UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	)	Docket No. PL18-1-___
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews	)	Docket No. PL21-3-___

JOINT REQUEST FOR REHEARING BY STATES LOUISIANA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, FLORIDA, GEORGIA, IDAHO, KANSAS, KENTUCKY, MISSISSIPPI, MISSOURI, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA

In accordance with Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" or "FERC"), 18 C.F.R. §385.212, 385.713, the States of Louisiana, Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia jointly and respectfully request rehearing of the Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC ¶61,107 (2022), and the Interim Policy Statement, 178 FERC ¶61,108 (2022) ("the Rules"), issued by the Commission on February 18, 2022 in the above-captioned Docket Nos. PL18-1 and PL21-3, respectively. Through these Rules, FERC has set out to fundamentally transform its approach to project approval by taking into account the purported harms of third parties' upstream and downstream greenhouse gas emissions. Beyond that, FERC has stated that it will "expect"—that is, effectively require—project sponsors to mitigate upstream and downstream GHGs. Additionally, the Rules set out a significance threshold of 100,000 metric tons for review under the National Environmental Policy Act.

The impact of these Rules cannot be overstated. They fundamentally reorder the balance

of authority between FERC and EPA at the federal level and between FERC and the States. They impose massive costs on the American economy. And perhaps most seriously, they elevate a nonstatutory policy concern over and above Congress's clearly stated command for the Commission to prioritize the provision of affordable and cheap energy to the American people.

I. Executive Summary[1]

On February 18, 2022, FERC issued an Updated Policy Statement on Certification of New Interstate Natural Gas Facilities and an Interim Policy Statement on GHG Emissions ("the Rules").[2] The Rules are among the most significant changes in direction the Commission has ever pursued. Yet not a shred of statutory text authorizes these changes. To the contrary—Congress clearly precluded the Commission from taking the actions it pursues in these Rules. For example, the Rules seek to inject the Commission deep into upstream and downstream activities that Congress has specifically reserved to State authority. Because the Rules implicate major questions and push the limits of executive and federal power, they must be clearly authorized by Congress. They are not. Making matters worse, the Rules are specifically precluded by statute at every level, are arbitrary and capricious, and unlawfully infringe on State powers. And because they are immediately effective, they plainly aggrieve the States, which rely upon revenues from these regulated activities and seek to defend their sovereign authority from this unlawful expansion of the Commission's jurisdiction.

II. Specifications of Errors

1. The Commission violated the Natural Gas Act by asserting the authority, and setting a policy, to consider upstream and downstream GHG emissions in making public convenience and necessity determinations under Section 7 of the Act. The Commission further violated the NGA by setting a policy of conditioning or

[1] The relevant facts of these proceedings, and their procedural histories, are laid out in the Rules (at ¶¶4-20).

[2] Although the Commission initially termed the Rule an "Interim Policy Statement," as Commissioner Danly explains, it is in fact a legislative rule, *see* Danly Dissent ¶46.

ultimately denying pipeline certificates under Section 7.

2. The Commission violated the NGA by asserting the authority and setting a policy to expect and substantively require sponsors to mitigate upstream and downstream GHG emissions.

3. The Commission's decision to analyze upstream and downstream GHG emissions is unlawful under the Administrative Procedure Act because it is arbitrary and capricious and violates the National Environmental Policy Act.

4. The Commission's significance threshold of 100,000 tpy CO_2e is unlawful under the APA because it is arbitrary and capricious and violates NEPA.

5. The Commission has unlawfully infringed upon authority reserved to the States by federal statutes and the Tenth Amendment.

6. The Commission unlawfully promulgated legislative rules without following the appropriate procedures.

III. Statement of Issues

1. Whether the Commission violated the NGA by asserting the authority, and setting a policy, to consider upstream and downstream GHG emissions in making public convenience and necessity determinations, and in conditioning and ultimately denying certificates, under NGA Section 7. Authorities: *See, e.g.*, 15 U.S.C. §717(b) (limiting Commission jurisdiction to interstate transportation and sales, and excluding production, local distribution, and retail sales); 15 U.S.C. § 717f (promulgating "public convenience and necessity" standard governing Commission certification of new interstate infrastructure); *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (setting out the Major Questions Doctrine: Congress must clearly authorize agency activity that has major economic or political consequences); *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669-70 (1976) (explaining that the NGA's general "public interest" standards are not "a broad license to promote the general public welfare" but "take meaning from the purposes of the regulatory legislation," and that the NGA's "principal purpose . . . was to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices"); *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 280-81 (D.C. Cir. 1990); *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1147 (D.C. Cir. 1980) (FERC's authority does not extend to "any circumstance in which FERC's regulatory tools might be useful").

