The End of the Pipeline Era or a Fresh Start? FERC Releases Updated Certificate Policy Statement for Interstate Gas Pipelines

Andrew Meaders*

I. INTRODUCTION

For seventy years, Cathy Holleran's family has owned and operated the twenty-three-acre North Harford Maple Farm in New Milford, Pennsylvania.[1] In 2016, the Holleran family watched as logging crews, accompanied by armed federal marshals, clear-cut five acres of sugarbush maple trees, 558 in all, to make room for the Constitution Pipeline. For Megan Holleran, Cathy's daughter, the loss of the trees was a crushing blow. "I have no words for how heartbroken I am," she said at the time.

* © 2023 Andrew Meaders, J.D. Candidate 2023, Tulane University Law School; B.A., University of Mississippi. The author would like to thank his wife, Julie, for her inspiration and support.

1. B.J. Small, *New Trees are Sweet Healing for North Harford Maple Farm*, CHESAPEAKE BAY FOUND: SAVE THE BAY BLOG (Oct. 9, 2020), https://www.cbf.org/blogs/save-the-bay/2020/10/new-trees-are-sweet-healing-for-north-harford-maple-farm.html.

"We've been preparing for this for years but watching the trees fall was harder than I ever imagined it would be."[2]

But four years later, in February 2020, Williams Companies canceled the Constitution Pipeline, citing the comparatively better risk-adjusted return on its existing pipeline network and expansions.[3] A federal court vacated the eminent domain order granted to the company five years before, and the Hollerans got a settlement and their scarred property back. Neighbors, local community groups, and the Pennsylvania Department of Conservation and Natural Resources pitched in to plant 200 red maples, sugar maples, and red oaks in the section cut for the pipeline. According to Cathy Holleran, the trees should mature to the size required for tapping maple syrup, a diameter of ten inches, within forty to fifty years.[4]

The absurdity of the Hollerans' ordeal is compounded by the fact that, before pipeline developers exercised and then un-exercised eminent domain, the Federal Energy Regulatory Commission ("FERC" or "the Commission") issued a Certificate of Public Convenience and Necessity ("CPCN"), ostensibly a determination that the Constitution Pipeline "is or will be required by the present or future public convenience and necessity."[5] Within this framework, the pipeline's cancellation suggests it may not have been required by the present or future public convenience and necessity. Considering that between 1999 and 2019, FERC approved 474 of 476 CPCN applications, public concern that FERC may have dropped the ball in its evaluation of other pipeline certificates seems reasonable.[6] To its credit, FERC has acknowledged potential shortcomings in its analysis, releasing Notices of Inquiry (NOIs) in 2018 and 2021 to solicit input from stakeholders.[7] The NOI process culminated

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2. Energy Justice Network, *Trees Cut as Maple Syrup Farmers Lose Eminent Domain Battle Over Constitution Pipeline*, ECOWATCH (Mar. 3, 2016, 1:40 AM), https://www.ecowatch.com/trees-cut-as-maple-syrup-farmers-lose-eminent-domain-battle-over-const-1882185526.html.

3. Brad Kramer, *Williams, Partners Abandon Constitution Pipeline Project*, NORTH AMERICAN PIPELINES PROJECT (Feb. 25, 2020), https://www.napipelines.com/williams-partners-abandon-constitution-pipeline-project/.

4. Small, *supra* note 1.

5. *Const. Pipeline Co., LLC,* 149 FERC ¶ 61,199 (2014), *order on reh'g,* 154 FERC ¶ 61,046 (2016).

6. *Certification of New Interstate Nat. Gas Facilities*, 83 Fed. Reg. 18020 (Apr. 25, 2018), 163 FERC ¶ 61,042 [hereinafter *2018 NOI*]; *Certification of New Interstate Nat. Gas Facilities*, 86 Fed. Reg 11268 (Feb. 24, 2021), 174 FERC ¶ 61,125 [hereinafter *2021 NOI*].

7. FED. ENERGY REGUL. COMM'N, 178 FERC ¶ 61,107, No. PL18-1-000, CERTIFICATION OF NEW INTERSTATE NATURAL GAS PIPELINE FACILITIES, UPDATED POLICY STATEMENT ON CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES, (2022) [hereinafter UPDATED CERTIFICATE POLICY STATEMENT].

in FERC's 2022 Updated Certificate Policy Statement (Updated CPS), released on February 18, 2022, which aims to clarify how FERC determines need and to provide "more regulatory certainty in the Commission's review process and public interest determinations."[8]

This Comment outlines how FERC has framed the "public convenience and necessity" standard over time and considers how updates to the Commission's determination of need might impact future interstate pipeline development. Part I briefly discusses the origins of the public convenience and necessity standard and its foundational requirement of market need plus public interest. This Part proceeds from an assumption that FERC's current interpretation of the public convenience and necessity standard should be faithful to congressional understanding of the term when it was adopted in the Natural Gas Act. Part II outlines FERC's historical approach to the determination of market need and public interest from the years immediately following passage of the Natural Gas Act in 1938 to the release of the Updated Certificate Policy Statement in February 2022. Subpart II(A) broadly traces FERC's understanding of the public convenience and necessity standard prior to 1999, while subpart II(B) addresses FERC's application of the 1999 Certificate Policy Statement (1999 CPS), drawing distinctions between the statement's aims and the Commission's practice in the two decades following its release.

Part III focuses directly on FERC's 2022 Updated CPS. Part III addresses public benefits and adverse impacts separately, in part to reflect the Commission's latest depiction of its "flexible balancing process." Subpart III(A) analyzes the Updated CPS's stated goals and its process for determining market need and other public benefits, highlighting both language recycled from the 1999 CPS and key changes to the Commission's review process. Subpart III(B) addresses the Updated CPS's framing of its adverse impacts review, specifically the addition of environmental impacts to the public interest review under the NGA. Both subparts aim to contextualize FERC's newly articulated approach within the history of its public convenience and necessity determinations.

Part IV compares the Updated CPS with its predecessor, first by noting key changes and the FERC Commissioners' diverging characterizations of those changes. Part IV proceeds with an argument that the Updated CPS, as written, better aligns with the public convenience and necessity standard than FERC has practiced over the past two decades. This comment concludes with an assessment of claims

8. *Id.*

that the Updated CPS will stifle the development of natural gas infrastructure in the United States, ultimately deciding that while the Updated CPS undoubtedly presents new obstacles to pipeline developers, these obstacles are likely inevitable but also surmountable.

II. THE PUBLIC CONVENIENCE AND NECESSITY STANDARD

Pursuant to Section 7(c)(1)(A) of the Natural Gas Act (NGA), a person or company aiming to build an interstate natural gas pipeline must first obtain FERC's certification that the proposed project "is or will be required by the present or future public convenience and necessity."[9] The Commission has authority under the NGA to attach to a certificate "such reasonable terms and conditions as the public convenience and necessity may require," and it can deny an application if public interest factors weigh against approval.[10] A certificate holder is entitled to acquire the property rights necessary to construct and operate the project via eminent domain.[11] Accordingly, the factors relied upon by the Commission to evaluate whether a proposed project is in the public interest carry significant weight. However, partly due to mixed guidance from courts on the scope and meaning of the public convenience and necessity standard, the power the Commission claims and the power it wields have often varied.

