

## Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts

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*As the Biden administration attempts to make climate change the focus of many aspects of its domestic and international agenda, an independent federal regulatory agency—the Federal Energy Regulatory Commission (FERC)—finds itself at the center of debates over the nation’s energy policies and greenhouse gas (GHG) emissions. Under Sections 4 and 5 of the Natural Gas Act of 1938, FERC has the authority and obligation to ensure that rates, charges, and rules relating to interstate natural gas sales and transportation are just, reasonable, and nondiscriminatory. Under Section 7 of the Natural Gas Act, FERC also has the authority to grant certificates for construction and operation of interstate natural gas pipelines that are needed for the “present or future public convenience and necessity.” FERC’s longstanding practice under its 1999 “Policy Statement on Certification of New Natural Gas Facilities” for pipelines is to assess whether there is a “market need” for the proposed pipeline project before addressing other considerations such as adverse impacts on existing pipeline company customers, other pipelines in the market and their customers, and landowners and communities.*

*Changes in the availability and price of U.S. energy resources, growing concerns over increased climate impacts of building new natural gas pipeline infrastructure, and a series of adverse court decisions for FERC on its assessment of pipeline need and environmental impacts prompted FERC to reconsider and ultimately revise its 1999 pipeline policy for the first time in over twenty years in February 2022. While this policy change has the potential to expand FERC’s ability to address concerns associated with new pipeline infrastructure from the courts and the public, the policy was subject to strong dissents from two FERC commissioners and vocal opposition from industry and members of Congress, prompting FERC to reconsider its new policy. This means that any real reforms will be likely be contested and difficult in both the short term and the long term.*

*As FERC considers new pipeline projects in the wake of this policy transition, this Article urges FERC to give real weight to the growing number of state and federal policies focusing on climate change and mandating a clean*

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*energy transition. This is in part because such policies directly impact whether new fossil fuel pipelines can establish the project need required to obtain a certificate under the Section 7 of the Natural Gas Act. FERC’s longstanding failure to consider climate impacts and the state of the nation’s energy transition as an integral part of its project need analysis under Section 7 of the Natural Gas Act is a failure to fulfill its statutory obligation to both ratepayers and landowners, burdening them with stranded costs associated with expensive and potentially soon-to-be-obsolete fossil fuel infrastructure. Moreover, FERC’s failure to adequately address project need for pipelines implicates not only Section 7 of the Natural Gas Act, but arguably also violates Sections 4 and 5 of the Natural Gas Act, which require FERC to ensure that rates, charges, practices, and rules governing natural gas sales and transportation are “just and reasonable.”*

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## Introduction

As the Biden administration attempts to make climate change the center of many aspects of its domestic and international agenda, an independent federal regulatory agency—the Federal Energy Regulatory Commission (FERC)—finds itself at the center of debates over the nation’s energy policies and greenhouse gas (GHG) emissions.<sup>1</sup> Under Sections 4 and 5 of the Natural Gas Act of 1938, FERC has the authority and obligation to ensure that rates, charges, practices, and rules relating to interstate natural gas sales and transportation are just, reasonable, and nondiscriminatory.<sup>2</sup> Under Section 7 of the Natural Gas Act, FERC also has the authority to grant certificates for construction and operation of interstate natural gas pipelines that are needed for the “present or future public convenience and necessity.”<sup>3</sup> Consistent with decades of case law, FERC has interpreted its authority under Section 7 of the Natural Gas Act as requiring it to evaluate “all factors bearing on the public interest” in determining whether a proposed pipeline is in the public convenience and necessity through a concurrent, but separate, analysis of both the economic and environmental impacts of the pipeline.<sup>4</sup>

FERC’s actions under the Natural Gas Act have significant implications for climate change. For instance, how FERC evaluates the “present or future public

1. See, e.g., Catherine Morehouse, *As Chatterjee’s Tenure Ends, FERC Could Be “Single Most Impactful Agency” on Climate*: Rep. Casten, UTIL. DIVE (July 12, 2021), <https://www.utilitydive.com/news/as-chatterjees-tenure-ends-ferc-could-be-single-most-impactful-agency-o/603140> [<https://perma.cc/K74G-BYLA>] (reporting on remarks that “FERC has the potential to be the single most impactful agency in the government as far as dealing with the climate crisis”); Catherine Morehouse, *Democrats’ “Hot FERC Summer” Campaign Aims to Boost FERC’s Visibility on Capitol Hill*, UTIL. DIVE (July 21, 2021), <https://www.utilitydive.com/news/democrats-hot-ferc-summer-campaign-aims-to-boost-fercs-visibility-on-ca/603664> [<https://perma.cc/F2TA-EUCT>] (reporting on U.S. Rep. Casten invoking Megan Thee Stallion’s song “Hot Girl Summer” to declare 2021 “Hot FERC Summer” to “bring increased attention to FERC at a critical time for climate and clean energy policy”). FERC is made up of five Commissioners appointed by the President and confirmed by the U.S. Senate that serve for five-year staggered terms. No more than three Commissioners can be from the same party. See *Meet the Commissioners*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/about/commission-members> [<https://perma.cc/6V5Z-FXG9>]; *Overview of FERC*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/about/what-ferc/about/overview-ferc> [<https://perma.cc/8M3V-AFC8>].

2. 15 U.S.C. §§ 717c(a), 717d(a) (2018) (codifying Sections 4 and 5 of the Natural Gas Act).

3. 15 U.S.C. § 717f(e) (2018) (granting FERC jurisdiction to issue certificates of public convenience and necessity to construct and operate interstate natural gas pipelines to “qualified applicant[s]” that are willing to perform “the service proposed” if FERC determines the pipeline is “required by the present or future public convenience and necessity”); see also 15 U.S.C. §§ 717c(a), 717d(a) (2018) (requiring FERC to ensure natural gas company rates and charges are “just and reasonable”). In the Energy Policy Act of 2005, Congress also granted FERC exclusive jurisdiction to approve liquefied natural gas (LNG) import and export terminals under Section 3 of the Natural Gas Act. Energy Policy Act of 2005, 42 U.S.C. §§ 13201-13574 (2018); see *infra* note 94 and accompanying text.

4. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999) (providing the 1999 Certificate Policy Statement). Two further orders clarified this policy statement. See Certification of New Interstate Pipeline Facilities, 90 FERC ¶ 61,128 (2000) (clarifying the policy statement); Certification of New Interstate Natural Gas Pipeline Facilities, 92 FERC ¶ 61,094 (2000) (further clarifying the policy statement); see also *Fed. Power Comm’n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961) (stating that FERC’s predecessor, the Federal Power Commission, “is the guardian of the public interest in determining whether certificates of convenience and necessity should be granted”); *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97, 111 (D.C. Cir. 2014) (holding that FERC has broad discretion to evaluate whether granting a pipeline certificate is in the public interest).

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convenience and necessity” of new natural gas pipelines under the Natural Gas Act will impact whether such projects are built despite a growing number of federal and state carbon-reduction policies disfavoring the use of natural gas for electricity, heating, and cooking because of the associated GHG emissions.<sup>5</sup> Continuing to grant certificates to build natural gas pipelines in the face of such federal and state clean energy policies, as well as the landowner, climate, and ratepayer impacts of such actions, risks stranded assets, harm to environmental justice concerns, increased GHG emissions from the natural gas sector, and unnecessary costs imposed on ratepayers.

As a result, the climate impacts of natural gas production, transportation, and use, as well as billions of dollars in energy investments, are at stake in virtually every FERC decision. Thus, not surprisingly, stakeholders, including renewable energy companies, fossil fuel companies, infrastructure companies, environmental groups, landowners, and states regularly challenge FERC orders that are contrary to their interests. Because of these stakes, FERC has come under increasing fire from environmental groups, landowners, and, in recent years, the federal appellate courts, for its failure to evaluate upstream and downstream GHG emissions from proposed natural gas pipelines,<sup>6</sup> its failure to evaluate the environmental-justice implications of new natural gas pipelines and export terminals,<sup>7</sup> its failure to require pipeline companies to provide sufficient evidence of “project need” “for new pipelines,<sup>8</sup> and its failure to allow landowners and others to obtain timely judicial review of adverse pipeline decisions prior to the exercise of eminent domain.<sup>9</sup> In 2020 and 2021, FERC received numerous rebukes and, in some cases, outright reversals, from the D.C. Circuit Court of Appeals regarding its evaluation of GHG emissions, treatment of landowners in the path of pipelines, and alleged excessive deference to pipeline companies’ claims that the pipeline in question was necessary and in the public interest.<sup>10</sup>

This Article focuses on this body of recent case law surrounding FERC’s natural gas pipeline orders issued under Section 7 of the Natural Gas Act. It evaluates the case law to date; FERC’s efforts to address procedural and substantive deficiencies the courts have identified in those cases; and what more FERC can and should do using its regulatory authority under the Natural Gas Act to better incorporate climate, land use, environmental, and other public interest

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5. See *infra* Section II.A (discussing policies).

6. *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017).

7. *Vecinos para el Bienstar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021).

8. *Env’t Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).

9. *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020). The Natural Gas Act grants nationwide eminent domain authority to natural gas pipeline companies that receive a certificate of public convenience and necessity from FERC. See 15 U.S.C. § 717f(h); *PennEast Pipeline Co. v. New Jersey*, 141 S. Ct. 2244 (2021).

10. See *Vecinos para el Bienstar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021); *Env’t Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020).

factors in its pipeline certificate process to evaluate the “present or future public convenience and necessity” for a proposed pipeline.

This Article contends that addressing the climate impacts of natural gas pipeline projects is no longer solely an “environmental” consideration for pipeline approval, but instead goes to the heart of FERC’s project need analysis for reviewing and granting pipeline certificates. Under the Natural Gas Act, FERC may grant an interstate natural gas pipeline a certificate if it first finds that the pipeline is “required by the present or future public convenience and necessity.”<sup>11</sup>

As the D.C. Circuit explained in 2021 and as discussed in more detail in Section I.A, FERC’s longstanding practice in implementing this authority under its 1999 Policy Statement on Certification of New Natural Gas Facilities was to assess whether there is a “market need” for the proposed pipeline project before addressing other considerations such as adverse impacts on existing pipeline company customers, other pipelines in the market and their customers, and impacted landowners and communities.<sup>12</sup>

In determining market need, FERC historically has relied heavily on “precedent agreements” between pipelines and potential customers, including precedent agreements with “affiliate companies” that pipeline opponents and, increasingly, the federal courts, have found do not necessarily reflect a true demand for new pipeline infrastructure.<sup>13</sup>

However, changes in the availability and price of U.S. energy resources, growing concerns over increased climate impacts of building new natural gas pipeline infrastructure, and a series of adverse court decisions for FERC on its assessment of pipeline need and environmental impacts prompted FERC to reconsider and ultimately revise its policies governing project need analysis and environmental impacts for the first time in over twenty years in February 2022.<sup>14</sup>

While this policy change has the potential to expand FERC’s ability to address these concerns associated with new pipeline infrastructure, the fact remains that FERC adopted its policy statement in a split 3-2 vote with two dissenting opinions. This means that any real reforms will be likely be contested and difficult in the short term, and perhaps even more precarious in future years depending on the nature of future FERC commissioner appointments. Accordingly, this Article relies on Section 7 of the Natural Gas Act itself, recent court decisions in interpreting that statutory provision, and stakeholder comments during FERC’s multi-year consideration of its policy statement to

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11. 15 U.S.C. § 717f(e) (2018).

12. *Env’t Def. Fund*, 2 F.4th at 961-62, 972-95 (discussing FERC’s market need analysis under the Natural Gas Act). *See also supra* note 4 (citing 1999 Certificate Policy Statement).

13. *See infra* Sections I.A, II.B (discussing the use of precedent agreements to show project need for new pipelines).

14. *See Updated Policy Statement on Certification of New Natural Gas Pipeline Facilities*, 178 FERC ¶ 61,107 (2022); *Fact Sheet | Updated Pipeline Certificate Policy Statement (PL18-1-000)*, FED. ENERGY REGUL. COMM’N (Feb. 17, 2022), <https://www.ferc.gov/news-events/news/fact-sheet-updated-pipeline-certificate-policy-statement-pl18-1-000> [<https://perma.cc/PFP4-F5HR>]. *See also infra* Section II.C (discussing FERC’s new policy).

argue that in implementing the updated policy statement, FERC should give real weight to the growing number of state and federal policies focusing on climate change and mandating a clean energy transition.

This is because such policies directly impact whether new fossil fuel pipelines can establish the project need required to obtain a certificate under the Section 7 Natural Gas Act. FERC's longstanding failure to consider climate impacts and the state of the nation's energy transition as an integral part of its project need analysis under Section 7 of the Natural Gas Act is a failure to fulfill its statutory obligation to both ratepayers and landowners, burdening them with stranded costs associated with expensive and potentially soon-to-be-obsolete fossil fuel infrastructure.

Because of this regulatory failure, FERC has approved and may continue to approve pipelines that are ultimately canceled after years of company investments, litigation, eminent-domain actions, and partial construction. There are real-world implications of this failure. When a pipeline is authorized and then canceled or its certificate declared invalid by the courts, the impacts are not limited to the pipeline company losing its investment. The costs associated with the years of permitting, land acquisition, and litigation prior to the pipeline's cancellation may be passed along to ratepayers. Just as importantly, canceled pipelines have long-term adverse effects on landowners who were in the path of the pipeline that may even have been partially built prior to cancellation.

Finally, FERC's failure to adequately address project need for pipelines implicates not only Section 7 of the Natural Gas Act, but arguably also violates Sections 4 and 5 of the Natural Gas Act, which require FERC to ensure that rates, charges, practices, and rules governing natural gas sales and transportation are "just and reasonable."<sup>15</sup> For decades now, FERC has used the identical "just and reasonable" language of the Federal Power Act to support a series of orders expanding energy markets and electric transmission access to allow participation of new energy technologies and market practices that support a clean energy transition, such as solar, wind, battery storage, and demand response.<sup>16</sup> FERC should follow a similar approach in its evaluation of project need for pipelines to ensure just and reasonable rates for natural gas. As discussed in Parts II and III, FERC can do so by incorporating technology and policy changes in the natural gas sector that significantly influence the economics of new natural gas pipelines. This directly impacts whether such pipelines serve the present or future public convenience and necessity and whether the rates and charges for such pipelines are just and reasonable.

Part I of this Article introduces FERC's obligation to ensure just and reasonable rates, charges, practices, and rules associated with interstate natural gas sales and transportation; FERC's 1999 Policy Statement governing its approval of interstate natural gas pipelines; and adverse impacts associated with FERC's continued use of its 1999 Policy Statement, particularly its evaluation of

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15. 15 U.S.C. §§ 717c(a), 717d(a) (2018).

16. *See infra* Section III.A.

project need for pipelines. Part II explores in more detail why FERC's project need analysis for pipelines is outdated in light of federal and state decarbonization policies, the impact of those policies on future natural gas demand, and recent federal court decisions invalidating FERC pipeline certificates. Part III proposes a way forward for FERC which draws on FERC's recent orders to ensure just and reasonable rates, charges, practices, and rules under the Federal Power Act, stakeholder comments suggesting a range of helpful reforms for FERC's 1999 Certificate Policy Statement, and FERC's 2022 Updated Certificate Policy Statement.