2. Whether the Commission violated the NGA by asserting the authority, and setting a policy, to "expect" or require project sponsors to mitigate upstream and downstream GHG emissions. Authorities: 15 U.S.C. §717f(e) (FERC may attach to certificates only "reasonable terms and conditions as the public convenience and necessity may require"); *Am. Gas Ass'n v. FERC*, 912 F.2d 1496, 1510 (D.C. Cir.

1990) (Commission may not rely on Section 7 conditioning power to circumvent limits on its authority).

3. Whether the Commission's decision to analyze upstream and downstream GHG emissions under NEPA violates NEPA or its implementing regulations, is arbitrary or capricious, or lacks reasoned explanation. Authorities: *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 770 (2004) ("[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect."); *Sierra Club v. FERC*, 827 F.3d 36, 48 (D.C. Cir. 2016) (The "independent decision to allow exports—a decision over which the Commission has no regulatory authority—breaks the NEPA causal chain").

4. Whether the Commission's significance threshold of 100,000 tpy CO_2e is arbitrary, capricious, or contrary to NEPA or its implementing regulations. Authorities: 40 C.F.R. §1508.1 (describing types of effects covered under NEPA); 40 C.F.R. §1508.8 (2019) (similar, under prior regulations); *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983) ("environmental effects of federal actions" under NEPA must "have a sufficiently close connection to the *physical environment*" (emphasis added)); *N. Nat. Gas Co.*, 174 FERC ¶61,189, P 32 (2021) ("In evaluating whether an impact is significant, the Commission determines whether 'it would result in a substantial adverse change in the physical environment.'" (quoting *Magnum Gas Storage, LLC*, 134 FERC ¶61,197, P 114 (2011))); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency must "provide reasoned explanation for its action," including changes of policy or position).

5. Whether the Commission's attempt to regulate upstream and downstream GHG emissions infringes powers reserved to the States by the Constitution and federal law. Authorities: 15 U.S.C. §717(b); 16 U.S.C. §824(b)(1); *ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 379 (2015) ("The Act leaves regulation of [non-interstate] portions of the industry—such as production, local distribution facilities, and direct sales—to the States."); *Bond v. United States*, 572 U.S. 844, 862 (2014) (clear statement needed to overcome presumption that "Congress normally preserves 'the constitutional balance between the National Government and the States'"); *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("[T]hree things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.").

6. Whether the Rules are legislative and thus were subject to full notice and comment procedures. Authorities: 5 U.S.C. §553; *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 227 (D.C. Cir. 2011); *Am. Trucking Ass'n, Inc. v. I. C. C.*, 659 F.2d 452, 463 (5th Cir. 1981), *opinion clarified on other grounds*, 666 F.2d 167 (5th Cir.

1982).

IV. Argument

A. THE RULES ARE CONTRARY TO LAW.

i. The Rules Are Beyond the Commission's Authority.

Because the federal government is one of limited and specifically enumerated powers and does not possess a general police power, the Major Questions Doctrine ensures that agencies do not impose new obligations of "vast 'economic and political significance'" upon private parties and States unless Congress "speaks clearly." *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The major questions doctrine consists of two steps. First, the Court must determine if the assertion of Executive authority implicates matters of "vast 'economic and political significance.'" *See id*. Second, the Court must determine if Congress has "expressly and specifically" delegated authority over the issue to the Executive. *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari) (collecting cases); *NFIB v. OSHA*, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022). The Major Questions Doctrine buttresses the Nondelegation Doctrine by "protect[ing] the separation of powers and ensur[ing] that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands." *NFIB*, 2022 WL 120952, at *6 (Gorsuch, J., concurring).

