

policies, and activities on environmental justice communities and the mitigation of those adverse impacts and burdens.

I. BACKGROUND

On September 15, 1999, the Commission issued a Policy Statement on the Certification of New Interstate Pipeline Facilities (“Certificate Policy Statement”) to provide guidance concerning how the Commission would evaluate certificate applications to determine whether such proposals meet the public convenience and necessity test of Section 7 of the Natural Gas Act.⁵ The purpose of the Policy Statement was to determine how best to balance “market demand against potential adverse environmental impacts and private property rights” in order to decide whether a project was in the public convenience and necessity.⁶ Its goals and objectives were “to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas” and “provide appropriate incentives for the optimal level of construction and efficient customer choices.”⁷

On April 19, 2018, the Commission issued the April 2018 NOI, which solicited comments regarding whether and how the Commission should revise the Certificate Policy Statement. The April 2018 NOI noted that nearly two decades had passed since the issuance of the Certificate Policy Statement.⁸ The April 2018 NOI explained that, in that time, the industry has seen unprecedented change, including: “(1) a revolution in natural gas production technology

⁵ *Certification of New Interstate Natural Gas Pipeline Facilities*, Statement of Policy, 88 FERC ¶ 61,227 (September 15, 1999), modified by, Errata Notice, 89 FERC ¶ 61,040 (October 8, 1999); Order Clarifying Statement of Policy, 90 FERC ¶ 61,128 (February 9, 2000); Order Further Clarifying Statement of Policy, 92 FERC ¶ 61,094 (July 28, 2000).

⁶ Certificate Policy Statement at p. 61,737.

⁷ *Id.* at p. 61,743.

⁸ April 2018 NOI at p. 2.

leading to dramatic increases in production; (2) new areas of major natural gas production; (3) flows on pipeline systems becoming bidirectional or reversing; (4) customers routinely entering into long-term precedent agreements for firm service during the formative stage of potential projects and the use of those precedent agreements as applicants' principal evidence of the need for their projects; and (5) the increased use of natural gas as a fuel source for electric generation, resulting in a closer relationship between natural gas transportation and natural gas-fired electric generation.”⁹

EDF submitted comments in response to the April 2018 NOI making a number of recommendations.¹⁰ In particular, EDF recommended that the Commission should: (1) incent increased utilization of existing capacity and analyze utilization capacity on recently constructed pipelines; (2) establish market rules and structures that delineate and price non-ratable just-in-time delivery services and non-ratable “packing” to support both pre-ramping and de-ramping of gas-fired electric generation; (3) require applicants to robustly demonstrate support for the proposed economic useful lives of their proposed facilities; (4) apply heightened review requirements to applications by pipeline developers supported by affiliated utilities and their captive customers; and (5) conduct a more robust and detailed cost benefit analysis of proposed projects. Consistent with the direction in the Commission’s February 2021 Notice of Inquiry, EDF has offered new information and recommendations in these comments rather than repeating those recommendations, but EDF continues to adhere to those recommendations and encourages the Commission to review and adopt them.

⁹ *Id.*

¹⁰ *Certification of New Interstate Natural Gas Pipeline Facilities*, Docket No. PL18-1 Comments of the Environmental Defense Fund (July 25, 2018).

Subsequently, on February 18, 2021, the Commission issued the February 2021 NOI, which solicited “new information and additional stakeholder perspectives to help the Commission explore whether it should revise its approach under the currently effective policy statement on the certification of new natural gas transportation facilities.” The February 2021 NOI recognized that further changes had occurred since the April 2018 NOI. In addition to the questions and topics included in the April 2018 NOI, it included several new questions as well as an additional topic, regarding environmental justice communities.

II. SUMMARY OF RECOMMENDATIONS

In these comments, EDF makes the following recommendations regarding the Commission’s regulations, policies, and practices:

1. The Commission should modify the threshold “no financial subsidies” requirement to require a more detailed review of the justification for the proposed project and should apply this requirement to all applications (A1 and A2);
2. As part of this modified threshold requirement, the applicant should be required to demonstrate that any asserted “need” cannot be met by existing infrastructure, including through more efficient utilization of existing infrastructure, and the Commission should create incentives for such efficient utilization (A1 and A2);
3. The Commission should conduct a more thorough balancing of the potential benefits of the proposed project against its potential adverse impacts and Commission Staff should issue a Draft Balancing Analysis for comment prior to the Commission rendering a decision, similar to the Draft Environmental Impact Statement issued for comment as part of the National Environmental Policy Act review process (A1 and A2);
4. The Commission should update the requirements for Exhibit I of the application, regarding market data, and should strictly apply the informational requirements for Exhibit I and other required exhibits (A3);
5. The Commission should consider all information relevant to the useful life of a pipeline in its need and depreciation analyses, including federal and state decarbonization requirements (A3 and A6);
6. The Commission should require that applicants filing precedent agreements with affiliated shippers, particularly where those affiliated shippers have captive customers, provide evidence that the proposed pipelines provide material cost savings to customers of the affiliated shipper, based on alternatives solicited through a fair and open process (A4);

7. The Commission should employ a comparative hearing process when faced with multiple pipeline applications to provide service in the same geographic area (A9);
8. The Commission should give greater weight to the concerns of impacted landowners and communities and should use the Office of Public Participation (“OPP”) to ensure that those stakeholders have effective outreach and opportunity to participate in Commission proceedings (B3);
9. The Commission should impose more detailed certificate conditions related to impact on and remediation of land affected by pre-construction, construction, and post-construction activities (B4);
10. The Commission should increase monitoring of remediation activities and take action when remediation is insufficient (B4); and
11. The Commission should recognize its past failures to appropriately address environmental justice issues and work with environmental justice communities and advocates to improve its identification of and response to adverse impacts and place greater weight on environmental justice concerns (E1 and E2).

The comments below expand upon the need for and proper implementation of these recommendations.

EDF also provides the following as Attachments to its Comments:

- EDF-1: Affidavit of James Murchie, CEO of Energy Income Partners
- EDF-2: Recommended Edits to Exhibit I (Market Data) in Redline
- EDF-3: Testimony of Alexander Kirk on behalf of Columbia Gas Transmission, Docket No. RP20-1060
- EDF-4: 2021 Vision Forward issued by the Interstate Natural Gas Association of America (INGAA)
- EDF-5: Comments of Environmental Defense Fund and New Jersey Conservation Foundation in New Jersey BPU Docket Nos. GO20010033 and GO19070846
- EDF-6: Analysis of Excess Capacity in St. Louis Region
- EDF-7: Standing Addendums from EDF v. FERC, Case No. 20-1016 *et al.*

III. COMMENTS

A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?

The Natural Gas Act gives the Commission the responsibility of managing the expansion and maintenance of the natural gas system by determining whether proposed pipelines and other

natural gas facilities are required “by the present or future public convenience and necessity.”¹¹ Any proposed facilities not in the public convenience or necessity may not be built.¹² This is a fact-specific inquiry that must be informed both by the details of the project and by prevailing and forecasted market conditions. The current Certificate Policy Statement was adopted in 1999.¹³ Since then, the natural gas market and the energy system as a whole have gone through substantial changes and they are on the cusp of an even greater shift. To appropriately evaluate applications for a certificate of public convenience and necessity under the Natural Gas Act, the Commission must update the Certificate Policy Statement in a manner informed by those conditions.

Under the current Certificate Policy Statement, the Commission first evaluates whether the project meets a “threshold requirement” of demonstrating that the project is financially supportable without subsidization from existing customers.¹⁴ In practice, this is usually accomplished through the filing of precedent agreements between the applicant and natural gas shippers demonstrating that most of the project’s capacity is subscribed to by new customers or by current customers purchasing additional capacity; it is the Commission’s policy not to “look behind” such agreements to consider the shipper’s reasons for subscribing to the capacity or otherwise evaluate what need for gas they reflect.¹⁵ Under the Certificate Policy Statement, the threshold requirement does not apply to new pipeline companies, since they have no existing

¹¹ 15 U.S.C. § 717f.

¹² *Id.*

¹³ Certificate Policy Statement.

¹⁴ *Id.* at p. 61,746.

¹⁵ *Id.* at pp. 61,748-9; *Spire STL Pipeline LLC*, Order Issuing Certificates, 164 FERC ¶ 61,085 at p. 61,485 (August 3, 2018) (“Spire Certificate Order”).

customers;¹⁶ however, in practice, the Commission generally conducts a similar review of filed evidence of need, particularly precedent agreements, for applications by new pipeline companies before moving on to the next stage of review.¹⁷

Second, if the threshold requirement is satisfied, the Commission balances adverse effects of the proposed facilities, with a focus on impacts on existing customers of the applicant, other existing pipelines and their captive customers, and impacted landowners and communities, against public benefits of the proposed facilities.¹⁸ Under the Certificate Policy Statement, a certificate is only granted where public benefits outweigh adverse impacts; the Commission may also impose conditions to minimize adverse effects.¹⁹ In practice, the analysis of public benefits also relies principally on precedent agreements in most cases, with the Commission accepting statements by the applicant or shippers about the benefits of those contracts with minimal further analysis, or even describing the mere existence of precedent agreements as a “benefit.”²⁰

At present, where the proposed facility meets the threshold requirement and public benefits outweigh adverse impacts, the certificate is granted.²¹ This current process continues to reflect the historic, strong, presumption of demand growth coupled with the historic view of relative supply constraints that was reasonably justified by prevailing market conditions in 1999. Those presumptions significantly differ from current and forecasted market conditions.

Accordingly, the Commission must update these elements of the Certificate Policy Statement in

¹⁶ Certificate Policy Statement at p. 61,746. (“For new pipeline companies, without existing customers, this requirement will have no application.”)

¹⁷ Spire Certificate Order at p. 61,476.

¹⁸ Certificate Policy Statement at pp. 61,745-7.

¹⁹ *Id.* at p. 61,745-6.

²⁰ Spire Certificate Order at pp. 61,495-6.

²¹ Certificate Policy Statement.

light of current conditions to prevent the issuance of certificates that do not reflect genuine “public convenience and necessity” and that will have significant adverse impacts, particularly on pipeline customers, impacted communities, landowners, and the environment.

In particular, EDF recommends that the Commission modify how it determines whether there is a public need for a proposed project in three ways:

- (1) the Commission should modify the threshold “no financial subsidies” requirement to include a more detailed review of the justification for the project, and in particular should enhance review of precedent agreements, as well as explicitly applying the threshold requirement to new pipeline companies;
- (2) as part of this modified threshold requirement, the applicant should be required to demonstrate that any asserted “need” cannot be met by existing infrastructure, including through more efficient utilization of existing infrastructure, and the Commission should create incentives for such efficient utilization; and
- (3) the Commission should conduct a more thorough balancing of the potential benefits of the proposed project against its potential adverse impacts, clearly separated from the threshold requirement, and should only find public need if the potential benefits as analyzed by the Commission clearly outweigh the potential adverse impacts, including the risk of creating stranded assets. To increase transparency and opportunities for stakeholder input, including the input of impacted landowners and communities, Commission Staff should issue a Draft Balancing Analysis for comment prior to the Commission rendering a decision, similar to the Draft Environmental Impact Statement issued for comment as part of the National Environmental Policy Act review process.

In response to this question and the following questions in section A, EDF explains why these changes are necessary and provides specific details on how they should be implemented.

At the time of the development of the 1999 Certificate Policy and until relatively recently, the development, regulation, and operation of the natural gas system has been rooted in the assumption that demand for natural gas grows with population and the economy while natural domestic gas supply was relatively constrained and would grow much more slowly than domestic demand. Based on these assumptions, the Commission established a presumption that the willingness of businesses to bear the risk of the cost of new facilities, including through

signing a pre-construction precedent agreement to purchase its capacity, was sufficient evidence that the facilities were needed.

