

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALABAMA MUNICIPAL DISTRIBUTORS)	
GROUP, et al.)	
)	
Petitioners,)	
)	
)	Case No. <u>22-1101</u>
)	
FEDERAL ENERGY REGULATORY)	
COMMISSION,)	
)	
)	
Respondent.)	

PETITION FOR REVIEW

Pursuant to Section 19(b) of the Natural Gas Act (“NGA”), 15 U.S.C. § 717r(b), Rule 15(a) of the Federal Rules of Appellate Procedure (“FRAP”), and Circuit Rule 15, Alabama Municipal Distributors Group, Austell Gas Systems, The Southeast Alabama Gas District, and Municipal Gas Authority of Georgia (collectively, “Petitioners”), individually, jointly and severally, hereby petition this Court for review of the following orders issued by Respondent, Federal Energy Regulatory Commission (“Commission” or “FERC”):

1. Tennessee Gas Company, L.L.C., Docket No. CP 20-50 and Southern Natural Gas Company, L.L.C., Docket No. CP20-51-000, Order Issuing Certificates and Approving Abandonment, 178 FERC ¶ 61,199 (March 25, 2022) (“March 25 Order”); and
2. Tennessee Gas Company, L.L.C., Docket No. CP 20-50 and Southern Natural Gas Company, L.L.C., Docket No. CP20-51-000, Notice of Denial of Rehearing By Operation of Law and Providing for Further

Consideration, 176 FERC ¶ 62,138 (May 26, 2022) (“Notice of Denial”).

In the proceeding below, Petitioners timely requested rehearing of the March 25 Order. The Notice of Denial did not address the substance of Petitioners’ request for rehearing. However, the Notice of Denial provided that, in the absence of Commission action within thirty (30) days of the request for rehearing being filed, such requests may be deemed denied by operation of law pursuant to this Circuit’s decision in *Allegheny Defense Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc), as well as pursuant to 15 U.S.C. § 717r(a) and 18 C.F.R. § 385.713(f) (2021).¹

This Petition for Review is timely filed pursuant to the NGA and this Court’s decision in *Allegheny Defense Project*. It has been filed with the Court within sixty (60) days of the date when Petitioners’ rehearing request was denied by operation of law. *See* U.S.C. § 717r(a)-(b); *Allegheny Defense*, 964 F.3d at 5, 18-19. Accordingly, the orders listed in this Petition are final and ripe for review by this Court.

Copies of the Commission’s orders are appended to this Petition for Review

¹ Petitioners reserve the right to further petition this Court for review in the event that the Commission takes further action to modify or set aside the January 2022 Order, in whole or in part, or take additional action in response to the rehearing request

are provided as Attachments 1 and 2. A Certificate of Service, listing the parties to the underlying proceedings, is provided as Attachment 3.

Finally, each of the Petitioners is a governmental entity and, thus, there is no need to file the corporate disclosure statement that would otherwise be required by Rule 26.1 of the Federal Rules of Appellate Procedure.

Respectfully submitted,

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Dated: June 7, 2022

ATTACHMENT 1

FERC ORDER IN

TENNESSEE GAS COMPANY, L.L.C.

DOCKET NO. CP20-50

and

SOUTHERN NATURAL GAS COMPANY, L.L.C.

DOCKET NO. CP20-51-000

**Order Issuing Certificates and Approving Abandonment, 178 FERC ¶ 61,199
(March 25, 2022)**

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2. Also, on February 7, 2020, Southern filed an application in Docket No. CP20-51-000, pursuant to sections 7(b) and 7(c) of the NGA and Part 157 of the Commission's regulations, for authorization to construct a new compressor station and three new meter stations (Southern Construction Project) in Clarke and Smith Counties, Mississippi and St. Bernard Parish, Louisiana. The proposed Southern Construction Project is designed to create capacity to support 1,100,000 dekatherms per day (Dth/d) of firm transportation service that Southern would abandon by lease to Tennessee Gas.

3. As discussed below, we grant the requested certificate and abandonment authorizations, subject to certain conditions.

I. Background and Proposals

4. Tennessee Gas, a Delaware limited liability company, is a natural gas company, as defined by section 2(6) of the NGA, engaged in the transportation of natural gas in interstate commerce and subject to the Commission's jurisdiction. Tennessee Gas operates its existing transmission system in Texas, Louisiana, the Gulf of Mexico, Arkansas, Mississippi, Alabama, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, and New Hampshire.

5. Southern, a Delaware limited liability company, also a natural gas company, as defined by section 2(6) of the NGA,⁴ is engaged in the transportation of natural gas in interstate commerce and subject to the Commission's jurisdiction. Southern operates its existing transmission system within Louisiana, Mississippi, Alabama, Georgia, South Carolina, Tennessee, and Florida.

6. Tennessee Gas is wholly owned by Kinder Morgan, Inc. and Southern is owned by Southern Company and Kinder Morgan, Inc.

A. Evangeline Pass Project

7. Tennessee Gas designed the Evangeline Pass Project to provide up to 1,100,000 Dth/d of incremental firm transportation service for Venture Global from a new interconnect with Southern at the new Rose Hill Receipt Meter Station in Mississippi to a new interconnect with the Gator Express Pipeline in Louisiana.

(Columbia Gulf) to construct an interconnection with the Gator Express Pipeline. *Columbia Gulf Transmission, LLC*, 178 FERC 61,198, at P 4 (2022).

⁴ 15 U.S.C. § 717a(6).

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The project consists of two components: (1) construction of pipeline and compression facilities and (2) the acquisition of leased capacity from Southern.

8. Specifically, Tennessee Gas proposes to construct and operate:

- approximately 9.1 miles of 36-inch-diameter pipeline loop along its existing 24-inch-diameter Yscloskey Toca Lateral located in St. Bernard Parish, Louisiana (Yscloskey Toca Lateral Loop);
- approximately 4.0 miles of 36-inch-diameter pipeline loop along its existing 36-inch-diameter 500-2 Line in Plaquemines Parish (Grand Bayou Loop); and
- a new compressor station along its existing 500 Line system at mainline valve 529 in St. Bernard Parish, Louisiana consisting of a single 23,470 horsepower (hp) natural gas-fired Solar Titan 130 turbine unit and auxiliary facilities (Compressor Station 529).⁵

9. In addition, Tennessee Gas, under section 2.55(b) of the Commission's regulations, proposes to replace two 10,410 hp compressor units at its existing Compressor Station 527 in Plaquemines Parish.⁶

10. Tennessee Gas conducted a binding open season for the Evangeline Pass Project from September 6 through September 30, 2019, after which it executed a binding precedent agreement with Venture Global for up to 2,000,000 Dth/d of firm transportation service for a primary term of 20 years.⁷ The proposed service would be provided through a combination of existing unsubscribed transportation service capacity

⁵ Compressor Station 529 would be partially constructed on an existing, previously abandoned compressor station site owned by Tennessee Gas. *See Tennessee Gas Pipeline Co.*, 40 FERC ¶ 61,132 (1987).

⁶ 18 C.F.R. § 2.55(b) (2021). Section 2.55(b) of the Commission's regulations provides authorization for pipeline companies to replace obsolete facilities with new facilities, if those new facilities will have substantially equivalent design capacity and all construction activities will be confined to the existing right-of-way and use only the temporary work space used to construct the original facilities.

⁷ Tennessee Gas Application at 5.

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(900,000 Dth/d)⁸ and incremental transportation service created by the project facilities (1,100,000 Dth/d).

11. Tennessee Gas estimates the cost of the project to be \$261,658,650.⁹ It proposes to charge its general system recourse reservation and usage charges for firm and interruptible transportation service pursuant to its currently effective Rate Schedules T-A and IT as initial recourse rates for project service, and to recover compressor fuel and any lost and unaccounted for volumes through its currently effective system fuel retention rate. Finally, Tennessee Gas requests a pre-determination that it may roll the Evangeline Pass Project's costs into its system-wide rates in its next NGA section 4 general rate proceeding.

B. Southern Construction Project

12. Southern proposes to construct a new compressor station and three new meter stations, creating capacity on its pipeline system sufficient to support the additional 1,100,000 Dth/d of firm transportation service it proposes to lease to Tennessee Gas.

13. The new Rose Hill Compressor Station would consist of two 11,110 hp natural gas-fired Solar Taurus 70 turbine units for a total of 22,220 hp and would be located in Clarke County, Mississippi, near an existing interconnect with Tennessee Gas. The new Rose Hill Receipt Meter Station would be installed on the same property as the Rose Hill Compressor Station. The new MEP Receipt Meter Station would be located in Smith County, Mississippi, near an existing interconnect with Midcontinent Express Pipeline, LLC. The new Toca Delivery Meter Station would be located in St. Bernard Parish, Louisiana, near Southern's existing Toca Compressor Station and an existing interconnect with Tennessee Gas.

14. In addition to requesting NGA section 7(c) case-specific certificate authority for the construction activities described above, Southern states that it will rely on section 2.55 of the Commission's regulations¹⁰ to construct, modify, or replace several system auxiliary and appurtenant facilities at existing compressor stations and along the pipeline

⁸ Tennessee Gas will install auxiliary facilities to allow for the bidirectional flow of 900,000 Dth/d of existing unsubscribed transportation service capacity under sections 2.55(a) and (b) of the Commission's regulations and its blanket certificate authority.

⁹ Tennessee Gas Application, Exhibit K.

¹⁰ 18 C.F.R. § 2.55(a), (b). The Commission's regulations provide automatic authority in section 2.55 for the construction of qualifying auxiliary and replacement facilities.

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corridor in Clarke, Smith, Jasper, Simpson, Jefferson Davis, Lawrence, and Walthall Counties, Mississippi, and St. Bernard, Washington, St. Tammany, and Orleans Parishes, Louisiana. All section 2.55 facilities would be completed within the confines of existing facilities, rights-of-way, or Southern-owned property. Southern states that these facilities will not increase capacity on its system but will be necessary to effectuate the bidirectional flow after the project is placed in service.

15. Southern estimates the cost of the project to be \$171,412,811.¹¹

C. Capacity Lease

16. The Capacity Lease provides that Southern will construct, own, and operate certain facilities necessary to provide 1,100,000 Dth/d of incremental firm transportation service and abandon this capacity by lease to Tennessee Gas. Tennessee Gas will lease capacity sufficient to provide up to 1,100,000 Dth/d of firm transportation service on Southern's system from the Rose Hill Receipt Point from Tennessee Gas in Mississippi to the Toca Delivery Point in Louisiana for Venture Global. Tennessee Gas states that it will acquire the leased capacity from Southern as "off-system" capacity pursuant to its tariff.¹² The Capacity Lease provides for a primary term of 20 years with the potential for a five-year extension. Under the Capacity Lease, Tennessee Gas will pay Southern a monthly lease payment of \$2,929,609, which equates to a daily reservation charge of approximately \$0.0875 per Dth. Pursuant to the Capacity Lease agreement, Southern will charge Tennessee Gas a separate fuel rate on the volumes transported under the lease to cover the associated fuel usage and lost and unaccounted-for gas (LAUF) associated with the leased capacity. Southern proposes an initial fuel rate of 0.32% for the lease and will update the fuel rate on an annual basis.

II. Notice, Interventions, Comments, and Protest

17. Notice of Tennessee Gas's and Southern's applications in Docket Nos. CP20-50-000 and CP20-51-000, respectively, was published in the *Federal Register* on February 27, 2020.¹³ The notice established March 13, 2020, as the deadline for filing comments and interventions. All timely, unopposed motions to intervene are automatically granted pursuant to Rule 214 of the Commission's Rules of Practice and

¹¹ Southern Application, Exhibit K.

¹² Tennessee Gas Tariff Article XXI of the General Terms & Conditions.

¹³ 85 Fed. Reg. 11,361 (Feb. 27, 2020).

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Procedure.¹⁴ On May 26, 2021, the Natural Gas Supply Association (NGSA) and Center for Liquefied Natural Gas (Center for LNG) filed a late motion to intervene, which was granted.¹⁵

18. Numerous individuals and entities filed comments expressing concerns about the need for and the environmental impacts of the projects. These comments are addressed in the Environmental Assessment (EA), Environmental Impact Statement (EIS), and as appropriate, in the discussion below.

19. In its comments filed on November 16, 2021, the EPA recommends that any decision on this proposed action be postponed until the Commission has finalized its pending policy updates, reevaluated and updated the NEPA analysis, and provided opportunity for public review and comment on any substantially new information. As the evidentiary record for this project did not substantially change, public review and comment on this analysis is not required. The EPA also commented that the Commission failed to adequately analyze other pending applications that are in the same regional pipeline network in the cumulative impacts analysis. The EPA's comments are addressed in the environmental section below.

20. On March 13, 2020, the Alabama Municipal Distributors Group, the Austell Gas System, the Southeast Alabama Gas District, and the Municipal Gas Authority of Georgia (collectively, Municipals) filed a protest in both dockets opposing the Capacity Lease. On March 31, 2020, Southern and Tennessee Gas (Applicants) filed a joint motion for leave to answer and answer to the Municipals' protest. On April 15, 2020 and amended on April 17, 2020, Municipals filed an answer to the Applicants' March 31, 2020 answer. Although the Commission's Rules of Practice and Procedure do not permit answers to protests and answers to answers¹⁶, we will accept the Applicants' and Municipals' answers because they provide information that has assisted in our decision-making.

¹⁴ 18 C.F.R. § 385.214(c) (2021). Motions to intervene filed within the comment period for a draft environmental impact statement are deemed timely under Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 380.10(a)(i) (2021) (citing 18 C.F.R. § 385.214).

¹⁵ See Aug. 10, 2021 Notice Granting Late Intervention to NGSA and Center for LNG.

¹⁶ 18 C.F.R. § 213(a)(2).

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III. Discussion

21. Because the proposed facilities for the Southern Construction Project and the Evangeline Pass Project will be used to transport natural gas in interstate commerce, subject to the jurisdiction of the Commission, the construction, operation, and acquisition by lease of the facilities and capacity are subject to the requirements of subsections (c) and (e) of section 7 of the NGA.¹⁷ In addition, Southern's proposed abandonment of the capacity created by the Southern Construction Project is subject to the requirements of section 7(b) of the NGA.¹⁸

A. Certificate Policy Statement

22. The 1999 Certificate Policy Statement provides guidance for evaluating proposals to certificate new construction.¹⁹ The 1999 Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. The 1999 Certificate Policy Statement explains that, in deciding whether to authorize the construction of new pipeline facilities, the Commission balances the public benefits against the potential adverse consequences. The Commission's goal is to appropriately consider the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction.

23. Under this policy, the threshold requirement for applicants proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The next step is to determine whether the applicant has made efforts to eliminate or minimize any adverse effects the project might have on the applicant's existing customers, existing pipelines in the market and their captive customers, and landowners and communities affected by the route of the new

¹⁷ 15 U.S.C. § 717f(e).

¹⁸ *Id.* § 717f(b).

¹⁹ *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, corrected, 89 FERC ¶ 61,040 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000) (1999 Certificate Policy Statement). To clarify, by contemporaneous order, the Commission is suspending the effectiveness of the policy statements issued last month to replace the 1999 Statement. 178 FERC ¶ 61,197.

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pipeline facilities.²⁰ If residual adverse effects on these interest groups are identified after efforts have been made to minimize them, the Commission will evaluate the project by balancing the evidence of public benefits to be achieved against the residual adverse effects. This is essentially an economic test. Only when the benefits outweigh the adverse effects on economic interests will the Commission proceed to complete the environmental analysis where other interests are considered.

1. Southern Construction Project and Capacity Lease

24. As stated, the threshold requirement for pipelines proposing new projects is that the pipeline must be prepared to financially support the project without relying on subsidization from its existing customers. The Southern Construction Project is designed to enable Southern to provide 1,100,000 Dth/d of incremental firm natural gas transportation service, which will be leased to Tennessee Gas. Tennessee Gas needs additional capacity, beyond that to be provided by the looping and compression it proposes to construct on its own system, in order to provide the contracted service to Venture Global. Tennessee Gas is proposing to lease that capacity from Southern, an affiliate pipeline. Southern does not have existing unsubscribed capacity on its system sufficient to meet the needs of Tennessee Gas and its shipper, Venture Global. Therefore, Southern is proposing to construct additional facilities, specifically a new compressor station housing two 11,110 hp gas-fired turbine units, to create additional capacity it will then lease to Tennessee Gas. Gas will flow off of Tennessee Gas into the leased capacity on Southern's system at the new Rose Hill Receipt Point. The transported gas will supply feedgas for use by Venture Global at its Plaquemines LNG export facility, which will export gas from the United States. Southern has entered into a binding 20-year precedent agreement with Tennessee Gas for lease of the full capacity to be created by the Southern Construction Project. As discussed below, we find that the service to be provided by Tennessee Gas to Venture Global is needed and that the capacity to be constructed by Southern and leased to Tennessee Gas is necessary to enable Tennessee Gas to transport natural gas for Venture Global.

25. In the protest, Municipals argue that the proposed lease is nevertheless subsidized by existing shippers. However, as further discussed below, the proposed Capacity Lease satisfies Commission policy and does not result in subsidization by Southern's existing

²⁰ In 2021, the Commission established the Office of Public Participation (OPP) to support meaningful public engagement and participation in Commission proceedings. OPP provides members of the public, including environmental justice communities, with assistance in Commission proceedings—including navigating Commission processes and activities relating to the Project.

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shippers.²¹ As we explain, the Commission's requirement that all lease costs be kept separate from system costs is sufficient to insulate shippers on the lessor pipeline from any effects of the lease.

26. We also find that there will be no adverse impact on existing customers or other existing pipelines and their captive customers. The Southern Construction Project is designed to enable Southern to provide capacity to support 1,100,000 Dth/d of incremental firm natural gas transportation service that will be leased to Tennessee Gas without degrading the service of Southern's existing customers. There is no evidence that the project will displace service on any other systems.

27. We further find that Southern has taken sufficient steps to minimize adverse economic impacts on landowners and surrounding communities. Most of the Southern Construction Project facilities will be located within the fence lines of its existing compressor stations and existing meter stations. The new Rose Hill Compressor Station and Rose Hill Meter Station would be located on the same 11-acre property and Southern states that it has executed an option agreement with the landowner for the site. Thus, we conclude that the project would not have a significant adverse economic effect on landowners and surrounding communities.

28. The proposed project will enable Southern to provide capacity necessary to support 1,100,000 Dth/d of firm transportation service, which it will lease to Tennessee Gas. Accordingly, we find that Southern has demonstrated a need for the Southern Construction Project and Capacity Lease and further, that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, or on landowners and surrounding communities. Therefore, we conclude that the Southern Construction Project and Capacity Lease are consistent with the criteria set forth in the 1999 Certificate Policy Statement and analyze the environmental impacts of the project below.²²

2. Evangeline Pass Project

29. As discussed above, the threshold requirement for pipelines proposing new projects is that the applicant must be prepared to financially support the project without relying on subsidization from its existing customers. The Commission has determined that, in general, where a pipeline proposes to charge incremental rates for new

²¹ See *infra* PP 47-66.

²² See Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project's benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

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construction, the pipeline satisfies the threshold requirement that the project will not be subsidized by existing shippers.²³ Tennessee Gas demonstrates that the illustrative incremental rate for the Evangeline Pass Project is lower than the existing system rates. Accordingly, we find that Tennessee Gas's proposal to charge its existing applicable system reservation rates as the initial recourse rates for the project will not result in existing customers subsidizing the Evangeline Pass Project and we accept the proposed rates.

