ORAL ARGUMENT HAS NOT BEEN SCHEDULED

Docket No. 18-1188

In the United States Court of Appeals
for the District of Columbia Circuit

OTSEGO 2000, INC. and JOHN AND MARY VALENTINE,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF ORDERS ISSUED BY
FEDERAL ENERGY REGULATORY COMMISSION

REPLY BRIEF OF PETITIONERS OTSEGO 2000 and JOHN AND MARY VALENTINE

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CO2e	Carbon dioxide equivalent
Certificate	Certificate of public convenience and necessity
CEQ	Council on Environmental Quality
EA	Environmental Assessment
EIS	Environmental Impact Statement
FERC	Federal Energy Regulatory Commission
Greenhouse Gas	GHG
NGA	Natural Gas Act
NEPA	National Environmental Protection Act
Otsego 2000	Otsego 2000 Inc.
Project	New Market Project
Petitioners	Otsego2000 and John and Mary Valentine

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

SUMMARY OF ARGUMENT

FERC makes paradoxical and circular arguments in support of its order approving the Dominion New Market Project. It claims, at once, that it has performed sufficient environmental analyses to determine that the project will have no significant impacts, but then claims to have been entirely unable to study either the downstream or upstream contribution of greenhouse gas ("GHG") emissions associated with the project. Admitting that it well knows the identity of the entities which have contracted to purchase natural gas transmitted through the newly approved infrastructure, FERC still claims an incapacity to even make inquiry of them concerning the expected use of the newly-facilitated supply. Based on such specious and lazy reasoning, FERC states that it need not analyze such end-uses in determining the environmental impacts of the project. Likewise, even though natural gas cannot be reasonably extracted and used without pipeline infrastructure and that the expansion of the latter enables and stimulates the former, FERC refused in this case to study relevant environmental effects of the production process.

FERC'S reasoning and its conclusion contravene its critical role in ensuring that projects within its regulatory ambit get approved only after a reasoned determination that they further the public interest, a determination made impossible absent a thorough environmental review which considers all direct, indirect, and cumulative impacts. The substantial weight of recent case law supports recognition

of FERC's unaccepted obligation. *See, e.g.*, *Sierra Club v. Fed. Energy Regulatory Comm'n.*, 867 F.3d 1357, 1372 (D.C. Cir. 2017) *("Sabal Trail"); WildEarth Guardians v. BLM*, 870 F.3d 1222, 1237-38 (10th Cir. 2017); *Montana Envtl. Info. Ctr. v. U.S. Office of Surface Mining*, 274 F.Supp.3d 1074, 1090-91 (D. Mont. 2017); *San Juan Citizens Alliance et al. v. BLM*, No. 16-cv-376 at *12-13 (D.N.M. June 14, 2018); *W.Org. of Res. Councils v. BLM.* 2018 WL 1475470 at *13 (D. Mont. March 26, 2018).

FERC may not render itself blind to the dangers of climate change by failing to analyze the impacts of projects under its jurisdiction. Without seeking relevant data and having made no meaningful effort to evaluate upstream or downstream emissions, FERC's circular conclusion that Dominion's New Market Project would have no significant environmental impact is arbitrary and capricious. Instead of embracing the empirical challenges, which conducting necessary studies may involve, FERC spends most of its brief trying to explain away its obligation and lauding its inadequate work product. The Court should reject this approach and, for the reasons explained in appellant's prior brief and those submitted by supporting amici, vacate the challenged order and the overbroad declination to conduct such reviews, which represents FERC's new policy, and re-commit the agency to fulfilling its statutory duty.

ARGUMENT

Point I

FERC's Determination is clearly arbitrary and capricious.

There is no dispute that, before approving Dominion's New Market Project, FERC failed to comprehensively study either its upstream or downstream impacts. Yet, without such a review, the agency determined that the compressor stations and other facilities associated with the project would have no significant environmental impact. In so doing, FERC short-circuited necessary evaluation of matters with substantial consequence. This is the definition of an arbitrary and capricious action.

Fundamentally, FERC's arguments are self-serving and circular. First, the agency claims that information relating to the production and consumption of transported natural gas is not known or foreseeable. From this, it concludes that upstream and downstream GHG emissions are neither indirect nor cumulative effects and that analyzing them is unnecessary. FERC also claims that it is unable to assess the environmental impacts caused by any GHG emissions it recognizes. Armed with multiple excuses, the agency then grants itself permission to ignore those GHG emissions entirely and announce that the project will have no significant environmental impact.

