May 3, 2023

The Honorable John Barrasso, M.D.
United States Senate
Washington, D.C. 20510

Dear Senator Barrasso,

Thank you for your April 26, 2023 letter.[1] In that letter, you express apprehension over policies that affect the availability, reliability, and affordability of the nation's electric supplies and that affect the delivery of natural gas domestically and abroad. You ask that my colleagues and I answer a series of questions completely and promptly. Below, please find my responses.

1. The Biden administration has set a clear target of reaching "net-zero" greenhouse gas emissions economy-wide by 2050. This target has not been adopted by Congress and is not reflected in statute. To achieve it, the administration is urging mass electrification of all sectors of the economy. Princeton's "Net-Zero America: Potential Pathways, Infrastructure and Impacts" study predicts that U.S. electricity production will need to "double to quadruple by 2050 in the net-zero scenarios" to meet the increased demand from electrification of the transportation and industrial sectors. States such as New York have begun banning natural gas in new buildings to forward this electrification goal.

a. What do you believe the impact of electrification will be on the reliability and affordability of electric service as demand for electricity increases?

Consensus among those charged with directly overseeing the reliability of the bulk electric system appears to be that widespread electrification can significantly affect demand projections and energy needs, straining the electric system. Specifically, they are concerned that electrification policies are increasing demand on the system at the same time the electric system is facing capacity shortfalls. The North American Electric Reliability Corporation (NERC) stated that "estimates from the California Energy Commission staff of the added electrical load from plug-in EV charging by 2030, under the state's zero-emission vehicle targets, indicate an additional 5,500 MW of demand at midnight and 4,600 MW of demand at 10:00 a.m. on a typical weekday . . . an increase of 25 and 20%, respectively at those times."[2] NERC has also

[1] Senator Barrasso, April 26, 2023 Letter, Docket Nos. RM22-7-000, et al. (Accession No. 20230426-5284) (Letter).

[2] NERC, *2022 Long-Term Reliability Assessment*, at 23 (Dec. 2022), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2022.pdf #search=%22electrification%22.

expressed the concern that "electrification of residential heating requires the system to serve especially high demand on especially cold days."[3]

The Northeast Power Coordinating Council, Inc. (NPCC), one of six Regional Entities that perform certain functions under NERC's oversight,[4] has warned similarly. At the Commission's New England Winter Gas-Electric Forum held last September, NPCC President and CEO Charles Dickerson stated that "if there's not . . . a technology that can be kept so that the system operators and the balancing authorities can continue to make certain that we match the supply with the demand, we're going to have challenges" and "[t]hose challenges are going to be we're going to curtail users, even if it's going to be some through some voluntary curtailment, or maybe through forced curtailment, depending on how extreme the weather, and how big the gap is. This is going to be exacerbated by transportation electrification, and the projected proliferation of electric vehicles. Those devices are going to use even more electricity, so what we have right now is going to become more strained."[5]

In addition, ISO New England has warned that electrification and the penetration of renewables could lead to higher rates and unreliable service. It advised that "[a]s electrification leads to larger loads, power systems must not prematurely retire too many dispatchable units or fail to adequately replace their reliability attributes if they are retired."[6] In its analysis of deep decarbonization scenarios with heavy renewable penetration and electrification loads, ISO New England found that "such Scenarios contained many minutes where reserves dropped below their requirement threshold, triggering high real-time energy prices" and "expensive administratively-imposed prices and possible rolling disconnection of customers after all operator emergency measures are applied to maintain system reliability."[7]

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[3] *Id.* 5.

[4] *See* FERC Staff, *Reliability Primer: An Overview of the Federal Energy Regulatory Commission's Role in Overseeing the Reliable Operation of the Nation's Bulk Power System*, at 35 (Apr. 23, 2020), https://www.ferc.gov/sites/default/files/2020-04/reliability-primer_1.pdf.

[5] FERC, Transcript of September 8, 2022 New England Winter Gas-Electric Forum, Docket No. AD22-9-000, at 13 (Accession No. 20221011-4000).

[6] ISO New England Inc., *2021 Economic Study: Future Grid Reliability Study Phase I*, at 37 (July 29, 2022), https://www.iso-ne.com/static-assets/documents/2022/07/2021_economic_study_future_grid_reliability_study_phase_1_report.pdf.

[7] *Id.*

Given these challenges, NERC has urged policymakers to "[c]onsider the impact that the electrification of transportation, space heating, and other sectors may have on future electricity demand and infrastructure."[8]

b. What do you see as the central challenges associated with doubling or quadrupling electric generation in the next 30 years?

I see two central challenges associated with doubling or quadrupling electric generation: first, how much it will cost, and second, who will pay those costs.

It can be challenging to find credible estimates of how much it will cost to develop the contemplated generation fleet that the implementation of some of the more aggressive public policies would require. It will likely cost at least in the hundreds of billions of dollars. To my knowledge, the Commission has no plans to conduct such an analysis itself. Regardless, all of these costs will ultimately be borne by ratepayers.

c. Will electrification programs, such as the ones described above, make coming demand challenges more or less severe?

NERC has stated that electrification programs will cause demand challenges to become more severe. In its *2022 Long-Term Reliability Assessment*, NERC stated that "[i]n many parts of North America, peak electricity demand is increasing, and forecasting demand and its response to extreme temperatures and abnormal weather is increasingly uncertain. Electrification . . . trends can be expected to further contribute to demand growth and sensitivity to weather patterns."[9]

2. The Commission established a Joint Federal-State Task Force on Electric Transmission ("Task Force") in 2021. The Task Force has met six times. States must have a voice in a process that will almost certainly have a direct impact on how they regulate, build, and pay for electric transmission lines. During the second meeting of the Task Force, the issue of requiring a "minimum transfer capacity" between regions was discussed.

a. Does the Commission have the authority under current law to require a minimum level of electric transmission connecting each region?

