

ORAL ARGUMENT NOT YET SCHEDULED

No. 18-1188

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

OTSEGO 2000, *et al.*,*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

DOMINION ENERGY TRANSMISSION, INC.,

Intervenor-Respondent.

On Petition for Review of Orders of the Federal Energy Regulatory Commission

**BRIEF OF *AMICUS CURIAE* INTERSTATE NATURAL GAS
ASSOCIATION OF AMERICA IN SUPPORT OF RESPONDENTS**

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February 1, 2019

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), *amicus curiae* Interstate Natural Gas Association of America submits this certificate as to parties, rulings, and related cases.

A. PARTIES AND AMICI

Except for the following, all parties, intervenors, and *amici* appearing in this Court are listed in the petitioners' opening brief.

The following parties have filed *amicus* briefs in support of petitioners: the States of New York, Maryland, New Jersey, Oregon, Washington, the Commonwealth of Massachusetts, and the District of Columbia; and the Sierra Club.

The following parties have filed *amicus* briefs in support of respondents: the Interstate Natural Gas Association of America, American Fuel & Petrochemical Manufacturers, the American Petroleum Institute, the Chamber of Commerce of the United States of America, and the National Association of Manufacturers.

B. RULINGS UNDER REVIEW

References to the rulings at issue appear in the petitioners' opening brief.

C. RELATED CASES

The case on review has not previously been before this Court. Counsel is unaware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

Date: February 1, 2019

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CORPORATE DISCLOSURE STATEMENT

The Interstate Natural Gas Association of America (“INGAA”) is an incorporated, not-for-profit trade association representing the majority of interstate natural gas pipeline companies operating in the United States. INGAA has no parent corporation and no publicly held company has 10% or greater ownership in INGAA.

Date: February 1, 2019

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**CERTIFICATE OF COUNSEL REGARDING
AUTHORITY TO FILE AND SEPARATE BRIEFING**

All parties have consented to the filing of this brief. On February 1, 2019, *amicus curiae* Interstate Natural Gas Association of America (“INGAA”) filed a written representation of that consent pursuant to D.C. Cir. R. 29(b).*

Pursuant to D.C. Cir. R. 29(d), counsel for *amicus curiae* hereby certify that no other non-government *amicus* brief of which they are aware focuses on the subjects addressed herein, i.e., the soundness of the Commission’s decision given the nature of the interstate natural gas transportation network and features of the market for firm transportation capacity, the role of natural gas in meeting the nation’s energy needs, the limitations on the Commission’s statutory jurisdiction, and the importance of maintaining an efficient and effective process for approval of new interstate natural gas infrastructure projects. As the leading trade organization for the interstate natural gas pipeline industry, INGAA is well-suited to provide the Court important context on these subjects that will assist it in resolving this case. INGAA has endeavored to coordinate with respondents to avoid duplication in briefing.

* Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

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TABLE OF CONTENTS

	Page
Certificate As To Parties, Rulings, And Related Cases.....	i
Corporate Disclosure Statement	iii
Certificate Of Counsel Regarding Authority To File And Separate Briefing.....	iv
Table Of Authorities	vii
Glossary	xi
Statutes And Regulations.....	1
Identity And Interest Of <i>Amicus Curiae</i>	1
Summary Of Argument	2
Argument	4
I. The Commission Is Not Required To Consider Potential Upstream And Downstream GHG Emissions.....	6
A. Incremental Upstream Or Downstream GHG Emissions Are Generally Not Indirect Or Cumulative Effects Of The Commission’s Approval Of Natural Gas Infrastructure Projects.....	6
B. <i>Sabal Trail</i> Does Not Apply To This Case.....	13
C. Expanding The Scope Of <i>Sabal Trail</i> Would Create Additional And Unwarranted Regulatory Burdens.....	18
II. The Commission’s Decision Not To Go Beyond NEPA’s Requirements Was Reasonable And Correct.	21
A. Generalized Estimates Of Upstream Or Downstream GHG Emissions Are Of Limited Relevance At Best To The Commission’s Decisionmaking.	21
B. The Court Should Not Require FERC To Demand Speculative And Unknowable Data From Project Applicants.	24
Conclusion	28
Certificate Of Compliance	29
Certificate Of Service	30

TABLE OF AUTHORITIES

Cases:	Page(s)
<i>Am. Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (2011).....	27
<i>Atl. Ref. Co. v. Pub. Serv. Comm’n</i> , 360 U.S. 378 (1959).....	10
<i>California v. Southland Royalty Co.</i> , 436 U.S. 519 (1978).....	10, 27
* <i>Dep’t of Transp. v. Pub. Citizen</i> , 541 U.S. 752 (2004).....	2, 5, 7, 28
<i>Fed. Power Comm’n v. Panhandle E. Pipe Line Co.</i> , 337 U.S. 498 (1949).....	10
<i>Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	26
* <i>NAACP v. Fed. Power Comm’n</i> , 425 U.S. 662 (1976).....	5, 20
<i>Oneok, Inc. v. Learjet, Inc.</i> , 135 S. Ct. 1591 (2015).....	10
<i>Potomac All. v. U.S. Nuclear Regulatory Comm’n</i> , 682 F.2d 1030 (D.C. Cir. 1982).....	7
<i>Pub. Utils. Comm’n v. FERC</i> , 900 F.2d 269 (D.C. Cir. 1990).....	27
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017).....	3, 5, 13, 14, 15, 16, 17, 18
<i>Sierra Club v. Froehlke</i> , 486 F.2d 946 (7th Cir. 1973)	27
<i>Sierra Club v. U.S. Dep’t of Energy</i> , 867 F.3d 189 (D.C. Cir. 2017).....	18

