UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Transcontinental Gas Pipe Line Company, LLC Docket No. CP21-94-000

REQUEST FOR REHEARING OF THE ORDER ISSUING CERTIFICATE AND APPROVING ABANDONMENT FOR THE REGIONAL ENERGY ACCESS EXPANSION

Pursuant to section 19(a) of the Natural Gas Act ("NGA"),[1] and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission" of "FERC"),[2] Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper (collectively, "DRN"), respectfully requests rehearing of the Commission's January 11, 2023 Order Issuing Certificate and Approving Abandonment for Transcontinental Gas Pipe Line Company, LLC's ("Transco's") Regional Energy Access Expansion project ("REAE" or "the Project").[3]

DRN timely intervened in Docket No. CP21-94-000 via Motions to Intervene filed on April 30, 2021.[4] Neither motion was opposed, DRN's motions to intervene were granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure, and DRN is accordingly a party

[1] 15 U.S.C. § 717r(a).
[2] 18 C.F.R. § 385.713.
[3] *See* Order Issuing Certificate and Approving Abandonment, Transcontinental Gas Pipe Line Company, LLC, 182 FERC ¶ 61,006 (Jan. 11, 2023) (hereinafter, "Certificate Order").
[4] *See* Motion to Intervene of Delaware Riverkeeper Network, Doc. Accession No. 20210430-5333, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Apr. 30, 2021); Motion to Intervene of Maya K. van Rossum, the Delaware Riverkeeper, Doc. Accession No. 20210430-5338, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Apr. 30, 2021). DRN's intervenor status was noted in the Commission's January 11, 2023 order. *See* Certificate Order, *supra* n.3, at Appendix A.

within the meaning of that rule with standing to seek rehearing.[5] This request for rehearing is timely filed within thirty days of the Commission's January 11, 2023 Certificate Order.

I. STATEMENT OF RELEVANT FACTS

On March 26, 2021, Transco filed an application pursuant to sections 7(b) and 7(c) of the NGA[6] and Part 157 of the Commission's regulations[7] for authorization to construct and operate the Project. The Project would allow Transco to provide an additional 829,400 dekatherms per day (dth/D) of firm transportation service to serve incremental natural gas supply needs beginning in the 2023/2024 winter heating season.[8] According to the Commission's Final Environmental Impact Statement ("FEIS"), the Project facilities include:

> • installation of 22.2 miles of 30-inch-diameter pipeline loop in Luzerne County, Pennsylvania (Regional Energy Lateral);
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> • installation of 13.8 miles of 42-inch-diameter pipeline loop in Monroe County, Pennsylvania (Effort Loop);
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> • installation of the new electric-motor driven Compressor Station 201 (9,000 nominal horsepower [hp] at International Organization of Standardization [ISO] conditions) in Gloucester County, New Jersey);
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> • installation of two gas turbine driven compressor units (31,800 nominal hp at ISO conditions) at existing Compressor Station 505 in Somerset County, New Jersey to accommodate the abandonment and replacement of approximately 16,000 hp from eight existing internal combustion engine driven compressor units and increase the certificated station compression by 15,800 hp;
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> • installation of a gas turbine compressor unit (63,742 nominal hp at ISO conditions) and modifications to three existing compressors at existing Compressor Station 515 in Luzerne County, Pennsylvania to accommodate the abandonment and replacement of approximately 17,000 hp from five existing gas-fired

[5] *See* 15 U.S.C. § 717r(a), 18 C.F.R. § 385.713(b).
[6] 15 U.S.C. §§ 717f(b), (c).
[7] 18 C.F.R. Part 157.
[8] *See* Abbreviated Application for Certificate of Public Convenience and Necessity and for Order Permitting and Approving Abandonment of Facilities, Doc. Accession No. 20210326-5274, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Mar. 26, 2021) (hereinafter, "Application").

reciprocating engine driven compressors and increase the certificated station compression by 46,742 hp;

• uprate and rewheel two existing electric motor-driven compressor units at existing Compressor Station 195 in York County, Pennsylvania to increase the certificated station compression by 5,000 hp and accommodate the abandonment of two existing gas-fired reciprocating engine driven compressors, which total approximately 8,000 hp;

• installation of piping modifications at existing Compressor Station 200 in Chester County, Pennsylvania to support south flow of natural gas;

• uprate one existing electric motor-driven compressor unit at existing Compressor Station 207 in Middlesex County, New Jersey to increase the certificated station compression by 4,100 hp;

• modifications at existing compressor stations, meter stations, interconnects, and ancillary facilities in Pennsylvania, New Jersey, and Maryland; and

• installation of ancillary facilities such as mainline valves, communication facilities, and pig launchers and receivers.[9]

DRN, along with our partners, submitted numerous comment letters and reliable existing data and resources during the public commenting periods identifying numerous deficiencies in both Transco's application materials and the Commission's review of the Project. A majority of these deficiencies, and unfortunately those with the greatest import and bearing on the public interest, have not been remedied by the Commission in its FEIS or its Certificate Order.

For the reasons explained below, the Commission's actions in preparing its FEIS and issuing its Certificate Order are arbitrary, capricious, or otherwise not in accordance with the law,[10]

[9] Regional Energy Access Expansion Project Final Environmental Impact Statement, Doc. Accession No. 20220729-3005, Transcontinental Gas Pipe Line Company, LLC, FERC Docket CP21-94-000 (July 2022) (hereinafter, "FEIS").
[10] *See* 5 U.S.C. § 706(2).

fail to meet the requirements of the National Environmental Policy Act[11] and its implementing regulations,[12] and violate the NGA[13] and its implementing regulations.[14]

DRN asserts that based on the record, the Project is not required by the present or future public convenience and necessity. Because the Commission's deficient EIS cannot serve as the basis for an adequate hard look at the Project's environmental impacts, and because the Commission's consideration of project need was flawed, the Commission could not rationally conclude that the public benefits of the Project outweigh its adverse impacts.

II. CONCISE STATEMENT OF ERRORS IN THE CERTIFICATE ORDER

A. The Commission erred in its conclusion under the NGA that the project is or will be required by the present or future public convenience and necessity, as there was lack of substantial evidence in the record to support its determination of project need.

B. The Commission erred by denying the motion for an evidentiary hearing despite the presence of contested issues of material fact.

C. The Commission erred in its NEPA analysis by deferring the question of the Project's purpose and need until the Certificate Order was issued.

D. The Commission erred in its NEPA alternatives analysis by failing to identify any non-gas alternatives, either in the no-action alternative, or combined with gas transportation.

E. The Commission erred by failing to adequately evaluate siting alternatives for Compressor Station 201 that would avoid disproportionately high and adverse impacts in environmental justice communities.

F. The Commission erred in its NEPA and NGA analyses by failing to address the Project's climate change impacts.

1. The Commission erred in its NEPA and NGA analyses by failing to acknowledge the reasonably foreseeable upstream impacts of the Project, including GHG emissions.

2. The Commission erred in its NEPA analysis and ultimate decision under the NGA by failing to determine the significance of the Project's climate change impacts.

[11] 42 U.S.C. §§ 4321–4370h.
[12] 40 C.F.R. Parts 1500 to 1508.
[13] 15 U.S.C. §§ 717–717z.
[14] 18 C.F.R. Part 157.

3. The Commission erred by failing to consider measures to mitigate the climate change impacts of the Project.

4. The Commission erred by failing to prepare a supplemental environmental impact statement after the Council on Environmental Quality's Guidance on Consideration of Greenhouse Gas Emissions and Climate Change was published.

5. The Commission erred in its NEPA and NGA analyses by deferring its obligation to comply with those statutes pending the finalization of a generally applicable policy statement.

6. The Commission's failure to adequately consider the Project's climate change impacts renders its finding of public convenience and necessity arbitrary, capricious, and contrary to the NGA.

G. The Commission erred by relying on future state agency determinations to conclude that impacts to water resources were not significant.

H. The Commission erred by relying on ongoing easement negotiations to absolve it of its duty to evaluate environmental impacts associated with those easements.

I. The Commission erred by failing to provide updated information on the Project's direct and indirect air emissions.

III. STATEMENT OF ISSUES

The subsections below correspond to the numbered paragraphs in Section III above, and set forth DRN's position with respect to the identified issues. DRN also submitted substantial comments to the Commission regarding the Project, and hereby incorporates by reference all arguments, evidence, and reasoning contained in those submissions.[15]

[15] *See* Comment Regarding Environmental Review, Doc. Accession No. 20210430-5490; Scoping Comments of the Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, Doc. Accession No. 20211119-5271; Comments of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, PennFuture, and Clean Air Council regarding the Draft Environmental Impact Statement for the proposed Regional Energy Access Expansion, Doc. Accession No. 20220425-5423; Supplemental Comments of Delaware Riverkeeper Network and Maya K. van Rossum, the Delaware Riverkeeper, regarding the Draft Environmental Impact Statement for the proposed Regional Energy Access Expansion, Doc. Accession No. 20220426-5318; Comments on Transco Regional Energy Access Expansion Project's Revised Applications for Permits for Water Obstructions and Encroachments and for Erosion and Sediment Control, Doc. Accession No. 20221013-5084; all filed in Transcontinental Gas Pipe Line Company, Inc., FERC Docket No. CP21-94-00.

IV. ARGUMENT

A. The Commission erred in its conclusion under the NGA that the project is or will be required by the present or future public convenience and necessity, as there was lack of substantial evidence in the record to support its determination of project need.

Sections 7(c) and 7(e) of the NGA provide that the Commission may authorize the "transportation or sale of natural gas, . . . undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof"[16] if it finds that such activity "is or will be required by the present or future public convenience and necessity."[17] In 1999, the Commission issued a policy "for determining whether there is a need for a specific project and whether, on balance, the project will serve the public interest."[18] An overarching goal for this policy is to "foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas."[19] In addition, the policy was intended to "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project."[20] Accordingly, "construction projects that would have residual adverse effects would be approved only where the public benefits to be achieved by the project can be found to outweigh the adverse effects."[21]

To establish the need for a project, an applicant must submit sufficient evidence to show that the public benefits will outweigh the adverse effects. Potential benefits may include "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers,

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[16] 15 U.S.C. § 717f(c)(1)(A).
[17] *Id*. § 717f(e).
[18] Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61227 (1999), *clarified* 90 FERC ¶ 61128 (2000), *further clarified* 92 FERC ¶ 61094 (2000) (hereinafter, "Certificate Policy").
[19] *Id*. at 13.
[20] *Id*. at 23.
[21] *Id*. at 23.

providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives."[22] The evidence necessary to show such benefits "will usually include a market study."[23] Here, the Commission considered three market studies: a study submitted by Transco and prepared by Levitan and Associates ("Transco Levitan Study"); a study commissioned by the New Jersey Board of Public Utilities from the London Economics International Group ("NJ Agencies Study"); and a study submitted by the New Jersey Conservation Foundation prepared by Skipping Stone ("NJCF Skipping Stone Study").

The Commission concluded that the public benefits of the Project's construction and operation included the provision of more reliable service on peak winter days and an increase of supply diversity.[24] This conclusion implicitly acknowledges that there is existing reliable service on peak winter days, and the Project would go beyond what is necessary to meet current demand.

The Commission failed to give the appropriate weight to the New Jersey Board of Public Utilities' ("NJBPU's") findings after review of an earlier study by Levitan and Associates, the NJ Agencies Study, and additional stakeholder comments.[25] After consideration of all of this material, the NJBPU concluded that "through 2030, New Jersey's firm gas capacity can meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal weather on a scale experienced in the past, and 3) in the case of a design day."[26] The NJBPU specifically found that

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[22] *Id*. at 25.
[23] *Id*.
[24] Certificate Order, *supra* n.3, at P 25.
[25] *See* Attachment 1 to Motion to Intervene Out of Time and to Lodge of the New Jersey Parties, Doc. Accession No. 20220711-5186, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (July 11, 2022) (hereinafter "NJBPU Order"). The motion filed by the New Jersey Parties specifically underlined the "unique and considered perspective of a state utility commission, which the Board reached after a rigorous stakeholder process that involved reviewing substantial public comments on the conclusions of the London Economic Report." *Id*. at 5.
[26] NJBPU Order, *supra* n.25, at 11.

the NJ Agencies Study "supports the argument against the need for additional interstate pipeline capacity" and "reaffirms the need for greater scrutiny consistent with the recent policy changes taking place at [the Commission] as the agency attempts to overhaul its existing pipeline project analysis."[27] These findings refuted the conclusions in the Transco Levitan Study, and the Commission has failed to explain why it gave greater evidentiary weight to a single study conducted by a private natural gas company in the face of conclusions reached during an adjudication by a state agency that is charged with the "general supervision and regulation of and jurisdiction and control over all public utilities" in New Jersey.[28]

In reaching its conclusion, the Commission speculated that the differing studies "may reflect differences in risk tolerance."[29] While the New Jersey LDCs may have a lower risk tolerance because of their *business* obligation to serve their customers under all possible circumstances, the NJBPU's risk tolerance is likely higher due to *public interest* considerations—namely, the ability to conserve energy and the urgent need to transition away from fossil fuels. Rather than accepting the level of risk that adequately addresses a broader scope of the public interest, the Commission sides with the business needs and desires of the LDCs.

