169 FERC ¶ 61,133
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

El Paso Natural Gas Company, L.L.C. Docket No. CP18-332-000

ORDER ISSUING CERTIFICATE

(Issued November 21, 2019)

1. On April 26, 2018, El Paso Natural Gas Company, L.L.C. (El Paso) filed an application in Docket No. CP18-332-000 pursuant to section 7(c) of the Natural Gas Act (NGA)[1] and Part 157 of the Commission's regulations,[2] seeking authorization to construct and operate its South Mainline Expansion Project comprising approximately 17 miles of loop pipeline facilities in Hudspeth and El Paso Counties, Texas, and two new compressor stations in Luna County, New Mexico and Cochise County, Arizona. El Paso also seeks a predetermination of rolled-in rate treatment for the costs associated with the project. We will grant the requested authorizations, subject to the conditions herein, as discussed below.

I. Background and Proposal

2. El Paso, a limited liability company organized and existing under the laws of the State of Delaware, is a natural gas company as defined by section 2(6) of the NGA, engaged in the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission.[3] El Paso owns and operates an integrated interstate pipeline system which extends from various natural gas production areas in the southwestern United States through the States of Oklahoma, Texas, New Mexico, Colorado, and Arizona, terminating at the Arizona-California border.

3. El Paso proposes to construct and operate the South Mainline Expansion Project to provide additional westbound transportation service for three shippers on El Paso's South Mainline system. In total, the project will provide 317,116 dekatherms (Dth) per day of

[1] 15 U.S.C. § 717f(c) (2012).

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

[3] 15 U.S.C. § 717(a)(6) (2012).

firm natural gas transportation service using a combination of existing unsubscribed capacity (135,031 Dth per day) and new capacity made available by the proposed expansion (182,085 Dth per day).[4] In order to provide customers with this service, El Paso proposes to:

1) construct a new, approximately 13,220 horsepower (hp) single gas turbine-powered Red Mountain Compressor Station located in Luna County, New Mexico;

2) construct a new, approximately 13,220 hp single gas turbine-powered Dragoon Compressor Station located in Cochise County, Arizona; and

3) construct an approximate 17-mile, 30-inch-diameter loop pipeline[5] of El Paso's existing Line Nos. 1100 and 1103 in El Paso County, Texas.

4. El Paso states that the construction of the new compression and loop line facilities will enable El Paso to provide an additional 182,085 Dth per day of firm expansion transportation service downstream (westbound) of its existing Hueco Compressor Station located in Hudspeth County, Texas.

5. The project is fully subscribed. El Paso conducted an open season for the South Mainline Expansion Project from June 2, 2016 to June 28, 2016. Following the open season, El Paso entered into an 18-year binding precedent agreement for firm transportation service with Comisión Federal de Electricidad (Comisión Federal).[6] This agreement took effect on April 1, 2017 with El Paso using existing, unsubscribed capacity to provide service for Comisión Federal prior to the in-service date of the South Mainline Expansion Project.[7] As of January 1, 2019, El Paso is using existing capacity to

[4] El Paso January 14, 2019 Response to Data Request at 4-5.

[5] A pipeline loop is a new pipeline placed adjacent to an existing pipeline and connected to that pipeline at both ends.

[6] Comisión Federal is a Mexican state-owned electric utility that engages in the generation, transmission, distribution, and sale of electric power.

[7] El Paso August 6, 2018 Responses to Data Requests at 8. El Paso began providing service for Comisión Federal on April 1, 2017, under the precedent agreement. From April 1, 2017, to December 31, 2018, El Paso used existing capacity to provide 261,747 Dth per day of service for Comisión Federal from receipt points in Blanco, New Mexico and the Permian Basin to the interconnection with El Paso's Samalayuca Lateral near El Paso, Texas. El Paso August 6, 2018 Responses to Data Requests at 11-12.

provide transportation service totaling 135,031 Dth per day—85,031 Dth per day from Blanco, New Mexico to Ehrenberg, Arizona and 50,000 Dth per day from Mendoza Trail, Texas to the connection with the Trans-Pecos pipeline in the Permian Basin—for Comisión Federal.[8] El Paso will continue to provide this service until the precedent agreement terminates on September 30, 2035.

6. After the in-service date of the South Mainline Expansion Project, El Paso will provide a total of 271,000 Dth per day of transportation service for Comisión Federal to delivery points along the Mexico-United States border in Texas and Arizona. In addition to the 135,031 Dth per day of service described above, El Paso will use expansion capacity to provide an additional 135,969 Dth per day of service for Comisión Federal until the termination of the precedent agreement.[9] This service will include an additional 2,869 Dth per day of service from Blanco, New Mexico to Ehrenberg, Arizona and a total of 133,100 Dth per day of service to the interconnection with Sierrita Gas Pipeline, LLC near Tucson, Arizona from three receipt points—12,100 Dth per day from Blanco, New Mexico, 85,000 Dth per day from Waha, Texas, and 36,000 Dth per day from Keystone, Texas.[10]

7. Following a supplemental open season held April 24, 2017 to May 15, 2017, El Paso entered into a 12-year binding precedent agreement with Salt River Project Agricultural Improvement and Power District (Salt River).[11] Under the agreement, El Paso will use expansion capacity to provide 29,167 Dth per day of service on a seasonally adjusted basis[12] from the Permian Basin to Salt River's Santan Generating Station in Gilbert, Arizona.[13]

8. El Paso continued to hold open seasons for the remaining 16,949 Dth per day of unsubscribed expansion service after filing its certificate application. Following the August 15 to September 12, 2018 open season, El Paso entered into a 25-year binding

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[8] El Paso August 6, 2018 Responses to Data Requests at 4-5, 13.

[9] *Id*. at 4-5, 14.

[10] *Id*.

[11] Salt River is a non-jurisdictional electric utility that serves the Phoenix, Arizona metropolitan area.

[12] 50,000 Dth per day of summer-only service.

[13] The Santan Generating Station is an existing gas-fired facility used to meet peak summer demand.

precedent agreement with Sempra Gas & Power Marketing, LLC ("Sempra").[14] Under this agreement, El Paso will use expansion capacity to provide 16,949 Dth per day of service on a seasonally adjusted basis from receipt points in the Permian Basin to Ehrenberg, Arizona.[15]

9. El Paso estimates that the expansion facilities will cost $127,900,000. El Paso proposes to use its existing system rates as initial recourse rates for firm service on the project and requests a predetermination that it may roll the project costs into its system rates in its next general section 4 rate proceeding. Comisión Federal and Salt River have elected to pay a negotiated rate. Sempra has agreed to pay the maximum applicable reservation rate for El Paso's California Rate Zone.

II. Notice, Interventions, Protests, and Comments

10. Notice of El Paso's application was published in the *Federal Register* on May 15, 2018, with comments due May 30, 2018.[16] NJR Energy Services Company, Salt River, Arizona Public Service Company, El Paso Municipal Customer Group, Atmos Energy Corporation, Southwest Gas Corporation, Apache Nitrogen Products, Inc., Freeport Minerals Corporation, Southern California Gas Company, and San Diego Gas & Electric filed timely, unopposed motions to intervene. Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure.[17] Adriana Castillo, a representative of El Paso Water, a local public utility company, filed comments which are addressed under environmental impacts, below.

11. El Paso Municipal Customer Group (Municipal Customers)[18] and Freeport Minerals Corporation (Freeport) both filed protests with their motions to intervene, opposing El Paso's requested predetermination of rolled-in rates. Both protests are

[14] Sempra is a wholly-owned indirect subsidiary of Sempra Energy, a public utility holding company based in San Diego, California.

[15] El Paso November 7, 2018 Supplemental Information.

[16] 83 Fed. Reg. 22,474 (2018).

[17] 18 C.F.R. § 385.214(c) (2019).

[18] Municipal Customers is composed of the following distributor-customers of El Paso: the Cities of Mesa, Benson, and Safford, Arizona; the Cities of Las Cruces, Deming, and Socorro, New Mexico; the Navajo Tribal Utility Authority; Graham County Utilities, Inc.; and Duncan Rural Service Corporation.

addressed below. El Paso filed an answer to the protests of the Municipal Customers and Freeport. The Commission's Rules of Practice and Procedure do not permit answers to protests unless otherwise ordered by the decisional authority;[19] however, we will accept El Paso's answer because it provides information that has assisted in our decision-making process.

III. Discussion

12. Because El Paso's proposed facilities will be used to transport natural gas in interstate commerce, subject to the Commission's jurisdiction, the construction, operation and abandonment of the facilities are subject to the requirements of subsections (c), and (e) of section 7 of the NGA.[20]

A. Application of Certificate Policy Statement

13. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.[21] 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. It explains that in deciding whether to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

14. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, or landowners and communities affected by the construction of the new natural gas facilities. If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate

[19] 18 C.F.R. § 385.213(a)(2) (2019).

[20] 15 U.S.C. §§ 717f(c) and (e) (2012).

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

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.

15. As stated above, the threshold requirement under the Certificate Policy Statement is that the applicant must be prepared to financially support the project without relying on subsidization from existing customers. El Paso proposes to charge its existing applicable rates under Rate Schedule FT-1 as the recourse rates for project service. As discussed below, illustrative rates calculated to recover the incremental costs associated with the project are lower than El Paso's existing system rates. Therefore, we will accept El Paso's proposal to charge its existing rates as initial recourse rates for service on the South Mainline Expansion Project. Further, as is also discussed below, the Commission is granting El Paso's request for a predetermination that El Paso may roll the costs of the South Mainline Expansion Project into its system rates in a future rate case because the revenue generated from the project's expansion service exceeds its estimated incremental cost of service. Therefore, we find that El Paso's existing customers will not subsidize the South Mainline Expansion Project and the Certificate Policy Statement's threshold requirement is met.

16. We also find that the South Mainline Expansion Project will not have an adverse effect on existing customers. The project is designed to provide the expansion service while maintaining existing services. Further, none of El Paso's existing customers have presented any concerns that the proposed project will result in degradation of their service. Nor is there any evidence that El Paso's proposal will displace existing service on other pipelines, and no other pipeline companies or their customers have objected to El Paso's proposal.

17. Construction of the South Mainline Expansion Project will be confined to areas adjacent to existing pipelines and facilities. El Paso proposes to co-locate the pipeline in an existing right-of-way and to site the new compressor stations within previously disturbed compressor station sites owned by El Paso. Thus, we find El Paso's proposal is designed to minimize adverse impacts on affected landowners and surrounding communities.

18. The South Mainline Expansion Project will enable El Paso to provide up to 317,116 Dth per day of firm natural gas transportation service for Comisión Federal, Salt River, and Sempra, which have signed eighteen-year, twelve-year, and twenty-five-year precedent agreements, respectively. Based on the benefits the proposal will provide, and the lack of effects on existing customers, other pipelines and their captive customers, landowners, and surrounding communities, we find, consistent with the Certificate Policy Statement and NGA section 7(c), that the public convenience and necessity requires approval of the South Mainline Expansion Project, as conditioned in this order.

B. Proposed Rates

1. Initial Recourse Rates

19. El Paso proposes to charge its existing Rate Schedule FT-1 zonal recourse rates for firm transportation service utilizing the project's facilities.

20. In designing an illustrative rate for the project, El Paso used a first-year cost of service of $19,762,604, reflecting a depreciation rate of 2.32 percent (including negative salvage), and a pre-tax return of 10.84 percent.[22] El Paso allocated both the fixed and variable portions of the project's total cost of service to the three delivery zones—Within Basin (WB), Arizona (AZ), and California (CA)—underlying the two Transportation Service Agreements (TSAs) that were supporting the expansion at the time El Paso filed the certificate application using the Commission-approved Dth per mile methodology. Applying the allocated cost of service to the contracted capacity for those supporting TSAs, El Paso derived illustrative stand-alone reservation charges for the three zones—$0.6230 per Dth for WB, $6.2476 per Dth for AZ, and $6.7727 per Dth for CA. These illustrative reservation charges are less than El Paso's currently effective zone recourse reservation charges of $4.2814 per Dth for WB, $13.7307 per Dth for AZ, and $13.7307 per Dth for CA, for transportation agreements under Rate Schedules FT-1. As the illustrative reservation charges for WB, AZ, and CA under Rate Schedule FT-1 are less than the currently effective recourse charges,[23] the Commission approves El Paso's proposal to charge system recourse reservation charges as the initial recourse charges for project service.

21. El Paso also calculated illustrative commodity charges for the three zones—$0.0001 per Dth for WB, $0.0008 per Dth for AZ, and $0.0009 per Dth for CA, which are less than El Paso's currently effective commodity charges of $0.0091 per Dth for WB, $0.0318 per Dth for AZ, and $0.0318 per Dth for CA. As the illustrative commodity charges for Rate Schedules FT-1 are less than the currently effective system recourse commodity charges, the Commission approves El Paso's proposal to charge system commodity charges as the initial recourse charges for project service.

[22] Application, Exhibit N, Page 1 of 4.

[23] Because the maximum recourse rates were subject to refund in Docket No. RP10-1398 at the time of the filing, El Paso performed an additional comparison to the compliance rates ordered in Opinion No. 528-A. Based on that comparison, the illustrative rates are still lower than the compliance rates.

2. Fuel

22. El Paso proposes to recover any compressor fuel and any lost and unaccounted for volumes through El Paso's system fuel rate. El Paso filed three different studies demonstrating that the fuel retention rates for both the mainline and the Permian Basin zones decrease after the South Mainline Expansion is placed in service.

23. In its Motion to Intervene and Protest, the Municipal Customers state that "[El Paso] appears to use throughput quantities from existing capacity that would invalidate its studies" and asks the Commission to scrutinize El Paso's request to use its system fuel rate for the expansion project.[24]

24. El Paso's studies appropriately included throughput quantities from existing capacity. When the Commission looks at the impact of an expansion on the pipeline's fuel rate, the Commission looks at the additional fuel being consumed by the new compression (if applicable) as well as the underlying throughput from the expansion to determine how these two factors impact the pipeline's existing fuel rate.[25] If the addition of the new compression and throughput will result in a reduction in the pipeline's existing fuel rate, the Commission will approve the use of the system fuel rate for the project as existing shippers will benefit from the lower fuel rate.[26]

25. El Paso's studies, based on a variety of different variables and scenarios, show that fuel rates for both the mainline and the Permian Basin will decrease after the South Mainline Expansion is placed in service. In the first study, the mainline and the Permian Basin rates decrease from 2.29 percent and 0.42 percent, to 1.85 percent and 0.33 percent, respectively; in the second study, the rates decrease from 1.74 percent for the mainline and 0.22 percent for the Permian Basin, to 1.71 percent and 0.18 percent, respectively; and, in the third study the rates decrease from 2.29 percent and 0.42 percent for the mainline and Permian Basin to 2.23 percent and 0.40 percent, respectively. Because existing shippers will see a lower retention rate both on El Paso's mainline and in the Permian Basin once the new facilities are placed into service, the Commission accepts El Paso's request to use its system fuel rates for the project.

