

## CONSIDERING THE PUBLIC CONVENIENCE AND NECESSITY IN PIPELINE CERTIFICATE CASES UNDER THE NATURAL GAS ACT

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*“Those who cannot remember the past are condemned to repeat it.”*  
– George Santayana<sup>1</sup>

**Synopsis:** The Constitution provides that the regulation of interstate commerce is the province of the federal government. In the Natural Gas Act, Congress delegated the determination of whether interstate pipeline projects were in the public convenience and necessity to the Federal Power Commission, now the Federal Energy Regulatory Commission. Since the earliest days of regulation, the Commission has grappled with opposition to proposed pipeline construction, while relying on private contracts to demonstrate market demand for a new pipeline project. Although the details of exactly how the Commission ultimately determines whether a project can proceed have changed over time, the Commission has continued to rely on private contracts. The Commission’s policy has now evolved to the point that the financial risk of a project is placed on the investors in the pipeline project. The Commission’s environmental review of a project proceeds on a parallel track, and can result in significant route changes and environmental mitigation conditions, reducing the environmental impacts of a project. However, the Commission continues to rely on the existence of contracts for use of the pipeline as the best evidence of market demand.

I. Introduction .....	116
II. The Natural Gas Act.....	117
III. Interpreting the Meaning of “Public Convenience and Necessity”	120
IV. Evidence of the Public Convenience and Necessity Under the NGA .....	121
V. Evolution to a Competitive Industry .....	123
VI. The Policy Statement .....	125
A. The Notice of Proposed Rulemaking .....	125
B. The Policy Adopted .....	127
1. Incremental Pricing and the Prohibition Against Subsidies.....	128

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1. GEORGE SANTAYANA, *THE LIFE OF REASON: INTRODUCTION AND REASON IN COMMON SENSE* 172 (Marianne S. Wokeck & Martin A. Coleman eds., MIT Press 2011).

2. The Market as Evidence of the Need for a Project.....	128
3. The Balancing Test and Review Under the National Environmental Policy Act .....	129
VII. Conclusion .....	131

## I. INTRODUCTION

Applications for authorization from the Federal Energy Regulatory Commission (Commission) to construct new gas pipeline infrastructure currently face unprecedented levels of opposition.<sup>2</sup> But, the arguments typically raised by opponents are not new. The same objections to pipeline construction have been raised since the early days of the Commission. Landowners do not want a pipeline on their property and they resent pipelines' use of eminent domain to acquire rights-of-way. Environmental groups challenge the adequacy of the Commission's environmental review. Both groups object to reliance on contracts or precedent agreements, especially agreements with company affiliates, as evidence that a project is required by public convenience and necessity.<sup>3</sup> Pipelines remain, however, the only method of large-scale transportation of natural gas from supply basins to demand centers.<sup>4</sup>

In 1999, the Commission issued a statement that revisited its policy for certifying new construction under section 7 of the Natural Gas Act (NGA).<sup>5</sup> The 1999 Policy Statement mandates that, before granting certificates, the Commission must first determine that the new pipeline infrastructure is required by the present or future public convenience and necessity.<sup>6</sup> The Policy Statement also addressed several major issues raised historically in pipeline certificate cases and provided guidance for their resolution. Among other things, the Policy Statement adopted an economic balancing test that weighs the public benefits of a project against its adverse impacts.<sup>7</sup> The Policy Statement continued the Commission's historical

2. See Written Testimony of Comm'r Tony Clark, Fed. Energy Reg. Comm'n, Before the Committee on Energy and Commerce Subcommittee on Energy and Power United States House of Representatives Hearing on Oversight of the Federal Energy Regulatory Commission, at 5-6 (Dec. 1, 2015), <https://www.ferc.gov/CalendarFiles/20151201095914-Clark-12-01-2015.pdf> ("I believe a major challenge for energy regulators over the next several years—both at the federal and state levels—will be to grapple with this tension of dealing with policies that necessitate large infrastructure projects in an era of heightened infrastructure opposition.").

3. See, e.g., *Transcon. Gas Pipe Line Co.*, 157 F.E.R.C. ¶ 61,095 at PP 3-6 (2016); *Fla. Se. Connection, LLC*, 154 F.E.R.C. ¶ 61,080 at P 77 (2016), *order on reh'g*, 156 F.E.R.C. ¶ 61,160 (2016).

4. This fact was explicitly recognized at the time of passage of the NGA. See *To Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes: Hearing on H.R. 11662 Before Subcomm. on Interstate and Foreign Commerce, 74th Cong. 57* (1936) (Statement of Col. William T. Chantland, Attorney in Charge of Legal Work, FTC Utilities Division) ("As pipe lines are the only present method of transportation of natural gas, and as the principal markets, actual and potential, are at long distances and across many State lines from the big reserve areas, the States have been helpless to cope with such transportation problem.").

5. Policy Statement, *Certification of New Interstate Nat. Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999), *corrected by*, 89 F.E.R.C. ¶ 61,040 (1999), *clarified by*, 90 F.E.R.C. ¶ 61,128, *clarified by*, 92 F.E.R.C. ¶ 61,094 (2000).

6. 92 F.E.R.C. ¶ 61,094 at PP 1-2.

7. *Id.*

reliance on market forces as evidenced by contracts or precedent agreements as indicators of the need for a project.

The reliance on precedent agreements or contracts is disciplined, however, by a pricing policy that puts the risk of unsold or overbuilt project capacity on the sponsor. The Commission thus defined the circumstances that would determine whether a project was required by the public convenience and necessity.

The Policy Statement formally adopted principles that the Commission began implementing over thirty years ago to address changes that occurred as the natural gas industry matured, including the consideration of market forces to identify the need for gas and protection for consumers by allocating risk to project sponsors.<sup>8</sup> The Commission's separate environmental review process, guided by the National Environmental Policy Act of 1969 (NEPA), ensures that any environmental impacts are properly disclosed, reduced, and mitigated. These remain effective tools for determining that a proposed pipeline construction project is required by the public convenience and necessity. Indeed, in 2016 the Commission rejected one project for lack of market support,<sup>9</sup> and two other pipeline projects proposed to serve New England were cancelled, or put on hold, due to lack of market support.<sup>10</sup>

Since 1999, the Policy Statement has been used effectively to identify projects that serve the public interest while protecting consumers and other interest groups. The Policy Statement was developed as a result of Commission experience over many decades and in response to changes within the pipeline industry. It has been a long journey. Today, the Commission's approach is under renewed attack. This article reviews some of the many steps of that journey in the hope that they need not be repeated.

