

April 18, 2018

Via electronic mail

Chairman Kevin McIntyre
Commissioners Cheryl LaFleur, Neil Chatterjee, Robert Powelson, and Richard Glick
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: FERC Review of the 1999 Natural Gas Policy Statement

Dear Chairman McIntyre and Commissioners LaFleur, Chatterjee, Powelson, and Glick,

We applaud the Commission's decision to revisit the 1999 Natural Gas Policy Statement.¹ While the Policy Statement is meant to "strike the proper balance between the enhancement of competitive alternatives and the possibility of over building,"² FERC's approach to reviewing pipeline applications is stale. Given the vast changes between today's energy landscape and that of 1999, FERC's approach incentivizes—rather than limits—overbuilding and poses significant economic and environmental risks. **As such, we urge the Commission to reform its pipeline review process to ensure that—above all else—the public interest is protected, which is consistent with FERC's mandate under the Natural Gas Act.**

Times Have Changed

Gas production and pipeline construction have increased dramatically since 1999. Between 1999 and 2016, FERC approved over 400 pipeline projects totaling 180 billion cubic feet per day (Bcf/d) in natural gas capacity (rejecting only two).³ For the first time since 1957, the United States is a net exporter of natural gas.⁴ These changes raise concerns about the impacts of gas production, development, and transportation on climate and on the health, safety, and property rights of communities where pipelines are built.⁵ Further, gains in clean, renewable energy, and energy efficiency⁶ have raised questions about the need for new pipelines, particularly given current pipeline underutilization.⁷

Despite these dramatic changes, FERC still evaluates interstate natural gas pipeline certificate applications the same way as it did in 1999.⁸ As noted by former U.S. Department of Energy Assistant Secretary for Policy and former Massachusetts Department of Public Utilities Commissioner Susan Tierney, Ph.D., the "changes that have occurred in the nearly two decades since FERC's 1999 Policy Statement warrant a fresh look at whether the guidance adopted at that time and applied in certification dockets since then still remains appropriate[.]"⁹

We agree. It's time for a 21st century approach. Accordingly, we write to voice our support for the following modernizations to the Commission's pipeline review process.

21st Century Approach to Pipeline Review

Evaluate project need as the threshold question. The Natural Gas Act requires FERC to determine whether a pipeline project is in the public interest.¹⁰ To answer this inquiry, the Policy Statement directs FERC to first determine whether the proposed pipeline can be paid for without subsidization by existing customers, followed by an evaluation of the project's economic interests.¹¹ But the key determinant in deciding whether a project is in the public interest is whether the project is needed to support energy demands. A project that is not needed to satisfy energy requirements that also will cause permanent environmental and economic impacts is antithetical to the public interest. **Thus, project need should be the threshold determination for whether a project is in the public interest.**

Determine project need through an “all relevant factors” approach. The Policy Statement wisely outlines sample—but not exclusive—factors to be considered when determining whether a project is needed.¹² However, in practice, FERC typically relies exclusively on precedent agreements—contracts between pipeline developers and prospective shippers—to determine project need.¹³ In addition to contradicting the language and intent of the Policy Statement, FERC’s reliance on precedent agreements fails to consider that (1) precedent agreements are not necessarily a good proxy for market need, (2) environmental and/or other factors may override private contractual interests in determining public need,¹⁴ and (3) there may be alternatives to the proposed capacity to meet the purported demand, such as using underutilized existing pipeline capacity or alternative, cleaner energy resources. Further, a true “all relevant factors” approach enables FERC to balance other factors against precedent agreements to determine whether the pipeline is, in the aggregate, in the public interest. **We recommend FERC requiring adherence to the Policy Statement’s “all relevant factors” approach to determining public need. This ensures that the Commission makes a reasoned public interest determination based on all pertinent information.**

Perform deeper review when proposed projects depend on pipeline affiliate agreements. As noted above, the Commission’s near exclusive reliance on precedent agreements to demonstrate pipeline need is problematic, but when these agreements are between pipeline affiliates—which is increasingly the case—an even more troubling situation arises. Because the pipeline developer essentially is contracting with itself, the actual market need for the pipeline is questionable at best. Further, when the affiliate shipper is a monopoly utility, customers end up paying for the pipeline via higher utility bills, despite the Commission never truly determining whether the project is needed. Simultaneously, the utility will reap lucrative profits through FERC-approved rates of return. The mismatch between the 40-50-year lifespan of pipeline assets¹⁵ with the declining prospect of their long-term usefulness cannot be ignored.¹⁶ **Thus, as part of an “all relevant factors” approach, FERC must conduct a deeper review of market need when affiliate precedent agreements are the pipeline developer’s purported evidence of project need.**