#### I. FERC's Authority and Obligation to Ensure That Proposed Natural Gas Pipelines are Required by the "Present or Future Public Convenience and Necessity"

The Natural Gas Act grants FERC broad authority over natural gas markets and infrastructure. Sections 4 and 5 of the Natural Gas Act grant FERC exclusive authority to ensure that the rates, charges, practices, rules, and regulations governing interstate natural gas sales and transportation are "just and reasonable" and nondiscriminatory. Under this authority FERC may invalidate any rates, charges, practices, rules, or regulations that are "unjust," "unreasonable," or discriminatory and issue orders remedying the same.<sup>17</sup> Section 7 of the Natural Gas Act authorizes FERC to grant certificates for the construction and operation of interstate natural gas pipelines that are required for the "present or future public convenience and necessity."<sup>18</sup> As this Part explains, FERC's longstanding regime for approving new natural gas pipeline infrastructure is legally deficient, as its 2022 Updated Certificate Policy Statement acknowledges in part. Moreover, FERC's failure to consider new climate and decarbonization policies as part of its analysis for project need has resulted in the Commission approving new natural gas pipelines that are not in the present or future public convenience and necessity, resulting in stranded assets, increased costs for retail consumers, and unnecessary adverse impacts for landowners whose land is taken to build these pipelines.

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17. 15 U.S.C. §§ 717c(a), 717d(a) (2018) (codifying Sections 4 and 5 of the Natural Gas Act). This language is identical to provisions of the Federal Power Act, which grants FERC authority to set just and reasonable electricity rates and thus has resulted in the federal courts interpreting FERC's authority under the Natural Gas Act and the Federal Power Act in parallel. *See* 16 U.S.C. §§ 824d(a), 824e(a) (2018) (codifying the identical language in Sections 205 and 206 of the Federal Power Act); Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 14-15 (2019) (discussing FERC's authority to set just and reasonable rates and practices under the Federal Power Act); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (discussing the interchangeability of cases interpreting FERC's authority to establish just and reasonable rates and practices under the Federal Power Act and the Natural Gas Act).

18. *See supra* notes 3-4.

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### *A. The Natural Gas Act, FERC's 1999 Certificate Policy Statement, and Application of NEPA*

Congress enacted the Natural Gas Act in 1938, declaring that “the business of transporting and selling natural gas” is “affected with a public interest” and delegating authority for federal regulation of interstate natural gas transportation and sales to the Federal Power Commission which, later, became FERC.<sup>19</sup> Under Sections 7(c) and (e) of the Natural Gas Act, FERC has exclusive authority to grant a certificate of public convenience and necessity, which is required to construct and operate an interstate natural gas pipeline, if the applicant can establish that it is “able and willing” to construct and operate the pipeline consistent with the requirements of the Natural Gas Act and the pipeline “is or will be required by the present or future public convenience and necessity.”<sup>20</sup> Under FERC’s 1999 Certificate Policy Statement, the Commission evaluates “all factors bearing on the public interest” in making this determination through a concurrent, but separate, analysis of both the economic and environmental impacts of a proposed pipeline.<sup>21</sup> In the policy statement, FERC described its goals as to “foster competitive markets, protect captive customers, and avoid unnecessary environmental impacts.”<sup>22</sup>

Regarding the economic review, FERC first determines whether the project “can proceed without subsidies” from the proponent’s existing customers and whether the project can “stand on its own financially” by establishing a market need through the existence of pre-construction contracts (also called “precedent agreements”) or other evidence of market need such as demand projections.<sup>23</sup> After FERC determines a pipeline is financially viable, FERC assesses the potential adverse economic effects on (1) the proposer’s existing customers, through increased rates or adverse impacts of service; (2) competing pipelines and their customers, through unsubscribed capacity on existing pipelines that must be paid by its captive customers; and (3) landowners and surrounding communities, through the use of eminent domain and interference with property

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19. 15 U.S.C. §§ 717(a) (2018) (“[I]t 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.”).

20. 15 U.S.C. §§ 717f(c), 717f(e) (2018). For a detailed analysis of the relevant provisions of the Natural Gas Act relating to pipelines, including legislative history case decisions, and the economic and environmental factors FERC must consider in granting certificates, see Romany Webb, *Climate Change, FERC, and Natural Gas Pipelines: The Legal Basis for Considering Greenhouse Gas Emissions Under Section 7 of the Natural Gas Act*, 28 NYU ENV’T L.J. 179 (2020).

21. See *supra* note 4; Webb, *supra* note 20, at 199-201.

22. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶¶ 61,227, 61,737, 61,749 (1999); see also Certification of New Interstate Natural Gas Pipelines, 90 FERC ¶¶ 61,128, 61,397 (2000) (providing for concurrent economic and environmental review of a proposed pipeline).

23. *Id.* ¶¶ 61,745-46; Webb, *supra* note 20, at 199-200. In practice, FERC relied almost exclusively on preconstruction contracts to satisfy the market need requirement. This practice was subject to significant criticism on grounds that it led FERC to grant certificates to pipelines that were not needed to meet demand and were not in the public interest. See Webb, *supra* note 20, at 200 n.106; *infra* Section II.B.



rights.<sup>24</sup> FERC then weighs the economic benefits against the adverse impacts of the proposed pipeline, taking into account any mitigation measures proposed by the operator.

As for the environmental review associated with the proposed pipeline, FERC must comply with the National Environmental Policy Act (NEPA), which requires federal agencies, including FERC, to consider the potential environmental impacts of “major federal actions,” which include federal permits and certificates issued to private parties.<sup>25</sup> Federal agencies evaluate these potential environmental impacts in an Environmental Assessment (EA) or a more comprehensive Environmental Impact Statement (EIS). FERC regulations provide that the agency will normally prepare an EIS prior to approving a certificate of public convenience and necessity for any proposed pipeline under Section 7 of the Natural Gas Act.<sup>26</sup> Under NEPA, an EIS must discuss the direct, indirect, and cumulative effects of the proposed action. However, even beyond NEPA, Section 7 requires FERC to consider environmental impacts of natural gas pipelines and, as a result, its mandate under the statute requires it to evaluate both economic and environmental impacts, including climate impacts, of proposed pipelines.<sup>27</sup>

In recent years, there has been significant litigation involving decisions by FERC and other federal agencies over the failure of these agencies to adequately evaluate the GHG emissions and other climate impacts of proposed fossil fuel projects subject to NEPA.<sup>28</sup> In the natural gas pipeline context, the litigation has centered on FERC’s alleged failure to adequately evaluate both “upstream” GHG emissions (resulting from increased natural gas production that would be prompted by the new pipeline) and “downstream” GHG emissions (resulting from increased natural gas consumption flowing from the proposed pipeline) as part of its analysis of indirect effects under NEPA. The D.C. Circuit held in 2017, in *Sierra Club v. FERC*, that, at least in some situations, FERC must evaluate the downstream GHG emissions associated with natural gas pipeline projects under

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24. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶¶ 61,747-48 (1999).

25. 42 U.S.C. § 4332(2)(C) (2018) (requiring environmental review for “major Federal actions significantly affecting the quality of the human environment”); 40 C.F.R. § 1508.18 (defining and describing major federal actions).

26. 18 C.F.R. § 380.6(a)(3) (2021).

27. See *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ [under NEPA] of the direct and indirect environmental effects of pipelines it approves.”) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)).

28. Glick & Christensen, *supra* note 17, at 6, 40-43 (discussing FERC’s evaluation of climate change impacts associated with natural gas pipelines under NEPA and citing cases involving federal actions by other federal agencies such as granting permits for coal mining on federal lands, oil and gas leasing on federal lands and waters, and the like); see also LINCOLN L. DAVIES, ALEXANDRA B. KLASS, HARI M. OSOFSKY, JOSEPH P. TOMAIN & ELIZABETH J. WILSON, *ENERGY LAW AND POLICY* 179 (3d ed. 2022) (discussing NEPA challenges to federal actions involving fossil fuel projects that will contribute to global climate change).

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NEPA.<sup>29</sup> This is true, according to the court, because FERC has statutory authority to deny a pipeline certificate because of environmental factors, including the pipeline's contribution to U.S. GHG emissions.<sup>30</sup> Since that time, there remains a strong difference of opinion both within FERC and among academics regarding the extent to which FERC should calculate and evaluate upstream and downstream GHG emissions as part of its NEPA analysis for proposed natural gas pipelines.<sup>31</sup>

In November 2021, FERC held a technical conference “to discuss methods natural gas companies may use to mitigate the effects of direct and indirect GHG emissions resulting from Natural Gas Act [S]ections 3 and 7 authorizations.”<sup>32</sup> This new focus on pipeline-related GHG emissions took place against a backdrop of many years of FERC granting certificates for virtually every pipeline that applied. According to a 2019 report, between 1999 and July 2019, FERC approved 474 interstate natural gas pipeline projects and rejected only two. These projects totaled 278 billion cubic feet per day of capacity and nearly 23,773 new miles of pipeline.<sup>33</sup> This raises the question of whether FERC has been adequately assessing not only the environmental impacts of proposed pipelines, but the overall market need of pipelines, as discussed in Part II below.

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29. 867 F.3d 1357, 1374 (D.C. Cir. 2017). *See also* *Birckhead v. FERC*, 925 F.3d 510, 519-21 (D.C. Cir. 2019) (dismissing the case on procedural grounds but stating that the court was “troubled” by FERC’s refusal to evaluate the upstream and downstream GHG emission associated with the proposed pipeline); *Food & Water Watch v. FERC*, No. 20-1132, 2022 WL 727037 (D.C. Cir. Mar. 11, 2022).

30. *See supra* note 27; *see also* *Letter from FERC Chair Richard Glick to U.S. Sen. John Barrasso*, FED. ENERGY REGUL. COMM’N (Sept. 24, 2021), <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=56E59657-6FF2-CFD7-A24B-7C27D4100000> [<https://perma.cc/V5ET-P7H8>] (discussing D.C. Circuit cases regarding FERC review of GHG emissions for proposed natural gas pipelines under Section 7).

31. *See* Glick & Christensen, *supra* note 17, at 40-43 (discussing disagreements within FERC); Webb, *supra* note 20, at 185 n.24 (discussing scholarly debates on the topic); *see also* *Interstate Natural Gas Pipeline Siting: FERC Policies and Issues for Congress*, CONG. RSCH. SERV. 9-10 (May 27, 2021), <https://sgp.fas.org/crs/misc/R45239.pdf> [<https://perma.cc/8N2C-BFDQ>] (discussing differences within FERC on the scope of NEPA review for upstream and downstream GHG emissions associated with pipeline projects and shifts in FERC policy on the same). For more discussion of this topic, *see also* Michael Burger & Jessica Wentz, *Downstream and Upstream Greenhouse Gas Emissions: The Proper Scope of NEPA Review*, 41 HARV. ENV’T L. REV. 109, 115 n.21 (2017); James W. Coleman, *Beyond the Pipeline Wars: Reforming Environmental Assessment of Energy Transport Infrastructure*, 2018 UTAH ENV’T L. REV. 119, 162, 164 (2018); Jayni Hein, Jason Schwartz & Avi Zevin, *Pipeline Approvals and Greenhouse Gas Emissions*, INST. FOR POL’Y INTEGRITY (Apr. 2019), [https://policyintegrity.org/files/publications/Pipeline\\_Approvals\\_and\\_GHG\\_Emissions.pdf](https://policyintegrity.org/files/publications/Pipeline_Approvals_and_GHG_Emissions.pdf) [<https://perma.cc/3LPE-QKTS>]; and James W. Coleman, *Pipelines & Power-Lines: Building the Energy Transport Future*, 80 OHIO ST. L. J. 263, 285-88 (2019).

32. *See* Supplemental Notice of Technical Conference, 86 Fed. Reg. 55,838 (Oct. 7, 2021) (providing notice and a conference agenda). Section 3 of the Natural Gas Act governs FERC certificates required for constructing LNG import and export facilities. *See infra* note 94 and accompanying text.

33. SUSAN F. TIERNEY, FERC’S CERTIFICATION OF NEW INTERSTATE NATURAL GAS FACILITIES: REVISING THE 1999 POLICY STATEMENT FOR 21ST CENTURY CONDITIONS 8 (2019), [https://www.analysisgroup.com/globalassets/content/insights/publishing/revising\\_ferc\\_1999\\_pipeline\\_certification.pdf](https://www.analysisgroup.com/globalassets/content/insights/publishing/revising_ferc_1999_pipeline_certification.pdf) [<https://perma.cc/P9T2-UFU7>].

*B. The Adverse Impacts on Landowners and Natural Gas Ratepayers  
Associated with FERC's Certificate Policy and Processes*

FERC has continued to grant certificates for natural gas pipelines despite new federal and state policies designed to phase out the use of natural gas and other fossil fuels. Such actions have real-world, immediate implications for the natural gas industry, natural gas ratepayers, and landowners in the path of these pipelines. Recent industry cancellations of FERC-approved and, in some cases, even partially built natural gas pipelines, highlight the risks of FERC continuing with the status quo.

For instance, in 2017, FERC granted a certificate of need to the Atlantic Coast Pipeline—a proposed system of several pipelines and compressor stations owned primarily by two of the nation's largest investor-owned utilities, Duke Energy and Dominion Resources, designed to transport natural gas hundreds of miles from West Virginia through Virginia and North Carolina.<sup>34</sup> Environmental groups, landowners, and others opposed the pipeline from the start, and challenged the FERC certificate of need and multiple federal and state environmental permits in the courts.

One of those cases, which involved whether the U.S. Forest Service had authority to grant an easement for the pipeline to cross under the Appalachian Trail, went to the U.S. Supreme Court. In 2020, in *U.S. Forest Service v. Cowpasture River Preservation Association*, the Court held that the Forest Service had authority to grant an easement through lands within national forests traversed by the Trail, granting a victory to the pipeline.<sup>35</sup> However, this victory was short-lived. With litigation still pending over the FERC certificate of need and multiple environmental permits<sup>36</sup>—leading to years of delays, billions of dollars of cost overruns, and continuing uncertainty regarding whether the pipeline would be built at all—Duke and Dominion announced the cancellation of the pipeline merely one month after their Supreme Court win.<sup>37</sup>

While the companies cited the sustained litigation as the primary reason for the demise of the pipeline, changes in state policy regarding clean energy transition and the growing cost-competitiveness of renewable energy also played a significant role. Just prior to the pipeline's cancellation, Virginia enacted the

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34. Atl. Coast Pipeline, LLC, 161 FERC ¶ 61,042 (2017).

35. 140 S. Ct. 1837, 1850 (2020).

36. See Sarah Vogelsong, *With Supreme Court Case Over, Courts Again Weigh Whether Atlantic Coast Pipeline is Needed*, VA. MERCURY (June 23, 2020, 12:01 AM), <https://www.virginiamercury.com/2020/06/23/with-supreme-court-case-over-legal-challenges-to-atlantic-coast-pipeline-turn-to-the-issue-of-need> [<https://perma.cc/FHZ6-AFWD>] (discussing the active litigation over the FERC Certificate of Public Convenience and Necessity and various other federal and state environmental permits).

37. Ivan Penn, *Atlantic Coast Pipeline Canceled as Delays and Costs Mount*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/2020/07/05/business/atlantic-coast-pipeline-cancel-dominion-energy-berkshire-hathaway.html> [<https://perma.cc/M825-BHYH>].