The public convenience and necessity standard did not arrive in the NGA as a blank slate but was instead colored by several decades of state and federal law. Before the NGA, the public convenience and necessity standard appeared in federal legislation such as the Transportation Act of 1920, which required railroads to obtain a CPCN before constructing an extension.[12] In fact, as far back as 1882, the Massachusetts legislature required the Board of Railroad Commissioners to certify that "public convenience and necessity require construction of [the] railroad proposed" before allowing it to proceed.[13] Similarly, thirty-three states had laws on the books prior to 1930 requiring companies to obtain CPCNs

9. 15 U.S.C. § 717f(e).

10. *Id*.

11. 15 U.S.C. § 717f(h) (1988).

12. Transp. Act of 1920, 41 Stat. 456 (*amended by* Pub. L. No. 107-217, §6(b), 116 Stat. 1306 (2002)).

13. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States 1870–1920*, 79 COLUM. L. REV. 426, 435–36 (1979).

from state public utility commissions before conducting or expanding operations.[14]

Public interest scholar William K. Jones identified five key rationales for CPCN requirements in state legislation, including four rooted in public utility economics: (1) avoiding wasteful duplication of physical facilities; (2) preventing "ruinous competition" among regulated companies; (3) the diversion of more profitable customers from the incumbent utility, which leaves them with less profitable customers and increases the chances of failure; and (4) protecting utility investors.[15] The final rationale is to protect the community "against social costs sometimes described as externalities," a charge that historically led regulators to consider public safety and environmental damage.[16] All five rationales proceed from the idea that, in some circumstances, unregulated competition might be so harmful to the community as to necessitate restrictions on entry.[17] As the Harvard Electricity Law Initiative has documented, state courts consistently endorsed the idea that the standard required regulators to prioritize the needs of the public at large over the needs of individuals and public utilities.[18]

The Supreme Court has affirmed the Commission's role as "guardian of the public interest" when it comes to certificate approvals.[19] In the Court's view, the public convenience and necessity standard "connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination."[20] Thus, the Natural Gas Act requires FERC "not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgement to determine from its analysis of the total situation on which side of the

14. Ford P. Hall, *A Re-Examination of Competition in Gas and Electric Utilities*, 50 YALE L.J. 875, 883 (1941).

15. Jones, *supra* note 13, at 428.

16. *Id*.

17. New State Ice Co. v. Liebmann, 285 U.S. 262, 282 (1932) (Brandeis, J., concurring) ("The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that, under certain circumstances, free competition might be harmful to the community, and that, when it was so, absolute freedom to enter the business of one's choice should be denied.").

18. Harv. Elec. Law Initiative, Comment on Certification of New Interstate Gas Facilities, Docket No. PL18-1-000 (July 25, 2018), http://eelp.law.harvard.edu/wp-content/uploads/Harvard-Electricity-Law-Initiative-Policy-Statement-0725.pdf.

19. Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 7 (1961).

20. *Id.* at 23.

controversy the public interest lies."[21] To do so, FERC must "evaluate all factors bearing on the public interest."[22]

However, the Court explained in *NAACP v. Federal Power Commission* that FERC does not have a broad license under the NGA to promote the general welfare and must instead confine its public interest review to the purposes for which the NGA was adopted.[23] The Court found it clear that the principal purpose of the Power and Gas Acts was "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices."[24] It noted, for example, that while there are subsidiary purposes in the Act, including the consideration of conservation, environmental, and antitrust questions, the elimination of employment discrimination was not one of them.[25]

Courts have generally interpreted the *NAACP* decision to require FERC to cabin its review to factors directly related to its statutory purpose,[26] but it is not clear if the "public interest" referenced by the Court in *NAACP* extends to public interest reviews as part of the public convenience and necessity standard. The NGA employs both a public interest standard and the public convenience and necessity standard in different subsections of Section 7.[27] If courts must give effect to the words of a statute and "refrain from reading a phrase into the statute when Congress has left it out," then presumably Congress intended the Commission to evaluate certificate applications under a standard distinguishable from the public interest standard. Perhaps it explains why current FERC Chairman Richard Glick claims that the public convenience and necessity standard in Section 7 establishes a two-step inquiry.[28] First, the Commission must determine if the project is needed. Second, where a project is needed, the Commission must determine whether it is in the public interest.[29]

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21. *Id*.

22. *Id.* at 8 (citing Atl. Refin. Co. v. Pub. Serv. Comm'n, 360 U.S. 378, 391 (1959)).

23. 425 U.S. 662, 669 (1976).

24. *Id.* at 669–70.

25. *Id.* at 670 n.6 (citing 15 U.S.C. § 717s(a); 16 U.S.C. §§ 803(a), (h); Gulf States Utils. Co. v. FPC, 411 U.S. 747; Udall v. FPC, 387 U.S. 428).

26. *See generally* Pub. Utils. Comm'n of Cal. v. FERC, 900 F.2d 269, 281 (D.C. Cir. 1990) (finding FERC must focus on factors relevant to the "main purposes of the Natural Gas Act," in which the Commission has expertise).

27. *Compare* 15 U.S.C. § 717f(e), *with* 15 U.S.C. § 717f(a).

28. *Hearing to Review FERC's Recent Guidance on Nat. Gas Pipelines Before the Sen. Comm. on Energy and Nat. Res.* (Mar. 3, 2022) (Written Testimony of Richard Glick, Chairman, Fed. Energy Regul. Comm'n).

29. *Id*.

This description of FERC's responsibility aligns with the historical understanding of the public convenience and necessity standard and accurately characterizes the Commission's function as Congress understood it in 1938. However, while FERC has taken a relatively consistent approach to the first step, it has struggled to both clarify the boundaries of its public interest review and to stick to its framework once it has done so. In fact, FERC has frequently allowed the first step to subsume the entire inquiry.

III. FERC'S APPLICATION OF THE STANDARD UNDER THE NATURAL GAS ACT

A. Background (1938–1999)

The Natural Gas Act passed when pipelines were aggregators of supply meant to support the pipeline's merchant function.[30] Commissioner Glick has described it as a system of limited competition among vertically integrated companies selling bundled commodity and transportation services at Commission-regulated prices.[31] In an early certificate proceeding, *In re Kansas Pipe Line & Gas Company*, the Federal Power Commission (FPC), FERC's predecessor, outlined what it considered the minimum requirements for a showing that public convenience and necessity justified a project.[32] Applicants were required to show that: (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, (6) the rates proposed to be charged are reasonable, and (7) the anticipated fixed costs or the amount of such fixed costs (such as operating and maintenance expenses, depreciation, taxes, and return) are reasonable.[33]

The *Kansas Pipe Line* factors offer insight into its early priorities and are still memorialized in the exhibits FERC requires to be included in

30. Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 122 (2017).

31. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7.

32. 2 F.P.C. 29, 56 (1939).