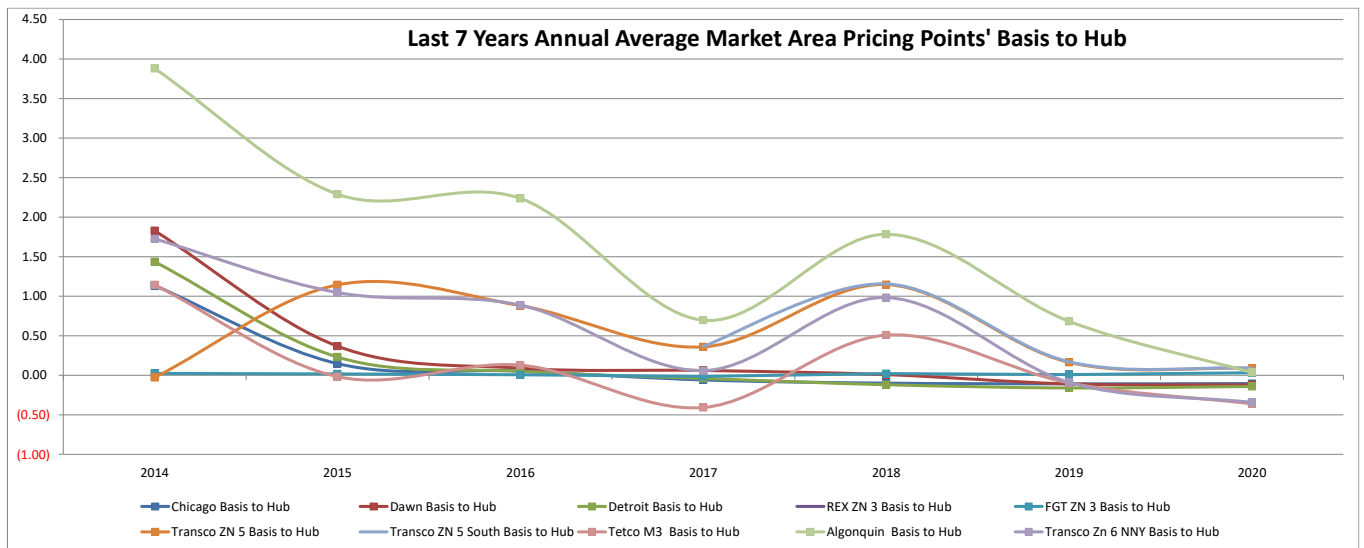
This assumption of growing demand and the approval process established based on it has precipitated the Commission's approval of over 500 pipeline applications since 1999.²² The Commission accepted, based on the limited evidence of precedent agreement(s), that both market need and public need existed as new pipeline projects would support growing demand; and, even in cases where intervenors demonstrated flat demand and sufficient existing supply, the prevailing presumption shifted to the asserted view that new pipeline projects would ensure longer-term supply sufficiency and provide access to lower prices. In addition, the view that North American natural gas resources were finite and insufficient to meet projected and experienced demand growth led to the proposal, approval, and development of a number of new LNG import terminals expected to operate as baseload supply facilities.

However, over the last decade, massive changes have uprooted these long-held presumptions. The development of new and expanded domestic resources, particularly through fracking, led to supply growth well beyond what was forecasted and projected supplies well beyond past limits. At the same time, public policy and the falling costs of renewable energy and electrification technologies have led to forecasts of flat or falling annual natural gas demand in much of the country. The new supply has already resulted in the proposals and refashioning of LNG import terminals to LNG export terminals and the reversals of historic flow on substantial portions of the nation's gas transmission system, as well as development of greenfield pipeline projects to support both shifting domestic demand and emergence of substantial export functions.

²² FERC, Approved Major Pipeline Projects (1997-Present), available at <https://www.ferc.gov/industries-data/natural-gas/approved-major-pipeline-projects-2015-present>.

Geographic regions that were formerly just “market areas” have now been transformed into dominant supply areas, seeking demand outlets elsewhere. As the Commission has recognized,²³ one consequence of this significant buildout is that gas prices have largely converged across the different supply and demand areas in the United States.

As seen below, most of the market area prices have, on an annual basis, essentially converged with the Henry Hub’s prices:



If producing basins’ prices and market areas’ prices are nearly the same, the economic rationale for spending millions of dollars on new facilities in order to “promote competition” or “enhance market functioning” is diminished because commodity prices in the respective areas have converged.

Over the last two decades, as natural gas supply in the United States began to substantially increase, the simultaneous demand increases, including for significantly increased natural gas generation and partly driven by falling natural gas prices, allowed for the question of “market need” to be definitively answered in the positive because “these developments created

²³ Spire Certificate Order at p. 61,493

an acute need for new natural gas infrastructure to transport gas to serve customers.”²⁴ However, looking forward, it is reasonable to project diminished annual demand for gas in many regions.²⁵ Both “market need” and “public need” take on new meanings in an era of a built-out system with flat or declining annual demand. Few if any projects will be justified by actual supply shortage, demand growth, or the potential for increased competition to lower prices; instead, the Commission will increasingly be asked to certificate projects on the basis that those projects will enhance reliability or resiliency, replace existing infrastructure, or meet specific functional needs, such as peak demand. Going forward, the Commission will need a durable framework that can accurately assess whether projects offered to replace or duplicate existing infrastructure will actually enhance reliability or resilience, and will actually meet the evolving needs of retail gas utilities and thus, in fact, satisfy the public convenience and necessity standard.

Governing in an era of uncertainty will require heightened review of new certificate applications. The Commission must reevaluate the information it requires be provided by pipeline applicants to ensure a complete record upon which an informed decision can be made. A growing list of Commissioners have criticized the Commission’s approach, some even describing Section 7 reviews as “anemic” and “patently insufficient.”²⁶ A flurry of recent

²⁴ *Millennium Pipeline Co., L.L.C.*, Order Issuing Certificate, 140 FERC ¶ 61,045 at p. 61,219 (July 17, 2012) (Commissioner LaFleur, dissenting).

²⁵ *See., e.g., Dominion Cove Point LNG, LP*, Docket No. RP17-197, Section 4 General Rate Case, Exhibit No. DCP-0088 at p. 19, lines 17-22 (November 23, 2016) (“There are many items that contribute to future uncertainty about natural gas demand in the long-run, including the technological development of alternative energies and renewable energies, potential gains in energy efficiency, and laws and policies that support the adoption of these technologies, alternatives, and efficiencies. These changes could reduce the demand for natural gas in the long-run, negatively impacting the demand for all of DCP’s services. . . .”).

²⁶ *Spire Certificate Order* at p. 61,527 (Commissioner Glick, dissenting).

appellate decisions have also made clear that the Commission needs to “do better” in reviewing certificate applications:

- In *City of Oberlin v. FERC*, the D.C. Circuit found that the Commission failed to adequately justify its determination that it is lawful to credit Nexus’s contracts with foreign shippers serving foreign customers as evidence of market demand for the interstate pipeline.²⁷
- In *Birkhead v. FERC*, the D.C. Circuit stated that “[w]e are troubled, as we were in the upstream-effects context, by the Commission’s attempt to justify its decision to discount downstream impacts based on its lack of information about the destination and end use of gas in question.”²⁸
- In *Allegheny Defense Project v. FERC*, the D.C. Circuit described the Commission’s tolling order practice as “fundamentally unfair,” at least when it “allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court[,] ensur[ing] that irreparable harm will occur before any party has access to judicial relief.”²⁹

Although the Commission has since corrected some of these deficiencies, these statements make clear that the Commission’s role as “the guardian of the public interest” demands more. Going forward, the Commission must be prepared to request additional information from the applicant, invite a paper or comparative hearing to develop a complete record, or be willing to deny a project without prejudice until the pipeline meets its burden of proof. This approach will allow the Commission to make better informed and supported decisions, thereby reducing its litigation risk in certificate cases.

As explained in the Attachment EDF-1, the affidavit submitted by Energy Income Partners CEO James Murchie, the Commission must also take a hard look at how existing infrastructure is used and identify opportunities for incentives to drive more efficient use of the

²⁷ 937 F.3d 599 (D.C. Cir. 2019).

²⁸ 925 F.3d 510, 520 (D.C. Cir. 2019).

²⁹ 964 F.3d 1 (D.C. Cir. 2020) (citing *Spire STL Pipeline*, 169 FERC ¶ 61,134 (Glick, Comm’r, dissenting)).

capital already invested in the existing pipeline network.³⁰ Going forward, the gas system will be called upon to serve as a facilitator of renewable deployment through the provision of hourly variable supply to electric generators performing balancing services to supplement and complement renewable generations' variable hourly output. The ability of natural gas to continue facilitating renewable deployment rests far more on using the incumbent infrastructure more efficiently and effectively than on greenfield gas infrastructure development. As renewable energy deployment continues, the total annual volume of natural gas used in power generation is likely to decline over time, but peak demand may remain stable or increase. This, coupled with the need to balance variable renewable generation, will increase the value of ancillary services provided by gas infrastructure, such as the provision of hourly non-ratable deliveries, the holding and storing of the ratable supply-receipts-into-the-pipe during hours of “no-burn” by generators, and the accommodation of ever steeper ramps and de-ramps to accommodate ever increasing renewable integration.³¹ Rewarding pipelines for *that* value creation, as opposed to the simple building of new infrastructure, will drive cost efficiency for consumers and better overall returns for investors by avoiding duplicative investment.³²

For a facility to be justified by “public convenience and necessity,” it must be additive to the natural gas system and meet a need that cannot be met by the current system. If the pipeline applicant is not a new entrant, it should first have to demonstrate that its existing infrastructure is being utilized to its fullest extent. This would require the pipeline, in its application, to provide a

³⁰ Attachment EDF-1, Affidavit of James J. Murchie (May 26, 2021).

³¹ *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7, Reply Comments of Environmental Defense Fund (May 9, 2018).

³² Attachment EDF-1, Affidavit of James J. Murchie at ¶ 29.

comparison of the shape of the proposed new demand (over the extent of the proposed facilities) as compared to the shape of the currently existing demand on its system (over the extent of the proposed facilities) and present both against the shape of current contracts whose primary path(s) traverse the proposed facilities. The Commission has in the past required pipelines to provide steady state and transient hydraulic pipeflow simulation studies for both winter and summer seasons to demonstrate how the pipeline will be able to contractually meet all swing, no-notice, quick notice, and hourly delivery commitments on its physical system after abandonment.³³ This information, coupled with the exposition of actual facility utilization, would similarly demonstrate whether there is an opportunity for the turnback of seasonal or hourly contract rights on its system. At present, many customers, especially local distribution companies (“LDCs”) and shippers serving LDC loads, have annual contracts whose utilization is at a low to non-existent load factor during extended portions of each year and/or predictable hours of each day over portions of each year.³⁴

To the extent the projected peak demand associated with a proposed expansion coincides with the period of fallow utilization of an incumbent shipper, an opportunity for optimizing the contracting and utilization of existing facilities could exist. Where hourly or seasonal turnback by an incumbent is operationally feasible and desirable to the incumbent, FERC should allow the

³³ *Trunkline Gas Company, LLC*, Docket No. CP12-491, Trunkline Gas Company, LLC Response to Data Request (February 26, 2013).

³⁴ *See, e.g.*, NYPSC Case No. 19-G-0678, National Grid Natural Gas Long-Term Capacity Report at p. 26 (February 24, 2020) (Figure 12: Downstate NY Gas Daily Demand Variability Over a Twelve-Month Period in 2013-2014 (colder year) and 2018-2019 (warmer year)).

pipeline to charge (and retain the revenues³⁵ from) the new customer for the turned-back, legacy capacity, at the unit price it would have cost to build the new capacity.

Allowing pipelines to receive Capacity Optimization Revenue would provide incentive revenue to the pipeline, relieve the incumbent of associated reservation charges, allow for more efficient contracting and use of existing assets, and eliminate the environmental impacts associated with new infrastructure build. In addition, even where the applicant is a new entrant, the Commission should be open to evidence from intervenors that the need the new facilities would serve could be met by more efficient utilization of the facilities of other incumbents, and those incumbents should have the same opportunity to earn revenue through serving those needs.

