UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	**)**	**Docket No. PL18-1-000**
	)	
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews	**)**	**Docket No. PL21-3-000**
	)	**(Not Consolidated)**

COMMENTS OF THE ELECTRICITY CONSUMERS RESOURCE COUNCIL (ELCON)

Pursuant to the Federal Energy Regulatory Commission's (FERC or Commission) Order on Draft Policy Statements, issued in the above-captioned proceedings on March 24, 2022, the Electricity Consumers Resource Council (ELCON) respectfully submits these initial comments in response to FERC's February 18, 2022 Updated Policy Statement[1] and Interim GHG Policy Statement[2] (collectively, the "Draft Policy Statements").

ELCON supports FERC's efforts in this proceeding to develop the record prior to implementing either of the Draft Policy Statements. However, ELCON urges FERC to reconsider the policy proposals contained in the Draft Policy Statements. As explained in further detail below, if FERC withholds approval of proposed natural gas pipeline projects due to the level of greenhouse gas (GHG) emissions associated with the project, as determined by FERC, this would have the effect of directly regulating GHG emissions (which exceeds FERC's statutory authority) while ignoring its Congressional mandate to assure the plentiful supply of gas and electricity at the lowest reasonable cost.

---

[1] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Policy Statement).

[2] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

I. INTRODUCTION

ELCON is the national association representing large industrial consumers of electricity. ELCON member companies provide a wide range of products from virtually every segment of the industrial community—we own and operate hundreds of major facilities and are significant consumers of electricity in the footprints of all organized markets and other regions throughout the United States. Reliable electricity supply at just and reasonable rates is essential to our members' operations. As we detail below, changes to the Commission's pipeline certification policy will have a direct financial impact on ELCON members. We ask that the Commission assess any changes to its natural gas pipeline certification policy through the consumer lens, and to consider the impacts of its policies on the cost of delivered power (subject to reliability standards).[3]

II. COMMENTS

A. Consumer Considerations

1. Policy Uncertainty Harms Natural Gas Infrastructure Development.

The Commission erred when it found that its Interim GHG Policy Statement would increase certainty and predictability.[4] As detailed below, it does just the opposite. Further, reduced certainty and predictability has a chilling effect on natural gas infrastructure development.

Industry observers have noted that FERC's actions in these dockets, as well as the substantive proposals contained in the Draft Policy Statements, represent a dramatic

---

[3] *See* ELCON, *et al.*, Letter to the U.S. Senate Committee on Energy and Natural Resources and the House Committee on Energy and Commerce (July 8, 2021), available at: https://elcon.org/independent-study-of-the-cost-of-electricity/.

[4] Interim GHG Policy Statement at P 80; *see also* Interim GHG Policy Statement at P 1 ("Although the guidance contained herein is subject to revision based on the record developed in this proceeding, we will begin applying the framework established in this policy statement in the interim. Doing so will allow the Commission to evaluate and act on pending applications under sections 3 and 7 of the [Natural Gas Act] without undue delay and *with an eye toward greater certainty and predictability for all stakeholders*.") (emphasis added); Updated Policy Statement at P 100 ("A major purpose of this Updated Policy Statement is to *provide clarity and regulatory certainty* regarding the Commission's decision-making process.") (emphasis added).

departure from prior natural gas infrastructure review policies. The U.S. Chamber of Commerce emphasized in comments to the Senate Committee on Energy and Natural Resources that FERC has "unilaterally expanded the [Natural Act Act's (NGA)] 'public interest' standard to now include climate change which, while an important consideration, is inconsistent with FERC's statutory obligations under the NGA."[5] In doing so, "[i]nstead of enhancing certainty and providing clarification of FERC's certificate evaluations, FERC has undermined investor reliance on market need and competition, essentially jettisoning the benefits of free enterprise and substituting it with a novel interpretation of the NGA that is driven by political winds."[6]

Other observers have also described FERC's actions as ill-considered and politically motivated, characterizing its regulatory process in these dockets as "increasingly ad hoc, ill-defined, politicized, driven by decision criteria far outside FERC's actual areas of expertise, and certain to display shifting standards over time" and warning that such flawed processes "will not prove consistent with the long-term flow of private-sector investment needed to preserve and enhance the safety, efficiency, and environmental improvement that are the fundamental goals and outcomes of a market economy."[7]

Ultimately, the regulatory uncertainty that continues to plague the natural gas and industrial consumer sectors will undermine efforts to preserve reliability while reducing sector-wide emissions. This sentiment is commonly reflected in the trade press, where another industry observer recently stated that "[u]nfortunately, FERC's current [proceeding] relating to natural gas certifications threatens to pour cold water on a key component of our infrastructure system, which is the continued build-out and modernization of the nation's network of pipelines—infrastructure that is very much

---

[5] U.S. Chamber of Commerce, U.S. Chamber Letter on FERC Pipeline Policy Hearing (Mar. 2, 2022), available at: https://www.uschamber.com/energy/u-s-chamber-letter-on-ferc-pipeline-policy-hearing.

[6] *Id.*

[7] Benjamin Zycher, How a Federal Regulator is Hijacking Energy Policy (Jan. 26, 2022), available at: https://www.nationalreview.com/2022/01/how-a-federal-regulator-is-hijacking-energy-policy/.

