UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	**)** **)** **)**	**Docket No. PL18-1-000**

INITIAL COMMENTS OF THE NATURAL GAS SUPPLY ASSOCIATION AND CENTER FOR LIQUEFIED NATURAL GAS ON THE DRAFT UPDATED POLICY STATEMENT ON CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES

Pursuant to the Federal Energy Regulatory Commission's ("FERC" or "Commission") March 24, 2022, request[1] for comments on the draft policy statement for Certification of New Interstate Natural Gas Facilities ("Updated Draft Policy Statement"),[2] the Natural Gas Supply Association ("NGSA") and Center for Liquefied Natural Gas ("CLNG") respectfully submit the following initial comments.

I. IDENTITY OF COMMENTORS

A. NGSA

NGSA represents integrated and independent energy companies that produce and market domestic natural gas, and is the only national trade association that solely focuses on producer-marketer issues related to the downstream natural gas industry. NGSA's members trade, transact, and invest in the U.S. natural gas market, as well as supply, and ship billions of cubic feet of natural gas per day on interstate pipelines. NGSA members

[1] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022) ("Order on Draft Policy Statements").
[2] 178 FERC ¶ 61,107 (2022). The Commission also sought comments on its Draft Policy for Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 (2022) ("Draft GHG Policy Statement"). Concurrently with these comments, NGSA and CLNG provide separate comments on the Draft GHG Policy Statement. Although these comments refer to the proposed policy statements using the "draft" designation, NGSA and CLNG believe it is important to note for context that initially, the policy statements were not issued in draft form.

are often anchor shippers on pipeline projects. Therefore, NGSA members are significantly impacted by the outcome of this proceeding.

NGSA's members are leading the transition to a reliable and low-emissions energy future by investing billions of dollars in new technologies and practices to continue the momentum of innovation. Since 2006, displacing coal with natural gas in the electric power sector has helped reduce carbon dioxide ("CO_2") emissions by nearly 3.4 billion metric tons in the United States, which equates to 58% more reductions than what has been achieved during the same time frame by all zero-carbon emission sources.[3] In large part, due to the shift from coal to natural gas as the leading fuel for electric generation, total greenhouse gas ("GHG") emissions generated by the electric sector is at its lowest level since 1987.[4]

NGSA supports the ambitious goal of achieving economy-wide net-zero GHG emissions by 2050[5] and supported the United States rejoining the Paris Agreement.[6] In 2020, NGSA publicly announced its members' commitment to achieving significant mitigation of methane emissions.[7] NGSA's member companies have been instrumental in

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[3] *See* U.S. Energy Info. Admin., *U.S. Energy-Related Carbon Dioxide Emissions, 2019* (Sept. 30, 2020), https://www.eia.gov/environment/emissions/carbon/archive/2019/; *see also* U.S. Energy Info. Admin., *Electricity energy-related carbon dioxide emissions, Fuel specific emission tables by state*, line 55 (last accessed Apr. 25, 2022), https://www.eia.gov/environment/emissions/state/excel/electricity.xlsx.

[4] *See generally* U.S. Energy Info. Admin., *Electricity energy-related carbon dioxide emissions, Fuel specific emission tables by state*, line 55 (last accessed Apr. 25, 2022), https://www.eia.gov/environment/emissions/state/excel/electricity.xlsx. (using data from 2018, the most recent year available).

[5] NGSA, *Reaching Climate Goals with Natural Gas and LNG* (Fall 2021), https://www.ngsa.org/wp-content/uploads/sites/3/2021/10/Reaching-Climate-Goals-with-Natural-Gas-LNG-Fall-2021.pdf.

[6] *See* NGSA, Environment, available at https://www.ngsa.org/environment/; NGSA, Press Release, NGSA Members Support Rejoining Paris Agreement, https://www.ngsa.org/wp-content/uploads/sites/3/2021/01/1.20.2021-NGSA-Supports-Rejoining-Paris-Agreement.pdf

[7] Press Release, NGSA, *Addressing Methane Emissions Essential to Achieving Cleaning Environment, America's Natural Gas Suppliers Say* (Oct. 5, 2020), https://www.ngsa.org/wp-content/uploads/sites/3/2020/10/10.5.2020-Addressing-Methane-Emissions-Essential-Says-NGSA.pdf.

developing new technologies to better detect and prevent methane emissions and to build on the industry's existing record of substantially reducing carbon emissions.

NGSA's and CLNG's members are actively developing new emerging technologies such as Carbon Capture, Utilization, and Storage ("CCUS") and hydrogen to meet energy demand while further reducing emissions.[8] In pursuit of lower GHG emissions, several NGSA member companies have developed and launched CCUS techniques and technologies, ranging from CCUS hubs to fuel treatments that reduce emissions from wellhead to end-use. In fact, through NGSA members' commitments to the Oil and Gas Climate Initiative, its Climate Investments group has been able to invest billions across the globe to identify and produce the best CCUS solutions. NGSA's members are at different phases of hydrogen development, yet all see the fuel as an important part of the energy mix moving forward. Some members are already utilizing the fuel in pilot power plants to help reduce CO_2 emissions by four million tons a year.[9] Additionally, NGSA member companies are partnering with certification providers to provide customers with certified or responsibly sourced natural gas.

B. CLNG

CLNG advocates for public policies that advance the use of liquefied natural gas ("LNG") in the United States, and its export internationally. A committee of the NGSA, CLNG represents the full value chain, including LNG producers, shippers, terminal operators, and developers, providing it with unique insight into the ways in which the vast potential of this abundant and versatile fuel can be fully realized.

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[8] Press Release, NGSA, *NGSA Members are Innovating for a Clean Energy Future for All* (Fall 2021), https://www.ngsa.org/wp-content/uploads/sites/3/2022/02/NGSA-Members-Are-Innovating-for-a-Clean-Energy-Future-for-All.pdf.

[9] *Id.*

When countries increase their use of natural gas for power generation, not only will they reduce their GHG emissions through fuel switching from higher-emitting fuels to natural gas, they also will gain the opportunity to increase their use of renewable energy, thus reducing emissions even further. This is because natural gas is an ideal partner to renewable energy resources. Natural gas makes a perfect ally to ramp up and support renewable resources, allowing for more generation to be powered by renewables. In fact, for every 1% increase in natural gas-powered electric generation, renewable power generation increases by 0.88%.[10] The natural gas industry is a partner in transitioning to a lower-carbon future and exporting U.S. LNG is one of the ways that NGSA and CLNG are working together to reduce emissions on a global scale, while meeting the energy demand for a growing population. LNG exports also provide secure, stable, reliable gas supplies to our allies in Europe and throughout the world.[11]

Domestically, the LNG industry is also taking an active approach to reducing emissions through innovative technologies and practices at the facilities, in the field, as well as in the transportation of LNG. CLNG member companies are using electric motors to minimize air emissions, utilizing natural gas recycling to eliminate flaring, using drone technologies to detect leakage, and providing LNG customers with GHG emission data associated with LNG cargos produced—to name just a few innovative practices. As the world evolves with the energy transition, natural gas and LNG are key to a clean energy future for all.

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[10] INGAA, *Natural Gas & Renewables: Working Together*, at 1, https://tinyurl.com/5azk4dyx (last accessed Apr. 25, 2022).

[11] *See* CLNG, *U.S. LNG Exports: Delivering Certainty in a Time of Crisis*, https://www.lngfacts.org/wp-content/uploads/sites/2/2022/02/CLNG_EU_LNG_Exports_EnergySecurity-0218.pdf (last accessed Apr. 25, 2022) (summarizing recent U.S. LNG exports).

