American Gas Association

Submitted via regulations.gov

Comments of the American Gas Association
On the Proposed Federal Acquisition Regulation:
Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk

FAR Case 2021-015, Docket No. FAR-2021-015, Sequence No. 1

February 13, 2023

The American Gas Association ("AGA") appreciates the opportunity to comment on the notice of proposed rulemaking: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk proposed by the Department of Defense (DOD), the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and published in the Federal Register on November 13, 2022, at 87 Fed. Reg. 68312 (Proposal). These three agencies, the DOD, GSA, and NASA, together with the Office of Management and Budget (OMB), comprise the leadership of the Federal Acquisition Council (FAR Council).

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial, and industrial natural gas customers in the U.S., of which 95 percent — more than 73 million customers — receive their gas from AGA members. AGA is an advocate for natural gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one third of the United States' energy needs.[1]

The FAR Council issued its Proposal based on the President's direction in Executive Order 14030, Climate-Related Financial Risk, 86 Fed. Reg. 27,967 (May 25, 2021) (EO). The EO directed the FAR Council to consider amending the FAR to require federal contractors to report their greenhouse gas (GHG) emissions and to set and disclose science-based targets for reducing their emissions consistent with U.S. goals to achieve net-zero GHGs across the economy. The FAR

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

Council explains in the preamble that the Proposal is intended to use the federal government's massive purchasing power "to shift markets, drive innovation, and be a catalyst for adoption of new norms and global standards." 87 Fed. Reg. at 68,318.

We agree with our sister association, the Edison Electric Institute (EEI), in comments filed in this docket, that the federal government's goals to address climate change are laudable and important. We also agree with EEI that, unfortunately, this Proposal misses the mark by attempting to create a single generic, one size fits all rule which would apply to the entire broad sweep of economic sectors that provide products and services to the government, potentially leading to misalignments in the context of specific sectors such as the utility sector. EPA has recognized this problem in the climate change context before, when it created multiple Subparts in its GHG Reporting Rules tailored to different industry sectors. By attempting to cover all sectors with a single generic rule, the FAR Council's Proposal, by contrast, ignores the differences among those sectors, which results in a proposed regulatory scheme that does not account for utility-specific issues, does not align well with the significant GHG reductions and robust emission disclosures already made by our members, and creates unnecessarily duplicative federal agency GHG reporting regimes. Most importantly, the Proposal would inadvertently undermine the fundamental goal of the FAR to promote cost-effective procurement by impeding paths for using natural gas infrastructure to achieve net zero goals cost-effectively while providing resilient, reliable energy to the federal government.

I. The Proposal Fails to Recognize Natural Gas Utilities' Leadership in Significant and Continuing Emission Reductions and Disclosures

There appears to be an underlying assumption in the Proposal that federal contractors in various industry sectors are not yet committed to taking action to reduce their GHG emissions and to providing transparent reporting of their GHG emissions and climate plans. We agree with EEI that this general assumption is not valid with respect to electric or natural gas utilities. To the extent the Proposal is intended to drive action, no such driver is needed for this industry. AGA's gas utility members have led the way in both GHG emission reductions and transparent climate disclosures.

A. AGA Member Gas Utilities Were Founding Members of EPA's Voluntary Methane Reduction Initiatives and Have Implemented Best Practices That Have Reduced Direct Scope 1 Methane Emissions by 69 Percent Since 1990

AGA and our gas utility members have led the way in developing and deploying best practices for reducing methane emissions. AGA and our members were founding partners in EPA's Natural Gas STAR program in 1993. Our members have been committed to this voluntary technology and best practices program for reducing methane emissions for 30 years. AGA and our members also helped establish the EPA Methane Challenge program, which calls on participating companies to set challenging best management practice (BMP) goals for reducing methane emissions across their operations. For example, the Methane Challenge sets mileage goals (subject to state public utility commission approvals) for replacing vintage cast iron or unprotected steel pipe with modern materials much less prone to leakage, chiefly high and medium density polyethylene (PE) or cathodically-protected steel pipe.[2] Alternatively, participating companies have set goals for reducing emissions to achieve low methane emissions intensity levels under the ONE Future track of EPA's Methane Challenge Program. All the original founding natural gas distribution participants in Methane Challenge are AGA member companies.