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[24] Municipal Customers May 30, 2018 Protest at 5.

[25] *ANR Pipeline Co.*, 156 FERC ¶ 61,212, at P 26 (2016).

[26] *Id.*; *see also Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069, at P 60 (2007) (granting pre-determination of rolled-in rate treatment for fuel costs where existing customers will have lower overall transportation and fuel rates after the addition of the expansion facilities).

3. Rolled-in Rate Treatment

26. El Paso requests a predetermination of rolled-in rate treatment for the project's cost in a future NGA section 4 general rate case. El Paso conducted a rolled-in cost study and made two arguments to support their request: (1) the illustrative rates are substantially lower than the contract negotiated rates, the currently effective maximum recourse rates, and the compliance rates ordered in Opinion No. 528-A; and (2) the revenue of $29,016,065 generated using the lesser-of the negotiated rates of the agreements with Comisión Federal and Salt River supporting the South Mainline Expansion Project or the maximum recourse rates far exceeds the project's cost of service of $19,762,604.

27. Freeport contends that El Paso's first argument for a predetermination of rolled-in rate treatment is flawed because, in its illustrative study, El Paso compares the illustrative incremental rates to the existing rates, which do not reflect the recent decrease in corporate income tax rate from 35 percent to 21 percent.[27] They state that El Paso should wait for the then-pending determination in Docket No. RM18-11-000, which "will establish the procedures for ensuring that the economic benefits related to the reduction in the federal corporate income tax rate are passed through to [El Paso's] customers."[28] In its answer, El Paso contends that it would be inappropriate for the Commission to deviate from current policy—in this case, the current tax policies—until it issues a final rule.[29]

28. The Commission does not base its predetermination of rolled-in rate treatment on a comparison between the illustrative rates and general system rates.[30] Rather, as explained below, when making a predetermination of rolled-in rate treatment, the Commission analyzes whether the project's revenues exceed the project's costs.[31] Accordingly, Freeport's concerns regarding the correct recourse rates to use in comparison to the illustrative incremental rates is irrelevant to our roll-in analysis.

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[27] Freeport May 30, 2018 Protest at 3.

[28] *Id*. at 4 (citing *El Paso Natural Gas Co.*, 163 FERC ¶ 61,079, at P 149 (2018)).

[29] El Paso June 14, 2018 Answer to Protests at 9 (citing *ANR Pipeline Co*., 87 FERC ¶ 61,241, at 61,943 (1999)).

[30] *Tennessee Gas Pipeline Company, L.L.C.*, 165 FERC ¶ 61,217, at P 8 (2018).

[31] *Id*.

29. The Municipal Customers argue that El Paso's request is flawed because in its revenue analysis El Paso included existing capacity to calculate project rates, contrary to Commission precedent.[32] In its answer, El Paso responds that it is appropriate to consider revenue generated from both existing and expansion capacity when determining whether to grant a pre-determination of rolled-in rate treatment because, unlike in *Florida Gas*,[33] the project shippers are not served solely by existing capacity and "the existing and expansion capacity combine to form an integrated capacity portfolio tailored to suit [Comisión Federal's and Salt River's] transportation needs."[34] El Paso states that it developed the South Mainline Expansion Project with the goal of relieving Texas-area constraints and facilitating east-to-west deliveries to New Mexico, Arizona and California markets in response to market demand.[35] El Paso states that Comisión Federal and Salt River recognized this value in contracting for the capacity that is underpinning the expansion.[36] Prior to the in-service date of the South Mainline Expansion Project, Comisión Federal's primary delivery points are predominantly in Texas.[37] However, upon completion of the project, and elimination of the Cornudas area constraints, the majority of the service capacity for Comisión Federal is provided to Arizona delivery points.[38] Further, all of Salt River's 29,167 Dth per day on a seasonally adjusted basis is being delivered to Arizona delivery points.[39] El Paso states that in the absence of either the existing capacity or the South Mainline Expansion Project, El Paso would not be able to meet its obligations to Comisión Federal and Salt River because the expansion

[32] Municipal Customers May 30, 2018 Protest at 4-5 (citing *Florida Gas Transmission Co.,* LLC, 154 FERC ¶ 61,256, at P 23 (2016)).

[33] *Florida Gas Transmission Co.,* LLC, 154 FERC ¶ 61,256.

[34] El Paso June 14, 2018 Answer to Protests at 3.

[35] *Id*. at 5.

[36] *Id.*

[37] *Id*.

[38] *Id*.

[39] *Id*.

capacity is "integral to enabling the existing capacity to be used to serve the project shipper."[40]

30. We decline to determine whether it is appropriate to consider revenue from existing capacity in this instance because, as explained below, when El Paso's contract with Sempra entered October 15, 2018 is also considered, the projected revenues from expansion service alone exceed the project's estimated incremental cost of service.

31. The Commission grants a predetermination favoring rolled-in rate treatment for an expansion project's costs when projected incremental revenues for the project exceed the project's estimated incremental cost of service.[41] 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 revenues generated using actual contract volumes and either the maximum recourse rate or, if the negotiated rate is lower than the recourse rate, the actual negotiated rate.[42]

32. The South Mainline Expansion Project will result in 182,085 Dth per day of new expansion service that has been contracted for by Comisión Federal, Salt River, and Sempra. Under its contract with Comisión Federal, El Paso will provide 133,100 Dth per day of service using expansion capacity to the Sierrita Gas Pipeline, LLC (Sierrita) interconnect in the AZ delivery zone, and 2,869 Dth per day of service using expansion capacity to an interconnection in Ehrenberg, Arizona, in the CA delivery zone. Under its contract with Salt River, El Paso will provide 29,167 Dth per day of service on a seasonally adjusted basis using expansion capacity to Salt River's Santan Generating Station in Gilbert, Arizona in the AZ delivery zone. Under its contract with Sempra, El Paso will provide 16,949 Dth per day of service on a seasonally adjusted basis using expansion capacity to Ehrenberg, Arizona in the CA delivery zone. The revenue from these contracts totals $20,825,403 ($13,822,163 for Comisión Federal, $4,324,934 for

[40] *Id*. at 4 (quoting *ANR Pipeline Co.,* 156 FERC ¶ 61,212, at P 22, n.22 (2016) and citing *Tennessee Gas Pipeline Co.*, 161 FERC ¶ 61,265, at P 30 (2017)).

[41] *See Tennessee Gas Pipeline Co.*, 161 FERC ¶ 61,265, at P 28 (2017), *reh'g denied*, 165 FERC ¶ 61,217, at P 13 (2018); *Dominion Transmission, Inc.,* 144 FERC ¶ 61,182, at P 19 (2013), and Certificate Policy Statement, 88 FERC ¶ 61,227 (1999).

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

Salt River, and $2,678,306 for Sempra).[43] This total revenue exceeds the cost of service for the project of $19,762,604. Therefore, the Commission approves El Paso's request for pre-determination of rolled-in rate treatment, absent a significant change in circumstances.

4. Negotiated Rates

33. El Paso proposes to provide service to Comisión Federal and Salt River under negotiated rate agreements. El Paso must file either the negotiated rate agreements or tariff records setting forth the essential elements of the agreements in accordance with the Alternative Rate Policy Statement[44] and the Commission's negotiated rate policies.[45] El Paso must file the negotiated rate agreements or tariff records at least 30 days, but no more than 60 days, before the proposed effective date for such rates.[46]

5. Reporting Incremental Project Costs

34. The Commission will require El Paso to keep separate books and accounting of costs and revenues attributable to the proposed incremental services and capacity created by the South Mainline Expansion Project in the same manner as required by section 154.309 of the Commission's regulations.[47] The books should be maintained

[43] These revenues are based on the rates provided in the Application for Comisión Federal and Salt River and the rates provided in the TSA for Sempra. Application, Exhibit N, Page 4 of 4; El Paso November 7, 2018 Supplemental Information.

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

[45] *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).

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

[47] 18 C.F.R. § 154.309 (2019).

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.[48]

C. Environmental Impacts

35. On June 7, 2018, the Commission issued a *Notice of Intent to Prepare an Environmental Assessment* (NOI). The NOI was published in the *Federal Register* on June 13, 2018 and sent to affected landowners; federal, state, and local government agencies; elected officials; environmental and public interest groups; Native American tribes; other interested parties; and local libraries and newspapers.[49]

36. In response to the NOI, the Commission received comments from El Paso Water, the Ysleta del Sur Pueblo Tribe, and the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS) New Mexico and Arizona state offices. El Paso Water requested that El Paso review its plans with El Paso Water to avoid conflict with water mains and appurtenant structures in the Homestead Meadows neighborhood. The Ysleta del Sur Pueblo Tribe stated that it had no comments or concerns with the proposed project, but requested consultation in the event that any human remains or artifacts are unearthed during project construction. The NRCS Arizona State Office noted that the Dragoon Compressor Station site does not include prime or agricultural farmland, and therefore is exempt from review under the national Farmland Protection Policy Act. The NRCS New Mexico State Office stated it had no comments on the proposed project.

37. To satisfy the requirements of the National Environmental Policy Act of 1969, our staff prepared an Environmental Assessment (EA) for El Paso's proposal. The analysis in the EA addresses geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, air quality, noise, safety, socioeconomics, cumulative impacts, and alternatives. All substantive comments received in response to the NOI were addressed in the EA. The EA was placed into the public record on November 14, 2018 with a 30-day comment period.

1. Downstream Greenhouse Gas Emissions

38. The EA provided an estimate of 1.0 million metric tons of carbon dioxide (CO_2) per year from the combustion of the natural gas at the Santan Generating Plant, based on

[48] *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262 (2008).

[49] 83 Fed. Reg. 27,596 (2018).

50,000 Dth per day of transportation service provided under the Salt River contract.[50] However, after the EA was issued, El Paso clarified that the contract with Salt River provides summer-only service, equal to 29,167 Dth per day on a seasonally adjusted basis.[51] As such, the estimated GHG emissions from the end-use combustion of the natural gas provided to the Santan Generating Plant for Salt River are lower than the estimates presented in the EA.[52] Fully combusting 29,167 Dth per day of gas would produce approximately 0.56 million metric tons of CO_2 per year, which represents a 0.65 percent increase in CO_2 emissions in Arizona,[53] and an approximately 0.0098 percent increase in national CO_2 emissions.[54]

39. Additionally, the EA's downstream GHG emissions discussion needs to be further updated to reflect that the remaining 16,949 Dth per day of transportation service is now subscribed by Sempra.[55] In response to Commission staff's inquiry, El Paso stated that the natural gas being transported under the contract with Sempra "will likely be used to generate electric power."[56]

40. The D.C. Circuit Court of Appeals in *Sierra Club v. FERC*, held that where it is known that the natural gas transported by a project will be used for a specific end-use combustion, the Commission should "estimate[] the amount of power-plant carbon

[50] EA at 83.

[51] El Paso January 14, 2019 Response to Data Request.

[52] EA at 83.

[53] Based on Arizona's GHG emissions of 86.1 million metric tons of CO_2 from fossil fuel consumption for the 2017 calendar year. U.S. Energy Information Admin., *Arizona Carbon Dioxide Emissions from Fossil Fuel Consumption* (2019), https://www.eia.gov/environment/emissions/state/.

[54] Based upon national net emissions of 5,742.6 million metric ton of CO_2e for the 2017 calendar year. U.S. Envtl. Protection Agency, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017* at ES-8 (2019), https://www.epa.gov/sites/production/files/2019-04/documents/us-ghg-inventory-2019-main-text.pdf.

[55] El Paso November 7, 2018 Supplemental Information.

[56] El Paso April 26, 2019 Response to Data Request.

emissions that the pipelines will make possible."[57] Subsequently, the D.C. Circuit in *Birckhead v. FERC*, noted that "emissions from downstream gas combustion are [not], as a categorical matter, always a reasonably foreseeable indirect effect of a pipeline project,"[58] but that the Commission must at least attempt to obtain information regarding the end-use of the gas.[59] We disagree with the dissent's assertion that we should rely on generalized statements regarding the end-use of gas delivered by the project. Sempra is a power marketer that does not own or control any generation or transmission facilities.[60] Sempra holds natural gas transportation and storage capacity, performs asset optimization, gas and power commodity purchases and sales, and derivative swap transactions.[61] Because marketers hold a portfolio of physical capacity assets and supply contracts which they use in combination to move gas from supply areas or hubs to their end-use customers, and because their customers and destinations do not remain fixed, but will change over the life of their contracts, the ultimate destination of gas transported on capacity subscribed by a marketer cannot be predicted with any specificity. Accordingly, El Paso's generalized statement does not provide evidence that it is reasonably foreseeable that the gas that will be transported using Sempra's capacity will be used for electric generation. Therefore, with the inclusion of the downstream emissions from Salt River's Santan Generating Plant, we have considered all reasonably foreseeable downstream greenhouse gas emissions caused by the project.

2. Response to Comments

41. The Commission received comments on the EA from the Texas Parks and Wildlife Department (Texas PWD), El Paso on December 14, 2018 and January 3, 2019, the San Carlos Apache Tribe, and Teamsters National Pipeline Labor Management Trust (Teamsters).

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

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

[59] *Id.* at 520.

[60] *See* Letter Order Granting Market Based Rate Authorization to Sempra at 2, Docket No. ER16-1833-000 (July 20, 2016).

[61] *See* SD&GE published list of energy marketing affiliates https://www.sdge.com/rates-and-regulations/other-regulatory-filings/energy-marketing-affiliates

a. Texas Parks and Wildlife Department

42. Texas PWD's comments address general construction practices, impacts on vegetation and wildlife habitat, and protections for migratory birds and certain state-listed species. Best management practices and mitigation measures addressing these concerns were included in El Paso's Environmental Compliance Management Plan and in Resource Report 3 and were reported in the EA.[62] Texas PWD identifies some additional issues, discussed below, that were not addressed in the EA. These include specific erosion and sedimentation control measures aimed at preventing species impacts, and other species-specific recommendations.

43. El Paso responded to Texas PWD's comments on January 2, 2019. El Paso states that it will implement best management practices to reduce the potential for impacts on habitat and wildlife resources.