II. BACKGROUND

A. Procedural History and Summary of Policies

On April 19, 2018, and again on February 18, 2021, the Commission issued notices of inquiry[12] to explore whether, and if so how, it should revise the approach established by its 1999 policy statement on the certification of new interstate natural gas transportation facilities ("1999 Policy Statement")[13] to determine whether a proposed project "is or will be required by the present or future public convenience and necessity."[14] NGSA and CLNG submitted comments in response to both NOIs, encouraging the Commission to explore changes that would improve the transparency, timing, and predictability of the Commission's permitting process, and urging caution in ensuring that new policies would not hinder the development of new infrastructure.[15]

On February 18, 2022, the Commission issued the Updated Certificate Policy Statement (now the "Updated Draft Policy Statement"), which proposes substantial changes to its longstanding policy for evaluating certificate applications, and the Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (now the "Draft GHG Policy Statement"),[16] which proposes new requirements for evaluating and conditioning mitigation of GHG emissions.[17]

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[12] *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2021) ("2018 NOI"); *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021) (collectively, "NOIs").
[13] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (collectively, "1999 Policy Statement").
[14] 15 U.S.C. § 717f(e).
[15] *See* Comments of the Natural Gas Supply Association in Response to Notice of Inquiry, Docket No. PL18-1-000 (July 25, 2018); Comments of the Center for Liquefied Natural Gas in Response to Notice of Inquiry, Docket No. PL18-1-000 (July 25, 2018); Comments of the Natural Gas Supply Association in Response to Notice of Inquiry at 22-23, Docket No. PL18-1-000 (May 26, 2021); Comments of the Center for Liquefied Natural Gas in Response to Notice of Inquiry, Docket No. PL18-1-000 (May 26, 2021).
[16] 178 FERC ¶ 61,108 (2022). The two statements are collectively referred to as the "Policy Statements."
[17] Updated Draft Policy Statement, 178 FERC ¶ 61,107; Draft GHG Policy Statement, 178 FERC ¶ 61,108.

Initially, both Policy Statements were made effective immediately and applied to all future and currently pending applications.[18]

Historically, Commission policy has been to assess need on the basis of "market decisions by pipelines and shippers, as opposed to regulatory tests."[19] The Updated Draft Policy Statement proposes to reverse this practice, replacing its market-based test for determining whether to approve new infrastructure with numerous regulatory considerations that would make it impossible for project stakeholders to predict whether any given project will be approved, and if approved, what the project will ultimately cost and what rate will result. Specifically, the Commission proposes to reduce its reliance upon commercial arrangements between parties expressing long-term intent to invest in and utilize pipeline facilities—known as precedent agreements—as presumptive indications of need for a project. Instead, for every project, the Commission would look at a wide range of other factors to determine whether there is need for a project.[20] This move away from relying on the market would apply to all precedent agreements: those between pipelines and non-affiliated shippers would be given less weight; and precedent agreements between affiliates would generally be insufficient.[21]

The Commission further stated that it can deny a project based on adverse effects to a pipeline's existing customers; existing pipelines and their captive customers; environmental interests; or the interests of landowners and surrounding communities, including environmental justice communities.[22] The Commission did not explain how

[18] Updated Draft Policy Statement at P 100; Draft GHG Policy Statement at P 129.
[19] 1999 Policy Statement, 90 FERC ¶ 61,128 at p. 61,390.
[20] Updated Draft Policy Statement at P 54.
[21] *Id.* at P 60 (precedent agreements involving affiliates "will generally be insufficient to demonstrate need").
[22] *Id.* at P 62.

adverse effects to any of these interests would affect its assessment of the public convenience and necessity.

With these changes, the Commission proposes to consider environmental interests not only as part of its review under the National Environmental Policy Act ("NEPA"), but also in its determination under the Natural Gas Act ("NGA") of whether a project is "required by the public convenience and necessity."[23] This is a monumental change because, historically, the Commission's evaluation of the public convenience and necessity was primarily an economic one, not an environmental one. Further, the new policy would expand the scope of environmental review to include impacts of GHG emissions associated with upstream production and downstream combustion of gas. This would make a project's success dependent on factors beyond the applicant's control.

The Updated Draft Policy Statement further provides that the Commission "expect[s] applicants to propose measures for mitigating impacts" and, should the Commission deem an applicant's proposed mitigation measures inadequate, the Commission "may condition the certificate to require additional mitigation."[24] The Updated Draft Policy Statement provides that the Commission may deny an application where any adverse impacts of a project cannot be mitigated or minimized.[25] However, the Commission provides little guidance as to how it plans to determine if an applicant's proposed mitigation measures suffice to secure approval of a project.

[23] Updated Draft Policy Statement at P 75; *id.* at P 74 ("We will consider environmental impacts and potential mitigation in both our environmental reviews under NEPA and our public interest determinations under the NGA.").
[24] *Id.* at P 74.
[25] *Id.*

The Commission lays out many reasons why it would not approve a project, but provides virtually no guidance on what is necessary for a project to successfully obtain a certificate.

B. Events Following Issuance of the Policy Statements

The Policy Statements sent shockwaves through the natural gas industry and the highest levels of government. Two weeks after the Commission issued the Policy Statements, the Senate Committee on Energy & Natural Resources convened a hearing with all five Commissioners to review the Policy Statements. Senators from both parties expressed concern that the Policy Statements would create hurdles for project developers.[26] Several Commissioners expressed willingness to modify the proposal in response to the Senators' concerns.[27]

Numerous stakeholders across the natural gas value chain, including NGSA and CLNG, sought rehearing of the Policy Statements.[28] Like many other concerned stakeholders, NGSA and CLNG explained that the Policy Statements would provide industry without a predictable framework on which to build natural gas infrastructure, having eliminated the concrete benchmarks that have allowed the industry to expand over

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[26] *See Full Committee Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines*, U.S. Senate Committee on Energy & Natural Resources (Mar. 3, 2022) (Statement of Senator Manchin at 7) (explaining that the new Policy Statements "exacerbate[] the politicization of [FERC], undermine[] long-term regulatory certainty and the ability of industry to plan and invest") https://tinyurl.com/yahjyfyr; *id.*, Comments of Senator John Barrasso ("These policies are going to make it next to impossible to build any new natural gas infrastructure or upgrade our existing facilities in the United States."), https://tinyurl.com/54w99rsw.

[27] *See, e.g.*, Testimony of Commissioner Phillips, Senate Hearing at 2:11:35 (Mar. 3, 2022) ("As we go forward, I'm committed to making sure that, if there's a better framework, if there are reasonable, legally durable modifications we can make to these policies, I'm committed to doing so."), https://tinyurl.com/yazhyv7h.

[28] *See* Request for Rehearing and Clarification of the Natural Gas Supply Association and Center for Liquefied Natural Gas, Docket Nos. PL18-1-000, *et al.* (Mar. 18, 2022).

the last 20 years, and facilitate the displacement of more carbon-intensive fuels with natural gas.[29]

On March 24, 2022, the Commission rescinded both of its Policy Statements, reissued them as drafts (hereinafter, "Draft Policy Statements"), and requested initial and reply comments.[30] Changing course, the Commission now states that it will not apply the Draft Policy Statements "to pending applications or applications filed before the Commission issues any final guidance in these dockets."[31] On April 12, 2022, the Commission issued an order dismissing the requests for rehearing of the orders issuing the Policy Statements.[32] The Commission stated that it will consider the dismissed pleadings as comments on the Draft Policy Statements, "as appropriate."[33]

In addition to domestic developments, the world energy situation has been disrupted due to Russia's invasion of Ukraine. On January 28, 2022, in response to the escalating conflict in Ukraine, U.S. President Biden and European Commission President von der Leyen issued a joint statement committing the United States to intensifying strategic energy cooperation for the security of supply of natural gas to the European Union in order to avoid "supply shocks" that could result from a further Russian invasion of Ukraine.[34] President Biden committed that:

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[29] *Id.* at 2.
[30] *See* Order on Draft Policy Statements, 178 FERC ¶ 61,197 at Ordering Par. (A)-(B). As a result, NGSA and CLNG's Request for Rehearing and Clarification filed March 18, 2022, is now moot. However, in addition to the issues raised by these Comments, CLNG and NGSA incorporate by reference its requested clarifications, to the extent still relevant, from its Request for Rehearing and Clarification in this docket.
[31] *Id.* at P 2.
[32] *Certification of New Interstate Natural Gas Facilities*, 179 FERC ¶ 61,012 (2022).
[33] *Id.* at P 4 n.8.
[34] The White House, Joint Statement by President Biden and President von der Leyen on U.S.-EU Cooperation on Energy Security (Jan. 28, 2022), https://tinyurl.com/25zvbd5r.