In part, FERC defends its approval of the project by saying that the project's sponsor had the financial wherewithal to proceed and demonstrated a market for the

natural gas to be transmitted. In fact, FERC had knowledge of who was to purchase the gas. Further inquiry would have allowed a determination of projected use, information that, in turn, could have informed analysis of downstream GHG emissions. Accordingly, to the extent FERC claims it did not assess impacts for lack of information, the answer is simple: the absence of that information was of FERC's own making. In response, FERC argues that it was petitioner's responsibility to supply the necessary data to FERC. But this proposition represents a fundamental abdication of FERC's regulatory responsibility as it, not the petitioner or intervenors, carries that responsibility.

Important to the matter of downstream GHG emissions is this Court's decision in *Sabal Trail*. FERC contends that *Sabal Trail* means that an agency must analyze downstream impacts only when it knows asset destination. FERC submits that, where asset destination is less certain, FERC need not perform such analysis. However, this is too narrow a reading of the precedent and discounts the role FERC must play in obtaining information necessary to conduct the GHG analyses *Sabal Trail* compels. Environmental studies under NEPA do not merely report already known impacts of a proposed action, but rather obtain data and information to allow new understanding of impacts and so inform decision-making. To require FERC to gather information allowing a determination of the public interest is to require it to

do its job. Absent such diligence, it cannot make informed decisions, as required by NEPA and section 106 of the Natural Gas Act.

FERC also contends that it is not possible to know where the gas being transmitted originates, thereby making upstream GHG analysis impossible. But, again, FERC has not demonstrated any effort to ascertain this pertinent information. Plainly, FERC knows the capacity of the proposed project and can make inquiry as to the source of gas, whether that may be from new wells or extant resources. These are empirical questions not beyond inquiry or satisfactory resolution and the answer to these questions will dictate, in part, the environmental effects of the new infrastructure capacity. Again, FERC suggests that a meaningful analysis will yield unsettled uncertainty. However, it does so without making a good faith attempt at conducting that analysis. This constitutes a post facto rationale, rather than a considered conclusion.

Similarly, FERC's argument that there is no accepted methodology to determine how GHG emissions translate into physical environmental effects is hollow considering the availability of several known methods for quantifying these impacts and FERC's eschewal of them. Related to this, FERC concedes that the project will incrementally contribute to climate change, yet, without analysis, concludes that the environmental effects will not be significant. This constitutes arbitrary and capricious agency action.

Recognizing that FERC's role is to review and, where warranted, approve infrastructure projects does not advance the agency's position. Congress expects the agency to review applications based on factors other than whether approving them will increase the supply of natural gas. By definition, all reviewed projects are so intended. The review process exists to balance such increased distribution against the public interest, which includes the question of whether such increased distribution does or does not serve the public interest. If all projects inherently serve the public interest, then such an inquiry would be redundant and unnecessary. Likewise, if all such projects defeat the public interest, then FERC would have a very limited review role.

Congress intended a careful case-by-case review of the costs/benefits associated with each project. Here, for example, FERC increased support for the use of fossil fuels, specifically natural gas, despite aggressive efforts within New York and nationally to reduce dependence on such consumption and to expand the use of alternative energy sources. How much will any given proposal contribute to GHG emissions and what other more environmentally beneficial alternatives exist? Such analysis is forestalled by FERC's unwillingness to obtain and analyze the necessary data.

Point II

FERC failed to evaluate downstream GHG emissions, and its effort to distinguish *Sabal Trail* is baseless.

FERC bases its decision to ignore downstream GHG emissions on a flawed interpretation of this Court's decision in *Sabal Trail*. In *Sabal Trail*, this Court reversed and remanded an order approving construction of pipelines in Florida on the grounds that FERC failed to evaluate downstream GHG emissions. However, in their responses to Otsego's petition, FERC and Dominion attempt to distinguish and impermissibly limit the reach of *Sabal Trail* to cases where the end-use of the transported gas can be specifically identified. This constitutes a gross misinterpretation of this Court's ruling.

In *Sabal Trail*, this Court found that downstream GHG emissions from power plants were clearly foreseeable and must be analyzed. However, the Court did not hold that other downstream GHG emissions associated with the consumption of natural gas may be ignored. Indeed, the Court held, as Otsego argues here, that impacts associated with the downstream consumption of gas must be evaluated and that useful analysis can occur even if individual sources and quantities of GHG emissions are not precisely known. Significantly, the Court recognized the imprecise nature of certain analyses, stating, "we have previously held that NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may

sometimes need to make educated assumptions about an uncertain future." *Sabal Trail,* 867 F.3d at 1374.

