Federal Energy Regulatory Commission Changes Course on Certification and Project Reviews of New Gas Pipeline Policies

14 April 2022

In a two-paragraph order issued March 24, 2022 (“March 24 Order”),[1] the Federal Energy Regulatory Commission (“FERC” or the “Commission”) unanimously changed course on two major, recently issued policy statements applicable to interstate natural gas pipeline projects and, to a lesser extent, authorizations for liquefied natural gas (“LNG”) terminals.

The March 24 Order reclassified the *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*[2] (“Updated Certificate Policy”) and the interim *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*[3] (“GHG Policy Statement,” together with the Updated Certificate Policy, the “New Gas Pipeline Policies”) as drafts for further public comment. Importantly, FERC stated that the New Gas Pipeline Policies will not apply to either pending applications or applications filed before FERC finalizes the New Gas Pipeline Policies.

Rapid Retreat

FERC issued the New Gas Pipeline Policies (described in detail below) on February 18, 2022, less than one week before Russia’s invasion of Ukraine, and in the midst of rising domestic commodity prices. The combination of factors increased negative attention on the policies, which generally were cast by the energy industry and others as making new natural gas pipeline and LNG export infrastructure, and, by extension, new natural gas resources, more expensive and difficult to develop. FERC's proposal to apply the New Gas Pipeline Policies to in-progress reviews, moreover, heightened concerns about potential challenges to projects that were already far along. On March 3, 2022, the Senate Energy and Natural Resources Committee convened a hearing to discuss the New Gas Pipeline Polices; the hearing was particularly contentious.

FERC's retreat now provides the Commission with the opportunity to resolve some of those concerns in the near future and build a bipartisan set of policies that might gain a degree of support from dissenting Commissioners Danly and Christie. FERC will accept comments on the New Gas Pipeline Policies through April 25, 2022, with reply comments due by May 25, 2022.

In a subsequent order, issued April 12, 2022, FERC dismissed requests for rehearing of the orders issuing the New Gas Pipeline Policies, but stated that it would consider the requests as comments.[4] Commissioner Danly concurred separately to express concerns about the effect that uncertainty created by the draft New Gas Pipeline Policies will have on the industry, while also expressing doubt that the Commission would meaningfully address issues raised in the rehearing requests.

Updated Certificate Policy

The Updated Certificate Policy revises a previous policy statement issued by FERC in 1999.[5] Under the Natural Gas Act ("NGA"), FERC issues certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce. This public convenience and necessity standard "encompasses all factors bearing on the public interest,"[6] and the Commission may attach terms and conditions to a certificate "as the public convenience and necessity may require."[7]

Developments since 1999, including changes to the industry, increased interest from landowners and other stakeholders, and litigation related to environmental and climate impacts prompted the Commission to initiate the current revision process, with Notices of Inquiry in April 2018 and February 2021.[8]

1. The Public Convenience and Necessity

Under the 1999 Policy Statement, FERC's threshold requirement was to determine whether a pipeline project could proceed without subsidization from existing customers (i.e., whether it could stand on its own, financially). The Commission would then consider the adverse impact of the proposed project on: (1) the applicant's existing customers; (2) existing pipelines in the market and their captive customers; and (3) landowners and communities affected by the proposed project. If benefits of a project outweighed adverse effects, then FERC considered potential environmental impacts through an analysis pursuant to the National Environmental Policy Act ("NEPA").[9]

In contrast, in the Updated Certificate Policy, the Commission first asks whether there is a need for the project. While acknowledging that FERC practice since 1999 had relied almost exclusively on precedent agreements to establish project need,[10] the Commission now finds that only looking to precedent agreements may cause the Commission to reach a determination inconsistent with the weight of the evidence. Accordingly, the Commission reaffirmed its commitment to consider all factors relevant to assessing the need for a project. The Commission noted that precedent agreements remain an important piece of evidence, but precedent agreements "may not be sufficient in and of themselves."[11]

Further, the Commission concluded that the common practice of utilizing precedent agreements with affiliates of the applicant(s) will "generally be insufficient to demonstrate need."[12] The Commission stated that it will determine how much additional evidence is required, on top of affiliate precedent agreements, on a case-by-case basis.