30. Tennessee Gas entered into a binding, 20-year precedent agreement with Venture Global, which is not affiliated with Tennessee Gas, for 2,000,000 Dth/d of firm transportation service.²⁴ A precedent agreement with an unaffiliated shipper for 100% of the project's capacity is significant evidence of the need for the proposed project. Venture Global will use the gas transported on the project as feedgas for its Plaquemines LNG export facility, which will export gas from the United States. The Commission, in 2019, authorized the siting, construction, and operation of the Plaquemines LNG Terminal, finding that the proposal was not inconsistent with the public interest.²⁵ The U.S. Department of Energy (DOE) Office of Fossil Energy similarly authorized Venture Global to export domestically produced liquefied natural gas from its Plaquemines LNG export terminal to both free trade and non-free trade agreement countries, finding that it had not been shown that Venture Global's "proposed exports will be inconsistent with the public interest."²⁶

31. Sierra Club, however, argues that a pipeline that supplies gas for export is outside the scope of section 7 of the NGA, and that exporting gas serves no public interests as pertinent to the public convenience and necessity analysis.²⁷ It avers that the EA and EIS

²⁴ Tennessee Gas Application at 5.

²⁵ *Venture Global Plaquemines LNG, LLC*, 168 FERC ¶ 61,204, at P 19 (2019)

²⁶ *Venture Global Plaquemines LNG, LLC*, FE Docket No. 16-28-LNG, Order No. 3866 (July 21, 2016) (Order Granting Long-Term, Multi-Contract Authorization to Export LNG to Free Trade Agreement Nations). *Venture Global Plaquemines LNG, LLC*, FE Docket No. 16-28-LNG, Order No. 4446 at 43 (Oct. 16, 2019) (Order Granting Long-Term Authorization to Export LNG to Non-free Trade Agreement Nations). See *EarthReports, Inc. v. FERC*, 828 F.3d 949, 952-53 (D.C. Cir. 2016) (detailing how regulatory oversight for the export of LNG and supporting facilities is divided between the Commission and Department of Energy).

²⁷ Sierra Club Sept. 7, 2021 Draft EIS Comments at 4-5.

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do not demonstrate that the project will transport gas in interstate commerce, as required by *City of Oberlin*.²⁸

32. Sierra Club misreads the D.C. Circuit's holding in *City of Oberlin*, which was that the Commission must fully explain why "it is lawful to credit precedent agreements with foreign shippers serving foreign customers toward a finding that an interstate pipeline is required by the public," not that doing so is unlawful.²⁹ The Commission may rely on a pipeline sponsor's precedent agreements with an LNG export facility as evidence of need in its Section 7 finding. Gas imports and exports benefit domestic markets; thus, contracts for the transportation of gas that will be imported or exported are appropriately viewed as indicative of a domestic public benefit. Moreover, the fact that the gas that Tennessee Gas's proposed project transports ultimately may be exported does not alter the status of the project as a section 7 pipeline transporting gas in interstate commerce.³⁰ Tennessee Gas's natural gas transmission system extends nearly 12,000 miles, from Texas and the Louisianan Coast to New England. Where the gas carried by the Tennessee Gas pipeline is consumed is immaterial to its status as an interstate pipeline, since "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey."³¹

33. Further, no person can export gas from the United States without the commodity export having been first approved by the Secretary of Energy under section 3 of the NGA.³² The D.C. Circuit has found that the language in NGA section 3(a) demonstrates that NGA section 3 "sets out a general presumption favoring such authorization."³³ A finding by the Secretary under section 3 that an export for a certain amount of gas is not inconsistent with the public interest is not dispositive of the question whether a pipeline proposed to transport that gas in interstate commerce on its journey to the point of export

²⁸ *City of Oberlin v. FERC*, 937 F.3d 599, 606-07 (D.C. Cir. 2019) (*City of Oberlin*).

²⁹ *Id.* at 607.

³⁰ *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199, at P 16 (2020) (*NEXUS*).

³¹ *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981) (citations omitted).

³² 15 U.S.C. § 717b(a); 42 U.S.C. § 7151(b).

³³ *EarthReports, Inc. v. FERC*, 828 F.3d at 953 (citing *W. Va. Pub. Serv. Comm'n v. Dep't of Energy*, 681 F.2d 847, 856 (D.C. Cir. 1982)).

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is required by the public convenience and necessity.³⁴ Rather, it highlights why it is appropriate for the Commission to give precedent agreements for the transportation of gas destined for export the same weight in determining need that it gives to other precedent agreements for transportation. If the Commission were precluded from considering the benefits represented by precedent agreements with shippers transporting gas for export in determining whether the interstate facilities are required by the public convenience and necessity, Congress' directive and intent, as expressed in section 3 and various trade agreements, would be thwarted.³⁵ Thus, Sierra Club's claim that the project is not needed because the precedent agreement may be with a shipper whose ultimate intent is delivery of the gas to foreign customers, does not undermine our finding that Tennessee Gas has demonstrated a need for the project through a precedent agreement for 100% of the project capacity with an unaffiliated shipper.³⁶

34. Tennessee Gas's existing shippers will not subsidize the proposed project. Further, the Evangeline Pass Project will not adversely affect service to Tennessee Gas's existing customers, or to other pipelines and their captive customers. The project will enable Tennessee Gas to provide long-term, firm transportation service for Venture Global through the new facilities while maintaining existing service. We also find that there will be no adverse impact on other pipelines in the region or their captive customers because the project will provide additional transportation to meet Venture Global's need, not to displace existing service providers. No pipelines or their captive customers have objected directly to Tennessee Gas's Evangeline Pass Project.

³⁴ We note that in limited scenarios, gas could be exported directly from a production area in a border state without ever entering interstate commerce. *See, e.g., Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151 (D.C. Cir. 1948); *Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, at P 31 (2016). However, in the majority of instances where the Secretary, pursuant to Congress' directives, has found the export of natural gas to be consistent with the public interest, the commodity must flow through an interstate pipeline, authorized pursuant to section 7 of the NGA, to reach the export facility at the border. *See, e.g., Portland Nat. Gas Transmission Sys.*, 165 FERC ¶ 61,049 (2018).

³⁵ *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199, at P 15 (2020) (*NEXUS*). Moreover, as we have previously found, benefits for projects that may transport gas for export includes strengthening the domestic economy and the international trade balance and supporting domestic jobs in gas production and transportation as well as jobs in industrial sectors that rely on gas. *Id.* P 17.

³⁶ *See id.* P 11 (contract with shipper whose intends to deliver the gas to foreign customers does not diminish the probative value of such agreements).

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35. We find that the Evangeline Pass Project is designed to minimize adverse economic impacts on landowners and surrounding communities. The Evangeline Pass Project would affect 386 acres of land during construction, of which 142 acres would be new permanent easement for operation. The new Compressor Station 529 would be partly located on the existing site of a previously-abandoned compressor station owned by Tennessee Gas. The rights-of-way for the looping pipelines would be located within and adjacent to the right-of-way associated with Tennessee Gas's existing Line 500-2 and Yscloskey Tocal Lateral.

36. The proposed project would enable Tennessee Gas to provide up to 2,000,000 Dth/d of firm transportation service, 100% of the project's capacity, to Venture Global. Accordingly, we find that Tennessee Gas has demonstrated a need for the project. Further the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities. Therefore, we conclude that the Evangeline Pass Project is consistent with the criteria set forth in the 1999 Certificate Policy Statement and analyze the environmental impacts of the project below.³⁷

B. Rates – Evangeline Pass Project

1. Recourse Rates

37. Tennessee Gas proposes to provide firm and interruptible transportation service on the project facilities pursuant to its currently-effective Rate Schedules FT-A and IT.³⁸ Tennessee Gas states that its currently effective system recourse reservation charge under Rate Schedule FT-A for Zone 1-1 is \$7.1656 per Dth and its system recourse usage charge is \$0.0081 per Dth.³⁹ Tennessee Gas states that pursuant to its 2019 Settlement in Docket No. RP19-351-002, its applicable Rate Schedule FT-A general system recourse reservation charge for Zone 1-1 will be \$6.7741 per Dth and its system recourse usage

³⁷ See Certificate Policy Statement, 88 FERC at 61,745-46 (explaining that only when the project's benefits outweigh the adverse effects on the economic interests will the Commission then complete the environmental analysis).

³⁸ Tennessee Gas and Venture Global mutually agreed to a discounted reservation charge of \$6.0073 per Dth and usage charge of \$0.0081 per Dth applicable to transportation service. See Tennessee Gas Application, Exhibit N.

³⁹ Tennessee Gas June 23, 2020 Data Response.

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charge will be \$0.0081 per Dth, effective November 1, 2022.⁴⁰ Tennessee Gas also calculated an illustrative incremental reservation charge of \$6.0739 per Dth and illustrative usage charge of \$0.0018 per Dth based on an incremental first-year cost of service of \$80,797,000 and an annual design capacity of project facilities of 13,200,000 Dth. Tennessee Gas's illustrative incremental reservation charge reflects cost-of-service factors approved by the Commission including: (1) a depreciation rate of 1.85% and a negative salvage rate of 0.25%, as established in Tennessee Gas's last rate case settlement in Docket No. RP11-1566-000,⁴¹ and (2) a return and income tax allowance based upon Tennessee Gas's last approved pre-tax rate of return of 13.25% as established in Tennessee Gas's settlement in Docket No. RP95-112-000⁴² and a federal income tax rate of 21%.

38. We have reviewed Tennessee Gas's proposed cost of service and initial rates and find that they reasonably reflect current Commission policy. Under the 1999 Certificate Policy Statement, there is a presumption that incremental rates should be charged for proposed expansion transportation service if the incremental rate calculated to recover the costs of such service exceeds the maximum system recourse rate.⁴³ Where the currently-effective system recourse rate is greater than the illustrative incremental cost-based recourse rate, the Commission has found it appropriate to establish the existing system rate as the initial recourse rate for the incremental transportation service to be provided on the project.⁴⁴ Because the currently effective maximum Rate Schedule FT-A recourse reservation and usage charges are greater than the illustrative incremental reservation and usage charges, we will approve Tennessee Gas's request to use its existing rates under Rate Schedule FT-A as the initial recourse rates for project service. We also approve Tennessee Gas's proposal to use its existing interruptible rate under Rate Schedule IT.

2. Fuel

39. Tennessee Gas proposes to recover compressor fuel and electric power costs and any lost and unaccounted for volumes through Tennessee Gas's currently effective

⁴⁰ *Id.*

⁴¹ *Tennessee Gas Pipeline Co.*, 137 FERC ¶ 61,182 (2011).

⁴² *Tennessee Gas Pipeline Co.*, 77 FERC ¶ 61,083 (1996).

⁴³ Certificate Policy Statement, 88 FERC at 61,745.

⁴⁴ *See, e.g., Texas Gas Transmission, LLC*, 152 FERC ¶ 61,160 at P 30; *Millennium Pipeline Co.*, 145 FERC ¶ 61,007 at P 30.

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system fuel retention rate. In support of its proposal, Tennessee Gas provided a fuel study⁴⁵ that demonstrates that charging the project shippers the generally applicable system fuel percentage and electric power rates will not result in existing shippers on the system subsidizing the project. Accordingly, we will approve Tennessee Gas's proposal to charge its generally applicable system fuel percentage and system electric power rates on the capacity associated with the project facilities.

3. Pre-Determination of Rolled-In Rate Treatment

40. Tennessee Gas requests a pre-determination that it may roll the project's costs into its system-wide rates in its next NGA section 4 general rate proceeding. To receive a pre-determination favoring rolled-in rate treatment, a pipeline must demonstrate that rolling in the costs associated with the construction and operation of new facilities will not result in existing customers subsidizing the expansion. In general, this means that a pipeline must show that the revenues to be generated by an expansion project will exceed the costs of the project. For purposes of making a determination in a certificate proceeding as to whether it would be appropriate to roll the costs of a project into the pipeline's system rates in a future NGA section 4 proceeding, the Commission compares the cost of the project to the revenues generated using actual contract volumes and, in the case of discounted rates, the actual discounted contract rate.⁴⁶

41. In support, Tennessee Gas calculated its first-year cost of service of \$80,797,000 and projected revenues of \$82,158,000 using the discounted contract rate,⁴⁷ which results in revenues exceeding the cost of service by \$1,361,000. Therefore, we will grant Tennessee Gas's request for a pre-determination favoring rolled-in rate treatment for the costs of the project in a future NGA section 4 rate case, absent any significant change in circumstances.

4. Reporting Costs for the Evangeline Pass Project

42. We will require Tennessee Gas to keep separate books and accounting of costs and revenues attributable to the capacity created by the project in the same manner as required by section 154.309 of the Commission's regulations.⁴⁸ The books should be

⁴⁵ Tennessee Gas Application, Exhibit Z-5.

⁴⁶ See *Tennessee Gas Pipeline Co.*, 140 FERC ¶ 61,120 (2012).

⁴⁷ *Supra* n.38.

⁴⁸ 18 C.F.R. § 154.309. See *Gulf South Pipeline Co.*, 173 FERC ¶ 61,049, at P 6 (2020) (for projects that use existing system rates for the initial rates the Commission's

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maintained with applicable cross-reference and the information must be in sufficient detail so that the data can be identified in Statements G, I, and J in any future NGA section 4 or 5 rate case, and the information must be provided consistent with Order No. 710.⁴⁹

5. Non-Conforming Provisions of the Transportation Agreement

43. Tennessee Gas states that the precedent agreement requires Venture Global and Tennessee Gas to execute a Firm Transportation Service Agreement (TSA) and a Discount Rate Agreement. Tennessee Gas states that there are differences between Venture Global's proposed TSA and Tennessee Gas's *pro forma* Rate Schedule FT-A transportation service agreement (*Pro Forma* Agreement). The proposed TSA between Venture Global and Tennessee Gas contains two provisions that materially deviate from Tennessee Gas's *Pro Forma* Agreement. First, the TSA includes a non-conforming provision requiring Venture Global to meet certain objective creditworthiness standards, or to provide Tennessee Gas with credit support in the form of a guaranty or letter of credit. Tennessee Gas states that Section 6.4 of the *Pro Forma* Agreement contains optional language permitting Tennessee Gas and a shipper to include language cross-referencing the credit support provisions agreed to by Tennessee Gas and a shipper in a precedent agreement or similar agreement to the TSA. Tennessee Gas states that because the credit support provisions were directly incorporated in the TSA, rather than cross referenced to a precedent agreement, these provisions may be deemed non-conforming.

44. Second, Exhibit A of the TSA reflects certain contractual right-of-first-refusal provisions in the fill-in-the-blank section for other provisions that are described in Article XXXVI of the General Terms and Conditions of Tennessee Gas's tariff. Tennessee Gas states that the Commission has determined in the past that the extension rights in these non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the

requirement for separate books and accounting applies only to internal books and records).

⁴⁹ See *Revisions to Forms, Statements, and Reporting Requirements for Natural Gas Pipelines*, Order No. 710, 122 FERC ¶ 61,262, at P 23 (2008). In *Gulf South Pipeline Co.*, the Commission clarified that a pipeline charging its existing system rates for a project is not required to provide books and accounting consistent with Order No. 710. However, a pipeline is required to maintain its internal books and accounting such that it would have the ability to include this information in a future FERC Form No. 2 if the rate treatment for the project is changed in a future rate proceeding. 173 FERC ¶ 61,049 at P 7.

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needed security to ensure the viability of a project.⁵⁰ Tennessee Gas states that because Venture Global has provided contractual support to make the construction of the project possible, it is reasonable that Venture Global be provided contractual right-of-first refusal provisions and that they should not be deemed unduly discriminatory.

45. In *Columbia Gas Transmission Corporation*, the Commission clarified that a material deviation is any provision in a service agreement that: (1) goes beyond filling in the blank spaces with the appropriate information allowed by the tariff, and (2) affects the substantive rights of the parties.⁵¹ The Commission prohibits negotiated terms and conditions of service that result in a shipper receiving a different quality of service than that offered other shippers under the pipeline's generally applicable tariff or that affect the quality of service received by others.⁵² However, not all material deviations are impermissible. As the Commission explained in *Columbia*, provisions that materially deviate from the corresponding *pro forma* agreement fall into two general categories: (1) provisions the Commission must prohibit because they present a significant potential for undue discrimination among shippers, and (2) provisions the Commission can permit without a substantial risk of undue discrimination.⁵³

46. We find that the incorporation of non-conforming provisions in Tennessee Gas's TSA constitutes a material deviation from Tennessee Gas's *Pro Forma* Agreement. However, in other proceedings, the Commission has found that non-conforming provisions may be necessary to reflect the unique circumstances involved with the construction of new infrastructure and to provide the needed security to ensure the viability of a project.⁵⁴ Here, we find the two non-conforming provisions identified by Tennessee Gas are permissible because they do not present a risk of undue discrimination, do not adversely affect the operational conditions of providing service, and do not result in any customer receiving a different quality of service. The Commission emphasizes that the above determination relates only to those items

⁵⁰ See *Tennessee Gas Pipeline Co.*, 161 FERC ¶ 61,265, at P 43 (2017).

⁵¹ 97 FERC ¶ 61,221, at 62,002 (2001) (*Columbia*).

⁵² See *Monroe Gas Storage Co.*, 130 FERC ¶ 61,113, at P 28 (2010).

⁵³ *Columbia*, 97 FERC, at 62,003.

⁵⁴ See, e.g., *Tennessee Gas Pipeline Co.*, 144 FERC ¶ 61,219, at P32 (2013); *Midcontinent Express Pipeline LLC*, 124 FERC ¶ 61,089, at P 83 (2008).

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described by Tennessee Gas in its application and not to the entirety of the precedent agreement or the language contained in the precedent agreement.⁵⁵

C. Capacity Lease

1. Municipals' Protest

47. Municipals allege that the facilities being constructed by Southern to create the lease capacity constitute a cheap expansion,⁵⁶ i.e., an incremental rate calculated to recover the costs of the new facilities would be lower than the existing system rate. In support, Municipals point out that the lease rate Southern proposes to charge Tennessee is about half the applicable system rate that Southern is charging its system customers for transportation service, and the same for the fuel rate.⁵⁷ Municipals argue that the Commission should require existing system rates to be charged as initial rates for service and that the associated costs and revenues be rolled into system rates in a future section 4 rate proceeding, because this would reduce the general system rates and prevent subsidization of the project by existing shippers. Municipals contend that Southern has re-packaged what would be firm transportation into a lease agreement, benefitting Southern's affiliate, Tennessee Gas, and its shippers, to the detriment of shippers on Southern's system.⁵⁸

48. Municipals state that an important consideration set forth in the 1999 Certificate Policy Statement is the protection of fair competition between interstate pipelines⁵⁹ and that Southern's proposal undermines fair competition. Although Municipals acknowledge that it is Commission policy to approve a lease if, among other criteria, the lease rate is equal to or less than the applicable tariff rate of the lessor, Municipals

⁵⁵ A Commission ruling on non-conforming provisions in a certificate proceeding does not waive any future review of such provisions when the executed copy of the non-conforming agreement(s) and a tariff record identifying the agreement(s) as non-conforming are filed with the Commission, consistent with section 154.112 of the Commission's regulations. *See, e.g., Tennessee Gas Pipeline Co.*, 150 FERC ¶ 61,160 at P 44 n.33.

⁵⁶ Municipals Protest at 2.

⁵⁷ The lease rate is \$0.0875 per Dth and Southern's applicable system rate is \$0.1535 per Dth. *Id.* 2-3.

⁵⁸ *Id.* at 4-5.

⁵⁹ *Id.* at 4.

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request that the Commission re-examine whether that policy should be applied where the source of the leased capacity is expansion capacity and where the lease is between affiliates. Municipals contend that where the capacity in question is being constructed for lease, as opposed to leases of existing capacity, the criteria of the 1999 Certificate Policy Statement, opposed to the Commission's capacity lease policy, should be applied.

