fugitive methane emissions from pipeline leaks and above ground facilities, but not attempt to quantify these emissions or analyze blowdowns or other methane emission sources.[107] The Massachusetts AGO also requests that the Commission require Tennessee to use state-of-the-art methane leak detection and reduction technologies, and maintain a regular inspection schedule.[108]

66. The EA discusses the direct greenhouse gas impacts from construction and operation of the project, the climate change impacts in the region, and the regulatory

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possible." *Birckhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019) (quoting *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)).

[103] Commission staff May 16, 2019 Data Request.

[104] Tennessee May 20, 2019 Data Response.

[105] *See, e.g,* BEAT June 17, 2019 Comment at 9; City of Holyoke June 17, 2019 Comment at 4.

[106] *See, e.g.,* Massachusetts AGO June 17, 2019 Comment at 8-9.

[107] *Id.*

[108] *Id.* at 9.

structure for greenhouse gases under the Clean Air Act.[109] The EA estimated that construction of the 261 Upgrade Project may result in emissions of up to 4,531 tons of carbon dioxide equivalent (CO_2e) over the duration of construction.[110] Additionally, the EA estimated that operation of the project will result in emissions of up to 113,131 tons of CO_2e per year during project operation.[111]

67. Methane emissions are included as part of the greenhouse gas emissions presented in the EA.[112] Construction and operational greenhouse gas emissions, including emissions associated with blowdowns, are presented in tables 17 and 18 of the EA.[113] Regarding the Massachusetts AGO's request to require state-of-the-art methane leak detection and reduction technologies, the Commission requires that all projects be designed to meet the minimum standards that are set by the EPA, the agency with authority to establish air emission standards for stationary sources.[114] In its application, Tennessee proposes to install one new centrifugal compressor equipped with a dry seal system, which is not subject to the standards.[115] However, Tennessee also states fugitive emissions will be subject to leak detection and repair requirements set forth in these standards.[116]

68. The EA also included a qualitative discussion that addressed various effects of climate change.[117] The EA acknowledges that the quantified greenhouse gas emissions

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[109] EA at 53-55.

[110] *Id.* at 54.

[111] *Id.*

[112] EA at 53-54.

[113] EA at 54.

[114] *See* 40 C.F.R. pt. 60 (2019).

[115] Tennessee Application, Resource Report 9 at 9-7. Compressor units include one of two types of sealing systems to prevent gas leakage: a wet seal system or a dry seal system. The EPA sets standards for wet seal systems to reduce emission of gas. However, the EPA has not set standards for dry seal systems because those systems inherently result in lower emissions than wet seal designs.

[116] *Id.*

[117] EA at 66-69.

from the construction and operation of the project will contribute incrementally to climate change.[118] Further, the Commission has previously concluded it could not determine a project's incremental physical impacts on the environment caused by greenhouse gas emissions.[119] The Commission has also previously concluded it could not determine whether a project's contribution to climate change would be significant.[120]

6. Alternatives

a. Project Purpose

69. PLAN states that the EA's description of the project's purpose improperly narrows the range of alternatives that the EA considers.[121] PLAN states that the broader purpose for the project, to help alleviate capacity-strain in the New England gas market, can be met through a variety of alternatives that are dismissed in the EA, such as demand management and use of renewable energy.

70. We disagree. It is appropriate that the applicant's statement of purpose and need inform the choice of alternatives. The choice of alternatives, and the depth of discussion of those alternatives, must be reasonable.[122] The CEQ advises, however, that "a reasonable range of alternatives depends on the nature of the proposal and the facts in each case."[123] An agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is "shaped by the application at issue and by the function that the agency plays in the decisional process."[124]

71. Here, the EA's stated purpose and need for the project, to provide long-term firm transportation service to the project's shippers and to help alleviate capacity-strain in the

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[118] *Id.* at 68.

[119] *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

[120] *Id*.

[121] PLAN June 14, 2019 Comment at 1-2.

[122] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

[123] CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026, 18,027 (1981).

[124] *Citizens Against Burlington, Inc.*, 938 F.2d at 195, 199.

New England gas markets, provided an appropriate basis on which to evaluate the project's alternatives.[125]

b. Electric-Driven Compressor Station Alternative

72. Commenters contend that the EA should not have dismissed the use of an electric-driven compressor unit as a viable alternative to the proposed gas-fired unit at CS 261 based on the lack of electric facilities.[126] PLAN states that an electric-driven compressor unit could be built at an alternate location that would not impact surrounding wetlands.[127] The Massachusetts AGO states that the EA should have quantified the reduction in greenhouse gases that would have come from an electric-driven compressor unit.[128]

73. The EA considered and eliminated the alternative of using an electric-driven compressor unit for a variety of reasons. Tennessee evaluated use of an electric-drive compressor but determined that it would be more costly and would not provide as great a level of operational flexibility during periods of peak demand and severe weather events as would a natural gas driven compressor. [129] The alternative would also not provide significant environmental advantages.[130] The EA found that an electric-driven compressor unit would require construction of a new building, electric substation, and ancillary equipment within the CS 261 site, and that such construction would impact a large wetland system associated with Worthington Brook.[131] Regardless of whether there was a feasible alternate site that would not impact the wetland system, construction associated with substitution of a new electric-driven compressor unit would still create more environmental impacts than the proposed action, which does not require construction beyond the existing developed portion of the site and would have minimal, temporary wetland disturbance during construction.[132]

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[125] EA at 1.

