



FEDERAL ENERGY REGULATORY COMMISSION
Commissioner Mark C. Christie

September 27, 2021

The Honorable John Barrasso, M.D.
Ranking Member
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Barrasso:

Thank you for your September 15, 2021 letter and for the opportunity to address the important issues you raise in it.

Question 1: Please provide a chart showing the status of Certificate Applications currently under consideration by the Commission, showing the date on which each application was filed, and the current stage of review for each, and the standard or review that applies to each application and notice, if any, that the applicant had of changes in the standard. (E.g., please identify those Applications for which staff's review under National Environmental Policy Act (NEPA) has resulted in the publication of a draft or final Environmental Impact Statement, Environmental Assessment, or other form of documentation of the Commission's review of the project for the purposes of the Commission's compliance with NEPA, whether the NEPA requirement has changed since the application was filed.)

Commissioner Christie Answer to Question 1:

I understand this chart has been prepared and provided by the Chairman in his September 24, 2021 response to your letter.

Question 2: Has the Commission adopted a generally-applicable requirement for an EIS "to assist the Commission in its consideration of [a natural gas pipeline] Project's contribution to Climate Change and [its] decision-making process to determine whether [a] proposed Project is in the public convenience and necessity"? [citing *Notice of Intent to Prepare an Environmental Impact Statement for the Proposed North Baja Xpress Project and Schedule for Environmental Review* issued May 27, 2021 in Docket No. CP20-27-000 at 1.]

Commissioner Christie Answer to Question 2:

Not at this point. However, as your question references, the Commission has recently issued a number of Notices of Intent to prepare an Environmental Impact Statement ("EIS") in which this issue is included. Interested persons and organizations have been invited to address this and other relevant issues through the EIS process.



Question 2(a): If so, what standards has or will the Commission apply to determine that an EIS (e.g., in the place of or as a supplement to an Environmental Assessment) addressing a “Project’s contribution to Climate Change” is necessary?

Commissioner Christie Answer to Question 2(a): Please see answer to Q.2 above.

Question 2(b): If not, in what context and for what purpose were the May 27 Notices issued or subsequent similar actions taken?

Commissioner Christie Answer to Question 2(b): The Commission was not asked to, and did not vote to issue the May 27 Notices. Thus, I have no information responsive to your question.

Question 2(c): What significance do actions such as the May 27 Notices hold for other projects under review or that may be filed before the Commission has concluded its review of the 1999 Policy Statement and announced any changes?

Commissioner Christie Answer to Question 2(c): I have stated publicly several times¹ that I believe any major changes in the processes and policies for handling certificates of public convenience and necessity (“CPCNs”) under the Natural Gas Act (indeed, for any major regulatory change) should be made *prospectively* and in a *general proceeding* in which all interested persons may participate and give their views. I understand the argument that if an individual case is in front of us we must decide it under applicable legal requirements and not delay the case; however, pending the outcome of the Notice of Inquiry (“NOI”), we should go no further in setting new policies and procedures than absolutely and clearly required by existing law. As I explain in greater detail below, in my opinion, we should also be working to address the outcome of the pending NOI. As my dissent in *Algonquin* made clear, the actions taken by the majority in that case went beyond those required by law.²

Further, the Notice of Inquiry has been pending for years,³ was “refresh[ed]” in February of this year,⁴ comment was closed on April 26, 2021, and any proposed changes to the Certificates Policy Statement could have been published by now for comment and ultimate adoption by this Commission. Acting on the NOI would allow the Commission to avoid making major changes in policy in individual cases without benefit of broad participation and with only limited factual records.

¹ *Algonquin Gas Transmission, LLC, Maritimes & Northeast Pipeline, LLC*, 175 FERC ¶ 61,150 (2021) (“*Algonquin*”) (Comm’r Christie, dissenting) (available at <https://www.ferc.gov/news-events/news/commissioner-christies-dissent-regarding-algonquin-gas-transmission-llc-et-al>); *N. Natural Gas Co.*, 174 FERC ¶ 61,189 (2021) (Comm’r Christie, dissenting) (available at <https://www.ferc.gov/news-events/news/item-c-3-commissioner-mark-c-christie-concurring-part-and-dissenting-part>).

² *Algonquin*, 175 FERC ¶ 61,150 (2021) (Comm’r Christie, dissenting).

³ *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018).

⁴ *Certification of New Interstate Natural Gas Facilities*, 174 FERC ¶ 61,125 (2021).



Question 3: Has the Commission determined that NEPA or any other law requires it to consider greenhouse gas emissions downstream or upstream of any or all interstate natural gas projects prior to the issuance of a Certificate?

Commissioner Christie Answer to Question 3:

Not in all cases and not definitively. As discussed further in my answer to 3(b) below, the United States Court of Appeals for the D.C. Circuit (“D.C. Circuit”) has ruled in recent cases⁵ that the Commission should perform some sort of greenhouse gas (“GHG”) analysis but the court has not specified the form such analysis should take, nor how extensive it should be, nor how the Commission should use such an analysis in its evaluation of a certificate application. Those issues should be considered and, I am hopeful, guidance based on the applicable statutes can be given in the NOI.

Question 3(a): If so, please list and explain the relevant Commission precedent.

Commissioner Christie Answer to Question 3(a): Please answer to 3 above.

Question 3(b): If not, please (i) cite the specific authorities that require any such determination(s) and thoroughly explain your reasoning as to the basis for and scope of such determination(s); and (ii) explain why it is reasonable and appropriate to announce its intention to make such determination(s) in individual proceedings rather than in a generic proceeding.