To the extent the pipeline applicant has exhausted opportunities for capacity optimization, it should be required to present evidence to demonstrate that new infrastructure is in fact needed; and, to propose how that new infrastructure will be depreciated over time consistent with imperative to decarbonize. Additionally, in those applications where the shippers that have signed precedent agreements have captive customers such that their shareholders are not solely at risk for cost recovery (such as in the case of LDC or electric utility shippers), such evidence could include: (1) the results of a competitive RFP process offered by the utility that selected the pipeline applicant as the best choice among other supply and demand relief options, (2) an evaluation of available, existing capacity in the region to demonstrate there is no available

³⁵ Similar to Commission treatment of revenues from negotiated rate contracts, where revenues are neither considered “discounted” transactions when revenues are below maximum rates, nor are revenues in excess of maximum rates credited to cost of service in Section 4 cases, such Capacity Optimization Revenues should also be excluded from consideration as general revenues in Section 4 rate cases. Instead, they should be treated like revenues from other incrementally-priced projects where the project has its own standalone cost of service and revenue stream.

capacity on neighboring pipelines, or (3) a detailed response to the information required in Exhibit I (Market Data).

A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider? For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

As described above, the current Certificate Policy Statement gives short shrift to the issue of “public need,” despite the fact that it is core to the Commission’s statutory obligation under the Natural Gas Act. The threshold requirement formally applies only to pipelines with existing customers and asks only about the impact on those customers.³⁶ The second requirement, that benefits outweigh adverse impacts, does include a role for need in identifying and analyzing benefits, but does not require an explicit finding that need exists for the project.³⁷ The Commission’s test, over time, has also conflated the issue of “need” with benefits.

Notably, the Certificate Policy Statement does include a list of potential project “benefits” that appear to constitute reasons a project may be needed: “meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.”³⁸ However, the Commission has not strictly adhered to that list in approving projects, but has instead described factors like the mere

³⁶ Certificate Policy Statement at p. 61,746.

³⁷ *Id.* at pp. 61,745-7.

³⁸ *Id.* at p. 61,748.

existence of a precedent agreement as a “benefit” of the project and then accepted this “benefit” as sufficient evidence of need.³⁹

In practice, the Commission purports to address the issue of need but only in a limited manner that is highly deferential to the applicant. For example, in the Spire Order, the Commission followed a brief section titled “Subsidization” in which it finds the threshold requirement to be inapplicable with a significantly longer section titled “Need for the Project,” in which it ultimately finds the existence of a precedent agreement for most of the project’s capacity sufficient to demonstrate need, without “looking behind” the agreement to determine whether the contract reflects a genuine need on the shipper’s part.⁴⁰

The Commission effectively delegates the question of whether public need exists to private corporations, with the Commission finding need so long as two companies, the applicant and a shipper willing to sign precedent agreement, assert there is need. This has even been extended to the situation where only one company has asserted a claim of need, in cases where all of the applicant’s subscribed capacity precedent agreements are with affiliated shippers.

To be fair, in 1999 and for a number of years thereafter, market need was largely synonymous with “market demand,” as demand for natural gas continued to increase year-over-year and new greenfield facilities were generally proposed for the purpose of serving that new demand. However, as demand for natural gas diminishes over time, sole reliance on precedent agreements to establish “market need” no longer answers the question of whether the project is required by the public convenience and necessity.

³⁹ Spire Certificate Order at p. 61,526 (Commissioner LaFleur, dissenting) (explaining that the adverse effects of the project “clearly outweigh the only benefit articulated, a precedent agreement”).

⁴⁰ *Id.* at pp. 61,476-88.

For these reasons, the Commission should modify the threshold requirement to make it a test of “public need” and make it applicable to all applications. This will require that the applicant provide a specific basis for public need. That basis could be one of the items listed in the Certificate Policy Statement or could be an alternative basis accompanied by a justification from the applicant of why that basis reflects need. The applicant should also be required to provide specific evidence that the need identified exists and that the proposed facilities will serve that need. The applicant should further be required to demonstrate that the identified need cannot be met by existing infrastructure, including through more efficient utilization of existing infrastructure.

For example, in determining whether a project enhances resilience or reliability, the Commission needs to set clear guideposts, particularly because, unlike the Federal Power Act, the Natural Gas Act does not provide for the development of mandatory reliability standards. In the absence of such a framework, the applicant is left with unbounded discretion to assert, on its own behalf or based on statements by shippers, what is and is not needed to maintain reliability or increase resiliency. For example, the applicant and shipper in the Spire case asserted that the Spire STL pipeline would enhance reliability, as it provided an additional transportation path that partly circumvented a seismic zone.⁴¹ However, intervenors presented record evidence demonstrating that there is a 0.00005 percent chance of a large magnitude earthquake occurring in the region,⁴² portions of the shipper’s own service territory are within the same seismic zone rendering illogical the notion that a pipeline must avoid that zone to be reliable,⁴³ and the shipper

⁴¹ *Id.* at p. 61,484.

⁴² *Spire STL Pipeline LLC*, Docket No. CP17-40, Protest of Enable Mississippi River Transmission LLC at page 42 (February 27, 2017).

⁴³ *Id.*

already had a transportation path that avoided the seismic zone.⁴⁴ Despite this evidence, the Commission, asserting that it would not “look behind” contracts, treated claims of reliability as a benefit of the project. If an applicant seeks to rely on an assertion of “enhanced reliability” as evidence of project need or a project benefit, it must assemble a record that actually quantifies and validates such benefits.

Assessing any reliability benefit must also take into account pipeline tariff provisions that apply when there is an outage on a stretch of pipe or compressor station. Several pipeline tariffs’ General Terms and Conditions, including Algonquin’s, provide for the proration of impaired deliveries.⁴⁵ In the event of an emergency situation, service would be interrupted or curtailed in the order provided in Section 24.4, starting with scheduled service for peak and loan service (the lowest priority of interruptible service) and ending with prorated scheduled service under all firm service agreements. In other words, no incremental service, or addition of a lateral service or delivery point, overcomes the fact that all suffer equally when an emergency arises. Therefore, if a project is offered to meet a “resilience” need, there should be a heightened burden to show that project somehow overcomes the operation of the pipeline’s pro-rata curtailment and scheduling provisions of its tariff, or that the benefit is sufficient to justify the project even given those provisions. The pipeline applicant should be required to demonstrate with sufficient detail the resilience problem asserted to be addressed and how the project would solve that problem. Where some or all of the shippers subscribing to a project purportedly designed for a resilience need are affiliates of the applicant and therefore beneficiaries of project revenues, the

⁴⁴ *Spire STL Pipeline LLC*, Docket No. CP17-40, Laclede Gas Company Motion for Leave and Statement in Support of Application at p. 4, n.1 (February 27, 2017).

⁴⁵ Algonquin Gas Transmission, LLC FERC Gas Tariff, General Terms and Conditions at Section 16.3, available at <https://infopost.spectraenergy.com/infopost/AGHome.asp?Pipe=AG>.

Commission should conduct a heightened review, including a hearing or other processes allowing for data requests and cross examination by intervenors.

As another example, arguably any new pipeline project could claim to meet a need of “promoting competition among natural gas companies” or “enhancing the functioning of gas markets.” Therefore, if an applicant relies on such a need to justify its project, the applicant should be required to provide more detailed information in support of either. For instance, a new pipeline to promote competition should be required to qualitatively and quantitatively demonstrate how customers would benefit from increased competition, including demonstrated cost savings; especially in light of evident price convergence. The Commission must also have a means of measuring how the functioning of the gas market is enhanced. Given prevailing market conditions and collapsing basis price differentials, it is unlikely that new greenfield projects could offer meaningful benefits in this area.

Beyond the initial question of whether “public need” exists for a proposed facility, the Commission should continue to conduct a balancing test to determine whether the potential benefits of the proposed facility outweigh the potential adverse impacts caused by the facility. The potential benefits considered should include both the primary justification of the project’s need, such ability to serve increased demand, improved reliability, or enhanced competition, as well as secondary benefits such as number of jobs created. The potential adverse impacts considered should include, as discussed below, the impact on landowners who will have their property taken by eminent domain, and on communities near the facilities, as well as adverse environmental impacts. The impacts on other pipelines should also be considered; while it is true that the Commission’s role is not to protect incumbent pipelines from fair competition, the

Commission's role is to prevent overbuilding of the system.⁴⁶ Indeed, at the foundation of utility regulation is the recognition that overbuilding of the utility system is not in the public interest, along with the recognition that this will result in monopolies that require careful regulation.

While the fact that a proposed facility will cause financial harm to existing pipelines is not, on its own, definitive proof that the proposed facility will result in an overbuilt system, the

Commission should carefully consider such impacts in its analysis. As described further below using the case study of the Spire STL pipeline, a failure to fully consider the impacts of a new pipeline on existing facilities can result in a substantially overbuilt system.

In balancing potential benefits and potential adverse impacts of a proposed facility, the Commission should both consider the benefits and adverse impacts in a qualitative matter and perform a quantitative balancing of the benefits and adverse impacts. While the Commission described the existing balancing test as an "economic test," in practice the Commission has not conducted a detailed quantitative analysis in its certificate orders. Rather, the Commission has briefly reviewed the "benefits" described by the applicant and any commenting shippers, including "benefits" of questionable value like the mere existence of an affiliate precedent agreement, and the adverse impacts described by intervenors, and then summarily stated that the "benefits" outweigh the adverse impacts. Naming public benefits and adverse effects is not the same thing as weighing them. As demonstrated in the chart below, the Commission's balancing analysis contains very little analysis at all:

⁴⁶ See, e.g., Certificate Policy Statement at p. 61,737.

Case	Balancing Analysis
<p><i>Eastern Shore Natural Gas Co.</i>, 132 FERC ¶ 61,204 (2010)</p>	<p>P 35 Based on all the above, the Commission finds that the proposal will serve a demonstrated market need and provide a new regional supply source without adverse impacts on existing customers, other pipelines, landowners, or communities.</p>
<p><i>Dominion Transmission, Inc.</i>, 141 FERC ¶ 61,240 (2012)</p>	<p>P 21 The proposed Allegheny Storage Project will increase the transportation and storage capacity available on DTI's system. All of the proposed capacity has been subscribed under long-term contracts, demonstrating the existence of a market for the project. Based on the benefits the project will provide and the minimal adverse effects the project will have on the economic interests of existing shippers, other pipelines and their captive customers, landowners and surrounding communities, we find, consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of DTI's proposal, as conditioned in this order.</p>
<p><i>Millennium Pipeline Co. L.L.C.</i>, 140 FERC ¶ 61,045 (2012)</p>	<p>P 15 Based on the benefits the project will provide and the minimal adverse effect on existing shippers, other pipelines and their captive customers, landowners and surrounding communities, we find, consistent with the criteria discussed in the Certificate Policy Statement and subject to the environmental discussion below, that the public convenience and necessity requires approval of Millennium's proposal, as conditioned in this order.</p>

<p><i>NEXUS Gas Transmission, LLC</i>, 160 FERC ¶ 61,022 (2017)</p>	<p>P 51 Based on the benefits the project will provide and the minimal adverse impacts on existing shippers, other pipelines and their captive customers, and landowners and surrounding communities, we find, consistent with the Certificate Policy Statement and NGA section 7(c), that the public convenience and necessity requires approval of NEXUS’s proposal, subject to the conditions discussed below</p>
<p><i>Mountain Valley Pipeline</i>, 161 FERC ¶ 61,043 (2017)</p>	<p>P 64 We find that the benefits that the MVP Project will provide to the market outweigh any adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities</p>
<p><i>Spire STL Pipeline LLC</i>, 164 FERC ¶ 61,085 (2018)</p>	<p>P 123 We find that the benefits that the Spire STL Project will provide to the market, including enhanced access to diverse supply sources and the fostering of competitive alternatives, outweigh the potential adverse effects on existing shippers, other pipelines and their captive customers, and landowners or surrounding communities.</p>

In order to increase the transparency of its review and ensure that it has appropriately represented and considered the public benefits and adverse impacts of a project, the Commission should direct Commission Staff to prepare a Draft Balancing Analysis for each application and release that Draft Balancing Analysis for public review and comment in advance of issuing the Initial Order. This would allow intervenors, including in particular impacted landowners and communities, to see whether the adverse impacts they will face have been fully identified and given appropriate consideration, as well as to offer evidence that the magnitude of the adverse impacts will be greater than the Draft Balancing Analysis estimates. The Commission should establish a specific timeline for the Draft Balancing Analysis that allows for Commission Staff to have the benefit of initial filings before preparing the analysis, but that also offers intervenors (as

well as the applicant) a reasonable comment period after the Draft Balancing Analysis is published and ensures that the Commission has a reasonable amount of time to review those comments before rendering a decision. This process could be generally similar to the NEPA analysis process used to develop an Environmental Impact Statement (EIS), which includes the following steps:⁴⁷

1. An agency publishes a Notice of Intent in the Federal Register. The Notice of Intent informs the public of the upcoming environmental analysis and describes how the public can become involved in the EIS preparation. This Notice of Intent starts the scoping process, which is the period in which the federal agency and the public collaborate to define the range of issues and potential alternatives to be addressed in the EIS.
2. A draft EIS is published for public review and comment for a minimum of 45 days. Upon close of the comment period, agencies consider all substantive comments and, if necessary, conduct further analyses.
3. A final EIS is then published, which provides responses to substantive comments. Publication of the final EIS begins the minimum 30-day “wait period,” in which agencies are generally required to wait 30 days before making a final decision on a proposed action.
4. The EIS process ends with the issuance of the Record of Decision (ROD). The ROD:
 - explains the agency’s decision,
 - describes the alternatives the agency considered, and
 - discusses the agency’s plans for mitigation and monitoring, if necessary.