44. We have reviewed El Paso's proposed measures for wildlife protection in its application and the additions to those measures described in its January 2, 2019 letter. As explained below, El Paso's measures are consistent with industry-wide construction and environmental protection practices, and we find them acceptable to protect wildlife and vegetation.

i. General Construction and Vegetation/Wildlife Habitat Protection

45. Texas PWD recommends that El Paso use erosion and seed/mulch stabilization materials that avoid entanglement hazards to snakes and other wildlife, such as no-till seed drilling, hydromulching, and/or hydroseeding, and erosion control blankets made of loosely woven, natural fiber netting.

46. El Paso states that it will require its contractor to use loosely woven, natural fiber netting for erosion and seed/mulch stabilization that allows for the expansion of mesh openings to protect wildlife.[63] El Paso states that it will replace the removed topsoil, till, and then use seed drilling where practical for seed replacement.[64] Where seed drilling is not practical, El Paso will consider broadcasting with crimping the mulch and hydromulching.[65] We find these measures consistent with the best management practices

[62] EA at 40, 42.

[63] El Paso January 2, 2019 Answer to Texas PWD.

[64] *Id*.

[65] *Id*.

for the successful revegetation of the right-of-way, while protecting snakes and other wildlife.

ii. Migratory Birds and the Western Burrowing Owl

47. For migratory birds, Texas PWD recommends: (1) avoiding vegetation clearing activities during the general bird nesting season or, if unavoidable, survey the area to ensure that no nests with eggs or young will be disturbed by operations; (2) maintaining a 150-foot buffer of vegetation around any observed nests; and (3) avoiding disturbing areas with occupied nests until the eggs have hatched and the young have fledged.

48. For the Western burrowing owl, a state-listed species, Texas PWD specifically recommends: (1) surveying the project area for mammal burrows or any urban structures that may provide suitable habitat for the burrowing owl prior to construction; (2) protecting any identified nests from destruction and disturbance; and (3) leaving identified nests in place rather than relocating them.

49. The EA describes the measures El Paso will take to reduce the project's impact on migratory birds, including the Western burrowing owl.[66] El Paso will minimize the amount of vegetation cleared, remove vegetation prior to nesting season to discourage migratory birds from building nests in the project area, have a qualified biologist conduct Western burrowing owl nesting surveys prior to any ground disturbance, and, if nests are found before or during construction, consult with the U.S. Fish and Wildlife Service to develop measures to avoid destroying the nest.[67] We find these measures will adequately minimize the impacts on the Western burrowing owl and other migratory birds.

iii. Other State-listed Species

50. Texas PWD also recommends measures to protect four other state-listed sensitive species: the Texas horned lizard, the black-tailed prairie dog, Wheeler's spurge, and the kit fox. Texas PWD recommends: (1) surveying for lizards and prairie dogs prior to disturbance and relocating them off-site; (2) fencing off active construction areas to wildlife; (3) covering any open trenches overnight and inspecting areas for trapped wildlife; (4) if the site is found to have unavoidable habitat for the horned lizard or prairie dogs, having a biological monitor be present during construction activities and training contractors to identify horned lizards and prairie dogs where feasible; and (5) conducting a survey for Wheeler's spurge and if found, avoiding adverse impacts to plants to the

[66] EA at 46-47.

[67] *Id*.

extent possible. Texas PWD also recommends taking precautions to avoid impacts to kit fox if they are found in the project area.

51. As indicated in the EA, El Paso did not identify any Texas horned lizards or black-tailed prairie dogs during its biological site surveys.[68] As discussed in the EA[69] and the supplemental information filed by El Paso on January 2, 2019, El Paso's wildlife protection measures include providing environmental awareness training to construction personnel, checking for wildlife under vehicles and equipment and in trenches and uncapped pipe segments, and installing escape ramps in trenches. In addition, El Paso will provide an Environmental Monitor on-site to assess the presence of prairie dogs or horned lizards in the construction area.[70] El Paso commits to relocate any horned lizards in the work area and will contact a prairie dog relocation specialist if prairie dogs are found on the project site.[71]

52. No Wheeler's spurge was identified during El Paso's biological site surveys. As described above, El Paso will minimize the amount of vegetation cleared and restore vegetation in accordance with its Reclamation Plan. For the kit fox, construction personnel will receive environmental awareness training and check for wildlife under equipment and vehicles and in trenches, and escape ramps will be installed in trenches. We find El Paso's proposed measures for state-listed species responsive to Texas PWD's recommendations.

b. El Paso

53. In its December 14, 2018 comments, El Paso opposes the EA's recommended environmental condition 12 that, with two exceptions, would require El Paso to restrict the new permanent pipeline right-of-way width for the South Mainline Expansion Project's 17-mile loop line to 25 feet immediately adjacent to the existing operational right-of-way and to 50 feet where the loop deviates from the existing operational right-of-way. Instead, El Paso contends that the Commission should authorize an additional 60-foot width permanent right-of-way along the loop line as requested in its application. By way of support, El Paso states that sandy soils throughout the general project area require additional workspace during construction and for future maintenance activities. El Paso asserts that its operational and maintenance experience with the existing pipeline demonstrates the necessity for additional room to shore up the trench walls during

[68] *Id*. at 49.

[69] EA at 45-47.

[70] El Paso January 2, 2019 Answer to Texas PWD at 3-4.

[71] *Id*.

construction and during any future maintenance activities that require excavation on the right-of-way. El Paso states that having a larger right-of-way would potentially reduce the amount of damages El Paso would have to pay to affected landowners during initial construction and after the future maintenance. El Paso also notes that it has already been obtaining easements along the loop line that are 60 feet or more in width and that having varying widths of easement in this area would lead to confusion in future right-of-way maintenance.

54. We agree with staff's assessment in the EA that El Paso has failed to support its asserted need for a larger permanent (as opposed to construction) right-of-way for the entire length of the South Mainline Expansion Project pipeline loop.[72] We note that the current alignment for the proposed loop is 30 feet off El Paso's existing Line 1100 centerline. Based on general industry standards for pipelines, the Commission has long found that granting an additional permanent right-of-way width of 25 feet when looping, and 50 feet for new (i.e., non-looped) pipeline segments that are not aligned adjacent to the mainline, is generally appropriate.[73] Where specific circumstances make it appropriate to deviate from the standard guidelines, the Commission does so.[74]

55. El Paso argues that recommended environmental condition 12's permanent right-of-way restrictions would result in El Paso's right-of-way being an inconsistent width. However, we note that El Paso's current permanent right-of-way along the proposed project alignment ranges from 80 to 120 feet wide. Further, as requested in El Paso's application and explained in the EA, recommended environmental condition 12 grants two requested exceptions from a uniform right-of-way width: (1) a 100-foot width additional permanent right-of-way where the project crosses sand dunes, and; (2) no additional permanent right-of-way where the project crosses through a residential area.

[72] EA at 12-13.

[73] Commission's January 2017 Guidance Manual for Environmental Report Preparation For Applications Filed Under the Natural Gas Act (https://www.ferc.gov/industries/gas/enviro/guidelines/guidance-manual-volume-1.pdf).

[74] For example, in this proceeding the EA's recommended environmental condition 12 grants, as El Paso requested, a 100-foot wide permanent right-of-way between mileposts 188.25 and 189.00 because the pipeline crosses sand dunes. Similarly, no additional right-of-way was requested by El Paso for the portion of the project between mileposts 189.3 and 190.7, and none was recommended in the EA, because the pipeline crosses through a residential area; that segment of line will be placed within El Paso's existing right-of-way.

56. The fact that El Paso has already negotiated wider easements for the segments of proposed pipeline does not persuade us to grant additional expanded rights-of-way as a part of our certificate. The extent to which El Paso has been able to negotiate pre-certificate easements with willing landowners is not dispositive of our determination regarding what is required by the public convenience and necessity. We note that project proposals submitted by applicants for consideration by the Commission are always subject to change—a proposed project may or may not be approved, and proposed right-of-way dimensions may be adjusted or proposed routes changed via variations or alternatives.[75]

57. Based on industry standards and our staff's longstanding oversight of right-of-way operational requirements, we find that an additional 60 feet of permanent right-of-way for the South Mainline Expansion Project is unnecessary for operational and maintenance purposes.[76] We believe that recommended environmental condition 12, now included as a condition to this order, appropriately limits El Paso's expanded permanent right-of-way to a width necessary for operations. Further, this condition will ensure that El Paso's vegetation maintenance activities are restricted to only the additional permanent right-of-way authorized by this order.[77]

c. San Carlos Apache Tribe

58. In its letter dated November 21, 2018, the San Carlos Apache Tribe concurs with the EA conclusions and requests to be contacted should there be any change in the project.

d. Teamsters

59. The Teamsters comment that the project should employ local union contractors and include a number of purported environmental, socioeconomic, and construction advantages of using unionized labor. They also submitted a copy of a brochure

[75] *See, e.g.*, *Nexus Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 150 (2017) (requiring centerline adjustments and workspace modifications to proposed routes and easements to respond to landowner requests, reduce environmental impacts, and/or address engineering constraints).

[76] If, in the future, El Paso is able to demonstrate the need for additional right-of-way to perform maintenance activities, it may seek additional Commission approval at that time.

[77] Commission's Upland Erosion Control, Revegetation and Maintenance Plan, at 17 (May 2013) (https://www.ferc.gov/industries/gas/enviro/plan.pdf).

describing the services that the Teamsters provide during pipeline construction. The Commission cannot require El Paso to hire union contractors or a specific service provider; it is in El Paso's discretion to determine whether to use union contractors and Teamster-provided services.[78]

IV. Conclusion

60. Based on the analysis in the EA, as supplemented herein, we conclude that if constructed and operated in accordance with El Paso's application and supplements, including any commitments made therein, 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. 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.

61. 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.[79]

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[78] *Columbia Gas Transmission*, 166 FERC ¶ 61,037, at n.40 (2019).

[79] *See* 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) 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).

62. At a hearing held on November 21, 2019, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

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

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

1) El Paso's completing the authorized 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) El Paso's compliance with all applicable Commission regulations, 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) El Paso's adherence to 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) El Paso's proposal to charge its existing system recourse rates under Rate Schedules FT-1 as initial rates and its system fuel rate is approved.

(D) El Paso's request for a predetermination supporting rolled-in rate treatment for the costs of the South Mainline Expansion Project in its next NGA general section 4 rate proceeding is granted.

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

(F) E Paso shall file the negotiated rate agreements or tariff records at least 30 days, but not more than 60 days, prior to the commencement of service.

(G) El Paso 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 or notifies El Paso. El Paso 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)

Kimberly D. Bose,
Secretary.

Appendix

Environmental Conditions

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

1. El Paso 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 environmental assessment (EA), unless modified by the Order. El Paso must:

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

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

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

3. **Prior to any construction**, El Paso 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, supplemented by filed alignment sheets, and shall include the right-of-way modification identified in condition number 12. **As soon as they are available, and before the start of**

construction, El Paso 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.

El Paso'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. El Paso'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. El Paso 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 which do not affect other landowners or sensitive environmental areas such as wetlands.

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

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

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

    a. how El Paso 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 El Paso 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 El Paso 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 El Paso's organization having responsibility for compliance;
    g. the procedures (including use of contract penalties) El Paso 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. El Paso shall employ at least one EI for the Project. 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. a full-time position, separate from all other activity inspectors;
e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, El Paso shall file updated status reports with the Secretary on a **biweekly 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 El Paso'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 during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
d. a description of the corrective actions implemented in response to all instances of noncompliance;
e. the effectiveness of all corrective actions implemented;
f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
g. copies of any correspondence received by El Paso from other federal, state, or local permitting agencies concerning instances of noncompliance, and El Paso's response.

9. El Paso must receive written authorization from the Director of OEP **before commencing construction of any Project facilities.** To obtain such authorization, El Paso must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

10. El Paso must receive written authorization from the Director of OEP **before placing the Project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the ROW and other areas affected by the Project are proceeding satisfactorily.

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

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

12. El Paso shall restrict the new permanent pipeline right-of-way width for the Loop Line to 25 feet immediately adjacent to its existing operational right-of-way and restrict the new permanent pipeline right-of-way width to 50 feet where the proposed loop deviates from its existing operational right-of-way. This permanent pipeline right-of-way restriction applies between approximate mileposts 174.5 and 191.5, with the exception of the sand dune area between mileposts 188.25 and 189.00, where a 100-foot-wide right-of-way is required, and the residential area between approximate mileposts 189.3 and 190.7, where no additional permanent right-of-way is proposed.

13. **Prior to construction of the Loop Line,** El Paso shall file with the Secretary, for review and written approval by the Director of OEP, evidence of landowner concurrence with the site-specific construction plan near milepost 190.83 or file a revised site-specific construction plan near milepost 190.83 that maintains a 10 foot buffer between the aboveground structures and the additional temporary workspace.

14. **Prior to construction of the horizontal directional drill (HDD) crossing along the Loop Line at Montana Avenue**, El Paso shall file with the Secretary, for review and written approval by the Director of OEP, the specific design requirements for El Paso's chosen noise mitigation method for the HDD entry site. Such design requirements shall be included in a noise mitigation plan, accompanied by a diagram illustrating the placement of the mitigation structure(s) in relation to the HDD entry site equipment and nearby noise sensitive areas (NSAs) (as identified in its acoustic assessment report filed September 14, 2018), dimensions of the structure(s), minimum Sound Transmission Class rating for the structure(s), and supporting calculations estimating the expected mitigated day-night sound level on the A-weighted scale (L_{dn}) at nearby NSAs. During drilling operations, El Paso shall implement the approved plan, monitor noise levels, include the initial noise levels in its biweekly status reports, and make all

reasonable efforts to restrict the noise attributable to the drilling operations to no more than an L_{dn} of 55 decibels on the A-weighted scale (dBA) at the NSAs.

15. El Paso shall make all reasonable efforts to ensure its predicted noise levels from the Dragoon and Red Mountain Compressor Stations are not exceeded at nearby NSAs and file with the Secretary noise surveys for the stations **no later than 60 days** after placing each station into service. If a full power load condition noise survey is not possible, El Paso should file an interim survey at the maximum possible power load **within 60 days** of placing the station into service and file the full power load survey **within 6 months.** If the noise attributable to operation of all equipment at the stations under interim or full power load conditions exceeds an L_{dn} of 55 dBA at any nearby NSA**,** El Paso shall:

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

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

El Paso Natural Gas Company, L.L.C. Docket No. CP18-332-000

(Issued November 21, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today's order because it violates both the Natural Gas Act[1] (NGA) and the National Environmental Policy Act[2] (NEPA). The Commission once again refuses to consider the consequences its actions have for climate change. Although neither the NGA nor NEPA permit the Commission to assume away the climate change implications of constructing and operating this project, that is precisely what the Commission is doing here.