49. Municipals also state that Exhibit N of Southern's application estimates that Southern will receive approximately \$9 million of revenue under the Capacity Lease during the first three years of service and contend that Southern will therefore "be substantially over-recovering costs."⁶⁰ Municipals state that Southern's proposal is at odds with the basic mandate that rates for service must be cost-based. Therefore, Municipals request that the Commission require Southern to credit, in future rate cases, revenues received from the lease transaction to system rates if the Commission approves an incremental rate for the lease. Municipals argue that crediting of revenues from leases has been the Commission's established policy, and when there are no other shippers on the expansion capacity, such as the case in the instant application, the Commission should credit the revenues to the pipeline's system customers.⁶¹

50. Municipals further assert that the 1999 Certificate Policy Statement is clear that a pipeline can only ask the expansion shipper, and not existing shippers, to share the risk of the project.⁶² Municipals state that the Commission has consistently applied this mandate to lease agreements, requiring that the lessor be at risk for all costs of the project not collected from the lessee.⁶³ Although Southern asserts that it has met this mandate by proposing that during the term of the lease with Tennessee Gas, all the costs of the lease will be kept separate from the cost of service applicable to Southern's system customers, Municipals assert that various provisions found in both the precedent agreement and the lease may transfer the risk onto Southern. Accordingly, Municipals insist that Southern must implement certain bookkeeping and accounting procedures to ensure costs related to

⁶⁰ Municipals Protest at 7.

⁶¹ *Id.* at 8 (citing *Rockies Express Pipeline LLC*, 119 FERC ¶ 61,069, at P 66 (2007); *Natural Gas Pipeline Co.*, 118 FERC ¶ 61,211, at P 17 (2007)).

⁶² *Id.*

⁶³ *Id.* (citing *Tennessee Gas Pipeline Co.*, 163 FERC ¶ 61,007, at P 28 (2018); *Constitution Pipeline Co.*, 149 FERC ¶ 61,199, at P 39 (2014)).

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the lease not reimbursed by Tennessee Gas are not shifted to Southern system customers.⁶⁴

51. In response, Applicants argue that the proposed Capacity Lease is consistent with Commission policy,⁶⁵ and point out that the Commission's criteria for approving leases has not varied based on affiliation.⁶⁶ Applicants assert that Southern has appropriately proposed to keep the costs and revenues of the lease separate from its system rates for the specific purpose of insulating its existing system shippers from any effects of the lease and that rolling in the costs of the lease, as proposed by Municipals, would be contrary to Commission precedent and could expose Southern's existing customers to risks associated with the lease. Applicants argue that because Southern is keeping all costs associated with the proposed facilities separate from its system rates, it alone will be at risk for any cost overruns and that it would not be equitable for Southern to be obligated to credit the lease payments to existing shippers. Should issues regarding cost recovery arise after the lease arrangement has terminated, Applicants state Municipals will have the opportunity to raise such issues in any future NGA section 4 rate case filed by Southern.

52. In response to Applicants' answer, Municipals request that the Commission reverse its lease precedent and not apply it where the capacity to be leased is being newly constructed. Municipals contend that many of the benefits of the lease arrangement claimed by the Applicants can be achieved by Southern providing firm transportation service to Tennessee Gas.⁶⁷ Municipals argue that the facilities and costs associated with the lease would not change under a firm transportation contract, but that cost recovery would.

⁶⁴ *Id.* at 8, 11.

⁶⁵ Applicants Answer at 4 (citing *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,080 (2016) (lease of the Hillabee Expansion Project involved the construction and installation of approximately 43.5 miles of pipeline looping facilities and 88,5000 horsepower of compression); *National Fuel Supply Corp.*, 150 FERC ¶ 61,160 (2015) (additional compression)).

⁶⁶ *Id.* (citing *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017), *Gulf Crossing Pipeline Company LLC*, 123 FERC ¶ 61,100 (2008)).

⁶⁷ Municipals Reply at 3.

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2. Lease Policy

53. Historically, the Commission views lease arrangements and the pricing for lease capacity differently from transportation services under rate contracts. The Commission views a lease of interstate pipeline capacity as an acquisition of a property interest that the lessee acquires in the capacity of the lessor's pipeline.⁶⁸ To enter into a lease agreement, the lessee generally is required to be a natural gas company under the NGA and is required to obtain NGA section 7(c) certificate authorization to acquire the capacity. The lessee owns the acquired capacity and the capacity is subject to its tariff. The leased capacity is allocated for use by the lessee's customers. The lessor, while it may remain the operator of the pipeline system, no longer has any rights to use the leased capacity.⁶⁹

54. The Commission's historic practice is to approve a lease if it finds that: (i) there are benefits from using a lease arrangement; (ii) the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease; and (iii) the lease arrangement does not adversely affect existing customers. As the Commission has stated previously:

We will not consider any of the prongs of the test in isolation, but rather will balance them, on a case-by-case basis. Given the facts of individual lease cases, we will determine whether a proposal meets all of the three established criteria, and, if it does not, weigh the significance of the lease's failure to satisfy any criterion against the benefits it would provide with respect to other criteria.⁷⁰

a. Lease Benefits

55. The Commission has found that capacity leases, in general, have several potential public benefits: leases can promote efficient use of existing facilities; avoid construction of duplicative facilities; reduce the risk of overbuilding; reduce costs; and minimize

⁶⁸ *Texas Eastern Transmission Corp.*, 94 FERC ¶ 61,139, at 61,530 (2001).

⁶⁹ *Texas Gas Transmission, LLC*, 113 FERC ¶ 61,185, at P 10 (2005).

⁷⁰ *See, e.g., National Fuel Gas Supply Co.*, 172 FERC ¶ 61,039, at P 43 (2020).

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environmental impacts. In addition, leases can result in administrative efficiencies for shippers.⁷¹

56. The proposed Capacity Lease will enable Tennessee Gas to transport natural gas for Venture Global by relying on the expansion of another pipeline's existing infrastructure in the region, resulting in the construction of fewer, less costly facilities than Tennessee Gas would need to construct on its own system to provide equivalent transportation service. To provide capacity to accommodate the 1,100,000 Dth/d of firm transportation service Tennessee Gas will provide to Venture Global, Southern proposes to install a new compressor station, construct three new meter stations, make modifications to several existing compressor stations, and construct certain appurtenant and auxiliary facilities to effectuate bi-directional flow when the project is placed in service. In its application, Tennessee Gas explains that providing service to Venture Global using facilities constructed completely on its own system would necessitate significantly more expensive looping of Tennessee Gas's system from its existing Rose Hill interconnect with Southern to the Toca Lateral. This would entail the construction of an approximately 175-mile, 36-inch pipeline and two new compressor stations.⁷² Tennessee Gas states that this alternative would not only result in significant impacts to environmental resources and landowners but also cost approximately \$1.55 billion,⁷³ as compared to the estimated \$171,412,811 cost of Southern's proposed construction project. We find that there are fewer environmental impacts associated with Southern's construction of facilities under the lease arrangement compared to Tennessee Gas's construction of new, greenfield pipeline facilities of equivalent capacity. We also find the lease will provide administrative efficiencies by allowing Venture Global to enter into a single firm transportation contract and make one nomination on Tennessee Gas's system instead of nominations on both Tennessee Gas's and Southern's systems.

b. Lease Payments

57. Municipals argue that while the proposed lease might benefit Tennessee Gas and its shipper, Venture Global, Southern's shippers would be better off if the Commission treated the arrangement as if Tennessee Gas itself was becoming a shipper on Southern rather than leasing the new capacity. This is because Commission lease policy generally requires parties to demonstrate that the lease payments are less than or equal to the lessor's firm recourse transportation rates for comparable transportation service over the

⁷¹ See, e.g., *Dominion Transmission, Inc.*, 104 FERC ¶ 61,267, at P 21 (2003); *Islander East Pipeline Co.*, 100 FERC ¶ 61,276, at P 70 (2002).

⁷² Tennessee Gas Application at 25.

⁷³ *Id* at 25-26; Resource Report 10, at 10-5.

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term of the lease.⁷⁴ As noted by Municipals, the daily reservation lease charge of \$0.0875 per Dth is significantly lower than Southern's applicable daily reservation charge of \$0.1535 per Dth. Municipals correctly contend that the Commission would not authorize an incremental recourse rate for transportation service on an expansion project that is less than the applicable system rate; as stated above, Commission transportation-rate policy requires system rates be charged for expansion service where the incremental rate would be lower than the system rate. But Municipals' argument ignores the important distinction that the lease of capacity by one interstate pipeline company to another is not the equivalent of the provision of interstate transportation service, and thus is not priced similarly.⁷⁵ The rights available to a lessee pipeline under a capacity lease are more limited than those conferred upon a shipper receiving firm transportation service pursuant to Part 284 of the Commission's regulations. For example, Tennessee Gas, the lessee, has the right under the Capacity Lease Agreement for its shippers to deliver gas under the lease at the Rose Hill #2 receipt point on Southern's system and receive gas back at the Toca #2 delivery point; Tennessee Gas and its shippers using Tennessee Gas's leased capacity on Southern only have access to secondary points on Southern's system within the primary path of the lease.⁷⁶ This is in contrast to the right of a shipper receiving Part 284 transportation service on Southern's system to use all secondary points outside of their contract path within each zone they are paying reservation charges. Similarly, as a lessee, Tennessee Gas has no right to other Part 284 attributes such as capacity release or segmentation. The limitation of rights under a capacity lease is a reason that the Commission does not require lease payments to be set at the lessor's recourse rate for comparable transportation service – it protects the lessee's shippers from paying a higher rate as they have less flexibility on the lease capacity than they would if they were to take service directly from Southern. However, because Southern is prohibited, during the term of the lease, from including any of the costs associated with the lease in its rates to its system shippers, Southern's shippers,

⁷⁴ See, e.g., *Dominion Transmission, Inc.*, 104 FERC ¶ 61,267, at PP 54-58 (2003) (approving a lease rate of \$4.867 per Dth versus system rate of \$8.846 per Dth); *Texas Eastern Transmission, LP*, 139 FERC ¶ 61,138, at P 52 (2012) (approving a lease rate of \$1.351 per Dth versus system rate of \$6.57 per Dth); *Gulf South Pipeline Co.*, 119 FERC ¶ 61,281, at PP 15,33 (2007) (approving a daily lease rate of \$0.124 per Dth versus system rate of \$0.338 per Dth).

⁷⁵ Municipals cite to *Gulf South Pipeline Co. v. FERC*, 955 F.3d 1001 (D.C. Cir. 2020) for the point that shippers should pay similar rates for similar service, but a case involving facts different from this proceeding. However, as noted, Tennessee Gas will not be a shipper on the Southern system.

⁷⁶ Capacity Lease Agreement Section 7.1.

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including Municipals, are protected from having to subsidize any costs associated with the leased capacity.

58. The Commission's rate requirements for expansions that will be used to provide transportation service under Part 284 of the Commission's regulations to shippers of the constructing pipeline (i.e., that the existing system rate be used as the initial recourse rate for service if that rate is higher than an incremental rate calculated to recover the costs to provide the service) are intended to ensure that existing shippers can compete with expansion shippers on an equal basis for markets on that pipeline. The recourse rate for new expansion shippers cannot be lower than that of existing shippers. However, as explained above, when a pipeline obtains capacity under a capacity lease, the lessee essentially owns that capacity and the capacity becomes part of its system. Shippers that use the lease capacity are not transporting gas on, or competing for markets on, the lessor's pipeline (i.e., the expansion capacity on Southern will be used by shippers transporting gas on Tennessee Gas's system). Shippers on the lessor's pipeline are not impacted or disadvantaged by the lease arrangement because the shippers using the lease capacity are competing for markets on the lessee's pipeline. Further, the Commission requires all lease costs to be kept separate from the lessor's system costs, protecting shippers on the lessor pipeline from any negative consequences should the lease prematurely terminate. For that reason, the Commission does not apply its rate policies for transportation service on expansion projects to situations where newly-constructed capacity is made available to another interstate pipeline company pursuant to a capacity lease. We note that if we were to apply the policy in this instance, the cost of the lease would increase roughly by 75% and would most likely negatively impact the project and the benefits, including the environmental benefits, that would be realized under the lease arrangement.⁷⁷

59. Historically, the lease rates approved by the Commission for new capacity constructed specifically for the purpose of leasing were close to the lessor's cost-based rate for the leased capacity.⁷⁸ Here, Southern proposes to charge Tennessee Gas a daily lease reservation charge of \$0.0875 per Dth. In a June 23, 2020 data response, Southern

⁷⁷ If Tennessee Gas were to contract for firm transportation service on the Southern system, it would pay Southern a daily firm reservation charge of \$0.1535 per Dth, which is approximately 75% higher than the daily lease reservation charge of \$0.0875 per Dth.

⁷⁸ See, e.g., *Tennessee Gas Pipeline Co.*, 150 FERC ¶ 61,160 at P 36; *Constitution Pipeline Co.*, 149 FERC ¶ 61,199 at P 15; *Tennessee Gas Pipeline Co.*, 136 FERC ¶ 61,173, at P 36 (2011).

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states that the calculated daily cost-based reservation charge for the lease capacity is \$0.0700 per Dth.⁷⁹

60. Municipals protest that the basic principle of the Commission's rate regulation is that rates must be cost-based and that Southern's proposal guarantees that it will "massively" over-recover costs if it is permitted to charge rates that are greater than the incremental costs of its project.⁸⁰ To prevent such over-collection, Municipals request that the Commission credit the revenues of the lease to its system customers.⁸¹

61. The Commission has previously stated the second prong of its capacity lease analysis looks to see if the lease payments are less than, or equal to, the lessor's firm transportation rates for comparable service over the terms of the lease. Southern has identified the comparable firm transportation rate on Southern under its Rate Schedule FT as the Zone 0 monthly reservation charge of \$4.67 (or a daily firm reservation charge of \$0.1535 per Dth), and any applicable FT commodity charges. Thus, the proposed lease reservation charge of \$0.0875 per Dth per day satisfies the second prong of the Commission's capacity lease analysis, being, as pointed out by Municipals, notably less than Southern's comparable system rate of \$0.1535 per Dth. However, as discussed above, capacity provided pursuant to a capacity lease is in several ways inferior to Part 284 transportation service. In other cases, where the Commission found there was no existing comparable service, the Commission has evaluated the capacity lease payment using other metrics, such as comparing the lease payment to what the maximum recourse rate would be if the lessor pipeline were to provide transportation service through the project facilities on a stand-alone basis.⁸² As noted above, for illustrative purposes, Southern calculated a daily cost-based reservation charge for the lease capacity of \$0.0700 per Dth. While still lower than Southern's existing Zone 0 rate, we acknowledge that the proposed capacity lease rate exceeds this rate calculated by Southern for stand-alone service. However, a comparison of rates is not the end of our analysis. As noted above, where a proposal fails to meet all three of the established criteria, the Commission may nonetheless weigh the failure against the benefits the lease may provide with respect to the remaining criteria.⁸³ As discussed above, we find that there are significant benefits to the Capacity Lease. Further, we note that while the

⁷⁹ Southern Jun. 23, 2020 Data Response.

⁸⁰ Municipals Reply at 9.

⁸¹ See, e.g., *Rockies Express*, 119 FERC ¶ 61,069; *Natural*, 118 FERC ¶ 61,211.

⁸² See *supra* P 57.

⁸³ See, e.g., *National Fuel Gas Supply Co.*, 172 FERC ¶ 61,039 at P 47.

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payment Tennessee Gas is making to Southern under the lease exceeds Southern's costs for the new facilities, it is still significantly less than what it would cost Tennessee Gas to construct facilities on its own system to provide comparable service for Venture Global.

62. Municipals imply that Tennessee Gas and Southern have leveraged their affiliate relationship to arrive at an arrangement that is detrimental to shippers on Southern's system. There is no evidence in the record to suggest that is the case. When meeting the demands of incremental shippers, pipelines have options to choose from in providing service, such as: constructing facilities themselves; leasing capacity from another pipeline in the area, who may need to construct facilities to provide the service in a more economic manner; or contracting for transportation capacity on another pipeline if service is available to serve their needs. Here, Tennessee Gas entered a lease agreement with Southern to provide capacity for Tennessee as Southern did not have available capacity to meet Tennessee Gas's needs it proposed to construct additional facilities. As discussed above, there are considerable environmental and cost advantages to Tennessee Gas leasing capacity on Southern's system instead of constructing additional capacity on its own system. Municipals do not dispute these advantages, nor have they pointed to any other non-Tennessee Gas-affiliated systems in the region that Tennessee Gas might have approached instead of entering into an agreement with Southern. Moreover, it is not unheard of for unaffiliated companies to arrive at lease payments that although are above the lessor's cost for constructing the capacity are still below the lessee's costs to construct equivalent capacity on its own system.⁸⁴ Where the Commission has found, as here, that the proposed lease offers demonstrable benefits and will not result in adverse impacts on the customers of either system, the Commission has approved the proposed lease arrangement.⁸⁵

63. Regarding the Municipals' request that the Commission require Southern to credit any revenues above the cost of the lease arrangement to Southern's system customers, we decline to do so. While the Municipals are correct that the Commission previously required lease revenues to be credited in *Rockies Express Pipeline LLC* and *Natural Gas Pipeline Company*,⁸⁶ the Commission no longer treats leases in the same manner as we did at the time those orders were issued. Previously, the costs and revenues from capacity leases were included in the pipeline's system rates; however, in *Gulf South Pipeline Company*, the Commission modified that policy and required that during the term of the lease, Gulf South Pipeline Company (the lessor) would not be permitted to

⁸⁴ See, e.g., *id.* PP 46-47.

⁸⁵ See, e.g., *id.* PP 49-51.

⁸⁶ See *supra* n.61.

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reflect in its system rates any of the costs associated with the leased capacity.⁸⁷ Therefore, during the term of the lease of capacity from Southern to Tennessee Gas, Southern will not be permitted to roll the costs of the leased capacity into its system rates. This protects recourse rate shippers on its system from any negative consequences that may arise if the lease transaction terminates early,⁸⁸ and assures that the lessor is fully at risk for all the lease capacity that is constructed. Consistent with Commission policy, we will require that during the term of the lease with Tennessee Gas, Southern will not be permitted to reflect in its system rates any of the costs associated with the lease capacity.

c. Lease Impacts on Existing Customers

64. The third prong of the Commission's capacity lease analysis considers whether a proposed lease arrangement would have an adverse effect on existing customers, such that the impact would outweigh the positive benefits already identified. We find that the lease will not adversely affect Southern's or Tennessee Gas's existing customers. We disagree with Municipals that certain termination provisions in the precedent agreement and Capacity Lease Agreement will put Southern's existing shippers at risk. As stated above, during the term of the lease, Southern will not be permitted to reflect in its system rates any of the costs associated with the lease capacity. Upon termination of the lease, Southern will have to obtain Commission authorization before reacquiring the leased capacity. Moreover, after the capacity is reacquired, Southern's customers would have the ability to challenge, in a section 4 rate proceeding, any proposal by Southern to include costs associated with the capacity in its system rates, with Southern bearing the burden of proving that doing so would not result in subsidization of the capacity by existing system shippers. Southern is required to separately account for the costs and revenues associated with the leased facilities and to segregate those costs and revenues from its other system costs for the specific purpose of insulating existing system shippers from any effects of the lease, consistent with the requirements of section 154.309 of the Commission's regulations.⁸⁹ The capacity being created for the lease will not result in adverse effects to Southern's existing customers because the lease will use newly created southbound capacity and will not affect the availability of firm capacity for existing

⁸⁷ *Gulf South Pipeline Co.*, 119 FERC ¶ 61,281 at P 42.