The Commission could borrow from this process as it updates its review of public benefits and adverse effects. This reform would promote transparency, confidence and public participation in the Commission’s decision making process. This process should also be informed by consultation with the OPP regarding landowner and community impacts.⁴⁸

A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were

⁴⁷ Environmental Protection Agency, National Environmental Policy Act Review Process , available at <https://www.epa.gov/nepa/national-environmental-policy-act-review-process>.

⁴⁸ The appropriate role of the OPP in certificate proceedings is discussed further below.

to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

Although the burden of proof in certificate proceedings falls squarely upon the applicant,⁴⁹ it has been observed that FERC's unwillingness to "look behind" precedent agreements and take protesting parties' arguments seriously "has the effect of flipping that burden on its head."⁵⁰ While one tool to return the burden to its proper place is to require applicants to provide a more detailed explanation and more evidence of need, as discussed above, the Commission should also make greater use of existing tools, including requiring the submission of, and carefully evaluating, all parts of the certificate application required by current regulations. For instance, 18 C.F.R. Section 157.14 specifies the exhibits that must accompany a certificate application, which include, among other exhibits, Exhibit I (Market Data) and Exhibit O (Depreciation). Over time, the Commission has repeatedly granted waivers of several of these requirements. The consequence of granting such waivers is that a significant portion of Section 7(c) information and data filing "requirements" are casually wiped away.

The below chart summarizes what was provided by the applicant for a number of recently approved pipeline certificates in the following categories: (a) whether, pursuant to 18 C.F.R. § 157.6(b)(8), the applicant provided "an analysis reflecting the impact of the fuel usage resulting

⁴⁹ See *Texaco Inc. v. FERC*, 148 F.3d 1091, 1093 (D.C. Cir. 1998) ("To satisfy section 7's 'public convenience and necessity' requirement, an applicant must prove that the facility it proposes to build 'is or will be required by the present or future public convenience and necessity'" (quoting 15 U.S.C. § 717f(e)); *Atl. Ref. Co. v. FPC*, 316 F.2d 677, 678 (D.C. Cir. 1963) ("The burden of proving the public convenience and necessity is, of course, on the natural gas company."))

⁵⁰ Spire Certificate Order at p. 61,531 (Commissioner Glick, dissenting).

from the proposed expansion project;” (b) whether, pursuant to 18 C.F.R. § 157.6(a)(5) and 18 C.F.R. § 157.14, the applicant provided an Exhibit G showing “[a] flow diagram showing daily design capacity and reflecting operating conditions with only existing facilities in operation” and “[a] second flow diagram showing daily design capacity and reflecting operating conditions with both proposed and existing facilities in operation;” (c) whether, pursuant to the same sections, the applicant provided an Exhibit H describing “[t]hose production areas accessible to the proposed construction that contain sufficient existing or potential gas supplies for the proposed project;” (d) whether, pursuant to those same sections, the applicant provided an Exhibit I including “[a] system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities are under construction, and actual data of like import for each of the 3 years next preceding the filing of the application” and “[a] copy of each market survey made within the past three years for such markets as are to receive new or increased service from the project applied for.”

No.	Pipeline, Docket No., and Application Date	Analysis of Impact of Fuel Usage	Selected Info from Exhibit G	Selected Info from Exhibit H	Selected Info from Exhibit I
1	Spire STL CP17-40 1/26/2017	Requirements not met.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided documents relating to open season and confidential contract.
2	PennEast CP15-558 9/25/2015	Requirements not met. Information is provided regarding applicant's LAUF rate but not on destination markets' LAUF.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
3	Mountain Valley Pipeline CP16-10 10/23/2015	Requirements not met. Information is provided regarding applicant's LAUF rate but not on destination markets' LAUF.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
4	MVP Southgate CP19-14 11/6/2018	Requirements not met. Information is provided regarding applicant's LAUF rate but not on destination markets' LAUF.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Provided third-party study of market demand.

5	Algonquin (Weymouth Compressor) CP16-9 10/22/2015	Requirements not met.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
6	Transco CP17-101 3/27/2017	Requirements are addressed at a high level in Exhibit Z-1..	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
7	Florida Gas CP19-474 5/31/2019	Requirements are addressed at a high level on pages 11-12 of the application.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
8	Gulf South CP19-125 3/29/2019	Requirements not met. Information is provided regarding applicant's LAUF rate but not on destination markets' LAUF	Purportedly provided but designated as CEII.	Expressly omitted.	Requirements not met. Only provided confidential contract.
9	Gulfstream CP19-475 6/3/2019	Requirements not met.	Purportedly provided but designated as CEII.	Expressly omitted on the grounds that shippers obtain their own gas.	Requirements not met. Only provided confidential contracts.
10	Texas Eastern CP19-509 9/4/2019	Requirements not met.	Expressly omitted on the grounds that the project maintains system design.	Expressly omitted on the grounds that shippers obtain their own gas.	Expressly omitted because the project maintains existing service.

In particular, Exhibit I requires detailed information that would be informative with respect to the need for a project, regardless of whether the project's capacity is subscribed to by precedent agreements. In practice, however, pipeline applicants usually submit only precedent agreements and assert that this exhibit's requirements are therefore satisfied. While it is clear that certain information contemplated to be filed as part of Exhibit I is no longer germane and can

reasonably be revised or eliminated from filing requirements, much of the information is relevant to the Commission's decision-making and should therefore be required as part of application submissions. In Attachment EDF-2, EDF proposes edits to the Exhibit I requirements in redline. Once the Exhibit I requirements are updated, the Commission should require every applicant to fully comply with those requirements and should only grant waivers if the stringent standard for a waiver request has been satisfied.⁵¹

In addition to no longer waiving much of the data requirements in and revising Exhibit I, the Commission must also revisit its review of Exhibit O, regarding depreciation. Historically, the Commission regularly relied on the potential exhaustion of natural gas resources in determining the economic life in Natural Gas Act Section 7 cases. In these cases, depreciable life was based on the estimated gas reserves at the upstream end of a pipeline's system, while demand for natural gas, and thus the pipeline's services, at the downstream end were assumed to be permanent.⁵² As described above, supply is no longer subject to the same limits as were previously anticipated, while annual demand, as a result of public policy and declining costs of renewable energy and electrification technologies, is likely to decline.

Going forward, depreciation rates must reflect an economic useful life that is consistent with the imperative to decarbonize, as well as specific federal, state, and local requirements for

⁵¹ The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties. *See, e.g., Florida Gas Transmission Company, LLC*, 174 FERC ¶ 61,170 at ¶ 6 (March 3, 2021); *Calpine Energy Servs., L.P.*, 154 FERC ¶ 61,082 at ¶ 12 (February 4, 2016); *Midcontinent Indep. Sys. Operator, Inc.*, 154 FERC ¶ 61,059 at ¶ 14 (January 29, 2016); *New York Power Auth.*, 152 FERC ¶ 61,058 at ¶ 22 (July 17, 2015).

⁵² *Iroquois Gas Transmission System, L.P.*, 84 FERC ¶ 61,086 at p. 61,348 (July 29, 1998); *see also Tallgrass Interstate Gas Transmission, LLC*, Docket No. RP16-137, Section 4 Rate Case Filing, Direct Testimony of Patrick R. Crowley (October 30, 2015).

greenhouse gas (“GHG”) reductions. The Commission recently had to grapple with an appropriate amortization period for a proxy unit used to establish the New York Independent System Operation (“NYISO”) ICAP Demand Curve.⁵³ In his partial dissent, Chairman Glick explained that, in light of New York’s greenhouse gas reduction goals, fundamental reforms to the NYISO tariff recognizing the more limited future of gas generators would likely be necessary.⁵⁴ The Commission must acknowledge the need to similarly align the useful life of gas infrastructure with climate commitments and science-based GHG reduction targets.⁵⁵

States are already recognizing the need to align gas infrastructure with climate goals and mandates. For example, the New York Public Service Commission Staff Gas System Planning Process Proposal details information gas utilities should provide in comparing non-pipeline alternatives with traditional gas infrastructure solutions, including a “scenario that assumes that the full value of new gas assets will be depreciated by 2050.”⁵⁶ Many states have passed legislation requiring sharp declines in carbon emissions over the next decade, which is likely to reduce gas usage in all sectors of the economy, particularly for generation and building heating. The Commission should ensure that its regulatory oversight of new gas infrastructure aligns with these state objectives.

⁵³ *New York Independent System Operator, Inc.*, Order Accepting, in Part, Subject to Condition and Directing Compliance Filing, 175 FERC ¶ 61,012 (April 9, 2021).

⁵⁴ *Id.* (Chairman Glick, dissenting in part at ¶ 3).

⁵⁵ In a March 22, 2021 order in Docket No. CP20-487, the Commission found that “when states have GHG emissions reduction targets we will endeavor to consider the GHG emissions of a project on those state goals.” *Northern Natural Gas Co.*, 174 FERC ¶ 61,189 at ¶ 35 (2021). As explained in this section, state GHG emission reduction targets are also relevant to the economic useful life of proposed gas facilities.

⁵⁶ *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, NYPSC Case No. 20-G-0131, Staff Gas System Planning Process Proposal (February 12, 2021).

Unlike certificate applications, in Section 4 rate cases, pipelines provide detailed testimony in support of their requested economic lives. As detailed in Attachment EDF-3, the Testimony of Alexander Kirk on behalf of Columbia Gas Transmission in Docket No. RP20-1060 concludes that state and local government policies, economics, technological developments, and consumer demand could cause substantial uncertainty over the long-run for natural gas:

The combination of declining costs of renewable energy and battery storage will cause natural gas to be a relatively high marginal cost source of energy in the future. Such a development would lead to the future underutilization of natural gas pipeline capacity due to a lack of demand for natural gas-fired generation as well and other uses due to electrification . . . Since declining demand results in a lower willingness-to-pay by shippers, a decline in demand (but stable supply) presents a situation where a pipeline will be unable to effectively increase its rates to reflect reduced billing determinants that would allow it to recover its cost of service (inclusive of recovery of the net book cost of plant).⁵⁷

Witness Kirk concludes that a reasonable economic life for Columbia is limited to 35 years, as “market forces due to the dramatic declines in the projected prices of wind and solar power and battery storage are likely to reduce the demand for Columbia’s services.”⁵⁸ Similar types of analyses should be provided in certificate applications as part of a pipeline’s Exhibit O demonstration.

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

EDF’s prior comments detailed the prevalence of affiliate-backed capacity expansions and offered suggestions for how the Commission could apply heightened review to certain

⁵⁷ *Columbia Gas Transmission, LLC*, Docket No. RP20-1060, Section 4 Rate Case, Direct Testimony of Alexander Kirk at p. 40 (July 31, 2020) (included as Attachment EDF-3).