The most likely procedural path the Commission would employ in order to issue an order requiring a minimum quantity of electric transmission connecting each region would be under

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[8] NERC, *2022 Long-Term Reliability Assessment*, at 7.

[9] NERC, *2022 Long-Term Reliability Assessment*, at 5.

section 206 of the Federal Power Act (FPA), which provides that the Commission may investigate current rates to determine whether they are unjust and unreasonable.[10] To employ section 206, the Commission would have to affirmatively determine that existing tariffs are unjust and unreasonable absent additional electric transfer capacity between regions. It would then be obligated to impose a replacement rate that is just and reasonable. I doubt that the Commission would be able to make such a finding on a generic, nationwide basis. I am skeptical that section 206, which gives the Commission an adjudicatory role for assessing the justness and reasonableness of particular tariff provisions, also confers upon the Commission the power to establish universal policies absent particularized showings in each utility's tariff. I am confident that section 206 does not confer authority upon the Commission to dictate to utilities the particulars of how they must build out their transmission systems and no other provision in the FPA gives the Commission authority to impose such requirements. The FPA empowers the Commission to judge the justness and reasonableness of rates. It does not empower the Commission to serve as a national transmission system planner. While section 215 of the FPA governs the establishment of mandatory and enforceable reliability standards, it explicitly precludes FERC from imposing "any requirement . . . to construct new transmission capacity or generation capacity."[11]

b. What evidence, if any, is there that compelling the construction of more electric transmission between regions will improve reliability and affordability?

I have not yet seen evidence to suggest that the Commission would be able to support an FPA section 206 finding that existing wholesale electric rates are unjust and unreasonable in the absence of additional electric transmission capacity between regions. The Commission has solicited such evidence in its Notice of Proposed Rulemaking on *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*,[12] but we are still reviewing that evidence. Regardless of the record in that proceeding, the Commission should be on guard against taking localized transmission shortfalls and, on that basis, make nationwide findings and then impose comprehensive, uniform remedies. I will review the evidence carefully to determine whether each affected region is in fact experiencing the rate concerns that would justify encouraging the construction of more electric transmission between regions, particularly since such an endeavor would be extremely costly and those costs would ultimately be borne by the ratepayers.

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[10] 16 U.S.C. § 824e.

[11] *Id.* § 824*o*(a)(3).

[12] 179 FERC ¶ 61,028 (2022) (Danly, Comm'r, dissenting).

3. PJM President Manu Asthana was interviewed by Platts S&P Global for the March 24, 2023 edition of *Inside FERC*. The article entitled, "*PJM CEO acknowledges market changes needed to bolster grid reliability*," states the following:

> **Of the 40 GW of generation at risk of retirement in PJM by 2030, a majority of that is at risk due to federal or state policies rather than market pressure, Asthana said. "Policy reasons are harder to reverse," but some states with clean energy goals have "reliability offramps."**

Recent reliability events in PJM, specifically near Christmas 2022, make the potential loss of 40 GW of firm generation especially concerning. Any public policy determinations that degrade reliability to this degree should be carefully reconsidered.

a. Should public policy determinations be implicated in the cost allocation formula for electric transmission projects if they significantly degrade reliability? If so, to what extent should such public policy factors be considered?

Yes, but not as others have set forth.[13] Public policy determinations in favor of renewable resources require the replacement (i.e., retirement) of existing fossil fuel resources and significant new construction of generation facilities. Renewable resources, due to their low energy density, are also more likely to be dispersed and located far from load, requiring significant new electric transmission infrastructure (i.e., miles of transmission lines), which is expensive. These public policy determinations have a direct effect on the cost of electric service. Such costs should be allocated to the jurisdictions (i.e., states) that support incurring such costs, not imposed on states that do not share those public policy objectives. Ensuring that one state's policies do not cause unacceptable rate increases on neighboring states is one of the FPA's core purposes and it is good public policy to require jurisdictions to bear the costs of their own policy decisions. When costs are socialized, they become harder to identify and economic discipline disappears.

b. If the Commission were to require parties to consider public policy determinations when allocating transmission cost, would doing so intensify the resource adequacy challenges that are already evident in many regions?

Under the FPA, states are free to choose the generation assets that are employed within their borders. Because the bulk electric system is a large, multi-jurisdictional mechanism, any single state's decisions can have consequences for resource adequacy and reliability, the effects of which may well be felt outside that state's borders. The Commission's concerns when

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[13] *Id.* PP 73-75.

allocating costs should be confined to ensuring that one state's public policy choices not be the cause unacceptable rate effects to its neighbors' citizens. That is to say, the Commission should ensure that ratepayers only bear the costs of the public policy decisions for which they are responsible or for which they receive demonstrable benefits (either reduced transmission rates or the satisfaction of NERC reliability standards). This subject is becoming ever more important: we have seen increasing enthusiasm among some states to establish energy policies that regulate extra-territorial generation. The Commission—and the courts—need to remain vigilant and police state efforts to regulate the interstate sale of electricity.

c. What so-called "reliability off ramps," if any, should be considered when costs are allocated?

Reliability is one of the two fundamental objectives of electric service, the other being reasonable rates. If the electric system is regularly unreliable, the U.S. economy will collapse, and the safety and welfare of the American people will be imperiled. So-called "reliability offramps" provide exceptions to renewable goals to ensure reliability. While such offramps may alleviate specific, discrete reliability concerns in particular circumstances, they will ultimately undermine the efficient development of the electric system. "Reliability offramps" will not provide the certainty that merchant generators need to rationally participate in the wholesale electric markets, nor will they serve to establish the incentives needed to induce necessary maintenance investments in generation facilities. Though a generator may have a sense that it may end up being a needed resource, the generator likely will not commit to making substantial investments that are necessary to remain in operation (or operate efficiently and reliably) on the off chance that a state or federal agency might one day trigger an "off ramp." Policy prescriptions change the flow of capital regardless of how needed for an "off ramp" an asset might eventually be.

d. What role, if any, can the Commission play if public policies degrade the reliability of the bulk power system?

