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Blog Post

Changing Course: FERC Adopts New Policy on Its Consideration of Certain Climate Impacts in Reviewing Proposed Interstate Pipeline (and LNG?) Infrastructure

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On March 22, 2021, the Federal Energy Regulatory Commission (“FERC”), in [an order approving a certificate of public convenience and necessity for an interstate natural gas pipeline project \(“Order”\),¹](#) affected a significant policy shift by formally considering climate change impacts in its approval. The vote on the order was 3-2, with two Commissioners issuing strong dissents raising concerns about the legality of the new policy and its impact on a pending generic proceeding in which FERC currently is accepting public comments.

FERC’s Previous Policy

Prior to the Order, FERC had narrowly construed its authority and obligation to consider the potential greenhouse gas (“GHG”) emissions associated with applications under the the Natural Gas Act (“NGA”) for certificates of public convenience and necessity to construct interstate natural gas pipelines and liquefied natural gas (“LNG”) infrastructure. FERC had quantified potential GHG emissions in certain prior cases, but it had refrained from either analyzing whether the GHG emissions were “significant,” for purposes of the

National Environmental Policy Act (“NEPA”) or considering the GHG emissions in its public interest analysis under the NGA.

FERC’s Order

The Order involved an application seeking authorization under section 7 of the NGA to abandon in place certain pipeline facilities located in Nebraska and South Dakota, and to construct approximately 87 miles of pipeline facilities and associated facilities (the “Project”) to replace the pipeline capacity associated with the proposed abandonment. FERC assessed the Project’s GHG emissions and the contribution of those GHG emissions to climate change. The Order acknowledged previous FERC policy, finding that the analysis of GHG emissions and their contribution to climate change is required under both (1) NEPA, which mandates that FERC take a “hard look” at the environmental impacts of a proposed project and (2) the NGA, which requires FERC to determine whether a proposed project is required by the public convenience and necessity.

FERC conducted that analysis in the Order by comparing the Project’s reasonably foreseeable GHG emissions to the total GHG emissions in the U.S. as well as to the emissions totals in Nebraska and South Dakota – the two states in which the proposed facilities will be located. FERC estimated that the total GHG emissions from construction and operation of the Project would be 20,006 metric tons. FERC found that construction of the Project could result in an increase in the U.S.’ GHG emissions by 0.0003%, and operation in subsequent years could result in an increase in the nation’s GHG emissions by 0.000006%. FERC also found that the Project could result in an increase in Nebraska’s GHG emissions by 0.000078% and South Dakota’s GHG emissions by 0.0002%. Based on these comparisons, FERC concluded that the Project’s contribution to climate change would not be significant and granted the Project’s requested NGA certificate without expressly weighing the climate change impacts against the Project’s benefits.

FERC noted that the newly announced policy would continue to evolve, and that, in future cases where it finds impacts on climate change to be significant, such impacts would be considered along with numerous other

factors to determine if the project is required by the public convenience and necessity.

In the Order, the majority noted FERC's recent issuance of a notice of inquiry regarding FERC's certificate policy statement ("NOI").² In that NOI, which we covered [in a separate post](#), FERC commenced a comprehensive review of its existing policies on the certification of interstate natural gas transportation infrastructure. Among other things, the NOI includes several questions on FERC's consideration of proposed projects' climate impacts. Although the public comment period on the NOI remains open, the majority noted in the Order that the GHG emissions from the Project would not be considered significant regardless of how FERC's analysis evolves in future proceedings, including the NOI.

Three commissioners voted to approve the Order: Chairman Richard Glick and Commissioner Allison Clements, both of whom are Democrats, and Republican Commissioner Neil Chatterjee. Republican Commissioners James Danly and Mark Christie both dissented.

The Danly Dissent

Commissioner Danly authored a lengthy and strongly worded critique of the majority's decision, asserting that it "leave[s] the public and the regulated community – including investors upon whom we rely to provide billions of dollars for critical infrastructure – with no discernible principles by which [FERC] intends to consider proposed projects." Commissioner Danly argued, among other things, that the majority's Order violates the Administrative Procedure Act by reversing FERC's long-standing policy without adequate explanation, prejudices those aspects of the pending NOI regarding FERC's certificate policy statement that pertain to FERC's assessment of GHG emissions, and intrudes on the Environmental Protection Agency's authority to regulate GHG emissions under the Clean Air Act. Commissioner Christie echoed the latter concern in his separate dissent, which emphasizes that the majority answered a "major question of law" that is still open for public comment in the NOI proceeding.

Commissioner Danly also argued that FERC is not an environmental regulator, and that Congress did not intend for FERC to evaluate the significance of GHG emissions. Rather, Commissioner Danly argued that FERC's role is to administer the NGA to "encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."³ He also expressed concerns over FERC's adoption of this policy change in an individual adjudicatory proceeding, rather than through a general rulemaking or notice of inquiry. Finally, Commissioner Danly raised concern that using the Order as the vehicle for the policy change raises the possibility that no party may be in a position to challenge the Order and seek judicial review of the new policy and noted that his concerns are amplified, because the Order is FERC's second "surprise issuance in as many months," referring to a February 2021 order in which FERC commenced a hearing to reopen the certificate of a project that is already in operation.⁴ As a result, Commissioner Danly suggested that all natural gas pipeline companies, LNG companies and pipeline shippers should intervene in each pending certificate proceeding to preserve their rights to challenge unanticipated policy changes and provided a list of pending proceedings to assist that effort. Commissioner Danly concluded his dissent by voicing his "fear that today's [Order] marks the beginning of a series of decisions that will have profound effects on the industry, its customers, and on NGA section 3 and section 7 approvals going forward."⁵

Looking Ahead

FERC's action in the Order represents a significant policy change that could make it more difficult and expensive to certificate and build interstate natural gas pipelines. It is unclear whether any party will be able, and willing, to seek rehearing and judicial appeal of the Order. Regardless, the Order indicates that the majority of the sitting FERC Commissioners have concluded that the agency must assess the significance of GHG emissions under both NEPA and the NGA. Accordingly, it is reasonable to expect those Commissioners to seek to further enshrine that policy decision in the pending NOI proceeding. Moreover, the fact that FERC made policy changes through an individual certificate proceeding – as it also did in a recent decision to reopen the NGA certificate for an operating gas pipeline⁶ – raises

the possibility that FERC may continue to implement policy in individual certificate proceedings in the future. This could prevent parties from challenging the policy implementation due to a lack of standing, as Commissioner Danly highlighted in his dissent. Consistent with that concern, while the Order involved only NGA section 7, Commissioner Danly's dissent in the proceeding raises the question whether the majority might adopt the same policy changes to analyze the significance of GHG emissions in NGA section 3 proceedings involving LNG infrastructure. Market participants and investors should consider closely monitoring such FERC proceedings, as the administrative records developed therein likely will serve as indicators of, and potential levers for or against, further policy changes.

1. *Northern Natural Gas Co.*, 174 FERC ¶ 61,189 (2021).↔

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

3. Order (Danly, Comm'r dissenting) at P 19, citing to *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976); accord *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70).↔

4. Order (Danly, Comm'r dissenting) at P 2 (referring to FERC's decision to reopen Algonquin Gas Transmission's Atlantic Bridge Project. *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021)).↔

5. Order (Danly, Comm'r dissenting) at P 29.↔

6. See *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021) (establishing a paper hearing seeking briefs regarding whether to continue to allow operation of certain previously-certificated and operational facilities).↔

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