UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Certification of New Interstate Natural Gas Facilities	**)** **)**	**Docket No. PL18-1-000**

COMMENTS OF THE AMERICAN GAS ASSOCIATION

Pursuant to the "Notice of Inquiry" issued by the Federal Energy Regulatory Commission ("Commission") on April 19, 2018, in Docket No. PL18-1-000, *Certification of New Interstate Natural Gas Facilities*,[1] and the "Order Extending Time for Comments," issued May 23, 2018,[2] the American Gas Association ("AGA") respectfully submits these comments. The continued extension and expansion of the interstate natural gas pipeline system, which ensures a secure and reliable supply of natural gas, in accordance with the requirements of section 7(c) of the Natural Gas Act ("NGA"),[3] is of great importance to the member utilities of AGA, and AGA urges the Commission to carefully consider the comments of AGA and those of its member companies as it evaluates what revisions, if any, to make to the Policy Statement.[4]

I. INTRODUCTION

The highest priority for a natural gas local distribution company ("LDC" or "natural gas utility") is the delivery of natural gas to its customers safely, reliably, responsibly, and at just and reasonable rates. While LDCs are not responsible for the construction of interstate transmission pipeline projects, LDCs often distribute the natural gas transported by the interstate pipelines to

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1 *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018), 83 Fed. Reg. 18020 (April 25, 2018) ("Notice").

2 *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,138 (2018).

3 15 U.S.C. 717f.

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) ("Policy Statement").

retail, industrial, and electric generation customers. Furthermore, LDCs often serve as "anchor shippers" that contractually agree to subscribe to service from new and expanded interstate pipelines, thereby playing a significant role in demonstrating that those projects have merit from both a consumer-benefits standpoint, as well as from an economic viability standpoint. Natural gas utilities also play a vital role in local economic development efforts, since natural gas service is often a prerequisite to attracting manufacturing and commercial investments. These enterprises contribute to local economies by providing jobs and tax revenues. Interstate pipelines play a critical part in the supply chain because the natural gas flowing through those pipelines is ultimately used by LDCs to serve customers that use natural gas in their homes, businesses, or industrial facilities.

Since 1999, the Commission's Policy Statement regarding the certification of new interstate natural gas pipeline facilities has been an effective and proven tool for the natural gas industry, the Commission, and stakeholders. The Policy Statement describes the criteria and analytical steps used by the Commission to balance a proposed natural gas pipeline project's public benefits against its potential adverse consequences, and this has provided the industry and stakeholders with a clear understanding of the Commission's review process.

The Notice highlights certain changes in the natural gas industry since the issuance of the Policy Statement, including the substantial increase in production and pipeline infrastructure, as well as shifts in the identity of pipeline firm customers.[5] AGA agrees that significant developments have occurred over the past two decades, making the Commission's initiative to reexamine the principles of the Policy Statement appropriate and timely. As explained in detail below, however, AGA urges the Commission to carefully weigh the merits of the existing Policy

[5] *E.g.*, Notice at P 2, P 19 - P 23.

Statement in the context of the Commission's goals and in light of the Policy Statement's successes. The Policy Statement has proven to be a flexible and effective document which promotes regulatory certainty and a natural gas infrastructure system capable of evolving and growing to meet radically-changing needs on the part of the natural gas industry and the consuming public. The Policy Statement, as currently written, remains effective for analyzing certificate applications notwithstanding the changes in the industry.

AGA's comments primarily focus on the Commission's questions regarding the standards for determining "need" pursuant to the Policy Statement, and as discussed in detail below, the Commission should not make significant changes to the "need" requirement and related factors. Specifically, AGA supports the use of precedent agreements to evidence the need for a proposed project. The existence of precedent agreement support for a project shows that entities serving natural gas markets, such as an LDC, have assessed the project's costs in light of all of the expected benefits, and have chosen to make a substantial commitment to use and pay for the project's capacity. Furthermore, in its determinations regarding project need, the Commission should not distinguish among end-uses of natural gas because such differentiation would be inconsistent with the Commission's non-discrimination policy. AGA also comments on improving the efficiency and effectiveness of the certificate processes. On balance, material changes to the Policy Statement are not warranted; however, the overall review process for the required approvals could be examined and streamlined. AGA reserves the right to file reply comments, if appropriate, to ensure that a complete and accurate record is available to the Commission in this important proceeding.