Commissioner Clements highlighted this discrepancy in her concurrence, noting the failure to discuss "the weight the Commission should accord to the finding of the [NJBPU]," given that agency's consideration of the need to reduce consumption of natural gas.[30] Even beyond its faulty NEPA analysis, the Commission catastrophically fails to even acknowledge the public's interest

[27] *Id*.
[28] N.J.S.A. 48:2-13(a).
[29] Certificate Order, *supra* n.3, at P 34. DRN notes that this hypothesis could have been tested in an evidentiary hearing. *See* Section B, *infra*.
[30] Certificate Order, *supra* n.3 (Comm'r Clements, *concurring* at P 4).

in reducing fossil fuel use and avoiding overbuild infrastructure, which induces lock-in and continued reliance on fossil fuels.[31]

Because the Commission must "evaluate *all factors* bearing on the public interest,"[32] treating the NJ Agencies Study and the NJBPU's adoption thereof as merely a competing market study on par with the Transco Levitan Study was arbitrary, capricious, and contrary to the standard set by Section 7 of the NGA. The Commission has also "entirely failed to consider an important aspect of the problem" of whether the Project is truly needed in light of the need to reduce reliance on fossil fuels.[33] The Commission must rectify this error by granting rehearing, vacating the Certificate Order, and conducting an evidentiary hearing on the issue of project need.

B. The Commission erred by denying the motion for an evidentiary hearing despite the presence of contested issues of material fact.

On September 6, 2022, the New Jersey Conservation Foundation ("NJCF"), Frederick Pottger Jr., and Christina Rogers (collectively, "Movants") moved for an evidentiary hearing pursuant to 18 C.F.R. § 385.212 on the basis that the certificate proceeding involved contested issues of material fact regarding the need for the Project.[34] The Commission denied the motion in its Certificate Order, concluding that "all issues of material fact relating to Transco's proposal, including on the issue of need, are capable of being resolved on the basis of the written records, which contains substantial evidence on this issue."[35]

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[31] *See* Section F.2, *infra*.
[32] *Envt'l Def. Fund v. FERC*, 2 F.4th 953, 961 (D.C. Cir. 2021) (quoting *Atl. Refin. Co. v. Pub.Serv. Comm'n of N.Y.*, 360 U.S. 378, 391 (1959)).
[33] *Id*. at 966 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).
[34] *See* Motion for an Evidentiary Hearing, Doc. Accession No. 20220906-5099, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Sept. 6, 2022).
[35] Certificate Order, *supra* n.3, at P 14.

Although the NGA does not require trial-type hearings in all cases, the Commission's denial of a request for evidentiary hearing may be an abuse of discretion where there are disputed issues of material fact that cannot be adequately resolved on the written record.[36] In the "context of FERC proceedings . . . 'mere allegations of disputed facts are insufficient to mandate a hearing; petitioners must make an adequate proffer of evidence to support' their claim."[37] Where parties "adequately flag[an] issue for the Commission as a specific disputed material issue of fact," the Commission should hold an evidentiary hearing to address it."[38] Movants identified ten issues for resolution at a hearing,[39] and later submitted their own expert report with five additional unresolved issues,[40] adequately flagging the issues to be resolved at an evidentiary hearing.

The Commission erred in denying the request for evidentiary hearing, as it is clear from the Commission's own statements in the Certificate Order and concurrences that material issues *remained unresolved* at the time of its decision. For example, in reaching its conclusion on project need, the Commission noted that the different inputs to the Transco Levitan Study and the NJ Agencies Study resulted in different conclusions. Rather than examining the factual basis of those inputs, the Commission hypothesized that the "difference in input assumptions *may* reflect differences in risk tolerance."[41] As recognized by Commissioner Clements, "[t]he Levitan study takes the LDC's design day demand forecasts at face value; it does not ask what the bases for the

[36] *Cf. Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (finding no abuse of discretion where disputed issues were adequately resolved on the written record).
[37] *Blumenthal v. FERC*, 613 F.3d 1143, 1144 (D.C. Cir. 2010) (quoting *Cerro Wire & Cable v. FERC*, 677 F.2d 124, 129 (D.C. Cir. 1982)).
[38] *Cajun Elec. Power Co-op, Inc. v. FERC*, 28 F.3d 173, 178 (D.C. Cir. 1994).
[39] *See* Motion for an Evidentiary Hearing, *supra* n.34, at 9–10.
[40] *See* Comment Submitting Expert Report, Doc. Accession No. 20220909-5000, Transcontinental Gas Pipe Line Co., LLC, FERC Docket CP21-94-000 (Sept. 9, 2022).
[41] Certificate Order, *supra* n.3, at P 34 (emphasis added).

forecasts are or the degree to which the forecasts reflect state energy policies and programs. Nor has the Commission endeavored to answer those questions itself."[42]

It is also evident that the Commission lacked information that, if obtained through testimony at an evidentiary hearing, could have led to a different outcome. In Commissioner Christie's concurrence, he wonders what NJBPU's position is as to this particular pipeline project, and the NJBPU's position on the LDCs' contracts with Transco.[43] He also adds that, in his opinion, the studies submitted by Transco, the NJ Agencies, and NJCF "do not outweigh the persuasive evidence of need represented by the executed agreements to take service," but, at the same time, wonders "how much weight the third-parties studies . . . should receive" absent "authentica[tion] by a witness (such as the study's author) who could testify and be subject to cross-examination under oath."[44]

It is apparent that in addition to allowing material questions to remain unanswered, the Commission's denial of the evidentiary hearing request also affected the weight given to the evidence in the record. Accordingly, the Commission's failure to hold an evidentiary hearing was an abuse of its discretion in these circumstances. The Commission should grant rehearing, vacate the Certificate Order, and hold an evidentiary hearing on the issues identified by Movants.

C. The Commission erred in its NEPA analysis by deferring the question of the Project's purpose and need until the Certificate Order was issued.

The Council on Environmental Quality's ("CEQ's") NEPA regulations require that an EIS "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action."[45] "Where an action is taken pursuant to a specific

[42] *Id*. (Comm'r Clements, *concurring* at P 5).
[43] *Id*. (Comm'r Christie, *concurring* at P 1).
[44] *Id*. (Comm'r Christie, *concurring* at PP 3, 4).
[45] 40 C.F.R. § 1502.13.

statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."[46] The Commission "bears the responsibility for defining at the outset the objectives of an action."[47] When, as here, the Commission is asked to approve a specific project, it should "take into account the needs and goals of the parties involved in the application," but also should "always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives."[48] Thus, the Commission must "first consider the requesting party's interest in the project, and second, it must consider the extent of the agency's authority to approve or modify the project."[49] A purpose and need statement is unreasonable where "the agency defines it so narrowly as to allow only one alternative from among the environmentally benign ones in the agency's power, such that the EIS becomes essentially a foreordained formality."[50]

Here, the Commission completely ignored the second step in its FEIS, explaining that "[m]arket review of a project is beyond the scope of the NEPA review and is a factor that will be assessed by the Commission in any order issued for the Project."[51] By deferring the question of market need, the Commission artificially constrained the range of alternatives within its decisionmaking power under Section 7 of the NGA.[52]

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[46] *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004) (citing *City of New York v. U.S. Dep't of Transp.*, 715 F.2d 732, 743 (2d Cir. 1983)).
[47] *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195–96 (D.C. Cir. 1991).
[48] *Id*. at 196
[49] *Nat'l Parks Conservation Ass'n v. United States*, 177 F. Supp. 3d 1, 15 (D.D.C. 2016).
[50] *Sierra Club, Inc. v. U.S. Forest Serv.*, 897 F.3d 582, 598–99 (4th Cir. 2018) (quoting *Webster v. U.S. Dep't of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012)).
[51] FEIS, *supra* n.9, at 1-2.
[52] *See* Section D, *infra*.

In complying with NEPA, the Commission is also charged with "evaluat[ing] reasonable alternatives to the proposed action"[53] that "would avoid or minimize adverse impacts or enhance the quality of the human environment."[54] In doing so, the Commission must "consider such alternatives to the proposed action as may *partially* or completely meet the proposal's goal."[55] By accepting Transco's proposal at face value without determining at least the market need for the project, the Commission failed to examine the true need for the Project in its FEIS, and failed to identify and evaluate alternatives that may not have met the applicant's goals but would still have been responsive to the statutory objectives of the NGA.

The Project's purpose and need, as articulated in the Commission's FEIS is to "allow Transco to provide an incremental 829,400 dekatherms per day (Dth/d) of year-round firm transportation capacity from the Marcellus Shale production area in northeastern Pennsylvania to delivery points in New Jersey, Pennsylvania, and Maryland."[56] The FEIS explains that "[m]arket review of a project is beyond the scope of the NEPA review and is a factor that will be assessed by the Commission in any order issued for the Project."[57] The question of purpose and need is thus deferred, as the FEIS states that "[t]he need for the Project will be assessed by the Commission in its orders rather than in Commission staff's NEPA analysis."[58]

[53] 40 C.F.R. § 1502.14.
[54] *Id*. § 1502.1.
[55] *Friends of Animals v. Romero*, 948 F.3d 579, 591 (2d Cir. 2020) (quoting *City of New York*, 715 F.2d at 742).
[56] FEIS, *supra* n.9, at 1-2.
[57] *Id*.
[58] *Id*.

NEPA "is addressed to agencies as a whole, not only to their professional staffs."[59] Compliance with the act is the "primary and nondelegable responsibility" of the Commission.[60] The Commission cannot delegate compliance with the requirement to craft a purpose and need statement to their staff and then accept the staff's deferment of that question to the relevant final agency action. This administrative sleight-of-hand means that the Commission's compliance with the "purpose and need" requirement of NEPA falls through the cracks.

While the Commission does have the opportunity to review FERC Staff's FEIS and adopt or reject its findings in the final Certificate Order, the information-forcing aspect of the FEIS is artificially constrained by prematurely preparing a detailed statement of the environmental impacts of the Project (as proposed by the applicant), as well as alternatives to the Project (that are constrained by reference to the applicant's goals alone), before determining the Project's purpose and need.[61] By avoiding the question of whether Transco's proposed Project aligns with the statutory objectives of the NGA and is responsive to a true demand, the Commission unlawfully "restrict[ed] its analysis to those 'alternative means by which a particular applicant can reach *his* goals.'"[62]

Rather than defining exactly the Project proposed by Transco, the Commission was required to address the "*underlying* purpose and need,"[63] namely, the need for transportation of

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[59] *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1118 (D.C. Cir. 1971).
[60] *Greene Cty. Planning Bd. v. Fed. Power Comm'n*, 455 F.2d 412, 420 (2d Cir. 1972) (citing *Calvert* Cliffs, 449 F.2d at 1119).
[61] *See* 42 U.S.C. § 4332(2)(C)(ii), (iii) (requiring a detailed statement on "adverse environmental effects which *cannot be avoided* should the proposal be implemented" and "*alternatives* to the proposed action" (emphasis added)).
[62] *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997) (quoting *Van Abbema v. Fornell*, 807 F.2d 633, 638 (7th Cir. 1986)).
[63] 40 C.F.R. § 1502.13.

natural gas and the associated construction of facilities.[64] To align the purpose and need statement with NEPA's requirements, the Commission should have adhered to the Environmental Protection Agency's ("EPA's") recommendation to "clearly establish the current demand which justifies the project need to provide the additional capacity to the system."[65] To rectify this error, the Commission must grant rehearing, vacate the Certificate Order, conduct an evidentiary hearing, and begin the NEPA process anew with an appropriately-defined statement of purpose and need.

D. The Commission erred in its NEPA alternatives analysis by failing to identify any non-gas alternatives, either in the no-action alternative, or combined with gas transportation.

The CEQ recently explained that "agencies should evaluate reasonable alternatives that may have lower greenhouse gas ("GHG") emissions, which could include technically and economically feasible clean energy alternatives to proposed fossil fuel-related projects . . . ."[66] In the FEIS for this Project, the Commission rejected the consideration of non-gas energy alternatives, reasoning that because "FERC is tasked with authorizing infrastructure to be used for the transportation of natural gas, not the consumption of natural gas . . . alternatives that do not also facilitate the transportation of natural gas cannot be a function surrogate."[67]

This reasoning assumes that each and every alternative must be a total function surrogate for the Project as proposed by Transco. Not so. First, alternatives that would only partially meet the Project's purpose and need are appropriate for consideration in an EIS.[68] Second, the no-action

[64] *See* 15 U.S.C. § 717f(c), (e).
[65] Comments of U.S. Envtl. Prot. Agency Region 3 on the Draft Envtl. Impact Statement, Doc. Accession No. 20220425-5217, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Apr. 25, 2022).
[66] National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change, 88 Fed. Reg. 1196, 1204 (Jan. 9, 2023) (hereinafter, "GHG Guidance").
[67] FEIS, *supra* n.9, at 3-3.
[68] *See Friends of Animals*, 948 F.3d at 591 (quoting *City of New York*, 715 F.2d at 742).

alternative, by definition, does not necessarily meet the Project's stated purpose and need.[69] Its purpose is to provide an environmental "baseline" for comparison to the various action alternatives.[70]

By failing to include non-gas alternatives in the no-action or other alternatives, the Commission reached the obviously incorrect conclusion that "no system, route, or other alternative would provide a significant environmental advantage over the Project as proposed."[71] The purpose of the alternatives analysis is not to find an alternative that would both meet the Project goals as proposed by the applicant *and* provide a significant environmental advantage over the Project as proposed—instead, the purpose of an alternatives analysis under NEPA is to inform the agency of a range of alternatives within its authority in order to help inform its ultimate decision.