As Commissioner Christie explains (at ¶23), "[w]hether th[e] Commission can reject a certificate based on a GHG analysis – a certificate that otherwise would be approved under the NGA – is undeniably a major question of public policy," and "will have enormous implications for the lives of everyone in this country, given the inseparability of energy security from economic security." Balancing the continued affordability and availability of fossil fuels against any climate-related consequences of GHG emissions is one of the most politically and economically consequential issues in America. The Commission's policy also raises serious questions under the

Nondelegation Doctrine and the Tenth Amendment. The creation of the 100,000 tpy CO_2e threshold is a quintessentially legislative act. And the fundamental reordering of the application and permit system, and shift in priority from promoting affordable natural gas to combating climate change, is a legislative judgment. And as discussed below, the areas of upstream and downstream activity that the Rules attempt to reach are quintessentially within the States' police powers and have been specifically reserved to the States by Congress, *see infra*. Because the Rules trigger the Major Questions Doctrine, the Commission bears the burden to identify clear statutory authorization. *NFIB*, 2022 WL 120952, at *3. It has not done so.

Congress did not vest in FERC the power to regulate environmental impacts. Rather, the NGA vests the Commission with responsibility as an economic regulator to ensure the orderly and reasonably priced development of natural gas. *See, e.g.*, *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947) ("[T]hree things, and three things only Congress drew within its own regulatory power, delegated by the [Natural Gas] Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."). The Commission points to no clear statement of support for its new decision to regulate greenhouse gases. Accordingly, it violates the Major Questions Doctrine.

Congress's allocation of authority between the Environmental Protection Agency and FERC further demonstrates the lack of congressional authorization for the Rules. "Congress selects different regulatory regimes to address different problems." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 426 (2011). To the extent Congress has conferred any power over GHG emissions to any federal agency, that agency is EPA, not FERC. *See id.* ("Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants") (emphasis

added). As the D.C. Circuit sees it, "there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls *squarely* within the EPA's wheelhouse." *Am. Lung Ass'n. v. EPA*, 985 F.3d at 959-60 (D.C. Cir. 2021). By contrast, the NGA is concerned with ensuring reasonably priced natural gas.

In sum, not only does FERC lack clear statutory authorization for the Rules, but all statutory indications—including the NGA's plain text and the allocation of authority to EPA—indicate that Congress affirmatively prohibited FERC from regulating greenhouse gas emissions. Because the Rules undeniably impact a question of major significance, "[t]he question ... is whether the Act *plainly* authorizes" it. *NFIB*, 142 S. Ct. at 665. As discussed, "[i]t does not." *Id.*

ii. The Commission Lacks Authority to Consider Upstream or Downstream GHG Emissions Under NGA Section 7.

Upstream and downstream GHG emissions are not within the scope of the NGA's "public convenience and necessity" provision. 15 U.S.C. §717f(e). Under the NGA, FERC cannot regulate non-FERC jurisdictional third parties' upstream and downstream GHG emissions. The term "public convenience and necessity" is not "a broad license to promote the general public welfare." *NAACP v. FPC*, 425 U.S. 662, 669 (1976). Instead, the term is "a charge to promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *NAACP*, 425 U.S. at 670. The regulation of GHG emissions plainly does not fall within the ambit of "*promot[ing]* the orderly *production* of *plentiful* supplies ... at just and reasonable rates." *Id.* (emphasis added). And the Commission cannot rely upon the NGA's secondary purposes in a way that would undermine the NGA's primary purpose of promoting development. What's more, Congress, in enacting the NGA, did not give the Commission comprehensive powers over every incident of gas production, transportation, and sale. Rather, "Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field leaving the residue for state

regulation. Therefore, it is necessary to consider with care whether, despite the accepted meaning of the term 'public convenience and necessity,' the Commission has trod on forbidden ground in making its decision." *Fed. Power Comm. v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961).[3]