* **Authorities upon which we chiefly rely are marked with an asterisk.**

Cases—Continued:	Page(s)
<i>Theodore Roosevelt Conservation P’ship v. Salazar</i> , 616 F.3d 497 (D.C. Cir. 2010).....	19
Administrative Cases:	
<i>Atlantic Coast Pipeline, LLC</i> , 161 FERC ¶ 61,042 (2017).....	19
* <i>Dominion Transmission, Inc.</i> , 155 FERC ¶ 61,106 (2016).....	18, 19
* <i>Dominion Transmission, Inc.</i> , 163 FERC ¶ 61,128 (2018).....	2, 6, 7, 9, 12, 13, 16, 17, 21, 22, 23, 26
<i>Fla. Se. Connection, LLC</i> , 154 FERC ¶ 61,080 (2016).....	14, 15
* <i>Fla. Se. Connection, LLC</i> , 162 FERC ¶ 61,233 (2018).....	20, 27
<i>Millennium Pipeline Co.</i> , 161 FERC ¶ 61,229 (2017).....	15, 22, 23
<i>Mountain Valley Pipeline, LLC</i> , 161 FERC ¶ 61,043 (2017).....	19
<i>PennEast Pipeline Co.</i> , 162 FERC ¶ 61,053 (2018).....	19
<i>Rice Energy Mktg. LLC</i> , 153 FERC ¶ 61,048 (2015).....	17
Statutes and Regulations:	
15 U.S.C. § 717.....	1
15 U.S.C. § 717(b).....	10, 20
16 U.S.C. § 824(b)(1).....	10
18 C.F.R. § 284.7.....	11

Statutes and Regulations—Continued:	Page(s)
18 C.F.R. § 284.8	11
Rules:	
Fed. R. App. P. 29(a)(3).....	2
Fed. R. App. P. 29(a)(4)(E).....	1
Other Authorities:	
<i>About U.S. Natural Gas Pipelines</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2CERWom	10
Robert Christin et al., <i>Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act</i> , 38 ENERGY L.J. 115 (2017).....	11
Jude Clemente, <i>What Happens When You Don't Build Natural Gas Pipelines?</i> , FORBES (Jan. 7, 2018), https://bit.ly/2CLPLss	23
<i>Energy Infrastructure: Hearing Before the S. Comm. on Energy & Nat. Res.</i> , 115th Cong. (2018) (statement of Donald F. Santa, President & CEO, Interstate Natural Gas Association of America), https://bit.ly/2B6X6Tv	10
INGAA, <i>Interstate Natural Gas Pipeline Efficiency 22</i> (Oct. 2010), https://bit.ly/2FLzqba	23
Kennedy Maize, <i>Natural Gas: Clear Skies, Some Clouds on the Horizon</i> , POWER (Aug. 1, 2018), https://bit.ly/2DtYIIu	12
JAMES H. MCGREW, FERC: FEDERAL ENERGY REGULATORY COMMISSION (2d ed. 2009)	9, 11
C. Grady Moore, III et al., <i>Indirect Impacts and Climate Change: Assessing NEPA's Reach</i> , NAT. RESOURCES & ENV'T, Spring 2009, at 30.....	19

Other Authorities—Continued:	Page(s)
<i>Natural Gas Explained: Natural Gas and the Environment</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2VUKw2j	12
<i>Natural Gas Explained: Use of Natural Gas</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2rDkDWr	19
Office of Energy Policy & Systems Analysis, U.S. Dep’t of Energy, <i>Natural Gas Infrastructure Modernization Programs at Local Distribution Companies: Key Issues and Considerations</i> (Jan. 2017), https://bit.ly/2WehcJ	16
Opinion No. 94-26, <i>Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market</i> , Case 93-G-0932 (N.Y. Pub. Serv. Comm’n Dec. 20, 1994), https://on.ny.gov/2SoB6xv	25
<i>Today in Energy, September 11, 2015</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2RN4T37	23
<i>Today in Energy, June 16, 2017</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2FIicqG	12
U.S. ENERGY INFO. ADMIN., DELIVERABILITY ON THE INTERSTATE NATURAL GAS PIPELINE SYSTEM 5 (May 1998), https://bit.ly/2R9fWPb	23
<i>Use of Energy in the United States Explained</i> , U.S. ENERGY INFO. ADMIN., https://bit.ly/2RRxK2q	9
<i>What FERC Does</i> , FED. ENERGY REGULATORY COMM’N, https://www.ferc.gov/about/ferc-does.asp	9
Colin A. Young, <i>Massive Oil Burn During Cold Snap A ‘Disaster’, Says State Energy and Environment Secretary</i> , BERKSHIRE EAGLE (STATEHOUSE NEWS SERVICE) (Jan. 24, 2018), https://bit.ly/2DtVc0F	23

GLOSSARY

As used herein,

Certificate Order means Order Issuing Certificate, *Dominion Transmission, Inc.*, 155 FERC ¶ 61,106 (2016);

Dominion means Dominion Energy Transmission, Inc.;

FERC or **Commission** means Federal Energy Regulatory Commission;

GHG means greenhouse gas;

NEPA means the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*;

INGAA means Interstate Natural Gas Association of America;

P means the internal paragraph number within a FERC order;

the Project means the New Market Project;

Rehearing Order or **Reh’g Order** means Order Denying Rehearing, *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018).

STATUTES AND REGULATIONS

Relevant statutes and regulations are appended to the respondent's brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America (“INGAA”) is a national trade association that advocates regulatory and legislative positions of importance to the interstate natural gas pipeline industry in North America.¹ INGAA represents the majority of interstate natural gas transmission pipeline companies in the United States. Its members transport much of the nation's natural gas through a network of approximately 200,000 miles of pipelines. INGAA's members are regulated by the Federal Energy Regulatory Commission (“FERC” or “Commission”) under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* INGAA and its members have a substantial interest in pipeline development, continued investment in energy infrastructure, and ensuring predictable, consistent, rational, and fair law and policy affecting natural gas transportation. To advance those interests, INGAA regularly files briefs in cases concerning the industry.

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

As the leading trade organization for the interstate natural gas pipeline industry, INGAA has a significant interest in, and can offer a unique perspective on, the issues presented in this case. *See Fed. R. App. P. 29(a)(3)*.