⁸⁸ We also note that capacity leases do not have pre-granted abandonment. Upon termination of the lease, the Applicants will need to seek and receive prior Commission approval, Tennessee Gas to abandon, and Southern to reacquire, capacity subject to the lease arrangement.

⁸⁹ 18 C.F.R. § 154.309 (2021).

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customers. Southern will also charge Tennessee Gas an incremental fuel rate to cover fuel gas and lost and unaccounted-for gas associated with the lease capacity.

65. Tennessee Gas states that the lease of capacity will not adversely affect its existing customers as the capacity is incremental to its system and Tennessee Gas will make any unused capacity available to its shippers pursuant to its tariff. Additionally, Tennessee Gas is proposing no changes to its tariff or to its existing general system rates in this proceeding to recover the costs of the lease capacity.

66. We find that the proposed Capacity Lease satisfies the Commission's lease policy with one exception—that the lease payments be less than the illustrative rate for comparable transportation service over the term of the lease. However, we find that the failure to meet this criterion does not outweigh the overall benefits that the proposed lease would provide. Based on the foregoing discussion, we find that the Capacity Lease provides sufficient benefits, the lease payments are satisfactory, and the project will not negatively impact either Tennessee Gas's or Southern's existing customers. Accordingly, we approve the Capacity Lease.

3. Abandonment

67. We approve Southern's request to abandon by lease to Tennessee Gas the capacity to support 1,100,000 Dth/d of firm transportation service. Consistent with Commission policy, we will require Southern to file, within 10 days of the date of abandonment of the lease capacity to Tennessee Gas, a statement providing the effective date of the abandonment.⁹⁰ We also remind the Applicants that when the lease terminates, Tennessee Gas is required to obtain authority to abandon the lease capacity and Southern is required to obtain certificate authorization to reacquire that capacity.⁹¹

4. Accounting Analysis

68. We will require Tennessee Gas to treat the capacity lease with Southern as an operating lease for accounting purposes, and record the monthly lease payments in Account 858, Transmission and Compression of Gas by Others, consistent with the accounting treatment for other similar capacity lease agreements approved by the

⁹⁰ See, e.g., *ANR Pipeline Co.*, 170 FERC ¶ 61,234, at P 12 (2020); *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028 (2013).

⁹¹ See, e.g., *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 at PP 63, 76; *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 35 (2003).

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Commission.⁹² Additionally, Southern should record the monthly lease receipts in Account 489.2, Revenues from Transportation of Gas of Others through Transmission Facilities.

5. Pro Forma Tariff Records

69. Southern included, in Exhibit P, *pro forma* tariff records establishing the incremental fuel retention rate of 0.32% for the Capacity Lease. This fuel retention rate will be updated and trued-up annually according to the terms of the lease and Southern's tariff. We approve the *pro forma* tariff records included in Exhibit P of Southern's application.

D. Environmental Impacts

70. On March 20, 2020, the Commission issued a Notice of Intent to Prepare an Environmental Assessment for the Proposed Evangeline Pass Expansion Project and Request for Comments on Environmental Issues (NOI). The NOI was published in the Federal Register⁹³ and mailed to interested parties including: federal, state, and local officials; agency representatives; environmental and public interest groups; Native American Tribes; local libraries and newspapers; and affected property owners. In response to the NOI, the Teamsters National Pipeline Labor Management Cooperation Trust (Teamsters), Louisiana Department of Wildlife and Fisheries (Louisiana DWF),⁹⁴ the Muscogee (Creek) Nation,⁹⁵ and the EPA Region 4 filed comments.

71. To satisfy the requirements of the National Environmental Policy Act of 1969 (NEPA),⁹⁶ Commission staff initially prepared an EA for Southern's and Tennessee Gas's proposals. The analysis in the EA addressed all substantive environmental comments received prior to issuance of the EA and, noted that

⁹² See, e.g., *Midwestern Gas Transmission Co.*, 73 FERC ¶ 61,320 (1995); *TriState Pipeline LLC*, 88 FERC ¶ 61,328 (1999); *Gulf Crossing Pipeline Company LLC*, 123 FERC ¶ 61,100 (2008); *Columbia Gas Transmission, LLC*, 145 FERC ¶ 61,028 (2013); *Constitution Pipeline Co.*, 149 FERC ¶ 61,199 (2014).

⁹³ 85 Fed. Reg. 19,938 (Apr. 9, 2020).

⁹⁴ Dave Butler Apr. 22, 2020 Comments on NOI.

⁹⁵ Robin Soweka Jr. May 18, 2020 Comments on NOI. The Muscogee Nation requested a copy of the EA; staff provided a copy of the EA via email.

⁹⁶ 42 U.S.C. §§ 4321 *et seq.* See also 18 C.F.R. pt. 380 (2021) (Commission's regulations implementing NEPA).

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Commission staff was unable to assess the projects' contribution to climate change, concluded that the projects⁹⁷ would not constitute a major federal action significantly affecting the quality of human environment.⁹⁸ On August 24, 2020, the EA was issued for a 30-day comment period and placed into the public record. The Commission received six comments on the EA from Shell Beach, Teamsters, National Marine Fisheries Service (NMFS), and Louisiana DWF.

72. Following issuance of the EA, the Commission issued a Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Evangeline Pass Expansion Project and Schedule for Environmental Review on June 30, 2021. On July 16, 2021, the Commission issued the draft EIS, which incorporated the EA's analysis and conclusions with the exception of those related to the project's impacts on climate change, responded to comments received on the EA, and estimated downstream greenhouse gas (GHG) emissions related to the project.⁹⁹ The draft EIS provided information that will assist the Commission's consideration of the project's contribution to climate change. The draft EIS was filed with the EPA and a formal notice of availability was issued in the *Federal Register* on July 22, 2021, which established a 45-day comment period on the draft EIS that ended on September 7, 2021. U.S. Department of the Interior, EPA, NMFS, Choctaw Nation of Oklahoma, Louisiana DWF, Teamsters, Healthy Gulf, Institute for Policy Integrity at New York University School of Law, Sierra Club, Shell Beach, Tennessee Gas and Southern, and two individuals (Angela Memoli and Gary and Christy Richards) filed comments in response to the draft EIS.

73. Commission staff issued the final EIS on October 8, 2021 and published a notice of the availability of the final EIS in the *Federal Register* on October 15, 2021.¹⁰⁰ The final EIS addresses all substantive environmental comments received on the draft EIS and concludes that construction of the project will result in adverse environmental impacts, but that these impacts would be avoided or minimized through mitigation measures and would not be significant, except for the project's effect on climate change, the significance of which staff was unable to determine. The final EIS addresses: geology; soils; ground water; surface water; wetlands; aquatic resources and essential fish habitat; vegetation and wildlife (including threatened, endangered, and other special-status

⁹⁷ Consistent with the final EIS, the Environmental Impacts section refers to the Southern Construction Project, Capacity Lease, and the Evangeline Pass Projects collectively as projects.

⁹⁸ EA at B-108 to B-109.

⁹⁹ 86 Fed. Reg. 38,711 (July 22, 2021).

¹⁰⁰ 86 Fed. Reg. 57,419 (Oct. 15, 2021).

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species); land use and visual resources; cultural resources; socioeconomics (including environmental justice); air quality and noise; GHGs and climate change; reliability and safety; cumulative impacts; and alternatives. The Commission received comments on the final EIS from the EPA, which are addressed below as are environmental issues of concern, including climate change and impacts on environmental justice communities.

1. Essential Fish Habitat

74. Tennessee Gas's project facilities fall within Essential Fish Habitat (EFH) for red drum, several species of reef fish, shrimp, and coastal migratory pelagics. In compliance with the Magnuson-Stevens Fishery Conservation and Management Act, Commission staff consulted with NMFS regarding EFH. Tennessee Gas's Evangeline Pass Project would temporarily disturb 124.8 acres of EFH by dredging, excavation, and related activities for pipe installation and barge access for construction of the Grand Bayou Loop. Temporary impacts on EFH include loss of prey, increased sedimentation and turbidity, potential introduction of pollutants, and increased noise levels. Permanent impacts on EFH include the shading by platforms, and the direct impact of the pilings on the soft substrate. On October 5, 2021, the NMFS filed a comment stating that the Evangeline Pass Project would not have a substantial adverse impact to EFH given Tennessee Gas's proposal to purchase a total of 30.81 acres of mitigation credits from a Corps and Louisiana DNR approved mitigation bank to offset impacts of the project.¹⁰¹ The NMFS further indicated that it does not object to the project as proposed and that no further EFH consultation is necessary.

75. Tennessee Gas's proposed EFH reporting includes three monitoring events: preconstruction; restoration completion; and one year following a complete growing season. Tennessee Gas proposes to send the reports to the Corps and Louisiana DNR. NMFS requested that it receive copies of the monitoring reports.¹⁰² Therefore, environmental condition 19 in the appendix to this order, requires Tennessee Gas to provide the monitoring reports to NMFS.

76. NMFS also recommended that Tennessee Gas locate HDD bore exit and/or entry locations in open water, where possible, to avoid and minimize potential impacts on wetlands and to reduce the number of additional temporary workspaces required for the HDD crossings. Tennessee Gas proposes an HDD along the Yscloskey Toca Lateral Loop near milepost 4.4, for which the proposed entry and exit locations are located within wetlands. The nearest open water feature to the proposed entry location at

¹⁰¹ NMFS Oct. 5, 2021 Letter on EFH Impacts.

¹⁰² Commission staff Nov. 10, 2020 memo containing correspondence from NMFS.

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milepost 4.4 is located approximately 0.3 mile away near milepost 4.1. The nearest open water feature to the proposed exit location at milepost 4.8 is also located approximately 0.3 mile away at milepost 5.1. If feasible, relocating the HDD entry and exit locations would extend the drill for about 0.3 mile from each location, extending the length of the HDD to a total of about 1 mile. The final EIS included recommended condition 20, requiring Tennessee Gas to provide, prior to construction, a feasibility and hydrofracture risk assessment for the HDD if the bore exit and/or entry locations extended into areas of open water. The recommendation stated that Tennessee Gas should adopt this modification if the design is feasible and hydrofracture risk is not increased compared to the current design. To potentially minimize EFH wetland impacts, we have included this recommendation as environmental condition 20 in the appendix A to this order.

77. Given that most of the impacts would be temporary and permanent impacts would be limited in spatial extent, the EA and final EIS conclude that any adverse impacts on EFH would be minor. We agree.

2. Environmental Justice

78. In conducting NEPA reviews of proposed natural gas projects, the Commission follows the instruction of Executive Order 12898, which directs federal agencies to identify and address “disproportionately high and adverse human health or environmental effects” of their actions on minority and low-income populations (i.e., environmental justice communities).¹⁰³ Executive Order 14008 also directs agencies to develop “programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts.”¹⁰⁴ Environmental justice is “the fair treatment and meaningful involvement of

¹⁰³ Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994). While the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, and statutory duty to evaluate all factors bearing on the public interest. 15 U.S.C. § 717f; *see also* 18 C.F.R. § 380.12(g) (2021) (requiring applicants to submit information about the socioeconomic impact area of a project for the Commission’s consideration during NEPA review); Commission, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.

¹⁰⁴ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). The term “environmental justice community” includes disadvantaged communities that have been historically marginalized and overburdened by pollution. *Id.* § 219. The term also includes, but may not be limited to minority populations, low-income populations, or

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all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”¹⁰⁵

79. Consistent with CEQ¹⁰⁶ and EPA¹⁰⁷ guidance, Commission staff considers:
(1) whether environmental justice communities (minority or low-income

indigenous peoples. *See* EPA, *EJ 2020 Glossary* (Aug. 2, 2019), <https://www.epa.gov/environmentaljustice/ej-2020-glossary>.

¹⁰⁵ EPA, *Learn About Environmental Justice*, [https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20\(EJ\)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies](https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20(EJ)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies) (last visited Mar. 4, 2022). Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental, and commercial operations or policies. *Id.* Meaningful involvement of potentially affected environmental justice community residents means: (1) people have an opportunity to participate in decisions about activities that may affect their environment and/or health; (2) the public’s contributions can influence the regulatory agency’s decision; (3) community concerns will be considered in the decision-making process; and (4) decision makers will seek out and facilitate the involvement of those potentially affected. *Id.*

¹⁰⁶ CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* 4 (Dec. 1997) (CEQ’s *Environmental Justice Guidance*), https://www.energy.gov/sites/default/files/nepapub/nepa_documents/RedDont/G-CEQ-EJGuidance.pdf. CEQ offers recommendations on how federal agencies can provide opportunities for effective community participation in the NEPA process, including identifying potential effects and mitigation measures in consultation with affected communities and improving the accessibility of public meetings, crucial documents, and notices. There were opportunities for public involvement during the Commission’s pre-filing and environmental review processes, though the record does not demonstrate that these opportunities were targeted at engaging environmental justice communities. *See supra* PP 70-73. For assistance with interventions, comments, requests for rehearing, or other filings, and for information about any applicable deadlines for such filings, members of the public are encouraged to contact OPP directly at 202-502-6592 or OPP@ferc.gov for further information. *See supra* n.20.

¹⁰⁷ *See generally* EPA, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016) (Promising Practices), https://www.epa.gov/sites/default/files/2016-08/documents/nepa_promising_practices_document_2016.pdf.

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populations)¹⁰⁸ exist in the project area; (2) whether impacts on environmental justice communities are disproportionately high and adverse; and (3) what mitigation measures might be needed. Following the recommendations set forth in *Promising Practices*, the Commission uses the 50 percent and the meaningfully greater analysis methods to identify minority populations.¹⁰⁹ Using this methodology, minority populations have been defined as where either: (1) the aggregate minority population of the block groups in the affected area exceeds 50%; or (2) the aggregate minority population in the block group affected is 10% higher than the aggregate minority population percentage in the county/parish.¹¹⁰

80. CEQ's *Environmental Justice Guidance* also directs low-income populations to be identified based on the annual statistical poverty thresholds from the U.S. Census Bureau. Using *Promising Practices*' low-income threshold criteria method, low-income populations are identified as block groups where the percent of low-income population in the identified block group is equal to or greater than that of the county/parish.

81. To identify potential environmental justice communities, Commission staff used 2019 U.S. Census American Community Survey data¹¹¹ for the race, ethnicity, and poverty data at the block group level.¹¹² Additionally, in accordance with

¹⁰⁸ See generally Exec. Order No. 12,898, 59 Fed. Reg. 7629. Minority populations are those groups that include: American Indian or Alaskan Native; Asian or Pacific Islander; Black, not of Hispanic origin; or Hispanic. CEQ's *Environmental Justice Guidance* at 25.

¹⁰⁹ See *Promising Practices* at 21-25.

¹¹⁰ Here, Commission staff selected county and parish as the comparable reference communities to ensure that affected environmental justice communities are properly identified. A reference community may vary according to the characteristics of the particular project and the surrounding communities.

¹¹¹ U.S. Census Bureau, American Community Survey 2019 ACS 1-Year Estimates Detailed Tables, File# B17017, Poverty Status in the Past 12 Months by Household Type by Age of Householder, <https://data.census.gov/cedsci/table?q=B17017;File#B03002> Hispanic or Latino Origin By Race, <https://data.census.gov/cedsci/table?q=b03002>

¹¹² For this project, we determined that a one-mile radius around the proposed aboveground facilities was the appropriate unit of geographic analysis for assessing project impacts on the environmental justice communities. A one-mile radius is

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Promising Practices, staff used EJSCREEN, EPA's environmental justice mapping and screening tool, as an initial step to gather information regarding minority and low-income populations; potential environmental quality issues; environmental and demographic indicators; and other important factors and also reviewed additional Census data.

82. Once staff collected the block group level data, as discussed in further detail below, staff conducted an impacts analysis for the identified environmental justice communities, and evaluated health or environmental hazards; the natural physical environment; and associated social, economic, and cultural factors to determine whether impacts to environmental justice communities are disproportionately high and adverse. For this project, Commission staff determined whether impacts were disproportionately high and adverse on environmental justice communities and also whether those impacts were significant.¹¹³ Commission staff assessed whether impacts to an environmental justice community were disproportionately high and adverse based on whether those impacts were predominately borne by that community, consistent with EPA's recommendations in *Promising Practices*.¹¹⁴ Identified project impacts and subsequent mitigation measures are discussed below.

83. Commission staff identified one census block group crossed by the proposed Grand Bayou Loop as an environmental justice population based on a minority population that is meaningfully greater than the Plaquemines Parish population and a low-income population greater than the Plaquemines Parish population (Census Tract 1, Block Group 504).

84. The identified environmental justice communities may be temporarily affected by visual, noise, traffic, and air quality impacts during construction of the proposed facilities. The EIS provided a list of 14 separate projects for which the cumulative

sufficiently broad considering the likely concentration and range of construction emissions, noise, traffic impacts and visual impacts proximal to the proposed facilities.

¹¹³ See *Promising Practices* at 33 (stating that "an agency may determine that impacts are disproportionately high and adverse, but not significant within the meaning of NEPA").

¹¹⁴ *Promising Practices* at 44-46 (explaining that there are various approaches to determining whether an action will cause a disproportionately high and adverse impact, and that one recommended approach is to consider whether an impact would be "predominantly borne by minority populations or low-income populations"). We recognize that EPA and CEQ are in the process of updating their guidance regarding environmental justice and we will review and incorporate that anticipated guidance in our future analysis, as appropriate.

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impacts were assessed for impact on environmental justice communities.¹¹⁵ The EA and EIS concluded, and we agree, that these impacts are not disproportionately high and adverse or significant. Although construction activity may be visible by the minority population that exists within the block group crossed by the proposed Grand Bayou Loop, the visual impacts resulting from the presence of construction equipment and barges will be temporary, and the proposed pipeline after construction would occur primarily in open waters and once complete would be underground. While noise from construction would vary, it would not result in significant noise impacts on local residents and the surrounding communities, including the environmental justice population, because construction equipment would only be temporarily operated on an as-needed basis during the construction period, during daytime hours, except when required for activities such as hydrostatic testing, operation of pumps at waterbody crossings, and certain HDD activities that require continuous work.¹¹⁶ Area residents may be temporarily affected by traffic, but Tennessee's commitment to implementing mitigation measures to alleviate any potential road congestion would make the impacts minor and short-term.

85. The EIS stated that potential pollution emissions from the project, when considered with background concentrations, would be below the National Ambient Air Quality Standards (NAAQS), which are designed to protect public health, including sensitive populations such as those with asthma. The EIS also acknowledged that NAAQS attainment alone may not assure there is no localized harm to sensitive populations.¹¹⁷ Commission staff determined, and we agree, that project emissions from construction and operation may cause a disproportionate impact on sensitive populations more vulnerable than the general population to air quality impacts. We further agree with Commission staff that because project emissions when considered with background concentrations would be below the NAAQS, which are designed to protect public health, including sensitive populations such as children, the elderly, and asthmatics, the project would not result in high or adverse impacts on vulnerable populations and would not

¹¹⁵ Table 4E: Planned and Existing Development Projects Considered in the Project's Cumulative Impacts Analysis for the [Southern] Project. EIS app. E.

¹¹⁶ Tennessee Gas and Southern would construct from Monday through Saturday, from 7 am to 7 pm. Certain HDD activities and hydrostatic testing would require extended construction hours, in some cases 24-hours. In addition, weather conditions, site conditions, specialized construction techniques, emergencies, or other atypical circumstances may also require extended construction hours, which may include nighttime or Sunday hours. If work hours are anticipated outside of the planned work hours, Southern Gas and Tennessee would notify affected landowners and parties and work to accommodate any special needs.

¹¹⁷ EIS at 42-43.

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have a disproportionately high and adverse impact on the remaining environmental justice community or a significant impact.

