

170 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gulf South Pipeline Company, LP

Docket No. CP19-125-000

ORDER ISSUING CERTIFICATE

(Issued March 19, 2020)

1. On March 29, 2019, Gulf South Pipeline Company, LP (Gulf South) filed an application pursuant to section 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations² for authorization to construct and operate approximately 22 miles of 30-inch diameter pipeline, parallel to its existing Index 99 natural gas pipeline system in Texas, and other appurtenant facilities at existing compressor stations in Texas and Louisiana in order to provide additional transportation services (Index 99 Expansion Project). Gulf South also seeks a predetermination of rolled-in rate treatment for the costs associated with the project. For the reasons discussed below, we grant the requested authorizations, subject to the conditions described herein.

I. Background and Proposal

2. Gulf South, a Delaware limited partnership, is a natural gas company as defined by section 2(6) of the NGA³ engaged in the transportation of natural gas in interstate commerce and subject to the Commission's jurisdiction. Gulf South's transmission system extends from Texas through Louisiana and Mississippi, and to Alabama and Florida.

3. The Index 99 Expansion Project is designed to enable Gulf South to provide additional firm natural gas transportation service from the Shelby Trough in east Texas to existing interconnects with Transcontinental Gas Pipeline Company, LLC (Transco) and Sabine Pipe Line, LLC. In total, the project will provide 750,000 dekatherms per day (Dth/d) of firm natural gas transportation service using a combination of existing unsubscribed capacity (250,000 Dth/d) and new capacity made available by the proposed

¹ 15 U.S.C. § 717f (2018).

² 18 C.F.R. pt. 157 (2019).

³ 15 U.S.C. § 717a(6).

expansion (500,000 Dth/d). To provide this expansion service, Gulf South proposes to construct and operate the following facilities:

- approximately 22 miles of new 30-inch-diameter pipeline (Index 99L) parallel to the existing Index 99 pipeline in San Augustine County, Texas and terminating at Gulf South's existing Magasco Compressor Station in Sabine County;⁴
- a pig⁵ receiver at the intersection of the new Index 99L pipeline and Gulf South's existing Index 99 System, in San Augustine County, Texas;
- a pig launcher within Gulf South's existing Magasco Compressor Station in Sabine County, Texas;
- one new mainline valve assembly along the new Index 99L pipeline, in San Augustine County, Texas; and
- approximately 250 feet of new 24-inch-diameter compressor station pipeline and a 24-inch-diameter pressure control valve along the new 24-inch-diameter station pipe at the existing Hall Summit Compressor Station in Bienville Parish, Louisiana.

4. Prior to holding an open season, Gulf South executed a binding precedent agreement with Aethon United BR LP (Aethon United) for the 750,000 Dth/d of firm natural gas transportation service. Under the agreement, Aethon United will execute a conforming firm transportation service agreement for a 10-year term.

5. Gulf South states that it held an open season from February 1, 2019, to February 8, 2019, for the Index 99 Expansion Project, but did not receive any bids for firm transportation service nor any offers to turnback capacity.

6. Gulf South estimates the cost of the Index 99 Expansion Project to be approximately \$75 million.

7. Gulf South proposes to use its existing system rates under Rate Schedule FTS as the applicable recourse rates for firm project transportation service and to apply its

⁴ Gulf South notes that it will construct a new Index 99 receipt point under its blanket certificate authority to tie into the northern end of the Index 99L pipeline to provide the shipper with a primary firm receipt point to receive up to 500,000 Dth/d of gas. Application at 5.

⁵ A "pig" is a tool that the pipeline company inserts into and pushes through the pipeline for cleaning the pipeline, conducting internal inspections, or other purposes.

generally applicable system fuel retention and electric power rates for service on the Index 99 Expansion Project. Gulf South also requests a predetermination that it may roll the project costs into its system rates in its next general NGA section 4 rate proceeding. Gulf South and the shipper have agreed to negotiated rates.

II. Notice and Interventions

8. Notice of Gulf South's application was issued on April 12, 2019, and published in the *Federal Register* on April 18, 2019.⁶ United Municipal Distributors Group (UMDG), on its own and on behalf of its members;⁷ Atmos Energy Corporation; PSEG Energy Resources & Trade LLC; and Centerpoint Energy Resources Corporation filed timely motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.⁸

III. Discussion

9. Because the proposed facilities will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction and operation of the facilities are subject to subsections (c) and (e) of the NGA.

A. Certificate Policy Statement

10. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.⁹ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The Certificate Policy Statement explains that in deciding whether to authorize the construction of new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's

⁶ 84 Fed. Reg. 16,253 (2019).

⁷ UMDG consists of the following municipal-distributor customers of Gulf South: City of Brewton, Alabama; Town of Century, Florida; Utilities Board of the Town of Citronelle, Alabama; City of Fairhope, Alabama; Utilities Board of the City of Foley, Alabama; North Baldwin Utilities, Alabama; Okaloosa Gas District, Florida; City of Pensacola, Florida; and South Alabama Gas District, Alabama.

⁸ 18 C.F.R. § 385.214(c)(1) (2019).