Finally, as Commissioner Danly explains, the D.C. Circuit's holding in *Sabal Trail* does not fundamentally alter the meaning of the NGA and Supreme Court precedent. First, *Sabal Trail* is wrongly decided. It has been criticized by other circuit courts. *See Ctr. for Biological Diversity v. U.S. Army Corps of Engr's*, 941 F.3d 1288, 1299-1300 (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. The *Sabal Trail* court narrowly focused on the reasonable foreseeability of the downstream effects, as understood colloquially, while breezing past other statutory limits and precedents ... clarifying what effects are cognizable under NEPA."). And it fundamentally conflicts with the Council on Environmental Quality's binding regulations demanding a proximate cause standard for foreseeability. Beyond that, *Sabal Trail* conflicts with the Supreme Court's holding in *Public Citizen*, which explicitly held that agencies are "not obligated to consider" such effects "that could only occur after intervening action" by third parties such as upstream producers and downstream generators. *See Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (citing *Department of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004)).

iii. The Commission Lacks Authority to Require—Directly or Indirectly—Mitigation of Upstream and Downstream Emissions.

The Commission (at ¶98) declares that the NGA empowers it to "require a project sponsor

[3] *Transcontinental* provides no support for the Commission's action. That case does not suggest "that the Commission can consider adverse effects of air pollution," much less "climate change impacts." Danly Dissent ¶89. And *Transcontinental*'s reasoning has been overtaken by subsequent statutes including the Natural Gas Production Act and Wellhead Decontrol Act. *See* Danly Dissent ¶¶17-19.

to mitigate all, or a portion of, the impacts related to a proposed project's GHG emissions." That is incorrect. The Act allows the Commission only to attach "such reasonable terms and conditions as *the public convenience and necessity* may require." 15 U.S.C. § 717f(e) (emphasis added). As explained above, the term "public convenience and necessity" must be interpreted by refence to the NGA's purpose to "promote the orderly production of plentiful supplies of electric energy and natural gas at just and reasonable rates." *NAACP*, 425 U.S. at 670; *see also Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 280-81 (D.C. Cir. 1990) ("public convenience and necessity," as used in the NGA, is "limited to 'the purposes that Congress had in mind when it enacted [the NGA]'" (quoting *NAACP*, 425 U.S. at 670)). Imposing mitigation requirements—directly or indirectly—undermines rather than furthers this central goal.

And as Commissioner Danly explains (at ¶38), to the extent Congress has allowed an agency to require GHG mitigation, that agency is EPA, not FERC. "Congress delegated to EPA"—not FERC—"the decision whether and how to regulate carbon-dioxide emissions." *Am. Elec. Power Co., Inc.*, 564 U.S. at 426. Accordingly, the authority to impose mitigation requirements for GHG emissions far exceeds FERC's jurisdiction.

It is of no consequence that the Commission has couched its attempts to impose mitigation requirements as use of its conditioning authority. The Commission cannot employ its conditioning authority to do indirectly things that it cannot do at all. This means that it cannot circumvent congressional limitations by utilizing its conditioning authority to "insinuate into its territory issues that Congress" deliberately "located elsewhere." *ANR Pipeline Co. v. FERC*, 876 F.2d 124, 133 (D.C. Cir. 1989). Accordingly, the Commission cannot use conditions to mitigate GHG emissions from upstream production and downstream consumption because those activities are plainly outside the Commission's regulatory jurisdiction. As discussed below, *infra* §IV, the Commission

cannot wield jurisdiction over activities such as upstream development of natural gas wells or downstream combustion of natural gas by utilities or end-users, all of which exceeds the Commission's authority. *See ONEOK, Inc. v. Learjet, Inc.*, 575 U.S. 373, 379 (2015) ("The Act leaves regulation of [non-interstate] portions of the industry—such as production, local distribution facilities, and direct sales—to the States."). But the Commission's use of the conditioning authority to require mitigation in the Rules would be "aimed directly at" precisely these activities beyond the Commission's jurisdiction and achieve exactly this same result—regulation of nonjurisdictional upstream and downstream activities by the Commission. *ANR Pipeline Co.*, 876 F.2d at 133. Because the Commission cannot rely on the conditioning authority to circumvent restrictions on its authority, the Rules are unlawful. *See id.*

Finally, the Commission's use of the term "expectation" does not undo the harm. The label an agency uses cannot change the substantive impact of its action. *See, e.g.*, *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 79 (D.C. Cir. 2020). Codifying an expectation that an agency will employ when reviewing applications is just another way of enacting a regulation. And the Commission cannot avoid the limits on its jurisdiction through such empty language.

iv. The Commission's consideration of upstream and downstream GHG emissions falls outside the scope of lawful analysis under NEPA.