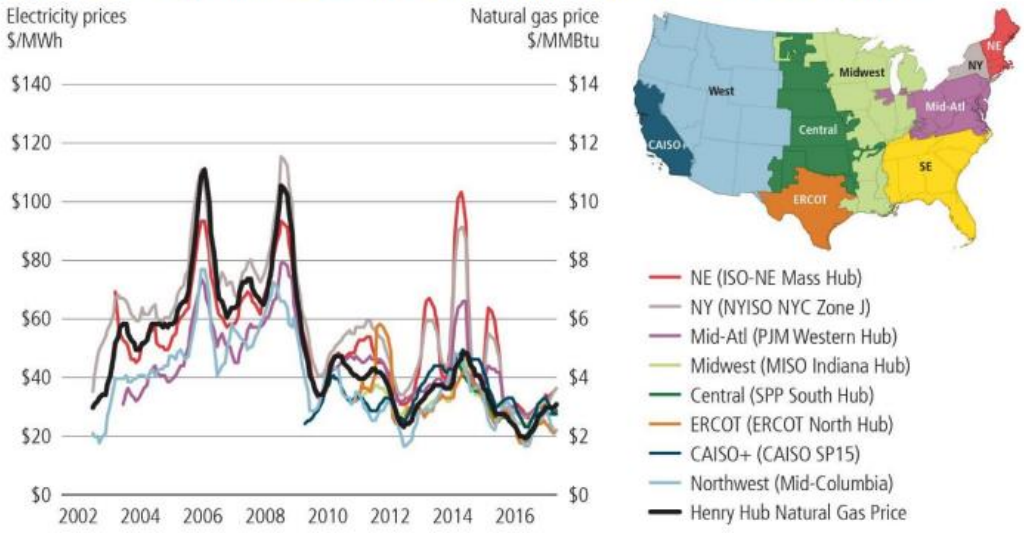
needed to meet energy needs and address climate change."[8] FERC must carefully consider its next steps in these dockets so as to avoid sowing further uncertainty and chilling crucial infrastructure investments.

2. Consumers Need Natural Gas Infrastructure.

i. Natural gas infrastructure is necessary for low-cost electricity.

The cost of natural gas drives electricity prices. As described in a U.S. Department of Energy Staff Report published in 2017, the frequency with which natural gas sets the price of electricity has increased in many of the nation's markets.[9] The following graph produced in the DOE Staff Report illustrates this trend:[10]

Figure 6.2. Average Wholesale Electric Costs/MWh Have Fallen between 2002 and 2016[446]



From 2002–2016, wholesale electricity prices have increasingly tracked natural gas prices, and as natural gas generation has increased over time, the differences in price between regions have also decreased (e.g., prices in NYISO and PJM are much closer in 2016 than in 2004).

As shown above, from 2002-2016, wholesale electricity prices increasingly tracked

---

[8] Kevin Sunday, To Build Back Better, Make FERC Boring Again (Sept. 15, 2021), available at: https://www.utilitydive.com/news/to-build-back-better-make-ferc-boring-again/606594/.

[9] U.S. Department of Energy, Staff Report to the Secretary on Electricity Markets and Reliability (Aug. 2017) (DOE Staff Report), available at: https://www.energy.gov/sites/prod/files/2017/08/f36/Staff%20Report%20on%20Electricity%20Markets%20and%20Reliability_0.pdf.

[10] *Id.* at 122.

natural gas prices.[11] Further, the DOE Staff Report observed that "2017 could mark the first time in [PJM Interconnection, L.L.C.'s (PJM)] history that gas is marginal for more intervals than coal," meaning that "infra-marginal rents that were previously based on the marginal cost of coal resources have been supplanted by the marginal cost of natural gas resources."[12] In the 2021 State of the Market Report for PJM, the market monitor confirmed that "[p]rices in PJM are the result of input prices, consistent with a competitive market. Low natural gas prices were a primary cause of low PJM energy market prices from 2017 to 2020. Higher natural gas prices are a primary cause of higher prices in 2021."[13]

We also know from experience that constrained natural gas capacity causes high and volatile electricity prices in other regions of the U.S., particularly New York and New England.[14] In contrast, reductions in marginal fuel costs have lowered the slope of the electricity supply curve over time in areas where natural gas fuel and transportation are abundant. Consumers have benefitted from this shift in fuel prices because the low cost of natural gas has significantly reduced the wholesale cost of electricity. The illustrative example below represents a simulated dispatch curve in the Electric Reliability Council of Texas (ERCOT) using U.S. Energy Information Administration data.[15]

Assuming a mid-range ERCOT demand of about 40,000 megawatts (MW), the reduced cost of natural gas generation from 2005 to 2015 would lower electricity clearing prices from approximately $60/MW-hour to about $20/MW-hour. For a back-