⁹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227; *corrected*, 89 FERC ¶ 61,040 (1999), *order on clarification*, 90 FERC ¶ 61,128; *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

responsibility for unsubscribed capacity, avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

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

12. Gulf South's proposal satisfies the threshold requirement that it financially support the project without relying on subsidization from its existing customers. Gulf South proposes to charge its existing system rates under Rate Schedule FTS as the applicable recourse rates for the project service. As discussed below, Gulf South's existing system rates exceed illustrative incremental rates calculated to recover the costs of the project. We accept Gulf South's proposal to charge its existing system rates as the initial recourse rates for service utilizing the incremental capacity created by the proposed facilities. Therefore, we find that Gulf South's existing customers will not subsidize the Index 99 Expansion Project and that the threshold no-subsidy requirement is met.

13. We also find that the proposed project will have no adverse effect on service to Gulf South's existing customers because the proposed expansion facilities are designed to provide incremental service to meet the needs of the project shipper while maintaining existing services and without degrading service to Gulf South's existing customers. We also find that there will be no adverse impact on other pipelines in the region or their captive customers, and no other pipelines or their captive customers have filed adverse comments regarding Gulf South's proposal.

14. We are further satisfied that Gulf South has taken appropriate steps to minimize adverse impacts on landowners. As discussed in the Environmental Assessment and, as appropriate, below, Gulf South's proposed project will temporarily disturb approximately 391.5 acres of land during construction, and permanently disturb approximately 162.5 acres of land during operation. Gulf South has actively worked with local stakeholders, including landowners, as well as federal and state agencies to develop the proposed pipeline route. Gulf South proposes to co-locate approximately 93% of the Index 99L pipeline alongside the existing Gulf South Index 99 pipeline.

15. Accordingly, we find that Gulf South has demonstrated a need for the Index 99 Expansion Project and that the project's benefits will outweigh any adverse economic effects on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities. Therefore, we conclude that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.¹⁰

B. Initial Recourse Rates

16. Gulf South proposes to use its existing reservation and usage charges under Rate Schedule FTS as the initial maximum recourse rates for firm transportation service. Gulf South calculated an illustrative incremental daily reservation charge of \$0.0712 per Dth reflecting an estimated first-year incremental fixed cost of service of \$12,999,299 and annual billing determinants of 182,500,000 Dth. In addition, Gulf South calculated an illustrative usage charge of \$0.0002 per Dth based on an estimated variable cost of service of \$21,244 and annual throughput of 127,750,000 Dth.¹¹ The cost of service reflects a transmission depreciation rate of 2.18 percent, last established and approved via settlement in Docket No. RP15-65-000,¹² and rate of return of 10.41%, last established and approved via settlement in Docket No. RP97-373-000.¹³ The illustrative recourse reservation and usage charges are less than Gulf South's currently effective maximum recourse reservation charge of \$0.3380 per Dth per day and maximum recourse usage charge of \$0.0125 per Dth, respectively, under Rate Schedule FTS.¹⁴

17. We have reviewed Gulf South's proposed cost of service and initial rates and find they reasonably reflect current Commission policy. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental rate exceeds the maximum system recourse rate.¹⁵ Where the currently-effective system recourse rate is greater than the estimated incremental cost-based recourse rate, the Commission has found it appropriate

¹⁰ See Certificate Policy Statement, 88 FERC at ¶ 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

¹¹ Based on a 70% load factor. See Exhibit N, page 1.

¹² *Gulf South Pipeline Co., LP*, 153 FERC ¶ 61,326, at P 6 (2015).

¹³ *Koch Gateway Pipeline Co.*, 84 FERC ¶ 61,143 (1998).

¹⁴ Gulf South Pipeline Company, LP, FERC NGA Gas Tariff, Tariffs, Section 4.1, Currently Effective Rates – Transportation – FTS Service, 16.0.0.

¹⁵ Certificate Policy Statement, 88 FERC at 61,746.

to establish the existing system rate as the initial recourse rate for the project.¹⁶ Because the maximum Rate Schedule FTS recourse reservation and usage charges are greater than the illustrative incremental reservation and usage charges, we will approve Gulf South's request to use its existing rates under Rate Schedules FTS as the initial recourse rates for the project facilities.

1. Fuel

18. Gulf South proposes to recover compressor fuel and any lost and unaccounted for volumes through Gulf South's currently-effective system fuel retention rate. In support of its proposal, Gulf South provided a fuel study¹⁷ that demonstrates that charging the project shippers the generally applicable system fuel percentage will not result in existing shippers on the system subsidizing the project. Accordingly, we will approve Gulf South's proposal to charge its generally applicable system fuel percentage on the capacity associated with the project facilities.

2. Negotiated Rates

19. Gulf South proposes to provide service to the Customer under a negotiated rate transportation agreement. Gulf South must file either the negotiated rate agreement or tariff records setting forth the essential elements of the agreements in accordance with the Alternative Rate Policy Statement¹⁸ and the Commission's negotiated rate policies.¹⁹ Gulf South must file the negotiated rate agreement or tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.²⁰

¹⁶ See, e.g., *Texas Gas Transmission, LLC*, 152 FERC ¶ 61,160, at P 30 (2015); *Millennium Pipeline Co., L.L.C.*, 145 FERC ¶ 61,007, at P 30 (2013).