SUMMARY OF ARGUMENT

The Commission correctly concluded that its environmental review of the New Market Project (“the Project”)—a limited undertaking “to construct and operate certain compression and related facilities” in New York—did not need to include an analysis of distant, causally attenuated greenhouse gas (“GHG”) emissions “associated with the production, processing, distribution, or consumption of gas.” Order Denying Rehearing, 163 FERC ¶ 61,128, PP 1, 63 (2018) (“Reh’g Order”), JA____, _____. That conclusion draws support from the record in this case, the nature of the interstate natural gas pipeline network and market for gas transportation capacity, the scope of FERC’s statutory authority, and the “rule of reason” inherent in the National Environmental Policy Act (“NEPA”) and its implementing regulations. *See Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004).

1. Nothing in the record supports finding a reasonably close causal connection between FERC’s approval of the New Market Project and incremental upstream or downstream GHG emissions, or that such emissions lead to reasonably foreseeable environmental effects, as would be required to trigger a NEPA indirect-effects analysis. Nor can the requisite causal link or reasonable foreseeability be

established based on generic assumptions about the presumed effect of additional transportation capacity on the natural gas market. This Court’s 2-1 decision in *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (“*Sabal Trail*”), addressed only downstream emissions and involved a proposed project serving specific identified electric generation facilities. Petitioners improperly seek to broaden *Sabal Trail* to reach the very different circumstances of this case—and apparently all pipeline projects nationwide. Doing so goes beyond NEPA’s requirements, and would add cost and delay to FERC’s already protracted review of proposed natural gas projects without benefitting FERC’s decisionmaking process.

2. Petitioners argue that FERC should have “disclose[d] what [could] be determined” based on available information, e.g., the worst-case “full-burn calculations” it has provided for some other projects. Otsego Br. 35. But NEPA does not require the Commission to provide such upper-bound estimates in this case, and the Commission’s decision not to do so was reasonable given the inherently limited utility of such broad-brush calculations. Petitioners believe FERC should “require[] . . . pipeline applicant[s] to produce data” that might bear on analysis of upstream and downstream GHG emissions, *id.* at 33, albeit without specifying the kind of information the Commission should have sought. But project applicants typically do not have (or have access to) useful information about upstream sources or downstream uses of gas to be transported on their systems, either at the time a

project is proposed or over the decades-long life of most gas infrastructure. Even if developers could gather and provide that information, any analysis of upstream and downstream GHG emissions would still be speculative and would not aid FERC's decisionmaking. The petition for review should be denied.

ARGUMENT

Natural gas is one of the nation's most important primary sources of energy, and the timely addition of new interstate pipeline infrastructure has allowed American businesses and consumers to benefit from the United States' abundance of this crucial resource. The development of the nation's natural gas pipeline grid has provided more reliable access to competitive natural gas supplies and resulted in more affordable—and environmentally friendly—energy and energy-based products.

Petitioners and their *amici* oppose the development of the natural gas infrastructure proposed here. Their broader, if unstated, goals appear to be (1) transforming NEPA, a fundamentally procedural statute, into a tool for achieving substantive policy outcomes associated with reducing GHG emissions; and (2) using FERC's case-by-case consideration of proposed natural gas *transportation* projects as a vehicle for creating and implementing national and even global energy policy relating to energy *generation* and *consumption*. In petitioners' apparent belief, the Commission's review of every FERC-jurisdictional natural gas infrastructure

project, no matter its characteristics or relation to the overall pipeline grid, must include a “comprehensive analysis of lifecycle emissions, including emissions relating to the production, processing, distribution and consumption of gas associated with” the project under consideration. Otsego Br. 11.

That argument goes well beyond what NEPA requires, and rests on misconceptions about the interstate natural gas pipeline network and the market for gas transportation services; about the scope of the Commission’s jurisdiction in regulating the natural gas industry; and about NEPA’s role in the Commission’s review of proposed natural gas infrastructure projects. Petitioners also err by seeking to transform this Court’s *Sabal Trail* decision from a context-specific ruling into a *per se* obligation for FERC to engage in speculative analysis of temporally, geographically, and causally distant GHG emissions throughout the natural gas supply chain—evidently, from wellhead to burner tip—in every case. That would eliminate the “rule of reason,” which directs FERC to tailor its environmental review to account for “the usefulness of any new potential information to [its] decisionmaking.” *Pub. Citizen*, 541 U.S. at 767. It also would add significant costs and delays to FERC’s approval process, undermining Congress’ “charge to *promote*” “the orderly development of plentiful supplies of . . . natural gas at reasonable prices,” *NAACP v. Fed. Power Comm’n*, 425 U.S. 662, 670 (1976) (emphasis added).

I. The Commission Is Not Required To Consider Potential Upstream And Downstream GHG Emissions.

This case concerns the Commission's environmental review of the New Market Project, a discrete proposal to "construct and operate certain compression and related facilities," to provide 112,000 dekatherms per day of additional firm transportation service on Dominion's existing pipeline network. Reh'g Order PP 1-2, JA____. Two local distribution companies in New York subscribed to the additional capacity created by the Project. *Id.* P 2, JA____. The crux of petitioners' argument is that NEPA required the Commission to include an "evaluat[ion of] upstream and downstream GHG emissions" in its environmental review of the Project. Otsego Br. 29. They are mistaken.

A. Incremental Upstream Or Downstream GHG Emissions Are Generally Not Indirect Or Cumulative Effects Of The Commission's Approval Of Natural Gas Infrastructure Projects.

Petitioners contend that FERC's orders in this case have "eliminate[d] any meaningful analysis of [GHG] emissions in this case and for future decisions." Otsego Br. 41. Not so. The Commission affirmed that it is "cognizant of the potentially severe consequences of climate change," and it "considered [and quantified] direct greenhouse gas emissions from the construction and operation of the project and recommended mitigation measures to reduce greenhouse gas emissions." Reh'g Order P 44, JA____; *see id.* P 58, JA____. The Commission clarified, however, that it will adapt its NEPA analysis to fit the circumstances of

each case: it will analyze upstream and downstream environmental effects (including effects resulting from upstream and downstream GHG emissions) when and if “those effects are indirect or cumulative impacts as contemplated by [the Council on Environmental Quality’s] regulations.” Reh’g Order P 42, JA____. “[U]pstream and downstream environmental effects” will meet that standard where they “are sufficiently causally connected to and are reasonably foreseeable effects of the proposed action.” *Id.* P 44, JA____.

