

**United States Senate Committee on Energy and Natural Resources**  
**March 3, 2022 Hearing: *A Review of Recent Actions of the Federal Energy Regulatory Commission Relating To Permitting, Construction and Operation of Interstate Natural Gas Pipelines and Other Natural Gas Infrastructure Projects***

**Additional Questions for the Record**  
**Responses of The Honorable Allison Clements, Commissioner**  
**Federal Energy Regulatory Commission**  
**April 7, 2022**

**Questions from Chairman Joe Manchin III**

**Question 1:** The updated Certificate Policy Statement expands the impacts that FERC will consider without providing guidance on benefits that may be difficult to quantify.

- a. Does FERC currently consider a project’s contribution to national security, energy independence and reliability a benefit?

**RESPONSE:** Chairman Manchin, thank you for these questions. The Commission’s evaluation of a project’s benefits is conducted on a case-by-case basis. The Commission can consider all evidence of need submitted on the record, including evidence of national security, energy independence, and reliability impacts. This approach is consistent with the 1999 Certificate Policy Statement, which provides for the Commission to consider “all relevant factors reflecting on the need for the project.” *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,747 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Policy Statement).

- b. Assuming FERC will consider a project’s contribution to national security, energy independence and reliability, how will FERC quantify and balance these benefits against environmental impacts?

**RESPONSE:** Under the 1999 Policy Statement, the Commission has relied on the evidence in the record to consider the benefits of a proposed project alongside its potential adverse impacts, without always quantifying the relative impact of any specific factors. Because the Commission voted on March 24, 2022 to make the Updated Certificate Policy Statement a draft, we will continue to consider applications pursuant to the 1999 Policy Statement’s guidance. *See Order on Draft Policy Statements*, 178 FERC ¶ 61,197, P 2 (2022) (March 2022 Order); *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (draft Updated Certificate Policy Statement); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (draft Interim GHG Policy Statement or draft GHG Policy Statement) (together, “Policy Statements”).

- c. How and when will FERC provide applicants further guidance on how they should quantify or otherwise present benefits in a certificate application?

**RESPONSE:** Because the Commission voted on March 24, 2022 to make the Updated Certificate Policy Statement a draft, we will continue to consider applications pursuant to the 1999 Policy Statement’s guidance, as well as relevant Commission and court precedent issued since the 1999 Policy Statement. *See* March 2022 Order, 178 FERC ¶ 61,197 at P 2. The 1999 Policy Statement provides that the Commission will

consider “all relevant factors reflecting on the need for the project[,]” which might include, “but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.” 88 FERC ¶ 61,227 at 61,747. The Commission may decide to provide further guidance in a future final policy statement following the submission of initial and reply comments, or in the context of an individual proceeding. I look forward to working with my colleagues to provide industry and stakeholders with needed certainty.

**Question 2:** The Interim Greenhouse Gas Policy Statement recommends that applicants propose upstream, downstream, operational, and construction emissions mitigation measures and notes that costs associated with the mitigation may be recoverable to the same extent as other construction and operational expenses.

- a. How does FERC intend to move forward on the rate-making process to allow for cost recovery of these expenses?

**RESPONSE:** As noted above, on March 24, 2022, the Commission voted to convert the Interim GHG Policy Statement into a draft. Therefore, there is no longer a final policy that recommends applicants propose mitigation measures. To the extent applicants were to propose cost recovery for such mitigation, as with other cost-recovery and rate-making requests, project sponsors would either propose to include those costs in a Natural Gas Act (NGA) section 4 filing or include them in any response to an NGA section 5 complaint. These types of costs may require further fact-finding and evidentiary support, so the Commission may decide to send the matter to hearing and settlement procedures before an administrative law judge at the Commission. As a practical matter, this would result in either a negotiated settlement of these costs or an initial decision issued by the administrative law judge following a full evidentiary hearing.

- b. How will applicants know what mitigation expenses FERC will find prudent and recoverable especially for upstream and downstream emissions?

**RESPONSE:** As discussed above, mitigation expenses are likely to require additional fact-finding and evidentiary support in hearing and settlement judge procedures. As currently written, the draft GHG Policy Statement includes several criteria that mitigation measures must meet to be cost-recoverable, including that they are real and additional, quantifiable, unencumbered, and trackable.<sup>1</sup> To determine what expenses are recoverable, the Commission will evaluate either a negotiated settlement of these costs or the factual and legal analyses of an initial decision issued by the administrative law judge following a full evidentiary hearing.

**Question 3:** FERC’s new policy statements will apply retroactively to applications currently pending before FERC, which has created uncertainty for project developers and a bottleneck in the approval of projects.

