

United States Senate

WASHINGTON, DC 20510

March 22, 2022

The Honorable Gene L. Dodaro
Comptroller General of the United States
Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Comptroller General Dodaro,

On February 18, 2022, the Federal Energy Regulatory Commission (“Commission” or “FERC”) issued two Policy Statements setting forth updated factors the Commission will weigh when determining whether to approve interstate natural gas pipelines and other natural gas infrastructure.¹ FERC made each of the Policy Statements immediately effective to currently pending and yet-to-be-filed applications under the Natural Gas Act (“NGA”).²

The Policy Statements are rules according to the plain language of the Congressional Review Act (“CRA”).³ A number of legal opinions of the Comptroller General and the Government Accountability Office (“GAO”), including those discussed below, support this conclusion.⁴ Consequently, the Commission erred in failing to submit the Policy Statements for review.

We respectfully request that you determine as soon as possible that each of the Policy Statements meets the definition of a rule under the CRA and thus the Commission should have submitted both to Congress and to you for review. As the Commission gave each of the Policy Statements immediate effect, it is urgent that you exercise your responsibility under the CRA to determine whether each of the Policy Statements constitutes a “rule” pursuant to the CRA. We believe that your previous interpretations of the definition of a rule under the CRA make it clear that both Policy Statements are rules as defined by the CRA.

¹ *Updated Policy Statement on Certification of New Interstate Natural Gas Facilities* Docket No. PL18-1-000 (“Updated Policy Statement”). The Updated Policy Statement superseded the Commission’s 1999 Natural Gas Policy Statement which has governed its review of natural gas infrastructure applications since its issuance. *Interim Policy Statement on the Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Review* Docket No. PL21-3-000 (“Interim Greenhouse Gas Policy Statement”).

² Updated Policy Statement, PL18-1-000, at ¶ 100; Interim Greenhouse Gas Policy Statement, PL21-3-000, at ¶ 1. Although labeled as “interim,” the Interim Greenhouse Gas Policy Statement has gone into full effect and is being applied to applications currently before the Commission. It may be amended after the close of a 60 day comment period. However, nothing requires the Commission to make changes to the Interim Greenhouse Gas Policy Statement. Nevertheless, if the Commission modifies the Interim Greenhouse Gas Policy Statement after the comment period or any party seeks rehearing or the Commission grants rehearing of the Interim Greenhouse Gas Policy Statement or the Updated Policy Statement, GAO need not and should not restart its consideration of the CRA question that this letter presents as to each Policy Statement.

³ 5 U.S.C. § 804(3) (citing 5 U.S.C. § 551(4)).

⁴ As GAO’s *Procedures and Practices for Legal Decisions and Opinions* provides, “The Office of General Counsel (OGC) is the component of United States Government Accountability Office (GAO) responsible for providing opinions to Congress, its committees, and Members, and for providing decisions to accountable officers and heads of executive agencies.” Following the text of the CRA, this letter will refer to the opinion we seek as “your determination.”

As you have previously stated:

*“CRA adopts the definition of rule under the Administrative Procedure Act (APA), which states in relevant part that a rule is ‘the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.’”*⁵

As you have determined, “this definition is broad, and includes both rules requiring notice and comment rulemaking and those that do not.”⁶ You concluded that a general statement of policy is a rule subject to the requirements of the CRA.⁷ The Supreme Court has described “general statements of policy” as “statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.”⁸ As you have outlined, an agency action qualifies as a rule under the CRA when three key components of the definition are present: (1) an agency statement, (2) with future effect, that is (3) designed to implement, interpret, or prescribe law or policy.⁹

In response to a request from Senator Toomey, you determined that *Interagency Guidance on Leveraged Lending* that was issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation (“Interagency Guidance”) was a rule for purposes of the CRA. Your determination on the Interagency Guidance contains a thorough analysis of the application of the CRA to agency actions, including general statements of policy by an agency.

In response to a another request from Senator Toomey, you determined that the *Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act* (“Bulletin”) issued by the Bureau of Consumer Financial Protection which “provide[d] guidance about indirect auto lenders’ compliance with the fair lending requirements of the Equal Credit Opportunity Act (“ECOA”) and its implementing regulation, Regulation B,” was a rule under the CRA.¹⁰ You found the Bulletin to be a rule because it was a general statement of policy that instructed auto lenders to “ensure that they are operating in compliance with the ECOA and Regulation B” and provided steps for their compliance.¹¹

In the case of the Interagency Guidance and the Bulletin, the agencies claimed their actions were not rules under the CRA. They argued to varying degrees that their actions were not general statements of policy, did not establish binding legal standards, were not certain or final, and did not substantially affect the rights or obligations of non-agency parties. FERC is likely to make similar claims with respect to each of the Policy Statements. These claims should be rejected for the same reasons that you rejected the claims of the agencies concerning the Interagency Guidance and the Bulletin.

⁵ B-329272 at 2 (Oct. 19, 2017) (citing 5 U.S.C. § 804(3), 5 U.S.C. § 551(4)).

⁶ B-329272 at 5 (Oct. 19, 2017); B-329129 at 6 (Dec. 5, 2017).

⁷ B-329272 at 1 (Oct. 19, 2017); B-329129 at 1 (Dec. 5, 2017).

⁸ *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993) (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (quoting U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act at 30 n.3 (1947))).

⁹ B-32972 at 5 (Oct. 19, 2017).

¹⁰ B-329129 at 2 (Dec. 5, 2017).

¹¹ B-329129 at 3 (Dec. 5, 2017).