## II. THE NATURAL GAS ACT

In 1927, the U.S. Supreme Court ruled that the states lacked authority to regulate the interstate transportation or sale for resale of natural gas because regulation of interstate commerce was the province of the federal government.<sup>11</sup> Consequently, interstate gas pipelines were entirely unregulated. In 1936, the Federal Trade Commission (FTC) issued an extensive report on the natural gas industry, including, among other things, ineffective regulation of pipeline construction.<sup>12</sup>

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8. 88 F.E.R.C. ¶ 61,227 at 3-5, 19-26.

9. *Jordan Cove Energy Project, L.P.*, 154 F.E.R.C. ¶ 61,190 at P 48, *order denying reh'g*, 157 F.E.R.C. ¶ 61,194 (2016). *See also Turtle Bayou Gas Storage Co.*, 135 F.E.R.C. ¶ 61,233 at P 37 (2011) (denying certificate to construct gas storage facility because applicant had not secured any subsurface property rights and had not provided evidence of a specific need for the project), *reconsideration denied*, 139 F.E.R.C. ¶ 31,033 (2012).

10. *See e.g.*, Jon Chesto, *Kinder Morgan Shelves \$3 Billion Pipeline Project*, Boston Globe, at 4, Apr. 20, 2016, <https://www.bostonglobe.com/business/2016/04/20/kinder-morgan-shelves-billion-new-england-pipeline-project/iEafnAP2P41o0B9tmM0IEI/story.html>; Brian Dowling, *Gas Giant Spectra Delays \$3 Billion NE Pipeline Project*, Boston Herald, Dec. 28, 2016, [http://www.bostonherald.com/business/business\\_markets/2016/12/gas\\_giant\\_spectra\\_delays\\_3\\_billion\\_ne\\_pipeline\\_project](http://www.bostonherald.com/business/business_markets/2016/12/gas_giant_spectra_delays_3_billion_ne_pipeline_project).

11. *See e.g.*, *Missouri v. Kan. Nat. Gas Co.*, 265 U.S. 298, 309-10 (1924); *Pub. Utils. Comm'n of R.I. v. Attelboro Steam & Elec. Co.*, 273 U.S. 83 (1927).

12. FED. TRADE COMM'N, ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDED JUNE 30, at 34-40 (1936) (hereinafter FTC REPORT), [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/annual-report-1936/ar1936\\_0.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1936/ar1936_0.pdf).

Congress responded by passing the Natural Gas Act (NGA),<sup>13</sup> which extended the authority of the Federal Power Commission (FPC or the Commission) to include regulation of the interstate transportation or sale for resale of natural gas.<sup>14</sup> Almost eighty years old, the NGA remains a critical and powerful federal regulatory statute, as relevant today as it was when it was enacted. Section 1 of the NGA declares that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.”<sup>15</sup> The House Report on the bill explained that “[t]he basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act.”<sup>16</sup> Thus, Supreme Court precedent and the statute establish the preeminent federal role in pipeline certification.

Section 7(c)(1)(A) of the NGA provides that a natural gas company, or person that will be a natural gas company, requires authorization in the form of a certificate of public convenience and necessity from the Commission before it may “undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities” for the transportation or sale for resale of gas in interstate commerce.<sup>17</sup> Section 7(e) of the NGA provides that the Commission shall grant

13. 15 U.S.C. §§ 717-717w (2006).

14. Previously, the FPC had been responsible for regulating certain hydroelectric activities and for regulating the transmission and wholesale of electricity in interstate commerce. See Federal Power Act, 16 U.S.C. §§ 791a-825f (1920). The FPC was succeeded by the Federal Energy Regulatory Commission in 1977. See Department of Energy Organization Act, 42 U.S.C. § 7172 (1977). “Commission” as used throughout this article refers to either the FPC or to the Federal Energy Regulatory Commission depending on the context. References to the Commission prior to 1977 apply to the FPC. References to the Commission after 1977 apply to the successor Federal Energy Regulatory Commission.

15. 15 U.S.C. § 717(a).

16. H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (1937).

17. Section 7(c) of the NGA provides :

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in

a certificate to any qualified applicant if it finds that the proposed project is or will be required by the present or future public convenience and necessity.<sup>18</sup> Thus, prior to construction, if the Commission finds that a company has demonstrated that the project is required by the public convenience and necessity, the Commission must grant the certificate.<sup>19</sup>

Once a company enters into the business of transporting gas in interstate commerce it becomes a “natural gas company”<sup>20</sup> providing services that are “affected with a public interest.”<sup>21</sup> Natural gas companies operating under the NGA are regulated by the Commission and their rates and terms and conditions of service are subject to review and approval under the NGA. Once a pipeline enters interstate service, it may not abandon jurisdictional facilities or service without prior Commission approval.<sup>22</sup>

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cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

- (A) natural gas sold by the producer to such person; and
- (B) natural gas produced by such person.

15 U.S.C. § 717f(c).

18. Section 7(e) of the NGA provides:

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, 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.

15 U.S.C. § 717f(e).

19. Although section 7(c)(1)(b) of the NGA requires that in certificate cases the “Commission shall set the matter for hearing,” the Commission and the courts have not interpreted this provision to require a trial-type evidentiary hearing unless material facts are in dispute that cannot be resolved on the basis of written pleadings. *See, e.g., El Paso Nat. Gas Co.*, 65 F.E.R.C. ¶ 61,276 at P 61,866 (1993) (citing *S. Union Gas Co. v. FERC*, 840 F.2d 964, 970 (D.C. Cir. 1988); *Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124 (D.C. Cir. 1982); *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125, 1128 (D.C. Cir. 1969)). The Commission has not set a certificate case for a trial-type hearing since 1998. *See Granite State Gas Transmission, Inc.*, 82 F.E.R.C. ¶ 61,232 at P 61,890 (1998).

20. “‘Natural-gas company’ means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C. § 717a(6).

21. 15 U.S.C. § 717(a).

22. Section 7(b) of the NGA provides:

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and

The Supreme Court has explained that the NGA “permits the relations between the parties to be established initially by contract.”<sup>23</sup> Subject to the Commission’s regulatory oversight of their rates and terms and conditions of service, interstate gas pipelines remain private enterprises, owned by their stockholders and dependent on private contracts to market their services. Thus, the NGA is based on the underlying assumption that private contracts will provide the basis for determining the market need for new construction.