3. Greenhouse Gas Emissions and Climate Change

86. The Council on Environmental Quality (CEQ) defines impacts as “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives, including those effects that occur at the same time and place as the proposed action or alternatives and may include effects that are later in time or farther removed in distance from the proposed action or alternatives.”¹¹⁸ An impact is reasonably foreseeable if it is “sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”¹¹⁹

87. The EPA states that “[r]easonable ranges of emissions forecasts can be produced for upstream GHG emissions” and recommends the Commission develop that information for the proposed project.¹²⁰ That is not required here. Under D.C. Circuit precedent, the Commission need not consider the effects of upstream production or downstream transportation, consumption, or combustion of exported gas because the DOE’s “independent decision to allow exports . . . breaks the NEPA causal chain and absolves the Commission of responsibility to include [these considerations] in its NEPA analysis.”¹²¹ Thus, where, as here, it is known that the natural gas being transported by a proposed project will be delivered to an LNG export terminal for liquefaction and, ultimately, export to other countries, the Commission’s environmental analysis will not consider the upstream or downstream effects of increased natural gas exports.¹²² As stated above, the Southern Construction project is designed to support a lease to Tennessee, who will in turn use that service and additional service created by the

¹¹⁸ 40 C.F.R. § 1508.1(g) (2021).

¹¹⁹ *Id.* § 1508.1(aa).

¹²⁰ EPA Comment at 1.

¹²¹ *Sierra Club v. FERC*, 827 F.3d 36, 48 (D.C. Cir. 2016) (*Freeport*).

¹²² *Freeport*, 827 F.3d at 47 (holding that the Commission does not have to address the indirect effects of the anticipated export of natural gas because the Department of Energy, not the Commission, has sole authority to license and consider the environmental impacts of the export of any natural gas going through LNG facilities); *Freeport*, 827 F.3d at 68-69 (same); *EarthReports, Inc.*, 828 F.3d at 956 (same); *see also Sierra Club v. FERC*, 867 F.3d at 1372 (explaining *Freeport*).

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Evangeline Pass Project to meet the demands of Venture Global, who plans to export the natural gas transported by this project through its Plaquemines LNG Terminal.¹²³ Thus, in this proceeding, the Commission will not consider the upstream or downstream GHG emissions caused by the export of the natural gas transported by the project.

88. For the Southern Construction Project and the Evangeline Pass Project, the reasonably foreseeable and causally connected GHG emissions are emissions associated with the project's construction and operation. The Commission is not herein characterizing these emissions as significant or insignificant because we are conducting a generic proceeding to determine whether and how the Commission will conduct significance determinations going forward.¹²⁴ However, we are providing and considering information about these emissions based on the information in this proceeding.¹²⁵ Specifically, the EIS estimates that construction of the projects may result in emissions of up to 49,346 metric tons of CO₂e over the duration of construction.¹²⁶ The project's estimated direct operational GHG emissions are 145,247 metric tons per

¹²³ See Venture Global Motion to Intervene at 3 (“Plaquemines LNG has entered into a precedent agreement with Tennessee for the entire capacity of the Project . . . This transportation capacity is needed to transport feed gas for the Plaquemines LNG Project.”); Tennessee Gas Resource Report 9 at 9-18 (“[Applicants] understands that with the exception of any natural gas utilized by Venture Global in support of the liquefaction process, the vast majority of the natural gas to be delivered by Southern to [Tennessee Gas], and subsequently by [Tennessee Gas] to Venture Global via the Gator Express Pipeline would be liquefied at the terminal by Venture Global and ultimately exported overseas.”); Southern Resource Report 9 (same).

¹²⁴ Although we acknowledge that the Commission has previously assessed the “significance” of GHGs, see *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021), we do not do so here. The Commission is considering approaches for assessing significance in a pending proceeding. See Order on Draft Policy Statements, 178 FERC 61,197 (2022).

¹²⁵ *WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013).

¹²⁶ Final EIS at 20.

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year of CO₂e,¹²⁷ which was calculated based on 100% utilization;¹²⁸ i.e., it is assumed that the facilities are operated at maximum capacity for 365 days/year, 24 hours/day.¹²⁹

89. As we have done in prior certificate orders, we compare GHG emissions to the total GHG emissions of the United States as a whole. This comparison allows us to assess the project's share of contribution to GHG emissions at the national level, which provides us additional context in considering the project's potential impact on climate change. The annual GHGs from direct operation of both projects are 145,247 metric tons per year of CO₂e. To provide context to the GHG estimate, 5.769 billion metric tons of CO₂e were emitted at a national level in 2019 (inclusive of CO₂e sources and sinks).¹³⁰ The operation of these projects could potentially increase CO₂e emissions based on the 2019 levels by 0.0025%.¹³¹ At the state level, energy related CO₂e emissions in Louisiana and Mississippi were 211 and 63 million metric tons of CO₂e in 2018, respectively.¹³² Accordingly, the project's operation emissions could potentially increase CO₂e emissions based on the Louisiana and Mississippi 2018 levels by 0.034 percent and

¹²⁷ *Id.*

¹²⁸ In the absent of evidence supporting an alternative utilization rate we are using a conservative assumption of full burn.

¹²⁹ Final EIS at 20. Additionally, the estimate includes blowdowns and fugitive emissions from compressor station equipment and piping, as well as fugitive emissions from the pipeline lateral, meter station, tie-in facility, valves and ancillary facilities. *Id.*

¹³⁰ EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019* at ES-9 (Table ES-2) (2021), <https://www.epa.gov/sites/production/files/2021-04/documents/us-ghg-inventory-2021-chapter-executive-summary.pdf> (accessed Apr. 2021).

¹³¹ Although the national emissions reduction targets expressed in the EPA's Clean Power Plan were repealed in 2019, *EPA, Repeal of the Clean Power Plan; Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520, 32,522-32 (July 8, 2019), the Biden Administration announced in 2021 that the United States will rejoin the Paris Climate Accord, *Tackling the Climate Crisis at Home and Abroad*, 86 Fed. Reg. 7619. It is not yet clear if the U.S. will retain or modify its former goals.

¹³² U.S. Energy Information Administration, Table 1, State Energy-Related Carbon Dioxide Emissions by Year, Unadjusted: Louisiana, Mississippi (March 2, 2021), <https://www.eia.gov/environment/emissions/state/> (accessed June 2021).

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0.105 percent, respectively.¹³³ The EPA recommends that the Commission avoid expressing project-level emissions as a percentage of national or state emissions and instead should qualitatively discuss the increasing conflict between GHG emissions and GHG reduction policies and ways to mitigate that conflict. As stated in the final EIS, the project would increase the atmospheric concentration of GHGs, in combination with past and future emissions from all other sources and would contribute cumulatively to climate change. Additionally, as done in the final EIS, when states have GHG emissions reduction targets, we will compare a project's GHG emissions to those state goals to provide additional context and aid the decision-making process.¹³⁴ However, the Commission is unable to determine how individual projects will affect international, national, or state-wide GHG emissions reduction targets or whether a project's GHG emissions comply with those goals or laws.

90. As stated in the EA and the final EIS, Southern and Tennessee Gas are taking steps to reduce its direct GHG emissions. Southern and Tennessee Gas will implement measures to reduce fugitive emissions, including voluntary measures outlined by the Interstate Natural Gas Association of America.¹³⁵ In addition, Southern and Tennessee Gas are members of the One Future Campaign (voluntary program to get methane emissions across the lifecycle of natural gas down to one percent or less by 2025) and the Methane Challenge Program.¹³⁶

¹³³ EIS at 30.

¹³⁴ Final EIS at 22-23 (noting that based on the state of Louisiana's target to reduce net GHG emissions 26% to 28% by 2025 and 40% to 50% by 2030, compared to 2005 levels, the project's direct GHG emissions would represent 0.049% and 0.071% of Louisiana's 2025 and 2030 projected GHG emission levels and that Mississippi does not have any executive or statutory GHG emission targets).

¹³⁵ Additional information can be found here Interstate Natural Gas Association of America, *Minimizing Methane Emissions* (May 2021), <https://www.ingaa.org/File.aspx?id=37866&v=bb0282ca>

¹³⁶ Final EIS at 44.

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91. The EPA requests that the final EIS include an estimate of the social cost of GHGs, which EPA claims reflects the best available science and methodologies to incorporate the value to society of net changes in direct and indirect GHG emissions from a proposed action. In support of the Commission utilizing the social costs of GHGs, EPA urges the Commission to consider the D.C. Circuit's recent decision in *Vecinos*¹³⁷ where the court remanded the certificate order without vacatur due to deficiencies under the Administrative Procedure Act in the Commission's analysis of environmental justice issues and its failure to respond to an argument regarding the consideration of greenhouse gas emissions. Similarly, Sierra Club and the Institute for Policy Integrity, citing *Vecinos*, argue that 40 C.F.R. § 1502.21(c)(4) requires that the Commission apply the social cost of carbon protocol to its consideration of the project's climate impacts.¹³⁸

92. The social cost of GHGs is an administrative tool intended to quantify, in dollars, estimates of long-term damage that may result from future emissions of carbon dioxide, nitrous oxide, and methane. In response to the comments, we are disclosing Commission staff's estimate of the social cost of carbon associated with direct emissions from the operation of the projects using the calculations described below.¹³⁹ However, noting the pending litigation challenging federal agencies' use of the IWG's interim values for calculating the social cost of GHGs,¹⁴⁰ we are not relying on or using the social cost of

¹³⁷ *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021) (*Vecinos*).

¹³⁸ Sierra Club August 2021 DEIS Comments at 23; Institute for Policy Integrity at New York University School of Law August 2021 DEIS Comments at 11-12.

¹³⁹ See also *Vecinos*, 6 F.4th at 1329-30.

¹⁴⁰ *Missouri v. Biden*, 8th Cir. No. 21-3013; *Louisiana v. Biden*, No. 21-cv-1074-JDC-KK (W.D. La). On February 11, 2022, the U.S. District Court for the Western District of Louisiana issued a preliminary injunction limiting federal agencies' employment of estimates of the social costs of GHGs and use of the IWG's interim estimates. On March 16, 2022, the U.S. Court of Appeals for the Fifth Circuit issued a stay of the district court's preliminary injunction, finding among other things that the federal agency defendants' continued use of the interim estimates was lawful. *Louisiana v. Biden*, No. 22-30087 (5th Cir. Mar. 16, 2022).

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carbon estimates to make any finding or determination regarding either the impact of the project's GHG emissions or whether the project is in the public convenience and necessity.¹⁴¹

93. As both EPA and CEQ participate in the IWG, we used the methods and values contained in the IWG's current draft guidance but note that different values will result from the use of other methods.¹⁴² Emissions during operation would primarily be carbon dioxide with very little nitrous oxide and methane. Accordingly, Commission staff calculated the social cost of carbon using carbon dioxide equivalent (CO_{2e}) in lieu of the social cost of GHGs of carbon dioxide, nitrous oxide, and methane. For the analysis, staff assumed discount rates of 5 percent (\$14 per metric ton in 2020), 3 percent (\$51 per ton in 2020), and 2.5 percent (\$76 per ton in 2020),¹⁴³ assumed the project will begin

¹⁴¹ Furthermore, the Commission is not applying the social cost of carbon herein because it has not determined which, if any, modifications are needed to render that tool useful for project-level analyses. See CEQ's May 27, 2021 Comments filed in Docket No. PL18-1-000, at 2 (noting that it is working with representatives from the IWG to develop forthcoming additional guidance regarding the application of the social cost of GHGs tool in federal decision-making processes, including in NEPA analyses).

¹⁴² *Technical Support Document: Social Cost of Carbon, Methane, and Nitrous Oxide Interim Estimates under Executive Order 13990*, Interagency Working Group on Social Cost of Greenhouse Gases, United States Government, February 2021 (IWG Interim Estimates Technical Support Document). On February 11, 2022, the U.S. District Court for the Western District of Louisiana issued a preliminary injunction limiting federal agencies' employment of estimates of the social costs of GHGs and use of the IWG's interim estimates. On March 16, 2022, the U.S. Court of Appeals for the Fifth Circuit issued a stay of the district court's preliminary injunction, finding among other things that the federal agency defendants' continued use of the interim estimates was lawful. *Louisiana v. Biden*, No. 22-30087 (5th Cir. Mar. 16, 2022).

¹⁴³ IWG Interim Estimates Technical Support Document at 24. To quantify the potential damages associated with estimated emissions, the IWG methodology applies consumption discount rates to estimated emissions costs. The IWG's discount rates are a function of the rate of economic growth where higher growth scenarios lead to higher discount rates. For example, IWG's method includes the 2.5 percent discount rate to address the concern that interest rates are highly uncertain over time; the 3 percent value to be consistent with OMB circular A-4 (2003) and the real rate of return on 10-year Treasury Securities from the prior 30 years (1973 through 2002); and the 5 percent discount rate to represent the possibility that climate-related damages may be positively correlated with market returns. Thus, higher discount rates further discount future impacts based on estimated economic growth. Values based on lower discount rates are

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service in 2023 and that the project's emissions will be at a constant rate throughout the life of the 20-year contract. Noting these assumptions, the 145,247 metric tons of annual CO₂e emissions from both projects is calculated to result in a total social cost of carbon equal to \$36,218,557, \$137,343,413, and \$207,983,536, respectively (all in 2020 dollars).¹⁴⁴ Using the 95th percentile of the social cost of carbon using the 3 percent discount rate (\$152 per ton in 2020),¹⁴⁵ the total social cost of carbon from 145,247 metric tons of annual CO₂e emissions of the project is calculated to be \$417,144,180 (in 2020 dollars).

4. Cumulative Effects

94. The EA and final EIS identify present and reasonably foreseeable future projects within resource specific geographic scopes for the projects, including: natural gas and crude oil infrastructure projects; a methanol facility; two sediment diversion projects; two shoreline and marsh restoration projects; levee restoration projects; road and bridge projects; non-jurisdictional facilities associated with the project (e.g., overhead power lines, septic systems), Commission-jurisdictional maintenance projects, and the Plaquemines LNG's Terminal and the associated Gator Express Pipeline. The EA and final EIS evaluate cumulative impacts on geology and soils, groundwater, wetlands, surface water, vegetation, wildlife, fisheries, land use, visual resources, socioeconomics, air quality, and noise. The analysis considers Tennessee Gas's and Southern's proposed measures, the permitting and required authorizations of the proposed projects and other projects within the geographic scope, the expectation that the other projects would implement similar best management practices to those of the proposed projects, and the existing environmental conditions. The projects, when combined with these other projects in the area, would primarily result in minor and temporary contributions to cumulative impacts on surface waters, wetlands, wildlife, air quality, and noise.

95. The EPA's comments on the final EIS state that the Commission did not adequately consider the cumulative impacts to air quality Columbia Gulf Transmission, LLC East Lateral Xpress Project and other Commission-jurisdictional projects in the area

consistent with studies of discounting approaches relevant for intergenerational analysis. *Id.* at 18-19, 23-24.

¹⁴⁴ The IWG draft guidance identifies costs in 2020 dollars. *Id.* at 5 (Table ES-1).

¹⁴⁵ This value represents "higher-than-expected economic impacts from climate change further out in the tails of the [social cost of CO₂] distribution." *Id.* at 11. In other words, it represents a higher impact scenario with a lower probability of occurring.

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to air quality, GHGs, and other resource areas.¹⁴⁶ The EPA also states that since other actions under consideration before the Commission are in the same regional pipeline network, connecting to the same regional facility systems, it is unclear how they are distinct actions.¹⁴⁷

96. The final EIS, in response to comments on the draft, examined the East Lateral Xpress Project and other nearby projects and found that while the Golden Meadow Compressor Station, proposed as part of the East Lateral Xpress Project, would be within the geographic scope for the air quality assessment for the Evangeline Pass Project, all activities proposed by Tennessee would be horsepower replacement under section 2.55 and would not result in cumulative impacts.¹⁴⁸ At its closest point, the Evangeline Pass Expansion Project pipeline loop is 7.4 miles northeast of an East Lateral Xpress Project meter station in Plaquemines Parish. Many of the impacts associated with the Evangeline Pass pipeline loop and the meter station would be temporary (only occurring during construction) or short-term (expected to restore within a few years of construction); therefore, some of the impacts would not overlap. Additionally, many of the longer-term or permanent impacts from each of the projects (e.g., wetland loss) would require mitigation from the respective permitting agency, and would therefore, minimize overall permanent impacts. Although construction of the projects may occur concurrently with construction of planned projects in southern Louisiana and Mississippi, combined impacts would be short-term and temporary. Therefore, the EA and final EIS conclude that impacts resulting from the projects are not expected to significantly contribute to cumulative impacts. We agree.

5. Environmental Impacts Conclusion

97. We have reviewed the information and analysis contained in the final EIS regarding potential environmental effects of the projects, as well as the other information in the record. We are accepting the environmental recommendations in the final EIS as modified herein, and are including them as conditions in the appendix to this order.

98. Based on our consideration of this information and the discussion above, we agree with the conclusions presented in the final EIS and find that the projects, if implemented as described in the final EIS, is an environmentally acceptable action. Therefore, for the

¹⁴⁶ EPA Comments on Final EIS at 1-2.

¹⁴⁷ *Id.* at 2.

¹⁴⁸ Final EIS at 45.

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reasons discussed above, we find that the project is in the public convenience and necessity.

IV. Conclusion

99. The proposed Southern Construction Project will allow Tennessee Gas to transport natural gas for Venture Global, an unaffiliated shipper, via the Capacity Lease with Southern constructing fewer, less costly facilities than Tennessee Gas would have needed to construct on its own system to provide equivalent transportation service. Municipals protest the project and lease, but a lease does not provide the same rights to the lessee and the lessee's shippers, thus, we find the rate proposed by Southern appropriate. Further, Southern will not be able to roll-in the rates of the Southern Construction Project unless it demonstrates during a rate case that the costs of the project would not be subsidized by existing customers

100. The proposed Evangeline Pass Project will enable Tennessee Gas to provide firm transportation service for Venture Global. We find that Tennessee Gas has demonstrated a need for the Evangeline Pass Project, and that the project will not have adverse economic impacts on existing shippers or other pipelines and their existing customers, and that the project's benefits will outweigh any adverse economic effects on landowners and surrounding communities.

101. We have analyzed the technical aspects of the projects and conclude that they have been appropriately designed to achieve the intended purposes. Based on the discussion above, we find under section 7 of the NGA that the public convenience and necessity requires approval of the projects, subject to the conditions in this order.

102. Compliance with the environmental conditions appended to our orders is integral to ensuring that the environmental impacts of approved projects are consistent with those anticipated by our environmental analyses. Thus, Commission staff carefully reviews all information submitted, and will issue a notice to proceed with a particular activity only when satisfied that the applicant has complied with all applicable conditions. We also note that the Commission has the authority to take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project, including authority to impose any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the order, as well as the avoidance or mitigation of unforeseen adverse environmental impacts resulting from project construction and operation.

103. Any state or local permits issued with respect to the jurisdictional facilities authorized herein must be consistent with the conditions of this certificate. The Commission encourages cooperation between interstate pipelines and local authorities. However, this does not mean that state and local agencies, through application of state or

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local laws, may prohibit or unreasonably delay the construction or operation of facilities approved by this Commission.¹⁴⁹

104. At a meeting held on March 24, 2022, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the application, as supplemented, and exhibits thereto, and all comments submitted herein, and upon consideration of the record,

The Commission orders:

(A) A certificate of public convenience and necessity is issued to Tennessee Gas, authorizing it to construct, and operate the proposed Evangeline Pass Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(B) A certificate of public convenience and necessity is issued to Southern, authorizing it to construct, and operate the Southern Construction Project, as described and conditioned herein, and as more fully described in the application and subsequent filings by the applicant, including any commitments made therein.