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Virginia Clean Economy Act, which required the state to build a 100% carbon-free electric grid by 2050 and imposed significant mandates on the state's utilities, particularly Dominion, to decarbonize its energy generation assets and invest in wind, solar, and energy storage plants.<sup>38</sup> Notably, at the same time the utility companies announced the cancelation of the Atlantic Coast Pipeline, Dominion announced that it was selling all of its existing natural gas transmission and storage assets to Warren Buffet's Berkshire Hathaway company in a deal valued at nearly \$10 billion.<sup>39</sup>

In another case that reached the Supreme Court, *PennEast Pipeline Company v. New Jersey*, the Court held in 2021, in a 5-4 decision, that the Natural Gas Act authorized pipeline companies to exercise eminent domain authority to take state-owned land as well as privately-owned land and that the Eleventh Amendment to the Constitution did not bar such actions.<sup>40</sup> Once again, this was a legal victory for the pipeline company that belied the underlying flaws in FERC's determination that there was a market need for the pipeline. After its Supreme Court win, the pipeline, which was originally proposed to go into service in 2017, still needed to obtain both state and federal permits, including permits from the State of New Jersey, which had opposed the pipeline for years based on its climate and other environmental impacts.<sup>41</sup> In August 2021, PennEast informed the U.S. Court of Appeals for the Third Circuit that it was exploring dismissal of all its pending eminent domain claims against New Jersey and private landowners, citing unspecified "regulatory hurdles" facing the pipeline.<sup>42</sup> Less than a month later, it announced that it was canceling the project entirely.<sup>43</sup>

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38. Virginia Clean Economy Act, 2020 Va. Acts 1193; Sarah Vogelsong, *What Sank the Atlantic Coast Pipeline? It Wasn't Just Environmentalism*, VA. MERCURY (July 8, 2020, 2:42 PM), <https://www.virginiamercury.com/2020/07/08/what-sank-the-atlantic-coast-pipeline-it-wasnt-just-environmentalism> [<https://perma.cc/D7G4-8KV8>].

39. Vogelsong, *supra* note 38; Penn, *supra* note 37.

40. 141 S. Ct. 2244, 2257, 2262 (2021).

41. Chris Knight, *PennEast Pipeline Owners Write Down Investments*, ARGUS BLOG (Aug. 5, 2021), <https://www.argusmedia.com/en/news/2241648-penneast-pipeline-owners-write-down-investments> [<https://perma.cc/38SP-HFEW>] (discussing the ongoing litigation over permits for the pipeline despite PennEast's Supreme Court win); see also Hannah Northey & David Iaconangelo, *N.Y. Rejects \$1 Billion Pipeline Over Climate, Water Concerns*, ENERGYWIRE (May 18, 2021, 6:28 AM EST), <https://www.eenews.net/articles/n-y-rejects-1b-pipeline-over-climate-water-concerns> [<https://perma.cc/UVA4-8LPP>] (reporting on New York's denial of water permits for another controversial interstate natural gas pipeline because the proposed project did not comply with state water and climate policies).

42. See Niina H. Farah, *PennEast Pumps Brakes on Pipeline Despite Supreme Court Win*, ENERGYWIRE (Sept. 23, 2021, 6:11 AM EST), <https://www.eenews.net/articles/penneast-pumps-brakes-on-pipeline-despite-supreme-court-win> [<https://perma.cc/W6XA-4XCJ>] (discussing PennEast's filing, the company's difficulties in obtaining the necessary environmental permits to build the pipeline, and speculation that the project would ultimately be canceled).

43. See Niina H. Farah, *PennEast Cancels Pipeline Despite Supreme Court Win*, GREENWIRE (Sept. 27, 2021, 9:03 AM EST), <https://www.eenews.net/articles/penneast-cancels-pipeline-despite-supreme-court-win> [<https://perma.cc/52S9-UHEC>] (reporting on PennEast's announcement that it did not have the necessary state water quality certification and wetlands permits to move forward with development of the pipeline, despite receiving a certificate of public convenience and necessity from FERC and winning its eminent domain case at the Supreme Court).

These are only two examples of pipelines canceled for economic reasons after a FERC determination of project need; others exist as well.<sup>44</sup> When a pipeline is authorized and then canceled or its certificate invalidated, the impacts are not limited to the pipeline company losing its investment. The costs associated with the years of permitting, land acquisition, and litigation prior to the pipeline's cancellation have long-term adverse effects on both landowners and ratepayers.

Importantly, once FERC issues a certificate, the pipeline can begin eminent domain proceedings against landowners who have refused to grant easements for the pipeline and the pipeline can also begin construction activities before landowners even have a right to challenge the FERC certificate in court. Until 2020, this problem was exacerbated by FERC's practice of issuing "tolling orders"—a procedural mechanism where FERC delayed entering a final appealable order for a year or more while it considered opponents' motions for reconsideration. During this time, the pipeline company could proceed with eminent domain and construction even though the landowners had no final FERC order for purposes of judicial review. That changed when the D.C. Circuit decided *Alleghany Defense Project v. FERC*, and, acting en banc, reversed its prior case law on this issue and found that FERC's tolling order practice violated the judicial review provisions of the Natural Gas Act.<sup>45</sup>

As Judge Millett put it when she concurred in the panel decision (prior to authoring the en banc decision reversing the court's prior precedent on the issue), FERC's tolling order practice violated landowners' due process rights and resulted in "a Kafkaesque regime" under which FERC "can keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop."<sup>46</sup> In that case, involving the 200-mile Atlantic Sunrise Pipeline through Pennsylvania, the Carolinas, and Alabama, FERC refused to grant a stay of eminent domain proceedings and construction while it considered

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44. See Suzanne Mattei, *Another Big Pipeline Project Bites the Dust—And FERC Should Take Notice*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Sept. 29, 2021), <https://ieefa.org/another-big-pipeline-project-bites-the-dust-and-ferc-should-take-notice> [<https://perma.cc/8X4L-XCMQ>] (discussing the cancellation of the Constitution Pipeline and the Northeast Supply Expansion Pipeline and summarizing a report by Moody's Investor Services that described eight examples of pipelines where "companies failed or were failing to recognize the implications of regulatory processes, community opposition, and market signals"); Niina H. Farrah, Miranda Willson, & Carlos Anchondo, *Jordan Cove Project Dies. What It Means for FERC, Gas*, ENERGYWIRE (Dec. 2, 2021, 6:58 AM EST), <https://www.eenews.net/articles/jordan-cove-project-dies-what-it-means-for-ferc-gas> [<https://perma.cc/CM88-UG5L>] (reporting on the cancellation of the FERC-approved Jordan Cove liquefied natural gas export terminal and associated pipeline in the face of landowner and state opposition to the project and allegations, including from dissenting Commissioner Glick, that FERC had failed to adequately assess whether the economic benefits of the project outweighed its costs).

45. 964 F.3d 1, 11-19 (D.C. Cir. 2020).

46. *Alleghany Def. Project v. FERC*, 932 F.3d 940, 948 (D.C. Cir. 2019), *rev'd en banc*, 964 F.3d 1 (D.C. Cir. 2020); see also Alexandra B. Klass, *The Public Use Clause in an Age of U.S. Natural Gas Exports*, 72 STAN. L. REV. ONLINE (Apr. 2020), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/03/72-Stan.-L.-Rev.-Online-Klass.pdf> [<https://perma.cc/U88K-QC8T>] (discussing *Alleghany Defense Project*).

the landowners' required motion for reconsideration of the FERC order. This resulted in the pipeline company constructing the pipeline and placing it into service, imposing significant physical damage to plaintiffs' properties, all before the landowners could legally seek judicial review of the FERC certificate order.<sup>47</sup>

However, even with the new policy regarding tolling orders, FERC approval of pipeline certificates that are later invalidated or canceled by the courts have significant and permanent impacts on landowners. When a pipeline is canceled after the company has already obtained the easements it needs to build the project and begun land-clearing operations, the landowners do not necessarily get their land back. For instance, for the canceled Atlantic Coast Pipeline, the pipeline company still retains easements for numerous properties along the more than 600 miles of proposed pipeline, leaving landowners in limbo regarding whether they will ever recover those easement interests from the company.<sup>48</sup> Moreover, in many cases, the company has already removed trees and otherwise disturbed the land, raising questions about the timing and extent of remediation by the company.<sup>49</sup> These adverse impacts are a direct result of FERC's flawed process for evaluating project need for pipelines and are not consistent with FERC's statutory obligations under Section 7 of the Natural Gas Act. While FERC created a new Office of Public Participation (OPP) in 2021 in part to address increasing concerns regarding barriers to landowner participation in pipeline proceedings,<sup>50</sup> it remains to be seen whether the OPP can bring about any significant reforms in the absence of policy changes through Congressional action or a major shift by FERC in the wake of its 2022 Updated Certificate Policy Statement.

Moreover, beyond landowner impacts, FERC's narrow project need analysis for new natural gas pipelines adversely impacts ratepayers, resulting in unjust and unreasonable rates under Section 4 and 5 of the Natural Gas Act. As shown above, many of the natural gas pipelines that FERC approved were

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47. *Alleghany Def. Project*, 964 F.3d at 7-9.

48. See Sarah Vogelsong, *The Atlantic Coast Pipeline Was Canceled. What Happens to All the Land Acquired for It?*, VA. MERCURY (July 29, 2020, 12:01 AM), <https://www.virginiamercury.com/2020/07/29/the-atlantic-coast-pipeline-was-canceled-what-happens-to-all-the-land-acquired-for-it> [<https://perma.cc/5NPH-G7XC>].

49. *Id.*; see also Environmental Defense Fund, Comments on Certification of New Interstate Natural Gas Facilities at 51-52 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5239](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5239) [<https://perma.cc/LR5L-4LNY>] (detailing landowner impacts associated with the Spire STL pipeline); Institute for Energy Economics and Financial Analysis Comments on FERC's Certificate Policy Statement on New Fossil Gas Pipelines at 26-28 (May 25, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210525-5153](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210525-5153) [<https://perma.cc/P2KA-QF4M>] (describing landowner impacts associated with canceled pipelines).

50. See *Office of Public Participation (OPP)*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/OPP> [<https://perma.cc/MWF8-AW63>]; *FERC Report on the Office of Public Participation*, FED. ENERGY REGUL. COMM'N (June 24, 2021), <https://www.ferc.gov/media/ferc-report-office-public-participation> [<https://perma.cc/QL95-V6ZY>] ("Commenters indicated that members of the public—especially communities that have been historically underrepresented before the Commission—need OPP to assist with participation in Commission proceedings. Commenters emphasized that this assistance would help place communities on equal footing with well-resourced industry stakeholders, particularly in proceedings involving natural gas pipeline projects and electric matters under the Commission's jurisdiction.").

canceled after tens of millions of dollars had been spent on litigation, land acquisition, and even partial construction of the pipeline. Yet other pipelines FERC has approved will be built but underutilized if FERC's analysis of market need does not reflect actual demand, which is impacted by federal and state decarbonization policies, energy efficiency, and other factors not currently evaluated by FERC as part of project need.<sup>51</sup> Ultimately, natural gas customers will need to pay at least some of these unnecessary costs through federal and state ratemaking proceedings.<sup>52</sup>

## II. FERC's Evaluation of Project Need for New Natural Gas Pipelines in an Age of Clean Energy Transition

Between 1999, when FERC enacted its last Certificate Policy Statement, and 2020, the share of U.S. electricity generated from natural gas increased from 15% to 40%, the share that coal-fired generated fell from 51% to 19%, nuclear generation remained flat at 20%, hydropower generation fell from 9% to 7%, and non-hydropower renewable energy generation grew from 2% to 13%.<sup>53</sup> The dramatic shift away from coal-fired generation toward natural gas generation in the electricity sector was due to sustained lower prices for domestic natural gas resulting from the advent of hydraulic fracturing and directional drilling technologies beginning in approximately 2007.<sup>54</sup> This, in turn, opened up vast

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51. See, e.g., Melissa Powers, *Natural Gas Lock-In*, 69 KAN. L. REV. 889, 834-38 (2021) (discussing the stranded assets associated with FERC-approved new natural gas pipelines and the policy actions needed to prevent new natural gas infrastructure from being built); Richard Martin, *Overpowered: PJM Market Rules Drive an Era of Oversupply*, S&P GLOB. MKT. INTEL. (Dec. 3, 2019), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/overpowered-pjm-market-rules-drive-an-era-of-oversupply-54111666> [<https://perma.cc/GPD4-B9NX>].

52. See Institute for Energy Economics and Financial Analysis, Comments on FERC's Certificate Policy Statement on New Fossil Gas Pipelines, *supra* note 49 at 15-17, 26 (describing how pipeline companies earn a significant rate of return on pipeline investments that are ultimately paid for by end-use customers); Environmental Defense Fund, Comments on Certification of New Interstate Natural Gas Facilities, *supra* note 49 at 35-39 (describing how FERC and state public utility commission cost of service analyses can result in adverse financial impacts on end-use natural gas customers if unnecessary pipelines are built); see also Mattei, *supra* note 44; Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018) (Glick dissenting) (dissenting from FERC's grant of certificate for the Spire STL pipeline on the grounds that the pipeline did not establish a market need in the face of regional flat demand for natural gas and focusing on the affiliate company's "captive customers" who "could be stuck with a 23 percent increase in cost-of-service" in order to facilitate the company earning a 14 percent return on equity when use of existing pipeline infrastructure was available); Statement of Commissioner Norman Bay, Order Granting Abandonment and Issuing Certificates, 158 FERC ¶ 61,145 (Feb 3, 2017) ("It is inefficient to build pipelines that may not be needed over the long term and become stranded assets. Overbuilding may subject ratepayers to increased costs of shipping gas on legacy systems.").

53. Percentages calculated from *Electric Power Annual 2010*, U.S. ENERGY INFO. ADMIN. 21-22 tbl.2.1.A (Nov. 2011), <https://www.eia.gov/electricity/annual/archive/pdf/03482010.pdf> [<https://perma.cc/26BS-EMW7>]; and *Electric Power Monthly with Data for June 2021*, U.S. ENERGY INFO. ADMIN. 17 tbl.1.1 (Aug. 2021), <https://www.eia.gov/electricity/monthly/archive/august2021.pdf> [<https://perma.cc/ZP47-Z49U>].

54. See, e.g., Melissa N. Diaz, *U.S. Energy in the 21<sup>st</sup> Century: A Primer*, CONG. RSCH. SERV. 9-11, 20-22 (Mar. 16, 2021), <https://crsreports.congress.gov/product/pdf/R/R46723> [<https://perma.cc/4SNT-NQRM>] (discussing reasons for the shift from coal to natural gas in the electricity sector); Peter Maloney, *EIA: Low Gas Prices Set to Drive Decline in Coal Generation*, UTIL. DIVE (Jan. 11, 2018),

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amounts of U.S. shale gas resources for development. However, while the percentage of electricity generated from natural gas has increased during this period, overall U.S. demand for natural gas has remained flat, raising questions regarding whether the industry and the nation should plan for additional growth.<sup>55</sup>

There are over 300,000 miles of high-capacity natural gas pipelines in the United States,<sup>56</sup> creating a transportation network connecting production and processing facilities with a range of customers that includes (1) electric utilities that use the fuel to generate electricity to sell to both other utilities for resale and directly to end-use customers; (2) natural gas utilities that sell the gas at retail for heating and cooking in the commercial and residential sectors; and (3) industrial facilities for use in their production processes. More specifically, approximately 38% of natural gas is used in the electricity sector, 33% in the industrial sector, 15% in the residential sector, 10% in the commercial sector, and 3% in the transportation sector.<sup>57</sup>

As of 2021, the interstate natural gas trade association projected that over thirty-three billion cubic feet per day of natural gas capacity would be placed into service through new major gas pipeline projects from 2020 to 2025, adding several thousand miles of new pipeline and over \$40 billion in new capital investment.<sup>58</sup> Moreover, between 1999 and 2021, FERC has granted certificates to approximately 500 natural gas pipelines and rejected only two.<sup>59</sup>

This ambitious natural gas buildout is occurring against a backdrop of a major shift in federal and state policies designed to eliminate fossil fuels and

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<https://www.utilitydive.com/news/eia-low-gas-prices-set-to-drive-decline-in-coal-generation/514556/> [<https://perma.cc/E63Q-BVJ8>] (same).

