

Oral Argument Not Yet Scheduled

**IN THE UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

DELAWARE RIVERKEEPER)
 NETWORK and MAYA K. VAN)
 ROSSUM, the Delaware)
 Riverkeeper,)
)
Petitioners,)
)
 v.)
)
 FEDERAL ENERGY REGULATORY)
 COMMISSION,)
)
Respondent.)
)
 _____)

No. 23-1077

PETITION FOR REVIEW

This Petition for Review is submitted on behalf of the Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively “Petitioners”). Petitioners hereby petition this Court for review of the following orders issued by the Federal Energy Regulatory Commission (“Commission”): (1) the January 11, 2023 Order Issuing Certificate and Approving Abandonment, Transcontinental Gas Pipe Line Company, LLC, Docket No. CP21-94-000, 182 FERC ¶ 61,006 (2022) (“Certificate Order”); the March 13, 2023 Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration, Transcontinental Gas Pipe Line Company, LLC, Docket No. CP21-94-001, 182

FERC ¶ 62,146 (2023) (“Denial by Operation of Law”); and (3) the March 17, 2023 Order on Rehearing, Granting Clarification, Denying Stay, and Dismissing Waiver, Transcontinental Gas Pipe Line Company, LLC, Docket No. CP21-94-001, 182 FERC ¶ 61,148 (2023) (“Rehearing Order”).¹ The Commission’s Certificate Order authorizes Transcontinental Gas Pipe Line Company, LLC (“Transco”) to construct and operate the Regional Energy Access Expansion (“REAE” or “Project”) in Pennsylvania, New Jersey, and Maryland. Petitioners timely applied rehearing of the Certificate Order pursuant to 15 U.S.C. § 717r(a), and that application was denied by operation of law thirty days thereafter. The Commission’s Rehearing Order modified the discussion in the Certificate Order while reaching the same result as the Certificate Order.

Petitioners and their members have been, and will be, adversely affected by the proposed Project and appurtenant facilities because the Project, if constructed, operated, and maintained, would run through and adversely affect the Delaware River Basin watershed and its communities. This Court has jurisdiction and this petition is timely filed pursuant to Section 717r(a) and (b) of the Natural Gas Act. *See* 15 U.S.C. § 717r(a), (b).

Respectfully submitted this 20th day of March, 2023.

/s/ Kacy C. Manahan
Kacy C. Manahan

¹ All Attached as Exhibit A.

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v.

FEDERAL ENERGY REGULATORY)
COMMISSION,)

Respondent.

No. _____

CORPORATE DISCLOSURE STATEMENT

The Delaware Riverkeeper Network is a nonprofit 503(c)(3) membership organization that advocates for the protection of the Delaware River, its tributaries, and the communities of its watershed. Delaware Riverkeeper Network does not have any parent corporation, nor does it issue stock.

Respectfully submitted this 20th day of March, 2023.

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CERTIFICATE OF SERVICE

I, Kacy C. Manahan, hereby certify under penalty of perjury that in accordance with Federal Rule of Appellate Procedure 15(c), on March 20, 2023, I served a copy of the foregoing Petition for Review by electronic mail on the all parties admitted to the proceeding before the Federal Energy Regulatory Commission for docket numbers CP21-94-000 and CP21-94-001, as listed in Exhibit B.

I further certify that in accordance with D.C. Circuit Rule 15(a), I sent a copy of the foregoing Petition for Review via electronic mail to the following:

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/s/ Kacy C. Manahan

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Exhibit A

182 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-000

ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT

(Issued January 11, 2023)

1. On March 26, 2021, Transcontinental Gas Pipe Line Company, LLC (Transco) filed an application, pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)¹ and Part 157 of the Commission's regulations,² requesting authorization to construct and operate the Regional Energy Access Expansion (REAE or project). The proposed REAE project consists of the abandonment and replacement of existing, less energy efficient compression facilities and the construction of new pipeline facilities in Luzerne and Monroe Counties, Pennsylvania, and a new compressor station in Gloucester County, New Jersey; the expansion of existing compressor stations in Somerset County, New Jersey, and Luzerne County, Pennsylvania; modifications to the certified capacity of compressor stations in York and Chester Counties, Pennsylvania, and Middlesex County New Jersey; and modifications to various tie-ins, regulators, and delivery meter stations in Pennsylvania, New Jersey, and Maryland. Transco states that the purpose of the REAE project is to provide an additional 829,400 dekatherms per day (Dth/d) of firm transportation service for its shippers. For the reasons discussed below, the Commission grants the requested certificate and abandonment authorizations subject to conditions.

I. Background and Proposal

2. Transco, a limited liability company formed and existing under the laws of the State of Delaware, is a natural gas company as defined by section 2(6) of the NGA³ and operates natural gas transportation facilities that extend from Texas, Louisiana, and the offshore Gulf of Mexico area, through Mississippi, Alabama, Georgia, South Carolina,

¹ 15 U.S.C. § 717f(b), (c).

² 18 C.F.R. pt. 157 (2021).

³ 15 U.S.C. § 717a(6).

North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey, to its termini in the New York City metropolitan area.

A. Regional Energy Access Expansion Project

3. The REAE is an incremental expansion of Transco's existing pipeline system that consists of two components: (1) modernization of certain compression facilities; and (2) the construction of new facilities to provide 829,400 Dth/d of firm transportation service from northeastern Pennsylvania to multiple delivery points in New Jersey, Pennsylvania, and Maryland.

4. To provide this additional service, Transco proposes to construct and operate approximately 22.3 miles of 30-inch-diameter lateral pipeline (the Regional Energy Lateral) and 13.8 miles of 42-inch-diameter loop pipeline (the Effort Loop) in Pennsylvania; one new compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New Jersey; modifications to existing pipeline tie-ins, valves, regulators, and meter regulating stations in Pennsylvania, New Jersey, and Maryland; the addition of ancillary facilities such as regulation controls, valves, cathodic protection, communication facilities, and pig launchers and receivers in Pennsylvania; and abandonment and replacement of certain existing compression facilities with higher horsepower compression at Compressor Stations 505 and 515, as detailed below.

5. Transco requests authorization to abandon eight gas-fired reciprocating engine driven compressor units (totaling approximately 16,000 horsepower (HP) of compression) at Station 505 in Somerset County, New Jersey, and five gas-fired reciprocating engine-driven compressors (totaling approximately 17,000 HP) from Station 515 in Luzerne County, Pennsylvania, and to install four new gas-fired turbine driven compressor units, two each at existing Stations 505 and 515. The replacement units will have a combined 30,810 and 58,684 of site-rated HP at Stations 505 and 515, respectively. Transco also proposes to modify three existing compressors units at Station 515. Transco contends that its customers will benefit from the increased reliability of replacement equipment, resulting in fewer maintenance outages, less downtime, decreased air emissions, less fuel consumption and costs, and lower operation and maintenance costs.

6. Transco states that the project will enhance access to natural gas supply and further diversify fuel supply access. Further, Transco states that the project will provide overall reliability and diversification of energy infrastructure in the Northeast by easing locational constraints currently caused by limited pipeline takeaway capacity. Transco contends that the project is designed to help benefit the public by promoting competitive

markets and enhancing the security of natural gas supplies to major delivery points serving the Northeast.⁴

7. Transco held an open season for the project on March 8, 2019, a supplemental open season from April 28, 2020 to May 28, 2020, and a reverse open season from April 24, 2020 to May 25, 2020.⁵ Additionally, Transco conducted a supplemental open season in May 2021 for a portion of the firm transportation capacity that was not offered in Transco's previous open seasons for the project. As a result of the open seasons, Transco executed binding precedent agreements for the full project capacity with the following eight project shippers for primary terms ranging from 15 to 17 years.

Intended Use of the Natural Gas (Dth/d1) by Customer for Regional Energy Access ⁶							
Customer	Power Generation	Residential	Commercial	Industrial	Other	Total	Location (by State) of End-Use
New Jersey Natural Gas Company	—	296,520	56,480	—	—	353,000	New Jersey (100%)
Williams Energy Resources	30,000	45,000	45,000	10,000	20,000	150,000	Delaware (9%) Maryland (9%) New Jersey (57%) New York (17%) Pennsylvania (9%)

⁴ Transco Application at 5-6.

⁵ As part of the open season, Transco solicited turnback capacity from its existing customers. Transco received a binding offer to permanently relinquish 41,400 Dth per day of firm transportation capacity from Transco's Station 200 in Chester County, Pennsylvania, to the Marcus Hook Meter and Regulation Station, located in Delaware County, Pennsylvania (Zone 6 relinquished capacity), and 19,665 Dth per day of firm transportation capacity from the Marcus Hook Meter and Regulation Station to the Post Road Meter Station, located in Delaware County, Pennsylvania, under one existing service agreement. The relinquished capacity was utilized in designing the project.

⁶ Transco December 10, 2021 Response to Environmental Information Request at 45-46.

PECO Energy Company	—	67,000	33,000	—	—	100,000	Pennsylvania (100%)
South Jersey Resources, LLC	46,400	—	5,000	20,000	—	71,400	Delaware (21%) New Jersey (79%)
PSEG Power LLC	—	44,400	14,400	1,200	—	60,000	New Jersey (100%)
Baltimore Gas and Electric Company	—	37,600	2,400	—	—	40,000	Maryland (100%)
Elizabethtown Gas Company	—	22,500	7,500	—	—	30,000	New Jersey (100%)
South Jersey Gas Company	—	17,500	7,500	—	—	25,000	New Jersey (100%)

8. As reflected in the above table, the majority of the project's capacity (approximately 56%) is subscribed by New Jersey LDCs: New Jersey Natural Gas Co., South Jersey Gas Co., PSEG Power LLC, and Elizabethtown Gas Co., LLC. PECO Energy Company, a Pennsylvania LDC, and Baltimore Gas and Electric Company, a Maryland LDC, have contracted for 12% and five percent, respectively, of the project capacity. The remaining project capacity is subscribed by Williams Energy Resources, LLC (18%),⁷ a natural gas marketer with a portfolio of various types of customers and South Jersey Resources, LLC (nine percent), a natural gas marketer operating primarily in New Jersey but with wholesale customers throughout the region.⁸

9. Transco states that all project shippers elected to pay a negotiated rate for service on the project facilities.

⁷ Both Williams Energy Resources, LLC and Transco are affiliates of Williams Energy Company. The other seven shippers are not affiliated with Transco.

⁸ South Jersey Resources stated that it serves power plants, refineries, and retail customers and has over 100,000 Dth/day of firm commitments off Transco's system but only 71,400 Dth/day of firm capacity to deliver gas to its customers. The company plans to use the 30,000 Dth/day of subscribed project capacity to meet its firm obligations year-round. South Jersey Resource Group, LLC April 30, 2021 Motion to Intervene at 5.

II. Procedural Matters

A. Notice, Comments, Interventions, and Protests

10. Notice of Transco's application was issued on April 9, 2021, and published in the *Federal Register* on April 16, 2021, with interventions, comments, and protests due on April 30, 2021.⁹

11. The New Jersey Department of Environmental Protection (NJDEP) filed a timely notice of intervention.¹⁰ Numerous parties filed timely motions to intervene, and are listed in Appendix A. Timely, unopposed motions to intervene are granted automatically pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.¹¹ The New Jersey League of Conservation Voters and New Jersey Conservation Foundation filed timely,¹² opposed¹³ motions to intervene, which were granted by notice.¹⁴ Untimely motions to intervene were filed by: Columbia Gas of Virginia, Inc.; UGI Utilities Inc; Slade Sizemore; Constellation Energy Generation, LLC; New Jersey Board of Public Utilities and New Jersey Division of Rate Counsel; Reading Blue Mountain and Northern Railroad Company (Reading Railroad); and Catherine Folio and have been granted by notice.¹⁵ 1.5C LLC, a nonprofit advocating for policies to reduce climate change impacts, filed an untimely motion to intervene that was denied by notice.¹⁶ On July 11, 2022, the New Jersey Board of Public Utilities (NJ BPU) and the New Jersey

⁹ 86 Fed. Reg. 20,132 (Apr. 16, 2021).

¹⁰ Timely notices of intervention are granted by operation of Rule 214(a)(2) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(a)(2) (2021).

¹¹ 18 C.F.R. § 385.214(c).

¹² New Jersey League of Conservation Voters and New Jersey Conservation Foundation filed motions to intervene on April 25, 2022, within the comment period of the draft environmental impact statement, which are deemed timely pursuant to the Commission's regulations. 18 C.F.R. § 380.10(a)(i) (2021) (citing 18 C.F.R. § 385.214).

¹³ These two interventions were opposed by Transco.

¹⁴ See Secretary's September 7, 2022 Notice Granting Intervention.

¹⁵ See Secretary's September 8, 2022 Notice Granting Late Intervention; Secretary's November 14, 2022 Notice Granting Late Intervention.

¹⁶ See Secretary's September 22, 2022 Notice Denying Late Intervention.

Division of Rate Counsel (NJ Rate Counsel) (jointly, New Jersey Agencies) filed an unopposed motion to intervene out of time and on November 18, 2022, the Aquashicola-Pohopoco Watershed Conservancy filed an untimely motion to intervene that was opposed by Transco. Both the New Jersey Agencies and Aquashicola-Pohopoco Watershed Conservancy have demonstrated that they each have an interest in this proceeding and granting the untimely motion will not delay, disrupt, or otherwise prejudice this proceeding. Thus, we will grant the New Jersey Agencies and Aquashicola-Pohopoco Watershed Conservancy's untimely motions to intervene pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure.¹⁷

12. Over 200 individuals and groups filed comments and protests regarding various issues, including project purpose and need; alternatives; water resources; wetland impacts; fish, wildlife, and protected species; impacts on recreation; visual impacts; air quality; noise; socioeconomic impacts; environmental justice; cumulative impacts; safety; greenhouse gases (GHG); and climate change. These concerns are addressed in the final Environmental Impact Statement (EIS) and/or below.

B. Prohibited Answers

13. On November 2, 2022, Transco filed a timely Answer to Catherine Folio's October 18, 2022 Motion to Intervene, stating it did not oppose her request for intervention, but sought to clarify certain representations. On November 10, 2022, Ms. Folio filed an answer to Transco's November 2, 2022 Answer. Although the Commission's Rules of Practice and Procedure do not permit answers to answers,¹⁸ we will accept Ms. Folio's answer because it provides information that has assisted in our decision making.

C. Request for Evidentiary Hearing

14. On September 6, 2022, the New Jersey Conservation Foundation filed a motion for an evidentiary hearing for this project to determine the question of need.¹⁹ On September 21, 2022, Transco filed an answer to the motion.²⁰ On September 28, 2022,

¹⁷ 18 C.F.R. § 385.214(d).

¹⁸ 18 C.F.R. § 385.213(a)(2) (2021) (prohibiting answers to answers unless ordered by the decisional authority).

¹⁹ New Jersey Conservation Foundation September 6, 2022 Motion for Evidentiary Hearing.

²⁰ Transco September 21, 2022 Answer.

the New Jersey Conservation Foundation filed a motion for leave to answer Transco's answer. The Commission's Rules of Practice and Procedure do not permit answers to answers, and we therefore will not consider New Jersey Conservation Foundation's filing, which does not provide information that assists our decision making.²¹ Although our regulations provide for a hearing, neither section 7 of the NGA nor our regulations require that such a hearing be a trial-type evidentiary hearing. When the written record provides a sufficient basis for resolving the relevant issues, it is our practice to provide for a paper hearing.²² That is the case here. We have reviewed the request for a hearing and conclude that all issues of material fact relating to Transco's proposal, including on the issue of need, are capable of being resolved on the basis of the written record, which contains substantial evidence on this issue. Accordingly, we will deny the request for a formal hearing.

III. Discussion

15. Because the proposed facilities for the REAE project will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the proposal is subject to the requirements of sections (c) and (e) of section 7 of the NGA.²³ In addition, Transco's abandonment of facilities is subject to the requirements of section 7(b) of the NGA.²⁴

A. Abandonment

16. Section 7(b) of the NGA provides that an interstate pipeline company may abandon jurisdictional facilities or services only if the abandonment is permitted by the present or future public convenience or necessity.²⁵ In deciding whether a proposed abandonment is warranted, the Commission considers all relevant factors, but the criteria

²¹ *See supra* n.16.

²² *See, e.g., Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (“[the Commission] need not conduct such [an evidentiary] hearing if [the issues at hand] may be adequately resolved on the written record.”); *Tenn. Gas Pipeline Co., LLC*, 158 FERC ¶ 61,110, at P 11 (2017).

²³ 15 U.S.C. §§ 717f(b), (c), (e).

²⁴ *Id.* § 717f(b).

²⁵ *Id.*

vary with the circumstances of the particular proposal.²⁶ Continuity and stability of existing services are the primary considerations in assessing whether the public convenience or necessity allow the abandonment.²⁷ If the Commission finds that an applicant's proposed abandonment will not jeopardize continuity of existing natural gas transportation services, it will defer to the applicant's business judgment to abandon the facilities.²⁸

17. Transco states that the abandonment component of the REAE project would allow Transco to enhance its existing interstate system by abandoning and replacing obsolete compression units with more reliable and efficient units, reducing system transmission plant costs significantly.²⁹ Thus, because Transco is replacing the units being abandoned, the abandonment will not jeopardize service to existing customers, will improve operational and maintenance inefficiencies, and increase reliability. Accordingly, we find that the proposed abandonment is permitted by the public convenience or necessity.

B. Certificate Policy Statement

18. The Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.³⁰ The Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The 1999 Certificate Policy Statement explains that, in deciding whether and under what terms to authorize the construction of major new natural gas facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the

²⁶ *El Paso Nat. Gas Co.*, 148 FERC ¶ 61,226, at P 11 (2014) (*El Paso*).

²⁷ *Nat'l Fuel Gas Supply Corp.*, 160 FERC ¶ 61,050, at P 17 (2017) (citing *El Paso*, 148 FERC ¶ 61,226 at P 12).

²⁸ *Id.* (citing *Trunkline Gas Co., LLC*, 145 FERC ¶ 61,108, at P 65 (2013)) (additional citation omitted).

²⁹ *Id.*

³⁰ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement).

environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

19. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new pipeline facilities.³¹ If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. No Subsidy Requirement

20. As discussed above, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined that, in general, where a pipeline proposes to charge incremental rates for new construction serving new incremental load, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.³² Transco proposes to establish an initial incremental recourse reservation rate for firm service using the incremental capacity created by the REAE project. Its proposed incremental rate is designed to recover the full cost of the expansion facilities, and is higher than Transco's applicable system rate. Therefore, we find that Transco's existing shippers will not subsidize the expansion project. Further, as detailed in the Rates section below, Transco has properly allocated the cost of the replacement horsepower at compressor stations 505 and 515 to both project shippers and existing customers.

³¹ In 2021, the Commission established the Office of Public Participation (OPP) to support meaningful public engagement and participation in Commission proceedings. OPP provides members of the public, including environmental justice communities, with assistance in FERC proceedings—including navigating Commission processes and activities relating to the Project.

³² See, e.g., *Transcontinental Gas Pipe Line Corp.*, 98 FERC ¶ 61,155 (2002).

2. Project Need

21. Transco has entered long-term precedent agreements with shippers for 100% of the project's capacity. Shippers also separately stated their support and need for the project. South Jersey Gas Company and Elizabethtown Gas Company indicated the "[p]roject will support overall reliability and diversification of energy infrastructure in the Northeast, decreasing peak day constraints caused by limited pipeline takeaway capacity."³³ The South Jersey Resources Group stated that the project is needed to address "current challenges...including increased natural gas prices during the winter months for consumers in the Northeast, and limited power generation supplies in some regions that hinder the ability to respond to extreme weather events."³⁴ New Jersey Natural Gas similarly wrote that the project will allow it to "improve reliability, ensure competitive pricing and price stability, and enhance operating flexibility."³⁵ Exelon, the parent company of BGE and PECO, has indicated that the project's firm service will allow it to lessen its need for short-term contracts and more reliably meet winter demand.³⁶ PSEG also states that the project will allow it to "meet growing firm demand among its high-priority customers and to address projected peak-day deficits."³⁷ Transco also submitted a study, prepared by Levitan and Associates (Transco Levitan Study),³⁸ which assessed the pipeline capacity available to the six LDC shippers in New Jersey, Pennsylvania, and Maryland that have entered into precedent agreements for Transco's REAE. The goal of the study was to compare each LDC's forecasted customer requirements under design day criteria to the existing pipeline capacity and on-system storage available to meet those requirements over the study period.³⁹ As detailed below,⁴⁰ the study finds that the project's capacity is needed to remedy shortfalls in

³³ South Jersey Gas Company and Elizabethtown Gas Company Apr. 30, 2021 Motion to Intervene and Comments at 5-6.

³⁴ South Jersey Resources Group LLC November 9, 2022 Letter.

³⁵ New Jersey Natural Gas November 9, 2022 Letter.

³⁶ Exelon April 28, 2021 Comments in Support of Application at 3.

³⁷ PSEG April 30, 2021 Comments at 2.

³⁸ Transco April 22, 2022 Response to Additional Information Request at attach. 1D (Transco Levitan Study).

³⁹ Transco Levitan Study at 7.

⁴⁰ See *infra* PP 30-31.

capacity to meet design day requirements⁴¹ and to alleviate constraints in meeting natural gas-fired generation demand during extreme cold events.⁴² Five parties filed comments supporting Transco's need study.⁴³

22. Commenters, including the NJ BPU and the NJ Rate Counsel argue that the project capacity is not needed by the New Jersey LDCs. The NJ BPU accepted in a decision on June 29, 2022, the findings of a study commissioned from the London Economics International Group (NJ Agencies Study) on "New Jersey's transforming energy system and the future role of its domestic natural gas industry."⁴⁴ The New Jersey

⁴¹ The 'design day' is the basis for planning gas capacity requirements. The design day therefore reflects the highest gas demand an LDC expects to be obligated to serve on an extremely cold winter day. The peak day is a historical value of gas demand that is adjusted for expected load growth over time and used in estimating a design day. Each LDC uses its own criteria to define design day, but which is generally defined in a similar, but not uniform way. The coldest day in 30 years is a commonly used design day standard. In a recent American Gas Association survey of U.S. natural gas utilities: four percent used a 1-in-50 year risk of occurrence, 36% employed a 1-in-30 year, six percent used a 1-in-20, two LDCs used a 1-in-15, four a 1-in-10 occurrence probability. Fourteen companies utilized an alternative period criterion, ranging from 20 years to 1-in-90 years and 16 companies used other methodologies including multilinear regression, design day weather standard, historical peak and severe weather event. *American Gas Association, Energy Analysis: LDC Supply Portfolio Management during the 2018-2019 Winter Heating Season at 14* (Dec. 2019), <https://www.aga.org/wp-content/uploads/2019/12/whs-2018-2019-report-final-12-20-2019-.pdf>.

⁴² Transco Levitan Study at 52.

⁴³ Pennsylvania Manufacturer's Association (Karl A. Marrara), New Jersey Natural Gas Company, Exelon Corporation (PECO), South Jersey Gas and Elizabethtown Gas (Timothy W. Rundall), and the American Petroleum Institute (API) all filed comments arguing the Commission should adopt the Transco Levitan Study.

⁴⁴ New Jersey Agencies July 11, 2022 Motion to Intervene and Lodge at 4. The NJ Agencies Study was commissioned in 2020 as part of the NJ BPU stakeholder proceeding initiated in 2019 on whether there is sufficient gas capacity to meet New Jersey's customers' needs, prospectively. In that proceeding, New Jersey Natural Gas Company submitted a 2019 study by Levitan and Associates, Inc. to the NJ BPU and Environmental Defense Fund and the New Jersey Conservation Fund (NJCF) filed an affidavit from Greg Lander, President of Skipping Stone. Ultimately, the NJ BPU issued an order on June 6, 2022 (June 2022 BPU Order) accepting the NJ Agencies Study findings. *Id.*

Agencies Study, discussed in more detail below, concludes the state's LDCs "can easily meet firm demand under [] normal winter weather conditions, [] in cases of colder-than-normal weather on a scale experienced in the past, and [] in the case of a design day through 2030 using existing pipeline capacity."⁴⁵ The NJ BPU decision also directed the gas distribution utilities to consider non-pipeline alternatives identified in the report to ensure sufficient gas capacity.⁴⁶

23. The New Jersey Conservation Foundation urges the Commission to adopt the NJ Agencies Study conclusion that the project capacity is unneeded and also submitted a study (NJCF Skipping Stone Study) that reaches the same conclusion.⁴⁷ Other commentors also emphasize that the New Jersey Board of Public Utilities "has found that additional gas capacity is not needed in light of the state's emission reduction requirements and current pipeline capacity."⁴⁸

24. Other commentors also share the New Jersey Agencies' view that the additional natural gas infrastructure is unnecessary. Some argue that the project is not needed because the region should instead transition to alternative sources of energy to combat climate change.⁴⁹ Sierra Club argues that the project will hinder Pennsylvania's and New Jersey's stated goals to reduce greenhouse gas (GHG) emissions.⁵⁰ Diana Dakey argues that the project is unneeded regional domestic pipeline capacity that is being built to provide producers in the Marcellus region with market access.⁵¹ Food and Water Watch asserts that the project will become prematurely obsolete and a stranded asset as the country implements policy changes to meet GHG reduction targets.⁵²

⁴⁵ *Id.* at 4-5.

⁴⁶ NJ BPU June 29, 2022 Decision at 11.

⁴⁷ New Jersey Conservation Foundation July 22, 2022 Motion to Lodge at attach. B (NJCF Skipping Stone Study).

⁴⁸ *See e.g.*, Food and Water Watch August 29, 2022 Motion to Lodge at 2.

⁴⁹ Sierra Club April 30, 2021 Motion to Intervene at 4; Delaware Riverkeeper Network April 30, 2021 Comments at 3-4.

⁵⁰ Sierra Club April 30, 2021 Motion to Intervene at 4.

⁵¹ Diana Dakey September 15, 2022 Comments at 1.

⁵² Food and Water Watch April 30, 2021 Comments at 3-4.

25. As discussed below, in considering all evidence in the record, including each of the studies and the binding precedent agreements for 100% of the project capacity, the Commission finds that the construction and operation of the project will provide more reliable service on peak winter days and will increase supply diversity.

a. Transco Levitan Study

26. The Transco Levitan Study finds that, after accounting for firm delivery rights of downstream customers, existing firm capacity in the region would fall short of the LDCs' design day demand of LDC-served customers in New Jersey and Southeastern Pennsylvania during the 2022/23 winter heating season by 345.2 thousand dekatherms per day (MDth/d), and the shortfall would increase to 774 MDth/d by the 2029/30 winter heating season. By the 2038/39 winter heating season, the shortfall would range between 774.4 MDth/d to 1,345.6 MDth/d, depending on three demand scenarios analyzed in the study.⁵³ The study also finds that the project will alleviate constraints that hamper Transco's ability to serve natural gas-fired generation demand in the region during extreme cold events.⁵⁴ To reach these conclusions, the study relied on public market data, state regulatory filings, and assessed low, medium, and high demand growth scenarios.⁵⁵

27. The study assumes the accuracy of the LDCs' design day demand forecasts,⁵⁶ which, by design, are oriented to conservatively ensure reliability. The study did not examine the degree to which the demand forecasts reflected New Jersey's Energy Master Plan and other energy efficiency and energy policy targets, thus potentially overstating future demand. Another limitation of the study is that it discounted the availability of any firm capacity held by natural gas wholesalers with primary (but not only) delivery points downstream of New Jersey, as some of this "downstream" capacity has been available to New Jersey shippers in the past through short-term peaking contracts, and may be available in the future on the same short-term basis.⁵⁷ The study does, however, factor in

⁵³ Transco Levitan Study at 2-3. After 2029/30, the study evaluates three scenarios "Low Demand," which assumes no demand growth after 2029/30, "High Demand," which assumes that demand continues to grow at the same average annual rate, and "Average Demand," which assumes demand grows at the average of the rates in the High Demand and Low Demand scenarios.

⁵⁴ Transco Levitan Study at 11.

⁵⁵ Transco Levitan Study at 8.

⁵⁶ *See supra* n.34.

⁵⁷ *See infra* P 28 (discussing the NJ Agencies Study's consideration of

competing demand for natural gas from electric generators, which more accurately reflects overall future demand for natural gas in the study area than a study focused only on LDC demand. This is important because during peak winter days when the demand for natural gas for heating is highest, delivery requirements of natural gas-fired generators often also peak.⁵⁸ Generally, the Transco Levitan Study appears consistent with traditional LDC supply planning.

b. NJ Agencies Study and NJ BPU Decision

28. The NJ Agencies Study finds that new pipeline capacity into the state of New Jersey is unnecessary because sufficient capacity already exists to serve the state's LDCs, and will continue to be sufficient if gains in energy efficiency are realized and non-pipeline alternatives are made available.⁵⁹ We note that the NJ Agencies Study is relevant only for the 56% of project capacity subscribed by New Jersey LDCs, and is not reflective of the shipper need for the remaining 44% of the project capacity. The NJ Agencies Study uses a 'demand outlook scenario' that reflects the minimum efficiency gains required by the NJ BPU as of June 10, 2020, and includes assumptions projecting the efficiency gains from 2025 to 2030.⁶⁰ The NJ Agencies Study argues that the New Jersey LDCs' expectations of regular, peak, and design day demand are in excess of the LDCs' own modeling of expected demand growth in those markets.⁶¹ The study uses

"downstream" capacity held by gas wholesalers).

⁵⁸ Transco Levitan Study at 7, 77, 92.

⁵⁹ NJ Agencies Study at 79. Five conditions were considered: (1) a Normal Winter Day (2,547 thousand dekatherms per day or MDth/d); (2) a Historical Peak Day (3,967 MDth/d); (3) a Winter Design Day (5,469 MDth/d); (4) a 1-in-90 Design Day (5,896 MDth/d); and (5) a Perfect Storm of high demand and a large supply disruption (5,321 MDth/d). Under the probability scenario of a Winter Design Day, which is the standard that the natural gas capacity system is built to supply to ensure reliability, LEI concluded that there would be a surplus of 274 MDth/d. The risk assessments determined the only potential natural gas supply shortfall was found during a very rare "1-in-90 design day" and/or a "perfect storm." For a 1-in-90 design day, there would be a shortfall of 153 MDth/d. A "perfect storm" occurs when there is a pipeline outage on a design day. During a perfect storm scenario, LEI predicted a shortfall of 525 MDth/d.

⁶⁰ NJ Agencies Study at 23 (citing *New Jersey Board of Public Utilities, Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs* (June 10, 2020)).

⁶¹ NJ Agencies Study at 48.

LDCs' design day demand forecasts for one set of scenarios, and compares those to another set of scenarios using lower demand forecasts based on historical averages.⁶² The study's assumptions differ from the LDCs' demand assumptions by projecting higher energy efficiency⁶³ gains and fewer oil-to-natural gas conversions for heating purposes, both of which would lead to lower demand for natural gas.⁶⁴ These projections are based on the assumption that New Jersey will achieve its targets with respect to energy efficiency gains and electrification of heating loads.⁶⁵ Further, the NJ Agencies Study concludes that New Jersey LDCs overstate demand growth for design day due to slightly exaggerating historical trends (1.02% versus .95%), assuming energy efficiencies are not gained, and relying on customers switching from oil to natural gas for a portion of demand growth, even though this type of fuel switching will likely slow given state policies which encourage electrification of heating systems.

29. In addition, the NJ Agencies Study concludes that, while LDCs in New Jersey will need to compete with one another to access firm "downstream" pipeline capacity, i.e., capacity through New Jersey contracted on a firm basis to users with primary delivery points downstream of New Jersey (e.g., in New York and New England), some downstream capacity will be available to New Jersey LDCs.⁶⁶ Specifically, the NJ Agencies Study relied on data from the LDCs of total past volumes of peaking

⁶² NJ Agencies Study at 12.

⁶³ Efficiency programs include rebates designed to incentivize efficiency, educational campaigns, energy audits, and retrofit projects.

⁶⁴ NJ Agencies Study at 48. Under the NJ Agencies Study's analysis, including modest efficiency gains but not building electrification or successful implementation of non-pipeline alternatives, the surplus pipeline capacity on a Winter Design Day, considering only firm demand, is five percent. According to the NJ Agencies Study, insufficient pipeline capacity can occur due to extreme weather, which they term "1-in-90-year" weather, particularly if a major transcontinental pipeline into New Jersey also fails during the weather event (i.e., a "perfect storm" event). The non-pipeline alternatives studied were: energy efficiency; voluntary demand response; direct load control; building electrification; renewable natural gas; green hydrogen; liquefied natural gas/compressed natural gas, and advanced leak detection. *New Jersey Board of Public Utilities, Exploration of Gas Capacity and Related Issues* at 4-5 (June 29, 2022).

⁶⁵ NJ Agencies Study at 11.

⁶⁶ NJ Agencies Study at 88.

capacity for which they have contracted.⁶⁷ For example, the study assumes that New Jersey Natural Gas Company will contract for 200 MDth/d going forward, based on its past contracting practice, even though New Jersey Natural Gas Company's projected off-system peaking resource use declines from 230.7 MDth/d in 2020/21 to 80.0 MDth/d in 2021/22, and to zero thereafter. For the winter heating season in years 2025/26 and later, the study projected total off-system peaking resources at a constant 619 MDth/d;⁶⁸ i.e., the study assumes that amount of off-system peaking resources from already contracted-for firm "downstream" pipeline capacity can be used by New Jersey LDCs when needed.

30. The NJ BPU accepted the study's findings that gas demand could be met using non-pipeline alternatives and best practices during supply constraints. The NJ BPU directed its Division of Reliability and Security to develop a Best Practices Guide and Playbook for capacity related emergencies, with input from the LDCs it regulates, and directed those LDCs to consider the feasibility of non-pipeline alternatives identified in the study to reduce demand.⁶⁹ The NJ BPU June 29, 2022 Decision noted that "[t]his consideration shall include evaluating [non-pipeline alternatives], both currently and as technology develops, to determine if the [non-pipeline alternatives] are cost effective and appropriate for their respective distribution systems."⁷⁰

31. We recognize that the State of New Jersey has a policy goal to achieve certain environmental targets,⁷¹ and that, as noted above, the state has directed LDCs to consider the feasibility of non-pipeline alternatives in meeting peak-day demand, consistent with those environmental goals. Nevertheless, there is no requirement under New Jersey law that LDCs adopt non-pipeline alternatives and, moreover, the record suggests that LDCs may decline to adopt non-pipeline alternatives where, for example, they are technically feasible, but not economic. As such, we find that the record does not support the conclusion that sufficient non-pipeline alternatives will necessarily be in place to eliminate the need for REAE project. That is particularly so in light of the considerable

⁶⁷ NJ Agencies Study at 94.

⁶⁸ NJ Agencies Study at 98.

⁶⁹ NJ BPU June 29, 2022 Decision at 11.

⁷⁰ *Id.*

⁷¹ According to its website, the [New Jersey Energy Master Plan](#) sets forth a strategic vision for the production, distribution, consumption, and conservation of energy in the State of New Jersey. No evidence has been submitted in this record as to what tools have been provided to achieve this vision.

uncertainty surrounding forecasts for future penetration of non-pipeline alternatives such as renewable natural gas and green hydrogen given infrastructure, economic, safety, and feedstock-related challenges. Here, LDC shippers state that the REAE project is needed to ensure supply during a ‘design day’ to gas heating loads in the multi-state area,⁷² and potentially to generators that would provide power for electric heating loads in the same area. In addition, the NJ Agencies Study is focused on firm demand and thus omits from its analysis interruptible natural gas generator and industrial demand, even though, as the NJ Agencies Study acknowledges, generator and industrial loads are the largest source of growth in natural gas demand in New Jersey.⁷³ We find that the weight of the record supports a need for the REAE project, notwithstanding the potential for non-pipeline alternatives at some point in the future.

c. **NJCF Skipping Stone Study**

32. The NJCF Skipping Stone Study asserts that the current natural gas system is overbuilt and identifies pipeline capacity that Skipping Stone believes is available for use in serving New Jersey.⁷⁴ The study bases this conclusion on the assumption that large volumes of non-New Jersey LDC capacity contracts that pass through New Jersey should be counted as available to New Jersey LDCs even if the primary, firm delivery points of the gas are not in New Jersey.⁷⁵ The NJCF Skipping Stone Study argued that, including secondary delivery points, there is another 1,792 MDth/d of capacity through Station 210 going south; and another 133.5 Dth/d going north. Skipping Stone seems to imply by this

⁷² See, e.g., South Jersey Resources Group LLC November 9, 2022 Letter; PSEG April 30, 2021 Comments at 2.

⁷³ NJ Agencies Study at 28-30. We note that there may be additional uncertainties with the study’s shortfall analysis related to interruptible demand. The study assumes that third-party natural gas suppliers are interruptible customers without accounting for the fact that some commercial and industrial retail choice customers may have firm service contracts. NJ Agencies Study at 28-30. Furthermore, the study assumes all electric generator demand is served by interruptible capacity even though some may be served by firm capacity. See NJ Agencies Study at 30 (characterizing supply to the power sector as generally interruptible).

⁷⁴ NJCF Skipping Stone Study at 12. The study argues that current cumulative pipeline capacity in New Jersey is 10 Bcf/d, and exceeds the design day need by nearly 5,000,000 dth/day. NJCF Skipping Stone Study at 3.

⁷⁵ See NJCF Skipping Stone Study at 4 (defining “in path stranded capacity” as capacity traversing New Jersey where the downstream location has more firm capacity delivering gas than capacity to take away gas or more market demand to accept the gas).

that there is much more capacity available to the LDCs.⁷⁶ This assumption ignores the fact that if the downstream firm capacity customers exercise their rights to the capacity, then New Jersey LDCs will not be able to rely on it.

33. In addition, the NJCF Skipping Stone Study did not address future reliability needs because it ignores ‘design day’ planning principles – i.e., it makes no effort to estimate the highest gas demand an LDC may be obligated to serve on an extremely cold winter day during the planning horizon. Instead, it focused exclusively on historical peak demand from LDCs (which is less than design day demand) and ignored demand from other customers, including electric generators and industrials. It emphasized the flexibility of supply options during times in which the system is not constrained, rather than examining supply options during times, such as design days, when the system is constrained. Based on the foregoing, we find that this study significantly understates the need for additional pipeline capacity to meet possible extreme cold weather customer demand, including the demand for heating by residential customers under such conditions, rendering it unhelpful in determining project need under the Certificate Policy Statement.

d. Project Need Conclusions

34. Both the NJ Agencies Study and the Transco Levitan Study provide valuable information for the Commission’s consideration. However, as detailed above, the studies use different inputs regarding Design Day projections, the availability to New Jersey shippers of existing contracted-for downstream capacity, and the timing of achieving energy efficiency gains and non-pipeline alternatives, which leads to the differences in each study’s respective conclusion about the extent of a natural gas pipeline capacity deficit for New Jersey LDCs. This difference in input assumptions may reflect differences in risk tolerance: the Transco Levitan Study reflects a lower risk tolerance because LDCs have an obligation to serve their customers (both residential and industrial) even on extreme weather days, while the NJ Agencies Study reflects a higher risk tolerance, relying as it does on the achievement of future actions on energy efficiency and non-pipeline alternatives. After due consideration of both studies and other evidence as discussed, the Commission finds that the construction and operation of the project will provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity. However, we do note the New Jersey Agencies’ concerns and emphasize that, as required in ordering paragraph (E), the project may not proceed unless Transco executes firm contracts for 100% of the project capacity for the same terms of service represented in signed precedent agreements.

⁷⁶ NJ Agencies Study at 92.

35. Sierra Club's general argument that the project is not needed because of Pennsylvania's and New Jersey's commitments to reduce GHG emissions by 80% by 2050⁷⁷ is not sufficient to undermine our finding that Transco has demonstrated a need for the project. Project shippers note that the project capacity offers a more cost-effective means to satisfy their statutory obligations to provide safe, reliable, affordable, and clean natural gas service to heat homes and businesses than continued reliance on third-party peaking services in the face of growing demand.⁷⁸ Moreover, the expected end-use for gas to be transported by the project is not just in Pennsylvania and New Jersey, but throughout the Northeast, including Maryland, Delaware, and New York.