II. COMMUNICATIONS

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III. IDENTITY AND INTERESTS

The American Gas Association, founded in 1918, represents more than 200 state-regulated and municipal natural gas utility companies that deliver clean natural gas to more than 177 million Americans. AGA also advocates for the more than 73 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent – more than 69 million customers – receive their gas from AGA members. Today, natural gas meets more than one-fourth of the United States' energy needs.[6]

AGA member LDCs own and operate local natural gas distribution pipeline systems that typically receive natural gas supplies that have been transported on the interstate pipeline system. LDCs deliver natural gas under locally-regulated rates, terms and conditions, directly to residential, commercial, and industrial customers, including electric generators. AGA members take service from virtually every interstate natural gas pipeline regulated by the Commission under the NGA. As customers of jurisdictional pipelines and providers of natural gas distribution service to all retail segments, AGA members are directly affected by the Commission's rules and policies

[6] For more information, please visit www.aga.org.

addressing or affecting the certification of new pipeline capacity. AGA's goals include ensuring that the interstate natural gas transportation network provides adequate, secure and reliable service. AGA member companies, therefore, have a direct and substantial interest in the issues raised in this proceeding.

IV. COMMENTS

A. The Policy Statement Has Been Successful in Promoting Needed Infrastructure While Ensuring Other Stakeholder Interests Are Addressed

The Policy Statement has been remarkably effective in encouraging the construction of a reliable interstate natural gas pipeline system adequate to meet the enormous changes in production and markets over the past two decades. At the same time, the Commission has fulfilled its obligations to consider both stakeholder interests (*e.g.*, landowners, environmental, existing pipelines, and shippers) and the broader directives of Congress regarding the natural gas industry. The result has been tremendous benefits for consumers of natural gas due to more abundant and less costly domestic supplies, and for the environment due to the replacement of other fossil fuels with cleaner-burning natural gas. Moreover, these changes have benefitted the nation's economy because natural gas consumption has fueled substantial industrial activity in regions that were not traditional production areas. Additionally, the nation's abundant supply of natural gas has allowed companies to export the commodity to other countries. As the Department of Energy's Office of the Inspector General recently found,[7] the Commission has executed its responsibilities consistent with its statutory directives. The DOE Audit Report suggested only relatively minor course adjustments regarding transparency and access to the process, but found no significant problems.

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[7] "Audit Report – The Federal Energy Regulatory Commission's Natural Gas Certification Process," DOE-OIG-18-33, May 2018 ("DOE Audit Report").

AGA also specifically recommends that the Commission conclude that the framework and standards contained in the Policy Statement should not be altered, particularly, as discussed in the following section, with regard to the determination of need.

B. Responses to Specific Questions in the Notice Regarding the Commission's Determination of Need

A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?

Although AGA supports the Commission's determination to *review* the adequacy of the current standards for determining whether there is a public need, AGA strongly recommends that substantive changes are neither necessary nor appropriate to the standards of the Policy Statement regarding proof of need.

In approaching this question, the Commission should give appropriate weight to the important benefits that have resulted from the application of the current standard. As the Notice summarizes, the nation's natural gas industry has faced dramatic and potentially disruptive market changes in the past 15 years, resulting in a pressing need for new and realigned pipeline infrastructure. While natural gas production has increased by approximately 26 percent[8] and as new geographic production patterns have changed pipeline operations in several regions of the country, the current standard has permitted the Commission to authorize the construction of necessary new pipeline capacity to meet changes in the market.[9]

At the same time, the Commission has been able to subject certificate applications to close and thorough scrutiny. Participation by various stakeholders has soared in certificate proceedings, which has created challenges in the timely processing of applications, but underscores the broad

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8 *See* Notice at P 19 (discussing the increase in domestic natural gas production).

9 The Commission notes some of the associated increases in certificate activity at fn. 60 of the Notice.

success of the Commission in encouraging participation by a wide range of interested parties. Moreover, the practice of the Commission has hardly been to "rubber stamp" projects – a number of applications have been denied, as the Notice observed.[10]

Significantly, there is also no evidence that the application of the "need" standard in the Policy Statement has resulted in the construction of vast quantities of unutilized capacity. To the contrary, the projects approved in recent years and those still in the application process indicate a continuing need for more capacity. Had the Policy Statement resulted in enormous over-growth of natural gas pipeline capacity, and if the nation was now faced with an abundance of unneeded and unused capacity, it might have been reasonable to call for greater scrutiny of the tests and standards. But the exact opposite is the case; for example, the entire New England region is noted for its continuing shortfall of transportation capacity.[11]

The burden must be on any party seeking substantial changes to the policy to show that the *result* of the Policy Statement has been the construction of substantial unneeded capacity. No such showing has been made. The evidence reviewed in the Notice – which encompasses the certificate orders and proceedings over nearly 20 years of Policy Statement guidance – supports the conclusion that the current policy has allowed the pipeline industry to keep pace with increasing demands and changed market flows, while still permitting a careful and reasoned review as to

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[10] In addition to the instances cited in the Notice, at P 35, fn. 94, the Commission has denied other applications for lack of support within the required timeframe, *e.g.*, *Chestnut Ridge Storage LLC*, 139 FERC ¶ 61,149 (2012), or for other reasons.