---

[11] *Id.*

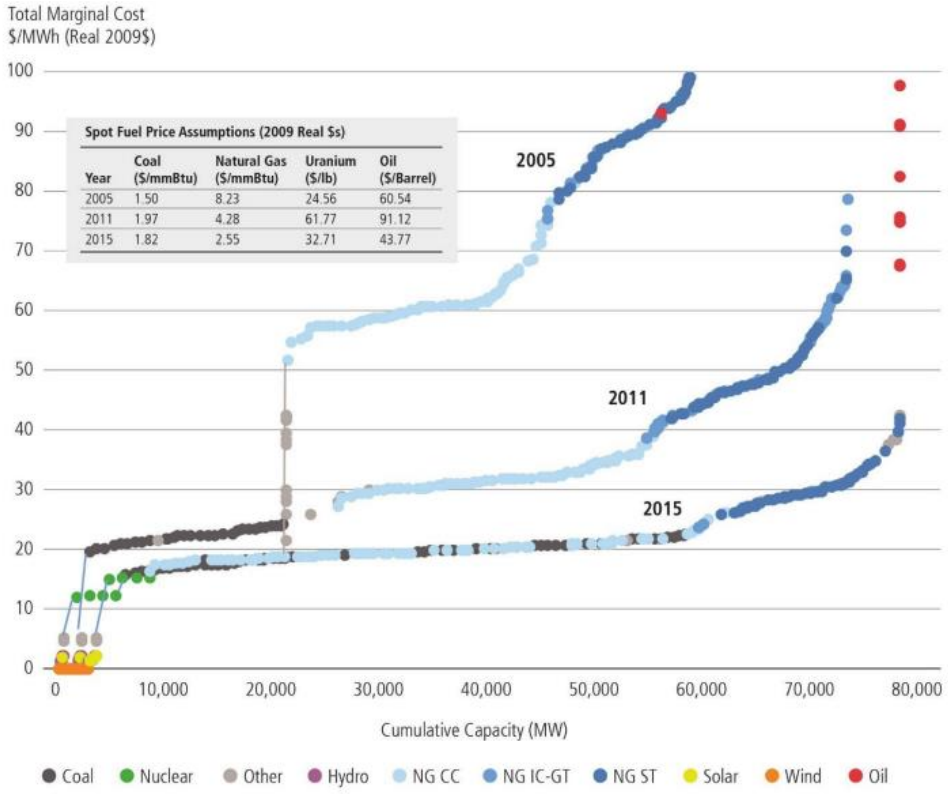
[12] *Id.* at 112.

[13] 2021 State of the Market Report for PJM at 123 (Mar. 10, 2022), available at: https://www.monitoringanalytics.com/reports/PJM_State_of_the_Market/2021/2021-som-pjm-sec3.pdf.

[14] *See, e.g.*, Arnold R. Wallenstein, New York Energy Policies Will Raise Electricity Costs and Air Pollution, Slamming Low-Income Communities (Mar. 9, 2022), available at: https://www.utilitydive.com/news/new-york-energy-policies-will-raise-electricity-costs-and-air-pollution-sl/619748/.

[15] DOE Staff Report at 112.

of-the-envelope approximation of the potential ERCOT-wide savings over an entire year, we could multiply ERCOT's total consumption of 382 million MW-hours[16] in 2020 by $40/MW-hour, which yields a total savings of $15.28 billion. The implication to draw from the graph is that, if natural gas prices were to rise again to levels not seen in years, we can be reasonably sure of the extent to which electricity prices will rise with them.[17]



[16] ERCOT Fact Sheet (Nov. 17, 2021), available at: https://www.ercot.com/files/docs/2021/11/23/ERCOT%20Fact%20Sheet.pdf.

[17] Natural Gas Combined Cycle (NGCC) heat rates have improved as well, but the overwhelming driver of lower electricity prices is the fuel price, not heat rate improvements.

ii. Natural gas infrastructure is necessary for electric reliability.

A dependable and adequate natural gas supply is critically needed to maintain electric system reliability.[18] The North American Electric Reliability Corporation (NERC) repeatedly has observed that "[w]ith increasing levels of variable renewable generation in the resource mix, there is a growing need to have resources available that can be reliably called upon on short notice to balance electricity supply and demand if shortfall conditions occur."[19] Further, "[f]lexible resources that can include responsive generators with assured fuel or energy and demand response are necessary in some areas today to ensure resource adequacy and meet ramping needs."[20]

NERC's previous Long-Term Reliability Assessment (LTRA) reports have highlighted these issues as well, noting in 2021 that "[s]ufficient flexible [dispatchable] resources are needed to support increasing levels of variable [intermittent] generation uncertainty. Until storage technology is fully developed and deployed at scale, . . . *natural gas-fired generation will remain a necessary balancing resource to provide increasing flexibility needs*."[21] Similarly, in 2020, NERC noted that "[a]s more solar and wind generation is added, additional flexible resources are needed to offset their resources' variability. This is placing more operating pressure on those (typically natural gas) resources and *makes them the key to securing [Bulk Power System] reliability*."[22]

In capacity-constrained regions such as the New England Independent System Operator (ISO-NE) and the California Independent System Operator, Inc. (CAISO),

---

[18] *See* NERC December 2021 Long-Term Reliability Assessment at 5 (Dec. 2021) (NERC December 2021 LTRA) ("Natural gas is the reliability 'fuel that keeps the lights on,' and *natural gas policy must reflect this reality*.") (emphasis added), available at: https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf.

[19] NERC 2021 State of Reliability Report at 52 (Aug. 2021), available at: https://www.nerc.com/pa/RAPA/PA/Performance%20Analysis%20DL/NERC_SOR_2021.pdf.

[20] *Id.*

[21] NERC December 2021 LTRA at 6 (emphasis added).