The Court also recognized that "emission estimates would be largely influenced by assumptions rather than direct parameters about the project" and that "some educated assumptions are inevitable in the NEPA process." *Id.* (internal quotes and citations omitted). Notwithstanding the imprecise nature of analysis associated with educated assumptions, the default estimate of zero impact that results from ignoring downstream effects cannot be justified.

In *Sabal Trail,* the Court further held that where increased pipeline capacity is known, a quantitative analysis of GHG emission impacts can and should be performed based on that information:

> FERC has already estimated how much gas the pipelines will transport: about one million dekatherms (roughly 1.1 billion cubic feet) per day. The EIS gave no reason why this number could not be used to estimate greenhouse-gas emissions . . . We conclude that the EIS for the Southeast Market Pipelines Project should have either given *a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport* or explained more specifically why it could not have done so. As we have noted, greenhouse-gas emissions are an indirect effect of authorizing this project, which FERC could reasonably foresee, and which the agency has legal authority to mitigate. The EIS accordingly needed to include a discussion of the 'significance' of this indirect effect, as well as the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.

Id. (emphasis added) (citations omitted). The Court continued:

> Quantification would permit the agency to compare the emissions from this project to emissions from other projects, to total emissions from the state or the region, or to regional or national emissions-control goals. Without such comparisons, it is difficult to see how FERC could engage in 'informed decision making' with respect to the greenhouse-gas effects of this project, or how 'informed public comment' could be possible.

Id.

The Court further noted that estimated GHG levels "can serve as a reasonable proxy for assessing potential climate change impacts and provide decision makers and the public with useful information for a reasoned choice among alternatives." *Id.* (citing *WildEarth Guardians v. U.S. Bureau of Land Management*, 870 F.3d 1222 (10th Cir. 2017)).

These findings clearly establish that GHG emissions are critical to understanding the environmental impacts of a project, and, therefore, must be evaluated to allow the reviewing agency to make informed decisions. To comply with the Court's decision in *Sabal Trail*, FERC in fact prepared a Supplemental EIS which estimated downstream GHG emissions. The study included a "full-burn" analysis based on full capacity of the project. FERC could have, and should have, performed such an analysis for Dominion's New Market Project. Dominion's application was predicated upon firm commitments for the purchase of additional gas to serve "new markets" as confirmed throughout FERC's response. (*See, e.g.*,

FERC's reference to "new, fully subscribed capacity," FERC, p. 20). Consequently, GHG emissions associated with downstream use could and should have been evaluated. As discussed below, additional analyses could have been performed as well.

FERC argues that it is not required to consider downstream greenhouse gas impacts because states regulate the end-use consumption of gas. (*See* FERC, p. 12 and pp. 34-35). Again, *Sabal Trail* rejects this argument, holding that "the existence of permit requirements overseen by another federal agency or state permitting authority cannot substitute for a proper NEPA analysis." *Sabal Trail,* 867 F.3d at 1375.

Here, FERC attempts to distinguish *Sabal Trail* by claiming that the NGA "expressly excludes local distribution companies and distribution facilities from its jurisdiction." (FERC, p. 12 and pp. 34-35). However, states have the ability to regulate the end-use consumption of natural gas, whether that consumption occurs by a power plant or other type of end-user. Therefore, this distinction is irrelevant. Notwithstanding the regulatory authority of another federal or state agency, FERC is obliged pursuant to NEPA to perform a substantive analysis of GHG impacts.

In another attempt to distinguish *Sabal Trail*, FERC argues that "[t]he New Market Project's capacity was sized to meet the local distribution companies' forecasted peak demand, which will occur on an intermittent basis." (FERC, p. 38).

The operative word here is "forecasted." While the use of natural gas by customers served by distribution companies may vary on a daily or even hourly basis, the patterns of that use are seasonal and can be forecasted. Indeed, if such patterns could not be predicted, Dominion and the buyers of the natural gas that it transports would be unable to establish firm contracts for the sale of gas. The fact that those firm contracts exist (and have been offered as justification for a finding of public convenience and necessity), confirms that forecasting gas consumption is not only possible, but an inherent part of the business. Those forecasts could have and should have been used to formulate reasonable estimates of GHG emissions.