The Commission's analysis of the "no action" alternative was woefully inadequate as it failed to forecast a "baseline" of environmental effects, instead tautologically concluding that if the "no action" alternative was selected, then

> the proposed facilities would not be constructed, and the short- and long-term environmental impacts of the Project would not occur. In addition, if the no-action alternative is selected, the stated purpose of the Project would not be met, and the proposed transportation of natural gas supply to Pennsylvania, New Jersey, and Maryland markets would not occur.[72]

Again allowing the question of need to fall through the cracks, the FEIS concludes that the "Commission will ultimately determine the Project need and could choose the no-action alternative," but implied that environmentally, all things would be equal because "staff has not

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[69] Unless, of course, the Commission finds that the applicant's assertion of need is unsupported, or that the need may be met by means other than certification of the proposed project.
[70] *See, e.g., Biodiversity Conservation All. v. U.S. Forest Serv.*, 765 F.3d 1264, 1269 (10th Cir. 2014) ("In general, NEPA analysis uses a no-action alternative as a baseline for measuring the effects of the proposed action.").
[71] FEIS, *supra* n.9, at 3-32.
[72] *Id*. at 3-3.

identified a significant impact associated with the proposed action."[73] "[F]ailing to adequately distinguish" between the action or no-action alternative in this manner "defeat[s] NEPA's purpose" and renders the FEIS "so deficient as to 'defeat NEPA's goals of informed decisionmaking and informed public comment,'" and, accordingly, renders the FEIS arbitrary and capricious.[74]

First, it is not accurate that the Project has no significant impacts—instead, the Commission failed to evaluate the Project's climate impacts in violation of NEPA.[75] Second, after initially appearing neutral on project need pending the Commission's ultimate decision on the application, the FEIS does an about-face and insists that the only possible outcome that would meet the asserted need is the authorization of natural gas transportation infrastructure.[76] This leaves no room for the Commission to assess, in its NEPA analysis, alternatives that would meet *actual* need, should the Commission find that a lesser volume of natural gas, or even non-gas alternatives, could meet the stated demand.[77]

Given that certification of the Project is a federal action that involves the transportation and use of fossil fuels for *at least* the next twenty years, the Commission was required to discuss the "baseline" climate change trajectory as a part of the no-action alternative so that any climate impacts associated with the proposal or other alternatives could be appropriately contextualized.[78]

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[73] *Id*.
[74] *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017) (quoting *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009)).
[75] *See generally* Section F, *infra*.
[76] FEIS, *supra* n.9, at 3-3.
[77] *See* Section D, *supra*.
[78] *See Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2020) ("A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action. The no action alternative is meant to 'provide a baseline against which the action alternative . . . is

Here, the Commission did not evaluate the baseline at all, instead simply stating that the environmental consequences identified in the FEIS would not occur. In the absence of a determination of the Project's climate change impacts, the Commission effectively buries its head in the sand as to the impact its decision would have on the ongoing climate crisis.

As the CEQ makes clear in its recent guidance document, a failure to recognize the difference between an action and a no-action alternative with regard to climate change is logically unsound. "Agencies should not simply assume that if the federal action does not take place, another action will perfectly substitute for it and generate identical emissions, such that the actions' net emissions relative to the baseline are zero. Such an assumption of perfect substitution typically contradicts basic economic principles of supply and demand."[79] Instead, the Commission should have conducted a substitution analysis, which reveals "how a proposed action and its alternatives are projected to affect the resulting resource or energy mix, including resulting GHG emissions."[80]

The Commission is in a particularly knowledgeable position regarding the nation's energy mix, as it "regulates the interstate transmission of electricity, natural gas, and oil."[81] Outside of the information immediately available to the Commission, there are tools such as the U.S. Energy Information Administration's National Energy Modeling System (NEMS),[82] the Bureau of Ocean

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evaluated.'" (quoting *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1065 (9th Cir. 1998))).

[79] GHG Guidance, *supra* n.66, at 1205.

[80] *Id*.

[81] *See* What FERC Does, https://www.ferc.gov/what-ferc-does (last visited Jan. 30, 2023).

[82] Documentation of the National Energy Modeling System Modules, https://www.eia.gov/outlooks/aeo/nems/documentation/ (last visited Jan. 30, 2023).

Energy Management's Market Simulation Model,[83] or ICF International Inc.'s Integrated Planning Model (IPM).[84]

A more granular analysis of the no-action alternative would also result in consideration of non-gas alternatives. The Commission in its FEIS refused to evaluate non-gas alternatives to the Project, on the basis that "FERC is tasked with authorizing infrastructure to be used for the transportation of natural gas, not the consumption of natural gas."[85] This articulation of the Commission's role, however, completely ignores the fact that, where a project seeks to add new capacity, the Commission evaluates the demand to be served in its certificate proceedings, and theoretically will not issue a certificate without a showing that there is need for the gas to be transported.[86] This error is especially egregious considering the substantial evidence in the record concerning the State of New Jersey's current firm gas capacity to "meet firm demand under 1) normal winter weather conditions, 2) in cases of colder-than-normal weather on a scale experienced in the past, and 3) in the case of a design day."[87] The NJBPU's Order also discussed eight non-pipeline alternatives that could address any demand issues relating to any potential capacity shortfall.[88]

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[83] U.S. Dep't of the Interior, Bureau of Ocean Energy Mgmt., BOEM 2021-072, *Consumer Surplus and Energy Substitutes for OCS Oil and Gas Production: The 2021 Revised Market Simulation Model (MarketSim)* (November 2021), https://www.boem.gov/marketsim-model-documentation.

[84] Integrated Planning Model (IPM), https://www.icf.com/technology/ipm (last visited Jan. 30, 2023).

[85] FEIS, *supra* n.9, at 3-3.

[86] *See* Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61227 at p. 28–29 (1999), *clarified* 90 FERC ¶ 61128 (2000), *further clarified* 92 FERC ¶ 61094 (2000) ("Applicants also must submit evidence of the public benefits to be achieved by the proposed project such as contracts, precedent agreements, studies of projected demand in the market to be served, or other evidence of public benefit of the project.").

[87] NJBPU Order at 11.

[88] *Id*. at 4–5.

Thus, in evaluating this need, it was arbitrary and capricious for the Commission to ignore competing evidence that non-gas alternatives may serve the need in the event that the project is not approved, or in the event that a lesser capacity than requested by the applicant is approved. The Commission incorrectly asserts in its FEIS that it only has two choices—to deny the Certificate or to grant it with or without conditions.[89] Not only is the Commission empowered to approve only a portion of a proposed project, there is also a vast realm of reasonable conditions that may attach to a certificate. The NGA makes clear that the Commission is not restricted to approving a project only as proposed by an applicant:

> [A] certificate shall be issued to any qualified applicant therefor, authorizing the whole *or any part of* the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, *to the extent authorized by the certificate*, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder *such reasonable terms and conditions as the public convenience and necessity may require*.[90]

By limiting its NEPA analysis of alternatives to a binary thumbs-up or thumbs-down, the Commission arbitrarily and capriciously adopted a limited view of its own statutory authority, which resulted in a failure to take a "hard look" at the range of options before it.[91]

As recently acknowledged in its draft Certificate Policy Statement, the Commission's goals and objectives in evaluating a proposed project are to: "(1) appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of

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[89] FEIS at 3-3.
[90] 15 U.S.C. § 717f(e) (emphases added).
[91] *See Baltimore Gas & Elec. Co., Inc. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

unnecessary disruption of the environment, and the unneeded exercise of eminent domain; (2) provide appropriate incentives for the optimal level of construction and efficient customer choices; and (3) provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project."[92] In order to achieve these objectives, the Commission must consider no-action alternatives as well as non-gas energy alternatives that would meet the purpose and need of the proposed project.

Because Transco provided a more granular breakdown of the market need for the Project in its April 22, 2022 submission,[93] The Commission should have used this information to evaluate each shipper's asserted need to determine not only whether the need is actually supported by marked demand, but also whether non-gas or no-action alternatives to *portions* of the capacity proposed could in fact meet that demand.

In addition, FERC Staff must look beyond the applicant's stated goals when formulating the "purpose and need" in its NEPA document. On April 20, 2022, the Council on Environmental Quality revised its NEPA regulations to remove references to the goals of the applicant in definitions of purpose and need and "reasonable alternatives."[94] CEQ explained that a purpose and need statement should not be unnecessarily restricted by an applicant's stated goals, and agencies must also consider "other potentially relevant factors":

> These include the agency's mission and the specifics of the agency decision, including statutory and regulatory requirements. Factors may also include national, agency, or other policy objectives applicable to a proposed action, such as a discretionary grant program targeted to achieve certain policy goals; desired conditions

[92] Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107, P 50 (Feb. 18, 2022) (quoting Certificate Policy).
[93] *See* Supplemental Information at Attachment 1D, Doc. Accession No. 20220422-5150, FERC Docket No. CP21-94-000 (Apr. 22, 2022).
[94] National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453 (Apr. 20, 2022).

> on the landscape or other environmental outcomes; local needs; and an applicant's goals.[95]

Specifically, CEQ made clear that "[t]here may be times when an agency identifies a reasonable range of alternatives that includes alternatives–other than the no action alternative–that are beyond the goals of the applicant or outside the agency's jurisdiction because the agency concludes that they are useful for the agency decision maker and the public to make an informed decision."[96] Without consideration of such alternatives, an agency may be blinded to options that "better meet the policies and requirements set forth in NEPA and the agency's statutory authority and goals."[97] The U.S. Court of Appeals for the Seventh Circuit has explained that "NEPA requires an agency to 'exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project' and to look at the general goal of the project rather than only those alternatives by which a particular applicant can reach its own specific goals."[98]

Whether characterized as a no-action alternative or simply a non-gas energy alternative, FERC's own guidance provides that

> [T]he no-action alternative discussion should discuss what other options may be pursued by customers of the proposed project to satisfy the need for the proposed project. For example, if the proposed project were not constructed, describe the alternatives to meet the project objectives, and, if known, the likely environmental effects and costs of pursuing these options. These options should include the use of other natural gas systems, non-gas energy alternatives, and/or energy conservation or efficiency, as applicable.[99]

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[95] *Id*. at 23,458.
[96] *Id*. at 23,459.
[97] *Id*.
[98] *Envtl. Law & Policy Ctr. v. U.S. Nuclear Reg. Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006) (quoting *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 669 (7th Cir. 1997)).
[99] FERC, Guidance Manual for Environmental Report Preparation (Feb. 2017) at 4-135-136, available at https://www.ferc.gov/sites/default/files/2020-04/guidancemanual-volume-1.pdf ("FERC Resource Report Guidance").

However, the FEIS dismisses any non-gas alternative out of hand, and focuses instead on "transportation of natural gas" as the Project purpose. This directly contradicts FERC's own guidance, and eliminates a range of alternatives (or simply the no-action alternative) that would allow the Commission to reach a decision that would avoid over-building, the unnecessary disruption of the environment, and the unnecessary use of eminent domain.[100]

The Commission cannot define the Project's purpose and need so narrowly that every conceivable alternative to the Project is ruled out by definition.[101] The only reason that the transportation of natural gas is purported to be needed is because of the end uses–thus, it is necessary for the Commission to examine the end uses of the gas to be transported and evaluate whether there are non-gas alternatives that would serve the needs associated with these end uses. As the D.C. Circuit has explained, "[t]he existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal."[102]

According to Transco, "[e]stimated downstream intended use of contracted volumes includes peak demand for electric power generation, commercial and residential heating, and industrial and manufacturing processes."[103] In Resource Report 10 of its application, Transco

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[100] *See* Certificate Policy, *supra* n.18, at P 50.

[101] *See Simmons*, 120 F.3d at 666 (Agencies cannot "contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)."); *see also, e.g.*, *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070 (9th Cir. 2010) ("Agencies enjoy 'considerable discretion' to define the purpose and need of a project. However, 'an agency cannot define its objectives in unreasonably narrow terms.'" (internal citations omitted)).

[102] *City of Pittsburgh v. FPC*, 237 F.2d 741, 751 n.28 (D.C. Cir. 1956).

