

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Certification of New Interstate Natural Gas Facilities)))))	Docket No. PL18-1-000
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**COMMENTS OF
AMERICAN PETROLEUM INSTITUTE**

I. Introduction

The American Petroleum Institute (“API”) submits these comments in response to the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) February 18, 2022 draft policy statement, “Certification of New Interstate Natural Gas Facilities” (“2022 Draft Certificate Policy Statement”).¹

The 2022 Draft Certificate Policy Statement follows FERC’s issuances of notices of inquiry (“NOI”) in 2021² (“2021 NOI”) and 2018³ (“2018 NOI”) in which FERC sought comment on whether, and if so, how FERC should revise its existing policy on the certification of new interstate natural gas facilities (the “1999 Certificate Policy Statement”).⁴ API submitted

¹ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022); *Order on Draft Policy Statements*, 178 FERC ¶ 61,197 (2022) [hereinafter *2022 Draft Certificate Policy Statement*]; *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022) (clarifying that the 2022 Draft Certificate Policy Statement was a draft policy statement, not effective until final, and seeking comment).

² Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021) [hereinafter *2021 NOI*].

³ Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018) [hereinafter *2018 NOI*].

⁴ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000) [hereinafter *1999 Certificate Policy Statement*].

comments in response to both the 2018 NOI⁵ as well as the 2021 NOI.⁶

API is a national trade association representing nearly 600 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API advances its policy priorities by working with industry, government, and customer stakeholders to promote continued availability of our nation's clean abundant natural gas resources for a more secure energy future. As part of its mission, API frequently participates in proceedings before FERC and other federal agencies, as well as in litigation in state and federal courts. Therefore, API has an interest in any changes to the Commission's process for certificating new interstate natural gas pipeline projects, including the approach outlined in the 2022 Draft Certificate Policy Statement.

API previously sought rehearing of the 2022 Updated Certificate Policy Statement before it was re-designated as a draft. On rehearing, API expressed its belief that the 2022 Updated Certificate Policy Statement was inconsistent with the Commission's statutory responsibilities under the Natural Gas Act ("NGA") which charges the Commission with ensuring adequate supplies of reasonably priced natural gas, particularly as the practical implications of the Commission's 2022 Updated Certificate Policy Statement would be to chill investments in natural gas infrastructure and increase costs.⁷ API explained that while the National Environmental Policy Act ("NEPA") directs FERC to consider the environmental impacts of a project, this does not equate to authorizing FERC to incorporate these considerations into its

⁵ *Comments of American Petroleum Institute*, Accession No. 20180725-5162 (July 25, 2018) [hereinafter *2018 NOI Comments*].

⁶ *Comments of American Petroleum Institute*, Accession No. 20210526-5222 (May 26, 2021) at 3 [hereinafter *2021 NOI Comments*].

⁷ API's March 18, 2022 Request for Rehearing at 6-8 ("Rehearing Request").

separate public interest analysis under the NGA.⁸ API further asserted that certain aspects of the updated policy, particularly its downplaying the evidentiary weight of precedent agreements, was arbitrary and capricious and not the product of reasoned decision making.⁹

API appreciates that the Commission continues to allow stakeholders to participate in, and comment on its ongoing efforts to revise the 1999 Certificate Policy Statement. The 1999 Policy Statement fostered an environment for the United States to become a global energy supplier, and provided stability in energy markets at home. While our industry and energy markets have evolved, the 1999 Policy Statement sought to balance public need determination, environmental analysis, stakeholder engagement, and the revised Policy Statement should recognize the US natural gas abundance as a strategic asset that we must continue to utilize to retain energy security. The 1999 Certificate Policy Statement, and the clear guidance it provided to our industry and interested stakeholders, was instrumental in the responsible buildout of the nation's natural gas infrastructure, providing reliable and affordable natural gas.

On March 25, 2022, President Biden and European Commission President Ursula von der Leyen issued a joint statement on bolstering energy security as the European Union (EU) reduces its dependence on Russian natural gas.¹⁰ Among other things,¹¹ the EU will work with its member states to ensure demand for additional volumes of approximately 50 billion cubic meters per year of U.S. liquefied natural gas (LNG) through at least 2030. Given that U.S. LNG export

⁸ *Id.* at 6-7.

⁹ *Id.* at 8-10.

