UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	)	Docket No. PL18-1-001
Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews	)	Docket No. PL21-3-001

SUPPLEMENTAL REPLY COMMENTS OF
THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

The Interstate Natural Gas Association of America ("INGAA") moves for leave to submit and submits these supplemental reply comments on the Federal Energy Regulatory Commission's ("FERC" or "Commission") draft Updated Policy Statement on Certification of New Interstate Natural Gas Facilities ("Updated CPS") and Interim Policy Statement on Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews ("GHG Statement" and, collectively with the Updated CPS, "Draft Policy Statements").[1] Although the Commission's order soliciting comment on the Draft Policy Statements did not provide for supplemental replies,[2] the Commission should nonetheless consider INGAA's comments because, as discussed further below, the comments will assist the Commission in understanding the issues raised.

INGAA is a trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA's

[1] *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) ("Updated CPS"); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) ("GHG Statement").

[2] Order on Draft Policy Statements, *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197, P 2 (2022) ("March 24 Order").

26 members represent the majority of interstate natural gas transmission pipeline companies in the United States. INGAA's members, which operate approximately 200,000 miles of interstate natural gas pipelines, serve as an indispensable link between natural gas producers and consumers. Its members' interstate natural gas pipelines are regulated by the Commission pursuant to the Natural Gas Act ("NGA").[3]

COMMENTS

I. Motion for Leave to Submit Supplemental Reply Comments

INGAA moves to file these comments pursuant to Rule 212 of the Commission's Rules of Practice and Procedure.[4] The Commission's March 24 Order did not provide for supplemental reply comments, but the Commission should nonetheless consider these supplemental comments because they will assist the Commission in understanding and ensure a more complete record of issues raised for the first time in reply comments.

On May 25, the National Resources Defense Council ("NRDC") submitted its "climate test" tool in this proceeding.[5] This "novel" tool purports to "evaluat[e] the climate significance of greenhouse gas emissions from individual fossil fuel projects, such as FERC-jurisdictional pipeline proposals," by "compar[ing] the project's share of the remaining carbon budget to the fraction of energy demand it could meet."[6] NRDC "suggests" that the Commission use its climate tool to assess the significance of projects in NGA Section 7 proceedings.[7] Absent from NRDC's submission is any explanation as

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[3] 15 U.S.C. §§ 717-717w.

[4] 18 C.F.R. § 385.212.

[5] Reply Comments of Natural Resources Defense Council at 1, Docket Nos. PL21-3-000, PL21-3-001 (May 25, 2022) ("NRDC Comments").

[6] *Id.*

[7] *See* GHG Statement at P 67 & n.160.

to why the organization submitted its "climate test" as part of its reply comments, thereby depriving other stakeholders of an opportunity to comment on the test and the Commission of a more robust discussion of the test.

The Commission should permit supplemental comments discussing the NRDC's "climate test." NRDC acknowledges that its test has not yet been peer reviewed,[8] and, as others have pointed out, the test has significant flaws.[9] Even if the climate test had merit (it does not), it would be error for the Commission to rely on the test in future proceedings absent public notice and meaningful opportunity to comment on the test.[10] The Commission has accepted supplemental comments under similar circumstances and should do so again here.[11]

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[8] NRDC Comments at 1-2.

[9] *See* Supplemental Reply Comments of Enbridge Gas Pipelines, Docket Nos. PL18-1-000, PL21-3-000 (June 24, 2022) ("Enbridge Supplemental Comments").

[10] *See Alaska Gasline Development Corp.*, 172 FERC ¶ 61,214, P 22 (2020) ("[T]he Commission's procedures, consistent with NEPA and the NGA, allowed the public a meaningful opportunity to comment and resulted in an informed Commission decision."). *Cf. Turlock Irrigation Dist.*, 65 FERC ¶ 61,373, 63,016 (1993) ("[W]e believe that parties should have a meaningful opportunity to comment on all aspects of the record that the Commission relies on.").