Petitioners do not seriously quarrel with this basic legal framework. For good reason. *See, e.g., Pub. Citizen*, 541 U.S. at 767 (NEPA requires analysis only where there is a “reasonably close causal relationship between the environmental effect and the alleged cause” (internal quotation marks omitted)); *Potomac All. v. U.S. Nuclear Regulatory Comm’n*, 682 F.2d 1030, 1035 (D.C. Cir. 1982) (NEPA requires consideration of “only the reasonably foreseeable environmental effects of the action”). Rather, petitioners challenge FERC’s determination that it did not need to analyze potential upstream and downstream GHG emissions in its review of the Project. *See* Otsego Br. 25, 29.

However, petitioners point to nothing in (or outside) the record that supports any particular causal relationship between the Commission’s approval of the Project—a limited undertaking to construct or upgrade a handful of compression stations and related facilities—and any net incremental increase in upstream or

downstream GHG emissions. Instead, petitioners offer a wholly generalized argument as to why, in their view, incremental upstream and downstream GHG emissions will be foreseeable indirect or cumulative effects of this Project under NEPA. *See* Otsego Br. 37 (arguing generally that “adding [pipeline] capacity has the potential to spur demand” due to increased supply or decreased price).² Petitioners’ core theory, in other words, is that incremental pipeline capacity will necessarily lead to increased production and consumption of natural gas (due to effects on availability or prices) and, in turn, higher upstream and downstream GHG emissions.

That argument, however, lacks record support and ignores basic features of the market for natural gas transportation capacity. The magnitude and even direction (positive or negative) of any project’s effect on net natural gas consumption and GHG emissions will depend on numerous factors that vary over time, including whether natural gas shipped using the additional transportation capacity substitutes for existing supplies (due to competitive/pricing effects) or displaces other higher-emitting fuels (such as coal or fuel oil), what portion of capacity is released by a contracting shipper back into the market, the identity of any shippers that purchase

² Petitioners’ *amici* rely on similar generalizations. *See* Sierra Club Br. 9-10; States’ Br. 17.

that capacity, how those replacement shippers use the capacity, and seasonal and other variations in the pipeline's utilization.

More generally, FERC's approval of pipeline projects is typically a response to increased demand for natural gas, not the cause of the same. *Cf.* Reh'g Order PP 60, 63, JA____. Demand for energy exists and is growing over the long term, due to macro-level factors such as population and economic growth.³ The Commission has no ability, let alone legal authority, to change the ultimate causes of increasing energy demand. Notwithstanding its role regulating aspects of the natural gas markets, FERC does not control the mining, transportation, or consumption of coal, construction or operation of electric generation facilities (hydropower excepted), construction or operation of oil production wells or (apart from interstate rates) oil pipelines, or plans for reducing general energy usage. *See generally* JAMES H. MCGREW, *FERC: FEDERAL ENERGY REGULATORY COMMISSION* 1-3, 228 (2d ed. 2009); *What FERC Does*, FED. ENERGY REGULATORY COMM'N, <https://www.ferc.gov/about/ferc-does.asp> (last visited Jan. 31, 2019). Even as to natural gas, FERC's jurisdiction is statutorily confined and distinct: while FERC has jurisdiction over wholesales and interstate transportation of natural gas (including interstate transportation facilities), Congress specifically declined to grant

³ *See, e.g., Use of Energy in the United States Explained*, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2RRxK2q> (last visited Jan. 31, 2019) (noting "general historical trend of year-over-year increases in energy consumption" from 1949 to 2007).

FERC authority to regulate production, gathering, or local distribution of gas, 15 U.S.C. § 717(b), or “facilities used for the generation of electric energy,” 16 U.S.C. § 824(b)(1). *See Fed. Power Comm’n v. Panhandle E. Pipe Line Co.*, 337 U.S. 498, 503-04 (1949).⁴

Moreover, individual FERC-jurisdictional natural gas transportation projects do not exist in a vacuum. “The U.S. natural gas pipeline network is a highly integrated transmission and distribution grid” that includes over 300,000 miles of interstate and intrastate transmission pipelines, as well as “[m]ore than 11,000 delivery points, 5,000 receipt points, and 1,400 interconnection points that provide for the transfer of natural gas throughout the United States.” *About U.S. Natural Gas Pipelines*, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2CERWom> (last visited Jan. 31, 2019). In many ways, this network is “analogous to the interstate highway system,”⁵ especially under FERC’s modern natural gas regulatory program, which is designed to promote an economically efficient, competitive, and market-

⁴ The purpose of the Natural Gas Act was not to give FERC comprehensive authority over natural gas, let alone energy or environmental policy in general. *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595-96 (2015) (describing history); *California v. Southland Royalty Co.*, 436 U.S. 519, 523 (1978) (“The fundamental purpose of the Natural Gas Act is to assure an adequate and reliable supply of gas at reasonable prices.”); *Atl. Ref. Co. v. Pub. Serv. Comm’n*, 360 U.S. 378, 388 (1959) (similar).

⁵ *Energy Infrastructure: Hearing Before the S. Comm. on Energy & Nat. Res.*, 115th Cong. 1 (2018) (statement of Donald F. Santa, President & CEO, Interstate Natural Gas Association of America), <https://bit.ly/2B6X6Tv>.

responsive integrated natural gas pipeline system. *See generally* MCGREW, *supra*, at 117-23; Robert Christin et al., *Considering the Public Convenience and Necessity in Pipeline Certificate Cases Under the Natural Gas Act*, 38 ENERGY L.J. 115, 123-25 (2017). For example, FERC has promoted an efficient market for natural gas pipeline capacity that allows shippers to “segment” their capacity to allow transportation of gas to multiple delivery points along a pipeline’s path. *See* 18 C.F.R. § 284.7. It has also fostered a robust secondary market for pipeline capacity, in which shippers (including local distribution companies like the shippers on this Project) can and do release capacity when they do not need it, to be purchased by replacement shippers who may utilize it at different receipt or delivery points, to move natural gas between regions or trading hubs, wherever it is valued most. *See* 18 C.F.R. § 284.8.