Our member gas utilities also share leading practices for reducing methane emissions through AGA conferences, meetings, workshops, webinars, and white papers. For example, AGA worked with members to develop a Blowdown Emission Reduction White Paper[3] in 2020 to help share lessons and practices to reduce the amount of gas vented in repair and replacement projects. For safety reasons, gas typically must be removed from lines and equipment before work is performed on them. However, our members have developed methods for repairs that do not require voiding lines in some instances, for example by using specialized "smart pig" robots that can operate in pressurized lines. Where gas must be removed from a line, emissions can still be reduced to a minimum by using compression and innovative vacuum technologies to draw down pressure in lines followed by capturing remaining residual gas and redirecting it for beneficial use.

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[2] EPA's Methane Challenge program reports that gas distribution segment partners replaced nearly 1,000 miles of cast iron pipelines and more than 2,100 miles of unprotected steel pipelines in 2020 alone, reducing emissions by 199,811 metric tons CO_2e. See EPA's website for the Methane Challenge program, https://epa.gov/natural-gas-star-program/methane-challenge-program-accomplishments.

[3] See AGA Blowdown Emission Reduction White Paper (2020), https://www.aga.org/research-policy/resource-library/aga-blowdown-emissions-reduction-august-2020/.

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The methane emissions reduction strategies our members shared in Natural Gas STAR and the commitments they made in the Methane Challenge program, along with other initiatives such as the leading practices showcased in AGA's Blowdown Emission Reduction White Paper, have helped to reduce methane emissions from U.S. natural gas distribution systems by 69 percent from 1990 to 2019, down to just 0.1 percent of annual produced natural gas, as shown in AGA's analysis of the April 2022 GHG Inventory for 1990-2022.[4]

B. AGA and EEI Spearheaded Transparent Disclosures by Pioneering the Environment, Social Governance (ESG) Reporting Template for Gas & Electric Utilities, an Innovative Methane Intensity Metric – A Resource Already Available to Federal Agencies

To provide enhanced investor-focused voluntary disclosures that go a step beyond EPA's reporting rules, in 2018, AGA and EEI[5], working with member company subject matter experts and a broad investor working group, developed the first-ever voluntary ESG reporting template designed to help gas and electric utility companies to provide the financial sector with more uniform and consistent ESG and sustainability data and information. The template includes GHG emissions data that gas and electric utilities report annually to EPA. For gas utilities, the template calculates a methane intensity metric for delivered natural gas equal to the methane emissions reported to EPA under Subpart W of the GHG Reporting Rules[6] as a percentage of the methane in natural gas throughput for the relevant segment, such as gas distribution. The EEI-AGA ESG Template has been updated twice since 2018, most recently in May 2021. Participating utilities post their Template data on their websites, providing a ready reference that federal agencies can use in considering energy procurement decisions.

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[4] *See* AGA's Analysis of the April 2022 Inventory of U.S. Greenhouse Gas Emissions and Sinks (1990-2020): **https://www.aga.org/research/reports/epa-updates-to-inventory-ghg/.**

[5] It should be noted that most of EEI's U.S. utility members are combined gas and electric utilities that are also members of AGA.

C. AGA and EEI Advanced Transparent Disclosures Across the Natural Gas Value Chain in the NGSI Methane Intensity Protocol – Another Resource Already Available to Federal Agencies

In addition to direct GHG emissions, our members also wanted to pursue greater transparency and accuracy regarding the methane intensity of their upstream natural gas suppliers. In response, AGA and EEI worked with our members and representatives across the natural gas value chain to develop the Natural Gas Sustainability Initiative (NGSI) Methane Intensity Protocol.[7] NGSI provides comprehensive methane intensity metrics for five segments of the natural gas supply chain: (1) production; (2) gathering and boosting; (3) processing; (4) transmission and storage; and (5) natural gas distribution. Participants disclose their methane emissions for a wider range of sources than EPA requires under the GHG Reporting Rule, including sources and emissions that fall below EPA's reporting thresholds. NGSI participants then compare emissions to throughput to calculate their methane intensity. By publicizing their NGSI methane intensity, companies can be recognized for their leadership, providing a strong incentive for companies across the natural gas supply chain to reduce methane emissions.