33. *See id.* at 40, 45–46, 53–55.

the application.[34] While the weight given to individual *Kansas Pipe Line* factors has evolved according to circumstances, FERC has historically prioritized pre-construction contracts, or precedent agreements, as evidence of need.[35] Notably, the Commission introduced the *Kansas Pipe Line* factors when it doubted its authority to consider the broad social and economic costs of proposed pipelines, arguing that Congress would have given it jurisdiction over all pipelines, not just those proposed to transport natural gas to markets already served by another pipeline, if this were the case.[36] Soon after Congress amended the Natural Gas Act in 1942 to extend the Commission's jurisdiction to include all interstate pipelines,[37] the Commission appeared convinced that conservation of gas for high-value uses fell within its review.[38] By the 1950s, the Commission generally disfavored projects proposed to transport gas for "inferior" uses, explaining in 1959 that a pipeline was rejected because the proposed use of the gas as boiler fuel was a policy consideration that outweighed the "conventional" requirements of public convenience and necessity.[39]

The Supreme Court affirmed the view that the public interest factors extend beyond questions of market demand and gave the Commission justification for considering environmental effects with its decision in *Federal Power Commission v. Transcontinental Pipeline Corp.* The FPC denied Transco's certificate application after determining that use of the natural gas as boiler fuel at Con Ed's Waterside Station would be an "inferior" use from a conservation standpoint and take up pipeline capacity required by domestic consumers.[40] Transco and Con Ed argued that replacing coal with natural gas would lessen air pollution, a feature the FPC acknowledged before nonetheless prioritizing its concerns about end use.[41] The Court approved the FPC's consideration of end use in its decision-making process under Section 7 and implicitly affirmed the Commission's authority to consider downstream air pollution by deferring to its factual findings.[42] By 1966, the Commission revealed that,

34. *See* 18 C.F.R. § 157.14(a)(8)–(19) (2016).

35. Christin, *supra* note 30, at 127.

36. *Kan. Pipe Line & Gas Co*., 2 F.P.C. 29, 57 (1939) ("Congress did not intend this Commission generally to weight the broad social and economic effects of the use of various fuels.").

37. *See* Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 11–12 (1961).

38. *Hope Nat. Gas, et al.*, 4 F.P.C. 59, 62–63 (1944).

39. *Transcon. Pipeline Corp*., 21 F.P.C. 138, 141 (1959).

40. Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp., 365 U.S. 1, 4–5 (1961).

41. *Id.* at 6.

42. *Id.* ("The court also expressed sympathy with respondents' contention that the Commission had given inadequate weight to the air pollution factor; but the holding below does

like the public, it was "increasingly concerned about the environment" and rejected the argument that air pollution falls solely within the ambit of local authorities.[43] In 1970, passage of the National Environmental Policy Act (NEPA) confirmed FERC's suggestion that its concern for the environment reflected public sentiment. NEPA allowed the Commission to cabin its consideration of environmental impacts within an Environmental Impact Statement (EIS) or Environmental Assessment (EA),[44] thereby making it easier to divorce environmental impacts from the Commission's public interest review pursuant to the Natural Gas Act.

FERC's conception of its regulatory role changed with the passage of the Natural Gas Policy Act of 1978, which aimed to provide investors with incentives to increase the supply available to the interstate market. In response to the legislation and an increasingly competitive market, FERC adapted its regulatory policy in the 1980s. The Commission issued Order No. 436, which, in addition to pushing for third-party access, established an Optional Expedited Certificate process allowing for the accelerated evaluation of applications for new services.[45] Under the Expedited Certificate Process, a project was presumed to be required by the public convenience and necessity if the applicant accepted the full risk of its proposal, i.e., "at-risk" rate conditions for unsubscribed capacity that would preclude the applicant from shifting costs to its customers.[46]

While the Optional Expedited Certificate program was not widely utilized by applicants, FERC began to apply its at-risk conditions to applications filed under the regular procedure. By the time the 1999 Certificate Policy Statement was adopted, FERC processed applications only once the applicant had obtained subscriber contracts for twenty-five percent of its proposed capacity, and final approval was contingent on "[ten]-year commitments for all of its capacity" or a showing that revenues would exceed costs.[47] Applicants unable to make these showings received certificates subject to a condition that applicants would be "at-risk" for any unsold capacity.[48] This transition reflected the

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not appear to be based on that ground.") (citing Consol. Edison Co. of N.Y., Inc. v. Fed. Power Comm'n, 271 F.2d 942, 942 (3d Cir. 1959)).

43. *Transwestern Pipeline Co*., 36 F.P.C. 176, 177 (1966).

44. 42 U.S.C. § 4332(2)(C).

45. *Regul. of Nat. Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408, 42,408 (Oct. 18, 1985).

46. *Id.* at 42,471.

47. FED. ENERGY REGUL. COMM'N, 88 FERC ¶ 61,747, No. PL99-3-000, CERTIFICATION OF NEW INTERSTATE NATURAL GAS PIPELINE FACILITIES, (1999) [hereinafter 1999 CERTIFICATE POLICY STATEMENT].

48. *Id.*

Commission's position that precedent agreements could be relied upon to establish demand and protect consumers.[49]

But FERC soon acknowledged a pitfall of relying almost exclusively on contracts to determine market need: the Commission struggled to explain to landowners and community interests why their land specifically was required for a project.[50] In 1999, FERC issued a Certificate Policy Statement to address this issue and others raised in a previous rulemaking proceeding on short-term natural gas transportation services.[51] Acknowledging that proceeding, and pointing to the Commission's recent experiences evaluating project proposals, the 1999 CPS announced that FERC deemed it necessary to revisit its CPCN process, specifically its policy for determining the need for a project and whether it would serve the public interest.[52] Once again, FERC appeared to have doubts about its ability to determine market need under current practices, but struggled to articulate precisely what its public interest review required.

B. The 1999 Certificate Policy Statement (1999-2022)

By the late 1990s, FERC appeared increasingly content to rely primarily on precedent agreements as evidence of need. But, as criticism from stakeholders highlighted, this approach resigned the Commission to the role of spectator in a matter supposedly affected by the public interest. The 1999 CPS, issued on September 15, 1999, reflects the Commission's attempt to develop a more complete justification of the need for a project.[53] This subpart first addresses FERC's framing of the 1999 CPS and summarizes its stated intentions before highlighting two areas where its practice appeared to diverge: the weight of precedent agreements and the role of its environmental review. This subpart concludes by noting two recent decisions from the United States Court of Appeals for the D.C. Circuit that brought the gap between policy and practice into sharp relief.

FERC released the 1999 CPS to define the analytical steps that ought to guide its evaluation of CPCN applications.[54] The Commission explained that an effective policy statement should further the Commission's goals "to foster competitive markets, protect captive

49. Christin, *supra* note 30, at 125.

50. 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47, at 61,744.

51. *Id.* at 61,736.

52. *Id.* at 61,737.

53. *Id.* at 61,744 ("The reliance solely on long-term contracts to demonstrate demand does not test for all the public benefits that can be achieved by a proposed project.").