The Supreme Court has said that the FPA "vests in the [Commission] exclusive jurisdiction over wholesale sales of electricity in the interstate market."[14] As states enact increasingly aggressive "net zero" goals, they are increasingly regulating activity—indirectly and directly—that takes place outside of their own borders. To the extent to which states are regulating the "wholesale sales of electricity in the interstate market," such regulation is federally pre-empted and aggrieved parties should seek redress at the courts. The only tool available to the Commission to directly achieve resource adequacy goals within the wholesale markets is its authority over electric rates. (The mandatory reliability standards in section 215 of the FPA speak to the operation of the bulk electric system, not the economic incentives that can be

[14] *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153 (2016).

employed to ensure that utilities invest in sufficient generation to ensure that there is an adequate supply of power.) If rates are unjust and unreasonable, i.e., if the markets are failing to achieve their goals of resource adequacy, relief should be sought under section 206 of the FPA.

e. If electric grids suffer frequent reliability events or increasing reliability risks, doesn't the underlying structure of the markets responsible for the grid become unjust and unreasonable under the FPA?

Yes. The FPA requires the Commission to ensure just and reasonable rates in the wholesale (interstate) markets. The Commission cannot impose public policy decisions regarding choice of generation upon the states, but the Commission must ensure that the rates paid for wholesale electric service are just and reasonable. Any rate paid for electric service, whether for energy or capacity, must confer real benefits upon the ratepayer. If the Commission determines that a market is incapable of delivering the promised benefits of the ratepayer's costs, the rates on file are not just and reasonable and, either *sua sponte*, or by complaint, the Commission must act under section 206 of the FPA to declare the prevailing rate unjust and unreasonable and impose a just and reasonable replacement rate. The replacement rate should be designed to achieve the resource adequacy goals that the earlier rate failed to achieve.

4. In my last letter, I asked several questions concerning the Transmission NOPRs that are currently on the Commission's docket. One issue I raised, which remains a central concern, is what happens when states do not agree to a cost allocation method because of a variety of factors including state public policy goals. In her answer, Commissioner Clements offered three different solutions if states fail to agree on a specific cost allocation method. These include;"(1) offering more time to the relevant state entities in order to reach agreement; (2) require the relevant public utility transmission provider to establish a cost allocation method (while demonstrating that it has made good faith efforts to seek agreement from the relevant states); or (3) the Commission itself may establish a cost allocation method." Commissioner Christie explained that "voluntary agreements among one or more states to pay for specific policy driven projects" have already been approved by the Commission.

a. Is the current practice, as described by Commissioner Christie, an effective way to build out regional transmission projects largely based on state policy goals?

I completely agree with Commissioner Christie that the Commission should not impose transmission project costs on unwilling states with contrary public policy objectives. The question of whether this is an "effective" manner to build out regional transmission projects to meet certain states' public policy objectives assumes that such a build out is necessary or appropriate. This is not a safe assumption. In many cases, the transmission development currently contemplated will serve merely to connect large quantities of renewable generation to the bulk electric system, each megawatt of which offers declining marginal reliability benefits.

These marginal reliability benefits will be purchased at the cost of drastically increased transmission rates. As an all-in proposition for the ratepayer, in many cases, this will result in more expensive, less reliable electric service.

b. Do you agree with his assessment that voluntary state agreements are the proper default option when states reach an impasse?

Yes.

c. Does the Commission have the legal authority adopt each of the three options described by Commissioner Clements? If so, what are the likely benefits or burdens that would result from each alternative?

The FPA grants the Commission jurisdictional authority over interstate wholesale electric rates. The Commission thus has the legal authority to adopt any of the three options to the extent that they involve interstate electric rates (as they almost certainly do). Specifically, the Commission can offer states additional time to reach agreement on cost allocation. Under this authority, the Commission also can require the public utility to develop a cost allocation method or to establish a cost allocation method of its own. Both fall within the Commission's ordinary exercise of its authority. However, the mere fact that the Commission enjoys that jurisdiction does not mean that the Commission should *exercise it,* especially if it is done so over the objection of unwilling states. The Commission should never require ratepayers of one state to bear the burden of the exorbitant costs of unnecessary transmission development which would otherwise never have been built, but for the divergent public policy choices of neighboring states.

d. What specific pitfalls do you associate with allowing states to engage in voluntary state agreements in the future?

I see no pitfalls associated with a state voluntarily choosing to force its citizens to pay for the exorbitant costs of an unnecessary transmission build out to pay for the public policy choices of neighboring states. That is a political question for the state in question and, if the state's decision for its citizens to bear the costs of another jurisdiction's public policy goals is later found by that state's ratepayers to be in error, the solution is likewise political. This answer assumes, of course, that the transmission projects at issue are not intended either to satisfy NERC-mandated reliability standards or to reduce ratepayer costs. Such projects, when the benefits are calculable and identifiable, are well within FERC's ordinary transmission ratemaking authorities.

5. Section 401 of the Federal Water Pollution Control Act ("Section 401") requires applicants for federal permits to obtain state approval for facilities that may result in a discharge into navigable waters. Previously, this has given certain states a veto power over projects requiring water permits that cross their jurisdiction. By denying a water quality

certification, such states can effectively nullify the Commission's certificate orders resulting, in part, if not in whole, with the cancellation of projects found to be in the public convenience and necessity.

a. If you are able to compile this data on or before May 3, 2023, please provide a list of projects authorized under NGA sections 3 and 7 that have been canceled or have had to request an extension of time for completing project construction, because of challenges related to obtaining a state water quality certification. Please also identify the state that has not issued the water quality certification.