> The United States will strive to ensure, including working with international partners, additional liquified natural gas (LNG) volumes for the EU market of at least 15 bcm in 2022 with expected increases going forward.[35]

On March 8, 2022, President Biden Issued Executive Order 14066 prohibiting the importation of Russian energy products, including oil and LNG.[36] Secretary of Energy Granholm told industry that to offset this supply loss, "right now, we need oil and gas production to rise to meet current demand."[37]

Exports of LNG to aid our European allies in reducing their reliance on Russian natural gas requires a variety of domestic infrastructure, not just export terminals. Natural gas needs to move through pipelines to reach the export terminals. Policy statements that provide a roadmap for project opponents, but not proponents, do not serve the national interest. The Commission's deliberations must include the impact of its policies on national security policy.

NGSA and CLNG welcome the Commission's determination to seek comments on the Draft Policy Statements. The Commission now must heed the concerns of the industry it oversees and provide a clear, workable, and stable regulatory framework to allow the market to determine the standards under which new natural gas infrastructure can be certificated. To accomplish this, the Commission should modify the Updated Draft Policy Statement as described below, and address NGSA's and CLNG's concerns.

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[35] The White House, Joint Statement Between the United States and the European Commission on European Energy Security (Mar. 25, 2022), https://tinyurl.com/ykp6w6cz.

[36] Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine, Executive Order 14066, 87 Fed. Reg. 13,625 (Mar. 10, 2022), https://www.federalregister.gov/documents/2022/03/10/2022-05232/prohibiting-certain-imports-and-new-investments-with-respect-to-continued-russian-federation-efforts.

[37] Dep't of Energy, Remarks as Prepared for Delivery by Secretary of Energy Jennifer Granholm at CERAweek 2022 (Mar. 9, 2022), https://www.energy.gov/articles/secretary-granholm-ceraweek-keynote-luncheon-and-11-fireside-chat-sp-globals-dan-yergin.

III. COMMENTS

A. The Commission Should Modify the Updated Draft Policy Statement to Promote the Orderly Development of Plentiful Supplies of Natural Gas at Reasonable Prices and Ensure Regulatory Certainty for Project Developers.

NGSA and CLNG support reasonable efforts by the Commission to update its policies and to create a durable program for the permitting of natural gas infrastructure that provides for the orderly development of plentiful supplies of natural gas at reasonable prices,[38] while also protecting the interests of landowners, affected communities, and the environment. Commission policies must provide the industry with regulatory certainty to allow it to plan natural gas infrastructure projects predictably and efficiently. The 1999 Policy Statement has been successful in encouraging the development of natural gas supplies that facilitated the displacement of more carbon-intensive energy sources, with attendant environmental benefits and stable supplies for consumers. Any updated policies must continue to facilitate those benefits.

The Updated Draft Policy Statement does not provide industry with a predictable framework on which to build natural gas infrastructure. Instead, it proposes to eliminate the concrete benchmarks that have allowed the industry to expand over the last 20 years while achieving major reductions in GHG emissions. The Commission proposes to require project applicants to take new costly and time-consuming steps in preparing their applications, without any assurance that a project will be approved, how it will be conditioned, or whether it will remain economically viable following Commission review.

[38] *NAACP v. FPC*, 425 U.S. 662, 670 (1976) (explaining that the purpose of the NGA is to "encourage the orderly development of plentiful supplies of natural gas . . . at reasonable prices.").

This will *impede*—not "encourage"—development of natural gas infrastructure, and will drive up costs for proposed projects and reduce production.

The Updated Draft Policy Statement threatens to further stall Commission review of natural gas pipeline applications that, in recent years, has slowed considerably. The Updated Draft Policy Statement threatens to elongate this review process even further. This is especially troublesome when the United States has made a commitment to its allies to increase LNG exports.

The Commission must revise the Draft Policy Statements. The Commission should make the following revisions:

- The Commission should clarify that when a pipeline has executed precedent agreement(s) with non-affiliated shippers for most of its firm capacity, the Commission will determine that there is need for a project, without looking to market studies or other evidence.[39]

- The Commission should provide that, in most circumstances, precedent agreements between pipelines and affiliated shippers are strong evidence of need, and that the Commission will "look behind" precedent agreements only in instances where there is "contrary evidence."[40] The Commission should not sweep aside all affiliate agreements, under the incorrect assumption that they cannot be probative of genuine need for a project.

- The Commission should clarify how, in the limited instances in which it looks behind precedent agreements, it will determine whether a project is needed. The Commission should clarify how it will review "circumstances surrounding the precedent agreements," market studies, and any other information it deems indicative of project need.[41]

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[39] *See City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019) (upholding "Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.'") (citation omitted).

[40] *See, e.g.*, *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, at P 84 ("[a]n affiliation between project shippers and the owners of the pipelines is not, by itself, evidence of self dealing"), *order on reh'g*, 156 FERC ¶ 61,160 (2016), *vacating sub nom.*, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) ("*Sabal Trail*"); *Millennium Pipeline Co.*, 100 FERC ¶ 61,277, at P 57 (2002) ("[A]s long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project."); *E. Shore Nat. Gas Co.*, 132 FERC ¶ 61,204, at P 31 (2010) ("the Commission gives equal weight to contracts with affiliates and non-affiliates").

[41] Updated Draft Policy Statement at P 54. *See generally Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), as corrected (June 19, 1995) (an agency must provide the regulated community with

- The Commission should not discriminate among end-uses of natural gas.[42]

- The Commission should clarify how it will assess alternatives for producer-push and LNG export supply projects. In determining whether a project is required by the public convenience and necessity, the Commission should not require mitigation of environmental impacts outside of its jurisdiction under the NGA.[43]

- The Commission should clarify that the Updated Draft Policy Statement does not change the longstanding balancing process or assign greater weight to any factors than has been done under the 1999 Policy Statement.

B. The Commission Should Clarify That Precedent Agreements Remain Strong Evidence of Project Need.

The Updated Draft Policy Statement creates substantial uncertainty regarding the role of precedent agreements in the Commission's determination of need. The Updated Draft Policy Statement proposes to replace the historic emphasis on precedent agreements with a nebulous assessment of project need. For all projects, even those supported by precedent agreements between non-affiliates for 100% of a pipeline's firm capacity, the Commission proposes to "look[] at evidence beyond precedent agreements."[44] Citing to its current policy of considering "all relevant factors" to project need, the Commission

"ascertainable certainty" as to the standards with which they are expected to conform) (citing *Diamond Roofing Co. v. Occupational Safety & Health Rev. Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) (an agency "has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated.")).

[42] 18 C.F.R. § 284.7(b) (requiring pipelines to provide transportation service without undue discrimination); *Crossroads Pipeline Co.*, 71 FERC ¶ 61,076, at p. 61,264 ("[A]n open access pipeline . . . must provide service to any shipper . . . if it receives a request for service and capacity is available."), *order on reh'g*, 73 FERC ¶ 61,138 (1995). *See generally Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations; Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 1991–1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,939, at p. 30,393 (1992) (requiring pipelines to offer service on an open-access basis "to ensure that all shippers have meaningful access to the pipeline transportation grid").

[43] *See generally* 2018 NOI at P 8 ("We note the Commission only has authority over facilities for the transportation of natural gas in interstate commerce. The Commission has no authority to certificate intrastate facilities or facilities for the production, gathering, or local distribution of natural gas. Nor does the Commission have jurisdiction over facilities used for the generation of electric energy.") (internal citation omitted).