AGA's members are also taking action to reduce the carbon intensity of their delivered product by entering bilateral contracts, where possible, to acquire natural gas that has been certified as meeting stringent emission standards by independent third-party auditors. The number of new innovative certification products has expanded rapidly in the last several years. For example, Rocky Mountain Institute ("RMI") and SYSTEMIQ announced a new certified low methane gas standard in December 2020 called MiQ ("Methane Intelligence")[8] that incorporates the NGSI methane intensity metric for production coupled with monitoring on a semi-annual or quarterly basis to detect and fix any higher-emitting sources. There are also other certified lower methane gas platforms, including Equitable Origin's Energy Certification[9] and certification by an equipment vendor's initiative, Project Canary-Trustwell™[10] and its trademarked Responsibly Sourced Gas™ ("RSG"). An increasing number of producers announced in 2021 and 2022 that they are obtaining third party certification under these standards to offer lower methane intensity natural gas. While it is not yet possible to track certified natural gas outside bilateral contracts, innovative efforts are underway to allow tracking these certified attributes in a manner comparable to the market for renewable energy credits (RECs) or EPA's credits for renewable vehicle fuels such as renewable natural gas (RNG).

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[7] *See* https://www.aga.org/policy/natural-gas-esgsustainability/.

[8] *See* https://miq.org/ (last accessed Sept. 8, 2022).

[9] *See* https://energystandards.org/ (last accessed Sept. 9, 2022).

[10] *See* https://www.projectcanary.com/services/responsibly-sourced-gas/ (last accessed Sept. 9, 2022).

D. Natural Gas Utilities Already Publicly Report Direct GHG Emissions to the Federal Government Under EPA's GHG Reporting Rules, and the SEC has Proposed Requiring Direct and Indirect GHG Reporting; The Proposal Should Not Require Duplicative or Inconsistent Emissions Reporting

Under the Proposal, any federal contractor with more than $7.5 million in annual federal contractual obligations would be required to inventory and report its scope 1 direct emissions from its own operations and scope 2 indirect emissions from the third-party generation of energy that the contractor purchases. Federal contractors with more than $50 million in annual federal contractual obligations would also be required to inventory and report scope 3 indirect emissions, such as from their upstream suppliers and downstream customers.

The Proposal's reporting regime would address a topic already covered by existing EPA regulations and by the Securities and Exchange Commission's (SEC's) proposed rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (April 11, 2022). AGA and EEI filed joint comments on the SEC proposed rule, attached as Appendix A to these comments. Any final rule arising out of the FAR Council's Proposal should directly address the interplay between these reporting regimes, and how compliance with substantially similar requirements under a different reporting regime satisfies the requirements of the Proposal.

For example, for more than a decade, local gas distribution companies and others in the natural gas value chain have submitted annual GHG emission reports to EPA pursuant to EPA's mandatory GHG Reporting Rules.[11] A gas distribution utility company that exceeds the "facility" reporting threshold for all their GHG emissions across a single state is required to report its direct scope 1 GHG emissions that in turn exceed the reportable emissions threshold. Gas utilities report both their carbon dioxide emissions from combustion sources and methane emissions under Subpart W of EPA's GHG Reporting Rules. These reports on GHG emissions during the previous calendar year must be submitted by March 31 each year, after which, EPA audits the reports and follows up for clarification as needed. In October or November of each year, EPA posts the vetted GHG emissions data on EPA's website, in a format that allows readers to see all the data reported for a particular company.

In addition, the SEC has proposed requiring publicly traded, which would likely encompass most significant and major federal contractors, to disclose scope 1, 2 and 3 emissions. While the

[11] EPA GHG Reporting Rules, 40 C.F.R. Part 98.

Proposal does recognize the SEC proposal, it does not address how companies that are subject to both regimes would reconcile any competing or duplicative requirements.