The following projects have been canceled in part because of the project proponent's inability to obtain a water quality certification or challenges related to obtaining a water quality certification:

- In 2020, Constitution Pipeline Co., LLC (Constitution) canceled its Constitution Pipeline Project (Docket No. CP13-499-000) in part because of challenges related to obtaining a water quality certification from the State of New York made "[t]he underlying risk adjusted return for [the] greenfield pipeline project . . . dimmish[] in such a way that further development [was] no longer supported."[15] Constitution made this determination following the court finding New York had waived Clean Water Act (CWA) section 401 water quality certification.

- In 2021, PennEast Pipeline Company, LLC (PennEast) canceled its PennEast Project (Docket No. CP15-558-000) due to its inability to obtain CWA section 401 water quality certification and other wetland permits from the State of New Jersey.[16]

- In 2021, Jordan Cove Energy Project L.P.'s Jordan Cove LNG Terminal and Pacific Connector Gas Pipeline, LP's related Pacific Connector Gas Pipeline Project (Docket Nos. CP17-494-000 and CP17-495-000) were canceled due to inability to obtain

[15] *Williams cancels N.Y. Constitution natgas pipeline*, REUTERS, Feb. 24, 2020, https://www.reuters.com/article/williams-constitution-natgas/update-1-williams-cancels-n-y-constitution-natgas-pipeline-idUSL2N2AO11B (quoting The Williams Companies, Inc.).

[16] PennEast Pipeline Co., LLC, Comment, Docket Nos. CP15-558-000, et al., at 1 (Nov. 30, 2021) (Accession No. 20211130-5187) ("further development of the Project is no longer supported given the challenges in acquiring certain permits needed to construct the Project, including a water quality certification and other wetlands permits under Section 401 of the Clean Water Act for the New Jersey portion of the Project").

CWA section 401 water quality certification and Coastal Zone Management Act approval from the State of Oregon.[17]

The following projects have requested an extension of time because of delays related to obtaining a water quality certification:

- In 2016 and again in 2018, the Commission granted Constitution's requests for an extension of time to complete construction of its Constitution Pipeline Project (Docket No. CP13-499) due to delays in obtaining a water quality certification from the State of New York.[18]

- In 2018 and again in 2022, the Commission granted National Fuel Gas Supply Corp. and Empire Pipeline, Inc.'s requests for an extension of time to complete construction of their Northern Accession 2016 Project (Docket No. CP15-115-000) due to delays in obtaining water quality certification from the State of New York.[19] The court affirmed the Commission's finding that New York waived its CWA section 401 certification.[20]

- In 2020, the Commission granted PennEast's request for an extension of time to complete its PennEast Project (CP15-558-000) due to delays in obtaining a water quality certification from the State of New Jersey.[21] As stated above, later that year, PennEast canceled its project.

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[17] Jordan Cove Energy Project L.P., et al., Initial Brief, Docket Nos. CP17-495-000, et al., at 2 (Dec. 1, 2021) (Accession No. 20211201-5196) ("Despite diligent and persistent efforts, Applicants have not been able to obtain the necessary state-issued permits and authorizations from various Oregon state agencies.").

[18] *Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081 (2018); FERC Staff, Letter Order Granting Request for Extension of Time, Docket No. CP13-499-000 (July 26, 2016) (Accession No. 20160726-3006).

[19] *Nat'l Fuel Gas Supply Corp*., 179 FERC ¶ 61,226 (2022), FERC Staff, Letter Order Granting Request for Extension of Time, Docket No. CP15-115-000 (Jan. 31, 2019) (Accession No. 20190131-3011).

[20] *N.Y. State Dep't of Envtl. Conservation v. FERC*, 991 F.3d 439 (2d Cir. 2021).

[21] *PennEast Pipeline Co., LLC*, 170 FERC ¶ 61,138 (2020).

- In 2020 and 2022, the Commission granted Mountain Valley Pipeline, LLC's requests for an extension of time to complete its Mountain Valley Pipeline Project (Docket No. CP16-10-000) due to litigation and permitting delays including those related to waterbody crossings.[22] On March 29, 2023, the U.S. Court of Appeals for the Fourth Circuit upheld the water quality certification issued by the Virginia State Water Control Board,[23] and on April 3, 2023, the Fourth Circuit vacated the water quality certification issued by the West Virginia Department of Environmental Protection.[24]

- In 2021, the Commission granted Transcontinental Gas Pipe Line Co., LLC's (Transco) request for an extension of time to complete its Northeast Supply Enhancement Project (Docket No. CP17-101-000) due to delays in obtaining a water quality certification from the States of New York and New Jersey.[25] On April 27, 2023, Transco filed a second request for an extension of time due to delays in obtaining a water quality certification from the States of New York and New Jersey.[26]

b. If you are unable to provide the response to Question 5 by May 3, 2023, please indicate when you may be able to provide the answer and express your views on the impact of Section 401 on the development of natural gas pipelines and electric transmission lines.

CWA section 401 grants the states an effective veto over FERC-jurisdictional projects that require water permits within their jurisdictions.[27] By denying a water quality certification,

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[22] *Mountain Valley Pipeline, LLC*, 180 FERC ¶ 61,117 (2022); *Mountain Valley Pipeline, LLC*, 173 FERC ¶ 61,026 (2020).

[23] *Sierra Club v. State Water Control Bd.*, 64 F.4th 187 (4th Cir. 2023).

[24] *Sierra Club v. W. Va. Dep't of Envtl. Protection*, 64 F.4th 487 (4th Cir. 2023).

[25] *Transcontinental Gas Pipe Line Co., LLC*, 175 FERC ¶ 61,148 (2021).

[26] Transcontinental Gas Pipe Line Co., LLC, Request for Extension of Time, Northeast Supply Enhancement Project, Docket No. CP17-101-005 (Apr. 27, 2023) (Accession No. 20230427-5427).

[27] *See, e.g.*, *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("Through this requirement, Congress intended that the states would retain the power to block, for

states can nullify the Commission's certificate orders resulting in partial or complete cancellation of projects that the Commission has found to be required by the present or future public convenience and necessity.