⁵⁸ *Id.* at p. 41.

categories of affiliate precedent agreements.⁵⁹ As offered in those prior comments, when posed with the threat of affiliate abuse between a pipeline developer and a retail gas utility affiliate, the Commission should: (1) invite a paper hearing to ensure a sufficient factual record that the market will support the expense of the new facilities over the contract term; and/or (2) impose a rate condition, requiring 50% of the pipeline applicant's recovery of return and taxes to be assigned to the usage rate.

As part of the paper hearing process, an affiliate gas utility could offer evidence that it engaged in an RFP type process that clearly and transparently evaluated alternatives. For example, in *Florida Southeast Connection*, the retail gas utility held an RFP to seek proposals for a new pipeline to accommodate Florida's long-term natural gas needs.⁶⁰ In the order finding that FPL's decision to enter into long-term natural gas transportation contracts was based on a fair and open process, the Florida Public Service Commission found that "the contracts are projected to save up to \$450 million over the term of the contracts when compared to the next most cost-effective proposal."⁶¹ Going forward, the Commission should similarly require evidence demonstrating that any affiliate-backed expansion will provide material cost savings to customers of the affiliated shipper, based on alternatives solicited through a fair and open process.

⁵⁹ *Certification of New Interstate Natural Gas Pipeline Facilities*, Docket No. PL18-1 Comments of the Environmental Defense Fund at pp. 29-35 (July 25, 2018).

⁶⁰ *Florida Southeast Connection*, Order Issuing Certificates and Approving Abandonment, 154 FERC ¶ 61,080 at ¶ 9 (February 2, 2016).

⁶¹ In re: Petition for prudence determination regarding new pipeline system by Florida Power & Light Company, FPSC Docket No. 130198-EI, Order No. PSC-13-0505-PAA-E1 (October 28, 2013).

The need for heightened review of affiliate contracts is especially necessary because the standards of conduct adopted in FERC Order 717 apply to existing interstate natural gas pipelines.⁶² A newly formed affiliate pipeline developer becomes a natural gas company, as defined by section 2(6) of the Natural Gas Act and subject to the Commission’s jurisdiction, only “[u]pon the receipt of its requested certificate authorizations and commencement of pipeline operations.”⁶³ However, during the pivotal period of the open season process and contract negotiation, there are no rules in place governing the interactions between a newly formed (or to be formed) pipeline developer and its affiliate gas utility. In practice, this means there is no meaningful separation between the pipeline development personnel and gas supply and operations personnel and that major new infrastructure projects are proposed and designed as the result of “negotiations” within the same corporate family and primarily for the benefit of that same corporate family’s shareholders. Another way to look at this structure is that where a corporate entity uses its monopsony power to the benefit of its shareholders is, in fact and function, as undesirable as an entity using its monopoly position to benefit its shareholders.⁶⁴

The Commission’s requirement that pipeline applicants conduct an open season process similarly does not cure this regulatory gap, as newly formed pipeline developers routinely offer

⁶² 18 C.F.R. § 358.1.

⁶³ Spire Certificate Order at ¶ 3; *see id.* at ¶ 104 (summarizing Spire’s argument that it is not yet a “transmission service provider” and therefore not subject to the Commission’s Order No. 717, *Standards of Conduct for Transmission Providers*).

⁶⁴ *Maritimes & Northeast Pipeline, LLC*, 154 FERC ¶ 61,084 at ¶ 31 (2016) (While the NGA primarily protects the public against the monopoly power of pipelines, it also protects the public against the monopsony power of shippers. NGA section 4(b)(1) charges the Commission with prohibiting pipelines from offering a shipper ‘any undue preference or advantage.’ Thus, we will not permit, let alone compel, Maritimes to treat Repsol’s capacity requests preferentially, simply because it is the largest shipper on Maritimes’ system.”).

precedent agreements with their affiliate gas utilities that were not connected to, or a result of, the open season process.⁶⁵ For example, in the Mountain Valley Pipeline proceeding, the Commission acknowledged that Consolidated Edison became an affiliate of Mountain Valley Pipeline and a shipper of the project three months after the initial certificate application was filed.⁶⁶ The Commission reiterated that its open season policy “only requires that a pipeline applicant conduct a fair and transparent open season, prior to filing its application, for potential shippers to seek and obtain firm capacity rights.”⁶⁷ Thus, the Commission’s sole focus regarding affiliates in certificate proceedings is whether there may have been undue discrimination against a non-affiliate shipper.⁶⁸ This concern completely ignores the threat of affiliate abuse posed when a newly formed pipeline developer enters into a negotiation with its affiliate gas utility (as monopsony buyer) and uses that precedent agreement to justify need for (and whose shareholders receive the benefit of) a major infrastructure project, as well as the potential that the shipper engaged in undue discrimination against other pipelines or even non-pipeline alternatives.

A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission’s consideration of need or should the Commission consider whether the contracts are subject to state review?

⁶⁵ Spire Certificate Order at ¶ 77 (noting that “the precedent agreement was not the direct result of the open season, but stemmed from prior discussions between Spire, Spire Missouri, and their corporate parents . . .”).

⁶⁶ *Mountain Valley Pipeline, LLC*, Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 at ¶ 49 (October 13, 2017).

⁶⁷ *Id.* at ¶ 54.

⁶⁸ *Id.* at ¶ 45.

The Commission should pay particular attention to whether the state commission has conducted any review of the precedent agreements or need for the proposed project prior to the Commission’s consideration of the application. While some states provide avenues for a prior review process,⁶⁹ many states do not. The Commission’s position—to defer any meaningful review of a precedent agreement to the state regulator—has created rippling effects of harm for state commissions, consumer advocates, retail ratepayers and other interested stakeholders.

When the Commission declines to meaningfully review the terms of and circumstances surrounding precedent agreements, state commissions are left as the sole source of regulatory oversight. FERC has repeatedly found that “any attempt by [FERC] to look behind the precedent agreements [in a certificate] proceeding might infringe upon the role of state regulators in determining the prudence of expenditures by the utilities that they regulate.”⁷⁰ This finding presumes that such state oversight is occurring, while overlooking the significant extent to which state commissions are limited by statute and law as to their review of these agreements.

In Missouri, for example, the state’s prudence review takes place in a Purchased Gas Adjustment (“PGA”)/Actual Cost Adjustment (“ACA”) process. This is an after-the-fact review, whereby the Missouri Commission is limited to reviewing whether the retail gas utility was prudent in contracting with the pipeline when compared to other alternatives.⁷¹ As explained by Dr. Sue Tierney, state regulators’ hands are tied in these proceedings by two factors:

⁶⁹ See, e.g., *In re: Petition for prudence determination regarding new pipeline system by Florida Power & Light Company*, FPSC Docket No. 130198-EI, Order No. PSC-13-0505-PAA-E1 (October 28, 2013).

⁷⁰ *Mountain Valley Pipeline, LLC*, Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 at ¶ 53 (2017).

⁷¹ *Pike County Light and Power Co. v. Penn. Pub. Util. Comm’n*, 77 Pa. Cmwlth 268 (1983).

First, states cannot undo a Commission-approved rate when the states incorporate the costs, like gas transportation service, as part of retail rates. Second, any attempt to deny cost recovery results in lowering the LDCs' credit rating, which raises their costs of equity capital or debt for all capital investments and will result in higher charges to consumers to cover this cost. Thus, the Commission's attempt to duck a fulsome Gas Act review—which it portrays as necessary to avoid trammeling PUCs' jurisdiction—is backwards. In fact, PUCs' reliance on the Commission to conduct its statutorily mandated need determination is another compelling reason for the Court to ensure that the Commission begins doing just that. *Spire* lays bare this truth; the state regulators apprised the Commission of their limited regulatory reach, and the Commission again abdicated its Gas Act mandate to protect the public interest.⁷²

All of these factors point to a significant gap in regulatory oversight between FERC and state commission review of affiliate transportation agreements. The Commission has an obligation under the Natural Gas Act to address these deficiencies. Where captive customers are asked to be the ultimate bearer of the costs of long-term transportation contracts, FERC must “address the question of whether the interests of the customers are sufficiently likely to be congruent with those of the ultimate consumers that will bear the cost of the agreed upon rates in their monthly energy bills.”⁷³

In addition, where the state commission, ratepayer advocate, or a similar state entity protests the project, the application should be subject to particular scrutiny and review. Where, in particular, one or more precedent agreements are with LDCs, these state entities have responsibility for protecting the captive customers of those LDCs and, based on the details of the project and applicable state law, may be best able to do so through participation in the Commission proceeding rather than through a separate state proceeding. In comments in generic Commission dockets and specific pipeline proceedings, state commissions and ratepayer

⁷² *EDF v. FERC*, D.C. Circuit Case No. 20-1016, Brief of Dr. Susan Tierney as Amicus Curiae in Support of Petitioner the Environmental Defense Fund at page 26 (July 1, 2020).

⁷³ *Mo. Pub. Serv. Comm'n v. FERC*, 337 F.3d 1066, 1076 (D.C. Cir. 2003).

advocates have submitted comments requesting the Commission consider their viewpoints and, in particular, have requested more thorough reviews of precedent agreements with affiliated shippers.⁷⁴ The Natural Gas Act contemplates an elevated role for state commissions and their input should be given sufficient weight and deference.⁷⁵ In particular, the Commission should consider making use of the provisions of the Natural Gas Act that enable it to create Joint Boards with state-nominated members or to confer with state commissions, including through joint hearings, as well as inviting state participation in technical conferences and other more informal engagement.⁷⁶

A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission’s determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?

⁷⁴ See, e.g., Certificate Policy Statement at p. 61,740 (“Ohio [Public Utilities Commission] states that pipelines should shoulder the increased risk and that [FERC] should look behind contracts with affiliates”); *E. Shore Natural Gas Co.*, 132 FERC ¶ 61,204, at ¶ 31 (2010) (“The Delaware [Public Service Commission] suggests the mere fact that the agreements are with affiliates of Eastern Shore somehow raises questions regarding the shippers need for the service”); *Spire STL Pipeline LLC*, Docket No. CP17-40, Conditional Protest of the Missouri Public Service Commission at p. 9, n.18 (February 27, 2017) (disputing that an affiliate precedent agreement reflects fair competition); Docket No. PL18-1, Comments of the Public Utilities Commission of the State of California (July 25, 2018) (asking FERC to examine whether affiliate precedent agreements contain perverse incentives); Docket Nos. CP15-117 and CP15-118, Request for Rehearing of the North Carolina Utilities Commission and the New York State Public Service Commission (August 8, 2016); Docket No. CP15-138, Request for Rehearing of the North Carolina Utilities Commission and the New York State Public Service Commission (March 6, 2017); Docket No. CP15-554, Request for Rehearing of the North Carolina Utilities Commission (November 13, 2017); Docket No. CP15-555, Request for Rehearing of the North Carolina Utilities Commission (November 13, 2017); Docket No. CP15-558, Request for Rehearing of the New Jersey Division of Rate Counsel (February 20, 2018).

⁷⁵ 15 U.S.C. § 717p.

⁷⁶ *Id.*

In order to determine whether a project is in the public convenience and necessity, the Commission must consider the intended or expected end use of the natural gas. The Commission cannot evaluate an assertion of a need that a project will serve without understanding what shippers will be using the pipeline's capacity and what purposes they will use it for. In many cases, this will be relatively obvious: a pipeline between a production area and an LNG export terminal is clearly designed for export, while a pipeline with a precedent agreement with an LDC shipper is most likely designed for the provision of gas to the LDC's end use customers. In any case where precedent agreements exist, the applicant will have an understanding of who is purchasing the gas and what its end use is, and therefore can be required to provide that information. In the unlikely scenario of an applicant who has no precedent agreements, whatever information that applicant files as evidence of need, including market studies, should have sufficient information to identify likely users and end-uses.

Notably, pipelines are already providing end use assessments as part of their Section 4 rate case filings. As detailed in Attachment EDF-3, Columbia Gas provided an analysis of the substantial amount of renewable energy potential that exists within its footprint that could reduce the demand for natural gas. Looking to an assessment put forth by the National Renewable Energy Laboratory ("NREL"), Columbia Gas witness Kirk identified 21,819,833 gigawatt hours of potential renewable energy production in the states Columbia serves and a total of 950,322 gigawatt hours of sales across all sectors (residential, commercial, industrial, and transportation):⁷⁷

⁷⁷ Attachment EDF-3 at p. 30.