[22] NERC December 2020 Long-Term Reliability Assessment at 7 (Dec. 2020) (emphases added), available at: https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2020.pdf.

regional stakeholder discussions are increasingly focused on reliability challenges associated with severe weather events and fuel availability. As the President and Chief Executive Officer of ISO-NE, Gordon van Welie, recently articulated:

> Fundamentally, the ISO's concern is that the resource mix and fuel infrastructure on which we depend will be insufficient in the face of the wrong combination of severe weather, non-gas generation contingencies, and fuel supply chain issues. In fact, the combination of extended severe weather conditions and a single large contingency could cause us to take emergency actions, including calling for controlled outages.[23]

In the CAISO region, ongoing initiatives include the Aliso Canyon Gas-Electric Coordination Initiative,[24] which aims to address capacity constraints through the implementation of temporary market and operational provisions to be renewed and updated periodically.

Notably, however, these regional actions cannot provide a comprehensive solution to the problem of constrained natural gas supply because such a solution requires actions that only FERC can authorize, including construction of new pipelines and system upgrades. Without this critical infrastructure, attempts by states or regions to improve the reliability of the Bulk Power System will be ineffective to combat potentially grid-disrupting events.

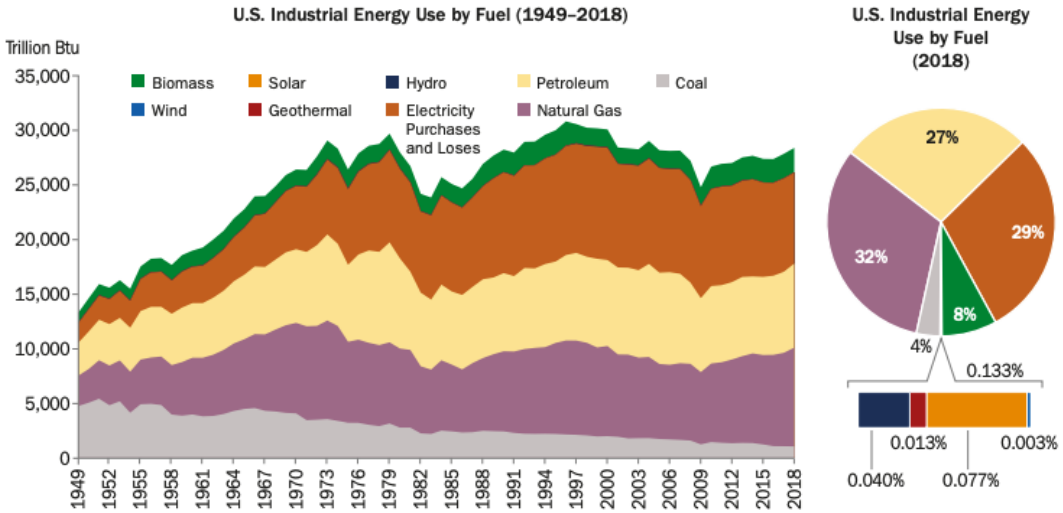
---

[23] Gordon van Welie, Letter to the NEPOOL Participants Committee Regarding Winter Reliability at 2 (Jan. 31, 2022), available at: https://www.iso-ne.com/static-assets/documents/2022/01/npc-2022-02-03-addl-agenda-item-3.pdf.

[24] *See* California ISO, Aliso Canyon Gas-Electric Coordination Initiative (last visited Apr. 17, 2022) ("Phase 1 of this initiative addressed the gas-electric market coordination concerns raised by the limited operations of the Aliso Canyon gas storage facility. The resulting provisions were approved by FERC and will sunset on Nov. 30, 2016. Aliso Canyon Phase 2 will evaluate and propose to either retire, extend or adjust the interim measures approved for the summer period and will file with FERC to seek authority to retain the needed measures through the winter period. Phase 3 proposes to extend the temporary market and operational tools currently in place so that they remain in effect beyond Nov. 30, 2017. Phase 4 proposes to further extend the measures for an additional year. Phase 5 proposes to permanently retain the maximum gas burn constraint in the Southern California region."), available at: https://stakeholdercenter.caiso.com/RecurringStakeholderProcesses/Aliso-Canyon-gas-electric-coordination.

iii. Natural gas infrastructure is necessary for industrial use.

Industrial use of natural gas is very common, both as a fuel in cogeneration facilities and as a chemical feedstock.[25] For example, natural gas is the most-used fuel for industrial energy, while the second-most-used "fuel" (*i.e.*, electricity) is generated using natural gas more than any other primary energy source:[26]