¹⁰ White House, *FACT SHEET: United States and European Commission Announce Task Force to Reduce Europe's Dependence on Russian Fossil Fuels*, (March 25, 2022), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/25/fact-sheet-united-states-and-european-commission-announce-task-force-to-reduce-europes-dependence-on-russian-fossil-fuels/>.

¹¹ The agreement also provides for at least 15 bcm of additional supplies of LNG sourced from the U.S., as well as its international partners.

terminals are running at full capacity, the additional LNG will likely need to come from newly constructed terminals that will require new pipeline infrastructure to serve. U.S. LNG exports have grown to account for more than 20% of the global LNG market, with more export capacity currently under construction and slated to enter service over the next several years. As countries turn away from Russia for natural gas supply, the ability of the U.S. to further ramp up its export capabilities will be paramount to global energy market stability. As LNG export terminals depend on reliable supplies of natural gas for liquefaction and export, policies which introduce uncertainty into the interstate natural gas pipeline permitting process, hindering the development of needed pipeline infrastructure, will have a direct, negative impact on the nation's ability to assist Europe in its efforts to divest from Russian natural gas. US natural gas abundance is a strategic asset that we must continue to utilize to strengthen our energy security.

API is concerned that the 2022 Draft Certificate Policy Statement will create significant uncertainty that impedes the development of the pipeline capacity needed to serve new export terminals and, as such, runs counter to the Biden Administration's efforts to bolster Europe's energy security. Without the timely development of these pipelines, the nation's ability to meet the administration's commitment to supply natural gas to our allies will be inhibited. Given that export terminals generally take at least three years to construct, API believes FERC should ensure a transparent and expedited review process for interstate natural gas pipelines that will serve these critical facilities.

API understands FERC's desire to revisit the 1999 Certificate Policy Statement, particularly given the transformation of our industry in the two decades since its implementation. However, the practicalities of our industry, coupled with the jurisdiction of other federal agencies and state bodies over certain relevant issues, cautions against wholesale changes to this

critical balancing that FERC undertakes. As discussed in greater detail below, API is concerned that, the 2022 Draft Certificate Policy Statement fails to account for the nuances and practical workings of our industry, particularly with regard to what the Commission believes is required to demonstrate whether a project is needed. Additionally, FERC’s statutory responsibilities as a regulator are primarily economic, not environmental, and there are other federal agencies tasked with considering these types of impacts, particularly the quantification of impacts on environmental justice communities and impacts from greenhouse gas (“GHG”) emissions.

II. Issues

A. Determining Need

API maintains that precedent agreements are the most reliable indicators of need for a project, and encourages FERC to maintain its current approach of considering arms-length precedent agreements, negotiated between sophisticated parties, as compelling evidence that a project is truly needed. As API has stated previously, precedent agreements are not entered into lightly; they represent significantly negotiated, binding, long-term financial commitments supporting a project, and should they be breached, significant financial penalties typically attach.¹²

Precedent agreements undergo significant internal analysis by parties regarding, among other aspects of a pipeline project, its size, scale, capacity, and route. By the time an applicant seeks a certificate of public convenience and necessity from FERC for a particular pipeline project, the project has been designed specifically to meet needs of the shippers, who have negotiated at length with the pipeline over the facets of the project and invested significant time

¹² 2021 NOI Comments at 6; 2018 NOI Comments at 4-6.

and resources into the project already. Moreover, because recourse rates are based on the project's total capacity, not its subscribed capacity, project proponents are at risk for unsubscribed capacity. The Commission itself accepted that precedent agreements provide the most substantial evidence of need for a pipeline. While the 1999 Certificate Policy Statement appropriately stated that it would consider "all relevant factors reflecting on the need for the project,"¹³ the 1999 Certificate Policy Statement also recognized that precedent agreements "constitute significant evidence of demand for the project."¹⁴ As the 1999 Certificate Policy Statement was applied in the years following its inception, precedent agreements naturally became the key indicator of whether there was demand for a project, as direct marketplace evidence of need.

Given the level of commitment precedent agreements represent, API similarly encourages FERC, in revising the 1999 Certificate Policy Statement, to maintain its current policy of not distinguishing between affiliated and independent entity precedent agreements. Precedent agreements between affiliates represent the same level of financial commitment and market need as precedent agreements between non-affiliates, and precedent agreements negotiated at arms-length should not be discounted solely because the parties are affiliated. Although in *Environmental Defense Fund v. FERC*,¹⁵ the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit.") held that FERC was required to "look behind" affiliated precedent agreements where there was "plausible evidence of self dealing,"¹⁶ this sole instance should not spur the Commission to determine wholesale that *all* precedent agreements

¹³ 1999 Certificate Policy Statement, 88 FERC at 61,747.