¹⁷ Application at 12.

¹⁸ *Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines; Regulation of Negotiated Transportation Services of Natural Gas Pipelines*, 74 FERC ¶ 61,076, order granting clarification, 74 FERC ¶ 61,194, reh'g and clarification denied, 75 FERC ¶ 61,024, reh'g denied, 75 FERC ¶ 61,066, reh'g dismissed, 75 FERC ¶ 61,291 (1996), petition denied sub nom. *Burlington Resources Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

¹⁹ *Natural Gas Pipelines Negotiated Rate Policies and Practices; Modification of Negotiated Rate Policy*, 104 FERC ¶ 61,134 (2003), order on reh'g and clarification, 114 FERC ¶ 61,042, reh'g dismissed and clarification denied, 114 FERC ¶ 61,304 (2006).

²⁰ Pipelines are required to file any service agreement containing non-conforming provisions and to disclose and identify any transportation term or agreement in a

3. Rolled-in Rate Predetermination

20. Gulf South requests a predetermination favoring rolled-in rate treatment for the project's cost in a future NGA section 4 general rate case.

21. To receive a predetermination favoring rolled-in rate treatment, a pipeline must demonstrate that rolling in the costs associated with the construction and operation of new facilities will not result in existing customers subsidizing the expansion. In general, this means that a pipeline must show that the revenues to be generated by an expansion project will exceed the costs of the project. For purposes of making a determination in a certificate proceeding as to whether it would be appropriate to roll the costs of a project into the pipeline's system rates in a future NGA section 4 proceeding, we compare the cost of the project to the estimated revenues generated using actual contract volumes at either the maximum recourse rate or, if the negotiated rate is lower than the recourse rate, the actual negotiated rate.²¹

22. Gulf South's estimated first-year negotiated rate revenue of \$49,959,375 exceeds its estimated first-year cost of service of \$13,020,443.²² Therefore, we will grant a predetermination favoring rolled-in rate treatment for the costs of the project in a future general NGA section 4 rate case, absent any significant change in circumstances.

4. Reporting Incremental Costs

23. We require Gulf South to keep separate books and accounting of costs and revenues attributable to the proposed incremental services and capacity created by the project in the same manner as required by section 154.309 of the Commission's regulations.²³ The books should be maintained with applicable cross-reference and the information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.²⁴

precedent agreement that survives the execution of the service agreement. *See, e.g., Texas Eastern Transmission, LP*, 149 FERC ¶ 61,198, at P 33 (2014).

²¹ *Tennessee Gas Pipeline Co., L.L.C.* 144 FERC ¶ 61,219, at P 22 (2013).

²² The Customer's negotiated rate of \$0.2650 per Dth is less than Gulf South's maximum recourse rate.

²³ 18 C.F.R. § 154.309 (2019).

²⁴ *See Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008).

C. Environmental

24. On May 13, 2019, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment for the Proposed Index 99 Expansion Project and Request for Comments on Environmental Issues* (NOI). The NOI was published in the Federal Register on May 17, 2019, and mailed to interested parties including federal, state, and local officials; agency representatives; environmental and public interest groups; Native American tribes; local libraries and newspapers; and affected property owners.²⁵ We received comments in response to the NOI from the U.S. Army Corps of Engineers (Army Corps), the National Park Service, Louisiana Department of Wildlife and Fisheries (Louisiana DWF), Quapaw Nation, and Choctaw Nation.

25. The Army Corps requested to be included as a cooperating agency in the preparation of the EA because it has jurisdictional authority pursuant to section 404 of the Clean Water Act,²⁶ which governs the discharge of dredged or fill material into waters of the United States (including wetlands). The National Park Service indicated interest in the project due to its proximity to the El Camino Real de los Tejas National Historic Trail, a congressionally designated special area under the National Trails System Act. However, the National Park Service later determined that the proposal would not impact the historic trail and indicated it had no further interest in the project. The Louisiana DWF generally expressed interest in reviewing the project design details and construction methodologies. The Quapaw Nation indicated that the project is outside its areas of interest and that it had no comments. The Choctaw Nation requested geographic information system (GIS) shapefiles, the cultural resources survey report(s), and a copy of the environmental assessment once completed. In response, Gulf South agreed to provide the requested cultural resource information to the Choctaw Nation.

26. To satisfy the requirements of the National Environmental Policy Act of 1969, our staff prepared an Environmental Assessment (EA) for Gulf South's proposal. The EA was prepared with the cooperation of the Army Corps. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, special status species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, cumulative impacts, and alternatives. All substantive environmental comments received in response to the NOI were addressed in the EA. The EA was placed into the public record on November 22, 2019. In response to the Choctaw Nation's request for a copy of the EA once complete, Commission staff informed the Choctaw Nation how they can access the EA in the public record. No comments were filed on the EA. Since issuance of the EA, Gulf South filed a report completing cultural resources surveys for the project, and the Texas State Historic Preservation Office's comments indicating no historic properties were present or affected by the project. We concur. Therefore, we

²⁵ 84 Fed. Reg. 22,482.