FERC further attempts to argue that an analysis of downstream GHG emissions is not possible because the consumption of natural gas could potentially displace other "higher-emitting" fuels. (FERC, p. 17, 39-41). Once again, this argument was rejected in *Sabal Trail*:

> Nor is *FERC excused from making emissions estimates just because the emissions in question might be partially offset by reductions elsewhere*. We thus do not agree that the EIS was absolved from estimating carbon emissions by the fact that some of the new pipeline's transport capacity will make it possible for utilities to retire dirtier, coal-fired plants. The effects an EIS is required to cover 'include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.' In other words, when an agency thinks the good consequences of a project will outweigh the bad, the agency still needs to discuss both the good and the bad.

Sabal Trail, 867 F.3d at 1374-1375 (emphasis added).

This Court's decision in *Sabal Trail* makes clear that FERC is required to investigate these inter-related issues pursuant to the "hard look" standard under NEPA and the NGA's "public interest" standard. Conspicuously, this argument by FERC also fails to acknowledge that the increased consumption of natural gas could potentially displace low-emitting energy sources, such as renewable energy and nuclear power. Such irrational bias must be rejected.[1] As a distraction, FERC also suggests that downstream gas could be used alternatively as industry feedstock (FERC, p.39), failing to mention that this comparatively tiny end-use sector produces GHG emissions as well. (*See* State Attorneys General Amici Curiae brief, p. 16.)

Finally, FERC claims that downstream GHG emissions need not be considered because "companies will continue to negotiate for and find natural gas supplies, and end use consumption of natural gas will occur, regardless of whether

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[1]During a public meeting hosted by Dominion on May 1, 2017 for the Borger Compressor Station, Dominion acknowledged that gas from its New Market Project would support Cricket Valley Energy Center, a new gas-fired power plant currently under construction in Dover, New York. According to the New York Independent System Operator (NYISO), the Cricket Valley facility would contribute to replacement of zero-emission electricity lost by the closure of the Indian Point nuclear power plant in Buchanan, New York. (NYISO 2018 Power Trends, p. 32). Dominion's admission regarding this end-use destination and the source of energy it would replace is further evidence that relevant information was available but ignored during the review process.

the project is approved." (FERC, p.33 (internal quotes removed)). FERC seems to confess here that it is incapable of exercising authority to limit the proliferation of natural gas pipelines at all. However, the Court appropriately held in *Sabal Trail* that this "does not bear on the question (of) whether FERC is legally authorized to consider downstream environmental effects when evaluating a Section 7 certificate application." *Sabal Trail*, 867 F.3d 1357 at n. 9. Clearly it is required to do so.

Power plants represent less than half of total natural gas consumption in the United States.[2] Therefore, the notion that FERC should limit its consideration of downstream GHG emissions only to pipeline projects where power plants are the exclusive consumer defies logic. As repeatedly demonstrated by this Court's holding in *Sabal Trail*, FERC's authority is not so limited.

Point III

FERC failed to evaluate upstream GHG emissions.

FERC also offers lame excuses for its failure to consider upstream impacts. FERC bases its refusal to evaluate upstream GHG emissions on a set of "chicken-and-egg" arguments which attempt to mask the inextricable relationship between gas production and transmission. FERC conceded that the Project was "built to satisfy a demand for additional gas transportation capacity," but then claims that the

[2] Energy Information Administration (Natural Gas Consumption by End Use: New York, annual), https://www.eia.gov/dnav/ng/ng_cons_sum_dcu_SNY_a.htm.

transport of gas is unrelated to extraction and not a proximate cause. (FERC, p. 16.) FERC then proceeds to claim that this is consistent with its experience that "infrastructure follows production, rather than vice versa." (*Id.*). FERC further asserts that "it is unknown— or virtually unknowable—whether the gas to be transported by the Project will come from new or existing production." (*Id.*).

This tortured reasoning, echoed by Dominion and industry amici, is apparently based on the false premise that upstream greenhouse gas emissions will be produced regardless of whether or not pipelines are built, and whether or not there is a means of transporting product to market. Indeed, Dominion and API go so far as to claim erroneously that "FERC regulates only pipeline projects that transport *already-extracted* natural gas." (Dominion, p. 26 (emphasis added)).

While it is true that gas wells (including exploratory wells) are sometimes drilled in anticipation of pipelines to bring gas to market, many more are drilled to support continued use of a transmission pipeline once that pipeline is installed. Production from a typical shale gas well drops sharply during the first year.[3] Thus, a causal relationship clearly exists between approval of pipeline capacity and new production to support the ongoing use of that pipeline over time.