3. Impacts on Existing Customers, Existing Pipelines and Their Customers, and Landowners and Surrounding Communities

36. As discussed above, Transco's existing shippers will not subsidize the proposed project. Further, the proposed project will have no adverse effect on Transco's existing customers because the proposed expansion facilities are designed to provide incremental service to meet the needs of the project shippers without degradation of service to Transco's existing customers.⁷⁹ We also find that there will be no adverse impact on other pipelines in the region or their captive customers. The project shippers will use the project's capacity to serve the incremental growth requirements of their markets, not to displace existing service providers.

37. We are further satisfied that Transco has taken steps sufficient to minimize adverse impacts on landowners and surrounding communities. The proposed facilities

⁷⁷ Sierra Club April 30, 2021 Comments at 2.

⁷⁸ South Jersey Gas Company and Elizabethtown Gas Company Apr. 30, 2021 Motion to Intervene and Comments at 5-6. *See also* New Jersey Natural Gas Company Nov. 9, 2022 Comments (urging the Commission to approve the project stating that it will improve reliability, ensure competitive pricing and price stability, and enhance operating flexibility); South Jersey Resources Group LLC Nov. 9, 2022 Comments (asserting that the project will help address current challenges including increased natural gas prices during the winter months for consumers in the Northeast and limited power generation supplies in some regions that hinder the ability to respond to extreme weather events); and South Jersey Gas Company and Elizabethtown Gas Company Nov. 9, 2022 Comments (stating the REAE Project is critical to ensure reliable and affordable natural gas supply for New Jersey in both the near and long term).

⁷⁹ The project will improve reliability and efficiency through the abandonment and replacement of horsepower at compressor stations 505 and 515 with more modern, energy efficient compression units. Application at 10-11.

were designed to use, to the extent practicable, existing rights-of-way and areas adjacent to existing rights-of-way.⁸⁰ The total acreage to be disturbed for construction of the project facilities is 792.3 acres, of which Transco would maintain 175.6 acres of the permanent pipeline right-of-way.⁸¹ Transco would restore the remaining acreage and allow it to revert to preconstruction uses.⁸² Transco states that it held stakeholder meetings in June and July of 2020, to inform the community of the project and solicit feedback from homeowners, landowners, and other stakeholders.⁸³ Transco also participated in the Commission's pre-filing process, and states that it has been working to address landowner and community concerns and will continue to do so.⁸⁴ Thus, we find that Transco has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities for purposes of our consideration under the Certificate Policy Statement.

4. Certificate Policy Statement Conclusion

38. The proposed project will enable Transco to provide 829,400 Dth/d of firm transportation service as well as increase the reliability and efficiency of compression units on Transco's system, and is fully subscribed. Accordingly, we find that Transco has demonstrated a need for the project. Further, the project will not have adverse economic impacts on existing shippers of other pipelines and their existing customers and will have minimal impacts on the interests of landowners and surrounding communities. Therefore, we concluded that the project is consistent with the criteria set forth in the Certificate Policy Statement and analyze the environmental impacts of the project below.⁸⁵

⁸⁰ Application at 18-19.

⁸¹ July 29, 2022 Final EIS at 4-81.

⁸² Final EIS at 4-81.

⁸³ Application at 19.

⁸⁴ *Id.* at 19-20. *See also* Transco November 1, 2022 Answer (stating that "Transco is committed to amicably negotiating the rights to land required by the project with affected landowners.").

⁸⁵ *See* Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

C. Rates

39. Transco estimates that the total cost of constructing the project is \$950,047,254, of which \$827,999,038 is allocated to the incremental service on the project and \$122,048,216 is allocated to the compressor station replacement activities at Stations 505 and 515.⁸⁶ Transco states that, consistent with criteria set forth in the 1999 Certificate Policy Statement,⁸⁷ the project costs are allocated between the incremental project shippers and the existing shippers based on the incremental HP and replacement HP, each represented as a percentage of the total HP.⁸⁸ Incremental charges for the project reflect only costs associated with incremental service and do not include compressor station replacement costs at Stations 505 and 515.⁸⁹

1. Incremental Recourse Rates

40. Transco proposes an incremental recourse rate under Rate Schedule FT for service using the capacity created by the project. Transco proposes an incremental daily firm recourse reservation charge of \$0.50550 per Dth/d, and an applicable usage charge of \$0.00429 per Dth based on a 100% load factor. Transco derived its proposed incremental firm recourse reservation charge based on a fixed first-year cost-of-service of \$153,030,293⁹⁰ and an annual design capacity of 302,731,000 Dth. Transco's proposed incremental charges are based on cost-of-service factors approved by the Commission including: an onshore depreciation rate of 3.00% for Solar turbine compressors and

⁸⁶ Application at Exh. K.

⁸⁷ See Certificate Policy Statement, 88 FERC at 61,746 (explaining that "Projects designed to improve existing service for existing customers by replacing existing capacity, improving reliability or providing flexibility, are for the benefit of existing customers" and are permitted to be rolled in).

⁸⁸ Transco notes that the existing compressor units at Stations 505 and 515 are obsolete and that replacing the existing units as part of the Project will enable Transco to reduce the non-incremental (i.e., system) transmission plant costs, rather than replace the existing units in a standalone project.

⁸⁹ Application at Exh. K.

⁹⁰ The total fixed cost of service of \$153,030,293 includes \$1,918,795 related to the Zone 6 relinquished capacity costs. Application at Exh. P, Page 1 of 2, Line No. 14.

2.50% for all other onshore transmission facilities, including negative salvage;⁹¹ and a pre-tax return of 12.83%, which reflects a 12.5% return on equity.⁹²

41. Transco's proposed incremental charges and cost of service include \$1,918,795 of costs related to the Zone 6 capacity relinquished in response to the reverse open season held from April 24, 2020, to May 25, 2020. Commission policy requires that in an NGA section 7 proceeding, no costs associated with existing capacity that is used for an incremental project be included in the incremental project's cost of service for purposes of establishing initial rates; rather, the initial incremental recourse rates should be designed to reflect only the incremental costs associated with the project.⁹³ Therefore, the costs associated with the existing Zone 6 relinquished capacity should be removed from the cost of service used in Transco's proposed incremental rate calculations.⁹⁴ We direct Transco to recalculate its proposed initial incremental firm recourse reservation charge and usage charge under Rate Schedule FT to remove the \$1,918,795 of Zone 6 relinquished capacity costs.

42. Under the Commission's Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion capacity if the incremental rate exceeds the maximum system recourse rate.⁹⁵ Transco's proposed incremental daily reservation charge of \$0.50550 per Dth/d plus the proposed usage charge of \$0.00429 per Dth is higher than Transco's current Rate Schedule FT, Zone 6-6, system maximum daily

⁹¹ Stated depreciation rates included in the Stipulation and Agreement (Settlement) approved by the Commission on March 24, 2020 in Docket No. RP18-1126-000, et al. See *Transcontinental Gas Pipe Line Co., LLC*, 170 FERC ¶ 61,245 (2020).

⁹² Transco notes that use of a 12.83% pre-tax return includes the ROE and income tax rates approved in the Settlement approved by the Commission on March 24, 2020 in Docket No. RP18-1126-000, et al., and is consistent with its initial rates filed for its Leidy South Project, the first expansion project filed by Transco subsequent to its Settlement.

⁹³ *Tenn. Gas Pipeline Co., L.L.C.*, 161 FERC ¶ 61,265, at P 21 (2017); *Texas E. Transmission, LP*, 165 FERC ¶ 61,132, at P 19 (2018).

⁹⁴ While the Commission rejects Transco's proposal to include in the incremental recourse rates the costs associated with the relinquished capacity, this finding is without prejudice to Transco proposing in its next section 4 rate proceeding an incremental rate design that reallocates those costs, which are already include in Transco's currently effective system rates, to the rates for the subject services.

⁹⁵ Certificate Policy Statement, 88 FERC at 61,745.

reservation charge of \$0.12698 per Dth/d plus the system maximum usage charge of \$0.00416 per Dth. With removal of the costs associated with the relinquished capacity costs, we believe Transco's revised incremental rates will still be above the system rates and therefore we approve an incremental rate for this project. In addition, Transco is directed to charge the applicable system interruptible rate for the expansion capacity.

2. Pre-determination of Rolled-in Rates for Station 505 and Station 515 Compressor Units

43. Transco proposes to abandon in place eight existing internal combustion engine-driven compressor units at Station 505 (approximately 16,000 HP) and five existing internal combustion engine-driven compressor units at Station 515 (approximately 17,000 HP), which currently serve Transco's existing system customers, and to replace these units with more modern, energy efficient equivalent horsepower. Transco states the existing units are obsolete, less energy efficient, less reliable, and costly to maintain and operate.⁹⁶ Of the total 30,810 HP being installed at Station 505, Transco states that it has allocated the costs associated with 51.93% (16,000 HP) of the compression to existing shippers and the remaining 48.07% of the costs are allocated to project shippers. Of the total 58,684 HP being installed at Station 515, Transco states that costs associated with 28.97% (17,000 HP) of the compression are allocated to existing shippers and the remaining 71.03% of the costs are allocated to project shippers.⁹⁷ Transco states that it used site-rated horsepower for the allocation instead of the ISO rating to better determine the horsepower used by the project shippers and Transco's existing customers. Transco estimates that the total cost of the replacement horsepower allocated to existing shippers will be \$122,048,216 (\$78,961,745 for Station 505 and \$43,086,471 for Station 515).⁹⁸

44. To support a request for a predetermination that a pipeline may roll the costs of a project into its system-wide rates in its next NGA section 4 rate proceeding, a pipeline must demonstrate that rolling in the costs associated with the construction and operation of new facilities will not result in existing customers subsidizing the expansion. The Certificate Policy Statement recognizes the appropriateness of rolled-in rate treatment for projects constructed to improve the reliability of service to existing customers or to improve service by replacing existing capacity, rather to increase levels of service.⁹⁹ Here, Transco states the existing compressor units are obsolete, less energy efficient, less

⁹⁶ Application at 10.

⁹⁷ *Id.* at 11-12.

⁹⁸ *Id.* at Exh. K.

⁹⁹ Certificate Policy Statement, 88 FERC ¶ 61,227 at n.12.

reliable, and costly to maintain and operate. By replacing them, Transco and its customers will benefit from the increased reliability of the new equipment, resulting in fewer maintenance outages, less downtime, decreased air emissions, less fuel consumption and costs, and lower operation and maintenance costs. Accordingly, we grant Transco a predetermination that it may roll the Station 505 and Station 515 replacement costs into its system rates in a future NGA section 4 rate case, absent a significant change in circumstances.

3. Fuel

45. Transco proposes to apply its generally applicable system fuel retention and electric power rates to the project. Transco requests a predetermination of rolled-in rate treatment of project fuel.¹⁰⁰ In support of its proposal, Transco provided a fuel study in Exhibit Z-1 to demonstrate that using the generally applicable system fuel retention percentage and electric power rates for the capacity created by the project will not result in existing shippers on the system subsidizing the project.

46. Transco's fuel study demonstrates that the project will result in an overall reduction in system fuel use (gas fuel consumption plus the gas equivalent of electric power consumption) attributable to existing customers. The fuel study uses a representative sampling of load profiles generated from actual system operating conditions during the annual period from July 1, 2019, to June 30, 2020. Transco states that it chose 10 representative days from this period to assess the system impact of the project facilities over a wide range of system load factors. Transco demonstrates that there is a negative 7.43% average change in fuel due to the project, demonstrating that the project facilities yield a net system fuel benefit to existing system customers. Accordingly, we will approve Transco's proposal to charge its generally applicable system fuel retention percentage and system electric power rates for the project facilities.

4. Reporting Incremental Costs

47. Section 154.309 of the Commission's regulations includes bookkeeping and accounting requirements applicable to all expansions for which incremental rates are charged. The requirements ensure that costs are properly allocated between pipelines' existing shippers and incremental expansion shippers.¹⁰¹ Therefore, we require Transco to keep separate books and accounting of costs and revenues attributable to the incremental capacity created by the project and internally for the replacement capacity for the Station 505 and Station 515 Compressor Units in the same manner as required by

¹⁰⁰ Application at Exh. Z-1 at 2.

¹⁰¹ 18 C.F.R. § 154.309 (2021).

section 154.309 of the Commission's regulations.¹⁰² The books should be maintained with applicable cross-reference and the information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.¹⁰³

5. Negotiated Rates

48. Transco proposes to provide service to the project shippers under negotiated rate agreements. Transco must file either its negotiated rate agreements or tariff records setting forth the essential terms of the agreements in accordance with the Alternative Rate Policy Statement¹⁰⁴ and the Commission's negotiated rate policies.¹⁰⁵

D. Environmental Analysis

49. On July 24, 2020, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the Planned Regional Energy Access Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Virtual Scoping

¹⁰² *Id.* See *Gulf S. Pipeline Co., LLC*, 173 FERC ¶ 61,049, at P 6 (2020) (for projects that use existing system rates for the initial rates, the Commission's requirement for separate books and accounting applies only to internal books and records).

¹⁰³ See *Revisions to Forms, Statements, & Reporting Requirements for Nat. Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008). In *Gulf South*, the Commission clarified that a pipeline charging its existing system rates for a project is not required to provide books and accounting consistent with Order No. 710. However, a pipeline is required to maintain its internal books and accounting such that it would have the ability to include this information in a future FERC Form No. 2 if the rate treatment for the project is changed in a future rate proceeding.

¹⁰⁴ *Alts. to Traditional Cost-of-Serv. Ratemaking for Nat. Gas Pipelines; Regul. of Negotiated Transportation Servs. of Nat. Gas Pipelines*, 74 FERC ¶ 61,076, clarification granted, 74 FERC ¶ 61,194, order on reh'g and clarification, 75 FERC ¶ 61,024, reh'g denied, 75 FERC ¶ 61,066, reh'g dismissed, 75 FERC ¶ 61,291 (1996), petition denied sub nom. *Burlington Res. Oil & Gas Co. v. FERC*, 172 F.3d 918 (D.C. Cir. 1998) (Alternative Rate Policy Statement).

¹⁰⁵ *Nat. Gas Pipelines Negotiated Rate Policies & Pracs.; Modification of Negotiated Rate Pol'y*, 104 FERC ¶ 61,134 (2003), order on reh'g and clarification, 114 FERC ¶ 61,042, reh'g dismissed and clarification denied, 114 FERC ¶ 61,304 (2006).

Sessions (NOI), which was published in the Federal Register on July 30, 2020.¹⁰⁶ Upon review of Transco's application filing on March 26, 2021, and the comments received in response to the Notice of Application on April 9, 2021, Commission staff determined that an environmental impact statement (EIS), rather than an environmental assessment, should be prepared. On October 19, 2021, the Commission issued a Notice of Intent to Prepare an Environmental Impact Statement, Request for Comments on Environmental Issues, and Schedule for Environmental Review (EIS NOI), which was published in the Federal Register on October 28, 2021.¹⁰⁷ The NOI and EIS NOI were mailed to the parties on the environmental mailing list, which included federal and state resource agencies; elected officials; environmental groups and non-governmental organizations; Native Americans Tribes; potentially affected landowners (as defined in the Commission's regulations¹⁰⁸); local libraries and newspapers; and other stakeholders who had indicated an interest in the project. Issuance of the NOI and EIS NOI opened separate 30-day formal scoping periods which expired on August 24, 2020, and November 19, 2021, respectively. Prior to issuance of the draft EIS, the Commission received 22 oral comments at the three virtual public scoping sessions held during the pre-filing review process and 377 written comments, including about 250 form letters expressing opposition or support for the project.

50. To satisfy the requirements of the National Environmental Policy Act (NEPA),¹⁰⁹ Commission staff issued on March 2, 2022, a draft EIS for the project, addressing all substantive environmental comments received prior to issuance. The U.S. Environmental Protection Agency (EPA) and U.S. Army Corps of Engineers participated as cooperating agencies in the preparation of the EIS. The draft EIS was filed with the EPA and a formal notice of availability was issued in the *Federal Register* on March 11, 2022,¹¹⁰ establishing a 45-day comment period that ended on April 25, 2022. The comment period provided opportunity for comments on the draft EIS either in the form of written comments and/or oral comments received at three separate public comment sessions conducted via teleconference. In response to the draft EIS, we received 23 oral

¹⁰⁶ 85 Fed. Reg. 45,869 (July 30, 2020). The Notice of Intent was issued during the Commission's pre-filing review process for Transco's project that began on June 18, 2020, in Docket No. PF20-3-000.

¹⁰⁷ 86 Fed. Reg. 59,707 (Oct. 28, 2021).

¹⁰⁸ 18 C.F.R. pt. 157.6(d) (2021).

¹⁰⁹ 42 U.S.C. §§ 4321 *et seq.* See also 18 C.F.R. pt. 380 (2021) (Commission's regulations implementing NEPA).

¹¹⁰ 87 Fed. Reg. 14,004 (Mar. 11, 2022)

comments at the public comment sessions and 166 written comment letters. Overall, comments concerned project purpose and need, alternatives, water resources, wetland impacts, fish, wildlife, protected species, impacts on recreation, visual impacts, air quality, noise, socioeconomic impacts, environmental justice, cumulative impacts, safety, greenhouse gas emissions (GHG), and climate change.

51. Commission staff issued the final EIS on July 29, 2022, and published a notice of the availability in the *Federal Register* on August 4, 2022.¹¹¹ The final EIS addresses: geology; soils; groundwater; surface water; wetlands; aquatic resources; vegetation and wildlife (including threatened, endangered, and other special-status species); land use and visual resources; cultural resources; socioeconomics (including environmental justice); air quality and noise; GHGs and climate change; reliability and safety; and alternatives. The final EIS addresses all substantive environmental comments received on the draft EIS and concludes that construction and operation of the project would result in some adverse environmental impacts. However, the final EIS determined that most of these impacts would be temporary and would occur during construction (e.g., impacts on land use, traffic, and noise). With the exception of potential impacts on climate change, the EIS concludes that impacts would be reduced to less than significant levels through implementation of Transco's proposed avoidance, minimization, and mitigation measures and Commission staff recommendations, which we have adopted herein as conditions.¹¹² The Commission received comments on the final EIS from U.S. Fish and Wildlife Service (FWS) and EPA, which are addressed below, as are environmental issues of concern, including climate change and impacts on environmental justice communities.¹¹³

1. Threatened and Endangered Species

52. In its comments on the final EIS, the FWS provided a response to Commission staff's request for concurrence regarding the effect of the project on federally listed endangered, threatened, and proposed species in Pennsylvania and New Jersey. The FWS, Pennsylvania Field Office, concurred with Commission staff's determination that the project may affect, but is not likely to adversely affect two federally listed endangered species, the Indiana bat (*Myotis sodalis*) and northeastern bulrush (*Scirpus ancistrochaetus*), and two species listed as threatened, the northern long-eared bat

¹¹¹ 87 Fed. Reg. 47,741 (Aug. 4, 2022).

¹¹² Final EIS at ES-11, 5-1.

¹¹³ The Delaware River Keeper Network also filed a copy of its request to the Pennsylvania Department of Environmental Protection for an extension of time to comment on certain state permits pending at the Pennsylvania DEP.

(*Myotis septentrionalis*) and bog turtle (*Glyptemys muhlenbergii*).¹¹⁴ With this concurrence, Endangered Species Act consultation with the FWS is complete. The final EIS had also recommended that Transco file final bat conservation measures and mitigation developed in coordination with the Pennsylvania Field Office of the FWS. Because Transco provided the FWS with the final bat conservation measures¹¹⁵ and the FWS found these acceptable, we are not including the EIS' recommendation in Appendix B to this Order.

2. Environmental Justice

53. In conducting NEPA reviews of proposed natural gas projects, the Commission follows the instruction of Executive Order 12898, which directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority and low-income populations (i.e., environmental justice communities).¹¹⁶ Executive Order 14008 also directs agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.”¹¹⁷ Environmental justice is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the

¹¹⁴ See U.S. Fish and Wildlife Service September 1, 2022 Concurrence.

¹¹⁵ See Transco September 12, 2022 Supplemental Information on Correspondence with U.S. Fish and Wildlife Service.

¹¹⁶ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, and statutory duties. See 15 U.S.C. § 717f; see also 18 C.F.R. § 380.12(g) (2021) (requiring applicants for projects involving significant aboveground facilities to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

¹¹⁷ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021). The term “environmental justice community” includes disadvantaged communities that have been historically marginalized and overburdened by pollution. *Id.* at 7629. The term also includes, but may not be limited to minority populations, low-income populations, or indigenous peoples. See EPA, EJ 2020 Glossary (Aug. 18, 2022), <https://www.epa.gov/environmentaljustice/ej-2020-glossary>.

development, implementation, and enforcement of environmental laws, regulations, and policies.”¹¹⁸

54. Consistent with the Council on Environmental Quality (CEQ)¹¹⁹ and EPA¹²⁰ guidance, the Commission’s methodology for assessing environmental justice impacts

¹¹⁸ EPA, *Learn About Environmental Justice*, <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice> (Sep. 6, 2022). Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. *Id.* Meaningful involvement of potentially affected environmental justice community residents means: (1) people have an appropriate opportunity to participate in decisions about a proposed activity that may affect their environment and/or health; (2) the public’s contributions can influence the regulatory agency’s decision; (3) community concerns will be considered in the decision-making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected. *Id.*

¹¹⁹ CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* 4 (Dec. 1997) (CEQ’s *Environmental Justice Guidance*), <https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf>. CEQ offers recommendations on how federal agencies can provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices. There were opportunities for public involvement during the Commission’s pre-filing and environmental review processes (final EIS at 1-5). *See also supra* P 48. Transco states that it held in-person and virtual informational open houses in June and July 2020 in the county of each major Project component to inform the public about the project, enable the public to view maps of the Project, and provide the public an opportunity to ask questions about the Project. Transco further states that it engaged with organizations that support low-income and minority communities to extend access to communities that may not be reachable through traditional means and worked with the Community Action Association of Pennsylvania to improve communication with low-income communities. Additionally, Transco states that the Project website was translated into Spanish and that project materials in English and Spanish were placed in community gathering centers and local venues including discount or grocery stores, minority -owned businesses, and faith-based institutions. *See* Final EIS at 4-131 and 4-132.

¹²⁰ *See generally* EPA, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016) (Promising Practices), <https://www.epa.gov/sites/default/files/2016->

considers: (1) whether environmental justice communities (e.g., minority or low-income populations)¹²¹ exist in the project area; (2) whether impacts on environmental justice communities are disproportionately high and adverse; and (3) possible mitigation measures. As recommended in *Promising Practices*, the Commission uses the 50% and the meaningfully greater analysis methods to identify minority populations.¹²² Specifically, a minority population is present where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50%; or (2) the aggregate minority population in the block group affected is 10% higher than the aggregate minority population percentage in the county.¹²³

55. CEQ's *Environmental Justice Guidance* also directs low-income populations to be identified based on the annual statistical poverty thresholds from the U.S. Census Bureau. Using *Promising Practices*' low-income threshold criteria method, low-income populations are identified as block groups where the percent of a low-income population in the identified block group is equal to or greater than that of the county.

56. To identify potential environmental justice communities during preparation of the EIS, Commission staff used 2019 U.S. Census American Community Survey data¹²⁴ for the race, ethnicity, and poverty data at the state, county, and block group level.¹²⁵

08/documents/nepa_promising_practices_document_2016.pdf.

¹²¹ See generally Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994). Minority populations are those groups that include: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic.

¹²² See *Promising Practices* at 21-25.

¹²³ Here, Commission staff selected the counties as the reference communities to ensure that affected environmental justice communities are properly identified. A reference community may vary according to the characteristics of the particular project and the surrounding communities.

¹²⁴ U.S. Census Bureau, American Community Survey 2019 ACS 5-Year Estimates Detailed Tables, File# B17017, Poverty Status in the Past 12 Months by Household Type by Age of Householder, <https://data.census.gov/cedsci/table?q=B17017;File#B03002> Hispanic or Latino Origin By Race, <https://data.census.gov/cedsci/table?q=b03002>.

¹²⁵ For this project, we determined that a 1-mile radius around the proposed aboveground facilities was the appropriate unit of geographic analysis for assessing project impacts on the environmental justice communities. A 1-mile radius is sufficiently broad considering the likely concentration and range of construction emissions, noise,

Additionally, in accordance with *Promising Practices*, staff used EJScreen, EPA's environmental justice mapping and screening tool, as an initial step to gather information regarding minority and low-income populations; potential environmental quality issues; environmental and demographic indicators; and other important factors.

57. Once staff collected the block group level data, as discussed in further detail below, staff conducted an impacts analysis for the identified environmental justice communities and evaluated health or environmental hazards, the natural physical environment, and associated social, economic, and cultural factors to determine whether impacts were disproportionately high and adverse on environmental justice communities and also whether those impacts were significant.¹²⁶ Commission staff assessed whether impacts to an environmental justice community were disproportionately high and adverse based on whether those impacts were predominately borne by that community, consistent with EPA's recommendations in *Promising Practices*.¹²⁷ Identified project impacts and proposed mitigation measures are discussed below.

58. As presented in the final EIS, 47 block groups out of 104 block groups near the project facilities exceed the defined thresholds for minority or low-income communities and are, therefore, environmental justice communities.¹²⁸ Of those 47 block groups, 11 have a minority population that either exceeds 50% or is meaningfully greater than their respective counties, 11 have a low-income population that is equal to or greater than their respective counties, and 25 have both a minority population and a low-income population that exceed the respective thresholds. Project work within the identified environmental justice communities includes the construction and operation of portions of the Regional Energy Lateral and the Effort Loop; construction and operation of the new

traffic impacts and visual impacts proximal to the proposed facilities.

¹²⁶ See *Promising Practices* at 33 (stating that “an agency may determine that impacts are disproportionately high and adverse, but not significant within the meaning of NEPA” and in other circumstances “an agency may determine that an impact is both disproportionately high and adverse and significant within the meaning of NEPA”).

¹²⁷ *Id.* at 44-46 (explaining that there are various approaches to determining whether an action will cause a disproportionately high and adverse impact, and that one recommended approach is to consider whether an impact would be “predominantly borne by minority populations or low-income populations”). We recognize that EPA and CEQ are in the process of updating their guidance regarding environmental justice and we will review and incorporate that anticipated guidance in our future analysis, as appropriate.

¹²⁸ Final EIS Table 4.7.8-1 at 4-135.

Compressor Station 201; and modifications to existing Compressor Stations 195, 200, 207, and 505, Camden Meter and Regulating (M&R) Station, and the Lawnside M&R Station. The Mt. Laurel M&R Station is not located within an environmental justice community, but there are environmental justice communities within a one-mile radius of the facility. Neither Compressor Station 515 nor the Beaver Dam Meter Station are in proximity to an environmental justice block group.

59. The final EIS disclosed impacts on the identified environmental justice communities in proximity to the project facilities including groundwater, visual, socioeconomic, traffic, and air and noise impacts from construction and operation. Environmental justice concerns are not present for other resource areas due to the minimal overall impact the project would have on them.

a. Groundwater Impacts

60. Construction, including blasting, could cause physical damage to water wells or diminish the yield and water quality of wells and springs near the project facilities. As discussed in the EIS, approximately 48 wells within 150 feet of the project facilities are located in environmental justice communities.¹²⁹ To reduce potential for impact, Transco is required to implement Transco's *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*, Transco's *Construction Spill Prevention and Response Procedures for Oil and Hazardous Materials*, *Blasting Plan*, and other best management practices designed to minimize erosion and protect environmental resources.¹³⁰ Transco is also required to provide temporary water supply if a well or spring are impacted.¹³¹ With implementation of these mitigation measures, impacts on environmental justice communities associated with groundwater and well impacts would be less than significant.¹³² The final EIS found that environmental justice communities in the study area would not experience cumulative impacts on groundwater.¹³³ We agree.

¹²⁹ Final EIS at 4-154.

¹³⁰ Final EIS at 4-154; *see also* Final EIS at 4-20, app. C (identifying and detailing impacts on water wells).

¹³¹ Final EIS at 4-23, 4-155.

¹³² Final EIS at 4-155.

¹³³ Final EIS at 4-208.

b. Visual Impacts

61. With respect to visual impacts on environmental justice populations, as described in the EIS, impacts on visual and/or aesthetic resources during the construction of the pipeline and aboveground facilities are expected to be temporary and minor.¹³⁴ Permanent visual impacts may exist along the pipeline rights-of-way and are expected to be minor. As discussed in the EIS, short-term visual impacts on environmental justice communities near Compressor Station 201 would be significant and long-term visual impacts would be less than significant.¹³⁵ To minimize permanent visual impacts on environmental justice communities from construction and operation of Compressor Station 201, Transco is required to provide tree plantings consistent with its visual screening plan.¹³⁶ Visual impacts on environmental justice communities from modification of Compressor Station 505 would be less than significant and no visual impacts would occur from modification of Compressor Stations 195, 200, and 207.¹³⁷ Additionally, visual impacts from modification of Camden M&R Station would be less than significant and no visual impacts on environmental justice communities are anticipated from modification of the Mt. Laurel M&R Station and the Lawnside M&R Station. Overall, visual impacts on environmental justice communities would be less than significant. The final EIS found that environmental justice communities in the study area would also experience cumulative impacts on visual resources; however, these impacts would be less than significant.¹³⁸ We agree. The final EIS found that direct and cumulative visual impacts on residences adjacent to Compressor Station 201, which are located in an environmental justice community, would be significant in the short-term until the visual screening plan is fully implemented but that long term visual impacts would be less than significant.¹³⁹

c. Socioeconomic and Traffic Impacts

62. With respect to socioeconomic impacts, traffic delays and an increase in demand for public services may occur during the construction period. As discussed in the final

¹³⁴ Final EIS at 4-155.

¹³⁵ Final EIS at 4-155.

¹³⁶ Final EIS at 4-155.

¹³⁷ Final EIS at 4-156.

¹³⁸ Final EIS at 4-209.

¹³⁹ Final EIS at 4-156, 4-209.

EIS, a temporary influx of about 353 workers/contractors could increase the demand for housing, law enforcement, and medical care during construction.¹⁴⁰ Transco would work with local law enforcement, fire departments, and emergency medical services prior to construction to coordinate for effective emergency response.¹⁴¹ Additionally, there would be an increase in the use of area roads by heavy construction equipment and associated vehicles, resulting in short term impacts on roadways, lasting the duration of construction. Transco is required to implement its Traffic Management Plan to minimize project effects on local traffic and transportation systems during construction.¹⁴² Therefore, socioeconomic and traffic-related impacts on the population, including environmental justice communities, would be temporary and less than significant.¹⁴³ The EIS concluded that environmental justice communities in the study area would also experience cumulative impacts on socioeconomics and traffic; however, these impacts would be less than significant.¹⁴⁴ We agree.

d. Air Emissions

63. Construction air emissions would result in short-term, localized impacts in the immediate vicinity of construction work areas, particularly Compressor Station 201, and would be below the National Ambient Air Quality Standards (NAAQS), which have been designated to protect public health, including sensitive and vulnerable populations.¹⁴⁵ Transco is required to implement a Fugitive Dust Control Plan and mitigate exhaust emissions during construction by using construction equipment and vehicles that comply with EPA mobile and non-road emission regulations. In addition, Transco is required to use commercial gasoline and diesel fuel products that meet specifications of applicable federal and state air pollution control regulations.

64. Operational emission increases from the Project would occur from Compressor Station 505. Transco's electric-driven compression at Compressor Stations 201, 207, and 195 would not generate combustion-related emissions and the connection at Compressor Station 200 would not generate combustion-related emissions. Accordingly, the project

¹⁴⁰ Final EIS at 4-156.

¹⁴¹ Final EIS at 4-124.

¹⁴² Final EIS at 4-157.

¹⁴³ Final EIS at 4-156, 4-157.

¹⁴⁴ Final EIS at 4-209.

¹⁴⁵ Final EIS at 4-157.

and each compressor station would be in compliance with the NAAQS. Although the project would be in compliance with the NAAQS and the NAAQS are designated to protect sensitive populations, the final EIS acknowledges that NAAQS attainment alone may not ensure there is no localized harm to such populations due to project emissions of volatile organic compounds, hazardous air pollutants, as well as issues such as the presence of non-project related pollution sources, local health risk factors, disease prevalence, and access (or lack thereof) to adequate care.¹⁴⁶ The EIS concluded, and we agree, that the air quality impacts from construction and the operation of project facilities would not result in a significant impact on air quality in the region, including air quality impacts on environmental justice communities.¹⁴⁷ The EIS also concluded that environmental justice communities in the study area would experience cumulative impacts related to air quality; however, these impacts would be less than significant.¹⁴⁸ We agree.

e. **Noise Impacts**

65. The final EIS also concluded, and we agree that, because of the limited duration of construction activities, distance to noise sensitive areas (NSA), and Transco's mitigation measures, the project would not result in significant noise impacts on the surrounding area, including environmental justice communities.¹⁴⁹ With respect to noise levels during construction activities for the proposed pipeline facilities, increase in noise levels at the closest residences would be temporary, generally lasting approximately three to four weeks. Construction noise increases related to aboveground facilities would also be temporary, lasting the duration of construction, approximately 13 months. Additionally, operation of the aboveground facilities and compressor stations, with Transco's noise mitigation measures, would not result in significant noise impacts on the surrounding community, including environmental justice communities. The EIS also concluded that environmental justice communities in the study area would experience cumulative impacts on noise; however, these impacts would be less than significant.¹⁵⁰ We agree.

¹⁴⁶ Final EIS at 4-157.

¹⁴⁷ Final EIS at 4-157.

¹⁴⁸ Final EIS at 4-209.

¹⁴⁹ Final EIS at 4-158.

¹⁵⁰ Final EIS at 4-210.

f. Environmental Justice Conclusion

66. As described in the final EIS, the proposed project will have a range of impacts on the environment and individuals living in the vicinity of the project facilities, including environmental justice communities. The final EIS concludes that impacts from construction and operation of Compressor Stations 195, 200, 207, and 505, Camden M&R Station, and the Lawnside M&R Station, which are located within identified environmental justice communities, would be disproportionately high and adverse as impacts would be predominately borne by environmental justice communities.¹⁵¹ We agree. The final EIS concludes that impacts from the Regional Energy Lateral and the Effort Loop would not be disproportionately high and adverse as impacts would not be predominately borne by environmental justice communities.¹⁵² We agree. Impacts associated with groundwater, visual, socioeconomics, traffic, air quality, and noise from all these facilities would be less than significant.¹⁵³ For Compressor Station 201, the final EIS concluded that, in the short term, direct and cumulative visual impacts on environmental justice communities associated with the construction of Compressor Station 201 would be significant.¹⁵⁴ We agree. Once the plantings associated with mitigation are established, long term visual impacts on environmental justice communities would be less than significant.¹⁵⁵ Impacts associated with groundwater, socioeconomics, traffic, air quality, and noise for Compressor Station 201 would be less than significant.

3. Greenhouse Gas Emissions and Climate Change

67. The CEQ defines effects or impacts as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable,” which include those effects “that occur at the same time and place” and those “that are later in time or farther removed in distance, but are still reasonably foreseeable.”¹⁵⁶ An impact is reasonably foreseeable if it is “sufficiently likely to occur such that a person of ordinary prudence

¹⁵¹ Final EIS at 4-159, 4-160.

¹⁵² Final EIS at 4-159.

¹⁵³ Final EIS at 4-154 through 4-158.

¹⁵⁴ Final EIS at 4-159 through 4-160.

¹⁵⁵ Final EIS at 4-160

¹⁵⁶ 40 C.F.R. § 1508.1(g) (2021).

would take it into account in reaching a decision.”¹⁵⁷ For this project, we find that the construction emissions, direct operational emissions, and the emissions from the downstream combustion of the gas transported by the project are reasonably foreseeable emissions.¹⁵⁸

68. The EPA recommends that Commission staff quantify upstream GHG emissions associated with the proposed project.¹⁵⁹ That is not required here. On May 26, 2021, Commission staff sent a data request to Transco asking for flow maps showing receipt points where gas from the Marcellus shale region would enter the Transco system. According to Transco, the project would receive gas from existing gathering infrastructure in the Marcellus Shale production area¹⁶⁰ via new connections with Williams Field Services Company, LLC, Regency NEPA, and UGI North.¹⁶¹ The environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations, where the supply source is unknown.¹⁶² Here, the specific source of natural gas to be transported

¹⁵⁷ *Id.* § 1508.1(aa).

¹⁵⁸ See *Food & Water Watch v. FERC*, 28 F.4th 277, 288 (D.C. Cir. 2022) (“Foreseeability depends on information about the ‘destination and end use of the gas in question.’”) (citation omitted); *Sierra Club v. FERC*, 867 F.3d at 1371 (“FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible.”).

¹⁵⁹ EPA Sept. 6, 2022 Comment on Final EIS at 2.

¹⁶⁰ Marcellus shale is a black shale geological formation containing natural gas reserves which are developed using horizontal drilling and hydraulic fracturing techniques. The Marcellus shale formation extends deep underground from Ohio and West Virginia, northeast through Pennsylvania and southern New York with multiple producing intervals within the formation. See *Dominion Transmission, Inc.*, 156 FERC ¶ 61,140, at n.32 (2016).

¹⁶¹ Transco Response to May 26, 2021 Environmental Information Request at 1 (filed June 15, 2021) (Regarding Resource Report 1 – Project Description).

¹⁶² See, e.g., *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *petition for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. App’x. 472, 474-75 (2d Cir. 2012) (unpublished opinion); see also *Kern River Gas Transmission Co.*, 179 FERC ¶ 61,121, at P 33 (2022); *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220,

via the Regional Energy Access Expansion Project is currently unknown. Although the project's receipt points are at interconnections with large gathering systems in Northeastern Pennsylvania, the record does not indicate from whom the project shippers may source their gas— indeed the project's purpose is to diversify fuel supply access – further, the producers/gas suppliers that hold capacity on each of the connected gathering systems could change throughout the project's operation.

69. The final EIS estimates that construction of the project may result in emissions of up to 48,013 tons (43,548 metric tons) of carbon dioxide equivalent (CO₂e) over the duration of construction.¹⁶³ The project's estimated operational GHG emissions are 619,674 tons per year (562,044 metric tons per year) of CO₂e,¹⁶⁴ which was calculated based on the increased horsepower resulting from the new project facilities and assuming 100% utilization; i.e., it is assumed that the facilities are operated at maximum capacity for 365 days/year, 24 hours/day.¹⁶⁵ The downstream GHG emissions from the project, assuming 100% utilization of the new incremental capacity of Transco's pipeline system, would result in up to 16.02 million metric tpy of CO₂e.

70. As we have done in prior certificate orders, we compare estimated project GHG emissions to the total GHG emissions of the United States as a whole and at the state level. This comparison allows us to contextualize the projected emissions of the project. At a national level, 5,222.4 million metric tons of CO₂e were emitted in 2020 (inclusive of CO₂e sources and sinks).¹⁶⁶ Construction emissions from the project could potentially increase CO₂e emissions based on the national 2020 levels by 0.0083%; in subsequent years, the operations and downstream GHG emissions could potentially increase emissions nationally by 0.32%.¹⁶⁷

at P 243 (2019), *order on reh'g*, 171 FERC ¶ 61,049, at P 89 (2020).

¹⁶³ Final EIS at 4-175.

¹⁶⁴ Final EIS at 4-175.

¹⁶⁵ Final EIS at 4-175. Additionally, the estimate includes reductions from abandoned units, fugitive emissions from compressor station equipment, piping, and ancillary facilities. *Id.*

¹⁶⁶ EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2020* at ES-4 (Table ES-2) (April 2022), <https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf>.

