

179 FERC ¶ 61,012
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Certification of New Interstate Natural Gas Facilities

Docket Nos. PL18-1-002

Consideration of Greenhouse Gas Emissions in Natural
Gas Infrastructure Project Reviews

PL21-3-002

ORDER DISMISSING REQUESTS FOR REHEARING

(Issued April 12, 2022)

1. On February 18, 2022, the Commission issued (1) an updated policy statement describing how the Commission will evaluate all factors bearing on the public interest in determining whether a new interstate natural gas transportation project is required by the public convenience and necessity under section 7 of the Natural Gas Act (NGA) (Updated Policy Statement)¹ and (2) an interim policy statement explaining how the Commission will assess the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the NGA (Interim Greenhouse Gas (GHG) Policy Statement).²
2. On March 18, 2022, the American Gas Association; United States Chamber of Commerce; Natural Gas Supply Association and Center for Liquefied Natural Gas; and Enbridge Gas Pipelines filed requests for rehearing and/or clarification of the Updated Policy Statement and the Interim GHG Policy Statement; on the same date, the Interstate Natural Gas Association of America; Boardwalk Pipelines, LP; TC Energy Corporation;

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

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

American Petroleum Institute; Kinder Morgan, Inc.; the State of Louisiana³ jointly with additional states; and the State of Texas filed requests for rehearing of the Updated Policy Statement and the Interim GHG Policy Statement. On March 21, 2022, Energy Transfer LP; Transcontinental Pipeline Company, LLC; and Freeport LNG Development, L.P.⁴ filed requests for rehearing and/or clarification.

3. On March 24, 2022, the Commission issued an order making both the Updated Policy Statement and the Interim GHG Policy Statement draft policy statements.⁵ In the March 24 Order, the Commission invited public comments on the draft policy statements⁶ and stated that it “will not apply the Updated Draft Policy Statement or the Draft GHG Policy Statement to new or pending applications.”⁷

4. We dismiss the requests for rehearing.⁸ Rule 713(b) of the Commission’s Rules of Practice and Procedure permits requests for rehearing “of any final decision or other final order in a proceeding.”⁹ A final order is one that imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.¹⁰ Consistent with both Commission and judicial precedent, the draft policy statements do

³ Louisiana’s filing was joined by the states of: Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Kentucky, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia.

⁴ Freeport LNG requested rehearing of only the Interim GHG Policy Statement.

⁵ *Certification of New Interstate Natural Gas Facilities and Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,197 (2022) (March 24 Order).

⁶ March 24 Order, 178 FERC ¶ 61,197 at P 2 (inviting initial comments on the draft policy statements by April 25, 2022 and reply comments by May 25, 2022).

⁷ *Id.* P 2 n.3.

⁸ However, we will consider the dismissed pleadings as comments on the draft policy statements, as appropriate.

⁹ 18 C.F.R. § 385.713(b) (2021); 15 U.S.C. § 717r(a) (parties “aggrieved by an order issued by the Commission in a proceeding . . . may apply for a rehearing within 30 days after the issuance of such order”).

¹⁰ *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003) (holding that “[f]inal agency action ‘mark[s] the consummation of the agency’s decisionmaking process’ and is ‘one by which rights or

not constitute any final Commission determination.¹¹ Because Commission action is not final and because the rehearing parties are not aggrieved by a statement of policy, rehearing does not lie and dismissal is appropriate.¹²

The Commission orders:

The requests for rehearing and requests for rehearing and/or clarification filed in the above-captioned proceeding are hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Danly is concurring with a separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

obligations have been determined, or from which legal consequences will flow””) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1997)).

¹¹ See, e.g., *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant Funded Transmission Projects*, 142 FERC ¶ 61,213, at P 2 (2013); see also *Pac. Gas & Elec. Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974) (holding that a statement of policy “is not finally determinative of the issues or rights to which it is addressed”; rather it only “announces the agency’s tentative intentions for the future.”).

¹² See, e.g., *Allocation of Capacity on New Merchant Transmission Projects and New Cost-Based, Participant Funded Transmission Projects*, 142 FERC ¶ 61,213 at P 2 (a policy statement is not finally determinative of the issues or rights to which it is addressed and only announces tentative intentions for the future); *Natural Gas Supply Ass’n*, 137 FERC ¶ 61,051, at P 30 (2011) (explaining that a statement of policy is not a final action but an expression of policy intent; therefore, parties are not aggrieved and rehearing does not lie); *Natural Gas Interchangeability*, 126 FERC ¶ 61,210, at P 2 (2009) (parties are not aggrieved by a policy statement and rehearing does not lie because a statement of policy is not finally determinative of the issues or rights to which it is addressed; rather, it only announces the agency’s tentative actions for the future); see also *Am. Gas Ass’n v. FERC*, 888 F.2d 136, 151-52 (D.C. Cir. 1989) (policy statements are not ripe for review until applied in specific cases); *Pac. Gas & Elec. Co.*, 506 F.2d at 38-39 (an agency cannot apply or rely upon a general statement of policy as law because a general statement of policy only announces what the agency seeks to establish as policy).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities Docket Nos. PL18-1-002

Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews PL21-3-002

(Issued April 12, 2022)

DANLY, Commissioner, *concurring*:

1. I concur with today's order¹ dismissing the fourteen requests for rehearing of the Updated Certificate Policy Statement² and Interim Greenhouse Gas (GHG) Emissions Policy Statement.³ Given that the Commission has since made these policy statements drafts and no longer applicable to "applications filed before the Commission issues any final guidance" in the policy statement dockets,⁴ the policy statements are no longer final and rehearing does not lie. I write separately to express two points.

2. *First*, while obviously a step in the right direction, turning the policy statements into drafts does not solve the problem created by the policy statements in the first place. The "fog of indecision"⁵ still lingers over the development of natural gas infrastructure. Although the Commission has indicated it will apply its 1999 Certificate Policy

¹ See *Certification of New Interstate Nat. Gas Facilities*, 179 FERC ¶ 61,012 (2022) (Rehearing Dismissal Order).

² See *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Danly & Christie, Comm'rs, dissenting) (Updated Certificate Policy Statement).

³ See *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (Danly & Christie, Comm'rs, dissenting) (Interim GHG Policy Statement).

⁴ *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (Order on Draft Policy Statements).

⁵ See *Hearing to Review FERC's Recent Guidance on Nat. Gas Pipelines Before the S. Comm. on Energy and Nat. Res.* (March 3, 2022 Senate Hearing), 117th Cong. (2022) (Senator Barrasso quoted Alan Armstrong, the CEO of The Williams Companies, Inc., as stating the Interim GHG Policy Statement "has shrouded FERC certificate decisions in a fog of indecision.").

Statement over the next two months' comment period,⁶ what will happen thereafter is anyone's guess. I fear that the philosophy animating the issuance of the policy statements in the first place will ultimately result in similar issuances in the future.⁷

3. This uncertainty continues to have an immediate impact on projects still in planning, which begins long before a certificate application is filed.⁸ How can a pipeline begin to design a project when it has no idea what the project costs will be? Pipelines must have *some* sense of anticipated costs in order to estimate rates, which "are an early viability benchmark, allowing the pipeline to determine if its expected return justifies investment, and allowing the shipper to weigh its investment decisions," as such decisions are made "long before significant costs are expended developing the project to prepare it for Commission review."⁹

4. Moreover, how can a pipeline go about ensuring that it can demonstrate that its proposal is needed? Under the 1999 Certificate Policy Statements, pipelines could demonstrate need by entering into precedent agreements with shippers before and after conducting an open season.¹⁰ Can a pipeline now reasonably enter into an agreement

⁶ See Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2 (suspending the application of the policy statements and establishing an initial and reply comment period that ends May 25, 2022).

⁷ See *id.* (Danly, Comm'r, concurring in part and dissenting in part at P 3).

⁸ See, e.g., Boardwalk Pipelines, LP March 18, 2022 Request for Rehearing, at 44 ("The lead time for the development of a pipeline project is extensive. Pipelines and their customers make contractual commitments and deploy substantial capital and resources long before a certificate application is ever filed with the Commission.").

⁹ Transcontinental Pipe Line Company, LLC March 21, 2022 Request for Rehearing and Alternative Motion for Reconsideration, at 24 (Transco Rehearing); see also Energy Infrastructure Council March 21, 2022 Comments in Support of Motion to Intervene and Request for Rehearing of the Interstate Natural Gas Association of America, Docket Nos. PL18-1-000 and PL21-3-000, at 4 ("It is difficult to see how a project sponsor, and in turn ratepayers and consumers signing up for capacity on new projects, can accurately analyze the economics of a natural gas infrastructure project and make an investment decision without knowing how much and what types of mitigation will be required and what that mitigation will cost.").

¹⁰ *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,748 (1999) ("Of course, if an applicant has entered into contracts or precedent agreements for the capacity, it will be expected to file the agreements in support of the project, and they would constitute significant evidence of demand for the project.").

with a shipper that plans to transport gas for an unknown use—a circumstance the Updated Certificate Policy statement indicates could result in a denial?¹¹ Do the Commission’s open access rules, which prohibit discrimination among customers, even *allow* a pipeline to refuse to enter into agreements with particular shippers based on end use following an open season?¹²

5. These are no small matters. Developing projects and preparing certificate applications are not inexpensive endeavors. Some have estimated that “about *ten percent of overall project costs* are incurred in [the] development phase.”¹³ To put that estimate in context, for the last three certificates issued by the Commission, that ten percent figure would have represented amounts ranging from \$26 million to \$36 million.¹⁴ One simply does not risk such capital under an uncertain regulatory regime.¹⁵ If pipeline companies determine that the risk is too great to develop otherwise needed infrastructure, that infrastructure will not be built and the inevitable consequence will be that customer demand for natural gas service will go unmet.¹⁶

¹¹ Updated Certificate Policy Statement, 178 FERC ¶ 61,107 at P 55 (“For all categories of proposed projects, we encourage applicants to provide specific information detailing how the gas to be transported by the proposed project will ultimately be used The absence of this information may prevent an applicant from meeting its burden to demonstrate that a project is needed.”).