The Updated Certificate Policy also encourages applicants to provide specific information about end uses and how the project serves such uses, along with the project's expected utilization rate.[13] Projects responding to increased natural gas demand may rely on market studies or analyses by the Energy Information Administration or other third parties to demonstrate need.[14] Projects may also show consumer benefits from lower natural gas prices.[15] Projects intended as upgrades, alternatively, may show system benefits, such as reduced operating costs.[16]The Commission will also consider evidence reflecting current and projected future demand.[17]

2. Consideration of Adverse Effects

The Commission proposed to consider four major interests that may be adversely affected by the construction and operation of new projects: (1) the applicant's existing customers; (2) existing pipelines and their captive customers; (3)

environmental interests; and (4) landowners and surrounding communities, including environmental justice communities. The Commission stated that it may deny an application in response to any of these types of adverse impacts.[18]

The Commission also signaled that the balance of harms and benefits will be central to its analysis: Some proposals may be denied solely because of the magnitude of one particular adverse impact that cannot be mitigated, while there may be a proposed project with many adverse impacts that is still approved because the public benefit is so great.[19]

3. Dissents

Commissioners Danly and Christie issued vigorous dissents to the Updated Certificate Policy. Each asserted that the Commission had exceeded its statutory jurisdiction and disagreed with the proposed handling of environmental impacts. Commissioner Danly took issue with relying on conditioning authority to reduce adverse impacts, disputed the decision to emphasize environmental considerations alongside economic considerations and critiqued the departure from the Commission's reliance on precedent agreements to prove a need for a proposed project. Both expressed concerns regarding the impact of the policy on reliability, costs to pipelines end users and energy security.

GHG Policy Statement

The interim GHG Policy Statement (issued for the first time in February) set forth the Commission's proposed approach to addressing greenhouse gas emissions in NEPA analyses and for consideration in public-interest and mitigation determinations under the NGA.

1. Thresholds

Under the GHG Policy Statement, if a project may result in at least 100,000 metric tons per year of CO¬2e, assuming 100% burn-rate for transported natural gas, FERC would prepare an environmental impact statement.[20] However, in determining whether mitigation measures are warranted, the Commission proposed to use the projected utilization rate.[21] The Commission proposed to adopt the 100,000 metric tons per year of CO2e threshold because it would "provide the Commission a workable and consistent path forward to analyze proposed projects"[22] a standard that, according to the Commission, would cover the "vast majority of potential GHG emissions from natural gas projects authorized by the Commission."[23]

The Commission proposed to quantify "reasonably foreseeable" emissions, which have a "reasonably close causal relationship to the proposed action," including actions distant from the project and later in time, as well as emissions from construction and operation.[24] This proposal would mark a significant shift from Commission precedent and would greatly expand the Commission's consideration of emissions in evaluating a project.

To this end, the Commission proposed to treat NGA Section 7 proceedings (for interstate natural gas pipeline and storage facilities) differently from Section 3 proceedings (for LNG terminals). FERC determined that direct emissions of each type of proceeding are reasonably foreseeable results of FERC action, but proposed not to consider either upstream or downstream emissions in Section 3 proceedings due to the U.S. Department of Energy's role in authorizing natural gas exports.[25] For Section 7 proceedings, on the other hand, FERC proposed to consider, on a case-by-case basis, whether upstream[26] and downstream[27] greenhouse gas emissions are reasonably foreseeable.[28]

Downstream emissions may not be foreseeable for every project, so FERC proposed to allow developers to submit evidence to that effect.[29] FERC also would "consider any other evidence in the record that impacts the quantification of the project's reasonably foreseeable emissions" and would consider regulations implemented by other agencies that affect greenhouse gas emissions from FERC-jurisdictional facilities,[30] along with evidence presented by commenters and intervenors.[31]

2. Mitigation

The GHG Policy Statement would encourage, but not require, that a project sponsor offer mitigation measures,[32] which the Commission proposed to consider "on a case-by-case basis when balancing the need for a project against its adverse environmental impacts."[33] The Commission reserved the ability to impose additional mitigation measures to reach a public interest determination, as set forth in the Updated Certificate Policy.[34]

Examples of mitigation measures include renewable energy credits, mandatory compliance market participation and voluntary carbon market participation, as well as physical mitigation.[35] Project sponsors may request to recover mitigation costs through rates, much as they can currently propose to recover construction and operation costs.[36]

Any proposed mitigation measures should be: (i) real and additional, meaning that emissions reductions would not have occurred without the mitigation measure and in excess of existing regulatory requirements; (ii) quantifiable through a "transparent and replicable methodology"; (iii) unencumbered, meaning that any seller of mitigation measures has clear ownership of or exclusive rights to the greenhouse gas reduction benefits; and (iv) trackable, meaning that the project sponsor proposes to track and monitor compliance for the life of the project.[37]

3. Implementation and Guidance to Applicants

FERC encouraged applicants to include a range of information related to greenhouse gases, including: projected utilization rates; estimates of reasonably foreseeable project emissions; either a quantification of upstream and downstream emissions or evidence to support why such emissions are not reasonably foreseeable; a description of proposed mitigation measures and their purported effect, along with tracking mechanisms; and a detailed mitigation cost estimate and cost-recovery proposal.[38]