[44] Updated Draft Policy Statement at P 54.

introduces a litany of factors that will purportedly inform its evaluation of project need.[45] These include, "the circumstances surrounding the precedent agreement," such as how the open season was conducted, how the gas transported on the project will be used, and analyses of market trends.[46] The Commission further states that it could consider demand projections, underlying the capacity subscribed, estimated capacity utilization rates, potential cost savings to customers, regional assessments, and filings or statements from state regulatory commissions or local distribution companies ("LDCs") regarding the proposed project.[47] The Commission does not explain how these factors will inform its analysis, but states that it will consider all of them.

This approach makes it impossible for project developers and stakeholders to know whether a new pipeline will be approved. Lacking any regulatory certainty, potential investors will be extremely reluctant to take the financial risks necessary to develop projects. This will make it *more* difficult to develop new pipeline infrastructure, in direct conflict with the Commission's statutory mandate of encouraging the development of plentiful supplies of natural gas at reasonable costs.[48]

The Commission should maintain its longstanding policy that precedent agreements are the best indicator of need, and in most cases, are sufficient in and of themselves to support a finding that a project is needed. In the event there is evidence questioning the probative value of a precedent agreement, particularly when the precedent

[45] *Id*.
[46] *Id.*
[47] *Id.* at PP 54-59.
[48] *NAACP*, 425 U.S. at 670 (explaining that the purpose of the NGA is to "encourage the orderly development of plentiful supplies of natural gas . . . at reasonable prices.").

agreement is between affiliated companies, the Commission should probe further to evaluate project need.

1. The Commission Has Always Viewed Contracts as the Strongest Indicator of Need for a Project.

The Commission mischaracterizes its proposed test as "reaffirming" the practice under the 1999 Policy Statement of considering "all relevant factors" bearing on the need for a project.[49] In fact, Commission practice since passage of the NGA has been to focus on private contracts as the best indicator of project need, and the Commission considered other factors only tangentially, and to allow pipelines flexibility in making the case for need.[50] The Commission always has applied an economic-driven analysis to determine whether projects were needed. Immediately following passage of the NGA, the Commission required applicants to provide seven elements to support their applications, the first of which required a showing that adequate supply existed to support the project.[51] The Commission relied on private contracts to show the adequacy of supply for the pipeline.[52]

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[49] Updated Draft Policy Statement at P 53 (quoting 1999 Policy Statement, 88 FERC at p. 61,747).

[50] *See* Robert Christin, Paul Korman, and Michael Pincus, *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 Energy L.J. 115, 120 (2017) (describing legislative history and historic use of precedent agreements as evidence of project need).

[51] *In re Kan. Pipe Line & Gas Co.*, 2 FPC 29, 56 (1939) (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 (*id.* at 40); (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural gas service (*id.* at 45); (3) the facilities for which they seek a certificate are adequate (*id.* at 46-47); (4) the costs of construction of the facilities which they propose are both adequate and reasonable (*id.* at 53); (5) the anticipated fixed charges or the amount of such fixed charges are reasonable (*id.* at 54); (6) the rates proposed to be charged are reasonable (*id.* at 54-55); and (7) the anticipated fixed costs or the amount of such fixed costs (such as operating and maintenance expenses, depreciation, taxes, and return) must be reasonable (*id.* at 54).).

[52] *Id*. at 41 ("We could not issue an unconditional certificate of public convenience and necessity nor authorize the issuance of such an unconditional certificate until we had received assurance in the form of a contract satisfactory to us that the reserve of natural gas purportedly available to the Kansas Company is actually available upon firm commitment.").

As the industry evolved, pipelines shifted from being aggregators of gas supplies to providers of open-access transportation service, and pipeline-on-pipeline competition was fostered by the Commission. Commission policy was to ensure that pipeline customers were not forced to subsidize the costs of new facilities, and of unsubscribed capacity in particular. To prevent overbuilding, the Commission placed pipelines "at risk" for new capacity, meaning that they were only permitted to recover costs of capacity for which they had executed firm contracts.[53] Precedent agreements became the central factor in the Commission's consideration of whether new projects were required by the public convenience and necessity, as they demonstrated a market demand and, combined with the at-risk policy, allowed the Commission to ensure that other shippers on the pipeline would not be forced to bear the costs of unsubscribed pipeline capacity.

By the time the Commission issued its 1999 Policy Statement, its practice was to require an applicant to provide "10-year firm commitments for all of its capacity" or be able to show that revenues would exceed costs.[54] An applicant unable to show that level of commitment could still receive a certificate but would be "at-risk" for any unsold capacity.[55] Under this policy, "the percentage of capacity under long-term contracts [was] the only measure of the demand for a proposed project."[56]

In the 1999 Policy Statement, the Commission determined that by requiring applicants to provide long-term precedent agreements, the Commission had been ignoring

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[53] *See Revisions to Regulations Governing Authorizations for Construction of Natural Gas Pipeline Facilities*, Order No. 555, 1991–1996 FERC Stats. & Regs., Regs. Preambles ¶ 30,928, at p. 30,227, *order on reh'g and postponing effective date*, 57 FERC ¶ 61,195 (1991), *order withdrawing amendments*, 62 FERC ¶ 61,249 (1993).
[54] 1999 Policy Statement, 88 FERC at p. 61,743.
[55] *Id*. at p. 61,747.
[56] *Id*. at p. 61,744.

that projects could be built based on shorter-term contracts.[57] The Commission also found that this policy did not account "for all the public benefits that can be achieved by a proposed project."[58]

To better account for the various types of contracts that could underpin new pipelines and the benefits of new capacity, the Commission broadened its policy to allow pipeline applicants to support their projects with more than just long-term precedent agreements. It stated that it would "no longer require an applicant to present contracts for any specific percentage of the new capacity,"[59] and instead, expanded the inputs into its determination of need to include not just precedent agreements, but also, "demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."[60] Nonetheless, the Commission explained that "precedent agreements always will be important evidence of demand for a project."[61] The purpose of this policy was to facilitate construction of pipelines even when project developers lack long-term precedent agreements to support them.

The 1999 Policy Statement's willingness to consider "all relevant factors reflecting on the need for the project" was meant to provide pipelines with *added flexibility* to support the need for new capacity.[62] It made Commission policy less prescriptive by allowing project applicants to demonstrate need with other factors, such as market studies. However, the pipeline would remain at risk for any unsold capacity.

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[57] 1999 Policy Statement, 88 FERC at p. 61,744.
[58] *Id*. These factors included "the environmental advantages of gas over other fuels, lower fuel costs, access to new supply sources or the connection of new supply to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options, and the need for an adequate pipeline infrastructure." *Id.*
[59] *Id.* at p. 61,748.
[60] *Id*. at p. 61,747.
[61] *Id.* at p. 61,748.
[62] *Id*. at pp. 61,747-48.

Notwithstanding the Commission's willingness to consider "all relevant factors," an applicant with precedent agreements for the vast majority of its project capacity could expect the Commission to find that its project was needed, as had been true since the passage of the NGA. The Commission continued to emphasize precedent agreements so that its decision of whether a project was needed would be based on "market decisions by pipelines and shippers, as opposed to regulatory tests."[63]

If enacted, the Updated Draft Policy Statement would reverse this approach, imposing a litany of regulatory prescriptions while devaluing decisions made by real-life market participants. It introduces an ill-defined array of regulatory hurdles to be overcome in order for an applicant to demonstrate that a project is needed, even if the applicant has executed precedent agreements for the vast majority of its capacity and assumed the risk of the project. This leaves it unclear whether precedent agreements can suffice to demonstrate need.[64] The Commission's consistent application of the 1999 Policy Statement has allowed project sponsors to determine if an application is likely to be approved. Creating uncertainty for the marketplace will likely result in fewer and more costly projects.

2. The Commission Should Clarify That Precedent Agreements with Non-Affiliates Will Suffice to Demonstrate Need for a Project.