Under NEPA, FERC is not required to analyze environmental "effects" that it has no statutory authority to act upon. *Pub. Citizen*, 541 U.S. at 770. The Supreme Court has been clear that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* And the D.C. Circuit applied this principle in similar circumstances to conclude that FERC is not required by NEPA to analyze upstream GHG emissions because the "independent decision to allow exports—a decision over which the Commission has no regulatory authority—breaks the

NEPA causal chain," meaning the Commission is not a "legally relevant cause" of such GHG emissions. *Sierra Club v. FERC*, 827 F.3d 36, 48 (D.C. Cir. 2016) (citing *Public Citizen*, 541 U.S. at 769). This same reasoning applies directly to the Rules.

As discussed, the Commission's reliance on the D.C. Circuit's holding in *Sabal Trail* is misplaced. The court's conclusion there—that downstream and upstream GHG emissions are encompassed under NEPA in the Section 7 context—is plainly incorrect under NEPA, its implementing regulations, and the Supreme Court's holding in *Public Citizen*. As Commissioner Christie explains (¶45),

> the *Sabal Trail* court never considered with reference to the Commission's statutory authority the proper scope of that public interest analysis or the extent to which "environmental" issues could be considered in that context. It simply assumed the Commission's authority to be unlimited. But as discussed above, Congress drafted the NGA for the purpose of filling a specific gap in regulatory authority. The only way *Sabal Trail* would be correct is if Congress had "clearly authorized" the Commission to evaluate geographically and temporally remote impacts of non-jurisdictional activity in its "public convenience and necessity" determinations. ... [T]hat conclusion is clearly, irredeemably, wrong.

Accordingly, under controlling Supreme Court precedent and CEQ's binding NEPA regulations, 40 C.F.R. § 1508.1(g)(2), NEPA provides no authority for the Commission's consideration of indirect upstream and downstream GHG emissions.

B. THE RULES ARE ARBITRARY AND CAPRICIOUS.

i. The significance threshold is arbitrary and capricious.

The Commission's creation of a 100,000 tpy GHG emissions significance threshold for purposes of NEPA review is arbitrary and capricious and is contrary to NEPA and CEQ's binding implementing regulations. *See* GHG Statement ¶81 ("A project with estimated emissions of 100,000 metric tons per year of CO_2e or greater will be presumed to have a significant effect, unless record evidence refutes that presumption.").

This imposition of a single numerical threshold is contrary to longstanding FERC practice,

which is to determine whether an impact "'would result in a substantial adverse change in the physical environment.'" *See, e.g.*, *N. Nat. Gas Co.*, 174 FERC ¶61,189, P 32 (2021). This change in FERC's traditional practice is not adequately explained by the Rules. *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position.").

Beyond that, NEPA and its binding implementing regulations are concerned with effects on the "physical environment"—perceptible changes in the human environment. *See* 40 C.F.R. §1508.1(g); 40 C.F.R. §1508.8 (2019). Climate change physical effects simply do not fit into this definition because they result, if at all, from the aggregate effect of global GHG emissions—no individual natural gas project will ever by itself result in perceptible change in physical climate. *See* Int'l Energy Agency, Global Energy Review 2021, at 11 (Apr. 2021), https://bit.ly/3GoG02N. Finally, FERC's use of an arbitrarily chosen number that is unrelated to the actual physical extent of the effect of the actual project under review is arbitrary and has no basis in the record. Thus, FERC's prior approach focused on physical effects was reasonable and in line with NEPA and precedent. But in setting the 100,000 tpy threshold, the Commission arbitrarily and silently departed from Commission practice and from the law.