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[3] *Production and Royalty Declines in a Natural Gas Well Over Time*, Geology.com: Geology New and Information, https://geology.com/royalty/production-decline.shtml; *See also, Natural Gas Production Decline Curve and Royalty Estimation*; Penn State Extension, https://extension.psu.edu/natural-gas-production-decline-curve-and-royalty-estimation

Further, if gas wells are drilled in advance of available transport capacity, they are shut off (also referred to as "shut-in") until transport capacity is available. If transport capacity becomes available, they are then opened so that a pathway is created for gas to flow through gathering lines, compressor stations, and various processing stages prior to entering the transmission pipeline. The movement and processing of gas through each of these upstream stages result in additional GHG emissions that are therefore enabled by approval of the main transmission pipeline. Thus, a causal relationship cannot be denied.

FERC admits that the project application explicitly stated that Dominion's pipeline system is "particularly suited to transport gas produced in the Appalachian regions of West Virginia and Ohio." (FERC, p. 28). Nonetheless, FERC then attempts to walk this back by stating that the project could actually receive gas from any number of pipeline companies crossing multiple states. Dominion chimes in, saying that its network interconnects with systems that span anywhere from the Gulf of Mexico to New York City. (Dominion, p. 28).

Although, the implication here is that sources and destinations of gas are completely unpredictable, that is not so. Dominion's project provides for unidirectional flow, and locations like New York City are far more likely to be destinations, rather than sources, of gas. The motivation behind the project is obvious from the full language of Dominion's application: "Natural gas produced

from the Marcellus and Utica shales in the Appalachian region of West Virginia and Ohio is *expected to continue* its strong and rapid growth." (Dominion Application, filed June 2, 2014, p. 4 (emphasis added)). Based on this, reasonable estimates could have been made regarding the upstream impacts of that gas infrastructure. Notwithstanding assumptions made for analysis, the default estimate of zero impact that FERC applied by ignoring upstream effects entirely is clearly less valid, and cannot be justified.

In its arguments, FERC and Dominion also contend that the evaluation of upstream GHG impacts requires detailed information regarding the precise number, location, and timing of gas well development and related facilities. However, this is true only if an exact estimate of total upstream impacts is required. It is not. NEPA's 'hard look' standard and NGA's 'public interest' standard require only the prudent evaluation of information; they do not require infinitesimally precise knowledge of all upstream infrastructure development. In prior findings relative to the evaluation of downstream GHG impacts, this Court held that "NEPA analysis necessarily involves some 'reasonable forecasting,' and that agencies may sometimes need to make educated assumptions about an uncertain future." *Sabal Trail,* 867 F.3d at 1374. This clearly applies to upstream emissions estimates as well.

Point IV

GHG emissions are Reasonably Foreseeable

In granting approval for construction of Dominion's New Market Project, FERC erroneously concluded that upstream and downstream impacts of GHG emissions were unforeseeable or too speculative to consider.

NEPA requires that federal agencies consider "any adverse environmental effects" of "major actions." 42 U.S.C. § 4332(C). CEQ regulations provide that "effects" include both those which are direct and indirect. 40 C.F.R. § 1508.8. Indirect effects are defined as those that "are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Mid-States Coalition for Progress v. U.S. Bureau of Land Management,* 345 F.3d 520 (8th Cir, 2003). This language leaves little doubt that the type of effect at issue here, harmful GHG emissions, are "something that must be addressed in an EIS if they are 'reasonably foreseeable.' As in other legal contexts, an environmental effect is 'reasonably foreseeable' if it is sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision." *Mid-States*, at 549 (citing *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

In *Mid-States*, the court reasoned that if the increased availability of a resource (in that case coal) would drive the construction of additional power plants and use of coal, the agency would need to know where those plants will be built, and how

much coal these new power plants would use. The court explained that even if the precise plants where the coal will be burned are not known, this only establishes that the *extent* of the effect is speculative; the *nature* of the effect remains "far from speculative." *Id.* In *Mid-States*, the Court held that "when the nature of the effect is reasonably foreseeable, but its extent is not, we think that the agency may not simply ignore the effect." *Id.* The Court referred to the CEQ guidelines which would require an agency to include the following data if the extent of a known harmful emission was not clearly understood:

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

Id. at 550.

As in *Mid-States*, the *nature* of GHG emissions as a result of producing, transporting, and burning natural gas is clearly foreseeable. Thus, even if the *extent* of the emissions is uncertain, FERC had a duty to behave as a prudent person and consider the mounting scientific evidence of GHG impacts on the climate before

granting approval. Uncertainty about the extent of emissions does not allow FERC to ignore them.