2. In today's order authorizing El Paso Natural Gas Company's (El Paso) proposed South Mainline Expansion Project (Project), the Commission continues to treat greenhouse gas (GHG) emissions and climate change differently than all other environmental impacts.[3] The Commission again refuses to consider whether the Project's contribution to climate change from GHG emissions would be significant, even though it quantifies the direct GHG emissions from the Project's construction and operation as well as a fraction of its downstream GHG emissions.[4] That failure forms an integral part of the Commission's decisionmaking: The refusal to assess the significance of the Project's contribution to the harm caused by climate change is what allows the Commission to state that approval of the Project "would not constitute a major federal action significantly affecting the quality of the human environment"[5] and, as a result, conclude that the Project is in the public interest and required by the public convenience and necessity.[6] Claiming that a project has no significant environmental impacts while at

[1] 15 U.S.C. § 717f (2012).

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

[3] *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133, at P 4 (2019) (Certificate Order); South Mainline Expansion Project Environmental Assessment (EA) at 8.

[4] As discussed further below, *see infra* PP 10-11, the Commission quantified the downstream GHG emissions for the capacity subscribed by Salt River Project, but not the capacity subscribed by the Project's other domestic customer, Sempra Gas & Power Marketing, LLC (Sempra).

[5] Certificate Order, 169 FERC ¶ 61,133 at P 57; EA at 118.

[6] *Id.* at P 18.

the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking.

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

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

4. We know with certainty what causes climate change: It is the result of GHG emissions, including carbon dioxide and methane, released in large quantities through the production, transportation, and the consumption of fossil fuels, including natural gas. The Commission recognizes this relationship, finding, as it must, that climate change is "driven by accumulation of GHG in the atmosphere primarily through combustion of fossil fuels" and that emissions from the Project's construction and operation, in combination with emissions from other sources, would "contribute incrementally to future climate change impacts."[7] 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.[8]

[7] EA at 111-112.

[8] Section 7 of the NGA requires that, before issuing a certificate for new pipeline construction, the Commission must find both a need for the pipeline and that, on balance, the pipeline's benefits outweigh its harms. 15 U.S.C. § 717f. Furthermore, NEPA requires the Commission to take a "hard look" at the environmental impacts of its decisions. *See* 42 U.S.C. § 4332(2)(C)(iii); *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). This means that the Commission must consider and discuss the significance of the harm from a pipeline's contribution to climate change by actually evaluating the magnitude of the pipeline's environmental impact. Doing so

5. Today's order falls short of that standard. As part of its public interest determination, the Commission must examine the Project's impact on the environment and public safety, which includes the facility's impact on climate change.[9] That is now clearly established D.C. Circuit precedent.[10] The Commission, however, insists that it need not consider whether the Project's contribution to climate change is significant because there is "no generally accepted significance criteria for GHG emissions."[11] 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.[12] 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,

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enables the Commission to compare the environment before and after the proposed federal action and factor the changes into its decisionmaking process. *See Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) (*Sabal Trail*) ("The [FEIS] needed to include a discussion of the 'significance' of this indirect effect."); 40 C.F.R. § 1502.16 (a)–(b) (An agency's environmental review must "include the environmental impacts of the alternatives including the proposed action," as well as a discussion of direct and indirect effects *and their significance*. (emphasis added)).

[9] *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").

[10] *See Allegheny Def. Project v. FERC*, 932 F.3d 940, 945-46 (D.C. Cir. 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 9.

[11] *See* EA at 112 ("There is no standard methodology to estimate what extent[] a project's incremental contribution to greenhouse gas emissions would result in physical effects on the environment for the purposes of evaluating the Project's impacts on climate change, either locally or nationally.").

[12] *See* Certificate Order, 169 FERC ¶ 61,133 at P 57 (approval of Project would not constitute a major federal action significantly affecting the quality of the human environment); EA at 118.

unreasoned, and an abdication of our responsibility to give climate change the "hard look" that the law demands.[13]

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

7. Commissioner McNamee argues that the D.C. Circuit cases cited above[14] were wrongly decided.[15] 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.[16] As Commissioners, our job is to apply

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[13] *E.g.*, *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1322 (D.C. Cir. 2015) (agencies cannot overlook a single environmental consequence if it is even "arguably significant"); *see Michigan v. EPA*, 135 S. Ct. 2699, 2706 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (internal quotation marks omitted)); *see also Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that agency action is "arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency.").

[14] *Supra* n.10.

[15] Certificate Order, 169 FERC ¶ 61,133 (McNamee, Comm'r, concurring at P 12 & n.29).

[16] *E.g.*, *Sabal Trail*, 867 F.3d at 1373.

that law, not to attack binding judicial precedent in favor of an interpretation that was, in fact, expressly rejected by the court.[17]

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

8. 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.[18] As noted, 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 is an indirect effect and must, therefore, be included within the Commission's NEPA analysis.[19] It is past time for the Commission to learn that lesson.

9. Beginning with *Sabal Trail*, the D.C. Circuit has held unambiguously that the Commission must identify and consider reasonably foreseeable downstream GHG emissions as part of its NEPA analysis.[20] Shortly after that decision, the Commission attempted to cabin *Sabal Trail* to its facts, taking the position that it was required to consider downstream GHG emissions *only* under the exact facts presented in *Sabal Trail—i.e.*, where the pipeline was transporting natural gas for combustion at a particular natural gas power plant (or plants).[21] In *Birckhead*, the D.C. Circuit rejected that argument, admonishing the Commission that it must examine the specific record before it and that it may not categorically ignore a pipeline's downstream emissions just because it

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

[18] 40 C.F.R. §§ 1502.16(b), 1508.8(b); *Sabal Trail*, 867 F.3d at 1371.

[19] *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.

[20] *Sabal Trail*, 867 F.3d at 1371-72; *see also id.* at 1371 ("Effects are reasonably foreseeable if they are 'sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.'" (quoting *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016))).

[21] *Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

does not fit neatly within the facts of *Sabal Trail*. Indeed, the Court expressly rejected the Commission's argument "that downstream emissions are an indirect effect of a project only when the project's 'entire purpose' is to transport gas to be burned at 'specifically-identified' destinations"—i.e., the facts of *Sabal Trail*.[22] Since *Birckhead*, the court has continued to turn aside the Commission's efforts to ignore reasonably foreseeable downstream GHG emissions.[23]

10. And yet, with today's order, the Commission continues to thumb its nose at the court by stubbornly clinging to its interpretation of *Sabal Trail* that *Birckhead* rejected. Although the EA estimated the downstream GHG emissions for the natural gas capacity subscribed by Salt River Project,[24] because it was intended to serve a "specifically-identified" power plant,[25] there is no comparable estimate of the GHG emissions associated with the capacity subscribed by Sempra.[26] The Commission does not provide any reason to ignore those emissions. As an initial matter, we know that the vast

[22] *Birckhead*, 925 F.3d at 519 (citing the Commission's brief in that case).

[23] *See Allegheny Def. Project*, 932 F.3d at 945-46 (holding that the petitioners are "correct that NEPA required the Commission to consider both the direct and indirect environmental effects of the Project, and that, despite what the Commission argues, the downstream greenhouse-gas emissions are just such an indirect effect").

[24] EA at 83 (estimating approximately 1 million metric tons of GHG per year based on the assumption that the 50,000 dekatherms per day delivered to Salt River Project is combusted in power plants in Arizona, including the Santan Generating Station).

[25] *Id.* at 83.

[26] A substantial portion of the Project's capacity will be used to serve exports to Mexico. Exports of natural gas require their own public interest determination by the Department of Energy under section 3 of the NGA, *see* 15 U.S.C. § 717b(a) & (c); *EarthReports, Inc. v. FERC*, 828 F.3d 949, 953 (D.C. Cir. 2016); *W. Virginia Pub. Servs. Comm'n v. U. S. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982), which should itself consider the reasonably foreseeable GHG emissions caused by the combustion of the exported gas, *see Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 193, 195 (D.C. Cir. 2017) (discussing the Department's obligation consider the indirect effects of its decision and its consideration of the emissions associated with using exported natural gas to produce electricity). Because the Department of Energy conducts a separate public interest determination that should consider any adverse effects of downstream GHG emissions, we need not consider those impacts here.

majority, 97 percent, of all natural gas consumed in the United States is combusted[27]—a fact that, on its own might be sufficient to make downstream emissions reasonably foreseeable, at least absent contrary evidence. After all, the D.C. Circuit has recognized that NEPA does not require absolute certainty and that "some educated assumptions are inevitable in the NEPA process."[28] Moreover, the record here makes this a relatively easy case: In response to a data request from Commission staff, El Paso stated that the capacity subscribed by Sempra "will likely be used to generate electric power."[29] That would seem to be more-than-sufficient to confirm that the gas is highly likely to be combusted, making the resulting GHG emissions reasonably foreseeable.

11. Nevertheless, the Commission refuses to calculate or consider the downstream emissions that will likely result from natural gas shipped via Sempra's capacity on the Project. Instead, the Commission asserts that because Sempra is a power marketer "the ultimate destination of gas transported . . . cannot be predicted with any specificity."[30] That is nothing more than a repackaged version of the policy that the D.C. Circuit rejected in *Birckhead—i.e.*, that the Commission will ignore downstream GHG emissions, "unless [the natural gas is] used for a known domestic end use."[31] Today's holding means that, almost by definition, the Commission will never consider the GHG emissions resulting from a power marketer's capacity subscriptions, even when the record indicates that the gas will be used for electricity generation, as it does here. It is hard to imagine what would cause the Commission to try so hard to ignore those emissions other than its lingering inability to take the *Sabal Trail* line of cases seriously

[27] 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.

[28] *Sabal Trail*, 867 F.3d at 1374; *see id.* (stating that "the effects of assumptions on estimates can be checked by disclosing those assumptions so that readers can take the resulting estimates with the appropriate amount of salt").

[29] El Paso April 26, 2019 Response to Data Request at 3.

[30] Certificate Order, 169 FERC ¶ 61,133 at P 40.

[31] EA at 84.

and its apparent belief that those decisions can still essentially be cabined to its facts.[32] But until the majority starts taking the D.C. Circuit's holding seriously, I will have no choice but to continue to dissent from Commission orders that ignore reasonably GHG emissions.

12. In addition, even where the Commission quantifies the Project's GHG emissions, it fails to "evaluate the 'incremental impact' that [those emissions] will have on climate change or the environment more generally."[33] 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.[34] 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.[35] But neither today's order nor the accompanying EA provide that discussion or even attempt to assess the significance of the Project's GHG emissions.

13. Instead, the Commission insists that it need not assess the significance of the Project's GHG emissions because it lacks "generally accepted significance criteria" or a

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[32] *Cf. id.* ("We do not attempt here to perform a downstream emissions calculation for the quantities of natural gas that would be transported by the Project either having an indeterminate end use."). *But see Birckhead*, 925 F.3d at 518-19 (rejecting the "Commission['s] conten[tion] [that *Sabal Trail*] . . . is narrowly limited to the facts of that case" (internal quotation marks omitted)).

[33] *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").

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

[35] *See, e.g.*, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purpose is to ensure that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

"standard methodology"[36] for evaluating the significance of GHG emissions. 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.[37]

14. 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 "vegetation,"[38] "wildlife" (including "special status species"),[39] or the "100-year floodplain."[40] Notwithstanding the lack of any "standard methodology" or "generally accepted significance criteria" 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

[36] EA at 112.

[37] *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).

[38] EA at 43.

[39] *Id.* at 46.

[40] *Id.* at 27.

least, exercise similar qualitative judgment to assess the significance of GHG emissions here is arbitrary and capricious.[41]

15. That refusal is even more mystifying because NEPA "does not dictate particular decisional outcomes."[42] NEPA "'merely prohibits uninformed—rather than unwise—agency action.'"[43] 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.

16. 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.[44] 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.[45] The Commission not only has the obligation to discuss mitigation of adverse environmental impacts under NEPA, but also

[41] 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, e.g.*, *id.* at 24. 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 wildlife and traffic, but not climate change.

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

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

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

[45] *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 authority to condition certificates under section 7 of the NGA,[46] which could encompass measures to mitigate a project's GHG emissions.

17. 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.

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18. Today's order is not the product of reasoned decisionmaking. Its analysis of the Project's contribution to climate change is shoddy and its conclusion that the Project will not have any significant environmental impacts is illogical. After all, the Commission itself acknowledges that the Project will contribute to climate change, but refuses to consider whether that contribution might be significant before proclaiming that the Project will have no significant environmental impacts. So long as that is the case, the record simply cannot support the Commission's conclusion that there will be no significant environmental impacts. Simply put, the Commission's analysis of the Project's consequences for climate change does not represent the "hard look" that the law requires.

For these reasons, I respectfully dissent in part.

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Richard Glick
Commissioner

[46] 15 U.S.C. § 717f(e); Certificate Order, 169 FERC ¶ 61,133 at P 57 ("[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 . . . .").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

El Paso Natural Gas Company, L.L.C. Docket No. CP18-332-000

(Issued November 21, 2019)

McNAMEE, Commissioner, *concurring*:

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

2. Although I fully support this order, I write separately to address what I perceive to be a misinterpretation of the Commission's authority under the NGA and NEPA. There have been contentions that the NGA authorizes the Commission to deny a certificate application based on the environmental effects that result from the upstream production and downstream use of natural gas, that the NGA authorizes the Commission to establish measures to mitigate GHG emissions, and that the Commission violates the NGA and NEPA by not determining whether GHG emissions significantly affect the environment. I disagree.

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[1] *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133 (2019)

[2] *Id.* P 18.

[3] *Id.* P 60.

[4] *Id.* PP 38-40.

[5] 867 F.3d 1357 (D.C. Cir. 2017). This case is commonly referred to as "Sabal Trail" because the Sabal Trail Pipeline is one of the three pipelines making up the Southeast Market Pipelines Project.

3. A close examination of the statutory text and foundation of the NGA demonstrates that the Commission does not have the authority under the NGA or NEPA to deny a pipeline certificate application based on the environmental effects of the upstream production or downstream use of natural gas nor does the Commission have the authority to unilaterally establish measures to mitigate GHG emissions. Further, the Commission has no objective basis to determine whether GHG emissions will have a significant effect on climate change nor the authority to establish its own basis for making such a determination.

4. It is my intention that my discussion of the statutory text and foundation will assist the Commission, the courts, and other parties in their arguments regarding the meaning of the "public convenience and necessity" and the Commission's consideration of a project's effect on climate change. Before I offer my arguments, it is important that I further expound on the current debate.