- a. Since these policies apply retroactively, are you concerned that applying them retroactively will impact the financing and timeliness of project applications? Why or why not?

**RESPONSE:** On March 24, 2022, the Commission issued an order modifying the status of the Updated Certificate Policy Statement and Interim GHG Policy Statement. See March 2022 Order, 178 FERC ¶ 61,197 at PP 1-2. Both Policy Statements are now in draft form and are open to comment. Accordingly, concerns over their effect on pending project reviews are no longer applicable. *Id.* P 2 (“The Commission will not apply the

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<sup>1</sup> Draft GHG Policy Statement, 178 FERC ¶ 61,108 at P 109.

Updated Draft Policy Statement or the Draft GHG Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets.”).

### Questions from Ranking Member John Barrasso

**Question 1:** Chairman Glick, you and Commissioner Phillips repeatedly stated that recent court decisions required issuance of the Policy Statements the Commission issued on February 18, 2022 (“the Policy Statements”). Commissioners Danly and Christie took the contrary view. Please provide the case, pin cite, and precise quotation of each judicial precedent that in your view *requires*:

- a. The issuance at all of either one or both of the Policy Statements;

**RESPONSE:** Ranking Member Barrasso, thank you for these questions. The Commission’s issuance of policy statements is not required by any court case since policy statements by their nature are discretionary. However, the guidance contained in the draft Policy Statements is informed by binding case law, including court decisions finding the Commission’s decision-making on certificate applications to be deficient for inadequate consideration of GHG impacts,<sup>2</sup> inadequate consideration of environmental justice concerns,<sup>3</sup> and failure to examine project need closely enough.<sup>4</sup>

- b. The issuance now of either one or both of the Policy Statements;

**RESPONSE:** The timing of any policy statement issued by the Commission is not dictated by judicial precedent, but instead depends on a number of factors, including developments making clarification of our policy useful to stakeholders and the need to harmonize our approach with judicial precedent.

- c. The elevation of non-economic considerations in assessing need (in all cases not just those involving affiliate transactions) under the Natural Gas Act (NGA);

**RESPONSE:** The draft Policy Statements do not elevate non-economic considerations over economic considerations. Rather, under the draft Updated Certificate Policy Statement, evidence of need and other project benefits would be balanced against other public interest factors, including environmental impacts and environmental justice concerns, which the courts have instructed the Commission to consider.<sup>5</sup>

- d. The establishment of a 100,000 ton threshold to presume significance of greenhouse gas emissions (GHGs);

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<sup>2</sup> 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*).

<sup>3</sup> *Vecinos*, 6 F.4th at 1330-31.

<sup>4</sup> *Env'tl. Def. Fund v. FERC*, 2 F.4th 953, 973-77 (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).

<sup>5</sup> See, e.g., *Vecinos*, 6 F.4th at 1327-32; *Sabal Trail*, 867 F.3d at 1368-75.

**RESPONSE:** The 100,000 ton threshold contained in the draft GHG Policy Statement is not required by any specific court case. Rather, as the draft GHG Policy Statement explains, the threshold was established to provide the Commission with a workable and consistent path forward to analyze proposed projects. A specific numerical threshold can be clearly understood and consistently applied.<sup>6</sup> That being said, the GHG Policy Statement is now a draft and may be revised following submission of additional public comments.

- e. The use of an Environmental Impact Statement (EIS) instead of an Environmental Assessment (EA) as the default NEPA document;

**RESPONSE:** The draft GHG Policy Statement does not use the Environmental Impact Statement (EIS) as the default National Environmental Policy Act (NEPA) document. Rather, it sets a conservative threshold for determining significance that would help assure the Commission complies with its obligations under NEPA. The courts have held that if an agency action *might* have significant environmental impacts, then an EIS must be prepared.<sup>7</sup> As currently written, the draft GHG Policy Statement sets a clear numerical threshold of annual GHG emissions (100,000 metric tons or more per year of CO<sub>2</sub>e) triggering the preparation of an EIS.<sup>8</sup> This approach to finding significance may change upon the Commission’s review of additional comments. As I stated in several separate statements I issued together with recent pipeline certificate approvals,<sup>9</sup> I think the 100,000 metric tons threshold is a good measure for determining potential significance. It is unlikely to be the only way and I am open to the Commission providing some other type of guidance that also provides project sponsors certainty about when their projects will require preparation of an EIS.

- f. The consideration of downstream and upstream greenhouse gas emissions beyond *Sabal Trail* requirements as described in *Appalachian Voices v. FERC* WL 847199 (2019) (Affirming the Commission’s determination and writing that *Sabal Trail* required that “FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”); and

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<sup>6</sup> Draft GHG Policy Statement, 178 FERC ¶ 61,108 at P 87.