The SEC is now considering comments submitted on its proposal, including whether to require disclosure of scope 3 indirect emissions from upstream suppliers and downstream customers, given significant uncertainties in estimating scope 3 emissions from third parties. As AGA and EEI explained in our comments to the SEC, scope 3 emissions are difficult to quantify and generally require estimates without detailed confirmable data.[12] The World Resource Institute's (WRI) GHG Protocol recognizes this challenge and states that scope 3 is an "optional reporting category."[13]

The FAR Council should not require duplicative or inconsistent reporting, as this would waste resources for the government as well as the private sector and could lead to conflicting regulations and confusion. AGA urges the FAR Council *not* to require contractors to report scope 3 emissions due to the significant uncertainties involved in estimating emissions from upstream suppliers and downstream customers. In addition, we urge the FAR Council to recognize that compliance with the applicable reporting requirements of the EPA GHG Reporting Rules or the SEC climate disclosure regulations will satisfy the FAR GHG and climate reporting requirements.

II. By Adopting SBTi, the Proposal Overlooks and Blocks Pathways to Net Zero Using Gas Utility Infrastructure That Could Achieve the Government's Goals Cost-Effectively and Reliably to Better Support Mission Readiness

As explained in the next section of our comments, the Proposal would effectively prohibit major contractors in the natural gas value chain from providing any fuels, products or services to federal agencies, because the Proposal would require major contractors to obtain validation for their climate targets from the Science Based Targets Initiative (SBTi), a foreign, private entity that declines to validate targets for companies in the natural gas sector, including natural gas utilities. The SBTi, and thus the Proposal, seem to assume that there is no pathway to net zero for natural gas utilities and their infrastructure. This is a false assumption. AGA's GHG Net Zero Pathways for Gas Utilities Study prepared by ICF International and released in 2021 demonstrates that "through the use of a variety of technologies and approaches, gas utilities can achieve net-zero

[12] Appendix A, EEI-AGA Comments filed June 17, 2022, on SEC Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosure for Investors, Release Nos. 33-11042 and 34-94478; File No. S7-10-22, pp. 5-10.
[13] Id, p. 5.

targets and contribute to economy-wide net-zero emissions goals."[14] We are submitting a copy of the study as Appendix B to these comments in Docket EPA-HQ-OAR-2022-0875.

The Net Zero study evaluates four illustrative pathways using different GHG reduction strategies that gas utilities can deploy to achieve net-zero goals.[15] These strategies include energy efficiency, innovative technology, methane emissions reductions, and net zero gaseous fuels such as renewable natural gas (RNG) and clean hydrogen. The approach taken by each gas utility will likely vary depending on factors such as differing geography, structure, facilities, state regulatory oversight and customer base. However, while different company plans will vary as to the degree to which they deploy specific strategies, all will likely include some combination of strategies from all four categories – including technologies and procedures for reducing the gas utility's scope 1 direct methane emissions. The study demonstrates that gas utilities can set net zero targets, and many have done so. They should not be precluded from supplying federal facilities based on an unfounded assumption by a private third party, whose decision-making process is not transparent and is not governed by the notice and comment requirements of the Administrative Procedures Act.

III. AGA Urges the FAR Council to Delete the SBTi Requirement as it Would Effectively Bar Federal Procurement of Natural Gas, Hydrogen, or RNG from Most Major Contractors – Because SBTi Declines to Validate Goals for Companies in the Oil or Natural Gas Value Chain

The FAR Council should delete the SBTi requirements from any final rule. The Proposal, perhaps inadvertently, creates a classic "Catch 22." It would require major federal contractors starting two years after publication of a final rule to establish a "science-based target" for GHG emissions reductions and to have that target validated by a joint venture based in Europe of non-governmental organizations called the SBTi. However, if a major contractor is a company in the oil or natural gas value chain, such as a natural gas local distribution utility, it is literally impossible under the majority of circumstances to obtain the SBTi's validation. The SBTi has no sector-specific target setting guidance for companies in the oil or natural gas value chain, and it has announced that in the absence of such guidance, it will not allow companies to make

[14] Net-Zero Emissions Opportunities for Gas Utilities, https://www.aga.org/wp-content/uploads/2022/02/aga-net-zero-emissions, AGA Comments Appendix B, p, 5.
[15] Id., see p. 9, Exhibit E.s.3.

commitments or validate GHG reduction targets for companies in the oil or natural gas value chain.[16]