### III. INTERPRETING THE MEANING OF “PUBLIC CONVENIENCE AND NECESSITY”

The NGA does not define “public convenience and necessity,” but instead leaves interpretation of that phrase to the regulatory agency. At the time the NGA was enacted by Congress, a number of other regulatory statutes required agencies to issue certificates based on a determination of the “public convenience and necessity.” The legislative history to the NGA notes that,

[t]here are similar provisions requiring certificates of public convenience and necessity for extensions of service in the Interstate Commerce Act (U.S.C. 1934 title 40 sec. 1 (18-20)); the Communications Act of 1934 (U.S.C. 1934 title 47 sec. 214) and the Motor Carriers Act U.S.C. 1934 title 49 secs. 306, 307, 308).<sup>24</sup>

Thus, the concept of a regulatory agency determining whether a private entity’s proposal was in the public convenience and necessity was an established practice when the NGA was enacted. Quoting its interpretation of an analogous statute, the Supreme Court explained the Commission’s role in interpreting the phrase “public convenience and necessity” as used in the NGA: “The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority.”<sup>25</sup> Thus, courts have allowed the Commission significant freedom to decide under what circumstances it should issue a certificate for pipeline construction.

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approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

15 U.S.C. § 717f(b).

23. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 339 (1956). *See also Kern River Gas Transmission Co.*, 117 F.E.R.C. ¶ 61,077 at PP 62-63 (2006) (Commission’s role to ensure that the rates offered and accepted as a result of individual negotiations are just and reasonable), *order on reh’g*, 123 F.E.R.C. ¶ 61,056 (2008), *order on reh’g*, 126 F.E.R.C. ¶ 61,034, *order on reh’g*, 129 F.E.R.C. ¶ 61,240 (2009), *reh’g denied*, 133 F.E.R.C. ¶ 61,162 (2010), *order on initial decision*, 136 F.E.R.C. ¶ 61,045 (2011), *order on reh’g*, 142 F.E.R.C. ¶ 61,132, *order on reh’g*, 145 F.E.R.C. ¶ 61,042 (2013); *Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 531-34 (2008).

24. *Committee on Interstate Commerce, Interstate Transportation and Sale of Natural Gas*, S. Rep. No. 75-1162, at 5 (Aug. 9, 1937).

25. *FPC v. Transcon. Gas Pipeline Co.*, 365 U.S. 1, 7 (1961) (quoting *United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945)).

## IV. EVIDENCE OF THE PUBLIC CONVENIENCE AND NECESSITY UNDER THE NGA

In one of its earliest proceedings, the Commission defined public convenience and necessity to mean:

a public need or benefit without which the public is inconvenienced to the extent of being handicapped in the pursuit of business or comfort or both—without which the public generally in the area involved is denied to its detriment that which is enjoyed by the public of other areas similarly situated.<sup>26</sup>

The Commission adopted a list of seven elements that it considered the minimum requirements to demonstrate that a project was required by the public convenience and necessity.<sup>27</sup> From the outset, evidence required to support a pipeline project relied in part on a showing based on private contracts. In *Kansas Pipe Line* the Commission stated:

We are of the opinion that applicants who contend that “public convenience and necessity” require or will require the construction of facilities for the transportation of natural gas must show that they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them.<sup>28</sup>

In this original case, the applicants presented a precedent agreement to meet the supply requirement.<sup>29</sup> The Commission relied on the precedent agreement for issuance of a conditional certificate, but stated:

We could not issue an unconditional certificate of public convenience and necessity nor authorize the issuance of such an unconditional certificate until we had received assurance in the form of a contract satisfactory to us that the reserve of natural gas purportedly available to the Kansas Company is actually available upon firm commitment.<sup>30</sup>

The *Kansas Pipe Line* requirement to show evidence of “potential customers” was less strict. Based on the testimony of “witnesses who are men of long experience,” the Commission noted that it was not the practice to attempt to secure firm commitments from prospective customers for a pipeline extension into a territory where no physical connections existed, stating:

We see no reason to require applicants before us to submit firm commitments for the sale of natural gas in all cases; it is, we feel, enough if applicants show that on the basis of experience in similar territory, there are reasonable grounds for anticipating that customers will be attached to the proposed facilities.<sup>31</sup>

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26. *In re Kan. Pipe Line & Gas Co.*, 2 F.P.C. 29, 56 (1939).

27. *Id.* at 55. Under the test established, applicants were required to show that (1) they possess a supply of natural gas adequate to meet those demands which it is reasonable to assume will be made upon them (*id.* at 40); (2) there exist in the territory proposed to be served customers who can reasonably be expected to use such natural-gas service (*id.* at 45); (3) the facilities for which they seek a certificate are adequate (*id.* at 46-47); (4) the costs of construction of the facilities which they propose are both adequate and reasonable (2 F.P.C. at 53); (5) the anticipated fixed charges or the amount of such fixed charges are reasonable (*id.* at 54); (6) the rates proposed to be charged are reasonable (*id.* at 54-55); and (7) the anticipated fixed costs or the amount of such fixed costs (such as operating and maintenance expenses, depreciation, taxes, and return) must be reasonable (*id.* at 54).

28. *Id.* at 40.

29. 2 F.P.C. at 41 (“Though there is not at present a firm contract in existence . . . for the sale and purchase of natural gas, the terms of that contract have been agreed upon between the parties.”).

30. *Id.*

31. *Id.* at 45.

The factors identified in *Kansas Pipe Line* were developed when pipelines were aggregators of supply meant to support the pipeline's merchant function. The focus of the Commission's inquiry was on the sufficiency of gas reserves to support the proposed pipeline.<sup>32</sup> These factors were strictly applied by the Commission for many years, and remain memorialized in the current list of exhibits required to be included in pipeline certificate applications.<sup>33</sup> However, the weight given to individual factors has changed significantly in response to changes in the industry and as a result of the Commission's decades-long experience implementing the NGA. Historically, the Commission had always required pipelines to have executed firm contracts and supporting market data equivalent to the total capacity of its proposed facilities before it could commence construction of a new project.<sup>34</sup> Adequacy of supply is no longer a significant consideration in most cases where new pipeline infrastructure is proposed.<sup>35</sup>

32. As the Commission has explained:

The natural gas industry in 1939 was dramatically different from the industry that exists today. In 1939, the development of a national natural gas pipeline grid was in its beginning stages. Furthermore, pipelines rendered gas service as merchants of natural gas-by purchasing gas from producers, transporting that gas to a delivery point, and ultimately selling the gas to local distribution companies or industrial end-users. The rate charged for this service was a bundled charge representing, generally, the cost of the gas added to certain costs associated with the construction and operation of the transporting facilities.