[11] *See Revisions to Electric Reliability Organization Definition of Bulk Electric System and Rules of Procedure*, 141 FERC ¶ 61,236, P 30, n.27 (2012) ("Although the NOPR did not allow for reply comments, we will accept these pleadings because they have assisted our understanding of NERC's proposal in this Final Rule."); *see also Equitrans, LP*, 152 FERC ¶ 61,103, P 10, n.4 (2015) ("[T]he Commission accepts Equitrans' Reply since it will not delay the proceeding, may assist the Commission in understanding the issues raised, and will ensure a complete record."); *Seaway Crude Pipeline Co.*, 142 FERC ¶ 61,201, P 10, n.8 (2013) ("The Commission grants leave and accepts Seaway's reply comments, as they provide the Commission a full understanding of the issues in this proceeding and will assist in our decision making."). *Compare* Order Denying Request for Reconsideration, *La. Pub. Serv. Comm'n v. Entergy Servs., Inc.*, 156 FERC ¶ 63,053, P 4 (2016) ("[N]ovel arguments raised for the first time in reply briefs and new or revised legal and factual issues that were first raised in reply briefs will not be considered. Such material arrives too late in the proceedings to afford participants a meaningful opportunity to review and constitutes improper rebuttal.") (quotation marks omitted); *Clear-View Techs., Inc. v. Rasnick*, 2015 WL 3509384, at *4 (N.D. Cal. June 3, 2015) ("Defendants attempted to sandbag Plaintiff by enclosing Dr. McCune's technical report as an appendix to the Turner rebuttal report. This behavior runs afoul of the purpose and plain language of Rule 26, and cannot be countenanced."); *U.S. Automatic Sprinkler, Co. v. Reliable Automatic Sprinkler Co*., 2010 WL 1266659, at *4 (S.D. Ind. Mar. 25, 2010) ("[A] party's right to file rebuttal and supplementary expert reports does not . . . give license to sandbag one's opponent with claims and issues which should have been included in the expert witness' report." (quotation marks omitted)).

II. Supplemental Reply Comments

A policy choice does not transform into a scientific judgment simply because it incorporates or relies on technical considerations.[12] Such is the case with NRDC's "climate test." As the Enbridge Supplemental Comments explain, in order for the Commission to use the NRDC's climate test, it must first select the "climate goal" with which the proposed project must be consistent.[13] The Supreme Court recently concluded that "deci[sions regarding] how Americans will get their energy" require "balancing . . . many vital considerations of national policy."[14] And the selection of a "[c]ap[]" on greenhouse gas emissions to "force a nationwide transition" in the energy industry is a "decision of such magnitude and consequence" that it "rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[15]

Congress has not adopted a binding climate goal or cap on emissions, nor has it provided the Commission with clear authority to select one. Some might argue that Congress' use of the phrase "public convenience and necessity" in the NGA authorized the Commission to consider and decide questions of vast political and economic significance, such as how the United States should address climate change.[16] This argument fails for at

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[12] *See, e.g.*, *Nuclear Energy Institute, Inc. v. EPA*, 373 F.3d 1251, 1267 (D.C. Cir. 2004) (per curiam) (National Academy of Sciences "explained that 'although the selection of a time period of applicability has scientific elements, it also has policy aspects that we have not addressed'"); *id.* at 1298-99 ("[I]n rejecting [National Academy of Sciences'] recommendation that 'the time over which compliance should be assessed should include the time when greatest risk occurs, within the limits imposed by the stability of the geologic system,' [Nuclear Regulatory Commission] acknowledged that its judgment involved policy as well as technical considerations.").

[13] *See* Enbridge Supplemental Comments at 7-8.

[14] *W. Va. v. EPA*, __ S.Ct. __, Case No. 20-1530, Slip Op. at 25 (June 30, 2022); *see also id.* at 25-26 ("basic and consequential tradeoffs involved in . . . cho[osing]" the amount of coal in the electric generation mix "are ones that Congress would likely have intended for itself").

[15] *Id.* at 31.

[16] *See* 15 U.S.C. § 717f.

least three reasons. *First*, the phrase "public convenience and necessity," as used in the NGA, is "limited to 'the purposes that Congress had in mind when it enacted [the NGA],'"[17] namely "the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[18] Climate change does not "reasonably relate to the purposes for which FERC was given certificate authority."[19] *Second*, "shorn of all context, the word[s] are an empty vessel"; "almost anything could constitute" a factor affecting the public convenience and necessity.[20] This "vague statutory grant is not close to the sort of clear authorization required by [the Supreme Court's] precedents" for an agency to consider major questions.[21] *Third*, the Commission's use of the NGA to address climate change would be a novel application of the law, and the "discover[y] in a long-extant statute an unheralded power representing a transformative expansion in its regulatory authority" indicates that the Commission would be acting outside the scope of its authority.[22]