54. *Id.* at 61,743.

customers, and avoid unnecessary environmental and community impacts."[55] It should also incentivize the development of a record supporting the need for a proposed project and the public benefits to be obtained, as well as attempts by the applicant to mitigate or avoid potential adverse impacts.[56] The 1999 CPS noted that it shared many key characteristics with previous policy statements.[57] It uses familiar language to describe the previous policy as a "flexible balancing process" during which the Commission weighed several factors, including market support; economic, operational, and competitive benefits; and environmental impact.[58]

The 1999 CPS created a new threshold requirement for proposed projects. Before balancing public benefits and adverse impacts, FERC would consider whether the project could proceed without relying on subsidies from the applicant's existing customers.[59] In the Commission's view, this threshold question accomplished several important tasks. First, it ended FERC's preference for rolled-in pricing, which many argued sent improper market signals by allowing existing customers to subsidize the cost of expansion and thereby hide the true cost of expansion.[60] Second, the Commission argued, it would preclude adverse impacts on landowners, who would not be subject to eminent domain for projects that were not financially viable, and on existing pipelines, which would not have to compete with new market entrants that received financial subsidies through rolled-in pricing.[61] Finally, an applicant who could prove the financial viability of a project without subsidies "will have shown an important indicator of market-based need for a project," or, put another way, "the first indicator of public benefit."[62]

The Commission's approach under the 1999 CPS balanced evidence of public benefits against residual adverse effects in what it said was essentially an economic test."[63] Applicants were also expected to structure proposed projects to avoid "adverse economic, competitive, environmental, or other effects on the relevant interests," and to minimize

55. *Id.*

56. *Id.* at 61,748.

57. *Id.* at 61,743 ("In some respects, this policy is not a significant change from the kind of analysis employed currently in certificate cases.").

58. *Id.*

59. *Id.* at 61,746.

60. *Id.* ("Eliminating the subsidization usually inherent in rolled-in rates recognizes that a policy of incrementally pricing facilities sends the proper price signals to the market.").

61. *Id.* at 61,746.

62. *Id.* at 61,747.

63. *Id.* at 61,745.

adverse impacts where eliminating them was impossible.[64] Projects with residual adverse effects would be approved "only where the public benefits to be achieved from the project c[ould] be found to outweigh the adverse effects."[65] Thus, once an applicant showed that a proposed project could proceed without subsidization from existing customers, the Commission would undertake another balancing process, this time weighing public benefits with adverse impacts.[66] The public benefits to be considered, in addition to need, included meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects to improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.[67] The amount of evidence required for an applicant to meet this burden depended on the magnitude of potential adverse impacts on relevant interests.[68]

Notably, the 1999 CPS eschewed a single test for market need, explaining instead that the Commission would "consider all relevant factors bearing on the need for a project."[69] Prior to its publication of the 1999 Policy Statement, FERC required applicants to present precedent agreements to demonstrate need.[70] While the Commission noted that precedent agreements "always will be important evidence of demand," it explained that its new evaluation of pipeline proposals would instead take a more holistic approach, focusing on the impact of the project on relevant interests balanced against the benefits gained from the project.[71] Nonetheless, evidence of demand might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.[72] By FERC's account, this shift in approach obviated concerns about precedent agreements with affiliate shippers, which the Commission acknowledged had been the subject of a number of comments.[73] The 1999 Policy Statement clarified that evidence

64. *Id.* at 61,747–48 (noting that the relevant interests include (1) the existing customers of the pipeline proposing the project, (2) existing pipelines in the market and their captive customers, and (3) landowners and communities affected by the route of the new pipeline).

65. *Id.* at 61,745.

66. *Id*.

67. *Id.* at 61,748.

68. *Id.* at 61,748.

69. *Id.* at 61,747.

70. *Id*.

71. *Id.* at 61,748.

72. *Id.* at 61,747.

73. *Id.* at 61,748–49.

to establish need will usually include a market study.[74] Moreover, "[v]ague assertions of public benefits will not be sufficient."[75]

In the two decades after its release, however, FERC interpreted the 1999 CPS as not requiring it to look behind the precedent agreements to evaluate project need, instead determining it could reasonably accept market need as reflected by the applicant's existing contracts with shippers.[76] The 1999 Policy Statement's threshold question required applicants to make an initial showing that the project could proceed without increasing rates for existing customers. In the Commission's view, "[c]ompanies willing to invest in a project, without financial subsidies, will have shown an important indicator of market-based need for a project."[77] The threshold question thus made existing contracts with shippers necessary for approval but also tempted the Commission to let them be sufficient.

The D.C. Circuit consistently endorsed this approach, explaining in *Myersville Citizens for a Rural Community, Inc. v. FERC* that the petitioners had identified nothing in the 1999 Policy Statement to prove that it requires, rather than simply permits, the Commission to look beyond the market need as reflected by the applicant's existing contracts with shippers.[78] In *City of Oberlin v. FERC*, the Court affirmed the Commission's decision to treat both affiliated and unaffiliated precedent agreements as evidence of market need, again citing its policy not to "make judgments about the needs of individual shippers."[79] By the time the court decided *Environmental Defense Fund v. FERC* (*EDF v. FERC*) in June 2021, pipeline developers argued that these decisions stood for two broad propositions: first, the Commission generally need not look behind precedent agreements to determine if there is market demand, and second, affiliate precedent agreements should almost always be treated the same as unaffiliated precedent agreements.[80]

The *EDF v. FERC* case resulted from the Commission's approval of a proposal by Spire STL, an affiliate of the gas utility Spire Missouri, to construct and operate a new, sixty-five-mile interstate natural gas pipeline

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74. *Id.* at 61,748.

75. *Id*.

76. *See, e.g., Spire STL Pipeline LLC*, Nos. CP17-40-000, CP17-40-001, 2018 WL 3744001, at *20 (FERC 2018).

77. *Id.* at 61,747.

78. 783 F.3d 1301, 1311 (D.C. Cir. 2015) (quoting Minisink Residents for Env't Pres. & Safety v. Fed. Energy Regul. Comm'n, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014)).

79. City of Oberlin v. Fed. Energy Regul. Comm'n, 937 F.3d 599, 604-05 (D.C. Cir. 2019).

80. Env't Def. Fund v. Fed. Energy Regul. Comm'n, 2 F.4th 953, 974 (D.C. Cir. 2021).

extending from an interconnection with Rockies Express Pipeline LLC (REX) in Scott County, Illinois, to interconnections in St. Louis County.[81] To demonstrate need, Spire STL relied on precedent agreements with Spire Missouri for 87.5 percent of the pipeline's capacity after no other bids were submitted.[82] In a 3-2 decision, FERC granted the certificate, explaining that it "may reasonably accept the market need reflected by the applicant's existing contracts with shippers and not look behind those contracts to establish need."[83] The D.C. Circuit disagreed, finding that it was arbitrary and capricious for FERC to rely exclusively on a single precedent agreement with an affiliated shipper to establish market need, particularly when demand projections were flat for the foreseeable future and the Commission neglected to make a finding on whether the pipeline provided a more economical alternative to existing pipelines.[84]

The D.C. Circuit similarly unsettled FERC practice in *Sierra Club v. FERC*, which stemmed from the Commission's approval of three interstate pipelines proposed to transport natural gas for power generation. The court held that combustion of the transported gas was the entire purpose for the project and thus greenhouse gas emissions were a reasonably foreseeable indirect effect of the Commission's approval.[85] Pipeline developers argued that FERC could not be the legally relevant cause of powerplant carbon emissions and thus had no obligations to consider these indirect effects in its NEPA analysis. But the court disagreed, finding that "[b]ecause FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a 'legally relevant cause' of the direct and indirect environmental effects of pipelines it approves."[86]

The court's finding that FERC could deny a certificate for environmental reasons came as a surprise. The 1999 CPS explained that environmental review proceeds "[o]nly when the benefits outweigh the adverse effects on economic interests,"[87] effectively cabining the consideration of environmental impacts to the required NEPA analysis. Despite FERC's practice of undertaking its separate economic and environmental reviews simultaneously, the policy statement's sequential

81. *Spire STL Pipeline LLC*, 2018 WL 3744001, *1 (2018).