Point V

FERC failed to consider the impacts on climate change.

GHG emissions are released at every stage of natural gas extraction, processing, transmission, and consumption. As noted by dissenting commissioners, it is also well established that the release of GHG emissions into the atmosphere exacerbates climate change. FERC arrives at its conclusion that Dominion's New Market Project would have no significant environmental impacts by ignoring these basic facts.

In its brief, FERC admits that the project Environmental Assessment focused on property owned by Dominion and GHG emissions associated with construction and operation of those facilities. (FERC, p.21). Within this extremely narrow scope of review, FERC acknowledged that incremental climate impacts may result. However, it chose to ignore those impacts, stating that there is "no accepted methodology to determine how a project's GHG emissions would translate into physical environmental effects." (*Id.*).

Moreover, FERC chose to ignore upstream and downstream GHG impacts of natural gas carried by the project, declaring those impacts to be neither indirect nor cumulative because effects were unforeseeable or could not be precisely quantified.

Absent any meaningful consideration of GHG emissions and their contribution to climate change, FERC approved Dominion's New Market Project, finding that it would have no significant environmental impact.

This defective reasoning was rejected in *Wildearth Guardians v. Bureau of Land Management*, 870 F.3d 1222 (10th Cir. 2017). There the Court found that granting coal mining leases was arbitrary and capricious specifically because climate change impacts were not considered. The Court rejected the claim that new leases would have no impact on the environment because coal could be extracted elsewhere. The Court also found that it was arbitrary and capricious for the Bureau of Land Management to ignore readily available tools, including climate modeling technology, to measure the potential climate impacts, which amounted to a failure to acquire the information "essential to a reasoned choice" *Id.* at 1235-38 (citing 40 C.F.R. § 1502.22).

FERC makes the same error here. By failing to consider climate impacts, FERC has chosen to ignore widespread scientific consensus regarding the profound consequences of increased GHG emissions, including but not limited to rising temperature, extreme weather, sea-level rise, drought, disease, loss of species, and how such impacts affect the human condition. Scientifically credible, peer-reviewed analyses of these adverse impacts have been documented in numerous reports by the International Panel on Climate Change ("IPCC"), including its recent report on the

consequences of a 1.5 degree Celsius rise in temperature[4], as well as the most recent U.S. Fourth National Climate Assessment (Volume II, Impacts, Risks and Adaptation in the U.S).[5] By refusing to consider the climate change ramifications of GHG emissions, and essentially assigning a value of "no impact" to such effects, FERC has abdicated its statutory obligations under NEPA and its implementing regulations.

In addition, FERC's refusal to consider the economic impacts associated with GHG emissions constitutes a complete denial of the profound relationship between the economy and climate change. As pointed out by Sierra Club and the State Attorneys General amici, such potential impacts can be modeled using metrics such as the "Social Cost of Carbon." *See*, *e.g.*, *Wildearth Guardians*, *supra*, where the Court held it was an abuse of discretion to refuse to use existing models for measuring climate impacts "essential to a reasoned choice among alternatives." *Id.* at 1238 (quoting 40 C.F.R. § 1502.22(a)).

Relating to this, FERC faults Sierra Club and state amici for discussing the "Social Cost of Carbon" and other models, stating that non-parties are prohibited from raising issues that were not presented by a party to an appeal. (FERC, p. 43, p.

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[4] Special Report: Global Warming of 1.5 degrees Celsius; Intergovernmental Panel on Climate Change, https://www.ipcc.ch/sr15/

[5] Fourth National Climate Assessment, U.S. Global Change Research Program, 2018, https://nca2018.globalchange.gov/

47). Although Otsego did not name specific models in its request for rehearing, Otsego clearly demanded at every point in these proceedings, as it continues to do now, that an analysis of all upstream and downstream environmental impacts be performed, as required by NEPA. To proceed in the absence of such analysis, which could necessarily involve economic modeling, is an abuse of discretion.

FERC's refusal to consider the environmental and economic impacts of GHG emissions on climate change as direct, indirect, and cumulative impacts of the Project clearly constitutes arbitrary and capricious decision-making and an abuse of its discretion. Whether such blindness is caused by ideological direction outside of FERC is not the issue; Otsego is focused on the agency's responsibility which should not be a function of politics. Congress has not altered FERC's regulatory responsibilities.

Point VI

Otsego raised the need to consider GHG impacts throughout the proceedings and is not foreclosed.