C. THE RULES IMPERMISSIBLY INFRINGE THE AUTHORITY OF THE STATES.

Congress carefully limited FERC to economic regulation and regulation of only *interstate* commerce. As discussed, the Rules transgress the Commission's jurisdiction as an economic regulator. It also transgresses Congress's careful limitations on FERC's jurisdiction over activities regulated by the States. In the NGA, Congress specifically deprived the Commission of authority to regulate upstream activities such as production and downstream activities such as local

distribution and consumption. *See* 15 U.S.C. §717(b). The Federal Power Act also expressly deprives the Commission of authority "over facilities used for the generation of electric energy." 16 U.S.C. §824(b)(1). Congress thus expressly left regulation of upstream and downstream activities in the natural gas sector to State and tribal authorities. *ONEOK, Inc.*, 575 U.S. at 379 ("The Act leaves regulation of [non-interstate] portions of the industry—such as production, local distribution facilities, and direct sales—to the States."). As the Court has long recognized, the NGA "had no purpose or effect to cut down state power." *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n*, 332 U.S. 507, 518 (1947).Indeed, the Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Id.* at 517-18.

Courts have carefully maintained the line between State and federal regulation of natural gas transportation and sales. Just as States may not enact laws "aimed at" interstate aspects of natural gas transportation and sales within the Commission's exclusive jurisdiction, *ONEOK*, 575 U.S. at 385 (quoting *N. Nat. Gas Co. v. State Corp. Comm'n*, 372 U.S. 84, 94 (1963)), the Commission is not authorized to take actions "aimed at" matters that Congress left within the jurisdiction of the States, *id.* Because "[t]he states, not the Commission, are the entities responsible for shaping the [electric] generation mix," *Calpine Corp*., 171 FERC ¶ 61,035, P 5 (2020) (Glick, Comm'r, dissenting), the Commission may not unlawfully insert itself into such matters that fall outside the scope of the purposes for which the NGA (and, as relevant, the FPA) was enacted. But that is exactly what it has done in these Rules.

Congress expressly denied the Commission jurisdiction over upstream and downstream activities. *See* 15 U.S.C. §717(b); 16 U.S.C. §824(b)(1). And the States are vigorous actors in these areas. *See, e.g.*, NARUC, ERE-1/GAS-1: Resolution Encouraging State and Federal Policymakers to Seek Guidance from State Utility Regulators to Design Markets that Will Achieve Reduction

of Greenhouse Gas Emissions at Least Cost, Resolutions Passed by the Board of Directors of the National Association of Regulatory Utility Commissioners at the 2022 Winter Policy Summit (Feb. 16, 2022), https://bit.ly/3IOqdMl (noting that "years of policy- and market-driven investments in electric efficiency, renewable generation, and other CO2 reducing technologies" have led to a less carbon-intensive electric power sector); Laura Shields, Greenhouse Gas Emissions Reduction Targets and Market-Based Policies, Nat'l Conf. of State Legislatures (Sept. 22, 2021), https://bit.ly/3m2wQ44 ("At least 16 states and Puerto Rico have enacted legislation establishing GHG emissions reduction requirements, with more requiring state agencies to report or inventory GHG emissions.").

The Rules thus violate the fundamental precept that the Commission's authorizing statutory authorities were "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Panhandle E. Pipe Line Co.*, 332 U.S. at 517-18. Congress did not authorize the Commission to create workarounds circumventing its careful preservation of State authority over questions such as the use of natural gas for cooking, heating, electric generation, and other fundamental matters within the States' traditional powers. *See Am. Gas Ass'n*, 912 F.2d at 1510 (FERC cannot do "indirectly . . . things that it cannot do at all"). And it certainly did not authorize FERC to do so in an attempt to address climate change, which is far removed from the Commission's charge to ensure affordable and plentiful power. FERC cannot pursue its "regulatory initiative" with fundamentally transformative effect through a mere "work-around." *Nat'l Fed'n of Indep. Bus.*, 142 S. Ct. at 668 (Gorsuch, J., concurring).

