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FERC Issues Two Policy Statements Impacting Natural Gas Infrastructure Projects

On February 17, the Federal Energy Regulatory Commission (FERC or the Commission) issued two well-anticipated policy statements intended to provide guidance on its review of pending and future natural gas infrastructure projects (*Updated Policy Statement on Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Certificate Policy Statement); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (GHG Policy Statement)). Specifically, the Commission will now consider a broader range of environmental and social impacts associated with proposed projects, including their reasonably foreseeable greenhouse gas (GHG) emissions. Passed by a 3-2 margin, with strong dissents by the Commission's two Republican commissioners, these policy announcements represent the Commission's most substantive revisions to its evaluation of proposed projects under the Natural Gas Act (NGA) in over two decades.

Updated Certificate Policy Statement (*Docket No. PL18-1*)

Acknowledging its previous approach toward evaluating the effects of certificating new natural gas projects focused primarily on economic interests, the Commission now intends to "evaluate all factors bearing on the public interest, including the balancing of economic and environmental interests in determining whether a project is required by the public convenience and necessity" under Section 7 of the NGA.[1] In balancing the benefits of a project against its adverse impacts, the Commission will place highest importance on evidence demonstrating project need. To that end, project proponents can no longer simply rely on precedent agreements.[2] Instead, the Commission will examine *all* relevant factors supporting the need for a project, such as whether it will displace a more carbon-intensive energy source or will enhance more renewable energy integration. In assessing the adverse impacts of a proposed project, the Commission will now examine the effects on:

1. the interests of the applicant's existing customers;
2. the interests of existing pipelines and their captive customers;
3. environmental interests and resources; and
4. the interests of landowners and surrounding communities, including environmental justice communities.[3]

The Commission will also evaluate how applicants intend to mitigate such impacts, and reserves the authority to condition a certificate on the requirement of additional mitigation measures.[4] The companion GHG Policy Statement adds detail to how the Commission will integrate climate change considerations into its public interest findings under the NGA. The Updated Certificate Policy Statement will apply immediately to any pending or new certificate applications. Stakeholders with pending applications will be given the opportunity to supplement the record in their existing dockets and to explain how their proposals are consistent with the new FERC policy.

GHG Policy Statement (*Docket No. PL21-3*)

The Commission's concurrent interim GHG Policy Statement outlines how the Commission will consider climate impacts, including GHG emissions, in its evaluation of jurisdictional natural gas infrastructure projects under both Section 3 and Section 7 of the NGA. The Commission will consider those emissions resulting from the construction and operation of such projects as well as, in most cases, GHG emissions associated with the upstream and downstream combustion of transported

gas, in its reviews under the NGA and the National Environmental Policy Act (NEPA). Specifically, the Commission "will quantify a project's GHG emissions that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action, including those effects that occur at the same time and place as the proposed action and effects that are later in time or farther removed in distance from the proposed action."[5] Under the interim policy, a project's reasonable foreseeable GHG emissions will be based on the projected amount of capacity that will be actually used, and a "100% utilization or 'full burn' rate for the proposed project's emissions" for purposes of determining whether an Environmental Assessment (EA) or Environmental Impact Statement (EIS) will be required under NEPA.[6] The Commission will apply a rebuttable presumption that projects with 100,000 metric tons per year of carbon dioxide equivalents (CO2e) emissions will be deemed to have significant impact on climate change, and will thus require the preparation of an EIS. Under the GHG Policy Statement, the Commission encourages project sponsors to include the following information in any prospective NGA Section 3 or Section 7 application. This information will assist the Commission in considering any climate change impacts, inclusive of any mitigation measures, as part of both its NEPA determination and its NGA public interest determination:

- the project's projected utilization rate and supporting information;
- an estimate of reasonably foreseeable project GHG emissions;
- if no upstream and downstream emissions are quantified, evidence demonstrating why

those emissions are not reasonably foreseeable project emissions;

- any evidence impacting the quantification of the project's reasonably foreseeable GHG emissions;
- a description of any proposed GHG mitigation measures, including the percentage of the project's direct and indirect GHG emissions that will be mitigated and, if applicable, a mechanism for tracking mitigation of GHG emissions; and
- a detailed cost estimate of any proposed GHG mitigation and a proposal for recovering such costs.[7]

The GHG Policy Statement will immediately apply to all current and pending NGA Section 3 and Section 7 applications. As with the Updated Certificate Policy Statement, project sponsors with pending proposals will be given the opportunity to supplement the record and to explain how their proposals are consistent with the new FERC policy. Given its interim designation, the GHG Policy Statement may still be revised based on the record developed in this proceeding. Comments on the interim GHG Policy Statement are due by April 4, 2022. The immediate impact of these two new policies will be to introduce additional uncertainty into what has already become a prolonged FERC natural gas infrastructure permitting process. Ostensibly aimed at providing the Commission with a more robust record to defend against future judicial challenges to its project approval decisions, the policy statements' ambiguity concerning the appropriate level of GHG emissions mitigation may ultimately prove to be a greater deterrent to many future infrastructure investment decisions than the potential for an adverse decision from an appellate court. If past is prologue, such uncertainty will provide an additional legal battleground upon which FERC natural gas approval proceedings will be waged.

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[1] Updated Certificate Policy Statement at P 51.

[2] *Id.* at P 54.

[3] *Id.* at PP 62, 98. The Commission specifically emphasizes that its evaluation of the impacts on environmental justice communities will now be "robust," and that addressing impacts on environmental justice communities is more than just "checking a box." *Id.* at PP 86, 94.

[4] *Id.* at PP 74, 98.

[5] GHG Policy Statement at P 28.

[6] *Id.* at P 3.

[7] *Id.* at P 129.

Authors

David T. Doot
Of Counsel

Hartford, CT | (860) 275-0102

dtdoot@daypitney.com

Harold M. Blinderman
Partner

Hartford, CT | (860) 275-0357

hmblinderman@daypitney.com

Joseph H. Fagan
Partner

Washington, D.C. | (202) 218-3901

jfagan@daypitney.com

Margaret Czepiel
Associate

Washington, D.C. | (202) 218-3906

mczepiel@daypitney.com

Paul N. Belval
Partner

Hartford, CT | (860) 275-0381

pnbelval@daypitney.com

Samantha M. Regan
Senior Associate

Hartford, CT | (860) 275-0214

sregan@daypitney.com