As discussed in its opening brief, Otsego repeatedly raised the issue of GHG impacts throughout proceedings for this project, including in its scoping document and in petition for rehearing. Dominion even quotes portions of Otsego's comments. Any claim that such issues were not raised is belied by the extensive record below. Dominion's claim that the issue was addressed too briefly in its petition is also

absurd as there is no requirement that a participant bang the table to satisfy an exhaustion requirement.

With respect to upstream impacts, Otsego wrote in its scoping comments:

> [E]xpanding the carrying capacity of Dominion's pipeline would increase demand for extraction operations "upstream" of the Project and result in a foreseeable increase in drilling and fracking in Pennsylvania, Ohio, and West Virginia....The environmental impacts of this Project cannot be cumulatively analyzed, as required by NEPA, without considering all reasonably foreseeable impacts, including the potential impacts of increased gas extraction and high-volume hydraulic fracturing. These impacts include the installation of gas well pads, drilling rigs, gathering lines, processing plants, and other activities. Accordingly, FERC should include a comprehensive assessment of safety, health, *environmental and climate impacts* associated with a build-out of extraction facilities and related infrastructure to supply shale gas to the Project.

(Otsego 2000 Scoping Comments; December 3, 2014; p. 11 (emphasis added)).

Similarly, with respect to downstream impacts, Otsego wrote:

> A comprehensive build-out analysis of potential "downstream" negative impacts resulting from the increased use of fracked gas in the "new markets" contemplated by Dominion and its partners should also be required . . . . These include, *but are not limited to*, the likelihood of future power plants, storage facilities, distribution networks and other types of gas infrastructure. All of these . . . are interrelated and must be reviewed based on their cumulative impacts on the region, the *environment, and climate change*.

(*Id.* at 12 (emphasis added)).

Upon release of the Project's Environmental Assessment, Otsego submitted a letter to FERC expressing disappointment in the agency's failure to address issues that Otsego had identified. In that letter, Otsego wrote: "[T]he project introduces significant, complex, and inter-related impacts affecting . . . greenhouse gas emissions . . . in addition to potential upstream and downstream impacts . . . . An EIS should have been prepared to consider all of these direct, indirect, and cumulative impacts. (National Environmental Policy Act ("NEPA"), 40 CFR. § 1508.25.)." (Otsego 2000 letter to FERC, November 18, 2015; p. 4). Further, in a section of the same letter titled *Climate Change Ignored*, Otsego urged FERC to address "greenhouse gas emissions associated with the extraction, transport, distribution, and use of gas within the pipeline," and stated: "No such analysis was performed." (*Id.* at 18).

Finally, in its Request for Rehearing, Otsego objected to the fact that FERC had failed to address downstream and upstream GHG impacts. Otsego criticized FERC for severely limiting the scope of its review and misapplying CEQ guidance. (Rehearing Request, p. 13). It also disputed FERC's claim that impacts are not reasonably foreseeable or may simply be ignored for lack of a "standard methodology" to assess them. As Otsego wrote, "[S]uch arguments clearly skirt the Commission's obligations pursuant to NEPA. The Commission is required to apply the best available science to assess impacts. As with any other aspect of professional

review, part of that task involves developing scientifically sound methodologies to perform those assessments." (*Id.* at 13-14).

Again, Otsego demanded that FERC perform the required analysis stating, "Consistent with original scoping comments submitted to FERC, Otsego 2000 maintains that a comprehensive analysis of lifecycle emissions, including emissions relating to the production, processing, distribution, and consumption of gas associated with Dominion's New Market Project, should be performed." (*Id.* at 23). Otsego's repeated requests that GHG emissions impacts be considered as direct, indirect, and cumulative impacts of the project were clearly sufficient to preserve this issue on appeal. *See, e.g., Louisiana Intrastate Corporation v. FERC*, 962 F.2d 37, 295 U.S. App. D.C. 228 (1992) holding that where repeated requests for consideration of an issue were made the record was adequate to "put the Commission on notice of the ground on which rehearing was being sought" as confirmed by the fact that FERC responded on the merits. The same is true here.

The record is very clear that Otsego repeatedly called upon FERC to perform a meaningful analysis of GHG emissions, taking into account both the upstream production and downstream consumption of natural gas. Accordingly, in its petition to this Court, Otsego criticizes FERC for not taking action necessary to accomplish this task—which includes obtaining information. In their dissent, Commissioners Lafleur and Glick argued this point as well, stating that FERC had failed to obtain

data, in part because it failed to ask for it. Yet, incredulously, and despite Otsego's extensive record of comment, FERC and Dominion now assert that the issue of obtaining information constitutes a "new issue" that Otsego is prohibited from discussing. (FERC, p. 29-30). It is not.