Order No. 555, *Revisions to Regulations Governing Authorizations for Construction of Nat. Gas Pipeline Facilities*, III F.E.R.C. STATS. & REGS. ¶ 30,928, at P 30,224, 56 Fed. Reg. 52,330 (1991), *order on reh'g and postponing effective date*, 57 F.E.R.C. ¶ 61,195 (1991), *order withdrawing amendments*, 62 F.E.R.C. ¶ 61,249 (1993). Order No. 555 was withdrawn by the Commission on March 16, 1993, and is referred to in this article solely for its discussion of the Commission's regulatory history. The order withdrawing the Order No. 555 regulations states:

Although the Commission postponed the effective date of the final rule, the regulations adopted therein were codified in the 1992 edition of the Code of Federal Regulations . . . Codification of the non-effective, Order No. 555 regulations understandably has generated considerable confusion in the industry, particularly among practitioners before the Commission. To alleviate this confusion, the Commission is withdrawing the amendments adopted in Order No. 555.

*Revisions to Regulations Governing Authorizations for Construction of Nat. Gas. Pipeline Facilities*, 58 Fed. Reg. 15,481 (1993) (to be codified at 18 C.F.R. pts. 2, 154, 157, 284, 375 & 380). No subsequent order was issued in the proceeding. See also [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 30,965.

33. 18 C.F.R. §§ 157.14(a)(8)-(19).

34. *Id.*; see also *Questar Pipeline Co.*, 59 F.E.R.C. ¶ 61,363 at P 62,369 (1992).

35. Order No. 436, *Regulation of Nat. Gas Pipelines After Partial Wellhead Decontrol*, 33 F.E.R.C. ¶ 61,007 at PP 61,815-16, 61,925 (1985), *order on reh'g & clarification*, Order No. 436-A, [1982-1985 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,675 (1985), *order on reh'g*, Order No. 436-B, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,688, *order denying reh'g*, Order No. 436-C, 34 F.E.R.C. ¶ 61,404, *order denying applications for reh'g*, Order No. 436-D, 34 F.E.R.C. ¶ 61,405, *reconsideration denied*, Order No. 436-E, 34 F.E.R.C. ¶ 61,403 (1986), *vacated and remanded*, *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *readopted on an interim basis*, *Regulation of Nat. Gas Pipelines After Partial Wellhead Decontrol*, Order No. 500, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,761, *order granting extension of time*, Order No. 500-A, 1986-1990 F.E.R.C. Stats. & Regs., Regs. Preambles ¶ 30,770, *order on reh'g*, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,772, *order on reh'g*, Order No. 500-C, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,786 (1987), *order modifying dates*, Order No. 500-D, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,800, *order denying reh'g*, Order No. 500-E, 43 F.E.R.C. ¶ 61,234, *order extending date*, Order No. 500-F, [1986-1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,841 (1988), *order denying reh'g*, Order No. 500-G, 46



## V. EVOLUTION TO A COMPETITIVE INDUSTRY

After industry restructuring in the 1970's, the practice of analyzing applications for pipeline construction set out in *Kansas Pipe Line* went from unwieldy to untenable.<sup>36</sup> Gas shortages caused by federal regulation of producer rates led Congress to enact the Natural Gas Policy Act of 1978 (NGPA).<sup>37</sup> The NGPA was intended to provide investors with incentives to develop supply and thus increase the availability of gas to the interstate market. Instead of rates set by the Commission for interstate sales of gas by producers, the NGPA set rates for the "first sales" of gas and began the phased decontrol of wellhead gas prices to permit market forces to play a role in supply and demand.<sup>38</sup> Producer deregulation culminated with the Natural Gas Wellhead Decontrol Act of 1989, which removed all price ceilings dictated by the NGPA as of January 1, 1993.<sup>39</sup>

During the same period, a maturing pipeline industry led to a nationwide pipeline grid, which allowed increasingly efficient transportation transactions (e.g., through backhauls, displacement, and exchanges).<sup>40</sup> When the NGA passed, many markets had two or more pipeline suppliers. The Commission believed that pipeline-on-pipeline competition altered its regulatory role.<sup>41</sup>

In 1985, the Commission issued Order No. 436 to adapt its regulatory framework to the changed circumstances of the industry. The goal of Order No. 436 was to retain utility-type regulation over interstate transportation, while allowing the gas commodity market to competitively develop.<sup>42</sup> To do this, the Commission promulgated Order No. 436, which establishes a voluntary program for pipelines that would agree to offer non-discriminatory, open-access transportation to third-

F.E.R.C. ¶ 61,148, *final rule*, Order No. 500-H, [1986–1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,867 (1989), *order on reh'g*, Order No. 500-I, [1986–1990 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,880, *aff'd in part & remanded in part*, Am. Gas Ass'n v. FERC, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 957 (1991), *order on remand*, Order No. 500-J, [1991–1996 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,915, *order on remand on "double crediting" issue*, Order No. 500-K, [1991–1996 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 30,917, *reh'g denied*, Order No. 500-L, 55 F.E.R.C. ¶ 61,489 (1991); *see also* Order No. 555, III F.E.R.C. STATS. & REGS., at 30,225-26.

36. *See generally*, Order No. 555, III F.E.R.C. STATS. & REGS., at 30,225 ("As the industry has continued to evolve since issuance of Order No. 436, it has become apparent that requiring a traditional *Kansas Pipe Line* analysis for construction of facilities to be used for open-access transportation may be inefficient, unwieldy, and unnecessary.").

37. 15 U.S.C. §§ 3301–3432.

38. *See generally* Order No. 636, *Pipeline Serv. Obligations & Revisions to Regulations Governing Self-Implementing Transp. Under Part 284 of the Comm'n's Regulations: Regulation of Nat. Gas Pipelines After Partial Wellhead Decontrol*, 59 F.E.R.C. 61,030 at 14 (1992), *order on reh'g*, Order No. 636-A, 60 F.E.R.C. 61,102 (1992), *order on reh'g*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *aff'd in part & remanded in part sub nom.*, United Distributors Cos. v. FERC, 88 F.3d 1105 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1224, *order on remand*, Order No. 636-C, 78 F.E.R.C. ¶ 61,186 (1997), *reh'g denied*, Order No. 636-D, 83 F.E.R.C. ¶ 61,210 (1998).

39. Pub. L. No. 101-60 § 2(b), 103 Stat. 157, 158 (1989).

40. FTC REPORT, *supra* note 12, at 34-40.

41. 33 F.E.R.C. ¶ 61,007, at P 61,815.