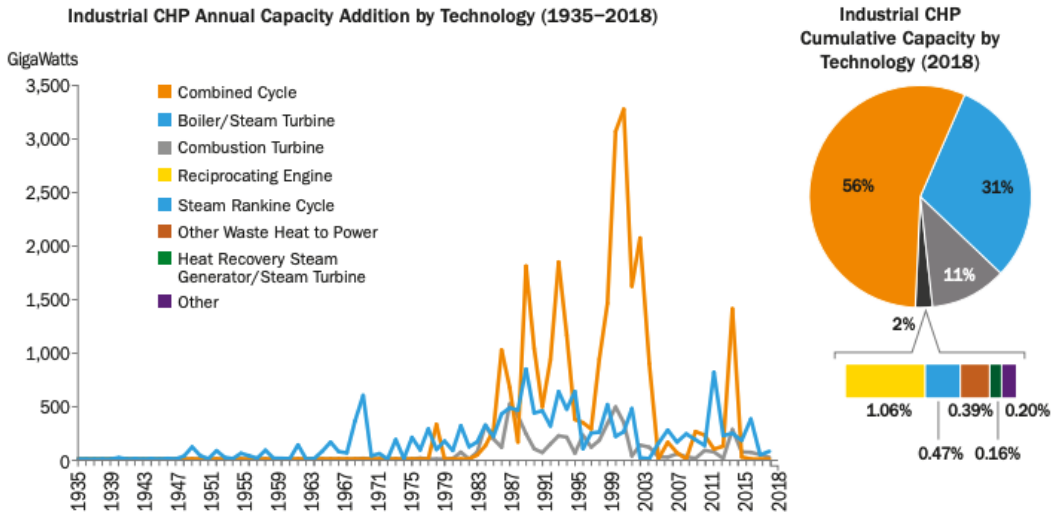
Further, combined cycle natural gas units are the leading technology for combined heat and power systems, which are used by many industrial consumers:[27]

---

[25] National Renewable Energy Laboratory, Industrial Energy Data Book at 12-13 (2018) (NREL 2018 Industrial Energy Data Book), available at: https://www.nrel.gov/docs/fy20osti/73901.pdf.

[26] *Id.* at 12. In 2021, natural gas produced 38.3% of electricity, followed by coal (21.8%), nuclear energy (18.9%), wind (9.2%), and hydro (6.3%). *See* U.S. Energy Information Administration, Frequently Asked Questions (FAQs) (last visited Apr. 17, 2022), available at: https://www.eia.gov/tools/faqs/faq.php?id=427&t=3.

[27] NREL 2018 Industrial Energy Data Book at 66.



Thus, in addition to the critical need for natural gas to keep our power supply reliable, an adequate and dependable supply of natural gas is critically needed for our industrial consumption and generation of electricity.

3. Climate Goals Require More Pipeline Infrastructure.

The decarbonization goals of the Biden Administration, states, and major corporations will require pipeline infrastructure to transport carbon dioxide, renewable natural gas, hydrogen,[28] or other gases and fuels.[29] Analysts have noted that "[t]he Biden administration's move to bring the United States back into the Paris Agreement and lower greenhouse gas emissions to address climate change will, if carried through, lead to a reduction in fossil fuel consumption. Cutting back on the burning of coal, oil, and natural gas will be critical to transitioning the country to the lower-carbon energy system it needs to achieve decarbonization targets."[30] However, "while it may seem

---

[28] Natural gas is the chemical feedstock for steam-methane reformation, the process by which the vast majority of hydrogen is produced in the United States. *See* U.S. Department of Energy, Hydrogen Production: Natural Gas Reforming (last visited Apr. 25, 2022), available at: https://www.energy.gov/eere/fuelcells/hydrogen-production-natural-gas-reforming.

[29] *See, e.g.*, Columbia Center on Global Energy Policy, Investing in the US Natural Gas Pipeline System to Support Net-Zero Targets (Apr. 22, 2021), available at: https://www.energypolicy.columbia.edu/research/report/investing-us-natural-gas-pipeline-system-support-net-zero-targets.

[30] *Id.*, Executive Summary at 1.

counterintuitive," analysts observe that investing more in the domestic natural gas pipeline network could actually help the U.S. to reach net-zero emission goals more quickly and cheaply.[31] Therefore, "[f]ortifying and upgrading the system could prepare the existing infrastructure to transport zero-carbon fuels as they become available and, in the meantime, reduce harmful methane leaks from natural gas."[32]

B. Legal Considerations

1. GHG Mitigation is a Major Policy Question.

Major policy questions should be decided by Congress, not by the executive branch or independent agencies.[33] As noted in Commissioner Christie's February 18, 2022 dissent in Docket No. PL21-3-000, Justice Gorsuch of the U.S. Supreme Court recently explained that:

> The federal government's powers . . . are not general, but limited and divided. Not only must the federal government properly invoke a constitutionally enumerated source of authority to regulate in this area or any other, it must also act consistently with the Constitution's separation of powers. And when it comes to that obligation, this Court has established at least one firm rule: "We expect Congress to speak clearly" if it wishes to assign to an executive agency decisions "of vast economic and political significance." We sometimes call this the major questions doctrine.[34]

We agree with Commissioner Christie that the Draft Policy Statements implicate the major questions doctrine,[35] given the myriad and far-reaching consumer impacts discussed above. Pursuant to that doctrine, Commissioner Christie observes that granting broad deference to FERC on major questions is not appropriate where the

---

[31] *Id.*

[32] *Id.*

[33] *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 667 (2022) (*NFIB*).

[34] *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring) (citations omitted).