Given these realities, a project’s impact on net upstream and downstream GHG emissions is largely opaque. With respect to upstream production, the source of natural gas to be shipped on a particular pipeline expansion project can vary widely, particularly where a pipeline is connected (directly or indirectly) with distribution hubs that allow sourcing from various production regions. To the extent new wells are drilled either in the near term or over the lifetime of pipeline infrastructure assets, their location will be determined by a range of short- and long-term factors related to the cost of production, state and local regulatory regimes,

technological developments, and natural gas and energy markets more broadly, over which FERC lacks even indirect control. *See generally* Reh’g Order PP 60-61 & n.146, JA____-_____.

In turn, discerning potential incremental contributions to *downstream* GHG emissions from end-users’ consumption of natural gas transported on a given project requires information, among other things, about (1) where and how the transported natural gas will be consumed; (2) what fraction of gas will be used as an industrial input (and not combusted) versus burned for heating, cooking, or power generation; (3) whether the transported natural gas will displace other natural gas supplies due to availability or price competitiveness; and (4) whether the natural gas will displace other, higher-emitting fuel sources—such as coal or fuel oil,⁶ which natural gas is increasingly replacing as a source for electric generation and heating.⁷ Indeed, even

⁶ “About 117 pounds of carbon dioxide are produced per million British thermal units (MMBtu) equivalent of natural gas compared with more than 200 pounds of CO₂ per MMBtu of coal and more than 160 pounds per MMBtu of distillate fuel oil.” *Natural Gas Explained: Natural Gas and the Environment*, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2VUKw2j> (last visited Jan. 31, 2019).

⁷ *See* New Market Project: Environmental Assessment 109, *Dominion Transmission, Inc.*, FERC Docket No. CP14-497-000 (Oct. 20, 2015), JA____ (explaining that, although any prediction would be speculative, “it is possible that without the proposed Project the energy needs may be met by alternative energy sources” like “coal and oil,” whereas “[r]enewable energy sources are not currently available to meet the Project’s needs”); *see also generally* *Today in Energy, June 16, 2017*, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2FIICqG> (last visited Jan. 31, 2019) (providing data on long-term trends in use of gas and coal for electric generation); *see also* Kennedy Maize, *Natural Gas: Clear Skies, Some Clouds on the Horizon*, POWER

where natural gas transported on a project will be used to serve new incremental demand (e.g., fueling new electric generation facilities or heating new homes), a project may still result in a net decrease in overall GHG emissions compared to baseline conditions, if that demand would otherwise have been satisfied through higher-emitting sources (like coal or fuel oil).⁸

Merely observing that interstate transportation is a “component[] of the general [gas] supply chain,” Reh’g Order P 60, JA_____, and that the availability of additional transportation capacity can affect a gas commodity’s availability or price, *see* Otsego Br. 37, does not make it reasonably foreseeable under NEPA that a given project will increase upstream or downstream GHG emissions, let alone indicate the scale of any effect. Petitioners have not identified any concrete reason, grounded in the administrative record, to believe *this Project* will be the legally relevant cause of any reasonably foreseeable upstream or downstream GHG emissions.

B. *Sabal Trail Does Not Apply To This Case*

Petitioners err in arguing that FERC’s orders here violate *Sabal Trail*. *See* Otsego Br. 29. The Commission appropriately recognized the context-specific nature of the NEPA analysis and this Court’s holding in that case. *See* Reh’g Order

(Aug. 1, 2018), <https://bit.ly/2DtYIIu> (“Gas should continue to push coal out of electric markets, according to FERC . . .”).

⁸ Estimating offsets for this Project is more speculative than even in *Sabal Trail*, where the record did indicate the new infrastructure would facilitate retirement of certain coal-fired plants. *Cf. Sabal Trail*, 867 F.3d at 1375.

P 43 n.96, JA____; FERC Br. 32-33. By contrast, petitioners seek to expand *Sabal Trail* in at least two significant ways: to cover not only upstream GHG emissions (not addressed in *Sabal Trail*), but also downstream GHG emissions evidently for every project that adds incremental natural gas transportation capacity to the nation’s pipeline grid.

Sabal Trail dealt with the Southeast Market Pipelines Project, where “[t]wo major utilities . . . ha[d] already committed to buying nearly all the gas the project [was] . . . able to transport” as fuel for identifiable “power plants in Florida” that either “already exist[ed]” or were “in the planning stages.” 867 F.3d at 1363-64, 1371. Moreover, at the time, “only two major natural-gas pipelines serve[d] the state” of Florida, “and both [were] almost at capacity.” *Id.* at 1364. In arguing that FERC was required to analyze downstream GHG emissions, the petitioners in *Sabal Trail* contended that “the details of [downstream] consumption [we]re known.” Sierra Club Br. 31, *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (No. 16-1329). Notably, the Commission’s certificate order approving the Southeast Market Pipelines Project identified specific power plants that would be receiving natural gas transported on the project. *See, e.g., Fla. Se. Connection, LLC*, 154 FERC ¶ 61,080, P 4 (2016) (identifying the “Martin Clean Energy Center near Indiantown, Florida”); *id.* P 18 (identifying a “proposed electric generation plant in Citrus County,

Florida”); *id.* P 78 (identifying the “proposed . . . Okeechobee Clean Energy Center”).

On those facts, this Court concluded—over a vigorous dissent—that FERC was a legally relevant cause of the GHG emissions produced by downstream power plants burning the transported natural gas and that such emissions were reasonably foreseeable. *Sabal Trail*, 867 F.3d at 1371-73. The Court emphasized that “the project’s entire purpose” was to “transport natural gas to Florida power plants,” *Id.* at 1371-72—specifically, the identifiable proposed and existing power plants of the “[t]wo major utilities” that had “committed to buying nearly all the gas the project will be able to transport,” *id.* at 1364. *Sabal Trail* therefore turned on the causal relationship between (1) a project intended to provide incremental transportation capacity to serve known natural-gas-fired power plants in a capacity-constrained market and (2) downstream emissions from those power plants.