¹⁴ *Id.*

¹⁵ 2 F.4th 953 (D.C. Cir. 2021) (*Spire*).

¹⁶ *Spire*, 2 F.4th 975.

are products of self-dealing, and as such have reduced probative value. *EDF v. FERC* involved a unique set of circumstances and thus its narrow holding should not be the sole reason for the change in FERC's policy. There, the D.C. Circuit found that the Commission's public convenience and necessity determination for the facts in that particular case was arbitrary and capricious. So, that case does not stand for the broad proposition that the Commission must look beyond the precedent agreements in all instances. Rather, under the 1999 Certificate Policy Statement and current FERC policy, FERC has sufficient flexibility to consider the terms of a precedent agreement, such that there is no need for the Commission to establish new policies for specific provisions or that treat affiliate and non-affiliate precedent agreements differently.¹⁷

Such a policy would also ignore some of the practical workings of our industry, as in many instances LNG developers depend on affiliated precedent agreements in order for their fuel to reach the market. As the Commission is aware, in practice, LNG project developers frequently will reach an agreement with an affiliate for the feed gas pipeline capacity, then release that capacity via the Commission's capacity release process to its LNG offtakers once it has signed long-term offtake agreements with them.¹⁸ Certainly, in such an instance, it cannot be said that a precedent agreement between affiliates for 100% of a proposed pipeline's capacity to deliver feed gas to an LNG terminal is not indicative of need for the pipeline.

API understands FERC's desire to take additional indicators of need into consideration, and notes that the 1999 Certificate Policy Statement does not limit its need analysis solely to

¹⁷ *Id.*

¹⁸ API notes that as new opportunities in the U.S. energy markets develop, it is possible that the development and deployment of new energy resources, like hydrogen and renewable natural gas ("RNG") will need to be treated similarly in order to successfully bring the industry to scale.

precedent agreements, and indeed it permits (but does not require) the Commission to consider numerous factors in determining project need.¹⁹ However, the fact remains that only precedent agreements executed between parties, in which a financial commitment is made, represent binding objective demonstrations of need for a particular project. Other evidence is naturally more subjective and may not ultimately be probative of project need. For example, a consulting firm that provides analysis of regional market demand may not take into account the needs of end users, such as industrial facilities or local utilities desiring additional supplies of natural gas.

While requiring that applicants provide information about end-uses for gas transported by a proposed project may seem logical and likely to produce evidence of project demand,²⁰ in practice that information is of little value in assessing whether market demand for a project will exist. Interstate pipelines operate for decades, and over this time span, several factors (including changes in the cost of natural gas, market demand, and environmental regulation at the federal, state, and local level) will cause the end-use of gas transported by the project to vary considerably.²¹ Where the gas ultimately will be consumed or combusted—and the entity that does so—may in many instances be unknowable. A gas marketer, for example, could subscribe to project capacity without knowing precisely where that gas will go,²² or project capacity could be released by a project shipper to a third-party shipper which values that capacity more.²³ Shifts in areas of natural gas production and demand, including LNG exports, in recent years has also led to pipelines reversing flow in certain areas, or making sections of their pipeline systems bi-directional, to accommodate these changes. Clearly, predicting where the gas will go and to

¹⁹ 1999 Certificate Policy Statement, 88 FERC at 61,747.

²⁰ 2022 Certificate Policy Statement at PP 54-55.

²¹ 2021 *NOI Comments* at 6-7; 2018 *NOI Comments* at 6-9.

²² 2018 *NOI Comments* at 8.

²³ 2021 *NOI Comments* at 7; 2018 *NOI Comments* at 7-8.

whom it will be delivered is speculative and difficult if not impossible to predict years into the future. The Commission should not look to make reliable, objective indicators of market need for a project (*i.e.*, precedent agreements) subservient to the best estimate of a project proponent or others.