²⁶ 33 U.S.C. § 1344 (2018).

have removed EA recommended environmental condition 14 from the appendix to this order.

Updated Greenhouse Gas Analysis

27. The EA estimates the maximum potential greenhouse gas (GHG) emissions from construction of the Index 99 Expansion Project to be 7224 metric tons of carbon dioxide equivalent (CO₂e).²⁷ To provide context to the EA's GHG estimate, 5.743 billion metric tons of CO₂e were emitted at a national level in 2017 (inclusive of CO₂e sources and sinks).²⁸ The construction-related emissions of the project could potentially increase CO₂e emissions based on the 2017 levels by 0.0001 percent at the national level.²⁹ Currently, there are no national targets to use as a benchmark for comparison.³⁰

28. GHG emissions, such as those emitted from the project's construction-related activities, will contribute incrementally to climate change, and we have previously disclosed various effects of climate change on the Gulf Coast and Southeast regions of the United States.³¹ However, as the Commission has previously concluded, it cannot determine a project's incremental physical impacts on the environment caused by GHG

²⁷ EA at 47.

²⁸ U.S. Environmental Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks 1990-2017* at ES6-8 (Table ES-2) (2019), available at <https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf> (accessed November 2019).

²⁹ We note that this calculation does not include the total estimated GHG emissions of 96.5 tons per year of CO₂e from fugitive methane releases from project equipment leaks and pig launcher/receiver operations. EA at 48.

³⁰ The national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed, Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations, 84 Fed. Reg. 32,520, 32,522-32 (July 8, 2019), and the targets in the Paris Climate Accord are pending withdrawal.

³¹ *Gulf South Pipeline Company, LP*, Willis Lateral Project Environmental Assessment at 73, Docket No. CP18-525-000 (March 2019) (detailing the environmental impacts attributed to climate change in the Gulf Coast and Southeast region from U.S. Global Change Research Program's 2017 and 2018 Climate Science Special Report: Fourth National Climate Assessment).

emissions.³² We have also previously concluded the Commission cannot determine whether an individual project's contribution to climate change would be significant.³³ That situation has not changed.

29. Based on the analysis in the EA, we conclude that if constructed and operated in accordance with Gulf South's application and supplements, and in compliance with the environmental conditions in the appendix to this order, our approval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment.

D. Conclusion

30. Based on our Certificate Policy Statement determination and our environmental analysis, we find under section 7 of the NGA that the public convenience and necessity requires approval of Gulf South's Index 99 Expansion Project, subject to the conditions in this order.

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

32. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the (construction or operation) of facilities approved by this Commission.³⁴

³² *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 67-70 (2018) (LaFleur, Comm'r, *dissenting in part*; Glick, Comm'r, *dissenting in part*).

³³ *Id.*

³⁴ *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory

33. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and comments, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Gulf South, authorizing it to construct and operate the proposed facilities, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) The certificate authority issued in Ordering Paragraph (A) is conditioned on Gulf South:

- (1) completing construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) complying with all applicable Commission regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations;
- (3) complying with the environmental conditions listed in the appendix to this order; and
- (4) filing written statements affirming that it has executed firm service agreements for volumes and service terms equivalent to those in its precedent agreement, prior to commencing construction.

(C) Gulf South's proposal to charge its existing system recourse rates for firm transportation under Rate Schedule FTS as initial rates and its system fuel rate is approved.

(D) Gulf South's request for a predetermination supporting rolled-in rate treatment for the costs of the Index 99 Extension Project in its next general NGA section 4 rate proceeding is granted, absent any significant change in circumstances.

authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

(E) Gulf South shall keep separate books and accounts of costs attributable to the proposed Project services, as described above.

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

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

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix Environmental Conditions

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

1. Gulf South shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EA, unless modified by the Order. Gulf South must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of Office of Energy Projects (OEP) **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.
3. **Prior to any construction**, Gulf South shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EIs), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.
4. The authorized facility locations shall be as shown in the EA, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of**

construction, Gulf South shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

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

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

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

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

- a. implementation of cultural resources mitigation measures;
 - b. implementation of endangered, threatened, or special concern species mitigation measures;
 - c. recommendations by state regulatory authorities; and
 - d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.
6. **Within 60 days of the acceptance of the authorization and before construction**

begins, Gulf South shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP. Gulf South must file revisions to the plan as schedules change. The plan shall identify:

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

- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - e. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Gulf South shall file updated status reports with the Secretary on a **weekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
- a. an update on Gulf South's efforts to obtain the necessary federal authorizations;
 - b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally sensitive areas;
 - c. a listing of all problems encountered, and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints that may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and

Department recommended mitigation measures that Gulf South will implement for the Bachman's sparrow.