[103] Transcontinental Gas Pipe Line Company, LLC, Response to Environmental Information Request Issued May 26, 2021, at 113, Doc. Accession No. 20210615-5073, FERC Docket No. CP21-94-000 (June 15, 2021).

discussed alternative energy sources, however, its consideration of alternatives was artificially constrained by the requirement that any alternative must be "capable of providing the equivalent energy supplied by the 829,400 Dth/d of natural gas to existing Transco markets in PA, NJ, and MD."[104] This requirement is too burdensome and broad, amounting to an all-or-nothing approach that prevents FERC from considering less environmentally harmful alternatives to the Project. A more granular breakdown of the end uses provided by Transco gives FERC additional information to determine whether some or all of the need for capacity proposed can be satisfied by alternative energy sources.[105] Thus, FERC must consider alternatives involving transportation of *less* gas, given the various purposes the Project is supposed to serve. To adequately consider the no-action and non-gas alternatives available to meet the purpose and need of the Commission's action, the Commission must grant rehearing, vacate the Certificate Order, hold an evidentiary hearing on project need, and begin a new NEPA process, incorporating an analysis of no-action and non-gas alternatives into its EIS.

E. The Commission erred by failing to adequately evaluate siting alternatives for Compressor Station 201 that would avoid disproportionately high and adverse impacts in environmental justice communities.

The Commission is required by Executive Order 12898 to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . . ."[106] Contrary to this directive, the Commission merely *identified* the disproportionately high adverse effects of Compressor Station

[104] Transcontinental Gas Pipe Line Company, LLC, Application Resource Report 10 at 10-5, Doc. Accession No. 20210326-5274, FERC Docket No. CP21-94-000 (March 26, 2021).
[105] *See* Response to Environmental Information Request Issued May 26, 2021, *supra* n.103, at 126.
[106] Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

201 without *addressing* them through a legally adequate NEPA analysis or accurate evaluation of adverse effects in its NGA determination of public convenience and necessity. Thus, the Commission's environmental justice analysis is arbitrary and capricious under NEPA and the APA because it failed to acknowledge that the preferred siting alternative for Compressor Station 201 would have a disproportionately high and adverse impact on a *greater number of individuals* living in an environmental justice community, as compared to other feasible alternatives.[107]

The Commission also failed to adequately evaluate these adverse impacts as a part of its NGA analysis, despite recognizing the need to "ensure natural gas infrastructure certification and siting policy and processes are consistent with environmental justice."[108] The Commission's conclusion that none of the alternative site options for Compressor Station 201 "provided a significant environmental advantage over the proposed location" was based on the irrational assumption that disproportionately high and adverse visual impacts on over 400 households in an environmental justice community was equivalent to similar impacts on less than 40 households in an environmental justice community. Thus, its approval of the applicant's preferred siting option for Compressor Station 201 was a "clear error of judgment" based on a disregard of the relevant factors in its Section 7 determination.[109]

In its FEIS, the Commission acknowledged that "construction and operation of portions of the Regional Energy Lateral and the Effort Loop; construction and operation of the new Compressor Station 201; and modifications to existing Compressor Stations 195, 200, 207, and 505, Camden M&R Station, and the Lawnside M&R Station" are located within environmental

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[107] *See Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021).
[108] *See* Fed. Energy Regulatory Comm'n, Equity Action Plan at 8–9 (Apr. 15, 2022), https://www.ferc.gov/equity.
[109] *See Citizens to Perserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

justice communities, and that the Mt. Laurel M&R Station is within one mile of an environmental justice community.[110] The Commission's conclusions regarding the environmental justice impacts of these facilities can be summarized as follows:

- Construction and operation of the new pipeline components—the Regional Energy Lateral and the Effort Loop—would not be "predominately borne by environmental justice communities."[111]

- The Mt. Laurel M&R Station would include "temporary impacts associated with traffic, air quality and construction noise," but these impacts would not be significant.[112]

- "Minor, permanent impacts on visual resources and air quality would occur for Compressor Station 505," but those impacts are less than significant.[113]

- "Minor, permanent impacts on visual resources" would occur for the Camden M&R Station, but those impacts are less than significant.[114]

- "Impacts from construction and operation of Compressor Station 201 would be predominately borne by an environmental justice community" and include significant temporary visual impacts, as well as less-than-significant permanent visual impacts. "Therefore, impacts on environmental justice communities from this Project component would be disproportionately high and adverse." These impacts would occur despite proposed mitigation measures.[115]

In the Certificate Order, the Commission merely cited to the FEIS's conclusions regarding environmental justice impacts and indicated its agreement with those conclusions.[116] The Certificate Order does not discuss how these impacts factored into the Commission's decision to issue the Certificate, other than by implication in its conclusion that the Project is an "environmentally acceptable" action.[117]

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[110] FEIS, *supra* n.9, at 4-159.
[111] *Id*.
[112] *Id*.
[113] *Id*.
[114] *Id*.
[115] *Id*. at 4-159 to 4-160.
[116] Certificate Order, *supra* n.3, at P 66.
[117] *See id*. at P 81.

In its alternatives analysis, the Commission evaluated a total of four potential sites for Compressor Station 201, including the proposed Mantua Grove Road site. The Commission concluded: "Based on the location of the sites and the proposed use of electric-driven compression, we do not believe selection of any site alternative would result in a greater impact on environmental justice communities when compared to other site alternatives."[118] This conclusion is seemingly based on the number of minority and low-income *block groups* that would be affected rather than the number of *individuals* likely to be affected—each of the sites were within one mile of between two and four minority and/or low-income block groups.[119] However, while the three other alternatives evaluated were each within a half mile of less than 40 residences, the proposed (and ultimately sanctioned) site was within a half mile of *over 400 residences*.[120] Despite finding that all four sites could be easily supplied with adequate electric power without significantly affecting resources or landowners,[121] and despite finding that the proposed site would involve disproportionately high and adverse impacts on an environmental justice community,[122] the Commission concluded that none of the alternative site options "provided a significant environmental advantage over the proposed location."[123]

The Commission erred by evaluating impacts based on number of environmental justice census blocks affected, rather than the effect on number of residents in an environmental justice community. All things being equal otherwise in terms of feasibility,[124] the Commission failed to

[118] FEIS, *supra* n.9, at 3-25.
[119] *See id*. at Table 3.5.2-1/
[120] *Id*.
[121] *Id*. at 3-27.
[122] *Id*. at 4-160; Certificate Order, *supra* n.3, at P 66.
[123] FEIS, *supra* n.9, at 3-27.
[124] The Commission notes that "the proposed site is the only site option that is currently available for purchase." *Id*. at 3-27. It is unclear whether this means the proposed site is the only site being offered on the market, or whether Transco had approached the owners of the alternative sites and

explain why a disproportionately high and adverse impact on over 400 households was the environmentally preferable outcome compared to a similar impact on less than 40 households. Reliance on number of block groups rather than accounting for actual on-the-ground impacts was arbitrary and capricious, and amounts to a failure to "make use of reliable existing data and resources" to "ensure the professional integrity, including scientific integrity, of the discussion[] and analys[i]s" in its FEIS, as required by NEPA regulations.[125]

As Commissioner Clements pointed out in her concurrence, the Commission cannot "whistle past the fact that the wider public"—including environmental justice communities—"ultimately pays the price when the Commission allows construction of unneeded new capacity."[126] By failing to take a "hard look" at the feasibility of alternatives that would have adverse effects on fewer individuals, the Commission took a careless approach to its obligation to rigorously evaluate the Project's effects on environmental justice communities and to actually mitigate those effects. Accordingly, the Commission should grant rehearing, vacate the Certificate Order, hold an evidentiary hearing on project need, and rectify its environmental justice analysis in a new NEPA process.

F. The Commission erred in its NEPA and NGA analyses by failing to address the Project's climate change impacts.

The Commission's failure to evaluate the Project's climate change impacts in its FEIS violates NEPA. NEPA requires that all agencies of the Federal government prepare a "detailed statement" prior to engaging in "major Federal actions significantly affecting the quality of the human environment."[127] This statement, known as an EIS, must describe (1) the "environmental

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was told that the owners would not sell their properties to Transco, meaning they could only be acquired by eminent domain.

[125] 40 C.F.R. § 1502.23.

[126] Certificate Order, *supra* n.3 (Clements, Comm'r, *concurring*, at P 7).

[127] 42 U.S.C. § 4332(C).

impact of the proposed action"; (2) any "adverse environmental effects which cannot be avoided"; (3) any "alternatives to the proposed action"; and (4) any "irreversible or irretrievable commitment of resources."[128] In an EIS, discussion of an action's environmental consequences, including any adverse environmental effects of the proposal, "forms the scientific an analytic basis" for the alternatives analysis.[129]

The effects or impacts to be discussed include "changes to the human environment from the proposed action or alternatives that are reasonably foreseeable," including "direct effects, which are caused by the action and occur at the same time or place," "indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable," and "cumulative effects, which are effects on the on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from individually minor but collectively significant actions taking place over a period of time."[130]

Beyond the direct GHG emissions associated with the construction and operation of the Project facilities themselves, the reasonably foreseeable indirect GHG emissions associated with the Project include the upstream and downstream emissions, including those associated with the extraction, processing, refining, and end-use of the natural gas.[131]

The Commission explained that the "EIS is not characterizing the Project's GHG emissions as significant or insignificant because the Commission is conducting a generic proceeding to

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[128] *Id*.
[129] 40 C.F.R. § 1502.16(a).
[130] *Id*. § 1508.1(g).
[131] *See* GHG Guidance, *supra* n.66, at 1204; *see also Sierra Club v. FERC* (*Sabal Trail*), 867 F.3d 1357, 1372 (D.C. Cir. 2017).

determine whether and how the Commission will conduct significance determinations going forward."[132] The Commission also claims that "GHG mitigation is a pending policy decision at the time of this EIS publication and its resolution is beyond the scope of staff's NEPA review in this proceeding."[133] In its Certificate Order, the Commission failed to pick up where FERC staff left off, and similarly abdicated its duty to evaluate the significance of the Project's GHG emissions.[134]

Existing law requires FERC to evaluate the significance of the Project's GHG emissions and methods to avoid those impacts. An EIS must "provide full and fair discussion of significant environmental impacts" and "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."[135] An EIS must also discuss the environmental consequences of a proposed action, including the "environmental impacts of the proposed action and reasonable alternatives to the proposed action and the significance of those impacts."[136]

NEPA was explicitly enacted to account for "the profound impact of man's activity on the interrelations of all components of the natural environment"[137] and to "recognize the worldwide and long-range character of environmental problems."[138] Accordingly, "Federal agencies must disclose and consider the reasonably foreseeable effects of their proposed actions including *the extent to which* a proposed action and its reasonable alternatives (including the no action alternative) would result in reasonably foreseeable GHG emissions that contribute to climate

[132] FEIS, *supra* n.9, at 4-158, 4-210; *see also id*. at I-17, I-179, I-217.
[133] *Id*. at 4-179.
[134] Certificate Order, *supra* n.3, at P 73.
[135] 40 C.F.R. § 1502.1.
[136] *Id*. § 1502.16(a).
[137] 42 U.S.C. § 4331(a).
[138] *Id*. § 4332(F).

change."[139] "[Q]uantifying a proposed action's reasonably foreseeable GHG emissions whenever possible, and placing those emissions in appropriate context are important components of analyzing a proposed action's reasonably foreseeable climate change effects."[140]

While the FEIS provides a "disclosure" of the GHG Project's emissions, it fails to offer reasonable alternatives or mitigation recommendations that would avoid or minimize these adverse impacts. CEQ regulations make clear that the scope of an EIS includes "alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action)."[141] The Commission's failure to engage in an evaluation of the proposed Project's climate change impacts, the climate change impacts of any alternatives (including the no-action alternative), or consideration of means to mitigate those impacts amounts to a catastrophic failure under NEPA, the NGA, and the APA. Accordingly, the Commission must grant rehearing, vacate the Certificate Order, and begin the NEPA process anew with a draft and final EIS that corrects the errors identified herein.

1. The Commission erred in its NEPA and NGA analyses by failing to acknowledge the reasonably foreseeable upstream impacts of the Project, including GHG emissions.

In the FEIS, the Commission concluded that because it could not identify the "specific source of natural gas to be transported by the Project," environmental effects associated with upstream GHG emissions "are likely neither caused by a proposed project nor are they reasonably foreseeable consequences of [FERC's] approval of a project, as contemplated by CEQ regulations."[142] The Commission adopts this conclusion in its Certificate Order, adding that "[a]lthough the project's receipt points are at interconnections with large gathering systems in

[139] GHG Guidance, *supra* n.66, at 1200.
[140] *Id*.
[141] 40 C.F.R. §§ 1501.9(e)(2), 1502.14(e).
[142] FEIS, *supra* n.9, at 4-178.