The SBTi previously posted a draft oil and natural gas guidance document to its website that essentially assumed that a company would be required to show a straight-line reduction to zero involvement in natural gas production, transmission or distribution. SBTi did not involve *any* representatives from U.S. natural gas utilities or transmission pipeline companies in developing its draft guidance. The result was a document that completely ignores the available pathways to net zero for using the robust natural gas distribution and transmission infrastructure in the United States, such as net zero RNG, net zero clean hydrogen, and new more efficient technologies. SBTi deleted the draft guidance from its website in late 2022, and it has not engaged AGA or our members in any attempt to revise the draft guidance. The SBTi process is not transparent and certainly does not follow the rigorous consensus process of standards organizations such as the ASTM or AINSI.

As a result of the SBTi "Catch 22" in the Proposal, major contractors that are currently providing essential natural gas service to federal agencies, including the DOD, would effectively be precluded from continuing to do so starting two years after publication of a final rule. Stated another way, under the Proposal as currently drafted, absent a waiver for national security, which appears to be the only proposed ground for waiver, those federal agencies would have two years after the final rule to cease any procurement of natural gas – or even net zero GHG hydrogen or RNG – from a major federal contractor in the natural gas sector, including local gas distribution utilities as well as producers or pipelines. Federal agencies would simultaneously be cut-off from supplies of diesel, gasoline, jet fuel and other petroleum-based fuels. The resulting energy crunch would likely result in significant energy shortages and inflationary energy costs for the federal government, jeopardizing mission readiness for DOD and other federal agencies.

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[16] SBTi's website states in relevant part that:
"**1. Companies that cannot commit to the SBTi until the oil and gas method is finalized" include:**
1.1 Companies with any level of direct involvement in exploration, extraction, … and/or production of oil, natural gas, … or other fossil fuels, irrespective of percentage revenue generated by these activities, i.e. including, but not limited to, integrated oil and gas companies, integrated gas companies, … gas distributors (except as noted in category 2 below)." Category 2 continues:
2. Companies that *can* join the SBTi" include: 2.1 Companies that derive less than 50% of revenue from a) sale, transmission, and distribution of fossil fuels, …; **2.4** Subsidiaries of fossil fuel companies (see 1.1) may join the SBTi if the subsidiary itself is not considered a fossil fuel company." SBTi then states that while it continues to work on an oil and natural gas methodology**, "The SBTi will no longer accept commitments and/or validate targets for companies that fit category 1**." SBTi also deleted any commitments previously made. See https://sciencebasedtargets.org/sectors/oil-and-gas#what-is-the-sb-tis-policy-on-fossil-fuel-companies (last checked Jan. 30, 2023).

Such an abrupt and drastic disruption in energy supplies would not further the statutory goals of the FAR to promote cost-effective procurements, nor is it necessary or even advisable to achieve the federal government's GHG reduction goals, as explained above and in AGA's Net Zero Study, attached as Appendix A. We urge the FAR Council to delete this SBTi requirement from any final rule, or at least provide an exception for utilities that supply federal facilities as the SBTi standard does not provide a pathway for compliance. If a GHG target requirement is retained, it should not be based on SBTi.

IV. The Proposal Fails to Address the Contractual and Regulatory Regimes Under Which Gas Utilities Provide Energy Services to Federal Facilities and Customers

By taking a generic approach to all economic sectors, the Proposal overlooks the unique state utility commission regulatory regime that governs local gas distribution service and federal regulation of interstate natural gas transmission by the Federal Energy Regulatory Commission (FERC). In particular, state regulation of local gas distribution rates and costs limits the federal government's ability, as a retail customer of natural gas, to seek alternative arrangements. This is similar to the limitations on the federal government's ability to seek alternative sources for electricity beyond the state-regulated local electric utility, as described in EEI's comments filed in this docket, which we support to the extent relevant to gas utilities. But there are also differences between regulation of, and contractual frameworks used by, electric and gas utilities that any final rule based on the Proposal must also consider.