15. **During horizontal directional drilling operations at MP 12.12**, Gulf South shall monitor noise levels and report the monitored noise levels in its weekly construction status reports, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than a day-night noise level of 55 decibels on the A-weighted scale at the nearby noise sensitive areas.
16. Gulf South shall conduct general project construction activities (excluding horizontal directional drills) in residential areas between the daytime hours of 7:00am and 7:00pm.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gulf South Pipeline Company, LP

Docket No. CP19-125-000

(Issued March 19, 2020)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act¹ (NGA) and the National Environmental Policy Act² (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing Gulf South Pipeline Company, LP's (Gulf South) proposed Index 99 Expansion Project (Project), the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts. The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction.³ That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"⁴ and, as a result, conclude that the Project is in the public interest and required by the public convenience and necessity.⁵ Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

¹ 15 U.S.C. § 717f (2018).

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

³ *Gulf South Pipeline Co.*, 170 FERC ¶ 61,201, at P 27 (2020) (Certificate Order); Index 99 Expansion Project Environmental Assessment at Tables 6–18 (EA).

⁴ Certificate Order, 170 FERC ¶ 61,201 at P 29; EA at 74.

⁵ Certificate Order, 170 FERC ¶ 61,201 at P 30.

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

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

4. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that "GHG emissions, such as those emitted from the project's construction-related activities, will contribute incrementally to climate change."⁶ In light of this undisputed relationship between anthropogenic GHG emissions and climate change, the Commission must carefully consider the Project's contribution to climate change, both in order to fulfill NEPA's requirements and to determine whether the Project is in the public interest and required by the public convenience and necessity.⁷

5.

⁶ *Id.* P 28.

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

6. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the facility's impact on climate change.⁸ That is now clearly established D.C. Circuit precedent.⁹ The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because it, simply put, "cannot"¹⁰ However, the most troubling part of the Commission's rationale is what comes next. Based on this alleged inability to assess significance, the Commission concludes that the Project will have no significant environmental impact.¹¹ Think about that. The Commission is saying out of one side of its mouth that it need not assess the significance of the Project's impact on climate change while, out of the other side of its mouth, assuring us that all environmental impacts are insignificant. That is ludicrous, unreasoned, and an abdication of our responsibility to give climate change the "hard look" that the law demands.¹²

⁸ See *Sabal Trail*, 867 F.3d at 1373 (explaining that the Commission must consider a pipeline's direct and indirect GHG emissions because the Commission may "deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment"); see also *Atl. Ref. Co. v. Pub. Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959) (holding that the NGA requires the Commission to consider "all factors bearing on the public interest").

⁹ See *Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 2019 WL 6605464 (D.C. Cir. Dec. 5, 2019); *Birckhead v. FERC*, 925 F.3d 510, 518-19 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d at 1371-72. The history of these cases is discussed further below. See *infra* P 8.

¹⁰ See Certificate Order, 170 FERC ¶ 61,201 at P 28 nn.32-33 (citing *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at PP 67-70); see *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 at P 67 (finding that without a "standard methodology" to "determine how a project's contribution to [GHG] emissions would translate into physical effects on the environment. . . the Commission cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that impact would contribute to climate change").

¹¹ See Certificate Order, 170 FERC ¶ 61,201 at P 29 ("[A]pproval of this proposal would not constitute a major federal action significantly affecting the quality of the human environment."); see also EA at 67.

¹²E.g., *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (Agencies cannot overlook a single environmental consequence if it is even "arguably significant."); see *Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation

7. It also means that the volume of emissions caused by the Project does not play a meaningful role in the Commission's public interest determination, no matter how many times the Commission assures us otherwise. Using the approach in today's order, the Commission will always be able to conclude that a project will not have any significant environmental impact irrespective of the project's actual GHG emissions or those emissions' impact on climate change. So long as that is the case, a project's impact on climate change cannot, as a logical matter, play a meaningful role in the Commission's public interest determination. A public interest determination that systematically excludes the most important environmental consideration of our time is contrary to law, arbitrary and capricious, and not the product of reasoned decisionmaking.

8. Commissioner McNamee argues that the D.C. Circuit cases cited above¹³ were wrongly decided.¹⁴ Although that is his prerogative, it is irrelevant to the task before us. As he has explained, we are called on to apply the law and the facts, not our personal policy preferences. But surely, implicit in that statement, is a recognition that we must apply the law as it is, not as we wish it were. The D.C. Circuit has unambiguously interpreted the "public convenience and necessity" standard in section 7 of the NGA to encompass the authority to consider and, if appropriate, act upon "the direct and indirect environmental effects" of a proposed pipeline.¹⁵ As Commissioners, our job is to apply that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.¹⁶

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

marks omitted)); *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency").

¹³ *Supra* notes 8-9.

¹⁴ Certificate Order, 170 FERC ¶ 61,201 (McNamee, Comm'r, concurring at P 3).

¹⁵ *E.g., Sabal Trail*, 867 F.3d at 1373.

¹⁶ *Id.*; *see Birckhead*, 925 F.3d at 519 (explaining that in "the pipeline certification context the Commission does have statutory authority to act" on the reasonably foreseeable GHG emissions caused by the pipeline (citing *Sabal Trail*, 867 F.3d at 1373)).