55. See *Growing Industrial Consumption and Exports Support Future U.S. Natural Gas Market Growth*, U.S. ENERGY INFO. ADMIN. (Feb. 16, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=46757> [<https://perma.cc/NV3V-5C5A>] (projecting that future natural gas market growth will be due to demand for exports and modest industrial sector growth but that U.S. demand for natural gas in other sectors, such as electric power, residential, commercial, and transportation, will “increase slowly or stay flat” through 2050); see also The Niskanen Center and Affected Landowners, Motion to Intervene and Joint Comments on the Commission’s Renewed Notice of Inquiry on the Certification of New Interstate Natural Gas Facilities, 174 FERC ¶ 61,125, at 3 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5166](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5166) [<https://perma.cc/UBS6-57GZ>] (discussing flat domestic natural gas demand as a reason for FERC to reform pipeline project need analysis); Environmental Defense Fund, Comments on the Certification of New Interstate Natural Gas Facilities, *supra* note 49 at 8-12 (same).

56. CONG. RSCH. SERV., *supra* note 31, at 2.

57. *U.S. Energy Consumption by Source and Sector, 2020*, U.S. ENERGY INFO. ADMIN. (2020), <https://www.eia.gov/energyexplained/us-energy-facts/images/consumption-by-source-and-sector.pdf> [<https://perma.cc/HNN8-8NR4>].

58. CONG. RSCH. SERV., *supra* note 31, at 2-3 (citing reports and projections from the Interstate Natural Gas Association of America).

59. See Environmental Defense Fund, Comments on the Certification of New Interstate Natural Gas Facilities, *supra* note 49 at 9; Susan F. Tierney, Ph.D., Comments on Certification of New Interstate Natural Gas Facilities at 2 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/filelist?accession\\_number=20210526-5272](https://elibrary.ferc.gov/eLibrary/filelist?accession_number=20210526-5272) [<https://perma.cc/C9V7-6YY2>]; *Approved Major Pipeline Projects (1997-Present)*, FED. ENERGY REGUL. COMM’N (July 2021), <https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-1997-present> [<https://perma.cc/3V6Q-NQS6>].



their associated GHG emissions from all sectors of the U.S. economy, as the remainder of this Part addresses.

Section II.A details the growth in federal, state, and local climate and decarbonization policies designed to transition away from fossil fuels in favor of renewable energy for electricity, heating, and cooking. Section II.B shows how the federal courts are becoming increasingly skeptical of actions by FERC that ignore these trends and accept at face value claims by industry that new natural gas infrastructure is needed and in the public interest. Finally, Section II.C discusses actions FERC has taken to update its certificate policy to address both adverse judicial decisions and changes in the natural gas industry and markets.

### *A. Federal and State Renewable Energy and Decarbonization Policies*

One of the main drivers of the growth of renewable energy in the United States over the past two decades has been the adoption of clean energy and decarbonization policies at the federal, state, and local levels. At the federal level, the Biden Administration has supported a range of initiatives designed to significantly reduce the amount of fossil fuels, including natural gas, used to generate electricity and heat homes and other buildings. President Biden has set a target to reduce net GHG emissions in the United States by about 50% from 2005 levels by 2030, to generate all electricity from carbon-free sources by 2035, and to achieve net-zero emissions across the entire economy by 2050.<sup>60</sup> Moreover, in 2020, Congress set a goal of building twenty gigawatts of wind, solar, and geothermal energy on public lands by 2025, and President Biden has set a separate goal of building thirty gigawatts of offshore wind energy by 2030.<sup>61</sup> Just as importantly, in late 2021, Congress enacted the Infrastructure Investment and Jobs Act, which provides tens of billions of dollars designed to shift the U.S. economy away from fossil fuels in the electricity and transportation sectors in favor of carbon free resources to address climate change.<sup>62</sup>

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60. *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, WHITE HOUSE (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies> [https://perma.cc/24E2-MVHR]; see also Exec. Order No. 14,008, 86 Fed. Reg. 7,619, 7,624 (Feb. 1, 2021).

61. Consolidated Appropriations Act, 2021, Pub L. No. 116-260, 134 Stat. 1182 (enrolling the Energy Act of 2020 in Division Z, which contains these renewable energy goals); *Fact Sheet: Biden Administration Jumpstarts Offshore Wind Energy Projects to Create Jobs*, WHITE HOUSE (Mar. 29, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/29/fact-sheet-biden-administration-jumpstarts-offshore-wind-energy-projects-to-create-jobs> [https://perma.cc/EY3C-FQYE].

62. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021); *Fact Sheet: The Bipartisan Infrastructure Deal Boosts Clean Energy Jobs, Strengthens Resilience, and Advances Environmental Justice*, WHITE HOUSE (Nov. 8, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/08/fact-sheet-the-bipartisan-infrastructure-deal-boosts-clean-energy-jobs-strengthens-resilience-and-advances-environmental-justice/> [https://perma.cc/7XN6-ZG5C] (discussing provisions of the law); Katrina McLaughlin & Lori Bird, *Implementing the Clean Energy Investments in the Bipartisan Infrastructure Law*, WORLD RES. INST. (Dec. 22, 2021), <https://www.wri.org/insights/implementing-clean-energy-investments-us-bipartisan-infrastructure-law> [https://perma.cc/J486-6JLZ] (same).

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At the state level, numerous state legislatures have adopted aggressive “100% clean energy” laws to address climate change that require electric utilities and other actors to phase out the use of fossil fuels completely by 2045 or 2050, with ambitious targets in interim years.<sup>63</sup> In 2019 alone, Maine, Nevada, New Mexico, New York, and Washington joined California and Hawaii in adopting such laws; Virginia followed suit in 2020; and North Carolina, Oregon and Illinois joined the group in 2021.<sup>64</sup> These laws build on, but differ significantly from, the state renewable portfolio standards (RPSs) that states began enacting in the 1990s and which now exist in more than half of the states. In general, RPSs apply only in the electricity sector while the new 100% clean energy laws often also include all segments of the economy that produce carbon emissions such as buildings and transportation.<sup>65</sup> Moreover, the 100% clean energy laws focus on energy resources that are “carbon free” or “zero emission” rather than “renewable,” thus allowing the use of nuclear energy and carbon capture and storage (CCS) technologies (if they can ever be utilized at commercial scale in a cost-effective manner) to meet the mandates.<sup>66</sup> Finally, the new laws focus on the urgency of addressing climate change and are designed to support a major energy transition away from fossil fuels and GHG emissions in the state rather than simply to promote the use of renewable energy in the electricity sector for either climate or business development reasons.<sup>67</sup>

Some state and local governments have also taken steps to reduce or eliminate the use of natural gas for building heating and cooking in favor of electricity to take advantage of the rapidly decarbonizing electricity sector. Since 2019, over fifty California cities, as well as local governments in other states, have enacted laws restricting or banning natural gas connections in new residential and commercial buildings to reduce carbon emissions and address

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63. See David Sarkisian, *Clean Energy Standards Gaining Attention Across the U.S.*, DSIRE INSIGHT (July 28, 2021), <https://www.dsireinsight.com/blog/2021/7/26/clean-energy-standards-gaining-attention-across-the-us> [<https://perma.cc/D5Y9-J9WD>] (reporting the states that enacted clean energy standards between September 2020 and July 2021, showing a map of all states that have enacted such standards). For a list of states that enacted clean energy standards prior to September 2020, see *States Expanding Renewable and Clean Energy Standards*, DSIRE INSIGHT (Sept. 25, 2020), <https://www.dsireinsight.com/blog/2020/9/25/states-expanding-renewable-and-clean-energy-standards> [<https://perma.cc/V5TY-JF2U>].

64. Alexandra B. Klass, *Eminent Domain Law as Climate Policy*, 2020 WIS. L. REV. 49, 53; e.g., Virginia Clean Economy Act, 2020 Va. Acts 1193; S.B. 2408, 102nd General Assemb., Reg. Sess. (Il. 2021) (enrolling the Illinois Energy Transition Act); Act of September 25, 2021, ch. 508, 2021 Or. Laws 1; see also *State Renewable Portfolio Standards and Goals*, NAT’L CONF. STATE LEGISLATURES (Aug. 13, 2021), <https://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx> [<https://perma.cc/P9HU-KQDW>] (detailing such laws in all fifty states, with a focus on statutory amendments since 2018); Sara Cline, *Oregon Governor Signs Ambitious Clean Energy Bill*, KATU.COM (July 27, 2021), <https://katu.com/news/local/oregon-governor-signs-ambitious-clean-energy-bill> [<https://perma.cc/PAN7-GXS6>] (describing Oregon’s 100% clean energy law); Jeffrey Tomich, *Landmark Ill. Climate Bill Passes in Boon for Nuclear, Renewables*, ENERGYWIRE (Sept. 14, 2021, 6:09 AM EST), <https://www.eenews.net/articles/landmark-ill-climate-bill-passes-in-boon-for-nuclear-renewables> [<https://perma.cc/R9L7-4RW8>].

65. Klass, *supra* note 64, at 53-55.

66. *Id.*

67. Sarkisian, *supra* note 63.

climate change.<sup>68</sup> While numerous states have preempted local government natural gas bans,<sup>69</sup> both California and Massachusetts have enacted new laws to support such a transition from gas to electricity in the residential and commercial heating and cooking sectors.<sup>70</sup> Moreover, in 2021, the New York City Council voted to phase out the use of natural gas in new building construction and the New York state legislature introduced a similar law with support from the Governor.<sup>71</sup>

These new laws provide additional support for pipeline opponent arguments that FERC's current policies have resulted in overbuilding natural gas infrastructure that will lead to stranded assets and carbon lock-in.<sup>72</sup> These arguments are at the heart of the dramatic increase in litigation at FERC and in the courts surrounding new natural gas pipelines, with opponents arguing that a massive buildout of new fossil fuel infrastructure is inconsistent with NEPA and Section 7 of the Natural Gas Act. As these trends continue, FERC's track record in the courts has taken a hit, as Section B explains.

### *B. Growing Judicial Scrutiny of FERC's Analysis of Pipeline Need and Environmental Impacts*

This Section discusses two recent decisions from the D.C. Circuit invalidating FERC orders granting certificates for new natural gas pipelines. After decades of judicial deference to FERC in this area, these cases illustrate

68. See Kristin Musulin, *San Jose, Oakland, Join Growing List of California Cities to Ban Natural Gas Construction*, SMART CITIES DIVE (Dec. 4, 2020), <https://www.smartcitiesdive.com/news/san-jose-oakland-join-growing-list-of-california-cities-to-ban-natural-gas/591507> [<https://perma.cc/9DB9-U69A>].

69. See, e.g., Jeffrey Tomich, *Gas Ban Backlash Spreads Across the U.S.*, ENERGYWIRE (Feb. 2, 2021), <https://www.eenews.net/stories/1063724065> [<https://perma.cc/T943-ZNEM>] (reporting on state legislative actions to preempt local natural gas bans); Jeff Brady & Dan Charles, *As Cities Grapple with Climate Change, Gas Utilities Fight to Stay in Business*, NAT'L PUB. RADIO (Feb. 22, 2021, 4:19 PM ET), <https://www.npr.org/2021/02/22/967439914/as-cities-grapple-with-climate-change-gas-utilities-fight-to-stay-in-business> [<https://perma.cc/Z42Y-6X3N>] (discussing industry and legislative efforts to preempt local natural gas bans); Tom DiChristopher, *Gas Ban Monitor: Building Electrification Evolves as 19 States Prohibit Bans*, S&P GLOB. MKT. INTEL. (July 20, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/gas-ban-monitor-building-electrification-evolves-as-19-states-prohibit-bans-65518738> [<https://perma.cc/V35R-NYT2>].

70. See Ann C. Mulkern, *California Aims to Cut Gas in New Homes, Stops Short of Ban*, ENERGYWIRE (May 10, 2021), <https://www.eenews.net/articles/calif-aims-to-cut-gas-use-in-homes-stops-short-of-ban> [<https://perma.cc/7Q4G-KWXV>]; Tom DiChristopher, *Mass. Building Gas Ban Movement Expands After 2020 Setback*, S&P GLOB. MKT. INTEL. (Jan. 12, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/mass-building-gas-ban-movement-expands-after-2020-setback-62026427> [<https://perma.cc/6KDA-X55K>].

71. A Local Law to Amend the Administrative Code of the City of New York, in Relation to the Use of Substances with Certain Emissions Profiles, New York City, N.Y., Code § 24-177.1; All-Electric Building Act, S.B. S6843B, 2021-2022 Leg. Sess. (N.Y. 2021); David Iaconangelo, *N.Y. Governor Backs Nation's First Statewide Gas Ban*, ENERGYWIRE (Jan. 6, 2022), <https://www.eenews.net/articles/n-y-governor-backs-nations-first-statewide-gas-ban> [<https://perma.cc/B4KZ-QRKZ>].

72. See Powers, *supra* note 51 (discussing lock-in associated with new natural gas infrastructure); *infra* Sections II.C.1, III.B (comments in FERC proceedings on stranded assets associated with new natural gas infrastructure).

the increasing judicial scrutiny of FERC’s pipeline certificates, placing pressure on FERC to engage in a more critical analysis of both pipeline companies’ evidence of market need, and the climate and environmental justice impacts of new pipelines.

First, in 2021, in *Environmental Defense Fund v. FERC*, the D.C. Circuit held that FERC violated Section 7 of the Natural Gas Act in granting a certificate of public convenience and necessity to Spire STL to construct a new natural gas pipeline in the St. Louis area.<sup>73</sup> It did so, not because FERC’s NEPA analysis was inadequate, but because its analysis of project need was inadequate. The court began by setting forth FERC’s own requirements in the 1999 Certificate Policy Statement for determining whether a new pipeline “is or will be required by the present or future public convenience and necessity.”<sup>74</sup> According to the court, under the 1999 Certificate Policy Statement, FERC “first considers whether there is a market need for the proposed project” and, if so, “whether there will be adverse impacts on ‘existing customers of the pipeline proposing the project, existing pipelines in the market and their captive customers, or landowners and communities affected by the route of the new pipeline.’”<sup>75</sup> If such adverse impacts on those stakeholders exist, then the Commission must balance the “evidence of public benefits to be achieved against the residual adverse effects” considering “all relevant factors.”<sup>76</sup> The “market need” requirement is to ensure “that a project will not be subsidized by existing customers.”<sup>77</sup>

As explained in Section I.A, under the 1999 Certificate Policy Statement, one way a company can establish a market need for a pipeline is through the existence of “precedent agreements,” which are preconstruction contracts with the pipeline company to use the proposed pipeline. In this case, no shippers committed to the project, so Spire STL entered into a private agreement with one of its affiliate gas companies—Spire Missouri—for 87.5% of the pipeline’s projected capacity.<sup>78</sup> When Spire STL applied to FERC for its certificate, it used the precedent agreement with its affiliate to establish the market need for the pipeline.<sup>79</sup> It also admitted in its application that because demand projections for the region were flat, the pipeline was not required to serve new natural gas load. Instead, the company cited other benefits associated with the new pipeline, including increased reliability and supply security as well as the elimination of reliance on propane in the region.<sup>80</sup> The Environmental Defense Fund and other

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73. 2 F.4th 953, 976 (D.C. Cir. 2021).