A. The FAR Council Should Consider the Unique Regulatory and Contractual Framework for Gas Utilities

Any final rule must address unique utility regulatory and contractual issues for gas utilities. First, gas utilities do not own or earn a profit on the energy commodity – natural gas or RNG. Instead, since the 1970's, the natural gas market has been deregulated. Prices for the commodity are set by market forces. Producers sell the natural gas and earn a profit on the commodity, but interstate pipelines and gas utilities do not. Instead, they pass-through the cost of the commodity to customers without a profit. Pipelines and gas utilities also typically take steps to minimize the customers' costs as much as possible -- such as through hedging instruments and by contracting to acquire custody of the natural gas during off peak times of the year (spring and fall) when the commodity cost is lower, storing the gas in underground salt caverns or depleted production fields, or in liquefied natural gas (LNG) storage facilities, and withdrawing the lower cost supply during the winter peak heating season or summer peak to reduce the need to acquire natural gas on the spot market at peak prices.

Second, FERC regulates the interstate natural gas pipelines' transportation rates, but not the market-based wholesale commodity cost, which is set by supply and demand in the market.

Third, the state utility commission for each state regulates the transportation rates that each local gas distribution company in the state is allowed to charge residential, commercial and industrial customers. States also regulate and determine whether to approve costs for the construction and repair of gas distribution and intrastate utility-operated transmission pipeline infrastructure.

Fourth, the federal Department of Transportation (DOT) Pipeline and Hazardous Substances Administration (PHMSA) regulates pipeline safety for both interstate natural gas pipelines and local gas distribution under 49 C.F.R. Part 172. Many states also exercise delegated authority to implement and enforce PHMSA's federal pipeline safety standards. State utility commissions in turn take into account and regulate the capital expenditures and operations and maintenance costs that gas utilities incur to upgrade facilities and procedures to comply with PHMSA's pipeline safety regulations.

Finally, it is important to understand the fundamental utility covenant between the utility and the state regulator. Because gas utilities operate natural monopolies that provide very capital-intensive infrastructure that is not easily duplicated and that it would be wasteful to duplicate, states have granted exclusive service territories to individual utility companies in exchange for strict economic regulation of their costs and rates of return. State utility commissions are governed by state legislation that requires the commissions to balance what can be described as a three-legged stool: (1) expenditures to promote safety and energy reliability ; (2) keeping customer costs affordable; and (3) allowing a reasonable return on equity that will attract investment capital at a reasonable cost – because failing to do so would increase costs, reduce resources available to promote safety and reliability and cause rates to be more costly. It is a delicate balance. Retail customers in the state pay the resulting "just and reasonable" utility commission-approved rates.

As EEI points out in their comments in this docket, even if a contracting officer deemed a utility to be "non responsible" as the Proposal contemplates in several circumstances, the contracting officer would be limited by state law regarding the options available for seeking alternative deliveries of natural gas – or net zero RNG. The FAR Council should consider waivers for utilities as EEI suggests, or it should provide alternative compliance pathways where needed to ensure the Proposal is consistent with state laws governing how natural gas distribution and intrastate transmission service is regulated. Similar alternatives should be provided for interstate natural gas transmission service consistent with federal regulation by FERC.

B. AGA Agrees with EEI that Areawide Public Utility Contracts are Unlike Other Federal Contracts and Must Be Addressed Separately as unique GSA-Managed Framework Agreements

Like EEI's electric utility members, many AGA member gas utilities deliver energy to federal facilities and installations within their franchised service territories under areawide public utility contracts as part of their state-mandated duty to provide service.[17] In other words, such utilities do not seek out federal contracts—they simply are required to provide service as a franchised utility. This type of agreement is unique to utilities. Areawide contracts are framework agreements managed by the GSA. They allow federal agencies to take gas or electric service like any other retail customer. Areawide contracts do not address rates, terms, or conditions – which are established by the state regulatory commission. Instead, GSA public utility areawide agreements provide the basis for federal agencies to seek appropriations needed to pay for energy service, whether gas or electric. As described in EEI's comments in this docket, areawide agreements typically have 10-year terms and are normally renewed. Based on state utility franchise laws, utilities do not submit bids for award of these areawide framework agreements.