[11] *See, e.g.*, Testimony of Mr. Gordon van Welie, President and Chief Executive Officer of ISO New England before the U.S. Senate Committee on Energy & Natural Resources (January 23, 2018), https://www.iso-ne.com/static-assets/documents/2018/01/testimony_gordonvanwelie_january232018.pdf. Mr. van Welie explained that it has been "known for several years that when it gets cold New England does not have sufficient natural gas supply infrastructure to meet demand for both home heating and power generation." Furthermore, according to Mr. van Welie, "[d]espite several attempts on a regional and individual state basis to find innovative ways to finance new natural gas pipeline investment, ISO-NE does not see that investment materializing in the near future."

need.[12]

The general likelihood of an ongoing need for major additions to the pipeline network in the future is supported by numerous studies that show a projected increase in natural gas production and consumption, thereby creating a need for more natural gas transportation capacity to deliver the gas supply to markets in the next decade and beyond.[13] In sum, the framework for determining a project's need, including the use of precedent agreements, as discussed below, has been broadly successful and instrumental not only in getting new capacity built to accommodate increased production and consumption, but also for increased gas-electric harmonization, which has been a key focal point of the Commission.

A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider? For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

Where necessary, the Commission should continue to consider a broad range of benefits that may demonstrate a need for new pipeline capacity, beyond, and in addition to, a demonstration of market demand. For the reasons discussed below in response to Question A3, AGA strongly supports the use of precedent agreements as a *sufficient* measure for demonstrating market need. Where there is market need for the additional capacity proposed by a certificate applicant, as shown by precedent agreements, the Commission should continue to conclude that the "public need"

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[12] Moreover, since the issuance of the Policy Statement, the Commission has updated and improved the capacity release program and revised the capacity release policies to facilitate asset management arrangements in order to reflect changes in the market for capacity. *See, e.g., Promotion of a More Efficient Capacity Release Market*, Order No. 712, FERC Stats. & Regs. ¶ 31,271, 123 FERC ¶ 61,286 (2008), *order on reh'g*, Order No. 712-A, FERC Stats. & Regs. ¶ 31,284, 125 FERC ¶ 61,216 (2008), *order on reh'g*, Order No. 712-B, 127 FERC ¶ 61,051 (2009).

[13] *See, e.g.*, EIA Annual Energy Outlook 2018, https://www.eia.gov/outlooks/aeo/pdf/AEO2018.pdf at pp. 59-76; https://www.mckinseyenergyinsights.com/services/market-intelligence/reports/north-american-gas-outlook/; *see also* HIS CERA, *Fueling the Future with Natural Gas: Bringing It Home* at ES-1 (January 2014), https://www.fuelingthefuture.org/assets/content/AGF-Fueling-the-Future-Study.pdf.

factor has been met. The factors cited in the Policy Statement all remain factors to which the Commission should give weight in assessing whether an applicant has met the "public need" showing, in the absence of precedent agreements. As summarized in the Notice, those benefits have included: "(1) meeting unserved demand; (2) eliminating bottlenecks; (3) providing access to new supplies; (4) lowering costs to consumers; (5) providing new interconnects that improve the interstate pipeline network; (6) providing competitive alternatives; (7) increasing electric reliability; and (8) advancing clean air objectives."[14] Applicants, however, should not be required to demonstrate support by means of these additional factors when precedent agreements already adequately support the proposed construction of new capacity. In effect, the existence of a precedent agreement signifies that market participants believe that one or more of these factors of public need will be met, and are consequently entering into agreements evidencing this belief, *i.e.*, putting their money where their mouth is.

While precedent agreements are adequate evidence to support the need for a project, the Commission should not narrow the other factors that could be analyzed to determine the benefits of new capacity. When the benefits listed in the Notice and the Policy Statement,[15] become applicable, the Commission should be aware that the issue of need often involves factors and analysis that are more complex and nuanced than comparisons of regional demand and supply of natural gas. LDCs, for example, often assess proposed new pipeline capacity in light of a project's ability to serve discrete segments of their distribution systems that are either geographically isolated from other pipeline sources and/or have limited internal transmission connectivity with portions of their service territory. Consequently, an LDC's assessment of whether existing

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[14] Notice at P 31 *citing* Policy Statement, 88 FERC ¶ 61,227 at 61,748.

[15] *Id.*

capacity is "adequate" may require an analysis of the benefits (and costs) of contracting to support additional capacity connected to particular sections of their distribution systems that cannot fully access other pipeline supplies that may nominally have interconnections with the LDC. The benefits of the additional capacity may not be easily or simply quantified, yet it may provide substantial public benefits in supplying both load growth capability in discrete areas of their systems and additional security and diversity of supply to existing natural gas consumers.

Additional pipeline capacity may also provide greater resiliency in meeting retail consumer demand for natural gas. Many of these benefits – supply security, resilience, and supply diversity – may be substantial factors affecting the decision of LDCs to support a pipeline project by contracting for the new capacity. These and other considerations often underlie LDC decisions to enter into precedent agreements, and at the same time, may result in other benefits traditionally recognized under the Policy Statement, *e.g.*, eliminating bottlenecks; providing access to new supplies; lowering costs to consumers; providing new interconnects that improve the interstate pipeline network; providing competitive alternatives; and increasing electric reliability.