74. *Id.* at 959 (quoting 15 U.S.C. § 717f(c)(1)(A) (2018), a subsection of the Natural Gas Act).

75. *Id.* (quoting Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227, 61,745 (1999)).

76. *Id.* (quoting Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,745).

77. *Id.* (quoting Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,747).

78. *Id.* at 963.

79. *Id.*

80. *Id.*

parties challenged the certificate application at FERC on the grounds that the precedent agreement with an affiliate was insufficient evidence of market need, and that the company should undertake a market study to justify need.<sup>81</sup>

FERC granted the certificate, stating that it would not “second guess” Spire Missouri’s “business decision” to enter into the precedent agreement with Spire STL, even though the companies were affiliates, which arguably undercuts any conclusion that this was an arms-length, market-based transaction.<sup>82</sup> On both FERC’s initial order granting the certificate and its denial of a request for rehearing, Commissioners LeFleur and Glick dissented on grounds that the majority was “turning a blind eye” to warning signs in the record that there were primarily pipeline company business reasons, rather than market need, for the pipeline. These warning signs included the fact that natural gas demand in the region was flat; the only precedent agreement to support the application was with an affiliate company rather than resulting from an arms-length transaction; and that Spire STL would earn a fourteen percent return on equity for building the pipeline.<sup>83</sup> The dissenting Commissioners also contended Spire STL did not establish that the benefits of the pipeline outweighed the harms associated with the pipeline, which include adverse financial impacts on existing pipelines and customers and adverse environmental impacts on landowners and communities.<sup>84</sup>

On appeal, the D.C. Circuit agreed with the petitioners and held that FERC’s order granting the pipeline certificate was arbitrary and capricious. The court acknowledged that precedent agreements can in some cases “demonstrate both market need and benefits that outweigh adverse effects of a new pipeline”<sup>85</sup> but that they are not always sufficient to establish a pipeline “is or will be required by the present or future public convenience and necessity.”<sup>86</sup> The court pointed out that nothing in FERC’s Certificate Policy Statement suggests that a single precedent agreement between affiliates for less than the pipeline’s full capacity is “conclusive proof of need” where there is no new load demand to meet, no finding that the pipeline would reduce costs, and no unaffiliated shippers subscribed to the pipeline.<sup>87</sup> The court distinguished earlier cases where it had upheld the use of precedent agreements to establish need because, in those cases, the precedent agreements either were not alleged to be between affiliate companies or were supported by a market study to establish need.<sup>88</sup>

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81. *Id.* at 963-64.

82. *Id.* at 965-67, 974-76 (quoting Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018)).

83. *Id.* at 966-67; Order Issuing Certificates, 164 FERC at ¶ 61,085; Order on Rehearing, Spire STL Pipeline LLC, 169 FERC ¶ 61,134 (2019).

84. *Env’t Def. Fund*, 2 F.4th at 966-67.

85. *Id.* at 972

86. *Id.* (quoting 15 U.S.C. § 717f(e)).

87. *Id.* at 973.

88. *See id.* at 974-75 (citing *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97 (D.C. Cir. 2014); *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015); and *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir., Feb. 19, 2019) (per curiam)).

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Moreover, the court found that the lack of evidence of market need served to undercut FERC's conclusions that the pipeline's benefits outweighed the potential harms to existing pipelines, captive customers, landowners, and other stakeholders. In this regard, the court stated that while the Commission had "broad discretion" to balance the benefits and costs, that discretion "may not go entirely unchecked."<sup>89</sup> In this case, according to the court, FERC "failed to seriously engage with the questions of whether these benefits were real or illusory, given that it took the position that it would 'not second guess the business decisions' of the pipeline shipper in this case."<sup>90</sup> As a remedy, the court vacated the certificate for the pipeline, which had already been constructed and placed in service.<sup>91</sup> Not surprisingly, this prompted an immediate flurry of filings at FERC and the D.C. Circuit regarding whether the pipeline should be shut down immediately in compliance with the court's order or be allowed to continue to operate on an emergency basis for the winter, thus raising again the issue of how much of a "need" there was for the pipeline in the first place.<sup>92</sup> In December 2021, FERC granted Spire STL a temporary certificate to continue natural gas service to the region while FERC considered the issues on remand from the D.C. Circuit decision.<sup>93</sup>

The *Environmental Defense Fund* case illustrates how courts are growing skeptical of FERC's extreme deference to pipeline companies' desire to build new fossil fuel infrastructure in an age of energy transition and climate change. While this case did not expressly raise the issue of climate change and the environmental harms associated with natural gas pipelines, the backdrop of the case is one where pipeline companies continue to attempt to increase profits through building new, long-lived fossil fuel infrastructure despite growing evidence that such projects are not in the present or future public convenience and necessity.

This conclusion regarding courts' increased skepticism of FERC's assessment of public convenience and necessity under the Natural Gas Act is bolstered by another case from 2021 that, unlike the prior case, expressly involved climate and environmental issues. In *Vecinos para el Bienstar de la*

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89. *Id.* at 975.

90. *Id.* at 975-76 (quoting Spire STL Pipeline LLC, 164 FERC ¶ 61,085 (2018))

91. *Id.* at 976-77.

92. *See, e.g.,* Catherine Morehouse, *FERC Requests More Evidence of Reliability Impacts as Spire STL Pipeline Seeks Temporary Approval*, UTIL. DIVE (Aug. 10, 2021), <https://www.utilitydive.com/news/ferc-requests-more-evidence-of-reliability-impacts-as-spire-stl-pipeline-se/604687> [<https://perma.cc/JR97-SRL2>] (discussing the aftermath of the D.C. Circuit decision and Spire STL's efforts to maintain pipeline operations); Miranda Willson, *D.C. Circuit Battle Escalates Over FERC Pipeline Approval*, ENERGYWIRE (Aug. 26, 2021, 7:09 AM EDT) (on file with author) (discussing filings in the D.C. Circuit over whether the court should allow the pipeline to keep operating despite its revocation of the certificate of public convenience and necessity).

93. *See* Spire STL Pipeline LLC, 177 FERC ¶ 61,147 (2021); *see also* Spire STL Pipeline LLC, 176 FERC ¶ 61,160 (2021) (issuing an earlier temporary certificate); Daniel Moore, *Energy Regulator Allows Spire Gas Pipeline to Run This Winter*, BLOOMBERG L. (Dec. 3, 2021), <https://news.bloomberglaw.com/environment-and-energy/energy-regulator-allows-spire-gas-pipeline-to-run-this-winter> [<https://perma.cc/UA2F-3NV2>].

*Comunidad Costera v. FERC*, the D.C. Circuit reviewed FERC's decision to authorize construction and operation of three LNG export terminals in Texas under Section 3 of the Natural Gas Act,<sup>94</sup> and two 135-mile pipelines carrying natural gas to one of those terminals under Section 7 of the Natural Gas Act.<sup>95</sup> The petitioners alleged that FERC failed to adequately consider the impacts of the proposed projects on climate change and impacted environmental justice communities, thus violating both NEPA and the Natural Gas Act.<sup>96</sup> In its decision, the court agreed, finding that FERC had acted in an arbitrary and capricious manner in granting the certificates.<sup>97</sup>

Regarding the climate analysis in the EIS prepared to satisfy NEPA, FERC had quantified the GHG emissions associated with the projects and found that construction and operation would increase GHG emissions and “contribute incrementally to future climate change impacts.”<sup>98</sup> FERC also stated, however, that it could not determine the significance of the projects' contribution to climate change because there was no “universally accepted methodology” to make that determination, and thus it was not possible to determine the local or regional climate impacts of the project.<sup>99</sup> The petitioners argued that FERC could have used the social cost of carbon or another generally accepted methodology to conduct an analysis and that its failure to address that issue in the EIS violated NEPA.

Specifically, petitioners pointed to 40 C.F.R. § 1502.21(c), which requires that “[i]f . . . information relevant to reasonably foreseeable significant adverse impacts cannot be obtained . . . because the means to obtain it are not known, the agency shall include within the environmental impact statement . . . [t]he agency's evaluation of such impacts based on theoretical approaches or research methods generally accepted in the scientific community.”<sup>100</sup> The court agreed with petitioners that FERC violated NEPA on grounds that the agency was required to use the social cost of carbon, a range of rates, or its own criteria “for assessing the significance of the projected costs of the projects' greenhouse gas emissions” or explain why the regulation did not require it to do so.<sup>101</sup>

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94. Section 3 of the Natural Gas Act grants FERC authority to approve LNG import and export terminals that are consistent with the “public interest.” 15 U.S.C. § 717b(a), (e) (2018). For a discussion of potential self-imposed limits on FERC's jurisdiction over LNG facilities, see Miranda Willson, “Major Gap.” *Gas Industry FERC Petitions Stoke NEPA Concerns*, ENERGYWIRE (Sept. 22, 2021, 6:23 AM EST), <https://www.eenews.net/articles/major-gap-gas-industry-ferc-petitions-stoke-nepa-concerns> [<https://perma.cc/H4AQ-5WTJ>].

95. *Vecinos para el Bienstar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021).

96. *Id.* at 1328-31.

97. *Id.* at 1331.

98. *Id.* at 1328.

99. *Id.*

100. *Id.* (quoting 40 C.F.R. § 1502.21(c)).

101. *Id.* at 1329-30. As for the environmental justice analysis in the EIS, the Commission evaluated the projects' impacts on low-income and minority communities within a two-mile radius of the project site but not similar communities further away. The court agreed with petitioners that the two-mile limit “was arbitrary, given its determination that environmental effects from the projects would extend well beyond two miles from the project sites.” *Id.* at 1330-31.

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Moreover, the court held that FERC's failure to adequately analyze the climate impacts of the project resulted in a violation not only of NEPA, but also of Sections 3 and 7 of the Natural Gas Act. The court held that FERC had relied on its faulty NEPA analysis to conclude that the pipeline was "in the public convenience and necessity" and the LNG terminals were "not inconsistent with the public interest."<sup>102</sup> Thus, FERC was required to reconsider these determinations under Sections 3 and 7 of the Natural Gas Act along with its NEPA analysis of climate impacts associated with the projects.<sup>103</sup>

Together, these two cases show the D.C. Circuit becoming increasingly skeptical of FERC's failure to adequately evaluate the economic need and climate impacts associated with natural gas infrastructure projects. Recent policy developments regarding clean energy transition support this skepticism. As discussed above, a growing number of states have adopted clean energy standards that require utilities to source up to one hundred percent of their electricity from renewable or zero-carbon energy resources such as wind, solar, hydropower, and nuclear energy by 2035 or 2050, with interim targets before then. While the commercial development of carbon capture and storage (CCS) technologies may allow for the continued use of some natural gas in the electricity sector without the associated carbon emissions, the costs and timeline for such development remain uncertain.

Even if CCS becomes commercially viable such that it will allow the continued use of natural gas to generate electricity, state and local policy developments outside of the electricity sector will continue to diminish the long-term need for new natural gas infrastructure. For instance, as described above, state and local governments in many parts of the country are working to reduce and ultimately eliminate the use of natural gas for heating and cooking in new buildings in favor of carbon-free electricity.

There remains a significant question, completely unaddressed by FERC at the present time, regarding how to balance a potential short-term need for new natural gas infrastructure against the concerns that such infrastructure will become obsolete before the end of its useful life. FERC's actions, which have generally minimized or ignored federal and state policy responses to the climate impacts of long-lived natural gas infrastructure, result in FERC failing to adequately evaluate both the market need for projects and their environmental impacts.<sup>104</sup> This in turn arguably violates both Section 7 of the Natural Gas Act as well as Sections 4 and 5 of the Natural Gas Act governing just and reasonable rates, as discussed in Part III. The adverse court decisions discussed in this Section provide helpful context for FERC's efforts to update its 1999 Certificate Policy Statement, which are discussed in Section C.

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102. *Id.* at 1331 (quoting Texas LNG Brownsville LLC, 169 FERC ¶ 61,130 (2019) and Rio Grande LNG, LLC, 169 FERC ¶ 61,131 (2019)).

103. *Id.*

104. For another analysis of why FERC's failure to evaluate climate impacts of pipelines violates Section 7 of the Natural Gas Act, see Webb, *supra* note 20.



*C. FERC Actions to Update its 1999 Certificate Policy Statement and Stakeholder Comments*

Since 2018, FERC has sought input from the regulated community, experts and advocacy groups, and the public as to whether it should revise its 1999 Certificate Policy Statement. The remainder of this Section details FERC's two notices of inquiry associated with the Policy Statement and the issuance of its Updated Certificate Policy Statement in February 2022.

1. FERC's 2018 and 2021 Notices of Inquiry and Comments Received

In April 2018, FERC issued a Notice of Inquiry (the 2018 Notice of Inquiry) "to examine its policies in light of changes in the natural gas industry and increased stakeholder interest in how it reviews natural gas pipeline proposals."<sup>105</sup> FERC sought comments from stakeholders regarding (1) the use of precedent agreements to demonstrate project need; (2) eminent domain and landowner interests; (3) evaluation of project alternatives and environmental effects; and (4) the efficiency and effectiveness of the certificate process.<sup>106</sup> After the close of the comment period three months later, during which time FERC received numerous substantive comments,<sup>107</sup> FERC took no further action on the Notice of Inquiry. Then, in February 2021, after the Senate confirmation of two new commissioners and President Biden's appointment of Richard Glick as FERC chairman, FERC "reopened" its review of the 1999 Certificate Policy Statement and sought additional comments.<sup>108</sup> In the announcement of the new inquiry (the 2021 Notice of Inquiry), Commissioner Glick stated that "it's important to recognize that many changes have occurred since our initial inquiry three years ago."<sup>109</sup>

The 2021 Notice of Inquiry listed the following areas for stakeholder comment, which were similar, but not identical, to the areas for comment in the 2018 notice: (1) potential adjustments to determination of need; (2) eminent domain and landowner interests; (3) consideration of environmental impacts; (4) efficiency of FERC's review process; and (5) consideration of effects on environmental-justice communities.<sup>110</sup> Not surprisingly, FERC received a

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105. Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042 (2018) (notice of inquiry).

106. *Id.* at ¶ 1.

107. For a detailed summary of the comments to the 2018 Notice of Inquiry, see TIERNEY, *supra* note 33.

108. Certificate of New Interstate Gas Facilities, 174 FERC ¶ 61,125 (2021) (notice of inquiry); *see also* CONG. RSCH. SERV. *supra* note 31, at 22-24 (discussing this notice of inquiry on revising the Certificate Policy Statement and the solicitation of comments on the same).

109. *FERC Revisits Review of Policy Statement on Interstate Natural Gas Pipeline Proposals*, FED. ENERGY REGUL. COMM'N (Feb. 18, 2021), <https://www.ferc.gov/news-events/news/ferc-revisits-review-policy-statement-interstate-natural-gas-pipeline-proposals> [<https://perma.cc/YVR9-JSKK>].