4. Dissents

Commissioners Danly and Christie also dissented vigorously to the GHG Policy Statement. Commissioner Danly asserted that the GHG Policy Statement is unlawful, unworkable and intended to discourage new natural gas infrastructure.[39] He cast doubt on the ability of project sponsors to recover mitigation costs[40] and took issue with applying the policy to current applicants.[41] Commissioner Danly also argued that the policy effectively amends FERC's NEPA regulations without complying with the Administrative Procedure Act's notice and comment procedures.[42]

Commissioner Christie argued that the GHG Policy Statement expanded authority and departed from precedent,[43] and asserted that the statement invokes the major questions doctrine because Congress has not expressly authorized FERC to regulate greenhouse gases.[44]

Next Steps

Interested parties now have until April 25, 2022, to file comments on either or both of the draft New Gas Pipeline Policies, and May 25 to file reply comments. FERC likely will require at least several months to consider comments and develop approaches that garner sufficient internal and external support. Consequently, final action is unlikely to occur until later in 2022 and may be complicated by midterm Congressional elections, as well as considerations around the expiration of Chairman Glick's current term and potential re-nomination. Many observers expect that the revised policies are likely to reflect a more bipartisan approach, and continued repercussions from the Russia-Ukraine War, including further sanctions on the Russian energy sector, may also influence the final policies.

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1. *Certification of New Interstate Natural Gas Facilities, et al.*, 178 FERC ¶ 61,197 (2022) (available at https://ferc.gov/media/c-1-032422).↩

2. *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022).↩

3. *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022).↩

4. *Certification of New Interstate Natural Gas Facilities, et al.*, 179 FERC ¶ 61,012 (2022) (available at https://elibrary.ferc.gov/eLibrary/filedownload?fileid=22D55E94-9E56-C5E9-8F55-801F7C000000).↩

5. 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (the "1999 Policy Statement").↩

6. Updated Certificate Policy at P 4.↩

7. *Id.* at P 5.↩

8. *Certification of New Interstate Natural Gas Facilities*, 83 FR 18020 (Apr. 25, 2018), 163 FERC ¶ 61,042 (2018); *Certification of New Interstate Natural Gas Facilities*, 86 FR 11268 (Feb. 24, 2021), 174 FERC ¶ 61,125 (2021).↩

9. Updated Certificate Policy at P 11.↩

10. *Id.* at P 54.↩

11. *Id.* The Commission additionally explained that it would look to the relevant circumstances surrounding the precedent agreements, such as whether the agreements were entered into before or after open season or if the

agreements were entered into in response to LDC or generator requests for proposals.↩

12. *Id.* at P 60. The Commission pointed to the U.S. Court of Appeals for the District of Columbia Circuit's recent decision in *Environmental Defense Fund v. FERC*, which noted that evidencing "'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement." 2 F.4th 953, 973 (D.C. Cir. 2021).↩

13. *Id.* at P 55.↩

14. *Id.* at P 56.↩

15. *Id.* at P 57.↩

16. *Id.* at P 58.↩

17. *Id.* at P 59.↩

18. *Id.* at P 62.↩

19. *Id.* at P 99.↩

20. GHG Policy Statement at P 3.↩

21. *Id.* at PP 3, 29.↩

22. *Id.* at P 87.↩

23. *Id.* at P 89.↩

24. *Id.* at P 28.↩

25. *Id.* at PP 31, 41.↩

26. Upstream emissions are generally those emissions that occur before the natural gas reaches the interstate pipeline. It includes emissions from drilling and extraction.↩

27. Downstream emissions occur after the natural gas has left the interstate pipeline. For example, if natural gas is burned at a power plant after leaving the interstate pipeline, then downstream emissions may include the emissions from burning the natural gas to generate electricity.↩

28. *Id.* at P 31.↩

29. *Id.* at P 38.↩

30. *Id.* at P 52.↩

31. *Id.*↩

32. See *id.* at PP 106-107.↩

33. *Id.* at P 98.↩

34. *Id.* at PP 98, 107.↩

35. *Id.* at PP 113-127.↩

36. *Id.* at P 128.↩

37. *Id.* at P 109.↩

38. *Id.* at P 129.↩

39. *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, Commissioner Danly Dissent, Docket No. PL21-3-000 at PP 2-3 (Feb. 18, 2022).↩

40. *Id.* at P 15.↩

41. *Id.* at P 48.↩

42. *Id.* at P 35.↩

43. *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, Commissioner Christie Dissent, Docket No. PL21-3-000 at PP 2, 4 (Feb. 18, 2022).↩

44. *Id.* at P 28.↩

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