A state veto runs contrary to the purpose of the Natural Gas Act (NGA) to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices,"[28] and the Commission's exclusive jurisdiction to regulate the interstate transportation of natural gas in interstate commerce.[29] Congress amended the NGA in 1947 to override state efforts to block interstate gas pipelines by granting section 7 certificate holders the right to seek eminent domain in the federal courts.[30] The passage of the CWA to provide states the power to deny water quality permits, and thus block the construction of natural gas pipelines, has effectively repealed Congress's attempt to create a single, cohesive national regulatory scheme to promote the development of interstate natural gas transportation infrastructure.

If one sought to end the states' veto under the CWA, Congress could consider modifying section 3(d) of the NGA (15 U.S.C. § 717b(d)) to place states in a consultative role to assist the Commission with identifying reasonable terms and conditions to mitigate impacts to coastal

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environmental reasons, local water *projects* that might otherwise win federal approval.") (emphasis added).

[28] *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (*NAACP*).

[29] *See Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.,* 489 U.S. 493, 506 (1989).

[30] *See* S. Rep. No. 80-429, at 3-4 ("It has also been suggested that the granting of the right of eminent domain is a matter peculiarly within the legislative and constitutional purview of the States and that it is proper that such rights should rest with the States in order that the States may therefore be in a position to require a natural-gas pipe-line company entering the State to serve the people of that State as a condition to obtaining the right of eminent domain. This argument defeats the very objectives of the Natural Gas Act. Under the Natural Gas Act, the Federal Power Commission is given exclusive jurisdiction to regulate the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and natural gas companies engaged in such transportation or sale. The Commission, through its certificate power, is authorized to grant certificates of convenience and necessity for the construction of interstate natural-gas pipe lines from points of supply to certain defined and limited markets. If a State may require such interstate natural-gas pipe lines to serve markets within that State as a condition to exercising the right of eminent domain, then it is obvious that the orders of the Federal Power Commission may be nullified.").

zones, air quality, and water quality. This consultative role would be in place of the states' current role issuing federal authorizations under the relevant federal statutes.

6. On January 9, 2023, CEQ published its Interim GHG Guidance. Although CEQ invited public comment on its Guidance, CEQ also stated that "[t]his interim guidance is effective immediately." In addition, CEQ stated "[a]gencies should use this guidance to inform the NEPA review process for all new proposed actions" and "should consider applying this guidance to actions in the EIS or EA preparation stage."

a. Given FERC's status as an independent agency, what weight does and should the Commission give the Guidance? Is it binding?

The Council on Environmental Quality's (CEQ) "guidance" cannot, by definition, establish requirements that agencies are bound to follow. The CEQ Guidance explicitly acknowledges that it "is not a rule or regulation . . . and is not legally enforceable."[31] The Commission is under no obligation to follow what amount to CEQ's recommendations. In fact, the Commission should give no weight whatever to CEQ's recommendations on alternatives, on the consideration of GHG emissions upstream and downstream of a proposed project, or on the mitigation of those emissions, because those recommendations directly contravene both Supreme Court and appellate case law. Their implementation may also run contrary to the purpose of the NGA which is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[32] To the extent to which our obligations under the NGA conflicts with the recommendations of CEQ, we are obligated to follow the requirements of the NGA. FERC, not CEQ, administers the NGA and the Commission is the agency owed deference to its interpretation. Only "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"[33]

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[31] 88 Fed. Reg. at 1197 n.4.

[32] *NAACP*, 425 U.S. at 669-70.

[33] *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (*Skidmore*)); *Skidmore*, 323 U.S. at 140 ("The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.").

b. The purpose of the NGA is to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices." To the extent to which the implementation of CEQ's Guidance is in tension with this statutory purpose, how does the Commission intend to reconcile the two?

The Commission cannot implement CEQ's Guidance if it conflicts with the principal purpose of the NGA to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[34] The Supreme Court has stated that "where a clear and unavoidable conflict in statutory authority exists, [the National Environmental Policy Act (NEPA)] must give way."[35] Likewise, as the Commission has explained: "[t]he Commission will comply with the regulations of the [CEQ] except where those regulations are inconsistent with the statutory requirements of the Commission."[36] CEQ's guidance document is not a regulation, and is therefore entitled to even less deference by the Commission than other CEQ promulgations.

c. Is FERC currently implementing, or considering implementing, this Guidance? If so, by what means?

At this point, it is not clear whether the Commission will implement the recommendations in the CEQ Guidance. The Chairman, who controls the administrative activities of the Commission, could choose to direct Commission staff to implement some or all of the recommendations contained within the CEQ Guidance. Regardless of how he decides to direct Commission staff, he is not entitled to direct compliance with those elements of the CEQ Guidance that the Commission's organic statutes do not authorize or with which they conflict.

As of May 1, 2023, the CEQ Guidance has not been implemented by Commission staff. Since the publication of the CEQ Guidance in the Federal Register on January 9, 2023, the Commission has published fourteen NEPA documents for natural gas infrastructure projects, none of which cite the CEQ Guidance or estimate GHGs emitted by activities upstream of the proposed natural gas infrastructure.[37] Nevertheless, while it is true that the Commission has not

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[34] *NAACP*, 425 U.S. at 669-70.

[35] *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla*., 426 U.S. 776, 788 (1976).

[36] 18 C.F.R. § 380.1.