(C) A certificate of public convenience and necessity is issued to Tennessee Gas authorizing it to acquire by lease, capacity from Southern, as described and conditioned herein

(D) Southern is authorized to abandon by lease to Tennessee Gas capacity on Southern's system, as described and conditioned herein. Southern shall notify the Commission within 10 days of the date of abandonment of the capacity leased to Tennessee Gas.

(E) The certificate authority issued in Ordering Paragraphs (A) and (B) is conditioned on:

¹⁴⁹ See 15 U.S.C. § 717r(d) (state or federal agency's failure to act on a permit considered to be inconsistent with Federal law); see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (state regulation that interferes with FERC's regulatory authority over the transportation of natural gas is preempted); *Dominion Transmission, Inc. v. Summers*, 723 F.3d, at 245 (D.C. Cir. 2013) (noting that state and local regulation is preempted by the NGA to the extent it conflicts with federal regulation, or would delay the construction and operation of facilities approved by the Commission).

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- (1) Completion of construction of the proposed facilities and making them available for service within two years of the date of this order pursuant to section 157.20(b) of the Commission's regulations;
- (2) Compliance with all applicable Commission regulations under the NGA including, but not limited to, Parts 154, 157, and 284, and paragraphs (a), (c), (e), and (f) of section 157.20 of the Commission's regulations; and
- (3) Compliance with the environmental conditions listed in the appendix to this order.

(F) Tennessee Gas's request to use its system-wide rate for firm and interruptible transportation service on the project facilities is approved.

(G) Tennessee Gas's request to use its system-wide fuel and electric power rates is approved.

(H) Tennessee is granted a pre-determination of rolled-in rate treatment for the Evangeline Pass Project in a future NGA section 4 rate case, absent a significant change in circumstances.

(I) Tennessee Gas shall keep separate books and accounting of costs attributable to the proposed services, as more fully described above.

(J) Tennessee Gas shall file a written statement affirming that it has executed firm contracts for the capacity levels and terms of service represented in the signed precedent agreements, prior to commencing construction.

(K) Southern shall keep separate books and accounting of costs attributable to the proposed services, as more fully described above.

(L) Tennessee Gas shall notify the Commission's environmental staff by telephone or e-mail of any environmental non-compliance identified by other federal, state, or local agencies on the same day that such agency notifies Tennessee Gas. Tennessee Gas shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

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(M) Southern shall notify the Commission's environmental staff by telephone or e-mail of any environmental noncompliance identified by other federal, state, or local agencies on the same day that such agency notifies Southern. Southern shall file written confirmation of such notification with the Secretary of the Commission within 24 hours.

By the Commission. Chairman Glick is concurring with a separate statement attached.
Commissioner Danly is concurring with a separate statement attached.
Commissioner Clements is concurring with a separate statement attached.
Commissioner Christie is concurring with a separate statement attached.
Commissioner Christie and Phillips are concurring with a joint separate statement attached.

(S E A L)

Debbie-Anne A. Reese,
Deputy Secretary.

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Appendix

Environmental Conditions

As recommended in the final environmental impact statement (final EIS) and otherwise amended herein, this authorization includes the following conditions.

1. Tennessee Gas and Southern shall follow the construction procedures and mitigation measures described in its applications and supplements (including responses to staff data requests) and as identified in the final EIS unless modified by the Order.

Tennessee Gas and Southern must:

- a. request any modification to these procedures, measures, or conditions in a filing with the Secretary of the Commission (Secretary);
- b. justify each modification relative to site-specific conditions;
- c. explain how that modification provides an equal or greater level of environmental protection than the original measure; and
- d. receive approval in writing from the Director of the Office of Energy Projects (OEP), or the Director's designee, **before using that modification.**

2. The Director of OEP, or the Director's designee, has delegated authority to address any requests for approvals or authorizations necessary to carry out the conditions of the Order, and take whatever steps are necessary to ensure the protection of environmental resources during construction and operation of the project. This authority shall allow:

- a. the modification of conditions of the Order;
- b. stop-work authority; and
- c. the imposition of any additional measures deemed necessary to ensure continued compliance with the intent of the conditions of the Order as well as the avoidance or mitigation of unforeseen adverse environmental impact resulting from project construction and operation.

3. **Prior to any construction**, Tennessee Gas and Southern shall each file an affirmative statement with the Secretary, certified by a senior company official, that all company personnel, environmental inspectors (EI), and contractor personnel will be informed of the EI's authority and have been or will be trained on the implementation of the environmental mitigation measures appropriate to their jobs **before** becoming involved with construction and restoration activities.

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4. The authorized facility locations shall be as shown in the final EIS, as supplemented by filed alignment sheets. **As soon as they are available, and before the start of construction**, Tennessee Gas and Southern shall each file with the Secretary any revised detailed survey alignment maps/sheets at a scale not smaller than 1:6,000 with station positions for all facilities approved by the Order. All requests for modifications of environmental conditions of the Order or site-specific clearances must be written and must reference locations designated on these alignment maps/sheets.

Tennessee Gas's and Southern's exercise of eminent domain authority granted under Natural Gas Act section 7(h) in any condemnation proceedings related to the Order must be consistent with these authorized facilities and locations. Tennessee Gas's and Southern's right of eminent domain granted under Natural Gas Act section 7(h) does not authorize it to increase the size of its natural gas pipeline or facilities to accommodate future needs or to acquire a right-of-way for a pipeline to transport a commodity other than natural gas.

5. Tennessee Gas and Southern shall each file with the Secretary detailed alignment maps/sheets and aerial photographs at a scale not smaller than 1:6,000 identifying all route realignments or facility relocations, and staging areas, pipe storage yards, new access roads, and other areas that would be used or disturbed and have not been previously identified in filings with the Secretary. Approval for each of these areas must be explicitly requested in writing. For each area, the request must include a description of the existing land use/cover type, documentation of landowner approval, whether any cultural resources or federally listed threatened or endangered species would be affected, and whether any other environmentally sensitive areas are within or abutting the area. All areas shall be clearly identified on the maps/sheets/aerial photographs. Each area must be approved in writing by the Director of OEP, or the Director's designee, **before construction in or near that area**.

This requirement does not apply to extra workspace allowed by our *Upland Erosion Control, Revegetation and Maintenance Plan* and/or minor field realignments per landowner needs and requirements which do not affect other landowners or sensitive environmental areas such as wetlands.

Examples of alterations requiring approval include all route realignments and facility location changes resulting from:

- a. implementation of cultural resources mitigation measures;
- b. implementation of endangered, threatened, or special concern species mitigation measures;
- c. recommendations by state regulatory authorities; and
- d. agreements with individual landowners that affect other landowners or could affect sensitive environmental areas.

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6. **At least 60 days before construction begins**, Tennessee Gas and Southern shall each file an Implementation Plan with the Secretary for review and written approval by the Director of OEP, or the Director's designee. Tennessee Gas and Southern must file revisions to the plan as schedules change. The plan shall identify:

- a. how Tennessee Gas and Southern will implement the construction procedures and mitigation measures described in its application and supplements (including responses to staff data requests), identified in the EA, and required by the Order;
- b. how Tennessee Gas and Southern will incorporate these requirements into the contract bid documents, construction contracts (especially penalty clauses and specifications), and construction drawings so that the mitigation required at each site is clear to onsite construction and inspection personnel;
- c. the number of EIs assigned, and how the company will ensure that sufficient personnel are available to implement the environmental mitigation;
- d. company personnel, including EIs and contractors, who will receive copies of the appropriate material;
- e. the location and dates of the environmental compliance training and instructions Tennessee Gas and Southern will give to all personnel involved with construction and restoration (initial and refresher training as the project progresses and personnel change);
- f. the company personnel (if known) and specific portion of Tennessee Gas's and Southern's organization having responsibility for compliance;
- g. the procedures (including use of contract penalties) Tennessee Gas and Southern will follow if noncompliance occurs; and
- h. for each discrete facility, a Gantt or PERT chart (or similar project scheduling diagram), and dates for:
 - i. the completion of all required surveys and reports;
 - ii. the environmental compliance training of onsite personnel;
 - iii. the start of construction; and
 - iv. the start and completion of restoration.

7. Tennessee Gas and Southern shall each employ at least one EI. The EI(s) shall be:

- a. responsible for monitoring and ensuring compliance with all mitigation measures required by the Order and other grants, permits, certificates, or other authorizing documents;
- b. responsible for evaluating the construction contractor's implementation of the environmental mitigation measures required in the contract (see condition 6 above) and any other authorizing document;

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- c. empowered to order correction of acts that violate the environmental conditions of the Order, and any other authorizing document;
- d. a full-time position, separate from all other activity inspectors;
- e. responsible for documenting compliance with the environmental conditions of the Order, as well as any environmental conditions/permit requirements imposed by other federal, state, or local agencies; and
- f. responsible for maintaining status reports.

8. Beginning with the filing of its Implementation Plan, Tennessee Gas shall file updated status reports with the Secretary on a **biweekly** basis and Southern shall file updated status reports with the Secretary on a **monthly** basis until all construction and restoration activities are complete. On request, these status reports will also be provided to other federal and state agencies with permitting responsibilities. Status reports shall include:

- a. an update on Tennessee Gas's and Southern's efforts to obtain the necessary federal authorizations;
- b. the construction status of the project, work planned for the following reporting period, and any schedule changes for stream crossings or work in other environmentally-sensitive areas;
- c. a listing of all problems encountered and each instance of noncompliance observed by the EI(s) during the reporting period (both for the conditions imposed by the Commission and any environmental conditions/permit requirements imposed by other federal, state, or local agencies);
- d. a description of the corrective actions implemented in response to all instances of noncompliance;
- e. the effectiveness of all corrective actions implemented;
- f. a description of any landowner/resident complaints which may relate to compliance with the requirements of the Order, and the measures taken to satisfy their concerns; and
- g. copies of any correspondence received by Tennessee Gas and Southern from other federal, state, or local permitting agencies concerning instances of noncompliance, and Tennessee Gas's and Southern's response.

9. Tennessee Gas and Southern must receive written authorization from the Director of OEP, or the Director's designee, **before commencing construction of any project facilities**. To obtain such authorization, Tennessee Gas and Southern must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof).

10. Tennessee Gas and Southern must receive written authorization from the Director of OEP, or the Director's designee, **before placing the project into service**. Such authorization will only be granted following a determination that rehabilitation and

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restoration of the right-of-way and other areas affected by the project are proceeding satisfactorily.

11. **Within 30 days of placing the authorized facilities in service**, Tennessee Gas and Southern shall each file an affirmative statement with the Secretary, certified by a senior company official:

- a. that the facilities have been constructed in compliance with all applicable conditions, and that continuing activities will be consistent with all applicable conditions; or
- b. identifying which of the conditions in the Order Tennessee Gas and Southern has complied with or will comply with. This statement shall also identify any areas affected by the project where compliance measures were not properly implemented, if not previously identified in filed status reports, and the reason for noncompliance.

12. **Prior to construction at the Rose Hill Compressor Station and Meter Station site**, Southern shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, its geotechnical report for the site, as well as plans to manage surface and groundwater, slope stabilization techniques, placement of spoil and felled trees during construction, and any monitoring and mitigation measures to protect Southern project facilities and downslope resources during construction and operation.

13. **Prior to construction**, Tennessee Gas shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, its geotechnical report for Compressor Station 529, as well as its finalized measures to mitigate for subsidence at the Tennessee Gas project facilities.

14. **Prior to construction**, Tennessee Gas shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, a site-specific plan for restoration of the Bayou Road Yard following construction, including procedures for topsoil segregation, cleanup, soil compaction mitigation, and revegetation.

15. Tennessee Gas shall **not begin** construction of the Evangeline Pass Project **until** it files with the Secretary a copy of the determination of consistency with the Coastal Zone Management Plan issued by the Louisiana Department of Natural Resources – Office of Coastal Management.

16. **Prior to construction of the Bayou Road and Highway 46/Florissant Highway Horizontal Directional Drill (HDD) crossing**, Tennessee Gas shall file with the Secretary, for review and written approval by the Director of OEP, or the Director's designee, an HDD noise mitigation plan to reduce the projected noise level attributable to

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the proposed drilling operations at Noise Sensitive Area (NSA) 1. During drilling operations, Tennessee Gas shall implement the approved plan, monitor noise levels, report the noise levels in the biweekly construction status reports, and make all reasonable efforts to restrict the noise attributable to the drilling operations to no more than a day-night sound level (L_{dn}) of 55 decibels on the A-weighted scale (dBA) at the NSA.

17. Tennessee Gas shall file noise surveys with the Secretary **no later than 60 days** after placing the Compressor Station 529 in service. If a full load condition noise survey is not possible, Tennessee Gas shall file an interim survey at the maximum possible horsepower load and file the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the station under interim or full power load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, Tennessee Gas shall:

- a. file a report with the Secretary on what changes are needed, for review and written approval by the Director of OEP, or the Director's designee;
- b. install additional noise controls to meet that level within 1 year of the in-service date; and
- c. confirm compliance with the L_{dn} of 55 dBA requirement by filing a second noise survey with the Secretary no later than 60 days after it installs the additional noise controls.

18. Southern shall file noise surveys with the Secretary **no later than 60 days** after placing the Rose Hill Compressor Station in service. If a full load condition noise survey is not possible, Southern shall file an interim survey at the maximum possible horsepower load and file the full load survey **within 6 months**. If the noise attributable to the operation of all of the equipment at the station under interim or full power load conditions exceeds an L_{dn} of 55 dBA at any nearby NSAs, Southern shall:

- a. file a report with the Secretary on what changes are needed, for review and written approval by the Director of OEP, or the Director's designee;
- b. install additional noise controls to meet that level **within 1 year** of the in-service date; and
- c. confirm compliance with the L_{dn} of 55 dBA requirement by filing a second noise survey with the Secretary **no later than 60 days** after it installs the additional noise controls.

19. Tennessee Gas shall file with the Secretary the monitoring reports as described in its Compensatory Mitigation and Monitoring Plan (preconstruction, following restoration, and one year post construction) and confirm that these reports were provided to the National Marine Fisheries Service.

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20. **Prior to construction**, Tennessee Gas shall file with the Secretary, for review and approval by the Director of OEP, a feasibility and hydrofracture risk assessment for the HDD near milepost 4.4 on the Yscloskey Toca Lateral Loop with bore exit and/or entry locations extended into areas of open water. If the design is feasible and hydrofracture risk is not increased compared to the current design, Tennessee shall adopt this modification. If the design is not feasible or hydrofracture risk is significantly elevated, Tennessee Gas shall file a description of construction methods and impact minimization/mitigation measures that it will implement in areas where the HDD entry and exit points occur within a wetland.

21. **Within 5 days of receipt of a water quality certification issued by the Louisiana Department of Environmental Quality or Mississippi Department of Environmental Quality**, Tennessee Gas and Southern shall each file the complete certification, including all conditions, and all conditions attached to the water quality certification constitute mandatory conditions of this *Certificate Order*. **Prior to construction**, Tennessee Gas and Southern shall each file, for review and written approval by the Director of OEP, or the Director's designee, any revisions to its project design necessary to comply with the water quality certification conditions.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

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(Issued March 25, 2022)

GLICK, Chairman, *concurring*:

1. I believe that the record before us indicates that Tennessee Gas Pipeline Company, L.L.C.'s (Tennessee Gas) Evangeline Pass Expansion Project is needed and in the public interest. On the question of need, the project is supported by a binding, 20-year precedent agreement for all of the project's capacity in order to serve Venture Global Plaquemines LNG, LLC's liquified natural gas (LNG) export facility, which is not affiliated with Tennessee Gas.¹ In my view, a project sponsor's precedent agreements with nonaffiliates for the use of a substantial portion of the project's capacity, particularly to service an LNG export facility, constitutes significant evidence of need for the project, which the protests do not rebut. I also believe that the project's benefits outweigh its adverse impacts. As a result, I believe that the project is in the public interest and therefore required by the public convenience and necessity under section 7(c) of the Natural Gas Act (NGA). I write separately, however, because today's order does not assess the significance of the project's GHG emissions on climate change.

2. In 2017, the U.S. Court of Appeals for the District of Columbia Circuit in *Sabal Trail*, concluded that the Commission is required to quantify and consider the reasonably foreseeable GHG emissions caused by its issuance of an NGA section 7 certificate.² Following *Sabal Trail*, the D.C. Circuit has repeatedly confirmed that the Commission must consider those GHG emissions and their impact on climate change in its review of new natural gas infrastructure, and that failing to do so puts the orders we issue at risk on judicial review.³

¹ *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199, at P 30 (2022).

² *Sierra Club v. FERC*, 867 F.3d 1357, 1374 (D.C. Cir. 2017) ("*Sabal Trail*").

³ See *Food & Water Watch v. FERC*, No. 20-1132, --- F.4th ---, 2022 WL 727037, at *7-8 (D.C. Cir. Mar. 11, 2022); *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1325 (D.C. Cir. 2021); *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019).

3. At times the Commission has raised concerns that it is difficult to assess significance due to the absence of a universally accepted scientific methodology to do so⁴ and it is difficult to ascribe discrete physical impacts to the molecules of carbon dioxide caused by a particular project.⁵ But “universal acceptance” is not the standard to consider the significance of climate change.⁶ After all, the administration of NEPA is rife with judgment calls, and agencies necessarily must use the best tools and information at hand, caveating them as appropriate.⁷ In addition, the Commission does not hold other environmental impacts associated with natural gas infrastructure to the same high standards for considering significance. For example, the Commission routinely assesses the significance of impacts on resources as idiosyncratic and diverse as permafrost,⁸ “ephemeral and intermittent waterbodies,”⁹ visual resources,¹⁰ and old growth forests,¹¹

⁴ See, e.g., Final Environmental Impact Statement for Alaska LNG Project, Docket No. CP17-178-000, at 4-1222 (Mar. 2020).

⁵ See, e.g., *Alaska Gasline Dev. Corp.*, 171 FERC ¶ 61,134, at P 216 (2020) (“Without either the ability to determine discrete resource impacts or an established target to compare GHG emissions against, the final EIS concludes that it cannot determine the significance of the project's contribution to climate change.”).

⁶ *Alaska Gasline Dev. Corp.*, 171 FERC ¶ 61,134 at PP 19-20 (Glick, Comm’r, dissenting); *Tenn. Gas Pipeline Co., L.L.C.*, 170 FERC ¶ 61,142 at P 5 (2020) (Glick, Comm’r, dissenting in part).

⁷ See, e.g., *Sabal Trail*, 867 F.3d at 1374 (“[S]ome educated assumptions are inevitable in the NEPA process.”); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014); *Spiller v. White*, 352 F.3d 235, 244 n.5 (5th Cir. 2003) (rejecting petitioner's contention that the significance determination must be objective, factual, and quantitative and should not involve any qualitative judgment calls).

⁸ Final Environmental Impact Statement for Alaska LNG Project, Docket No. CP17-178-000, at ES-4 (Mar. 2020) (finding that the Project would result in “significant longterm to permanent impacts on thaw sensitive permafrost (about 6,218 acres)” and to “thaw stable permafrost (about 3,499 acres)”).

⁹ Environmental Assessment for Cheyenne Connector Pipeline Project, Docket No. CP18-102-000, at 26 (Dec. 2018).

¹⁰ *Texas LNG Brownsville LLC*, 169 FERC ¶ 61,130, at P 56 (2019).

¹¹ Final Environmental Impact Statement for Atlantic Coast Pipeline Project, Docket No. CP15-554-000, at ES-10, ES-12 (July 2017).

without clearly articulated, “objective” standards, much less ones enjoying universal acceptance.