Obtaining information to perform a meaningful assessment of upstream and downstream GHG emissions and their impacts is part and parcel of conducting an informed analysis. Otsego was obliged to identify the proper scope of FERC's review, which it did regarding the upstream production and downstream consumption of gas. However, Otsego is not obliged to instruct FERC in the specific details of how to procure information needed to do that. Rather, that is the clear obligation of FERC in exercising its duty under NEPA and the NGA to perform a substantive analysis. FERC's failure to obtain information necessary to fulfill its statutory obligation is a clear abuse of discretion.

Point VII

This Court has jurisdiction to review FERC's announced policy to ignore GHG impacts in future cases.

FERC concedes that it used its order on rehearing in this case, an individual adjudicatory proceeding, to announce a broad, new policy to curtail future evaluation of GHG emissions under NEPA affecting the vast majority of natural gas infrastructure projects under its jurisdiction. FERC's order on rehearing is

inconsistent with its duty under NEPA to evaluate the "reasonably foreseeable" environmental impacts of such projects, and appears designed to stymie public input on how FERC should account for the dire consequences of climate change when deciding whether to approve this and future projects.

The claim that Otsego cannot seek review of FERC's adoption of this new policy except through a second petition for rehearing is absurd. In abandoning its prior policy within its order on rehearing, FERC acted without notice to affected parties and without granting Otsego any opportunity to be heard on the issue. Otsego cannot be faulted for failing to raise this issue *before* FERC made its announcement. Accordingly, the issue is properly included in this appeal.

Further, FERC's adoption of a new policy rejecting consideration of GHG emissions in future cases, announced in a single docket and without notice, is not simply an adjudicatory decision. It has far-reaching effects and prejudices all parties in all cases pending before FERC. As State Attorneys General Amici Curiae wrote:

> FERC abused its discretion by announcing a broadly applicable policy change with prospective effect in the context of the individual adjudicatory proceeding before it .... FERC's approach cuts off public participation on an important policy matter and is contrary to the spirit of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 554. FERC's announcement of a policy applicable to all future natural gas transportation applications is especially egregious, because only one party moved for rehearing and therefore preserved its right to seek judicial . . .

(State Attorneys General Amici Curiae Brief Supporting Petitioner, p. 25 (citations omitted)).

Although agencies generally have discretion to announce new policies in adjudications, *see NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974), FERC abused that discretion by announcing a broadly applicable policy change with prospective effect in the context of an individual adjudicatory proceeding. *See, e.g., Catholic Health Initiatives Iowa Corp. v. Sebelius*, 718 F.3d 914, 922 (D.C. Cir. 2013) ("an adjudication *must* have retroactive effect, or else it would be considered a rulemaking").

FERC's approach also eliminates public participation on an important policy matter and is contrary to the spirit of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 554. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (APA rulemaking requirements "were designed to assure fairness and mature consideration of rules of general application"); *See also. Ford Motor Co. v. Fed. Trade Comm'n*, 673 F.2d 1008, 1010 (9th Cir. 1981) (agency erred by announcing a policy in adjudication that changed existing law and had widespread application on a topic that was already subject to a pending rulemaking). For all these reasons, this Court must vacate FERC's ill-conceived and improperly adopted policy announcement.

CONCLUSION

For all of the reasons stated above, in our opening brief, and in the briefs submitted by amici, including the joint brief of the Attorneys General of the States of New York, New Jersey, Massachusetts, Maryland, Oregon, Washington, and the District of Columbia, and the brief of the Sierra Club, National Chapter, we urge this Court to vacate the Certificate issued and to remand FERC's order with instructions to conduct the appropriate environmental review. We also urge this Court to vacate the new policy announced within FERC's order to restrict the review of upstream and downstream emissions.

Dated: Goshen, New York
February 15, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of this Court's order as it contains 6,498 words, excluding those parts of the brief exempted by Fed.R.App.P. 32(a)(7(B)(iii) and Circuit Rule 32(e)(1). Microsoft Word computed the word count.

The Brief complies with the Typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) as it has been prepared in a proportionately spaced type face, Times New Roman, in 14 point font.

The brief has been scanned for viruses and is virus free.

Dated: February 15, 2019

MICHAEL H. SUSSMAN, ESQ.