The Updated Draft Policy Statement provides that precedent agreements may not suffice to sustain a finding of need "in the face of contrary evidence or where there is reason to discount the probative value of those precedent agreements."[65] The Commission should

[63] 1999 Policy Statement, 90 FERC at p. 61,390.
[64] Updated Draft Policy Statement at P 54 ("[T]he existence of precedent agreements may not be sufficient in and of themselves to establish need for the project.").
[65] *Id.*

clarify that this inquiry into "contrary evidence" applies only in the event the precedent agreements are between pipelines and affiliates, and that, consistent with longstanding policy, precedent agreements with non-affiliates for most of a project's capacity will be sufficient to demonstrate need for the project.

The Updated Draft Policy Statement provides no support for a change in policy that would discount the value of precedent agreements between pipelines and non-affiliated shippers. The concerns expressed in the Updated Draft Policy Statement about the reliability of precedent agreements should be limited only to precedent agreements between pipelines and affiliated shippers.

Thus, the Commission should clarify that if an applicant provides non-affiliate precedent agreements for the vast majority of its project capacity, this will still suffice to show that a project is needed, even without additional support. For instance, if a pipeline shows that it is fully subscribed by non-affiliates, but project opponents submit market studies asserting the project is unneeded, the Commission should clarify that it will still find the project is needed.[66] This would be consistent with the Commission's longstanding policy,[67] which courts have repeatedly upheld.[68] As Chairman Glick recently explained, "a project sponsor's precedent agreements with nonaffiliates for the use of a substantial portion of the project's capacity . . . constitutes significant evidence of need for the project."[69]

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[66] The Commission's policies requiring the project proponent to remain at risk for the project guard against any subsidies of the project by other shippers on the pipeline.
[67] 1999 Policy Statement, 88 FERC at p. 61,749.
[68] *See, e.g.*, *Myersville Citizens for a Rural Cmt'y., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (upholding the Commission's determination of market need based on precedent agreements); *Sabal Trail*, 867 F.3d at 1379 (same).
[69] *Iroquois Gas Transmission Sys., L.P.*, 178 FERC ¶ 61,200 (2022) (Glick, Dissent at P 1).

3. The Commission Should Clarify That Absent "Contrary Evidence," Precedent Agreements Between Affiliates Are Strong Evidence of Need.

The Commission should revise the Updated Draft Policy Statement's blanket finding that "affiliate precedent agreements will generally be insufficient to demonstrate need."[70] This ignores circumstances in which precedent agreements with affiliates can provide strong evidence of need for a project, such as for LNG export-related projects. The Commission should retain its longstanding policy of not looking beyond precedent agreements with affiliates, unless the Commission is presented with an affirmative reason to do so.

a. The Commission Should Not Make a Blanket Determination That Precedent Agreements Between Affiliates Are Not Probative of Need for a Project.

The Commission erred by concluding in the Updated Draft Policy Statement that precedent agreements between affiliates do not support need for a project. While NGSA and CLNG agree that in limited circumstances it is appropriate for the Commission to apply greater scrutiny to projects backed by affiliate precedent agreements, the Commission goes too far by devaluing these agreements entirely.

Prior to issuing the 1999 Policy Statement, the Commission's practice was to give "equal weight to contracts between an applicant and its affiliates and an applicant and unrelated third parties."[71] After considering whether to modify this policy in the 1999 Policy Statement, the Commission decided to continue ascribing equal weight to affiliate and non-affiliate precedent agreements. The Commission stated that it would continue to

[70] Updated Draft Policy Statement at P 60.

[71] 1999 Policy Statement, 88 FERC at p. 61,744 (citing *Transcon. Gas Pipe Line Corp.*, 82 FERC ¶ 61,084, at p. 61,316 (1998)). *See, e.g.*, *Tex. E. Transmission Corp.*, 84 FERC ¶ 61,044, at p. 61,191 (1998) ("It is not the Commission's policy to disregard contracts between affiliates in establishing need for projects.").

avoid "looking behind contracts," and instead would focus on ensuring that projects are not subsidized by existing customers.[72]

Since issuing the 1999 Policy Statement, the Commission consistently has found affiliate and non-affiliated contracts equally probative of need.[73] The Commission maintained that the "mere fact" that some of a project's shippers are affiliates "does not call into question their need for the new capacity or otherwise diminish the showing of market support."[74] The Commission emphasized that regardless of an affiliate relationship between the pipeline and a shipper, the shipper must still offer the commodity at competitive prices in competitive environments.[75] The Commission also recognized that due to the massive financial commitment required to construct and operate a pipeline, it is unlikely that a project sponsor would commit to construct a pipeline for which there was

[72] 1999 Policy Statement, 88 FERC at pp. 61,739-40, 61,744, 61,748 (explaining that the Commission does not look behind precedent agreements to question the individual shippers' business decisions to enter into contracts, and that the Commission's policy is less focused on whether the contracts are with affiliated or unaffiliated shippers and more focused on whether existing ratepayers would subsidize the project) (citing *Transcon.*, 82 FERC at p. 61,316).

[73] *See, e.g.*, *PennEast Pipeline Co.*, 162 FERC ¶ 61,053, at P 33, *order on reh'g*, 164 FERC ¶ 61,098 (2018); *Atl. Coast Pipeline, LLC*, 161 FERC ¶ 61,042, at P 59 (2017), *order on reh'g*, 164 FERC ¶ 61,100 (2018); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 45 (2017), *order on reh'g*, 163 FERC ¶ 61,197 (2018), *pet. for review denied sub nom.*, *Appalachian Voices v. FERC*, Nos. 17-1271, *et al.*, 2019 WL 847199 (D.C. Cir. June 22, 2001); *Fla. Se. Connection*, 154 FERC ¶ 61,080 at P 84 ("[a]n affiliation between project shippers and the owners of the pipelines is not, by itself, evidence of self dealing"), *order on reh'g*, 156 FERC ¶ 61,160, *vacating sub nom.*, *Sabal Trail*, 867 F.3d 1357; *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 48 (2017), *order on reh'g*, 164 FERC ¶ 61,054 (2018), *pet. for review granted in part sub nom.*, *City of Oberlin*, 937 F.3d 599. *See also Millennium Pipeline*, 100 FERC ¶ 61,277 at P 57 ("[A]s long as the precedent agreements are long-term and binding, we do not distinguish between pipelines' precedent agreements with affiliates or independent marketers in establishing the market need for a proposed project."); *E. Shore Nat. Gas*, 132 FERC ¶ 61,204 at P 31 ("the Commission gives equal weight to contracts with affiliates and non-affiliates").

[74] *PennEast Pipeline*, 162 FERC ¶ 61,053 at P 34. *See also Greenbrier Pipeline Co.*, 103 FERC ¶ 61,024, at P 17 ("The fact that the marketers are affiliated with the project sponsor does not lessen the marketers' need for the new capacity or their obligation to pay for it under the terms of their contracts."), *reh'g denied*, 104 FERC ¶ 61,145, *reh'g denied*, 105 FERC ¶ 61,188 (2003).

[75] *Millennium Pipeline*, 100 FERC ¶ 61,277 at P 57; *see also E. Tenn. Nat. Gas Co*., 98 FERC ¶ 61,331, at p. 62,398 ("[T]he Commission does not distinguish between contracts with affiliates and non-affiliates, as long as the contracts are binding. The fact that the two power plants are affiliates of the project sponsor does not lessen their need for the new capacity or their obligation to pay for it") (internal citation omitted), *reh'g denied*, 101 FERC ¶ 61,188 (2002), *order on reh'g*, 102 FERC ¶ 61,225 (2003), *aff'd sub nom. Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323 (D.C. Cir. 2004).

no actual need, regardless of whether the sponsor was affiliated with the project's shippers.[76]

This is not to say Commission practice was, or should be, to blindly accept any contract. In the event the Commission is presented with evidence of potential improper self-dealing between the pipeline and its affiliated shipper, the Commission can seek additional evidence of pipeline need.[77] But the Commission's past practice was not to presume, without contrary evidence, that mere affiliation between a project sponsor and its customer lessened the precedent agreement's probative value of need for the project.[78]

The Commission proposes to sweep decades of policy and precedent aside in the Updated Draft Policy Statement, stating that "affiliate precedent agreements will generally be insufficient to demonstrate need."[79] To support this decision, the Commission relied almost entirely on a single case, *Environmental Defense Fund v. FERC.*[80] In that case, the U.S. Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") vacated a certificate approving a pipeline:

> in a situation in which the proposed pipeline was not meant to serve any new load demand, there was no Commission finding that a new pipeline would reduce costs, the application was supported by only a single precedent agreement, and the one shipper who was party to the

[76] *See, e.g.*, *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220, at P 35 (2019) ("Given the substantial financial commitment required under these agreements by [affiliated] project shippers, we find that these agreements are the best evidence that the service to be provided by the project is needed in the markets to be served.") (internal footnote omitted), *order on reh'g*, 171 FERC ¶ 61,049 (2020).

