

**Written Testimony of Allison Clements
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**Before the Committee on Energy and Natural Resources
United States Senate
March 3, 2022**

Chairman Manchin, Ranking Member Barrasso, and Members of the Committee, thank you for the opportunity to testify this morning regarding the Commission's updated policy statement on certification of new interstate natural gas facilities¹ and our interim policy statement on consideration of greenhouse gas emissions (GHGs).²

I will first explain why the Updated Certificate Policy Statement makes good sense both as a matter of law and policy. I will next address the reasons I voted for the Interim GHG Policy Statement, including the greater transparency it provides. Finally, I will respond to some of the concerns my colleagues have expressed about these two policies. My belief is that thoughtful implementation of these two policies will support, rather than undermine, energy security, reliability, and affordability.

Updated Certificate Policy Statement

Let me begin with the background and purposes of the Updated Certificate Policy Statement. The Commission originally issued a policy statement on certification of interstate natural gas facilities in 1999.³ Developments over the last twenty years have overtaken the 1999 policy. Demand for natural gas has substantially increased, both domestically and abroad. The commercialization of hydraulic fracturing has dramatically increased the domestic supply of natural gas. Consequently, applications to the Commission for approval of new transportation and export projects have multiplied. Responding to increased gas infrastructure development, Tribes, landowners, communities, and environmental groups have expanded their participation in Commission proceedings. Court challenges to Commission decisions have mounted. And too often the courts have found the Commission's decision-making deficient, including for

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

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

³ *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) (1999 Policy Statement).

inadequate consideration of GHG impacts⁴ and environmental justice concerns,⁵ and failure to examine project need closely enough.⁶

The Commission's newly issued Updated Certificate Policy Statement is based on the record developed through two notices of inquiry, one in 2018 and another in 2021, which together generated over 38,000 comments. While the new policy has the same broad goals as its predecessor⁷ and retains much of its content,⁸ the new policy is an improvement in several respects. I will highlight two:

First, the new policy makes project need the gating question in our public interest analysis and provides clearer guidance than its predecessor on the information the Commission will consider in assessing need. Although the 1999 Policy Statement provided that the "Commission will consider *all relevant factors* reflecting on the need for the project,"⁹ over the years the Commission's practice has devolved to rely almost exclusively on contracts with prospective customers, called precedent agreements, to establish need. This myopic practice contravenes the 1999 Policy Statement.¹⁰ And it would be indefensible going forward, as market, policy, and regulatory developments, as well as emerging reliability demands, add new variables to the need equation. The Updated Certificate Policy Statement reaffirms that the Commission will consider all relevant factors pertaining to project need and spells out the evidence we expect to review.¹¹

⁴ See, e.g., *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329 (D.C. Cir. 2021) (*Vecinos*); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*).

⁵ *Vecinos*, 6 F.4th at 1330-31.

⁶ *Env'tl. Def. Fund v. FERC*, 2 F.4th 953, 973 (D.C. Cir. 2021) (remanding and vacating certificate order for Spire STL Pipeline because the Commission relied solely on an affiliate precedent agreement to establish need).

⁷ These include considering competitive transportation alternatives, avoiding over-building of infrastructure, avoiding unnecessary environmental impacts and the unneeded exercise of eminent domain, providing appropriate incentives for the optimal level of construction and efficient consumer choices, and incentivizing applicants to structure projects to avoid or minimize adverse impacts. Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 50 (citing 1999 Policy Statement, 88 FERC at 61,737, 61,747).

⁸ For example, the Commission will continue to consider adverse effects on applicants' existing customers, existing pipelines and their captive customers, and landowners and communities. The Commission also retains its long-standing policy of no financial subsidies by a pipeline's existing customers. And the Commission will continue to balance adverse effects with anticipated benefits of the project. Compare Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at PP 52, 62-64, 100, with 1999 Policy Statement, 88 FERC at 61,745-50.

⁹ 1999 Policy Statement, 88 FERC at 61,747 (emphasis added).