¹⁶⁷ Although EPA's Affordable Clean Energy Rule, which repealed the national emissions reduction targets expressed in EPA's Clean Power Plan, was vacated in

71. At the state level, the final EIS compares the project's GHG emissions to the Delaware, Maryland, New Jersey, New York, and Pennsylvania GHG inventories for their respective construction and operational/downstream volumes for each applicable state.¹⁶⁸ The project would result in construction and operational emissions in Maryland, New Jersey, and Pennsylvania. For purposes determining the percentage of the project's downstream GHG emissions attributable to each state, staff relied on Transco's estimates on the intended end-use of the gas to be transported by the project, which reflected end use of gas to be transported by the project in Delaware, Maryland, New Jersey, New York, and Pennsylvania.¹⁶⁹ For each of these five states the energy related CO₂ emissions in 2019 were 13.6, 56.9, 100.8, 169, and 218.7 million metric tons, respectively.¹⁷⁰ Accordingly, based on the project's aboveground facility locations and identified end use, estimated project GHG emissions compared to the state inventories are as follows. For Delaware, project downstream emissions could potentially increase CO₂e emissions based on the state's 2019 levels by 4.0%. For Maryland, project construction could potentially increase CO₂e emissions based on that state's 2019 levels by 0.002%; in subsequent years, project operation and downstream emissions could potentially increase emissions by 1.8%. For New Jersey, project construction could potentially increase CO₂e emissions based on the state's 2019 levels by 0.01%; in subsequent years, project operation and downstream emissions could potentially increase emissions by 11.8%. In New York, project downstream emissions could potentially increase CO₂e emissions based on the state's 2019 levels by 0.3%. Last, for Pennsylvania, project construction could potentially increase CO₂e emissions based on the state's 2019 levels by 0.02%; in subsequent years, project operation and downstream emissions could potentially increase emissions by 1.2%.

72. When states have GHG emissions reduction targets, we will compare the project's GHG emissions to those state goals to provide additional context. All five of these states have statewide goals for GHG emissions reduction targets and the final EIS discloses the

Am. Lung Ass'n v. EPA, 985 F.3d 914 (D.C. Cir. 2021), EPA has not yet issued a new rule prescribing new national emissions reduction targets.

¹⁶⁸ Final EIS at 4-176.

¹⁶⁹ Transco Response to Staff Dec. 1, 2021 Environmental Information Request at Response 27 (filed Dec. 10, 2021) (providing table of Intended Use of the Natural Gas (Dth/d1) by Customer).

¹⁷⁰ Final EIS at 4-176.

percentage that the project's GHG emissions would represent of each state's projected GHG emission levels, assuming the state meets its targeted reductions.¹⁷¹

73. By adopting the climate impact analysis in the EIS, we recognize that the project may release GHG emissions that contribute incrementally to future global climate change impacts,¹⁷² and have identified climate change impacts in the region.¹⁷³ In light of this analysis, and because we are conducting a generic proceeding to determine whether and how to Commission will conduct significance determinations for GHG emissions going forward, the Commission is not herein characterizing these emissions as significant or insignificant.¹⁷⁴

74. Last, the EPA repeats its comments on the draft EIS that the Commission should consider and incorporate practicable mitigation measures to reduce the proposed action's GHG emissions into the proposed terms and conditions required as part of certificate issuance.¹⁷⁵ As stated in the final EIS, Transco has not indicated any mitigation for GHG emissions.¹⁷⁶

¹⁷¹ Final EIS at 4-176 – 4-177.

¹⁷² Final EIS at 4-175.

¹⁷³ Final EIS at 4-174.

¹⁷⁴ On February 17, 2022, the Commission issued the Updated Certificate Policy Statement and an Interim GHG Policy Statement. *Certification of New Interstate Nat. Gas Facilities Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,197 (2022). The Interim GHG Policy Statement established a NEPA significance threshold of 100,000 tons per year of carbon-dioxide-equivalent (CO₂e) as a matter of policy, which was meant to serve as interim guidance for project applicants and stakeholders and the Commission sought public comment on the statement. On March 24, 2022, the Commission, upon further consideration, made both statements draft and stated that it would not apply either statement to pending or new projects until the Commission issues any final guidance after public comment. Interim GHG Policy Statement, 178 FERC ¶ 61,197 at P 2.

¹⁷⁵ EPA Sept. 6, 2022 Comment on Final EIS at 2.

¹⁷⁶ Final EIS at 4-179

4. Landowner Concerns

75. On October 17, 2022, Reading Blue Mountain and Northern Railroad Company (Reading Railroad) filed a motion to intervene out of time in which it questioned Transco's ability to exercise the right of eminent domain with respect to two proposed above-ground access road crossings over Reading Railroad's Main Line railroad.¹⁷⁷ Specifically, Reading Railroad asserts that the requested at-grade crossings are not necessary for completion of the project, were not included among the affected roadway or railroad properties listed in Transco's application to the Commission, and expressed concern about possibility that Transco will apply any Certificate issued by the Commission to condemn land for the two Main Line at-grade access road crossings.¹⁷⁸

76. In response to Reading Railroad's filing, Transco states that the two temporary surface crossings and one underground pipeline crossing for the REAE Project were identified in its March 26, 2021 certificate application.¹⁷⁹ Transco asserts that it has followed Reading Railroad's procedures for obtaining surface licenses by applying, on April 14, 2022, for a Private Grade Crossing in accordance with Reading Railroad's "Railroad Private Grade Crossing Policy." Transco further notes that it believes the key issue in the ongoing discussions concerning the temporary above-ground crossings is "determining a mutually acceptable amount of compensation, given certain characteristics of the railroad at the location of the proposed crossing and that this issue can be resolved through further negotiations."¹⁸⁰

77. The Commission urges companies to reach mutual negotiated easement agreements with all private landowners prior to construction.¹⁸¹ We encourage Transco

¹⁷⁷ Reading Railroad Oct. 17, 2022 Motion to Intervene at 1.

¹⁷⁸ *Id.* at 2-4.

¹⁷⁹ Transco November 1 Answer to Reading Blue Mountain and Northern Railroad Company's Motion to Intervene Out of Time at 2; *id.* at 3-4 (detailing the identification and specifications for the surface crossings in its alignment sheets that were submitted with its March 2021 Certificate Application).

¹⁸⁰ Transco November 1 Answer to Reading Blue Mountain and Northern Railroad Company's Motion to Intervene Out of Time at 1.

¹⁸¹ *See, e.g., Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 241 (2016).

to continue negotiating with Reading Railroad in order to limit the need to obtain rights by way of eminent domain.

78. Another landowner impacted by the project route, Catherine Folio, has expressed concerns regarding project construction. On October 18, 2022, Ms. Folio filed a late motion to intervene and subsequently filed an answer to address Transco's "mischaracteriz[ation] of conversations with Ms. Folio, the adverse impacts of the proposed pipeline to Ms. Folio's land, and the relevant easement agreement."¹⁸² Ms. Folio objects to Transco's claim that adverse impacts identified in Ms. Folio's Motion to Intervene were addressed "to the satisfaction of Ms. Folio."¹⁸³ Ms. Folio states that, while she has entered into an easement agreement with Transco, she does not consider the easement agreement to be the "mutually agreeable settlement," and that she remains opposed to the project and continues to have serious concerns about impacts to her land from construction of the Transco pipeline. We note that if, during construction, Ms. Folio, or any landowner, has issues related to the construction activities by the pipeline company, there are several avenues for recourse.¹⁸⁴ Landowners can contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.¹⁸⁵ To ensure that landowner issues are promptly resolved, we have added environmental condition 9 to require that Transco develop, file, and implement project-specific environmental complaint resolution procedures prior to construction. The procedures

¹⁸² Catherine Folio's November 10, 2022 Answer to Transco's Response to Catherine Folio's Motion to Intervene. Ms. Folio is represented by Niskanen Center, which also represents other affected landowners in this docket.

¹⁸³ Transco Nov. 2, 2022 Answer to Catherine Folio's Motion to Intervene Out of Time at 1.

¹⁸⁴ The mandatory environmental conditions contained in the Certificate Order provide a framework to ensure that the environment is protected during project construction and that instances of non-compliance are documented and remedied. As explicitly prescribed in certificate orders, the Director of OEP has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. Thus, once the Director authorizes construction to proceed, Commission staff in OEP's Division of Gas — Environment and Engineering maintain oversight for the duration of the construction and restoration process to ensure that the pipeline and all aboveground facilities are constructed and installed in an environmentally-sound manner and consistent with the certificate requirements.

¹⁸⁵ The Landowner Helpline may assist with: construction-related concerns and damages from certificated projects; land access disputes; executed easement disputes; land restoration disputes; and noise and vibration complaints.

must provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems or concerns during Transco's construction of the REAE Project and restoration of the impacted resources. Under this condition, Transco must mail the complaint procedures to each landowner and include in its filed biweekly construction status reports, required under environmental condition 8, both the landowner-identified complaint and the measures taken by Transco to satisfy the landowner's concerns.

79. Further, Ms. Folio with her counsel, the Niskanen Center, objects to Transco's alleged communication directly with represented landowners without the knowledge and consent of those landowners' lawyers.¹⁸⁶ We remind Transco that we expect it to contact landowners with known legal representation only through those representatives.

80. Last, we note that in August and September 2022,¹⁸⁷ landowners Erin Petrosky and Raymond Grove filed comments opposing Transco's Residential Construction Plan¹⁸⁸ for their property located at milepost (MP) 19.5 on the proposed Regional Energy Lateral, which comments were subsequently withdrawn on October 28, 2022.¹⁸⁹

5. Environmental Impacts Conclusion

81. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the project, as well as the other information in the record. We are accepting the environmental recommendations in the final EIS as modified herein and are including them as conditions in Appendix B to this order. Based on our consideration of this information and the discussion above, we agree with the

¹⁸⁶ Catherine Folio November 10, 2022 Answer at 2-3.

¹⁸⁷ Erin Petrosky August 15, 2022 Public Comment at 1; Erin Petrosky and Raymond Grove, September 13, 2022 Comment.

¹⁸⁸ Transco generated site-specific Residential Construction Plans (RCP) for properties that would have occupied structures within 50 feet of the proposed construction workspace, in order to inform landowners of precise locations of project workspaces, identify measures to minimize disruption during construction, and to maintain access to the residences.

¹⁸⁹ Erin Petosky October 28, 2022 Comment Withdrawing Prior Filings; *see also* Transco November 1, 2022 Answer at 9 (emphasizing Transco's continuing efforts to negotiate with affected landowners and highlighting Ms. Petrosky's and Mr. Grove's withdrawal of comments).

conclusions presented in the final EIS and find that the project, if implemented as described in the final EIS, is an environmentally acceptable action.

IV. Conclusion

82. The proposed project will enable Transco to provide up to 829,400 Dth/d of firm transportation service from northeastern Pennsylvania to multiple delivery points in New Jersey, Pennsylvania, and Maryland. We find that Transco has demonstrated a need for the Regional Energy Access Expansion Project, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. We have analyzed the technical aspects of the project and conclude that it has been appropriately designed to achieve its intended purpose. Based on the discussion above, we find under section 7 of the NGA that the public convenience and necessity requires approval of Transco's Regional Energy Access Expansion Project, subject to the conditions in this order.

83. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analysis. Thus, Commission staff carefully reviews all information submitted. Only when staff is satisfied that the applicant has complied with all applicable conditions will a notice to proceed with the activity to which the conditions are relevant be issued. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during abandonment, construction, and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

84. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁹⁰

¹⁹⁰ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted) and *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal

85. In Order No. 871-B, the Commission adopted a policy of presumptively staying its NGA section 7(c) certificate orders during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners.¹⁹¹ Because several affected landowners have intervened and protested, and Transco has not acquired all necessary property interests, we will stay the certificate during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by the landowner, up until 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a).¹⁹² Under Order No. 871-B, the project developer “may move to preclude, or lift, a stay based on a showing of significant hardship.”¹⁹³ The Commission will seek to act expeditiously on any such motion, should Transco pursue such relief.¹⁹⁴

86. The Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, and all comments, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued authorizing Transco to construct and operate the Regional Energy Access Expansion Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) Transco is granted permission and approval of the proposed abandonments, as described in this order and in the application.

(C) The certificate authority issued in Ordering Paragraphs (A) and (B) shall be

regulation, or would delay the construction and operation of facilities approved by the Commission).

¹⁹¹ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-B, 175 FERC ¶ 61,098 (2021).

¹⁹² *Id.* P 43.

¹⁹³ *Id.* P 51.

¹⁹⁴ As the Commission stated in Order No. 871-B, we note again that “a commitment by the pipeline developer not to begin eminent domain proceedings until the Commission issues a final order on any landowner rehearing requests will weigh in favor of granting such a motion.” *Id.*

conditioned on the following:

1. applicant's completion of the authorized construction of the proposed facilities and making them available for service within three years from the date of this order, pursuant to section 157.20(b) of the Commission's regulations;
2. applicant's compliance with all applicable Commission regulations under the NGA including, paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
3. applicant's compliance with the environmental conditions listed in the Appendix to this order.

(D) The certificate authority issued in Ordering Paragraphs (A) and (B) is stayed during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners, up until 90 days following the date that a request for rehearing may be deemed to have been denied under NGA section 19(a). If no request for rehearing is filed by landowners, the stay will automatically lift following the close of the 30-day period for seeking rehearing.

(E) Transco shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in signed precedent agreements, prior to commencing construction.

(F) Transco's proposed incremental rates, as revised and conditioned above, are approved for the project. Transco is directed to charge the applicable system interruptible rate for the expansion capacity.

(G) Transco's proposal to charge its generally applicable system fuel percentage and system electric power rates to recover fuel and electric power costs associated with the project is approved.

(H) A predetermination is granted for Transco to roll the Station 505 and Station 515 replacement costs into its system rates in a future NGA section 4 rate case, absent a significant change in circumstances.

(I) Transco is directed to notify the Commission within 10 days of the abandonments.

(J) Transco shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Transco. Transco shall file written

confirmation of such notification with the Secretary of the Commission within 24 hours.

(K) New Jersey Board of Public Utilities', New Jersey Division of Rate Counsel's, and Aquashicola-Pohopoco Watershed Conservancy's untimely motions to intervene are granted.

By the Commission.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

Appendix A
Intervenors

American Petroleum Institute	Laborers International Union of North America
Atlanta Gas Light Company, et. al.	Laura Cisar
Bernadette Maher	Maya van Rossum the Delaware Riverkeeper
Cabot Oil and Gas Corporation	Michael Egenton
Carol Kuehn	Natural Gas Supply Association (DC)
Center for Liquefied Natural Gas	New Jersey Department of Environmental Protection
Charles Adonizio	New Jersey Laborers' Employers' Cooperation and Education Trust
Chemistry Council of NJ	New Jersey Natural Gas Company
Chief Oil and Gas, LLC	Pennsylvania Manufacturers Association
Christopher Neumann	Philadelphia Gas Works
Deana Luchs	Piedmont Natural Gas Company, Inc.
Delaware Riverkeeper Network	PSEG Energy Resources & Trade LLC
Duke Energy Carolinas, LLC, Duke Energy Progress, LLC, and Duke Energy Florida, LLC	Richard Stern
Energy Services Company	S. Pasricha
Exelon Corp	Sane Energy Project
Gary Frederick	Sara Gronim
James Spinola	Scott Salvigsen
International Union of Operating Engineers Local 825	Sierra Club
International Union of Operating Engineers, Washington, DC	South Jersey Resources Group, LLC
Judith Canepa	South Jersey Gas Company and Elizabethtown Gas Company
Kevin Corcoran	Southern Jersey Chamber of Commerce
Kirkman Frost	

Southern New Jersey Development
Council

Susan London

Symmetry Energy Solutions, LLC

United Association of Journeymen and
Apprentices of the Plumbing and
Pipefitting Industry of the United States
and Canada, AFL-CIO

Appendix B
Environmental Conditions

As recommended in the final environmental impact statement (EIS), this authorization includes the following conditions.

1. Transcontinental Gas Pipe Line Company, LLC (Transco) shall follow the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests) and as identified in the EIS, unless modified by the Order. Transco must:
 - a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
 - b. justify each modification relative to site-specific conditions;
 - c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
 - d. receive approval in writing from the Director of the Office of Energy Projects (OEP), or the Director's designee, **before using that modification.**
2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the Project. This authority shall allow:
 - a. the modification of conditions of the Order;
 - b. stop-work authority; and
 - c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from Project construction and operation.
3. **Prior to any construction**, Transco shall file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the

environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities

4. The authorized facility locations shall be as shown in the EIS, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Transco shall file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Transco's exercise of eminent domain authority granted under Natural Gas Act (NGA) section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Transco's right of eminent domain granted under NGA section 7(h) does not authorize it to increase the size of its natural gas facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Transco shall file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP, or the Director's designee, **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by the Commission's *Upland Erosion Control, Revegetation, and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;

- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and
- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

6. **Within 60 days of the acceptance of the authorization and before construction begins**, Transco shall file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. Transco must file revisions to the plan as schedules change. The plan shall identify:

- a. how Transco will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EIS, and required by the Order;
- b. how Transco will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
- c. the number of EIs assigned per spread, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
- d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
- e. the location and dates of the environmental compliance training and instructions Transco will give to all personnel involved with construction and restoration (initial and refresher training as the Project progresses and personnel change), with the opportunity for OEP staff to participate in the training session(s);
- f. the company personnel (if known) and specific portion of Transco's organization having responsibility for compliance;
- g. the procedures (including use of contract penalties) Transco will follow if noncompliance occurs; and

- h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - (1) the completion of all required surveys and reports;
 - (2) the environmental compliance training of onsite personnel;
 - (3) the start of construction; and
 - (4) the start and completion of restoration.
7. Transco shall employ at least one EI per construction spread. The EI shall be:
 - a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
 - b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;
 - c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
 - d. a full-time position, separate from all other activity inspectors;
 - e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
 - f. responsible for maintaining status reports.
8. Beginning with the filing of its Implementation Plan, Transco shall file updated status reports with the Secretary on a **biweekly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:
 - a. an update on Transco's efforts to obtain the necessary federal authorizations;

- b. the construction status of each spread, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
 - c. a listing of all problems encountered and each instance of noncompliance observed by the EIs during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
 - d. a description of the corrective actions implemented in response to all instances of noncompliance;
 - e. the effectiveness of all corrective actions implemented;
 - f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
 - g. copies of any correspondence received by Transco from other federal, state, or local permitting agencies concerning instances of noncompliance, and Transco's response.
9. Transco shall develop and implement an environmental complaint resolution procedure, and file such procedure with the Secretary, for review and approval by the Director of OEP, or the Director's designee. The procedure shall provide landowners with clear and simple directions for identifying and resolving their environmental mitigation problems/concerns during construction of the Project and restoration of the right-of-way. **Prior to construction**, Transco shall mail the complaint procedures to each landowner whose property will be crossed by the Project.
- a. In its letter to affected landowners, Transco shall:
 - (1) provide a local contact that the landowners should call first with their concerns; the letter should indicate how soon a landowner should expect a response;
 - (2) instruct the landowners that if they are not satisfied with the response, they should call Transco's Hotline; the letter should indicate how soon to expect a response; and

- (3) instruct the landowners that if they are still not satisfied with the response from Transco's Hotline, they should contact the Commission's Landowner Helpline at 877-337-2237 or at LandownerHelp@ferc.gov.
 - b. In addition, Transco shall include in its biweekly status report a copy of a table that contains the following information for each problem/concern:
 - (1) the identity of the caller and date of the call;
 - (2) the location by milepost and identification number from the authorized alignment sheet(s) of the affected property;
 - (3) a description of the problem/concern; and
 - (4) an explanation of how and when the problem was resolved, will be resolved, or why it has not been resolved.
10. Transco must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction of any Project facilities**. To obtain such authorization, Transco must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).
11. Transco must receive written authorization from the Director of OEP, or the Director's designee, **before placing the Project into service**. Such authorization will only be granted following a determination that rehabilitation and restoration of the right-of-way and other areas affected by the Project are proceeding satisfactorily.
12. **Within 30 days of placing the authorized facilities in service**, Transco shall file an affirmative statement with the Secretary, certified by a senior company official:
 - a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
 - b. identifying which of the conditions in the Order Transco has complied with or will comply with. This statement shall also identify any areas affected by the Project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

13. All conditions attached to the water quality certificate issued by the Pennsylvania Department of Environmental Protection, except those that the Director of OEP, or the Director's designee, identify as waived pursuant to 40 C.F.R. § 121.9, constitute mandatory conditions of the Certificate Order. **Prior to construction**, Transco shall file, for review and written approval of the Director of OEP, or the Director's designee, any revisions to its Project design necessary to comply with the water quality certification conditions.
14. **As part of its Implementation Plan**, Transco shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, a *Laflin Municipal Park Restoration Plan* that is developed in conjunction with the Borough of Laflin and describes the measures and timeframes that Transco will implement to restore the park and ballfield to existing or better use conditions. (*Section 3.4.3*)
15. **Prior to construction**, Transco shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, evidence of landowner concurrence with the site-specific construction plans for construction workspace within 10 feet of a residence and any plans that include outbuilding removal, unless the workspace is part of the existing maintained right-of-way. If Transco is unable to obtain concurrence, Transco shall file revised site-specific construction plans that maintain a 10-foot buffer between the residence and the Project workspace and avoid outbuilding removal. (*Section 4.5.2.4*)
16. Transco shall file a noise survey with the Secretary **no later than 60 days** after placing the new Compressor Station 201 in service. If full load condition noise surveys are not possible, Transco shall provide an interim survey at the maximum possible horsepower load and provide the full load survey **within six months**. If the noise attributable to the operation of Compressor Station 201 under interim or full horsepower load conditions exceeds a day-night sound level (L_{dn}) of 55 A-weighted decibels (dBA) at any nearby noise sensitive areas (NSAs), Transco shall file a report on what changes are needed and install additional noise controls to meet that level **within one year** of the facility's in-service date. Transco shall confirm compliance with the L_{dn} of 55 dBA requirements by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. (*Section 4.9.3*)
17. Transco shall file noise surveys with the Secretary **no later than 60 days** after placing in service the authorized unit(s) and uprates at Compressor Stations 195, 207, 505, and 515. If full load condition noise surveys are not possible, Transco shall provide an interim survey at the maximum possible horsepower load and

provide the full load survey **within six months**. If the noise attributable to operation of the modified stations under interim or full horsepower load conditions exceeds a L_{dn} of 55 dBA at any nearby NSAs, Transco shall file a report on what changes are needed and install additional noise controls to meet that level **within one year** of the in-service date. Transco shall confirm compliance with the L_{dn} of 55 dBA requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls. (*Section 4.9.3*)

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-000

(Issued January 11, 2023)

DANLY, Commissioner, *concurring in part and dissenting in part*:

1. I concur in the decision to grant Transcontinental Gas Pipe Line Company, LLC's (Transco) requested Natural Gas Act (NGA) section 7¹ authorizations. As in other recent NGA section 7 issuances, there are a number of flaws in this order. I have written about all of these problems extensively.² Here, I will focus on three elements of today's order which require particular attention: (1) the order's assessment of project need; (2) its stay of the certificate; and (3) its unlawful grant of late interventions.

2. *First*, I dissent from this order's reasoning in reaching its determination of project need. This order departs from Commission policy in how we assess need when reviewing an NGA section 7 application. The Commission states that "in considering all evidence in the record, including each of the studies and the binding precedent agreements for 100% of the project capacity, the Commission finds that the construction and operation of the project will provide more reliable service on peak winter days and will increase supply diversity."³ Yes, other evidence can be considered,⁴ but under the Commission's current policy, precedent agreements are by far the most objective evidence that can be introduced concerning need. I fear that this language could perhaps be read to imply that the precedent agreements for 100% of a project's capacity (by

¹ 15 U.S.C. § 717f.

² See, e.g., *Gas Transmission Nw. LLC*, 180 FERC ¶ 61,056 (2022) (Danly, Comm'r, concurring in the judgment at P 2) (discussing the breadth of the public convenience and necessity standard under the NGA); *id.* (Danly, Comm'r, concurring in the judgment at PP 3-4) (stating that the Commission should repudiate the eye-ball test established in *Northern Natural Gas Company*, 174 FERC ¶ 61,189 (2021)); *id.* (Danly, Comm'r, concurring in the judgment at P 3) (explaining that there is no standard by which the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of greenhouse gas emissions).

³ *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006, at P 25 (2023).

⁴ See, e.g., *Spire STL Pipeline LLC*, 181 FERC ¶ 61,232 (2022).

primarily *unaffiliated* shippers, no less) might, by themselves, be insufficient to demonstrate need or, perhaps more troubling, that other evidence proffered in the face of such precedent agreements, somehow tip the evidence against a finding of need. This would mark a departure from our longstanding precedent and application of the Certificate Policy Statement.⁵ To the extent that this is what is intended, the order has a problem: the Commission has not even attempted to explain its departure—an obvious violation of the Administrative Procedure Act. As a reminder, “[a]n agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books.”⁶

⁵ See, e.g., *City of Oberlin, Ohio v. FERC*, 937 F.3d 599, 606 (D.C. Cir. 2019) (“[T]his Court has also recognized that ‘it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.’”) (citation omitted); *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014) (“Petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project’s benefits by looking beyond the market need reflected by the applicant’s existing contracts with shippers. To the contrary, the policy statement specifically recognizes that such agreements ‘always will be important evidence of demand for a project.’”) (citation omitted); see also *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1311 (D.C. Cir. 2015) (explaining that “for a variety of reasons related to the nature of the market, ‘it is Commission policy to not look behind precedent or service agreements to make judgments about the needs of individual shippers.’ . . . In keeping with its policy, the Commission concluded that the evidence that the Project was fully subscribed was adequate to support the finding of market need.”) (citations omitted). But see *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747, *corrected*, 89 FERC ¶ 61,040 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (Certificate Policy Statement) (“Rather than relying only on one test for need, the Commission will consider all relevant factors reflecting on the need for the project. These might include, but would not be limited to, precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. The objective would be for the applicant to make a sufficient showing of the public benefits of its proposed project to outweigh any residual adverse effects discussed below.”).

⁶ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (citation omitted).

3. *Second*, I dissent from the Commission's decision to stay the certificate's effectiveness.⁷ The order stays the certificate under the policy established in Order No. 871-B, which provides that NGA section 7(c) certificates of public convenience and necessity will be presumptively stayed during the 30-day rehearing period and pending Commission resolution of any timely requests for rehearing filed by landowners, up until 90 days following the date that a qualifying request for rehearing may be deemed denied by operation of law.⁸ I dissent from this order's application of that policy, as a general matter, for the same reasons as stated in my dissents to Order No. 871-B⁹ and Order No. 871-C¹⁰ and in a number of prior separate statements.¹¹

4. In addition, I dissent from the decision to stay the effectiveness of the certificate based on the facts in this particular case. I cannot understand why my colleagues did not ultimately decide that the circumstances here overcome the presumptive stay policy established under Order No. 871-B and Order No. 871-C. If such a "presumption" cannot be overcome in these circumstances, when could they?

5. As the order recognizes, this project will provide more reliable service to the local distribution companies which deliver a critical commodity that is needed for home heating and for electric generation throughout the region.¹² Transco has explained that a

⁷ See *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 at P 85 & Ordering Para. (D).

⁸ See *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, 175 FERC ¶ 61,098, at P 46 (Order No. 871-B), *order on reh'g & clarification*, 176 FERC ¶ 61,062 (2021) (Order No. 871-C).

⁹ See Order No. 871-B, 175 FERC ¶ 61,098 (Danly, Comm'r, dissenting).

¹⁰ See Order No. 871-C, 176 FERC ¶ 61,062 (Danly, Comm'r, dissenting).

¹¹ See, e.g., *N. Nat. Gas Co.*, 178 FERC ¶ 61,203 (2022) (Danly, Comm'r, concurring in part & dissenting in part); *Gulf S. Pipeline Co., LLC*, 181 FERC ¶ 61,145 (2022) (Danly, Comm'r, concurring in part & dissenting in part at P 2).

¹² *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 at P 35 ("Project shippers note that the project capacity offers a more cost-effective means to satisfy their statutory obligations to provide safe, reliable, affordable, and clean natural gas service to heat homes and businesses than continued reliance on third-party peaking services in the face of growing demand.") (citing South Jersey Gas Company and Elizabethtown Gas Company Apr. 30, 2021 Motion to Intervene and Comments at 5-6; New Jersey Natural Gas Company Nov. 9, 2022 Comments (urging the Commission to approve the project stating that it will improve reliability, ensure competitive pricing and price stability, and

delay in authorization could “threaten [their] ability to meet critical construction windows established to protect certain threatened and endangered species” and that “[m]issing those construction windows would delay construction and postpone the in-service date by up to 12 months, preventing this vital (and fully subscribed) natural gas pipeline capacity from being placed into service in time for the 2023-2024 winter heating season.”¹³ For that reason, the Commission should have considered the factors that are normally considered in staying an order¹⁴ and should have refused to implement the stay because such a stay would be contrary to the public interest.

6. The project sponsor already indicated that if it misses “critical construction windows,” it could result in a delay of up to 12 months for the project to go into service. As explained in the application, “[b]y increasing gas supply access along Transco’s existing Leidy Line, the Project will support overall reliability and diversification of energy infrastructure in the Northeast, eliminating peak day constraints currently caused by limited pipeline takeaway capacity” and “the Project will benefit the public by promoting competitive markets and enhancing the security of natural gas supplies to major delivery points serving the Northeast.”¹⁵ Additionally, I understand from Commission staff that Transco coordinated with the U.S. Fish and Wildlife Service Pennsylvania Field Office and the Pennsylvania Game Commission to develop project conservation measures to protect federally-listed and state-listed bat species and that these measures include a restriction that requires that tree clearing occur between

enhance operating flexibility); South Jersey Resources Group LLC Nov. 9, 2022 Comments (asserting that the project will help address current challenges including increased natural gas prices during the winter months for consumers in the Northeast and limited power generation supplies in some regions that hinder the ability to respond to extreme weather events); and South Jersey Gas Company and Elizabethtown Gas Company Nov. 9, 2022 Comments (stating the REAE Project is critical to ensure reliable and affordable natural gas supply for New Jersey in both the near and long term)).

¹³ Transco November 8, 2022 Request for Commission Order for the Regional Energy Access Expansion Project at 1.

¹⁴ See, e.g., *Columbia Gas Transmission, LLC*, 152 FERC ¶ 61,131, at P 51 (2015) (“The Commission considers several factors when evaluating applications for stay, including: (1) if there will be irreparable injury if a stay is not granted; (2) if any interested party will be substantially harmed by the stay; and (3) if the stay is in the public interest.”).

¹⁵ Application at 6.

November 16 and March 31.¹⁶ Has the Commission, in staying the certificate, all but guaranteed that this project—one that the Commission has already found to be required by the public convenience and necessity—will not go into service in time for the 2023-2024 winter season and by the targeted in-service date of December 1, 2023?¹⁷ I remind the applicant that it is entitled under our stay policy to seek relief by requesting that the stay be lifted. And such a request for relief need not await rehearing; they need merely file a motion. Should they seek to avail themselves of their rights to challenge the stay, they would do well to consider filing such a request as soon as possible.¹⁸

7. *Third*, and finally, I dissent as to the granting of late motions to intervene filed by the New Jersey Board of Public Utilities and the New Jersey Division of Rate Counsel and the Aquashicola-Pohopoco Watershed Conservancy. In granting these interventions the Commission abandons its standard and states that the movants “have demonstrated that they each have an interest in this proceeding and granting the untimely motion will not delay, disrupt, or otherwise prejudice this proceeding.”¹⁹ Notably missing from the determination to grant the late interventions is a finding that there was “good cause for failing to file the motion[s] within the time prescribed.”²⁰ These interventions were thus granted contrary to our regulations.

For these reasons, I respectfully concur in part and dissent in part.

James P. Danly
Commissioner

¹⁶ See Transco July 1, 2021 Supplemental Information Filing.

¹⁷ See Application at 13; New Jersey Natural Gas Company July 26, 2022 Supplementary Comments in Support of Transco Regional Energy Access Expansion Project at 2 (“Transco proposes to place the REAE Project in service by December 1, 2023 to meet the needs of consumers during the 2023/2024 winter heating season.”).

¹⁸ See *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 at P 85 (“the project developer ‘may move to preclude, or lift, a stay based on a showing of significant hardship.’ The Commission will seek to act expeditiously on any such motion, should Transco pursue such relief.”) (citations omitted).

¹⁹ *Id.* P 11.

²⁰ 18 C.F.R. § 385.214(d)(1)(i).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-000

(Issued January 11, 2023)

CLEMENTS, Commissioner, *concurring*:

1. I concur with the decision to issue a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company, LLC (Transco) for its Regional Energy Access Expansion (REAE) project.¹ I do so because the decision comports with our 1999 Certificate Policy Statement. However, I write separately to highlight the inadequacies of the 1999 Certificate Policy Statement and our existing procedures for eliciting and considering evidence pertaining to project need today, in 2023. Twenty years ago, the Commission was primarily concerned about assuring there would be sufficient natural gas transportation capacity to serve growing demand for natural gas. Now, a combination of market forces and federal, state, and local climate protection policies may lead to flat or declining demand for natural gas over time. The circumstances impacting the need for new pipeline capacity are an order of magnitude more complex than they were in 1999, but our policies and practices have not evolved to address that complexity. The Commission should draw on its experience in this proceeding to update the 1999 Certificate Policy Statement – as well as our certificate application review procedures – to ensure we fully evaluate all the important variables affecting the need for each proposed new project.

2. The Commission’s 1999 Certificate Policy Statement calls on the Commission to consider “all relevant factors reflecting on need for the project.”² This information includes, but is not limited to, “precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market.”³ The 1999 Certificate Policy Statement further provides that “the evidence necessary to establish the need for the project will usually include a

¹ *Transcontinental Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (2023) (Order).

² *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at p. 17 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Certificate Policy Statement).

³ *Id.*

market study.”⁴ Notwithstanding the plain language of the policy statement, over time, the Commission has come to rely almost exclusively on precedent agreements to establish project need. Although the courts generally have deferred to the Commission’s need determinations, failure to consider credible evidence contradicting the claimed need for a project violates both the Natural Gas Act and the Administrative Procedure Act.⁵

3. In this case the Commission actually has done what it said it would do in the 1999 Certificate Policy Statement, and that is a meaningful step forward. In addition to considering Transco’s precedent agreements, we have also considered market studies and shipper submissions to determine that the proposed REAE project is needed.⁶ Nevertheless, by denying an evidentiary hearing⁷ and relying only on the paper record, we have left important questions unanswered.

4. Perhaps the most glaring omission in the Commission’s need analysis is any discussion of the weight the Commission should accord to the finding of the New Jersey Board of Public Utilities (NJ BPU) that no additional pipeline capacity is needed in New Jersey. The state has set ambitious targets for reducing greenhouse gas emissions.⁸ The NJ BPU is one of the lead agencies in New Jersey responsible for achieving those goals. It is also the principal regulator of the four New Jersey local distribution companies (LDCs) that have entered into precedent agreements for a combined 56% of the REAE project’s capacity.⁹ The NJ BPU conducted a stakeholder process and commissioned an

⁴ *Id.* at p. 19.

⁵ *See Env’tl. Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021) (vacating certificate order where Commission relied exclusively on single precedent agreement with pipeline affiliate and failed to consider credible allegations of self-dealing and evidence undermining claimed need).

⁶ Order at PP 21-35.

⁷ *Id.* at P 14.

⁸ New Jersey seeks to reduce greenhouse gas emissions by 80% below 2006 levels by 2050 and to use 100% clean energy in the electric power, transportation, and building sectors by 2050. *See* New Jersey Global Warming Response Act, N.J.S.A. 26:2C-37; New Jersey Governor Executive Order No. 274 (Nov. 10, 2021); State of New Jersey Energy Master Plan (available at https://nj.gov/emp/docs/pdf/2020_NJBPU_EMP.pdf). New Jersey’s Clean Energy Act requires state-regulated electric utilities to reduce fossil fuel consumption by 2% and gas utilities to reduce consumption by 0.75%. N.J.S.A. 34:1A-85, *et seq.*

⁹ I recognize that the remaining 44% of the REAE project’s capacity is under

independent study by London Economics International Group (the NJ Agencies Study) to determine whether New Jersey needs additional natural gas pipeline capacity. Based in part on state plans to reduce the use of natural gas, the NJ BPU adopted the NJ Agencies Study and concluded, by order, that New Jersey does *not* require additional capacity.¹⁰ Our decision accords no special weight to the NJ BPU's determination, instead treating the NJ Agencies Study and the NJ BPU's order as on a par with Transco's market study (discussed below). As more states adopt laws and policies like New Jersey's, we should expect more frequent and active participation by states and their utility regulators in our certificate proceedings.¹¹ Rather than improvising case-by-case, we should determine *as a matter of policy* how to consider and weigh relevant state laws, programs, and administrative determinations in future certificate proceedings.

5. Transco commissioned its own market study, prepared by Levitan and Associates, which finds there will be a design day capacity shortfall without the REAE project. Reliability is always a key concern for the Commission, so the reliability issues the Levitan study identifies must be taken seriously. Yet, the Levitan study contradicts the findings of the NJ BPU, which is the agency responsible for assuring that New Jersey LDCs deliver reliable natural gas service. The Levitan study takes the LDCs' design day demand forecasts at face value; it does not ask what the bases for the forecasts are or the

contract. LDCs in other states have entered into precedent agreements for 17% of the project's capacity. An affiliated natural gas marketer contracted for another 18% and an unaffiliated marketer for 9%. Notably, the bulk of the marketers' business is in New Jersey. *See* Order at PP 7-8. If the New Jersey-related capacity were taken out of the equation, I doubt we could find that Transco had met its burden of establishing the REAE project is needed.

¹⁰ *See* Order at P 22.

¹¹ New Jersey is not alone in adopting an ambitious climate program; many other state and local governments are implementing legislation and policies designed to reduce the use of fossil fuels, including natural gas. *See* Alexandra B. Klass, *Evaluating Project Need for Natural Gas Pipelines in an Age of Climate Change: A Spotlight on FERC and the Courts*, 39 Yale J. on Reg. 658, 675 (2022) (listing state and local enactments and programs). State regulators may lack the statutory authority or procedures to approve an LDC's proposed precedent agreement in advance, making the Commission's certificate proceeding their only avenue for preventing an LDC's execution of a precedent agreement the regulator deems unnecessary or otherwise imprudent. State regulators also may see after-the-fact prudence reviews as counterproductive because denying cost recovery to the LDC could impair its credit rating, thereby increasing its cost of capital, and ultimately its rates, which reflect the cost of capital.

degree to which the forecasts reflect state energy policies and programs.¹² Nor has the Commission endeavored to answer those questions itself.

6. Other important need-related questions include the timeline for, and likely efficacy of, New Jersey's building electrification and other planned measures to reduce reliance on natural gas. Having confined itself to the paper record that the parties created, the Commission cannot answer these questions. Leaving the job half-done, the Commission essentially dismisses the totality of New Jersey's efforts with the observation that the "non-pipeline" alternatives addressed in the NJ BPU's order are not mandatory.¹³ Although this approach may be defensible under the 1999 Certificate Policy Statement, it surely is not optimal.

7. Some may ask why the Commission should concern itself with an LDC's actual need for natural gas since the state utility regulator can decide the LDC imprudently entered into the agreement. The answer is simple. The Commission is responsible for making its own public interest determination under the Natural Gas Act, and the public interest encompasses much more than the costs that may be unjustifiably imposed on the LDC's ratepayers. The Commission cannot avoid its statutory responsibilities through reflexive reliance either on the views of state utility regulators or a project sponsor's precedent agreements. Nor can we whistle past the fact that the wider public ultimately pays the price when the Commission allows construction of unneeded new capacity. That price may include the permanent loss of land taken by eminent domain, other property damage, disruption to environmental justice and other communities in the project vicinity, and environmental damage.

