

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Certification of New Interstate Natural Gas Facilities | Docket No. PL18-1-001

**COMMENTS OF THE
AMERICAN ANTITRUST INSTITUTE**

The Federal Energy Regulatory Commission ("FERC" or "Commission") seeks comments on its Order on Draft Policy Statements, issued March 24, 2022 in Docket No. PL18-1-001, regarding certification of new interstate natural gas facilities ("Draft Policy Statement").¹ The Commission's inquiry arises in the context of the agency's authority under Section 7(c) of the Natural Gas Act (NGA), which requires that "any person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce must obtain a certificate of public convenience and necessity from the Commission."²

As discussed in AAI's comments in the Commission's 2018 Notice of Inquiry ("NOI") on the certification of new interstate natural gas facilities in PL18-1-000,³ affiliate precedent agreements (APAs) raise serious concerns around their potential to facilitate "regulatory evasion" or "self-dealing." Such conduct can impair competition and result in higher prices of essential natural gas and electricity, to the detriment of consumers. Commission policy governing reliance on APAs as evidence of project need for the purposes of natural gas facilities certification is therefore critical to the agency's mandate to promote competition and protect consumers.

AAI's comments on the Draft Policy Statement address two major issues. First,

¹ *Certification of New Interstate Natural Gas Facilities*, Order on Draft Policy Statements, 178 FERC ¶ 61,197 (2022) ("Draft Policy Statement").

² 15 U.S.C. 717f.

³ *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,1042 (2018) ("2018 NOI"). See, Comments of the American Antitrust Institute, *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 163 FERC ¶ 61,1042 (2018), https://www.antitrustinstitute.org/wp-content/uploads/2018/09/FERC_NOI-Natural-Gas-Certification_AAI-Comments_7.25.18.pdf ("AAI 2018 NOI Comments").

addressing the potentially harmful effects of APAs, especially against the backdrop of changes in energy markets and broader concerns over declining competition, should be high priority for the Commission. Second, as explained in AAI's comments in the 2018 NOI, there are important additional informational requirements, not included in the Draft Policy Statement, that the Commission should consider in promulgating accurate, comprehensive, and strong policy to address the potential adverse effects of APAs. AAI therefore urges the Commission to act expeditiously in producing binding, updated policy containing an accurate analytical framework to address the potential harmful effects of APAs and the agency's reliance on them as evidence of project need.

I. The Interest of the American Antitrust Institute

AAI is an independent, nonprofit organization with a mission to promote competition that protects consumers, businesses, and society.⁴ We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of competition policy. AAI has provided legal and economic analysis, commentary, and testimony on mergers, market design, energy policy, and competition policy involving the energy industries since the organization's founding in 1998.

II. Communications

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⁴ See <https://antitrustinstitute.org> for more information.

III. Background on the Commission’s Actions in PL18-1

The Draft Policy Statement is the most recent Commission action in a proceeding that stretches back four years. In April 2018, the Commission issued an NOI seeking comment on the certification of new interstate natural gas facilities⁵ in an effort to update the Commission’s 1999 Statement of Policy.⁶ The 2018 NOI languished under the Trump Administration, which dialed back regulations across the board, especially in the energy sector.⁷ It was not until February 2021 that the Commission issued a second NOI under new leadership from the Biden Administration.⁸

In February 2022, about a year after the 2021 NOI was issued, the Commission issued an Updated Policy Statement.⁹ But a month later in March 2022, the Commission converted the Updated Policy Statement to a Draft Policy Statement. The result is that the Commission has, after four years, produced no binding, updated policy on certification, including critical policy that addresses the pressing competition and consumer concerns raised by APAs and reliance on them as evidence of project need.

Prevailing policy governing these issues therefore remains in the 1999 Statement of Policy, which is now over 20 years old. As discussed below, the competition and consumer issues surrounding APAs, and the Commission’s reliance on them as evidence of project need, have grown increasingly problematic. Heightened concerns over regulatory evasion in

⁵ 2018 NOI, *supra* note 2.

⁶ *Certification of New Interstate Natural Gas Pipeline Facilities*, Statement of Policy, 88 FERC ¶ 61,227 (1999), clarified, 90 FERC ¶ 61,128, further clarified, 92 FERC ¶ 61,094 (2000) (“Statement of Policy”).

