A POLICY REVOLUTION TO MATCH THE SHALE REVOLUTION?

Date: 26 April 2018

U.S. Oil, Gas & Resources Alert

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On April 19, 2018, the Federal Energy Regulatory Commission ("FERC") announced a Notice of Inquiry (NOI) regarding its Certificate Policy Statement for new interstate natural gas pipeline construction (the "1999 Policy Statement"). [1] This is the first generic proceeding that FERC has held on this certificate policy since it was issued on September 15, 1999. While the Commissioners made clear that the NOI should not be viewed as a forecast of future changes to the policy, it arises in the context of increasingly public statements by past and current Commissioners about the relevance of the 1999 Policy Statement to the current natural gas market. Before resigning in February 2017, former FERC Chairman, Norman Bay, filed separate remarks in his last order approving a natural gas pipeline project suggesting that the 1999 Policy Statement was outdated. [2] More recently, Commissioner LaFleur dissented from the approval of the Mountain Valley Pipeline (MVP) and Atlantic Coast Pipeline (ACP) projects finding that the Commission's implementation of the 1999 Policy Statement focused too narrowly on the existence of precedent agreements in evaluating the economic need for a proposed project. [3] Commissioners Glick and LaFleur subsequently dissented in part from other approvals based on their objections to the environmental review process. [4]

The purpose of the NOI is to explore whether FERC should revise the 1999 Policy Statement and if so, how. The NOI solicits feedback on FERC's methodology for determining the public need for a project, eminent domain and landowner interests, FERC's evaluation of a project's environmental impacts, and the efficiency and effectiveness of the certificate process. The 1999 Policy Statement remains in place during the NOI period, and FERC will continue to process applications for new pipeline facilities under this policy. Comments must be filed no later than June 25, 2018.

EXISTING FRAMEWORK: 1999 POLICY STATEMENT

The 1999 Policy Statement provides the analytical framework that FERC uses when it evaluates applications for the construction of new pipeline facilities to determine if the proposed facilities are in the public convenience and necessity. [5] FERC developed the 1999 Policy Statement in light of changes in the natural gas industry and their impact on FERC's then-existing policies for the certification and pricing of new construction projects.

Under the 1999 Policy Statement, FERC first determines whether a proposed project can proceed without subsidies from the applicant's existing customers (unless the applicant is a new pipeline company). [6] FERC then considers whether the applicant has made efforts to eliminate or minimize any adverse effects on existing customers, existing pipelines in the market and their customers, and the landowners and communities directly affected by the project. [7] As part of this process, FERC reviews the applicant's efforts to mitigate adverse effects and assists the applicant with determining how to further mitigate the effects, but leaves the choice of how to structure the project with the applicant. If FERC determines that the proposed project will have adverse effects on any of the relevant interests, FERC conducts an "economic test" that balances the evidence of the project's public benefits against its adverse effects. FERC approves projects only if the public benefits outweigh the adverse effects. [8] Applicants are responsible for submitting evidence of the project's public benefits, including contracts, precedent agreements, and studies of projected demand in the market to be served. The sufficiency of the evidence that FERC considers when conducting this balancing test has come under increased scrutiny.

OBJECTIONS TO THE EXISTING FRAMEWORK

Environmental organizations and opponents of specific natural gas pipeline projects have criticized various aspects of the 1999 Policy Statement for some time. However, former Chairman Bay's separate statement in the approval for the Northern Access 2016 Project was the first official statement from FERC on the subject. [9] Highlighting the significant change in energy markets resulting from the shale revolution, Chairman Bay encouraged FERC to consider expanding its demand analysis beyond precedent agreements to avoid pipeline infrastructure overbuild. [10] Although not legally required, Chairman Bay also advised FERC to analyze the environmental impact of increased gas production from the Marcellus and Utica regions, [11] and the downstream impacts of increased natural gas use, including greenhouse gas emissions. [12] In October 2017, Commissioner LaFleur voted to reject the proposed MVP and ACP projects based on their combined, rather than individual, impact on the Appalachian region, an approach that she argued was appropriate because of the projects' similarities in "routes, impact, and timing." [13] Commissioner LaFleur advocated for adopting this regional approach for projects with similar routes, impact, and timing and placing increased importance on evidence other than precedent agreements when evaluating a project's economic need. [14] She concluded that the balance of the environmental impact and the economic need did not tip in favor of approving both and would have preferred that FERC approve a combined project that met each project's need and limited the environmental impact. [15] Commissioners Chatterjee and Powelson explicitly rejected Commissioner LaFleur's regional approach as inconsistent with FERC's existing policy, indicating their belief that the current approach is appropriate. [16] More recently, Commissioners Glick and LaFleur dissented in part from the approval of the two other pipeline projects because the Commissioners declined to use the social cost of carbon in their environmental review. [17] In doing so they voiced their support for the generic proceeding: "We are hopeful that the recently announced generic proceeding on pipeline review will allow the Commission and its stakeholders to consider these issues in a meaningful and comprehensive way." [18]