Any causal chain linking approval of the New Market Project to incremental upstream or downstream GHG emissions is significantly more attenuated. To begin, *Sabal Trail* did not address emissions from *upstream* activities at all. The relationship between natural gas transportation infrastructure and upstream production is far more attenuated than the downstream emissions in *Sabal Trail*,⁹

⁹ See *Millennium Pipeline Co.*, 161 FERC ¶ 61,229, P 155 (2017) (“To date, the Commission has not been presented with a proposed pipeline project that the record shows will cause the predictable development of gas reserves. In fact, the opposite

and the relationship between *this* Project and any identifiable upstream production is at best obscure. On the record of this case, which involves targeted upgrades to compressor stations along Dominion’s existing pipeline network, “there is not even an identified general supply area for the gas that will be transported,” and the “source of natural gas to be transported . . . will likely change throughout the Project’s operation.” Reh’g Order P 61, JA____; accord FERC Br. 28-29. Petitioners point to no record evidence to the contrary.

Even as to downstream effects, any causal chain is again highly attenuated. Here, “the gas to be transported by the New Market Project will be received by two local distribution companies.” Reh’g Order P 62, JA____. Unlike the power plants in *Sabal Trail*, local distribution companies are not themselves end-users: rather, they may deliver natural gas to a range of end-users, including residential, commercial, and industrial customers, through a network of natural gas mains and service lines.¹⁰ Thus, the causal chain between the Project and any downstream GHG emissions from end usage is more indirect and attenuated than in *Sabal Trail*.

causal relationship is more likely, i.e., once production begins in an area, shippers or end users will support the development of a pipeline to move the produced gas.”).

¹⁰ Office of Energy Policy & Systems Analysis, U.S. Dep’t of Energy, *Natural Gas Infrastructure Modernization Programs at Local Distribution Companies: Key Issues and Considerations* 5 (Jan. 2017), <https://bit.ly/2WehcnJ>. Some “[v]ery large customers” may “receive gas directly from interstate or intrastate pipelines, bypassing the [local distribution company].” *Id.* at 5 n.a.

Relatedly, any downstream GHG emissions are not reasonably foreseeable because, unlike in *Sabal Trail*, the record contains no information about “the specific end use of the transported natural gas.” Reh’g Order P 62, JA____. Nor is there even a guarantee that local distribution companies will use all their capacity to serve their own end-user customer base on any given day, much less on a continuous basis. Although local distribution companies must have enough transportation capacity to reliably meet the highest anticipated levels of peak demand (and may be compelled by state law to do so), their day-to-day demand is highly variable due to weather and other factors.¹¹ Cf. FERC Br. 38. Thus, local distribution companies often enter into asset management agreements allowing a marketer to use contracted capacity when the local distribution company does not require all of its capacity to serve its load. See *Rice Energy Mktg. LLC*, 153 FERC ¶ 61,048, P 5 (2015); FERC Br. 39. The Commission cannot determine the relationship between a given project and downstream GHG emissions unless it knows, among other things, how the natural gas is being used, how energy demands would otherwise be satisfied, and whether (and to what extent) identified shippers will use or release their subscribed transportation capacity.

Holding that NEPA requires analyzing downstream GHG emissions in this case would represent a considerable expansion of *Sabal Trail*. And it would run

¹¹ See *infra* pp. 22-23, 25.

contrary to this Court's prior admonitions that an agency need not "drill down into increasingly speculative projections" about environmental impacts that it "lacks . . . authority to control," *Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 200 (D.C. Cir. 2017).

C. Expanding The Scope Of Sabal Trail Would Create Additional And Unwarranted Regulatory Burdens.

Neither petitioners nor their *amici* suggest any limiting principle to their proposed expansion of *Sabal Trail*. In their apparent view, FERC must analyze upstream and downstream GHG emissions (and perhaps other upstream and downstream effects) in evaluating any project, of any size, adding natural gas transportation capacity to the nation's pipeline grid. In addition to its legal flaws, such an expansion would be unwise and unhelpful.

The Commission's environmental review process is already exhaustive. Indeed, in this very case involving a relatively limited project, the Commission prepared a detailed 200-page environmental analysis addressing "geology, soils, water resources, wetlands, vegetation, fisheries, wildlife, threatened and endangered species, land use, recreation, visual resources, cultural resources, socioeconomics, air quality, noise, safety, cumulative impacts, and alternatives." Order Issuing Certificate, 155 FERC ¶ 61,106, P 31 (2016) ("Certificate Order"), JA____. The environmental assessment for this Project demonstrates that the Commission takes seriously its NEPA obligation to "take a hard look at environmental impacts before

actions are taken.” *Theodore Roosevelt Conservation P’ship v. Salazar*, 616 F.3d 497, 517 (D.C. Cir. 2010).

The Commission is thorough in its environmental review of proposed natural gas infrastructure; but in light of the “tendency of NEPA analyses to expand over time,” “[a]gencies assessing indirect impacts under NEPA, and courts reviewing NEPA challenges to these analyses, should be careful to ensure that the purpose of NEPA remains in sight and that the ‘rule of reason’ inherent in any NEPA analysis remains intact.” C. Grady Moore, III et al., *Indirect Impacts and Climate Change: Assessing NEPA’s Reach*, NAT. RESOURCES & ENV’T, Spring 2009, at 30. That is especially true when it comes to interstate natural gas infrastructure, which allows the efficient delivery of a primary energy source on which millions of Americans rely for electricity, heating, cooking, and other uses.¹² Here, nearly two years elapsed between Dominion’s application and FERC’s issuance of the Certificate Order approving the Project. *See* Certificate Order P 1, JA____. The environmental review process for new pipelines can take even longer.¹³

¹² *See Natural Gas Explained: Use of Natural Gas*, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2rDkDWr> (last visited Jan. 31, 2019).