110. Certificate of New Interstate Gas Facilities, 174 FERC ¶ 61,125, ¶ 1 (2021) (notice of inquiry).

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significant number of comments to its 2021 notice from natural gas interests, landowners, environmental groups, and other stakeholders.<sup>111</sup>

Numerous comments submitted in response to the 2021 Notice of Inquiry raised concerns regarding the 'limited scope of information used by FERC to establish project need. For instance, the New Jersey Division of Rate Counsel filed comments stating that since the time of FERC's 2018 Notice of Inquiry, "there have been substantial shifts in public policy at the federal and state levels. As a result, the need for a rigorous assessment of project need—both at present and over the service life of the proposed project—has become more urgent. The need assessment should include an examination of how an applicant's pipeline proposal fits with—if not advances the achievement of—these new federal and state policies."<sup>112</sup> The New Jersey comments went on to cite President Biden's January 2021 executive order directing the creation of a federal plan to create a carbon-free electricity sector by 2035, and state clean energy policies in New Jersey and elsewhere that may make many new natural gas pipelines obsolete.<sup>113</sup>

Other stakeholders provided detailed comments on how FERC should take these market and policy changes into account, broaden its project need analysis to include regional infrastructure issues and state decarbonization policies, and take other steps to create a more robust market need analysis beyond precedent agreements for individual pipelines to ensure new pipelines are in the present or future public convenience and necessity.<sup>114</sup> Some of these specific proposals are discussed in detail in Section III.B.

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111. See Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶ 19 (stating that FERC received "more than 35,000 comments, including more than 150 unique comment letters, from a diverse range of stakeholders" in response to the 2021 Notice of Inquiry).

112. New Jersey Division of Rate Counsel, Supplemental Comments on the Certification of New Interstate Natural Gas Facilities 4-8 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5230](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5230) [<https://perma.cc/WBB8-G3XV>].

113. *Id.* at 4-8; see also Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021).

114. See, e.g., Comments of Susan F. Tierney, *supra* note 60, at 5 (setting forth reasons why FERC must conduct more "fulsome" reviews of whether a natural gas pipeline is needed and enclosing a report detailing the same); Environmental Defense Fund, Comments on the Certification of New Interstate Natural Gas Facilities, *supra* note 50; Institute for Policy Integrity, Comments on Certification of New Interstate Natural Gas Facilities (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5201](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5201); The Niskanen Center and Affected Landowners, Motion to Intervene and Joint Comments on the Commission's Renewed Notice of Inquiry on the Certification of New Interstate Natural Gas Facilities, *supra* note 55 (contending that FERC's focus on precedent agreements with affiliates to establish market need under the 1999 Certificate Policy Statement has resulted in overbuilding natural gas infrastructure that has led to canceled pipelines, unnecessary costs, and adverse landowner impacts and does not adequately serve the public interest in light of today's market and policy landscape); Institute for Energy Economics and Financial Analysis, Comments on FERC's Certificate Policy Statement on New Fossil Gas Pipelines, *supra* note 49 (discussing canceled pipelines; inadequate need assessments; and associated adverse impacts on ratepayers, the economy, and landowners); United States Environmental Protection Agency, Comment Letter on the Certification of New Interstate Natural Gas Facilities, at 1-3 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5267](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5267) [<https://perma.cc/44F9-FB34>] (expressing concern about "carbon lock-in" and the potential for stranded assets under FERC's current approach and recommending that FERC broaden its market need approach to consider existing infrastructure, state energy transition and climate reduction policies); see also TIERNEY, *supra* note 33 (providing a report filed with Tierney's comments detailing suggested changes to the 1999 Certificate Policy Statement including more robust evaluation of the costs of pipelines and a

Not surprisingly, natural gas companies and their supporters took a different view and submitted comments urging FERC to retain the 1999 Certificate Policy Statement.<sup>115</sup> These commentors also reminded the agency that the Natural Gas Act is focused on economic regulation, not environmental regulation, and thus GHG emissions or other environmental issues should not be a central part of the agency's analysis beyond compliance with NEPA.<sup>116</sup> These commentors also opposed FERC broadening its project need analysis to consider regional infrastructure needs, understandably wishing each pipeline to be considered in isolation.

## 2. FERC's Updated Certificate Policy Statement

The comment period closed in May 2021, and, in February 2022, FERC issued its Updated Policy on Certification of New Natural Gas Facilities (2022 Updated Certificate Policy Statement) on a 3-2 vote.<sup>117</sup> At the outset, FERC provided a history of the proceedings and recognized the significant changes that had occurred since the 1999 Certificate Policy Statement, including significant changes in natural gas markets, production, and technologies; increased focus of climate change and GHG emissions in FERC proceedings; increased judicial scrutiny of FERC pipeline decisions; an enhanced desire by the public to participate in FERC proceedings; and greater national recognition of the impacts

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broader evaluation of relevant interests, including the ability of states to meet their energy policy goals and an assessment of regional infrastructure and energy needs); Suzanne Mattei & Tom Sanzillo, *FERC's Failure to Analyze Energy Market Forces: Risks to Ratepayers, Landowners, and the Overall Economy*, INST. FOR ENERGY ECON. & FIN. ANALYSIS (Dec. 2020), [https://ieefa.org/wp-content/uploads/2020/12/FERCs-Failure-to-Analyze-Energy-Market-Forces\\_December-2020.pdf](https://ieefa.org/wp-content/uploads/2020/12/FERCs-Failure-to-Analyze-Energy-Market-Forces_December-2020.pdf) [<https://perma.cc/8ZNJ-F7YS>].

115. See Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶ 21 (stating that regulated entities and trade associations were “nearly unanimous” in their support of retaining the 1999 Certificate Policy Statement on the issue of determining public need for new pipeline facilities).

116. See, e.g., Natural Gas Supply Association, Comments on the Certification of New Interstate Natural Gas Facilities, at 3 (May 26, 2021) [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5235](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5235) [<https://perma.cc/N69M-HF6J>] (urging FERC to retain the 1999 Certificate Policy Statement and stating that the Natural Gas Act's focus is on economic regulation rather than on environmental regulation); Interstate Natural Gas Association of America, Comments on the Certification of New Interstate Natural Gas Facilities, (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5167](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5167) [<https://perma.cc/XMR9-AFWT>] (same); Enbridge Gas Pipelines, Initial Comments on the Certification of New Interstate Natural Gas Facilities (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5225](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5225) [<https://perma.cc/2EZ3-VGT8>] (same); Comments of U.S. Chamber of Commerce, Comment Letter on the Certification of New Interstate Natural Gas Facilities, at 8-11 (May 26, 2021), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20210526-5255](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20210526-5255) (highlighting the economic focus of the Natural Gas Act urging FERC not to inject additional environmental analysis into its Section 7 proceedings in any changes to the 1999 Certificate Policy Statement); see also TIERNEY, *supra* note 33 (summarizing the comments on the 2018 Notice of Inquiry from natural gas interests that were very similar to those submitted in 2021).

117. Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14. See also Ethan Howland, *FERC Expands Criteria for Reviewing Gas Infrastructure Proposals, Outlines GHG Framework*, UTIL. DIVE (Feb. 18, 2022), <https://www.utilitydive.com/news/ferc-criteria-reviewing-gas-infrastructure-pipeline-proposals/619092/> [<https://perma.cc/2HEJ-24Z6>]; Miranda Willson, *FERC Issues Historic Overhaul of Pipeline Approvals*, ENERGYWIRE (Feb. 18, 2022), <https://www.eenews.net/articles/ferc-issues-historic-overhaul-of-pipeline-approvals> [<https://perma.cc/XFK8-KQD8>].

of proposed pipelines on landowners, communities, and environmental justice and equity values.<sup>118</sup>

After summarizing the comments submitted by stakeholders,<sup>119</sup> the Commission stated that its “goals and objectives” associated with the 2022 Updated Certificate Policy Statement remain consistent with the 1999 Certificate Policy Statement but “provide a more comprehensive analytical framework for its decision-making process.”<sup>120</sup> It noted that, as in the past, it “will weigh the public benefits of a [pipeline] proposal, the most important of which is the need that will be served by the project, against its adverse impacts.”<sup>121</sup> Thus, “[t]o demonstrate that a project is required by the public convenience and necessity, an applicant must first establish the project is needed.”<sup>122</sup> The Commission stated the expectations and requirements for applicants to establish project need “have evolved over time” and recognized that “in practice, the Commission has relied almost exclusively on precedent agreements to establish project need.”<sup>123</sup> The Commission then stated that it could no longer “adequately assess project need without also looking at evidence beyond precedent agreements” and that “affiliate precedent agreements will generally be insufficient to demonstrate need,” citing the *Environmental Defense Fund* case.<sup>124</sup>

The Commission detailed the types of evidence of project need applicants could provide beyond precedent agreements, including “how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project.”<sup>125</sup> The Commission also gave examples of evidence of project need such as market studies, publicly available information from government or third parties showing projections of market growth, load growth profiles, gas supply portfolios, evidence of policy and regulatory developments, projected lower natural gas prices for customers resulting from increased competition, and evidence of alternatives to the proposed project.<sup>126</sup> The Commission stated that it would evaluate, on a case-by-case basis, how much evidence beyond precedent agreements would be required and warned that the absence of such evidence “may prevent an applicant from meeting its burden to demonstrate that a project is needed.”<sup>127</sup> If an applicant fails to meet its burden of demonstrating project need, the Commission “will not undertake any further consideration of the project’s benefits or adverse effects.”<sup>128</sup> Nowhere in its updated analysis of

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118. Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶ 12-16.

119. *Id.* at ¶¶ 20-49.

120. *Id.* at ¶¶ 50-51.

121. *Id.* at ¶ 52.

122. *Id.* at ¶ 53.

123. *Id.*

124. *Id.* at ¶ 54 n.173.

125. *Id.* at ¶ 55.

126. *Id.* at ¶¶ 55-59.

127. *Id.* at ¶¶ 60-62.

128. *Id.* at ¶ 61.

project need did the Commission make specific reference to the use of state or federal climate policies as evidence of project need or lack thereof, other than to reference the relevance of “policy and regulatory developments.”<sup>129</sup>

The Commission then detailed how it would evaluate adverse effects in determining whether to issue a certificate for a project, focusing on “(1) the interests of the applicant’s existing customers; (2) the interests of existing pipelines and their captive customers; (3) environment interests; and (4) the interests of landowners and surrounding communities, including environmental justice communities.”<sup>130</sup> The Commission did not make significant changes regarding the economic interests of the applicant’s customers, other pipelines, and other pipelines’ customers.<sup>131</sup> However, regarding environmental interests, the Commission stated that changes were needed from the 1999 Certificate Policy Statement and that, going forward, it would consider environmental impacts, including GHG emission and impacts on environmental justice communities, as part of both its NEPA analysis and its public interest determination under the Natural Gas Act.<sup>132</sup> It stated that the Commission “expects applicants to structure their protects to avoid, or minimize, potential adverse environmental impacts” and that the Commission would use its authority under the Natural Gas Act to deny an application based on failure to mitigate environmental impacts or to condition the certificate on additional mitigation measures.<sup>133</sup> Regarding landowner impacts, the Commission indicated that its analysis would be “more expansive” than in prior years, and that it was “committed to ensuring that environmental justice and equity concerns are better incorporated into our decision-making processes.”<sup>134</sup>

The 2022 Updated Certificate Policy Statement was subject to strong dissenting opinions by Commissioners Danly and Christie, each of which focused their ire primarily on the Commission’s new policy of giving greater weight to environmental impacts in general and GHG emissions in particular in determining whether a project is or will be required by the present or future public convenience and necessity. Commissioner Danly stressed the limits of the Commission’s regulatory authority under the Natural Gas Act, and warned that NEPA did not extend that jurisdiction to allow FERC to deny a certificate or

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129. *Id.* at ¶ 59.

130. *Id.* at ¶ 62.

131. *Id.* at ¶¶ 63-70.

132. *Id.* at ¶¶ 71-76.

133. *Id.* at ¶¶ 74-76. The Commission also referenced a separate policy statement issued the same day as the Updated Policy Statement explaining how FERC would evaluate project-related GHG emissions. *Id.* at ¶ 76; see Interim Policy Statement, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, Dkt. No. PL21-3-000 (Feb. 18, 2021), <https://www.ferc.gov/media/pl21-3-000> [<https://perma.cc/V3HB-XNYD>].

134. Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶¶ 78-79. Later in the Updated Policy Statement, the Commission provided additional details regarding what would be evaluated as part of this more “expansive” review of landowner impacts and how it would address impacts to environmental justice communities. See *id.* at ¶¶ 81-93.

impose conditions on a certificate for failure to mitigate climate impacts.<sup>135</sup> On determining project need, he agreed that the Commission could take evidence other than precedent agreements into account, and that the precedent agreements with affiliates should in some cases be subject to greater scrutiny, but he disagreed that evidence beyond precedent agreements should always be required or that the Commission should evaluate the end use of gas in determining project need.<sup>136</sup> Commissioner Danly also questioned whether the 2022 Updated Certificate Policy Statement could be even be binding on the Commission in the absence of enacting the policy pursuant to notice-and-comment rulemaking under the Administrative Procedure Act.<sup>137</sup>

Commissioner Christie raised similar concerns, stating that the 2022 Updated Certificate Policy Statement was an action by the FERC majority to “arrogate to itself the power the rewrite” the Natural Gas Act and NEPA, exceeded its authority, was bad policy, and violated the Supreme Court’s “major questions” doctrine.<sup>138</sup> He warned the new policy would do “fundamental damage to the nation’s energy security” by making energy projects more costly and difficult to build. He focused on longstanding FERC precedent and caselaw stating that FERC is an economic regulator rather than an environmental regulator, and that environmental impacts must always be “subsidiary” to FERC’s statutory role to promote the development of U.S. natural gas resources and to protect the interests of ratepayers.<sup>139</sup> He called out “well-funded interests groups working to reduce or eliminate natural gas usage” and contended that the 2022 Updated Certificate Policy Statement would result in advancing these interest groups’ policy goals.<sup>140</sup> While he respected the rights of interest groups to promote those policy goals, he warned that such policy questions should only be decided by democratically elected legislators rather than “unelected judges or administrative agencies.”<sup>141</sup>

### III. A Way Forward: Integrating the Updated Policy Statement on Pipelines with FERC’s Existing Authority to Set “Just and Reasonable” Rates

This Part evaluates a way forward for FERC based on its governing statutes, court decisions reviewing FERC’s authority under the Natural Gas Act and the Commission’s 2022 Updated Certificate Policy Statement. Section III.A considers how FERC has exercised its authority to set just and reasonable rates in the electricity context under the Federal Power Act and suggests that FERC could look to its history of policymaking under that statute to support a broader

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135. Dissent of Commissioner Danly, Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶¶ 3-8.

136. *Id.* at ¶¶ 10-19.

137. *Id.* at ¶¶ 39-42.

138. Dissent of Commissioner Christie, Updated Policy Statement on Certification of New Natural Gas Facilities, *supra* note 14, at ¶¶ 2-3.

139. *Id.* at ¶¶ 15-16.

140. *Id.* at ¶ 49.