[126] *See, e.g.,* Massachusetts AGO June 17, 2019 Comment at 4.

[127] PLAN June 10, 2019 Comment at 8.

[128] Massachusetts AGO June 17, 2019 Comment at 4.

[129] EA at 71; Tennessee Application, Resource Report 10 at 10-11.

[130] EA at 71.

[131] *Id.*

[132] *Id.*

74. Moreover, the EA stated that although electric-driven compression would eliminate certain stationary source emissions at CS 261, these emissions would be transferred to electric generation facilities in the area, which also use natural gas, coal, oil or other methods of electrical generation that yield their own environmental impacts.[133] NEPA's "rule of reason" governs "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them."[134] Because there is nothing in the record nor publicly available information on the specific source of electricity that would power the alternative electric-driven compressor unit, the EA reasonably did not quantify the environmental effects, including the GHG emissions, related to the unknown power generation source.

75. Considering the above, we therefore find that the EA appropriately eliminated the electric-driven compressor unit alternative.

7. Segmentation

76. CEQ regulations require the Commission to include "connected actions," "cumulative actions," and "similar actions" in its NEPA analyses. An agency impermissibly 'segments' NEPA review when it divides connected, cumulative, or similar federal actions into separate projects and thereby fails to address the true scope and impact of the activities that should be under consideration. "Connected actions" include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; or (c) are interdependent parts of a larger action and depend on the larger action for their justification.[135]

77. In evaluating whether multiple actions are, in fact, connected actions, courts have employed a "substantial independent utility" test, which the Commission finds useful for determining whether the three criteria for a connected action are met. The test asks "whether one project will serve a significant purpose even if a second related project is not built."[136] For proposals that connect to or build upon an existing infrastructure

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[133] *Id.*

[134] *Citizens Against Burlington*, 938 F.2d at 195 (emphasis in original) (quotation marks omitted).

[135] 40 C.F.R. § 1508.25(a)(1).

[136] *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 69 (D.C. Cir. 1987). *See also O'Reilly v. U.S. Army Corps of Eng'rs*, 477 F.3d 225, 237 (5th Cir. 2007) (defining independent utility as whether one project "can stand alone without requiring

network, this standard distinguishes between those proposals that are separately useful from those that are not. While the analogy between the two is not apt in many regards, similar to a highway network, "it is inherent in the very concept of" the interstate pipeline grid "that each segment will facilitate movement in many others; if such mutual benefits compelled aggregation, no project could be said to enjoy independent utility."[137]

78. In *Delaware Riverkeeper Network v. FERC*, the court ruled that individual pipeline proposals were interdependent parts of a larger action where four pipeline projects, when taken together, would result in "a single pipeline" that was "linear and physically interdependent" and where those projects were financially interdependent.[138]

79. Commenters state that the Longmeadow Meter Station should have been included in the scope of the EA, and its absence is improper segmentation.[139] PLAN and the Town of Longmeadow both argue that the Longmeadow Meter Station is interdependent with the 261 Upgrade Project and cannot be considered a separate action. As evidence that the Longmeadow Meter Station is a part of the 261 Upgrade Project, PLAN points to a presentation Tennessee made that included the two actions on the same slide and handouts from CMA that listed the two actions as reliability projects.[140]

80. As noted in the Project Need analysis above, CMA filed a response to comments, stating that the new point of delivery that will be constructed at the Longmeadow Meter Station is completely independent from the need for additional capacity created by the 261 Upgrade Project.[141] CMA elaborates that currently, natural gas service is provided to its customers on the east side of the Connecticut River by a single pipe, and if something were to happen to that pipe, there could be a loss of service to some of CMA's

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construction of the other [projects] either in terms of the facilities required or of profitability.").

[137] *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d at 69.

[138] *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, at 1314 (D.C. Cir. 2014).

[139] *See* PLAN June 10, 2019 Comment at 4-5; Town of Longmeadow June 18, 2019 Comment at 2 (citing 40 C.F.R. § 1508.25(a)(1)(iii)); BEAT June 17, 2019 Comment at 8-9.

[140] PLAN June 10, 2019 Comment at 5; PLAN June 21, 2019 Comment at 1; PLAN August 28, 2019 Comment at 6-7.

[141] CMA June 25, 2019 Comment at 4.

customers.[142] Thus, the primary purpose of adding the delivery point at the Longmeadow Meter Station is to reduce the risk of disruption and enhance reliability and redundancy.[143]

81. Also noted in the Project Need analysis above, Tennessee filed a response clarifying that the Longmeadow Meter Station has an independent utility and will be constructed whether or not the 261 Upgrade Project proceeds and along a separate timeline.[144] Tennessee states that the volume of gas that will be supplied to the meter station will be sourced from Tennessee's existing system and is therefore not related to the 261 Upgrade Project.[145] Further, Tennessee notes that CMA requested that the Longmeadow Meter Station delivery point be operational by November 2019, whereas the 261 Upgrade Project is anticipated to be placed in service in November 2020, highlighting the separate timelines of the two actions.[146]

82. Actions are not connected if they display independent utility. The primary utility of the Longmeadow Meter Station is to enhance reliability and redundancy for CMA's customers, whereas a primary purpose of the 261 Upgrade Project is to provide additional transportation service to the project's shippers. Additionally, construction and operation of the 261 Upgrade Project and Longmeadow Meter Station do not require other previous or simultaneous actions to be taken. Each action comprises discrete facilities in separate locations. Commission staff has independently examined the submitted flow diagrams for the 261 Upgrade Project and has determined that the design of project is not affected by the Longmeadow Meter Station construction and that Tennessee can provide all required transportation services to its shippers independent of the Longmeadow Meter Station.