For every LDC, system configurations and portfolio arrangements to meet peak loads (by pipeline, storage, peaking supplies, *etc.*) are highly individualized. AGA understands that individual companies plan to provide more detailed examples of how new pipeline capacity may match their unique operational and customer demand requirements, and AGA urges the Commission to review those comments closely as it considers this question.

In sum, in the absence of precedent agreements that establish public need, AGA recommends that the Commission retain the broad scope of "public need" employed under the Policy Statement, and that the Commission reject any proposals seeking to either reduce the range of benefits considered or reduce the assessment into a simplistic numeric benefits calculation.

A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

The Commission should continue to rely on precedent agreements as providing adequate evidence of public need for a proposed project; in the absence of precedent agreement support, other evidence may support a conclusion that a project is needed, but precedent agreement support in and of itself does provide adequate evidence of need. The existence of a precedent agreement, of sufficient term, shows that an entity serving natural gas markets – whether an LDC, a producer, a marketer, or an end-user – has assessed the project's costs in light of all of the expected benefits, and has chosen to make a substantial, long-term commitment to use and pay for the capacity to be provided by the project. As noted in the answer above to Question A2, the decision of an LDC to execute a precedent agreement may reflect not only demand requiring new capacity, but other benefits as well, some stemming from the particular configuration of the LDC's distribution system.

The long-term commitments represented by precedent agreements are not lightly undertaken by natural gas market participants. In the case of LDCs, commitments to long-term contracts are typically undertaken in the context of ongoing state agency oversight designed to assess whether the LDC's gas supply decisions meet state statutory and regulatory standards designed to protect retail consumers from unnecessary long-term costs.[16] Many LDCs that enter

[16] State regulatory agencies employ a widely varying approach to exercising this oversight, sometimes doing so via annual gas cost proceedings, sometimes by regular audits, and sometimes by other

into precedent agreements to support new pipeline projects are subject to some form of approval requirements or are subject to prudence reviews by their state regulator, where costs for pipeline capacity must be deemed to be prudently incurred.

Producers, marketers, or end-users (including some electric generators) do not face regulatory review; instead, their decision to make commitments is constrained by powerful market factors. Entering into precedent agreements for multi-year firm contracts creates significant costs, in the form of obligations to pay fixed costs over multi-year periods for transportation, while being at risk for whether the supply or demand will meet their projections. The Commission has accepted as a general premise that the markets for the production and sale of natural gas are broadly competitive, and thus the producers, marketers, and others entering into long-term obligations are at risk for non-recovery of these costs should they be unable to compete in those markets. Moreover, even at the precedent agreement stage, such obligations are reflected in investor and lender credit assessments, imposing costs even before the pipeline is constructed. Therefore, whether the party is an LDC or non-LDC shipper, no entity undertakes the obligations of precedent agreements lightly.

Precedent agreements executed by LDCs are typically subject to state review based on the protection of retail consumer interests, and precedent agreements entered into by other market players are subject to the discipline of the markets, including the investing and lending communities. The commitments in the precedent agreements for either type of entity reflect genuine assessments of need based on a close understanding of the relevant natural gas markets. The Commission has properly relied on these agreements under the existing Policy Statement, and

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methods. Although the means of implementation are diverse, state agencies pursue their respective consumer-protection goals.

it should continue to do so in the future.

As noted above, other types of need evidence may be useful in the *absence* of precedent agreements, but there is no need for broadening the inquiry for the purpose of second-guessing and "looking behind" the precedent agreements, which already demonstrate a confirmed need for new capacity. Precedent agreements are the best indicator for demonstrating project need. By bringing in more factors and "looking behind" the precedent agreements, it could actually create regulatory uncertainty and barriers to entry for companies considering constructing new capacity.

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

The Commission should not adopt different standards for weighing precedent agreements that are entered into by affiliated and non-affiliated pipeline customers. The premise for using a precedent agreement is, as explained above, that the commitment represents the customer's assumption of risk – of non-recovery of future costs due to regulators or the marketplace, of balance sheet and financing costs, *etc.* – in order to gain the benefits of the proposed pipeline project's capacity. This commitment is not rendered less costly or less risky because an affiliate may have an ownership interest in the project.

The premise of this question appears to be based on the misplaced assumption that affiliated shippers may lack the incentive to rigorously consider their need for capacity before committing to a precedent agreement because the payments will be to an affiliated pipeline. However, the recovery risk to the shipper is not mitigated by the affiliation of the pipeline and shipper – it is determined by whether the shipper will be able to recover costs by using or marketing the capacity. If there is no need – that is, no value – for the capacity, the shipper (affiliated or not) will not be able to recover the costs of the long-term contract from its customers. That conclusion holds true whether the risk of not recovering pipeline contract costs arises from the threat of

disallowance by a state regulator or from the threat that the capacity will not be of value in serving downstream markets. In either case, the affiliation of the shipper and the pipeline does nothing to shield the shipper from the heavy, adverse consequences of entering into long-term contract obligations for pipeline capacity that does not meet the shipper's needs.