141. *Id.* at ¶¶ 49-51.

view of what is just, reasonable, and in the public interest under the Natural Gas Act. Section III.B builds on that analysis and suggests how FERC can rely on both its 2022 Updated Certificate Policy Statement and stakeholder comments in its most recent Notice of Inquiry proceeding to create a more comprehensive and durable evaluation of market need for new pipelines. Section III.C proposes that FERC should place more emphasis on federal, state, and local climate policies as part of its project need analysis. This Section illustrates how this approach is both consistent with the Natural Gas Act and avoids many of the current disagreements among Commissioners in the 2022 Updated Certificate Policy Statement regarding the extent of the Commission's statutory authority.

#### *A. FERC Actions Under the Federal Power Act*

Pursuant to the 1935 Amendments to the Federal Power Act, FERC has jurisdiction over the rules governing interstate, wholesale electricity markets and interstate electric transmission to ensure rates, charges, and practices are “just and reasonable.”<sup>142</sup> The language granting FERC jurisdiction to establish just and reasonable rates and practices under the Federal Power Act is identical to that under the Natural Gas Act. As a result, for decades, the federal courts have regularly used electricity cases and natural gas cases interchangeably in reviewing FERC orders.<sup>143</sup>

When it comes to the Federal Power Act, FERC has exercised its broad authority to set just and reasonable rates and practices by issuing orders to expand electric generator and customer access to utility-owned interstate electric transmission lines;<sup>144</sup> to require utilities and other transmission owners to engage in regional transmission planning;<sup>145</sup> and to open up wholesale electricity markets to demand response,<sup>146</sup> battery storage,<sup>147</sup> and distributed energy resources,<sup>148</sup> among other actions. While FERC did not take these actions expressly to address climate change or to support a clean energy transition, the effect of these orders has been to remove market barriers to developing clean energy resources and technologies, which has both accelerated the clean energy transition and promoted just and reasonable electric rates, charges, and

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142. 16 U.S.C. §§ 824d(a), 824e(a) (2018).

143. *See supra* note 17.

144. Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 75 FERC ¶ 61,080 (1996) (codified at 18 C.F.R. pts. 35, 385).

145. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051 (2011) (codified at 18 C.F.R. pt. 35).

146. Wholesale Competition in Regions with Organized Electric Markets, 125 FERC ¶ 61,071 (2008) (codified at 18 C.F.R. pt. 35); Demand Response Compensation in Organized Wholesale Energy Markets, 134 FERC ¶ 61,187 (2011) (codified at 18 C.F.R. pt. 35).

147. Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 162 FERC ¶ 61,127 (2018) (codified at 18 C.F.R. pt. 35).

148. Participation of Distributed Energy Resource Aggregation in Markets Operated by Regional Transmission Organizations and Independent System Operators, 172 FERC ¶ 61,247 (2020) (codified at 18 C.F.R. pt. 35).

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practices.<sup>149</sup> Notably, the federal courts, including the Supreme Court, have upheld FERC's broad authority under Section 206 of the Federal Power Act to change its rules governing electricity markets to ensure just and reasonable rates and practices in light of changes in energy economics, technology, and policies in the face of legal challenges by a range of stakeholders.<sup>150</sup>

Moreover, when it comes to electric transmission infrastructure planning under the Federal Power Act, FERC has specifically directed electric utilities and other regulated entities to consider both regional transmission needs as well as state and federal "public policy requirements," including clean energy mandates, in developing transmission plans to ensure just and reasonable transmission rates. In 2011, in Order 1000, FERC found that "significant changes in the nation's electric power industry" required these reforms, in part based on increased investments in the transmission of renewable energy resources.<sup>151</sup> Thus, among other things, FERC required electric utilities and other entities engaged in transmission planning to develop transmission plans that were regional in scope and to expressly consider "transmission needs driven by public policy requirements established by state or federal laws or regulations."<sup>152</sup> These "public policy requirements" are the same federal and state clean energy laws FERC has expressly ignored when it comes to determining the need for new natural gas pipelines under the Natural Gas Act, causing some commenters to urge FERC to include a similar evaluation in determining pipeline project need.<sup>153</sup>

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149. See Glick & Christensen, *supra* note 17, at 5, 14-21 (discussing FERC orders).

150. See *New York v. FERC*, 535 U.S. 1, 10-12 (2002) (upholding Order 888, which established open access electric transmission services); *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767-70 (2016) (upholding Order 745 and confirming that FERC has expansive authority to remedy unjust and unreasonable rates and discriminatory practices, most notably "in a technical area like electricity rate design" where the Court affords FERC "great deference") (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 532 (2008)); *Nat'l Ass'n of Reg. Util. Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) (upholding Order 841, which ensured energy storage resources have access to wholesale electricity markets on the basis of FERC's broad authority to ensure just and reasonable electricity rates in light of economic and technical developments associated with energy storage).

151. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 52 (D.C. Cir. 2014); see also Glick & Christiansen, *supra* note 17, at 37-38 (discussing Order 1000).

152. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61,051, at 1 (2011) (codified at 18 C.F.R. pt. 35).

153. Commenters on FERC's 2018 and 2021 Notices of Inquiry for its 1999 Certificate Policy Statement urged FERC to draw on its use of public policy requirements in the electric transmission planning context under the Federal Power Act to update its evaluation of new natural gas pipelines under the Natural Gas Act. See Sabin Center for Climate Policy, *Comment Letter on the Certification of New Interstate Natural Gas Facilities*, at 4-5 (June 18, 2018), [https://elibrary.ferc.gov/eLibrary/docinfo?accession\\_number=20180618-5051](https://elibrary.ferc.gov/eLibrary/docinfo?accession_number=20180618-5051) [<https://perma.cc/S7M8-9LXZ>] ("There is some precedent for considering policy in energy system planning. In the electricity context, for example, FERC has allowed "transmission needs driven by public policy requirements established by state or federal laws or regulations" to be considered in planning. Public policy requirements should also be considered in the natural gas context."); Institute for Policy Integrity, *Comments on Certification of New Interstate Natural Gas Facilities*, *supra* note 114 (May 26, 2021) (describing Order 1000's use of state public policies to help determine the need for new transmission under the Federal Power Act and arguing that FERC should similarly consider state public policies in determining the need for new natural gas pipelines under the Natural Gas Act).



In Order 1000, FERC fully recognized that public policy requirements, including clean energy polices, will vary by region, and will impact transmission needs based on available resources and transmission constraints. However, it still found that its statutory mandate to ensure just and reasonable electricity rates required such policies to be considered in transmission planning.<sup>154</sup> Several states, electric utilities, and other stakeholders challenged Order 1000 on grounds that FERC lacked statutory authority to enact it and because its provisions were arbitrary and capricious. The D.C. Circuit upheld Order 1000 in its entirety, citing the great deference given to FERC in remedying practices that result in unjust and unreasonable rates, actions which “lie at the core of [FERC’s] regulatory mission.”<sup>155</sup>

These FERC orders issued under Sections 205 and 206 of the Federal Power Act, and the court decisions upholding them, provide additional support for FERC as it charts a new course for evaluating new natural gas pipelines. As discussed in more detail below, these electricity orders, particularly Order 1000, support the proposition that FERC has the broad authority, and arguably the obligation, to ensure that its project need analysis for new pipelines does not result in overbuilding unneeded fossil fuel infrastructure that will result in stranded assets and, consequently, unjust and unreasonable rates for gas utilities and consumers.

### *B. Climate Policies, Project Need, and Just and Reasonable Rates*

One of the reasons FERC first issued its Notice of Inquiry in 2018 and restarted it in 2021 was the fact that the energy landscape has changed significantly since 1999.<sup>156</sup> In 1999, and for the next decade, any new natural gas pipeline was likely displacing a more pollution-intensive form of heating or electricity, such as coal or oil. That is no longer the case. Instead, new natural gas infrastructure paid for by captive ratepayers is often competing with or displacing new wind, solar, and battery storage investments either supported by the markets and, in some cases, mandated by a growing number of states. Moreover, market trends show that these renewable energy resources either are currently or will soon be cheaper than natural gas.<sup>157</sup>

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154. Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 136 FERC ¶ 61,051, at 2, 166-221 (2011) (codified at 18 C.F.R. pt. 35) (discussing public policy requirements); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 139 FERC ¶ 61,132, at 317-339 (2012) (codified at 18 C.F.R. pt. 35); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 141 FERC ¶ 61,044, at 4 n.5 (2012) (codified at 18 C.F.R. pt. 35) (describing public policy requirements).

155. *S.C. Pub. Serv. Auth.*, 762 F.3d at 52, 54-55 (quoting *Alcoa Inc. v. FERC*, 564 F.3d 1342, 1347 (D.C. Cir. 2009)); see also Glick & Christiansen, *supra* note 17, at 37-38 (discussing Order 1000).

156. Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042 (2018) (2018 Notice of Inquiry); Certificate of New Interstate Gas Facilities, 174 FERC ¶ 61,125 (2021) (2021 Notice of Inquiry).

157. See, e.g., Alexandra B. Klass & Gabriel Chan, *Cooperative Clean Energy*, 100 N.C. L. REV. 1, 35-36 (2021) (discussing the significant decline in the cost of renewable energy resources and

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Section 7 of the Natural Gas Act allows FERC to grant pipeline certificates only where new pipelines are “required by the present or future public convenience and necessity.”<sup>158</sup> In the years immediately after 1999, there were good arguments to support new pipelines as a required component of encouraging natural gas use for both heating and electricity based on energy costs and pollution reduction goals. But the landscape regarding the future role of natural gas for both heating and electricity has changed significantly in recent years due to the availability of low-cost carbon-free energy resources, new clean energy technologies, and growing policy support for a clean energy transition.

As a result, FERC’s determination of “project need” under Section 7 can no longer ignore these market and policy forces in favor of a myopic focus on the existence of precedent agreements with affiliates or non-affiliates. Instead, Section 7 of the Natural Gas Act arguably *requires* FERC to evaluate state and federal climate and clean energy policies, regional gas infrastructure and energy needs, the GHG emissions associated with new natural gas pipelines, and the price of available renewable energy resources that could displace natural gas in conducting its project need analysis.<sup>159</sup>

One might argue that state and federal climate and clean energy policies are subject to change, as legislative majorities come and go, and thus such policies are too uncertain to be considered as part of a pipeline’s market need. The response to that argument, however, is that even if such policies are not dispositive, FERC should at least consider whether a particular state or region has enacted policies to phase out fossil fuels in the electricity and heating sector before concluding there is a long-term need for new pipeline infrastructure to accommodate new natural gas demand. This is particularly true in regions such as the northeastern United States and the West Coast, where most states have

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relative costs of renewable energy and fossil fuels to produce electricity); *Levelized Costs of New Generation Resources in the Annual Energy Outlook 2021*, U.S. ENERGY INFO. ADMIN. (Feb. 2021), [https://www.eia.gov/outlooks/aeo/pdf/electricity\\_generation.pdf](https://www.eia.gov/outlooks/aeo/pdf/electricity_generation.pdf) [<https://perma.cc/FB7C-SYA2>]; Rupert Way, Penny Mealy, J. Doyne Farmer & Matthew Ives, *Empirically Grounded Technology Forecasts and the Energy Transition*, INST. FOR NEW ECON. THINKING (INET Oxford Working Paper No. 2021-01, Sept. 14, 2021), [https://www.inet.ox.ac.uk/files/energy\\_transition\\_paper-INET-working-paper.pdf](https://www.inet.ox.ac.uk/files/energy_transition_paper-INET-working-paper.pdf) [<https://perma.cc/P39H-YQCL>] (forecasting an even more significant declines in renewable energy costs); Kingsmil Bond, *The Renewable Spring: The Interplay Between Finance and Policy in the Energy Transition*, INT’L RENEWABLE ENERGY AGENCY (Mar. 2021), [https://irena.org/-/media/Files/IRENA/Agency/Publication/2021/Oct/IRENA\\_Renewable\\_Spring\\_2021.pdf](https://irena.org/-/media/Files/IRENA/Agency/Publication/2021/Oct/IRENA_Renewable_Spring_2021.pdf) [<https://perma.cc/L67K-DA9H>] (same); Dan Gearino, *The Clean Energy Transition Enters Hyperdrive*, INSIDE CLIMATE NEWS (Nov. 25, 2021), <https://insideclimatenews.org/news/25112021/clean-energy-transition-progress> [<https://perma.cc/GLK5-P5EE>] (describing the INET and IRENA studies).

158. 15 U.S.C. § 717f(e) (2018).

159. See *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ [under NEPA] of the direct and indirect environmental effects of pipelines it approves”) (quoting *Sierra Club v. FERC*, 827 F.3d 36, 47 (D.C. Cir. 2016)). Moreover, in 2021, in comments on two environmental review documents prepared under NEPA, EPA urged FERC to begin using the social cost of carbon in its environmental review for new pipelines to appropriately evaluate the climate impacts of these projects. See Robert Walton, *EPA Urges FERC to Use Social Cost of Carbon in Gas Project Reviews*, UTIL. DIVE (Aug. 27, 2021), <https://www.utilitydive.com/news/epa-urges-ferc-to-use-social-cost-of-carbon-in-gas-project-reviews/605683> [<https://perma.cc/2PRX-CGHG>].

strong decarbonization policies that are only getting more stringent, not more lenient, as time goes on.<sup>160</sup>

As illustrated in Section I.B., FERC's failure to consider these policies has led it to grant certificates to pipelines that were later cancelled for lack of demand in states with clean energy policies that disfavor new natural gas infrastructure.<sup>161</sup> Moreover, in Order 1000, FERC has already adopted a policy that requires the consideration of state clean energy laws when it comes to planning for new electric transmission infrastructure under the Federal Power Act.<sup>162</sup> The reasons for considering such policies in the electricity sector apply equally or with even more force in the natural gas pipeline sector because of concerns over carbon lock-in and the potential for stranded assets.<sup>163</sup>

This does not mean that FERC should reject requests for certificates for all new natural gas pipelines. It is certainly likely that, in the short term, there will continue to be pipelines that are in the public interest and that serve the present or future public convenience and necessity. The transition from natural gas to renewable energy for electricity and heating purposes will be gradual, current decarbonization policies vary by state, and a market analysis for the region in question may justify new pipeline infrastructure. But, as time goes on, and if policy and technology development trends hold, fewer prospective pipeline projects should qualify.

Comments filed by multiple parties in the response to the 2021 Notice of Inquiry provide a helpful roadmap for FERC to chart a new course under the 2022 Updated Certificate Policy Statement. For instance, energy expert Susan F. Tierney of Analysis Group has suggested that FERC reform its project need analysis for pipelines so that it includes: (1) a broader cost-benefit analysis for each pipeline rather than reliance on precedent agreements; (2) consideration of state climate policies; and (3) an assessment of broader regional infrastructure and market factors which FERC currently ignores.<sup>164</sup>

Likewise, the Institute for Policy Integrity has suggested that FERC borrow from its actions in the electricity sector relating to Order 1000 to (1) consider pipeline need on a regional basis to “avoid overbuilding, and to prevent unjust and unreasonable natural gas transportation service rates;”<sup>165</sup> and (2) consider

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160. See *supra* Section II.A (discussing state 100% clean energy laws and other decarbonization policies).

161. See *supra* Section I.B.

162. See *supra* Section III.A.

163. See, e.g., Sarah Ladin & Burçin Ünel, *Reforming Pipeline Review: Taking a Closer Look at the Need for New Natural Gas Infrastructure*, INST. FOR POL'Y INTEGRITY 1, 5-9, 11-15 (Feb. 2022), [https://policyintegrity.org/files/publications/Pipeline\\_Review\\_Report\\_vF.pdf](https://policyintegrity.org/files/publications/Pipeline_Review_Report_vF.pdf) [<https://perma.cc/G3J2-SGA2>] (recommending that FERC borrow from Order 1000 and other rules and practices in the electricity sector in its pipeline certificate proceedings to include analyses of regional infrastructure needs and the potential to create stranded assets due to decarbonization in the electricity and building sectors).

