STATEMENT

Statement of
Commissioner Richard Glick on
Dominion Transmission, Inc.

Date: May 18, 2018

Docket No.: CP14-497-001

"Today, the Commission adopts a new policy regarding its consideration of how pipeline permitting decisions under section 7[1] of the Natural Gas Act (NGA) contribute to climate change. In particular, the Commission now concludes that the NGA and the National Environmental Policy Act[2] (NEPA) do not require that the Commission consider greenhouse gas emissions from the production or consumption of natural gas that may be the reasonably foreseeable result of the Commission's certification decisions.[3] Because I disagree with the Commission's interpretation of our obligations under the NGA and NEPA, I dissent in part from today's order, which I might otherwise join were it not for this new policy.[4] I find it particularly disappointing that the Commission is adopting this new policy just as it embarks on a broad review of the Commission's process for certificating new natural gas pipelines, which will include how greenhouse gas emissions are assessed.[5]

"Climate change poses an existential threat to our security, economy, environment, and, ultimately, the health of individual citizens.[6] Unlike many of the challenges that our society faces, we know with certainty what causes climate change: It is the result of greenhouse gas emissions, including carbon dioxide and methane—which can be released in large quantities through the production and the consumption of natural gas. Accordingly, it is critical that, as an agency of the federal government, the Commission comply with its statutory responsibility to document and consider how its authorization of a natural gas pipeline facility will lead to the emission of greenhouse gases, contributing to climate change.

"In today's order on rehearing, the Commission argues that it cannot consider the New Market Project's effect on climate change because the record does not include information regarding the specific nature and extent of the impact

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[1] 15 U.S.C. 717f (2012).

[2] National Environmental Policy Act of 1969, Pub. L. No. 91–190, 83 Stat. 852.

[3] *Dominion Transmission, Inc.* 163 FERC ¶ 61,128 (2018) (*New Market*).

[4] I agree that the record in this particular proceeding does not contain "meaningful information," *New Market*, 163 FERC ¶ 61,128 at P 34, sufficient to identify the reasonably foreseeable effects of the New Market Project on greenhouse gas emissions associated with the production and consumption of natural gas. I disagree, however, with other conclusions that the Commission reaches and, therefore, cannot join today's order.

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

[6] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, at 2 & n.9 (2018) (Glick, Comm'r, dissenting).

that authorizing the new pipeline facilities will have on the production and consumption of natural gas.[7] The Commission contends that whatever effect the New Market Project has on the production and consumption of natural gas will not be reasonably foreseeable and, therefore, not something that the Commission must address in its NEPA analysis.[8] In so doing, the Commission is adopting a remarkably narrow view of its responsibilities under NEPA and the NGA's public interest standard. Under this view, even if the Commission knows that new pipeline facilities would have an environmental impact—in this case, causing greenhouse gas emissions by facilitating additional production and consumption of natural gas—the Commission is not obligated to consider those impacts unless the Commission knows definitively that the production and consumption would not occur absent the pipeline.[9]

"That approach violates NEPA's requirement that federal agencies take "a hard look at [the] environmental consequences" of their decisions.[10] As an initial matter, the principal reason that the Commission does not have this "meaningful information" is that the Commission does not *ask* for it. But NEPA does not permit agencies to so easily shirk their responsibilities to consider environmental consequences. Rather, NEPA requires that an agency "must use its best efforts to find out all that it reasonably can."[11] The Commission has several opportunities throughout the pre-filing and formal application processes to issue a data request to the pipeline developer seeking information about the source of the gas to be transported as well as its ultimate end use.[12] A simple data request would seem to fall easily within what constitutes the Commission's "best efforts." In the absence of any such efforts, the Commission should not be able to rely on the lack of "meaningful information" to satisfy its obligations under NEPA and the NGA to identify the reasonably foreseeable consequences of its actions.[13]

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[7] *New Market*, 163 FERC ¶ 61,128 at PP 38–42, 59–63.

[8] *Id*.

[9] *See id.* PP 38, 59.

[10] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotation marks omitted).

[11] *Barnes v. Dep't of Transp.*, 655 F.3d 1124, 1136 (9th Cir. 2011) (internal quotation marks omitted).