The assumption that precedent agreements signed by affiliates, whether LDCs or others, require a separate review standard, or call for a second-guessing of the market assessment made by the shipper, is simply unfounded. Precedent agreements with affiliates are equally valid for the determination of project need. Moreover, most pipelines are unwilling to take the risk of building a new project if not enough parties subscribe for the capacity. Thus, if precedent agreements with affiliates are treated less favorably, then there will be a smaller pool of prospective shippers willing to take on the commitment for a new project, making it less likely that a project would satisfy a public need to move forward. This ultimately means less competition and less production getting to market.

A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission's consideration of need or should the Commission consider whether the contracts are subject to state review?

The key conclusion provided by precedent agreements supporting proposed new capacity is that the market, as assessed by parties with substantial resources at risk, supports the need for the capacity. As a general rule, it would not be appropriate to further parse through a precedent agreement's individual provisions to determine whether there is in fact a need. Accordingly, the Commission should not focus on individual provisions of a precedent agreement except in the rare circumstance that particular provisions, on their face, undermine the ultimate conclusion that the

precedent agreement illustrates a market need.[17]

Regarding the term of a precedent agreement, most agreements for pipeline projects are for longer terms because of the significant investment that pipelines make in developing a pipeline project. The specific term of a precedent agreement is negotiated between the shipper and the pipeline. Each prospective shipper must evaluate whether the term of the precedent agreement is consistent with its own need for capacity, but this does not negate the market need for the project if one shipper's term is for a different period than another shipper's commitment. Likewise, the Commission should not pick and choose between the importance and desirability of precedent agreements by favoring those subject to state review over others. Doing so would not be useful because the NGA does not create a hierarchy for examining the end-use of pipeline capacity and because precedent agreements with customers that may not be subject to state review nevertheless play an important part in the development of pipeline infrastructure that may be used to serve end-use customers, *i.e.*, electric generation.

A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission's determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?

The Commission should not distinguish among uses of natural gas to determine the need for proposed projects. LDCs serving retail consumers and other end-users clearly provide deliveries to important human needs customers, but pipeline projects also serve industrial, commercial, and electric generation loads behind the LDCs' city gates and directly from the pipeline. The concept that the Commission should begin judging certificate applications based on

[17] For example, if a precedent agreement contains provisions showing or referencing the lack of intent to make the agreement binding on the parties, or language of similar consequence.

differing values attributed to the "end-use" characteristics of shippers' markets – perhaps even the end-use profiles of individual shippers, such as LDCs – should be rejected for several reasons.

First, the NGA does not distinguish between different end-uses of natural gas. Congress did for a time prohibit certain uses of natural gas, *e.g.*, for electric power generation, although those restrictions were repealed.[18] Congress established elaborate provisions for allocating gas *supplies* to different types of end-uses in the Natural Gas Policy Act ("NGPA"),[19] but those restrictions do not apply in the post-unbundled world of natural gas transportation.[20] Long before passage of the NGA, state statutes provided models for Congress to limit or prefer different uses of natural gas.[21] In the NGA, Congress could have imposed such use-based preferences and restrictions, but did not, and therefore the Commission does not have a statutory mandate to begin doing so in the certificate context. Moreover, public policy regarding end-use determinations is best addressed at the state or local level, not at the federal level during the review of a certificate application.

Second, the Commission's consistent policy since Order No. 436 has been to mandate non-discriminatory transportation of natural gas.[22] Additionally, since Order No. 636, the Commission has required that pipelines establish a level playing field for all shippers on the interstate pipeline

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18 The Power Plant and Industrial Fuel Use Act of 1978. Pub. L. No. 95-617, 92 Stat. 3117 (codified in U.S.C. §§ 15, 16, 26, 30, 42, and 43), relevant provisions repealed at Pub. L. No. 100-42, 101 Stat. 310.

19 *See, e.g.*, 15 U.S.C §§ 3391, *et seq.*, "Natural Gas Curtailment Policies."

20 *See, e.g.*, *City of Mesa v. FERC*, 993 F.2d 888 (D.C. Cir. 1993).

21 *See, e.g.*, *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920) (upholding a state statute banning, *inter alia*, use of natural gas for carbon black purposes).