¹⁰ In the 1999 Policy Statement, the Commission expressed concern with relying primarily or exclusively on precedent agreements to establish need. *Id.* at 61,744.

¹¹ See Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at PP 53-61.

Second, the Updated Certificate Policy Statement provides for consideration of *all* factors affecting the broader public interest, as the Supreme Court has instructed we must do.¹² The courts have long recognized that environmental impacts are part of the Commission’s determination of public convenience and necessity in certificate cases.¹³ Indeed, the D.C. Circuit Court of Appeals has held that the Commission may deny a certificate on environmental grounds, making the Commission the “legally relevant cause” of a proposed project’s reasonably foreseeable GHG impacts under the National Environmental Policy Act (NEPA).¹⁴ The new policy statement provides for balanced consideration of a project’s benefits against its potential adverse impacts, including impacts on the environment, landowners, and environmental justice communities.¹⁵ The policy therefore provides the framework for making carefully considered and legally durable decisions, which will benefit all stakeholders, including project sponsors.

Interim GHG Policy Statement

The Interim GHG Policy Statement explains how the Commission will meet its legal obligation to consider GHG emissions in reviewing proposed natural gas infrastructure projects.¹⁶ We heard from stakeholders that more guidance was needed on how the Commission would calculate emissions and when the Commission would require an Environmental Impact Statement (EIS) instead of an Environmental Assessment (EA). The interim policy establishes a clear numerical threshold of annual GHG emissions triggering the preparation of an EIS – an important step toward the transparency and regulatory certainty that stakeholders have sought.

The interim policy statement also encourages, but does not require, project sponsors to propose measures to mitigate GHG emissions.¹⁷ Several major interstate natural gas companies

¹² *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959) (“This is not to say that rates are the only factor bearing on the public convenience and necessity, for [section] 7(e) requires the Commission to evaluate all factors bearing on the public interest.”).

¹³ In 1961, the Supreme Court recognized that the Commission’s predecessor, the Federal Power Commission, had the authority to consider the air quality impacts of end-users’ combustion of transported natural gas in its public convenience and necessity determination. *See FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 17 (1961).

¹⁴ *Sabal Trail*, 867 F.3d at 1373; *accord Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (*Birckhead*).

¹⁵ *See Updated Certificate Policy Statement*, 178 FERC ¶ 61,107 at PP 94-99.

¹⁶ The courts have required the Commission to consider the reasonably foreseeable GHG emissions resulting from natural gas projects under both the Natural Gas Act and NEPA. *See Sabal Trail*, 867 F.3d at 1373-74; *Birckhead*, 925 F.3d at 518.

¹⁷ In doing so, the policy relies on the Commission’s broad conditioning authority under the Natural Gas Act. *See* 15 U.S.C. § 717f(e) (granting Commission “power to attach to the issuance of the certificate ... such reasonable terms and conditions as the public convenience and necessity may require”); 15 U.S.C. § 717b(e)(3)(A) (granting authority to approve LNG terminals upon “such terms and conditions as the Commission find[s] necessary or appropriate”).

have voluntarily pledged to achieve net-zero carbon emissions by 2050.¹⁸ The GHG Policy Statement provides that project sponsors may propose as mitigation the reduction of GHG emissions from existing facilities, including those with no direct connection to the proposed project.¹⁹ The policy therefore meshes well with industry’s own carbon-reduction goals.

Contrary to concerns raised following the interim policy’s issuance, the policy does *not* purport to regulate GHG emissions. That is the role of federal and state environmental agencies, and the policy statement respects these jurisdictional boundaries. Just as the Commission has done with other types of environmental impacts, we will take GHG emissions and any proposed mitigation measures into account in balancing a project’s benefits against its adverse effects. A finding that a project has significant GHG emissions does not necessitate rejection. The Commission could certainly approve a project with material GHG emissions if its benefits outweighed its adverse impacts.