I. Current debate

5. When acting on a certificate application, the Commission has two primary statutory obligations: (1) to determine whether the project is required by the "public convenience and necessity" as required by the NGA;[6] and (2) to take a "hard look" at the direct,[7] indirect,[8] and cumulative effects[9] of the proposed action as required by NEPA and the Council on Environmental Quality's (CEQ) implementing regulations. Recently, there has been much debate concerning what factors the Commission can consider in determining whether a proposed project is in the "public convenience and necessity," and whether the effects of upstream production and downstream use of natural gas are

[6] 15 U.S.C. § 717f(e) (2018).

[7] Direct effects are those "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a) (2019).

[8] Indirect effects are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b) (2019). The U.S. Supreme Court held that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause; "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

[9] Cumulative effects are those "which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (2019).

indirect effects of a certificate application that must be considered in the Commission's NEPA analysis.

6. My colleague equates "public convenience and necessity" with a "public interest" standard, arguing that such a standard requires the Commission to weigh GHGs emitted from the project facilities and related to the upstream production and downstream use of natural gas.[10] In support of his contention, my colleague cites the holding in *Sabal Trail* and dicta in *Atlantic Refining Co. v. Public Service Commission of State of New York* (*CATCO*).[11] My colleague argues that the Commission must determine whether GHG emissions have a significant impact on climate change in order for climate change to "play a meaningful role in the Commission's public interest determination."[12] And he argues that by not determining the significance of those emissions, the "public interest determination [] systematically excludes the most important environmental consideration of our time" and "is contrary to law, arbitrary and capricious" and is not "the product of reasoned decisionmaking."[13]

7. My colleague also argues that the emissions from all downstream use of natural gas are indirect effects of the Project and must be considered in the Commission's Environmental Assessment (EA).[14] In other proceedings, he argues that the Commission must also consider GHG emissions from upstream natural gas production.[15] He asserts that the Commission must determine whether GHG emissions will have a significant effect on climate change and that the Commission could make that determination using the Social Cost of Carbon or its own expertise.[16] Further, he contends that the

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[10] *El Paso Nat. Gas Co., L.L.C.*, 169 FERC ¶ 61,133 at P 5 (Glick, Comm'r, dissenting) (Dissent).

[11] *Id.* P 5 n.9 (citing *CATCO*, 360 U.S. 378, 391 (1959)). The case *Atlantic Refining Co. v. Public Service Commission of State of New York* is commonly known as "*CATCO*" because the petitioners were sometimes identified by that name.

[12] Dissent P 6.

[13] *Id.*

[14] *Id.* P 11.

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

[16] Dissent PP 12-14.

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

8. Several recent cases before the United States Court of Appeals for the D.C. Circuit have also considered the Commission's obligations under the NGA and NEPA as they apply to what environmental effects the Commission is required to consider under NEPA.[18] In *Sabal Trail*, the D.C. Circuit vacated and remanded the Commission's order issuing a certificate for the Southeast Market Pipelines Project, finding that the Commission inadequately assessed GHGs emitted from downstream power plants in its environmental impact statement (EIS) for the project. [19] The court held that the downstream GHG emissions resulting from burning the natural gas at the power plants were a reasonably foreseeable indirect effect of authorizing the project and, at a minimum, the Commission should have estimated those emissions.

9. Further, the *Sabal Trail* court found the Commission's authorization of the project was the legally relevant cause of the GHGs emitted from the downstream power plants "because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment."[20] The court stated the Commission could do so because, when considering whether pipeline applications are in the public convenience and necessity, "FERC will balance 'the public benefits against the adverse effects of the project,' *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) (internal quotation marks omitted), including adverse environmental effects, *see Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C.

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[17] *Id.* P 16.

[18] The courts have not explicitly opined on whether the Commission is required to determine whether GHG emissions will have a significant impact on climate change or whether the Commission must mitigate GHG emissions. The D.C. Circuit, however, has suggested that the Commission is not required to determine whether GHG emissions are significant. *Appalachian Voices v. FERC*, 2019 WL 847199, *2 (D.C. Cir. Feb. 19, 2019) ("FERC provided an estimate of the upper bound of emissions resulting from end-use combustion, and it gave several reasons why it believed petitioner's preferred metric, the Social Cost of Carbon, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

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

[20] *Id.* at 1373.

Cir. 2015)."[21] Relying on its finding that the Commission could deny a pipeline on environmental grounds, the court distinguished *Sabal Trail* from the Supreme Court's holding in *Public Citizen,* where the Court held "when the agency has no *legal* power to prevent a certain environmental effect, there is no decision to inform, and the agency need not analyze the effect in its NEPA review"[22] and the D.C. Circuit's decision in *Sierra Club v. FERC* (*Freeport*), where it held "that FERC had *no legal authority to prevent* the adverse environmental effects of natural gas exports."[23]

10. Based on these findings, the court concluded that "greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate."[24] The court also held "the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions . . . or explained more specifically why it could not have done so."[25] The court impressed that "[it did] not hold that quantification of greenhouse-gas emissions is required *every* time those emissions are an indirect effect of an agency action" and recognized that "in some cases quantification may not be feasible."[26]

11. More recently, in *Birckhead v. FERC*,[27] the D.C. Circuit commented in dicta on the Commission's authority to consider downstream emissions. The court stated that because the Commission could "'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is the legally relevant cause of the direct and indirect environmental effects of pipelines it approves'—even

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[21] *Id.*

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

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

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

[25] *Id.*

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

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

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

12. I respect the holding of the court in *Sabal Trail* and the discussion the court engaged in in *Birckhead*, and I recognize that the *Sabal Trail* holding is binding on the Commission. However, I respectfully disagree with the court's finding that the Commission can, pursuant to the NGA, deny a pipeline based on environmental effects stemming from the production and use of natural gas, and that the Commission is therefore required to consider such environmental effects under the NGA and NEPA.[29]

13. The U.S. Supreme Court has observed that NEPA requires an indirect effect to have "a reasonably close causal relationship" with the alleged cause.[30] Whether there is a reasonably close causal relationship depends on "the underlying policies or legislative intent" of the agency's organic statute "to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not."[31] Below, my review of the text of the NGA and subsequent acts by Congress demonstrates that the "public convenience and necessity" standard in the NGA is not so broad as to include environmental effects of the upstream production or downstream use of natural gas, and that the Commission cannot be responsible for those effects. Further, my review of appellate briefs filed with the court and the Commission's orders suggests that the court may not have been presented with the arguments I make here.

14. As for GHGs emitted from the pipeline facilities themselves, I believe that the Commission can consider such emissions in its public convenience and necessity determination and is required to consider them in its NEPA analysis. As I set forth

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

[29] In his dissent replying to this concurrence, my colleague states that the D.C. Circuit has been unambiguous in its interpretation of NGA section 7 and the Commission's authority to act on the direct and indirect effects of a pipeline. With this statement, my colleague attempts to transform the narrow ruling on the facts in *Sabal Trail*, and the dicta in *Birckhead*, to proclaim a new reading of the NGA and NEPA. However, the Commission is still bound by the NGA and NEPA as enacted by Congress, and interpreted by the U.S. Supreme Court and the D.C. Circuit. Our obligation is to read the statutes and case law in harmony. This concurrence articulates the legal reasoning by which to do so.

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

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

below, however, the Commission cannot unilaterally establish measures to mitigate GHG emissions, and there currently is no suitable method for the Commission to determine whether GHG emissions are significant.

II. The NGA does not permit the Commission to deny a certificate application based on environmental effects related to the upstream production or downstream use of natural gas

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

[32] 15 U.S.C. § 717f(e) (2018). It is noteworthy that the phrase "public interest" is not included in NGA section 7(c)(1)(A) (requiring pipelines to have a certificate) or NGA section 7(e) (requiring the Commission to issue certificates). Rather, these provisions use the phrase "public convenience and necessity." NGA section 7(c)(1)(B) does refer to public interest when discussing how the Commission can issue a temporary certificate in cases of emergency. *Id.* § 717f(c)(1)(B). Congress is "presumed to have used no superfluous words." *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878); *see also U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 499 (D.C. Cir. 2004) ("It is, of course, a 'cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, n.13 (2004))).

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

[34] *CATCO*, 360 U.S. at 391 ("This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest."). The Court never expounded further on that statement.

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

words must "take meaning from the purposes of regulatory legislation."[36] The Court has made clear that statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[37] The Court has further instructed that one must "construe statutes, not isolated provisions."[38]

16. Indeed, that is how the Court in *CATCO* – the first U.S. Supreme Court case including the "all factors bearing on the public interest" language – interpreted the phrase "public convenience and necessity." In that case, the Court held that the public convenience and necessity requires the Commission to closely scrutinize initial rates *based on the framework and text* of the NGA.[39]

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[36] *Id.*; *see also Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) ("Any such authority to consider all factors bearing on the 'public interest' must take into account what the 'public interest' means in the context of the Natural Gas Act. FERC's authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC's regulatory tools might be useful.").

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

[38] *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)).

[39] *CATCO*, 360 U.S. 378, 388-91. The Court stated "[t]he Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Id.* at 388. The Court found that the text of NGA sections 4 and 5 supported the premise that Congress designed the Act to provide complete protection from excessive rates and charges. *Id.* ("The heart of the Act is found in those provisions requiring . . . that all rates and charges 'made, demanded, or received' shall be 'just and reasonable.'"); *id.* at 389 ("The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act . . . ."). The Court recognized that the Commission's role in setting initial rates was a critical component of providing consumers complete protection because "the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable" and "would provide a windfall for the natural gas company with a consequent squall for the consumers," which "Congress did not intend." *Id.* at 389-90.

17. Following this precedent, the phrase "public convenience and necessity" must therefore be read within the overall statutory scheme of the NGA. As set forth below, construing the NGA *as a statute* demonstrates that Congress determined the public interest required (i) the public to have access to natural gas and (ii) economic regulation of the transportation and sale of natural gas to protect such public access.

A. The text of the NGA does not support denying a certificate application based on the environmental effects of the upstream production or downstream use of natural gas

1. NGA section 1(a)—limited meaning of "public interest"

18. Section 1 of the NGA sets out the reason for its enactment. NGA section 1(a) states, "[a]s disclosed in reports of the Federal Trade Commission [(FTC)] made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public *is affected with a public interest,* and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the *public interest*."[40]

19. A review of the FTC Report referred to in NGA section 1 demonstrates that the NGA was enacted to counter activities that would limit the public's access to natural gas and subject the public to abusive pricing. Specifically, the FTC Report stated "[a]ll communities and industries within the capacity and reasonable distance of existing or future transmission facilities should be assured a natural-gas supply and receive it at fair, nondiscriminatory prices."[41]

20. The FTC Report further stated "[a]ny proposed Federal legislation should be premised, in part at least, on the fact that natural gas is a valuable, but limited, natural resource in Nation-wide demand, which is produced only in certain States and limited areas, and the conservation, production, transportation, and distribution of which,

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

[41] FEDERAL TRADE COMMISSION, UTILITY CORPORATIONS FINAL REPORT OF THE FEDERAL TRADE COMMISSION TO THE SENATE OF THE UNITED STATES PURSUANT TO SENATE RESOLUTION NO. 83, 70TH CONGRESS, 1ST SESSION ON ECONOMIC, CORPORATE, OPERATING, AND FINANCIAL PHASES OF THE NATURAL-GAS-PRODUCING, PIPE-LINE, AND UTILITY INDUSTRIES WITH CONCLUSIONS AND RECOMMENDATIONS NO. 84-A at 609 (1936) (FTC Report), https://babel.hathitrust.org/cgi/pt?id=ien.35556021351598&view=1up&seq=718.

therefore, under proper control and regulation, are matters charged with high national public interest."[42]

21. The text of NGA section 1(a) and its reference to the FTC Report make clear that "public interest" is directly linked to ensuring the public's access to natural gas through regulating its transport and sale. Moreover, the NGA is designed to promote the "public interest" primarily through economic regulation. This is apparent in the text of the NGA and by its reference to the FTC Report that identified the concern with monopolistic activity that would limit access to natural gas.[43]

22. Therefore, there is no textual support in NGA section 1 for the claim that the Commission may deny a pipeline application due to potential upstream and downstream effects of GHG emissions on climate change. But, this is not the end of the analysis. We must also examine the Commission's specific authority under the NGA section 7.

[42] *Id.* at 611.

[43] 15 U.S.C. § 717(a) (2018) ("Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary and in the public interest"). The limited, economic regulation meaning of "public interest" was clear at the time the NGA was adopted. The NGA's use of the phrase "affected with the public interest" is consistent with the States' use of this phrase when enacting laws regulating public utilities. Historically, state legislatures used the phrase "affected with the public interest" as the basis of their authority to regulate rates charged for the sale of commodities, rendered services, or use of private property. *Munn v. Illinois*, 94 U.S. 113, 125-26 (1876). The Court found that businesses affected with a public interest or "said to be clothed with a public interest justifying some public regulation" include "[b]usinesses, which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation." *Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522, 535 (1923). In essence, these businesses became quasi-public enterprises and were determined to have an "indispensable nature." *Id.* at 538. Such a conclusion also meant that if these businesses were not restrained by the government, the public could be subject to "the exorbitant charges and arbitrary control to which the public might be subjected without regulation." *Id.*

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

23. Like NGA section 1, the text of NGA section 7 makes clear that its purpose is to ensure that the public has access to natural gas. A review of the various provisions of NGA section 7 make this point evident:

- Section 7(a) authorizes the Commission to "direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas . . . to the public . . . ."[44] The Commission has stated that "[s]ection 7(a) clearly established the means whereby the Commission could secure *the benefits* of gas service for certain communities, markets and territories adjacent to those originally established by the gas industry, where in the public interest."[45]

- Section 7(b) requires Commission approval for a natural gas pipeline company to "abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities."[46] That is, Congress considered access to natural gas to be so important that it even prohibited natural gas pipeline companies from abandoning service without Commission approval.

- Section 7(c)(1)(B) authorizes the Commission to "issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate."[47] The underlying presumption of this section is that the need for natural gas can be so

[44] 15 U.S.C. § 717f(a).

[45] *Arcadian Corp. v. Southern Nat. Gas Co.*, 61 FERC ¶ 61,183, at 61,676 (1992) (emphasis added). The Commission's analysis in this regard was unaffected by the opinion in *Atlanta Gas Light Co. v. FERC*, 140 F.3d 1392 (11th Cir. 1998) (vacating the Commission's 1991 and 1992 orders on other grounds).

[46] 15 U.S.C. § 717f(b) (2018).

[47] *Id.* § 717f(c)(1)(B).

important that the Commission can issue a certificate without notice and hearing.

- Section 7(e) states "a certificate *shall* be issued" when a project is in the public convenience and necessity, [48] leaving the Commission no discretion after determining a project meets the public convenience and necessity standard.