THE NOTICE OF INQ

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FERC's April 19 NOI seeks stakeholder feedback on the four topics most subject to debate: project need, eminent domain and landowner interests, environment, and effectiveness and efficiency of FERC processes. Each set of questions opens with a broad inquiry into whether change is necessary and then targets specific issues for which FERC would like specific recommendations.

- Public Need Analysis. With respect to FERC's public need analysis, FERC asks what project benefits it should consider and what, if any, additional or alternative evidence beyond precedent agreements should be reviewed. FERC also asks whether and how it should assess a project's end use, existing infrastructure, and alternative energy sources, and whether and how it should review projects on a regional basis.
- Eminent Domain and Landowner Issues. The eminent domain and landowner questions cover how FERC balances the use of eminent domain against project need and whether the certificate process adequately takes landowner interests into account. Further, FERC solicits feedback on how it addresses applications when the applicant is unable to access sections of the proposed right-of-way prior to FERC approval.
- Environmental Impacts. The environmental impact questions pertain both to FERC's certificate analysis and NEPA review. In the NOI, FERC solicits feedback on its alternatives analysis and whether and how it should consider GHG emissions from upstream and downstream activities, the social cost of carbon, and other environmental impacts. FERC also asks whether it should conduct its cumulative impact analysis on a regional basis.
- FERC Process. Finally, consistent with President Trump's Executive Order 13807, which encouraged agencies to improve processes so that the review of infrastructure projects can be limited to two years, FERC solicits feedback on ways to improve the efficiency and effectiveness of the certificate process from pre-filing through post order issuance. FERC specifically requests feedback on the interagency review process and public participation. Further, FERC asks whether and how it could shorten the process for specific types of projects.

RESPONDING TO THE NOI

Comments are due to FERC by June 25, 2018. FERC will announce next steps, if any, once the Commissioners have had the opportunity to review all of the comments. Based on heightened public interest in the certificate process for new natural gas pipeline projects, we expect that FERC likely will receive significant feedback. Therefore, we anticipate that it will be some time before the Commissioners decide whether or how to amend the 1999 Policy Statement, despite this being a high priority for Chairman McIntyre.

Notes:
[1] *Notice of Inquiry,* 163 FERC ¶ 61,042 (2018).
[2] *National Fuel Gas Supply Corporation, Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (2017) (Bay, Comm'r, *Separate Statement*).
[3] *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, dissenting); *Atlantic Coast Pipeline*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, dissenting).
[4] *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 (2018) (Glick and LaFleur, Comm'rs, dissenting).
[5] *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).
[6] *Id*. at 19–21.
[7] *Id*. at 21–24.
[8] *Id*. at 19. FERC also conducts an independent environmental review of the project as required under the National Environmental Policy Act (NEPA). While a distinct process, FERC considers a project's environmental

impact when evaluating the project's impact on the landowners and communities affected by the pipeline route. *Id*. at 24.
[9] *National Fuel Gas Supply Corporation, Empire Pipeline, Inc.*, 158 FERC ¶ 61,145 (2017) (Bay, Comm'r, *Separate Statement*).
[10] *Id*.
[11] *Id.*
[12] *Id*. The DC Circuit subsequently struck down FERC's review and authorization of three interstate natural gas pipelines for failure to analyze the greenhouse gas emissions from the combustion of the transported gas in the Florida power plants for which the pipelines were built. *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017). The three projects were Sabal Trail (a Spectra, NextEra and Duke project), the Hillabee Expansion (a Williams project), and Florida Southeast Connection (a NextEra project).
[13] *Mountain Valley Pipeline*, 161 FERC ¶ 61,043 (2017) (LaFleur, Comm'r, dissenting); *Atlantic Coast Pipeline*, 161 FERC ¶ 61,042 (2017) (LaFleur, Comm'r, dissenting).
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *See, e.g., Florida Southeast Connection*, LLC, 162 FERC ¶ 61,233 (2018) (Glick and LaFleur, Comm'rs, dissenting); *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238 (2018) (Glick and LaFleur, Comm'rs, dissenting).
[18] *DTE Midstream Appalachia*, LLC, 162 FERC ¶ 61,238 (2018) (Glick and LaFleur, Comm'rs, dissenting).

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