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Chairman Manchin, Ranking Member Barrasso, and Members of the Committee:

Thank you for the opportunity to appear before the Committee and share my thoughts about FERC's recent policy statements. It is my firm belief that these policy statements should never have issued. They are ill-conceived, they are unlawful, and they are certain to undermine FERC's mission under the Natural Gas Act "to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices."[1]

The inevitable effect of these policy statements will be to chill investment in natural gas and Liquefied Natural Gas (LNG) infrastructure. In America, we rely on private investment to deliver our essential services. The companies that provide these services do so under the supervision of regulators like FERC and state public utility commissions. Nevertheless, though regulated, these companies are rational economic actors. They will not invest money, they cannot invest money, if the cost of capital is too high. And nothing drives up the cost of capital like uncertainty.

These policy statements do nothing but create uncertainty. They have thrown the entire process of planning, financing, and applying for a natural gas pipeline certificate or approval for an LNG terminal into disarray. FERC has now abandoned its longstanding, strict reliance on the simplest and most probative evidence of need for a pipeline: precedent agreements between project sponsors and shippers seeking to purchase a pipeline's capacity before construction even begins. FERC will instead employ a vague multi-factor balancing test, in which it will exercise its judgment in place of the market's, to determine whether a project is "needed" or not.

The policy statements also cause unnecessary and unjustifiable delay in what is an already lengthy process. The Interim Greenhouse Gas (GHG) Policy Statement establishes a wholly arbitrary threshold of 100,000 metric tons per year of CO2e, and then declares that projects with emissions above that threshold will be presumed to have a significant effect on the environment. Such projects will therefore be subject to a full Environmental Impact Statement in our NEPA review instead of a shorter, faster Environmental Assessment. The reasons offered in support of that 100,000-ton threshold? Administrative efficiency, consistency with other agencies practices (though under different statutes and unrelated to the effects of GHG emissions on climate change), and inclusivity, and because the 100,000-ton figure would encompass 99% of the emissions of FERC-jurisdictional projects. Not a single one of these justifications bears on the specific question of environmental effects and the threshold established cannot meaningfully inform our decision making. But this threshold will have the inevitable consequence of extending the time that the majority of our project applications are under review, likely adding many months to the process. This is a questionable policy change given the fact that just last Friday, two weeks after the

[1] *NAACP v. FPC*, 425 U.S. 662, 669-70 (1976).

issuance of the GHG policy statement, FERC issued an EIS in which it declared that it could not assess the significance of the effects of a particular project's emissions on climate change.[2]

The policy statements have already created crippling uncertainty as to applicants' obligations to remediate or mitigate a project's GHG emissions. The policy statements tell applicants that FERC "expect[s]"[3] them to mitigate their direct and indirect emissions—meaning FERC has decided that pipeline sponsors are the entities responsible for remediating the emissions of gathering facilities *upstream* and the retail customers, electrical generators, and industrial consumers *downstream*. This assertion of jurisdiction is unjustified and unjustifiable, and FERC fails to explain why the providers of *transportation service* should bear the responsibility for those emissions. Regardless, FERC then studiously avoids explaining how remediation for such emissions must be conducted—it offers suggestions, but no direction—and it does not explain how much mitigation is necessary. Applicants are left to guess how much and what type of mitigation will please FERC, which has also reserved to itself the privilege of requiring yet *further* mitigation as a condition of the pipeline certificate should it deem the applicant's efforts insufficient.

How can any company accurately assess risk under such a regime? At *every stage* in the new certificate process, the applicants will have to reassess the economic fundamentals of their proposed projects. It appears as though FERC designed this process in order to make it impossible to rationally allocate capital.

These policies will have a direct effect on electric rates and reliability. The bulk power system and the natural gas pipeline system are deeply intertwined. In a series of orders over the last year, FERC has seemingly done everything it can to undermine the wholesale electricity markets. In PJM, which covers 13 states and the District of Columbia, FERC removed the protections that prevent state-subsidized intermittent resources from driving dispatchable resources like natural gas or nuclear plants out of business. Through these orders, FERC has placed its thumb firmly on the scale in favor of intermittent resources and against the generators that provide critical reliability in the organized electric markets. As natural gas costs go up due to supply constraints and burdensome regulation, the all-in cost of electricity will rise while electric reliability is threatened.