Northeastern Pennsylvania, the record does not indicate *from whom* the project shippers may source their gas—indeed the project's purpose is to diversify fuel supply access—further, the producers/gas supplies that hold capacity on each of the connected gathering systems could change throughout the project's operation."[143]

To the contrary, CEQ explains that "[i]ndirect effects generally include reasonably foreseeable emissions related to a proposed action that are upstream or downstream of the activity resulting from the proposed action."[144] In the case of a pipeline project conveying natural gas, "[i]ndirect emissions are often reasonably foreseeable since quantifiable connections frequently exist between a proposed activity that involves *use or conveyance* of a commodity or resource, and changes relating to the *production* or consumption of that resource."[145] The CEQ uses natural gas pipelines as an example: "natural gas pipeline infrastructure creates the economic conditions for additional natural gas consumption and production, including both domestically and internationally, which produce indirect (both upstream and downstream) GHG emissions that contribute to climate change."[146]

Despite this, the Commission stated that upstream emissions could not be reasonably foreseeable without first determining "the location of the supply source; whether transported gas would come from new or existing production; and whether there would be any potential associated development activities, and if so, its location."[147] In the Certificate Order, the Commission claims that although the Project will receive gas from specific gathering infrastructure in the Marcellus

[143] Certificate Order, *supra* n.3, at P 68.
[144] GHG Guidance, *supra* n.66 at 1204.
[145] *Id*. (emphasis added).
[146] *Id*. at 1204 n.86.
[147] FEIS, *supra* n.9, at 4-178.

Shale production area of Northeastern Pennsylvania, the specific *identity* of the natural gas producers are unknown.[148] Perhaps recognizing that to claim ignorance of the supply source's location would strain credulity, the Commission now moves the goalpost and claims that the producers and gas suppliers themselves must be identified.

NEPA regulations provide that the term "reasonably foreseeable" means "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision."[149] Neither the identity of, nor the location of, specific gas producers and suppliers affects the likelihood that the gas will be produced, supplied, transported, and ultimately combusted as a result of the Commission's approval of the Project. Especially regarding climate change effects, which the Commission recognizes in its FEIS as "fundamentally global impacts" that occur regardless of a project's location: "a project 1 mile away emitting 1 ton of GHGs would contribute to climate change in a similar manner as a project 2,000 miles distant also emitting 1 ton of GHGs."[150] In light of the nature of these impacts, the Commission fails to explain why the location of gas wells or the identity of producers is necessary to evaluate the GHG emissions caused by upstream gas drilling.

A lack of specific information relevant to reasonably foreseeable impacts does not make those impacts unforeseeable. NEPA does not allow agencies to consider only specific, known, and certain effects. As the Eighth Circuit held, "when the nature of the effect is reasonably foreseeable but its extent is not . . . [an] agency may not simply ignore the effect."[151] Indeed, where an action's

[148] Certificate Order, *supra* n.3, at P 68.
[149] 40 C.F.R. § 1508.1(aa).
[150] FEIS, *supra* n.9, at 4-173.
[151] *Mid-States*, 345 F.3d at 549–50 (agency may not ignore "the construction of additional [coal-fired] power plants" that may result merely because agency does not "know where those plants will be built, and how much coal these new unnamed power plants would use").

effects are not precisely known, the action is *more*—not less—likely to warrant an EIS.[152] "It is well recognized that a lack of certainty concerning prospective environmental impacts cannot relieve an agency of responsibility for considering reasonably foreseeable contingencies."[153]

Even without the existing information about the location of upstream production or the identity of producers, analysis of the Project's upstream impacts is required under NEPA. CEQ's regulations explicitly acknowledge that information gaps may exist when evaluating reasonably foreseeable significant adverse effects such as climate change.[154] In those circumstances, the regulation requires the Commission to obtain the missing information if the information is "essential to a reasoned choice among alternatives" and "the overall costs of obtaining it are not unreasonable."[155] In circumstances where the missing information "cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

> (1) A statement that such information is incomplete or unavailable;
>
> (2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
>
> (3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and
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> (4) The agency's evaluation of such impacts based on theoretical approaches or research methods generally accepted in the scientific community.[156]

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[152] *See Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 154–55 (D.C. Cir. 1985) (Uncertainty is "one of the specific criteria for deciding whether an EIS is necessary.").
[153] *Potomac All. v. U.S. Nuclear Regulatory Comm'n*, 682 F.2d 1030, 1036 (D.C. Cir. 1982) (Bazelon, J., *concurring*).
[154] 40 C.F.R. § 1502.21.
[155] *Id*. § 1502.21(b).
[156] *Id*. § 1502.21(c).

Thus, the Commission should have acknowledged that the particular location and identity of upstream producers has low relevance in terms of estimating GHG emissions, and used "reliable existing data and resources,"[157] as required by CEQ regulations, to discuss and analyze the upstream GHG impacts of the Project.

In this proceeding, EPA specifically found that "FERC can estimate upstream GHG emissions." EPA went on to explain that

> At a minimum, an analysis can be performed by applying average emission rates per unit of natural gas produced from recent years of emissions data in the National Greenhouse Gas Inventory to project throughput, as EPA has demonstrated in recent comment letters responding to relevant EISs. Omitting consideration of upstream GHG emissions results in an underestimation of the proposal's impacts.[158]

Beyond this bare minimum, the Commission is capable of obtaining and analyzing information about upstream impacts associated with natural gas production, including information that would "help predict the number and location of any additional wells that would be drilled as a result of any production demand associated with the project."[159] As DRN explained in our comments, former pipeline project applicant PennEast Pipeline Company, LLC ("PennEast"), was able to respond to a request for "an estimate of the number of wells required to supply the amount of natural gas that could be transported by the PennEast pipeline."[160] In its response, PennEast explained:

> The PennEast pipeline could transport approximately 1.1 million dekatherms per day (MMDth/d) of natural gas. Dekatherms is a unit

[157] *Id*. § 1502.23.
[158] Comments of Envtl. Prot. Agency Region 3, Doc. Accession No. 20220906-5160, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Sept. 6, 2022).
[159] *Food & Water Watch v. FERC*, 28 F.4th 277, 286 (D.C. Cir. 2022) (quoting *Tennessee Gas Pipeline Co., LLC*, 169 FERC ¶ 61230 at P 62 (2019)).
[160] Supplemental Response at 73, Doc. Accession No. 20161128-5255, PennEast Pipeline Company, LLC, FERC Docket No. CP15-558-000 (Nov. 28, 2016).

> of heat, where one (1) dekatherm equals one (1) MMBtu. To estimate the number of natural gas wells that represent this transmission capacity, using readily available information and unit conversions requires two (2) values: 1) the average heat content of a volume of gas and 2) the average volumetric production rate per well.
>
> The average heat content of a volume of gas has been assumed as 1,021 Btu (higher heating value) per standard cubic foot (scf) of natural gas. This value can range anywhere from 900 to over 1,030. Using the assumed value, the estimated volumetric transmission capacity of the PennEast pipeline is approximately 1,077 million scf/day.
>
> The average volumetric production rate per well in the Marcellus Region is published monthly by the U.S. Energy Information Administration (EIA) in the Drilling Productivity Report for key tight oil and shale gas regions. The latest version of this report indicates a "New-well gas production per rig" of 12,130 thousand cubic feet/day. Based on this data value, and assuming that one (1) rig equals one (1) "well" for this analysis (a Marcellus Region drilling rig will usually involve multiple horizontal wells), the PennEast pipeline could transport the production from approximately 89 new wells. This estimate also assumes that the EIA's reported gas production "cubic feet" measurement is in scf of natural gas.
>
> The reality is that production of natural gas wells in the Marcellus Region will decrease over time, as drilling methods and gas recovery technology improve over time. Therefore, estimating an average regional "production per well" value is a moving target. There was no readily available region-wide average rate identified that could be used in this analysis. However, by assuming that the average "production per well" value in the Marcellus Region is about half of the new well rate, the PennEast pipeline could transport the production of approximately 178 wells if the assumed average well production rate is 6,065 thousand cubic feet per day.[161]

Because it is an established fact that Transco's proposed Project would source its gas from "the Marcellus Shale production area in northeastern Pennsylvania,"[162] the Commission could use the

[161] *Id*. at 73–74.
[162] FEIS, *supra* n.9, at 1-2.

same monthly Drilling Productivity Report,[163] readily-available information, unit conversions, and the stated capacity of 829,400 Dth/d to estimate the number of wells in Northeastern Pennsylvania that would supply the Project.

There is sufficient evidence in the record not only to calculate the number of wells and their associated GHG emissions, but also to discuss the non-climate environmental impacts of upstream natural gas drilling in Northeastern Pennsylvania. CEQ regulations specifically require agencies to consider indirect effects such as "growth inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems."[164] The reasonably foreseeable actions include the construction, operation and maintenance of the shale gas wells that will be the source of the gas carried by a project. The analysis of impact for these gas wells, which will be producing gas for the purposes of delivering it through a project in interstate commerce, must include the associated access roads, gathering lines, compressor stations, water pipelines, water consumption and disposal, truck traffic, and other supporting infrastructure which is necessary for the construction, development, and operation of these wells.

The idea that the Commission must consider resource extraction within the scope of its Section 7 proceedings is not radical. The Supreme Court held in 1961 that the term "public convenience and necessity" is broad enough to encompass "all factors bearing on the public interest," including the end use of the gas to be transported.[165] In 1967, the D.C. Circuit emphasized that "market demand is not the only relevant factor" and that *conservation* of natural

[163] U.S. Energy Information Administration, Drilling Productivity Report, http://www.eia.gov/petroleum/drilling/pdf/dpr-full.pdf (last visited Feb. 7, 2023).
[164] 40 C.F.R. § 1508.
[165] *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7–8 (1961) (quoting *Atl. Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)).

gas was relevant to public convenience and necessity.[166] The conservation of natural gas speaks directly to upstream production and requires the Commission to look at how an increase in resource extraction bears on the public interest. Therefore, the Natural Gas Act and NEPA require the Commission to consider upstream and downstream impacts when determining the adverse effects of a natural gas pipeline on the public interest. Accordingly, the Commission should grant rehearing, vacate the Certificate Order and use "existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment" in an EIS, including "theoretical approaches or research methods generally accepted in the scientific community."[167]

2. The Commission erred in its NEPA analysis and ultimate decision under the NGA by failing to determine the significance of the Project's climate change impacts.

Although the FEIS disclosed various calculations—including the Social Cost of Greenhouse Gases ("SC-GHG")—for a portion of the project's direct and indirect GHG emissions, the Commission failed to determine their significance, or use this information in its analysis of alternatives, mitigation measures, or in the ultimate decision to issue the Certificate Order.

The Commission's FEIS first "disclose[d] the Project's GHG emissions in comparison to national and state GHG emission inventories"[168] The Commission concluded that "[c]onstruction emissions from the Project could potentially increase CO_2e emissions based on the national 2020 levels by 0.0083 percent; in subsequent years, the Project operations including downstream emissions could potentially increase emissions nationally by 0.32 percent."[169] In terms of comparison to states' 2019 levels of energy-related CO2 emissions, downstream and/or operating

[166] *Pub. Serv. Comm'n of State of N.Y. v. Fed. Power Comm'n*, 373 F.2d 816, 821 (D.C. Cir. 1967) (citing *Transcon.*, 365 U.S. at 8).
[167] 40 C.F.R. § 1502.21(c).
[168] FEIS, *supra* n.9, at 4-175.
[169] *Id*. at 4-176.

CO_2e emissions could increase Delaware's level by 4%, Maryland's level by 1.8%, New Jersey's level by 11.8%, New York's level by 0.3%, and Pennsylvania's by 1.2%.[170] Construction-related CO_2e emissions could increase Maryland's level by 0.002%, New Jersey's level by 0.01%, and Pennsylvania's by 0.02%.[171] The Commission's Certificate Order reiterates these figures without explaining how or whether they influenced the Commission's decision.[172]

Next, the FEIS compared the Project's operational emissions to state GHG reduction goals, and found that the Project would comprise 5% of Delaware's 2030 goal levels, 2.2% of Maryland's 2030 goal levels, 0.4% and 1.6% of New York's 2030 and 2050 goal levels, a whopping 47.8% of New Jersey's 2050 goal levels, and 1% and 3.9% of Pennsylvania's 2025 and 2050 goal levels.[173] Despite these disturbing figures, the FEIS explains that the Commission "is unable to determine how individual projects will affect international, national, or statewide GHG emissions reduction targets or whether a project's GHG emissions comply with those goals or laws."[174] The Commission's Certificate Order merely refers back to these calculations without explaining how or whether they factored into the Commission's decision.[175]

This comparison of Project emissions to state and federal GHG reduction goals is a prime opportunity for the Commission to not only acknowledge the long-term implications of its decision, but also to recognize its role in natural gas lock-in. In evaluating natural gas lock-in, the Commission must go beyond the bare conclusion in the FEIS that "construction and operation of the Project would increase the atmospheric concentration of GHGs, in combination with past and

[170] *Id*.
[171] *Id*.
[172] Certificate Order, *supra* n.3, at P 71.
[173] FEIS, *supra* n.9, at 4-176.
[174] *Id*. at 4-178.
[175] Certificate Order, *supra* n.3, at P 72.

future emissions from all other sources and would contribute cumulatively to climate change."[176] This statement does not address the impact of lock-in, which does not refer to the persistence of GHG emissions in the atmosphere and their contribution to climate change, but rather refers to decisions made regarding development and infrastructure that inhibit the necessary societal transition away from fossil fuels:

> [T]he deployment of new natural gas infrastructure has already created path dependencies due to technological, institutional, behavioral, narrative, and legal feedback loops that mutually reinforce the use and expansion of natural gas infrastructure. These path dependencies begin with the deployment of capital-intensive infrastructure, such as production wells, gas-fired power plants, and gas pipelines in the United States, that are designed to operate and provide returns over several decades and often stay online longer. This infrastructure has induced the formation of broader technological systems, from gas processing plants to end-use appliances, that have become reliant on and have helped reinforce the use of natural gas.[177]

In other words, the Commission's NEPA analysis must acknowledge the "adverse environmental effects which cannot be avoided"[178] as a result of approving long-lasting fossil fuel infrastructure that creates a feedback loop of increased natural gas reliance at a time when we need to rapidly decrease use of fossil fuels in order to prevent catastrophic changes to the planet. As EPA explained in its comments on the Commission's Draft EIS:

> [The comparison of Project emissions to national, state, and regional science-based GHG reduction goals] highlights the increasing conflict over the anticipated project lifetime between continued project-level emissions and state and national reduction goals that should be considered further in the EIS. EPA recommends that FERC thoroughly discuss the role of the project in the context of national, state, and regional policies to achieve science-based GHG reduction goals, *and evaluate and disclose whether a project that*

[176] FEIS, *supra* n.9, at 4-177.
[177] Powers, Melissa, *Natural Gas Lock-In*, 69 Kan. L. Rev. 889 (2021).
[178] 42 U.S.C. § 4332(C)(ii).