- Section 7(h) grants the pipeline certificate holder the powers of the sovereign to "exercise of the right of eminent domain in the district court of the United States."[49] By granting the power of eminent domain, Congress made clear the importance of ensuring that natural gas could be delivered from its source to the public by not allowing traditional property rights to stand in the way of pipeline construction. Furthermore, the sovereign's power of eminent domain must be for a public use[50] and Congress considered natural gas pipelines a public use.

24. Each of these textual provisions illuminate the ultimate purpose of the NGA: to ensure that the public has access to natural gas because Congress considered such access to be in the public interest.[51] To now interpret "public convenience and necessity" to mean that the Commission has the authority to deny a certificate for a pipeline due to upstream or downstream emissions because the pipeline may result in access to, and the use of, natural gas would radically rewrite the NGA and undermine its stated purpose.

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

[49] *Id.* § 717f(h).

[50] *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) ("The right of eminent domain, that is, the right to take private property for public uses, appertains to every independent government.").

[51] This interpretation is also supported by the Commission's 1999 Certificate Policy Statement. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,743 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) ("[I]t should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts *while serving increasing demands for natural gas*.") (emphasis added); *id.* at 61,751 ("[T]he Commission is urged to authorize new pipeline capacity to meet an anticipated increase in demand for natural gas . . . .").

3. NGA section 1(b) and section 201 of the Federal Power Act (FPA)—authority over environmental effects related to the upstream production and downstream use of transported natural gas reserved to States

25. Statutory text also confirms that control over the physical environmental effects related to the upstream production and downstream use of natural gas are squarely reserved for the States. NGA section 1(b) provides that "[t]he provisions of this chapter . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities for such distribution or to the production or gathering of natural gas."[52] The Ninth Circuit and the D.C. Circuit have interpreted the reference to distribution as meaning that States have exclusive authority over the gas once the gas moves beyond high-pressure mainlines.[53] Likewise, FPA section 201 specifically reserves the authority to make generation decisions to the States.[54]

26. U.S. Supreme Court precedent and legislative history confirm that the regulation of the physical upstream production and downstream use of gas is reserved for the States.

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[52] 15 U.S.C. § 717(b) (2018); *see Pennzoil v. FERC*, 645 F.2d 360, 380-82 (5th Cir. 1981) (holding that FERC lacks the power to even interpret gas purchase agreements between producers and pipelines for the sale of gas that has been removed from NGA jurisdiction).

[53] *See S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010) ("In sum, the history and judicial construction of the Natural Gas Act suggest that all aspects related to the direct consumption of gas . . . remain within the exclusive purview of the states."); *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 277 (D.C. Cir. 1990) ("[T]he state . . . has authority over the gas once it moves beyond the high-pressure mains into the hands of an end user."). I note that the court in *Sabal Trail* did not discuss or distinguish *Public Utilities Commission of State of Cal v. FERC*.

[54] 16 U.S.C. § 824(b)(1) (2018) ("The Commission . . . shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . . ."). Despite Congress explicitly denying the Commission jurisdiction over generation decisions in the FPA, some argue that the Commission has the authority to prevent natural gas generation through general language in the NGA regarding public convenience and necessity. Such an approach violates the principle that explicit language trumps general provisions. *See, e.g.*, *Passamaquoddy Tribe v. State of Me.*, 897 F. Supp. 632, 635 ("In this case, the unequivocal language in the Maine Settlement Act clearly trumps the Gaming Act's general provisions that are silent as to Maine.").

The Court has observed that Congress enacted the NGA to address "specific evils" related to non-transparent rates for the interstate transportation and sale of natural gas and the monopoly power of holding companies that owned natural gas pipeline company stock.[55] The Court has also found that Congress enacted the NGA to

> fill the regulatory void created by the Court's earlier decisions prohibiting States from regulating interstate transportation and sales for resale of natural gas, while at the same time leaving undisturbed the recognized power of the States to regulate all in-state gas sales directly to consumers. Thus, the NGA "was drawn with meticulous regard for the continued exercise of state power, not to handicap it any way."[56]

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[55] *FPC v. Hope Nat. Gas Co.* (*Hope*), 320 U.S. 591, 610 (1944) ("state commissions found it difficult or impossible to discover what it cost interstate pipe-line companies to deliver gas within the consuming states"); *id.* ("[T]he investigations of the Federal Trade Commission had disclosed the majority of the pipe-line mileage in the country used to transport natural gas, together with an increasing percentage of the natural gas supply for pipe-line transportation, had been acquired by a handful of holding companies."). Senate Resolution 83, which directed the FTC to develop the report that the NGA is founded on, also demonstrates that Congress was only concerned with consumer protection and monopoly power. The resolution directed the FTC to investigate capital assets and liabilities of natural gas companies, issuance of securities by the natural gas companies, the relationship between company stockholders and holding companies, other services provided by the holding companies, adverse impacts of holding companies controlling natural gas companies, and potential legislation to correct any abuses by holding companies. FTC Report at 1.

[56] *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 292 (1997) (internal citations omitted) (quoting *Panhandle E. Pipeline Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516-522 (1947) (*Panhandle*)); *see also Nw. Cent. Pipeline v. State Corp. Comm'n*, 489 U.S. 493, 512 (1989) ("The NGA 'was designed to supplement state power and to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to encroach upon the jurisdiction of the other.'" (quoting *Panhandle*, 332 U.S. at 513)); *Panhandle*, 332 U.S. at 520 (In recognizing that the NGA articulated a legislative program recognizing the respective responsibilities of federal and state regulatory agencies, the Court noted that the NGA does not "contemplate ineffective regulation at either level as Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.").

27. In *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.* (*Transco*),[57] the Court also recognized that "Congress did not desire that an important aspect of this field be left unregulated."[58] Thus, the Court held that where congressional authority is not explicit and States cannot practicably regulate a given area, the Commission can consider the issue in its public convenience and necessity determination.[59]

28. Based on this rule, and legislative history,[60] the *Transco* Court found that in its public convenience and necessity determination, the Commission appropriately considered whether the end-use of the gas in a non-producing state was economically wasteful as there was a regulatory gap and no State could be expected to control how gas is used in another State.[61] The Court also impressed that

> The Commission ha[d] not attempted to exert its influence over such "*physically*" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are properly of concern to the producing State; nor has the Commission attempted to regulate the "economic" aspects of gas used within the producing State.[62]

29. In contrast, there is no legislative history to support that the Commission may consider environmental effects related to the upstream production or downstream use of gas and the field of environmental regulation of such activities is not one that has been left unregulated. Unlike in *Transco*, states can reasonably be expected to regulate air emissions from the upstream production or downstream use of natural gas: "air pollution control at its source is the primary responsibility of States and local governments."[63] The Clean Air Act vests States with authority to issue permits to regulate stationary sources

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

[58] *Id.* at 19.

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

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

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

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

[63] 42 U.S.C. § 7401 (2018).

related to upstream and downstream activities.[64] In addition, pursuant to their police powers, States have the ability to regulate environmental effects related to the upstream production and downstream use of natural gas within their jurisdictions.[65] The FTC Report referenced in NGA section 1(a) recognized that States' ability to regulate the use of natural gas.[66] And, various States have exercised this ability. For example, Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont participate in the Regional Greenhouse Gas Initiative (RGGI), which requires power plants with a capacity over 25 megawatts to hold allowances equal to their CO_2 emissions over a three-year control period.[67]

30. Some may make the argument that "considering" the environmental effects related to upstream production and downstream use is hardly "regulating" such activities. I disagree. For the Commission to consider such effects would be an attempt to exert influence over States' regulation of physical upstream production or downstream use of natural gas, which the Court in *Transco* suggested would be encroaching upon forbidden ground. If, for example, the Commission considered and denied a certificate based on the GHG emissions released from production activities, the Commission would be making a judgment that such production is too harmful for the environment and preempting a State's authority to decide whether and how to regulate upstream production or

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[64] *Id.* § 7661e ("Nothing in this subchapter shall prevent a State, or interstate permitting authority, from establishing additional permitting requirements not inconsistent with this chapter.") The Act defines "permitting authority" as "the Administrator or the air pollution control agency authorized by the Administrator to carry out a permit program under this subchapter." *Id.* § 7661.

[65] *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 442 (1960) ("Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the more traditional concept of what is compendiously known as the police power.").

[66] FTC Report at 716 (describing Louisiana) ("The department of conservation be, and it is hereby, given supervision over the production and use of natural gas in connection with the manufacture of carbon black in other manufacturing enterprises and for domestic consumption.").

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

downstream use of natural gas.[68] Likewise, for the Commission to consider and deny a project based on emissions from end users, the Commission would be making a judgment that natural gas should not be used for certain activities. Such exertion of influence is impermissible: "when the Congress explicitly reserves jurisdiction over a matter to the states, as here, the Commission has no business considering how to 'induc[e] a change [of state] policy' with respect to that matter."[69]

31. Hence, there is no gap in regulating GHG emissions for the Commission to fill. The NGA reserves authority over the upstream production and downstream use of natural gas to the States, and States can practicably regulate GHGs emitted by those activities. And, even if there were a gap that federal regulation could fill, as discussed below, it is nonsensical for the Commission to attempt to fill a gap that Congress has clearly meant for the U.S. Environmental Protection Agency (EPA) to occupy.[70] Therefore, as GHG emissions from the upstream production and downstream use of natural gas are not properly of concern to the Commission, the Commission cannot consider such effects in its public convenience and necessity determination.

B. Denying a pipeline based on upstream or downstream environmental effects would undermine other acts of Congress

32. Since enactment of the NGA and NEPA, Congress has enacted additional legislation promoting the development and use of natural gas and limiting the Commission's authority over the natural gas commodity. Each of these legislation enactments indicates that the Commission's authority over upstream production and

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[68] *See also Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1320 (D.C. Cir. 2015) ("The Commission's power to preempt state and local regulation by approving the construction of natural gas facilities is limited by the Natural Gas Act's savings clause, which provides that the Natural Gas Act's terms must not be construed to 'affect[] the rights of States' under the Clean Air Act. 15 U.S.C. § 717b(d)(2)."); *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 243 (D.C. Cir. 2013) ("But Congress expressly saved states' [Clean Air Act] powers from preemption.").

[69] *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996); *see ANR Pipeline Co. v. FERC*, 876 F.2d 124, 132 (D.C. Cir. 1989) ("We think it would be a considerable stretch from there to say that, in certifying transportation that is necessary to carry out a sale, the Commission is required to reconsider the very aspects of the sale that have been assessed by an agency specifically vested by Congress with authority over the subject.").

[70] *See infra* PP 52-56.

downstream use of natural gas has been further limited by Congress. Arguments that the Commission can rely on the NGA's public convenience and necessity standard and NEPA to deny a pipeline application so as to prevent the upstream production or downstream use of natural gas would undermine these acts of Congress.

1. Natural Gas Policy Act of 1978

33. Determining that federal regulation of natural gas limited interstate access to the commodity, resulting in shortages and high prices, Congress passed the Natural Gas Policy Act of 1978 (NGPA). The NGPA significantly deregulated the natural gas industry.[71] Importantly, NGPA section 601(c)(1) states, "[t]he Commission may not deny, or condition the grant of, any certificate under section 7 of the Natural Gas Act based upon the amount paid in any sale of natural gas, if such amount is deemed to be just and reasonable under subsection (b) of this section."[72]

34. Besides using price deregulation to promote access to natural gas, Congress gave explicit powers to the President to ensure that natural gas reached consumers. NGPA section 302(c) explicitly provides, "[t]he President may, by order, require any pipeline to transport natural gas, and to construct and operate such facilities for the transportation of natural gas, as he determines necessary to carry out any contract authorized under

[71] Generally, the NGPA limited the Commission's authority over gas that is not transported in interstate commerce, new sales of gas, sales of gas and transportation by Hinshaw pipelines, and certain sales, transportation and allocation of gas during certain gas supply emergencies. *See, e.g.*, NGPA sections 601(a)(1)(A)-(D), 15 U.S.C. § 3431(a)(1)(A)-(D) (2018).

[72] *Id.* § 3431(c)(1) (2018). In addition, section 121(a) provides, "the provisions of subtitle A respecting the maximum lawful price for the first sale of each of the following categories of natural gas shall, except as provided in subsections (d) and (e), cease to apply effective January 1, 1985." 15 U.S.C. § 3331(a), *repealed by* the Wellhead Decontrol Act of 1989, Pub. L. 101-60 § 2(b), 103 Stat. 157.

subsection (a)."[73] Similarly, the NGPA gave authority to the Secretary of Energy to promote access to natural gas.[74]

35. There can be no doubt about the plain language of the NGPA: the Court observed that Congress passed the NGPA to "promote gas transportation by interstate and intrastate pipelines."[75] Furthermore, the NGPA was "intended to provide investors with adequate incentive to develop new sources of supply."[76]

2. Fuel Use Act of 1978

36. With respect to natural gas as a fuel source for electric generation, in 1987 Congress repealed sections of the Powerplant and Industrial Fuel Use Act of 1978 (Fuel Use Act),[77] which had restricted the use of natural gas in electric generation so as to conserve it for other uses. With the repeal of the Fuel Use Act, Congress made clear that

[73] *Id.* § 3362.

[74] *See id.* § 3391(a) ("[T]he Secretary of Energy shall prescribe and make effective a rule . . . which provides . . . no curtailment plan of an interstate pipeline may provide for curtailment of deliveries for any essential agricultural use . . . ."); *id.* § 3392(a) ("The Secretary of Energy shall prescribe and make effective a rule which provides that notwithstanding any other provisions of law (other than subsection (b)) and to the maximum extent practicable, no interstate pipeline may curtail deliveries of natural gas for any essential industrial process or feedstock use. . . ."); *id.* § 3392(a) ("The Secretary of Energy shall determine and certify to the Commission the natural gas requirements (expressed either as volumes or percentages of use) of persons (or classes thereof) for essential industrial process and feedstock uses (other than those referred to in section 3391(f)(1)(B))."); *id.* § 3393(a) ("The Secretary of Energy shall prescribe the rules under sections 3391 and 3392 of this title pursuant to his authority under the Department of Energy Organization Act to establish and review priorities for curtailments under the Natural Gas Act.").