82. *Id.* at *2.

83. *Id.* at *20.

84. Env't Def. Fund v. Fed. Energy Regul. Comm'n, 2 F.4th 953, 976–77 (D.C. Cir. 2021).

85. 867 F. 3d 1357, 1372 (D.C. Cir. 2017).

86. *Id.* at 1373.

87. 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47, at 61,745.

framing led to questions about the Commission's priorities.[88] FERC often added to the confusion. Between 2014 and 2018, the Commission did not even mention the environmental review in sixty of its 125 approval decisions.[89] But during the same period, fifty-six decisions described the approval either as "based on" both the economic and environmental review or based on the economic review "subject to" the environmental review.[90]

The Commission has also struggled to discern the extent of its obligations to evaluate climate impacts. In *Sierra Club v. FERC*, the D.C. Circuit found that NEPA requires FERC to either provide "a quantitative estimate" of the downstream emissions or "explain . . . in detail" why such an estimate cannot be provided.[91] In the following months, FERC estimated downstream gas emissions in EAs and EISs and, when it lacked information about end use, provided an upper-bound estimate of downstream emissions assuming full combustion.[92] This practice stopped in May 2018 when the Commission determined that the estimates were "inherently speculative" and not required by NEPA.[93] In the Commission's view, *Sierra Club* only required downstream emissions estimates when it had detailed information about the end use of the gas.[94]

IV. THE UPDATED CERTIFICATE POLICY STATEMENT

A month before the May 2018 end to emissions estimates, the Commission issued a Notice of Inquiry to examine its policies in light of dramatic changes in the natural gas industry and increased stakeholder interest in how FERC reviews natural gas pipeline proposals.[95] This 2018 NOI acknowledged concerns as to whether precedent agreements remained an appropriate indicator of need and included ten related questions for comment.[96] While the inquiry was opened for public comments through July 25, 2018, the Commission did not provide a timetable for its review and took no further action during the Trump

88. *See* UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7.

89. Romany Webb, CLIMATE CHANGE, FERC, AND NATURAL GAS PIPELINES: THE LEGAL BASIS FOR CONSIDERING GREENHOUSE GAS EMISSIONS UNDER SECTION 7 OF THE NATURAL GAS ACT, 27 (2019).

90. *Id*.

91. 867 F. 3d 1357, 1375 (D.C. Cir. 2017).

92. *See e.g*., *Dominion Transmission, Inc*., No. CP14-497-001 F.E.R.C. *10 (2018) (LaFleur, dissenting in part) (order denying rehearing).

93. *Id.* at *25.

94. *Id.* at *17.

95. Notice of Inquiry, 83 Fed. Reg. 18020-01 (Apr. 25, 2018).

96. *Id.* at *1–2.

Administration. In February 2021, however, the Commission—under the new leadership of Chairman Richard Glick and with a full complement of five commissioners—announced its intent to reopen its review of the Policy Statement.[97] The 2021 Notice of Inquiry posed the same ten questions (with revisions to one) regarding potential adjustments to determination of need, along with two new questions.[98] The Commission released the Updated Certificate Policy Statement (Updated CPS) and an Interim Greenhouse Gas Policy Statement on February 18, 2022.

The Updated CPS begins by explaining that its goals remain largely the same as those of the 1999 CPS.[99] More specifically, it aims to (1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain;" (2) "provide appropriate incentives for the optimal level of construction and efficient customer choices;" and (3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project."[100] The Updated CPS also describes the decision-making process in familiar language: "the Commission will weigh the public benefits of a proposal, the most important of which is the need that will be served by the project, against its adverse impacts." Notably, however, where an applicant fails to carry its burden to demonstrate the need for a proposed project, the Commission will not undertake any further consideration of need.[101]

A. Public Benefits

The determination of market need outlined by the Updated CPS reflects the first major departure from the Commission's practice under the 1999 CPS. While the 1999 CPS expressed concern about relying on pre-construction contracts to establish need, particularly precedent agreements with affiliate shippers, the Updated CPS acknowledges that, historically, the Commission has nevertheless relied "almost exclusively

97. Kristen E. Gibbs and Pamela T. Wu, *Under New Chairman, FERC Refocuses Its Priorities for Natural Gas Pipeline Projects*, MORGAN LEWIS (Sept. 15, 2021), https://www.morganlewis.com/pubs/2021/09/under-new-chairman-ferc-refocuses-its-priorities-for-natural-gas-pipeline-projects.

98. *2021 NOI*, *supra* note 6.

99. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *13.

100. *Id.*

101. *Id.* at *16.

on precedent agreements to establish project need."[102] Thus, reiterating the Commission's intent to consider all relevant factors bearing on the need for a project portends a significant course correction even if it recycles language from the 1999 CPS. In the end, this newly articulated approach to determining need reveals the Commission's intent to make independent determinations, effectively substituting its own judgment for the market's.

First, precedent agreements alone no longer suffice to demonstrate need. As the 1999 CPS noted, many different factors may indicate the need—or lack thereof—for a new interstate pipeline.[103] According to the Updated CPS, looking only to precedent agreements and ignoring other, potentially contrary information may lead the Commission to reach a determination that is inconsistent with the weight of the evidence and thus violates both the NGA and its responsibilities under the Administrative Procedure Act.[104] While insufficient to establish need by themselves, the Updated CPS nonetheless affirms that precedent agreements are important evidence and explains that the Commission still expects applicants to provide them.[105] The revision effectively negates the D.C. Circuit's finding in *Minisink Residents for Environmental Preservation and Safety v. FERC* that the 1999 CPS does not require the Commission to look beyond market need as reflected by the applicant's existing contracts with shippers.[106]

Second, the Commission will take a more skeptical look at precedent agreements themselves, not only taking contrary evidence into account but also considering the circumstances behind them.[107] These circumstances might include whether agreements were entered into before or after an open bidding season, the results of that open season and the number of bidders, and whether the agreements were a response to

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102. *Compare* 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47, at 61,744. ("[T]he test relying on the percent of capacity contracted does not reflect the reality of the natural gas industry's structure and presents difficult issues.") *with* UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14 ("[I]n practice, the Commission has relied almost exclusively on precedent agreements to establish project need.").

103. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14.

104. *Id*.

105. *Id*.

106. *See* Minisink Residents for Env't Pres. & Safety v. Fed. Energy Regul. Comm'n, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) ("Petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers.").

107. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14.

requests for proposals, plus any evidence of need connected to a specific end use.[108] This description of the Commission's process responds directly to the D.C. Circuit's criticism of its "ostrich-like approach" to Spire STL's application.[109]

Third, the Updated CPS once again highlights concerns associated with affiliate precedent agreements, explicitly stating that they will generally be insufficient to demonstrate need.[110] Here, the Commission accepts the D.C. Circuit's admonition that "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement."[111] The Commission will consider additional evidence, including evidence proffered by third parties, when projects are backed primarily by precedent agreements with affiliates and determine how much additional evidence of need is required on a case-by-case basis.[112] It thus appears that FERC will not only look beyond precedent agreements but behind them as well.