D. THE RULES ARE LEGISLATIVE RULES.

The Commission dresses up the Rules as mere "policy statements." But an agency's label is not dispositive. *See, e.g.*, *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 79 (D.C. Cir. 2020);

Texas v. United States, 787 F.3d 733, 763 (5th Cir. 2015) (courts must be "mindful but suspicious of the agency's own characterization" of an action). Instead, courts look to "whether the rule has binding effect on agency discretion or severely restricts it." *Pros. & Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). And to whether the Rules affect the rights and obligations of private parties. *Id.* As Commissioner Danly explains (at ¶¶46-47), the Rules do both:

> [T]he Interim Policy Statement is a substantive, binding rule that is subject to judicial review. Despite the Interim Policy Statement's hortatory verbiage, "there are sinews of command beneath the velvet words." Perhaps the best illustration of this is the list of six items project sponsors are "encouraged" to include in their applications in light of the new policy statement. This list includes estimates of the proposal's cumulative direct and indirect emissions and what mitigation measures the project sponsors propose, as well as a "detailed cost estimate" of the proposed mitigation and a "proposal for recovering those costs."
>
> This is not encouragement. This is command. The project sponsors will know that if they want to win approval for their projects this is what they must do even if they must guess at what will ultimately satisfy the Commission's new policies.

Because the Rules are legislative, they were required to go through full public notice and comment. The period provided by the agency did not adequately put the public on notice of what was to come and did not allow for full public participation, including by failing to indicate the ultimate text of the Rules. *See* 5 U.S.C. §553.

E. THE STATES ARE AGGRIEVED AND IMMEDIATELY HARMED BY THE RULES.

As an initial matter, the Commission cannot pretend that these Rules do not immediately cause harm because they are dressed up in the language of "encouragement." The Rules go into immediate effect and apply their "expectations" to even pending certificate applications. Statement ¶74, 100. And using terms such as "interim" and "encourage" does not change the Rules' actual effect. As Commissioner Christie explained (at ¶2 n.5), they go into effect immediately and will inflict major new costs and uncertainties on certificate applications that have been pending with the Commission for months or years.

The Rules violate the States' traditional police powers. And they violate the powers reserved to the States expressly by the FPA and NGA. *See* 15 U.S.C. §717(b); 16 U.S.C. §824(b)(1). Such harms to sovereign authority aggrieve the States and immediately and irreparably harm them. *See, e.g.*, *Texas v. EEOC*, 933 F.3d 433, 446 (5th Cir. 2019).

Applying the Rules to pending projects creates immediate delay and financial costs, which will seriously harm the States' revenue and access to affordable energy. Louisiana, for example, is home to a thriving energy industry, including many LNG export terminals, pipeline systems, and infrastructure. Louisiana has a vast network of pipeline infrastructure throughout the State. *See, e.g.*, TC Energy, Operations Map (updated Dec. 2019), https://bit.ly/3sgPuFI. Accordingly, Louisiana is particularly aggrieved by this Rule. Besides receiving property, income, and sales-tax revenue related to natural gas at all stages of production and distribution, Louisiana receives revenue from oil and natural gas production on state property, the market for which may be affected by the proposed LNG terminal and associated infrastructure. And Louisiana receives revenue from oil and natural gas production on the Outer Continental Shelf, the development and marketing of which may be affected by the proposed LNG terminal and associated infrastructure. *See* 43 U.S.C. §1337(g)(5)(A)(i).

The Rules revise the threshold for an environmental impact statement and finding of significant impact, which also will devastate Louisiana's economy and revenues by severely burdening the approval process for projects. The Rules expand the consideration of third-party activity upstream and downstream, thereby harming Louisiana's natural gas industry by making it significantly more difficult to obtain project approval under the NGA and NEPA. Louisiana is harmed by the Rules' incursion over its authority—protected by the Constitution, the NGA, and the FPA—over regulation of upstream activities such as wells and downstream activities such as

production and utility provision. Louisiana is a landowner in its own right and derives significant revenues from other landowners. The Rules' lack of specificity in the requirements surrounding engagement with landowners will thus aggrieve Louisiana. The Rules will harm Louisiana by increasing delays for building new infrastructure and investing in upgrading old infrastructure.

Louisiana also has *parens patriae* interests in this rulemaking. It seeks to ensure that FERC rules and policies do not undermine its ability to collect tax revenues—which fund governmental services that benefit all Louisiana citizens—from new or ongoing natural gas development and infrastructure projects, and to ensure that natural gas remains an affordable, reliable, and readily available energy source for the State and its citizens.

V. CONCLUSION

For the foregoing reasons, the Commission should grant the petition for rehearing.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 18th, 2022, the foregoing document was served upon each person designated on the official service list compiled by the Secretary of the Federal Energy Regulatory Commission in these proceedings.

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