Table 1
Columbia States Renewable Energy Potential and 2019 Total Sales

Potential Energy from Renewable Sources	Gigawatt Hours
Urban Utility-scale Photovoltaics	408,520
Rural Utility-scale Photovoltaics	14,962,087
Rooftop Photovoltaics	183,570
Concentrating Solar Power	0
Onshore Wind	216,636
Offshore Wind	3,130,407
Biopower-Solid	56,961
Biopower-Gaseous	25,207
Geothermal Hydrothermal	0
Enhanced Geothermal Systems	2,801,567
Hydropower	34,877
TOTAL	21,819,833
2019 Total Retail Sales (All Sectors)	950,322

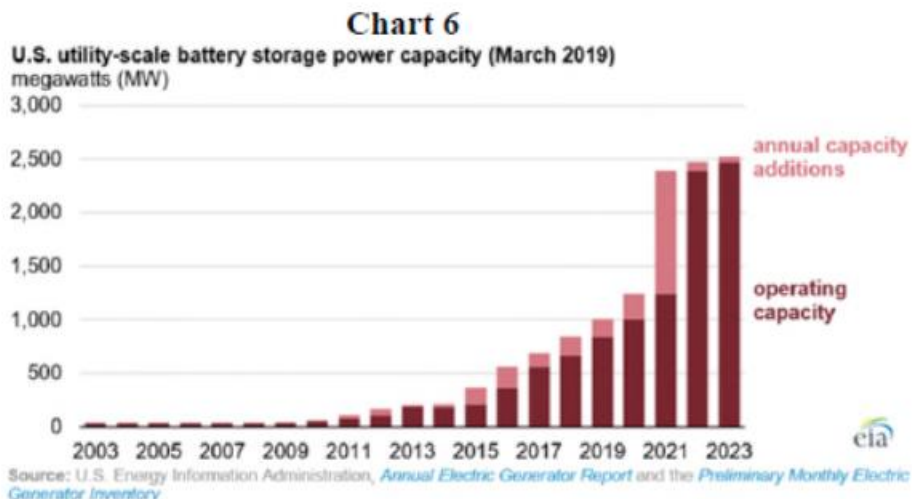
Witness Kirk concludes that “[i]n the long run, since most end-use consumption of natural gas can be substituted with electricity, this shows the potential for renewable energies to significantly diminish demand for natural gas . . . The data indicates that if renewable energy is price-competitive, ample renewable energy potential exists within the Columbia States alone to displace all energy consumption within these states.”⁷⁸

Pipeline analyses also make clear that battery storage technology will support increased reliance on renewable sources in the long run. Columbia Gas witness Kirk observes that many battery storage facilities are located in the Columbia footprint and that “the continued decline in battery storage costs combined with renewable generation from solar and wind will cause renewable energy to be significantly more competitive by 2030 or earlier.”⁷⁹ He cites the

⁷⁸ *Id.*

⁷⁹ *Id.* at p. 36.

following Energy Information Administration data, which shows that U.S. utility scale battery storage is expected to grow substantially by 2023:



The testimony also makes clear that the adoption of renewable energy can displace gas demand in the residential, commercial, and industrial sectors.⁸⁰ Witness Kirk, citing to a study by NREL, explains that “air-source heat pump and heat pump water heaters, offering electric-based space-heating and water-heating, are likely to be at cost-parity with natural gas space-heating and water-heating between 2020 and 2030, and are likely to be ‘substantially lower cost’ between 2040 and 2050.”⁸¹

These cost predictions and technological assessments must also be viewed in light of the imperative to decarbonize. Consistent with science-based targets making clear the need for regulation to swiftly and dramatically reduce emissions, climate change policies are entering into effect at various levels of government in the United States. On his first day in office, President

⁸⁰ *Id.* at pp. 36-37.

⁸¹ *Id.* at p. 38.

Biden acted to bring the United States back into the Paris Climate Agreement.⁸² Recently, the Biden-Harris Administration set an ambitious and necessary target for the U.S. to achieve a 50-52% reduction in economy-wide greenhouse gas pollution by 2030 (below 2005 levels).⁸³ The Administration recognizes that part of the comprehensive strategy to achieve this target will include reducing short-lived climate pollutants such as methane that can deliver fast climate benefits.⁸⁴ Currently, 25 states, the District of Columbia and Puerto Rico have established GHG emissions targets. For instance, the Climate Leadership and Community Protection Act mandates that the State of New York adopt measures to reduce state-wide GHG emissions by 40% by 2030 and 85% by 2050 (from 1990 levels), with an additional goal of achieving net zero emissions across all sectors of the economy by 2050.⁸⁵ Pipelines are acknowledging the impact of these state climate goals in Section 4 rate case testimony and conclude that “[t]o achieve reductions in greenhouse gas emissions of these magnitudes will require a significant decrease in natural gas use, and a consequent decrease in use of natural gas transportation and storage services.”⁸⁶

⁸² The White House, Fact Sheet: President-elect Biden’s Day One Executive Actions Deliver Relief for Families Across America Amid Converging Crises (Jan. 20, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-president-elect-bidens-day-one-executive-actions-deliver-relief-for-families-across-america-amid-converging-crises/>.

⁸³ The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

⁸⁴ *Id.*

⁸⁵ Climate Leadership and Community Protection Act (“CLCPA”), 2019 N.Y. Sess. Laws 106.

⁸⁶ *Columbia Gas Transmission, LLC*, Docket No. RP20-1060, Direct Testimony of Alexander Kirk at p. 27 (July 31, 2020) (included as Attachment EDF-3).

Considering the intended or expected end use of natural gas is also critical in light of ongoing state efforts. Several state public utilities commissions have taken the important first step of opening broad, state-wide proceedings to evaluate the future role of natural gas and how best to reconcile their climate goals with existing gas utility policies and business models. The California PUC predicts that, “[o]ver the next 25 years, state and municipal laws concerning greenhouse gas emissions will result in the replacement of gas-fueled technologies and, in turn, reduce the demand for natural gas.”⁸⁷ The Massachusetts Department of Public Utilities has found that the energy transition requires it “to consider new policies and structures that would protect ratepayers as the Commonwealth reduces its reliance on natural gas. . . .”⁸⁸ The New York State Public Service Commission has observed that gas planning “must be conducted in a manner consistent with [the state’s climate legislation].”⁸⁹

Gas utilities are also starting to perform assessments of how state climate goals will translate into action. In Massachusetts, for example, the gas utilities are evaluating both high electrification and low electrification scenarios. The high electrification scenario assumes a significant reduction in LDC sales and requires the LDC to conduct a feasibility and impact assessment:

Building on the 2030 CECP Examination, perform a detailed examination of the feasibility and impact on customers and the LDCs’ gas distribution operations

⁸⁷ *Long-Term Gas Planning Rulemaking*, CPUC Rulemaking 20-01-007, Order Instituting Rulemaking to Establish Policies, Processes, and Rules to Ensure Safe and Reliable Gas Systems in California and Perform Long-Term Gas System Planning at p. 3 (January 16, 2020).

⁸⁸ *Investigation by the Department of Public Utilities on its own Motion into the role of gas local distribution companies as the Commonwealth achieves its target 2050 climate goals*, Mass. D.P.U. 20-80, Vote and Order Opening Investigation at p. 2 (October 29, 2020).

⁸⁹ *Proceeding on Motion of the Commission in Regard to Gas Planning Procedures*, NYPSC Case 20-G-0131, Order Instituting Proceeding at p. 3 (March 19, 2020).

through 2050, assuming a pace of building services electrification and required emissions reductions as described in the 2050 Roadmap All Options scenario resulting in an approximately 90% volumetric reduction in total LDC sales.⁹⁰

Similarly, New York City, in a joint study with the City’s major electric and gas utilities, projects that total natural gas demand across all sectors will fall more than 60% by 2050, even under a “low carbon fuels” pathway.⁹¹ As these examples illustrate, achieving economy-wide climate goals will require massive transformation across all sectors and will necessitate a diminished role for natural gas in our future energy system.

In response to the imperative to decarbonize the energy system, the gas industry has committed to taking specific action to reduce GHG emissions. The Interstate Natural Gas Association of America (“INGAA”) has committed to “reaching net zero GHG emissions from natural gas and storage operations by no later than 2050 . . .”⁹² Gas utilities, such as National Grid and Southern California Gas Company, have committed to net zero GHG emissions by 2050 or earlier.⁹³ GHG assessments are becoming integral to business transactions, as customers

⁹⁰ Massachusetts Dept. of Pub. Utilities, Request for Proposal: The Role of Gas Distribution Companies in Achieving the Commonwealth’s 2050 Climate Goals at p. 7 (Feb. 5, 2021), available at <https://fileservice.eea.comacloud.net/FileService.Api/file/FileRoom/13209897>.

⁹¹ City of New York Mayor’s Office of Sustainability, Con Edison, & National Grid, *Pathways to Carbon-Neutral NYC: Modernize, Reimagine, Reach* at p. 75 (Apr. 2021), available at <https://www1.nyc.gov/assets/sustainability/downloads/pdf/publications/Carbon-Neutral-NYC.pdf> (“NYC Pathways Study”).

⁹² Interstate Natural Gas Association of America, 2021 Vision Forward, available at <https://www.ingaa.org/File.aspx?id=38523&v=6553c6c8>. This commitment is included as an attachment at EDF-4.

⁹³ National Grid, National Grid Releases Net Zero by 2050 Plan (October 2, 2020), available at <https://www.nationalgridus.com/News/2020/10/National-Grid-Releases-Net-Zero-by-2050-Plan/>; SoCalGas, *Aspire 2045* (March 2021), available at https://www.socalgas.com/sites/default/files/2021-03/SoCalGas_Climate_Commitment.pdf.

demand more detailed information about the GHG footprint of LNG cargoes.⁹⁴ It is against this backdrop of change spurred by new technologies, evolving customer expectations, and climate goals designed to meet science-based targets that the Commission should consider the expected—and evolving—end use of natural gas.

Given these factors, the expected end use of natural gas is an important component of the need analysis due to the quickly changing uses of the gas system in many states. Similar to the information pipelines already provide in Section 4 proceedings, pipeline applicants should be required to conduct these end use assessments for the states in which they operate in support of their Section 7 applications. The Commission should not approve an application where the use cases are inconsistent with legal requirements, including federal, state, and local greenhouse gas emission requirements. In addition, as described above, in reviewing an application, the Commission must consider the depreciation applicable to the proposed facilities. This must be informed by the timeline for the facility's usage; the depreciation analysis would look very different for a facility that will become unused within five years based on current state law than for a facility that has an end use purpose consistent with a longer lifespan.

A7. Should the Commission consider requiring additional or alternative evidence of need for different end uses? What would be the effect on pipeline companies, consumers, gas prices, and competition? Examples of end uses could include: LDC contracts to serve domestic use; contracts with marketers to move gas from a production area to a liquid trading point; contracts for transporting gas to an export facility; projects for reliability and/or resilience; and contracts for electric generating resources.

⁹⁴ Isla Binnie, Reuters, Repsol makes first delivery of carbon-compensated LNG (March 12, 2021), available at <https://www.reuters.com/article/us-repsol-lng-carbonoffset/repsol-makes-first-delivery-of-carbon-compensated-lng-idUSKBN2B41DT>; Ben German, Axios, Natural gas exporters race to have the least polluting fossil fuels (February 25, 2021), available at <https://www.axios.com/fossil-fuels-pollution-green-energy-ffe221d8-aaa8-4a26-bb21-990e244aa4e0.html>.

The Commission should tailor its review and analysis of an application based on the expected end use and identified need. A project designed to serve new demand should require different evidence than a project designed to offer reliability benefits or than a project designed to increase competition; similarly, a project designed to serve an LDC shipper should require different evidence than a project designed to ship gas from a production area to a trading point or a project designed to transport gas to an export facility.