[37] FERC Staff, Supplemental EA for Port Arthur LNG Expansion Project, Docket No. CP20-55-000 (Apr. 28, 2023) (Accession No. 20230428-3014) (no citation to CEQ Guidance); FERC Staff, Draft EIS for Virginia Reliability Project and Commonwealth Energy Connector Project, Columbia Gas Transmission, LLC & Transcontinental Gas Pipe Line Company, LLC, Docket Nos. CP22-503-000, et al. (Apr. 11, 2023) (Accession No. 20230411-3013) (no citation

announced whether it will adopt any policy changes to implement the CEQ Guidance, it has certainly implied that compliance may be forthcoming.[38]

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to CEQ Guidance); FERC Staff, Final EIS for Wahpeton Expansion Project, WBI Energy Transmission, Inc., Docket No. CP22-466-000 (Apr. 7, 2023) (Accession No. 20230407-3001) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, EA for Trailblazer Conversion Project, Trailblazer Pipe Line Co., et al., Docket No. CP22-468-000 (Mar. 31, 2023) (Accession No. 20230331-3022) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, EA for Southeast Energy Connector Project, Transcontinental Gas Pipe Line Co., LLC, Docket No. CP22-501-000 (Mar. 24, 2023) (Accession No. 20230324-3025) (no citation to CEQ Guidance); FERC Staff, EA for BSC Compression Replacement Project, Boardwalk Storage Co., LLC, Docket No. CP22-494-000 (Mar. 13, 2023) (Accession No. 20230313-3006) (no citation to CEQ Guidance); FERC Staff, Final EIS for Northern Lights 2023 Expansion Project, Northern Natural Gas Company, Docket No. CP22-138-000 (Mar. 10, 2023) (Accession No. 20230310-3001) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, Final EIS for Southside Reliability Enhancement Project, Transcontinental Gas Pipe Line Co., LLC, Docket No. CP22-461-000 (Feb. 24, 2023) (20230224-3006) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, Final EIS for Venice Extension Project, Texas Eastern Transmission LP, Docket No. CP22-15-000 (Feb. 17, 2023) (Accession No. 20230217-3003) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, EA for Appalachia to Market II and Entriken HP Replacement Project, Texas Eastern Transmission, LP, Docket No. CP22-486-000 (Feb. 10, 2023) (Accession No. 20230210-3009) (no citation to CEQ Guidance); FERC Staff, Draft EIS for Cumberland Project, Tennessee Gas Pipeline Co., LLC, Docket No. CP22-493-000 (Feb. 3, 2023) (Accession No. 20230203-3006) (no citation to CEQ Guidance); FERC Staff, Final EIS for Ohio Valley Connector Expansion Project, Equitrans, LP, Docket No. CP22-44-000 (Jan. 20, 2023) (Accession No. 20230120-3006) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, Draft EIS for CP2 LNG and CP Express Project, Venture Global CP2 LNG, LLC, et al., Docket Nos. CP22-22-000, et al. (Jan. 19, 2023) (Accession No. 20230119-3072) (no citation to CEQ Guidance and declines to estimate upstream emissions); FERC Staff, Final EIS for Three Rivers Interconnection Project, Alliance Pipeline L.P., Docket No. CP21-113-000 (Jan. 13, 2023) (Accession No. 20230113-3012) (no citation to CEQ Guidance and declines to estimate upstream emissions).

[38] *See, e.g.*, *Columbia Gas Transmission, LLC*, 182 FERC ¶ 61,171, at P 40 n.73 (2023) ("We note that on January 9, 2023, CEQ issued interim guidance to assist agencies in analyzing GHG and climate change effects under NEPA. CEQ states that agencies should use this guidance to inform NEPA review for all new proposed actions, but agencies are not expected to

7. CEQ's Interim GHG Guidance states that "agencies should evaluate reasonable alternatives that may have lower GHG emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects." Has FERC found in the past that energy efficiency, conservation, and clean energy alternatives are practical alternatives to constructing and operating proposed interstate natural gas pipelines or LNG import/export facilities?

In accordance with NEPA and the NGA, the Commission has not found that energy efficiency, conservation, and clean energy alternatives are practical alternatives to proposed NGA section 3 or section 7 facilities. In response to each request by the U.S. Environmental Protection Agency (EPA) to evaluate whether non-natural gas resources could serve the need for a proposed project,[39] the Commission has stated that those options will not be considered as

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apply this guidance to concluded NEPA reviews and actions for which a final EIS or environmental assessment has been issued. Because the Commission issued the EA prior to the publication of this guidance, the Commission is not applying the guidance to the instant action.") (citations omitted); *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148, at P 86 (2023) (similar); *Great Basin Gas Transmission Co.*, 182 FERC ¶ 61,088, at P 22 n.21 (2023) (similar); *LA Storage, LLC*, 182 FERC ¶ 61,026, at P 12 n.29 (2023) (similar); *see also* Miranda Willson, *Republicans ask FERC how it will implement climate guidance*, ENERGYWIRE, Mar. 21, 2023 ("The framework is nonbinding, but FERC has previously indicated that it follows White House guidance. FERC acting Chair Willie Phillips, a Democrat, has also said he believes the agency's process for considering and measuring greenhouse gas emissions is already largely in line with the White House's draft guidance. 'Of course, we look forward to taking a closer look to determine where we can improve our process,' Phillips told reporters in January.").

[39] *See, e.g.*, EPA Region 6, March 13, 2023 Comments on Draft Environmental Impact Statement for CP2 LNG and CP Express Project, Docket Nos. CP22-21-000, et al., at 2 (Accession No. 20230314-5012) ("EPA recommends that FERC evaluate non-gas energy alternatives, as well as other non-project alternatives that satisfy the need for the project under the no-action alternative."); EPA Region 8, July 22, 2022 Additional Scoping Comments on Environmental Issues for the Planned Wahpeton Expansion Project in Docket No. PF21-4-000, filed in Docket No. CP22-466-000, at 3 (Accession No. 20220722-5086) ("We encourage the Commission to review the application in light of alternative options outside of the increase in fossil fuel related infrastructure that might also meet national needs. At a minimum, we recommend non-fossil fuel options be considered as alternatives for analysis in the NEPA document.").

alternatives to the proposed project because the purpose of the project is to transport natural gas, while non-natural gas options do not serve that purpose.[40]

To comply with CEQ's Guidance on alternatives would be to redefine the proposed action and thereby ignore the unambiguous language of NEPA case law. As the D.C. Circuit has explained:

> NEPA plainly refers to alternatives to the 'major *Federal* actions significantly affecting the quality of the human environment,' and not to alternatives to the applicant's proposal. An agency cannot redefine the goals of the proposal that arouses the call for action; it must evaluate alternative ways of achieving *its* goals, shaped by the application at issue and by the function that the agency plays in the decisional process. Congress did expect agencies to consider an applicant's wants when the agency formulates the goals of its own proposed action. Congress did not expect agencies to determine for the applicant what the goals of the applicant's proposal should be.[41]

Moreover, the NGA requires that the Commission promote the orderly development of natural gas at reasonable prices, not alternative energy sources. Congress has declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest."[42] Having made its decision and codified it into law, Congress has determined that the Commission's duty under the NGA is to promote natural gas infrastructure. We are bound to follow the statute as enacted by Congress.[43] The Commission has no authority to investigate whether renewable energy or energy efficiency could substitute for gas, and we are without authority to promote other policies when to do so would violate the purpose of our own statute.

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[40] *See, e.g.*, FERC Staff, Final EIS for Wahpeton Expansion Project, Docket No. CP22-466-000, at 3-2 to 3-3 (Apr. 7, 2023).

[41] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (emphasis in original) (citations omitted).

[42] 15 U.S.C. § 717(a).

[43] *NAACP*, 425 U.S. at 669-70 ("[I]t is clear that the principal purpose of [the NGA] was to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.") (citations omitted).

8. The CEQ Interim Guidance provides an example of "indirect effects" that includes the entire life cycle of fossil fuels: "Indirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action. For example, where the proposed action involves fossil fuel extraction . . . [t]he reasonably foreseeable indirect effects of such an action likely would include effects associated with the processing, refining, transporting, and end-use of the fossil fuel being extracted, including combustion of the resource to produce energy." CEQ's Interim GHG Guidance appears to suggest agencies should unilaterally determine appropriate GHG mitigation, stating "[a]gencies should consider available mitigation measures."

a. The CEQ's example appears to imply that where the proposed action would involve the construction and operation of an interstate natural gas pipeline, the reasonably foreseeable indirect effects would include the entire lifecycle of natural gas emissions – that is, the production, processing, and end use of natural gas. Do you agree?

It is apparent that the CEQ Guidance, if implemented fully and according to its plain terms, would have the Commission quantify all GHGs emitted by any activity upstream and downstream of natural gas pipeline infrastructure projects. The CEQ Guidance states this plainly: "natural gas pipeline infrastructure creates the economic conditions for additional natural gas production and consumption, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change."[44] The CEQ Guidance also states that "agencies should . . . [q]uantify the reasonably foreseeable GHG emissions (including direct and indirect emissions) of a proposed action . . . ."[45]

b. What GHG emissions does FERC consider subject to mitigation? Will FERC only require mitigation of GHG emissions directly released by a facility's construction and operation? Will FERC require mitigation of GHG emissions released by the upstream production or processing, or downstream consumption of natural gas?

It is not clear whether, and, if so, in what form, FERC will impose conditions in NGA section 3 or section 7 authorizations to require mitigation of GHG emissions. As you indicate,[46] pending before the Commission is the draft-Interim GHG Policy Statement, which stated that the

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[44] 88 Fed. Reg. at 1204 n.86.

[45] *Id.* at 1200.

[46] Letter at 2.

Commission could approve the mitigation of direct and indirect GHG emissions and "encouraged" such mitigation.[47] Despite my repeated calls to do so, my colleagues have not seen fit to close the proceeding in Docket No. PL21-3-000, leaving open the possibility that the now-draft Interim GHG Policy Statement could be finalized.[48]

The only way that the Commission can require mitigation is to use the Commission's authority to attach conditions to its authorizations. The NGA empowers the Commission "to attach to the issuance of a certificate . . . reasonable terms and conditions as the public convenience and necessity may require."[49] The Commission's conditioning authority does not give it *carte blanche* to condition pipelines however it wishes; the NGA's conditioning authority is constrained by the text and purpose of the statute.

The Commission can only exercise its conditioning authority in a manner consistent with the purpose of the NGA which is "to promote the orderly production of plentiful supplies of . . . natural gas at just and reasonable rates."[50] It is probable that courts would look with skepticism upon any condition attached to a natural gas pipeline certificate that mitigated emissions released by the upstream production or processing, or downstream use of natural gas, which are not within the Commission's jurisdiction and do not bear a direct relation to the harms caused by the construction and operation of the facility itself. The NGA unambiguously states that "[t]he provisions of this chapter . . . shall not apply . . . to the production or gathering of natural gas."[51] Similarly, we neither license end-use facilities nor control the purchase or

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[47] *Consideration of Greenhouse Gas Emissions in Nat. Infrastructure Project Revs.*, 178 FERC ¶ 61,108, at P 98 (2022) (Interim GHG Policy Statement).

[48] *See Cameron LNG, LLC*, 182 FERC ¶ 61,173 (2023) (Danly, Comm'r, concurring in the result at P 3) ("The Interim GHG Policy Statement has been in draft form for nearly a year. The regulated industry needs certainty that the Commission's moment of misguided whims will not resurface. My colleagues should simply terminate the proceeding in Docket No. PL21-3-000."); *Alliance Pipeline L.P.*, 182 FERC ¶ 61,172 (2023) (Danly, Comm'r, concurring in the result at P 3) (same)*; Columbia Gas Transmission, LLC*, 182 FERC ¶ 61,171 (2023) (Danly, Comm'r, concurring in the result P 3) (same); *Fla. Gas Transmission Co., LLC*, 182 FERC ¶ 61,170 (2023) (Danly, Comm'r, concurring in the result at P 3) (same).

[49] 15 U.S.C. § 717f(e).