[77] *See, e.g.*, Spire STL Pipeline LLC, Response to Data Request, Docket Nos. CP17-40-000, -001 (Mar. 13, 2018).

[78] *Transcon. Gas Pipe Line Co*., 141 FERC ¶ 61,091, at P 21 (2012) ("Absent evidence of affiliate abuse, we see no reason not to view marketing affiliates like any other shipper for purposes of assessing the demand for capacity . . . ."), *reh'g denied*, 143 FERC ¶ 61,132 (2013).

[79] Updated Draft Policy Statement at P 60.

[80] *Id.* (citing *Envtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021) ("*EDF v. FERC*")). Aside from quoting *EDF v. FERC*, the Commission's only other support for its finding were quotes from the 1999 Policy Statement in a footnote, in which the Commission had summarized arguments made opposing the reliance on affiliate precedent agreements, but in which the Commission had ultimately decided that affiliate agreements were equally probative of need as non-affiliate agreements. *Id*. at P 60 n.175.

> precedent agreement was a corporate affiliate of the applicant who was proposing to build the new pipeline.[81]

The court did not state that precedent agreements between affiliates are valueless. Indeed, the court recognized precedent holding precisely the opposite:

> *City of Oberlin* says that FERC can put precedent agreements with affiliates on the same footing as non-affiliate precedent agreements (*i.e.*, it may "fully credit[]" them), but only so long as FERC finds "no evidence of self-dealing" or affiliate abuse and the pipeline operator "bears the risk for any unsubscribed capacity."[82]

The court found in *EDF v. FERC* that the Commission had "refused" to consider any additional evidence of need, or lack thereof, beyond the single precedent agreement.[83] Citing only to this decision, which was based on the unique facts at issue, the Commission proposes that ***any*** precedent agreement between affiliates, regardless of the circumstances, will not demonstrate project need.[84] That is not what the court held, and relying on the decision as the sole basis to completely disregard affiliate precedent agreements would not be reasoned decision-making.

b. The Commission Must Recognize That There Are Different Types of Precedent Agreements Between Affiliates.

The Commission should rescind its blanket determination that "affiliate precedent agreements will generally be insufficient to demonstrate need."[85] Instead, the Commission should retain its longstanding policy of presuming that all precedent agreements are strong evidence of need for a project, but taking a closer look if presented with evidence to the contrary.

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[81] *EDF v. FERC*, 2 F.4th at 973.
[82] *Id*. at 975.
[83] *Id*.
[84] Updated Draft Policy Statement at P 60.
[85] *Id.*

A policy of devaluing all affiliate agreements would fail to recognize myriad circumstances in which affiliate agreements are equally indicative of need for a project as agreements with non-affiliated shippers. Several examples were presented to the Commission in response to the 2018 NOI. Commentors explained that there are countless different types of arrangements that support development of a new pipeline project, and that to discount the value of a precedent agreement merely because of the shipper's affiliation with the pipeline would ignore its actual evidentiary value.

1. LNG Projects

The Commission's reversal of its policy on affiliate precedent agreements would have significant adverse consequences in the context of LNG export terminals. The business model of many LNG export terminals requires the LNG company to obtain natural gas, transport it to the export terminal on pipelines subject to the Commission's jurisdiction, and liquefy it for sale to a third party. In many cases, these functions are carried out by affiliates of pipelines constructed for the purpose of transporting natural gas to the LNG terminal. In other cases, LNG terminals or their customers may execute precedent agreements with affiliated pipelines, then assign or release the capacity to customers, asset managers, or others to handle gas deliveries.[86] Commentors explained that these arrangements are critical to the success of their projects. The mere fact that such entities are affiliated does not lessen the value of their precedent agreements as evidence of need for the pipeline transportation.[87]

[86] *See* Initial Comments of Enbridge Gas Pipelines at 35-39, Docket No. PL18-1-000 (May 26, 2021).
[87] *See* Comments of the Interstate Natural Gas Ass'n of America at 35-36, Docket No. PL18-1-000 (July 25, 2018) ("INGAA 2018 Comments"); Comments of Rio Bravo Pipeline Company, LLC and Rio Grande LNG, LLC at 5-6, Docket No. PL18-1-000 (July 25, 2018) ("RG Developers' Comments"); Comments of Cheniere Energy, Inc. to Notice of Inquiry Concerning Certification of New Interstate Natural Gas Facilities at 5-6, Docket No. PL18-1-000 (July 25, 2018).

The Commission's new determination that affiliate precedent agreements are, essentially, worthless in the certificate process, could upend the business models that have supported the recent build-out of LNG export capacity. The Commission's action comes at a particularly inappropriate time when it is the national security policy of the United States to assist its European allies and others to reduce their reliance on Russian natural gas.

2. Producer/Marketer Contracts

A marketer may purchase volumes produced in a production area, and contract with an affiliated pipeline to ship the supply to a market hub.[88] In other scenarios, an affiliated shipper works with an existing pipeline company to construct new facilities to meet the shipper's needs.[89] In yet other cases, a joint venture partner might have an equity stake in a pipeline and hold capacity as a shipper. Under those circumstances, the joint venture partner's decision to acquire an equity stake in the pipeline would be particularly strong evidence of need, because it would demonstrate the shipper's dual financial commitment to the project, as a shipper liable for demand charges and as an investor subject to the risks of ownership and operation of the pipeline.[90] These joint ventures and other similar ownership structures provide pipeline companies with access to capital and share risk with project customers.[91]

[88] RG Developers' Comments at 5-6. *See, e.g.*, *Double E Pipeline, LLC*, 173 FERC ¶ 61,074 (2020).
[89] Initial Comments of Spectra Energy Partners, LP at 20-22, Docket No. PL18-1-000, at 20-22 (July 25, 2018) ("Spectra 2018 Comments") (describing NEXUS pipeline).
[90] Comments of the Interstate Natural Gas Ass'n of America at 19-20, Docket No. PL18-1-000 (May 26, 2021) ("INGAA 2021 Comments").
[91] *See* Spectra 2018 Comments at 3-4.

3. State-Regulated Entities

Commentors also explained that when a state-regulated LDC or electric generation service works with an affiliated company to develop a pipeline project, the shipper is subject to prudence review by its state public utilities commission.[92] In this case, because the state-regulated company passes along the costs of the pipeline capacity to its customers, the state regulator would not permit it to enter into an uncompetitive contract for pipeline capacity, particularly if the pipeline was affiliated with the shipper. Even if the prudence review takes place after the Commission certificates a pipeline, the state-regulated entity remains at risk if the state regulator finds the contract to be imprudent. The review, regardless of when it occurs, should be a powerful disincentive to inappropriate conduct.

The Commission should modify the Updated Draft Policy Statement to provide that in most cases, precedent agreements with affiliates will support a finding that a project is needed. In the event that the Commission is presented with "contrary evidence," such as evidence of unfair dealing between affiliates, the Commission should look more closely at the circumstances surrounding development of the project. The Commission should not engage in this far-reaching inquiry *by default* merely because a pipeline is affiliated with one of its shippers. The Commission must recognize that there are numerous different types of precedent agreements between affiliates, and that in most cases, agreements between pipelines and affiliates support a finding that a project is needed.