For example, where a project is primarily or exclusively serving one or more LDC shippers, the Commission should invite the applicant to submit the results of the LDC's analysis of its various supply and demand relief options and the reasons for choosing to take service from the pipeline applicant. As the Commission has previously acknowledged, its lack of jurisdiction over shippers and end users does not preclude or foreclose it from further developing the record by requesting additional data from the project applicant.⁹⁵

Retail gas utilities' gas supply planning choices have become subject to increased scrutiny in the past few years. To help bring transparency and accountability to these decisions, EDF has suggested—at the state level—that retail utilities be required to submit an RFP to compare alternatives that could either provide natural gas supply or demand relief.⁹⁶ An example of EDF's recommendations, filed with the New Jersey Board of Public Utilities, is appended to

⁹⁵ *Birkhead v. FERC*, 925 F.3d 510, 520 (D.C. Cir. 2019).

⁹⁶ *Gas Planning Procedures*, NYPSC Case No. 20-G-0131, Comments of Environmental Defense Fund on Staff Gas System Planning Process Proposal; *Natural Gas Commodity and Delivery Capacities in the State of New Jersey – Investigation of the Current and Mid-Term Future Supply and Demand*, NJBPU Docket No. GO20010033 *et al.*, Comments of the Environmental Defense Fund and New Jersey Conservation Foundation at pp. 19-22 (May 13, 2021) (included as Attachment EDF-5).

this document as Attachment EDF-5. This type of evidence has been offered in prior Commission cases⁹⁷ and would help demonstrate that a project is in fact needed.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?

As described above, the Commission should take federal, state, and local requirements for decarbonization into account as a factor in considering an application. To the extent that, based on those requirements or other factors like contract term, the end use planned for the gas is unlikely to be necessary for the entire asserted useful life of the project, the Commission should require the applicant to provide additional information on potential future end uses of the gas. This should also inform the depreciation analysis of the project.

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

Yes, the Commission should consider a comparative hearing process when faced with multiple pipeline applications to provide service in the same geographic area. In the past, the Commission has used a comparative hearing process to assess numerous competing applications to provide new transportation service to specific new customers in the northeast and where only one pipeline was needed to provide a specified increment of service to a given customer.⁹⁸

⁹⁷ See *Ruby Pipeline, L.L.C.*, Preliminary Determination on Non-Environmental Issues, 128 FERC ¶ 61,224 at ¶ 37 (Sept. 4, 2009) (finding the proposed Ruby pipeline and transportation contract “consistent with Commission policy” in part because the California Public Utilities Commission “directed PG&E to replace expiring contracts on GTN in order to diversify PG&E’s gas supply, and, after evaluating several options, the CPUC approved PG&E’s acquisition of capacity on Ruby’s proposed pipeline”).

⁹⁸ *Millennium Pipeline Co.*, 97 FERC ¶ 61,292 at p. 62,315 (2001) (explaining the Commission’s process in *Northeast U.S. Pipeline Projects*, 40 FERC ¶ 61,087 (1987)).

Employing a similar process could avoid the pitfalls that followed the Commission's approval of both the Atlantic Coast Project and the Mountain Valley Project. Commissioner LaFleur's dissent in the Mountain Valley Pipeline order observed the similarities in respective routes, impact, and timing of the Atlantic Coast Project and Mountain Valley Pipeline project:

ACP and MVP are proposed to be built in the same region with certain segments located in close geographic proximity. Collectively, they represent approximately 900 miles of new gas pipeline infrastructure through West Virginia, Virginia and North Carolina, and will deliver 3.44 Bcf/d of natural gas to the Southeast. The record demonstrates that these two large projects will have similar, and significant, environmental impacts on the region. Both the ACP and MVP cross hundreds of miles of karst terrain, thousands of waterbodies, and many agricultural, residential, and commercial areas. Furthermore, the projects traverse many important cultural, historic, and natural resources, including the Appalachian National Scenic Trail and the Blue Ridge Parkway. Both projects appear to be receiving gas from the same location, and both deliver gas that can reach some common destination markets. Moreover, these projects are being developed under similar development schedules, as further evidenced by the Commission acting on them concurrently today. Given these similarities and overlapping issues, I believe it is appropriate to balance the collective environmental impacts of these projects on the Appalachian region against the economic need for the projects. In so doing, I am not persuaded that both of these projects as proposed are in the public interest.⁹⁹The ultimate cancellation of the Atlantic Coast Pipeline suggests that a more thorough review of need and weighing of public benefits and adverse effects for the region was warranted. When the Commission is faced with multiple

⁹⁹ *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (Commissioner LaFleur, dissenting at p. 2)

pipeline applications to provide service in the same geographic area, it should consider utilizing a comparative hearing approach to assess all applications simultaneously. This approach could help to streamline the review process, significantly reduce costs for all parties, and avoid the cancellation of major projects.

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission’s environmental review);⁷ (2) if demand in a new project’s markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

As described above, analysis of certificate applications should consider whether more efficient use of existing infrastructure, including both the applicant’s existing facilities and other facilities serving the relevant geographic areas, could serve the need identified by the applicant. The applicant should be required to provide specific information about its existing facilities as part of the application, including comparing the shape of proposed new demand, demand on its existing system, and current contracts. This information, along with pipeflow simulation studies and information on actual facility utilization, would demonstrate whether there is an opportunity for the turnback of seasonal or hourly contract rights on its system to serve the needs identified. There are likely to be particular opportunities in cases where LDC shippers and shippers serving LDC loads have annual contracts with low to non-existent load factors during much of the year and high demand only during certain, relatively predictable hours. The Commission should also ensure that the applicant’s market survey and other information submitted as part of Exhibit I identifies other facilities serving the relevant area.

Commission Staff could also have a role in reviewing available, excess capacity on neighboring pipelines. For example, in the Nexus remand order, “Commission staff used publicly-available information from NEXUS’ application and other pipeline company’s

electronic bulletin boards to determine that there is similarly no unsubscribed capacity available to serve the 625,000 Dth per day subscribed by NEXUS' domestic shippers.”¹⁰⁰ This type of analysis could serve as a protection against approval of unnecessary capacity.

Conducting a thorough review of available, excess capacity on neighboring pipelines could serve as a protection against overbuilding and the risk of stranded assets. For instance, in Attachment EDF-6, EDF presents an analysis of the excess capacity in the St. Louis region resulting from the Commission's approval of the affiliate-backed Spire STL Pipeline. Attachment EDF-6 includes: 1) the 2011 to 2021 history of Spire Missouri's capacity subscriptions, showing the impact of the Spire STL Pipeline on the existing and past subscribed capacity of Enable MRT to the St. Louis area; 2) the posting of unsubscribed capacity by neighboring pipeline MOGAS showing capacity available to serve the St. Louis market; and, 3) the posting of unsubscribed capacity by another neighboring pipeline Enable MRT showing the capacity available to serve the St. Louis Market. This analysis demonstrates that the construction of the Spire STL Pipeline, and subsequent turnback of existing capacity by Spire Missouri, has resulted in a significant amount of unsubscribed capacity available on other pipelines in the St. Louis area—approximately 576,948 Dth per day on the Enable MRT and MOGAS interstate pipelines. This amount of excess capacity is greater than the entire capacity of the Spire STL pipeline—400,000 Dth per day. If a primary objective of the Commission is to prevent overbuilding, then it must develop the analytical tools to confirm that its approval of new pipeline infrastructure will not result in significant amounts of excess capacity.

A11. In its determination of need, should the Commission consider the economic, energy security and social attributes of domestic production and use of natural gas as detailed in

¹⁰⁰ *Nexus Gas Transmission, LLC*, 172 FERC ¶ 61,199 at ¶ 27 (2020).

the letter dated February 11, 2021 from the Chairman of the Senate Energy and Natural Resources Committee, Senator Joe Manchin III, to President Biden?

Both the market need analysis and the comparison of benefits and adverse impacts must be specifically focused on the proposed project, rather than hypothetical or general benefits of natural gas production and usage. As described above, these reviews should also be separated. To the extent that an individual project demonstrates economic benefits, energy security benefits, or other societal benefits, those could be considered as part of the weighing of benefits and adverse impacts. However, those benefits would have to be supported by specific information demonstrating that those benefits will be associated with the facilities proposed. For example, any potential economic benefits of a proposed project must be considered in context of the project costs, with recognition of the fact that project costs will ultimately be paid by end-use consumers, who would spend that money differently were the project not built. Similarly, any justification related to energy security would need to demonstrate what specific energy security benefits the proposed project would offer, how those benefits compare to alternatives, and that those benefits, along with any other potential benefits of the project, outweigh the potential harms of the project.

B3. For proposed projects that will potentially require the exercise of eminent domain, should the Commission consider changing how it balances the potential use of eminent domain against the showing of need for the project? Since the amount of eminent domain used cannot be established with certainty until after a Commission order is issued, is it possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use such that the Commission could use that information during the consideration of an application?

As with many other issues discussed above, the Commission should recognize that the applicant has the burden of demonstrating that adverse impacts of the proposed project do not outweigh the benefits of the project. The Commission should recognize that the use of eminent domain represents a significant adverse impact and should require the applicant to provide

information on how much land might need to be taken through eminent domain. Specifically, the applicant should be expected to provide information on how much of the pipeline route it can acquire without eminent domain, including through contracts, letters of intent, and other evidence that the applicant is able to obtain the right to build the project without eminent domain, and how much of the pipeline route it has been unable to acquire through voluntary methods. The Commission should assume that any land the applicant has not been able to voluntarily acquire the right to build on or pass through will need to be acquired through eminent domain and should evaluate adverse impacts in accordance with that assumption.

B4. Does the Commission’s current certificate process adequately take landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

The current certificate process fails to adequately take landowner interests into account. As part of the Spire Pipeline appeal, EDF offered the affidavit of several of its members whose land was taken by eminent domain. Affidavits by those landowners are attached as Attachment EDF-7. Those affidavits demonstrate the difficulty that landowners have in engaging with the Commission process and describe the harm inflicted on landowners by pipeline companies. For example, Jacob Gettings, Jr. explained that pipeline construction on his land resulted in a loss of topsoil, soil compaction, and damage to subsurface drain tiles, which make the land less productive for crops and result in standing water on the property, potentially impairing a plan to install solar panels on the property.¹⁰¹ Gregory Stout described the damage that the pipeline construction process did to a conservation prairie he established and maintained as part of a United States Department of Agriculture conservation program, as well as the destruction of

¹⁰¹ Attachment EDF-7, Decl. of Jacob Gettings, Jr. at ¶¶ 17-21.

mature trees he had planted and damage to his driveway.¹⁰² Kenneth Davis explained that he and his wife had planned to build a home on their land but have since abandoned those plans as the pipeline passes close to the area with road access and where they had installed a water line.¹⁰³ Patrick Parker described the impairment of ability to farm the land and use it for cattle during the construction process and the long-term detrimental effects that pipeline construction caused.¹⁰⁴ In addition to this evidence, a number of other landowners and members of impacted communities offered detailed descriptions of the harm done to them and of the difficulty of participating in the Commission process during the listening sessions held by the Commission regarding the establishment of the OPP.¹⁰⁵

The Commission should not, as it has in some cases, assume that the lack of landowner protests indicates that a project will not have meaningful adverse impact on any landowners. As two Commissioners recently recognized, successful participation in a Commission proceeding requires timely compliance with the “sometimes byzantine set of rules and regulations that can make up a FERC proceeding.”¹⁰⁶ Instead, the Commission should assume that any landowners who have not voluntarily entered into a contract, letter of intent, or similar agreement for their

¹⁰² *Id.*, Decl. of Gregory Stout at ¶¶ 15-24.

¹⁰³ *Id.*, Decl. of Kenneth Davis at ¶¶ 20-21.

¹⁰⁴ *Id.*, Decl. of Patrick Parker at ¶¶ 14-20.

¹⁰⁵ *The Office of Public Participation*, Docket No. AD21-9, Transcript of the 03/17/2021 Public Comment Meeting re Landowners and Communities Affected by Infrastructure Development (March 26, 2021); Transcript of the 03/22/2021 Public Participation Listening Session (April 5, 2021); Transcript of the 03/24/2021 Public Participation Listening Session (April 5, 2021); Transcript of the 03/24/2021 Public Participation Listening Session (April 6, 2021).

