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Blog Post

FERC Resumes Review of Key Policies Concerning Interstate Natural Gas Pipeline Certificates

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On February 18, 2021, the Federal Energy Regulatory Commission (“FERC”) issued a [Notice of Inquiry](#) (“2021 NOI”)¹ to reopen its review of the agency’s currently effective policy statement on the certification of new interstate natural gas transportation facilities (“Policy Statement”).² Although it is too early to tell whether, or how, this proceeding will impact market participants, the 2021 NOI indicates a keen interest on the part of certain FERC commissioners, including Chairman Richard Glick, to update the long-standing Policy Statement to, among other things, reflect the Biden administration’s focus on decarbonization and environmental justice.

Background

Under Section 7 of the Natural Gas Act (“NGA”), FERC must determine whether a proposed interstate natural gas pipeline project is or will be in the public convenience and necessity.³ Interstate natural gas pipeline companies may not construct, extend or abandon interstate natural gas pipeline facilities without first obtaining a FERC certificate of public convenience and necessity.⁴ Since 1999, FERC has used the framework detailed in the Policy Statement to assess whether proposed projects are or will be in the public convenience and necessity.

In April 2018, FERC issued a notice of inquiry (“2018 NOI”)⁵ to explore whether and, if so, how it should revise the framework in the Policy Statement. In the 2018 NOI, FERC requested comments on 26 questions covering four topics: (1) reliance on precedent agreements to demonstrate need for a proposed project; (2) landowner interests and the potential exercise of eminent domain; (3) FERC’s evaluation of alternatives and environmental effects under the National Environmental Policy Act (“NEPA”) and the NGA; and (4) the efficiency and effectiveness of the Commission’s certificate processes.⁶ The 2018 NOI garnered tremendous interest from stakeholders; FERC received more than 3,000 public comments. However, FERC took no action.

2021 NOI

In issuing the 2021 NOI, FERC acknowledged its lack of action since the 2018 NOI and explained that issuing the 2021 NOI was necessary to account for changes that have occurred since issuance of the 2018 NOI. Among the changes FERC identified are the Council on Environmental Quality’s (“CEQ”) promulgation of updated NEPA regulations⁷ and President Biden’s Executive Order 14008, which mandates that federal agencies address the impact of federal actions on disadvantaged communities.⁸ FERC emphasized its intention to build on the existing record by considering the comments filed in response to the 2018 NOI in conjunction with new comments filed in response to the 2021 NOI.

The 2021 NOI requests comments on 40 questions covering the same four general topics raised in the 2018 NOI, plus one additional general topic: effects on environmental justice communities. Of the 40 questions in the 2021 NOI, 15 questions are new, nine questions are revised versions of questions in the 2018 NOI and 16 questions are identical to questions posed in the 2018 NOI. An overview of the questions posed in each of the five general topic areas follows.

- **Determination of Need.** FERC asked 12 questions regarding whether it should adjust its method for determining project need (nine identical to 2018 NOI questions, one revised 2018 NOI question, two new). The questions concern whether FERC should take a deeper look at whether

certain factors, such as the presence of precedent agreements, especially those with affiliated entities, support demand for a proposed project and whether FERC should consider the benefits of natural gas use and production to the national economy and to national energy security.

- ***Eminent Domain and Landowner Interests.*** FERC asked six questions regarding its consideration of the exercise of eminent domain and landowner interests (five identical to 2018 NOI questions, one new). FERC noted that it continues to receive comments on applicants' use of eminent domain and the Commission's issuance of certificate orders before an applicant obtains all authorizations necessary to commence construction. The new question inquires as to whether FERC has the authority to condition a certificate holder's use of eminent domain under the NGA and whether FERC should refrain from issuing certificates until a project applicant has obtained all other authorizations needed to commence construction.
- ***Environmental Impacts.*** Reflecting an increased focus on environmental impacts, FERC asked 11 questions regarding its consideration of environmental impacts (all revised 2018 NOI questions or new questions). FERC highlighted CEQ's issuance of new NEPA regulations in 2020 and noted there continues to be significant stakeholder interest in how FERC conducts its environmental review. FERC asked questions regarding its consideration of alternatives as part of its NEPA analysis and whether it should conduct a broader regional evaluation of a project's environmental impacts. FERC also asked questions regarding its consideration of a project's upstream and downstream impacts from greenhouse gas emissions, whether FERC should utilize the Social Cost of Carbon or some alternative methodology to assess a proposed project's climate impact, and how FERC should weigh adverse and favorable impacts when making its public interest determination under the NGA. Finally, FERC asked questions regarding whether it should impose greenhouse gas emissions limits or mitigation to reduce the significance of the impacts of such emissions, and whether it should adopt any categorical exclusions.
- ***Improvements to FERC's Review Process.*** FERC asked four questions regarding potential improvements to its review process (two identical to 2018 NOI questions, two revised 2018 NOI questions). The revised