[92] INGAA 2018 Comments at 34 (citing *Atl. Coast Pipeline*, 161 FERC ¶ 61,042 at P 60; *PennEast Pipeline*, 162 FERC ¶ 61,053 at P 34; Spectra 2018 Comments at 20-22; INGAA 2021 Comments at 19-20).

C. For Cases in Which the Commission Does Look Beyond Precedent Agreements, the Commission Must Clarify How It Will Review Project Need.

1. The Commission Should Clarify How It Will Weigh Circumstances Surrounding Execution of Precedent Agreements.

To the extent the Commission does look beyond precedent agreements in its assessment of need, it must clarify how this assessment will be performed. The Updated Draft Policy Statement proposes to look behind precedent agreements, even agreements with non-affiliates, to determine:

> the circumstances surrounding the precedent agreements (e.g., whether the agreements were entered into before or after an open season and the results of the open season, including the number of bidders, whether the agreements were entered into in response to LDC or generator requests for proposals (RFP) and, if so, the details around that RFP process, including the length of time from RFP to execution of the agreement).[93]

The Commission provided no context or explanation why any of these are relevant factors to whether a project is needed. In fact, they are not relevant. Regardless of the circumstances surrounding an open season, if it results in a binding contract for pipeline capacity, especially one with a non-affiliate, that is strong evidence of the need for the capacity. Indeed, the Commission has long eschewed a prescriptive policy for pipeline open seasons and, with limited exceptions, there are no regulations governing open seasons.[94] The Commission does not explain why it now proposes to deviate from this approach.

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[93] Updated Draft Policy Statement at P 54.

[94] *Regulations Governing the Conduct of Open Seasons for Alaska Natural Gas Transportation Projects*, 110 FERC ¶ 61,095 (2005). The exceptions are the regulations promulgated for the Alaska natural gas transportation project at the direction of Congress, 18 C.F.R. § 157.30-39, and the prohibition of multiple affiliate bidding. 18 C.F.R. § 284.15.

Assuming the Commission does consider these factors, it must explain how it plans to weigh and assess them. Absent such explanation, industry will lack a clear basis on which to make the financial commitments needed to develop new infrastructure. The Commission should provide additional explanation in response to the following questions:

- What relevance does the pipeline's open season process and results have to determining need?
- Is there a recommended amount of time for a pipeline to hold an open season?
- Is there a threshold number of bidders?
- If a project is developed at the request of one or more shippers, and no other bids are submitted during an open season, would the Commission view this as indicative of lower need?
- If precedent agreements are entered into in response to a shipper's request for proposals ("RFP"), is that more probative of need than a precedent agreement that was not preceded by an RFP? If so, why?
- What is the significance of length of time from an RFP or Open Season to execution of an agreement? Should pipelines strive for a certain amount of time in order to obtain the Commission's approval?
- Is there an expiration date to the validity of an open season? If so, what is it?
- How would the fact that a precedent agreement was entered into before an open season impact the Commission's need determination?

2. The Commission Should Clarify How It Will Review Market Studies.

The Updated Draft Policy Statement is likely to result at times in project applicants and project opponents submitting competing market studies of demand for new pipeline capacity. The Updated Draft Policy Statement suggests that project applicants provide "a market study that projects volumetric or peak day load growth,"[95] and proposes to consider

[95] Updated Draft Policy Statement at P 56.

"record evidence of regional projections for both gas supply and market growth, as well as pipeline-specific studies in these areas."[96]

The Commission's narrow definition of need must be expanded. Pipeline customers can have a myriad of reasons to contract with a particular pipeline without regard to market growth. Particular pipelines may offer supply optionality, and thus potential lower consumer prices, that is not available from incumbent pipelines. A new pipeline might provide additional reliability benefits by avoiding certain geographic difficulties such as flood plains or earthquake zones. An LDC may want to increase the ability to receive gas at additional portions of its system. New high-pressure deliveries may be able to assist an LDC in avoiding additional construction on its own system.

It is likely that in contested proceedings, project supporters will provide market studies demonstrating the need for a project while project opponents will provide market studies asserting that the project is unneeded. The problem of assigning weight to conflicting testimonies of "battling experts" is well-recognized,[97] and given the Commission's devaluation of precedent agreements, the Commission should address how it will respond to conflicting market studies and other factors that may have supported the decision by a shipper to execute a transportation contract. The Commission should clarify that, in the event it receives conflicting studies of project need, it will rely heavily on precedent agreements as an objective indictor of need.

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[96] *Id.* at P 57.

[97] *See, e.g.*, *El Paso Nat. Gas*, 78 FERC ¶ 61,318, at p. 62,366 (discussing difficulties that would occur in assessing reasonableness of take-or-pay contracts, when "the Commission would have had to examine the reasonableness of each pipeline's projection of future market conditions, which could easily turn into an extended battle between various experts"), *order on reh'g*, 81 FERC ¶ 61,124 (1997).

3. The Commission Should Clarify That It Will Not Discriminate Among End- Uses of Natural Gas.

The Updated Draft Policy Statement proposes to require project applicants to provide detailed information of how the gas will ultimately be used in its determination of project need.[98] Significantly, in some cases, the ultimate destination and end-use of the natural gas is unknown and unknowable. Recent reversals in the direction of flow on certain pipelines further demonstrates that the destination and end-use of natural gas is unknowable at that time that a certificate application is filed. The liquid market created by the Commission's capacity release regulations also means that the end-use of the gas may change in reaction to market forces.

The Commission should clarify that end-use is not a relevant factor in its determination of project need and that an inability to specify the end-use will not negatively affect the pipeline's application. Such clarification is required to provide the certainty needed for pipeline stakeholders to invest in projects, and to avoid violating the non-discrimination requirements at the heart of the NGA.[99] Furthermore, favoring of certain end-uses over others is outside the Commission's authority, as it lacks jurisdiction over end-uses of gas.[100]

The Commission does not explain the relevance of knowing the precise end-use of gas transported by the project on its determination of project need. If a shipper has

[98] Updated Draft Policy Statement at P 55.
[99] 18 C.F.R. § 284.7(b) (requiring pipelines to provide transportation service without undue discrimination); *Crossroads Pipeline*, 71 FERC ¶ 61,076 at p. 61,264 ("[A]n open access pipeline . . . must provide service to any shipper . . . if it receives a request for service and capacity is available."), *order on reh'g*, 73 FERC ¶ 61,138. *See generally* Order No. 636 at p. 30,393 (requiring pipelines to offer service on an open-access basis "to ensure that all shippers have meaningful access to the pipeline transportation grid").
[100] *See* 2018 NOI at P 8.

executed a precedent agreement, and agreed to pay demand charges, presumably it believes there is a market for the gas.

The Commission also fails to explain how it will weigh project need when the end-uses of gas are unknown, such as when gas is delivered to natural gas hubs, or when gas is transported on behalf of a natural gas marketer whose end-use customers are likely to change over time. The Updated Draft Policy Statement's discussion of end-use raises numerous questions:

- What relevance does the end-use of gas transported on a project have to the Commission's determination of need?[101]
- Are certain end-uses of the gas transported on a pipeline project accorded higher value than others? If so, which uses?
- How will the Commission weigh need when end-uses of a project are unknown; for instance, in the event a project is designed to deliver gas to a natural gas hub and not directly to an end-use market? How will the Commission weigh the need for projects anchored by natural gas marketers whose end-use customers are varied and are likely to change over time?
- The Commission threatens to deny applications in which the applicant does not provide information about the end-use of the gas.[102] What happens if a pipeline is being built from a producing region to a market hub from which gas could travel to multiple destinations, and the exact destinations of the specific molecules are not ascertainable? If the end-use is unknowable, will the Commission deny the application?

The mere existence of these questions demonstrates the complications implicit in an approach of allowing the end-use of gas to inform the need for the pipeline. A Commission response that these questions will be addressed on a "case-by-case" basis will not provide clarity to industry and stakeholders. Rather, the Commission should clarify that it will not consider the end-use of gas in its evaluation of project applications.