<sup>7</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1039 (D.C. Cir. 2021), *cert. denied*, 2022 WL 516382 (Feb. 22, 2022); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) (“If any ‘significant’ environmental impacts might result from the proposed agency action then an EIS must be prepared *before* agency action is taken.”) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983)) (emphases in original).

<sup>8</sup> Draft GHG Policy Statement, 178 FERC ¶ 61,108 at P 79.

<sup>9</sup> *See, e.g., Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) (Clements, Comm’r, concurring at P 3); *Tennessee Gas Pipeline Company, LLC and Southern Natural Gas Company, LLC*, 178 FERC ¶ 61,199 (2022) (Clements, Comm’r, concurring at P 3); *Iroquois Gas Transmission System, LP*, 178 FERC ¶ 61,200 (2022) (Clements, Comm’r, concurring at P 3); *Atlantic Coast Pipeline LLC et al*, 178 FERC ¶ 61,201 (2022) (Clements, Comm’r, concurring at P 3).

**RESPONSE:** As explained further in the now draft GHG Policy Statement, the Commission would quantify a project’s GHG emissions that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action,<sup>10</sup> as required by the courts, including in decisions after *Sabal Trail*.<sup>11</sup>

- g. The seizure of jurisdiction over the entire natural gas industry from well head to end use.

**RESPONSE:** Respectfully, neither the intent nor the would-be effect of the draft Policy Statements is to “seiz[e] . . . jurisdiction over the entire natural gas industry.” With these draft Policy Statements, the Commission is not attempting to regulate the aspects of the industry (including well head matters, drilling, or end use) which lie outside of its NGA section 3 or section 7 authority. Rather, under the draft Updated Certificate Policy Statement as written, evidence of end use would be used in weighing the need for the project.<sup>12</sup> Similarly, evidence of reasonably foreseeable upstream and downstream emissions would be considered on a case-by-case basis in complying with NEPA and determining the public interest under the NGA.<sup>13</sup> The Commission does not attempt to regulate GHG emissions through these draft Policy Statements, nor does it have the jurisdiction to do so.

**Question 2:** During the hearing, a majority of Commissioners argued that the Policy Statements were required because the majority was concerned that current and future projects would be remanded or vacated by the courts. However, many certificates have been approved since *Sabal Trail*.

Please specify the cases in which certificate orders were vacated or remanded because of a failure to prepare an EIS instead of an EA in accordance with *Sabal Trail* as outlined by *Appalachian Voices v. FERC* WL 847199 (2019) (“FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.”) Please limit your answer to FERC certificate orders issued under section 7 and not cases where cooperating agencies have been reversed on appeal. Please provide this information in chart form. Please include in the chart certificate cases that have been upheld since the issuance of *Sabal Trail*.

**RESPONSE:** I refer you to the Chairman’s response to this answer, including the corresponding chart attachment.

**Question 3:** All three Commissioners who voted for the Policy Statements argued in this hearing that the Commission acted to establish regulatory certainty. However, the record of this hearing includes multiple statements that indicate the Policy Statements lead to *greater uncertainty and not more certainty*.

- a. How can ambiguous and open-ended Policy Statements with no benchmarks encourage certainty in the heavily regulated and capital intensive interstate natural gas sector?

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<sup>10</sup> See Draft GHG Policy Statement, 178 FERC ¶ 61,108 at P 28.

<sup>11</sup> See *Sabal Trail*, 867 F.3d at 1373-74; *Birckhead*, 925 F.3d at 518-19; *Food & Water Watch et al v. FERC*, No. 20-1132, 2022 WL 727037 at \*4-5 (D.C. Cir. Mar. 11, 2022).

<sup>12</sup> Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at PP 54-55.

<sup>13</sup> *Id.* PP 75-76.

**RESPONSE:** Because the Commission voted on March 24, 2022 to make the Updated Certificate Policy Statement and Interim GHG Policy Statement drafts, we will continue to consider applications pursuant to the 1999 Policy Statement's guidance. *See* March 2022 Order, 178 FERC ¶ 61,197 at P 2. As written, these draft Policy Statements intended to provide two types of certainty to regulated parties. First, they were written to provide guidance on the Commission's standards in reviewing a certificate application, including a full evaluation of need, the balancing of all relevant factors bearing on the public interest, and a clear numerical threshold of annual GHG emissions that would trigger the preparation of an EIS. Second, and more importantly for industry certainty, these Policy Statements are written to align with courts' views on the Commission's required NGA section 7 and NEPA analyses and will therefore reduce the risk that the certificates will be vacated or remanded after issuance.

- b. If you disagree that the Policy Statements are ambiguous and open-ended, please identify specifically the standards that you think they establish. Please include a reference to the Paragraph(s) in either or both of the Policy Statements that support your view.