⁷ *See, e.g., Executive Order 13771—Reducing Regulation and Controlling Regulatory Costs* (Jan. 30, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700084/pdf/DCPD-201700084.pdf>. *See also*, Brookings Institution, *Regulatory Tracker*, <https://www.brookings.edu/interactives/tracking-regulatory-changes-in-the-biden-era/>.

⁸ *Certification of New Interstate Natural Gas Facilities*, Notice of Inquiry, 174 FERC ¶ 61,125 (2021) (“2021 NOI”).

⁹ *Certification of New Interstate Natural Gas Facilities*, Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 178 FERC ¶ 61,107 (2022) (“Updated Policy Statement”).

both antitrust enforcement and regulatory domains; general concerns about rising concentration and declining competition in the U.S. economy;¹⁰ and a recent successful challenge to Commission policy in federal appellate court emphasize the need for expeditious action on policy governing APAs in the context of natural gas facilities certification.

Moreover, the competition and consumer issues surrounding APAs are independent of the broader policy controversies around greenhouse gas, land use, and other issues that likely prompted the conversion of the Updated Policy Statement to a Draft Policy Statement. They should not languish further as the Commission addresses these broader policy debates. Instead, the Commission should act promptly to issue needed binding, updated policy on APAs and reliance on them as evidence of project need.

IV. The Serious Potential Adverse Competition and Consumer Effects of APAs Warrant Expeditious Commission Action

AAI's comments in the 2018 NOI outlined a comprehensive legal, economic, and policy case for why APAs potentially raise serious competition and consumer issues and, therefore, why Commission policy governing reliance on them as evidence of project need is critically important to "get right." AAI's comments were not referenced with other comments regarding APAs in the Updated (i.e., Draft) Policy Statement.¹¹ AAI's 2018 NOI comments highlighted significant changes in the structure and organization of upstream natural gas markets, downstream natural gas distribution markets, and electricity generation

¹⁰ *The State of Antitrust Enforcement and Competition Policy in the U.S.*, American Antitrust Institute (Apr. 14, 2020), <https://www.antitrustinstitute.org/work-product/antitrust-enforcement-report/>.

¹¹ AAI did not re-file the comments it filed in the 2018 NOI because it respectfully adhered to the Commission's admonition in the 2021 NOI that: "*We strongly urge stakeholders to not resubmit previously filed comments, which remain in the record of this proceeding.*" AAI's 2018 comments were fully responsive to the 10 questions posed in the 2018 NOI. And the one revised question and two new questions posed in the 2021 NOI were not relevant to AAI's 2018 NOI comments.

markets over the last two decades.¹² Consolidation in the energy sector has resulted in the formation of energy-related subsidiaries within larger holding companies, including pipelines, merchant generators, and regulated electric and gas distributors. Such changes directly affect strategic competitive incentives surrounding contracting for natural gas supplies and transportation and magnify the potential adverse competition and consumer effects of APAs.

AAI's 2018 NOI comments noted that current policy does not align with the Commission's goal of promoting competition because APAs are treated in the *same* way as other precedent agreements.¹³ AAI explained that APAs are unique in that they can raise concerns over "regulatory evasion" or "self-dealing." Agreements between an affiliated upstream input supplier and a downstream regulated entity with a common profit interest can create the incentive to inflate input costs because such costs can be passed on to ratepayers of the regulated entity.¹⁴ They can dampen competitive discipline in the downstream market and result in higher prices to customers of the downstream affiliate.¹⁵ Moreover, in most cases, public utility regulation is not equipped to detect regulatory evasion because regulators cannot or do not review and challenge input purchases.¹⁶

AAI's 2018 NOI comments noted that regulatory evasion has a long history in antitrust enforcement and regulation. Such concerns arose in cases such as *U.S. v. AT&T*,

¹² AAI 2018 NOI Comments, *supra* note 2, at 10.

¹³ *Id.*

¹⁴ See, e.g., Michael H. Riordan and Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513 (1995). See also Mohammad Harunuzzaman and Kenneth Costello, *State Commission Regulation of Self-Dealing Power Transactions*, National Regulatory Research Institute (90-06) (January 1996), <http://nrri.org/download/1996-06-state-commission-regulation-of-self-dealing-power-transactions/>; see also, Richard P. O'Neill, *Natural Gas Pipelines*, in NETWORK ACCESS, REGULATION AND ANTITRUST (D. Moss ed., 2005).