Finally, in seeking to revise the 1999 Certificate Policy Statement, the 2022 Draft Certificate Policy Statement does not explain *why* the Commission feels the 1999 Certificate Policy Statement is insufficient, or in violation of its responsibilities under the NGA. Aside from *Spire*, which we note is a narrow holding limited to specific circumstances, FERC did not provide examples in which the Commission’s analysis of whether a project is required by the public convenience and necessity under the 1999 Certificate Policy Statement led to an incorrect finding, or was otherwise overturned on appeal. Nor has the Commission provided evidence of other adverse effects from the 1999 Certificate Policy Statement. There is no indication that there has been overbuilding of interstate natural gas pipelines, nor evidence of significant unused capacity. Thus, it appears that the Commission is seeking to solve a problem that does not exist, and API urges FERC maintain the long-standing, well understood and appropriately balanced policy, rather than changing it on the basis of speculation or the factually false perception that the existing FERC process does not appropriately consider the public’s input.

B. Consideration of Adverse Impacts

1. Impacts on Captive Customers

In the 2022 Draft Certificate Policy Statement, the Commission proposes changes to its consideration of a new pipeline’s impacts on existing pipelines and their captive customers.²⁴

²⁴ 2022 Draft Certificate Policy Statement at PP 67-70.

Specifically, FERC states that it will seek to protect captive customers from the effects of competition (*i.e.*, a new pipeline), regardless of whether the competition is fair, by seeking to prevent overbuilding, particularly by considering whether existing pipelines can meet the demand of a proposed project.²⁵

As discussed below, new pipelines can offer several benefits including reductions in GHG emissions and other emissions; offering customers access to sources of renewable natural gas (RNG), hydrogen, and certified gas; and enhancing supply reliability in the power markets and especially in times of domestic and global supply emergencies. FERC should not forsake these benefits on the basis of seeking to prevent “overbuilding” particularly where overbuilding is rare and difficult to demonstrate. As API demonstrates in these comments, the ultimate destination for molecules of natural gas served by a particular pipeline, especially over extended periods of time, is almost impossible to predict, and different pipelines serve a variety of purposes. The Commission should not prevent the construction of needed pipeline infrastructure with contracts for firm capacity based on its own unilateral determination that a region already has sufficient pipeline capacity.²⁶ If there are commercial contracts for pipeline capacity, it should not be for the Commission to second guess whether that contracted-for capacity is “real.” In fact, adoption of such a position puts the Commission in direct conflict with its mandate under the Natural Gas Act and upheld by the United States Supreme Court to ensure adequate supplies of natural gas at reasonable prices for Americans.²⁷ API maintains that the Commission should not adopt a regional approach to determining whether pipelines are needed;²⁸ rather, FERC

²⁵ *Id.*

²⁶ *Id.* at P 69.

²⁷ *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976).

²⁸ *2021 NOI Comments* at 7.

should continue its policy of allowing the market determine whether there is a need for a particular pipeline.

2. Environmental Impacts

FERC should exercise caution in how, and to what degree it incorporates consideration of environmental impacts in its public interest determinations, particularly in light of the expertise and engagement of other federal agencies' work on these important issues, consistent with their statutory roles.

Regarding the 2022 Draft Certificate Policy Statement's consideration of GHG emissions,²⁹ API notes that any such consideration should be limited to the emissions over which FERC has jurisdiction to consider—specifically, the direct emissions from pipeline construction and operation.³⁰ As API has communicated previously, the Biden Administration, through the Council on Environmental Quality (“CEQ”) and the Environmental Protection Agency (“EPA”), is still undertaking efforts to update its NEPA guidance for federal agencies and the implementation of an environmental screening process.³¹ API maintains its position that FERC should allow for these efforts to conclude prior to considering GHG emissions in its public interest reviews. By exercising restraint, the Commission will ensure that its approach towards GHG emissions is consistent with the “whole-of-government approach” articulated by the Biden administration,³² and may benefit from the expertise of other agencies.³³

²⁹ *2022 Draft Certificate Policy Statement* at PP 75-76.

³⁰ API provides more fulsome comments on the Commission's consideration of GHG emissions in its companion comments on the Commission's Draft GHG Emissions Policy Statement, submitted concurrently with this filing.

³¹ *2021 NOI Comments* at 24-29.

³² *Id.* at 24.

³³ *Id.* at 30.