83. Although the two actions both involve CMA, they have different timelines and address separate needs. Unlike the projects at issue in *Delaware Riverkeeper Network*, construction of the Longmeadow Meter Station and the 261 Upgrade Project are not "financially and functionally interdependent."[147] Tennessee's proposed Longmeadow

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[142] *Id.*

[143] *Id.*

[144] Tennessee July 17, 2019 Response at 2.

[145] *Id.*

[146] *Id.*

[147] *Delaware Riverkeeper Network*, 753 F.3d 1304, at 1319; *see also City of Boston Delegation, et al. v. FERC*, No. 16-1081, *et al.*, 897 F.3d 241, 251-53 (D.C.

Meter Station is an independent project that is not in any way reliant upon the 261 Upgrade Project (or vice versa).[148] We therefore agree with the conclusions in the EA that including the Longmeadow Meter Station in the scope of the project analysis is not warranted.[149]

8. Conclusion

84. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with Tennessee's application and supplements, and in compliance with the environmental conditions in Appendix B of this Order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

85. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted. Only when satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

86. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities.

Cir. 2018) (providing an overview of other FERC segmentation and cumulative impacts cases).

[148] Senators Edward Markey and Elizabeth Warren filed comments arguing that Tennessee should not be able to use its blanket authority to construct the Longmeadow Meter Station. *See* Senators Edward Markey and Elizabeth Warren November 20, 2019 Comment. However, consistent with the provisions of section 157.211 of our regulations, Tennessee's use of the authority provided by its blanket certificate to construct the meter station is appropriate. 18 C.F.R. § 157.211 (2019); *see Tennessee Gas Pipeline Co.*, 20 FERC ¶ 62,409 (1982) (granting Tennessee a blanket certificate pursuant to Part 157, Subpart F of the Commission's regulations).

[149] *See* EA at 63.

However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.[150]

87. At a hearing held on December 19, 2019, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing Tennessee to construct and operate the 261 Upgrade Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) The certificate authority issued in Ordering Paragraphs (A) is conditioned on the following:

(1) Tennessee's completion of the authorized construction of the proposed facilities and making them available for service within 24 months from the date of this order, pursuant to section 157.20(b) of the Commission's regulations;

(2) Tennessee's compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154 and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the regulations;

(3) Tennessee's compliance with the environmental conditions listed in Appendix B of this order.

(C) Tennessee shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in the signed precedent agreements, prior to commencing construction.

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[150] *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also Schneidewind v. ANR Pipeline Co*., 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(D) Tennessee is granted permission and approval under NGA section 7(b) to abandon two compressor units at Tennessee's existing Compressor Station 261 in Hampden County, Massachusetts.

(E) Tennessee shall notify the Commission within ten (10) days of the date of the abandonment.

(F) Tennessee's proposal to use its incremental monthly reservation charge under Rate Schedule FT-A is approved as the initial charge for the new firm transportation service created by the project.

(G) Tennessee's proposal to use its incremental usage charge under Rate Schedule FT-A is approved as the initial charge for the new firm transportation service created by the project.

(H) Tennessee's predetermination request to roll in the costs related to the replacement of two compressor units at CS 261 in a future NGA section 4 general rate proceeding is granted.

(I) Tennessee's proposal to roll-in the project's fuel and electric power costs to its fuel tracker and assess the project's shippers the applicable general system fuel rates and electric power cost rates for new transportation capacity created by the project facilities is approved.

(J) Tennessee shall file actual tariff records setting forth the revised initial rates for service on the project at least 60 days prior to the date the project's facilities go into service.

(K) Tennessee shall file executed copies of the non-conforming agreements as part of its tariff, disclosing and reflecting all non-conforming language not less than 30 days and not more than 60 days, prior to the commencement of service on the projects.

(L) Tennessee shall keep separate books and accounts of costs attributable to the proposed incremental services, as described above.

(M) Tennessee shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Tennessee. Tennessee shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix A

Docket No. CP19-17-000: 261 Upgrade Projects

Timely, Unopposed Interventions

- Commonwealth of Massachusetts
- Pipe Line Awareness Network For The Northeast, Inc. (PLAN)
- New Jersey Natural Gas Company
- NJR Energy Services Company
- Bay State Gas Company d/b/a Columbia Gas of Massachusetts
- Berkshire Environmental Action Team (BEAT)
- Chattanooga Gas Company
- Northern Illinois Gas Company d/b/a Nicor Gas Company
- 2degreesatgreenneighbors.earth
- Cathy Kristofferson
- PSEG Energy Resources & Trade, LLC
- New York State Electric & Gas Corporation
- Deborah K. Saremi
- Climate Action Group (CAG)
- Kathy Mullins
- Laurie Robinson
- Massachusetts Energy Facilities Siting Board
- Longmeadow Select Board
- Jon Lothrop
- City of Northampton, Massachusetts
- Constance E. Dawson
- Atmos Energy Corporation
- Piedmont Natural Gas Company, Inc.
- Lindsay Sabadosa
- Duke Energy Kentucky, Inc. and Duke Energy Ohio, Inc.
- Mickey McKinley
- Diane Sibley
- Longmeadow Pipeline Awareness Group
- Susan M. Baxter
- Joanne Comerford
- Chief Oil & Gas, LLC
- Food & Water Watch
- Climate Action Now Western Massachusetts
- Jancie D. Hill
- William D. Diamond