9. The Commission's NEPA analysis is similarly flawed. When conducting a NEPA review, an agency must consider both the direct and the indirect effects of the project under consideration.¹⁷ The D.C. Circuit has repeatedly instructed the Commission that the GHG emissions caused by the reasonably foreseeable combustion of natural gas transported through a pipeline are an indirect effect and must, therefore, be included within the Commission's NEPA analysis.¹⁸ While the Commission does quantify the GHG emissions related to Project's construction,¹⁹ it fails to consider the indirect GHG emissions resulting from the incremental natural gas capacity facilitated by the Project. Once again the Commission takes the position that if it does not know the specific volume and end-use of the natural gas, any associated GHG emissions are categorically not reasonably foreseeable.²⁰

10. I remain baffled by the Commission's continued refusal to take any step towards considering indirect downstream emissions and their impact on climate change unless specifically and expressly directed to do so by the courts (and even that does not always seem to be the case²¹). Here, there are plenty of steps that the Commission could take to consider the GHGs associated with the Project's incremental capacity if it were actually inclined to take a 'hard look' at climate change. At a minimum, we know that the vast majority, 97 percent, of all natural gas consumed in the United States is combusted²²—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. Moreover, the record here makes this a

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

¹⁸ See *Allegheny Def. Project*, 932 F.3d at 945-46; *Birckhead*, 925 F.3d at 518-19; *Sabal Trail*, 867 F.3d at 1371-72.

¹⁹ See *supra* note 3.

²⁰ See *Tennessee Gas Pipeline Co.*, 169 FERC ¶ 61,230, at P 64 (2019) (stating that “[b]ecause the specific volume and end-use of the gas which will transported under those contracts, as well as the gas which may ultimately be transported using the uncontracted for capacity, is unknown, any potential greenhouse gas emissions associated with the ultimate combustion of the transported gas are not reasonably foreseeable”).

²¹ *El Paso Natural Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019) (Glick, Comm'r, dissenting in part at PP 10-11) (criticizing the Commission for failing to follow the D.C.'s guidance in *Birckhead* and consider GHG emissions associated with natural gas transportation capacity that it was told would be used to serve electricity generation).

²² U.S. Energy Info. Admin., *September 2019 Monthly Energy Review* 22, 97 (2019) (reporting that, in 2018, 778 Bcf of natural gas had a non-combustion use compared to 29,956 Bcf of total consumption), <https://www.eia.gov/totalenergy/data/monthly/archive/00351908.pdf>.

relatively easy case: The stated purpose for the expansion capacity is “to transport Shelby Trough shale supplies from East Texas and Northern Louisiana with an ultimate destination to serve markets along the Gulf Coast regions of the US.”²³ Gulf South also states that the natural gas to be transported “will likely be consumed or stored domestically.”²⁴ Using that information, the Commission could have easily engaged in a little “reasonable forecasting” aided by “educated assumptions”—which is precisely what NEPA requires—in order to develop an estimate or a range of estimates of the likely emissions caused by the Project.²⁵

11. In any case, even where the Commission quantifies the Project’s construction GHG emissions, it still fails to “evaluate the ‘incremental impact’ that [those emissions] will have on climate change or the environment more generally.”²⁶ In *Sabal Trail*, the court explained that the Commission was required “to include a discussion of the ‘significance’ of” the indirect effects of the Project, including its GHG emissions.²⁷ That makes sense. Identifying and evaluating the consequences that the Project’s GHG emissions may have for climate change is essential if NEPA is to play the disclosure and good government roles for which it was designed.²⁸ But neither today’s order nor the

²³ Gulf South Certificate Application at 525 (Project Summary).

²⁴ Gulf South July 3, 2019 Response to June 26, 2019 Data Request at 3.

²⁵ *Sabal Trail*, 867 F.3d at 1374 (quoting *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014)); *see id.* (“We understand that emission estimates would be largely influenced by assumptions rather than direct parameters about the project, but some educated assumptions are inevitable in the NEPA process. And the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt.” (internal citations and quotation marks omitted)).

²⁶ *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1216 (9th Cir. 2008); *see also WildEarth Guardians v. Zinke*, No. CV 16-1724 (RC), 2019 WL 1273181, at *1 (D.D.C. Mar. 19, 2019) (explaining that the agency was required to “provide the information necessary for the public and agency decisionmakers to understand the degree to which [its] decisions at issue would contribute” to the “impacts of climate change in the state, the region, and across the country”).

²⁷ *Sabal Trail*, 867 F.3d at 1374.

²⁸ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA’s purposes is to ensure that “relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision”); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) (“The idea behind NEPA is that if the agency’s eyes

accompanying EA provide that discussion or even attempt to assess the significance of the Project's GHG emissions.