42. *Id.* at P 61,816.

party customers.<sup>43</sup> Pipelines agreeing to participate would receive blanket certificates to provide transportation through their existing systems without prior authorization for each transaction.<sup>44</sup>

As an incentive for pipelines to provide non-discriminatory transportation on a self-implementing basis, Order No. 436 also established Optional Certificate Procedures, which provided expedited treatment for applications on new services.<sup>45</sup> The adopted procedures allowed an applicant to institute new jurisdictional services and to construct and operate facilities for the new service. These new regulations established a rebuttable presumption that, subject to review under NEPA, a project would be required by the public convenience and necessity subject to the condition *that the applicant must accept the full risk of its proposal*.<sup>46</sup> The risk condition was applied through rate conditions, which effectively prevented an applicant from shifting unrecovered costs to other customers.<sup>47</sup>

As the industry continued to evolve following issuance of Order No. 436, it became apparent to the Commission that the traditional *Kansas Pipe Line* factors used to analyze applications to construct facilities for open access transportation, “may be inefficient, unwieldy, and unnecessary.”<sup>48</sup> Applicants for Optional Expedited Certificates did not have to supply certain Exhibits required in *Kansas Pipe Line*,<sup>49</sup> but the program was not popular and relatively few such certificates were issued.<sup>50</sup> The Commission began to apply “at risk” conditions to case specific applications for construction that had not been filed under the Optional Expedited Certificates regulations. Initially, the conditions were case specific, but eventually a consistent policy emerged:

[W]e do not intend to abandon our responsibility to ensure that present and future customers do not make inappropriate contribution to the costs associated with newly constructed facilities. This we intend to accomplish by placing the pipelines at risk for the costs associated with their new facilities in the event all of the newly constructed capacity is not subscribed under firm contracts at the time the pipelines file to include the costs in their rates.<sup>51</sup> This can be accomplished in various ways. For example, the Commission could limit a pipeline’s cost recovery to only the capacity for which it has firm contracts for service to satisfy the at risk condition. The Com-

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43. *Id.* at P 61,846.

44. *Id.* at P 61,839.

45. *Id.* at P 61,911.

46. 33 F.E.R.C. ¶ 61,007, at PP 61,911, 61,926.

47. *Id.* at PP 61,918-19.

48. Order No. 555, III F.E.R.C. STATS. & REGS. at P 30,225.

49. 33 F.E.R.C. ¶ 61,007, at P 61,924.

50. Presumably, in the view of the pipeline industry, the risk of under recovering costs outweighed the presumption in favor of a certificate. Our research reveals only 20 Optional Expedited Certificates issued for major construction projects between 1988 and 2001. Application for the last such certificate had been pending before the rule was repealed in 2000.

51. “The duration of these contracts would have to be at least equal to the term required to meet the Commission’s contract standard in traditional 7(c) certificates. We note that most construction is supported by contracts with terms of ten years or more.” Order No. 555, III F.E.R.C. STATS. & REGS. at 30,227. *See also* 65 F.E.R.C. ¶ 61,276 at PP 62,270-71 (setting forth a new “threshold requirement” for evidence demonstrating applicant has “long term (e.g., [ten]-year) executed contracts or binding precedent agreements for a substantial amount of the firm capacity of the proposed facilities”).

mission also could determine that it would set rates based on 100[%] of the new facilities' capacity irrespective of the volumes subscribed to. These and other approaches would allow the Commission to ensure that ratepayers do not pay for unused capacity. . . . But to provide certainty to these applicants, we will place [the applicants] at risk by allowing them to recover only the costs associated with the capacity for which they have executed firm contracts.<sup>52</sup>

In sum, the Commission recognized in Order No. 555 that since 1985, when Order No. 436 was issued, processing certificate applications by closely analyzing them under the standards set out in *Kansas Pipe Line* was causing unreasonable delay and interfering with the efficient operation of competitive markets for both the sale and transportation of gas.<sup>53</sup>

In Order No. 436, the Commission recognized that, "market forces could be relied on to determine the ultimate need for the facilities as long as the consumer was protected."<sup>54</sup> The Commission's reliance on market forces to determine need and on risk conditions to protect consumers was developed in the Optional Certificate Procedures of Order No. 436.<sup>55</sup> This approach was later refined by applying risk conditions in case specific certificates.

## VI. THE POLICY STATEMENT

On September 15, 1999, the Commission issued the Policy Statement to provide industry guidance concerning how the Commission would evaluate proposals for certificating new construction.<sup>56</sup> Issuance of the Policy Statement was based on information that the Commission had received in the course of several other proceedings, as well as on the Commission's experience evaluating proposals for new pipeline construction.<sup>57</sup> The Policy Statement specifically considered comments that the Commission had received in an earlier rulemaking proceeding on short-term natural gas transportation services.<sup>58</sup> In the notice of that rulemaking proceeding, the Commission said that it was considering how best to balance "market demand against potential adverse environmental impacts and private property rights in weighing whether a project is required by the public convenience and necessity."<sup>59</sup>

### A. *The Notice of Proposed Rulemaking*

By 1999, when the Policy Statement was issued, the Commission had settled on the practice of requiring market support in the form of contracts for 25% of a new pipeline project in order for the Commission's Staff to begin processing the application. In order to receive a final certificate, the applicant needed to have

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52. Order No. 555, III F.E.R.C. STATS. & REGS at 30,227.

53. *Id.* at 30,225-26.

54. *Id.* (discussing 33 F.E.R.C. ¶ 61,007, at P 61,911).

55. 33 F.E.R.C. ¶ 61,007, at P 61,911.

56. 88 F.E.R.C. ¶ 61,227, at P 61,737.

57. *Id.* at P 61,230.

58. *Id.*; See also Notice of Proposed Rulemaking, *Regulation of Short-Term Nat. Gas Transp. Servs.*, [1996-2000 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 32,533, at 33,489 (1998).

59. 88 F.E.R.C. ¶ 61,227, at P 61,737.

“[ten]-year firm commitments for all of its capacity” or be able to show that revenues would exceed costs.<sup>60</sup> An applicant unable to show that level of commitment could still receive a certificate but would be subject to a condition putting the applicant “at-risk” for any unsold capacity.<sup>61</sup> The Commission did not distinguish among the contracting parties, affiliates, producers, local distribution companies (LDCs), or marketers.<sup>62</sup>

Yet, the Commission also noted that landowners and communities had become increasingly active in objecting to the taking of their land by eminent domain for pipeline right-of-way.<sup>63</sup> The Commission believed that “by relying almost exclusively on contract standards to establish the market need for new projects, the current policy made it difficult to articulate to landowners and community interests why their land must be used for a new pipeline project.”<sup>64</sup> Thus, over fifteen years ago the Commission recognized the need for its policies to address the perception that pipelines served private, not public, interests.

In the NOPR in Docket No. RM98-10-000, the Commission asked for comments on three options:

One option would be for the Commission to authorize all applications that at a minimum meet the regulatory requirements, then let the market pick winners and losers. Another would be for the Commission to select a single project to serve a given market and exclude all other competitors. Another possible option would be for the Commission to approve an environmentally acceptable right-of-way and let potential builders compete for a certificate.<sup>65</sup>

In addition, the Commission asked commenters to address several other issues including: whether the Commission should look behind precedent agreements or contracts presented as evidence of market demand to assess independently the need for additional gas service; whether the Commission should apply a different standard to precedent agreements or contracts with affiliates; and whether a different standard should apply to project sponsors who did not plan to use eminent domain to acquire right-of-way.<sup>66</sup> Thus, the Commission anticipated many of the issues raised by today’s pipeline opponents.