Conduct a regionally-focused assessment. The rapid expansion of natural gas production has led pipeline developers to propose competing projects to satisfy identical market demands. While the Policy Statement was intended to protect against overbuilding, too often, FERC reviews natural gas pipeline applications in a bubble, creating the risk of wasteful duplication and infrastructure that is out-of-step with the region’s needs. Considering each pipeline proposal in isolation also prevents the Commission from understanding how similar proposals cumulatively affect climate change, natural resources, and consumer prices. An integrated, more comprehensive review would assess the need for new pipelines based on the energy needs of the region(s) directly affected by the project. Such an assessment would examine factors such as existing and proposed pipeline capacity, long-term energy needs, and state policies. FERC also could address the need for a more regionally-focused review by incorporating some degree of regional planning into FERC’s analysis. FERC already has a model to draw from, as the electric sector has incorporated regional planning through the regional transmission organizations (RTOs) and other planning constructs in areas without RTOs. **We recommend FERC’s adoption of a regionally-focused review.**

Fully evaluate climate pollution and other environmental impacts. FERC’s current approach discounts the quantitative and qualitative relevance of downstream environmental impacts. Last year, the D.C. Circuit vacated a FERC certificate due to FERC failing to quantify and consider downstream indirect greenhouse gas effects.¹⁷ Fortunately, scientifically tested tools (such as the Social Cost of Carbon and the Social Cost of Methane) exist today that allow the Commission to monetize environmental impacts and neatly incorporate them into a public interest analysis. Further, as climate change “is the single most significant threat to humanity, fundamentally threatening our environment, economy, national security and human health,” it is “difficult to understand how” FERC can satisfy its “hard look” requirements under the National Environmental Policy Act (NEPA)¹⁸ without using every available tool to consider all direct, indirect, and cumulative environmental impacts, including downstream effects. **FERC must consider these environmental impacts in its “all relevant factors” and NEPA reviews.**

Ensure meaningful opportunities for public participation. Given that FERC is responsible for determining whether a project is in the public interest, it is critical to ensure that every stakeholder—regardless of resources—has the tools to fully participate in FERC proceedings. The Commission has recognized the importance of maintaining public confidence in FERC.¹⁹ Public confidence could be strengthened by holding hearings when there are disputed issues of material fact and through the creation and funding of a FERC Office of Public Participation.²⁰ Ensuring meaningful public participation also includes developing deliberate, concrete methods to (1) incorporate the voices of environmental justice communities as required by Executive Order 12,898,²¹ and (2) consult and collaborate with all tribal communities.²² **FERC should adopt these and other ways to ensure public participation in pipeline certificate application reviews.**

Conclusion

We again applaud the Commission for deciding to initiate this important review. We look forward to a robust process that gives careful, thorough consideration to the critical issues presented by the Commission’s review of proposed pipelines and provides sufficient time and meaningful opportunity for all stakeholders to present their views. We also welcome any opportunity to meet with you and Commission staff to discuss these proposals. Thank you for your attention to this matter.

Sincerely,

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¹ News Release, FERC, FERC to Review its 1999 Pipeline Policy Statement (Dec. 21, 2017), <https://www.ferc.gov/media/news-releases/2017/2017-4/12-21-17.asp#.WsY1WojwaUk>.

² Notice of Proposed Rulemaking, *Regulation of Short-Term Natural Gas Trans. Servs.*, at 161 (July 29, 1998), FERC Docket No. RM98-10-000.

³ Susan Tierney, *Natural Gas Pipeline Certification: Policy Considerations for a Changing Industry*, ANALYSIS GROUP (Nov. 6, 2017), at 12. In fact, while coal historically has been the dominant electricity source, in 2016, natural gas took over. *Natural gas expected to surpass coal in mix of fuel used for U.S. power generation in 2016*, EIA (Mar. 16, 2016) <https://www.eia.gov/todayinenergy/detail.php?id=25392>.

⁴ Naureen S. Malik, *U.S. Becomes a Net Gas Exporter for the First Time in 60 Years*, BLOOMBERG (Jan. 11, 2018), <https://www.bloomberg.com/news/articles/2018-01-10/u-s-became-a-net-gas-exporter-for-the-first-time-in-60-years>.

⁵ See, e.g., Janet Currie, Michael Greenstone, & Katherine Meckel, *Hydraulic fracturing and infant health: New evidence from Pennsylvania*, SCIENCE ADVANCES (Dec. 13, 2017), <http://advances.sciencemag.org/content/3/12/e1603021.full> (concluding that fracking reduces the health of infants born to mothers who live within 3 km of a well-site during pregnancy).