**RESPONSE:** To be clear, any Commission policy statement only establishes guidelines, not binding standards or rules. Because the Commission voted on March 24, 2022 to make the Updated Certificate Policy Statement and Interim GHG Policy Statement drafts and to consider additional public comment, the guidance that they would have established may change in the future. The draft Updated Certificate Policy Statement provides guidance on the information the Commission would find helpful in assessing project need,<sup>14</sup> and the Commission's approach to considering all factors bearing on the public interest (as instructed by the courts).<sup>15</sup> The draft GHG Policy Statement provides a clear emissions threshold that would trigger preparation of an EIS rather than an Environmental Assessment.<sup>16</sup>

- c. Why do you think the recent Policy Statements have spurred such a high level of concern?

**RESPONSE:** Although the Updated Certificate Policy Statement has been under review since 2018, any change to the status quo can be disconcerting for stakeholders. However, I believe it is necessary to update the 1999 Policy Statement to reflect the 20 years of dramatic changes in the natural gas industry, including new drivers of infrastructure proposals (in particular, the development of shale gas reserves), increased participation levels of Tribes, landowners, communities, and environmental groups, and increasing frequency and successes of court challenges to Commission-issued certificates. Without an update to address these dramatic changes, uncertainty and litigation risk may increase. I look forward to further engagement with my colleagues on these statements following submission of additional public comments, and I expect to carefully consider stakeholder concerns in any final issuance of these Policy Statements.

**Question 4:** During the hearing in response to Chairman Manchin, Chairman Glick and Commissioner Christie expressed differing views about when and under what circumstances the full Commission has had or will have an opportunity to vote on pipeline orders. Chairman Glick has been consistent in correspondence beginning as

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<sup>14</sup> *See, e.g.*, Draft Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at PP 50-61.

<sup>15</sup> *Id.* PP 62-99.

<sup>16</sup> *See, e.g.*, Draft GHG Policy Statement, 178 FERC ¶ 61,108 at PP 3, 79-81, 88-95.

long ago as May 2021 and continuing as recently as in a letter to me on March 1, 2022 that he would not and has not put any application then under review on hold while the Commission completed its work on the Policy Statements that were issued on February 18. During the hearing, after asking Chairman Manchin for leave to respond to Commissioner Christie, Chairman Glick testified:

“I have put orders up that I've disagreed with. As a Chair, I would never -- I'm not going to stand in the way -- even if I disagree with the majority of commissioner votes, I'm always going to put . . . the orders up for a vote even if I don't agree with the order.”

- a. Please provide the facts as you know them (or with reasonable diligence can discern them) whether the full Commission's consideration of an Order on an application under section 7 or an authorization under section 3 of the Natural Gas Act in any proceeding was delayed (for example, even after the completion of an Environmental Impact Statement) awaiting the Policy Statements that were issued on February 18. For any such application, please state the facts that support your view in support of or contrary to a claim of delay.

**RESPONSE:** I am not aware of instances in which an application has been delayed due to the consideration and issuance of the two Policy Statements, and I refer you to the Chairman's answer to this question for further details on his approach to putting up orders for review. I can assure you that I will do my part to assure expeditious processing of applications, consistent with the Commission's obligations to serve the public interest.

- b. Looking forward, please comment on Chairman Glick's statement in his letter to me of March 1, 2022 (as part of his response to the first question in my letter of February 15, 2022) that the Commission will not “hold up orders that are ready to issue and are supported by any majority of Commissioners based on these policy statements or work related thereto.” Is there any Commission rule that either prohibits or expressly permits orders that are ready to issue *but are not supported* by any majority of Commissioners based on any policy statement or work related to such policy statement to be held off the Commission's agenda for a vote?

**RESPONSE:** I understand you to be asking whether there is a Commission rule that would allow the Chairman to hold back an order (i.e., not putting an order up for a vote) that a majority does not support based on the fact that the Commission is working on a related policy statement. I am not aware of any Commission rule or practice that would fit the criteria you describe. That being said, the Commission can only act when an order is supported by a majority of its members. For further details, I refer you to the Chairman's response on this question.

- c. Wouldn't a practice to hold up orders *not supported by a majority of Commissioners based on a particular policy statement* in effect deny an applicant the opportunity to have a resolution of its application? If so, wouldn't that be unfair?

**RESPONSE:** Again, I am not aware of a Commission practice or rule to “hold up” orders not supported by the majority of Commissioners based on the fact that the Commission is working on a related policy statement. The Commission's timing to decide any certificate application varies depending on the

complexity of the case and the sufficiency of the evidence provided, the size of the project, the level of environmental impacts, and other factors.