¹³ *See, e.g., PennEast Pipeline Co.*, 162 FERC ¶ 61,053, P 93 (2018) (approximately 3 years and 3 months from start of pre-filing environmental review to issuance of certificate); *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, P 122 (2017) (2 years and 11 months); *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042, P 190 (2017) (2 years and 11 months).

Expanding *Sabal Trail* to include upstream and downstream GHG emissions in every case would lengthen the process without a commensurate benefit to the Commission's decisionmaking. The Commission can effectively address and mitigate environmental effects of constructing and operating the pipeline itself, such as impacts on local wildlife or wetlands. But the Commission lacks authority to impose mitigation measures on upstream or downstream facilities. *See Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, P 57 (2018); *see also* 15 U.S.C. § 717(b) (explicitly denying FERC authority over natural gas intrastate transportation or sale, "local distribution," "facilities used for such distribution," or "production or gathering"). And a policy of denying new projects outright based on concerns about GHG emissions associated with natural gas production or consumption—evidently, petitioners' preferred approach—would violate FERC's charge to promote "the orderly development of plentiful supplies of . . . natural gas at reasonable prices," *NAACP*, 425 U.S. at 670; *see* FERC Br. 34-36. Indeed, denying proposed projects or using pipeline approvals as a backdoor mechanism to regulate local distribution or state decisions about power-generation would constitute impermissible *de facto* regulation by FERC of components of the natural gas supply chain that Congress expressly reserved to other federal regulators and, primarily, to the states.

II. The Commission's Decision Not To Go Beyond NEPA's Requirements Was Reasonable And Correct.

Petitioners tacitly concede that it would be unrealistic for FERC to attempt to “fully analyze” potential impacts from upstream or downstream GHG emissions on the record here. Otsego Br. 9 (emphasis omitted). However, petitioners criticize the Commission for declining either to (1) provide an “estimate of potential impacts to the extent possible, including the estimate of upstream and downstream GHG emissions associated with a known quantity of natural gas,” or (2) “ask Dominion to supply the data which could have permitted the absent analysis.” *Id.* (emphasis omitted). Even assuming these arguments are both properly before the Court (*but see* FERC Br. 42-43), and putting aside their legal flaws (*see supra* Part I; FERC Br. 22-41), these arguments fail.

A. Generalized Estimates Of Upstream Or Downstream GHG Emissions Are Of Limited Relevance At Best To The Commission's Decisionmaking.

“For a short time, the Commission went beyond” NEPA’s requirements, “providing upper-bound estimates of upstream and downstream effects using general shale gas well information and worst-case scenarios of peak use.” Reh’g Order P 41, JA____. Petitioners fault the Commission for not doing so here, arguing that FERC “had information about the quantum of gas the [Project] . . . would carry” and that “[e]ven if the identity of individual end-users is not known, FERC can and,

therefore, must disclose what can be determined using reasonable methods, such as full-burn calculations.” Otsego Br. 31, 35.

FERC reasonably concluded that NEPA does not require it to provide upper-bound estimates “based on generalized assumptions,” which “muddle[] the scope of [FERC’s] obligations under NEPA,” Reh’g Order P 42, JA____, and are of inherently limited value.

Upper-bound estimates of *upstream* GHG emissions assume that all natural gas to be transported on a particular infrastructure project represents new, incremental production, and then use generalized data to estimate the amount of GHG emissions from extraction, processing, and upstream transportation of that amount of gas. *See, e.g., Millennium Pipeline Co.*, 161 FERC ¶ 61,229, P 160. In turn, upper-bound estimates of *downstream* GHG emissions (i.e., “full-burn” calculations) assume that (1) the project will transport its full design capacity 365 days per year, (2) every molecule of the transported natural gas will be burned, and (3) none of the transported natural gas will either displace natural gas that would otherwise be acquired from other sources, or displace usage of other (potentially higher-emitting) fuels. *Id.* P 164; *see generally* FERC Br. 11 (citing past orders).

These estimates are extremely conservative, in multiple additive respects. To begin, natural gas pipelines typically do not operate at full capacity 24 hours a day, 7 days a week. Demand for natural gas is affected by numerous factors, including

weather (with residential heating use peaking in winter and electric power use peaking in summer),¹⁴ and is subject to major and unpredictable fluctuations.¹⁵ To be clear, this does not mean that a pipeline's full capacity is not "needed"; severe economic, practical, and environmental consequences can occur when demand exceeds transportation capacity during times of peak demand,¹⁶ and pipelines are commonly designed with peak demand in mind.¹⁷ But it does significantly limit the usefulness, for purposes of NEPA, of upstream or downstream GHG emissions estimates based on the assumption that all of the transportation capacity will be used 365 days per year.

¹⁴ See *Today in Energy*, September 11, 2015, U.S. ENERGY INFO. ADMIN., <https://bit.ly/2RN4T37> (last visited Jan. 31, 2019).

¹⁵ See, e.g., INGAA, *Interstate Natural Gas Pipeline Efficiency* 22 (Oct. 2010), <https://bit.ly/2FLzqba> ("On many pipelines, steady baseload demand has been replaced by less predictable, day-to-day, load swings."); *id.* at 38 (describing "large swings in flow from morning to afternoon when air conditioning load peaks" in summer).

¹⁶ See, e.g., Colin A. Young, *Massive Oil Burn During Cold Snap A 'Disaster', Says State Energy and Environment Secretary*, BERKSHIRE EAGLE (STATEHOUSE NEWS SERVICE) (Jan. 24, 2018), <https://bit.ly/2DtVc0F>; Jude Clemente, *What Happens When You Don't Build Natural Gas Pipelines?*, FORBES (Jan. 7, 2018), <https://bit.ly/2CLPLss>.