22 *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs. ¶ 30,665 (1985), *vacated and remanded*, *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *readopted on an interim basis*, Order No. 500, FERC Stats. & Regs. ¶ 30,761 (1987), *remanded*, *Am. Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, FERC Stats. & Regs. ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, FERC Stats. & Regs. ¶ 30,880 (1990), *aff'd in part and remanded in part*, *Am. Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *order on remand*, Order No. 500-J, FERC Stats. & Regs. ¶ 30,915, *order on remand*, Order No. 500-K, FERC Stats. & Regs. ¶ 30,917, *reh'g denied*, Order No. 500-L (1991).

system so that "no gas seller has an advantage over another gas seller," and to "ensure that the benefits of [wellhead] decontrol redound to the consumers of natural gas to the maximum extent as envisioned by the NGPA and the Decontrol Act."[23] This goal has been manifested in various ways, including the Commission's specific requirement that capacity be allocated to those that value it the most, thus serving the policy of maximizing economic efficiency through the use of "allocative efficiency."[24] Altering the determination of "need" for new pipeline capacity such that decisions are to be guided by considerations of what may be "better" or "less worthy" end-uses will invite – rather than resolve – controversy, and would be completely inconsistent with the entire policy of non-discrimination and economic efficiency that the Commission has consistently followed for decades.

Third, in the absence of any statutory guidance or precedent regarding the posited end-use assessment, the Commission has no objective basis for preferring one use over another, or even of defining "uses" for purposes of establishing need. The proposal would place the Commission in the unknown territory of creating from whole cloth a hierarchy of end-uses, thus potentially creating winners and losers in access to new capacity, without any statutory basis or guidance.

Fourth, pipeline assets have long effective service lives, and many contracts are in place for extended periods. The anticipated use of the capacity at the time a certificate is filed or at the time a contract is entered into can change over the life of the project. For example, in response to market changes, shippers may exit markets in whole or in part by releasing their capacity to

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[23] *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, at 393, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g*, 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom. United Dist. Cos. v. FERC*, 88 F.3d 1105 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997).

[24] *See, e.g.*, Order No. 636-A at 30,555.

other shippers, who may use such capacity for new and unforeseen purposes. The uncertainty of the long-term use of the pipeline capacity renders the concept of a long-term end-use analysis potentially futile. Nor is there a reasonable basis for the Commission to require a demonstration of end-use that will not change over the life of the project. As noted above, in 1978, Congress placed restrictions on the use of natural gas for electric generation purposes and, thereafter, lifted those restrictions when changes in the market and other factors dictated that the use of natural gas for electric generation was beneficial.

The Commission should presume that the existence of shippers willing to make substantial financial commitments in precedent agreements for long-term firm contracts fully satisfies the market-need test of a project, and thus constitutes a "good" purpose for the creation of new capacity. The Commission should reject performing a long-term end-use analysis and instead retain its consistent policy of not weighing the value of different shippers' intended uses.

A7. Should the Commission consider requiring additional or alternative evidence of need for different end uses? What would be the effect on pipeline companies, consumers, gas prices, and competition? Examples of end uses could include: LDC contracts to serve domestic use; contracts with marketers to move gas from a production area to a liquid trading point; contracts for transporting gas to an export facility; projects for reliability and/or resilience; and contracts for electric generating resources.

For the reasons stated in response to Question A6, AGA strongly opposes the imposition of a needs test tied to end-use, and the sub-questions raised within Question A7 only further illustrate the pitfalls of attempting such an analysis. What is the intended end-use of a producer's or marketer's contract to reach a liquid point? What is the benefit of an end-use analysis by an LDC acquiring capacity under a long-term contract when its own customer profile may shift, and it may release capacity to others? The Commission should avoid being drawn into the morass of predicting end-uses and adjudicating access to capacity based on such projections. Also, because the Commission does not have the statutory authority over the end-use of the natural gas itself, the

Commission should not attempt to second guess the recipients' intended use of the commodity.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?

As discussed above in response to Question Nos. A6 and A7, the Commission should not institute any policy that differentiates, preferences, or discriminates among or against end-uses of natural gas. The NGA does not distinguish between different end-uses of natural gas and Commission precedent mandates non-discriminatory transportation of natural gas. The Commission should not attempt to account for, as part of the certificate application review process, the possible end-uses for natural gas because they may not be permanent and can change over time. Such an effort is highly speculative and would provide no benefit to the application review process.

There are a litany of events that could affect the possible end-uses of natural gas. For example, legal or regulatory changes, technological advances, and simple market demand could influence the end-use market for natural gas over time. It would be speculative for the Commission to attempt to predict what future events may occur that could affect the end-uses for natural gas, and by extension, it is speculative to predict the probability of such changes occurring. Recent events related to the shale revolution illustrate this point. As discussed above, at onetime, Congress limited the end-uses of natural gas, but such restrictions were repealed; this change, combined with technological advances related to the production of shale gas, have expanded the demand for natural gas for electric generation. It would not have been possible to predict with certainty the shifts that have occurred in the natural gas industry in the last several years and, by extension, the related changes in the transportation of natural gas and the end-use market. Specifically, regarding transportation, existing pipelines have expanded, become bidirectional, or changed flow direction to serve new or expanding markets as a result of the various legal, technological and market

changes that have occurred over time.[25] Such shifts could not have been predicted with certainty; therefore, the Commission should not attempt to predict market changes or attempt to account for end-use changes over time as part of its review process.