The Commission identified specific goals for its new policy:

An effective certificate policy should further the goals and objectives of the Commission’s natural gas regulatory policies. In particular, it should be designed to foster competitive markets, protect captive customers, and avoid unnecessary environmental and community impacts while serving increasing demands for natural gas. It should also provide appropriate incentives for the optimal level of construction and efficient customer choices.<sup>67</sup>

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60. *Id.* at P 61,743.

61. *Id.*

62. The Commission did not require contracts to support projects designed to provide system benefits, such as improved reliability, access to new supplies, or more economic operations.

63. *Id.* at P 61,744.

64. 88 F.E.R.C. ¶ 61,227, at P 61,744.

65. *Id.* at P 61,737; [1996–2000 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 32,533, at 33,490.

66. 88 F.E.R.C. ¶ 61,227, at PP 61,737-38; [1996–2000 REGS. PREAMBLES] F.E.R.C. STATS. & REGS. ¶ 32,533, at 33,489-90.

67. 88 F.E.R.C. ¶ 61,227, at P 61,743.

A large number of stakeholders submitted comments. These are summarized in the Policy Statement. The issues raised then were much the same as issues that confront the Commission today in deciding on applications for new pipeline projects. Landowners still object to losing property by eminent domain. Pipeline opponents still argue that precedent agreements are not sufficient evidence of the public convenience and necessity, that affiliate contracts are a sham, and that the Commission does not give adequate consideration to environmental factors.

### *B. The Policy Adopted*

The adopted 1999 Policy Statement considered all of these issues, and continues the Commission's long history of reliance on contracts or precedent agreements as "important evidence of demand for a project;" however, the Commission no longer requires contracts for any specific percentage of new capacity.<sup>68</sup> Instead, the Policy Statement focuses on the impact of the project on relevant interest groups balanced against the project's benefits.<sup>69</sup>

In order to receive a certificate for a new project, an applicant is expected to eliminate or at least minimize any potential adverse effects on three key groups with interests most likely to be affected by a pipeline construction project. The applicant's existing customers must not be required to subsidize a project that does not benefit them. Other pipelines and their customers must not be exposed to unfair competition.<sup>70</sup> Landowners and communities along the new pipeline's route should not be subjected to eminent domain where right-of-way can be acquired by good faith negotiation. A project is considered to be required by the public convenience and necessity where an applicant can show that public benefits outweigh any residual adverse effects on these aforementioned interest groups.<sup>71</sup>

A broad range of public benefits may be offered as proof that a project is required by the public convenience and necessity, and these benefits can be supported by any type of relevant evidence.<sup>72</sup> The goal must be to show that benefits outweigh adverse effects and therefore that the public interest will be served by the project. But the real linchpin of the policy is the pricing that is dictated by the prohibition on subsidies and places the risk on the project's investors.

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68. *Id.* at P 61,748.

69. *Id.*

70. The Policy Statement does not preclude certificating more than one pipeline to serve a given market. To the contrary, it is established that the Commission may find that the public convenience and necessity requires certificating pipelines that compete with each other for a market. *See Alabama-Tennessee Nat. Gas. Co. v. FPC*, 417 F.2d 511, 516 (5th Cir. 1969) ("Section 7(g) makes clear the Commission's power to grant more than one certificate of public convenience and necessity for one service area."); *N. Nat. Gas. Co. v. FPC*, 399 F.2d 953, 964-65 (D.C. Cir. 1968) (certification of two pipelines to serve a given market could provide incentives for the pipelines to improve service and reduce costs in order to retain and attract customers); *Cincinnati Gas & Elec. Co. v. FPC*, 389 F.2d 272, 276-77 (6th Cir. 1968); *Chatanooga Gas. Co. v. E. Tenn. Nat. Gas Co.*, 35 F.P.C. 917, 924-25 (1966) (certification of new pipeline to serve market where there was an existing pipeline granted precisely because lower rates are anticipated from the new carrier).

71. 88 F.E.R.C. ¶ 61,227, at P 61,745.

72. "The types of public benefits that might be shown are quite diverse but could include 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." *Id.* at P 61,748.

### 1. Incremental Pricing and the Prohibition Against Subsidies

The Commission recognized that as the industry became more competitive, the Commission needed to adapt its policies to provide the correct regulatory incentives. The prior policy had a bias for rolled-in pricing that sent the wrong price signals. Rolled-in pricing hid the cost of pipeline expansions because projects were subsidized by existing customers.<sup>73</sup> Accordingly, the Commission adopted a “threshold requirement.”<sup>74</sup> To establish the public convenience and necessity of an expansion, pipelines would need to support new projects without ever relying on subsidies from existing customers. The Commission adopted a policy of incrementally pricing new pipeline projects, thus allowing the market to decide when new projects were financially viable and placing all of the risk of overbuilding on the pipeline.<sup>75</sup>

### 2. The Market as Evidence of the Need for a Project

Numerous commenters had urged the Commission to let the market determine the need for new pipeline capacity and not substitute its judgment.<sup>76</sup> The prohibition against financial subsidies was responsive to these requests and solved several problems at once. By putting the economic risk of a new project on its sponsor, the Commission increased the significance of contracts as indicators of true need. The Commission has described this as a two-step process for determining the economic viability of a project in the following way:

The first step, which occurs prior to the certificate application, is for the pipeline to conduct an open season in which existing customers are given an opportunity to permanently relinquish their capacity. This first step ensures that a pipeline will not expand capacity if the demand for that capacity can be filled by existing shippers relinquishing their capacity. The open season policy was not changed by the recent Policy Statement. The second step is that the expansion shippers must be willing to purchase capacity at a rate that pays the full costs of the project, without subsidy from existing shippers through rolled-in pricing.<sup>77</sup>

Investors are highly unlikely to put capital at risk for projects that lack a genuine market—a point true for both existing pipelines and for new pipelines without existing customers. Pipelines have no incentive to enter into sham precedent agreements with affiliates for the same reason. If there is no throughput, the pipeline will not recover the cost of service. Therefore, the Commission’s “concern with precedent agreements is whether they are long-term in nature and whether they are binding,” not whether the agreement is with an affiliate.<sup>78</sup> To the extent

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73. *Id.* at P 61,745.

74. *Id.* at P 61,792.