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

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

[77] 42 U.S.C. § 8342, *repealed by* Pub. L. 100-42, § 1(a), 101 Stat. 310 (1987).

natural gas could be used for electric generation and that the regulation of the use of natural gas by power plants unnecessary.[78]

3. Natural Gas Wellhead Decontrol Act of 1989

37. If there were any remaining doubt that the Commission has no authority to consider the upstream development of natural gas and its environmental effects, such doubt was put to rest when Congress enacted the Wellhead Decontrol Act.[79] In this legislation, Congress specifically removed the Commission's authority over the upstream production of natural gas.[80]

38. But the Wellhead Decontrol Act was not merely about deregulating upstream natural gas production, Congress explained that the reason for deregulating natural gas at the wellhead was important to ensuring that end users had access to the commodity. The Senate Committee Report for the Decontrol Act stated "the purpose (of the legislation) is to promote competition for natural gas at the wellhead *to ensure consumers an adequate and reliable supply of natural gas at the lowest reasonable price*."[81] Similarly, the House Committee Report to the Decontrol Act noted, "[a]ll sellers must be able to reasonably reach the highest-bidding buyer in an increasingly national market. All buyers must be free to reach the lowest-selling producer, and obtain shipment of its gas to

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[78] *See also* President Ronald Reagan's Remarks on Signing H.R. 1941 Into Law, 23 WEEKLY COMP. PRES. DOC. 568, (May 21, 1987) ("This legislation eliminates unnecessary restrictions on the use of natural gas. It promotes efficient production and development of our energy resources by returning fuel choices to the marketplace. I've long believed that our country's natural gas resources should be free from regulatory burdens that are costly and counterproductive.").

[79] Pub. L. 101-60, 103 Stat. 157 (July 26, 1989).

[80] The Wellhead Decontrol Act amended NGPA section 601(a)(1)(A) to read, "[f]or purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to any natural gas solely by reason of any first sale of such natural gas." 15 U.S.C. § 3431(a)(1)(A), *amended by*, Pub. L. 101-60 § 3(a)(7)(A), 103 Stat. 157. *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1996) ("That enactment contemplates a considerably changed natural gas world in which regulation plays a much reduced role and the free market operates at the wellhead.").

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

them on even terms with other suppliers."[82] The House Committee Report also stated the Commission's "current competitive 'open access' pipeline system [should be] maintained."[83] With this statement, the House Committee Report was referencing Order No. 436 in which the Commission stated that open access transportation "is designed to remove any unnecessary regulatory obstacles and to facilitate transportation of gas to any end user that requests transportation service."[84]

39. The NGA, NGPA, the Wellhead Decontrol Act, and the repeal of the Fuel Use Act each reflect Congressional mandates to promote the production, transportation, and use of natural gas. None of these acts, and no other law, including NEPA, modifies the presumption in the NGA to facilitate access to natural gas. And, it is not for the Commission to substitute its judgment for that of Congress in determining energy policy.

C. Ordinary meaning of "public convenience and necessity" does not support consideration of environment effects related to upstream production or downstream use of natural gas.

40. In addition to considering the text of the NGA as a whole and subsequent-related acts, we must interpret the phrase "public convenience and necessity" using its ordinary meaning.[85] As discussed below, "public convenience and necessity" has always been understood to mean "need" for the service. To the extent the environment is considered, such consideration is limited to the effects stemming from the construction and operation of the proposed facilities and is not as broad as some would believe.

41. When Congress enacted the NGA, the phrase "public convenience and necessity" was a term of art used in state and federal public utility regulation.[86] In 1939, one year after the NGA's enactment, the Commission's predecessor agency the Federal Power

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

[83] *Id.* at 7.

[84] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, 50 Fed. Reg. 42,408, 42,478 (Oct. 18, 1985) (Order No. 436).

[85] *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning.").

[86] William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 427-28 (1979) (Jones).

Commission, defined public convenience and necessity as "a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both, without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated."[87] To make such showing, the Commission required certificate applicants to demonstrate that the public needed its proposed project, the applicant could perform the proposed service, and the service would be provided at reasonable rates.[88]

42. To the extent that public convenience and necessity included factors other than need, they were limited and usually directly related to the proposed facilities, not upstream or downstream effects related to the natural gas commodity. Such considerations included the effects on pipeline competition, duplication of facilities, and social costs, such as misuse of eminent domain and environmental impacts resulting from the creation of the right-of-way or service.[89] For example, the Commonwealth of Massachusetts considered environmental impacts resulting from the creation of the right-of-way and service in denying an application to build a railroad along a beach. The Commonwealth found that "the demand for train service was held to be outweighed by the fact the beach traversed 'will cease to be attractive when it is defaced and made dangerous by a steam railroad.'"[90]

43. The Commission's current guidance for determining whether a proposed project is in the public convenience and necessity is consistent with the historic use of the term. As outlined in its 1999 Certificate Policy Statement, the Commission implements an economic balancing test that is focused on whether there is a need for the facilities and adverse economic effects stemming from the construction and operation of the proposed facilities themselves. The Commission designed its balancing test "to foster competitive

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

[88] *See* Order No. 436, at 42,474 (listing the requirements outlined in *Kan. Pipe Line & Gas Co.*: "(1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them; (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service; (3) the facilities for which they seek a certificate are adequate; (4) the costs of construction of the facilities which they propose are both adequate and reasonable; (5) the anticipated fixed charges or the amount of such fixed charges are reasonable; and (6) the rates proposed to be charged are reasonable.")

[89] Jones at 428.

[90] *Id.* at 436.

markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas."[91] The Commission also stated that its balancing test "provide[s] appropriate incentives for the optimal level of construction and efficient customer choices."[92] To accomplish these objectives, the Commission determines whether a project is in the public convenience and necessity by balancing the public benefits of the project against the adverse economic impacts on the applicant's existing shippers, competitor pipelines and their captive customers, and landowners.[93]

44. Although the Certificate Policy Statement also recognizes the need to consider certain environmental issues related to a project, it makes clear that the environmental impacts to be considered are related to the construction and operation of the pipeline itself and the creation of the right-of-way.[94] As noted above, it is the Commission's objective to avoid *unnecessary* environmental impacts, meaning to route the pipeline to avoid environmental effects where possible and feasible, not to prevent or mitigate environmental effects from the upstream production or downstream use of natural gas. This is confirmed when one considers that if the project had unnecessary adverse environmental effects, the Commission would require the pipeline to reroute the pipeline: "If the environmental analysis following a preliminary determination indicates a preferred route other than the one proposed by the applicant, the earlier balancing of the public benefits of the project against its adverse effects would be reopened to take into account the adverse effects on landowners who would be affected by the changed route."[95]

45. Further, the Certificate Policy Statement states, "[i]deally, an applicant will structure its proposed project to avoid adverse economic, competitive, environmental, or

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

[92] *Id.*

[93] *Id.*

[94] *See also Ctr. for Biological Diversity v. U.S. Army Corps of Engineers*, _ F.3d_, 2019 WL 5690619, at *6 (11th Cir. 2019) ("Regulations cannot contradict their animating statutes or manufacture additional agency power.") (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125-26 (2000)).

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

other effects on the relevant interests from the construction of the new project."[96] And that is what occurred in this case. To minimize effects on the existing Homestead Meadows South residential subdivision, El Paso proposed to construct the Project's pipeline loop between milepost (MP) 189.2 and MP 191.5 entirely within its existing right-of-way instead of within an extended easement, which it proposed for the remainder of the pipeline loop. In addition, El Paso did not propose any temporary workspace within the subdivision.[97]

46. In sum, the ordinary meaning of "public convenience and necessity" does not support weighing the public need for the project against effects related to the upstream production or downstream use of natural gas.

D. NEPA does not authorize the Commission to deny a certificate application based on emissions from the upstream production or downstream use of transported natural gas

47. The text of the NGA, and the related subsequent acts by Congress, cannot be revised by NEPA or CEQ regulations to authorize the Commission to deny a certificate application based on effects from the upstream production and downstream use of natural gas.

48. The courts have made clear that NEPA does not expand a federal agency's substantive or jurisdictional powers.[98] Nor does NEPA repeal by implication any other

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

[97] EA at 12.

[98] *Nat. Res. Def. Council, Inc. v. EPA*, 822 F.2d 104, 129 (D.C. Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers. Whatever action the agency chooses to take must, of course, be within its province in the first instance.") (citations omitted); *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1986) ("The National Environmental Policy Act does not expand the jurisdiction of an agency beyond that set forth in its organic statute."); *Gage v. U.S. Atomic Energy Comm'n*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973) ("NEPA does not mandate action which goes beyond the agency's organic jurisdiction."); *see also Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976) ("where a clear and unavoidable conflict in statutory authority exists, NEPA must give way").

statute.[99] Rather, NEPA is a merely procedural statute that requires federal agencies to take a "hard look" at the environmental effects of a proposed action before acting on it.[100] NEPA also does not require a particular result. In fact, the Supreme Court has stated, even if a NEPA analysis identifies an environmental harm, the agency can still approve the project.[101]

49. Further, CEQ's regulations on indirect effects cannot make the GHG emissions from upstream production or downstream use part of the Commission's public convenience and necessity determination under the NGA. As stated above, an agency's obligation under NEPA to consider indirect environmental effects is not limitless. Indirect effects must have "a reasonably close causal relationship" with the alleged cause, and that relationship is dependent on the "underlying policies or legislative intent."[102] NEPA requires such reasonably close causal relationship because "inherent in NEPA and its implementing regulations is a 'rule of reason,'"[103] which "recognizes that it is pointless to require agencies to consider information they have no power to act on, or effects they have no power to prevent."[104] NEPA only requires federal agencies to

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

[100] *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.").

[101] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("Although these procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.").

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

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

[104] *Ctr. for Biological Diversity*, 2019 WL 5690619, *5; *see also Town of Barnstable v. FAA*, 740 F.3d 681, 691 (D.C. Cir. 2014) ("NEPA's 'rule of reason' does not require the FAA to prepare EIS when it would 'serve no purpose.'").

consider information that would be useful to their decision making.[105] Thus, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."[106]

50. The Commission has no power to deny a certificate for effects related to the upstream production or downstream use of natural gas. As explained above, the Commission's consideration of adverse environmental effects is limited to those effects stemming from the construction and operation of the pipeline facility and the related right-of-way. For the Commission to deny a pipeline based on GHGs emitted from the upstream production or downstream use of natural gas would be contrary to the text of the NGA and subsequent acts by Congress. The NGA reserves such considerations for the States, and the Commission must respect the jurisdictional boundaries set by Congress. Suggesting that the Commission can consider such effects not only defies Congress, but risks duplicative regulation.

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

51. My colleague also suggests that the Commission should require the mitigation of GHG emissions from the certificated pipeline facilities and the upstream production and downstream use of natural gas transported by those facilities. I understand his suggestions as proposing a carbon emissions fee, offsets or tax (similar to the Corps' compensatory wetland mitigation program), technology requirements (such as scrubbers

[105] 40 C.F.R. § 1500.1(c) (2019) ("Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.").

[106] *Pub. Citizen,* 541 U.S. at 770; *see also Town of Barnstable*, 740 F.3d at 691 ("Because the FAA 'simply lacks the power to act on whatever information might be contained in the [environmental impact ('EIS')],' NEPA does not apply to its no hazard determinations.") (internal citation omitted); *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 196-97 (4th Cir. 2009) (finding that the U.S. Army Corps of Engineers (Corps) was not required to consider the valley fill projects because "[West Virginia Department of Environmental Protection], and not the Corps, [had] 'control and responsibility' over all aspects of the valley fill projects beyond the filling of jurisdictional waters.").

or electric-powered compressor units),[107] or emission caps. My colleague argues that the Commission can require such mitigation under NGA section (e), which provides "[t]he Commission shall have the power to attach to the issuance of the certificate . . . such reasonable terms and conditions as the public convenience and necessity may require."[108]

52. I disagree. The Commission cannot interpret NGA section 7(e) to allow the Commission to establish measures to mitigate GHG emissions because Congress, through the Clean Air Act, assigned the EPA and the States exclusive authority to establish such measures. Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," [109] not the Commission.

53. The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution.[110] Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[111] and to establish standards of performance for the identified stationary sources.[112] The Clean Air Act requires the Administrator to conduct complex

[107] It is also important to consider the impact on reliability that would result from requiring electric-compressor units on a gas pipeline. In the event of a power outage, a pipeline with electric-compressor units may be unable to compress and transport gas to end-users, including power plants and residences for heating and cooking.

[108] 15 U.S.C. § 717f(e) (2018).

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

[110] *See id.* at 419.

[111] 42 U.S.C. § 7411(b)(1)(A) (2018).

[112] *Id.* § 7411(b)(1)(B).

balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard.[113]

54. In addition, the Clean Air Act allows the Administrator to "distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards."[114] The Act also permits the Administrator, with the consent of the Governor of the State in which the source is to be located, to waive its requirements "to encourage the use of an innovative technological system or systems of continuous emission reduction."[115]

55. Congress also intended that states would have a role in establishing measures to mitigate emissions from stationary sources. Section 111(f) notes that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies."[116]

56. Thus, the text of the Clean Air Act demonstrates it is improbable that NGA section 7(e) allows the Commission to establish GHG emission standards on mitigation measures out of whole cloth. To argue otherwise would defeat the significant discretion and complex balancing that the Clean Air Act entrusts in the EPA Administrator, and would eliminate the role of the States.

57. Furthermore, to argue that the Commission may use its NGA conditioning authority to establish GHG emission mitigation—a field in which the Commission has no expertise—and address climate change—an issue that has been subject to profound debate across our nation for decades—is an extraordinary leap. The Supreme Court's "major rules" canon advises that agency rules on issues that have vast economic and political significance must be treated "with a measure of skepticism" and require

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[113] *Id.* § 7411(a)(1).

[114] *Id.* § 7411(a)(2).

[115] *Id.* § 7411(j)(1)(A).

[116] *Id.* § 7411(f)(3).

Congress to provide clear authorization.[117] The Court has articulated this canon because Congress does not "hide elephants in mouseholes"[118] and "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."[119]

58. Courts would undoubtedly treat with skepticism any attempt by the Commission to mitigate GHG emissions. Congress has introduced climate change bills since at least 1977,[120] over four decades ago. Over the last 15 years, Congress has introduced and failed to pass 70 legislative bills to reduce GHG emissions—29 of those were carbon emission fees or taxes.[121] For the Commission to suddenly declare such climate mitigation power resides in the long-extant NGA and that Congress's efforts were superfluous strains credibility. Requiring pipelines to pay a carbon emissions fee or tax, or to invest in GHG mitigation would be a major rule, and Congress has made no indication that the Commission has such authority.

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[117] *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014); *Brown & Williamson,* 529 U.S. at 160 ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."); *see also Gonzales v. Oregon*, 546 U.S. 243, 267-68 (2006) (finding regulation regarding issue of profound debate suspect).

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

[119] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 12, 159 (quoting Justice Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986)); *see also* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: PART I*, 65 STAN. L. REV. 901, 1004 (2013) ("Major policy questions, major economic questions, major political questions, preemption questions are all the same. Drafters don't intend to leave them unresolved.")