8. With so much at stake, and so many variables affecting future demand for natural gas, the Commission's relatively superficial approach to evaluating project need will become increasingly untenable, both legally and practically. We should update our Certificate Policy Statement to provide for the full evaluation of *all* relevant information pertaining to need, including the effect of relevant federal, state, and local policies and programs on demand for natural gas to be transported by the proposed project. The Commission also should clarify that data requests, independent Commission staff analyses, and evidentiary hearings are appropriate tools to include in our need evaluation toolbox. In short, it is time for the Commission to implement policies and practices that reflect today's realities.

¹² See Order at P 27.

¹³ Order at P 31. The Commission has not asked and therefore does not know what progress New Jersey has made or likely will make implementing its nearly 300-page Energy Master Plan, issued in 2020, which describes the measures the state will take to meet its climate goals.

For these reasons, I respectfully concur.

Allison Clements
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-000

(Issued January 11, 2023)

CHRISTIE, Commissioner, *concurring*:

1. I support granting the Motion to Intervene Out of Time and to Lodge (“Motion to Intervene and Lodge”) jointly filed by the New Jersey Board of Public Utilities (“NJBPU”) and the New Jersey Division of Rate Counsel.¹ While the views of state officials are always due respectful consideration, in this case the position and views of the NJBPU are somewhat less than clear based on the history of this case. The NJBPU did not timely intervene to oppose this specific project (hence, the need for the Motion to Intervene Out of Time and Lodge). Nor does the NJBPU explicitly ask the Commission to *reject* this specific project, but only to accept a third-party study by London Economics² (“London Study”) that, as the Motion puts it, “will *help the Commission determine whether New Jersey requires any additional natural gas pipeline capacity.*”³ While the NJBPU indicates it accepts the “findings” of the London Study, as best as I can determine, that study was a general study applicable statewide, not to this specific project. But even assuming the NJBPU is implicitly opposed to the project, the record does not indicate that the NJBPU submitted any information explaining why the local gas distribution companies (“LDCs”) in New Jersey, which entered into contracts to take natural gas supply from this pipeline — LDCs which the NJBPU regulates—were wrong to do so or could have obtained alternative sources of gas supply to serve their residential, commercial and industrial customers,⁴ or would incur shipping costs that would be

¹ New Jersey Agencies’ Motion to Intervene Out of Time and Motion to Lodge, Docket No. CP21-94-000 (filed Jul. 11, 2022).

² Analysis of Natural Gas Capacity to Serve New Jersey Firm Customers, London Economics International LLC (Nov. 5, 2021) (London Study), attached to *In the Matter of the Exploration of Gas Capacity and Related Issues*, Docket No. GO19070846 (Jun. 29, 2022) (NJ BPU Order) submitted with New Jersey Agencies’ Motion to Intervene and Lodge, Docket No. CP21-94-000 (filed Jul. 11, 2022).

³ Motion to Intervene and Lodge at 1 (emphasis added).

⁴ As noted in the Order (*see* PP 28-31), the London Study considers several alternatives on both the demand and the supply sides that are merely theoretical. It

unreasonable or imprudently incurred or would be unnecessary to provide reliable service to customers. And, as the Order notes, New Jersey constitutes only about half of the need for the project, so the need issue is broader than one state.⁵

2. The London Study is one of three studies constituting part of the record in this case.⁶ The London Study's conclusions are at variance with another study, offered by the Applicant,⁷ also presented on the question of need.

3. So the question is how much weight the third-party studies submitted herein should receive. I am aware that the Commission has encouraged the submission of such studies in certificate cases,⁸ but, as I have noted before, a third-party study that has never been authenticated by a witness (such as the study's author) who could testify and be subject to cross-examination under oath would likely not be admitted into evidence under standard rules of evidence in any judicial proceeding.⁹ We generally accept, however,

speculates, for example, that some of the NJ LDCs' need could be met with technologies and infrastructure that are not presently available. *See, e.g.*, London Study at 56 ("Green Hydrogen" is a potential solution that is "still in an early stage of development"); and 59 ("natural gas response programs are still in their infancy").

⁵ Order at P 28.

⁶ The other two studies are the Skipping Stone Study submitted by EDF and the NJ Conversation Fund and the Levitan Study submitted by Transco. Each of the three studies is discussed in the Order. *See* Order at PP 21-35.

⁷ Transco April 22, 2022 Response to Additional Information Request at Attachment 1D (Transco Levitan Study).

⁸ *See Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, p.61,748 (1999) (1999 Certificate Policy Statement) ("evidence necessary to establish the need for [a new] project will usually include a market study.")

⁹ *See generally*, Fed. R. Evidence Rule 802. Earlier this year, I stated, "ideally, a third-party report without a witness who can authenticate it and be cross-examined on it would not even be admitted as evidence in any serious evidentiary proceeding." *Midcontinent Independent System Operator, Inc.*, 179 FERC ¶ 61,124 (May 18, 2022) (Christie, Concurring). I added, "I recognize that the Commission sometimes conducts paper hearings. However, in such proceedings, parties at least can submit competing testimony and evidence." *Id.* at n. 14.

this type of evidence in FERC proceedings like this one,¹⁰ which is legislative in nature, not judicial.

4. Weighed against the evidence from third-party studies in this proceeding is uncontested evidence that several shippers — *unaffiliated* with the pipeline developer — freely executed agreements to take service on the facility.¹¹ In fact, the precedent agreements cover 100% of the capacity of the REAE Project. Several of these shippers are LDCs that serve residential and commercial customers in New Jersey and executed agreements because they need the gas supply to serve their customers.¹² Meanwhile, as discussed in the Order, even while admitted to the record, each of the third-party studies suffers certain shortcomings that further limit their usefulness for aiding our decision-making.¹³ The third-party studies submitted in this proceeding are conflicting, are part of the record but, on balance, do not outweigh the persuasive evidence of need represented by the executed agreements to take service.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

¹⁰ See, e.g., *PJM Power Providers Grp. v. FERC*, 880 F.3d 559, 563 (D.C. Cir. 2018) (declining to convene a live hearing to adjudicate between competing experts is within FERC’s discretion) (citing *Minisink Residents for Env’t Pres. & Safety v. FERC*, 762 F.3d 97 114-15 (D.C. Cir. 2014) and *Blumenthal v. FERC*, 613 1142, 1144-45 (D.C. Cir. 2010)).

¹¹ See 1999 Certificate Policy Statement, 88 FERC ¶ 61,227 at p.61,748 (noting that precedent agreements will always “constitute significant evidence of demand,” and that when a proposed project “has precedent agreements with multiple new customers [it] may present a greater indication of need than a project with only a precedent agreement with an affiliate.”)

¹² See Order at P 21 (citing statements by various New Jersey LDCs supporting the need for the REAE Project in order to ensure reliability, promote operating flexibility, and provide rate stability to customers). To repeat, it is worth bearing in mind, as the Order notes, that New Jersey constitutes only about half of the need the REAE Project is intended to meet. *Id.* at P 28.

¹³ Order at PP 21-35.

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182 FERC ¶ 62,146
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-001

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW AND
PROVIDING FOR FURTHER CONSIDERATION

(March 13, 2023)

Rehearing has been timely requested of the Commission's order issued on January 11, 2023, in this proceeding. *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (2023). In the absence of Commission action on a request for rehearing within 30 days from the date it is filed, the request for rehearing may be deemed to have been denied. 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713 (2022); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 15 U.S.C. § 717r(a), the requests for rehearing of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 15 U.S.C. § 717r(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper.

Debbie-Anne A. Reese,
Deputy Secretary.

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182 FERC ¶ 61,148
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Willie L. Phillips, Acting Chairman;
James P. Danly, Allison Clements,
and Mark C. Christie.

Transcontinental Gas Pipe Line Company, LLC Docket No. CP21-94-001

ORDER ON REHEARING, GRANTING CLARIFICATION, DENYING STAY, AND
DISMISSING WAIVER

(Issued March 17, 2023)

1. On January 11, 2023, the Commission issued an order authorizing Transcontinental Gas Pipe Line Company, LLC (Transco) to construct and operate the Regional Energy Access Expansion Project (REAE or project).¹ On February 10, 2023, the following groups filed timely requests for rehearing of the Certificate Order: (1) New Jersey Conservation Foundation, New Jersey League of Conservation Voters, Aquashicola Pohopoco Watershed Conservancy, and affected landowner Catherine Folio (together, NJCF); (2) Delaware Riverkeeper Network and Maya K. van Rossum (together, Riverkeeper); and Food & Water Watch and Sierra Club (together, Sierra Club).² On February 10, 2023, the New Jersey Board of Public Utilities (NJ BPU) and the New Jersey Division of the Rate Counsel (Rate Counsel) (together, New Jersey Agencies) filed a motion for clarification of certain aspects of the Certificate Order. On February 10, 2023, the New Jersey Division of the Rate Counsel submitted a letter expressing support for, and purporting to join, NJCF's rehearing request and motion for a stay of the Certificate Order.

¹ *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (2023) (Certificate Order).

² With its rehearing request, NJCF submitted a motion for a stay of the Certificate Order until the conclusion of judicial review. *See* NJCF Rehearing Request at 51-59. In its rehearing request, Sierra Club requested the Commission stay the Certificate Order pending the final disposition of its rehearing request. *See* Sierra Club Rehearing Request at 1, 3, 26.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by section 19(a) of the Natural Gas Act (NGA),⁴ we are modifying the discussion in the Certificate Order and continue to reach the same result in this proceeding, as discussed below.⁵ Additionally, we grant the motion for clarification and deny the motions for stay.

I. Background

3. On March 26, 2021, Transco filed an application, pursuant to sections 7(b) and 7(c) of the Natural Gas Act (NGA)⁶ and Part 157 of the Commission's regulations,⁷ requesting authorization to construct and operate the REAE.⁸ The REAE is an incremental expansion of Transco's existing pipeline system consisting of two components: (1) modernization of certain compression facilities; and (2) the construction of new facilities to provide 829,400 dekatherms per day (Dth/d) of firm transportation capability from northeastern Pennsylvania to multiple delivery points in New Jersey, Pennsylvania, and Maryland.⁹

4. Transco proposes to construct and operate approximately 22.3 miles of 30-inch-diameter lateral pipeline (the Regional Energy Lateral) and 13.8 miles of 42-inch-diameter loop pipeline (the Effort Loop) in Pennsylvania; one new compressor station in New Jersey; modifications to five existing compressor stations in Pennsylvania and New

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁴ 15 U.S.C. § 717r(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁵ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the Certificate Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁶ 15 U.S.C. § 717f(b), (c).

⁷ 18 C.F.R. pt. 157 (2022).

⁸ Certificate Order, 182 FERC ¶ 61,006 at P 1.

⁹ *Id.* P 3.

Jersey; modifications to existing pipeline tie-ins, valves, regulators, and meter regulating stations in Pennsylvania, New Jersey, and Maryland; additional ancillary facilities such as regulation controls, valves, cathodic protection, communication facilities, and pig launchers and receivers in Pennsylvania; and to abandon and replace certain existing compression facilities with higher horsepower compression at Compressor Stations 505 and 515.¹⁰

5. Transco held an open season for the project on March 8, 2019, a supplemental open season from April 28, 2020 to May 28, 2020, and a reverse open season from April 24, 2020 to May 25, 2020.¹¹ Additionally, Transco conducted a supplemental open season in May 2021 for an increment of firm transportation capacity that was not offered in Transco's previous open seasons. As a result of the open seasons, Transco executed binding precedent agreements for the full project capacity with eight project shippers for primary terms ranging from 15 to 17 years.¹² The majority of the project's capacity (approximately 56%) is subscribed by New Jersey local distribution companies (LDC): New Jersey Natural Gas Co., South Jersey Gas Co., PSEG Power LLC, and Elizabethtown Gas Co., LLC. PECO Energy Company, a Pennsylvania LDC, and Baltimore Gas and Electric Company, a Maryland LDC, have contracted for 12% and 5%, respectively, of the project capacity.¹³ The remaining capacity is subscribed by Williams Energy Resources, LLC (18%),¹⁴ a natural gas marketer with a portfolio of various types of customers, and South Jersey Resources, LLC (9%), a natural gas marketer operating primarily in New Jersey but with wholesale customers throughout the region.¹⁵

¹⁰ *Id.* PP 1, 4.

¹¹ *Id.* P 7.

¹² *Id.*

¹³ *Id.* P 8.

¹⁴ Both Williams Energy Resources, LLC and Transco are affiliates of Williams Energy Company. The other seven shippers are not affiliated with Transco.

¹⁵ Certificate Order, 182 FERC ¶ 61,006 at P 8. For a more detailed breakdown of the intended use of the natural gas by customer, see the table at P 7 of the Certificate Order.

II. Procedural Issues

A. Deficient Request for Rehearing

6. The NGA requires that a request for rehearing set forth the specific grounds on which it is based.¹⁶ Additionally, the Commission's regulations provide that requests for rehearing must "[s]tate concisely the alleged error in the final decision" and "include a separate section entitled 'Statement of Issues,' listing each issue in a separately enumerated paragraph" that includes precedent relied upon.¹⁷ Consistent with these requirements, the Commission "has rejected attempts to incorporate by reference arguments from a prior pleading because such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant."¹⁸

7. On February 10, 2023, the Rate Counsel submitted a letter expressing support for, and purporting to join, NJCF's rehearing request and motion for a stay of the Certificate Order. The letter identifies two purported errors in the Certificate Order: (1) the Commission should have given more weight to a London Economics Institute capacity study proffered by the New Jersey Agencies because approximately 76% of the capacity from the REAE project will flow into New Jersey, rather than the Commission's estimate

¹⁶ 15 U.S.C. § 717r(a).

¹⁷ 18 C.F.R. § 385.713(c) (2022).

¹⁸ *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy*, 127 FERC ¶ 61,269, at P 295 (2009) (*San Diego Gas & Elec. Co.*); see also *Tenn. Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007, at P 7 (2016) ("[T]he Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent. Bootstrapping of arguments is not permitted.") (citations omitted); *ISO New England, Inc.*, 157 FERC ¶ 61,060, at P 4 (2016) (explaining that the identical provision governing requests for rehearing under the Federal Power Act "requires an application for rehearing to 'set forth specifically the ground or grounds upon which such application is based,' and the Commission has rejected attempts to incorporate by reference grounds for rehearing from prior pleadings") (citations omitted); *Alcoa Power Generating, Inc.*, 144 FERC ¶ 61,218, at P 10 (2013) ("The Commission, however, expects all grounds to be set forth in the rehearing request, and will dismiss any ground only incorporated by reference.") (citations omitted).

of 56%; and (2) the Commission failed to account for New Jersey's statutory requirement that natural gas facilities reduce their demand by 1.1% by 2026.¹⁹

8. We reject the Rate Counsel's filing to the extent it purports to join NJCF's request for rehearing because it does not satisfy the applicable pleading standards. First, the Rate Counsel fails to "include[] representative Commission and court precedent" upon which it relies to demonstrate an error in the Certificate Order.²⁰ Next, the Rate Counsel's rehearing request is deficient because it fails to include a Statement of Issues, as required by Rule 713 of the Commission's Rules of Practice and Procedure.²¹ Finally, the Commission has repeatedly rejected attempts to incorporate by reference arguments from another pleading because such incorporation fails to inform the Commission as to which arguments from the referenced pleading are relevant and how they are relevant.²² Accordingly, we reject the Rate Counsel's request for rehearing.

B. Motions for Stay

9. NJCF and Sierra Club request that the Commission stay the Certificate Order pending issuance of an order on rehearing.²³ Additionally, NJCF requests stay of the Certificate Order "until the conclusion of judicial review."²⁴ This order addresses and denies or dismisses the requests for rehearing; accordingly, we dismiss Sierra Club's motion for stay as moot.

10. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act: a stay will be granted if the Commission finds that

¹⁹ Rate Counsel February 10, 2023 Filing at 1-2.

²⁰ 18 C.F.R. § 385.713(c)(2); *see* 15 U.S.C. § 717r(a).

²¹ 18 C.F.R. § 385.713.

²² *See Jordan Cove Energy Project L.P.*, 171 FERC ¶ 61,136, at PP 15, 17 (2020); *San Diego Gas & Elec. Co. v. Sellers of Mkt. Energy*, 127 FERC ¶ 61,269 at P 295.

²³ NJCF Rehearing Request at 1-3, 51-59; Sierra Club Rehearing Request at 1, 3, 26.

²⁴ NJCF Rehearing Request at 1-3, 51-59.

“justice so requires.”²⁵ Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether a stay would substantially harm other parties, and whether the stay is in the public interest.²⁶ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.²⁷

11. In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur.²⁸ The injury must be both certain and great and it must be actual, not theoretical. Bare allegations of what is likely to occur do not suffice.²⁹ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.³⁰ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.³¹ A stay generally “will not be granted against something merely feared as liable to occur at some indefinite time in the future.”³²

12. In support of its claim of irreparable harm, NJCF states that it represents landowner Catherine Folio, whose land could be irreversibly damaged before the Commission and the courts can fully evaluate the significant evidence showing lack of

²⁵ 5 U.S.C. § 705.

²⁶ See *Const. Pipeline Co., LLC*, 154 FERC ¶ 61,092, at P 9 (2016); *Transcon. Gas PipeLine Co., LLC*, 150 FERC ¶ 61,183, at P 9 (2015); *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 14 (2012).

²⁷ See, e.g., *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,236, at P 8 (2016); *Transcon. Gas PipeLine Co., LLC*, 150 FERC ¶ 61,183 at P 9; *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022 at P 14.

²⁸ See *Transcon. Gas PipeLine Co., LLC*, 150 FERC ¶ 61,183 at P 10 (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (*Wis. Gas. Co.*)).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Wis. Gas Co.*, 758 F.2d at 674 (quoting *State of Conn. v. Ma.*, 282 U.S. 660, 674 (1931)).

need for the project.³³ Specifically, NJCF asserts that without a stay Ms. Folio's land could suffer from increased flooding; contamination of a creek, water table, and well on her property due to construction of a pipeline crossing; adverse impacts to her storage sheds;³⁴ and damage due to tree felling and pipeline construction.³⁵ We find that NJCF's asserted impacts are speculative and NJCF has not shown that irreparable injury is "likely" to occur. Further, the Commission included protective conditions in the Certificate Order and the final Environmental Impact Statement (Final EIS) to mitigate construction impacts on landowner property.³⁶

13. Additionally, NJCF states that, absent a stay, any project construction activities or permanent land alterations pending appeal will cause irreparable environmental harm to intervenors.³⁷ Specifically, NJCF asserts that construction will irreparably harm wetlands

³³ NJCF Rehearing Request at 51.

³⁴ In her November 17, 2022 reply comments, Ms. Folio states that construction of the pipeline could impact at least one of her storage sheds, potentially located next to or within the temporary right-of-way. Catherine Folio and Niskanen Center November 17, 2022 Reply Comments, Exhibit 1 at 3. In the same filing, Ms. Folio also indicated that Transco moved the work area boundary to accommodate both her wells and storage sheds. *Id.* Exhibit 1 at 4. *See* Transco Jan. 17, 2023 Implementation Plan, attach. 4-1 (13 of 16) at 11 (showing that the temporary right-of-way around milepost 49.50 avoids Ms. Folio's shed).

³⁵ NJCF Rehearing Request at 52.

³⁶ Certificate Order, 182 FERC ¶ 61,006 at P 60 (citing Final EIS at 4-32) (to reduce construction impacts to water wells or springs, Transco is required to implement its *Upland Erosion Control, Revegetation and Maintenance Plan* and *Wetland and Waterbody Construction and Mitigation Procedures*, Transco's *Construction Spill Prevention and Response Procedures for Oil and Hazardous Materials*, *Blasting Plan*, and other best management practices designed to minimize erosion and protect environmental resources); *id.* P 78, env't cond. 8 (Transco must mail complaint procedures to each landowner and include in its filed biweekly construction status reports both the landowner-identified complaint and the measures taken by Transco to satisfy the landowner's concerns); *id.* P 78, env't cond. 9 (requiring Transco to develop, file, and implement project-specific complaint resolution procedures prior to construction); *id.* P 78 (stating that any concerns or disputes over land use of access may be addressed by the Commission's Landowner Helpline).

³⁷ NJCF Rehearing Request at 53.

by converting previously forested and scrub-shrub wetlands to emergent wetlands; removing trees, shrubs, brush, roots, and rocks to level the right-of-way surface; impacting 603.1 acres of vegetation; and disturbing wildlife habitat.³⁸ NJCF also asserts that project construction will irreversibly impact the watershed affecting water quality, wildlife, fisheries, and vegetation.³⁹

14. The Final EIS addresses the project's impacts to vegetation and wetlands, water quality, and habitat. We recognize that the primary impact of the project on wetlands will be the alteration of wetland function due to vegetation clearing: for example, forested wetlands along the pipeline right-of-way will be converted to emergent wetlands and remain as open land and herbaceous communities.⁴⁰ However, Transco will minimize wetland and forest impacts by collocating a majority of the pipeline facilities with existing utility rights-of-ways (approximately 60% of Transco's Regional Energy Lateral and 100% of its Effort Loop)⁴¹ and will implement measures in its project-specific procedures to minimize impacts to wetlands.⁴² With respect to impacts to vegetated lands, Transco is required to stabilize and restore vegetated areas in accordance

³⁸ *Id.* at 54-55.

³⁹ *Id.* at 54-55.

⁴⁰ Final EIS at 4-37.

⁴¹ *Id.* at 4-44. *See id.* at 2-9 ("The width of the construction rights-of-way would be reduced to 75 feet in wetland areas where feasible and through other sensitive areas such as waterbodies, sensitive biological areas, and residential lands, as necessary."); Transco June 15, 2021 Response to Environmental Information Request, attach. 13 at 28 (showing that in wetlands, Transco will collocate the pipeline on 25-feet of existing permanent right-of-way and 25-feet of new permanent right-of-way, and will use 25-feet of temporary work space for construction).

⁴² *Id.* 4-38 to 4-39 (Transco's measures include: marking wetland boundaries; avoid cutting vegetation and grind stumps to ground level and just above ground level, respectively, and leaving root systems in place; locating alternative temporary work stations at least 50 feet from wetland boundaries; installing sediment barriers along the entire construction right-of-way at all waterbody/wetland crossings; segregate the top 12 inches of topsoil from the area disturbed by trenching in non-saturated wetlands; dewater trenching in a manner that will not cause erosion; install trench plugs/breakers at the banks of all waterbodies at wetland crossings immediately after trench excavation to prevent water diversion to upland portions of the pipeline trench; implement spill prevention and response protocols measures; limit vegetation maintenance during operation in wetlands

to a 10-foot-wide herbaceous corridor and removal of trees and shrubs within 15 feet of the pipeline centerline; and prohibit herbicide use within 100 feet of wetlands during construction and operation of the pipeline).

with its *Upland Erosion, Revegetation and Maintenance Plan*,⁴³ local agency or organization requirements, and relevant landowner agreements. Transco will implement mitigation measures to minimize or avoid potential construction impacts that could result in soil erosion, which Transco will maintain throughout construction until either the completion of restoration or replacement with permanent erosion controls.⁴⁴ Additionally, to minimize the spread of invasive species, Transco will implement its Invasive Species Management Plan to prevent, mitigate, and control the spread of noxious and invasive weeds during ground-disturbing activities.⁴⁵ To prevent habitat loss due to tree felling, Transco will develop a Tree Replanting Plan.⁴⁶ Finally, to minimize impacts to waterbodies and fisheries, Transco will implement mitigation measures included in its *Wetland and Waterbody Construction and Mitigation Procedures*, Spill Plan, Blasting Plan, and other best management practices.⁴⁷

⁴³ *Id.* at 4-16 (Transco's erosion control measures include interceptor diversions and sediment filter devices such as silt fences, would be installed immediately following land disturbing activities).

⁴⁴ *Id.*

⁴⁵ *Id.* at 4-46—4-47 (Transco's Invasive Species Management Plan includes measures to: provide noxious weed training, remove soil and vegetation from machinery to prevent transport of noxious weeds; properly dispose of collected soil and plant material; monitor for invasive species following construction; and treat weed populations with appropriate methods to prevent spread).

⁴⁶ *Id.* at 4-55 (Transco's Replanting Plan includes voluntary replanting of trees in forested temporary workspace that is greater than 15 feet from the pipeline centerline, with specific locations pending landowner approval. Transco anticipates replanting at a density of 435 trees per acre and including a variety of native sapling species, such as red maple (*Acer rubrum*), black gum (*Nyssa sylvatica*), pin oak (*Quercus palustris*), silver maple (*Acer saccharinum*), American sycamore (*Platanus occidentalis*), swamp white oak (*Quercus bicolor*), yellow poplar (*Liriodendron tulipifera*), and black cherry (*Prunus serotina*)).

⁴⁷ *Id.* at 4-30—4-32, 4-42 (Transco's plan includes measures to would minimize erosion and sedimentation, reduce compaction, manage dewatering, and restore pre-existing grades, and vegetation).

15. The EIS concluded and we agree that, with implementation of Transco's plans and the Commission's mitigation measures, construction and operation of the project will not have a significant impact on soil erosion, water quality, vegetation, surface waters, wetlands, fisheries, or wildlife.⁴⁸ NJCF has not shown that the mitigation measures are insufficient to prevent irreparable harm.⁴⁹ Accordingly, we find that NJCF's claims of environmental impacts do not constitute evidence of irreparable harm.⁵⁰

16. Where, as here, a movant has not established that it will suffer irreparable harm absent a stay, the Commission need not examine other factors.⁵¹ Because NJCF has not demonstrated that absent a stay there will be irreparable harm, we find that justice does not require a stay.

C. Motion for Waiver

17. On February 14, 2023, Transco filed a motion requesting that the Commission issue Transco authorization to proceed with the limited activity of non-mechanized tree

⁴⁸ *Id.* at 4-16—4-17 (soil erosion and revegetation potential), 4-24 (groundwater), 4-40 (wetlands), 4-43 (fisheries), 4-51 (vegetation), 4-57 (wildlife).

⁴⁹ *See, e.g., Mountain Valley Pipeline, LLC*, 174 FERC ¶ 61,192, at P 23 (2021) (“unsupported assumptions that mitigation measures will either be ignored or will fail” is insufficient to show irreparable harm).

⁵⁰ *See Nat'l Fuel Gas Supply Corp.*, 160 FERC ¶ 61,043, at P 9 (2017) (“These generalized claims of environmental harm do not constitute sufficient evidence of irreparable harm that would justify a stay”); *Tenn. Gas Pipeline Co., L.L.C.*, 155 FERC ¶ 61,087, at P 5 (2016) (finding that a “generalized claim [of environmental harm] does not constitute evidence of irreparable harm that would justify a stay”); *Fla. Se. Connection, LLC*, 154 FERC ¶ 61,264, at P 8 (2016) (denying stay premised upon “generalized environmental harm without identifying specifics”); *Empire Pipeline, Inc.*, 153 FERC ¶ 61,379, at P 11 (2015) (denying stay where movant “provided only unsupported, generalized allegations about environmental harm resulting from the project”); *Transcon. Gas Pipe Line*, 150 FERC ¶ 61,183 at P 19 (denying stay request where movant “only asserts generalized environmental harm to its members without identifying specifics”); *Tenn. Gas Pipeline Co.*, 96 FERC ¶ 61,116, at 61,446 (2001) (“general allegations do not constitute evidence of irreparable harm that would justify staying the orders in this proceeding”).

⁵¹ *Tenn. Gas Pipeline Co., LLC*, 160 FERC ¶ 61,062, at P 4 (2017).

falling on the REAE route and waive section 157.23(b) of the Commission's regulations to permit the authorization.⁵² Section 157.23 precludes the issuance of authorizations to proceed with construction of projects authorized under NGA sections 3 and 7 during the period for filing requests for rehearing of the initial orders or while rehearing is pending, subject to specific limitations.⁵³ This order addresses and denies or dismisses the requests for rehearing; accordingly, we dismiss Transco's motion for waiver as moot.

D. Evidentiary Hearing

18. NJCF, Riverkeeper, and Sierra Club argue that the Commission should revisit its denial of NJCF's motion for evidentiary hearing.⁵⁴ NJCF argues that questions regarding self-dealing have been left untouched and that the Commission failed to meaningfully engage with evidence undermining the project proponent's assertions regarding the need for the project.⁵⁵ According to NJCF, an evidentiary hearing would test the veracity and validity of data and analyses.⁵⁶ NJCF also argues that by failing to "engage" with its Skipping Stone Study, the Commission misconstrued certain data, failed to ask additional questions, and did not attempt to reconcile different conclusions those analyses reached.⁵⁷

19. Riverkeeper states that the Commission erred by denying NJCF's, Frederick Pottger, Jr.'s, and Christina Rogers' motion for an evidentiary hearing.⁵⁸ Riverkeeper contends that the Commission's failure to hold an evidentiary hearing prevented it from adequately assessing competing studies, including the Transco Levitan Study and the NJ

⁵² Transco Feb. 14, 2023 Motion for Waiver at 1 (citing Transco Feb. 15, 2023 Notice to Proceed Request; 18 C.F.R. § 157.23(b) (2022)).

⁵³ *Limiting Authorizations to Proceed with Constr. Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020).

⁵⁴ NJCF Rehearing Request at 32-33; Riverkeeper Rehearing Request at 9-11; Sierra Club Rehearing Request at 6.

⁵⁵ NJCF Rehearing Request at 32.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Riverkeeper Rehearing Request at 9-11.

Agencies' study.⁵⁹ Similarly, Sierra Club states that an evidentiary hearing would have allowed the Commission to gather more information regarding New Jersey's energy efficiency, renewable energy, and decarbonization efforts, so that the Commission could truly determine need for the project.⁶⁰

20. In the Certificate Order, the Commission determined that all issues of material fact relating to Transco's proposal were capable of being resolved on the basis of the written record, including the issue of need, regarding which the record contains substantial evidence.⁶¹ Accordingly, the Commission denied NJCF's request for evidentiary hearing.⁶² As stated previously, aside from making generalized statements, NJCF provides no basis to support its claims that Transco has engaged in self-dealing.⁶³ Despite NJCF and Riverkeeper's assertions, they have "not shown that a material issue of fact exists that the Commission could not, and cannot, resolve on the basis of the written record."⁶⁴ The written record contains significant evidence on the issue of need in the form of precedent agreements subscribing to 100% of the project's capacity. The record also contains additional evidence relating to need, including shipper comments and market studies, which we considered and discuss below.⁶⁵ NJCF, Riverkeeper, and all parties to the proceeding had the opportunity to submit their own evidence, as well as view and respond to other record evidence.⁶⁶

21. It is common Commission practice to provide for paper hearing procedures regarding proposed infrastructure projects.⁶⁷ The courts have found that the

⁵⁹ *Id.* at 10-11.

⁶⁰ Sierra Club Rehearing Request at 6.

⁶¹ Certificate Order, 182 FERC ¶ 61,006 at P 14.

⁶² *Id.*

⁶³ NJCF Rehearing Request at 25-29.

⁶⁴ *PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 at P 12 (2018).

⁶⁵ Certificate Order, 182 FERC ¶ 61,006 at PP 21-35.

⁶⁶ *See PennEast Pipeline Co., LLC*, 164 FERC ¶ 61,098 at P 12 (making substantially same argument).

⁶⁷ *See, e.g., Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) ("[The Commission] need not conduct such [an evidentiary] hearing if [the issues at hand] may

Commission's choice whether to hold an evidentiary hearing "is generally discretionary"⁶⁸ and that mere allegations of disputed facts are insufficient to mandate a hearing.⁶⁹ "In general, FERC must hold an evidentiary hearing 'only when a genuine issue of material fact exists,' ... and even then, 'FERC need not conduct such a hearing if [the disputed issues] may be adequately resolved on the written record.'"⁷⁰ NJCF, Riverkeeper, and Sierra Club make substantially similar arguments here to those that were rejected in *Minisink*.⁷¹ There, the court found no abuse of discretion where the Commission denied a request for evidentiary hearing, and instead, resolved the factual issue on the written record, "declining to interpret the [report] as the smoking-gun evidence Petitioners portrayed it to be."⁷² Similarly, here we find sufficient evidence in the written record to resolve all genuine issues of material fact, and we thus continue to find an evidentiary hearing unwarranted.

III. Discussion

A. Motion for Clarification

22. New Jersey Agencies seek clarification of two aspects of the Certificate Order. First, they seek clarification of certain statements made in the Certificate Order regarding a report conducted by consultants London Economics International which it submitted to

be adequately resolved on the written record."); *Tenn. Gas Pipeline Co., LLC*, 158 FERC ¶ 61,110, at P 12 (2017) (concluding that all material facts related to the proposal were capable of being resolved on the basis of the written record).

⁶⁸ *Blumenthal v. FERC*, 613 F.3d 1142, 1144 (D.C. Cir. 2010) (quoting *Cerro Wire & Cable v. FERC*, 677 F.2d 124, 128 (D.C. Cir. 1982)).

⁶⁹ *Id.* ("It is well established in the context of [Commission] proceedings that 'mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support' their claim") (quoting *Cerro*, 677 F.2d at 129).

⁷⁰ *Cajun Elec. Power Coop., Inc. v. FERC*, 28 F.3d 173, 177 (D.C. Cir. 1994) (citations omitted).

⁷¹ 762 F.3d at 114 (rejecting arguments that the Commission improperly refused to hold an evidentiary hearing to resolve "several key factual disputes" and upholding the Commission's practice of resolving issues on the written record).

⁷² *Id.*

the docket (NJ Agencies Study).⁷³ Additionally, the New Jersey Agencies seek clarification of their jurisdiction over prudency reviews.⁷⁴

23. With respect to the NJ Agencies Study, New Jersey Agencies seek clarification of the Commission's description of the conclusions in the study⁷⁵ as well as clarification that the Commission is not overriding factual findings made by the New Jersey Agencies regarding New Jersey LDCs' need for additional pipeline capacity.⁷⁶

24. With respect to concerns that the Commission may be trying to override factual determinations, we note that the Commission has jurisdiction to determine whether projects transporting natural gas in interstate commerce are required by the public convenience and necessity.⁷⁷ The Commission's determinations regarding project need are consistent with our jurisdiction. We note, however, that the Commission's analysis of the NJ Agencies Study is not intended to (and cannot) preclude the use of the study by the New Jersey Agencies to support their own determinations related to matters within their jurisdiction. As explained further below, we recognize that the New Jersey

⁷³ New Jersey Agencies Motion at 5.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.* at 9.

⁷⁷ See 15 U.S.C. § 717(b) ("The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."); *id.* § 717f(e) ("Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . .").

Agencies have the authority to make their own findings in matters subject to state jurisdiction.

25. The Certificate Order states that the NJ Agencies Study “finds that new pipeline capacity into the state of New Jersey is unnecessary because sufficient capacity already exists to serve the state’s LDCs, and will continue to be sufficient if gains in energy efficiency are realized and non-pipeline alternatives are made available.”⁷⁸ New Jersey Agencies request that the Commission clarify this statement to complete the record. To clarify, we read the NJ Agencies Study as asserting that sufficient capacity already exists to serve the state’s LDCs, and that the existing capacity will continue to be sufficient, if the following assumptions are met: (1) the gains in energy efficiency projected by the New Jersey LDCs that have subscribed service on the project come to pass; (2) the New Jersey LDCs have accurately forecast the rate of growth of design day demand;⁷⁹ and (3) that the New Jersey LDCs will be able, in the future, to reliably continue to obtain 619 MDth/d of off-system peaking resources (rights to downstream capacity).⁸⁰

26. New Jersey Agencies also seek clarification of statements in the Certificate Order that “there is no requirement under New Jersey law that LDCs adopt non-pipeline alternatives” and that there is “considerable uncertainty surrounding forecasts for future penetration of non-pipeline alternatives.”⁸¹ New Jersey Agencies state that the New Jersey Clean Energy Act of 2018 requires LDCs to reduce natural gas consumption by

⁷⁸ New Jersey Agencies Motion at 9; Certificate Order, 182 FERC ¶ 61,006 at P 28 (citing NJ Agencies Study at 79).

⁷⁹ Design days are a 24-hour period of demand which is used as a basis for planning gas capacity requirements. *See, e.g.*, 18 C.F.R. 157.14(a)(8) (2022) (requiring a section 7 certificate application to include “[f]low diagrams showing daily design capacity and reflecting operation with and without proposed facilities added”). Design day demands represent the maximum demands that are expected under the most severe weather assumptions. Utilities typically structure a portfolio of firm pipeline transportation and storage entitlements, firm natural gas supply, and peak shaving that will provide the gas supplies required by their firm customers in design day conditions. By definition, design days are extreme events where it cannot be assumed that interruptible transmission or capacity release will be available to meet demand. *See* Certificate Order, 182 FERC ¶ 61,006 at P 21 n.41.

⁸⁰ *See* Certificate Order, 182 FERC ¶ 61,006 at P 28.

⁸¹ *Id.* P 31.

0.75% annually.⁸² The Commission noted these goals in the Certificate Order⁸³ and acknowledges here that the reduction goal is a New Jersey statutory requirement. However, we continue to note that there are as yet no mandated mechanisms to implement these goals or require conservation or replacement of gas equipment with non-gas alternatives. We note, however, state policies do not, by themselves, limit the Commission's authority to find that a project is required by the public convenience and necessity.⁸⁴

27. New Jersey Agencies further request that the Commission clarify that the Commission's finding of overall market need for the REAE is not intended to preclude New Jersey from conducting its own review of whether the New Jersey LDCs have prudently subscribed to the project.⁸⁵ As New Jersey Agencies explains, the Commission has jurisdiction to determine whether the interstate wholesale rate is appropriate, while the states can review whether purchases under the wholesale rate by LDCs within the state are prudent.⁸⁶

28. We grant clarification. We did not intend to—and have no authority to—constrain the state's review of the prudence of purchases by New Jersey LDCs. The Commission has held that “oversight of the procurement decisions of [LDCs] is best left to state regulators.”⁸⁷ The Commission's findings under the NGA regarding whether the project is required by the public convenience and necessity do not preclude New Jersey, or any other state, from undertaking an after-the-fact prudence review of any purchase agreement by an LDC, consistent with the state's jurisdiction.

⁸² New Jersey Agencies Motion at n.8 (citing N.J.S.A 48:3-87.9).

⁸³ Certificate Order, 182 FERC ¶ 61,006 at P 31.

⁸⁴ 15 U.S.C. § 717(b).

⁸⁵ New Jersey Agencies Motion at 10.

⁸⁶ *Id.* at 10-11.

⁸⁷ *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085, at P 85 (2018), *order on reh'g*, 169 FERC ¶ 61,134 at P 27, *vacated Env't Def. Fund v. FERC*, 2 F.4th 953, *on remand*, 181 FERC ¶ 61,232.

B. Project Need

29. NJCF, Riverkeeper, and Sierra Club dispute the Commission's analysis and findings of project need in the Certificate Order.⁸⁸ Specifically, NJCF, Riverkeeper, and Sierra Club argue that the Commission failed to (1) give appropriate weight to the NJ Agencies Study and the Skipping Stone Study, and instead, relied on the study proffered by proponents of the project;⁸⁹ (2) elicit data or evidence to support Transco's unsupported statements that the project will provide supply diversity, flexibility, and reliability;⁹⁰ (3) address allegations of self-dealing;⁹¹ and (4) account for New Jersey LDCs requirement to provide safe and reliable service under New Jersey law.⁹²

30. Under the 1999 Certificate Policy Statement, the Commission "will consider all relevant factors reflecting on need for the project,"⁹³ which may include, but is not limited to, "precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market."⁹⁴ To establish need for the project, the Commission considered evidence in the record, *i.e.*, the precedent agreements subscribing to 100% of the project's capacity, market studies, and comments.⁹⁵ The Commission examined three market studies, the NJ Agencies Study (including the NJ BPU Decision),⁹⁶ the Skipping

⁸⁸ NJCF Rehearing Request at 12-36; Riverkeeper Rehearing Request at 6-9; Sierra Club Rehearing Request at 5-7. *See* Certificate Order, 182 FERC ¶ 61,006 at PP 21-35.