The Policy Statements are directly comparable to the agency actions at issue in your prior determinations. The Policy Statements prospectively inform all applicants for NGA section 7 and section 3 authorizations and the public of the manner in which the Commission will exercise its discretionary powers. Each of the Policy Statements is a general statement of policy. Each informs regulated entities how to comply with the NGA. The Policy Statements also outline considerations the Commission will take in determining compliance with the NGA. Each imposes new burdens, in the form of factors and expectations, not previously present in the Commission's analysis.

Both Policy Statements satisfy each of the components of the definition of a "rule" under the CRA that you have articulated. First, the Policy Statements are "agency statements." The Commission voted on and published the Policy Statements in the Federal Register.¹² Second, both Policy Statements apply to "currently pending applications."¹³ An immediate and future effect of each Policy Statement, among other effects, is to increase dramatically the burden on applicants to establish an adequate record to prove the need for a natural gas project and show that the benefits of a project outweigh its potential adverse impacts.¹⁴ Finally, each Policy Statement is designed to prescribe policy and implement sections 7 and 3 of the NGA.

Both Policy Statements change the factors considered by the Commission in its approval process. These factors include, among others, additional evidence to show that a project is needed and is therefore consistent with the public interest; the calculation of downstream and upstream greenhouse gas ("GHG") emissions; proposals from the applicant to "mitigate" GHG emissions; and new weight placed on considerations of "environmental justice." The Policy Statements each introduce several new definitions and thresholds that require applicants to provide additional information. The Policy Statements each explain that the Commission will consider new factors in deciding whether to grant a certificate or an authorization under the NGA.

The Policy Statements are not subject to the exemptions from the definition of a rule that the CRA provides. The CRA exempts three key categories of agency action from its definition of a rule. These are: (1) any rule of particular applicability, (2) any rule relating to agency management or personnel, and (3) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.¹⁵ First, the Policy Statements each have a broad scope and impact all current and future certificate applicants before the Commission and, indirectly, all persons and entities that rely on the interstate natural gas system. Thus, the exemption provided by 5 USCS § 804(3)(A) does not apply. Second, the Policy Statements do not relate to "agency management or personnel." Instead, the Policy Statements substantially impact the rights and obligations of non-agency parties who apply to the Commission, for example, the project developers who are applicants for NGA certificates or authorizations. Accordingly, the Policy Statements do not qualify for exemption under 5 USCS § 804(3)(B) or (C). Therefore, the Policy Statements do not fall under the enumerated exemptions and must instead be subject to the CRA.

¹² Updated Policy Statement on Certification of New Interstate Natural Gas Facilities, 87 FR 11548 (Mar. 1, 2022); Interim Policy Statement, 87 FR 14104 (Mar. 11, 2022).

¹³ Updated Policy Statement, PL18-1-000, at ¶ 100; Interim Greenhouse Gas Policy Statement, PL21-3-000, at ¶ 1.

¹⁴ See Updated Policy Statement, PL18-1-000, at ¶ 99.

¹⁵ 5 USC § 804 (3).

The Commission majority claims the Policy Statements do not establish binding rules.¹⁶ However, the Commission majority acknowledges that the Policy Statements “explain how the Commission will consider applications” for certificates of convenience and necessity under section 7 and authorizations under section 3 of the NGA. The fact is that the new Policy Statements will have a profound impact on non-agency parties such as the builders and operators of the nation’s interstate natural gas delivery system subject to FERC’s jurisdiction by imposing additional onerous requirements on “any currently pending applications for new certificates.”¹⁷ Applicants who have already filed applications with the Commission are “given the opportunity to supplement the record and explain how their proposals are consistent with [the] Updated Policy Statement.”¹⁸


Two FERC Commissioners wrote in strong dissents and testified before the United States Senate Committee on Energy and Natural Resources that the Policy Statements will chill investment in natural gas infrastructure immediately.¹⁹ Their view of the effect on non-agency parties is confirmed by a number of applicants for certificates or authorizations under the NGA as well as people who depend upon natural gas infrastructure.²⁰

For the foregoing reasons, we ask you to determine as soon as possible that each of the Policy Statements FERC issued on February 18, 2022 is a “rule” for purposes of the CRA and should have been submitted to Congress and to you for review. Thank you for your consideration

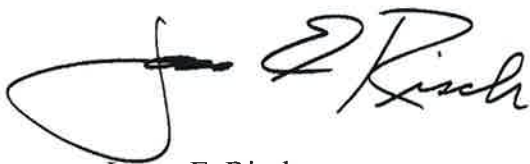
Sincerely,



John Barrasso, M.D.
U.S. Senator



Lisa Murkowski
U.S. Senator



James E. Risch
U.S. Senator



Pat Toomey
U.S. Senator

¹⁶ Updated Policy Statement, PL18-1-000, at ¶ 3. Interim Greenhouse Gas Policy Statement, PL21-3-000, at ¶ 5.

¹⁷ Updated Policy Statement, PL18-1-000, at ¶ 100. Interim Greenhouse Gas Policy Statement, PL21-3-000, at ¶ 1.

¹⁸ Updated Policy Statement, PL18-1-000, at ¶ 100.

¹⁹ Updated Policy Statement, PL18-1-000, Danly, Comm’r, dissenting at ¶ 2; Interim Greenhouse Gas Policy Statement, PL21-3-000, Danly, Comm’r, dissenting at ¶ 3; Updated Policy Statement, PL18-1-000, Christie, Comm’r, dissenting at ¶ 4.

²⁰ See, e.g., Letter from Alan S. Armstrong, President/CEO, The Williams Companies, Inc. to Chairman Manchin and Ranking Member Barrasso Energy and Natural Resources Committee (Mar. 2, 2022), (This letter and others will be provided upon request).



John Hoeven
U.S. Senator



James Lankford
U.S. Senator



Steve Daines
U.S. Senator



Cindy Hyde-Smith
U.S. Senator



Kevin Cramer
U.S. Senator



Roger Marshall
U.S. Senator