12. Instead, the Commission insists that it need not assess the significance of the Project's GHG emissions because it lacks a "standard methodology" to "determine how a project's contribution to [GHG] emissions would translate into physical effects on the environment."²⁹ But that does not excuse the Commission's failure to evaluate these emissions. As an initial matter, the lack of a single methodology does not prevent the Commission from adopting *a* methodology, even if that methodology is not universally accepted. The Commission has several tools to assess the harm from the Project's contribution to climate change, including, for example, the Social Cost of Carbon. By measuring the long-term damage done by a ton of carbon dioxide, the Social Cost of Carbon links GHG emissions to actual environmental effects from climate change, thereby facilitating the necessary "hard look" at the Project's environmental impacts that NEPA requires. Especially when it comes to a global problem like climate change, a measure for translating a single project's climate change impacts into concrete and comprehensible terms plays a useful role in the NEPA process by putting the harms from climate change in terms that are readily accessible for both agency decisionmakers and the public at large. The Commission, however, continues to ignore the tools at its disposal, relying on deeply flawed reasoning that I have previously critiqued at length.³⁰

13. Regardless of tools or methodologies available, the Commission also can use its expertise to consider all factors and determine, quantitatively or qualitatively, whether the Project's GHG emissions have a significant impact on climate change. That is precisely what the Commission does in other aspects of its environmental review. Consider, for example, the Commission's findings that the Project will not have a significant effect on issues as diverse as "soils,"³¹ "wetlands,"³² and "migratory birds."³³ Notwithstanding the

are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

²⁹ *See supra* note 10.

³⁰ *See, e.g., Transcontinental Gas Pipe Line Co., LLC*, 167 FERC ¶ 61,110 (2019) (Glick, Comm'r, dissenting in part at P 6 & n.11) (noting that the Social Cost of Carbon "gives both the Commission and the public a means to translate a discrete project's climate impacts into concrete and comprehensible terms"); *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099 (2018) (Glick, Comm'r, dissenting).

³¹ *Id.* at 23-24.

³² *Id.* at 29-31.

³³ *Id.* at 35-37.

lack of any or “universally accepted methods” to assess these impacts, the Commission managed to use its judgment to conduct a qualitative review and assess the significance of the Project’s effect on those considerations. The Commission’s refusal to, at the very least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.³⁴

14. That refusal is even more mystifying because NEPA “does not dictate particular decisional outcomes.”³⁵ NEPA “merely prohibits uninformed—rather than unwise—agency action.”³⁶ In other words, taking the matter seriously—and rigorously examining a project’s impacts on climate change—does not necessarily prevent any Commissioner from ultimately concluding that a project meets the public interest standard.

15. Even if the Commission were to determine that a project’s GHG emissions are significant, that would not be the end of the inquiry nor would it mean that the project is not in the public interest or required by the public convenience and necessity. Instead, the Commission could require mitigation—as the Commission often does with regard to other environmental impacts. The Supreme Court has held that, when a project may cause potentially significant environmental impacts, the relevant environmental impact statement must “contain a detailed discussion of possible mitigation measures” to address adverse environmental impacts.³⁷ The Court explained that, “[w]ithout such a discussion, neither the agency nor other interested groups and individuals can properly evaluate the severity of the adverse effects” of a project, making an examination of possible mitigation measures necessary to ensure that the agency has taken a “hard look” at the environmental consequences of the action at issue.³⁸ The Commission not only has the

³⁴ After all, the standard the Commission typically uses for evaluating significance is whether the adverse impact would result in a substantial adverse change in the physical environment. *See id.* at 19. Surely that standard is open to some subjective interpretation by each Commissioner. What today’s order does not explain is why it is appropriate to exercise subjective interpretation and judgment when it comes to impacts such as geologic resources and soils, but not climate change.

³⁵ *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 37 (D.C. Cir. 2015).

³⁶ *Id.* (quoting *Robertson*, 490 U.S. at 351).

³⁷ *Robertson*, 490 U.S. at 351.

obligation to discuss mitigation of adverse environmental impacts under NEPA, but also the authority to condition certificates under section 7 of the NGA,³⁹ which could encompass measures to mitigate a project's GHG emissions.

16. Furthermore, a rigorous examination and determination of significance regarding climate change impacts would bolster any finding of public interest by providing the Commission a more complete set of information necessary to weigh benefits against adverse effects. By refusing to assess significance, however, the Commission short circuits any discussion of mitigation measures for the Project's GHG emissions, eliminating a potential pathway for us to achieve consensus on whether the Project is consistent with the public interest.

* * *

17. Today's order is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Project will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record cannot support the Commission's conclusion that there will be no significant

³⁸ *Id.* at 352; *see also* 40 C.F.R. §§ 1508.20 (defining mitigation), 1508.25 (including in the scope of an environmental impact statement mitigation measures). The discussion of mitigation is especially critical under today's circumstances where the Commission prepared an EA instead of an Environmental Impact Statement to satisfy its NEPA obligations. The EA relies on the fact that certain environmental impacts will be mitigated in order to ultimately find that the Project "would not . . . significantly affect[] the quality of the human environment." *See e.g.* EA at 12 (geologic resources). Absent these mitigation requirements, the Project's environmental impacts would require the Commission to develop an Environmental Impact Statement—a much more extensive undertaking. *See Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) ("If any 'significant' environmental impacts might result from the proposed agency action then an [Environmental Impact Statement] must be prepared before the action is taken.").