¹⁷ See, e.g., Reh'g Order P 62, JA_____ (noting that New Market Project's "transportation capacity is designed for intermittent peak use"); *Millennium Pipeline Co.*, 161 FERC ¶ 61,229, P 164 ("[M]any projects are designed for peak use."); U.S. ENERGY INFO. ADMIN., DELIVERABILITY ON THE INTERSTATE NATURAL GAS PIPELINE SYSTEM 5 (May 1998), <https://bit.ly/2R9fWPb> ("The principal requirement of the natural gas transmission system is . . . meeting the peak-day demand of its shippers who have contracts for firm service.").

Upper-bound estimates also involve the extremely conservative assumption that *all* natural gas transported on the project represents new incremental production and usage, and that none of the downstream usage will either displace natural gas from other sources or fulfil energy needs that otherwise would be met by burning other, higher-emitting fuels like coal or fuel oil. This is a highly conservative assumption. For example, assuming some of the natural gas transported on the Project will ultimately be used for residential heating, it is exceedingly unlikely the residences in question would otherwise have gone without heat (and, conversely, likely that demand would have been met through higher-emitting fuels like coal or fuel oil). And even assuming the Project will exclusively serve incremental (i.e., new) demand, the net effect on upstream or downstream GHG emissions will depend on how that demand otherwise would have been met.

To be sure, FERC has explained these limitations when it has provided upper-bound estimates for other projects. But given their inherent limitations and tendency to dramatically overstate expected emissions, FERC could reasonably conclude that such imprecise and highly conservative estimates do not meaningfully inform its decisionmaking. *See* FERC Br. 46.

B. The Court Should Not Require FERC To Demand Speculative And Unknowable Data From Project Applicants.

Petitioners and their *amici* suggest FERC could improve estimates of upstream and downstream GHG emissions by requiring project developers to submit

additional data at the time a project is proposed, if necessary directing pipeline companies to seek that information from their customers (i.e., shippers) or other third-parties. But detailed information about the activities of distinct upstream and downstream entities usually is not known or even reasonably available to a project applicant. Upstream producers of natural gas closely guard their business strategies on where and when to drill, which turn on factors like the relative costs and size of reserves in particular production areas, and what technologies and operational methods to use. Gas marketers, which subscribe to capacity on many new (and existing) pipeline projects, use pipeline capacity to respond to market conditions, and generally will not (and cannot) know precisely how or where natural gas will be shipped at any particular time.

Even where (as here) a local distribution company contracts for firm capacity, it may serve a variety of end-uses (including industrial, residential, and commercial), and the shipper may release capacity to other (unknown) shippers over time. Indeed, some state regulators *require* local distribution companies to release capacity during periods of lower demand to help reduce ultimate costs to consumers.¹⁸ And even if

¹⁸ See, e.g., Opinion No. 94-26 at 38, *Proceeding on Motion of the Commission to Address Issues Associated with the Restructuring of the Emerging Competitive Natural Gas Market*, Case 93-G-0932 (N.Y. Pub. Serv. Comm'n Dec. 20, 1994), <https://on.ny.gov/2SoB6xv> (“Put simply, [a local distribution company] should be expected to take advantage of each apparently reasonable opportunity to release pipeline capacity or be prepared to justify its decision not to do so.”).

project developers could gather some information about upstream production or downstream usage at the time of a project application, attempting to estimate a project's effects on net GHG emissions over many decades would remain "an exercise in futility," Reh'g Order P 61, JA____, because upstream production sources and downstream end uses will change over time.

Moreover, neither a project developer nor the Commission has legal authority over upstream production or downstream usage. Upstream production of natural gas is regulated by the states (or federal or tribal entities other than the Commission when upstream production occurs on federal or tribal lands), and local distribution companies and other downstream end-users are subject to a variety of state and federal authorities other than the Commission.¹⁹ Given that these activities are outside FERC's regulatory authority, the Commission reasonably concluded that seeking detailed information about GHG emissions from upstream and downstream facilities will not meaningfully inform its substantive decisions as to alternatives, route or location, or methods and practices of constructing and operating particular proposed natural gas transportation facilities. "NEPA does not require that every conceivable study be performed and that each problem be documented from every

¹⁹ Notably, air emissions (including GHG emissions) from upstream and downstream activities are regulated under the Clean Air Act, which is administered by the U.S. Environmental Protection Agency and analogous agencies of authorized tribes and states. *See Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

angle,” *Sierra Club v. Froehlke*, 486 F.2d 946, 951 (7th Cir. 1973) (internal quotation marks omitted), and the Commission could reasonably conclude that attempts to collect and analyze data about matters far outside its jurisdiction or expertise, and relating to impacts it cannot control, would not be worth the considerable burdens on both the Commission and regulated industry. *Cf. Pub. Utils. Comm’n v. FERC*, 900 F.2d 269, 280 (D.C. Cir. 1990) (upholding Commission’s decision to “decline[] to rule on” issues “outside the scope of its expertise”).

* * * * *

The Commission’s task in this proceeding was not to decide whether the nation should use more or less natural gas to meet its growing energy needs, or to adjudicate the broad “questions of national or international policy” at stake in the area of climate change. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427-28 (2011). Those are matters “for Congress or the Executive Branch to decide.” *Fla. Se. Connection, LLC*, 162 FERC ¶ 61,233, P 29. “[T]he Commission’s job,” by contrast, is “to review applications before it on a case-by-case basis,” *id.*, keeping in mind its basic charge under the Natural Gas Act “to assure an adequate and reliable supply of gas at reasonable prices,” *Southland Royalty*, 436 U.S. at 523. And that is precisely what the Commission did here. Given the nature of the task before it, the scope of its statutory jurisdiction and expertise, and “the usefulness of any new

potential information to [its] decisionmaking,” *Pub. Citizen*, 541 U.S. at 767, the Commission’s decision not to analyze upstream and downstream GHG emissions in reviewing this Project was lawful and reasonable.

CONCLUSION

The petition for review should be denied.

Date: February 1, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7), because this brief contains 6,447 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that, on February 1, 2019, I electronically filed the foregoing *Brief of Amicus Curiae Interstate Natural Gas Association of America in Support of Respondents* with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system on all ECF-registered counsel.

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