[12] The Commission asserts that it is excused from asking these questions because there is no indication that the pipeline applicant will have that information and, in any case, it is the states that have jurisdiction over the production of natural gas. *New Market*, 163 FERC ¶ 61,128 at P 61; *see id.* P 41 n.89. Regarding the first point, there may be cases in which the upstream consequences of the Commission's permitting decisions will not be reasonably foreseeable. But it does not follow that the Commission must conclude, generically, that the environmental effects of upstream production will never be reasonably foreseeable because information about the exact source of natural gas is not specified. Rather, as discussed below, the question of what is reasonably foreseeable under NEPA is one that should be answered following a record-by-record inquiry. Regarding the second point, the natural gas sector is replete with overlapping state and federal authority and there is nothing surprising or uncommon about a state action affecting matters subject to federal authority and vice-a-versa. *See infra* n.24 and accompanying text. What NEPA requires is that the Commission consider the reasonably foreseeable environmental consequences of its permitting decisions and that it make its best efforts to gather the information needed to do so. The mere fact that other aspects of the causal chain are subject to state regulation, does not vitiate the Commission's obligation to consider those consequences. *See Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (*Sabal Trail*).

[13] Contrary to the suggestion in the Commission order, in concluding that there may be circumstances in which the upstream and downstream impacts of a pipeline facility are reasonably foreseeable results of the constructing and operating the proposed facility, I am relying on precisely the sort of "reasonably close causal relationship" that Supreme Court has required in the NEPA context and analogized to proximate cause. *See Federal Motor Carrier Safety Admin. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) ("NEPA requires a 'reasonably close causal relationship' between the environmental effect and the alleged cause. The Court

"The Commission responds that this information will rarely be relevant because upstream and downstream emissions generally are not reasonably foreseeable consequences of building the proposed project.[14] In reality, that depends on the record that the Commission compiles. There will undoubtedly be some cases where those emissions are, in fact, too speculative to be considered "reasonably foreseeable." But there may also be others, such as *Sabal Trail*, where an adequate record would provide sufficient information to make those emissions reasonably foreseeable.[15] Consistent with *Sabal Trail*, the determination of what environmental effects must be considered under NEPA should turn on a record-by-record inquiry of what effects are reasonably foreseeable, not on generic pronouncements divorced from the facts of any specific case. And unless the Commission makes its "best efforts" and asks the necessary questions, that record is unlikely to exist and Congress' purposes in enacting NEPA will be undermined.

"In addition, even where exact information regarding the source of the gas to be transported and the ultimate end use is not available to the pipeline developer, the Commission will often be able to produce comparably useful information based on reasonable forecasts of the greenhouse gas emissions associated with production and consumption.[16] "Forecasting environmental impacts is a regular component of NEPA reviews and a reasonable estimate may inform the federal decisionmaking process even where the agency is not completely confident in the results of its forecast.[17] For instance, in *Sabal Trail*, the United States Court of Appeals for the District of Columbia Circuit interpreted NEPA to require that the Commission attempt to quantify the greenhouse gas emissions associated with the Sabal Trail pipeline, even though the Commission could not know the actual greenhouse gas impact before the project entered operation.[18]

[has] analogized this requirement to the 'familiar doctrine of proximate cause from tort law.'" (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)); *see also Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014) ("Proximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct."); *Staelens v. Dobert*, 318 F.3d 77, 79 (1st Cir. 2003) ([I]n addition to being the cause in fact of the injury [the but for cause], the plaintiff must show that the negligent conduct was a proximate or legal cause of the injury as well. To establish proximate cause, a plaintiff must show that his or her injuries were within the reasonably foreseeable risks of harm created by the defendant's negligent conduct." (internal quotation marks and citations omitted)).

[14] *See New Market*, 163 FERC ¶ 61,128 at PP 41 n.89, 63; *id.* P 43 (suggesting that greenhouse gas emissions from the production and consumption of natural gas are "extraneous" to the Commission's public interest determination because the Commission does not control the production or consumption of natural gas).