¹⁵ AAI 2018 NOI Comments, *supra* note 2, at 7.

¹⁶ *Id.*

Occidental Petroleum Corp., and *Fresenius Medical Care AG & Co.*¹⁷ Regulatory evasion concerns were also central to the Federal Trade Commission’s challenge of Entergy-Koch LP’s acquisition of Koch’s Gulf South Pipeline Company LP.¹⁸ Similarly, the Commission has confronted regulatory evasion issues in the Okeechobee Lateral pipeline project,¹⁹ Florida Southeast Connection projects (Sabal Trail), and in Constitution Pipeline case.²⁰

Most recently, regulatory evasion issues were addressed in the D.C. Circuit’s decision in *Environmental Defense Fund v. FERC*,²¹ where AAI filed an amicus brief.²² There, the court found the Commission’s public convenience and necessity determination to be arbitrary and capricious due to reliance solely on an APA as evidence of need, noting that “...evidence of ‘market need’ is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement.”²³

Finally, the Biden Administration recognized in its July 9, 2021 Executive Order (EO) on Competition in the American Economy²⁴ that industries have consolidated and

¹⁷ 552 F. Supp. 131, 226-34 (D.D.C. 1982); 109 F.T.C. 167 (1986); and KGaA and Daiichi Sankyo Company, Ltd No. 081-0146 (F.T.C. Sept. 15, 2008).

¹⁸ In re Entergy Corporation ad Entergy-Koch LP, Case No. C-3998 (Jan. 31, 2001), <https://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergycmp.pdf> (Entergy-Koch Complaint). See also Analysis of the Complaint and Consent Order to Aid Public Comment, Entergy-Koch (Jan. 31, 2001), <https://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergycorpana.htm> (Analysis of the Complaint and Consent).

¹⁹ See, e.g., Gavin Bade, *FERC splits again on affiliates, climate in Florida pipeline approval*, utilitydive.com, June 5, 2018, <https://www.utilitydive.com/news/ferc-splits-again-on-affiliates-climate-in-florida-pipeline-approval/525006/>.

²⁰ See Florida Southeast Connection LLC, et al., 154 FERC ¶61,080 (2016), “Order Issuing Certificates and Approving Abandonment” (Docket Nos. CP14-554-000, CP15-16-000 and CP15-17-000). Constitution Pipeline Company, LLC, and Iroquois Gas Transmission System, LP, 149 FERC ¶ 61,199 (2014), “Order Issuing Certificates and Approving Abandonment” (Docket Nos. CP13-499-000 and CP13-502-000).

²¹ *Environmental Defense Fund v. FERC*, 2 F.4th 953, 976 (2021).

²² Brief of the American Antitrust Institute, *Environmental Defense Fund v. Fed. Energy Reg. Comm’n*, Nos. 20-1016, 20-1017 (Consolidated) (9th Cir. filed July 3, 2020), available at <https://www.antitrustinstitute.org/work-product/aai-asks-d-c-circuit-to-hold-ferc-to-higher-standards-in-protecting-competition-and-consumers-from-regulatory-gaming-edf-v-ferc/>.

²³ *Id.*, at 973.

²⁴ *Executive Order on Promoting Competition in the American Economy*, The White House (Jul. 9, 2021), at § 1, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

competition “has weakened in too many markets.”²⁵ The EO sets forth a “whole-of-government competition policy” that is “necessary to address overconcentration, monopolization, and unfair competition in the American economy.”²⁶ The EO names FERC, among other federal agencies, as possessing authority to protect conditions of fair competition, for example, by “...promulgating rules that promote competition...”²⁷

The foregoing analysis and developments highlight the need for binding policy to address the potential competition and consumer concerns raised by APAs and the Commission’s reliance on them as evidence of project need. Given the pressing nature of these issues, AAI urges the Commission to address them with no further delay.