⁶ See, e.g., Tierney, *supra* note 3, at 27-28 (noting the expansion of renewable generation since 1999). The U.S. Energy Information Association (EIA) projects that, by 2019, wind- and solar-powered generation will increase by 81,000 and 83,000 megawatt hours per day (MWh/d), respectively. *Short-Term Energy Outlook*, EIA (Mar. 6, 2018), <https://www.eia.gov/outlooks/steo/>.

⁷ *Natural Gas Infrastructure Implications of Increased Demand from the Electric Power Sector*, DOE (Feb. 2015), at vi (“Higher utilization of existing interstate natural gas pipeline infrastructure will reduce the need for new pipelines.”)

⁸ Statement of Policy, *Certificate of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999).

⁹ Tierney, *supra* note 3, at 36.

¹⁰ 15 U.S.C. § 717f (2012).

¹¹ Statement of Policy, *supra* note 8, at 18-19, 23.

¹² Statement of Policy, *supra* note 8, at 23.

¹³ E.g., *National Fuel Gas Supply Corp.*, 158 FERC ¶ 61,145, at 3 (2017) (Commissioner Bay, separate statement); Emily Pitlick Mallen & Katy Lukaszewski, *Pipeline Outlook: How FERC Reliance on Precedent Agreements Could Change*, TEXAS LAWYER (Mar. 1, 2018), <https://www.law.com/texaslawyer/2018/03/01/pipeline-outlook-how-ferc-reliance-on-precedent-agreements-could-change/>.

¹⁴ For example, the environmental consequences of new natural gas infrastructure—both in the ground and in the atmosphere—far surpass the expiration of initial shipper contracts. Compare, e.g., *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,208, at P 4 (2016) (noting that the precedent agreements upon which FERC evaluated need were for 20-year initial terms) with *The Interstate Natural Gas Transmission System: Scale, Physical Complexity and Business Model*, INGAA (Jan. 1, 2010), at 1 (“Given the dedication to routine and robust maintenance, it is not unusual for pipelines and equipment installed 50 or more years ago to still be in operation.”).

¹⁵ See *Interstate Natural Gas Transmission System*, *supra* note 14, at 1.

¹⁶ See Tierney, *supra* note 3, at 29 (noting that “the increasing penetration of large-scale renewable projects, small-scale non-fossil distributed energy resources, operational controls on the system, and flat demand . . . may have the effect of dampening, offsetting, and/or significantly altering the shape of the demand for natural gas in the years ahead.”).

¹⁷ *Sierra Club v. FERC*, 867 F.3d 1357, 1374-75 (D.C. Cir. 2017).

¹⁸ *Florida Southeast Connection, LLC*, 162 FERC ¶ 61,233, at 2-3 (2018) (Commissioner Glick, dissenting); see, e.g., *Town of Orangetown v. Gorsuch*, 718 F.2d 29, 35 (2d Cir. 1983), *cert. denied*, 465 U.S. 1099 (1984) (outlining the “hard look” standard under NEPA).

¹⁹ See Commissioners LaFleur & Glick’s comments in *DTE Midstream Appalachia, LLC*, 162 FERC ¶ 61,238, at 2 (2018) (Commissioners LaFleur & Glick, dissenting). See also Robert Walton, *New FERC chair wants to make agency more transparent*, UTILITYDIVE (Dec. 21, 2017), <https://www.utilitydive.com/news/new-ferc-chair-wants-to-make-agency-more-transparent/513605/>.

²⁰ See generally *Petition to Initiate a Rulemaking to Establish The Office of Public Participation As Established By Congress And To Fund Its Work* (Mar. 7, 2016), FERC Docket No. RM16-9-000; see also Marie Cusick, *Groups ask FERC for public participation office*, STATEIMPACT (Mar. 16, 2016, 4:00 p.m.), <https://stateimpact.npr.org/pennsylvania/2016/03/16/groups-ask-ferc-for-public-participation-office/>.

²¹ Exec. Order 12,898, *Fed. Actions to Address Env'tl. Justice in Minority Populations and Low-Income Populations*, 59 Fed. Reg. 32 (Feb. 16, 1994).

²² See, e.g., *Guide on Consultation and Collaboration with Indian Tribal Governments and the Public Participation of Indigenous Groups and Tribal Members in Env'tl. Decision Making*, NAT’L ENVTL. JUSTICE ADVISORY COUNCIL, INDIGENOUS PEOPLE’S SUBCOMMITTEE (Nov. 2000), https://www.epa.gov/sites/production/files/2015-03/documents/ips-consultation-guide_0.pdf.