75. *Id.* at P 61,746; Order Clarifying Policy Statement, 90 F.E.R.C. ¶ 61,128, at P 61,391. *But see* William B. Tye & Jose Antonio Garcia, *Who Pays, Who Benefits, and Adequate Investment in Natural Gas Infrastructure*, 28 ENERGY L. J. 1, 41 (2007) (arguing that “bias in favor of incremental pricing may push too many costs onto new users, while existing customers enjoy benefits at no cost”).

76. 88 F.E.R.C. ¶ 61,227, at P 61,738.

77. 90 F.E.R.C. ¶ 61,128, at P 61,392 (footnote omitted).

78. *Transcon. Gas Pipe Line Corp.*, 81 F.E.R.C. ¶ 61,104, at P 61,382 (1997), *reh'g denied*, 82 F.E.R.C. ¶ 61,084 (1998), *pet. dismissed*, *Brooklyn Union Gas Co. v. FERC*, 190 F.3d 369 (5th Cir. 1999); *see also Greenbrier Pipeline Co.*, 103 F.E.R.C. ¶ 61,024, at P 17 (2003) (“The fact that the marketers are affiliated with the project sponsor does not lessen the marketers’ need for the new capacity or their obligation to pay for it under

an affiliated LDC or electric utility is a shipper, the state regulatory agency can review the prudence of the state regulated entity's contract.<sup>79</sup> Additionally, the requirement for incrementally-priced rates helps address nearly all of the objections typically raised in pipeline certificate proceedings for new projects.

Existing customers of the expanding pipeline should not have to subsidize a project that does not serve them. Landowners should not be subject to eminent domain for projects that are not financially viable and therefore may not be viable in the marketplace. Existing pipelines should not have to compete against new entrants into their markets whose projects receive a financial subsidy (via rolled-in rates), and neither pipeline's captive customers should have to shoulder the costs of unused capacity that results from competing projects that are not financially viable. This is the only condition that uniformly serves to avoid adverse effects on all of the relevant interests and therefore should be a test for all proposed expansion projects by existing pipelines. It will be the predicate for the rest of the evaluation of a new project by an existing pipeline.<sup>80</sup>

The Commission found that the policies adopted in the Policy Statement had converged with those of the Optional Expedited Certificate procedures, as both programs operated to place the risk of a new project on the pipeline.<sup>81</sup> Accordingly, the Commission repealed the Optional Expedited Certificate rule in 2000.<sup>82</sup>

### 3. The Balancing Test and Review Under the National Environmental Policy Act

The balancing of adverse effects and benefits under the Policy Statement is largely focused on economic interests and proceeds separately from the Commission's environmental analysis of a project.<sup>83</sup> The Commission explained in the

the terms of their contracts."), *reh'g denied*, 104 F.E.R.C. ¶ 61,145 (2003), *reh'g denied*, 105 F.E.R.C. ¶ 61,188 (2003).

79. See generally, *Granite State Gas Transmission, Inc.*, 83 F.E.R.C. ¶ 61,194, at P 61,820 (1998); *Paiute Pipeline Co.*, 151 F.E.R.C. ¶ 61,132, at P 33 (2015) (affiliate LDC's prudence in exchanging lower cost system capacity for capacity on pipeline expansion project is matter for resolution by state public utility commission), *order on reh'g*, 153 F.E.R.C. ¶ 61,292 (2015), *order on reh'g*, 155 F.E.R.C. ¶ 61,267 (2016).

80. 88 F.E.R.C. ¶ 61,227, at P 61,746.

81. 90 F.E.R.C. ¶ 61,128, at P 61,390. We note as well that the Policy Statement effectively incorporates a principle adopted in Order No. 555 (even though the regulations issued by that order were later withdrawn), namely, that a pipeline should bear the risk of new capacity that does not benefit its existing customers. See, e.g., Order No. 555, III F.E.R.C. STATS. & REGS at 30,228 (project that does not satisfy the Kansas Pipe Line criteria will be placed at risk for underutilization of facilities).

82. Order No. 615, *Optional Certificate and Abandonment Procedures for Applications for New Service Under Section 7 of the Natural Gas Act*, 65 Fed. Reg. 45,856 (2000) (to be codified at 18 C.F.R. pt. 157). Referring to its notice of proposed rulemaking in the proceeding, the Commission said:

The Commission explained that because the optional certificate program operates under a rebuttable presumption that proposals under which the pipeline applicant will assume the financial risks associated with the project are in the public interest, the Commission does not weigh the public benefits against the adverse effects in considering such applications. The Commission stated that it believes that it will be better to consider all certificate applications under the broader criteria articulated in the Policy Statement.

*Id.* at 45,857.

83. The separation of the environmental analysis under the Policy Statement is consistent with a practice adopted in 1990 when the Commission began issuing "preliminary determinations" in pipeline certificate cases. See, e.g., *Colo. Interstate Gas Co.*, 52 F.E.R.C. ¶ 61,003 (1990). Preliminary determinations addressed all issues

Policy Statement that “[o]nly when the benefits outweigh the adverse effects on economic interests will the Commission then proceed to complete the environmental analysis where other interests are considered.”<sup>84</sup> Section 102 of NEPA requires that the Commission prepare an environmental impact statement (EIS) for “proposals for . . . major Federal actions significantly affecting the quality of the human environment.”<sup>85</sup> The “twin aims” of NEPA are to “place[] upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action” and “ensure[] that the agency will inform the public that it has indeed considered environmental concerns in its decision-making process.”<sup>86</sup> NEPA also requires the agency preparing an EIS to consider carefully the “scope” of its analysis, which is defined by Council of Environmental Quality regulations as “the range of actions, alternatives, and impacts to be considered in an environmental impact statement.”<sup>87</sup> For smaller projects, the Commission generally prepares an environmental assessment (EA), which is meant to be a “concise public document . . . that serves to . . . [b]riefly provide sufficient evidence and analysis for determining whether to prepare an [EIS] or finding of no significant impact.”<sup>88</sup> In practice, the Commission’s EISs and EAs prepared by its staff are often voluminous, and ultimately recommend a number of environmental mitigation conditions intended to decrease and minimize the environmental impacts of the proposed pipeline project, which are adopted by the Commission in its certificate orders.