¹² See TC Energy Corporation March 18, 2022 Motion for Leave to Intervene and Request for Rehearing, Docket Nos. PL18-1-000 and PL21-3-000, at 42-45 (discussing how the Updated Certificate Policy Statement’s project need requirements are inconsistent with the Commission’s open access rules).

¹³ Transco Rehearing Request at 29 (emphasis added).

¹⁴ See *Iroquois Gas Transmission Sys., L.P.*, 178 FERC ¶ 61,200, at P 6 (2022) (applicant estimated project would cost \$272 million); *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199, at P 11 (2022) (applicant estimated project would cost \$261,658,650); *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198, at P 6 (2022) (applicant estimated project would cost \$363,898,567).

¹⁵ See, e.g., Kinder Morgan, Inc. March 18, 2021 Request for Rehearing, Docket Nos. PL18-1-000 and PL21-3-000, at 62 (“Kinder Morgan cannot have confidence that as it proceeds through the phases of development and ultimately files a certificate application, it understands the regulatory rubric that will apply in reviewing its project and whether that regulatory rubric aligns with the assumptions and commercial decisions underlying its project.”).

¹⁶ See Kinder Morgan Rehearing Request at 62 (“Kinder Morgan has been

6. *Second*, while I am glad the Commission has explicitly stated that it will consider rehearing requests as comments in the policy statement dockets,¹⁷ I am concerned that the Commission will ultimately fail to respond to the arguments that have been raised in those requests for rehearing. And I have a good basis for that concern. The Interim GHG Policy Statement sidestepped many of the exact same arguments parties have made on rehearing, including the argument that the Commission cannot do indirectly what it is prohibited from doing directly¹⁸ and that courts have found that Congress has vested the U.S. Environmental Protection Agency (EPA), not FERC, with the authority to regulate GHG emissions.¹⁹ Perhaps if the Commission had thoughtfully (or even cursorily) considered these arguments in the first instance, it would not be in the position that it is now.

7. The Commission cannot ignore arguments it does not want to hear. Directly addressing criticism is a part of, indeed is fundamental to, the reasoned decision making that should be the hallmark of agency action under the Administrative Procedure Act. The Commission cannot impose obligations upon pipelines without regard to how much they might cost, how they will be paid for, or how they will affect consumer prices. To do so is to obstruct the development of the very infrastructure Congress has tasked us

inundated with outreaches from existing and potential customers who have expressed worries about the ability of the company in the current regulatory environment to build the natural gas infrastructure that is needed to meet their needs.”); *see also* Boardwalk Rehearing Request at 45.

¹⁷ Rehearing Dismissal Order, 179 FERC ¶ 61,012 at P 4 n.8.

¹⁸ For example, the Commission stated that “Commenters further assert that the Commission has no authority to establish environmental policy and that the Commission cannot use its conditioning authority to indirectly mitigate an effect that it has no authority to directly mitigate.” Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 101. The Commission provided no response to the argument. On rehearing, parties raise the same argument. *See, e.g.*, Natural Gas Supply Association, et al., March 18, 2022 Request for Rehearing and Clarification, at 14, 23 (arguing Commission cannot do indirectly what it cannot do directly).

¹⁹ For example, the Commission stated that “commenters argue that Congress has delegated authority to the EPA and state agencies to regulate GHGs under the [Clean Air Act].”). Interim GHG Policy Statement, 178 FERC ¶ 61,108 at P 102. The Commission provided no response to the argument. On rehearing, parties raise the same argument. *See, e.g.*, American Gas Association March 18, 2022 Request for Rehearing and Clarification, at 9 (“Instead, the courts have found that Congress tasked another agency, the [EPA], with determining whether and how to regulate greenhouse gases.”).

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with encouraging.²⁰ We should do our job and “promote the orderly production of plentiful supplies of . . . natural gas at just and reasonable rates.”²¹

For these reasons, I respectfully concur.

James P. Danly
Commissioner

²⁰ See March 3, 2022 Senate Hearing (Commissioner Danly responding to Senator Hoeven) (“I think probably the most startling part of these policy statements is that, as far as I can tell, none of the costs to consumers . . . actually factored into the consideration of the issuance of these [policy statements]. There is no discussion in the policy statements about calculations or research as to what it was going to cost consumers.”).

²¹ *NAACP v. FPC*, 425 U.S. 662, 670 (1976).

Document Content(s)

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