In light of the unique distinctions between areawide public utility contracts and typical, more generic federal procurement contacts, as EEI notes, there has been serious question as to whether the areawide utility contracts make gas or electric utilities "federal contractors" subject to all FAR provisions. As a recent example, the GSA initially decided unilaterally to order utilities to include the FAR COVID-19 vaccine mandate in all areawide utility contracts, but the GSA later reversed its unilateral decision, explaining it would not impose this clause absent utility consent.[18]

Some gas and electric utilities also have contracts with federal agencies that look more like standard federal contracts, including certain utility energy service contracts. However, considering the unique state franchise laws and regulation of utilities, both arrangements for utility energy service should be treated as distinct from the generic, general contractor agreements.

The GSA should initiate discussions with both gas and electric utilities to determine how to address areawide public utility contracts. AGA also agrees with EEI that the GSA should consider providing exceptions for utility companies – both gas and electric - or offer alternative

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[18] See [COVID-19 (Coronavirus) | GSA](), GSA, FAQ, COVID Safety Protocols Update.

compliance pathways to make any final rule consistent with state and federal regulation of gas and electric energy deliveries.

C. The FAR Council Should Provide Guidance on How to Determine Who the Contractor is for Gas Distribution Utility Companies Held by a Common Parent

It is not clear from the Proposal or related existing FAR definitions how to determine who the contractor is in the case of gas distribution utility companies that share a common parent company. This is important because the Proposal would apply significantly more requirements on major sources with $50 million or more in annual obligations. Individual gas utilities may not exceed that threshold, but when combined with the federal obligations of their affiliated gas and electric subsidiaries and rolled up at the corporate parent level, the combined obligations may well exceed the major contractor threshold.

The Proposal's definitions of "major contractor" and "significant contractor" do not explain whether a parent company or subsidiary utility company should be considered the contractor when applying the annual obligation thresholds. Both definitions refer to the "offeror" – a term that is not defined in the proposed rule but is defined in the existing FAR along with the term "offer", at 48 C.F.R. Part 2, as follows:

> *"Offer means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids"; responses to requests for proposals (negotiation) are offers called "proposals"; however, responses to requests for quotations (simplified acquisition) are "quotations", not offers. For unsolicited proposals, see subpart 15.6. "*
>
> *"Offeror means offeror or bidder."*

Neither definition makes sense in the context of an areawide utility agreement, since as discussed above, the utility is providing service as required by its state regulated franchise – not in response to a solicitation or pursuant to an unsolicited proposal. This is further reason to clarify that a utility providing service under an areawide agreement is not a federal contractor at all.

Where a utility has responded to a federal agency solicitation and entered into a traditional government contract, we agree with EEI that the utility should be considered the federal contractor, not its parent company. While several natural gas distribution utilities may share the same parent company, they each serve different populations, set their gas distribution rates in separate state utility commission proceedings, and may have significantly different methane and CO2 emissions profiles depending on their mix of gas metering and regulating stations, distribution mains, intrastate transmission lines and storage facilities. As a result, each gas distribution utility should be assessed independently.

D. The Final Rule Should Clarify that Public Gas Utilities Owned by a City or Other Local Government are Not Subject to the GHG Inventory, Disclosure and Science Based Target Requirements

While most of AGA's member gas utilities are investor-owned, some are public municipal utilities owned and operated by a city or other local government. The Proposal's preamble explains that proposed new FAR section 23.XX04(a) provides a series of exceptions for various entities, including "a state or local government." See 87 Fed. Reg. 68,314. Since publicly owned municipal gas utilities are part of their local government, AGA requests that the FAR Council make it clear in any Final Rule that this exception includes local government-operated municipal gas utilities.

E. The Proposal Mentions the Possibility of Exemptions and Waivers, But Provides No Detail – The Final Rule should Detail the Basis and Process, and should Include a Waiver for Companies Already Working with Federal Agencies to Achieve Net Zero Goals

In the preamble discussion, the Proposal briefly states that under the proposed new section 23.XX06, the new GHG disclosure and target setting requirements "may be waived by the senior procurement executive for facilities, business units, or other defined units for national security purposes or for emergencies, national security, or other mission essential purposes." There is no further detail in the preamble or the proposed regulatory text. See 87 Fed. Reg. 68,316 and 68,330.

AGA requests that any final rule include the process for requesting a waiver and also include additional grounds for a waiver. These waivers should not be time-limited, as the circumstances and regulatory regimes under which natural gas service is provided to federal facilities discussed above are not temporary.