The Commission has explained that the balancing test under the Policy Statement “precedes an environmental analysis” and that it does not err “by failing to balance project need and benefits against adverse environmental impacts.”<sup>89</sup> Opponents of Commission-regulated projects often claim that the approach of performing the economic balancing test before considering the environmental impacts of a project falls short of the review required by the NEPA. But, while NEPA can inform the Commission’s decision whether a project is required by the public convenience and necessity, that argument ignores the goals of NEPA requiring the Commission “to consider every significant aspect of the environmental impact of a proposed action” and to disclose to the “public that it has indeed considered

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in a proceeding except environmental issues. A preliminary determination decided under what condition a certificate would be granted subject to favorable environmental review. Issuance of the actual certificate and review of the environmental issues were the subject of a later order. *See id.* Once common, preliminary determinations are now rare. None have been issued since 2009. *See Ruby Pipeline, L.L.C.*, 128 F.E.R.C. ¶ 61,224 (2009), *order on clarification*, 131 F.E.R.C. ¶ 61,007 (2010). Today most significant construction projects follow the Commission’s “optional” pre-filing procedures which results in preparation of an environmental document early in the process of Commission staff’s review of a certificate application. *See* 18 C.F.R. § 157.21 (2012).

84. 88 F.E.R.C. ¶ 61,227, at P 61,745.

85. 42 U.S.C. § 4332(2)(C) (1975); *see also* 40 C.F.R. § 1502.3 (1978).

86. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (citing *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553(1978); *Weinberger v. Catholic Action of Haw.*, 454 U.S. 139, 143 (1981)).

87. 40 C.F.R. § 1508.25 (1977).

88. 40 C.F.R. § 1508.9(a).

89. *Midwestern Gas Transmission Co.*, 116 F.E.R.C. ¶ 61,182, at P 37 (2006).



environmental concerns in its decision-making process.”<sup>90</sup> Opponents’ arguments simply fail to consider the reality of the Commission’s certificate process. In theory, a pipeline project could have an environmental impact so severe that it would offset all other public benefits and could not meet the requirements of the public convenience and necessity.

Nothing prevents the Commission from finding that a project would not be required by the public convenience and necessity solely for environmental reasons. As a practical matter, though, an application for such a project would almost certainly never be filed.

Virtually all significant projects are now subject to the Commission’s “optional” pre-filing procedures.<sup>91</sup> Under these procedures, applicants begin early outreach to stakeholders and other permitting agencies and do not file applications until Commission staff has reviewed and commented on the environmental exhibits. Projects that might otherwise have significant adverse effects can be mitigated through rerouting or by the numerous environmental conditions applied to all construction certificates.<sup>92</sup> For example, one recent project considered 282 route variations, almost all of which were identified by landowners, government officials, and other stakeholders and incorporated 214 of those route variations into its proposed route.<sup>93</sup> The Commission’s order will generally recognize the incorporation of environmental conditions through language finding that subject to the conditions in the order, the project is in the public convenience and necessity.

## VII. CONCLUSION

The federal government has exclusive authority under the Commerce Clause of the Constitution to regulate the transportation of natural gas in interstate commerce. Pipelines are the only feasible method of transporting natural gas over long distances and Congress delegated the regulation of interstate pipeline construction to the Commission pursuant to the NGA. In reviewing the Commission’s performance of these regulatory responsibilities, appellate courts recognize that the decision to grant or deny a certificate application is “a matter peculiarly within the

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90. *Balt. Gas & Elec. Co.*, 462 U.S. at 97 (citing *Vt. Yankee Nuclear Power*, 435 U.S. at 553; *Weinberger*, 454 U.S. at 143).

91. See 18 C.F.R. § 157.21. The Commission’s pre-filing procedures were issued in compliance with section 311(d) of the Energy Policy Act of 2005 to establish mandatory procedures requiring prospective applicants to begin the Commission’s pre-filing review process at least six months prior to filing an application for authorization to site and construct a liquefied natural gas terminal. Pub. L. No. 109-58, 119 Stat. 594 (2005). However, applicants for other facilities subject to the Commission’s jurisdiction under the NGA may elect to undertake the pre-filing process on a voluntary basis prior to filing applications. 18 C.F.R. § 157.21(b). As a practical matter, applicants for major construction projects almost always participate in the pre-filing process.

92. For example, a typical Commission order authorizing 686 miles of pipeline construction in the south-east United States contained twenty-seven environmental conditions. *Fla. Se. Connection*, 154 F.E.R.C. ¶ 61,080, at App’x B (2016).

93. 154 F.E.R.C. ¶ 61,080, at P 71; see also *Constitution Pipeline Co.*, 149 F.E.R.C. ¶ 61,199, at PP 109, 112 (2014) (noting the pipeline made changes to over 50% of its proposed 124-mile-long pipeline route in order to address concerns from landowners and that another ninety-seven route variations were adopted by the pipeline or imposed by the Commission through the environmental review process), *reh’g denied*, 154 F.E.R.C. ¶ 61,046 (2016).

discretion of the Commission.”<sup>94</sup> A court will not substitute its judgment for that of the Commission as long as the Commission’s decision was “reasoned, principled, and based upon the record.”<sup>95</sup>

This article reviews the development of the Commission certificate policy in response to calls for new procedures to evaluate pipeline certificate applications. We think there is no need for such new procedures. The Commission’s evaluation of certificate applications under the principles adopted in the Policy Statement continues to satisfy the standards set by the statute and the courts. A competitive market cannot function efficiently if participants are unable to respond timely to market signals. The Commission’s reliance on contracts as the best evidence to determine project need has a long and successful history. When the market will not support a project, it does not go forward. For example, Independence Pipeline Company applied for a certificate to construct a 400-mile pipeline from the Midwest to Leidy, Pennsylvania in 1997. The project received a certificate in 2000.<sup>96</sup> In mid-2002 the project sponsors cancelled the project because of insufficient customer support.<sup>97</sup> More recently, two other pipeline projects were cancelled or put on hold due to lack of market support.<sup>98</sup>

The Commission’s policy of incremental pricing puts the financial risk of new projects on the pipelines and provides a strong incentive that disfavors unneeded projects. This approach adopted in the Policy Statement is consistent with the statute and sound economic principles. Instead of picking winners and losers, the Commission evaluates the public convenience and necessity of pipeline construction projects based on the demonstrated willingness of investors to risk capital in the market place.

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94. *E.g., Minisink Residents for Envtl. Prot. v. FERC*, 762 F.3d 97, 106 (D.C. Cir. 2014) (and cases cited therein).

95. *Id.*

96. *Indep. Pipeline Co.*, 92 F.E.R.C. ¶ 61,022 at P 2 (2002), *reh’d denied*, 92 F.E.R.C. ¶ 61,268 (2000), *clarifying order*, 96 F.E.R.C. ¶ 61,279 (2001).

97. 100 F.E.R.C. ¶ 61,082.

98. 88 F.E.R.C. ¶ 61,227, *corrected by*, 89 F.E.R.C. ¶ 61,040 (1999), *clarified by*, 90 F.E.R.C. ¶ 61,128, *clarified by*, 92 F.E.R.C. ¶ 61,094 (2000).