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

The Commission should not assess need on the basis of consolidating multiple pipeline certificate applications, nor should it take a regional approach or expand its assessment of impacts on existing pipelines. The suggestion to consider either multiple pipeline proposals or a regional approach poses grave practical and policy problems, and would be entirely at odds with the Commission's goals of encouraging and expediting needed new capacity.

When more than one pipeline proposal is pending before the Commission that pertain to the same geographic area, the applications typically do not propose the same service to and from the same origins and destinations. Pipelines may, for example, propose to serve the "Southeast" region, or even, more narrowly, "eastern Virginia and North Carolina," yet the project will, in actuality, reach entirely different customers with entirely different needs within those geographic regions. As noted above in the response to Question A2, even service to a single LDC may reach

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[25] *See, e.g., Columbia Gas Transmission, LLC and Columbia Gulf Transmission*, LLC, 158 FERC ¶ 61,046 (2018) (Commission order approving, *inter alia*, the Rayne XPress Project designed to provide an additional north-to-south firm transportation service on Columbia Gulf Transmission and discussing how the bi-directional operation of the line will provide shippers the opportunity to access the U.S. Gulf Coast markets); *Kinder Morgan Louisiana Pipeline, LLC*, 161 FERC ¶ 61,205 (2017) (granting a certificate for the Sabine Pass Expansion Project which would enable gas to flow from north to south on Kinder Morgan Louisiana's system when it was previously only capable of transporting gas in a northerly direction); *Rockies Express Pipeline LLC*, 150 FERC ¶ 61,161 (2015) (approving modifications to enable a section of the existing mainline to flow gas bi-directionally); *Columbia Gas Transmission, LLC and Columbia Gulf Transmission, LLC*, 145 FERC ¶ 61,028 (2013) (explaining that Columbia Gulf Transmission's south-to-north flow changed in response to shifts in traditional sources of gas supply).

different operational segments, and it is possible for an LDC to have a need for additional service from different pipelines to disparate segments of its system. Pipelines reaching a region do not reach an integrated end market, but typically markets fragmented among distribution systems and historically non-integrated segments within the same distribution system. Similarly, service by different proposed pipelines to large end-users or power generators within a single geographic area do not duplicate each other – end-users do not typically make costly commitments to competing projects for the same load; consequently, even for pipelines serving nearby end-users, the services are not necessarily either fungible or duplicative. Furthermore, from the supply end, even when pipelines serve the same geographic region, they typically do not source natural gas from the same points, and thus commonly provide supply diversity. The premise of the question – that pipeline proposals serving the same geographic area may be fungible – is therefore unlikely to be correct.

Second, pipeline projects typically are filed at different times, even if they appear to be generally contemporary, and have discrete timelines both from a construction schedule standpoint and from a customer demand/in-service commitment standpoint. Seeking to consider them together would necessarily interfere with the required timing of the projects involved.

Third, the proposal in the question would place the Commission in the position of choosing winners and losers among applicants – if the apparent goal were achieved of "rationalizing" and reducing the number of pipelines being built to a geographic area. This kingmaker role would run counter to the Commission's decades old commitment of encouraging greater consumer benefits by increasing competition among pipelines. As noted above, Congress's last enacted directives to the Commission were to ensure that the benefits of a more competitive wellhead market reach the nation's consumers, and the Commission has construed this goal to encompass greater inter-pipeline competition. Acting as a central-planning agency for new natural gas pipelines would be

entirely inconsistent with these statutory and policy directives. Any concerns about the needs analysis should not lead to a fundamental reversal in the Commission's role in the industry.

For these reasons, the Commission should reject proposals to address pipeline applications in geographic "batches" or with a central planner's role in mind.

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission's environmental review); (2) if demand in a new project's markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

For the reasons discussed in detail above,[26] the Commission should continue to rely on the presence of precedent agreements as the single best indication of market need. The need "adjustments" suggested in Question A10, assuming there are precedent agreements, appear to be intended to, in effect, ignore the precedent agreements and instead second guess the judgment of the shippers entering into binding commitments. The Commission should rely on the parties to the precedent agreements to have considered very closely whether existing infrastructure would provide an adequate alternative service[27] and whether demand will materialize, and the Commission should be able to rest its finding of need on the conclusions reached by the contracting parties. Furthermore, the issue of whether natural gas should not be transported to a gas-fired generator because the electric grid should be buying from alternative energy sources is beyond the scope of the certificate process under the NGA.

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[26] *See* AGA's response to Question Nos. A2 and A3.

[27] For example, pipelines are required to solicit turn-back capacity, so that any turn-back capacity may substitute for the expansion capacity. *See, e.g.*, *Algonquin Gas Transmission, LLC*, 120 FERC ¶ 61,072, P 66; *Natural Gas Pipeline Co. of America*, 101 FERC ¶ 61,125, P 40 (2002).