**Question 5:** Commission staff has repeatedly said that it is unable to assess the impact of an individual project on climate change. In the Delta Lateral Order (CP21-197) issued this week, Commission staff again stated that “FERC staff is unable to determine significance with regards to climate change impacts.” Why is the Commission still unable to make a determination on the impact of greenhouse gases after the issuance of a Policy Statement that was designed to do just that? Why, and if so when, is it reasonable to expect this situation to change?

**RESPONSE:** This statement appears in NEPA documents because it is considered the Commission’s role, not Staff’s, to determine the significance of GHG emissions. On March 24, 2022, the Commission issued an order modifying the status of the Interim GHG Policy Statement, which is now a draft and is open to comment. *See* March 2022 Order, 178 FERC ¶ 61,197 at P 2. We expect that stakeholders will comment on their perspectives on determining significance of greenhouse gas impacts, which will inform the Commission’s—and its Staff’s—next steps.

**Question 6:** Assuming that the Commission has applied the Policy Statements issued on February 18, if a natural gas project purchased carbon credits or funded environmental restoration in satisfaction of a commitment it made as part of its certificate application (a commitment it made in response to the Commission’s “encouragement” and to increase the likelihood that the Commission would approve its application), would the Commission allow for recovery of the costs in rates of satisfying such mitigation commitments? If so, how would the Commission evaluate such costs for recovery?

**RESPONSE:** As noted, the Commission has made the Policy Statements drafts and therefore does not have final guidance encouraging mitigation. To the extent such mitigation is proposed, as with other cost-recovery and rate-making requests, project sponsors would either propose to include those mitigation costs in an NGA section 4 filing or include them in any response to an NGA section 5 complaint. These types of costs may require further fact-finding and evidentiary support, so the Commission may decide to send the matter to hearing and settlement procedures before an administrative law judge at the Commission. As a practical matter, this would result in either a negotiated settlement of these costs or an initial decision issued by the administrative law judge following a full evidentiary hearing.

**Question 7:** Should the Interim GHG Policy Statement be revised to provide specific guidance on cost recovery for mitigation measures?

- a. If so, does the Commission or its staff have particular methodologies under consideration?

**RESPONSE:** The Interim GHG Policy Statement is now in draft form, and we expect comments to be filed about cost recovery for mitigation. The evaluation of these comments may result in changes to the draft GHG Policy Statement and further guidance on cost recovery matters.

- b. If not, why not?

**RESPONSE:** Please see the above response (Question 7(a)).



- c. When and in what form will the Commission disclose these methodologies to the public?

**RESPONSE:** Following evaluation of the comments received, the Commission may revise the draft GHG Policy Statement and provide additional guidance on cost recovery issues. The Commission may also provide guidance in individual cases.

- d. Please keep me informed of progress on the specific requirements for cost recovery for mitigation measures approved by the Commission.

**RESPONSE:** I understand you to be requesting information on future generic policies on cost recovery, rather than individual cases that may implicate cost recovery for the various types of mitigation measures project sponsors implement. As it has done in the past, our Office of External Affairs would keep Congress informed about future policy developments.

**Question 8:** The Department of Energy has an extensive program to promote hydrogen as an input fuel for the United States economy, including the energy sector. Hydrogen as an input for electricity generation, industrial processes, and domestic uses can help reduce emissions of greenhouse gases. Existing natural gas pipelines could help to deliver hydrogen in the future. How can the Commission enable the interstate natural gas pipeline system to: i) adapt to the greater use and transport of hydrogen; and, ii) help strengthen the reliability of an electric grid that will be expected to depend on primary energy inputs that have lower carbon emissions than today, including a greater contribution from intermittent sources of electric generation?

**RESPONSE:**

- i) Although no statute explicitly gives the Commission jurisdiction over pipelines that exclusively transport hydrogen gas, the Commission would have comparable experience in this area, including in natural gas pipeline siting and setting just and reasonable rates for interstate natural gas pipelines. That being said, the NGA does allow the Commission to exercise jurisdiction over interstate natural gas pipelines that blend hydrogen with natural gas. In terms of encouraging the greater use and transport of hydrogen, the Commission would have a role in approving pipeline tariff specifications for blended gas and could also take into account evidence of a proposed new pipeline's ability to convert to hydrogen in the future in its assessment of potential project benefits under section 7 of the NGA.
- ii) As an agency, the Commission is resource and fuel-neutral, meaning that it does not adopt policies with the specific aim to pick one type of resource over another. That being said, I recognize that our natural gas pipeline system and electric grid system are interrelated, and I am always open to the possibility of new technologies that could support the reliability of our grid. Should the infrastructure for those technologies become FERC-jurisdictional, including hydrogen gas pipelines, I will do my part to ensure that those applications are appropriately evaluated and processed.