In addition, the Updated CPS returns the consideration of end use to the forefront of the decision-making process, encouraging applicants to provide "specific information detailing how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project."[113] The Commission makes clear that this is more than a recommendation—the absence of end use information may preclude an applicant from meeting its burden to demonstrate need.[114] Applicants should therefore work with prospective shippers to obtain information about end use when it is not immediately apparent.[115]

Perhaps self-conscious about the new requirements it imposes, the Updated CPS proceeds to explain how different types of projects can demonstrate need. For example, market-driven projects responding to increased demand for natural gas might introduce a market study with information about volume projections or peak daily load growth, as well as analyses from the Energy Information Administration or other third

108. *Id.*

109. *See* Env't Def. Fund v. Fed. Energy Regul. Comm'n, 2 F.4th 953, 975 (D.C. Cir. 2021) ("FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement.").

110. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *16.

111. *Id.*

112. *Id.*

113. *Id.* at *15.

114. *Id.*

115. *Id.*

parties.[116] Additionally, individual shippers might provide "load growth profiles, gas supply portfolios, and any advanced approval of contracts by state public service."[117] For projects undertaken to add supplies of natural gas to existing markets, the Updated CPS advises applicants to rely on other evidence, including "projections of the net benefits, for example projected lower natural gas prices for consumers due to increased supply competition, compared to the incremental costs of transportation on the new pipeline."[118] The Commission intends to consider record evidence of both gas supply and market growth in its evaluation,[119] once again indicating its intent to make its own judgments about need.

Moreover, the Commission "will consider both current and projected *future* demand for a project based on the evidence in the record," an aim that aligns with its statutory directive to determine whether a proposed project is or will be required by the current or future public convenience and necessity.[120] Applicants should therefore submit analyses of market trends and any policy or regulatory developments that might impact the future need for the project. Most notable, perhaps, is the recommendation that applicants provide a thorough assessment of alternatives to facilitate the Commission's review. Previously confined to the environmental review, where the Commission frequently relied on the applicant's description of the purpose and need for a project, the alternatives analysis will now determine if "other suppliers would be able to meet some or all of the needs to be served by the proposed project on a timely, competitive basis or whether other factors may eliminate or curtail such needs."[121]

B. Adverse Impacts

The most significant revision to the 1999 CPS comes in its consideration of adverse effects. As explained in the previous subpart, the 1999 CPS considered residual adverse effects the project might have on the interests of three groups: (1) the applicant's existing customers, (2) existing pipelines in the market and their captive customers, and (3) landowners and communities affected by the proposed project.[122] The Updated CPS includes those three groups but adds environmental impacts

116. *Id.* at *15.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (emphasis added).
121. *Id.*
122. *See* 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47.

to the Commission's review, explaining that the consideration of environmental impacts is "an important part of the Commission's responsibility under the NGA to evaluate all factors bearing on the public interest."[123]

The incorporation of environmental impacts into the economic test responds directly to confusion about the role of the environmental review under the 1999 CPS, which explained that environmental interests would be "separately considered" after the Commission balanced public benefits with the residual adverse effects on economic interests.[124] The Updated CPS acknowledges this confusion regarding how the Commission considers environmental impacts in its public interest reviews, which caused stakeholders to believe that the Commission simply did not consider environmental impacts at all in its public interest determination, instead resigning them to review under NEPA.[125] The Updated CPS thus aims to "provide more clarity and regulatory certainty to all participants in certificate proceedings."[126]

Importantly, the Commission expects applicants to submit project proposals designed to "avoid, or minimize, potential adverse environmental impacts," language that does not stray too far from its general requirement that applicants attempt to mitigate adverse effects.[127] However, applicants should also propose specific measures for further mitigation of adverse environmental impacts within applications, which FERC will then use in its balancing test.[128] The Updated CPS also notes the Commission's authority under the NGA to attach reasonable terms and conditions to CPCNs, stating directly that the Commission may condition a certificate to require additional mitigation.[129] Where an adverse impact, including an environmental one, outweighs the benefits of the project and cannot be mitigated or minimized, the Commission may deny an application.[130]

The Updated CPS also incorporates environmental impacts in its review of adverse impacts to landowners and surrounding

123. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *18 (noting that, under its new framework, FERC will "balance all impacts, including economic *and environmental impacts*, together in its public interest determinations under the NGA") (emphasis added).

124. 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47, at 61,747.

125. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *18.

126. *Id.*

127. *Id.* at *19.

128. *Id.*

129. *Id.*

130. *Id.*

communities.[131] While the 1999 CPS focused on the economic effects associated with eminent domain, the Commission's review under the Updated CPS will be more expansive because "looking only at the economic impacts . . . does not sufficiently account for the full scope of impact on landowners."[132] The Updated CPS attributes this change in approach to an increase in the number of projects proposed in densely populated areas and a significant uptick in comments from landowners raising a diverse set of issues.[133] Perhaps more significantly, the Commission will include environmental justice communities in its consideration of impacts to communities surrounding a proposed project.[134] The Updated CPS explains that environmental justice communities may be particularly susceptible to incremental pollution and other adverse impacts connected to new projects. The Commission's public interest responsibility thus requires a serious evaluation of these effects and creates a definite place for them in the balancing test."[135]

And perhaps most significantly, the Updated CPS explains that consideration of environmental impacts in both the NGA public interest review and the NEPA analysis should include climate impacts. As explained in the previous section, the D.C. Circuit held in *Sierra Club* that reasonably foreseeable downstream emissions are an indirect effect of the Commission's authorization of proposed projects, making such emissions relevant to the Commission's public convenience and necessity determinations.[136] In a separate policy statement not examined here, the Commission describes how it will "integrate climate considerations into its public convenience and necessity findings under the NGA, including how [it] will consider measures to mitigate climate impacts."[137] This guidance aims to follow the D.C. Circuit's recent instruction that the Commission should attempt to obtain information regarding downstream uses so that it can determine whether greenhouse gas (GHG) emissions

131. *Id.* at *20.

132. *Id.* at *21.

133. *Id.* at *20. ("In the over 20 years that have passed since issuance of the 1999 Policy Statement, the Commission has seen an increase in proposals for projects in more densely populated areas, as well as a significant increase in comments from landowners raising a multitude of economic, environmental, and others concerns with proposed projects.").

134. *Id.* at *22.

135. *Id.*

136. *Id.* at *19.

137. *Id.*; *see also* Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 87 Fed. Reg., 14104-01, 14104 (March 11, 2022).

are a reasonably foreseeable effect of the project.[138] Regardless of the rationale, reserving a place in either analysis for climate impacts represents a clear step away from recent FERC practice.

V. THE END OF THE PIPELINE ERA?

At first glance, the Updated Certificate Policy Statement does not look much different from the 1999 Policy Statement. FERC Chairman Richard Glick took care to emphasize this point in his testimony before the Senate Committee on Energy and Natural Resources.[139] Once again, the CPS declares the Commission's intent to consider "all relevant factors," which Chairman Glick described as a return to the "totality of circumstances" approach that the Commission adopted in 1999. The Updated CPS again explains that precedent agreements with affiliates require greater scrutiny, as they cannot be presumed to be the product of arms-length negotiations. And again, the policy statement outlines a balancing process and aims to provide clarity on the Commission's evaluation of all factors bearing on the public interest.