> *increases fossil fuel consumption can be consistent with the energy use changes necessary to achieve these goals.*[179]

Here, the Commission failed to acknowledge the significance of the fact that its approval of the Project locks in ever-increasing fractions of state and federal GHG emissions, and fails in its ultimate decision to explain why, for example, it is "required by the present or future public convenience and necessity"[180] for this Project to operate in 2050, consuming nearly 50% of the State of New Jersey's emission levels merely to "provide more reliable service on peak winter days" and to "provide cost benefits by increasing supply diversity."[181]

In response to comments urging the use of the SC-GHG, the FEIS concluded that "the emissions from operation of this Project is calculated to result in a total social cost of GHG equal to $4 billion, $15 billion, and $23 billion" using discount rates of 5%, 3%, and 2.5%, respectively, and that in the highest-impact scenario, "the total social cost of GHGs from the Project is calculated to be $46 billion," all in 2020 dollars.[182] The Certificate Order makes no mention of these figures at all, and concludes "because we are conducting a generic proceeding to determine whether and how [the] Commission will conduct significance determinations for GHG emissions going forward, the Commission is not herein characterizing these emissions as significant or insignificant."[183]

The SC-GHG calculations provide practical information about how the Project will affect the human environment, and should have been used by the Commission to evaluate alternatives, mitigation measures, and its ultimate decision to approve or deny the Project. The SC-GHG is a

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[179] Comments of U.S. Envtl. Prot. Agency Region 3 on the Draft Envtl. Impact Statement, Doc. Accession No. 20220425-5217, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (Apr. 25, 2022) (emphasis added).
[180] 15 U.S.C. § 717f(e).
[181] Certificate Order, *supra* n.3, at P 34.
[182] FEIS, *supra* n.9, at 4-180.
[183] Certificate Order, *supra* n.3, at P 73.

tool that would allow FERC to measure, in monetary terms, the climate change impacts from a project's incremental addition of greenhouse gas emissions to the atmosphere. It is a "scientifically-derived metric" to translate tonnage of greenhouse gas to the cost of long-term climate harm, and remains generally accepted in the scientific community.[184] It is "the monetary value of the net harm to society associated with adding a small amount of [a] GHG to the atmosphere in a given year."[185] The value includes "all climate change impacts, including (but not limited to) changes in net agricultural productivity, human health effects, property damage from increased flood risk, natural disasters, disruption of energy systems, risk of conflict, environmental migration, and the value of ecosystem services."[186]

NEPA regulations provide that

> (c) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:
>
> > (1) A statement that such information is incomplete or unavailable;
> >
> > (2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;
> >
> > (3) A summary of existing credible scientific evidence that is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

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[184] *See* PennEast Pipeline Company, LLC, 164 FERC ¶ 61,098 (2018) (LaFluer, Comm'r, *concurring and dissenting*, at 5).
[185] Interagency Working Group of Social Cost of Greenhouse Gases, Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990 at 2 (Feb. 2021), available at https://www.whitehouse.gov/wp-content/uploads/2021/02/TechnicalSupportDocument_SocialCostofCarbonMethaneNitrousOxide.pdf.
[186] *Id*.

> (4) The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.[187]

The SC-GHG tool is generally accepted in the scientific community, and FERC should evaluate the Project's impacts using the SC-GHG. As the U.S. Court of Appeals for the D.C. Circuit has explained recently in addressing FERC's failure to respond to commenter's arguments concerning the SC-GHG:

> [I]f the protocol is a generally accepted method for estimating the impact of greenhouse gas emissions–as the Commission has previously declined to dispute–and if Petitioners' reading of 40 C.F.R. § 1502.21(c) is correct, then the Commission may have been obligated to use the social cost of carbon protocol in its EIS, notwithstanding its concert that no consensus exists as to an appropriate discount rate, that the tool provides a dollar estimate but does not measure the actual incremental impacts of a project on the environment, and that there are no established criteria for evaluating whether a given monetary cost is "significant."[188]

By using the SC-GHG as an economic yardstick, FERC's past concerns about not being able to tie the Project's emissions to a particular on-the-ground environmental impact would be alleviated—NEPA regulations explicitly require FERC to not only measure ecological, but also "economic" and "social" effects of a proposed action, especially when "economic or social and natural or physical environmental effects are interrelated."[189] Cost monetization, which the SC-GHG provides, is appropriate and required where available "alternative mode[s] of [NEPA] evaluation [are] insufficiently detailed to aid the decision-makers in deciding whether to proceed, or to provide the information the public needs to evaluate the project effectively."[190]

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[187] 40 C.F.R. § 1502.21.
[188] *Vecinos*, 6 F.4th at 1329 (citations omitted).
[189] 40 C.F.R. §§ 1502.16(b), 1508.1(g)(1).
[190] *Columbia Basin Land Prot. Ass'n v. Schlesinger*, 643 F.2d 585, 594 (9th Cir. 1981).

"The SC-GHG provides an appropriate and valuable metric that gives decision makers and the public useful information and context about a proposed action's climate effects *even if no other costs or benefits are monetized*, because metric tons of GHGs can be difficult to understand and assess the significance of in the abstract."[191] Here, however, the Commission *did* cite perceived monetary benefits of the project—namely, that it would "provide cost benefits by increasing supply diversity."[192] The Commission should have evaluated these cost benefits, as well as any other purported benefits, in light of the SC-GHG figures that reflect the adverse social costs associated with the Project's GHG emissions.

A failure to evaluate the significance of the Project's greenhouse gas emissions is arbitrary and capricious, as it amounts to a "fail[ure] to consider an important aspect of the problem,"[193] and directly contradicts NEPA. Climate change is a constant and pervasive factor in every environmental equation, and where NEPA commands "a detailed statement" of a project's "environmental impact," a failure to consider that project's impact on climate change is a violation of the law.[194] If it is truly impossible for the Commission to forecast the climate change impacts of the Project, then it must deny Transco's application, as any decision to authorize the Project would lack a "rational connection between the facts found and the conclusions made."[195]

The purpose of an EIS is to "provide a full and fair discussion of significant environmental impacts" and to "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."[196] In the FEIS

[191] GHG Guidance, *supra* n.66, at 1202.
[192] Certificate Order, *supra* n.3, at P 34.
[193] *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).
[194] *See* 42 U.S.C. § 4332(C).
[195] *State Farm*, 463 U.S. at 43.
[196] 40 C.F.R. § 1502.1.

and Certificate Order, the Commission simply describes what climate change is, acknowledges that the Project will contribute to climate change in some way, and recites multiple calculations that apparently have no bearing on the Commission's ultimate decision to approve the Project. The trajectory of climate change was not evaluated in the baseline no-action alternative,[197] and differing climate impacts or potential GHG emission mitigation were not discussed in any other action alternative, aside from a brief acknowledgement that electric compressor stations likely better facilitate the reduction of GHG emissions nationwide.[198]

The Commission must engage in a substantive evaluation of the Project's contribution to climate change. As former Commissioner Glick recognized, FERC "treat[s] greenhouse gas emissions and climate change differently than all other environmental impacts."[199] "Claiming that a project has no significant environmental impacts while at the same time refusing to assess the significance of the project's impact on the most important environmental issue of our time is not reasoned decisionmaking."[200] The Commission, after being instructed by the D.C. Circuit that it must consider the significance of GHG emissions in *Sabal Trail*,[201] simply continues this differential treatment of climate change impacts under a different guise. Rather than explicitly stating that the proposed Project has no significant climate impacts, the Commission throws its metaphorical hands in the air and then concludes that the Project is "environmentally acceptable."[202] This rationale results in the continuation of the Commission's unlawful practice of ignoring its role in exacerbating climate change.

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[197] *See* FEIS, *supra* n.9, at 3-3.
[198] *Id*. at 3-32.
[199] *Adelphia Gateway, LLC*, 169 FERC ¶ 61,220 (2020) (Glick, Comm'r, *dissenting in part*, at P 2).
[200] *Id.*
[201] 867 F.3d 1357, 1374 (D.C. Cir. 2017).
[202] Certificate Order, *supra* n.3, at P 81.

The Commission's presentation of various calculations, including the SC-GHG, has little to no function in the NEPA analysis if it is not used to make a significance determination and inform the Commission's comparison of alternatives, including the no-action alternative, and consideration of mitigation. CEQ regulations make clear that the scope of an EIS includes "alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action)."[203] So-called "disclosure" of GHG emissions and SC-GHG calculations, by itself, is insufficient because it "places the burden of analyzing the data on the public" without explaining how that data factors into FERC's decisionmaking process.[204] An evaluation of the significance of the Project's climate change impacts is necessary to inform FERC's decisionmaking when determining whether the Project is required by the public convenience and necessity.[205] Accordingly, the Commission should grant rehearing, vacate the Certificate Order, and evaluate the significance of the Project's GHG emissions in an EIS.

3. The Commission erred by failing to consider measures to mitigate the climate change impacts of the Project.

NEPA requires agencies to include in an EIS "a detailed discussion of possible mitigation measures."[206] "[O]mission of a reasonably complete discussion of possible mitigation measures would undermine the 'action-forcing' function of NEPA" and prevents the Commission and the public from "properly evaluat[ing] the severity of the adverse effects."[207] The environmental consequences section of an EIS must include "[e]nergy requirements and conservation potential of various alternatives and mitigation measures," "[n]atural or depletable resource requirements

[203] 40 C.F.R. §§ 1501.9(e)(2), 1502.14(e).
[204] *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 69 (D.D.C. 2019) (quoting *WildEarth Guardians v. Jewell*, 738 F.3d 298, 303 (D.C. Cir. 2013)).
[205] *See* 15 U.S.C. § 717f(e).
[206] *Robertson v. Methow Valley Citizens Coun.*, 490 U.S. 332, 351–52 (1989) (citing 42 U.S.C. § 4332(C)(ii)).
[207] *Id*. at 352.

and conservation potential of various alternatives and mitigation measures," and "[m]eans to mitigate adverse environmental impacts . . . ."[208] Mitigation is defined by CEQ as:

> Measures that avoid, minimize, or compensate for effects caused by a proposed action or alternatives as described in an environmental document or record of decision and that have a nexus to those effects. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:
>
> (1) Avoiding the impact altogether by not taking a certain action or parts of an action.
>
> (2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.
>
> (3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.
>
> (4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.
>
> (5) Compensating for the impact by replacing or providing substitute resources or environments.[209]

FERC staff concludes in the FEIS that "[w]ith implementation of Transco's impact avoidance, minimization, and mitigation measures, as well as their adherence to our recommendations, we conclude that Project effects would be reduced to less-than-significant levels, except for climate change impacts that are not characterized in this EIS as significant or insignificant."[210] In the Certificate Order, the Commission abstains from "characterizing [the Project's GHG] emissions as significant or insignificant," and accordingly accepts that "Transco has *not indicated any mitigation* for GHG emissions."[211]

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[208] 40 C.F.R. §§ 1502.16(a)(6), (7), (9).
[209] *Id*. § 1508.1(s).
[210] FEIS, *supra* n.9, at 5-1.
[211] Certificate Order, *supra* n.3, at PP 73, 74 (emphasis added).

In its recently-published Guidance, CEQ "encourages agencies to mitigate GHG emissions associated with their proposed actions to the greatest extent possible, consistent with national, science-based GHG reduction policies established to avoid the worst impacts of climate change."[212] The Commission has the authority to mitigate the environmental effects of a Section 7 certificate by either approving only a portion of the requested project, or by imposing terms and conditions required by the public convenience and necessity.[213] Thus consideration of potential GHG emissions mitigation is essential to a "reasoned choice among alternatives."[214] A failure to consider mitigation violates NEPA, the NGA, and the APA. The Commission should remedy this error by granting rehearing, vacating the Certificate Order, and preparing an EIS that incorporates an evaluation of GHG emissions mitigation.