164. See *supra* note 115 and accompanying text (citing and summarizing Tierney's comments).

165. Institute for Policy Integrity, Comments on Certification of New Interstate Natural Gas Facilities, *supra* note 114, at 32 (“Whereas acting under the [Federal Power Act], the Commission requires a coordinated regional approach to identify and consider ‘regional solutions to regional needs’ and

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the risks of stranded costs associated with building new natural gas pipeline with a forty-to-sixty-year lifespan in light of state decarbonization policies and broader clean energy transition trends nationwide.<sup>166</sup> It accurately stressed that the “[t]wo primary purposes [of the Natural Gas Act] are consumer protection against excessive prices and (relatedly) the orderly development of natural gas supplies,” that these goals require “that FERC certify only projects that are in the public interest,” and that a regional focus in determining need will best allow FERC to comply with Section 7 in evaluating proposed pipelines.<sup>167</sup>

Finally, the Environmental Defense Fund had several helpful suggestions for FERC in its comments on the 2021 Notice of Inquiry in connection with determining project need for new pipelines. These include: (1) a more detailed review of the justifications for the proposed project, including why more efficient utilization of *existing* natural gas infrastructure cannot be used to meet any market need; (2) a more thorough balancing of benefits and burdens of the proposed project, with FERC staff performing a draft balancing analysis for comment prior to decision, similar to the environmental review process under NEPA; and (3) considering all relevant information associated with the useful life of the pipeline, including federal and state decarbonization policies that may create a risk for stranded assets.<sup>168</sup>

The policies advocated by these commenters—shifting to a regional approach for determining project need, evaluating the project against the backdrop of whether existing infrastructure can meet any new demand, and considering the risk of stranded assets in light of rapidly developing clean energy policies and markets—would allow FERC to address many of the concerns raised by federal courts. Moreover, such an approach would bring FERC’s analysis of natural gas pipelines in line with its approach to electricity infrastructure and markets under the Federal Power Act. Doing so would help ensure that FERC’s evaluation of natural gas pipelines is consistent with its obligation to ensure just and reasonable rates under Sections 4 and 5 of the Natural Gas Act in addition to its separate obligation under Section 7 to only approve pipelines in the present and future public convenience and necessity. As discussed above, FERC can rely on its authority under Sections 4 and 5 of the Natural Gas Act to consider a broad range of factors for market need because of the impact of new pipeline infrastructure on natural gas rates and charges.

As illustrated in Section III.A, FERC’s track record in the courts is excellent when it relies on its broad authority over electricity rates, charges, and practices to set new rules for electricity markets and transmission planning. In doing so, FERC has considered state public policies in transmission planning and the

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implementation of ‘more efficient or cost-effective regional transmission alternatives,’ the Commission, acting under the [Natural Gas Act], has been steadfast in its refusal to look beyond private contracts as evidence of need or to assess projects from a regional perspective.”)

166. *Id.* at 39-42.

167. *Id.* at 35.

168. Environmental Defense Fund, Comments on the Certification of New Interstate Natural Gas Facilities, *supra* note 50, at 4-5.

regional needs of energy infrastructure to ensure that FERC-regulated practices, plans, and markets reflect developments in emerging energy resources, technologies, markets, and policies.

The Supreme Court has long recognized that FERC's authority under Sections 4 and 5 of the Natural Gas Act and Sections 205 and 206 of the Federal Power Act are equivalent and has used cases under the two statutes as precedent interchangeably.<sup>169</sup> Thus, FERC should take a page from its Federal Power Act playbook and use its authority under Sections 4 and 5 of the Natural Gas Act as further support for necessary changes to its project need analysis under Section 7. This would help ensure that new pipelines it approves are in fact in the present or future public convenience and necessity.<sup>170</sup> Doing so would be consistent with longstanding judicial doctrine recognizing the interrelationship between FERC's jurisdiction to ensure just and reasonable natural gas rates under Sections 4 and 5 and FERC's authority to determine whether a pipeline certificate is in the public interest under Section 7.

In his 2020 article *Zombie Energy Laws*, Professor Joshua C. Macey identifies how several statutes, rules, and judicial doctrines governing electricity markets have become “zombie energy laws”—laws that may have been justified based on prior market conditions but today “entrench incumbent market power and prevent the deployment of renewables,” resulting in discrimination in energy markets and unjust and unreasonable rates.<sup>171</sup> Professor Macey argues that current market conditions have made these laws “unjust and unreasonable,” and that FERC arguably is violating the Federal Power Act by continuing to enforce them rather than reforming them.<sup>172</sup>

The same argument can be made regarding FERC granting certificates of public convenience and necessity for natural gas pipelines based solely or primarily on evidence of precedent agreements rather than conducting a broader assessment of project need that includes a review of existing regional infrastructure and demand and climate policies that favor carbon free energy over natural gas and other fossil fuels. FERC should revise its current approach to pipeline siting based on the 2022 Updated Certificate Policy Statement as well as using its broad authority over rates, charges, and practices under Sections 4 and 5 of the Natural Gas Act.

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169. See *supra* note 18 (citing case law holding that extent of FERC's authority to set just and reasonable rates under the Natural Gas Act and Federal Power Act is the same).

170. *NRG Power Mktg. v. Maine Pub. Utils. Comm'n*, 558 U.S. 165, 174-76 (2010) (discussing the “public interest” standard applicable under both Sections 205 and 206 of the Federal Power Act and Sections 4 and 5 of the Natural Gas Act); see also, e.g., *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8, 23-31 (1961) (holding that the Commission must consider “all factors bearing on the public interest” in deciding whether to grant a pipeline certificate under Section 7 and that those factors may include the impact of granting the certificate on the price of gas in related markets) (quoting *Atl. Refin. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)); *Missouri Pub. Serv. v. FERC*, 601 F.3d 581, 588 (D.C. Cir. 2010) (requiring FERC to consider initial rates in its Section 7 proceeding despite the ability to evaluate rates later in a subsequent Section 4 proceeding).

171. Joshua C. Macey, *Zombie Energy Laws*, 73 *VAND. L. REV.* 1077, 1077 (2020).

172. *Id.* at 1084.

*C. Climate Policies and FERC's Role as an "Economic Regulator"*

Notably, in the 2022 Updated Certificate Policy Statement, while the FERC majority agreed that precedent agreements alone should no longer be the exclusive evidence used to establish project need, it included only a brief reference to the role of "policy and regulatory developments" in determining project need.<sup>173</sup> Other than the majority noting the existence of stakeholder comments on the topic, the primary mention of climate policy specifically was in Commissioner Christie's dissent, where he assailed the majority for engaging in climate policy itself.<sup>174</sup> He warned that policy determinations regarding the future role of natural gas in the energy sector must be left to elected representatives.<sup>175</sup>

However, the FERC majority's relative silence on the matter in no way prevents FERC from considering federal and state climate policies as part of its project need analysis. Indeed, Section 4, 5, and 7 of the Natural Gas Act *require* FERC to consider such policies to avoid the construction of potentially billions of dollars of stranded natural gas infrastructure assets. Approving pipelines to transport natural gas to cities and states that have committed to using carbon-free resources for heating, cooking, and electricity production cannot be in the public convenience and necessity or result in just and reasonable rates. If FERC were to ignore the fact that New York City and numerous California cities have voted to phase out natural gas in new building construction when considering pipelines proposed to transport gas to those communities, it would be an abdication of its 'statutory duty under the Natural Gas Act.

Recognizing changes in demand for natural gas and adequately addressing it as part of FERC's public convenience and necessity analysis does not in any way usurp the role of policymakers. Instead, taking seriously the changing market and policy landscape for future natural pipelines is precisely the type of economic regulation the dissenting Commissioners contend FERC should conduct.

To be clear, FERC should not be doing this analysis as part of its evaluation of environmental impacts under either the Natural Gas Act or NEPA, but instead as part of its project and market need analysis. If FERC proceeds in this way, the concerns of the dissenting Commissioners are addressed because FERC is not using NEPA to expand its authority under the Natural Gas Act or allowing environmental harm to outweigh project need. Instead, it is using existing policy changes by elected officials that is driving on-the-ground natural gas market trends to assess project need. Moreover, taking such policy developments into account in determining project need is fully consistent with the Updated

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173. Updated Policy Statement, *supra* note 14, at ¶ 59.

174. Updated Policy Statement, *supra* note 14, at ¶¶ 21-23, 27, 59; Dissent of Commissioner Christie, Updated Policy Statement, *supra* note 14, at ¶¶ 5, 49-56.

175. Dissent of Commissioner Christie, Updated Policy Statement, *supra* note 14, at ¶ 56.

Certificate Policy Statement, where the majority recognized the relevance of “policy and regulatory developments.”<sup>176</sup>

Finally, both of the dissenting Commissioners cite the Supreme Court’s 1976 decision in *National Association for the Advancement of Colored People (NAACP) v. Federal Power Commission*,<sup>177</sup> to reinforce FERC’s limited role as an economic regulator charged with encouraging “the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”<sup>178</sup> In *NAACP*, the Court held that the Commission did not have the power to regulate electric and natural gas utilities’ personnel practices or punish their discriminatory employment actions as part of its statutory public interest authority under the Natural Gas Act and Federal Power Act. However, the Court also held that the Commission *did* have the authority to consider the impacts of employment discrimination on utility rates under its mandate to set “just and reasonable” rates.<sup>179</sup>

The Court stated that FERC’s public interest mandate did not give it a “broad license to promote the general public welfare,” that “the principal purpose of [the Natural Gas and Federal Power Acts] was to encourage the orderly development of plentiful supplies of electricity and natural gas at reasonable prices,” and that nothing in the legislative history indicated one of the purposes of the laws was to eliminate employment discrimination.<sup>180</sup> However, the Court also held that to the extent a utility’s discriminatory employment practices resulted in duplicative or unnecessary labor costs, litigation costs associated with discrimination lawsuits, or other business costs that impacted the utility’s rates, the Commission was obligated to reject the collection of those costs from ratepayers in regulatory proceedings because such costs would be unjust and unreasonable under the applicable statutes.<sup>181</sup>

The *NAACP* case supports the claims made in this Article. Even accepting the contentions of the dissenting Commissioners that the Natural Gas Act directs FERC to be an economic regulator rather than an environmental regulator, it is impossible to regulate energy markets and ensure just and reasonable electric and gas rates without fully considering the impact of environmental policies on energy markets and technologies. Thus, to the extent natural gas companies seek to build pipelines to transport natural gas to states or cities that have enacted policies to ban the use of that fuel in favor of carbon-free alternatives, approving those pipelines and allowing companies to recover the costs of those pipelines from ratepayers would directly contradict the Supreme Court’s directives in the *NAACP* case. Accordingly, FERC has both the authority and the obligation to

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176. See *supra* note 181.

177. 425 U.S. 662 (1976). FERC’s predecessor agency was the Federal Power Commission.

178. Dissent of Commissioner Danly, Updated Policy Statement, *supra* note 14, at ¶¶ 3-4, 43 (citing *NAACP*, 425 U.S. at 670); Dissent of Commissioner Christie, Updated Policy Statement, *supra* note 14, at ¶¶ 13, 32 (same).

179. *NAACP*, 425 U.S. at 667.

180. *Id.* at 669-70.

181. *Id.* at 666-68.

## Evaluating Project Need for Natural Gas Pipelines

expand its public need analysis in ways that are both consistent with its Updated Policy Statement and the claims made in this Article.

### Conclusion

This Article contends that Sections 4, 5, and 7 of the Natural Gas Act all compel FERC to reform its approach to establishing project need for granting certificates of public convenience and necessity for new interstate natural gas pipelines. FERC can no longer put to the side the clean energy transition underway in the United States and relegate the climate impacts of pipelines to a subsidiary “environmental” assessment separate and apart from project need. Instead, because of developing local, state, and federal policies on climate change and the clean energy transition, the environmental impacts of new fossil fuel pipelines are central to whether new pipelines are in the present or future public convenience and necessity.

FERC’s longstanding approach to evaluating natural gas pipeline certificates has failed to fulfill its statutory obligation to ratepayers, potentially burdening them with decades of stranded costs associated with expensive and potentially soon-to-be-obsolete fossil fuel infrastructure. A growing number of federal appellate court decisions have recognized these deficiencies, creating more urgency for FERC action. FERC responded to some of these concerns in its 2022 Updated Certificate Policy Statement, but questions remain if and how it will use the growing number of local, state, and federal climate policies, including policies designed to phase out the use of natural gas in new building construction, in its public convenience and necessity analysis. This is particularly true in light of FERC’s decision, in March 2022, to consider additional comments on the Updated Certificate Policy Statement in light of strong opposition to the revisions by industry, numerous states, and members of Congress.<sup>182</sup> This Article makes the claim that FERC must consider these policies as part of its project need analysis rather than as part of its environmental impact analysis. Doing so is consistent with FERC’s role as an economic regulator and is consistent with its authority under Section 7 of the Natural Gas Act

Moreover, FERC’s failure to date to adequately address project need for new pipelines implicates not only Section 7 of the Natural Gas Act, but also

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182. See *FERC Seeks Comment on Draft Policy Statements on Pipeline Certification, GHG Emissions*, FED. ENERGY REGUL. COMM’N (Mar. 24, 2022), <https://www.ferc.gov/news-events/news/ferc-seeks-comment-draft-policy-statements-pipeline-certification-ghg-emissions> [https://perma.cc/6BJQ-397S]; see also Ethan Howland, *Sens. Manchin, Barrasso Slam FERC’s ‘Political Agenda’ on Natural Gas, Say It Will Stifle Development*, UTIL. DIVE (Mar. 4, 2022), <https://www.utilitydive.com/news/manchin-barrasso-ferc-gas-infrastructure-pipeline-review/619816/> [https://perma.cc/HPU2-RGH9]; Miranda Wilson, *Pipeline Giants Warn FERC of “Fierce Legal Challenge”*, ENERGYWIRE (Mar. 16, 2022, 7:03 AM), <https://subscriber.politicopro.com/article/eenews/2022/03/16/pipeline-giants-warn-ferc-of-fierce-legal-challenge-00017321> [https://perma.cc/W43G-5R7U]; Miranda Wilson, *19 States Appeal FERC Natural Gas Policies*, ENERGYWIRE (Mar. 22, 2022, 7:30 AM), <https://subscriber.politicopro.com/article/eenews/2022/03/22/19-states-appeal-ferc-natural-gas-policies-00018928> [https://perma.cc/6WBD-H2T4].



Sections 4 and 5 of the Natural Gas Act, which require that FERC ensure that rates and charges for natural gas are “just and reasonable.” FERC has used the identical “just and reasonable” language of the Federal Power Act to support its orders expanding energy markets and electric transmission access to allow participation of energy resources that support a clean energy transition. It has also used this authority to require utilities to consider state clean energy laws and regional needs in transmission planning. The courts have responded favorably. FERC should expand its evaluation of project need for pipelines to ensure just and reasonable rates for natural gas just as it has done to expand market access for clean energy resources in electricity markets. Such actions will allow FERC to comply with its Congressional mandate to ensure pipelines serve the present or future public convenience and necessity, are in the public interest, and result in just and reasonable rates.