³⁹ 15 U.S.C. § 717f(e); Certificate Order, 170 FERC ¶ 61,201 at P 31 ("[T]he Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources . . . , including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.").

environmental impacts. Simply put, the Commission's analysis of the Project's consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Gulf South Pipeline Company, LP

Docket No. CP19-125-000

(Issued March 19, 2020)

McNAMEE, Commissioner, *concurring*:

1. Today's order issues Gulf South Pipeline Company, LP (Gulf South) a certificate to construct and operate its proposed Index 99 Expansion Project (Project) to provide 750,000 dekatherms per day (Dth/d) of firm transportation service to existing interconnects with Transcontinental Gas Pipeline Company, LLC and Sabine Pipe Line, LLC.¹
2. I fully support the order as it complies with the Commission's statutory responsibilities under the Natural Gas Act (NGA) and the National Environmental Policy Act (NEPA). The order determines that the Project is in the public convenience and necessity, finding that the Project will not adversely affect Gulf South's existing customers or competitor pipelines and their captive customers, and that Gulf South had taken appropriate steps to minimize adverse impacts on landowners.² The order also finds that the Project will not significantly affect the quality of the human environment.³ Further, the Commission has quantified and considered greenhouse gases (GHG) directly emitted by the construction and operation of the Project,⁴ consistent with the holding in *Sierra Club v. FERC (Sabal Trail)*.⁵
3. I write separately to respond to my colleague's argument that the NGA and NEPA requires the Commission to quantify and consider emissions related to the downstream use of natural gas. The NGA does not permit the Commission deny a pipeline application based on the environmental effects related to the downstream use of natural

¹ 170 FERC ¶ 61,201 (2020). The Project will provide 750,000 Dth/d using a combination of existing unsubscribed capacity (250,000 Dth/d) and new capacity made by the proposed expansion (500,000 Dth/d). *Id.* P 3.

² *Id.* PP 12-15.

³ *Id.* P 29.

⁴ *Id.* PP 27-28; EA at 47-48.

⁵ 867 F.3d 1357 (D.C. Cir. 2017).

gas, or require a pipeline to mitigate such effects, in determining whether a project is in public convenience and necessity.⁶

4. In *Adelphia Gateway, LLC (Adelphia)*, I issued a concurrence explaining that the text of the NGA does not support denying an application based on the environmental effects related to the upstream production and downstream use of natural gas. Rather, the text of NGA sections 1 and 7 make evident that Congress enacted the NGA to provide public *access* to natural gas,⁷ and does not provide the Commission with the authority to regulate the environmental impacts of upstream production or downstream use of natural gas, since such authority was provided to the U.S. Environmental Protection Agency (EPA) and the States.⁸ Further, acting on GHG emissions related to the upstream production and downstream use of natural gas would be contrary to subsequent acts by Congress—including the National Gas Policy Act of 1978,⁹ repeal of the Fuel Use Act of 1978,¹⁰ the Natural Gas Wellhead Decontrol Act of 1989,¹¹ and the Energy Policy Act of 1992.¹² In addition, the meaning of the public convenience and necessity does not support denying an application based on environmental effects that are unrelated to the construction and operation of the pipeline itself.¹³

⁶ Despite my colleague’s arguments to the contrary, I state in my concurrence in *Adelphia Gateway, L.L.C.* in which I incorporate herein that “[t]hrough the D.C. Circuit’s holding in *Sabal Trail* is binding on the Commission, it is not appropriate to expand that holding through the dicta in *Birckhead* so as to establish new authorities under the NGA and NEPA. The Commission is still bound by the NGA and NEPA as enacted by Congress, and interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony.” *Adelphia*, 169 FERC ¶ 61,220, at P 12 n.29 (2019) (McNamee, Comm’r, concurring) (McNamee Adelphia Concurrence).

⁷ *Id.* PP 15-24; *see also Weaver’s Cove Energy, LLC v. Rhode Island Coastal Res. Mgmt. Council*, 589 F.3d 458, 461 (1st Cir. 2009) (“The NGA was originally passed in the 1930s to facilitate the growth of the energy-transportation industry . . .”).

⁸ McNamee Adelphia Concurrence at PP 25-31.

⁹ *Id.* PP 33-35.

¹⁰ *Id.* P 36.

¹¹ *Id.* PP 37-38.

¹² *Id.* P 39.

¹³ *Id.* PP 41-47.

5. Further, I disagree with my colleague that the Commission should have determined whether the incremental GHG emissions directly emitted by the Project are “significant” using the Social Cost of Carbon or by establishing its own framework. In my concurrence in *Adelphia*, I explain why the Social Cost of Carbon is not a useful tool to determine whether the GHG emissions are “significant” and the Commission has no authority or reasoned basis to make a determination of significance using its own expertise.¹⁴

6. I also disagree with my colleague that it is appropriate for the Commission to establish out of whole cloth a GHG emission mitigation program, particularly when Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions over the last 15 years.¹⁵ As I explain in *Adelphia*, Congress delegated the Administrator of the EPA the exclusive authority to establish standards of performance for air pollutants, including GHGs.¹⁶ For logistical reasons and administrative efficiency, I hereby incorporate my entire analysis in *Adelphia* by reference and am not reprinting the full text of my analysis here.¹⁷

For the reasons discussed above and incorporated by reference herein, I respectfully concur.

Bernard L. McNamee
Commissioner

¹⁴ *Id.* PP 62-73.

¹⁵ *Id.* PP 52-61.

¹⁶ *Id.* PP 53-57.

¹⁷ *Id.* PP 15-73.