API is supportive³⁴ of the 2022 Draft Certificate Policy Statement’s consideration of project impacts on environmental justice communities.³⁵ In so doing, FERC must consider whether these communities have been impacted by prior industrial activity unrelated to the proposed action pending before FERC, and not force new applicants to mitigate harms from prior projects to which it had no ability to prevent.³⁶ API understands the EPA, as well as many state agencies, require environmental justice screening tools, such as EJSCREEN³⁷, to be utilized as part of the permitting process to identify potential areas that may warrant further consideration for analysis, and outreach based on pollution burden and vulnerability. Furthermore, API is aware that the CEQ is planning to address environmental justice issues in Phase 2 of the rulemaking process that will revisit the 2020 National Environmental Policy Act (NEPA) regulations. By deferring to these resources and regulations referenced within the 2022 Certificate Policy Statement, FERC should ensure its approach in considering impacts on environmental justice communities is consistent with the adopted federal regulatory actions which align with congressional intent, as well as the underlying legal authorities. In so doing, FERC will allow project proponents to know what is expected of them and, provide industry with much-needed certainty in the permitting process. Such an approach is particularly warranted in situations such as this, where federal environmental justice policy is undergoing review and re-evaluation.

³⁴ *2021 NOI Comments* at 37 (“API commends the Commission for its efforts to address complex questions involving environmental justice communities to date”).

³⁵ *2022 Draft Certificate Policy Statement* at PP 86-93.

³⁶ *See 2021 NOI Comments* at 44-45.

³⁷ <http://www.epa.gov/ejscreen>.

If the Commission is committed to considering projects' adverse physical environmental impacts in its public interest review, fairness dictates that the Commission consider the environmental, not just economic, benefits natural gas pipelines provide. As API has stated previously, natural gas pipelines displacing other fossil fuels will result in a net reduction of GHG emissions,³⁸ as well significant reductions in other emissions.³⁹ Further, new natural gas pipelines often incorporate enhanced emissions detection and control technology, and can be developed to access sources of RNG and hydrogen⁴⁰ for blending into the natural gas stream, reducing the carbon intensity of the natural gas transported. FERC should also take into consideration whether a natural gas pipeline proposes to transport "certified natural gas," also known as responsibly sourced gas, the production of which has reduced environmental impacts and/or GHG emissions.⁴¹ Furthermore, natural gas often displaces higher GHG emitting fuel sources such as coal, fuel oil, and wood burning stoves, and when used to generate electricity, can complement the incorporation of renewable resources into the power grid.⁴² These substantial benefits offered by natural gas pipeline facilities should be given at least the same weight in the Commission's analysis as a project's adverse but manageable impacts.

³⁸ *Id.* at 31.

³⁹ U.S. Energy Information Administration, *Natural Gas Explained* (stating that natural gas combustion results in emissions in "nearly all types of air pollutants" and GHGs compared to coal or petroleum products).

⁴⁰ API notes that in many instances, LNG, hydrogen, and RNG depend on affiliated precedent agreements in order for their cleaner burning fuel sources to reach the market. In these instances, API stresses that FERC should not blindly apply its newly announced policy that affiliated precedent agreements are not indicative of need for a project. See *2022 Certificate Policy Statement* at P 60.

⁴¹ S&P Global, *Certified Natural Gas: Midstream Sector Begins Embracing Concept, Standards* (Oct. 14, 2021) available at <https://www.spglobal.com/commodity-insights/en/market-insights/latest-news/natural-gas/101421-certified-natural-gas-midstream-sector-begins-embracing-concept-standards>.

⁴² The Brattle Group, *Diversity of Reliability Attributes: A Key Component of the Modern Grid* (May 17, 2017) available at https://www.brattle.com/wp-content/uploads/2017/10/7351_diversity_of_reliability_attributes.pdf

III. Conclusion

API is grateful to the Commission for the opportunity to comment on the 2022 Draft Certificate Policy Statement. While API understands the Commission's interest in revisiting and, where necessary, revising the 1999 Certificate Policy Statement, API believes FERC must take into consideration the successes of the 1999 Certificate Policy Statement, and should not depart from this policy in ways that run counter to Congressional intent, and FERC's role in overseeing the orderly development of natural gas supplies at reasonable prices. API strongly encourages FERC to retain its reliance on precedent agreements, regardless of whether or not they are between affiliated entities, as the primary evidence of need for a project, as fairly negotiated precedent agreements between sophisticated parties represent the only objective evidence of demand for a project. FERC should factor in the benefits natural gas infrastructure provides, and defer action on evaluating GHG emissions until other agencies with the statutory authority have had the chance to do so. Any revised policy FERC issues should provide our industry with the guidance needed to allow for the continued growth of American natural gas infrastructure. In so doing, FERC will enable the United States and our allies to utilize American natural gas for decades to come.

Respectfully submitted,

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