[35] Interim GHG Policy Statement (Christie, Comm'r, dissenting at P 23) ("Whether this Commission can reject a certificate based on a GHG analysis—a certificate that otherwise would be approved under the NGA—is undeniably a major question of public policy. It will have enormous implications for the lives of everyone in this country, given the inseparability of energy security from economic security.").

relevant statutes lack an explicit grant of authority to address such questions.[36] Rather, there must be "unmistakable legislative support" for FERC's actions.[37]

2. FERC Plainly Lacks Unmistakable Legislative Support to Regulate GHG Emissions.

Multiple current and former members of the Commission have previously observed that FERC plainly lacks "unmistakable legislative support" to regulate GHG emissions or to reject pipeline certificates based on FERC's own GHG analysis. For example, Commissioner Christie's February 18, 2022 dissent notes that "Congress established in the NGA a regulatory regime to address . . . the need to develop the nation's natural gas resources and to protect ratepayers from unjust and unreasonable rates for gas shipped in the flow of interstate commerce," and that "nothing in the text of [the NGA] . . . empowers the Commission to entirely deny the construction of an export terminal or the issuance of a certificate based solely on an adverse indirect environmental effect regulated by another agency [*i.e.*, the U.S. Environmental Protection Agency (EPA)]."[38]

Similarly, former Commissioner McNamee has argued that there is no textual support in the NGA for the claim that the Commission may deny a pipeline application due to potential upstream and downstream effects of GHG emissions on climate change.[39] Specifically, NGA section 1 finds that "the business of transporting and selling natural gas for ultimate distribution to the public is *affected with a public interest*"[40] and cross-references a Federal Trade Commission Report finding, *inter alia*, that federal regulation should ensure an adequate natural-gas supply at fair,

---

[36] *Id.*

[37] *Id.* (citation omitted).

[38] *Id.* at PP 24, 12 (quoting *Sierra Club v. FERC*, 867 F.3d 1357, 1382 (D.C. Cir. 2017) (*Sabal Trail*) (Brown, J., dissenting in part and concurring in part)).

[39] *See Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2019) (McNamee, Comm'r, concurring at PP 18-22) (*Adelphia Gateway*).

[40] *See* NGA section 1(a), 15 U.S.C. § 717(a) (emphasis added).

nondiscriminatory prices.[41] Further, the text of NGA section 7 "makes clear that its purpose is to *ensure that the public has access to natural gas*."[42] The overall effect of these sections is to promote and protect natural gas production, transportation, and sales to consumers via economic regulation; not to constrain or eliminate such activities via environmental regulation. Moreover, section 1(b) of the NGA and section 201 of the Federal Power Act (FPA) reserve for the states the authority to mitigate the environmental effects of GHG emissions.[43]

In light of these considerations, FERC's authority to regulate GHG emissions or to reject pipeline certificates based on FERC's own GHG analysis remains a major policy question. Accordingly, FERC should wait for a clearer directive from Congress before undertaking *de facto* GHG regulation in certificate proceedings.

3. Implementation of the Draft Policy Statements Would Likely Violate FERC's Congressional Mandate to Assure the Plentiful Supply of Natural Gas and Electricity at Just and Reasonable Rates.

The Draft Policy Statements are inconsistent with FERC's obligations under the NGA and the FPA to the extent they constrain pipeline capacity and increase electricity prices (which, as discussed above, are likely outcomes if the Draft Policy Statements become law). As Commissioner Danly notes, "[t]he NGA authorizes the Commission to

---

[41] *Id.*

[42] *See Adelphia Gateway* (McNamee, Comm'r, concurring at PP 23-24) (emphasis added); *see also* NGA section 7, 15 U.S.C. § 717f, at subsection (a) (authorizing FERC to direct natural gas companies to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to the public); NGA section 7(b) (requiring FERC approval to abandon natural gas facilities/services); NGA section 7(c) (authorizing FERC to issue a temporary certificate in cases of emergency to assure maintenance of adequate service or to serve particular customers, without notice or hearing); NGA section 7(e) (stating that "a certificate shall be issued" when in the public convenience and necessity); NGA section 7(h) (granting a pipeline certificate holder the right to exercise eminent domain for pipeline construction).

[43] *See Adelphia Gateway* (McNamee, Comm'r, concurring at PP 25-31) (summarizing the relevant statutory provisions and their interpretation by the courts).

consider only those factors bearing on the 'public convenience and necessity.'"[44] Importantly, in the context of the NGA, "'public convenience and necessity' means 'a charge to *promote the orderly production of plentiful supplies* of electric energy and natural gas at just and reasonable rates.'"[45] This purpose was affirmed by later acts of Congress.[46]

As discussed above, the charge to promote plentiful energy supplies at just and reasonable rates does not explicitly include the authority to deny pipeline certificates based on the effects of GHG emissions on climate change.[47] Further, to the extent that the Draft Policy Statements would lead to pipeline constraints, FERC's actions actually run counter to the public convenience and necessity. Simply put, if pipelines are not plentiful, then neither are supplies. By extension, if pipeline constraints lead to higher electricity prices, then FERC's actions also run counter to its obligations under the NGA and the FPA to ensure that utilities serve customers at the lowest reasonable cost. As explained above, it is reasonably foreseeable that the Draft Policy Statements, if implemented, would have these effects. Consequently, it is likely that implementation of the Draft Policy Statements would violate FERC's Congressional mandate to assure the plentiful supply of gas and electricity at just and reasonable rates.