**Question 9:** In the Northeast, many natural gas utilities have been forced to place a moratorium on new service hookups because of insufficient gas supply. Many existing interstate pipelines are operating at maximum capacity and still cannot keep pace with demand.

The North American Electric Reliability Corporation’s 2021 Long-Term Reliability Assessment states: “In New England, limited natural gas pipeline capacity leads to a reliance on fuel oil and imported liquefied natural gas (LNG) to meet winter peak loads. Limited natural gas pipeline capacity and lack of redundancy is a concern for electric reliability in normal winter and a serious risk in a long-duration, extreme cold conditions.”<sup>17</sup> How should and will the Commission help to address these problems?

**RESPONSE:** I share a sense of urgency to support development of winter reliability solutions in New England. I have been working to encourage cooperation between states and ISO New England to pursue opportunities aimed both at ensuring adequate supply and lowering demand across their relative jurisdictions. I understand that there are several factors that discourage new pipeline development in the region, including opposition to such development by some states, as well as the lack of long-term firm gas off-takers necessary to justify any specific new pipeline development. It is therefore important we evaluate all tools available to support reliable service to the region. Within the Commission’s sphere, that includes steps like ensuring electric generation in the region is accurately valued in the wholesale electric markets for its reliability contributions, including during the winter; and removing barriers to participation through new supply technologies and flexible demand that can ease stress on the grid during peak periods. When the wholesale markets are designed correctly, they send accurate short-term and long-term investment signals consistent with the grid’s reliability needs. We can also engage productively with states to assess whether the Commission has a role to play in supporting states to use a variety of levers within their jurisdiction. On April 27 and 28, 2022, the Commission, along with the North American Electric Reliability Corporation (NERC) and its Regional Entities, is convening a technical conference that is focused on improving winter-readiness, including in New England. There are also other ongoing initiatives involving NERC, the North American Electric Standards Board, and ISO New England that may bear on this issue. Only by taking advantage of the authority available at all levels will there be long-lasting progress on this front.

**Question 10:** What analysis, if any, did the Commission perform to assess the potential impact of the policies articulated in the Policy Statements on i) the sufficiency or reliability of natural gas or electric service; or ii) the cost of natural gas or electricity?

a. If such analyses were performed, what did they show?

**RESPONSE:** The two Policy Statements were issued following several rounds of public comment and a technical conference, and many stakeholders did raise the topics listed in your question. That input was considered and reflected in the now draft Policy Statements. However, I am not aware of any quantitative analysis the Commission completed on the potential impact of the two Policy Statements on general reliability or cost, because the Commission considers the need for interstate pipeline application approvals on a case-by-case basis. These types of analyses may be performed in the specific context of individual cases, but not on a generalized basis through a policy statement. As I previously discussed, the draft Policy Statements do not set standards or rules, but only provide guidance on what the Commission would consider in certificate cases.

b. If such analyses were not performed, why were they not performed?

**RESPONSE:** Please see my response to Question 10(a).

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<sup>17</sup> [https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC\\_LTRA\\_2021.pdf](https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf).

- c. Is there any plan to perform such an analysis going forward?

**RESPONSE:** As I discuss in my response to Question 10(a), more detailed analyses may be performed in the context of individualized cases, but unlikely on a generalized basis through a policy statement.

**Question 11:** Should the immediate applicability of the Policy Statements issued on February 18 to currently pending applications for certificates under section 7 of the NGA be a reason to delay or deny requests for route changes or technical changes in a natural gas project? If so, please provide the reasons for your view. If not, when will or should the Commission act on such applications or provide assurance to applicants that action will be forthcoming?

**RESPONSE:** On March 24, 2022, the Commission issued an order modifying the status of the Updated Certificate Policy Statement and Interim GHG Policy Statement. Both Policy Statements are now in draft form and open to comment. *See* March 2022 Order, 178 FERC ¶ 61,197 at P 2. Accordingly, concerns about their effect on pending project reviews are no longer applicable.

**Question 12:** During your opening statement in the hearing, you testified that “nothing in the policy statement requires the Commission to reject a project because of significant GHG emissions.”

- a. However, isn’t it true that the Commission will reject a project when its adverse impacts outweigh its positive benefits?

**RESPONSE:** Under the draft Updated Certificate Policy Statement, the Commission would first determine project need before balancing benefits (including need) against adverse impacts. Should the adverse impacts outweigh a project’s benefits, the Commission may deny the certificate application under section 7 of the NGA.

- b. And isn’t it also true that under the new Policy Statements GHG mitigation measures can increase the benefits and shift the balance of benefits and adverse impacts? If not, why not?