Christie Answer to Question 3(b):

- (i) A number of relatively recent D. C. Circuit decisions have appeared to point the Commission in the direction of a more expansive NEPA review. In *Vecinos Para El Bienestar de la Comunidad Costera et al. v. FERC et al.*, for example, the court directed the Commission on remand to “explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework as ‘generally accepted in the scientific community’ within the meaning of the regulation, and if not, why not.” 6 F.4th 1321, 1329-30 (D.C. Cir. Aug. 3, 2021). Previously, the court had directed the Commission to estimate and analyze the amount of greenhouse gas emissions that were likely to be produced by power plants as an indirect downstream effect of granting a pipeline certificate. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (“*Sabal Trail*”). I was not a member of FERC during the *Sabal Trail* case. With

⁵ *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (“*Sabal Trail*”) (finding that the Commission erred in failing to consider, as an indirect effect of a pipeline certification, an estimate of the amount of greenhouse gas emissions produced by power plants served by the pipeline); *Vecinos Para El Bienestar de la Comunidad Costera et al. v. FERC et al.*, 6 F.4th 1321, 2021 WL 3354747 (D.C. Cir. Aug. 3, 2021); *but see, EarthReports v. FERC*, 848 F.3d 949 (D.C. Cir. 2016) (upholding Commission’s decision not to use the “social cost of carbon” tool to analyze the environmental impacts of greenhouse gas emissions from increased operation of LNG facility); and *Ctr. for Biological Diversity v. U.S. Army Corps of Eng’rs*, 941 F.3d 1288, 1299-1300 (11th Cir. 2019) (describing *Sabal Trail* as an “outlier opinion” that is “at odds with earlier D.C. Circuit cases” whose “legal analysis . . . is questionable at best.”).



regard to *Vecinos*, I believe it was wrongly decided, and I would have voted to seek rehearing, had such a vote been taken.

- (ii) As noted above in my answer to 2(c), I believe that any major changes in policy should be made only prospectively, in general proceedings, rather than in individual ones.

Question 4: How will the Commission meet the purposes of the Natural Gas Act to encourage the development of plentiful supplies of natural gas at reasonable prices if and as it adjusts its practice with respect to NEPA compliance? In light of the changes to FERC’s administration of its certificate program as a result of changes in its approach to NEPA compliance or other issues, does the Commission intend to conduct an analysis of the impact on the reliability and affordability of natural gas and electricity or on jobs? If not, why not?

Commissioner Christie Answer to Question 4:

I have said many times that ensuring reliability of the electric power supply – at the lowest necessary cost to consumers – is among this Commission’s highest priorities. A dependable and affordable supply of natural gas is inextricably part of ensuring a reliable power supply because today gas-fueled generation resources are such a large part of our vitally-needed dispatchable generation in the US. So, any potential impacts on reliability stemming from the decision to issue or not to issue a certificate to build a gas pipeline must carefully be considered in a certificate proceeding.

The Commission’s duties under NEPA must also be met. These duties are essentially procedural and informational. The twofold purpose of NEPA is to ensure that agency decision-making is informed by consideration of the possible environmental impacts of its major actions and to ensure that the public is also aware of them.⁶ Whether the procedural requirements of NEPA can override the text of the Natural Gas Act and require the Commission to reject a gas pipeline even when a finding of need has been made, is a question that has not been squarely addressed by the courts, nor by the Commission, at this point.⁷

Question 5: Is a 60-day comment cycle common for emergency certificate applications of the type filed by Spire STL Pipeline LLC? If so, why? If not, how frequently has a 60-day comment

⁶ See, *Balt. Gas & Elec. Co. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87, 97 (1983) (“NEPA has twin aims. First, it ‘places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action.’ *Vermont Yankee [Nuclear Power Corp. v. NRDC]*, 435 U.S. 519, 553 (1978)]. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process. *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139 ¶ (1981). Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations. See *Strycker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 ¶ (1980) (per curiam). Rather, it required only that the agency take a ‘hard look’ at the environmental consequences before taking a major action. See *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n.21 ¶ (1976)”; see also, *Sabal Trail*, 867 F.3d at 1367 (“the statute is primarily information-forcing.”).

⁷ The court in *Sabal Trail* purported to find that the Commission’s statutory duty “to consider ‘the public convenience and necessity’ when evaluating applications to construct and operate interstate pipelines” extends so far as to empower the Commission to “deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment,” 867 F.3d at 1373, but even that ruling did not purport to find that NEPA could require the Commission to deny a certificate for an otherwise-needed project.



cycle been established for an emergency certificate application? In a proceeding where a 60-day comment cycle was established for an emergency certificate application, was such a schedule adjusted in response to comments from state regulators, other state officials, customers, or others pointing to potential adverse effects of failing to act more quickly?

Commissioner Christie Answer to Question 5:

The Natural Gas Act permits the Commission to act on a request for a temporary emergency certificate without notice or hearing. 15 U.S.C. § 717f(c)(1)(B). Because of the DC Circuit’s opinion with its *vacatur* directive,⁸ the need for issuing the emergency certificate to Spire was overwhelming to ensure certainty and continuity of supply, particularly given the impending increase in demand that accompanies the onset of colder weather. I supported issuing the emergency certificate and would have supported an earlier issuance.

Question 6: Why did the Commission staff take 60 days to submit three questions to the utilities volunteering to establish the Southeast Energy Exchange Market?

Commissioner Christie Answer to Question 6:

As the Southeast Energy Exchange Market matter is a pending, contested proceeding before the Commission, I cannot address the merits of this matter. I note procedurally that: (i) two deficiency letters were issued in this matter—one on May 4, 2021 and one on August 6, 2021; and (ii) the Commission *is not asked to vote* on the decision of whether or not a deficiency letter issues.

Sincerely,

/s/ Mark C. Christie

Commissioner Mark C. Christie

⁸ *Emvtl. Def. Fund v. FERC*, 2 F.4th 953 (D.C. Cir. 2021).