questions seek comment on whether FERC could condense or combine certain aspects of the review process, and whether certain projects are suited for a more efficient process.

- ***Environmental Justice.*** FERC asked seven new questions to address Executive Order 14008 and ongoing concerns from stakeholders regarding FERC's consideration of impacts to environmental justice communities.⁹ Specifically, FERC asked questions regarding the identification of environmental justice communities, their participation in FERC's review process and FERC's evaluation of disproportionately high and adverse effects on environmental justice communities. FERC also asked questions regarding whether it should establish a method to evaluate mitigation for impacts on environmental justice communities. Finally, FERC asked questions regarding whether any federal law, including the NGA and NEPA, sets forth either: (1) specific duties FERC must fulfill regarding environmental justice analyses in certificate proceedings; or (2) specific remedies FERC must implement based on factual findings of environmental justice metrics or defined impacts.

Looking Ahead

FERC's five sitting Commissioners, which currently consist of three Republicans and two Democrats (with one of the Democrats holding the Chairmanship), voted unanimously to issue the 2021 NOI. Consistent with the range of views the individual Commissioners have publicly expressed about whether policy reform in this area is necessary, the 2021 NOI includes questions that may invite answers both for and against changes to the Policy Statement.

However, interested parties should not assume a particular outcome from inclusion of a particular question since it is unlikely the current slate of Commissioners ultimately will be the same ones who decide whether to change the Policy Statement. The political balance is likely to become a 3-2 Democrat majority sometime during the second half of 2021, which might increase the odds that the agency will adopt some significant changes to the Policy Statement. Recent and future CEQ actions, such as CEQ's recent

rescission of the Trump administration’s draft guidance on the consideration of greenhouse gas emissions,¹⁰ also may inform FERC’s decisions in this proceeding.

In the interim, stakeholder feedback on the questions posed in the 2021 NOI will be crucial in developing the record on which the Commission will base any such policy changes. Comments in response to the 2021 NOI are due on April 26, 2021. At this time, it is uncertain whether, or how, any policy changes adopted through this proceeding will impact market participants.

Stakeholders should closely monitor the proceeding as it represents a potentially important component of the Biden administration’s broader effort to reduce carbon emissions and elevate consideration of environmental justice in federal decision-making.

1. Certification of New Interstate Natural Gas Facilities, 174 FERC ¶ 61,125 (2021).↔

2. Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000).↔

3. 15 U.S.C. 717f.↔

4. *Id.*↔

5. Certification of New Interstate Natural Gas Facilities, 163 FERC ¶ 61,042 (2018).↔

6. See *id.* at PP 51-60.↔

7. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 43,304 (2020).↔

8. Exec. Order No. 14008, § 219, 86 FR 7619 (2021). Among other things, Executive Order 14008 directs federal agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.” *Id.* at 86 FR 7619, 7629.↔

9. According to the 2021 NOI, “[t]he term ‘environmental justice community’ could encompass (i) populations of color; (ii) communities of color; (iii) Native communities; and (iv) and low-income rural and urban communities, who are exposed to a disproportionate burden of the negative human health and environmental impacts of pollution or other environmental hazards.” 2021 NOI at P 20 (citing Executive Order 14008, § 219).↔

10. Council on Environmental Quality, National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions, Notice of Rescission of Draft Guidance, 86 Fed. Reg. 10252 (February 19, 2021).↔

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