

INSIGHTS

Continuing Review of New Pipeline Projects

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The Federal Energy Regulatory Commission (FERC) [officially announced](#) that it is going to review its policy framework for certification of new interstate natural gas and LNG pipelines in the U.S. and issued a [Notice of Inquiry \(Notice or NOI\)](#). This is the first time in nearly twenty years that FERC will examine its pipeline review and approval policy, [last issued in 1999](#). Kevin McIntyre, the current FERC Chairman, said review of the policy is intended to determine ‘whether, and if so, how’ any changes should be made in the evaluation of new pipeline projects. The NOI establishes a 60-day public comment period, beginning with publication in the [Federal Register](#), thus the deadline for comments is June 25, 2018.

Chairman McIntyre initially forecast the need for the review in his Senate confirmation hearings in September 2017. While this Notice has therefore been expected, it comes at an interesting time, when the FERC Commissioners themselves are split on their approach to pipeline project review, with challenges to some projects gaining ground with both appellate courts and states. The Trump Administration has also sent mixed policy messages to the industry, from expressing support for infrastructure projects generally ([including permit streamlining, April 11, 2018](#)) and to [imposing tariffs on steel pipe imports](#).

FERC’s NOI acknowledges the many changes that have occurred since the last policy statement issued nearly twenty years ago, in 1999. In just the past few years there has been the discovery of new oil and gas reserves and the associated use of fracking, new and expansion pipeline projects to address the increased production and demand, to growing opposition to new pipelines post-Keystone. At the same time, natural gas is rapidly replacing coal as a more cost effective and cleaner source of energy. The prior 1999 Policy Statement on Certification of New Interstate Natural Gas Pipeline Facilities (the Policy Statement) was issued to assist FERC in evaluating requests for certificates of new pipeline construction under Section 7 of the Natural Gas Act. As set forth under the Natural Gas Act, a certificate can only be issued to projects that are “required by the present or future public convenience and necessity.” 15 U.S.C. § 717f(c). To assist in that analysis, the 1999 Policy Statement required that a public benefit be shown to outweigh any adverse effects of new natural gas pipelines before FERC could issue a certificate approving construction. That consideration has been given effect primarily as an economic test, but over the years it has become increasingly difficult to quantify.

Illustrating such challenges, the NOI expressly seeks public comment on the following issues, among others: (1) market need for new service or competition; (2) impact of the exercise of eminent domain; (3) the role of NEPA review, including consideration of climate change and a range of alternatives; and (4) FERC procedures for reviewing applications for new construction.

Embedded with those issues are questions about who benefits from new construction, especially when a new pipeline travels through one geographical area (such as one or more states) only to serve another, or when resources are transported for export rather than domestic use. There has been increasing opposition to new pipeline construction in recent years, even as gas and fuel prices have gone down, and environmental impacts from pipelines have been reduced (e.g., reduction in methane emissions from gas lines and significant reduction in CO₂ by replacing coal with gas).

Like the country itself, FERC is currently split on how to approach many of these issues. Commissioners Cheryl LaFleur and Richard Glick have stated that issues such as the 'social cost of carbon' need to be given more analysis, while Commissioner Robert Powelson and Chairman Kevin McIntyre emphasize the need to give effect to recent directives to streamline federal permitting processes, See [Exec. Order 13807](#), 82 Fed. Reg. 40463 (Aug. 15, 2017) and prior *Pipelaws.com* posts of [August 15, 2017](#) and [April 11, 2018](#).

Agencies like FERC and PHMSA have been asked to assess new issues regarding pipeline construction, and the courts are increasingly involved in reaching final determinations. Ultimately, the public must weigh the benefit of natural gas and oil as reliable energy sources, when other sources are more costly or more environmentally damaging, and renewables are not yet established sufficiently to replace the current system. Given these issues, and the wide range of stakeholders' views, it is expected that the NOI will generate substantial comment.