**RESPONSE:** Although the two Policy Statements are now drafts, the draft Policy Statements as currently written would include GHG mitigation measures in the balancing test. However, that does not mean that the existence of GHG mitigation measures, or lack thereof, would be outcome determinative in any specific proceeding.

- c. Applying the new Policy Statements, does the Commission have the legal authority to reject a certificate application for a natural gas project because the project’s indirect emissions are significant?

**RESPONSE:** Court precedent, including *Sabal Trail* and *Birckhead*, explains that the Commission can deny a certificate application on the ground that the pipeline would be too harmful to the environment.<sup>18</sup> The Commission can deny an application for a certificate if it finds that the project is not required by the public

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<sup>18</sup> *Sabal Trail*, 867 F.3d at 1373 (“Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a ‘legally relevant cause’ of the direct and indirect environmental effects of pipelines it approves.”); *Birckhead*, 925 F.3d at 519 (quoting same language).

convenience and necessity,<sup>19</sup> either because a project sponsor has not demonstrated need or that a balancing of all public interest factors weighs against authorization of the proposed project. As written, the draft Policy Statements contemplate that the Commission would balance adverse environmental effects of the project, including GHG emissions, with its proposed benefits. However, a project's reasonably foreseeable emissions would be just one of many factors considered in the balancing process.

- d. If so, please state the source of the authority and be specific in explaining the approach you favor and the analysis you envision, including the level of indirect emissions that would prove significant for the analysis.

**RESPONSE:** As discussed above, I envision that reasonably foreseeable indirect emissions would be just one of many factors to be considered in determining the public convenience and necessity. The draft GHG Policy Statement sets a clear numerical threshold of annual GHG emissions (100,000 metric tons or more per year of CO<sub>2</sub>e) for determining significance,<sup>20</sup> primarily for the purpose of clearly defining when an EIS would be prepared. The draft Updated Certificate Policy Statement leaves for case-by-case determination how project benefits and adverse impacts would be weighed. The Commission would make a reasoned decision in each case based on objective record evidence.

### Questions from Senator Steve Daines

**Question 1:** Commissioner Clements, do you believe that the actions by FERC will lead to a longer permitting process for applicants?

**RESPONSE:** Senator Daines, thank you for these questions. Each pipeline certificate application is assessed for the public convenience and necessity on its own merits and on a case-by-case basis. Whether the draft Policy Statements will lead to longer or shorter permitting processes for any individual project depends on the content of the final guidance and the facts of each case. It is difficult to predict what, if any, effect these actions will have on average permit processing times. However, I expect that, as the Commission and stakeholders become familiar with the policies, processing will become faster and more efficient.

**Question 2:** Commissioner Clements, do you believe that the actions by FERC will lead to fewer or more approved pipeline certificates?

**RESPONSE:** The draft Policy Statements outline additional opportunities to show evidence of need, giving project sponsors more flexibility to make their need demonstration in applications. However, without knowing the facts of cases yet to come before the Commission, the content of the final guidance, or the number of applications that will come before the Commission in the future, it is difficult to predict whether the draft Policy Statements will lead to fewer or more approved natural gas infrastructure certificates in the long term. That being said, the purpose of these Policy Statements is not to decrease or increase approval of certificate applications; rather, it is to ensure that the certificates issued by the Commission are legally durable.

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<sup>19</sup> 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." 15 U.S.C. § 717f(e).

<sup>20</sup> Draft GHG Policy Statement, 178 FERC ¶ 61,108 at P 79.

**Question 3:** Commissioner Clements, what effect on consumer prices do you believe will result from FERC's recent actions?

**RESPONSE:** One of the Commission's most important roles is to ensure that customers receive service at just and reasonable rates. This requires the Commission to analyze the need for a project before its costs are passed along to consumers. It is possible that the Commission's recent practice of relying exclusively on precedent agreements (particularly with affiliates) to determine need could lead to overbuilding of projects and corresponding consumer cost increases. That said, I am unable to predict what will happen to consumer energy prices even if these draft Policy Statements were issued as written. Consumer energy prices are influenced by a number of forces well outside the Commission's jurisdiction and control and my expertise, including global events, supply-chain issues, OPEC, and economy-wide inflation.

**Question 4:** Commissioner Clements, what role did the effect on consumer prices play into your consideration of the two policy statements?