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

[51] 15 U.S.C. § 717(b). I have recently written on this subject matter in my in my concurrence for *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 (2023) (Danly, Comm'r, concurring at PP 4-5).

manner of consumption of natural gas. The Commission's authority under the NGA does not apply to "the local distribution of natural gas or to the facilities used for such distribution."[52] Nor has the Commission any authority "over facilities used for the generation of electric energy."[53]

The conditions must also be "reasonable." Presumably, if mitigation is imposed by means of certificate conditions so onerous that the project is no longer commercially viable, or so technically burdensome that they amount to the infeasible, they would not be "reasonable." Put simply, any burdensome conditions that seek to achieve public policy goals that are at odds with ensuring the development of infrastructure that would otherwise be in the public convenience and necessity would almost certainly be unlawful under the NGA.

9. How would FERC implement the Guidance in the context of implementing its backstop siting authority for transmission projects? Would the Commission consider the upstream emissions of generation projects? Would land use impacts or other environmental impacts of different generating sources, such as mining for minerals necessary for solar panels and wind turbines, be considered indirect effects? Would the entire lifecycle of different generation assets be considered indirect effects in the Commission's analysis? Please support your answer with specific statutory text and case law.

If the Commission implements the CEQ Guidance, it must do so in compliance with NEPA and controlling case law. The landmark Supreme Court case *Department of Transportation v. Public Citizen* (*Public Citizen*)[54] held that, under NEPA, agencies are only obligated to consider environmental effects for which the agency itself is the legal proximate cause.[55] As characterized by the Court of Appeals for the D.C. Circuit (D.C. Circuit), *Public Citizen* means that when "an agency 'has no ability to prevent a certain effect due to' that agency's 'limited statutory authority over the relevant action[], then that action 'cannot be

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[52] 15 U.S.C. § 717(b); *see also Mo. v. Kan. Gas Co.*, 265 U.S. 298, 308 (1924) ("With the delivery of the gas to distributing companies, however, the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. In such a case the effect on interstate commerce, if there be any, is indirect and incidental.") (citations omitted).

[53] 16 U.S.C. § 824(b)(1).

[54] 541 U.S. 752 (2004).

[55] *Id.* at 767.

considered a legally relevant "cause" of the effect' for NEPA purposes" and, accordingly, that the effect of that action need not be considered in an agency's NEPA analysis.[56]

Effects must also be "reasonably foreseeable" to fall within the scope of NEPA. Courts have found that "reasonably foreseeable" means effects that are "'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'"[57]

Because the FPA states that the Commission "shall not have jurisdiction . . . over facilities used for the generation of electric energy,"[58] the Commission *cannot* be the legally relevant cause of effects related to generation upstream of a transmission project approved under its backstop siting authority. Put simply, neither NEPA nor controlling case law require the Commission to consider effects related to generation upstream of proposed interstate transmission projects under FPA section 216.[59]

Nevertheless, in my view, if implemented fully and according to its plain terms, the CEQ Guidance will imperil the Commission's ability to conduct the permitting of electric transmission facilities under FPA section 216. The Commission has already received comments in its Notice of Proposed Rulemaking on Transmission Siting that the CEQ Guidance means, "where a proposed action involves 'conveyance of a commodity or resource' (*such as electricity*), upstream production and downstream use of that resource will generally be 'reasonably foreseeable'" and "[t]hus, any associated emissions [related to transmission development] must be considered an indirect effect of the proposed action."[60] One consequence of this interpretation will be litigation over upstream or downstream effects that parties allege the Commission should or should not have considered. If a court determines that an agency has failed to engage in reasoned decision making or failed to answer every argument properly raised by litigants in the proceeding, that court can find the agency's decision arbitrary and capricious under the Administrative Procedure Act and vacate and remand the Commission's order. In an effort to ensure the legal durability of its issuances, the Commission will have the incentive to prepare longer and ever more comprehensive NEPA documents—which will take more and more

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[56] *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016).

[57] *City of Shoreacres v. Waterworth*, 420 F.3d 440, 453 (5th Cir. 2005) (citation omitted); *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[58] 16 U.S.C. § 824(b).

[59] 16 U.S.C. § 824p.

[60] Sabin Center for Climate Change Law, Comments, Docket No. RM22-7-000, at 7 (Apr. 4, 2023) (emphasis added) (citation omitted) (Accession No. 20230404-5188).

time to prepare—in an effort to reduce the likelihood that a court will find that it has failed to offer sufficiently searching analysis or failed to provide an acceptably in-depth response to this or that issue raised in the proceedings.

My views are not idiosyncratic. In commenting on the CEQ Guidance, several entities expressed concern that "[c]lean energy development . . . is often hindered by the rigorous analysis required under NEPA,"[61] that "it is essential that the NEPA process does not create any additional burdens that could delay the environmental benefits of renewable energy development,"[62] and that agencies should not be allowed to "flyspeck the GHG impacts of solar equipment manufacturing or short-term disturbances of soil and vegetation."[63] That a trade group representing renewable energy developers believes that the CEQ guidance potentially hinders the development of their projects shows just how burdensome the guidance would be were the Commission to implement it.

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Thank you for the opportunity to share my thoughts. If I can be of any further assistance with these issues or any other Commission matter, please do not hesitate to contact me.

Sincerely,

James P. Danly
Commissioner

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[61] American Clean Power, Comments on CEQ Guidance, Docket ID. No. CEQ-2022-0005-3014, at 3 (Apr. 10, 2023), https://www.regulations.gov/comment/CEQ-2022-0005-0314.

[62] American Council on Renewable Energy, Comments on CEQ Guidance, Docket ID No. CEQ-2022-0005-0325, at 2 (Apr. 10, 2023), https://www.regulations.gov/comment/CEQ-2022-0005-0325.

[63] Solar Energy Industries Association, Comments on CEQ Guidance, Docket No. ID 2022-055-0331, at 3 (Apr. 10, 2023), https://www.regulations.gov/comment/CEQ-2022-0005-0331.