⁸⁹ NJCF Rehearing Request at 13-21; Riverkeeper Rehearing Request at 6-9; Sierra Club Rehearing Request at 5-7.

⁹⁰ NJCF Rehearing Request at 13, 21-25.

⁹¹ *Id.* at 13-14, 25-29.

⁹² *Id.* at 14, 30-32.

⁹³ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,747 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) (1999 Certificate Policy Statement).

⁹⁴ *Id.*

⁹⁵ Certificate Order, 182 FERC ¶ 61,006 at PP 21-35.

⁹⁶ Ultimately, NJ BPU issued an order on June 6, 2022, accepting the NJ Agencies

Stone Study, and the Transco Levitan Study.⁹⁷ The Commission found, on balance, that the New Jersey Agencies Study and the Transco Levitan Study provided valuable information for the Commission's consideration and, after considering that information, determined that construction and operation of the project will provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.⁹⁸

31. As discussed below, upon further considering all evidence in the record and requests for rehearing, including the binding precedent agreements for 100% of the project's capacity⁹⁹ and each of the studies,¹⁰⁰ we continue to find that the project is required by the public convenience and necessity.

1. Evaluation of Market Studies

a. New Jersey's Portion of the Gas Capacity

32. NJCF argues that the Commission mischaracterized the NJ Agencies Study as relevant only for 56% of project capacity.¹⁰¹ In doing so, NJCF asserts that the Commission factors in only the percentage of REAE's capacity held by New Jersey LDCs and ignores the 10.3% and 6.8% of REAE's total capacity designated for New Jersey markets that is subscribed by Williams and South Jersey Resources,

Study findings.

⁹⁷ Certificate Order, 182 FERC ¶ 61,006 at PP 21-34.

⁹⁸ *Id.* P 34.

⁹⁹ Precedent agreements constitute significant evidence of demand for a project. *Myersville*, 783 F.3d at 1311 (quoting *Minisink*, 762 F.3d at 111 n.10) ("Petitioners identify nothing in the policy statement or in any precedent construing it to suggest that it requires, rather than permits, the Commission to assess a project's benefits by looking beyond the market need reflected by the applicant's existing contracts with shippers").

¹⁰⁰ Certificate Order, 182 FERC ¶ 61,006 at PP 34, 38. *See Ind. Mun. Power Agency v. FERC*, 56 F.3d 247, 255 (D.C. Cir. 1995) (*Ind. Mun. Power Agency*) (explaining that the Commission's determination to afford more weight to one study over another is "precisely the kind of exercise of discretion to which [courts] defer").

¹⁰¹ NJCF Rehearing Request at 14 (citing Certificate Order, 182 FERC ¶ 61,006 at P 28).

respectively.¹⁰² According to NJCF, the New Jersey-bound load actually constitutes 73.5% of the project's capacity, and, therefore, the Commission arbitrarily and capriciously discounted and misinterpreted the weight that should be given to the NJ Agencies Study based on the amount of the natural gas set to flow to New Jersey.¹⁰³

33. As an initial matter, 56% of the project's capacity is subscribed by New Jersey LDCs.¹⁰⁴ An additional approximately 17% of the project's capacity is also destined for New Jersey markets, subscribed by Williams Energy Resources, LLC (Williams) and South Jersey Resources, LLC (South Jersey).¹⁰⁵ However, both Williams and South Jersey are natural gas marketers.¹⁰⁶ The NJ Agencies Study addressed only LDCs' future need for additional transportation capacity, not capacity potentially needed by natural gas marketers like Williams and South Jersey to serve customers.¹⁰⁷ Accordingly, the Commission reasonably viewed the study as being relevant to only the 56% of the project capacity directly subject to NJ BPU jurisdiction.¹⁰⁸

34. Nevertheless, even considering that 73.5% of the project's capacity will be contracted for New Jersey, this would not change the Commission's determination. The Commission fully considered the NJ Agencies Study and ultimately concluded that while it contained valuable information,¹⁰⁹ the project is required by the public convenience and

¹⁰² *Id.* at 14.

¹⁰³ *Id.* at 15.

¹⁰⁴ Certificate Order, 182 FERC ¶ 61,006 at P 8.

¹⁰⁵ *Id.* PP 7-8.

¹⁰⁶ *Id.* P 8.

¹⁰⁷ See NJ Agencies Study at 2 (“London Economics International LLC (“LEI”) was engaged by the Staff of the New Jersey Board of Public Utilities (“BPU”), at the direction of the BPU, to examine the capability of current and future natural gas transmission capacity *to serve gas demand from New Jersey's local gas distribution utilities*, and to determine if capacity on pipelines and from non-pipeline sources would be sufficient to ensure uninterrupted supply to all firm customers in the State through 2030.”) (emphasis added).

¹⁰⁸ Certificate Order, 182 FERC ¶ 61,006 at P 28. Certificate Order, 182 FERC ¶ 61,006 at P 28.

¹⁰⁹ Certificate Order, 182 FERC ¶ 61,006 at PP 28-31, 34 (stating that the NJ

necessity, which is demonstrated by the fact that the project is 100% subscribed and those precedent agreements are not outweighed by other record evidence regarding project need. Based on the totality of the record, the Commission found that the construction and operation of the project will provide more reliable service on peak winter days and provide cost benefits by increasing supply diversity.¹¹⁰

35. Sierra Club and Riverkeeper also argue that the Commission failed to adequately consider, or give significant weight to, the NJ Agencies Study and NJ BPU's adoption of its conclusions.¹¹¹ Riverkeeper also claims that the Commission failed to explain why it gave greater evidentiary weight to the Transco Levitan Study¹¹² and thus failed to consider whether the project is truly needed.¹¹³

36. In the Certificate Order, the Commission weighed the strengths and weaknesses of the NJ Agencies Study (including the NJ BPU Decision), the Skipping Stone Study, and the Transco Levitan Study.¹¹⁴ The Commission provided an in-depth analysis of the studies.¹¹⁵ Despite Sierra Club's and Riverkeeper's arguments, the Commission found that both the NJ Agencies Study and the Transco Levitan Study provided valuable information for the Commission's consideration.¹¹⁶ As further described here, important aspects of the NJ Agencies Study weigh against our placing more reliance on it for purposes of our assessment of Transco's application.

Agencies Study only assesses LDC firm needs, assumes higher efficiency gains, and makes assumptions for future penetration of non-pipeline alternatives).

¹¹¹ Sierra Club Rehearing Request at 5-7; Riverkeeper Rehearing Request at 7-8.

¹¹² Riverkeeper Rehearing Request at 7-8.

¹¹³ *Id.* at 7-8.

¹¹⁴ Certificate Order, 182 FERC ¶ 61,006 at PP 21-34.

¹¹⁵ *Id.*

¹¹⁶ *Id.* P 34.

37. For example, the NJ Agencies Study did not account for certain potentially offsetting effects that may undercut its claim that gas demand will decrease.¹¹⁷ The NJ Agencies Study concludes that New Jersey LDCs overstate demand growth for design day due to slightly exaggerated historical trends (1.02% versus .95%), assuming the energy efficiency of customer use of natural gas will not improve, and relying on customers switching from oil to natural gas for a portion of demand growth, even though this will likely slow given New Jersey State policies which encourage building electrification.¹¹⁸ That there may be natural gas demand displaced by building electrification does not mean that the demand for natural gas or the need for natural gas pipeline capacity would disappear; much of it might be transferred from the LDCs (and third-party natural gas suppliers) to the natural gas-fired generators in the region that would presumably need to increase output in order to meet the increased electrical demand from building electrification.¹¹⁹

38. Furthermore, the NJ Agencies Study projected total off-system peaking resources at a constant 619 MDth/d.¹²⁰ This is a key assumption underlying the findings of the NJ

¹¹⁷ NJ Agencies Study at 48.

¹¹⁸ *Id.* at 11, 48.

¹¹⁹ As the NJ Agencies Study states, “[n]atural gas demand in New Jersey has been growing over the past few years.” NJ Agencies Study at 37. New Jersey’s growth in natural gas consumption was “driven by increased deliveries to electric power consumers . . . and industrial customers.” *Id.* Consumption from residential customers grew at a slower pace, and consumption from commercial customers declined. *Id.* See also FERC, Winter Energy Market and Reliability Assessment 2022-2023 at 9 (2022), <https://www.ferc.gov/media/report-2022-2023-winter-assessment> (stating that forecasts indicate that the percentage of electricity generated by natural gas in winter 2022-2023 compared to winter 2021-2022 will increase by 3 percentage points in PJM, by 1.3 percentage points in New York Independent System Operator, Inc. (NYISO), and by 2.1 percentage points in ISO-New England (ISO-NE)); see *id.* (“NYISO’s share of generation output from natural gas is expected to rise to 47%. ISO-NE’s share of generation output from natural gas is expected to increase to 49% this winter. Finally, PJM’s share of generation output from natural gas is expected to increase to 40%.”); see *id.* at 17 (“regionally, for winter 2022-2023, natural gas-fired generation is forecast to provide between 30% to 60% of net winter capacity; over half of NYISO’s capacity (60.5%) and of ISO-NE’s capacity (52%); and nearly half of the capacity in . . . PJM (46.6%)”).

¹²⁰ We note that New Jersey Natural Gas projects its off-system peaking use

Agencies Study that sufficient capacity exists even on a design day.¹²¹ However, the ability to obtain sufficient off-system delivered gas peaking resources is uncertain because it is not contracted for on a long-term firm basis. Typically, these arrangements are relatively short-term and dependent on pipeline capacity being available year-to-year.

39. We note that the NJ Agencies Study's findings are dependent on its specific assumptions as to how successfully or quickly the State will achieve its energy efficiency and electrification goals. For the base forecast, the shortfall risk assessment reflects the historical peak demand growth of 0.95% and the minimum user demand-side energy efficiency gains required by the NJ BPU Order of June 10, 2020.¹²² This results in projected design day firm demand growth of 0.80% annually, and a projected design day demand in 2030 which is 377 MDth/d higher than in 2020.¹²³

declining to zero after 2022. Certificate Order, 182 FERC ¶ 61,006 at P 29.

¹²¹ NJ Agencies Study at 98-99.

¹²² The New Jersey Clean Energy Act of 2018 directed the NJ BPU to require “[e]ach natural gas public utility to achieve, within its territory by its customers, annual reductions in the use of natural gas of at least 0.75% of the average annual natural gas usage in the prior three years within five years of implementation of its gas energy efficiency program.” NJ BPU’s *Order Directing the Utilities to Establish Energy Efficiency and Peak Demand Reduction Programs* (Docket Nos. QO19010040, QO19060748, and QO17091004) (June 10, 2020).

¹²³ NJ Agencies Study at 46.

40. Despite Riverkeeper and Sierra Club’s assertions,¹²⁴ the Commission also identified shortcomings in the Transco Levitan Study.¹²⁵ The Transco Levitan Study “assumes the accuracy of the LDC design day demand forecasts, which, by design, are oriented to conservatively ensure reliability.”¹²⁶ Thus, the Commission determined that the study potentially overstated future demand because it “did not examine the degree to which the demand forecasts reflected New Jersey’s Energy Master Plan and other energy efficiency and energy policy targets.”¹²⁷ The Commission also found that a limitation of the Transco Levitan Study was that it “discounted the availability of any firm capacity held by natural gas wholesalers with primary (but not only) delivery points downstream of New Jersey, as some of this ‘downstream’ capacity has been available to New Jersey shippers in the past through short-term peaking contracts, and may be available in the future on the same short-term basis.”¹²⁸

41. However, despite the shortcomings identified in the Transco Levitan Study, the Commission found that it was generally consistent with accepted, traditional LDC supply planning practices.¹²⁹ These practices were developed under the supervision of state regulators nationwide, and we believe they appropriately balance the interests in reliable service at just and reasonable rates. Moreover, the Commission determined that the Transco Levitan Study, in contrast to the NJ Agencies Study, “factors in competing demand for natural gas from electric generators, which more accurately reflects overall

¹²⁴ Riverkeeper Rehearing Request at 8-9 (stating that the Commission’s evaluation of the Transco Levitan Study as on par with the NJ Agencies Study and NJ BPU’s adoption of same was arbitrary, capricious, and contrary to the NGA); *see also id.* at 10 (stating that the Commission failed to examine the factual basis of the inputs from the Transco Levitan Study and the NJ Agencies Study); Sierra Club Rehearing Request at 6 (stating that the Transco Levitan Study failed to account for emissions reductions required under state law, energy efficiency initiatives, and renewable energy integration, which ultimately renders the study’s analysis deficient in assessing the true need for the project); *id.* at 8 (stating that the Commission relied almost exclusively on Transco’s report).

¹²⁵ Certificate Order, 182 FERC ¶ 61,006 at PP 26-27.

¹²⁶ *Id.* P 27.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

future demand for natural gas in the study area than a study focused only on LDC demand.”¹³⁰ Of the available studies in the record, we find that the Transco Levitan Study has the fewest relevant methodological deficiencies, which supports the credibility and accuracy of its findings. Therefore, we find that the Transco Levitan Study is the more persuasive market study in the record. and most closely aligns with the Commission’s market analysis.

42. Recognizing the precedent agreements for 100% of the capacity and after considering the strengths and weaknesses of the market studies, the Commission ultimately determined that the construction and operation of the project is needed to provide more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.¹³¹ The Commission considered the NJCF’s, Riverkeeper’s, Sierra Club’s, and commenters’ arguments and explained why it found the NJ Agencies Study less persuasive.¹³²

b. The Commission’s Consideration of the Skipping Stone Study

43. NJCF argues that the Commission improperly disregarded the Skipping Stone Study as only focusing on LDC demand and not taking into account demand from electric generators and industrials (including power generators and interruptible loads).¹³³ In other words, NJCF maintains that the Skipping Stone Study reflects all New Jersey demand in its load duration curves for Winter 2018-19 through 2021-22, plotting it against all available firm gas delivery capacity available to New Jersey homes and businesses.¹³⁴

¹³⁰ *Id.*

¹³¹ *Id.* P 34.

¹³² *Id.* PP 21-34; *see also Ind. Mun. Power Agency*, 56 F.3d at 255 (explaining that the Commission’s choice regarding reliability of evidence is the kind of exercise of discretion to which courts defer).

¹³³ NJCF Rehearing Request at 16.

¹³⁴ *Id.* at 17.

44. We find NJCF's argument unpersuasive. As we explained in the Certificate Order,¹³⁵ and further explain below, the Commission reasonably put less weight on the Skipping Stone Study than other record evidence, in light of identified concerns. In particular, we continue to find the Skipping Stone Study not persuasive with respect to need because it focuses on flexibility of supply options during times in which the system is not constrained—rather than examining supply options during times when the system is constrained, overestimates the amount of natural gas available to New Jersey, and does not properly consider design day principles, instead, focusing on historical peak day figures.

45. The Skipping Stone Study identifies four kinds of firm delivery capacity it contends are available to New Jersey customers.¹³⁶ It starts with firm capacity contracted to New Jersey LDCs and then adds other categories of pipeline capacity that traverse New Jersey, including so called “stranded” pipeline capacity that it believes is available for use in New Jersey, pipeline capacity held by “merchants,” and pipeline capacity held by a “load serving entity, like an LDC or vertically integrated electric utility” where such capacity “traverses New Jersey” and “there are New Jersey delivery points along the path.”¹³⁷ Although the Skipping Stone Study considers both firm and interruptible capacity demand, as NJCF argues, it largely ignores the firm versus interruptible distinction on the *supply* side.¹³⁸ The study assumes that the firm capacity held by downstream customers—*i.e.*, delivery capacities for which the New Jersey LDCs are not the stated recipients in a firm contract—would nevertheless be available to New Jersey LDCs when they need it,¹³⁹ presumably through secondary market purchases of released pipeline capacity or use of interruptible transportation arrangements. We find that this assumption ignores the fact that if the downstream firm capacity customers exercise their rights to the capacity during a time of high demand in New Jersey, the capacity will not be available for use by the New Jersey LDCs.¹⁴⁰ In this regard, the Skipping Stone Study

¹³⁵ Certificate Order, 182 FERC ¶ 61,006 at PP 32-33.

¹³⁶ See Skipping Stone Study at 4-5.

¹³⁷ *Id.*

¹³⁸ We note that if in fact the study took into account power generators and interruptible load on *both* demand and supply side, this would suggest a stronger need for the pipeline. However, our analysis focuses on firm capacity for LDCs.

¹³⁹ Skipping Stone Study at 12.

¹⁴⁰ Certificate Order, 182 FERC ¶ 61,006 at P 32.

focused on flexibility of supply options during times in which the system is not constrained, rather than examining supply options during times, such as design days, when the system is constrained. Moreover, when calculating the volume of gas available to the New Jersey market, the Skipping Stone Study combined both firm and interruptible supply to the New Jersey LDCs, essentially double counting some available firm capacity and inflating the amount of natural gas available to New Jersey.¹⁴¹

46. Next, NJCF asserts that the Commission erred in finding the Skipping Stone Study unhelpful in assessing project need because it ignored design day planning principles.¹⁴² NJCF argues that, contrary to the Commission's discussion in its Certificate Order, the Skipping Stone Study in fact took into account design day figures and principles and used New Jersey LDCs' own design day figures.¹⁴³

47. Despite NJCF's assertions, we continue to find that the Skipping Stone Study did not properly consider LDC design day planning principles.¹⁴⁴ A pipeline's service to interruptible customers is secondary to the firm shippers' service. Design day planning principles consider the obligation of LDCs to provide reliable service, which necessarily entails the ownership of firm transmission capacity rights¹⁴⁵ and the availability of that capacity to meet demand on design days.

48. The Skipping Stone Study does not adequately address these design day planning principles. The study does not provide documentation of the derivation of its "estimated LDC design day load duration curves."¹⁴⁶ It compares the curves against undocumented

¹⁴¹ Skipping Stone Study at 17.

¹⁴² NJCF Rehearing Request at 17.

¹⁴³ *Id.*

¹⁴⁴ Certificate Order, 182 FERC ¶ 61,006 at P 33.

¹⁴⁵ Firm transportation service is offered to customers under schedules or contracts which anticipate no interruption under almost all operating conditions. *See Myersville*, 783 F.3d at 1307 & n.1 (stating that firm transportation, as opposed to interruptible, means the delivery of natural gas is guaranteed regardless of the proportion of the pipeline's capacity that is in use). Firm transportation service is not subject to prior claim by another customer and is the highest quality service offered to customers. *See* 18 C.F.R. § 284.7(a)(3) (2022).

¹⁴⁶ Skipping Stone Study at 18-19.

2018-19 LDC total demand curves¹⁴⁷ and also against the four types of regional pipeline capacity into New Jersey, as previously described.¹⁴⁸ But this simple comparison fails to take into consideration whether the capacity is contracted by the New Jersey LDCs or would even be available to them. Because the Skipping Stone Study did not discuss design day demand relative to firm supply, its conclusions do not quantify the ability of the LDCs to serve design day demand. The Skipping Stone Study appears to conflate the 2018-19 load duration curve for the region with its derived estimate of the LDCs' estimated design day requirements for 2032-33.¹⁴⁹ While the 2018-19 load duration curve contains the LDCs' actual demand for that period, it does not contain the LDCs' design day estimates. Likewise, while the 2032-33 estimated design day requirements are an estimate of the highest demand for the LDCs, the study does not contain any estimate of other sectors' (*i.e.*, non-LDC) demand during this peak period. It is unreasonable to conclude that because the peak of 2018-19 was met that the LDCs have no need for additional firm capacity in the future. Pipeline capacity is not held in common—it is contracted to parties who may elect to sell it to other market participants but have the superior right to use it themselves when needed. On a day of extremely high demand, the LDCs would have to compete for any capacity that they do not hold themselves with other demand sectors and are not assured of obtaining needed capacity. Thus, the study's conclusions do not take due account of the need for reliability and effectively ignore circumstances during capacity-constrained periods.

49. The types of capacity described by Skipping Stone, including “stranded” capacity, “merchant” capacity, and “load serving entity” capacity, extend beyond contracted firm capacity held by shippers with primary delivery points in New Jersey.¹⁵⁰ These types of capacity are not sources of reliable supply on *design days*.

50. The Skipping Stone Study concludes that “the actual 2018-'19 load duration curve, which was enabled by existing capacity in 2018-'19, far exceeds the New Jersey LDCs' estimated Design Day requirements of 2032-'33 with existing 2022 regional capacity available to New Jersey.”¹⁵¹ By relying on historical peak day demand from

¹⁴⁷ *Id.* at 16-18.

¹⁴⁸ *See supra* P 45.

¹⁴⁹ Skipping Stone Study at 3.

¹⁵⁰ *Id.* at 4-5.

¹⁵¹ *See* Skipping Stone Study at 18. We note that the study refers to its own derived estimates of design day load duration curves, rather than from the LDCs

2018-19, the study's conclusion that a shortfall does not and will not exist, and that New Jersey has access to a large amount of transportation capacity, fails to account for design day criteria,¹⁵² including the coldest weather historically experienced in the area, existing firm contracts, delivery pressure requirements, and anticipated market conditions. Using historical peak day data rather than data derived from design day reliability planning, in our view, understates the need for pipeline capacity in the area to be served by the project¹⁵³ and differs from accepted pipeline supply and design reliability practices.¹⁵⁴ Based on the foregoing, we continue to find the Skipping Stone Study not persuasive with respect to need.¹⁵⁵

themselves.

¹⁵² We note that neither NJCF, Sierra Club, nor Riverkeeper disputes the Commission's use of design day planning principles in our analysis.

¹⁵³ Certificate Order, 182 FERC ¶ 61,006 at P 21 & n.41 (stating that design day is the basis for planning gas capacity requirements and reflects the highest gas demand an LDC expects to be obligated to serve on an extremely cold winter day, while a peak day is a historical value of gas demand that is adjust for expected load growth over time and is used in estimating a design day).

¹⁵⁴ *Id.* P 33.

¹⁵⁵ *Id.* Courts generally defer to Commission expertise in deciding which evidence it considers to be more reliable. *Ind. Mun. Power Agency*, 56 F.3d at 255. Because analysis of the relevant documents "requires a high level of technical expertise," courts defer to "the informed discretion of the responsible federal agencies." *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989) (*Marsh*) (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976) (*Kleppe*)); see also *Fla. Mun. Power Agency v. FERC*, 602 F.3d 454, 461 (D.C. Cir. 2010) (*Fla. Mun. Power Agency*) (stating that where the Commission decides between conflicting evidence, the court applies a particularly deferential standard of review).

51. Finally, NJCF argues that the Commission improperly neglected to address the Winter Reliability Study lodged by NJCF.¹⁵⁶ NJCF states that the Commission's failure to properly consider or analyze this study constitutes reversible error.¹⁵⁷

52. We find that study has the same flaw as the more recent Skipping Stone Study regarding the assumption that downstream capacity contracted to others on a firm basis will nevertheless be available to New Jersey LDCs in the future, even on a design day.¹⁵⁸ Thus, the discussion of this flaw in the Skipping Stone Study, both in the Certificate Order and here on rehearing, also applies to the earlier Winter Reliability Study.¹⁵⁹ For this reason, the Commission finds the Winter Reliability Study to be of limited value in assessing the need for the proposed project. Furthermore, the Winter Reliability Study analyzed possible Transco Zone 5 and 6 deliveries solely from Transco, and did not account for other pipelines serving New Jersey, and considered deliveries only to potential Penn-East project customers in Pennsylvania, and not to New Jersey LDCs as are proposed in this case.¹⁶⁰ The Winter Reliability Study focused on actual deliveries and did not attempt to project design day demand into the future as was done by the Transco Levitan Study and the NJ Agencies Study. Further, the study is over five years old and thus does not account for developments since then that affect the analysis, such as changes in contracts and demand. For all these reasons the Commission does not consider the Winter Reliability Study helpful in our analysis.

c. **Evaluation of the Skipping Stone Study's Stranded Capacity Findings**

53. NJCF next argues that the Commission failed to address the stranded capacity issue raised in the Skipping Stone Study, namely that New Jersey LDCs currently use

¹⁵⁶ NJCF Rehearing Request at 18 (citing NJCF Motion to Lodge, attach. B); *see* Analysis of Regional Pipeline System's Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018) by Skipping Stone, February 11, 2018 (Winter Reliability Study).

¹⁵⁷ *Id.* at 18.

¹⁵⁸ Certificate Order, 182 FERC ¶ 61,006 at PP 32-34.

¹⁵⁹ *See id.*

¹⁶⁰ Winter Reliability Study at 5-9.

stranded capacity and rely on it.¹⁶¹ NJCF claims that the Commission arbitrarily dismissed the Skipping Stone Study capacity findings based on the notion that if the “downstream firm capacity customers exercise their rights to the capacity then New Jersey LDCs will not be able to rely on it.”¹⁶² NJCF maintains that any such rights exercised would be drawn from the “In Path LSE Capacity,” leaving the stranded capacity available for use.¹⁶³ Further, NJCF argues that if the downstream shippers decided to forgo nominating their primary capacity, and instead took capacity from shippers holding “stranded” capacity on a secondary basis, then the downstream shippers’ primary capacity would be readily available to New Jersey markets on a secondary basis.¹⁶⁴ In other words, NJCF claims that there is currently sufficient capacity (stranded or otherwise) to serve New Jersey loads, now and through the 2032-2033 design day demand.¹⁶⁵

54. We find that NJCF’s argument does not adequately address the problems we identified related to what the Skipping Stone Study refers to as In Path Stranded Capacity. In Path Stranded Capacity is defined in the Skipping Stone Study as capacity where the firm contracted capacity path: (a) traverses New Jersey; (b) there are New Jersey delivery points along the path; and (c) the downstream location (whether another pipeline or a distribution system) at the delivery point has more firm capacity delivering gas to the location than the location has either the firm capacity to take away the gas or market demand to accept the gas.

55. At the outset, the fact that downstream market demand may not have been high enough in the past to cause a downstream shipper to exercise its full rights to this firm capacity does not guarantee that downstream market demand will not increase in the future, particularly during extreme weather events, such as Winter Storm Elliot. Similarly, even if certain downstream shippers may have chosen in the past not to secure firm takeaway capacity from their delivery points, those choices could change in the future for various reasons, including increased market demand. Thus, the suggestion that

¹⁶¹ NJCF Rehearing Request at 18.

¹⁶² *Id.*

¹⁶³ *Id.* at 18-19.

¹⁶⁴ *Id.* at 19.

¹⁶⁵ *Id.*

this capacity is somehow permanently “stranded,” and therefore can be available to New Jersey LDCs during a future design day, is without merit.

56. To illustrate NJCF’s claim that New Jersey has alleged excess “In Path Stranded Capacity,” the Skipping Stone Study compares the firm receipts capacity with firm delivery capacity.¹⁶⁶ The Skipping Stone Study concludes that because there is more transportation capacity under firm contract to flow gas into New Jersey than is contracted to flow gas out, this allegedly stranded capacity (*i.e.*, the difference between the two) will always be available for use by New Jersey LDCs when they need it.¹⁶⁷ However, Skipping Stone’s assessment is inconsistent with basic principles of natural gas design day planning because it makes a judgment based on an historical comparison rather than reasonable design day principles.

57. Moreover, NJCF fails to acknowledge the potential for circumstances to change and cause downstream shippers to make different choices than they have in the past. Because downstream shippers may, in the future, use a greater percentage of the capacity to which they are entitled, this allegedly “stranded” firm capacity may not always be stranded and we find that it is not reasonable to assume that it will be available under stressed conditions. In other words, while the difference between firm capacity to deliver gas into New Jersey and firm capacity to transport gas from New Jersey to downstream delivery points may leave additional transportation capacity available for New Jersey during unstressed conditions like non-peak winter days, because customers with firm capacity rights can exercise those rights to that capacity at any time, it is not reasonable to assume that the New Jersey LDCs will be able to rely on it during constrained conditions like a design day.¹⁶⁸ Thus, we continue to find that the Skipping Stone Study emphasizes the flexibility of supply options during times in which the system is not constrained, rather than examining supply options during times, such as design days,

¹⁶⁶ Skipping Stone Study at 6-10.

¹⁶⁷ *Id.* at 8. *See also id.* at 7 (“As can be readily seen, there is 3,745,582 Dth/d of capacity that has been sold to [Algonquin]. This is *far in excess* of the 2,138,943 of capacity that [Algonquin] can actually receive, which leaves gas capacity stranded on the delivering pipelines.”); *Id.* at 8-9 (presenting “stranded capacity on [Texas Eastern’s system] that is available to New Jersey because contracted capacity to ConEd Manhattan exceeds the greatest ConEd Manhattan takeaway ever, going back to 2014, when the capacity was constructed and contracted.”).

¹⁶⁸ Certificate Order, 182 FERC ¶ 61,006 at P 32.

when the system is constrained.¹⁶⁹ Because we continue to find that reliability under such stressed conditions is probative of the need for the project, we disagree with NJCF that the Skipping Stone Study refutes the Commission's finding of need in the Certificate Order.

2. Supply Diversity, Flexibility, and Reliability during Design Days

58. NJCF argues that the Commission made generalized assertions of project benefits composed of supply diversity, flexibility, and reliability, without record evidence that this particular project produces such benefits.¹⁷⁰

59. We disagree that the Commission's findings of project benefits are inadequately supported. As explained in the Certificate Order, Transco explained in its application that customers "will benefit from the increased reliability of replacement equipment, resulting in fewer maintenance outages, less downtime, decreased air emissions, less fuel consumption and costs, and lower operation and maintenance costs."¹⁷¹ Transco also stated that the project will provide overall reliability and diversification of energy infrastructure in the Northeast by easing locational constraints currently caused by limited pipeline takeaway capacity and that the project is designed to help benefit the public by promoting competitive markets and enhancing the security of natural gas supplied to major delivery points serving the Northeast.¹⁷² Transco's explanations in its application were corroborated in the Transco Levitan Study,¹⁷³ and NJCF has offered no evidentiary basis that would call those findings into question. In addition, shippers expressed their support and need for the project, stating that REAE will support reliability, diversify supply, and enable shippers to meet winter demand and respond to extreme weather events.¹⁷⁴ Based on this record, the Commission agreed that the project

¹⁶⁹ *Id.* P 33.

¹⁷⁰ NJCF Rehearing Request at 21.

¹⁷¹ Certificate Order, 182 FERC ¶ 61,006 at P 5; Transco Application at 10.

¹⁷² Certificate Order, 182 FERC ¶ 61,006 at P 6.

¹⁷³ *See, e.g.*, Transco Levitan Study at 5.

¹⁷⁴ Certificate Order, 182 FERC ¶ 61,006 at P 21 (citing South Jersey Gas Company and Elizabethtown Gas Company Apr. 30, 2021 Motion to Intervene and Comments at 5-6; South Jersey Resources Group LLC November 9, 2022 Letter; New Jersey Natural Gas November 9, 2022 Letter; Exelon April 28, 2021 Comments in

would provide the cited benefits.¹⁷⁵ Although NJCF argues that the Commission should quantify these benefits, the Commission may rely on qualitative benefits, as it does here.¹⁷⁶

60. NJCF further claims that the Commission either ignored or misrepresented data showing that demand and design day forecasts are readily met without REAE capacity, and instead relied too heavily on statements from project proponents and project shippers, and therefore did not develop a record with sufficient evidence supporting the Commission's determination.¹⁷⁷

Support of Application at 3; PSEG April 30, 2021 Comments at 2).

¹⁷⁵ *Id.* P 82 (finding that the project will enable Transco to provide up to 829,400 Dth/d of firm transportation service, that Transco has demonstrated a need for the REAE project, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities, that it has been appropriately designed to achieve its intended purpose, and that the public convenience and necessity requires approval of the REAE project).

¹⁷⁶ *Fla. Se. Connection, LLC*, 164 FERC ¶ 61,099, at P 36 (2018) (explaining that the Commission can balance benefits and adverse impacts in a qualitative manner); *Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 286 (2018) (explaining that a proposed project's benefits may be assessed qualitatively).

¹⁷⁷ NJCF Rehearing Request at 23. NJCF also argues that the Commission "failed to elicit tariff provisions supporting assertions of reduced impact" in an extreme outage scenario that happens during a 1-in-90 event on a design day and failed to test any outage scenario to determine whether existing supply and/or capacity would still be available to meet demand without REAE capacity. *Id.* at 24-25. NJCF is obligated to "set forth specifically the ground or grounds upon which its rehearing is based." 15 U.S.C. § 717r(a); see also *Constellation Energy Commodities Grp., Inc. v. FERC*, 457 F.3d 14, 22 (D.C. Cir. 2006) (*Constellation Energy*) ("Each quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows 'specifically ... the ground on which rehearing [i]s being sought.>"). Accordingly, we do not agree that we erred by failing to "elicit tariff provisions;" NJCF does not explain the basis for this assertion or explain what tariff provisions it believes the Commission should have "elicited." In any event, the Commission would not "elicit" tariff provisions. Should a natural gas company make a tariff filing under NGA section 4, 15 U.S.C. § 717c, the Commission's

61. In fact, as discussed above, the Certificate Order thoroughly examined the record evidence regarding the need for REAE capacity. The Commission explained the strengths and weaknesses of the Transco Levitan Study, the Skipping Stone Study, and the NJ Agencies Study, and ultimately concluded that the NJ Agencies Study and the Transco Levitan Study provided valuable information for the Commission's consideration.¹⁷⁸ The conclusions in the Certificate Order were based on record evidence, as discussed, to support our finding of need.¹⁷⁹ Merely pointing to some contradictory evidence is insufficient because the question is "not whether record evidence supports [NJCF's] version of events, but whether it supports FERC's."¹⁸⁰ An agency's decision concerning the evidence before it "involves primarily issues of fact"¹⁸¹ and "because analysis of the relevant documents 'requires a high level of technical expertise,' [courts] defer to 'the informed discretion of the responsible federal agency.'"¹⁸² After due consideration of record evidence, the Commission determined, and continues to find, that there is a need for the project because it will enable the provision of more reliable service on peak winter days and will provide cost benefits by increasing supply diversity.¹⁸³

62. Next, NJCF claims that the Commission appears to be determining that LDCs should take account of interruptible loads, despite their controlling state laws, arguing

role in reviewing tariff revisions is "passive and reactive." *Adv. Energy Mgmt. All. v. FERC*, 860 F.3d 656, 662 (D.C. Cir. 2017) (finding that, "[w]hen acting on a public utility's rate filing under section 205, the Commission undertakes an essentially passive and reactive role and restricts itself to evaluating the confined proposal"). Moreover, NJCF is incorrect that the Commission failed to test outage scenarios. The Commission identified various outage scenarios in both the Transco Levitan Study and the NJ Agency Study and analyzed those scenarios to determine whether existing supply and/or capacity would be available to meet demand without the REAE project capacity. *See Certificate Order*, 182 FERC ¶ 61,006 at PP 26-31.

¹⁷⁸ Certificate Order, 182 FERC ¶ 61,006 at PP 21-35.

¹⁷⁹ *See generally id.*

¹⁸⁰ *Fla. Mun. Power Agency*, 602 F.3d at 461.

¹⁸¹ *Marsh*, 490 U.S. at 377.

¹⁸² *Id.* (quoting *Kleppe*, 427 U.S. at 412).

¹⁸³ Certificate Order, 182 FERC ¶ 61,006 at P 34.

that the Commission incorrectly determined that the NJ Agencies Study assumes that third party natural gas suppliers are interruptible load.¹⁸⁴ NJCF asserts that even if one were to increase New Jersey LDCs' projected design day load by 3% of interruptible load, this would still leave existing stranded and merchant in-path capacity unused based on Skipping Stone's analysis of the various types of pipeline capacity that it believes are available to New Jersey LDCs.¹⁸⁵

63. NJCF misreads the Certificate Order. The Commission did not determine that LDCs should take into account interruptible loads. It merely noted that the NJ Agencies Study omitted from its analysis of potential shortfall in available capacity interruptible natural gas generator and industrial demand, even though the record shows those are important and growing sources of demand for transportation capacity.¹⁸⁶ The Commission's need determination can consider such important sectors of demand, regardless of whether LDCs may do so in their planning.¹⁸⁷ We also disagree with NJCF's assertion that even if one were to increase New Jersey LDCs' projected design day load by 3% of interruptible load, this would still leave existing stranded and merchant in-path capacity available. As we explained, we do not agree that there is adequate firm pipeline capacity that can be used by New Jersey LDCs to meet firm demand on a constrained design day.¹⁸⁸

64. Additionally, NJCF asserts that the Commission improperly credited New Jersey Natural Gas's assertion that despite historically contracting for an average of 200,000 Dth/d of off-system delivered gas peaking resources, it now projects to use zero.¹⁸⁹ NJCF maintains that the Commission failed to cite evidence supporting this new projection,

¹⁸⁴ NJCF Rehearing Request at 23.

¹⁸⁵ *Id.* at 23.

¹⁸⁶ Certificate Order, 182 FERC ¶ 61,006 at P 31 (citing NJ Agencies Study at 28-30).

¹⁸⁷ *See* 1999 Certificate Policy Statement 88 FERC ¶ at 61,747 (“the Commission will consider all relevant factors reflecting on the need for the project”).

¹⁸⁸ *See* discussion *supra* III(B)(1)(c).

¹⁸⁹ NJCF Rehearing Request at 25.

instead, relying on the shipper assertions inconsistent with past practice and controverted by data and analysis.¹⁹⁰

65. As discussed earlier, the ability to obtain sufficient off-system delivered gas peaking resources is uncertain,¹⁹¹ and New Jersey Natural Gas is in a strong position to judge the availability of future resources based upon its contracting experience and statutory reliability responsibilities, among other factors. Consistent with typical industry practice, arrangements for off-system peaking supplies are relatively short-term and dependent on pipeline capacity being available year-to-year. While the NJ Agencies Study assumes that the total off-system peaking resources will remain constant at 619 MDth/d well into the future,¹⁹² circumstances, such as the potential for extreme weather events, undercut their assumption.¹⁹³ We reaffirm our determination that the REAE project is required by the public convenience and necessity.

3. Self-Dealing

66. NJCF argues that there is sufficient evidence of self-dealing in the record that calls into question the need for the project, such as internal LDC self-dealing, enriching shareholders at ratepayers' expense, and affiliate transactions.¹⁹⁴

¹⁹⁰ *Id.*

¹⁹¹ *See supra* P 38. We also note that NJCF's argument regarding New Jersey Natural Gas's ability to "profiteer" from offloading capacity unneeded to serve native load cuts against its argument of system capacity. If, as NJCF suggests, there is ample supply of transportation capacity in New Jersey making the REAE project redundant, then there would be no market for New Jersey Natural Gas to "offload" its capacity to, let alone above market prices. Furthermore, retail regulators tend to require the sharing of revenues from such off-system resales of capacity with the captive customers who paid for the underlying assets. This further undercuts NJCF's assertion that profiteering on behalf of shareholders is the motive for the LDCs to contract for this capacity.

¹⁹² Certificate Order, 182 FERC ¶ 61,006 at P 29; NJ Agencies Study at 98.

¹⁹³ *See Env't Action, Inc. v. FERC*, 939 F.2d 1057, 1064 (D.C. Cir. 1991) (stating that it is within the agency's expertise to make a prediction about the market it regulates, and a reasonable prediction is entitled to deference notwithstanding that there might also be another reasonable view).

¹⁹⁴ NJCF Rehearing Request at 25-29.

67. We disagree. The Transco REAE is designed specifically to provide its shippers with an additional 829,400 Dth/d of firm transportation to increase reliability and diversify energy infrastructure in the Northeast by easing local constraints currently caused by limited pipeline takeaway capacity.¹⁹⁵ The REAE is 100% subscribed, with non-affiliates subscribing to 82% of the capacity.¹⁹⁶ We find no evidence of self-dealing. While Williams and Transco are affiliates of Williams Energy Company, Williams is involved in wholesale energy marketing, and is not an LDC able to pass through approved costs to customers, and is accordingly at risk for recovering the costs of the capacity contract. Moreover, aside from making generalized assertions of self-dealing, NJCF provides no basis to support its claims on rehearing.¹⁹⁷ NJCF is obligated to “set forth specifically the ground or grounds upon which its rehearing is based.”¹⁹⁸ In sum, we find that the record does not indicate inappropriate self-dealing, enriching shareholders at ratepayers’ expense,¹⁹⁹ or affiliate abuse.