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

[121] CONGRESSIONAL RESEARCH SERVICE, MARKET-BASED GREENHOUSE GAS EMISSION REDUCTION LEGISLATION: 108TH THROUGH 116TH CONGRESSES at 3 (Oct. 23, 2019), https://fas.org/sgp/crs/misc/R45472.pdfhttps://fas.org/sgp/crs/misc/R45472.pdf. Likewise, the CEQ issued guidance on the consideration of GHG emissions in 2010, 2014, 2016, and 2019. None of those documents require, let alone recommend, that an agency establish a carbon emissions fee or tax.

59. Some may make the argument that the Commission can require mitigation without establishing a standard. I disagree. Establishing mitigation measures requires determining how much mitigation is required – i.e., setting a limit, or establishing a standard, that quantifies the amount of GHG emissions that will adversely affect the human environment. Some may also argue that the Commission has unilaterally established mitigation in other contexts, including wetlands, soil conservation, and noise. These examples, however, are distinguishable. Congress did not exclusively assign the authority to establish avoidance or restoration measures for mitigating effects on wetlands or soil to a specific agency. The Corps and the EPA developed a wetlands mitigation bank program pursuant to section 404 of the Clean Water Act.[122] Congress endorsed such mitigation.[123] As for noise, the Clean Air Act assigns the EPA Administrator authority over determining the level of noise that amounts to a public nuisance and requires federal agencies to consult with the EPA when its actions exceed the public nuisance standard.[124] The Commission complies with the Clean Air Act by requiring project noise levels in certain areas to not exceed 55 dBA Ldn, as required by EPA's guidelines.[125]

[122] 33 U.S.C. § 1344 (2018).

[123] *See* Water Resources Development Act, Pub. L. 110-114, § 2036(c), 121 Stat. 1041, 1094 (2007); National Defense Authorization Act, Pub. L. 108-136, § 314, 117 Stat. 1392, 1430 (2004); Transportation Equity Act for the 21st Century, Pub. L. 105-178, § 103 (b)(6)(M), 112 Stat. 107, 133 (1998); Water Resources Development Act of 1990, Pub. L. 101-640, § (a)(18)(C), 104 Stat. 4604, 4609 (1990).

[124] 42 U.S.C. § 7641(c) ("In any case where any Federal department or agency is carrying out or sponsoring any activity resulting in noise which the Administrator determines amounts to a public nuisance or is otherwise objectionable, such department or agency shall consult with the Administrator to determine possible means of abating such noise.").

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

60. Accordingly, there is no support that the Commission can use its NGA section 7(e) authority to establish measures to mitigate GHG emissions from proposed pipeline facilities or from the upstream production or downstream use of natural gas.[126]

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

61. My colleague argues that the Commission violates the NGA and NEPA by not determining the significance of GHG emissions that are effects of a project.[127] He challenges the Commission's explanation that it cannot determine significance because there is no standard for determining the significance of GHG emissions.[128] He argues that the Commission can adopt the Social Cost of Carbon[129] to determine whether GHG emissions are significant or rely on its own expertise as it does for other environmental resources, such as vegetation, wildlife, or floodplain.[130] He suggests that the Commission does not make a finding of significance in order to deceptively find that a project is in the public convenience and necessity.[131]

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[126] In addition, requiring a pipeline to mitigate emissions from the upstream production or downstream use of natural gas would not be "a reasonable term or condition as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (2018). It would be unreasonable to require a pipeline to mitigate an effect it has no control over. Further, as discussed above, emissions from the upstream production and downstream use of natural gas are not relevant to the NGA's public convenience and necessity determination.

[127] Dissent PP 2, 12.

[128] *Id.* P 13.

[129] *Id.*

[130] *Id.* P 14.

[131] *Id.* The dissent uses the phrase "public interest"; however, as noted earlier, the Commission issues certificates when required by the public convenience and necessity. NGA section 7(e) does not include the phrase "public interest." To the extent that the courts and the Commission have equated the "public convenience and necessity" with "public interest," the "public convenience and necessity" is not as broad as some would argue. *See supra* P 15.

62. The Social Cost of Carbon is not a suitable method for determining whether GHG emissions that are caused by a proposed project will have a significant effect on climate change and the Commission has no authority or objective basis using its own expertise to make such determination.

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

63. The Commission has found, and I agree, that the Social Cost of Carbon is not a suitable method for the Commission to determine significance of GHG emissions.[132] Because the courts have repeatedly upheld the Commission's reasoning,[133] I will not restate the Commission's reasoning here.

64. However, I will address the suggestion that the Social Cost of Carbon can translate a project's impact on climate change into "concrete and comprehensible terms" that will help inform agency decision-makers and the public at large.[134] The Social Cost of Carbon, described as an estimate of "the monetized damages associated with an incremental increase in carbon emissions in a given year,"[135] may appear straightforward. On closer inspection, however, the Social Cost of Carbon and its calculated outputs are

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

[133] *Appalachian Voices*, 2019 WL 847199, *2; *EarthReports, Inc. v. FERC*, 828 F.3d 949, 956 (D.C. Cir. 2016); *Sierra Club v. FERC*, 672 F. App'x 38, (D.C. Cir. 2016); *see also Citizens for a Healthy Cmty. v. U.S. Bureau of Land Mgmt.*, 377 F. Supp. 3d 1223, 1239-41 (D. Colo. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 77-79 (D.D.C. 2019) (upholding the agency's decision to not use the Social Cost of Carbon); *High Country Conservation Advocates v. U.S. Forest Serv.*, 333 F. Supp. 3d 1107, 1132 (D. Colo. 2018) ("[T]he *High Country* decision did not mandate that the Agencies apply the social cost of carbon protocol in their decisions; the court merely found arbitrary the Agencies' failure to do so without explanation.").

[134] Dissent P 13.

[135] Interagency Working Group on the Social Cost of Greenhouse Gases, *Technical Support Document – Technical Update of the Social Cost of Carbon for Regulatory impact Analysis – Under Executive Order 12866* at 1 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf (2016 Technical Support Document).

not so simple to interpret or evaluate.[136] When the Social Cost of Carbon estimates that one metric ton of CO_2 costs $12 (the 2020 cost for a discount rate of 5 percent),[137] agency decision-makers and the public have no objective basis or benchmark to determine whether that cost is significant. Bare numbers standing alone simply *cannot* ascribe significance.

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

65. Some argue that the lack of externally established targets does not relieve the Commission from establishing a framework or targets on its own. Some have suggested that the Commission can make up its own framework, citing the Commission's framework for determining return on equity (ROE) as an example. However, they overlook the fact that Congress designated the EPA, not the Commission, with exclusive authority to determine the amount of emissions that are harmful to the environment. In addition, there are no available resources or agency expertise upon which the Commission could reasonably base a framework or target.

66. As I explain above, Congress enacted the Clean Air Act to establish an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Section 111 of the Clean Air Act directs the Administrator of the EPA to identify stationary sources that "in his judgment cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare"[138] and to establish standards of performance for the identified

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[136] In fact, the website for the Climate Framework for Uncertainty Negotiation and Distribution (FUND) – one of the three integrated assessment models that the Social Cost of Carbon uses – states "[m]odels are often quite useless in unexperienced hands, and sometimes misleading. No one is smart enough to master in a short period what took someone else years to develop. Not-understood models are irrelevant, half-understood models are treacherous, and mis-understood models dangerous." FUND-Climate Framework for Uncertainty, Negotiation and Distribution, http://www.fund-model.org/ (LAST VISITED NOV. 18, 2019).

[137] *See* 2016 Technical Support Document at 4. The Social Cost of Carbon produces wide-ranging dollar values based upon a chosen discount rate, and the assumptions made. The Interagency Working Group on Social Cost of Greenhouse Gases estimated in 2016 that the Social Cost of one ton of carbon dioxide for the year 2020 ranged from $12 to $123. *Id.*

[138] 42 U.S.C. § 7411(b)(1)(A) (2018).

stationary sources.[139] Thus, the EPA has exclusive authority for determining whether emissions from pipeline facilities will have a significant effect on the environment.

67. Further, the Commission is not positioned to unilaterally establish a standard for determining whether GHG emissions will significantly affect the environment when there is neither federal guidance nor an accepted scientific consensus on these matters.[140] This inability to find an acceptable methodology is not for a lack of trying. The Commission reviews the climate science, state and national targets, and climate models that could inform its decision-making.[141]

68. Moreover, assessing the significance of project effects on climate change is unlike the Commission's determination of ROE. Establishing ROE has been one of the core functions of the Commission since its inception under the FPA as the Federal Power Commission.[142] And, setting ROE has been an activity of state public utility commissions, even before the creation of the Federal Power Commission.[143] The

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[139] *Id.* § 7411(b)(1)(B).

[140] The Council on Environmental Quality's 2019 Draft Greenhouse Gas Guidance states, "[a]gencies need not undertake new research or analysis of potential climate effects and may rely on available information and relevant scientific literature." CEQ, *Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions*, 84 Fed. Reg. 30,097, 30,098 (June 26, 2019); *see also* CEQ FINAL GUIDANCE FOR FEDERAL DEPARTMENTS AND AGENCIES ON CONSIDERATION OF GREENHOUSE GAS EMISSIONS AND THE EFFECTS OF CLIMATE CHANGE IN NATIONAL ENVIRONMENTAL POLICY ACT REVIEWS at 22 (Aug. 1, 2016) ("agencies need not undertake new research or analysis of potential climate change impacts in the proposed action area, but may instead summarize and incorporate by reference the relevant scientific literature"), https://ceq.doe.gov/docs/ceq-regulations-and-guidance/nepa_final_ghg_guidance.pdf.

[141] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at P 36; *see also WildEarth Guardians*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by the Appellants, the BLM was not required to identify specific effects on the climate in order to prepare an adequate EIS.").

[142] *Hope*, 320 U.S. 591 (1944); *FPC v. Nat. Gas Pipeline Co. of America*, 315 U.S. 575 (1942).

[143] *See, e.g., Willcox v. Consol. Gas Co.*, 212 U.S. 19, 41 (1909) (finding New York State must provide "a fair return upon the reasonable value of the property at the time it is being used for the public.").

Commission's methodology is also founded in established economic theory.[144] In contrast, assessing the significance of GHG emissions is not one of the Commission's core missions and there is no suitable methodology for making such determination.

69. It has been argued that the Commission can establish its own methodology for determining significance, pointing out that the Commission has determined the significance of effects on vegetation, wildlife, and 100-year flood plain using its own expertise and without generally accepted significance criteria or a standard methodology.

70. I disagree. As an initial matter, it is important to note that when the Commission states it has no suitable methodology for determining the significance of GHG emissions, the Commission means that it has no objective basis for making such finding. The Commission's findings regarding significance for vegetation, wildlife, and the 100-year floodplain have an objective basis. For example for vegetation, the Commission determined the existing vegetation in the project area by relying on Texas Parks and Wildlife Department materials and field reconnaissance.[145] The Commission determined the project's effect on vegetation by using the applicant's materials to quantify the amount of acres that will be temporarily impacted by construction and permanently impacted by operation, and by considering the mitigation and restoration activities that El Paso committed to in its Environmental Construction Management Plan, Reclamation Plan, and Noxious Weed Control Plan.[146] Based on this information, the Commission made a reasoned finding that the project impacts on vegetation will not be significant. The Commission conducted a similar evaluation of wildlife and the 100-year floodplain.

71. In contrast, the Commission has no reasoned basis to determine whether a project has a significant effect on climate change. To assess a project's effect on climate change, the Commission can only quantify the amount of project emissions. That calculated number cannot inform the Commission on climate change effects caused by the project, e.g., increase of sea level rise, effect on weather patterns, or effect on ocean acidification. Nor are there acceptable scientific models that the Commission may use to attribute every ton of GHG emissions to a physical climate change effect.

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[144] *Inquiry Regarding the Commission's Policy for Determining Return on Equity*, 166 FERC ¶ 61,207 (2019) (describing the Commission's use of the Discounted Cash Flow model that was originally developed in the 1950s as a method for investors to estimate the value of securities).

[145] EA at 38-39

[146] *Id.* at 42.

72. Without adequate support or a reasoned target, the Commission cannot ascribe significance to particular amounts of GHG emissions. To do so would not only exceed our agency's authority, but would risk reversal upon judicial review. Courts require agencies to "consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made."[147] Simply put, stating that an amount of GHG emissions appears significant without any objective support fails to meet the agency's obligations under the Administrative Procedure Act (APA).

V. Conclusion

73. This concurrence is intended to assist the Commission, courts, and other parties in their consideration of the Commission's obligations under the NGA and NEPA. The Commission cannot act *ultra vires* and claim more authority than the NGA provides it, regardless of the importance of the issue sought to be addressed.[148] The NGA provides the Commission no authority to deny a certificate application based on the environmental effects from the upstream production or downstream use of natural gas. Congress enacted the NGA, and subsequent legislation, to ensure the Commission provided public access to natural gas. Further, Congress designed the NGA to preserve States' authority to regulate the physical effects from the upstream production and downstream use of natural gas, and did not leave that field unregulated. Congress simply did not authorize the Commission to judge whether the upstream production or downstream use of gas will be too environmentally harmful.

74. Nor does the Commission have the ability to establish measures to mitigate GHG emissions. Pursuant to the Clean Air Act, Congress exclusively assigned authority to regulate emissions to the EPA and the States. Finally, the Commission has no objective

[147] *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C Cir. 2006) (quoting *Ariz. Cattle Growers' Ass'n v. FWS*, 273 F.3d 1229, 1235-36 (9th Cir. 2001)); *see also American Rivers v. FERC*, 895 F.3d 32, 51 (D.C. Cir. 2018) (" . . . the Commission's NEPA analysis was woefully light on reliable data and reasoned analysis and heavy on unsubstantiated inferences and *non sequiturs*") (italics in original); *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agr.*, 681 F.2d 1172, 1179 (9th Cir. 1982) ("The EA provides no foundation for the inference that a valid comparison may be drawn between the sheep's reaction to hikers and their reaction to large, noisy ten-wheel ore trucks.").

[148] *Office of Consumers' Counsel*, 655 F.2d at 1152 ("[A]ppropriate respect for legislative authority requires regulatory agencies to refrain from the temptation to stretch their jurisdiction to decide questions of competing public priorities whose resolution properly lies with Congress.").

basis for determining whether GHG emissions are significant that would satisfy the Commission's APA obligations and survive judicial review.

75. I recognize that some believe the Commission should do more to address climate change. The Commission, an energy agency with a limited statutory authority, is not the appropriate authority to establish a new regulatory regime.

For these reasons, I respectfully concur.

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Bernard L. McNamee
Commissioner