- Paula Garcia
- Darcy DuMont
- Adele Franks
- Ellen Graves
- Michaelann C. Bewsee
- Mindy Domb
- Arise, Inc. d/b/a Arise for Social Justice
- Andrea Chasen
- Emily Cavin
- Michele Marantz
- Tina Ingmann
- Neighbor to Neighbor Education Fund Holyoke Chapter
- The New England Local Distribution Companies
- Ernesto E. Cruz
- Sharon Moulton
- Tami Gouveia
- Montserrat Archbald

Late Interventions

- Mary A. Babinski
- Jesse Ladner
- Alex B. Morse

Appendix B

Environmental Conditions for the 261 Upgrade Projects

Docket No. CP19-7-000

As recommended in the Environmental Assessment (EA), this authorization includes the following conditions:

1. Tennessee Gas Pipeline Company, LLC (Tennessee) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Tennessee must:

    a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
    b. justify each modification relative to site-specific conditions;
    c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
    d. receive approval in writing from the Director of the Office of Energy Projects (OEP) **before using that modification.**

2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:

    a. the modification of conditions of the Order;
    b. stop-work authority; and
    c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.

3. **Prior to any construction**, Tennessee shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, Environmental Inspectors (EIs), and contractor personnel would be informed of the EI's authority and have been or would be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

4. The authorized facility locations shall be as shown in the EA, as supplemented by filed project figures. **As soon as they are available, and before the start of construction**, Tennessee shall file with the Secretary any revised detailed survey maps/figures for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these project figures.

   Tennessee's exercise of eminent domain authority granted under the Natural Gas Act section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Tennessee Gas's right of eminent domain granted under the Natural Gas Act section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Tennessee shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1: 6,000 identifying all facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/figures/aerial photographs. Each area must be approved in writing by the Director of OEP **before construction in or near that area**.

   This requirement does not apply to extra workspace allowed by FERC's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

   Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

   a. implementation of cultural resources mitigation measures;
   b. implementation of endangered, threatened, or special concern species mitigation measures;
   c. recommendations by state regulatory authorities; and
   d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the authorization and before construction begins**, Tennessee shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Tennessee must file revisions to their plan as schedules change. The plan shall identify:

    a. how Tennessee will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
    b. how Tennessee will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
    c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
    d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
    e. the location and dates of the environmental compliance training and instructions the company will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change);
    f. the company personnel (if known) and specific portion of the company's organization having responsibility for compliance;
    g. the procedures (including use of contract penalties) the company will follow if noncompliance occurs; and
    h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:

        i. the completion of all required surveys and reports;
        ii. the environmental compliance training of onsite personnel;
        iii. the start of construction; and
        iv. the start and completion of restoration.

7. Tennessee shall employ at least one EI for the project. The EI shall be:

a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
d. a full-time position, separate from all other activity inspectors;
e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Tennessee shall file updated status reports for the project with the Secretary on a **weekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

a. an update on Tennessee's efforts to obtain the necessary federal authorizations;
b. the construction status of the project, work planned for the following reporting period, and any scheduled changes for stream crossings or work in other environmentally-sensitive areas;
c. a listing of all problems encountered and each instance of noncompliance observed by the EI during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
d. a description of the corrective actions implemented in response to all instances of noncompliance;
e. the effectiveness of all corrective actions implemented;
f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
g. copies of any correspondence received by the company from other federal, state, or local permitting agencies concerning instances of noncompliance, and Tennessee response.

9. Tennessee must receive written authorization from the Director of OEP **before commencing construction of any project facilities**. To obtain such authorization, Tennessee must file with the Secretary documentation

that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

10. Tennessee must receive written authorization from the Director of OEP **before placing the pipeline loop and modified compressor station into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the areas affected by the project are proceeding satisfactorily.

11. **Within 30 days of placing the authorized facilities in service**, Tennessee shall file an affirmative statement with the Secretary, certified by a senior company official:

    a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
    b. identifying which of the conditions in the Order Tennessee has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. Tennessee shall file noise surveys with the Secretary **no later than 60** days after placing the authorized unit at the CS 261 in service. If a full load condition noise survey is not possible, Tennessee shall file an interim survey at the maximum possible horsepower load and file the full noise survey **within 6 months.** If the noise attributable to the operation of all of the equipment at any station under interim or full power load condition exceeds a day-night noise level of 55 decibels on the A-weighted scale at any nearby noise sensitive areas, Tennessee shall:

    a. file a report with the Secretary on what changes are needed, for review and written approval by the Director of OEP;
    b. install additional noise controls to meet that level **within 1 year** of the in-service date; and
    c. confirm compliance with the day-night noise level of 55 decibels on the A-weighted scale requirements by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C. Docket No. CP19-7-000

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it 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 authorizing Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee Gas) proposed Compressor Station 261 upgrade project (Project),[3] the Commission 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 quantifies 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 state that approval of the Project "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 in the public interest and required by the public convenience and

[1] 15 U.S.C. § 717f (2018).

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

[3] Today's order authorizes the abandonment of two existing compressor units and the replacement with a single new gas-fired turbine compressor unit. *See Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230, at P 29 (2019) (Certificate Order).

[4] 261 Upgrade Project Environmental Assessment at Tables 17–18 (EA).