FERC, however, is not the only federal agency that has natural gas and other forms of reliable, affordable energy in its sights. While FERC's actions obstruct the development of new pipeline infrastructure, the Department of Transportation's Pipeline and Hazardous Materials Safety Administration (PHMSA) is contemplating onerous over-regulation of *existing* infrastructure, in a move greatly expanding its jurisdiction.[4] On the production side, the Department of the Interior has hindered leasing processes for

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[2] FERC Staff February 25, 2022 Final Environmental Impact Statement for Kern River Transmission's Delta Lateral Project, Docket No. CP21-197-000, at 2 ("FERC staff is unable to determine the significance level of climate change impacts.").

[3] *Certification of New Interstate Nat. Gas Facilities*, 178 FERC ¶ 61,107, at P 74 (2022) (Danly and Christie, Comm'rs, dissenting) .

[4] *See*, *e.g*, *Pipeline Safety: Safety of Gas Gathering Pipelines: Extension of Reporting Requirements, Regulation of Large, High-Pressure Lines, and other Related Amendments*, Final Rule, Docket No. PHMSA-2011-0023, 86 Fed. Reg. 63266 (Nov. 15, 2021); *New Federal Regulations Add More than 400,000 Miles of "Gas Gathering" Pipelines Under Federal Oversight*, PHMSA News Release, at 1 (issued Nov. 15, 2021) (the "final rule expands Federal pipeline safety oversight to all onshore gas gathering pipelines," "appl[ies] federal pipeline safety regulations to tens of thousands of miles of unregulated gas gathering pipelines," and "for the first time—[will] require pipeline operators to report safety information for all gas gathering lines, representing more than 425,000 additional miles covered by Federal reporting requirements."), https://www.phmsa.dot.gov/news/new-federal-regulations-add-more-400000-miles-gas-gathering-pipelines-under-federal-oversight; *id.* ("All together, PHMSA estimates that there are at least 425,000 miles of onshore gas gathering lines that have not been subject to PHMSA oversight but will be after this rule takes effect.").

the development of new sources of energy on federal lands.[5] Nuclear power, the cleanest and most reliable source of electricity, is also drawing fire. Just last week, the Nuclear Regulatory Commission repealed reforms aimed at streamlining relicensing procedures for nuclear plants.[6] This will make it more difficult for nuclear power plants—which contribute enormously to the stability of the electric system—to remain in operation.

Perhaps most insidiously, the federal government is taking aim at *financing* natural gas and other forms of reliable, affordable energy. A constellation of federal financial regulatory agencies[7] have begun rulemakings to codify requirements aimed at shaming companies away from investing in reliable, affordable energy, while shielding fiduciaries from liability for making otherwise economically unjustifiable decisions.[8] Many Americans would be shocked to learn that their retirement savings are being weaponized to advance the political agendas of the companies that manage their accounts. Even the Federal Reserve is participating, risking its status as an apolitical entity, free from influence.[9] While proponents of these actions justify them in the name of addressing the risks of climate change, they too rest on unsteady legal authority. Congress declared in the Natural Gas Act that the sale of natural gas is affected with a public interest, yet today the administrative state has American natural gas squarely in its crosshairs.

Regardless of one's ultimate vision of America's ideal energy mix, the simple, undeniable reality is that, today, we need abundant natural gas and supporting infrastructure. Without it, many Americans will suffer energy insecurity as the costs of natural gas and electricity rise. And it is virtually certain that the stability of the bulk power system will suffer. As NERC, the entity charged with developing FERC's mandatory reliability standards recently said, "natural gas is the reliability 'fuel that keeps the lights on,' and natural gas policy must reflect this reality."[10] In some regions, reserve margins are already

[5] *Barrasso: BLM Ignores Deadline, Refuses to Hold Onshore Oil and Gas Lease Sales*, Senate Committee on Energy & Natural Resources, Republican News (Feb. 16, 2022) ("'The Biden administration continues to defy the courts and the law,' said Barrasso. 'The BLM has blown past a critical deadline required to hold the first federal onshore oil and gas lease sale this year. As a result, Wyoming and other Western states will now miss oil and gas lease sales for the fifth quarter in a row.'") (emphasis in original), https://www.energy.senate.gov/2022/2/barrasso-blm-ignores-deadline.

[6] *Fla. Power & Light Co (Turkey Point Nuclear Generating Units 3 and 4)*, Memorandum and Order of the Nuclear Regulatory Commission, Docket Nos. 50-250-SLR, 2022 WL 596817 (Feb. 24, 2022).