---

[44] Interim GHG Policy Statement (Danly, Comm'r, dissenting at PP 25-26) (citing *Nat'l Ass'n for the Advancement of Colored People v. Federal Power Comm'n*, 425 U.S. 662, 670 (1976)) (emphasis added) (footnote omitted). NGA section 1(a) states 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," and cross-references a Federal Trade Commission Report finding, *inter alia*, that federal regulation should ensure an adequate natural-gas supply at fair, nondiscriminatory prices. 15 U.S.C. § 717(a). *See also* NGA section 4 and FPA section 205, 15 U.S.C. § 717(c) and 16 U.S.C § 824d(a), providing that rates must be just and reasonable.

[45] *Id.*

[46] *See Adelphia Gateway* (McNamee, Comm'r, concurring at PP 32-40).

[47] *See id.* at PP 18-22 and 23-24 (finding that sections 1(a) and 7 of the NGA do not support denying a certificate application based on GHG emissions); *see also id.* at PP 25-31 (finding that section 1(b) of the NGA and section 201 of the FPA reserve for the states the authority to mitigate the environmental effects of GHG emissions).

4. FERC Should Seek Direction from the Supreme Court in Any Subsequent Appeals.

Courts are currently divided as to the scope of FERC's authority under the NGA and the National Environmental Policy Act (NEPA) to analyze GHG emissions. While the D.C. Circuit has held that FERC is required to quantify the emissions associated with burning natural gas at power generation plants,[48] the Eleventh Circuit found that consideration of environmental effects not proximately caused by a proposed project *(i.e.*, effects associated with production and storage) is improper and criticized the D.C. Circuit's decision as "questionable at best."[49]

Given that the D.C. Circuit and the Eleventh Circuit do not agree on FERC's role in this matter, FERC (and aggrieved parties) should seek certiorari before the Supreme Court to resolve the circuit split. It should not be incumbent on FERC to choose one appellate court opinion over another when the Circuit Courts disagree. For example, the Commission states in its Interim GHG Policy Statement that the Commission finds "subsequent direction from the D.C. Circuit more instructive than *Center for Biological Diversity* . . ."[50] This puts the Commission in the untenable position of facing remand or reversal based on the venue of any appeal and substantially increases regulatory risk for any pipeline applicant. If the Commission wants to promote regulatory certainty, it should elevate the issue to the Supreme Court, *e.g.*, if and when the Commission seeks further instruction from the judicial branch.

5. Absent Direction from Congress or the Supreme Court, FERC Should Defer to Environmental Agencies.

FERC should defer to guidance from environmental agencies such as the EPA instead of unilaterally establishing a methodology to assess the significance of GHG emissions for proposed natural gas pipeline facilities. As the Commission notes in its

---

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

[49] *Ctr. for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) ("The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents . . . ").

[50] Interim GHG Policy Statement at P 40.

Interim GHG Policy Statement, "[t]o date, no federal agency, including the Commission, has established a threshold for determining what level of project-induced GHG emissions is significant."[51] If FERC were to make its own significance determination in the context of pipeline certificate proceedings, it would exceed the scope of its expertise and encroach upon the purview of other agencies tasked with this type of analysis.

Congress, through the Clean Air Act, assigned to EPA and the states exclusive authority to determine what level of emissions is significant in terms of the potential to adversely affect public health or welfare.[52] More specifically:

> The Clean Air Act establishes an all-encompassing regulatory program, supervised by the EPA to deal comprehensively with interstate air pollution. Congress entrusted the Administrator of the EPA with significant discretion to determine appropriate emissions measures. Congress delegated the Administrator the authority to determine whether pipelines and other stationary sources endanger public health and welfare; section 111 of the Clean Air Act directs the Administrator of the EPA "to publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in *his judgment* it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and to establish standards of performance for the identified stationary sources. The Clean Air Act requires the Administrator to conduct complex balancing when determining a standard of performance, taking into consideration what is technologically achievable and the cost to achieve that standard. . . .
>
> Congress also intended that states would have a role in establishing measures to mitigate emissions from stationary sources. Section 111(f) [of the Clean Air Act] notes that "[b]efore promulgating any regulations . . . or listing any category of major stationary sources . . . the Administrator shall consult with appropriate representatives of the

[51] *Id.* at P 56.

[52] Congress designated the EPA as the expert agency "best suited to serve as primary regulator of greenhouse gas emissions," not FERC. *Am. Elec. Power Co., Inc. v. Conn.*, 564 U.S. 410, 428 (2011).

Governors and of State air pollution control agencies."[53]

Accordingly, Congress established a specific statutory scheme to delegate to EPA, as the expert environmental agency, the primary responsibility for implementing federal programs to regulate and mitigate GHG emissions. FERC is not a GHG expert and should not second-guess the intent of Congress to place such responsibility with other, more specialized agencies.

Moreover, ongoing litigation regarding the Biden Administration's social cost of carbon formula highlights the lack of consensus regarding the significance of varying levels of GHG emissions.[54] Given the lack of consensus, FERC risks muddying the waters if it chooses to move forward with the Draft Policy Statements. In particular, if FERC does not wait for guidance from the environmental agencies, then it may implement policies that either do not align or directly conflict with the Administration's policies.

6. Any Significance Findings Should Focus Solely on Direct Emissions from Pipeline Facilities.

In the absence of further guidance from Congress, the Supreme Court, or expert environmental agencies, FERC should revise the Draft Policy Statements to clarify that its assessment of the significance of GHG emissions is limited to direct emissions and does not include upstream or downstream emissions. Declining to assess the significance of indirect effects is consistent with the plain text of the NGA, which reserves such consideration for the states.[55] As discussed above, FERC must respect the

---

[53] *Adelphia Gateway* (McNamee, Comm'r, concurring at PP 54, 56) (internal citations omitted) (emphasis added).

