March 1, 2022

The Honorable John Barrasso
Ranking Member
Committee on Energy and Natural Resources
U.S. Senate
Washington, D.C. 20510

Dear Senator Barrasso,

Thank you for your February 15 letter. I share your view that the Federal Energy Regulatory Commission's (FERC or the Commission) now-issued policy statements must provide for greater regulatory certainty and enable the Commission to act on natural gas certificate applications in a timely manner. I believe that the actions the Commission took on February 17 will do just that.

As I have noted in our earlier correspondence, the federal courts have, on numerous occasions, invalidated governmental permits and authorizations needed to develop interstate pipelines, including several FERC interstate natural gas pipeline certificates of public convenience and necessity. Those court decisions generally found the relevant government agencies failed to comply with applicable statutory and regulatory requirements.

FERC's previous refusal to adequately consider the impacts of a proposed project's reasonably foreseeable greenhouse gas emissions on climate change has been one of the principal areas in which the courts have found the Commission's decisionmaking deficient. The U.S. Court of Appeals for the D.C. Circuit has clearly directed FERC to consider a project's impact on climate change as part of our decisionmaking under sections 3 and 7 of the Natural Gas Act (NGA).[1]

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[1] *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1331 (D.C. Cir. 2021) ("Because the Commission's analyses of the projects' impacts on climate change and environmental justice communities were deficient, the Commission must also revisit its determinations of public interest and convenience

Our constitutional structure demands that, as an administrative agency, the Commission must heed the directly applicable decisions of the federal courts that review our actions.[2] That is true whether we agree or disagree with those decisions. So long as those decisions are binding law, we have no choice but to follow them.

The policy statements the Commission approved will allow us to do just that by providing a framework for considering applications for LNG facility and pipeline project approvals under NGA sections 3 and 7 that comply with our responsibilities under the law and, as a result, are more capable of withstanding judicial scrutiny. This benefits all stakeholders, including both the developers who ultimately bear the financial cost of delays and cancelations caused by invalidated permits and authorizations, as well as the public that expects needed energy infrastructure to be delivered on time and on budget.

Below, I discuss the specific questions you pose in order.

1. Will you reconfirm that the Commission will not put any application currently under review on hold while it completes its work on these new policies? If not, why not?

Yes. I reiterate my commitment to put up certificate orders when there are votes to approve them. Consistent with that commitment, I can assure you that the Commission has not—and will not—hold up orders that are ready to issue and are

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under Sections 3 and 7 of the NGA."); *Birckhead v. FERC*, 925 F.3d 510, 519 (D.C. Cir. 2019) (the Commission may deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment); *Sierra Club v. FERC*, 867 F.3d 1357, 1373 (D.C. Cir. 2017) (explaining that "Congress broadly instructed the agency to consider "the public convenience and necessity" when evaluating applications to construct and operate interstate pipelines," which requires it to balance "the public benefits against the adverse effects of a project, including adverse environmental effects").

[2] The basic principle that the judicial branch ascertains and interprets the law and the executive branch applies it pursuant to those determinations dates back to the Founding. *See Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

supported by any majority of Commissioners based on these policy statements or work related thereto.

2. Will you confirm that projects under review prior to issuances in PL18-1-000 or PL21-3-000 or related proceedings will not be subject to those issuances? If not, why not?

The Commission's recent policy statements apply to all pending applications. As discussed above, I believe that these policy statements will bring the Commission into compliance with the guidance we have received from the federal courts and insulate the certificates we issue from further risk on appeal. That, in turn, will allow the Commission to "act on pending applications under sections 3 and 7 of the NGA without undue delay and with an eye toward greater certainty and predictability for all stakeholders."[3]

I appreciate—and carefully considered—the concern that applying the policy statements to pending proceedings might increase uncertainty in the short-term. But, I was ultimately convinced that any such uncertainty was outweighed by the potentially far greater long-term uncertainty created when deficient certificates and authorizations are vacated and remanded by the federal courts of appeals. Nevertheless, I believe the Commission should—and will—take a pragmatic approach in applying these policy statements to pending proceedings. To the extent possible, we should give due consideration to the fact that companies submitting previously filed applications did not have the benefit of the guidance provided in the two policy statements.

3. If the Commission decides that it is required by the courts and the Natural Gas Act to consider either downstream or upstream greenhouse gas emissions associated with a natural gas project, how will it assure that it is not "double-counting" or exaggerating greenhouse gas effects for example, by attributing those effects to pipelines as well as to related facilities such as storage facilities or compressor stations?