[101] The days of the Commission being concerned with end-use because of a looming shortage of natural gas are long gone.
[102] Updated Draft Policy Statement at P 55.

4. The Commission Should Clarify How It Will Assess Alternatives for Producer-Push and LNG Export Supply Projects.

The Updated Draft Policy Statement provides that the Commission will consider alternatives to the project in assessing the strength of the applicant's showing of need for a project.[103] The Commission must recognize that for certain types of projects, an assessment of "alternatives" may be difficult and have limited utility. This is particularly true for "producer-push" projects, in which natural gas producers often work with pipeline companies to help provide an outlet for natural gas production and access to additional downstream markets, and LNG supply projects, in which pipelines are built to provide sources of natural gas to feed LNG liquefaction terminals for ultimate export.

The Commission should explain how it will consider alternatives to a pipeline project as part of its assessment of need for a project. The NGA left the regulation of production and distribution to the States; is the Commission proposing to second-guess producer decisions on how to market their production, or LDCs and state regulators on gas purchasing decisions? Determining whether the export of LNG is in the public interest is within the purview of the Department of Energy. It is unclear what the Commission's role is if the requirements of Section 3 have been met and the applicants have export authorization. The Commission should not intrude on the jurisdiction of others in assessing need, and should explain how it will evaluate potential alternatives.

[103] Updated Draft Policy Statement at P 59.

D. The Commission Should Clarify That Production and Consumption of Natural Gas, and Environmental Impacts Thereof, Are Outside the Scope of Its Analysis of Whether a Project Is Required by the Public Convenience and Necessity.

The Commission should clarify that it will not consider factors outside of its jurisdiction, like upstream and downstream GHG emissions, in determining whether a project is required by the present or future public convenience and necessity. As written, the Updated Draft Policy Statement proposes that the Commission's evaluation of projects could be based in part on considerations outside its jurisdiction. Most notably, the Updated Draft Policy Statement states that the Commission "may deny an application based on any . . . adverse impacts," including GHG emissions associated with upstream production and downstream consumption of natural gas.[104] In the Draft GHG Policy Statement, the Commission "encourages each *project sponsor* to propose measures to mitigate the impacts of reasonably foreseeable GHG emissions associated with its proposed project."[105]

The Commission's jurisdiction is limited. The NGA specifically excludes the production and gathering of natural gas from Commission regulation.[106] States, not the

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[104] Updated Draft Policy Statement at P 62.

[105] Draft GHG Policy Statement at P 104 (emphasis added); *see also* Updated Draft Policy Statement at P 74 ("Additionally, we expect applicants to propose measures for mitigating impacts, and we will consider those measures—or the lack thereof—in balancing adverse impacts against the potential benefits of a proposal. . . . Should we deem an applicant's proposed mitigation of impacts inadequate to enable us to reach a public interest determination, we may condition the certificate to require additional mitigation.").

[106] NGA § 1(b) states:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale…but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b) (*see also ExxonMobil Gas Mktg. Co. v. FERC*, 297 F.3d 1071 (D.C. Cir. 2002); *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) (holding downstream consumption of natural gas is reserved to the states as well, holding as one court put it that "the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states."). *See also Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269,

Commission, have authority over upstream production and downstream consumption of gas.[107] NEPA, which in certain cases, may compel the Commission to quantify these impacts as part of the Commission's environmental review process, does not expand this jurisdiction.[108] Nothing in NEPA or the NGA allows the Commission to consider factors outside its jurisdiction in determining whether a project is required by the public convenience and necessity.

NGSA and CLNG address the Commission's proposal to consider upstream and downstream emissions in separate comments on the Draft GHG Policy Statement.[109] Notwithstanding potential changes to the Commission's policy concerning GHG emissions, the Commission must clarify that upstream and downstream environmental impacts are not part of its evaluation of projects under the NGA.

E. The Commission Should Clarify How It Will Balance a Project's Benefits Against Its Adverse Impacts.

Above all else, the Commission must provide the industry with regulatory certainty.[110] The Updated Draft Policy Statement fails to provide this certainty. To the contrary, it introduces numerous new factors into the Commission's balance of a project's benefits against its adverse impacts, and provides a roadmap to project opponents.

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277 (D.C. Cir. 1990) ("[T]he state . . . has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user.").

[107] *See, e.g.*, *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 510 (1989).

[108] *See, e.g.*, *NRDC v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.") (internal citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("[NEPA] does not expand the jurisdiction of an agency beyond that set forth in its organic statute . . . .").

[109] Comments of the Natural Gas Supply Association and Center for Liquefied Natural Gas on the Draft Greenhouse Gas Policy Statement, Docket No. PL21-3-000 (Apr. 25, 2022).

[110] *See generally Gen. Elec.*, 53 F.3d 1324 at 1329 (an agency must provide the regulated community with "ascertainable certainty" as to the standards with which they are expected to conform) (citing *Diamond Roofing*, 528 F.2d at 649 (an agency "has the responsibility to state with ascertainable certainty what is meant by the standards [it] has promulgated.")).

Under the 1999 Policy Statement, the Commission balanced the Project's public benefits against its adverse effects. The Commission made clear that this "is essentially an economic test."[111] Under the Updated Draft Policy Statement, the Commission would "balance all impacts, including economic and environmental impacts, together in its public interest determinations under the NGA."[112] The Updated Draft Policy Statement suggests the Commission will weigh these factors differently than it has in the past. The Updated Draft Policy Statement proposes to "consider environmental impacts and potential mitigation in both [its] environmental reviews under NEPA and [its] public interest determinations under the NGA."[113] Further, it states that it "expect[s] applicants to propose measures for mitigating impacts, and [it] will consider those measures—or the lack thereof—in balancing adverse impacts against the potential benefits of a proposal."[114] The Commission states that it may "deny an application based on any of the types of adverse impacts described herein, including environmental impacts, if the adverse impacts as a whole outweigh the benefits of the project and cannot be mitigated or minimized."[115] The Commission also states that "our consideration of impacts to communities surrounding a proposed project will include an assessment of impacts to any environmental justice communities and of necessary mitigation to avoid or lessen those impacts."[116]

The Commission provides no indication how it will balance a project's benefits and impacts to reach this decision, but introduces a range of new considerations, both with respect to need for a project and with the Commission's environmental review. Most

[111] 1999 Policy Statement, 88 FERC at p. 61,745.
[112] Updated Draft Policy Statement at P 73.
[113] *Id.* at P 74.
[114] *Id*.
[115] *Id*.
[116] *Id.* at P 79.

significantly, in departure from past practice, the Updated Draft Policy Statement proposes to include impacts of upstream and downstream GHG emissions, without explaining how these will be weighed. This provides industry and stakeholders with no concrete benchmarks that allow it to predict whether any project will be approved or how it will be conditioned.

With respect to mitigating environmental justice impacts to communities, the Commission should clarify that these impacts will be addressed in accordance with what other governmental agencies require when assessing new projects. For example, the Commission should reference the use of environmental justice screening tools, such as EPA's EJSCREEN (https://www.epa.gov/ejscreen) or an applicable state screening tool, as part of the permitting process, and compliance with NEPA that will be updated by the CEQ through its Phase 2 amendments[117] to address environmental justice issues properly.

The Commission should clarify that the Updated Draft Policy Statement does not change the longstanding balancing process or assign greater weight to any factors than it has done under the 1999 Policy Statement. If the Commission declines to issue these clarifications, it should explain how the balancing process has changed. Ultimately, the Commission must provide applicants and stakeholders with reliable goalposts that allow them to plan new infrastructure.

[117] CEQ, National Environmental Policy Act Implementing Regulations Revisions, Phase 1 Proposal, 86 Fed. Reg. 55,757, 55,759 (Oct. 7, 2021).

IV. CONCLUSION

For the reasons discussed above, the Commission should modify the Updated Draft Policy Statement as requested herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2010 (2021), I hereby certify that I have this 25th day of April 2022, served the forgoing document on each person designated on the official service list compiled by the Secretary in this proceeding.

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