4. Application of State Law to Need Determination

68. NJCF argues that the Commission erred in stating that “there is no requirement under New Jersey law that LDCs adopt non-pipeline alternatives” so that “the record does not support the conclusion that sufficient non-pipeline alternatives will necessarily

¹⁹⁵ Certificate Order, 182 FERC ¶ 61,006 at PP 3-6.

¹⁹⁶ *Id.* P 8 & n.7 (stating that Transco’s only affiliate, Williams, has subscribed to 18% of the project capacity); *see also NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022, at P 41 (2017), *order on reh’g*, 164 FERC ¶ 61,054 (2018) (finding need for a new pipeline system that was 59% subscribed).

¹⁹⁷ NJCF Rehearing Request at 25-29.

¹⁹⁸ 15 U.S.C. § 717r(a); *see also Constellation Energy*, 457 F.3d at 22 (“Each quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows ‘specifically . . . the ground on which rehearing [i]s being sought’”).

¹⁹⁹ *See supra* note 200.

be in place to eliminate the need for REAE.”²⁰⁰ Finally, NJCF points out that REAE-subscribed LDCs are legally required to reduce demand by 1.10% by 2026.²⁰¹

69. Similarly, Sierra Club argues that the Commission failed to consider the initiatives and climate laws of states impacted by the REAE, including the New Jersey Global Warming Response Act and the NJ BPU Energy Master Plan.²⁰² Sierra Club maintains that by failing to consider how state law and decarbonization initiatives will impact future demand for the gas anticipated by the project, the Commission has proceeded in an uninformed manner.²⁰³ Sierra Club further argues that the Commission’s sole reliance on precedent agreements significantly hinders a state’s ability to self-govern and comply with state law requirements.²⁰⁴

70. We find that the state actions referenced by NJCF and Sierra Club do not undercut the Commission’s finding of need for the REAE. This approach is consistent with the Commission’s recent orders.²⁰⁵ In those orders, the Commission rejected the argument that it was unnecessary to authorize natural gas infrastructure that would add additional capacity because New York enacted climate legislation that establishes statewide greenhouse gas (GHG) emissions reduction targets over time.²⁰⁶ The Commission explained that the New York climate legislation did not undermine the findings of project need, which were based on precedent agreements for 100% of the project capacity.²⁰⁷

²⁰⁰ NJCF Rehearing Request at 30, *see* Certificate Order, 182 FERC ¶ 61,006 at P 31.

²⁰¹ NJCF Rehearing Request at 31-32.

²⁰² Sierra Club Rehearing Request at 5-9.

²⁰³ *Id.* at 9.

²⁰⁴ *Id.* at 8.

²⁰⁵ *See, e.g., Gas Transmission Nw. LLC*, 181 FERC ¶ 61,234, at PP 14-15 (2022); *Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041, at P 17, *order on reh’g*, 181 FERC ¶ 61,051, at PP 15-17 (2022); *Iroquois Gas Transmission Sys.*, 178 FERC ¶ 61,200, at P 15 (2022).

²⁰⁶ *See Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041 at P 17, *order on reh’g*, 181 FERC ¶ 61,051 at PP 15-17; *Iroquois Gas Transmission Sys.*, 178 FERC ¶ 61,200 at P 15.

²⁰⁷ *See Gas Transmission N.w. LLC*, 181 FERC ¶ 61,234 at P 15 (stating that the

The orders also observed that the state legislation did not prohibit the use of natural gas and only mandated certain levels of GHG reductions.²⁰⁸ The same is true here, where New Jersey law requires LDCs to reduce natural gas consumption by 0.75% annually and both New Jersey and Pennsylvania have established GHG reduction commitments, but neither state has prescribed methods for achieving those targets. We continue to find that the REAE will provide benefits in the near-term, including more reliable service on peak winter days and increased diversity of supply, that support our finding that the project is needed.²⁰⁹ Accordingly, the fact that Pennsylvania and New Jersey have GHG reduction commitments by 2050 does not change our conclusion that Transco has demonstrated significant evidence of project need as discussed.²¹⁰

71. Finally, we reiterate that the Commission's orders in this proceeding do not preclude review of the prudence of purchases by New Jersey LDCs by the state.²¹¹ The Commission has long held that "oversight of the procurement decisions of [LDCs] is best left to state regulators."²¹² The Commission's findings that the REAE is required by the public convenience and necessity do not preclude New Jersey from undertaking an after-the-fact prudence review of any purchase agreement by a New Jersey LDC.

climate change legislative enactments and prohibition on the state's issuance of site certificates for Oregon-based fossil fuel electric generation facilities do not undercut the Commission's need determination); *Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041 at P 17, *order on reh'g*, 181 FERC ¶ 61,051 at P 16; *Iroquois Gas Transmission Sys.*, 178 FERC ¶ 61,200 at P 15.

²⁰⁸ See *Tenn. Gas Pipeline Co., L.L.C.*, 179 FERC ¶ 61,041 at P 17, *order on reh'g*, 181 FERC ¶ 61,051 at P 16; *Iroquois Gas Transmission Sys.*, 178 FERC ¶ 61,200 at P 15.

²⁰⁹ Certificate Order, 182 FERC ¶ 61,006 at P 34.

²¹⁰ See *supra* PP 20 & 34.

²¹¹ See discussion *supra* Part III.A.

²¹² *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 at P 85, *order on reh'g*, 169 FERC ¶ 61,134 at P 27.

C. National Environmental Policy Act (NEPA)

1. Project Purpose and Alternatives

72. NJCF, Riverkeeper, and Sierra Club raise several arguments alleging the Commission did not properly define the project purpose and did not consider an appropriate array of alternatives, including that the Commission: (1) violated NEPA's public participation requirements by failing to allow meaningful public comment on the purpose and need;²¹³ (2) defined purpose and need too narrowly;²¹⁴ (3) failed to consider non-gas alternatives, including as part of the no-action alternative;²¹⁵ and (4) failed to consider siting alternatives for Compressor Station 201 that would minimize environmental justice impacts.²¹⁶ We address each below.

a. Public Participation Requirements

73. NJCF argues that the Commission violated NEPA's public participation requirements by not engaging the public in the definition of the purpose and need for the EIS.²¹⁷ However, NJCF identifies no specific shortcoming on the part of the Commission with respect to public involvement in the entire certificate proceeding or more specifically in the NEPA process.²¹⁸ While NJCF may disagree with the purpose and need as defined in the Final EIS, NJCF is obligated to "set forth specifically the ground or grounds upon which its rehearing is based."²¹⁹ Simply making bare assertions of error without any analysis does not meet this requirement.

²¹³ NJCF Rehearing Request at 50-51.

²¹⁴ NJCF Rehearing Request at 39-44; Riverkeeper Rehearing Request at 11-15; Sierra Club Rehearing Request at 9-11.

²¹⁵ NJCF Rehearing Request at 44-47; Riverkeeper Rehearing Request at 15-24; Sierra Club Rehearing Request at 9-12.

²¹⁶ Riverkeeper Rehearing Request at 24-28.

²¹⁷ NJCF Rehearing Request at 50-51.

²¹⁸ See *Tenn. Gas Pipeline Co., L.L.C.*, 156 FERC ¶ 61,007 at P 7 ("[T]he Commission's regulations require rehearing requests to provide the basis, in fact and law, for each alleged error including representative Commission and court precedent.").

²¹⁹ 15 U.S.C. § 717r(a); see also *Constellation Energy*, 457 F.3d at 22 ("Each

74. In any event, the Commission provided multiple opportunities for public engagement during this proceeding, starting with a Notice of Intent to Prepare an Environmental Assessment for the Planned Regional Energy Access Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Virtual Scoping Sessions, which was published in the Federal Register on July 30, 2020.²²⁰ After determining that an EIS would be prepared, the Commission issued a Notice of Intent to Prepare an Environmental Impact Statement, Request for Comments on Environmental Issues, and Schedule for Environmental Review, which was published in the Federal Register on October 28, 2021.²²¹ A Draft EIS was issued in the *Federal Register* on March 11, 2022,²²² establishing a 45-day comment period that ended on April 25, 2022. The comment period provided opportunity for comments on the Draft EIS either in the form of written comments and/or oral comments received at three separate public comment sessions conducted via teleconference. In response to the Draft EIS, we received 23 oral comments at the public comment sessions and 166 written comment letters, many of which concerned project purpose and need.²²³ The Final EIS responded to the comments received throughout the environmental review process.²²⁴ The record of the proceeding shows that the public participation requirements of NEPA have been met.²²⁵

quoted passage states a conclusion; neither makes an argument. Parties are required to present their arguments to the Commission in such a way that the Commission knows ‘specifically . . . the ground on which rehearing [i]s being sought’’).

²²⁰ 85 Fed. Reg. 45,869 (July 30, 2020). The Notice of Intent was issued during the Commission’s pre-filing review process for Transco’s project that began on June 18, 2020, in Docket No. PF20-3-000.

²²¹ 86 Fed. Reg. 59,707 (Oct. 28, 2021).

²²² 87 Fed. Reg. 14004 (Mar. 11, 2022)

²²³ See, e.g., Final EIS at app. I, pp. I-7, I-63 to I-66, & I-129—I-134.

²²⁴ See Final EIS at app. I.

²²⁵ See 40 C.F.R. § 1503.1 (2022) (requiring agencies to request comments), § 1503.4 (requiring a response to comments) (1978).

b. Scope of Purpose and Need

75. NJCF, Riverkeeper, and Sierra Club argue that the Commission defined the purpose and need of the project to be evaluated in the Final EIS too narrowly, thus failing to comply with the requirements of NEPA.²²⁶ According to NJCF and Sierra Club, the definition of purpose and need in the Final EIS hews too closely to project purpose as described by the applicant and the Commission instead should have developed its own project purpose and need.²²⁷ NJCF and Sierra Club argue that by not widening the purpose and need analysis beyond that described by the applicant the Commission foreclosed consideration of alternatives that “would better meet the policies and requirements set forth in NEPA and the agency’s statutory authority and goals.”²²⁸

76. Section 1502.13 of the Council on Environmental Quality’s (CEQ) NEPA regulations require an EIS to include a brief discussion of the need for the project, alternatives, and environmental impacts of the proposed action and the alternatives.²²⁹ An agency uses the purpose and need statement to define the objectives of a proposed action and then to identify and consider legitimate alternatives.²³⁰ Courts have upheld federal agencies’ use of applicants’ project purpose and need in environmental

²²⁶ NJCF Rehearing Request at 39; Delaware Riverkeeper Rehearing Request at 12; Sierra Club Rehearing Request at 9-10.

²²⁷ NJCF Rehearing Request at 39-40; Sierra Club Rehearing Request at 10.

²²⁸ NJCF Rehearing Request at 41 (quoting “National Environmental Policy Act Implementing Regulation Revisions,” 87 Fed. Reg. 23,453, 23,459 (Apr. 20, 2022)) (internal quotations omitted); Sierra Club Rehearing Request at 11.

²²⁹ 40 C.F.R. § 1502.13 (1978) (requiring an EIS to “briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action”). As noted in the Final EIS, on July 16, 2020, CEQ promulgated a final rule updating its NEPA regulations, *see Update to the Reguls. Implementing the Procedural Provisions of the Nat’l Env’t Pol’y Act*, 85 Fed. Reg. 43,304 (Jul. 16, 2020) (2020 Rule), with an effective date of September 14, 2020. However, because NEPA review of the project was already in progress when the 2020 Rule took effect, Commission staff prepared the environmental documents consistent with the preexisting regulations that were promulgated in 1978. *See* Final EIS at 1-2, n.16.

²³⁰ *See Colo. Env’t Coal. v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999) (*Colo. Env’t Coal.*).

documents and as the basis for evaluating alternatives.²³¹ When an agency is asked to consider a specific proposal, the needs and goals of the parties involved in the application should be taken into account.²³²

77. We recognize that a project's purpose and need may not be so narrowly defined as to preclude consideration of reasonable alternatives. Nonetheless, an agency need only consider alternatives that will bring about the ends of the proposed action, and the evaluation is "shaped by the application at issue and by the function that the agency plays in the decisional process."²³³ CEQ has explained that "[r]easonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense."²³⁴

78. The Final EIS appropriately defined the project's purpose and need and used that statement to consider a reasonable range of alternatives.²³⁵ The Final EIS evaluated "a no-action alternative, the potential use of other natural gas transmission systems in the region, modification to alternatives to Transco's existing system, pipeline route alternatives, alternative locations for Compressor Station 201, and the use of electric motor-driven compressors at Compressor Stations 505 and 515."²³⁶ As explained in the Final EIS, the Commission's analysis focused on alternatives that could still meet the

²³¹ *E.g.*, *City of Grapevine v. U.S. Dep't of Transp.*, 17 F.3d 1502, 1506 (D.C. Cir. 1994); *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 199 (D.C. Cir. 1991) (*Citizens Against Burlington*); (explaining that the evaluation of alternatives is "shaped by the application at issue and by the function that the agency plays in the decisional process.").

²³² *Citizens Against Burlington*, 938 F.2d at 196.

²³³ *Id.* at 199; *see also Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 598-99 (4th Cir. 2018) (*Sierra Club*) (finding the statement of purpose and need for a Commission-jurisdictional natural gas pipeline project that explained where the gas must come from, where it will go, and how much the project would deliver, allowed for a sufficiently wide range of alternatives but was narrow enough that there were not an infinite number of alternatives).

²³⁴ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18,027 (Mar. 23, 1981).

²³⁵ Final EIS at ES-10, 3-1 to 3-32.

²³⁶ *Id.* at ES-10.

project objective, which is “to provide 829,400 Dth/d of firm natural gas transportation capacity from the Marcellus Shale production areas in northeastern Pennsylvania to delivery points in New Jersey, Pennsylvania, and Maryland, as well as the no-action alternative.”²³⁷

79. Riverkeeper argues that the Commission erred by deferring its consideration of market need under the NGA until after completion of the Final EIS, which contains a separate definition of purpose and need for the project.²³⁸ As stated above, the Final EIS defined the purpose and need for the project, clarified that “[m]arket review of a project is beyond the scope of the NEPA review and is a factor that will be assessed by the Commission in any order issued for the Project” and stated that the “need for the Project will be assessed by the Commission in its orders rather than in Commission staff’s NEPA analysis.”²³⁹

80. NJCF, Riverkeeper, and Sierra Club assert that when defining the purpose and need for the project in the Final EIS, the Commission should have considered the market need for the project and, by failing to do so in the Final EIS, unnecessarily constrained both the purpose and need and the range of alternatives considered.²⁴⁰ NJCF, Riverkeeper, and Sierra Club appear to conflate the description of the purpose and need for the project, required by NEPA, and the Commission’s determination of “public need” under the public convenience and necessity standard of NGA section 7.²⁴¹ The Final EIS is not a decision-making document but rather serves the two aims of ensuring that “every significant aspect of the environmental impact” of the proposed action is considered and

²³⁷ *Id.* at 1-2, 3-1.

²³⁸ Riverkeeper Rehearing Request at 11.

²³⁹ Final EIS at 1-2.

²⁴⁰ NJCF Rehearing Request at 43, 45-46; Riverkeeper Rehearing Request at 12; Sierra Club Rehearing Request at 10.

²⁴¹ Compare NGA § 7(e), 15 U.S.C. § 717f(e) (providing that, apart from statutory exceptions, “a certificate shall be issued to any qualified applicant . . . if it is found that the applicant is able and willing properly to do the acts and perform the service proposed,” including complying with “the requirements, rules and regulations of the Commission” and the project “is or will be required by the present or future public convenience and necessity”) with 40 C.F.R. § 1502.10(a)(4) (2022) (recommending that an EIS include a statement of “[p]urpose of and need for action”).

that the public is informed.²⁴² Defining the purpose and need in the Final EIS guides the identification of reasonable alternatives,²⁴³ and is not a standard by which the Commission determines whether to authorize a project. Rather, when deciding whether and under what terms to issue a certificate, the Commission balances public benefits, including market need, against the potential adverse consequences.²⁴⁴ On the other hand, neither NEPA nor the NGA requires the Commission to make its determination of whether the project is required by the public convenience and necessity in the Final EIS before that final determination. Thus, the Final EIS appropriately explained under NGA

²⁴² *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)).

²⁴³ *See supra* note 243; *see also Colo. Env't Coal.*, 185 F.3d at 1175 (statement of purpose and need guides environmental review process, including alternatives analysis); *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,246, at P 13 (2020) (citing *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998) (*Friends of Se.'s Future*) (stating that while agencies are afforded “considerable discretion to define the purpose and need of a project,” agencies’ definitions will be evaluated under the rule of reason)); *see also Theodore Roosevelt Conservation P’ship v. Salazar*, 661 F.3d 66, 72-74 (D.C. Cir. 2011) (*Theodore Roosevelt Conservation P’ship*); *City of Grapevine*, 17 F.3d at 1506 (quoting *Citizens Against Burlington*, 938 F.2d at 197-98 (“where a federal agency is not the sponsor of a project, ‘the Federal government’s consideration of alternatives may accord substantial weight to the preferences of the applicant and/or sponsor in the siting and design of the project’”)); *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 22 (“The Commission was not required to broaden to the objective of the project to encompass the type of alternatives advanced by” commenters where they do not meet the objective of the project); *Tenn. Gas Pipeline Co., L.L.C.*, 160 FERC ¶ 61,027, at P 29 (2017) (when evaluating a private proposal, an agency’s alternatives analysis is limited to feasible alternatives, meaning “a reasonable range of alternatives to the proposal includes rejecting the proposal to adopting it to varying degrees or with modifications”).

²⁴⁴ Certificate Order, 182 FERC ¶ 61,006 at P 18; *see also* 15 U.S.C. § 717f(e) (“The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.”).

section 7(c), the final determination of the need for the project lies with the Commission.²⁴⁵

81. Courts review both an agency's stated project purpose and its selection of alternatives under the "rule of reason," where an agency must reasonably define its goals for the proposed action, and an alternative is reasonable if it can feasibly achieve those goals.²⁴⁶ When an agency is tasked to decide whether to adopt a private applicant's proposal, and if so, to what degree, a reasonable range of alternatives to the proposal includes rejecting the proposal, adopting the proposal, or adopting the proposal with some modification.²⁴⁷ An agency may eliminate those alternatives that will not achieve a project's goals or which cannot be carried out because they are too speculative, infeasible, or impractical.²⁴⁸

82. Accordingly, Commission was not required to define the objective of the project to encompass the type of alternatives advanced by NJCF, Riverkeeper, or Sierra Club.²⁴⁹ As a general matter, renewable energy resources would not accomplish the project

²⁴⁵ Final EIS at 3.

²⁴⁶ See, e.g., *Friends of Se.'s Future*, 153 F.3d at 1066-67 (stating that while agencies are afforded "considerable discretion to define the purpose and need of a project," agencies' definitions will be evaluated under the rule of reason.); *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). See also 43 C.F.R. § 46.420(b) (2016) (defining "reasonable alternatives" as those alternatives "that are technically and economically practical or feasible and meet the purpose and need of the proposed action").

²⁴⁷ See *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 72-74.

²⁴⁸ See *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1323 (10th Cir. 2004) (The Commission need not analyze "the environmental consequences of alternatives it has in good faith rejected as too remote, speculative, or . . . impractical or ineffective.") (quoting *All Indian Pueblo Council v. U. S.*, 975 F.2d 1437, 1444 (10th Cir. 1992) (internal quotation marks omitted)); *Nat. Res. Def. Council, Inc. v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972) (same); see also *Nat'l Wildlife Fed'n v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990) (stating that NEPA does not require detailed discussion of the environmental effects of remote and speculative alternatives).

²⁴⁹ *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 22 ("The Commission was not required to broaden the objective of the project to encompass the type of alternatives advanced by Food and Water Watch").

purpose of providing natural gas transportation service.²⁵⁰ The Commission's role under the NGA is to decide "whether to adopt an applicant's proposal and, if so, to what degree," not to engage in resource planning for energy end-users."²⁵¹ While the parties claim that the Commission should have considered a greater range of alternatives, they have not identified any specific proposal by entities willing to pursue such alternatives that the Commission has overlooked.²⁵²

83. As described above, we find that the Final EIS definition of the purpose and need of the project was sufficient to support the required discussion in the Final EIS of the impacts of the project and reasonable alternatives. NJCF and Riverkeeper have not identified any requirement in either NEPA or the NGA that the Commission make its determination of whether the project is required by the public convenience and necessity in the Final EIS, nor does any such requirement exist.²⁵³

c. Consideration of Non-Gas Alternatives and No-Action Alternative

84. NJCF, Riverkeeper, and Sierra Club assert that because the purpose and need for the project is too narrow, the alternatives analysis, including the no-action alternative, improperly excludes non-gas alternatives that could meet all or at least part of the actual purpose of the proposal.²⁵⁴ For the reasons set forth below, we disagree that the Commission should have considered non-gas alternatives.

²⁵⁰ See *Columbia Gas Transmission, LLC*, 164 FERC ¶ 61,036, at P 65 & n.147 (2018), *order denying reh'g*, 170 FERC ¶ 61,247 (2020) ("As we have concluded with respect to other natural gas transportation infrastructure projects, we do not find that the potential for energy conservation and renewable energy sources to be practical alternatives."); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (2017) (recognizing that "renewable energy is not a comparable replacement for the transportation of natural gas").

²⁵¹ *Atl. Coast Pipeline, LLC*, 164 FERC ¶ 61,100, at P 120 (2018) (quoting *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73).

²⁵² See *Tenn. Gas Pipeline Co., LLC*, 181 FERC ¶ 61,051 at P 24.

²⁵³ *Id.* P 21.

²⁵⁴ See NJCF Rehearing Request at 44-47; Riverkeeper Rehearing Request at 15-24; Sierra Club Rehearing Request at 9-12.

85. As explained above,²⁵⁵ an agency may eliminate alternatives that will not achieve a project's goals or are otherwise unreasonable.²⁵⁶ Here, no entity provided a specific project alternative for Commission consideration. The Final EIS explained that it excluded renewable energy and energy efficiency alternatives because these alternatives do not transport natural gas²⁵⁷ and would not feasibly achieve the project's aims. The Final EIS concluded that neither the no-action alternative nor any non-gas alternative is capable of meeting the purpose of the project, and therefore they were eliminated from detailed study.²⁵⁸ NJCF, Riverkeeper, and Sierra Club contend this approach is impermissibly restrictive.²⁵⁹ However, for purposes of NEPA, an agency may take into account an applicant's needs and goals when assessing alternatives, so long as it does not limit the alternatives to only those that would adopt the applicant's proposal.²⁶⁰

86. NJCF, Riverkeeper, and Sierra Club cite to new and draft guidance and regulations to support the proposition that the Commission is required to expand the scope of its alternatives analysis,²⁶¹ arguing that this new guidance requires the Commission to consider any alternative that would result in lower GHG emissions.²⁶² On January 9, 2023, CEQ issued interim guidance to assist agencies in analyzing GHG and climate change effects under NEPA.²⁶³ CEQ states that agencies should use this guidance to inform NEPA review for all new proposed actions, but agencies are not expected to apply

²⁵⁵ See *supra* P 81.

²⁵⁶ See *supra* note 261.

²⁵⁷ Final EIS at 3-3.

²⁵⁸ *Id.* at ES-15.

²⁵⁹ NJCF Rehearing Request at 43; Riverkeeper at 16-17; Sierra Club at 10-11.

²⁶⁰ *Theodore Roosevelt Conservation P'ship*, 661 F.3d at 73-74.

²⁶¹ See Riverkeeper Rehearing Request at 18, 20-22; Sierra Club Rehearing Request at 10.

²⁶² See Riverkeeper Rehearing Request at 15, 17-18; Sierra Club Rehearing Request at 10.

²⁶³ See National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions & Climate Change, 88 Fed. Reg. 1196 (Jan. 9, 2023) (CEQ Guidance or guidance).

this guidance to concluded NEPA reviews and actions for which a final EIS or environmental assessment has been issued.²⁶⁴ Because the Commission issued the Final EIS prior to the publication of this guidance, the Commission is not formally applying the guidance to the instant action.²⁶⁵ Riverkeeper also cites to the 2022 revisions to CEQ's regulations,²⁶⁶ as well as the Commission's Draft Policy Statement on Certification of New Natural Gas Facilities.²⁶⁷ CEQ made its revisions to its regulations effective May 20, 2022, so they are not applicable to this proceeding, and the referenced Policy Statement is a draft document. Accordingly, neither document imposes requirements applicable to this proceeding.²⁶⁸ In any event, we note that nothing in the revision to CEQ's regulations "foreclose[s] an agency from considering the goals of the applicant."²⁶⁹

87. Moreover, as discussed above,²⁷⁰ because the alternatives considered under NEPA are informed both by "the project sponsor's goals,"²⁷¹ as well as "the goals that Congress has set for the agency,"²⁷² *i.e.*, the goals set in enacting the NGA, the Commission's

²⁶⁴ *Id.* at 1212 ("CEQ does not expect agencies to apply this guidance to concluded NEPA reviews and actions for which a final EIS or EA has been issued.").

²⁶⁵ *See LA Storage, LLC*, 182 FERC ¶ 61,026, at P 12 n.29 (2023).

²⁶⁶ *See* Riverkeeper Rehearing Request at 21.

²⁶⁷ *See id.*

²⁶⁸ *See supra* note 241; *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (converting the two policy statements issued on February 18, 2022, *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Certificate Policy Statement); *Consideration of Greenhouse Gas Emission in Nat'l Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022) to "draft" policy statements).

²⁶⁹ *Nat'l Env't Policy Act Implementing Regulations Revisions*, 87 Fed. Reg. 23453-01.

²⁷⁰ *See supra* P 81

²⁷¹ *Citizens Against Burlington*, 938 F.2d at 196.

²⁷² *Sierra Club v. U.S. Forest Serv.*, 897 F.3d 582, 598-99 (4th Cir. 2018) (finding the statement of purpose and need for a Commission-jurisdictional natural gas pipeline project that explained where the gas must come from, where it will go, and how much the

consideration of alternatives includes the no-action alternative and alternatives that achieve the purpose of the project.²⁷³ While NJCF and Riverkeeper argue that the Commission could use resources such as information provided by U.S. Energy Information Administration²⁷⁴ or analyses of wider market need²⁷⁵ to develop non-gas alternatives to meet the energy needs the project is intended to satisfy, such speculation regarding hypothetical energy alternatives outside of the Commission's jurisdiction goes beyond NEPA's "rule of reason" applicable to the identification of alternatives and is not necessary to analyze the present proposal. Similarly, although the Commission's guidance for completion of Environmental Reports requires applicants to identify what other means the project's customers could use to meet the project's purpose and need, and this has included non-gas alternatives, the guidance assumes the existence of actual alternatives or planned alternatives that could meet the same near-term need as the proposal.²⁷⁶

d. Siting Alternatives for Compressor Station 201

88. Riverkeeper states that the Commission did not adequately address the disproportionately high impacts to environmental justice communities from the proposed site for Compressor Station 201.²⁷⁷ Specifically, Riverkeeper argues that the

project would deliver, allowed for a sufficiently wide range of alternatives but was narrow enough that there were not an infinite number of alternatives).

²⁷³ Riverkeeper cites to the NJ BPU decision, which it says discussed 8 non-gas pipeline alternatives. *See* Riverkeeper Rehearing Request at 19. We note that the NJ BPU order discussed potential non-gas alternatives in a general manner and did not include any specific project or projects that could meet all or part of the purpose and need for this project. NJ BPU June 29, 2022, Decision at 4-5. Riverkeeper has not identified a specific alternative for the Commission's consideration. *See Tenn. Gas Pipeline Co., LLC*, 181 FERC ¶ 61,051 at P 24.

²⁷⁴ Riverkeeper Rehearing Request at 18.

²⁷⁵ NJCF Rehearing Request at 45.

²⁷⁶ *See* FERC, Guidance Manual for Environmental Report Preparation (Feb. 2017) at 4-135-136, <https://www.scribd.com/doc/286315156/FERC-GUIDANCE-MANUAL-FOR-ENVIRONMENTAL-REPORT-PREPARATION#> ("FERC Resource Report Guidance").

²⁷⁷ Riverkeeper Rehearing Request at 24-25.

Commission overlooked the fact that, while all considered sites have nearby environmental justice communities, the proposed site for Compressor Station 201 has a significantly higher total population living near the site than other sites.²⁷⁸

89. We agree with Commission staff's analysis in the Final EIS that, although there will be short term significant visual impacts on the community near proposed Compressor Station 201, based on the mitigation measures, long term visual impacts will be less than significant.²⁷⁹ The Final EIS explains the factors Commission staff considered for the siting of Compressor Station 201, including both the proposed location and three alternative locations, all of which are located within either minority or low-income block groups, and all of which are also within one mile of other block groups of interest.²⁸⁰ While we agree that the proposed site for Compressor Station 201 has a greater review area population than the alternative site locations, staff's environmental justice determinations are made based on effects, not population size. The Final EIS stated that although there are population differences between the proposed site and the alternative sites, population was only one of several factors considered. The Final EIS also analyzed potential impacts on wetlands and floodplains, proximity to infrastructure to provide electricity to the compressor station, and land ownership and availability when evaluating alternate compressor station locations.²⁸¹ We agree with the conclusion in the Final EIS that, based on consideration of all of the factors relating to the alternatives for siting of Compressor Station 201, long term visual impacts, once mitigated, at the proposed Compressor Station 201 site, will be less than significant.²⁸² Thus, we find that we appropriately considered all factors, including population differences, in evaluating alternatives for Compressor Station 201.

2. GHG Emissions

90. NJCF, Riverkeeper, and Sierra Club allege that the Commission did not properly account for impacts from GHG emissions, stating that the Commission failed to:

²⁷⁸ *Id.* at 25.

²⁷⁹ Certificate Order, 182 FERC ¶ 61,006 at P 66 (citing Final EIS at 4-159—4-160). Riverkeeper does not dispute the significance determination for any impact associated with Compressor Station 201.

²⁸⁰ Final EIS at 3-25.

²⁸¹ *Id.* at 3-25—3-27.

²⁸² *Id.* at 3-27.

(1) analyze the project's upstream impacts;²⁸³ (2) properly assess the significance of GHG emissions;²⁸⁴ (3) properly consider measures to mitigate the project's climate change impacts;²⁸⁵ (4) prepare a supplemental EIS;²⁸⁶ (5) consider climate change as part of its public interest determination;²⁸⁷ and (6) properly consider the impacts of the project over its lifespan.²⁸⁸

²⁸³ NJCF Rehearing Request at 47-49; Riverkeeper Rehearing Request at 31-38; Sierra Club Rehearing Request at 13-17.

²⁸⁴ Riverkeeper Rehearing Request at 38-46; Sierra Club Rehearing Request at 21-24.

²⁸⁵ Riverkeeper Rehearing Request at 46-48.

²⁸⁶ *Id.* at 48.

²⁸⁷ *Id.* at 54-56.

²⁸⁸ Sierra Club Rehearing Request at 24-25.

a. **Upstream Emissions**

91. NJCF, Riverkeeper, and Sierra Club advance several arguments that upstream emissions are reasonably foreseeable and thus indirect impacts for which the social cost of greenhouse gas should be calculated.²⁸⁹ We disagree.

92. NEPA requires agencies to consider indirect effects or impacts that “are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”²⁹⁰ The courts have found that an impact is reasonably foreseeable if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”²⁹¹

93. The environmental effects resulting from natural gas production are generally not reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations, where the supply source is unknown.²⁹² For example, the record lacks information that would help predict the number and location of any additional wells that would be drilled as a result of any production demand associated with the project.²⁹³ The record also does not evince from whom the shippers would source their gas and, indeed, those sources could regardless change throughout the project’s operation.²⁹⁴ The Certificate Order and Final EIS considered the record in this

²⁸⁹ NJCF Rehearing Request at 47-49; Riverkeeper Rehearing Request at 31-38; Sierra Club Rehearing Request at 13-17.

²⁹⁰ 40 C.F.R. § 1508.8(b) (1978). *See also* 40 C.F.R. § 1508.1(g)(2) (2022).

²⁹¹ *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citations omitted); *see also Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

²⁹² *See, e.g., Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 27; *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh’g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *pet. for review dismissed sub nom. Coal. for Responsible Growth v. FERC*, 485 F. App’x. 472, 474-75 (2d Cir. 2012) (unpublished opinion); *see also Adelpia Gateway, LLC*, 169 FERC ¶ 61,220, at P 243 (2019), *order on reh’g*, 171 FERC ¶ 61,049, at P 89 (2020).

²⁹³ *See Adelpia Gateway, LLC*, 169 FERC ¶ 61,220, at P 243 (2019).

²⁹⁴ *See Certificate Order*, 182 FERC ¶ 61,006 at P 68.

proceeding and concluded that any upstream GHG emissions would not be a reasonably foreseeable impact of the this project.²⁹⁵

94. NJCF, Riverkeeper, and Sierra Club dispute that conclusion, arguing that because the record demonstrates that the gas would be sourced from the Marcellus shale in Northeastern Pennsylvania, the production area is sufficiently specific to render upstream impacts reasonably foreseeable.²⁹⁶ We disagree. As noted, the upstream impacts associated with a potential increase in natural gas production can vary depending on the origin and source of the gas.²⁹⁷ The Commission explained that the project's receipt points are at interconnections with large gathering systems in Northeastern Pennsylvania. Consistent with Commission precedent, the Final EIS and Certificate Order explained that, based on this record, which does not include information indicating where the

²⁹⁵ *See id.* (“The environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations, where the supply source is unknown. Here, the specific source of natural gas to be transported via the REAE is currently unknown. Although the project's receipt points are at interconnections with large gathering systems in Northeastern Pennsylvania, the record does not indicate from whom the project shippers may source their gas—indeed the project's purpose is to diversify fuel supply access—further, the producers/gas suppliers that hold capacity on each of the connected gathering systems could change throughout the project's operation.”) (citations omitted); Final EIS at 4-178 (“We reiterate, the specific source of natural gas to be transported by the Project is currently unknown and would likely change throughout the Project's operation.”).

²⁹⁶ *See* NJCF Rehearing Request at 48; Riverkeeper Rehearing Request at 32-34; Sierra Club Rehearing Request at 13-14.

²⁹⁷ As discussed in the Final EIS, the Commission has not found upstream emissions to be an effect of any proposed project where, as here, the following factors are unknown: “the location of the supply source; whether transported gas would come from new or existing production; and whether there would be any potential associated development activities, and if so, its location.” Final EIS at 4-178. *See also Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232, at P 97 (2020) (environmental effects resulting from upstream natural gas production are not reasonably foreseeable consequences of the Commission's action where the origin and specific source of natural gas transported by the project is unknown); *Columbia Gas Transmission, LLC*, 170 FERC ¶ 61,045, at P 123 (2020) (same).

project shippers may source their gas within those large and diverse basins, the resulting uncertainty meant that there are no upstream emissions that are reasonably foreseeable.²⁹⁸

95. Sierra Club contends that, even in the absence of complete information, the Commission is not absolved from “reasonable forecasting”²⁹⁹ and that the Commission must “at the very least attempt to obtain the information necessary to fulfill its statutory responsibilities.”³⁰⁰ Although courts have held that NEPA requires “reasonable forecasting,”³⁰¹ an agency “is not required to engage in speculative analysis”³⁰² or “to do the impractical, if not enough information is available to permit meaningful consideration.”³⁰³ Here, Commission staff sought precisely such information, requesting that Transco provide flow maps showing receipt points where gas from the Marcellus

²⁹⁸ Certificate Order, 182 FERC ¶ 61,006 at P 68; *see, e.g., Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 27 (“The environmental effects resulting from natural gas production are generally neither caused by a proposed pipeline project nor are they reasonably foreseeable consequences of our approval of an infrastructure project, as contemplated by CEQ regulations, where the supply source is unknown.”); *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 61 (2018) (“Even if a causal relationship between the proposed action here and upstream production was presumed, the scope of the impacts from any such production is too speculative and thus not reasonably foreseeable. As we have explained, neither the Commission nor the applicant generally has sufficient information to determine the origin of the gas that will be transported onto a pipeline . . . [T]he Commission only has jurisdiction over the pipeline applicant, whose sole function is to transport gas from and to the contracted for delivery and receipt points. While the shippers might contract with a specific producer for their gas supply, the shipper would not know the source of the producer’s gas, and, for that matter, producers are not required to dedicate supplies to a particular shipper and thus likely will not know in advance the exact source of production.”) (citations omitted).

²⁹⁹ Sierra Club Rehearing Request at 14.

³⁰⁰ *Id.* at 19.

³⁰¹ *N. Plains Res. Council, Inc. v. The Surface Transp. Bd.*, 668 F.3d 1067, 1079 (9th Cir. 2011) (quoting *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 962 (9th Cir. 2003)).

³⁰² *N. Plains Res. Council, Inc. v. The Surface Transp. Bd.*, 668 F.3d. at 1078.

³⁰³ *Id.* (quoting *Env’t Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006)).

shale region would enter the Transco system.³⁰⁴ Transco responded that the project would receive gas from existing gathering infrastructure in the Marcellus Shale production area³⁰⁵ via new connections with Williams Field Services Company, LLC, Regency NEPA, and UGI North,³⁰⁶ and the Commission ultimately concluded that this information was not sufficient to render the upstream impacts reasonably foreseeable because the source of the gas remains unclear and could change, along with the producers/gas suppliers from whom the shippers may source their gas, throughout the project's operation.³⁰⁷

96. Sierra Club cites *Barnes v. U.S. Department of Transportation*³⁰⁸ and *Indigenous Environmental Network v. U.S. Department of State*³⁰⁹ as examples of binding court precedent that upstream emissions are reasonably foreseeable consequences of the Commission's approval because the project has the potential to spur demand.³¹⁰

97. We disagree that *Barnes* and *Indigenous Environmental Network* require the Commission to treat upstream emissions as reasonably foreseeable here. In *Barnes*, the U.S. Court of Appeals for the Ninth Circuit noted that the Federal Aviation

³⁰⁴ See Certificate Order, 182 FERC ¶ 61,006 at P 68 (referencing a data request sent to Transco by Commission staff on May 26, 2021); Transco Response to May 26, 2021 Environmental Information Request at 1 (filed Jun. 15, 2021) (Regarding Resource Report 1 – Project Description).

³⁰⁵ The Marcellus shale is a black shale geological formation containing natural gas reserves which are developed using horizontal drilling and hydraulic fracturing techniques. The Marcellus shale formation extends deep underground from Ohio and West Virginia, northeast through Pennsylvania and southern New York with multiple producing intervals within the formation. See *Dominion Transmission, Inc.*, 156 FERC ¶ 61,140, at P 29 n.32 (2016).

³⁰⁶ See Certificate Order, 182 FERC ¶ 61,006 at P 68 (citing Transco Response to May 26, 2021 Environmental Information Request at 1 (filed June 15, 2021) (Regarding Resource Report 1 – Project Description)).

³⁰⁷ See Certificate Order, 182 FERC ¶ 61,006 at P 68.

³⁰⁸ 655 F.3d 1124 (9th Cir. 2011).

³⁰⁹ 347 F.Supp.3d 561 (D. Mont. 2018).

³¹⁰ Sierra Club Rehearing Request at 14.

Administration had acknowledged that runway expansion projects have the unique potential to spur demand, but the agency failed to explain and support with record evidence its conclusion that the proposed project, the addition of a third runway at a two-runway airport, was unlikely to attract more private aircraft.³¹¹ The court held that it was reasonably foreseeable that the addition of a third runway would have a growth-inducing effect on aviation demand because airport capacity is primarily a factor of runway capacity.³¹² In contrast the project at issue here would add only a small amount of incremental capacity on Transco's existing 10,000-mile interstate pipeline system, and the record does not show that the project will spur additional production.

