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POLICY BRIEF

FERC Plays Politics with Pipelines

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Summary

On February 17th, the Federal Energy Regulatory Commission (FERC) issued two new policy statements that will have significant detrimental effects on the construction of natural gas pipelines in the United States. The statements open new avenues for even more dilatory and frivolous opposition to development from anti-pipeline extremists, as well as creating new opportunities for litigation to slow or stop pipeline construction. The timing of the announcement could hardly have been worse, coming just days before the Russian invasion of Ukraine, which has completely altered the global geopolitical landscape. With Western Europe so heavily dependent on Russia for its natural gas, it has been left with no choice but to continue to allow imports from the rogue nation even as it wages war with Ukraine. The U.S., with an abundance of natural gas, is a logical alternative provided we are able to build more pipelines to move the gas to market.

Recent years have already seen pipeline construction grow increasingly expensive and difficult, as political activists have taken a “death by a thousand cuts” approach to stopping pipelines, seeking delays and creating roadblocks at any opportunity. Given this context, FERC’s decision to create even more opportunities for this sort of delay is inexplicable. FERC’s statutory mandate is to ensure reliable gas supplies at a reasonable cost to consumers, but these policy statements provide support to organizations and activists who are directly opposed to those goals.

Background

A FERC policy statement is essentially a guideline for how FERC plans to approach consideration of a given issue. The February 17th announcement included two separate, but closely related, policy statements. The first policy statement is an update to FERC’s existing 1999 policy statement on certification of natural gas pipelines, the second is an interim policy statement on how FERC will assess greenhouse gas emissions in the pipeline approval process.

Certification of Natural Gas Pipelines

The updated pipeline certification statement has several problems seemingly designed to undermine the pipeline approval process.

First, the statement eliminates so-called precedent agreements as the key deciding factor for pipeline approvals. Precedent agreements are simply a binding agreement between a company applying to build a pipeline and a future customer, establishing that there is customer demand for the gas to be transported by the pipeline. There has been criticism of FERC's reliance on precedent agreements as the primary approval threshold, especially from environmental groups that claim that essentially no new natural gas pipeline capacity is needed. Whatever the merits of that criticism, however, the policy update is not an improvement on the status quo unless the intent is to prevent the approval of pipelines. In place of a clear criteria – a precedent agreement – the commission introduces a vague balancing concept seeking to "consider all relevant factors bearing on the need for a project." Which is to say that the FERC policy statement does not establish what else beyond a precedent agreement is required for pipeline approval. This leaves any company seeking to build a pipeline in an impossible situation, subject to the whim of FERC but given no firm criteria for what it needs to include in an application for approval.

Second, the policy statement seeks to expand the consideration of supposedly adverse effects of a pipeline. While this might sound reasonable in theory, the policy statement makes clear that this is not a good faith effort to consider impacts, but rather an effort to give NIMBYs and political actors new avenues to oppose and delay pipeline approvals. In one example, the policy statement seeks to expand the scope of impacts on landowners, moving beyond the economic impact of eminent domain to include unquantifiable complaints from landowners. This includes seeking evidence of "respectful and good faith negotiation" to acquire lands. While that phrase sounds warm and fuzzy, it is completely content free and in the eye of the beholder. How exactly is a company to show "respect" and "good faith"? There are no criteria, no standards, just vagueness. When NIMBYs and environmentalists seek to impede a pipeline, they can simply claim (and already do claim) lack of good faith as a delaying tactic. This new FERC statement will only supercharge that sort of frivolous delay.

Additionally, the policy statement makes a big show of considering impacts on "environmental justice" communities. Environmental justice is not a scientific term or a statutory term, it is a political term. This vague notion of environmental justice is once again in the eye of the beholder. It is not a concept with definitions or standards, but rather it is a rubric for political organizing and action by left wing activist groups. The only way to satisfy "environmental justice" standards is to convince "environmental justice" organizations to pronounce themselves satisfied. By injecting environmental justice into the FERC approval process, the Democratic commissioners are explicitly saying they plan to further politicize the pipeline approval process, looking to activist groups to provide sign off on pipeline approvals.

The combined effect of the updated pipeline certification statement is an explicit undermining of the pipeline approval process. The effect will be more delays and higher costs, if pipelines can even be completed at all.

Interim Greenhouse Gas Emission Policy

The interim greenhouse gas policy (GHG) shares the vagueness of the certification update policy. There are no criteria or binding rules for how a company can comply or calculate emissions. The only hard number is that FERC will require a full environmental impact statement (EIS) for projects with emissions of more than 100,000 tons per year. This threshold is completely arbitrary, it is not a statutory requirement, and will greatly increase the number of projects subject to an EIS. Given that an EIS takes much longer and is much more expensive than other forms of environmental review, this is an announcement of required increased costs on these projects.

The interim GHG policy also contemplates consideration of downstream combustion of natural gas in the pipeline approval process. This is problematic for several reasons. First, this potentially extends FERC regulatory jurisdiction to considering international emissions, which is beyond its statutory purview. Second, estimating downstream combustion is essentially impossible in any kind of rigorous manner. Whether gas is burned for power generation or used in a home changes methane and CO2 emissions. Cargos can be redirected and resold along the supply chain any number of times. But what downstream emissions considerations certainly do is give environmental activists challenging a pipeline almost carte blanche to make up some alternative emissions number and then oppose a pipeline at FERC or in court based on that number. The policy statement allows for case-by-case consideration that downstream impacts are not reasonably foreseeable, but even that would require enormous compliance cost to show and still leaves the opportunity for activists to oppose in FERC or sue on the downstream effects. Finally, a pipeline developer has no control over downstream use of its product, yet approval of its pipeline permit will be dependent on that downstream use.

Additionally, the statement allows for potential upstream emissions impacts to affect a pipeline approval. Here again, a pipeline has no control over the upstream emissions from producing gas. A pipeline cannot be expected to try to supervise a drilling company's emissions, but those emissions can affect a pipeline's approval. The upstream considerations introduce yet another element of uncertainty because it does not require calculations of upstream impacts to be included in an application, only encourages companies to do so.

Finally, the interim policy statement allows for vague "mitigation" actions by a pipeline applicant. However, mitigation is in the eye of the beholder, there are multiple standards and programs for GHG mitigation, and each has its critics and supporters. The FERC statement includes no standards for what constitutes mitigation, nor does it indicate how much mitigation might be necessary. Here again, the policy statement is creating yet another litigation point for environmental activists who can claim the proposed mitigation is not enough or miscalculated.

Like the policy update, the interim GHG statement is a recipe for delays and higher costs. Additionally, even though this policy is described as interim and is open for a public comment period for several months, FERC also announced that they would begin applying this policy to existing applications before the commission.

Conclusion

Both policy statements were passed by 3-2 majorities on partisan lines, with Democratic appointees in the majority. The partisan nature of these decisions is just another element of uncertainty these statements introduce into the FERC process, because a partisan policy statement is certain to be reassessed once the partisan makeup of the commission changes under the next Republican president. It is telling that the 1999 policy statement which was updated was originally passed unanimously. That is the sort of policy statement that provides certainty.

These two policy statements should be seen for what they are: an explicit politicization of the FERC pipeline approval process. These statements introduce political factors into the approval process and give activist groups virtual veto power over pipeline approvals. Under these new policies, pipeline approvals at FERC will become enormously difficult. The higher costs and delays must ultimately be passed on to the consumers of natural gas. With energy price inflation surging in the past year, and geopolitical events making abundant supplies of gas an imperative, FERC's policy statements are wildly out of step with the needs of the moment, and frankly out of step with FERC's own statutory mandates.