[15] In response to this point, the Commission contends that NEPA does not require the consideration of "speculative harms" or "consequences beyond those of greatest concern to the public and of greatest relevance to the agency's decision." *Id.* P 61 & n.143 (internal quotation marks omitted). I am not aware of any harm more "concerning" or "relevant" than the threat posed by climate change.

[16] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (2014) (quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)); *see Sierra Club v. Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) ("In determining what effects are 'reasonably foreseeable,' an agency must engage in 'reasonable forecasting and speculation.'" (quoting *Del. Riverkeeper*, 753 F.3d at 1310)).

[17] In determining what constitutes reasonable forecasting, it is relevant to consider the "usefulness of any new potential information to the decisionmaking process." *Sierra Club*, 867 F.3d at 198 (citing *Pub. Citizen*, 541 U.S. at 767).

[18] *Sabal Trail*, 867 F.3d at 1373–74.

Similar forecasts can play a useful role in the Commission's evaluation of the public interest, even in those instances when the Commission must make a number of assumptions in its forecasting process.[19]

"It is particularly important for the Commission to use its "best efforts" to identify and quantify the full scope of the environmental impacts of its pipeline certification decisions given that these pipelines are expanding the nation's capacity to carry natural gas from the wellhead to end-use consumers. Adding capacity has the potential to "spur demand" and, for that reason, an agency conducting a NEPA review must, at the very least, examine the effects that an expansion of pipeline capacity might have on production and consumption.[20] Indeed, if a proposed pipeline neither increases the supply of natural gas available to consumers nor decreases the price that those consumers would pay, it is hard to imagine why that pipeline would be "needed" in the first place.

"The fact that the pipeline's exact effect on the demand for natural gas may be unknown is no reason not to consider the type of effect it is likely to have.[21] As the United States Court of Appeals for the Eighth Circuit explained in *Mid States*—a case that also involved the downstream emissions from new infrastructure to transport fossil fuels—"if the *nature* of the effect" (i.e., increased emissions) is clear, the fact that "the *extent* of the effect is speculative" does not excuse an agency from considering that effect in its NEPA analysis.[22] And while natural gas pipelines can benefit the nation—including by, in some cases, providing natural gas supplies that can displace older, more greenhouse gas-intensive methods of electricity generation—any "hard look" at incremental pipeline capacity should also consider the environmental consequences associated with that additional capacity.

"I recognize that, even if the Commission were to try, there may be instances in which it will not have sufficient information to assess the consequences that issuing a particular certificate may have for climate change. But, in that

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[19] As Commission LaFleur aptly explains in her separate statement, prior to the policy change announced today, the Commission previously determined that forecasts of GHG emissions from production and consumption are both available and useful to affected parties, including the public.

[20] *See Barnes*, 655 F.3d at 1138; *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549 (8th Cir. 2003) (*Mid States*) ("[T]he proposition that the demand . . . will be unaffected by an increase in availability and a decrease in price . . . is illogical at best."). The Commission attempts to distinguish these cases chiefly by contending that "a number of factors, such as domestic natural gas prices and production costs, drive new drilling." *New Market*, 163 FERC ¶ 61,128 at P 60. Although sales price and production costs are, undoubtedly, factors that influence natural gas production, that is no answer to the argument that the Commission must at least consider the demand-inducing effects of new capacity. After all, surely the sales prices and production costs associated with air travel and coal mining affected demand in *Barnes* and *Mid States*, respectively.

[21] In the Commission's 1999 Policy Statement it provided the following illustrative list of the "public benefits": "meeting unserved demand, eliminating bottlenecks, access to new supplies, lower costs to consumers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives." *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, 61,748 (1999). All of those examples, with the exception of the last two, are benefits that could "spur demand" for natural gas. *Cf. Mid States*, 345 F.3d at 549.