**RESPONSE:** As I discussed above, setting just and reasonable rates is one of the Commission's most important priorities. Evidence that a proposed project would enhance competition and thereby reduce prices would be a significant factor weighing in support of project approval. I believe that the Commission's recent practice of relying solely on precedent agreements (particularly with affiliates) to determine need could lead to the overbuilding of projects, resulting in higher consumer costs. I believe that the Commission should conduct a fulsome analysis of need beyond the existence of precedent agreements where warranted, as the 1999 Certificate Policy Statement contemplated,<sup>21</sup> and that it should keep the Commission's current policy that existing customers do not subsidize new projects. Doing so will ensure that only needed pipelines are built and paid for by consumers.

**Question 5:** Commissioner Clements, do you believe that the actions taken by FERC could lead to less development, consumption and exports of U.S. natural gas and LNG?

**RESPONSE:** I disagree that the draft Policy Statements, as written, would necessarily lead to less development, consumption, and exports of natural gas. The development of the natural gas industry is influenced by actors and events outside of the Commission's jurisdiction, including by international events, state and local government policies, other federal agencies, and by private actors. As one example, in the near term, the draft Policy Statements would have little to no impact on the liquefied natural gas (LNG) market even if they were issued as written because the Commission has approved far more LNG capacity than has been built. Many LNG facilities that the Commission has approved have not yet been built due to factors outside of the Commission's control.

**Question 6:** Commissioner Clements, do you believe that the policy statements passed by FERC constitute a "rule" under the Congressional Rule Act?

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<sup>21</sup> 1999 Policy Statement, 88 FERC ¶ 61,227 at 61,747 ("Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.").

**RESPONSE:** Under current Office of Management and Budget guidance, if issued in final form, yes, the two Policy Statements would be considered “rules” under the Congressional Review Act. However, they are currently in draft form so they are not subject to the Congressional Review Act.

**Question 7:** Commissioner Clements, the 1999 policy statement was passed at FERC with bipartisan support. Do you believe that this partisan action by FERC weakens or undermines the rule, leaving it open to be rolled back at a future date?

**RESPONSE:** On March 24, 2022, the Commission issued an order modifying the status of the Updated Certificate Policy Statement and Interim GHG Policy Statement on a bipartisan basis. Both Policy Statements are now in draft form and open to comment. *See* March 2022 Order, 178 FERC ¶ 61,197 at P 2. I view this step as a renewed opportunity to acknowledge our genuine differences in the interpretation of the law and to identify points where our perspectives can be bridged to make improvements. I look forward to productively engaging with my colleagues on these statements going forward.

**Question 8:** Commissioner Clements, with the crisis in Ukraine happening right now and energy prices increasing both domestically and internationally do you believe that it was prudent for FERC to take actions that make it more difficult for the United States to increase domestic and international transportation of natural gas?

**RESPONSE:** I share your concerns about the war in Ukraine and the increase in energy prices for consumers here and abroad. However, issuance of the Commission’s Policy Statements, had we not voted to turn them to drafts open for comment, would not have had any near-term impact on natural gas transportation or associated prices. Further, the issuance of the Policy Statements on February 18, 2022 followed the Commission’s notices of inquiry in 2018 and 2021, and they were not timed to coincide with these important global events. I disagree that the draft Policy Statements, as currently written, would necessarily affect our country’s ability to increase domestic and international transportation of natural gas.

### **Question from Senator John Hoeven**

**Question:** My constituents want to ensure that they have access to the affordable, plentiful natural gas being produced at home in North Dakota.

Our state has made it a priority to develop new gas pipelines, which would likely connect to the interstate pipeline network, and thus be FERC jurisdictional, to deliver natural gas from western North Dakota to communities in eastern North Dakota.

How can FERC help support our state’s energy goals, in light of these two new policy statements that will make it exceptionally difficult for my state to achieve those goals?

**RESPONSE:** Senator Hoeven, thank you for this question. I am aware that North Dakota has natural gas resources, including in the western part of the state. Should the new natural gas pipeline referenced in your question be FERC jurisdictional, the Commission will evaluate the public convenience and necessity of the pipeline according to the certificate policy statement that is effective at that time. Any evidence submitted by North Dakota consumers and stakeholders would be considered as part of the full record.

That being said, I disagree that the draft Policy Statements, if issued as written, would make it “exceptionally difficult” for North Dakota to achieve its energy goals. The policies were not intended to impede the development of needed gas infrastructure, nor do I believe they would do so. To the contrary, they simply spell out the factors the Commission would contemplate in making its public convenience and necessity determination, consistent with court and Commission precedent. I expect the Commission will continue to authorize needed projects that are reasonably designed to minimize serious adverse impacts where technically and economically feasible, including projects in North Dakota.

It is also worth noting that the Commission has also issued an Advanced Notice of Proposed Rulemaking regarding electric transmission policy,<sup>22</sup> which may provide benefits to the wind industry in North Dakota.

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<sup>22</sup> See *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 86 Fed. Reg. 40,266 (2021).