[7] See, e.g., *Acting Chair Allison Herren Lee, Public Input Welcomed on Climate Change Disclosures*, U.S. Securities & Exchange Commission (Mar. 15, 2021), https://www.sec.gov/news/public-statement/lee-climate-change-disclosures*; CFTC Acting Chairman Behnam Establishes New Climate Risk Unit*, CFTC Press Release, at 1 (issued Mar. 17, 2021), https://www.cftc.gov/PressRoom/PressReleases/8368-21 (Acting Chairman Rostin Behnam announced "he has established the Climate Risk Unit (CRU) to support the agency's mission by focusing on the role of derivatives in understanding, pricing, and addressing climate-related risk and transitioning to a low-carbon economy.").

[8] *Request for Information on Possible Agency Actions to Protect Life Savings and Pensions from Threats of Climate-Related Financial Risk*, Request for Information, 87 Fed. Reg. 8289 (Feb. 14, 2022); *Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights*, Proposed Rule, 86 Fed. Reg. 57272 (Oct. 14, 2021).

[9] Press Release, Federal Reserve Board issues statement in support of the Glasgow Declaration by the Network of Central Banks and Supervisors for Greening the Financial System (NGFS), Nov. 3, 2021, https://www.federalreserve.gov/newsevents/pressreleases/other20211103a.htm#:~:text=While%20the%20primary%20responsibility%20for,of%20financial%20institutions%20and%20the.

[10] NERC, Long Term Reliability Assessment, at 5 (Dec. 2021), https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_LTRA_2021.pdf.

dangerously thin[11] and in the Northeast, we have observed a convergence of the prices of natural gas in New England and Europe as the region remains dependent upon LNG imports due to its inadequate pipeline infrastructure.[12]

I would like to close by taking a moment to dispel a misconception. The Members of this Committee have likely heard the argument that the contents of these policy statements were required by recent federal appellate court decisions. This is not true. The policy statements read far too much into a handful of D.C. Circuit opinions—most notably *Sabal Trail*[13] and *Birckhead*.[14] *Sabal Trail* has a narrow holding and cannot credibly be described as requiring FERC's unprecedented assertion of jurisdiction over the whole of the natural gas industry's emissions—from upstream production to downstream consumer use. And you do not have to take my word for it. In a case decided eighteen months later, *Appalachian Voices*,[15] the D.C. Circuit itself stated, in clear terms, what *Sabal Trail* requires of the Commission—nothing more than to provide an upper-bound emissions estimate and to explain why FERC does not believe it can calculate the effects of the project on climate change.[16] So long as FERC does just this, it has fully complied with the requirements of *Sabal Trail*. And, until last year, the Commission followed this exact approach in its orders and those orders have been affirmed. As to *Birckhead*, that case cannot require FERC to do *anything*. FERC won. And though the court did spill some ink discussing what it wished FERC would have done differently when assessing pipeline applications, it is black letter law that such statements are not binding, they are dicta. The only *holding* of that case was that the court lacked jurisdiction to entertain the petition for review. While it may be convenient for FERC to appeal to *Sabal Trail* and *Birckhead* as political cover for the seizure of jurisdiction embodied in these new policy statements, this maneuver, upon the barest inspection of the case law, is simply unconvincing.

At a time when natural gas and electric reliability are of primary concern, as prices are rising rapidly across the entire economy, and as we witness day by day and in the starkest possible terms how critical energy independence and energy security are to the United States and its allies, FERC's unwise and legally-unnecessary policy statements will impede the development of strategically critical and economically fundamental infrastructure at exactly the wrong time.

Thank you and I look forward to your questions.

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[11] *See* Kevin Robinson, *Agencies scramble to avoid summer blackouts*, ALBUQUERQUE J., Feb. 8, 2022 ("[T]his summer, [Public Service Company of New Mexico] projects less than a 1% margin . . . [a]nd in July and August, it's actually a negative 3.4% reserve margin, meaning the utility doesn't even have enough generating capacity to meet normal peak demand during those months . . . .").

[12] J. Robinson, Europe's gas supply concerns, high prices put New England forward market at risk, GAS DAILY, Mar. 1, 2022, at 2-3 (stating Algonquin city-gates January 2023 forward trades top $23/MMBtu and Dutch TTF winter 2022-23 forwards trade around $30/MMBtu).

[13] *Sierra Club v. FERC*, 867 F.3d 1357 (D.C. Cir. 2017) (*Sabal Trail*).

[14] *Birckhead v. FERC*, 925 F.3d 510 (D.C. Cir. 2019).

[15] *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019) (per curiam) (unpublished).

[16] *Id.* at *2 ("FERC provided an estimate of the upper bound of emissions . . . , and it gave several reasons why it believed petitioners' preferred metric, the Social Cost of Carbon tool, is not an appropriate measure of project-level climate change impacts and their significance under NEPA or the Natural Gas Act. That is all that is required for NEPA purposes.")