[5] Certificate Order, 169 FERC ¶ 61,230 at P 84; EA at 74.

necessity.[6] Claiming 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 the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that "(GHGs) occur…as a result of human activities, such as the burning of fossil fuels"[7] and that GHG emissions from the Project's construction and operation, in combination with emissions from other sources, would "contribute incrementally to future climate change impacts."[8] 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 in the public interest and required by the public convenience and necessity.[9]

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[6] Certificate Order, 169 FERC ¶ 61,230 at P 29.

[7] EA at 53.

[8] *Id.* at 68.

[9] 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

5. Today's order 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 facility's impact on climate change.[10] That is now clearly established D.C. Circuit precedent.[11] The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because there is no "universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs."[12] However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will have no significant environmental impact.[13] Think about that. The Commission is saying out of one side of its mouth that it need not assess the significance

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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 the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)).

[10] *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").

[11] *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. The history of these cases is discussed further below. *See infra* P 8.

[12] *See* EA at 68–69 ("Currently, there is no universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs . . . . Without the ability to determine discrete resource impacts, we are unable to determine the significance of the Project's contribution to climate change."); *see also* Certificate Order, 169 FERC ¶ 61,230 at P 68.

[13] *See* Certificate Order, 169 FERC ¶ 61,230 at P 84 ("[A]pproval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment."); *see also* EA at 74.

of the Project's impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, 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 volume of emissions caused by the Project does not play a meaningful role in the Commission's public interest determination, no matter how many times the Commission assures us otherwise. Using the approach in today's order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project's actual GHG emissions or those emissions' impact on climate change. So long as that is the case, a project's impact on climate change 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.

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

7. 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.[15] 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 pipeline are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.[16] While the Commission does quantify the

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[14] *E.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (Agencies 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] 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

[16] *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.

GHG emissions related to Project's construction and operation,[17] it fails to consider the indirect GHG emissions resulting from the incremental natural gas capacity facilitated by the Project. Once again the Commission takes the position that if it does not know the specific volume and end-use of the natural gas, any associated GHG emissions are categorically not reasonably foreseeable.[18]

8. I remain baffled by the Commission's continued refusal to take any step towards consider indirect downstream emissions and their impact on climate change unless specifically and expressly directed to do so by the courts (and even that does not always seem to be the case[19]). Here there are plenty of steps that the Commission could take to consider the GHGs associated with the Project's incremental capacity 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[20]—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. After all, the D.C. Circuit has recognized that NEPA does not require absolute certainty and that "some educated assumptions are inevitable in the NEPA process."[21]

9. In any case, even where the Commission quantifies the Project's construction and operational GHG emissions, it still fails to "evaluate the 'incremental impact' that [those

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[17] EA at Tables 17–18.

[18] Certificate Order, 169 FERC ¶ 61,230 at P 64 (stating that "[b]ecause the specific volume and end-use of the gas which will transported under those contracts, as well as the gas which may ultimately be transported using the uncontracted for capacity, is unknown, any potential greenhouse gas emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable").

[19] *El Paso Natural Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019) (Glick, Comm'r, dissenting in part at PP 10-11) (criticizing the Commission for failing to follow the D.C.'s guidance in *Birckhead* and consider GHG emissions associated with natural gas transportation capacity that it was told would be used to serve electricity generation).

[20] 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*.

[21] *Sabal Trail*, 867 F.3d at 1374; *see id.* (stating that "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").

emissions] will have on climate change or the environment more generally."[22] In *Sabal Trail*, the court explained that the Commission was required "to include a discussion of the 'significance' of" the indirect effects of the Project, including its GHG emissions.[23] That makes sense. Identifying and evaluating the consequences that the 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.[24] But neither today's order nor the accompanying EA provide that discussion or even attempt to assess the significance of the Project's GHG emissions.

10. Instead, the Commission insists that it need not assess the significance of the Project's GHG emissions because it lacks a "universally accepted methodology to attribute discrete, quantifiable, physical effects on the environment to the Project's incremental contribution to GHGs."[25] 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 single project's climate change impacts into concrete

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[22] *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *see also WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181, at *1 (D.D.C. Mar. 19, 2019) (explaining that the agency was required to "provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute" to the "impacts of climate change in the state, the region, and across the country").

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

[24] *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.").

[25] EA at 68.

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.[26]

11. 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 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 as diverse as "geologic resources"[27], "soils,"[28] and "migratory birds."[29] Notwithstanding the lack of any or "universally accepted methods" to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review and assess the significance of the Project's effect on those considerations. 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.[30]

12. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[31] NEPA "'merely prohibits uninformed—rather than unwise—

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[26] *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).

[27] EA at 12.

[28] *Id.* at 16.

[29] *Id.* at 36–37.

[30] 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 id.* at 10. 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 impacts such as geologic resources and soils, but not climate change.

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

agency action.'"[32] 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.

13. 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 or required by the public convenience and necessity. 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.[33] 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.[34] 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,[35] which could encompass measures to mitigate a project's GHG emissions.

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

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

[34] *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). The discussion of mitigation is especially critical under today's circumstances where the Commission prepared an EA instead of an Environmental 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." *See e.g.* EA at 12 (geologic resources). 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.").

[35] 15 U.S.C. § 717f(e); Certificate Order, 169 FERC ¶ 61,230 at P 85 ("[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 to ensure continued compliance with the intent of the

14. 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 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.