V. The Draft Policy Statement Does Not Consider the Full Array of Factors Necessary to Assess the Potential Adverse Effects of APAs

The Draft Policy Statement moves the ball forward on how current policy should be revised and strengthened in regard to the potential adverse effects of APAs. For example, the Commission concludes in the Draft Policy Statement that it cannot assess project need without looking at evidence beyond (all) precedent agreements. It reaffirms the 1999 Statement of Policy’s theoretical (but not practical) commitment to looking at *all* relevant factors, including:

“...whether the agreements were entered into before or after an open season and the results of the open season, including the number of bidders, whether the agreements were entered into in response to LDC or generator requests for proposals (RFP) and, if so, the details around that RFP process, including the length of time from RFP to execution of the agreement.”²⁸

On the issue of APAs, specifically, the Commission concludes that:

“...affiliate precedent agreements will generally be insufficient to demonstrate need. Instead, where projects are backed primarily by precedent agreements with affiliates, the Commission will consider additional

²⁵ *Id.*

²⁶ *Id.*, at § 2(g).

²⁷ *Id.*, at § 2(d)(iii).

²⁸ Draft Policy Statement, *supra* note 1, at P 55.

information, such as the evidence outlined above. [footnote omitted] We will determine how much additional evidence is required on a case-by-case determination.”²⁹

The Commission goes on to state that “additional” information should include: “...*how the gas to be transported by the proposed project will ultimately be used, why the project is needed to serve that use, and the expected utilization rate of the proposed project.*”³⁰

AAI is concerned that the Draft Policy Statement misses important considerations, raised in its comments on the 2018 NOI, that would have resulted in strong and responsive Commission policy regarding the potential adverse competition and consumer effects of APAs.³¹ AAI’s 2018 NOI comments noted three important factors in this regard. One is ascertaining whether the downstream electricity or gas distribution affiliates of a pipeline possess market power.³² As is often the case under such circumstances, consumers have no economic alternatives for the purchase of electricity or gas at the retail level and would therefore be harmed by the higher prices that could result from self-dealing. The Commission’s Draft Policy Statement does not mention this important factor. An in-depth assessment of the scope of competition in downstream markets is therefore critical to the Commission’s determination of the potential adverse effects of APAs and reliance on them as evidence of project need.

Second, in assessing the potential for regulatory evasion, it is vital to ascertain whether the purchase of upstream products and services involves an open and transparent procurement process. This includes a request for proposal (RFP) process that demonstrates the regulated entity considered all options for the purchase of gas supplies.³³ While the Draft

²⁹ *Id.*, at P 60.

³⁰ *Id.*, at P 55.

³¹ AAI 2018 NOI Comments, *supra* note 2.

³² *Id.*, at 7.

³³ *Id.*, at 12. *See also, e.g.*, the FTC’s remedy in Koch-Entergy. Agreement Containing Consent Order, Koch-Entergy, File No. 001-0172 (Jan. 31, 2001), <https://www.ftc.gov/sites/default/files/documents/cases/2001/01/entergyagree.pdf>.

Policy Statement does mention the importance of the “number of bidders” in an RFP, it does not mention that the types and diversity of bidders are also vitally important. A demonstration that a regulated affiliate considered multiple options for input purchases reveals the contours of competition in upstream markets, and that the RFP sought to identify such competition through an open and transparent process. The Draft Policy Statement does not raise this issue.

Finally, AAI’s 2018 comments highlighted the importance of determining whether state-level regulatory processes can detect regulatory evasion through the review of procurement practices.³⁴ The detectability of regulatory evasion is directly dependent on controlling regulation at the distribution level. And even though state-level regulation is independent of federal regulation, the interface between them on the issue of APAs is nonetheless vital to the Commission’s determinations regarding the potential adverse effects of APAs and reliance on them as evidence of project need. The Draft Policy Statement does not mention this important factor either.

In sum, the Commission’s proposed Draft Policy Statement lacks key informational requirements that are necessary to ascertain the extent to which an APA could result in harm to competition and consumers. AAI urges the Commission to consider the foregoing factors in developing an accurate and comprehensive framework for assessing APAs.

VI. Conclusion

For the reasons explained above, AAI urges the Commission to consider acting quickly to produce updated policy that specifically addresses competition and consumer concerns related APAs. This includes considering important, additional factors that would

³⁴ AAI 2018 NOI Comments, *supra* note 2, at 7.

aid in determining the potential for APAs to harm competition and consumers and, therefore, Commission policy governing reliance on them as evidence of project need.

Respectfully submitted,

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