But even if the Updated CPS relies on the usual language, it is a clear departure from recent FERC practice, as the response from dissenting commissioners made clear. By Commissioner James P. Danly's account, "the administrative state has American natural gas squarely in its crosshairs."[140] Danly describes the Updated Policy Statement as a "vague multi-factor balancing test" the Commission will employ to "exercise its judgment in place of the market's, to determine whether a project is 'needed' or not."[141] To that end, Commissioner Mark Christie argues the new policy will "provide a whole new array of avenues to attack natural gas pipelines and other facilities," a particularly troubling development when "there is a national campaign of legal warfare being waged against virtually every pipeline and other major natural-gas facilities in this

138. *See* Birckhead v. Fed. Energy Regul. Comm'n, 925 F.3d 510, 519 (D.C. Cir. 2019) ("We are troubled, as we were in the upstream-effects context, by the Commission's attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of the gas in question.").

139. *Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines Before the Sen. Committee on Energy and Natural Resources*, p. 6 (Mar. 3, 2022) (Written Testimony of Richard Glick, Chairman, Federal Energy Regulatory Commission) ("The Updated Certificate Policy Statement has much in common with the 1999 Certificate Policy Statement.").

140. *Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines Before the Sen. Committee on Energy and Natural Resources*, p. 3 (Mar. 3, 2022) (Written Testimony of James P. Danly, Commissioner, Federal Energy Regulatory Commission).

141. *Id.* at p. 1.

country."[142] While Chairman Glick has argued that the Updated CPS provides a "legally durable framework," Commissioner Christie claims it will chill investment and significantly raise costs and uncertainty.[143]

Arguments about impact aside, Commissioners Danly and Christie are likely right to view the Updated CPS as a substantial revision to FERC practice. First, the Updated CPS signals FERC's renewed interest in making independent assessments of market need. In contrast to its "ostrich-like" approach to Spire STL's application, FERC now intends to look behind precedent agreements, evaluating not only the surrounding circumstances but any other relevant evidence of need, including information submitted by third parties. Moreover, FERC will no longer accept precedent agreements with affiliate shippers as conclusive proof of need. Thus, pipeline developers—once emboldened by the *Minisink* court's conclusion that FERC was allowed but not required to look behind precedent agreements—must now arm themselves for a battle of the experts.

In addition, applicants must now provide specific information about end use, a direct response to *Sierra Club* and a signal of the Commission's environmental priorities.[144] While the Commission merely "encourages" applicants to provide end use information, it also notes that the absence of such information may prevent the applicant from meeting its burden. Downstream emissions estimates appeared in EISs for a brief period after *Sierra Club*, but thereafter the figures were confined to a separate environmental review and their import was never entirely clear.[145] Now that the Commission intends to consider climate impacts in its public interest review under the NGA, downstream emissions will be weighed directly against the public benefits of a project. Moreover, the incorporation of environmental impacts into the economic review gives FERC the tools to wield the authority it has claimed for years: the power to reject a pipeline for environmental reasons. The Commission's plan to consider the environmental impacts of a proposed project on landowners and environmental justice communities might have saved the Hollerans'

142. *Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines Before the Sen. Committee on Energy and Natural Resources*, p. 3 (Mar. 3, 2022) (Written Testimony of Mark C. Christie, Commissioner, Federal Energy Regulatory Commission).

143. *Id.* at p. 2.

144. Sierra Club v. Fed. Energy Regul. Comm'n, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment").

145. *See* Well, *supra* note 89; *see also* UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *9–10.

maple trees had it arrived in time, particularly considering the applicant's responsibility to avoid or mitigate adverse impacts.

The Commission also intends to consider record evidence of alternatives. Under the 1999 CPS, FERC generally deferred to an applicant's description of a proposed project's "purpose and need" during the NEPA alternatives analysis.[146] Narrow definitions of purpose and need allowed the Commission to evade its responsibility to examine project alternatives "to the fullest extent possible."[147] Weighing alternatives as part of the need determination presents applicants with a significant obstacle in the climate change era. The challenge is compounded by FERC's stated intention to assess future demand using market projections and by expected policy and regulatory developments.[148]

But substantive changes to FERC's certificate policy, even assuming they are applied as written, do not necessarily spell the end of natural gas infrastructure in the United States. First, precedent agreements still qualify as important evidence of need.[149] Applicants have always claimed that precedent agreements accurately reflect the market.[150] If those claims are true, FERC casting a wider net for information and taking a more skeptical view would only result in more definitive proof. It might preclude companies from building pipelines largely for a return on equity, but the public convenience and necessity standard was adopted with this concern in mind. Second, it is possible that end use considerations would have worked in favor of applicants during the past twenty years, when carbon emissions remained steady primarily because of coal's displacement by natural gas in power generation.[151] Even if this advantage has receded with the rise of renewable energy sources, it still exists. Finally, a thorough environmental review, including mitigation proposals, could potentially help developers overcome recent obstacles at the state

146. *See, e.g.*, FED. ENERGY REGUL. COMM'N, NO. 20170929-3022, SPIRE STL PIPELINE PROJECT ENV'T ASSESSMENT (2017) (restating Spire STL's statement of purpose and need as "enhancing infrastructure reliability *and diversity*," effectively excluding other shippers from consideration under the alternatives analysis) (emphasis added).

147. *See* National Environmental Policy Act, 42 U.S.C. § 4332, et seq.

148. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *15 ("The Commission will consider both current and projected future demand for a project based on the evidence in the record.").

149. *Id.* at *14.

150. *See, e.g.*, 88 FERC ¶ 61,227, at ¶ 61,738.

151. Figure 7.2, "Electricity Net Generation," Monthly Energy Review August 2022, ENERGY INFORMATION ADMINISTRATION, at 130, https://www.eia.gov/totalenergy/data/monthly/pdf/sec7.pdf.

and local level. It also encourages planning on a temporal scale that reduces the risk of overbuilding and stranded assets.

In the end, the Updated Policy Statement outlines a decision-making process in alignment with the Commission's responsibility under Section 7 of the NGA.[152] Historically, the public convenience and necessity standard proceeded from the idea that, in some cases, investor demand alone should not be sufficient to permit market entry.[153] The Updated CPS rightly recognizes that project need cannot be adequately assessed without evidence beyond precedent agreements.[154] The shale gas revolution and corresponding expansion of infrastructure created incentives for pipeline development beyond simply addressing market need. An effective economic regulator cannot be blind to those circumstances. Furthermore, the Updated CPS properly considers social and environmental impacts.[155] The Commission's previous practice of restricting its environmental review to the NEPA analysis diverged from the expansive view of the public interest attached to the public convenience and necessity standard as Congress understood it in 1938.