C. Response to the Inquiry Regarding Improvements to the Efficiency of the Commission's Review Process

AGA supports further streamlining of the Commission's certificate review process in order to provide for a timelier review of, and decisions on, infrastructure applications. The Commission should lead, coordinate, and update the permitting process so that natural gas infrastructure can be modernized and expanded to meet the needs of all citizens, enhance reliability, and help meet the nation's energy security and independence goals. Natural gas companies face serious challenges in managing multiple overlapping, inconsistent, and often duplicative federal, state and local permitting processes. All too often, an inefficient permitting process results in considerable delays, increased costs for shippers, or worse, halts needed projects.

AGA supports the goal of Executive Order 13807, "Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects," which is to "ensure that the Federal environmental review and permitting process for infrastructure projects is coordinated, predictable, and transparent."[28] It is critical that agencies, such as the Commission, make informed decisions concerning the environmental impacts of infrastructure projects, and provide transparency and accountability to the public regarding environmental review and authorization decisions. However, as explained in Executive Order 13807, it is also important that the permitting agencies "make timely decisions with the goal of completing all Federal environmental reviews and authorization decisions for major infrastructure projects within 2 years."[29] AGA supports the Commission's commitment to effectuate the goals of Executive

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[28] Executive Order No. 13807, 82 Fed. Reg. 40463 (Aug. 15, 2017).

[29] *Id.*

Order 13807 to improve the efficiency, timing, and overall predictability of the Commission's certification process.[30]

AGA further supports the objectives detailed in the "Memorandum of Understanding Implementing One Federal Decision Under Executive Order 13807,"[31] dated April 9, 2018, between the Commission and various other federal agencies ("MOU").[32] The MOU provides, consistent with Executive Order 13807, that the signatories agree to meet the two-year goal for completing all environmental reviews and authorization decisions for major infrastructure projects. The MOU also provides, *inter alia*, that the signatory agencies will communicate with each other during the review process, will carry out concurrent environmental reviews, and will work together to meet the milestone completion dates of any reviews or authorization decisions. AGA supports the cooperative efforts outlined in the MOU and the goal of providing a more predictable, transparent, and timely federal review and authorization process for delivering major infrastructure projects.

While the MOU is an effort to timely review projects on a federal level, issues also exist at the state and local level. In order to further streamline the entire review process, AGA also supports a process whereby the Commission requires any related state or local agency authorization, permit, or certification that is associated with a Commission-certificated project be completed in the time required by the applicable statute or a specified period of time after issuance of the federal certificate. AGA believes that the state and local permitting process plays a vital

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30 Notice at P 23.

31 Available at https://www.ferc.gov/legal/mou/2018/MOU-One-Federal-Decision.pdf.

32 The other agencies include the Department of the Interior, Department of Agriculture, Department of Commerce, Department of Housing and Urban Development, Department of Transportation, Department of Energy, Department of Homeland Security, U.S. Army Corps of Engineers, Environmental Protection Agency, Advisory Council on Historic Preservation, and Federal Permitting Improvement Steering Council.

role in authorizing a project; however, these processes should not be used as a backdoor way of halting projects already certificated by the Commission.

An example of such an occurrence recently played out regarding Millennium Pipeline Company, L.L.C.'s ("Millennium") Valley Lateral Project. The Commission granted a certificate to Millennium authorizing the Valley Lateral Project, and the order required Millennium to file documentation that it had received all authorizations required under federal law, or evidence of waiver thereof, including certification under section 401 of the Clean Water Act ("CWA"), prior to commencing construction.[33] Millennium requested the required CWA certification from the New York State Department of Environmental Conservation ("New York DEC"); however, the New York DEC delayed action on the application, prompting Millennium to seek an order from the Commission determining that the New York DEC waived its authority to issue the water quality certification. While the New York DEC ultimately denied Millennium's CWA application for certification, the Commission held that the state agency waived its water quality certification authority under section 401 of the CWA because it failed to act in a timely manner.[34] The New York DEC sought judicial review of the Commission's waiver determination and the United States Court of Appeals for the Second Circuit upheld the Commission, concluding that the New York DEC waived its authority to review Millennium's request for a water quality certification under the CWA by failing to act on that request within one year.[35] In an effort to avoid similar situations in the future, the Commission should articulate, as part of any forthcoming policy statement, that it expects that state and local authorities will approve or deny permits or certifications related to

[33] *Millennium Pipeline Company, L.L.C.*, 157 FERC ¶ 61,096 (2016).
[34] *Millennium Pipeline Company, L.L.C.*, 160 FERC ¶ 61,065 (2017).
[35] *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018).

Commission-jurisdictional projects within the time required by statute or a specified period of time after the federal certificate has been issued.

V. CONCLUSION

For the reasons stated above, the American Gas Association respectfully requests that the Commission consider these comments in this proceeding. AGA urges the Commission to ensure that the industry retains the ability to timely propose and construct infrastructure needed to meet the evolving market needs of the national natural gas market.

Respectfully submitted,

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