* * *

15. Today's order 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 the Project will contribute to climate change, but refuses to consider whether that 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 Project's 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

conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C. Docket Nos. CP19-7-000

(Issued December 19, 2019)

McNAMEE, Commissioner, *concurring*:

16. Today's order issues Tennessee Gas Pipeline Company, L.L.C. (Tennessee) a certificate to construct and operate its proposed 261 Upgrade Project (Project).[1] I agree that the order complies with the Commission's statutory responsibilities under the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). The order determines that the Project is in the public convenience and necessity, finding that the project will not adversely affect Tennessee's existing customers or competitor pipelines and their captive customers, and the project is designed to minimize adverse impacts on landowners.[2] The order also finds that the project will not significantly affect the environment.[3] Further, the Commission quantified and considered greenhouse gas (GHG) emissions that are directly associated with the construction and operation of the Project,[4] consistent with the holding in *Sierra Club v. FERC* (*Sabal Trail*).[5]

17. Although I fully support this order, I write separately to address what I perceive to be a misinterpretation of the Commission's authority under the NGA and NEPA. There have been contentions 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, that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and

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[1] *Tennessee Gas Pipeline Co., L.L.C.*, 169 FERC ¶ 61,230 (2019).

[2] *Id.* P 29.

[3] *Id.* 84.

[4] Environmental Assessment (EA) at 54, Tables 17 and 18.

[5] 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.

NEPA by not determining whether GHG emissions significantly affect the environment. I disagree.

18. 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 objective 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 a determination.

19. 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. Before I offer my arguments, it is important that I further expound on the current debate.

IV. Current debate

20. 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;[6] and (2) to take a "hard look" at the direct,[7] indirect,[8] and cumulative effects[9] 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

[6] 15 U.S.C. § 717f(e) (2018).

[7] 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).

[8] 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).

[9] 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).

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.

21. My colleague equates "public convenience and necessity" with a "public interest" standard, arguing that such a standard requires the Commission to weigh GHGs emitted from the project facilities and related to the upstream production and downstream use of natural gas.[10] In support of his contention, my colleague cites the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York* (*CATCO*).[11] My colleague argues that the Commission must 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."[12] And he argues that by not determining the significance of those emissions, the "public interest determination [] systematically 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."[13]

22. My colleague also argues that the emissions from all downstream use of natural gas are indirect effects of the Project and must be considered in the Commission's EA.[14] In other proceedings, he argues that the Commission must also consider GHG emissions from upstream natural gas production.[15] He asserts that the Commission must 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.[16] Further, he contends that the Commission could mitigate any GHG

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[10] *Tennessee Gas Pipeline Co., LLC*, 169 FERC ¶ 61,230 at P 2 (Glick, Comm'r, dissenting) (Dissent).

[11] *Id.* P 5 n.10 (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.

[12] Dissent P 6.

[13] *Id.*

[14] *Id.* P 7.

[15] *See Cheyenne Connector, LLC*, 168 FERC ¶ 61,180, at P 10 (2019) (Glick, Comm'r, dissenting).

[16] Dissent PP 9-11.

emissions in the event that it made a finding that the GHG emissions had a significant impact on climate change.[17]

23. Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission's obligations under the NGA and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.[18] 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 environmental impact statement (EIS) for the project. [19] 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.

24. 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."[20] 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.

[17] *Id.* P 13.

[18] 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.").

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

[20] *Id.* at 1373.

Cir. 2015)."[21] 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"[22] 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."[23]

25. 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."[24] 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."[25] The court impressed that "[it did] not hold that quantification of 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."[26]

26. More recently, in *Birckhead v. FERC*,[27] 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

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[21] *Id.*

[22] *Sabal Trail*, 867 F.3d at 1372 (citing *Pub. Citizen*, 541 U.S. at 770) (emphasis in original).

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

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

[25] *Id.*

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

[27] 925 F.3d 510 (D.C. Cir. 2019).

where it lacks jurisdiction over the producer or distributor of the gas transported by the pipeline."[28]

27. 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 production and use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.[29]

28. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause.[30] Whether there is a reasonably close causal relationship depends on "the underlying policies or legislative 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."[31] Below, my review of the text of the NGA and subsequent acts by Congress demonstrates 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. 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.

29. As for GHGs emitted from the 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.

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

[29] 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.

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

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

V. 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

30. To interpret the meaning of "public convenience and necessity," we must begin with the text of the NGA.[32] I recognize that the Commission[33] and the courts have equated the "public convenience and necessity" standard with "all factors bearing on the public interest."[34] However, the phrase "all factors bearing on the public interest" does not mean that the Commission has "broad license to promote the general public welfare"[35] or address greater societal concerns. Rather, the courts have stated that the words must "take meaning from the purposes of regulatory legislation."[36] The Court has

[32] 15 U.S.C. § 717f(e) (2018). *See infra* PP 41-47. 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))).

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

[34] *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 on that statement.

[35] *NAACP v. FERC*, 425 U.S. 662, 669 (1976).

[36] *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.").

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."[37] The Court has further instructed that one must "construe statutes, not isolated provisions."[38]

31. 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.[39]

32. 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.

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

[38] *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)).

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

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"

33. 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*."[40]

34. 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 stated "[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."[41]

35. The FTC Report further stated "[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 areas, and the conservation, production, transportation, and distribution of which, therefore, under proper control and regulation, are matters charged with high national public interest."[42]

36. 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

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[40] 15 U.S.C. § 717(a) (2018) (emphasis added).

[41] 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.

[42] *Id.* at 611.

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 identified the concern with monopolistic activity that would limit access to natural gas.[43]

37. 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 the NGA section 7.