98. Sierra Club's reference to *Indigenous Environmental Network* is equally unpersuasive because the court's opinion there did not address upstream GHG emissions as indirect effects,³¹³ but rather concluded only that the supplemental EIS for the Keystone Pipeline should have considered the cumulative effects of GHG emissions for the Alberta Clipper Pipeline expansion.³¹⁴ The court did not distinguish between types of GHG emissions (e.g., upstream, downstream, operational, construction) and thus the ruling does nothing to further Sierra Club's argument that upstream emissions are reasonably foreseeable.³¹⁵ *Indigenous Environmental Network* does not stand for the proposition that upstream GHG emissions are reasonably foreseeable. Accordingly, we find this case inapposite.

99. Sierra Club next cites *Birckhead v. FERC* and asserts that the Commission has recognized that there are "instances in which upstream gas production is both reasonably

³¹¹ See *Barnes*, 655 F.3d at 1137-38.

³¹² *Id.* at 1138.

³¹³ Although Sierra Club fails to provide a pincite directing our attention to a particular part of the court's opinion, we presume it is referring to the part in which the court discusses the cumulative effects resulting from GHG emissions.

³¹⁴ 347 F.Supp.3d at 577-78.

³¹⁵ "Reasonable foreseeability" is a requirement for impacts to be considered indirect or cumulative for the purpose of NEPA. See 40 C.F.R. § 1508.8(b) (1978) ("indirect effects or impacts are caused by the action and are later in time or farther removed in distance, but are still *reasonably foreseeable*." (emphasis added); *id.* § 1508.7 ("Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and *reasonably foreseeable future actions*....") (emphasis added).

foreseeable and sufficiently causally connected to a pipeline project to qualify as an indirect effect.”³¹⁶ However, the court did not disagree with the Commission’s views that the record would need to demonstrate “that the proposed project represents the only way to get additional gas ‘from a specified production area’ into the interstate pipeline system” for the requisite causal connection to exist.³¹⁷ Indeed, the *Birckhead* court accepted the Commission’s decision not to consider upstream gas production because the record lacked information about the number and location of any additional natural gas wells.³¹⁸

100. Finally, Sierra Club points to a recommendation and statements by the U.S. Environmental Protection Agency (EPA) that the Commission should consider whether the project will foreseeably induce production and that upstream emissions are reasonably foreseeable.³¹⁹ EPA’s comment does not undercut our conclusion that specifics regarding upstream production are not available and thus that impacts from production are too speculative to be reasonably foreseeable. In support of the same argument—that the Commission must consider GHG emissions from upstream production—Riverkeeper cites *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*³²⁰ and *Public Service Commission of the State of New York v. Federal Power Commission.*³²¹ Riverkeeper’s reliance on *Transco* and *NY PSC* is misplaced. Those cases had nothing to do with whether, or under what circumstances, the Commission is required to consider upstream GHG emissions under either NEPA or the NGA. Rather, these cases dealt with the scope of the Commission’s authority to consider conservation of natural gas – at that time thought to be a limited and dwindling resource – in its decisions under section 7.³²² As explained above, there is not a demonstrated causal

³¹⁶ Sierra Club Rehearing Request at 14-15 (citing *Birckhead v. FERC*, 925 F.3d 510, 517 (D.C. Cir. 2019)). Sierra Club distorts the court’s language by suggesting that the court stated there “are” instances (rather than “there *may* well be” instances) in which upstream emissions are reasonably foreseeable.

³¹⁷ *Birckhead*, 925 F.3d at 517.

³¹⁸ *See id.* at 517-18.

³¹⁹ *See* Sierra Club Rehearing Request at 15-17.

³²⁰ 365 U.S. 1 (1961).

³²¹ 373 F.2d 816 (D.C. Cir. 1967) (*New York PSC*), *rev’d on other grounds*, *FPC v. Sunray Dx Oil Co.*, 391 U.S. 9 (1968).

³²² Riverkeeper does not allege the certificate order was deficient for failure to

connection between the REAE project and upstream natural gas production, nor are upstream GHG emissions reasonably foreseeable.

101. The NGA analysis is distinct from the NEPA analysis, however, and must be addressed as well because Riverkeeper has pleaded specifically that we must consider upstream GHG emissions for NGA purposes.³²³ Even if substantial evidence demonstrated reasonable foreseeability and a causal connection between a proposed project and upstream production, which as discussed is absent here, no court has ever held that the Commission must consider upstream GHG impacts as part of its NGA analysis. The text of the NGA makes clear that upstream activities such as exploration, production and gathering are *not* under the Commission's jurisdiction,³²⁴ and courts have upheld our determinations that we do not need to consider upstream emissions as Riverkeeper suggests.³²⁵

consider conservation of natural gas.

³²³ Riverkeeper asserts that *Transcontinental* stands for the proposition that the term “public convenience and necessity” in the Natural Gas Act is broad enough to encompass all factors bearing on the public interest, including the end use of the gas to be transported, and that the Commission must consider upstream GHG emissions. *Transcontinental* itself states, to the contrary, that Congress did not intend to give the Commission comprehensive powers over every incident of gas production, transportation, and sale, and that the Commission's powers under section 7 are limited. 365 U.S. at 8, 17.

³²⁴ See 15 U.S.C. § 717(b) (“The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but *shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.*”) (emphasis added); see also *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 507 (1989) (“Section 1(b) of the NGA, 15 U.S.C. § 717(b), also expressly carves out a regulatory role for the States, however, providing that the States retain jurisdiction over intrastate transportation, local distribution, and distribution facilities, and over ‘the production or gathering of natural gas.’”).

³²⁵ See, e.g., *Cent. N.Y. Oil & Gas Co., LLC*, 137 FERC ¶ 61,121, at PP 81-101 (2011), *order on reh'g*, 138 FERC ¶ 61,104, at PP 33-49 (2012), *pet. for review*

102. NJCF argues that the record demonstrates the gas from the project is not needed and, therefore, in the absence of the project it cannot be said that the upstream emissions would still occur as the result of another project.³²⁶ It asserts that even if the upstream emissions were incurred as the result of another project, such emissions may not result if the no-action alternative were selected.³²⁷ As discussed, the project's upstream emissions are not reasonably foreseeable. As a reminder, NEPA is not a means of "mandating that agencies achieve particular substantive environmental results";³²⁸ rather, it serves to "impose[] only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions."³²⁹

103. Sierra Club argues that if the Commission believes it lacks sufficient information to assess upstream impacts, it must request from Transco any additional information that is needed to do the analysis.³³⁰ Citing the Commission's regulations at 18 C.F.R. § 157.14(a) (2022), Sierra Club argues that Transco is required to provide sufficient information on identification of all customers with information about usage, specific information about expected throughput and load shape, and information on possible alternatives, as well as information on gas supply.³³¹ As previously stated, the Commission did, in fact, request such information from Transco—specifically, flow maps showing receipt points where gas from the Marcellus shale region would enter the Transco system.³³² In the Certificate Order, the Commission concluded that, based on the

dismissed sub nom. Coal. for Responsible Growth v. FERC, 485 F. App'x. 472, 474-75 (2d Cir. 2012) (unpublished opinion).

³²⁶ NJCF Rehearing Request at 49.

³²⁷ *Id.*

³²⁸ *Marsh*, 490 U.S. at 371

³²⁹ *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-57 (2004) (citation omitted).

³³⁰ Sierra Club Rehearing Request at 18.

³³¹ *Id.*

³³² *See supra* P 95.

record, upstream emissions are not reasonably foreseeable.³³³ Transco also stated in its application that “Project Shippers will be responsible for contracting directly with suppliers of natural gas and arranging for deliveries of gas supplies that will be transported from the Receipt Point(s) to the Delivery Point(s) under the Project.”³³⁴ In other words, as stated in the Certificate Order, project shippers are responsible for sourcing their own gas and the source(s) from which they do so may change throughout the project’s operation.³³⁵ Sierra Club’s citation to the generic requirement in our regulations that applicants provide “information on production areas accessible to the proposed construction that contain sufficient existing or potential gas supplies for the proposed project” is unpersuasive.³³⁶ Because seeking this information would not provide meaningful information in this case, we find it appropriate to waive compliance with this regulation.³³⁷

b. Significance

104. Riverkeeper and Sierra Club argue that the Commission erred by not characterizing the significance of the project’s GHG emissions.³³⁸ In support, they state that the Commission offered no rationale for why the Social Cost of GHGs is inappropriate for determining the significance of the project’s impacts.³³⁹ Sierra Club

³³³ See Certificate Order, 182 FERC ¶ 61,006 at P 68.

³³⁴ Transco Mar. 26, 2021 Application for Certificate of Public Convenience and Necessity and for Order Permitting and Approving Abandonment of Facilities at 14.

³³⁵ See Certificate Order, 182 FERC ¶ 61,006 at P 68.

³³⁶ Sierra Club Rehearing Request at 18 (citing 18 C.F.R. § 157.14(a)(11)).

³³⁷ See *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 23 n.74; see also *Gulf S. Pipeline Co., LP*, 101 FERC ¶ 61,204, at P 16 (2002) (granting request to waive filing requirements in section 157.14(a)(11)).

³³⁸ Riverkeeper Rehearing Request at 38-46; Sierra Club Rehearing Request at 21-24. We note that despite Sierra Club’s assertion to the contrary, the Commission did not represent that it found GHG emissions “significant” for the purposes of performing an EIS. Moreover, Sierra Club failed to provide any evidence to support this assertion. See Sierra Club Rehearing Request at 21.

³³⁹ Riverkeeper Rehearing Request at 38-39; Sierra Club Rehearing Request at 21-22.

points to the fact that the Commission previously found that it could determine the significance of GHG impacts.³⁴⁰ Riverkeeper and Sierra Club also contend that the fact that the Commission is currently considering whether and how to conduct significance determinations in a separate proceeding does not obviate its duty to consider such impacts in this proceeding.³⁴¹

105. In the Final EIS, Commission staff recognized that construction and operation of the project would increase the atmospheric concentration of GHGs, in combination with past, current, and future emissions from all other sources globally and would contribute incrementally to future climate change impacts.³⁴² Commission staff also provided context for that observation through its discussion of the U.S. Global Change Research Program's Fourth Assessment Report's observations in the project's region.³⁴³

106. We note that we are not applying the social cost of carbon because we have not determined which, if any, modifications are needed to use this tool for project-level analyses.³⁴⁴ Further, we find that the Commission met its NEPA obligations and appropriately declined to label the emissions as significant or insignificant because it (1) fully disclosed the reasonably foreseeable GHG emissions associated with the project's construction, operation, and downstream emissions; (2) placed them in context; (3) identified climate impacts in the region; and (4) is actively conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.³⁴⁵

³⁴⁰ Sierra Club Rehearing Request at 22 (citing *N. Nat. Gas. Co.*, 174 FERC ¶ 61,189, at P 32 (2021)).

³⁴¹ Riverkeeper Rehearing Request at 51-54; Sierra Club Rehearing Request at 22.

³⁴² See Final EIS at 4-175; see also Certificate Order, 182 FERC ¶ 61,006 at P 73 (“By adopting the climate impact analysis in the EIS, we recognize that the project may release GHG emissions that contribute incrementally to future global climate change impacts, and have identified climate change impacts in the region.”).

³⁴³ See Final EIS at 4-173—4-174.

³⁴⁴ See, e.g., *LA Storage, LLC*, 182 FERC ¶ 61,026, at P 14 (2023).

³⁴⁵ See *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022), changed to draft status, *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022).

107. Riverkeeper argues that the Commission should use the comparison of the project's emissions to federal and state inventories to consider "natural gas lock-in," which it defines as "decisions made regarding development and infrastructure that inhibit the necessary societal transition away from fossil fuels."³⁴⁶ The Commission recognized that the project would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources, and would contribute cumulatively to climate change;³⁴⁷ however, the Commission is unable to determine how individual projects will affect international, national, or state-wide GHG emissions reduction targets or whether a project's GHG emissions comply with those goals or laws.³⁴⁸ Specifically, in the Final EIS, Commission staff compared both the projected construction and operational GHG emissions from the project to the total GHG emissions for the United States as a whole, and the States of Delaware, Maryland, New Jersey, New York, and Pennsylvania, and compared the projected operational GHG emissions in the context of state GHG goals for the aforementioned states.³⁴⁹ Riverkeeper points to no authority requiring anything more.

c. **Mitigation**

108. Riverkeeper argues that the Commission erred by failing to consider measures to mitigate the climate change impacts of the project.³⁵⁰ Riverkeeper further asserts that by omitting a reasonably complete discussion of possible mitigation measures the Commission undermines the action-forcing function of NEPA and prevents the Commission and the public from properly evaluating the severity of the adverse effects.³⁵¹ Riverkeeper also states that the Commission did not comply with CEQ's NEPA regulations that specify various mitigation requirements for an EIS.³⁵²

³⁴⁶ Riverkeeper Rehearing Request at 39-41.

³⁴⁷ See Certificate Order, 182 FERC ¶ 61,006 at P 73; Final EIS at 4-175.

³⁴⁸ See *Spire Storage W. LLC*, 179 FERC ¶ 61,123, at P 54 (2022).

³⁴⁹ For a full recitation of all the calculated figures, see Final EIS at 4-176—4-177.

³⁵⁰ Riverkeeper Rehearing Request at 46.

³⁵¹ *Id.* (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989) (*Methow Valley*)).

³⁵² Riverkeeper Rehearing Request at 46-47 (citing 40 C.F.R. §§ 1502.16(a)(6), (7), (9) (2022)). To the extent Riverkeeper attempts to argue that the Commission's

109. We continue to find the discussion of GHG emissions, including mitigation, consistent with our obligations under NEPA. Further, in response to comments from the EPA, the Final EIS also summarized measures that Transco has taken in designing its facilities in order to protect natural gas infrastructure from climate-change related impacts.³⁵³ Riverkeeper does not explain how this discussion is inadequate. Rather Riverkeeper speculates that the Commission could have approved only a “portion” of the project and that the Commission has the authority to impose “terms and conditions” in a section 7 certificate.³⁵⁴ Particularly at the rehearing stage, Riverkeeper’s generalized assertions of this nature do not demonstrate a material omission in the Commission’s analysis under NEPA.³⁵⁵ It is also worth noting that “NEPA not only does not require agencies to discuss any particular mitigation plans that they might put in place, it does not require agencies—or third parties—to effect any.”³⁵⁶ In any case, in the absence of additional specific proposed mitigation measures, we find that a further discussion of potential mitigation measures would not, consistent with the purpose of NEPA, meaningfully inform the Commission or the public’s consideration of the proposed project and alternatives.³⁵⁷

110. Riverkeeper states that the CEQ Guidance “encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change.”³⁵⁸ As previously stated, since the Commission issued the

consideration of mitigation as to other resources, aside from GHG emissions, is deficient, its argument lacks sufficient detail to require a response. *See infra* P 126 note 452.

³⁵³ Final EIS at 4-177.

³⁵⁴ *Id.* at 48.

³⁵⁵ *See infra* P 126 note 454.

³⁵⁶ *Citizens Against Burlington*, 938 F.2d at 206 (citation omitted).

³⁵⁷ *See, e.g., Dep’t of Transp. v. Pub. Citizen*, 541 U.S. at 767 (“[I]nherent in NEPA and its implementing regulations is a ‘rule of reason.’”); *Mayo v. Reynolds*, 875 F.3d 11, 20 (D.C. Cir. 2017) (“The rule of reason governs [a court’s] review of an agency’s environmental analysis.”).

³⁵⁸ Riverkeeper Rehearing Request at 48 (quoting CEQ Guidance, 88 Fed. Reg. at 1197).

Final EIS prior to the publication of this guidance, the Commission is not applying the guidance to the instant action.³⁵⁹

d. Supplemental EIS

111. Riverkeeper argues that the Commission erred by not preparing a supplemental EIS in light of the CEQ Guidance's issuance after publication of the Final EIS.³⁶⁰ As Riverkeeper recognizes, the CEQ Guidance expressly exempts agencies from applying the guidance "to concluded NEPA reviews and actions for which a final EIS or environmental assessment has been issued."³⁶¹ Since the Commission issued the Final EIS prior to the publication of this guidance, the Commission is appropriately not applying the guidance to the instant action.

112. Riverkeeper attempts to argue that the CEQ Guidance constitutes "significant new circumstances or information" that justify the Commission producing a supplemental EIS.³⁶² This argument would render the exemption in the CEQ Guidance for completed final EISs superfluous and we thus reject it, consonant with fundamental principles of interpretation.³⁶³

³⁵⁹ See *supra* P 86. To the extent Riverkeeper argues that the CEQ Guidance imposes any requirement on an agency to impose mitigation pursuant to a proposed action, this assertion is contrary to Supreme Court precedent. See *Methow Valley*, 490 U.S. at 350, 353 (holding that "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process" and that NEPA does not require specific measures be employed to mitigate the adverse effects of major federal actions).

³⁶⁰ Riverkeeper Rehearing Request at 48.

³⁶¹ CEQ Guidance, 88 Fed. Reg. at 1212.

³⁶² Riverkeeper Request at 50.

³⁶³ Cf. *Corley v. United States*, 556 U.S. 303, 314 (2009) ("[O]ne of the most basic interpretive canons [is] that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (internal quotation marks and citation omitted); *Morales v. Sociedad Espanola de Auxilio Mutuo y Beneficencia*, 524 F.3d 54, 59 (2008) ("A well-established canon of construction requires that courts give all language in a statute operative effect. This canon is fully transferable to the construction of regulations. Thus, a court should interpret a regulation so that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or

113. Riverkeeper's suggestion that the Commission is not entitled to deference for its determination as to whether to prepare a supplemental EIS is belied by the caselaw, including the case Riverkeeper cites.³⁶⁴ In *Marsh*, the Supreme Court rejected the argument that the decision whether to prepare a supplemental EIS deserves no deference on review, instead concluding that it "must defer to the informed discretion of the responsible federal agencies" and not set aside the agency's decision unless it was arbitrary and capricious.³⁶⁵ This proposition is widely accepted in the Courts of Appeals.³⁶⁶ The Commission's decision to not prepare a supplemental EIS would thus be entitled to deference on judicial review.

e. **Consideration of Climate Change Impacts**

114. Riverkeeper argues that the Commission's declination to determine whether the effect of the project's GHG emissions on climate change was significant or not renders the Commission's finding of public convenience and necessity arbitrary, capricious, and contrary to the NGA.³⁶⁷ We disagree. NEPA imposes only procedural requirements. The Commission estimated the reasonably foreseeable GHG emissions and compared them to national and state emissions levels based on the information, tools, and methodology available at the time.³⁶⁸ We also note that Riverkeeper fails to cite any authority for the proposition that the Commission's NEPA analysis is incomplete for lack of a significance determination despite Commission staff having completed an EIS that

insignificant.") (internal quotation marks and citations omitted).

³⁶⁴ See Riverkeeper Rehearing Request at 51 (citing *Marsh*, 490 U.S. at 378).

³⁶⁵ 490 U.S. at 378 (citations omitted).

³⁶⁶ See, e.g., *Stand Up for Cal.! v. U.S. Dep't of the Interior*, 994 F.3d 616, 629 n.5 (D.C. Cir. 2021) (*Stand Up for Cal.!*) ("[The] determination [not to prepare a supplemental EIS] is subject to considerable judicial deference."); *Cal. ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 795-96 (9th Cir. 2014) (deferring to the Secretary's decision not to prepare a supplemental EIS); *Wyo. v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1258 (10th Cir. 2011) ("[A]n agency is generally entitled to deference when it determines that new information or a change made to the proposed action does not warrant preparation of a supplemental EIS.") (citation omitted).

³⁶⁷ Riverkeeper Rehearing Request at 54-56.

³⁶⁸ See Final EIS at 4-180.

discloses the project's reasonably foreseeable GHG emissions.³⁶⁹ In light of this factual record, we find the Commission's analysis complete.³⁷⁰

f. Impacts over the Project's Lifespan

115. Citing a recommendation in the CEQ Guidance that agencies consider the projected GHG emissions or reductions for the expected lifetime of the action,³⁷¹ Sierra Club argues that the Commission erred by largely considering only annual emissions when it instead should have attributed a 50-year lifespan to the project during which Sierra Club alleges the project would contribute over 800 million metric tons of carbon pollution.³⁷²

116. As we have previously explained, the Commission is not applying the CEQ Guidance to this action because the Commission published the Final EIS prior to issuance of the guidance. Nevertheless, Commission staff, as recognized by Sierra Club in its rehearing request, did disclose the social cost of GHG values over the 20-year period of

³⁶⁹ In addition, we note that Riverkeeper has not proposed a methodology for assessing the significance of a discrete level of emissions. *See Food & Water Watch v. FERC*, 28 F.4th 277, 290 (D.C. Cir. 2022) (*Food & Water Watch*) (affirming the reasonableness of the Commission's decision not to further assess significance where Food & Water Watch failed to identify any methodology by which the Commission could do so).

³⁷⁰ *See Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at P 88 (2022) ("Sierra Club asks that the Commission nonetheless assess whether the GHG emissions are significant, despite the Commission having already completed an EIS. Sierra Club cites no caselaw to support its contention that the Commission's NEPA analysis is incomplete . . . In light of this factual record, and the Commission's continued consideration of issues that include whether and how to assess the significance of GHG emissions, we disagree with Sierra Club that more was required of the Commission in this case."); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205 at 72 (same).

³⁷¹ *See* CEQ Guidance, 88 Fed. Reg. at 1198 ("Recommending that agencies quantify a proposed action's projected GHG emissions or reductions for the expected lifetime of the action, considering available data and GHG quantification tools that are suitable for the proposed action[.]").

³⁷² Sierra Club Rehearing Request at 24-25.

the assumed life of the project for informational purposes,³⁷³ which is consistent with the Commission's practice for other projects.³⁷⁴ Nothing further is required.

3. Air Impacts

117. Sierra Club argues that the Commission should have considered the indirect downstream air impacts of the project resulting from end uses of natural gas, specifically referencing that the project is meant to serve local distribution within Baltimore City, Maryland, and Philadelphia County, Pennsylvania, which it contends are areas in moderate and marginal non-attainment status under the National Ambient Air Quality Standards (NAAQS) for 8-hour ozone emissions, respectively.³⁷⁵ Sierra Club analogizes this case to the facts of *Food & Water Watch v. FERC*, in which the court found that the Commission did not present sufficient evidence to demonstrate "a difference in foreseeability follows from the distinction between end uses."³⁷⁶

³⁷³ See Final EIS at 4-180 ("Accordingly, Commission staff calculated the social cost of carbon dioxide, nitrous oxide, and methane. For the analysis, staff assumed discount rates of 5 percent, 3 percent, and 2.5 percent, assumed the Project will begin service in 2024, and that the Project's emissions will be at a constant rate throughout a 20-year period, assumed to be the life of the Project for purposes of the SC-GHG calculation."). See, e.g., *LA Storage, LLC*, 182 FERC ¶ 61,026 at P 11 (explaining that the Commission does "not rely on, the results of the social cost of GHG methodology."); *id.* P 14 ("there are currently no criteria to identify what monetized values are significant for NEPA purposes, and we are currently unable to identify any such appropriate criteria.").

³⁷⁴ See, e.g., *LA Storage, LLC*, 182 FERC ¶ 61,026 at P 13 ("[T]he Commission disclosed the total cost of carbon for the projects' annual GHG emissions over a 20-year period[.]"); *Gas Transmission Nw. LLC*, 181 FERC ¶ 61,234 at P 35 ("[T]he Commission disclosed the total cost of carbon for the Project's GHG emissions assuming the Project will begin service in 2023 and emit at a constant rate for 20 years."); *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 37 ("The Commission calculat[ed] and disclos[ed]

the total cost of carbon for the projects' annual GHG emissions over the life of the 20-year contract for firm transportation service.").

³⁷⁵ Sierra Club Rehearing Request at 19-21.

³⁷⁶ See *Food & Water Watch*, 28 F.4th at 289. Despite Sierra Club's framing of the instant argument, the court did not state that the downstream impacts of use by local distribution companies is categorically reasonably foreseeable, but rather only that the

118. We find that the localized impacts due to potential increases in ozone and other pollutants in Baltimore City and Philadelphia County, in addition to the other local distribution areas, to be too uncertain to be reasonably foreseeable.³⁷⁷ We recognize that an incremental increase in natural gas combustion due to the project will likely result in some increase in emissions of air pollutants, including potential increases in the ozone precursors nitrogen oxides (NOx) and volatile organic compounds (VOC), which would contribute to potential increases in ozone concentrations. However, assessing the magnitude of any increases in downstream air pollutants³⁷⁸ that may result from increased natural gas combustion due to the project is highly uncertain and would require the Commission to engage in conjecture regarding where and how the natural gas is combusted and the conditions under which the ozone precursor pollutants resulting from combustion mix and react in the atmosphere.³⁷⁹ Doing so would require extensive assumptions that would result in a wide range of potential impacts on ozone concentrations, even assuming the project operated under a “full burn” scenario.³⁸⁰

Commission had not carried its evidentiary burden on that issue relative to the specific facts before it. *See id.* (explaining that the Commission has “not done enough to show that a difference in foreseeability follows from the distinction between end uses” and that “[o]n remand, the Commission remains free to consider whether there is a reasonable end-use distinction based on additional evidence, but it has not carried its burden before us at this stage.”).

³⁷⁷ *Sierra Club v. Marsh*, 976 F.2d at 768 (“Agencies must consider only those indirect effects that are ‘reasonably foreseeable.’ They need not consider potential effects that are highly speculative or indefinite.”); *see Freeport*, 867 F.3d at 199 (stating that an agency’s determination that an economic model estimating localized impacts would be far too speculative to be useful is a product of the agency’s expertise in energy markets and is entitled to deference).

³⁷⁸ *See infra* P 120 (distinguishing downstream GHG emissions from air pollutants caused by the combustion of natural gas).

³⁷⁹ *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 30.

³⁸⁰ These include assuming the volume of gas delivered by each LDC in each specific NJ nonattainment area, assuming 100% utilization of the pipelines, no way to determine the end-use location for the 150,000 Dth/day delivered to Williams Energy Resources (a gas marketer), and a certain volume going to power generation and industrial sources, which would potentially covered by Clean Air Act permits.

This range of potential emissions would be of limited utility to the Commission as the decisionmaker, or to interested members of the public.

119. For example, ozone, unlike GHGs,³⁸¹ is itself not directly released into the atmosphere from the combustion of natural gas, but rather results from the interaction of ozone precursors NO_x and VOCs in the presence of ultraviolet light.³⁸² These emissions vary between commercial, industrial, and residential uses based on combustion practices, efficiency, and the age of the combustion units. Similarly, NO_x and VOC emissions in residential settings vary based on whether the gas is combusted for home heating, water heating, cooking, or other uses. To calculate the NO_x and VOCs of these various end-users, we would have to make a number of assumptions regarding these combustion practices, efficiencies, age of units, and potential use of emissions controls that would have a large impact on the final emissions estimates. Additionally, because the combustion of the natural gas releases only ozone precursors, estimating the ozone effects would require the Commission to conduct complex regional photochemical modeling that considers the emissions during each season, atmospheric conditions, and existing emissions in the region.³⁸³ For this reason, incorrect assumptions or data inputs—regarding either the quantity of precursors produced or, for example, the season in which they are produced—would result in large variations in estimated indirect ozone emissions. All told, we find that the number and importance of the many assumptions that the Commission would need to make to develop a useful estimated range of indirect ozone emissions goes well beyond the sort of “reasonable forecasting and speculation” that NEPA requires.³⁸⁴ Given the above limitations and assumptions we do not find the

³⁸¹ GHGs can be a number of specific gases, including the primary ones released by use of fossil fuels—carbon dioxide, methane, and nitrous oxide. When fossil fuels, like natural gas, are combusted, these gases are released directly into the atmosphere. *See Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 404-406 (D.C. Cir. 2013) (explaining the composition and release of fossil-fuel carbon dioxide and biogenic carbon dioxide). GHG emissions can generally be estimated using relatively straightforward arithmetic based upon the capacity of natural gas transported by the project.

³⁸² *WildEarth Guardians v. Jewell*, 738 F.3d at 311 (*WildEarth Guardians*).

³⁸³ As we explain here, indirect ozone impacts of the project are highly uncertain; however, we note that states use regional photochemical modelling as part of their air quality planning and permitting responsibilities under the Clean Air Act and other authorities.

³⁸⁴ *Freeport*, 867 F.3d at 198 (citing *Del. Riverkeeper Network v. FERC*, 713 F.3d 1304, 1310 (D.C. Cir. 2014) (“reasonable being the operative word”)); *see also*

downstream emissions of ozone and other pollutants to be a reasonably foreseeable impact of our action.³⁸⁵

120. We are mindful of the project's potential impacts on environmental justice communities and, to that end, Commission staff conducted a robust air quality analysis in the Final EIS,³⁸⁶ including specifically considering reasonably foreseeable air quality impacts on environmental justice communities,³⁸⁷ which resulted in the Commission ultimately concluding in the Certificate Order that "air quality impacts from construction and the operation of project facilities would not result in a significant impact on air quality in the region, including air quality impacts on environmental justice communities."³⁸⁸

121. Sierra Club alleges that the Commission's "localized emissions analysis" does not fully account for the emissions of methane leaked throughout the lifecycle of gas moving

WildEarth Guardians, 738 F.3d at 312 ("The NEPA process involves an almost endless series of judgment calls.") (quoting *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987)).

³⁸⁵ *WildEarth Guardians v. Jewell*, 738 F.3d at 312 ("The NEPA process involves an almost endless series of judgement calls, and the line drawing decisions necessitated by the NEPA process are vested in agencies.") (citing *Duncan's Point Lot Owners Ass'n, Inc. v. FERC*, 522 F.3d 371, 376 (D.C. Cir. 2008)). In *Tennessee Gas Pipeline Company, LLC*, the Commission found that potential downstream increases in ozone and other pollutants were too uncertain to be reasonably foreseeable impacts of the Commission's authorization. In that case, the gas would serve a single end user in Westchester County, New York. See *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at PP 29-32. Here, the project will be delivered to a much wider geographic area including Baltimore City, Maryland, and Philadelphia County, Pennsylvania.

³⁸⁶ See generally Final EIS § 4.8.

³⁸⁷ See *id.* at 4-157—4-158.

³⁸⁸ Certificate Order, 182 FERC ¶ 61,006 at P 64; see *Freeport*, 867 F.3d at 199 (stating that the "determination that an economic model estimating localized impacts would be far too speculative to be useful is a product of its expertise in energy markets and is entitled to deference"); see also *Tenn. Gas Pipeline Co., L.L.C.*, 181 FERC ¶ 61,051 at P 32.

through the pipeline.³⁸⁹ Sierra Club offers no evidence for this claim, nor does it so much as cite the Final EIS or any other Commission document to indicate the analysis it disputes, but rather points only to a general article on methane leakage that is unrelated to the project under consideration.³⁹⁰ We reject Sierra Club's argument because it is not raised with sufficient specificity.³⁹¹ Sierra Club does not explain what it means by "localized emissions analysis," nor does it cite to any part of the Commission's analysis to which it objects. Without such information, we cannot evaluate its claim because we do not know the specific grounds on which rehearing is being sought.³⁹² In any event, the Final EIS included fugitive emissions as part of its operational emissions analysis.³⁹³

122. Riverkeeper argues that the Commission should have required Transco to redo its air modeling because a newer version of the modeling program is available, which fixed problems that existed in the previous version.³⁹⁴ In the response to comments in the Final

³⁸⁹ Sierra Club Rehearing Request at 21.

³⁹⁰ *Id.* (citing Josh Saul, Naureen Malik, *As Gas Prices Soar, Nobody Knows How Much Methane Is Leaking*, Bloomberg, (May 3, 2022) <https://www.bloomberg.com/features/2022-methane-leaks-natural-gas-energyemissions-data/?sref=qm26bHqj>).

³⁹¹ 15 U.S.C. § 717r(a) ("The application for rehearing shall set forth *specifically* the ground or grounds upon which such application is based.") (emphasis added); *see also LA Storage, LLC*, 182 FERC ¶ 61,026 at P 25 (citing *Ind. Util. Regul. Comm'n v. FERC*, 668 F.3d 735, 736 (D.C. Cir. 2012) (dismissing petition "insofar as it challenges the [Commission's] order on grounds the [petitioner] did not raise with sufficient specificity in its request for rehearing by the Commission")).

³⁹² *See, e.g., Constellation Energy*, 457 F.3d at 22 ("Parties are required to present their arguments to the Commission in such a way that the Commission knows 'specifically . . . the ground on which rehearing [i]s being sought.'") (quoting *Intermountain Mun. Gas Agency v. FERC*, 326 F.3d 1281, 1285 (D.C. Cir. 2003)).

³⁹³ *See* Final EIS at 4-175 ("These estimates for operational emissions are based on the increased horsepower resulting from the new Project facilities and assuming 100 percent utilization, where the proposed facilities are operated at maximum capacity for 365 days/year, 24 hours/day *and include fugitive emissions.*") (emphasis added).

³⁹⁴ Riverkeeper Rehearing Request at 61 (stating Transco used AERMOD Version 19191 to conduct its air quality dispersion modeling and AERMOD Version 21112 is now available).

EIS, the Commission explained that on the date Transco submitted its air dispersion modeling, AERMOD Version 19191 was the most recent version of the program.³⁹⁵ The Commission appropriately relied on the AERMOD Version 19191 analysis and was not obligated to require Transco to conduct an entirely new modeling analysis simply because a new version of the program was released after Transco completed its modeling.³⁹⁶ Moreover, Riverkeeper does not explain why the newer modeling program would yield results that made any substantive difference relative to the program that was used.

123. Riverkeeper's argument that the Commission should issue a new EIS that accounts for changes in NAAQS designations in the Philadelphia Metropolitan Air Quality Control Region, Baltimore Metropolitan Air Quality Control Region, and the New York-N. New Jersey-Long Island, NY-NJ-CT Air Quality Control Region that occurred after publication of the Final EIS fails for the same reason.³⁹⁷ Commission staff's air impacts analysis used the best data available at the time and Riverkeeper has offered no precedent for the proposition that the Commission must revise an EIS for any change in circumstances after issuance.³⁹⁸ To the contrary, the Supreme Court has recognized that such practice would frustrate administrative finality by subjecting agency action to potentially endless revisions with little chance of ever being complete.³⁹⁹ Moreover,

³⁹⁵ Final EIS at app. I, I-104.

³⁹⁶ See *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 510-11 (upholding the agency's decision not to redo a project's air quality analysis despite subsequently developing a different methodology for future analyses because the initial methodology was acceptable at the time it was used).

³⁹⁷ See Riverkeeper Rehearing Request at 62.

³⁹⁸ See Final EIS § 4.8. Moreover, states exercise authority delegated by EPA to implement the NAAQS permitting program for their jurisdiction. See, e.g., *Nat'l Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at P 130 (2017) (recognizing that New York has the authority to review and approve air permits for the project independent of the Commission's review).

³⁹⁹ See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 554-55 (1978) ("Administrative consideration of evidence . . . always creates a gap between the time the record is closed and the time the administrative decision is promulgated [and, we might add, the time the decision is judicially reviewed] . . . If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be

conformity requirements for newly designated nonattainment areas are not applicable until one year after the effective date of the final nonattainment designation for each NAAQS and pollutant.⁴⁰⁰ Since the Certificate Order was issued less than one year after the referenced changes in designation, the changes do not apply to the Commission's consideration of the project.

124. Nor is this an instance in which a supplemental EIS is required. In *Marsh*, the Supreme Court explained that an agency's decision to prepare a supplemental EIS is governed by a "rule of reason" and that an agency need not supplement an EIS every time new information comes to light after an EIS is finalized, for to do so "would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made."⁴⁰¹ An agency's determination of whether a supplemental EIS is needed "implicates substantial agency expertise" and is thus governed by the arbitrary and capricious standard and entitled to deference.⁴⁰² The D.C. Circuit has made clear that a supplemental EIS "must only be prepared where new information provides a *seriously* different picture of the environmental landscape."⁴⁰³ Here, the Final EIS disclosed the NAAQS attainment statuses in place when it was issued,⁴⁰⁴ and Riverkeeper offers no explanation for how the subsequent reclassification of the NAAQS for a single pollutant would materially affect the Commission's analysis

consummated in an order that would not be subject to reopening.") (quoting *ICC v. Jersey City*, 322 U.S. 503, 514 (1944)); see also *W. Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984) (declining to require an agency to "behave like Penelope, unraveling each day's work to start the web again the next day").

⁴⁰⁰ See 40 C.F.R. § 93.153(k) (2022).

⁴⁰¹ 490 U.S. at 373.

⁴⁰² *Id.* at 375-76; see also *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1059 (D.C. Cir. 2017) (*Friends of Capital Crescent Trail*) ("If an agency's decision not to prepare a [Supplemental EIS] turns on a factual dispute the resolution of which implicated substantial agency expertise, the court defers to the agency's judgment.") (quoting *Marsh*, 490 U.S. at 376).

⁴⁰³ *Stand Up for Cal.!*, 994 F.3d at 629 (emphasis in original) (quoting *Friends of Capital Crescent Trail*, 877 F.3d at 1060).

⁴⁰⁴ See Final EIS at 4-162.

of the project such that the substantial time and expense of a supplemental EIS is warranted.

4. Water Resources Impacts

125. Riverkeeper argues that the Commission erred by relying on future state agency action to conclude that impacts to water resources are not significant.⁴⁰⁵ Specifically, Riverkeeper points to various statements in the Final EIS indicating that Transco would be obligated to adhere to certain federal and state permits, plans, and/or approvals, and argues that reliance on such future actions is insufficient where it is unclear what requirements may or may not ultimately be imposed by the other agencies.⁴⁰⁶

126. Riverkeeper's first set of examples⁴⁰⁷ highlights the problem with this argument because they show that the Commission *did not* rely only on other agencies' action to conclude that impacts to water resources would be insignificant. For example, in the first quote highlighted by Riverkeeper, Commission staff stated that "construction and operation of the Project *would not result in significant impacts on groundwater resources, and* potential impacts would be further avoided or minimized by implementing Transco's construction and restoration plans and our recommendations and by complying with other regulatory permit conditions that are protective of water resources."⁴⁰⁸ In other words, Commission staff found (based on substantial preceding discussion, which was omitted by Riverkeeper) that the project would not result in significant impacts on groundwater resources. The use of "and" shows that the

⁴⁰⁵ Riverkeeper Rehearing Request at 57.

⁴⁰⁶ See generally *id.* at 57-60.

⁴⁰⁷ *Id.* at 57 n.254 (citing Final EIS at 5-4) ("[C]onstruction and operation . . . would not result in significant impacts on groundwater resources, and potential impacts would be further avoided or minimized by . . . complying with other regulatory permit conditions that are protective of water resources."); *id.* ("[P]ipeline construction activities affecting surface waters would be conducted in accordance with . . . any conditions that are part of other federal or state water approvals. We conclude that with these measures, along with our additional recommended mitigation measures, impacts on surface waters would largely be temporary and minor."); *id.* (citing Final EIS at 5-5) ("While long-term and permanent effects on wetlands would occur, adherence to Transco's *Wetland and Waterbody Construction and Mitigation Procedures*, conditions of state and federal permits, and a Project-specific mitigation plan would reduce effects.").

⁴⁰⁸ *Id.* (emphasis added) (citing Final EIS at 5-4).

conclusion was reinforced by the fact that other regulatory permit conditions would be imposed, rather than being necessarily predicated on it. The same can be said for each of the other highlighted excerpts, all of which discuss the Transco *Wetland and Waterbody Construction and Mitigation Procedures* and other mitigation as forming the bases for the conclusions drawn. For this reason, despite Riverkeeper's characterization, the Commission is obviously not simply leaving mitigation up to future, unidentified measures.⁴⁰⁹

127. Riverkeeper's reliance on *State of Idaho by and through Idaho Public Utilities Commission v. Interstate Commerce Commission (ICC)* is inapposite.⁴¹⁰ As Riverkeeper recognizes in its rehearing request,⁴¹¹ the NEPA issue in *ICC* was whether the Interstate Commerce Commission (ICC) violated NEPA by failing to produce an EIS *at all* in the face of suspected environmental harm.⁴¹² The court simply recognized that an agency cannot delegate its duty to prepare an EIS by requiring a project proponent to consult with other agencies that may have jurisdiction.⁴¹³ This is, of course, not at all the situation presented by the instant case. Here, Commission staff produced a detailed and voluminous EIS, which gave due consideration to each potentially affected environmental resource, including water resources. Moreover, as discussed in the preceding paragraph, Commission staff did not rely on other agencies' future actions to support the conclusions drawn, but rather recognized that compliance with the conditions of state and federal permits would further reduce potential adverse effects.