In dissenting from the new policies, my colleagues Commissioner Danly and Commissioner Christie’s statements contended that the policies exceed the Commission’s authority because they advance environmental goals in conflict with the Natural Gas Act’s primary purpose, which the Supreme Court said is to “encourage the orderly development of plentiful supplies . . . of natural gas at reasonable prices.”²⁰ But here are three inescapable facts:

First, the Supreme Court also said, in the very opinion my colleagues cite, that the statute’s purpose encompasses environmental concerns.²¹

Second, the D.C. Circuit has held that the Commission must consider GHG impacts and has the authority to require mitigation of those impacts.²² To rationalize their positions, my colleagues simply dismiss this D.C. Circuit precedent as wrong. It is not the role of an independent regulatory body, and in fact, it is a violation of our constitutional framework, to dismiss binding case law interpreting the Natural Gas Act and supplant one’s own opinion that either the court precedent was wrongly decided, or that other courts may eventually change the law.

Third, it is not the Commission’s prerogative to ignore or read language out of the Natural Gas Act. Section 7(e) of the statute provides that the Commission shall issue a certificate *if it finds that the proposed project “is or will be required by the present or future public convenience and necessity, otherwise such application shall be denied.”*²³ My dissenting

¹⁸ Press Release, Interstate Nat. Gas Ass’n of Am., Nat. Gas Trade Ass’n Members Release Updated Climate Commitments (Jan. 26, 2021), <https://www.ingaa.org/News/PressReleases/38525.aspx>.

¹⁹ Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 125.

²⁰ *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (citations omitted) (upholding Commission’s rejection of a petition to issue a rule requiring nondiscrimination in the employment practices of regulated companies).

²¹ *Id.* at n.6.

²² *See Sabal Trail*, 867 F.3d at 1374.

²³ 15 U.S.C. § 717f(e) (emphasis added).

colleagues apparently would make the development of additional gas supplies the overriding factor in every case. Since every proposed project contributes to the development of natural gas in some way, the Commission would have to approve every project, rendering the highlighted language superfluous. That cannot be what Congress intended.²⁴

In providing for full consideration of all relevant factors bearing on the public interest, the Updated Certificate Policy Statement honors both the words and the intent of the Natural Gas Act. To assure the future “orderly development” of natural gas supplies, the Commission must consider what has been accomplished since the last century and what lies ahead in this one. Since the Natural Gas Act was enacted in 1938, a three million-mile network of interstate, intrastate, and local natural gas pipelines has been built in the United States.²⁵ The Updated Certificate Policy Statement will help the Commission determine how each new proposed project may fit within that network and whether its approval would serve the public interest.

Finally, I want to assure the Committee that we will implement these policies with due regard to the important role natural gas plays both domestically and abroad.²⁶ The Updated Certificate Policy Statement provides guidance for consideration of the full range of benefits proposed new projects may offer, from reliability, to reducing costs for consumers through increased supply competition,²⁷ to facilitating the integration of low-cost renewable energy sources into the electric grid.²⁸ Further, I appreciate the critically sensitive geopolitical moment in which this conversation is taking place, as well as the harm that high gas prices risk imposing on U.S. customers. I believe that strengthening the Commission’s framework for the review of interstate gas pipeline applications will enhance energy security, reliability, and affordability while minimizing adverse impacts on the environment, landowners, and communities.

It remains the greatest honor to serve the American people. Thank you again for the opportunity to testify today.

²⁴ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (“[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . . .”) (quoted in *Corley v. United States*, 556 U.S. 303, 314 (2009)); see also *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

²⁵ U.S. ENERGY INFO. ADMIN., *Natural Gas Explained*, <https://www.eia.gov/energyexplained/natural-gas/natural-gas-pipelines.php>.

²⁶ The Commission has authorized a large amount of LNG export capacity, but many of the facilities remain unbuilt, including some of their associated pipelines. Specifically, the Commission has authorized LNG facilities comprising more than 40 bcf/d of export capacity, with about 30 bcf/d of that capacity remaining unbuilt. Eight LNG projects include an associated authorization for a pipeline that has not yet been constructed.

²⁷ Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 57.

²⁸ *Id.* P 97.