We note that as discussed above, requiring SBTi to validate major contractor GHG targets two years after publication of the final rule as a precondition to providing services to the federal government would effectively ban gas utilities from providing affordable, reliable energy to federal agencies, including the DOD. And this could lead to an energy supply barrier that could pose significant challenges to mission readiness. AGA urges the FAR Council to include this in its list of situations that would warrant granting a waiver.

AGA also agrees with EEI that the FAR Council should consider allowing a broad waiver in situations where the goals of the Proposal are being met through other means. One of the Proposal's stated purposes in requiring disclosure of emissions and climate-related risks is to drive action to address climate change that will help make the federal supply chain more resilient. As in the case of EEI's electric utility members, many AGA member gas utilities are already engaged with federal agencies in efforts to improve the energy reliability and resilience of federal facilities as well as to reduce their associated GHG emissions.

V. The Proposal Has Many Practical and Legal Flaws that Would Have to be Addressed Before Any New FAR Requirements Could Be Finalized

AGA agrees with and supports the comments of EEI on the Proposal's practical and legal flaws for the reasons stated in EEI's comments filed in this docket on Feb. 13, 2023. We highlight our concerns with the legal flaws below.

We question whether the FAR Council has Congressional authority to use government contracts to mandate GHG inventories, disclosures, and reduction targets.   The Procurement Act's goals are to promote economic and efficient contracting. Yet the Proposal, by the FAR Council's own estimate, would impose hundreds of millions of dollars in increased annual costs on federal contractors that would have to be recovered through prices on goods and services eventually or in the case of utilities, in state approved utility rates. Moreover, gas utilities that are major contractors would be subject to the SBTi target validation requirement and thus would be precluded from providing affordable, resilient, and reliable natural gas beginning two years after the FAR Council's anticipated final rule. This would cause significant disruptions in the government's energy supply chain and increased market-driven energy costs, as discussed above. None of this is consistent with the goals of the Procurement Act.

To the extent the FAR Council lacks clear Congressional delegation of authority to decide such a major issue with sweeping and damaging ramifications for both the federal government and the U.S. economy, this raises the question whether the Proposal violates the major federal question doctrine as delineated in the Supreme Court's decision in *West Virginia v. EPA*.[19]

[19] 142 S.Ct. 2587 (2022).

AGA also questions whether the FAR Council may simply surrender its authority over U.S. federal acquisition regulations to private organizations such as CDP and SBTi that frequently change their standards and do so without complying with the rigorous notice and comment procedures of the Administrative Procedures Act or the transparent consensus process used by standards organizations such as ASTM or ANSI.

Conclusion

If the FAR Council nevertheless proceeds with this rulemaking, we urge the FAR Council to issue a new proposed rule for notice and comment to make the necessary changes that could avoid most of the practical and legal issues raised by this Proposal. First, the FAR Council should avoid duplication and allow compliance with the EPA GHG Reporting Rules to satisfy requirements for disclosing direct scope 1 emissions, indirect scope 2 purchased electricity emissions and climate risk evaluations. Second, the FAR Council should not require major contractors to report scope 3 emissions, because scope 3 emission methodologies remain inconsistent and result in double counting. Third, the FAR Council should delete the reliance on SBTi for target definitions and validation, provide a waiver or alternative means of complying with any GHG reduction target setting requirement, and recognize there are pathways for natural gas utilities to achieve net zero GHG goals as demonstrated in the AGA Net Zero Study attached as Appendix B. Fourth, any final rule should address the unique contractual and regulatory framework under which gas utilities provide energy services, should allow a clear waiver for areawide public utility agreements, should provide guidance on how to determine who is the contractor for gas distribution utility companies owned by a common parent, clarify that the state and local government exception applies to municipal gas and electric utilities, and describe in adequate detail the process for obtaining waivers based on grounds such as emergency, national security and mission readiness. Finally, the FAR Council should address practical and legal flaws identified in the Proposal.

AGA appreciates the opportunity to comment. If you have any questions, please do not hesitate to contact me or Tim Parr, Deputy General Counsel, tparr@aga.org.

Respectfully Submitted,

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