[22] *Id*. The Commission attempts to distinguish *Mid States* on the basis that the agency in that case conceded that the harm in question was reasonably foreseeable. *New Market*, 163 FERC ¶ 61,128 at P 65. I agree that where an agency finds that a harm is reasonably foreseeable, but nevertheless fails to consider that harm, it invites *vacatur*. But while that concession may be sufficient, it is not necessary. As noted above, whether a particular harm is reasonably foreseeable should be a record-by-record determination and, accordingly, there may be instances in which an agency contends that a harm is not reasonably foreseeable, but the record indicates otherwise. *See Sabal Trail*, 867 F.3d at 1371–72.

scenario, it is the fact that the Commission made every effort to identify the climate-change impacts that satisfies the Commission's obligation to consider those impacts as indirect or cumulative effects under NEPA. The mere fact that the record does not contain specific information regarding the greenhouse gas emissions associated with increased production or consumption from a particular natural gas pipeline cannot excuse the Commission from considering those effects under NEPA when the Commission has not seriously attempted to gather that information in the first place.

"As stated earlier, anthropogenic climate change is among the most serious threats we face as a nation. For that reason, the Commission cannot determine whether a natural gas pipeline is in the "public interest" without considering the effect that granting a certificate will have on climate change. I certainly cannot support issuing a certificate where the Commission has not made its best effort to collect information regarding those emissions. Accordingly, I believe that the NGA's public interest standard requires the Commission to consider greenhouse gas emissions associated with the incremental production and consumption of natural gas caused by a new pipeline.[23]

"The fact that individual states and other federal agencies may consider, and even regulate, some of the environmental impacts from the pipeline, does not limit the Commission's responsibility to consider these impacts when evaluating the public interest.[24] Indeed, the certificate process is replete with overlapping jurisdiction: numerous federal and state agencies consider a pipeline's impact on natural resources under parallel and complementary statutes, including potential effects on endangered species, air quality, water bodies, and wetlands. Rather than indicating a problem with or a limit on the Commission's authority, these overlapping interests merely reflect the broad scope of the Commission's authority to evaluate the public interest and the sweeping impacts that a pipeline can have on the environment, communities, and individuals.

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"Today's order, following the Commission's recent order in *Sabal Trail*,[25] represents another step toward drastically limiting the Commission's consideration of climate change in the section 7 certification process. As I have explained,

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[23] The Court has explained that the NGA's purposes are multi-faceted. *See NAACP v. FPC*, 425 U.S. 662, 670 & n.6 (1976) (noting that, in addition to "encourag[ing] the orderly development of plentiful supplies of electricity and natural gas at reasonable prices," the Commission has the authority to consider "conservation, environmental, and antitrust" concerns as relevant to the Commission's statutory authority). Congress' instruction that the Commission consider "the public convenience and necessity" is plenty broad enough to permit the Commission to balance these different purposes when exercising its statutory authority under the NGA. *Cf. Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959) (holding that NGA section 7 requires the Commission to consider "all factors bearing on the public interest").

[24] The order appears to suggest that the allocation of jurisdiction in NGA section 1(b) implies a limit on the Commission's authority, or even its ability, to consider environmental effects under the NGA. That provision does no such thing. In considering the reasonably foreseeable consequences of its certification decisions, the Commission is not regulating, much less directly regulating, areas reserved for exclusive state jurisdiction. Although the Commission's evaluation of the public interest could, theoretically, affect matters subject to state jurisdiction, as long as the Commission is acting pursuant to its statutory authority and not directly regulating matters subject to state jurisdiction, the Commission will "not run afoul of [the NGA's jurisdiction limitations] just because it affects—even substantially—the" matters left for the states to decide. *FERC v. Elec. Power Supply Ass'n,* 136 S. Ct. 760, 776 (2016), as revised (Jan. 28, 2016); *Hughes v. Talen Energy Mktg.*, LLC, 136 S. Ct. 1288, 1292 (2016); *see also FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 30–31 (1961) (recognizing the Commission's authority to consider the impact of air pollution from industrial boilers under NGA section 7).

[25] *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233.

the Commission's consideration of climate change falls short of our statutory responsibilities under NEPA and the NGA. To be clear, I am not suggesting that the Commission should issue no new section 7 certificates. Pipeline facilities may have benefits that outweigh their costs. What I am arguing is that, as a result of the Commission's new policy, we frequently will not know whether the benefits outweigh the costs because the Commission is not asking enough questions or doing enough analysis.

"For these reasons, I respectfully dissent."