¹⁰⁶ *Spire STL Pipeline LLC*, Order Dismissing Complaint, 174 FERC ¶ 61,058 (January 19, 2021) (Commissioners Glick and Clements, concurring) (internal citations omitted).

use of the land will be adversely impacted by the project against their will and should consider their interests accordingly.

There is the potential for this situation to be significantly improved by the establishment of the OPP. EDF's comments regarding the design and role of the OPP contain a number of recommendations on how the OPP can best serve impacted landowners and communities in NGA Section 7 cases, as do a number of other comments filed in that docket.¹⁰⁷ Robust outreach and support from the OPP could improve notice to landowners and impacted communities, understanding of the procedural steps, and ability of landowners and impacted communities to intervene and participate. In addition, the OPP should help impacted landowners and communities connect with each other, with legal and technical experts interested in assisting them, and with other intervenors. However, as the Commission has not yet acted to establish the OPP and the actual establishment of the OPP will take, at minimum, a number of months after the Commission acts, the Commission should recognize that, for applications already filed or filed within the next several years, support from the OPP for impacted landowners and communities will be limited, at best, as compared to applications where a fully established OPP is able to engage from the start. Thus, the Commission should establish a policy of robust consideration of landowner interests that will be sufficient to protect landowners even in the absence of the additional protection of the OPP.

B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

¹⁰⁷ *The Office of Public Participation*, Docket No. AD21-9, Comments of the Environmental Defense Fund (April 23, 2021); Comments of Public Citizen, Inc. (April 23, 2021); Comments of Earthjustice (April 23, 2021).

Yes. In particular, the Commission should use certificate conditions to ensure that the impacted landowners and communities are treated fairly during the pre-construction, construction, and post-construction period. As detailed in the affidavits attached as Attachment EDF-7, landowners often face adverse impacts at all stages of the process, including intrusions and threats of eminent domain during the pre-construction process, disturbances to their use and enjoyment of their property during the construction process, often beyond what the pipeline company had told them to expect, failures of remediation after construction is complete, and long-term damage to and loss of use of their property.¹⁰⁸ However, even where the pipeline company has violated its certificate conditions, landowners often find it difficult to get relief from the Commission.

For example, in a recent decision, the Commission dismissed complaints filed by a consultant to several landowners on the bases that the consultant had not clearly identified itself as a representative of those landowners and that the complaint was not timely but was rather a time-barred request for rehearing of delegated decision by Commission Staff.¹⁰⁹ In concurrence, two Commissioners acknowledged that there were “serious concerns about whether [the pipeline company] has adequately restored the lands affected by the construction of the pipeline” and that the decision turned on the “sometimes byzantine set of rules and regulations that can make up a FERC proceeding.”¹¹⁰ Indeed, only two months later, the Commission issued an order finding in response to a report by a state regulator that there were a number of remediation failures

¹⁰⁸ Attachment EDF-7, Decls. of Jacob Gettings, Jr., Gregory Stout, Kenneth Davis, and Partick Parker.

¹⁰⁹ *Spire STL Pipeline LLC*, Order Dismissing Complaint, 174 FERC ¶ 61,058 (January 19, 2021).

¹¹⁰ *Id.* (Commissioners Glick and Clements, concurring) (internal citations omitted).

associated with the same pipeline and directing action by the pipeline company.¹¹¹ The Commission similarly found a number of serious remediation failures in the Midship case.¹¹²

Treatment of landowners and successful remediation could be improved by a combination of enhanced certificate conditions, improved outreach, and more robust oversight. First, the Commission should impose more detailed certificate conditions such that the applicant's obligations are clear to the applicant, to impacted landowners and communities, and to Commission Staff tasked with oversight and enforcement. These conditions will likely need to be tailored to each project and should be informed by the impacts that the project is expected to have on landowners, communities, and the natural environment. The input of impacted landowners and communities will be especially valuable in crafting these conditions; as described above, the OPP should be used as a tool to solicit such input. The Commission, as well as the OPP in seeking input, should also review past cases involving remediation failures and landowner complaints to support consideration of where enhanced certificate conditions might be most necessary. For example, the recent Spire STL and Midship orders both involved issues with topsoil remediation, suggesting that as an issue that requires heightened Commission attention.¹¹³ This sort of review could also inform the analysis of potential adverse impacts of future pipelines. The Commission should also ensure that pipeline provides full detail on its proposed route as part of Exhibit F and F-I¹¹⁴ and updates those exhibits when any changes are made to the route prior to the issuance of a certificate. Furthermore, the Commission should

¹¹¹ *Spire STL Pipeline LLC*, Order on Environmental Compliance, 174 FERC ¶ 61,219 (March 18, 2021).

¹¹² *Midship Pipeline Co., LLC*, Order on Environmental Compliance, 174 FERC ¶ 61,220 (March 18, 2021).

¹¹³ *Id.*; *Spire STL Pipeline LLC*, Order on Environmental Compliance, 174 FERC ¶ 61,219.

¹¹⁴ 18 C.F.R. § 157.14(6).

ensure that proposed route changes, before or after the issuance of a certificate, are subject to appropriately rigorous notice and review.

Second, Commission Staff should conduct more robust oversight and monitoring during the pre-construction, construction, and post-construction process, particularly with regard to remediation. This should include both improvements to the process of receiving and considering landowner complaints, which should be a function of the OPP, as well as an increase in proactive inspections, which could also be done by the OPP or could be a function of oversight and enforcement Staff. Inspectors should also consult directly with landowners. Finally, the Commission should build on its appropriate efforts in the recent Spire STL and Midship orders to ensure that pipeline companies are held accountable for compliance with certificate conditions and completion of appropriate remediation, including considering penalties or other appropriate remedies for egregious or repeated violations.

C6. Does the NGA, NEPA, or other federal statute authorize or mandate the use of Social Cost of Carbon (SCC) analysis by the Commission in its consideration of certificate applications? If so, how does the statute direct or authorize the Commission to use SCC? Does the statute set forth specific metrics or quantitative analyses that the Commission must or may use and/or specific findings of fact the Commission must or may make with regard to SCC analysis of a certificate application? Does the statute set forth specific remedies the Commission must or may implement based on specific SCC findings of fact?

EDF has joined comments filed by the Institute for Policy Integrity regarding the use of the Social Cost of Carbon in consideration of certificate applications and refers to those comments for its position on questions C6 through C9.

E1. Should the Commission change how it identifies potentially affected environmental justice communities? Why and if so, how? Specifically, what criteria should the Commission consider?

The Commission currently considers impacts to environmental justice communities through its NEPA review. FERC's Environmental Impact Assessments often refer to Executive Order 12898 *Federal Action to Address Environmental Justice in Minority Populations and Low-*

Income Populations, which requires federal agencies to consider if impacts on human health or the environment (including social and economic aspects) would be disproportionately high and adverse for minority and low-income populations and appreciably exceed impacts on the general population or other comparison group. While this assessment is critical, and currently done in a deficient manner as discussed immediately below, it is far from sufficient. There are other important dimensions to ensuring equitable outcomes, including an evaluation of energy access and affordability, procedural justice and democracy, and economic participation and community ownership.¹¹⁵ Going forward, the Commission should invite, encourage, and enable participation in the regulatory process by environmental justice communities and consider equity in all of its regulatory decisions. The additional comments offered below are not exhaustive and the recommendations and voices of environmental justice advocates and communities should be prioritized in developing any specific reforms.

E2. Are there concerns regarding environmental justice communities' participation in past Commission proceedings? If so, what are the concerns? Please provide concrete examples.

The Commission has failed to appropriately consider the adverse impacts of projects on environmental justice communities in a number of past cases, despite participation by members of those communities and organizations representing them in the proceeding. Two particularly glaring examples are the Commission's certificate orders regarding the Rio Grande LNG facility, the Rio Bravo Pipeline, and two other adjacent LNG facilities, and regarding the Atlantic Coast Pipeline.

¹¹⁵ Talia Lanckton and Subin DeVar, Initiative for Energy Justice, *Justice in 100 Metrics, Tools for Measuring Equity in 100% Renewable Energy Policy Implementation* (January 2021), available at <https://iejusa.org/wp-content/uploads/2021/03/Justice-in-100-Metrics-2021.pdf>.

With respect to the Atlantic Coast Pipeline, the Commission both failed to appropriately identify environmental justice communities and failed to sufficiently consider the impact on environmental justice communities it did identify. For example, the Commission found that a compressor station in Buckingham County, Virginia was not in or near an environmental justice community based solely on the fact that the three nearest census tracts did not qualify as minority communities, ignoring the fact that the community immediately surrounding the compressor station is a historic African-American community.¹¹⁶ The Commission must ensure that its review appropriately identifies environmental justice communities, rather than relying on a single limited methodology to deny their existence. Where the Commission did identify an environmental justice community that would suffer health impacts from air emissions, it found that, because the emissions “would not exceed regulatory permissible levels,” the health were not sufficiently severe to constitute a disproportionate impact.¹¹⁷ This ignores the purpose of environmental justice reviews. *All* projects must comply with “regulatory permissible levels” in all areas; any project that failed to would have its permits denied or would be in violation of the law. Environmental justice review must recognize that environmental justice communities have faced and continue to face disproportionate cumulative impacts even when all individual projects are operating within “regulatory permissible levels” and must consider disproportionate impacts to environmental justice communities in that context.

With respect to the Rio Grande facility and related facilities, the Commission recognized that environmental justice communities were impacted by the projects but then conducted an analysis that turned the purpose of environmental justice reviews on its head. After

¹¹⁶ *Atlantic Coast Pipeline, LLC*, Order Issuing Certificates, 161 FERC ¶ 61,042 at p. 61,266 (October 13, 2017).

¹¹⁷ *Id.* at p. 61,267.

acknowledging that all of the communities impacted by the project were environmental justice communities, the Commission determined that finding meant the project had no disproportionate impact on environmental justice communities, since there was no non-environmental justice community that faced a lower impact.¹¹⁸ The conclusion should have been the opposite: that the fact that only environmental justice communities would be impacted by the project demonstrated an environmental justice problem. Bizarrely, the Commission's decision suggests that the safest route an applicant concerned about environmental justice review can take is to ensure the entire project is sited such that only environmental justice communities are impacted. In addition, as in the Atlantic Coast Pipeline case, the Commission found the fact that emissions would not exceed a legal limit sufficient to demonstrate that there was no disproportionate impact.¹¹⁹

These examples alone demonstrate that the Commission must reform its review of impacts on environmental justice communities. Environmental justice communities also face barriers to participation in Commission proceedings, similar to barriers faced by impacted landowners described above. Furthermore, even when they do bring their concerns to the Commission, as occurred in both the Rio Grande and Atlantic Coast cases, those concerns are often dismissed or ignored. The Commission should work with environmental justice advocates and communities, both in this proceeding and through the OPP, to reform the process in a way that meets the needs of those communities.

¹¹⁸ *Rio Grande LNG, LLC*, Order Granting Authorizations Under Sections 3 and 7 of the Natural Gas Act, 169 FERC ¶ 61,131 at ¶ 98, Commissioner Glick dissenting at ¶ 7 (November 22, 2019); Order on Rehearing and Stay, 170 FERC ¶ 61,046 at ¶¶ 63-77, Commissioner Glick dissenting at ¶¶ 11-13 (January 23, 2020).

¹¹⁹ *Rio Grande LNG, LLC*, Order on Rehearing and Stay, 170 FERC ¶ 61,046 at ¶ 74.

IV. Conclusion

EDF respectfully recommends that the Commission modify the Certificate Policy Statement, related regulations, and its practices in conformance with recommendations provided above, as well as the recommendations in EDF's July 25, 2018 comments in this proceeding.

Dated: May 26, 2021

Respectfully submitted,

/s/ Ted Kelly

Ted Kelly

Senior Attorney, Energy

Environmental Defense Fund

1875 Connecticut Ave. NW

Suite 600

Washington, DC 20009

(202) 572-3317

tekelly@edf.org

/s/ Natalie Karas

Natalie Karas

Senior Director and Lead Counsel, Energy

Environmental Defense Fund

1875 Connecticut Ave. NW

Suite 600

Washington, DC 20009

(202) 572-3389

nkaras@edf.org