The Supreme Court has characterized "assert[ions of] power beyond what Congress could reasonably be understood to have granted" as "a particular and recurring problem" among agencies.[23] As INGAA and its members have repeatedly explained in this proceeding, the Commission's Draft Policy Statements would perpetuate this problem by

[17] *Pub. Utils. Comm'n v. FERC*, 900 F.2d 269, 280-81 (D.C. Cir. 1990) (quoting *National Association for the Advancement of Colored People v. Fed. Power Comm'n*, 425 U.S. 662, 670 (1976) ("*NAACP*").

[18] *NAACP*, 425 U.S. at 669-70; *see also Office 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," not "any circumstance in which FERC's regulatory tools might be useful.").

[19] *Office of Consumers' Counsel*, 655 F.2d at 1147.

[20] *W. Va. v. EPA*, Slip Op. at 28.

[21] *Id.*

[22] *Id.* at 20; *see also id*. at 13-15 (Gorsuch, J., concurring) ("[A]n agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority.").

[23] *Id.* at 12.

setting national climate policy in the absence of clear congressional authorization and direction.[24] For the same reason, the Commission therefore must reject the NRDC's climate test because it requires the Commission to make a choice that the agency lacks the legal authority to make.

Even if the Commission had the legal authority to rely on the test, NRDC's climate test is replete with irrational assumptions and logical errors that render its use in Commission proceedings inappropriate. The test, for example, proceeds from a flawed premise: we live in a world where existing energy infrastructure remains in place and the project being tested can be considered in isolation. If the Commission removes NRDC's unrealistic, untenable assumption regarding existing energy infrastructure, the NRDC's climate test fails to accomplish what it sets out to achieve. Our global society can change circumstances or modify its infrastructure, opening multiple pathways to whatever policy goal serves at the basis for the test and enabling *any* proposed project to be "consistent" with that goal. This is a significant flaw in NRDC's climate test, but, as the Enbridge Supplemental Comments explain, it is far from the only one.[25]

Even if the Commission had the legal authority to use the NRDC climate test and *even if* the test could determine whether a specific project was "consistent" with a specific

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[24] *See, e.g.*, Reply Comments of the Interstate Natural Gas Association of America at 23-29, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (May 25, 2022); Comments of the Interstate Natural Gas Association of America at 13-18, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (Apr. 25, 2022); Comments of Boardwalk Pipeline Partners, LP at 18-22 *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (Apr. 25, 2022); Comments of Kinder Morgan, Inc. at 46-53, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (Apr. 25, 2022); Comments of TC Energy Corp. at 16-20, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (Apr. 25, 2022); Comments of the Williams Companies at 9-10, *Certification of New Interstate Natural Gas Facilities*, FERC Docket No. PL18-1-000 (Apr. 25, 2022).

[25] *See* Enbridge Supplemental Comments at 10-14.

climate goal, the test results would still be inapposite to the Commission's National Environmental Policy Act ("NEPA") analyses. As INGAA has explained, "[t]he only statutorily defensible approach would be to base significance judgments on an assessment of specific physical climate effects that would not occur absent the amount of additional GHG emissions from the project itself."[26] This is the approach required under NEPA and case law establishing that NEPA's concern is with effects on the "physical environment."[27] It is also consistent with the Commission's established approach: "[i]n evaluating whether an impact is significant," the Commission will "determine[] whether 'it would result in a substantial adverse change in the physical environment.'"[28] A "compar[ison of] the project's share of the remaining carbon budget to the fraction of energy demand it could meet"—which is all NRDC's climate test purports to provide—offers *no* probative information regarding the actual physical effects of a specific project.[29]

[26] Comments of the Interstate Natural Gas Association of America at 3, 36-38, Docket Nos. PL18-1-000, PL21-3-000 (Apr. 25, 2022).

[27] *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)).

[28] *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, P 32 (2021) (quoting *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197, P 114 (2011)).

[29] *See* Enbridge Supplemental Comments at 14-17.

CONCLUSION

For the foregoing reasons and for those discussed in the Enbridge Supplemental Comments, INGAA respectfully requests that the Commission grant leave to file these comments and decline to rely on NRDC's "climate test" in future proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 6th day of July, 2022, caused to be served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ *Christopher Smith*
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