The Updated CPS also conforms to the Supreme Court's description of the Commission's role under Section 7.[156] The Commission will continue to undertake a balancing of public benefits and adverse effects, and the balancing will remain flexible enough to give the Commission some discretion. Furthermore, the Updated CPS as written fulfills the Commission's obligation to evaluate all factors bearing on the public interest, namely, the orderly development of plentiful supplies of natural gas at reasonable prices.[157] Facilitating orderly development requires some assessment of future demand, a daunting prospect at any moment, but particularly in the era of climate change when timescales only get shorter. The Commission intends to accept information from applicants and third parties alike,[158] all of which will in some way be influenced by assumptions about climate change and predictions about the policy and regulatory changes it inevitably spawns. Borrowing the Supreme Court's

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152. 15 U.S.C. § 717f(e).

153. *See* New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

154. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14.

155. *See id.* at *18–19, 22–24.

156. NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669–70 (1976) (finding that the purpose of the Natural Gas Act is "to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices.").

157. *Id*.

158. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *16 ("To the extent the Commission receives information in the record from third parties addressing the need for a project, that too will be considered in our analysis.").

construction, the Commission must include climate impacts in its review because these impacts directly and indirectly influence the orderly development of plentiful natural gas supplies at reasonable prices and thus bear on the public interest.

Finally, the Updated CPS responds directly to recent court decisions at both the state and federal levels. The D.C. Circuit's extreme step of vacating the certificate of the operational Spire STL pipeline highlighted the extent to which FERC had strayed from the language of the 1999 CPS.[159] Applicants like Spire figured out that an affirmative answer to the threshold question generally served as sufficient demonstration of need, and despite the policy statement's language, the Commission appeared hesitant to consider the totality of circumstances.[160] Under the Updated CPS, the Commission indicates a clear intent to make its own determination of need with precedent agreements being but one among several sources of evidence. Additionally, the Updated CPS responds directly to the D.C. Circuit's rejoinder in *Birckhead v. FERC* that NEPA "requires the Commission to at least attempt to obtain the information necessary to fulfill its statutory responsibilities."[161] Requiring applicants to produce specific information about end use gives the Commission a starting point for its NEPA analysis and fairly acknowledges that downstream emissions are indirect effects of FERC's project approvals.

VI. CONCLUSION

On March 18, 2022, a month after FERC released the Updated CPS, three weeks after Russia invaded Ukraine, and two weeks after a contentious hearing on Capitol Hill, the Commission announced that it was designating the Updated CPS and the Interim GHG Policy Statements as "draft policy statements."[162] The Commission extended the comment period until April 25, 2022, explaining that neither draft policy statement would apply to pending or new applications. Presumably, the Commission will continue to employ the 1999 CPS, though the order did not explicitly say so. The Commission's use of the pause button was a response to vociferous opposition from the natural gas industry and

159. Env't Def. Fund v. Fed. Energy Regul. Comm'n, 2 F.4th 953, 961 (D.C. Cir. 2021).

160. *Id.* at 975 ("FERC's ostrich-like approach flies in the face of the guidelines set forth in the Certificate Policy Statement.").

161. *See* UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7.

162. *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (Mar. 24, 2022).

members of Congress.[163] This opposition reiterates the extent to which the natural gas industry sees the Updated CPS as a dramatic departure from historical FERC practice, even as Chairman Glick continues to insist it is a necessary attempt to create a more durable legal framework for the Commission's decisions.

In the meantime, questions remain about whether the 1999 CPS will be resurrected, and if so, whether the Commission will apply it as it has in the past. It is quite possible that the language of both policy statements overlap enough that the Commission could use it to implement the same priorities articulated in the Updated CPS. Both policy statements promise that the Commission will evaluate all factors bearing on the need for a project.[164] Both the 1999 CPS and the Updated CPS speak of a flexible balancing process that weighs public benefits and adverse impacts.[165] Moreover, *Sierra Club* plainly gives FERC the authority to consider downstream emissions in its NEPA analysis.[166] The new Commission could always undertake a more comprehensive systems alternatives analysis by defining the project's purpose and need more broadly.[167] The natural gas industry has often claimed the Commission can reject a pipeline for environmental reasons as justification for the industry's preference for a public interest review that does not consider environmental or climate impacts.[168] Conceivably, then, the current Commission could endeavor to prove them right.

More importantly, both the 1999 CPS and the Updated CPS authorize the Commission to look behind precedent agreements and make

163. Catherine Morehouse, *Biden's Most Effective Climate Warrior Faces Potential Doom in the Senate*, POLITICO (Mar. 26, 2022), https://www.politico.com/news/2022/03/26/federal-energy-regulatory-commission-glick-senate-00017800.

164. *See* 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47; UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *18.

165. *See* 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47; UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *25.

166. Sierra Club v. Fed. Energy Regul. Comm'n, 867 F. 3d 1357, 1375 (D.C. Cir. 2017) ("FERC must either quantify and consider the project's downstream carbon emissions or explain in more detail why it cannot do so.").

167. *See generally* Nat'l Parks Conservation Ass'n v. Bureau of Land Management, 606 F.3d 1058, 1071 (9th Cir. 2010) (explaining that an agency's "definition of the project's purpose will necessarily affect the range of alternatives considered.").

168. Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 131 (2017) ("Nothing prevents the Commission from finding that a project would not be required by the public convenience and necessity solely for environmental reasons. As a practical matter, though, an application for such a project would almost certainly never be filed.").

independent judgments about market demand.[169] Any market studies and demand projections relied upon by the Commission inevitably include assumptions about climate impacts, acknowledged or otherwise, whether the Commission requires applicants to submit information about end use and downstream emissions or not. In other words, continued efforts to isolate climate and environmental impacts to the NEPA analysis make little sense in the current moment; they cannot be practically divorced from an economic review. Thus, if FERC follows the SEC's lead in determining that effective economic regulation requires consideration of climate impacts, the 1999 CPS could likely provide the cover.

In the end, the natural gas industry should resign itself to a more comprehensive public interest review pursuant to the public convenience and necessity standard adopted in Section 7 of the NGA. While FERC has often fallen short of its charge to evaluate all factors bearing on the public interest, the historical understanding of the public convenience and necessity standard and the Supreme Court's framing of it give the Commission room to make independent judgments about need and to consider environmental impacts in its public interest review. Furthermore, recent decisions by the D.C. Circuit in *Sierra Club* and *EDF v. FERC* will likely give FERC more latitude to apply priorities from the Updated CPS even through the 1999 CPS.[170]

Finally, the orderly development of natural gas supplies depends now more than ever on a thorough and comprehensive consideration of climate change and its impact on energy markets in the United States. Commissioner Christie describes FERC's Updated Policy Statement as an effort to address climate change, a policy goal that exceeds the Commission's authority under the Constitution and the Natural Gas Act.[171] But the policy is less of an effort to end carbon emissions than an attempt to acknowledge the impact of carbon emissions on the public interest. Accounting for these social and environmental externalities aligns with the understanding of the public convenience and necessity standard when it was adopted as part of the NGA. Today, effective economic regulation under Section 7 not only allows for consideration of climate impacts but requires it.

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169. 1999 CERTIFICATE POLICY STATEMENT, *supra* note 47, at 61,747; UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14.

170. Sierra Club v. Fed. Energy Regul. Comm'n, 867 F. 3d 1357 (D.C. Cir. 2017); Env't Def. Fund v. Fed. Energy Regul. Comm'n, 2 F.4th 953 (D.C. Cir. 2021).

171. UPDATED CERTIFICATE POLICY STATEMENT, *supra* note 7, at *14.