4. I concur because today’s order does not rehash those same arguments on the difficulty of assessing climate impacts. Instead, it explains that the Commission is not making a determination on significance given the proposal in our now-draft policy statement to establish a rebuttable presumption that a project causing 100,000 metric tons of CO₂e emissions would significantly contribute to climate change. Under the circumstances, I can support that conclusion.

5. Nevertheless, I am disappointed the Commission did not follow the lead of last year’s bipartisan order in *Northern Natural*, where we explained that “there is nothing about GHG emissions or their resulting contribution to climate change that prevents us from making . . . [a] significance determination.”¹² I would have preferred to apply *Northern Natural* here and would have concluded based on evidence in the record that the relevant 145,000 metric tons per year of GHG emissions are not significant.¹³

6. The EIS in this proceeding made significance determinations for the project’s impacts on geological resources, soils, surface waters, wetlands, and vegetation.¹⁴ These assessments include consideration of the number of affected acres of each resource, the duration of any such impacts, and any mitigation imposed by the project developer. Despite lacking any specific, objective, or universally accepted metric for measuring or evaluating these impacts, the Commission has no problem finding them less than significant.

¹² *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at P 32 (2021).

¹³ I recognize the now-draft GHG policy statement proposes 100,000 tons as a threshold over which a project’s GHG emissions would be presumed significant. *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, at P 81 (2022). In my view, that is a deliberately conservative number intended to ensure that the Commission did not lead projects developers down the path of an environmental assessment, only to subsequently change course and require an environmental impact statement in the event that the Commission were to establish a lower threshold in a final GHG policy statement than it did in the then-interim, now-draft policy statement. I remain open to reviewing the comments submitted in response to that draft statement, as well as guidance we may receive from other federal agencies, in considering what threshold would be appropriate in a final policy statement.

¹⁴ Final Environmental Impact Statement, Docket No. CP20-50-000, at ES-3, 7-10, 27-28, 36, 49 (Oct. 2021).

7. As noted above, the courts have been crystal clear in explaining that the Commission must consider climate change in its siting decisions under NGA sections 3 and 7.¹⁵ I continue to believe that the best approach for the Commission is to establish a transparent, predictable framework for considering climate impacts in order to give project developers the certainty they need to build new energy infrastructure. The significance determination is a bedrock element of that approach in that it constitutes perhaps the most important single step in informing federal decisionmakers and the public of the environmental consequences of the proposed action, which, after all, is the whole purpose of NEPA.¹⁶

For these reasons, I respectfully concur.

Richard Glick
Chairman

¹⁵ *Food & Water Watch*, 2022 WL 727037, at *7-8; *Birckhead*, 925 F.3d at 519; *Sabal Trail*, 867 F.3d at 1373-74.

¹⁶ *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that one of NEPA's purposes is to ensure that "relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"); *Lemon v. Geren*, 514 F.3d 1312, 1315 (D.C. Cir. 2008) ("The idea behind NEPA is that if the agency's eyes are open to the environmental consequences of its actions and if it considers options that entail less environmental damage, it may be persuaded to alter what it proposed.").

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

Docket No. CP20-50-000
CP20-51-000

(Issued March 25, 2022)

DANLY, Commissioner, *concurring in the judgment*:

1. I concur in the Commission's decision to grant the requested Natural Gas Act (NGA) section 7¹ authorizations to Tennessee Gas Pipeline Company, L.L.C. and Southern Natural Gas Company, L.L.C (collectively, Applicants).² In an order issued concurrently with this one, the Commission announces that it is "making the Updated [Certificate] Policy Statement and the Interim [Greenhouse Gas Emissions (GHG)] Policy Statement draft policy statements."³ I agree with the Commission's decision to not apply the Updated Certificate Policy Statement⁴ and the Interim GHG Policy Statement⁵ to this proceeding. I write separately to express a few clarifications regarding my position.

2. *First*, while not fatal to the durability of the order, I would have explicitly repudiated *Northern Natural Gas Company*⁶ and reaffirmed the Commission's prior position that "[w]ithout an accepted methodology, the Commission cannot make a finding whether a particular quantity of [GHG] emissions poses a significant impact on the environment, whether directly or cumulatively with other sources, and how that

¹ 15 U.S.C. § 717f(c) and (e).

² *See Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (*Tennessee*).

³ *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,197, at P 2 (2022) (Order on Draft Policy Statements).

⁴ *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Updated Certificate Policy Statement).

⁵ *Consideration of Greenhouse Gas Emissions in Nat. Gas Infrastructure Project Revs.*, 178 FERC ¶ 61,108 (2022) (Interim GHG Policy Statement).

⁶ *N. Nat. Gas Co.*, 174 FERC ¶ 61,189, at PP 29-36 (2021) (Danly, Comm'r, concurring in part and dissenting in part) (*Northern*).

impact would contribute to climate change.”⁷ This is because, as the Commission has stated, it is unable to connect a particular project’s GHG emissions to discrete, physical effects on the environment.⁸ The Council on Environmental Quality (CEQ) has found similarly.⁹ And the Commission’s now-draft Interim GHG Policy Statement¹⁰ does not alter these determinations.¹¹

3. Moreover, there is no standard by which the Commission could, consistent with our obligations under the law, ascribe significance to a particular rate or volume of GHG emissions.¹² The Commission’s erstwhile attempt to establish its own significance threshold demonstrates just that. Finding no standard upon which they could properly rely, my colleagues simply picked a number—one which, I understand, was not offered in any of the more than 35,000 comments¹³—and attempted to justify that arbitrary number with rationales that were either irrelevant to the issue of environmental harm or were not supported by the record.¹⁴

⁷ *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128, at P 67 (2018) (citation omitted).

⁸ *See, e.g., Nat. Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at P 188 (2017).

⁹ *See CEQ, Draft [National Environmental Policy Act (NEPA)] Guidance on Consideration of the Effects of Climate Change and Greenhouse Gas Emissions*, at P 3 (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf> (“it is not currently useful for the NEPA analysis to attempt to link specific climatological changes, or the environmental impacts thereof, to the particular project or emissions, as such direct linkage is difficult to isolate and to understand.”).

¹⁰ *See Order on Draft Policy Statements*, 178 FERC ¶ 61,197 at P 2.

¹¹ *See Interim GHG Policy Statement*, 178 FERC ¶ 61,108 (2022) (Danly, Comm’r, dissenting at P 22) (“And while it is not acknowledged at all in the Interim Policy Statement’s procedural history, the Commission has repeatedly stated that ‘it cannot determine a project’s incremental physical impacts on the environment caused by GHG emissions,’ and CEQ has made similar statements.”) (citations omitted).

¹² *See, e.g., Mountain Valley Pipeline, LLC*, 163 FERC ¶ 61,197, at P 292 (2018).

¹³ *Interim GHG Policy Statement*, 178 FERC ¶ 61,108 at P 19.

¹⁴ *Id.* (Danly, Comm’r, dissenting at PP 33-34).

4. Project sponsors are now left wondering whether the Commission's departure from *Northern* is temporary, and if so, for how long. And while it would normally be prudent to plan for its return, how does one plan for a policy that creates a test with no standards?¹⁵ I suppose, given recent issuances, that project sponsors at least now know that the Commission will not assess whether the project has a significant impact on climate change should the project result in a net reduction of GHG emissions.¹⁶ Nor will the Commission calculate the Social Cost of Carbon from project emissions in those circumstances.¹⁷ I cannot help but wonder if the Commission offers this lone island of certainty in a maneuver to encourage the development of a certain type of project or GHG mitigation plan.

5. *Second*, regarding the inclusion of a calculation of the Social Cost of Carbon from the project's emissions,¹⁸ the Commission has provided extensive discussion on why the use of the Social Cost of Carbon is not appropriate in project-level NEPA review, and why it cannot meaningfully inform the Commission's decisions on natural gas infrastructure projects under the NGA.¹⁹ Nothing can be gleaned from the numbers calculated by Commission staff in today's order.

6. I would also like to point to the Commission's recognition that "Sierra Club and the Institute for Policy Integrity, citing [*Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321 (D.C. Cir. 2021) (*Vecinos*)], argue that 40 C.F.R. § 1502.21(c)(4) requires that the Commission apply the social cost of carbon protocol to its

¹⁵ See *Northern*, 174 FERC ¶ 61,189 (Danly, Comm'r, concurring in part and dissenting in part at PP 15-16); *id.* P 16 (comparing the *Northern* test to "like posting a speed limit sign with a question mark instead of a number, leaving it to the police officer to decide arbitrarily whether you were speeding").

¹⁶ *Iroquois Gas Transmission Sys., L.P.*, 178 FERC ¶ 61,200, at P 56 (2022) (Danly, Comm'r, concurring in the judgment).

¹⁷ *Id.* P 59.

¹⁸ See *Tennessee*, 178 FERC ¶ 61,199 at P 93.

¹⁹ See, e.g., *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 296 (2017), *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-97 (2018), *aff'd sub nom. Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. 2019) ("[The Commission] gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.").

consideration of the project's climate impacts.”²⁰ The commenters blatantly misread the holding of that case. In *Vecinos*, the U.S. Court of Appeals for the District of Columbia Circuit's admonished the Commission, not for failing to use the Social Cost of Carbon, but for failing to respond to an argument. The Court stated that “[t]o the extent that the Commission failed to respond to Petitioners' argument that 40 C.F.R. § 1502.21(c) required it to use the social cost of carbon protocol or some other generally accepted methodology to assess of the impact of the projects' greenhouse gas emissions, we agree with Petitioners that the Commission failed to adequately analyze the impact of the projects' greenhouse gas emissions.”²¹ This is a narrow holding and, try as litigants might, the court's decision cannot be read as anything more than a reaffirmation of our longstanding (and unquestioned) obligation to respond to arguments. The fact that this particular argument focused on the Social Cost of Carbon is merely incidental. As a final note, I should reiterate that the Social Cost of Carbon was not developed for project level review and therefore its use is not mandated for evaluating impacts under section 1502.21 of the CEQ's regulations.²²

7. *Third*, it is worth discussing footnote 103 in today's order.²³ That footnote states that “[w]hile the Commission is not one of the specified agencies in Executive Order 12898, the Commission nonetheless addresses environmental justice in its analysis, in accordance with our governing regulations and guidance, *and statutory duty to evaluate all factors bearing on the public interest.*”²⁴ Indeed, the Supreme Court has found that NGA section “7(e) requires the Commission to evaluate all factors bearing on the public

²⁰ *Tennessee*, 178 FERC ¶ 61,199 at P 91 (2022).

²¹ *Vecinos*, 6 F.4th at 1329.

²² 40 C.F.R. § 1502.21(c). This reasoning is consistent with *Florida Southeast Connection, LLC* where the Commission stated, “[a]nd we do not dispute that [the Social Cost of Carbon] is generally accepted in the scientific community and can play an important role *in different contexts, such as rulemakings.*” 164 FERC ¶ 61,099, at P 35 (2018) (emphasis added).

²³ *Tennessee*, 178 FERC ¶ 61,199 at P 78 n.103.

²⁴ *Id.* (citing 15 U.S.C. § 717f; 18 C.F.R. § 380.12(g) (requiring applicants to submit information about the socioeconomic impact area of a project for the Commission's consideration during NEPA review); FERC, *Guidance Manual for Environmental Report Preparation* at 4-76 to 4-80 (Feb. 2017), <https://www.ferc.gov/sites/default/files/2020-04/guidance-manual-volume-1.pdf>.) (emphasis added).

interest.”²⁵ This finding, however, cannot be read in a vacuum. The Court has explained that the inclusion of the phrase “public interest” in a statute is not “a broad license to promote the general public welfare”—instead, it “take[s] meaning from the purposes of the regulatory legislation.”²⁶ We must then turn to the purpose of the NGA: “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”²⁷ Any balancing under the public convenience and necessity standard must “take meaning” from that purpose.

8. *Finally*, I wish to highlight the unnecessary delay of today’s issuance. It has been over two years since the Applicants filed their requests for certificate authorizations;²⁸ over nineteen months since the Commission issued an Environmental Assessment (EA) for the projects;²⁹ and over thirteen months after the Applicants’ requested action dates.³⁰

9. One cannot help but wonder what the purpose was for the Commission’s delay. The Chairman says he was able to determine that the “relevant 145,000 metric tons per year of GHG emissions are not significant.”³¹ Could he not have made that

²⁵ *Atl. Ref. Co. v. Pub. Serv. Comm’n of N.Y.*, 360 U.S. 378, 391 (1959).

²⁶ *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 669 (1976) (*NAACP*).

²⁷ *Id.* at 669-70; *accord Myersville Citizens for a Rural Cmty.*, 783 F.3d 1301, 1307 (quoting *NAACP*, 425 U.S. at 669-70). I note that the Supreme Court has also recognized the Commission has authority to consider “other subsidiary purposes,” such as “conservation, environmental, and antitrust questions.” *NAACP*, 425 U.S. at 670 & n.6 (citations omitted). But all subsidiary purposes are, necessarily, subordinate to the statute’s primary purpose.

²⁸ *See* Tennessee Gas Pipeline Company, L.L.C., Abbreviated Application for a Certificate of Public Convenience and Necessity, Docket No. CP20-50-000 (Feb. 7, 2020) (Tennessee Application); Southern Natural Gas Company, L.L.C., Application for Certificate of Public Convenience and Necessity under Section 7 of the NGA (Feb. 7, 2020) (Southern Application).

²⁹ *See* Commission Staff, Environmental Assessment for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP20-51-000 (Aug. 24, 2020) (Environmental Assessment).

³⁰ *See* Tennessee Application at 3 (listing January 31, 2021 as the requested action by date); Southern Application at 1 (same).

³¹ *Tennessee*, 178 FERC ¶ 61,199 (Glick, Chairman, concurring at P 5) (“I would have preferred to apply *Northern Natural* here and would have concluded based on

determination based on the contents of the EA? The EA quantified the relevant emissions,³² and there is no reason for issuing a draft and final Environmental Impact Statements simply to add, “we are unable to come to a conclusion regarding the significance of the Project’s contribution to climate change.”³³ The D.C. Circuit has not stated that an EA is inadequate for the consideration of projects’ GHG emissions.³⁴

10. There is no doubt that the Commission has delayed action on this and other certificates in order to issue the Updated Certificate Policy Statement and Interim GHG Policy Statement first.³⁵ My colleagues have claimed that those policy statements were necessary to provide a legally durable framework for certificate orders going forward,³⁶

evidence in the record that the relevant 145,000 metric tons per year of GHG emissions are not significant.”).

³² See Environmental Assessment at Tables 25-28.

³³ Tennessee Gas Pipeline Company, LLC, et al., Final Environmental Impact Statement for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP20-51-000, at 49 (Oct. 8, 2021); Tennessee Gas Pipeline Company, LLC, et al., Draft Environmental Impact Statement for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP20-51-000, at 20 (July 16, 2021).

³⁴ The D.C. Circuit recently upheld the Commission’s assessment of direct GHG emissions in an Environmental Assessment. See *Food & Water Watch v. FERC*, No. 20-1132, --- F.4th ---, 2022 WL 727037, at *9 (D.C. Cir. Mar. 11, 2022). Notably, the D.C. Circuit in *Food & Water Watch* does not require the preparation of an Environmental Impact Statement, but instead, on remand requires the Commission “perform a *supplemental environmental assessment* in which it must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.” *Id.* at *8 (emphasis added).

³⁵ Commissioner Danly March 2, 2022 Letter to Senator Barrasso, Docket Nos. PL18-1-000, et al., at 5-7, <https://www.ferc.gov/news-events/news/commissioner-james-danly-letter-senator-barrasso>.

³⁶ See, e.g., Written Testimony of Chairman Richard Glick for March 3, 2022 Senate Energy and Natural Resources Committee Hearing, at 9, <https://www.energy.senate.gov/services/files/270F8F6E-C554-43CF-B683-EB60583873D8> (“The principal purpose of the Interim Greenhouse Gas Policy Statement is to provide a framework for considering reasonably foreseeable greenhouse gas emissions in our analysis under NGA sections 3 and 7 that is consistent with binding court precedent.”); *Transcript of the 1087th Meeting*, FERC, at 36-37 (Feb. 17, 2022), <https://www.ferc.gov/news-events/events/february-17-2022-virtual-open-meeting-02172022> (Commissioner Clements stated, “I think [the Updated Certificate Policy Statement] is an important step

and that those policies were the “first step in addressing the uncertainty and delay associated with the Commission’s review of proposed natural gas infrastructure projects.”³⁷ And yet those policy statements are now in draft form, they are no longer in effect, but here we are acting on certificate orders.³⁸

For these reasons, I respectfully concur in the judgment.

James P. Danly
Commissioner

towards establishing a framework for making wise and legally durable decisions that account for the complexities of an energy system undergoing profound transformation.”).

³⁷ Written Testimony of Commissioner Willie L. Phillips for March 3, 2022 Senate Energy and Natural Resources Committee Hearing, at 2, <https://www.energy.senate.gov/services/files/794290C0-191C-4AF9-A747-E3108A111CEB>.

³⁸ See Order on Draft Policy Statements, 178 FERC ¶ 61,197 at P 2 (“Upon further consideration, we are making the Updated Policy Statement and the Interim GHG Policy Statement draft policy statements. . . . The Commission will not apply the Updated Draft Policy Statement or the Draft GHG Policy Statement to pending applications or applications filed before the Commission issues any final guidance in these dockets.”).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

Docket Nos. CP20-50-000
CP20-51-000

(Issued March 25, 2022)

CLEMENTS, Commissioner, *concurring*:

1. I concur with this order and write separately only to clarify why I agree with the decision not to characterize the significance of the greenhouse gas (GHG) emissions associated with the Evangeline Pass Expansion Project and Southern Construction Project (Proposed Projects).¹

2. The Commission must consider environmental impacts, including climate change impacts, both under the National Environmental Policy Act (NEPA)² and as part of its Natural Gas Act (NGA) section 7(e)³ determination of public convenience and necessity.⁴ In *Sabal Trail*, the court said that the NEPA environmental impact statement (EIS) for a Commission-authorized project needed to include a discussion of the significance of GHG emissions that were an indirect effect of authorizing the project.⁵ As explained below, although we have not characterized the environmental impact of the project's GHG emissions as "significant," we have done under NEPA what is substantively required for GHG emissions that may have a significant environmental impact. Moreover, our decision to avoid labeling the GHG emissions here as significant or

¹ Order Issuing Certificates and Approving Abandonment, 178 FERC ¶ 61,199, at P 88 (2022).

² 42 U.S.C. §§ 4331(a); 4332(2).

³ 15 U.S.C. § 717f(e).

⁴ See, e.g., *Vecinos Para El Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1329-29 (D.C. Cir. 2021) (*Vecinos*); *Sierra Club v. FERC*, 867 F.3d 1357, 1373-75 (D.C. Cir. 2017) (*Sabal Trail*); *Food & Water Watch v. FERC*, No. 20-1132, 2022 WL 727037, at *1 (D.C. Cir Mar. 11, 2022).

⁵ *Sabal Trail*, 867 F.3d at 1374 (citing Council on Environmental Quality regulation implementing NEPA, 40 C.F.R. § 1502.16(b)).

insignificant is a reasonable one under the special circumstances surrounding issuance of this decision.

3. Today's order declines to label the GHG emissions here as significant or insignificant because we do not have consensus among Commissioners on whether and how to determine significance. Consequently, the Commission is taking public comment in Docket No. PL21-3-000 on these and related issues.⁶ I supported establishing a 100,000-ton per year CO₂e threshold for determining significance in the Commission's *Draft GHG Policy Statement* because it would provide a workable framework for considering greenhouse gas emissions and give clarity to stakeholders about when the Commission will prepare an Environmental Impact Statement (EIS).⁷ But there may be other good approaches to determining significance. Now that the policy is converted to draft status and subject to public comment, I am open to considering all reasonable suggestions for alternative approaches. Declining to label the emissions here as either significant or insignificant makes clear that the Commission has not prejudged whether the threshold proposed in the draft policy is the best approach.