4. The Commission erred by failing to prepare a supplemental environmental impact statement after the Council on Environmental Quality's Guidance on Consideration of Greenhouse Gas Emissions and Climate Change was published.

On January 9, 2023, two days before the Commission issued its Certificate Order, CEQ published an immediately-applicable interim guidance document titled "National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions and Climate Change."[215] The purpose of the GHG Guidance is to "assist Federal agencies in their consideration of the effects of [GHG] emissions and climate change when evaluating proposed major Federal actions" and to "facilitate compliance with existing NEPA requirements."[216] The guidance "applies longstanding NEPA principles to the analysis of climate change effects, which are a well-recognized category of effects on the human environment *requiring* consideration under NEPA."[217]

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[212] GHG Guidance, *supra* n.66, at 1197.
[213] *See* 15 U.S.C. § 717f(e). *See also* Sections D & F.3, *supra*.
[214] 40 C.F.R. § 1502.21(b).
[215] GHG Guidance, *supra* n.66, at 1196.
[216] *Id*. at 1197.
[217] *Id*. at 1198 (emphasis added).

The GHG Guidance instructs agencies to :

> (1) Quantify the reasonably foreseeable GHG emissions (including direct and indirect emissions) of a proposed action, the no action alternative, and any reasonable alternatives . . . .
> (2) Disclose and provide context for the GHG emissions and climate impacts associated with a proposed action and alternatives, including by, as relevant, monetizing climate damages using estimates of the SC-GHG, placing emissions in the context of relevant climate action goals and commitments, and providing common equivalents . . . .
> (3) Analyze reasonable alternatives, including those that would reduce GHG emissions relative to baseline conditions, and identify available mitigation measures to avoid, minimize, or compensate for climate effects.[218]

Although CEQ stated that it "does not expect agencies to apply this guidance to concluded NEPA reviews and actions for which a final EIS or EA has been issued," in this circumstance, where the existing FEIS is materially deficient, arbitrary, capricious, and violates NEPA, the Commission was required to prepare a supplemental EIS incorporating climate change impacts as provided in the GHG Guidance prior to issuing the Certificate Order. Instead, the Certificate Order appeared on the docket two days after publication of the GHG Guidance, around 11:00 p,m. Eastern Standard Time. The Commission has the opportunity to rectify this error on rehearing.

CEQ's regulations provide that agencies "[s]hall prepare supplements to . . . final environmental impact statements if a major Federal action remains to occur, and . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."[219] An agency may also "prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so."[220] Although an agency "need not supplement an EIS every time new information comes to light after the EIS is finalized,"

[218] *Id*. at 1200–01.
[219] 40 C.F.R. § 1502.9(d)(1)(ii).
[220] *Id*. § 1502.9(d)(2).

the "rule of reason" provides that where major Federal action has yet to occur, and "the new information is sufficient to show that the remaining action will 'affect the quality of the human environment' in a significant manner or to a significant extent *not already considered*, a supplemental EIS must be prepared."[221]

As of the date that the GHG Guidance was published, the Commission's action had yet to occur, and in the existing FEIS, the Commission had balked at evaluating the Project's impacts on climate change due to ongoing internal agency deliberation about how to do so.[222] The GHG Guidance qualifies as "significant new circumstances or information" because it speaks directly to the issue of how to evaluate a project's climate change impacts, even specifically mentioning natural gas pipeline projects.[223] This is not a circumstance where the agency completed an evaluation of an action's climate change impacts and the GHG Guidance merely provided additional or differing methods of doing so—instead, the Commission refused to analyze the Project's effects on climate change because it did not have its own guiding policy. Thus, publication of the GHG Guidance constituted significant new information that would allow the Commission to consider significant environmental effects of the proposed Project to an extent not already considered.[224]

NEPA regulations also provide that where an agency lacks "information relevant to reasonably foreseeable significant adverse impacts" and that information is "essential to a reasoned

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[221] *Marsh v. Or. Nat. Res. Coun.*, 490 U.S. 360, 373–74 (1989) (emphasis added) (quoting 42 U.S.C. § 4332(2)(C)).
[222] *See* FEIS, *supra* n.9, at 4-175 ("Ultimately, this EIS is not characterizing the Project's GHG emissions as significant or insignificant because the Commission is conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.").
[223] *See* GHG Guidance at 1204 n.86, 1205.
[224] *Cf. Marsh*, 490 U.S. at 374.

choice among alternatives," when "the overall costs of obtaining that information are not unreasonable, the agency shall include the information in the environmental impact statement."[225] An analysis of the proposed Project's climate change effects is essential to a reasoned choice among alternatives, as it is a multi-decade fossil fuel infrastructure project being proposed amid a climate catastrophe in which nearly all branches and levels of government recognize that our society needs to rapidly decrease our use of fossil fuels. The Commission already has data in its possession about the proposed Project's climate impacts, and the GHG Guidance provides additional information about how to use that data.

If the Commission decides to deny rehearing on this issue, then, in the context of reviewing that decision, a court will not "automatically defer to the agency's express reliance on an interest in finality without carefully reviewing the record and satisfying [itself] that the agency has made a reasoned decision based on its evaluation of the significance—or lack of significance—of the new information."[226] Here, where the Commission has declined to evaluate the significance of the Project's climate change impacts *at all*, it is clear that a decision not to supplement the EIS would not pass muster before a reviewing court. For this reason, the Commission should grant rehearing, vacate the Certificate Order, and prepare a new EIS that incorporates the CEQ's GHG Guidance.

5. The Commission erred in its NEPA and NGA analyses by deferring its obligation to comply with those statutes pending the finalization of a generally applicable policy statement.

The Commission explained that its FEIS "is not characterizing the Project's GHG emissions as significant or insignificant because the Commission is conducting a generic proceeding to determine whether and how the Commission will conduct significance

[225] 40 C.F.R. § 1502.21(b).
[226] *Marsh*, 490 U.S. at 378.

determinations going forward."[227] The Commission also claims that "GHG mitigation is a pending policy decision at the time of this EIS publication and its resolution is beyond the scope of staff's NEPA review in this proceeding."[228] In the Certificate Order, after FERC staff punted the question of significance, the Commission fumbles: "because we are conducting a generic proceeding to determine whether and how [the] Commission will conduct significance determinations for GHG emissions going forward, the Commission is not herein characterizing these emissions as significant or insignificant."[229]

Existing law requires FERC to evaluate the significance of the Project's GHG emissions and methods to avoid those impacts. An EIS must "provide full and fair discussion of significant environmental impacts" and "inform decision makers and the public of reasonable alternatives that would avoid or minimize adverse impacts or enhance the quality of the human environment."[230] An EIS must also discuss the environmental consequences of a proposed action, including the "environmental impacts of the proposed action and reasonable alternatives to the proposed action *and the significance of those impacts*."[231]

While the FEIS provides a "disclosure" of the GHG Project's emissions, it fails to offer reasonable alternatives or mitigation recommendations that would avoid or minimize these adverse impacts. CEQ regulations make clear that the scope of an EIS includes "alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action)."[232] Without engaging in these questions, not only did the Commission violate

[227] FEIS, *supra* n.9, at 4-158, 4-210; *see also id*. at I-17, I-179, I-217.
[228] *Id*. at 4-179.
[229] Certificate Order, *supra* n.3, at P 73.
[230] 40 C.F.R. § 1502.1.
[231] *Id*. § 1502.16(a)(1).
[232] *Id*. §§ 1501.9(e)(2), 1502.14(e).

NEPA, it also failed to provide a reasoned basis for its decision that the Project "is or will be required by the public convenience and necessity."[233]

FERC itself has recognized the nexus between its decisions to authorize natural gas infrastructure and the exacerbation of climate change. In its Draft Greenhouse Gas Policy, FERC explained that

> Climate change poses a severe threat to the nation's security, economy, environment, and to the health of individual citizens. Human-made greenhouse gas (GHG) emissions, including carbon dioxide and methane, are the primary cause of climate change. GHG emissions are released in large quantities through the production, transportation, and consumption of natural gas. Accordingly, *to fulfill its statutory responsibilities*, it is critical that the Commission consider and document how its authorization of infrastructure projects under the NGA, particularly natural gas transportation facilities, will affect emissions of GHGs.[234]

FERC has also separately concluded that it is able to "assess the significance of a project's GHG emissions and those emissions' contribution to climate change."[235] FERC has explained that "[d]etermining the significance of the impacts from a proposed project's GHG emissions informs the Commission's review in a number of important respects, including its decision whether to prepare an environmental impact statement."[236] Thus, preparation of an EIS does not negate the Commission's error in failing to evaluate the significance of the Project's climate change impacts. "In evaluating whether an impact is significant, the Commission determines whether 'it would result in a substantial adverse change in the physical environment.'"[237] This determination is

[233] 15 U.S.C. § 717f(e). *See also* Section E.6, *infra*.
[234] Interim Policy Statement, Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, 178 FERC ¶ 61,108 P 2 (2022) (emphasis added).
[235] *Northern Natural Gas Company*, 174 FERC ¶ 61,189 P 29 (2021).
[236] *Id*. P 30.
[237] *Id*. P 32 (quoting *Magnum Gas Storage, LLC*, 134 FERC ¶ 61,197, at P 114 (2011)).

crucial to the Commission's decisionmaking process, which, even under the current Certificate Policy, includes the consideration of a Project's adverse environmental effects.[238]

Ultimately, there is no credible argument for awaiting the finalization of a non-binding policy statement when the Project applicant and all other participants in this docket have a full and fair opportunity to provide input on the significance of the Project's contribution to climate change. The Commission has a statutory duty to consider the significance of the Project's climate change effects, it has previously recognized that it has the ability to do so, and it should take this opportunity on rehearing to rectify its error by granting DRN's request for rehearing, vacating the Certificate Order, and preparing a new EIS.

6. The Commission's failure to adequately consider the Project's climate change impacts renders its finding of public convenience and necessity arbitrary, capricious, and contrary to the NGA.

The NGA was enacted because the "business of transporting and selling natural gas for ultimate distribution to the public is affected with the public interest,"[239] and a decision that a proposed project is required by the present or future public convenience and necessity involves consideration of "all factors bearing on the public interest."[240]

> Congress enacted the [NGA] with the principal aim of "encouraging the orderly development of plentiful supplies of . . . natural gas at reasonable prices," and "protecting consumers against exploitation at the hands of natural gas companies." Along with those main objectives, there are also several "subsidiary purposes" behind the NGA's passage, "including 'conservation, environmental, and antitrust' issues."[241]

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[238] Certificate Policy, *supra* n.18, at 24, 27. *See also Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101 (D.C. Cir. 2014) (describing environmental issues as within the Commission's public interest analysis).
[239] 15 U.S.C. § 717.
[240] *Atl. Refining Co.*, 360 U.S. at 391.
[241] *Minisink*, 762 F.3d at 101 (cleaned up) (first quoting *NAACP v. Fed. Power Comm'n*, 425 U.S. 662, 669–70 (1976), then quoting *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591,

According to its current Certificate Policy, the Commission "will approve an application for a certificate only if the public benefits from the project outweigh any adverse effects."[242] "The amount of evidence necessary to establish the need for a proposed project will depend on the potential adverse effects of the proposed project on the relevant interests."[243] Thus, as recognized by former Commissioner LaFleur, "[i]n cases where adverse effects are present . . . the amount of evidence necessary to establish need increases."[244] The Commission has the authority under the NGA to deny an application for a Section 7 certificate "on the ground that the pipeline would be too harmful to the environment."[245] It also has the authority to condition a certificate to mitigate a project's adverse impacts.[246]

Here, the Commission's deficient NEPA analysis, particularly its failure to grapple with the Project's climate change impacts, foreclosed a complete analysis of the Project's adverse effects. Consequently, the Commission failed to "examine[] the relevant considerations and articulate[] a satisfactory explanation for its action, including a rational connection between the facts found and the choice made."[247] In its Certificate Order, the Commission found "that the project, if implemented as described in the final EIS, is an environmentally acceptable action"[248]

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610 (1944), and then quoting *Pub. Utils. Comm'n of Cal. v. FERC*, 900 F.2d 269, 281 (D.C. Cir. 1990)).

[242] Certificate Policy, *supra* n.18, at 28.

[243] *Id*. at 25.

[244] *Spire STL Pipeline LLC*, 164 FERC ¶ 61,085 (2018) (LaFleur, Comm'r, *dissenting* at p. 4) (citing Certificate Policy, *supra* n.18, at 25).

[245] *Sabal Trail*, 867 F.3d at 1373.

[246] Certificate Policy, *supra* n.18, at 26 ("The objective is for the applicant to develop whatever record is necessary, *and for the Commission to impose whatever conditions are necessary*, for the Commission to be able to find that the benefits to the public from the project outweigh the adverse impact on the relevant interests." (emphasis added)).

[247] *Allegheny Def. Project*., 932 F.3d at 945 (quoting *Electric Power Supply Ass'n*, 136 S. Ct. at 782).