[54] *See, e.g.*, Kirkland & Ellis Energy Blog, Fifth Circuit Panel Sides with Biden Administration in Ongoing Fight with Certain States Over the Use of "Social Cost of Carbon" in Regulatory Decision-Making (Mar. 18, 2022), available at: https://www.kirkland.com/publications/blog-post/2022/03/social-cost-of-carbon-fifth-circuit. While the social cost of carbon formula remains pending on appeal before the Fifth Circuit, the Biden Administration will be able to utilize the formula during the pendency of the underlying litigation.

[55] *See Adelphia Gateway* (McNamee, Comm'r, concurring at PP 48-51) ("The text of the NGA, and the related subsequent acts by Congress, cannot be revised by NEPA or CEQ regulations to authorize the Commission to deny a certificate application based on effects from the upstream production and downstream use of natural gas.").

jurisdictional boundaries established by Congress.

Further, amending the Draft Policy Statements to clarify that FERC's assessment of the significance of GHG emissions is limited to direct emissions is consistent with the guidance provided by Chairman Glick during an exchange with Senator Cassidy in the March 3, 2022 hearing held by the Senate Committee on Energy and Natural Resources. At that hearing, Chairman Glick said "I want to make it clear that we actually say that, for downstream emissions, we're not going to require you to do it, to mitigate."[56] The Chairman then went on to say FERC will also not require mitigation of upstream emissions and will only require emissions mitigation "if it's associated with the construction of the pipeline and the operation of the pipeline."[57]

7. FERC Should Narrowly Address Recent D.C. Circuit Rulings Without Exceeding Its Statutory Authority or Expertise.

It is incumbent on FERC to narrowly address recent D.C. Circuit orders without exceeding its statutory authority or expertise. Specifically, FERC should *quantify* (take an inventory of) the reasonably foreseeable downstream GHG emissions but explain that—without guidance from Congress, the Supreme Court, or environmental agencies—it has no sound basis for finding that those emissions will have a "significant effect on the human environment."[58]

This approach is consistent with a narrow reading of recent D.C. Circuit orders remanding FERC's orders for failing to quantify indirect GHG emissions associated with certificated projects. For example, in *Food & Water Watch v. FERC*,[59] the Court remanded FERC's analysis of a pipeline proposal because it failed to adequately

---

[56] *Full Committee Hearing to Review FERC's Recent Guidance on Natural Gas Pipelines*: Hearing Before the S. Comm. On Energy & Nat. Resources, 117th Cong. (Sen. Cassidy questioning FERC Chairman Glick at 1:45:20), available at: https://www.energy.senate.gov/hearings/2022/3/full-committee-hearing-to-review-ferc-s-recent-guidance-on-natural-gas-pipelines.

[57] *Id*. at 1:47:20.

[58] *See* 40 C.F.R. § 1508.9(b).

[59] *Food & Water Watch and Berkshire Envtl. Action Team v. FERC*, D.C. Cir. Case No. 20-1132, slip op. (issued Mar. 11, 2022) (*Food & Water Watch v. FERC*).

quantify indirect emissions, but it did so without vacating FERC's Certificate Order and Rehearing Order.[60]

The Court explained that "[t]he decision to vacate depends on two factors: the likelihood that 'deficiencies' in an order can be redressed on remand, even if the agency reaches the same result, and the 'disruptive consequences' of vacatur."[61] Regarding the first factor, "[w]hen an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step."[62] In *Food & Water Watch v. FERC*, the Court found that FERC incorrectly bypassed NEPA's requirement to perform a more rigorous environmental impact statement by failing to quantify indirect GHG emissions at the first step.[63] However, the Court noted that "after adequately accounting for foreseeable downstream [GHG] emissions, the Commission could arrive at a finding of no significant impact."[64]

Based on the Court's instruction in this case, FERC could avoid remand or vacatur of its pipeline certificate orders by justifying its decision to skip the procedural step of assessing the significance of the downstream effects of proposed projects. Given the legal and jurisdictional concerns outlined above, FERC should adopt a narrow reading of the case and quantify reasonably foreseeable downstream GHG emissions in certificate proceedings but justify its decision not to assess the *significance* of those impacts by explaining that it has no sound basis to do so. In the absence of more specific guidance from the relevant authorities, ELCON believes that this is a sound approach that appropriately reflects consideration of the totality of the circumstances and avoids overstepping FERC's authority.

---

[60] *See id.*, slip op. at 23.

[61] *Id.*, slip op. at 24.

[62] *Id.*

[63] *Id.* at 17-18.

[64] *Id.* at 24.

III. CONCLUSION

ELCON appreciates FERC's efforts to supplement the record in these proceedings, and respectfully requests that FERC: (1) consider ELCON's comments; (2) assess any changes to the Draft Policy Statements through the consumer lens; and (3) consider the impacts of its policies on the reliability and cost of delivered power.

Respectfully submitted,

Travis Fisher
President & CEO
Electricity Consumers Resource Council
1101 K Street NW, Suite 700
Washington, DC 20005

Dated: April 25, 2022