4. I will continue to strive for clarity in our approach to considering significance. In the meantime, we must meet our basic legal obligations in individual certificate cases. Whatever label might be applied to the GHG emissions associated with the Proposed Projects, we have satisfied our obligations to describe them for the public and consider them under NEPA.⁸ To begin with, NEPA requires us to prepare an EIS for a project with impacts that might significantly affect the quality of the human environment.⁹ In this case, the Commission prepared an EIS that describes the climate impacts caused by

⁶ See Order on Draft Policy Statements, 178 FERC ¶ 61,197, P 2 (2022); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 (2022) (*Draft GHG Policy Statement*).

⁷ See *Draft GHG Policy Statement*, 178 FERC ¶ 61,108 at PP 3, 79.

⁸ See *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (NEPA EIS requirement forces agencies to take "hard look" at the consequences of their actions); *WildEarth Guardians v. Jewell*, 738 F.3d 298, 302 (D.C. Cir. 2013) (another purpose of EIS is ensuring environmental consequences are disclosed to the public).

⁹ See 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3; *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1039 (D.C. Cir. 2021), *cert. denied*, 2022 WL 516382 (Feb. 22, 2022).

GHG emissions,¹⁰ as the courts have said agencies should do.¹¹ The courts have further determined that quantifying emissions and comparing them to national and state emissions levels is a “reasonable proxy” for assessing climate impacts from GHG emissions.¹² The Commission’s order does this as well.¹³

5. After carefully weighing the Proposed Projects’ benefits and its adverse impacts, including its potential effects on climate change, I have concluded that the project meets the public convenience and necessity standard under NGA section 7(e).¹⁴

6. For these reasons, I respectfully concur.

Allison Clements
Commissioner

¹⁰ See Final Environmental Impact Statement for the Evangeline Pass Expansion Project, Docket Nos. CP20-50-000 and CP-20-51-000, at 17-25 (Oct. 2021).

¹¹ See, e.g., *WildEarth Guardians*, 738 F.3d at 308-09.

¹² *WildEarth Guardians*, 738 F.3d at 309; *Sabal Trail*, 867 F.3d at 1374-75.

¹³ Order Issuing Certificates and Approving Abandonment, 178 FERC ¶ 61,199, at PP 88-89.

¹⁴ 15 U.S.C. § 717f(e).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

Docket Nos. CP20-50-000
CP20-51-000

(Issued March 25, 2022)

CHRISTIE, Commissioner, *concurring*:

1. I concur with the order. I am entering essentially the same concurrence in this matter as in two other certificate cases that the Commission approves today.¹ The fundamental issues I address are substantially the same in all three cases.
2. “*Judges are not policymakers,*” says D.C. Circuit Court of Appeals judge and U.S. Supreme Court nominee Ketanji Brown Jackson.² I agree, and would add: judges *should* not be policymakers—certainly not on major questions of public policy, which in any liberal democracy worth the name are questions reserved to legislators elected by the people.
3. The nation’s response to climate change is obviously just such a major policy question. Reducing greenhouse gas (GHG) emissions because of their climate impact is a compelling national policy goal, but *how* the goal is pursued will affect the lives of literally all Americans because energy policy is also economic policy and national security policy. Whichever carbon policies are chosen will forcibly redistribute trillions of dollars, will affect the jobs of tens of millions of American workers, and will impact every American family’s ability to afford to heat their homes and pay their monthly power bills (and whether that power is reliable). The choice of carbon policies will determine whether thousands of communities in the energy-producing regions of this country are impoverished with no hope of recovering vitality in the lifetimes of their residents or their children. Carbon policies will affect even the country’s national security, as recent events in Ukraine and Europe illustrate.
4. So, determining these monumentally important questions of public policy is for elected legislators, not unelected judges, and not for unelected administrative agencies

¹ *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022); *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022); *Iroquois Gas Transmission System, L.P.*, 178 FERC ¶ 61,200 (2022).

² *See, e.g.*, Molly Christian, “Judges are not policymakers,” Supreme Court nominee Brown Jackson says,” *S&P Global Market Intelligence*, March 24, 2022.

such as this one, unless Congress has unambiguously given the agency clear authority and specific direction to implement a policy regarding GHG emissions and their impact on global climate change. Suffice it to say, Congress has not given this Commission the requisite specific authority or guidance.

5. It is highly likely that at least one, if not all, of these three certificates we approve today³ will be appealed, most likely to the D.C. Circuit, the forum of choice for those seeking to overturn FERC approvals of certificates for pipelines or to have them remanded on procedural grounds, delaying the projects and increasing their costs and already daunting uncertainties. As I noted in my dissent to the two certificate policy statements approved last month⁴ and suspended today,⁵ it is undeniable that there is a well-funded national campaign of legal warfare (“lawfare”) that seeks to achieve the *policy* goal of eliminating the use of natural gas by using administrative agencies and courts to prevent the construction of pipelines and related infrastructure, such as compressor stations, which are essential to transport natural gas from producers to consumers.⁶ This campaign does not need to win all its challenges to gas facilities;

³ *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022); *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022); *Iroquois Gas Transmission System, L.P.*, 178 FERC ¶ 61,200 (2022).

⁴ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,107 (2022) (Christie, Comm’r, dissenting); *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 178,61,108 (2022) (Christie, Comm’r, dissenting) (Christie Dissent). My dissent, identical in both orders, is also available online at: <https://www.ferc.gov/news-events/news/items-c-1-and-c-2-commissioner-christies-dissent-certificate-policy-and-interim>.

⁵ *Certification of New Interstate Natural Gas Facilities*, 178 FERC ¶ 61,197 (2022).

⁶ See, e.g., Bloomberg Philanthropies, <https://www.bloomberg.org/environment/moving-beyond-carbon/> (“Launched in 2019 with a \$500 million investment from Mike Bloomberg and Bloomberg Philanthropies, Beyond Carbon . . . works . . . to . . . *stop the construction of proposed gas plants.*”) (last visited Feb. 8, 2022) (emphasis added); Sierra Club, <https://www.sierraclub.org/policy/energy/fracking>, (“There are no ‘clean’ fossil fuels. The Sierra Club is committed to *eliminating the use of fossil fuels*, including coal, *natural gas* and oil, as soon as possible”) (emphases added) (last visited Feb. 8, 2022); Natural Resources Defense Council, <https://www.nrdc.org/issues/reduce-fossil-fuels> (“Oil, *gas*, and other fossil fuels come with grave consequences for our health and our future. . . . *NRDC is pushing America to move beyond these dirty fuels. We fight dangerous energy development on all fronts.*”) (emphases added) (last visited Feb. 8, 2022); Press

simply by challenging permits in every available administrative and judicial forum, whether it wins or loses an individual case, it drives up the costs of even seeking a permit to construct a facility, thus deterring any future projects.⁷

6. Citing this national legal campaign against natural gas is relevant because it illustrates that the debates attendant to FERC's duties and authorities in certificate cases are really about policy, not law. Groups opposed to the use of natural gas and all fossil fuels certainly have the right under the First Amendment to advocate for such policies, but the decision to ban the use of natural gas or prevent the construction of any new natural gas facilities is a major question of public policy by any measure, and thus is a decision that must be made by the elected legislature. With that relevant context in mind, let me note the following specific to these cases.

7. With regard to the Commission's NEPA duties, in all three cases they have been performed to the standards the courts have set for this Commission. NEPA, as has been stated many times, is a procedural statute that requires the agency to fully inform itself and the public of the environmental consequences of its decisions. As the D.C. Circuit itself said in *Sabal Trail*, NEPA is "primarily information-forcing," and courts should not

Release, *NRDC Receives \$100 million from Bezos Earth Fund to Accelerate Climate Action* (Nov. 16, 2020), available at <https://www.nrdc.org/media/2020/201116> ("The Bezos Earth Fund grant will be used to help NRDC advance climate solutions and legislation at the state level, move the needle on policies and programs focused on *reducing oil and gas production*") (emphasis added) (last visited Feb. 8, 2022); Sebastian Herrera, *Jeff Bezos Pledges \$10 Billion to Tackle Climate Change*, Wall Street Journal (Feb. 17, 2020) ("Mr. Bezos . . . said the *Bezos Earth Fund* would help back scientists, activists, [non-governmental organizations]") (emphasis added); see also, Ellie Potter, *Environmentalists launch campaign to ban gas from US clean energy program*, S&P Global Platts (Sep. 2, 2021) (quoting Collin Rees, U.S. Campaign Manager for Oil Change International, "Clean energy means *no gas* and no other fossil fuels, period.") (emphases added); Sean Sullivan, *FERC sets sights on gas infrastructure policy in 2022*, S&P Capital IQ (Dec. 31, 2021) (quoting Maya van Rossum, head of Delaware Riverkeeper Network, "we are not changing course at all: We continue to take on *every* pipeline, LNG, and fracked gas project as urgently as we did before, knowing we will have to *invest heavily to stop it . . .*") (emphases added).

⁷ Laurence Hammack, "Legal fights continue over the Mountain Valley Pipeline," *Roanoke Times*, Jan. 8, 2022 ("Even if this pipeline survives, opponents say their legal battle will not be a lost cause. 'You haven't seen another huge, several hundred mile pipeline proposed since Mountain Valley,' said [Gillian] Giannetti, [senior attorney with the Natural Resources Defense Council] . . . 'Developers know that a similar venture today would be met by 'an army' of opposition,' she said."

“flyspeck” an agency’s environmental analysis.⁸ The Supreme Court has said that it also is “well-settled that NEPA does not mandate particular results, but simply prescribes the necessary *process* . . . NEPA merely prohibits uninformed—rather than unwise—agency action.”⁹ In all three cases herein both an Environmental Assessment (EA) and a much more costly and time-consuming Environmental Impact Statement (EIS) was performed. Regardless of whether conducting an EIS after the EA had already been performed was necessary or appropriate, there is no question here that the Commission has fulfilled its duties under NEPA. The EIS *was* done and it was done professionally by Commission staff exercising their special expertise.

8. In all three cases, the EIS included estimates of the quantity of GHG emissions that would be directly caused by the facility’s construction and operation.¹⁰ In the two pipeline cases, since both serve LNG export facilities, no estimate of downstream indirect impacts was required.¹¹ In the compressor case, the EIS estimated downstream GHG emissions as 2.41 metric tons per year.¹²

9. Now we come to one of the fundamental questions which will likely be relevant on appeal. Should or even *can* the Commission credibly characterize the *impact* of estimated GHG emissions from a *single* facility on *global* climate change? And since there is no separate climate for Louisiana, Mississippi or Texas, nor even for the United States, there can only be an impact to consider on *global* climate. The answer to this question is self-evidently no, the Commission cannot credibly gauge the impact on the

⁸ See *Sierra Club v. FERC*, 867 F.3d 1357, 1367-68 (D.C. Cir. 2017) (*Sabal Trail*) (quoting *Nevada v. Dep’t of Energy*, 457 F.3d 78, 93 (D.C. Cir. 2006)).

⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989) (citations omitted; emphases added).

¹⁰ *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) at P 88; *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) at P 47. The Iroquois Enhancement by Compression Project’s EIS included estimates of emissions for the entire lifecycle of the project, from upstream to construction and transportation, to end use. *Iroquois Gas Transmission System, L.P.*, 178 FERC ¶ 61,200 (2022) at PP 49-50.

¹¹ *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) at P 87; *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) at P 46. Despite not having been required, the information was still provided. See *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) at P 72 & n.148; *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) at P 31.

¹² *Iroquois Gas Transmission, L.P.*, Docket No. CP20-48-000, Final EIS at 23 (Nov. 12, 2021).

global climate from a single facility. The Commission can estimate a *quantity* of GHG emissions in terms of tonnage *directly* from a facility. That is within our wheelhouse, and it can and should be used to order mitigation of *direct* emissions. And to satisfy the D. C. Circuit's decision in *Appalachian Voices*,¹³ incorporating the *Sabal Trail* "reasonably foreseeable" requirement, the Commission can meet its NEPA duties by providing an upper bound estimate of the quantity in tonnage of indirect downstream GHG emissions.

10. But estimating a *quantity* of GHG emissions, direct or indirect, is fundamentally different from predicting the *impact* of that tonnage on *global* climate change or making a finding whether the impacts on global climate are "significant" or insignificant.¹⁴ Any such prediction or finding would have no intellectual rigor whatsoever and certainly should not be used to *reject* a natural gas facility that would otherwise be found needed to serve the public under the Natural Gas Act. And let's be honest: that is really the end game of those advocating for FERC to characterize a facility's GHG impacts on global climate. This is obviously true since FERC has no jurisdiction whatsoever over upstream or downstream actors and has no authority to order mitigation of downstream (or upstream) emissions. Thus, outright rejection of the facility will have to be among the remedies on the table if global climate impacts are found to be "significant."

11. To illustrate how unhinged from reality rejection of a certificate due to the alleged global climate impacts would be, consider that FERC has, of course, *no* jurisdiction over other countries which are also affecting climate change. For example, currently the power capacity of China's massive fleet of coal-fired generating stations is alone roughly *equal to the total installed generation capacity of the entire U.S. power system*, and China is moving forward with plans to expand that already huge coal fleet by another 25%, many of which are already under construction.¹⁵ Nor is China alone in continuing to expand, not retire, coal-fired generation. Other countries, including India, Vietnam and Indonesia, have plans to build more coal generation.¹⁶ Compared to the volume of

¹³ *Appalachian Voices v. FERC*, 2019 WL 847199 (Feb. 19, 2019) (unpublished, per curiam).

¹⁴ See *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) (Glick, Chairman, concurring) at P 5.

¹⁵ See, e.g., Kenneth B. Medlock III, *China's Coal Habit Will Be Hard to Kick*, BARRON'S, Oct. 6, 2021; see also, Amy Gunia, *China Is Planning to Build 43 New Coal-Fired Power Plants. Can It Still Keep Its Promises to Cut Emissions?* [ed.: No, it cannot and will not.], TIME (Aug. 20, 2021) ("Gunia"); see also, Michael O'Boyle, *China Doesn't Need Another Coal Power Plant*, FORBES (Aug. 18, 2021).

¹⁶ Gunia, *supra*, n. 15.

climate-impacting GHG emissions continuously being produced by the coal fleets of China, India and other large consumers of power, any purported GHG impacts that can be ascribed to a single natural gas pipeline in the United States is, quite literally, *infinitesimal*.¹⁷

12. And that brings us to the central issue: Reading into the Natural Gas Act the power for FERC to reject a natural gas facility otherwise needed to serve the public, based on a purported impact of the facility on the global climate, is a public policy decision of immense magnitude. Telling FERC it has the authority, even the duty, to do so is a public policy decision of equally immense magnitude. It will affect the lives and livelihoods of tens of millions of American families and the country's energy, economic and national security. As Judge Brown Jackson said, "Judges are not policymakers." Nor should they be.

For these reasons, I respectfully concur.

Mark C. Christie
Commissioner

¹⁷ Nor does use of the artificial construct known as the "Social Cost of Carbon" provide any intellectual rigor or basis for assessing the impact on the global climate of a single facility, or of evaluating environmental impacts more broadly. In both of today's pipeline certificate cases the Social Cost of Carbon has been calculated using CEQ-EPA formulae and the information is provided. *Tenn. Gas Pipeline Co., L.L.C.*, 178 FERC ¶ 61,199 (2022) at P 93; *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198 (2022) at P 52. For reasons I will not go into now, but save for later, these purported social carbon cost calculations are utterly devoid of legal, policy or economic validity. I concur with these orders because the Social Cost of Carbon is not used herein as the basis for our decisions in any of the cases.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

Docket Nos. CP20-50-000
CP20-51-000

(Issued March 25, 2022))

PHILLIPS and CHRISTIE, Commissioners, *concurring*:

1. We concur in the issuance of today's order granting authorizations under section 7 of the Natural Gas Act (NGA). We agree the public convenience and necessity requires approval and enter essentially the same concurrence in this case as in two other certificate cases that the Commission approves today.¹

2. We write separately to explain why we depart from *Northern Natural*, where the Commission stated that emissions for a project were not significant.² In *Northern Natural*, the Commission disclosed the yearly emissions volumes and the estimated contribution to national and state emissions estimates, and then stated that, based on this record, that the emissions were not significant.³ It is not clear how this determination was made or how a finding of "significance" would have affected our duties and authority under the Natural Gas Act.

3. In this case, we assessed the project emissions in accordance with the National Environmental Policy Act (NEPA),⁴ but do not have an analytical tool or framework to estimate the extent of those emission impacts' on the environment. At this time, neither the Council on Environmental Quality, the entity charged with issuing NEPA guidance, nor any other federal agency has established a threshold for what constitutes a "significant" GHG contribution from an individual project. We should continue to provide as much detail as possible in accordance with our NEPA requirements, but to the

¹ *Columbia Gulf Transmission, LLC*, 178 FERC ¶ 61,198; *Iroquois Gas Transmission Sys., L.P.*, 178 FERC ¶ 61,200.

² *See N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021).

³ *Id.* at PP 34 - 36.

⁴ *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) ("Because current science does not allow for the specificity demanded by Appellants, the [agency] was not required to identify specific effects on the climate in order to prepare an adequate EIS.").

extent we make a determination that GHG impacts are significant or not – and an undue focus on drawing a bright line between “significance” and “insignificance” would appear to elevate form over substance -- we would like to identify the factors considered or otherwise explain our determination.

For these reasons, we respectfully concur.

Willie L. Phillips
Commissioner

Mark C. Christie
Commissioner

ATTACHMENT 2

FERC ORDER IN

TENNESSEE GAS COMPANY, L.L.C.

DOCKET NO. CP20-50

and

SOUTHERN NATURAL GAS COMPANY, L.L.C.

DOCKET NO. CP20-51-000

**Notice of Denial of Rehearing By Operation of Law and Providing for
Further Consideration, 176 FERC ¶ 62,138 (May 26, 2022)**

179 FERC ¶ 62,105
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Tennessee Gas Pipeline Company, L.L.C.
Southern Natural Gas Company, L.L.C.

Docket Nos. CP20-50-001
CP20-51-001

NOTICE OF DENIAL OF REHEARING BY OPERATION OF LAW AND
PROVIDING FOR FURTHER CONSIDERATION

(May 26, 2022)

Rehearing has been timely requested of the Commission's order issued on March 25, 2022, in this proceeding. *Tennessee Gas Pipeline Company, L.L.C.*, 178 FERC ¶ 61,199 (2022). In the absence of Commission action on a request for rehearing within 30 days from the date it is filed, the requests for rehearing may be deemed to have been denied. 15 U.S.C. § 717r(a); 18 C.F.R. § 385.713 (2021); *Allegheny Def. Project v. FERC*, 964 F.3d 1 (D.C. Cir. 2020) (en banc).

As provided in 15 U.S.C. § 717r(a), the requests for rehearing of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 15 U.S.C. § 717r(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper.

Kimberly D. Bose,
Secretary.

ATTACHMENT 3**CERTIFICATE OF SERVICE**

Pursuant to Rule 15(c) of the Federal Rules of Appellate Procedure and Circuit Rule 15, I hereby certify that I have this 6th day of June, 2022, served copies of the foregoing Petition for Review and Corporate Disclosure Statement of Alabama Municipal Distributors Group, Austell Gas Systems, The Southeast Alabama Gas District, and Municipal Gas Authority of Georgia by electronic mail on:

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And by electronic mail on all parties on the Commission's official service lists in the underlying proceedings, Docket Nos. CP20-50-000 and CP20-51-000. A service list with these contacts is attached hereto.

Respectfully,

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Dated: June 7, 2022

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