128. Riverkeeper next asserts that the Commission erred by not having complete versions of the New Jersey Stormwater Pollution Prevention Plan (SWPPP) and Pennsylvania Chapter 102 Erosion and Sediment Control Plan in the record when the Final EIS and Certificate Order were issued.⁴¹⁴ We disagree. Commission staff did not rely on these documents to conclude that the construction and operation of the project

⁴⁰⁹ *Id.* at 57-58 (citing *Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n*, 45 F.4th 291, 305 (D.C. Cir. 2022) ("An agency cannot simply leave mitigation measures as 'TBD,' relying on 'anticipated-but-unidentified' measures without further analysis.")).

⁴¹⁰ 35 F.3d 585 (D.C. Cir. 1994).

⁴¹¹ Riverkeeper Rehearing Request at 58.

⁴¹² 35 F.3d at 595.

⁴¹³ *Id.*

⁴¹⁴ Riverkeeper Rehearing Request at 58.

would not result in significant impacts on water resources.⁴¹⁵ Rather, Commission staff provided extensive discussion for why water resources would not be significantly impacted and simply acknowledged that state law requires Transco to prepare and follow a SWPPP and Chapter 102 Erosion and Sediment Control Plan.⁴¹⁶ Commission staff explained that, like the Chapter 102 Erosion and Sediment Control Plan, one of the main components addressed by the SWPPP is soil erosion and sediment control.⁴¹⁷ Commission staff then recognized that Transco also has a plan to address erosion control, spill prevention, and response procedures and directed the reader to where the full plan can be found.⁴¹⁸ We therefore disagree that the Commission failed to disclose relevant information on this issue.

129. Riverkeeper next takes exception to Commission staff's statement that "Transco would comply with any monitoring requirements incorporated in its CWA section 401 permits, *if required by the permitting agency.*"⁴¹⁹ This statement does not undercut staff's conclusions about water quality, but rather recognizes that the states, not the Commission, are authorized to impose requirements under section 401 of the Clean Water Act. In any event, the Commission is entitled to rely on the relevant agency's expertise to impose the requirements it believes are required to effectuate its statutory mandate.⁴²⁰

⁴¹⁵ See Final EIS at 4-24.

⁴¹⁶ *Id.* at 4-23—4-24. The Commission disclosed the status of these pending approvals at the time the Final EIS was issued in Table 1.4-1.

⁴¹⁷ *Id.* at 4-24.

⁴¹⁸ *Id.* ("In addition, Transco's Plan and Procedures and Spill Plan provide substantial detail of the erosion control and spill prevention and response procedures that would be implemented. Table 2.3-1 identifies the location where Transco's Plan and Procedures and Spill Plan can be found in their entirety.").

⁴¹⁹ Riverkeeper Rehearing Request at 59 (emphasis in Rehearing Request) (quoting Final EIS at 4-27, 4-30).

⁴²⁰ See, e.g., *EMR Network v. FCC*, 391 F.3d 269 (D.C. Cir. 2004) (finding that agency properly relied outside agency expertise); *Millennium Pipeline Co., LLC*, 161 FERC ¶ 61,229, at P 134 (2017) ("[i]n carrying out its NEPA responsibilities, Commission staff relies on other agencies' expertise"); *Algonquin Gas Transmission, LLC*, 154 FERC ¶ 61,048, at P 203 (2016) ("[T]he Commission is entitled to rely on an agency's expertise. The Commission's capability to assess different types of

130. Riverkeeper's arguments regarding the sufficiency of the proposed wetland mitigation plan pending before the Pennsylvania Department of Environmental Protection (Pennsylvania DEP), the wetland delineation submitted by Transco, and the Final EIS' characterization of certain temporary impacts fail for the same reason.⁴²¹ Pennsylvania DEP is the agency authorized to evaluate this wetland mitigation plan. Similarly, Transco is obligated to adhere to the requirements of any federal and state wetlands permits that may be required by law. Riverkeeper makes clear that it has raised its concerns on these issues to Pennsylvania DEP,⁴²² we accordingly defer to Pennsylvania DEP to act on these comments as it deems appropriate. Riverkeeper has not identified any precedent for its claim that the Commission errs in relying on expert federal and state agencies with jurisdiction over wetlands to impose the requirements necessary for Transco to comply with its legal requirements.

5. Environmental Impacts of Easements

131. Riverkeeper argues that the Commission violated NEPA by failing to evaluate the environmental impacts of the project on certain conservation easements. Not so. Commission staff conducted a robust environmental analysis in the Final EIS of the resources that could be affected by the project, which included resources that exist on preserved land. Riverkeeper asserts the Commission must go further and insert itself into negotiations between Transco and the relevant federal, state, or private entity with jurisdiction over the conservation easement about the specific mitigation requirements that are negotiated for Transco's use of the resource. Riverkeeper's suggested approach is inconsistent with Commission precedent. Easements, including any land use restrictions contained therein, are private contracts between Transco and the landowner or relevant resource agency.⁴²³ The parties are able to determine between themselves the terms on which an easement will be granted, including any site-specific mitigation the

environmental impacts, while extensive, is not infinite. Accordingly, we routinely rely on the expertise of other agencies to evaluate the environmental or safety impacts of proposed projects, provided we are satisfied as to their competence and the validity of their basic data and analysis.”); *Tenn. Gas Pipeline Co., L.L.C.*, 142 FERC ¶ 61,025, at P 66 (2013) (“We rely on other agencies to conduct certain studies because they are the resource agencies with expertise and responsibilities over the particular subject matters.”).

⁴²¹ See Riverkeeper Rehearing Request at 59-60.

⁴²² See *id.* at 59 n.267, 60 nn.269-70.

⁴²³ See *Atl. Coast Pipeline, LLC*, 180 FERC ¶ 61,059, at P 13 (2022).

landowner or relevant resource agency may seek, and we reiterate Commission staff's statement in the Final EIS that the Commission does not have a role in the easement negotiation process.⁴²⁴ Riverkeeper points to no precedent that would call this position into question. Moreover, Commission staff disclosed in the Final EIS site-specific mitigation of which it was aware that was negotiated between Transco and a given entity.⁴²⁵

⁴²⁴ See, e.g., *Constitution Pipeline Co., LLC*, 149 FERC ¶ 61,199, at P 141 (2014) (stating that “[t]he Commission does not have a role in disputes over easement agreements, which are a matter of private contract” and that the impacts “will be subject to the mutually agreed upon terms of the parties’ signed easements”); *Transcon. Gas Pipe Line Co., LLC*, 145 FERC ¶ 61,152, at P 49 (2013) (“[T]he Commission does not play a role in either negotiation or adjudication of easement compensation. Transco and each landowner can negotiate right-of-way easements and compensation, and the landowners may also negotiate with Transco for the loss of certain uses of land during and after construction, loss of any other resources, and any damage to property.”); *S. Star Cent. Gas Pipeline, Inc.*, 104 FERC ¶ 61,080, at P 20 (2003) (“Property values and damages are not issues adjudicated by this Commission. Generally, compensation for the granting of a pipeline easement is determined as the result of negotiations between the pipeline company and the landowner.”).

⁴²⁵ See, e.g., Final EIS at 4-100 (“Transco would coordinate with the Natural Land Trust to develop measures to minimize disturbance to recreational users of the area, including posting signs at centrally located or designated facilities within the preserve to notify users of the recreational area about the timing and location of planned construction activities.”); *id.* at 4-102 (“Transco would coordinate with The Nature Conservancy and Monroe County to develop measures to minimize disturbance to recreational users of these properties, and to ensure that expansion of the existing Transco right-of-way does not conflict with the provisions of the conservation easements. Measure that Transco would implement to minimize disturbance to recreational users of the properties includes posting signage to notify users of the properties about the timing and location of planned construction activities. Construction of the Regional Energy Lateral is proposed to begin in the second quarter of 2023 and end in the fourth quarter of 2024. Construction during this period could overlap with recreational use of the Nature Conservancy and Monroe County properties.”).

D. Balance of the Adverse Impacts and Public Benefits

132. NJCF argues that the Commission's Certificate Order failed to adequately balance the adverse impacts and public benefits of the project.⁴²⁶ Specifically, NJCF claims that the Commission did not adequately balance the adverse impacts and public benefits because it based its finding of public need on vague assertions of supply diversity and reliability, bald assertions from project proponents, reliance on the Transco Levitan Study, and misstatements of the NJ Agencies Study and the Skipping Stone Study.⁴²⁷ It further argues that the Commission must consider all factors bearing on the public interest, including impacts on landowners and the environment, consistent with the

⁴²⁶ NJCF Rehearing Request at 33.

⁴²⁷ *Id.* at 34-35.

NGA.⁴²⁸ NJCF claims that the project would actively harm the public by imposing unnecessary costs on New Jersey ratepayers and that the Commission failed to properly take into account and weigh the adverse permanent impacts to landowners.⁴²⁹ Finally, NJCF also argues that the Commission should balance the need for the project with the environmental impacts from climate change and GHG emissions.⁴³⁰

133. Consistent with the Certificate Policy Statement, we balance the need for and benefits derived from the project against the potential adverse consequences, including impacts on landowners.⁴³¹ In addition, as the Commission also explained in the Certificate Policy Statement, “the environmental analysis under NEPA is one part of the Commission’s analysis used to decide whether and under what terms to authorize the construction of major new pipeline facilities.”⁴³² Here, the Commission balanced the concerns of all interested parties and did not give undue weight to the interests of any particular party.⁴³³ The proposed facilities were designed to use, to the extent practicable,

⁴²⁸ *Id.* at 33 (arguing that the Commission, instead considered private contracts and vague allegations of public benefit).

⁴²⁹ *Id.* at 35-36.

⁴³⁰ *Id.* at 36-38.

⁴³¹ 1999 Certificate Policy Statement, 88 FERC at 61,744.

⁴³² *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at P 87 (2022) (citing 1999 Certificate Policy Statement, 88 FERC at 61,749); *see also LA Storage, LLC*, 182 FERC ¶ 61,026 at P 10 n.19 (same).

⁴³³ Certificate Order, 182 FERC ¶ 61,006 at PP 75-80; *see also id.* P 82. We also note that NJCF’s reliance on *Env’tl. Def. Fund v. FERC*, 2 F.4th 953, is misplaced. There, Spire STL Pipeline, LLC contracted with just one affiliate shipper and conceded that there was no new load demand in its service area. *Id.* at 974. Here, there is evidence of demand as demonstrated by precedent agreements, studies, and comments. Certificate Order, 182 FERC ¶ 61,006 at PP 21-35. Moreover, the REAE Project is 100% subscribed by affiliates and non-affiliates, with non-affiliates subscribing to 82% of the project capacity. *Id.* at P 8 & n.7. Accordingly, we disagree with NJCF’s assertion that the Commission’s balancing of costs and benefits consisted largely of its “*ipse dixit*”. NJCF Rehearing Request at 35; *see* Certificate Order, 182 FERC ¶ 61,006 at PP 21-35 (evaluating need); *see id.* at PP 36-38 (evaluating impacts on customers and surrounding communities); *see id.* at PP 49-81 (analyzing the environmental impacts).

existing rights-of-way and areas adjacent to existing rights-of-way.⁴³⁴ The total acreage to be disturbed for construction of the project facilities is 792.3 acres, of which Transco would maintain 175.6 acres of the permanent right-of-way.⁴³⁵ Transco will restore the remaining acreage and allow it to revert to preconstruction uses.⁴³⁶ Transco has held stakeholder meetings and participated in the Commission's pre-filing process.⁴³⁷ Finally, the Commission has added a requirement that Transco develop, file, and implement project-specific environmental complaint resolution procedures prior to construction.⁴³⁸ Accordingly, we continue to find that Transco has taken sufficient steps to minimize adverse impacts on landowners and surrounding communities, and that the benefits of the project in improving reliability and diversifying supply outweigh potential adverse effects.⁴³⁹

The Commission orders:

(A) In response to New Jersey Conservation Foundation's, Delaware Riverkeeper Network's, and Sierra Club's requests for rehearing, the Certificate Order is hereby modified and the result sustained, as discussed in the body of this order.

(B) New Jersey Rate Counsel's request for rehearing is hereby rejected, as discussed in the body of this order.

(C) New Jersey Conservation Foundation's motion for a stay of the Certificate Order until the conclusion of judicial review is hereby denied, as discussed in the body of this order.

(D) Sierra Club's motion for stay of the Certificate Order pending final disposition of its rehearing request is hereby dismissed as moot, as discussed in the body of this order.

⁴³⁴ Certificate Order, 182 FERC ¶ 61,006 at P 37.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.*

⁴³⁸ *Id.* P 78.

⁴³⁹ *Id.* P 37.

(E) New Jersey Agencies' motion for clarification is hereby granted, as discussed in the body of this order.

(F) Transcontinental Gas Pipe Line Company, LLC motion for waiver of section 157.23(b) of the Commission's regulations is hereby dismissed, as discussed in the body of this order.

By the Commission. Chairman Phillips is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Clements is concurring in part with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket Nos. CP21-94-001

(Issued March 17, 2023)

PHILLIPS, Chairman, *concurrency*:

1. I concur in today's order. As noted in today's order, the record does not identify any upstream greenhouse gas (GHG) emissions that are a reasonably foreseeable result of or causally connected to the Regional Energy Access Expansion (REAE) pipeline. Whatever our authority under the Natural Gas Act (NGA), I do not believe that there would be any upstream GHG emissions to factor into our analysis. Simply put, I do not see a need, in this proceeding, to spill ink on what authority we do—or do not—have to consider upstream GHG emissions under section 7 of the NGA where the record does not identify any upstream GHG emissions associated with the project.
2. I am committed to ensuring that the Commission does not stand in the way of critical energy infrastructure that is needed for reliability and in the public interest. The issuance of today's action clears the way for REAE to receive a notice to proceed with the necessary pre-construction work on the project right-of-way, including work that needs to be completed by March 31, when the critical construction windows end to protect certain threatened and endangered species.
3. The reality is that failing to issue a timely order in this proceeding would almost certainly delay the development of REAE for at least year, meaning that it would not be available for the upcoming winter heating season. Such a failure would also jeopardize reliability and the economic benefits, including jobs, associated with the REAE pipeline, which was unanimously approved by the Commission in the underlying order.

For the above reasons, I respectfully concur.

Willie L. Phillips
Chairman

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-001

(Issued March 17, 2023)

DANLY, Commissioner, *concurring*:

1. I commend to the reader's attention my separate statement to the underlying order.¹ I want to make clear that this order has flaws, some of which, I find, persist from the underlying order.² I also wish to impress upon the reader that I recognize the difficult position into which the Commission's actions have placed the project applicant.

2. While I concur with this order because there is a demonstrated need for the project, I nevertheless must acknowledge that this order falls short of ideal. It fails to lay out—in plain terms—much of what is really at issue. Before I explain why, I want to emphasize that my view regarding this proceeding is that neither the upstream greenhouse gas (GHG) emissions nor the downstream GHG emissions are reasonably foreseeable.³

¹ *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (2023) (Certificate Order) (Danly, Comm'r, concurring in part & dissenting in part).

² *See, e.g., id.* (Danly, Comm'r, concurring in part & dissenting in part at P 1 & n.2) (stating that “[a]s in other recent [Natural Gas Act (NGA)] section 7 issuances, there are a number of flaws in this order” and listing flaws); *id.* (Danly, Comm'r, concurring in part & dissenting in part at P 2) (disagreeing with “language [in the Certificate Order that] could perhaps be read to imply that the precedent agreements for 100% of a project's capacity (by primarily *unaffiliated* shippers, no less) might, by themselves, be insufficient to demonstrate need or, perhaps more troubling, that other evidence proffered in the face of such precedent agreements, somehow tip the evidence against a finding of need”).

³ I pause to note that I disagree with the Certificate Order's finding and this order's restatement of that finding that the downstream emissions are reasonably foreseeable. *See* Certificate Order, 182 FERC ¶ 61,006 at P 67 (“[T]he emissions from the downstream combustion of the gas transported by the project are reasonably foreseeable emissions.”), *order on reh'g*, 182 FERC ¶ 61,148, at P 106 (2023) (identifying the reasonably foreseeable emissions as including the downstream GHG

3. Paragraph 101 contains this order's critical language. It purports to distinguish our National Environmental Policy Act (NEPA) analysis from our obligations under the NGA. And, of course, it ought to. They are two different statutes with two distinct purposes. NEPA is—and has always been—a procedural statute.⁴ It can, and does,

emissions). The facts here, like in *Food & Water Watch v. FERC*, 28 F.4th 277 (D.C. Cir. 2022) (*Food & Water Watch*), involve adding capacity to provide incremental transportation service primarily to local distribution company shippers. In this proceeding, while a majority of the capacity is subscribed by local distribution companies, there are also two shippers that are natural gas marketers. I recognize that the court in *Food & Water Watch*, a proceeding concerning a project that serves local distribution companies, “concluded that the end use of the transported gas is reasonably foreseeable.” 28 F.4th at 289. Nonetheless, the court also stated that “[o]n remand, *the Commission remains free to consider whether there is a reasonable end-use distinction based on additional evidence, but it has not carried its burden before us at this stage,*” and “remand[ed] to the agency to perform a supplemental environmental assessment in which it must either quantify and consider the project’s downstream carbon emissions *or explain in more detail why it cannot do so.*” *Id.* (emphasis added). The local distribution companies and natural gas marketers at issue here and the discrete, known generators in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*) are dissimilar enough that the *Sabal Trail* precedent cannot directly apply. We have not yet acted on the *Food & Water Watch* remand and, even according to the court, the question remains open. Additionally, as I have said before, *Sabal Trail*, which *Food & Water Watch* applies, is inconsistent with the Supreme Court’s holding in *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (*Public Citizen*) (“NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause. The Court analogized this requirement to the ‘familiar doctrine of proximate cause from tort law.’”) (citation omitted). My views are not idiosyncratic. Both the partial dissenting statement in *Sabal Trail* and the Court of Appeals for the Eleventh Circuit agree. *See* 867 F.3d at 1383 (Brown, J., concurring in part and dissenting in part) (“Thus, just as FERC in the [Department of Energy] cases and the Federal Motor Carrier Safety Administration in *Public Citizen* did not have the legal power to prevent certain environmental effects, the Commission here has no authority to prevent the emission of greenhouse gases through newly-constructed or expanded power plants approved by the Board.”); *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1300 (11th Cir. 2019) (“[T]he legal analysis in *Sabal Trail* is questionable at best. It fails to take seriously the rule of reason announced in *Public Citizen* or to account for the untenable consequences of its decision.”).

⁴ *See, e.g., Public Citizen*, 541 U.S. at 756-57 (explaining that “NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and

require no substantive outcomes.⁵ What it requires is a “hard look”⁶ at the effects of the contemplated actions that a federal agency proposes to undertake. The NGA, in comparison, is a substantive statute and the means by which Congress has charged the Commission with the task of “encourag[ing] the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”⁷

4. With respect to the NGA, however, today’s order runs right up to the edge of its logical conclusion and then stalls at the last moment.⁸ Not only are our analyses under NEPA and the NGA distinct (as they must be),⁹ in fact, prudence would counsel us to

actions.”) (citation omitted).

⁵ We know, of course, that NEPA is not a means of “mandating that agencies achieve particular substantive environmental results.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 371 (1989). It instead serves to “impose[] only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.” *Public Citizen*, 541 U.S. at, 756-57.

⁶ See *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (“Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. Rather, it required only that the agency take a ‘hard look’ at the environmental consequences before taking a major action.”) (citations omitted).

⁷ *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976) (citations omitted); accord *Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1307 (D.C. Cir. 2015) (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider “other subsidiary purposes,” such as “conservation, environmental, and antitrust questions.” *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute’s primary purpose.

⁸ See *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 at P 101 (“Even if substantial evidence demonstrated reasonable foreseeability and a causal connection between a proposed project and upstream production, which as discussed is absent here, no court has ever held that the Commission must consider upstream GHG impacts as part of its NGA analysis. The text of the NGA makes clear that upstream activities such as exploration, production and gathering are *not* under the Commission’s jurisdiction, and courts have upheld our determinations that we do not need to consider upstream emissions as Riverkeeper suggests.”) (emphasis in original) (citation omitted).

⁹ See *id.* (“The NGA analysis is distinct from the NEPA analysis.”).

unambiguously establish the limits of our jurisdiction under the NGA¹⁰ and declare that we will not consider induced upstream production or its effects as part of our public

¹⁰ Of course, Commissioner Clements is entirely correct when she states that the Commission is bound to follow controlling judicial precedent. *See Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 (Clements, Comm’r, concurring in part at P 5). *Sabal Trail* requires the Commission to conduct certain analyses regarding downstream GHG emissions, under its narrow set of facts, and in satisfaction of the court’s view of our obligations *under NEPA*. The court also stated, in its discussion on indirect effects, and seemingly in an implicit ruling on our jurisdiction under the NGA (a separate inquiry from that required under NEPA) that “FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.” *Sabal Trail*, 867 F.3d at 1373 (citation omitted). But *National Cable & Telecommunications Association v. Brand X Internet Services* holds that even following a binding judicial issuance, agencies remain free in subsequent proceedings to offer reasonable interpretations of the jurisdiction conferred upon them by their organic statutes. 545 U.S. 967, 982-83 (2005) (*Brand X*). This proposition, for better or for worse, is now black letter administrative law. Far from flouting the authority of the courts, I suggest no more than that the Commission act within the remit confirmed in *Brand X* by offering a reasonable interpretation of our statute which would limit our jurisdiction consistent with the NGA’s purpose and its plain text. *See* 15 U.S.C. § 717(b) (listing the exemptions from the Commission’s jurisdiction). And we can do so secure in the knowledge that such an interpretation—again, for better or for worse—will be accorded the deference guaranteed by *Chevron*. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (*Chevron*) (“[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

convenience and necessity determination.¹¹ Why? Because upstream activities lie—by the unambiguous terms of the statute—wholly outside of our jurisdiction.¹²

5. Paragraph 101 of today’s order exposes a fundamental question regarding the proper administration of the NGA. Should we use it to accomplish whatever we want, even if our policy objectives run contrary to the purpose of the NGA?¹³ Or should we resolve upon disciplining ourselves to act in accordance with the purpose of the statute, bound by the authorities delegated by Congress¹⁴ and the exemptions to those authorities

¹¹ See *Off. of Consumers’ Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (“FERC’s authority to consider all factors bearing on the public interest when issuing certificates means authority to look into those factors which reasonably relate to the purposes for which FERC was given certification authority. It does not imply authority to issue orders regarding any circumstance in which FERC’s regulatory tools might be useful. In carrying out its statutory certification task FERC must recognize that ‘a need for federal regulation does not establish FPC jurisdiction that Congress has not granted.’”) (quoting *FPC v. La. Power & Light Co.*, 406 U.S. 621, 635-36 (1972)); *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 463 (D.C. Cir. 2005) (explaining that “[w]here an activity or entity falls within NGA § 1(b)’s exemption . . . , the provisions of NGA §§ 4, 5 and 7 . . . neither expand the Commission’s jurisdiction nor override § 1(b)’s . . . exemption”) (quoting *Conoco Inc. v. FERC*, 90 F.3d 536, 552 (D.C. Cir. 1996)) (internal quotation marks omitted). *But see Henry v. Fed. Power Comm’n*, 513 F.2d 395, 403 (D.C. Cir. 1975) (“Of particular and almost paramount significance for the subject under discussion is *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 81 S.Ct. 435, 5 L.Ed.2d 377 (1961), where the Court expressly held that the Commission’s power under [§] 7 to consider matters of the public interest when deciding whether to issue a certificate for jurisdictional facilities extends generally to a consideration of ‘All factors bearing on the public interest,’ and specifically extends to matters that are excluded from the direct regulatory jurisdiction of the Commission.”).

¹² See 15 U.S.C. § 717(b) (stating that the Commission’s jurisdiction “shall not apply . . . to the facilities used for . . . the production or gathering of natural gas”).

¹³ See *NAACP*, 425 U.S. at 669 (explaining that the purpose of the NGA is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices”) (citations omitted).

¹⁴ See *West Virginia v. Env’t. Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (“Agencies have only those powers given to them by Congress, and ‘enabling legislation’ is generally not an ‘open book to which the agency [may] add pages and change the plot line.’”) (citation omitted).

Congress specifically enumerated? Obviously, the latter. We could no more reasonably deny a pipeline for the effects of induced upstream production, which the statute places outside our jurisdiction, than we could deny an NGA section 3 authorization¹⁵ for an LNG export terminal because we do not like the effects that the expected exports would have on international gas markets.¹⁶ That determination rests solely with the Department of Energy, which is charged with authorizing “the export of natural gas as a commodity.”¹⁷ The same holds for any induced upstream effects on production, even if they *could* be found traceable to the proposed project. The statute consigns those powers to the states. And it does so explicitly:

The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate

¹⁵ 15 U.S.C. § 717b.

¹⁶ See *Port Arthur LNG, LLC*, 181 FERC ¶ 61,024, at P 12 & n.35 (2022) (stating in an extension of time proceeding that “[t]he Commission will not consider Sierra Club’s assertion that we must examine the project’s impact on domestic prices and supply as it is an attempt to re-litigate the issuance of the Authorization Order” and that “[n]or could we consider impacts on domestic prices and supply as the Commission’s authority under the Natural Gas Act is limited to the authorization of the siting, construction, and operation of LNG export facilities, while *the consideration of the impact of export of LNG as a commodity is solely under the Department of Energy’s authority*”) (emphasis added) (citation omitted); *Commonwealth LNG, LLC*, 181 FERC ¶ 61,143, at P 13 (2022) (“The Commission’s authority under NGA section 3 applies ‘only to the siting and the operation of the facilities necessary to accomplish an export[,]’ while ‘export decisions [are] squarely and exclusively within the [DOE]’s wheelhouse.’ Similarly, issues related to the impacts of natural gas development and production are related to DOE’s authorization of the export and not the Commission’s siting of the facilities”) (citations omitted); *Columbia Gulf Transmission, LLC*, 180 FERC ¶ 61,206, at PP 78, 80 (2022) (explaining for a NGA section 7 project that would provide incremental firm interstate natural gas transportation service to an LNG export facility that “the downstream GHG emissions are attributable to DOE’s ‘independent decision to allow exports—a decision over which the Commission has no regulatory authority’” and that “[w]e see no basis in the NGA for the Commission to encroach upon DOE’s sole authority over the review and authorization of exports of natural gas”); *Tenn. Gas Pipeline Co., L.L.C.*, 180 FERC ¶ 61,205, at PP 62, 64 (2022) (same).

¹⁷ *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016) (explaining that the Department of Energy has “exclusive authority over the export of natural gas as a commodity”).

commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, and to the importation or exportation of natural gas in foreign commerce and to persons engaged in such importation or exportation, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.¹⁸

6. I should end by noting that, despite my criticism, I am pleased we are acting on this order. I only wish that the Commission had acted sooner, perhaps by having granted Transcontinental Gas Pipe Line Company, LLC's (Transco) February 14, 2023 motion requesting that the Commission waive section 157.23(b)¹⁹ of our regulations to permit Transco to receive authorization to proceed with the limited activity of non-mechanized tree felling on the project route. For the reasons stated in my earlier statement, I am concerned that the delay in the Commission's action in this proceeding have adversely affected the project's ability to be placed into service 2023-2024 winter season and by the targeted in-service date of December 1, 2023.²⁰

¹⁸ 15 U.S.C. § 717(b).

¹⁹ 18 C.F.R. § 157.23(b) (explaining that for "orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C. 717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no authorization to proceed with construction activities will be issued: (a) Until the time for the filing of a request for rehearing under 15 U.S.C. 717r(a) has expired with no such request being filed, or (b) If a timely request for rehearing raising issues reflecting opposition to project construction, operation, or need is filed, until: (1) The request is no longer pending before the Commission; (2) The record of the proceeding is filed with the court of appeals; or (3) 90 days has passed after the date that the request for rehearing may be deemed to have been denied under 15 U.S.C. 717r(a)").

²⁰ See Certificate Order, 182 FERC ¶ 61,006 (Danly, Comm'r, concurring in part & dissenting in part at PP 3-5); see also Application at 13; New Jersey Natural Gas Company July 26, 2022 Supplementary Comments in Support of Transco Regional Energy Access Expansion Project at 2 ("Transco proposes to place the REAE Project in service by December 1, 2023 to meet the needs of consumers during the 2023/2024 winter heating season.").

For these reasons, I respectfully concur.

James P. Danly
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC

Docket No. CP21-94-001

(Issued March 17, 2023)

CLEMENTS, Commissioner, *concurring in part*:

1. I concur with the result of today's Order,¹ but write separately to highlight two aspects of the Order that are deeply troubling. First, in affirming the underlying certificate order's finding that Transco's REAE Project is needed, the Order relies on an incomplete record and the Commission's own speculation about certain key facts underpinning the competing market studies filed in the docket. These deficiencies prompt me to renew my call for the Commission to update the 1999 Certificate Policy Statement² and our certificate application review procedures to ensure we fully evaluate all the important factors bearing on the need for each proposed new gas infrastructure project.³ Second, in discussing whether the Commission is obligated to consider the environmental impacts of upstream greenhouse gas (GHG) emissions in its determination of the public convenience and necessity under section 7 of the Natural Gas Act (NGA),⁴ the Order includes a cryptic reference to the jurisdictional limitations in section 1(b) of the NGA.⁵ The Order does not explain what this language is intended to mean. For the reasons explained below, the language cannot lawfully be construed to mean the

¹ *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,148 (2023) (Order).

² *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, corrected, 89 FERC ¶ 61,040 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000) (1999 Certificate Policy Statement).

³ See *Transcon. Gas Pipe Line Co., LLC*, 182 FERC ¶ 61,006 (2023) (Certificate Order) (Clements, Comm'r, concurring, at PP 1, 8).

⁴ 15 U.S.C. § 717f.

⁵ 15 U.S.C. § 717(b); see Order at P 101 ("The text of the NGA makes clear that upstream activities such as exploration, production and gathering are *not* under the Commission's jurisdiction, and courts have upheld our determinations that we do not need to consider upstream emissions Riverkeeper suggests.").

Commission lacks authority to consider upstream GHG emissions in its determination of the public convenience and necessity.

2. As I said in my concurrence with the Certificate Order, reliability is always a key concern for the Commission,⁶ and I take the reliability issues in this case very seriously. Here, however, there are conflicting market studies reaching vastly different conclusions about whether new interstate pipeline capacity is needed now or will be in the future to serve New Jersey local distribution companies (LDCs). The New Jersey Board of Public Utilities (NJ BPU), the governmental entity responsible for assuring that LDCs in New Jersey provide reliable service, contests the need for new pipeline capacity based on an independent market study it commissioned (the NJ Agencies Study). That record evidence deserves thorough review in our need determination, as does the other record evidence pertaining to need. Unfortunately, because the Commission limited its consideration to the paper record the parties created, there are key gaps in our understanding of the conflicting market studies, and therefore of the need issue overall. To fill those gaps, this Order, like the Certificate Order, relies too heavily on unsupported assumptions and speculation.

3. A few examples show that the Commission's consideration of the need issue remains long on conjecture and short on facts. For instance, the Commission rejects the NJ Agencies Study's conclusions on the critical issue of demand growth because building electrification "might" transfer demand from the LDCs to natural gas-fired generators.⁷ Yet, the Commission has performed no analysis of the magnitude of this assumed transfer in demand, nor has it asked the parties to provide it. In another example, the Commission criticizes the NJ Agencies study based on its "key assumption" that off-system peaking resources will remain constant at 619 MDth/d.⁸ The Commission observes that the availability of these resources is "uncertain."⁹ However, the reasons the Commission gives for the uncertainty would have been true during past severe weather events, not just future ones; the Commission offers no explanation for why the identified uncertainties are relevant only to the future availability of off-system peaking resources. The only factual basis the Commission cites for its criticism relating to off-system peaking resources is that one NJ LDC projected its use of off-system peaking resources would decline to zero after 2022.¹⁰ However, the Commission does not know *why* the LDC

⁶ Certificate Order (Clements, Comm'r, concurring at P 5).

⁷ Order at P 37.

⁸ *Id.* at P 38.

⁹ *Id.*

¹⁰ Order at P 38 n.126.

made that projection because it has not asked the parties to supply the answer. It is entirely possible that the LDC did not believe it would *need* the off-system peaking resources, in which case its “projection” could undercut the need case for the REAE Project.

4. Despite the shortcomings in the Commission’s need analysis, that the Commission in this proceeding considered need-related record evidence at all (beyond the existence of precedent agreements) is a step forward because it heeds our 1999 Certificate Policy Statement. Our compliance with the 1999 Certificate Policy Statement is what enabled me to concur in the Certificate Order, as well as this Order, with respect to the need issue. But, as I have said before, we can and must do better in assessing the increasingly complex factors bearing on the need for new pipeline capacity, including the effect of relevant state laws, programs, and utility regulatory agency determinations.¹¹

5. As reflected in Commissioner Danly’s concurring statement, the cryptic reference to section 1(b) of the Natural Gas Act in paragraph 101 of the Order could be misinterpreted to suggest that the jurisdictional limitations in section 1(b) categorically prevent the Commission from considering upstream GHG emissions in its public convenience and necessity determinations under section 7 of the NGA.¹² But the language cannot lawfully be construed to mean that. The D.C. Circuit Court of Appeals has *twice* held that the Commission not only may consider indirect GHG emissions under section 7, but that it may *deny* a certificate application altogether on environmental grounds. The Court first reached this conclusion in *Sabal Trail* in 2017¹³; a different three-judge panel unanimously reaffirmed it two years later in *Birckhead*.¹⁴ Contrary to

¹¹ See Certificate Order (Clements, Comm’r, concurring at PP 1, 4, 8).

¹² Order (Danly, Comm’r, concurring at P 4).

¹³ *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*).

¹⁴ *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (*per curiam*) (*Birckhead*). See also *Henry v. FPC*, 513 F.2d 395, 403 (D.C. Cir. 1975) (explaining that the U.S. Supreme Court holds that the Commission’s consideration of factors bearing on the public interest in section 7 proceedings “specifically extends to matters that are excluded from the direct regulatory jurisdiction of the Commission”) (citing *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1 (1961)). That *Sabal Trail* and *Birckhead* involved “downstream” indirect GHG emissions—i.e., emissions from the end-user’s burning the natural gas supplied by the Commission-jurisdictional pipeline—is an unimportant distinction for present purposes because, under section 1(b), the Commission has no jurisdiction over those end-users, just as it has no jurisdiction over upstream natural gas producers. Nor does it matter that the two cases dealt with the Commission’s obligations under the National Environmental Policy Act (NEPA). The court’s

Commissioner Danly's contention, this Commission is bound to follow these controlling precedents.¹⁵ For the Commission to assert a legal theory that the D.C. Circuit has twice rejected (and no other Circuit Court has ever adopted) would be pure obstinacy. As the D.C. Circuit stated in *Atlantic City Electric v. FERC*: "If FERC thinks [the court is] wrong, then like any other litigant, it may petition for certiorari to the Supreme Court of the United States. Absent such a petition and the issuance of certiorari, in an order by the Supreme Court, FERC is bound by our decision."¹⁶

6. I am able to concur in the GHG aspect of the Order only because the reference to section 1(b) of the NGA in paragraph 101 is meaningless. If the language were construed to cast any doubt on the Commission's authority or responsibility to consider upstream or downstream GHG emissions under either the NGA or NEPA, then my concurrence should be construed as a dissent with respect to this aspect of the Order. As Chairman

construction of the Commission's authority under section 7 was necessary to its determination that the Commission was the legally relevant cause of the downstream emissions under NEPA.

¹⁵ Commissioner Danly proposes that the Commission "declare that we will not consider induced upstream production or its effects as part of our public convenience and necessity determination." Order (Danly, Comm'r, concurring at P 4). He suggests this is permissible pursuant to *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005). But far from the factual circumstances of *Brand X*, where the agency adopted a reasonable interpretation of the relevant statute which had never before been reviewed in court, Commissioner Danly suggests the Commission adopt a statutory interpretation that was *rejected* in *Birckhead*. There, the court rejected the Commission's argument that lack of jurisdiction over the emitting downstream entities broke the causal chain and held that the Commission's approval of a proposed jurisdictional project *can* be considered the legally relevant cause of the downstream GHG emissions "[b]ecause the Commission may . . . 'deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment.'" 925 F.3d at 519 (quoting *Sabal Trail*, 867 F.3d at 1373). If the Commission had no authority to consider greenhouse gas emissions in its public convenience and necessity determination under the NGA, as Commissioner Danly suggests, then the court could not possibly have reached its conclusion. *See id.* ("Although it is true that '[a]n agency has no obligation to gather or consider environmental information if it has no statutory authority to act on that information,' in the pipeline certification context the Commission does have statutory authority to act.") (alteration and emphasis in original) (quoting *Sabal Trail*, 867 F.3d at 1372).

¹⁶ *Atlantic City Elec. Co. v. FERC*, 329 F.3d 856, 859 (D.C. Cir. 2003).

Phillips' concurrence suggests,¹⁷ the Commission did not need to include the language in paragraph 101 in responding to Riverkeepers' argument on rehearing. In reading the three separate statements that language has sparked, stakeholders might reasonably question why the Commission wandered onto this sidetrack, particularly in a time-sensitive matter. If only to satisfy the Administrative Procedure Act's requirement for reasoned decision-making,¹⁸ the Commission should eschew including extraneous language like this in future orders.

7. Finally, it is important to clarify the Commission's obligations under the NGA and NEPA given Commissioner Danly's suggestion that our consideration of the public convenience and necessity under section 7 of the NGA is divorced from our responsibilities under NEPA.¹⁹ Nearly fifty years ago the Supreme Court found that environmental considerations are included in the Commission's determination of the public convenience and necessity under section 7 of the NGA.²⁰ NEPA prescribes the procedural mechanisms for how the Commission must factor environmental concerns into its decision-making. The statute requires all agencies, including this one, to take a "hard look" at the potential environmental consequences of their proposed actions in *deciding* what action to take.²¹ Our obligations under NEPA are thus inextricably linked to our obligation to consider environmental impacts, including upstream and downstream GHG emissions, in our decisions under section 7 of the NGA.²² The unnecessary

¹⁷ Order (Phillips, Chairman, concurring at P 1).

¹⁸ *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) (quoting *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) ("[A]n agency action will be set aside as arbitrary and capricious if it is not the product of 'reasoned decisionmaking.'").

¹⁹ See Order (Danly, Comm'r, concurring at PP 3, 4).

²⁰ *NAACP v. FPC*, 425 U.S. 662, 670 n.6 (1976).

²¹ See, e.g., *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("The sweeping policy goals announced in § 101 of NEPA . . . require that agencies take a "hard look" at environmental consequences.") (internal quotations omitted) (quoting *Kleppe v. Sierra Club*, 437 U.S. 390, 410 n.21 (1976)).

²² Indeed, NEPA may give content to a broad statutory "public interest" standard like that in NGA section 7, permitting the agency to reflect environmental considerations in its actions. See *Village of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 665-66 (D.C. Cir. 2011).

language in paragraph 101 of this Order cannot be construed to stand in the way of the Commission meeting those linked statutory obligations.

For the foregoing reasons, I respectfully concur in part.

Allison Clements
Commissioner

Document Content(s)

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Exhibit B

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