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

38. 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

[43] 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.*

natural gas . . . to the public . . . ."[44] 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."[45]

- 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."[46] 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."[47] 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.

- Section 7(e) states "a certificate *shall* be issued" when a project is in the public convenience and necessity,[48] 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

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[44] 15 U.S.C. § 717f(a) (2018).

[45] *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).

[46] 15 U.S.C. § 717f(b) (2018).

[47] *Id.* § 717f(c)(1)(B).

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

> the United States."[49] 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[50] and Congress considered natural gas pipelines a public use.

39. 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.[51] 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.

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

40. 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."[52] The Ninth Circuit and the D.C. Circuit have interpreted the

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[49] *Id.* § 717f(h).

[50] *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.").

[51] 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 . . . .").

[52] 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

reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.[53] Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.[54]

41. 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 States.[55] The Court has observed that Congress enacted the NGA to address "specific

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agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

[53] *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*.

[54] 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.").

[55] 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

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.[56] 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."[57]

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from monopoly power.

[56] *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.

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

42. In *Transco*,[58] the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."[59] 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.[60]

43. Based on this rule, and legislative history,[61] 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.[62] 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 "economic" aspects of gas used within the producing State.[63]

44. In contrast, there is no legislative history to support that the Commission may consider environmental effects related to the upstream production or downstream use of gas and the field of environmental regulation of such activities is not one that has been left unregulated.[64] Unlike in *Transco*, states can reasonably be expected to regulate air

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pipelines." *Louisiana Power & Light Co. v. Fed. Power Comm'n*, 483 F.2d 623, 633 (5th Cir. 1973).

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

[59] *Id.* at 19.

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

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

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

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

[64] 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

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."[65] The Clean Air Act vests States with authority to issue permits to regulate stationary sources related to upstream and downstream activities.[66] 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.[67] The FTC

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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 the 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*.

[65] 42 U.S.C. § 7401 (2018).

[66] *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.

[67] *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

Report referenced in NGA section 1(a) recognized that States' ability to regulate the use of natural gas.[68] 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.[69]

45. 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.[70] Such exertion of influence is impermissible: "when the Congress explicitly reserves jurisdiction over a matter to the states, as here, the

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exercise of even the more traditional concept of what is compendiously known as the police power.").

[68] 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.").

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

[70] *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 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.").

Commission has no business considering how to 'induc[e] a change [of state] policy' with respect to that matter."[71]

46. 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 U.S. Environmental Protection Agency (EPA) to occupy.[72] Therefore, as 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

47. Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the development 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.

1. Natural Gas Policy Act of 1978

48. 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.[73] Importantly, NGPA section 601(c)(1) states, "[t]he Commission may not

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[71] *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.").

[72] *See infra* PP 53-57.

[73] 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

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."[74]

49. 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)."[75] Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.[76]

50. 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

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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).

[74] *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).

[75] *Id.* § 3362.

[76] *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 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.").

intrastate pipelines."[77] Furthermore, the NGPA was "intended to provide investors with adequate incentive to develop new sources of supply."[78]

2. Powerplant and Industrial Fuel Use Act of 1978

51. 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),[79] 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.[80]

3. Natural Gas Wellhead Decontrol Act of 1989

52. If there were any remaining doubt that the Commission has no authority to consider the upstream development of natural gas and its environmental effects, such

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

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

[79] 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

[80] 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 distress 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.").

doubt was put to rest when Congress enacted the Wellhead Decontrol Act.[81] In this legislation, Congress specifically removed the Commission's authority over the upstream production of natural gas.[82]

53. 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 Decontrol Act stated "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*."[83] Similarly, the House Committee Report to the Decontrol Act noted, "[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."[84] The House Committee Report also stated the Commission's "current competitive 'open access' pipeline system [should be] maintained."[85] With this statement, the House Committee Report was referencing Order No. 436 in which the Commission stated that open access transportation "is designed to remove any unnecessary regulatory obstacles and to facilitate transportation of gas to any end user that requests transportation service."[86]

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

[82] 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.").

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

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

[85] *Id.* at 7.

[86] *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).

4. Energy Policy Act of 1992

54. 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."[87]

55. 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 environment effects related to upstream production or downstream use of natural gas.

56. 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.[88]

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

[88] Some will cite the reference to environment in footnote 6 in *NAACP v. FPC* to argue that the Commission can consider the environmental effects upstream production and downstream use of natural gas. *NAACP v. FERC*, 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 64 (explaining the Federal Power Commission previously considered environmental impacts of downstream end use when weighing the beneficial use of natural gas between competing uses).

57. When Congress enacted the NGA, the phrase "public convenience and necessity" was a term of art used in state and federal public utility regulation.[89] 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."[90] 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.[91]

58. 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.[92] 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 'will cease to be attractive when it is defaced and made dangerous by a steam railroad.'"[93]

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[89] 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).

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

[91] *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.")

[92] Jones at 428.

[93] *Id.* at 436.

59. 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."[94] The Commission also stated that its balancing test "provide[s] appropriate incentives for the optimal level of construction and efficient customer choices."[95] 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.[96]

60. 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.[97] 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 pipeline 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

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

[95] *Id.*

[96] *Id.*

[97] *See also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, 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."[98]

61. Further, the Certificate Policy Statement states, "[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."[99] And that is what occurred in this case. Tennessee avoids impacts on the environment and landowners by co-locating 100 percent of the pipeline adjacent to its existing right-of-way or other utility and transportation corridors.[100]

62. 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

63. 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.

64. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.[101] Nor does NEPA repeal by implication any other

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

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

[100] EA at 7-8.

[101] *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 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").

statute.[102] 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.[103] 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.[104]

65. 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."[105] NEPA requires such reasonably close causal relationship because "inherent in NEPA and its implementing regulations is a 'rule of reason,'"[106] 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."[107] Thus, "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."[108]

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

[103] *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.").

[104] *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.").

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

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

[107] *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 EIS when it would 'serve no purpose.'").

[108] *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

66. 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 defies Congress, but risks duplicative regulation.

VI. The NGA does not contemplate the Commission establishing mitigation for GHG emissions from pipelines

67. My colleague also suggests 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 by 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),[109] 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 . . . such reasonable terms and conditions as the public convenience and necessity may require."[110]

68. 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

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contained in the [environmental impact ('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.").

[109] 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.

[110] 15 U.S.C. § 717f(e) (2018).

to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," [111] not the Commission.

69. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[112] 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"[113] and to establish standards of performance for the identified stationary sources.[114] 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.[115]

70. 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."[116] 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 encourage the use of an innovative technological system or systems of continuous emission reduction."[117]

71. 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 . . .

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

[112] *See id.* at 419.

[113] 42 U.S.C. § 7411(b)(1)(A) (2018).

[114] *Id.* § 7411(b)(1)(B).

[115] *Id.* § 7411(a)(1).

[116] *Id.* § 7411(a)(2).

[117] *Id.* § 7411(j)(1)(A).

the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[118]

72. 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 on 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.

73. 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.[119] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[120] 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."[121]

74. Courts would undoubtedly treat with skepticism any attempt by the Commission to mitigate GHG emissions. Congress has introduced climate change bills since at least

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[118] *Id.* § 7411(f)(3).

[119] *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).

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

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

1977,[122] 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.[123] 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. Requiring pipelines to pay a carbon emissions fee or tax, or to invest in GHG mitigation would be a major rule, and Congress has made no indication that the Commission has such authority.

75. Some may make the argument that the Commission can require mitigation 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.[124] Congress endorsed such mitigation.[125] 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 actions exceed the public nuisance standard.[126] The Commission complies with the Clean Air Act by

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

[123] 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.pdfhttps://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.

[124] 33 U.S.C. § 1344 (2018).

[125] *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).

[126] 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

requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[127]

76. 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.[128]

VII. The Commission has no reliable objective standard for determining whether GHG emissions significantly affect the environment

77. My colleague argues that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.[129] He challenges the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[130] He argues that the Commission can adopt the Social Cost of Carbon[131] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as geological resources and migratory birds.[132] He suggests that the

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or agency shall consult with the Administrator to determine possible means of abating such noise.").

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

[128] 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.

[129] Dissent PP 2, 9.

[130] *Id.* P 10.

[131] *Id.*

[132] *Id.* P 11.

Commission does not make a finding of significance in order to deceptively find that a project is in the public convenience and necessity.[133]

78. 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 objective basis using its own expertise to make such determination.

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

79. 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.[134] Because the courts have repeatedly upheld the Commission's reasoning,[135] I will not restate the Commission's reasoning here.

80. 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.[136] The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an

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[133] *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 15.

[134] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 48 (2018).

[135] *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 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) ("[T]he *High 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.").

[136] Dissent P 10.

incremental increase in carbon emissions in a given year,"[137] may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are not so simple to interpret or evaluate.[138] 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),[139] agency decision-makers and the public have no objective basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

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

81. 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.

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[137] 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).

[138] 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).

[139] *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.*

82. 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"[140] and to establish standards of performance for the identified stationary sources.[141] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

83. 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.[142] This inability to find an acceptable methodology is not for a lack of trying. The Commission reviews the climate science, state and national targets, and climate models that could inform its decision-making.[143]

84. 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.[144] And, setting ROE has been an activity of state public utility

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[140] 42 U.S.C. § 7411(b)(1)(A) (2018).

[141] *Id.* § 7411(b)(1)(B).

[142] 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.

[143] *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.").

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

commissions, even before the creation of the Federal Power Commission.[145] The Commission's methodology is also founded in established economic theory.[146] 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.

85. 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 geological resources and migratory birds using its own expertise and without generally accepted significance criteria or a standard methodology.

86. 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 objective basis for making such finding. The Commission's findings regarding significance for geological resources and migratory birds have an objective basis. For example for geological resources, the Commission identified the existing mineral resources and geological hazards using materials made available by the U.S. Geological Survey, Massachusetts Bureau of Geographic Information, U.S. Energy Information Administration, Massachusetts Geological Survey, and University of Massachusetts.[147] The Commission determined the project's effect on mineral resources and geological hazards using these materials, information provided in the application, and Tennessee's Horizontal Directional Drill (HDD) Contingency Plan and HDD best management practices.[148] Based on this information, the Commission made a reasoned finding that the project impacts on geological resources will not be significant.[149] The Commission conducted a similar evaluation of migratory birds.

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575 (1942).

[145] *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.").

[146] *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).

[147] EA at 11-12.

[148] *Id.*

[149] *Id.*

87. 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. 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.

88. 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."[150] Simply put, stating that an amount of GHG emissions appears significant without any objective support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

VIII. Conclusion

89. 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.[151] 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

[150] *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.").

[151] *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.").

the Commission to judge whether the upstream production or downstream use of gas will be too environmentally harmful.

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

91. 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