[248] Certificate Order, *supra* n.3, at P 81.

despite its refusal to "characterize [the Project's GHG emissions] as significant or insignificant,"[249] to consider the climate effects of the baseline no-action alternative or any partial or full non-gas alternatives, or to consider the potential means of mitigating those impacts.[250] This failure to engage in relevant issues meant that the Commission's decision effectively assumed *no* climate change effect, a conclusion that is amply contradicted by evidence in the record.

In finding that the public benefits of the Project would include "more reliable service on peak winter days" and the provision of "cost benefits by increasing supply diversity,"[251] the Commission has considered the public benefits associated with downstream combustion of the gas and the upstream extraction of the gas while refusing to consider the adverse effects accompanying those benefits, as required under the NGA, the Commission's Certificate Policy, and the APA. The Commission's explicit decision to not engage in an evaluation of climate change impacts "entirely failed to consider an important aspect of the problem," and its conclusion that the Project is an environmentally acceptable action "runs counter to the evidence before the agency."[252] The Commission failed to engage in reasoned decisionmaking by treating climate impacts as a big question mark, and then reaching its decision *as if those impacts would not occur*.[253] The Commission should grant rehearing, vacate the Certificate Order, and assess the Project's climate change impacts in a new EIS, subsequently using that information to decide whether the Project is required by the present or future public convenience and necessity.

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[249] *Id*. at P 73.
[250] *Id*. at P 74.
[251] *Id*. at P 34.
[252] *State Farm*, 463 U.S. at 43.
[253] *Michigan v. EPA*, 576 U.S. 743, 750 (2015) ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." (quoting *Allentown Mack Sales & Serv. Inc. v. NLRB*, 522 U.S. 359, 374 (1998))).

G. The Commission erred by relying on future state agency determinations to conclude that impacts to water resources were not significant.

In reaching its conclusion that impacts to water resources were not significant, temporary, minor, and ultimately "environmentally acceptable," the Commission relied on an assumption that these impacts would be sufficiently reduced by future state agency action.[254] It is one thing for the Commission to review the protections provided by a state permit and conclude that those protections are adequate, it is another thing entirely for the Commission to rely on a *hypothetical* protection that the state permit *may* provide in order to support its analysis of water quality impacts.

NEPA regulations allow a Federal agency to adopt NEPA analyses of other Federal agencies, or portions thereof, "provided that the statement, assessment, portion thereof, or determination meets the standards for an adequate statement, assessment, or determination under the regulations in this subchapter."[255] Federal agencies may also rely on state agency analyses where those analyses are not "simply rubber stamp[ed]," but "reviewed and adopted" as the Federal agency's own analysis.[256] The Commission's conclusions, in both its FEIS and in its Certificate Order "'must be upheld, if at all, on the basis articulated by the agency itself' at the time of decision, not *post hoc* rationalizations."[257] "An agency cannot simply leave mitigation

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[254] *See* FEIS, *supra* n.9, at 5-4 ("[C]onstruction and operation fo the Proejct would not result in significant impacts on groundwater resources, and potential impacts would be further avoided or minimized by . . . complying with other regulatory permit conditions that are protective of water resources."); *id*. ("[P]ipeline construction activities affecting surface waters would be conducted in accordance with . . . any conditions that are part of other federal or state water approvals. We conclude that with these measures, along with our additional recommended mitigation measures, impacts on surface waters would largely be temporary and minor."); *id*. at 5-5 ("While long-term and permanent effects on wetlands would occur, adherence to Transco's Procedures, conditions of state and federal permits, and a Project-specific mitigation plan would reduce effects.").
[255] 40 C.F.R. § 1506.3(a).
[256] *Citizens Envtl. Coun. v. Volpe*, 484 F.2d 870, 873 (10th Cir. 1973) (quoting *Finish Allatoona's Interstate Right, Inc. v. Volpa*, 355 F. Supp. 933 (N.D. Ga. 1973)).
[257] *Anacostia Watershed Soc. v. Babbitt*, 871 F. Supp. 475, 486 (D.D.C. 1994) (quoting *State Farm*, 463 U.S. at 50).

measures as 'TBD,' relying on 'anticipated-but-unidentified' measures without further analysis."[258]

In *State of Idaho by and through Idaho Public Utilities Commission v. Interstate Commerce Commission*, the D.C. Circuit reviewed the Interstate Commerce Commission's (ICC's) decision to authorize the salvage of rail materials by Union Pacific based in part on its conclusion that the salvage would not significantly affect the quality of the human environment.[259] This conclusion was, in turn, based on conditions of the ICC's approval that required Union Pacific to "consult with various federal and state agencies about the specific environmental impacts that fall within their jurisdictions."[260] Although the ICC's error was on a larger scale because it completely failed to prepare an EIS, the Commission is using the same logic here in declining to take a "hard look" on the Project's impacts to water resources based on the assumption that other agencies' water quality programs will adequately mitigate any impacts and, thus, the Project will result in no significant impact to groundwater, surface water, and wetlands. [261]

Regarding stormwater impacts at construction sites, the Commission's FEIS merely states that "Transco is required to prepare and follow a [Stormwater Pollution Prevention Plan (SWPPP)] for construction at certain Project facilities in New Jersey," and that the Project will require a Chapter 102 Erosion and Sediment Control Plan in Pennsylvania.[262] Complete versions of these documents and approvals did not exist at the time of the FEIS, and did not appear in the record as of the date of the Commission's decision to issue the Certificate.

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[258] *Oglala Sioux Tribe v. U.S. Nuclear Reg. Comm'n*, 45 F.4th 291, 305 (D.C. Cir. 2022) (quoting *Am. Rivers v. FERC*, 895 F.3d 32, 54 (D.C. Cir. 2018)).
[259] 35 F.3d 585, 595 (D.C. Cir. 1994).
[260] *Id*.
[261] FEIS, *supra* n.9, at 4-24, 4-34, & 4-40.
[262] *Id*. at 4-23 to 4-24.

The FEIS also explains that to protect aquatic resources in Pennsylvania, "Transco would comply with any monitoring requirements incorporated in its CWA section 401 permits, *if required by the permitting agency*."[263] Of course, the existence of monitoring is pure speculation at this point, as Transco has not received its Chapter 102 or Chapter 105 permits. The adequacy of Transco's wetland mitigation plan also remained pending at the time of the FEIS and Certificate Order, and the Commission relies on the provision of a final wetland mitigation plan "prior to the start of construction."[264] Prior to its decision to issue the Certificate Order, the Commission was also on notice that the proposed wetland mitigation plan had serious flaws, as DRN its partners submitted to the Commission their comments to PADEP on Transco's pending Chapter 102 and 105 permit applications.[265]

The Commission also erred in its FEIS by relying entirely on wetland delineation submitted by Transco, without corroborating field-truthing from FERC, the Corps, or other state or federal agencies to verify that information.[266] The FEIS also makes no mention of anti-degradation requirements to ensure the integrity of special protection waters, including high quality and exceptional value waters, instead totally relying on any conditions or requirements that may hypothetically be imposed by state and federal permits. In fact, DRN and its partners have noted that Transco has not met its burden to demonstrate compliance with Pennsylvania's anti-degradation regulations.[267]

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[263] *Id*. at 4-27, 4-30 (emphasis added).
[264] *Id*. at 4-39.
[265] *See* Comments on Transco Regional Energy Access Expansion Project's Revised Applications for Permits for Water Obstructions and Encroachments and for Erosion and Sediment Control at 6–9, Doc. Accession No. 20221013-5084, Transcontinental Gas Pipe Line Co. Inc., FERC Docket No. CP21-94-000 (Oct. 13, 2022) (hereinafter, "Comments on PADEP Permits").
[266] *See* FEIS, *supra* n.9, at 4-35
[267] *See* Comments on PADEP Permits, *supra* n.265, at 23–25.

The FEIS also characterizes many long-term impacts as "temporary," such as the removal of tree shade and cover from surface waters.[268] Other wetland impacts are also characterized as temporary, despite that DRN and others have highlighted that PADEP's permitting process fails to adequately define that term or to enforce any meaning that may be ascribed to it.[269] Commenters have also identified several issues with Transco's proposed stream crossings for the Effort Loop, which, by prematurely issuing the Certificate Order, the Commission assumes will be resolved at some later date.[270] Given the many issues highlighted by DRN and other commenters, there is no basis in the record for the Commission to conclude that these substantial issues relating to water resource impacts will be resolved and will result in an "environmentally acceptable" project.

The Commission has a duty to independently evaluate the protections—or lack thereof—provided by agencies and other parties to ensure that the information-forcing aspect of NEPA is fulfilled and that the Commission can rely on the FEIS's conclusions when reaching its decision under Section 7 of the NGA. This *post-hoc* rationalization for concluding that water resource impacts would be "environmentally acceptable" is not permitted under NEPA. Based on this error, the Commission should grant rehearing, vacate the Certificate Order, and prepare a new EIS incorporating and evaluating the analyses of the relevant state agencies once those analyses are finalized.

H. The Commission erred by relying on ongoing easement negotiations to absolve it of its duty to evaluate environmental impacts associated with those easements.

In the FEIS, the Commission acknowledged comments received from DRN concerning impacts to preserved open space. In those comments, DRN and its partners highlighted the fact that the record lacked any substantive discussion of ongoing coordination with the Pennsylvania

[268] *See* FEIS, *supra* n.9, at 4-34, 4-43
[269] *See* Comments on PADEP Permits, *supra* n.265, at 7.
[270] *See id*. at 11–22.

Department of Conservation and Natural Resources, the National Park Service, and private conservation land trusts, which would contain details of specific mitigation requirements.[271] The Commission, rather than evaluating the environmental impact of these easements, noted that Transco would post signage during construction and claimed that "FERC staff do not have a role in the easement negotiation process."[272]

Again, by leaving it up to other agencies and third parties to evaluate the environmental impacts of the Project's incursion on open spaces and easements, the Commission violated NEPA by failing to take a "hard look" at those impacts and assuming that they would be resolved by other parties.[273] This amounts to a *post-hoc* rationalization for the Commission's action in approving the Project.[274] The Commission should grant rehearing, vacate the Certificate Order, and ensure that substantive information relating to environmental mitigation on the affected properties is included in its EIS, whether provided by Transco, or as suggested by DRN and partners in their comments on the Draft EIS.

I. The Commission erred by failing to provide updated information on the Project's direct and indirect air emissions.

In comments submitted regarding the Draft EIS, DRN and its partners highlighted the use of AERMOD Version 19191 to conduct air quality dispersion modeling, when AERMOD Version 21112, which fixed problems with the prior version, was available.[275] The Commission responded that on the date Transco submitted its air modeling, March 26, 2021, Version 19191 was the most

[271] Comments of DRN, PennFuture, and Clean Air Council regarding the DEIS at 18–21, Doc. Accession No. 20220425-5423, Transcontinental Gas Pipe Line Company, LLC, FERC Docket No. CP21-94-000 (April 25, 2022).
[272] FEIS, *supra* n.9, at 4-102.
[273] *See Idaho Pub. Utilities Comm'n*, 35 F.3d at 595.
[274] *See Anacostia Watershed Soc.*, 871 F. Supp. at 486 (quoting *State*, 463 U.S. at 50).
[275] Comments of DRN, PennFuture, and Clean Air Council, *supra* n.271, at 46.

recent version available.[276] The Commission's decision to rely on outdated data when it could have requested that Transco redo its air modeling using the newer version was arbitrary and capricious and in violation of NEPA, which requires agencies to "make use of reliable existing data and resources" and to "ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents."[277]

In addition, on November 7, 2022, as forecast in our comments on the Draft EIS, the Philadelphia Metropolitan and Baltimore Metropolitan Air Quality Control Regions were designated Moderate Nonattainment status by operation of law for the 2015 8-Hour Ozone NAAQS,[278] and the New York-N. New Jersey-Long Island, NY-NJ-CT Air Quality Control Region was designated Severe Nonattainment status by operation of law for the 2008 8-Hour Ozone NAAQS.[279] Although the redesignations occurred after publication of the FEIS, an updated air quality analysis using the latest version of AERMOD should include these new statuses and an analysis of how the Project's direct and indirect emissions will contribute to the relevant areas' nonattainment. On rehearing, the Commission should include these updates in its new EIS.

[276] FEIS, *supra* n.9, I-104.
[277] 40 C.F.R. § 1502.23.
[278] *See* Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Marginal for the 2015 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,897 (Oct. 7, 2022) (to be codified at 40 C.F.R. Parts 52 and 81).
[279] *See* Determinations of Attainment by the Attainment Date, Extensions of the Attainment Date, and Reclassification of Areas Classified as Serious for the 2008 Ozone National Ambient Air Quality Standards, 87 Fed. Reg. 60,926 (Oct. 7, 2022) (to be codified at 40 C.F.R. Parts 52 and 81).

V. CONCLUSION

For the foregoing reasons, DRN respectfully requests that the Commission grant DRN's request for rehearing, vacate the Certificate Order, hold an evidentiary hearing on the issues raised concerning project need, and begin the NEPA process anew with a draft and final EIS that remedies the errors identified herein.

Respectfully submitted,

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February 10, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Philadelphia, PA, this 10th day of February 2023.

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