As the Commission explained in the interim greenhouse gas policy statement, the D.C. Circuit has required the Commission to consider a project's reasonably foreseeable greenhouse gas emissions, which may include both upstream and

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[3] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108, at P 1 (2022).

downstream emissions.[4] One of the goals of the policy statement is to add greater precision to how the Commission estimates those reasonably foreseeable emissions, both to improve our own decisionmaking and to ensure that the Commission is assessing a project's contribution to climate change as accurately as possible.

One of the most important ways in which the Commission is pursuing that goal is by moving from estimates based on a so-called "full burn" analysis, which estimates the greenhouse gas emissions that would be caused if the pipeline operated at maximum capacity 24 hours a day, 365 days a year, to using estimates that reflect the projected utilization rate of the project based on the precedent agreements and other record evidence that supports the need for the project. This approach will provide a more realistic estimate of a project's greenhouse gas emissions and, as a result, help address concerns about overstating or exaggerating a project's contribution to climate change. In addition, the Commission will consider record evidence of other factors that, in practice, will reduce the emissions attributable to a proposed project, including, for example, reductions in greenhouse gas emissions caused by switching to natural gas from higher-emitting fuels and mitigation measures adopted pursuant to other greenhouse gas mitigation programs, such as those required by state or other federal law.

Finally, with respect to your specific concern regarding the potential for "double-counting" emissions by attributing them to multiple facilities, I agree that must be avoided. Regarding compressor stations, any emissions attributable to the incremental capacity created by a new or upgraded station would typically be considered as part of a broader pipeline application and not through separate inquiry that might double-count those emissions. In addition, when it comes to storage facilities, the Commission considers the direct emissions associated with the construction or operation of a facility, not emissions from the gas stored in the storage field. This similarly eliminates the potential for double-counting emissions.

4. For Chairman Glick, Commissioner Clements, and Commissioner Phillips: why isn't it possible to consider downstream or upstream greenhouse gas emissions with an EA without performing an EIS?

Under the National Environmental Policy Act, an agency must prepare an Environmental Impact Statement (EIS) for every "major [f]ederal action[] significantly

[4] *Id.* P 13 (citing *Birckhead v. FERC*, 925 F.3d 510, 518-19 (2019)).

affecting the quality of the human environment."[5] Agencies may, in their discretion, first prepare an Environmental Assessment (EA) for a proposed action that is not likely to have significant effects or when the significance is unknown, to determine whether an EIS is necessary for a particular action.[6] Preparation of a legally defensible EA requires the agency to have adequate information to support a finding that a proposed action, if approved, will have no significant impact on the human environment. Courts have emphasized that "[i]f any 'significant' environmental impacts might result from the proposed agency action[,] then an EIS must be prepared" prior to agency action.[7] The failure to prepare a required EIS is a basis to vacate the relevant federal permit or authorization.[8]

In the interim greenhouse gas policy statement, the Commission announced a rebuttable presumption that projects with reasonably foreseeable greenhouse gas emissions greater than 100,000 tons would be found to significantly contribute to climate change.[9] Although the Commission has solicited comments on that policy statement, particularly with respect to the 100,000 ton presumption, under current

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[5] 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3.

[6] 40 C.F.R. § 1501.5, 1508.1(h).

[7] *Grand Canyon Tr. v. FAA*, 290 F.3d 339, 340 (D.C. Cir. 2002) (quoting *Sierra Club v. Peterson*, 717 F.2d 1409, 1415 (D.C. Cir. 1983) (emphasis omitted)). Put another way, "if the court determines that the agency's proffered reasons for its [finding of no significant impact] are arbitrary and capricious and the evidence in a complete administrative record demonstrates that the project or regulation *may* have a significant impact, then it is appropriate to remand with instructions to prepare an EIS." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1179 (9th Cir. 2008) (emphasis added) (citing cases).

[8] *See, e.g.*, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1052-53 (D.C. Cir. 2021), *cert. denied sub nom. Dakota Access, LLC v. Standing Rock Sioux et al.*, No. 21-560, 2022 WL 516382 (U.S. Feb. 22, 2022).

[9] *Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews*, 178 FERC ¶ 61,108 at P 81.

policy, the potential that a project's reasonably foreseeable greenhouse gas emissions could exceed 100,000 tons necessitates the preparation of an EIS under the law.[10]

Over the last year, the Commission has been able to process a full EIS to consider a project's contribution to climate change in as little as 10 months, and we plan on adding extra personnel to further accelerate the process. I recognize that the additional time is not negligible, and, as you note in your letter, is likely to be especially important in areas of the country with a limited construction season. Nevertheless, I believe the additional legal durability provided by adequately considering the project's contribution to climate change is well worth it, especially when weighed against the considerable cost, in terms of both time and money, of a potential vacatur.

As a final note, your letter inquired as to the status of the Clear Creek Expansion Project.[11] As this is a pending contested application, I cannot comment on the merits of the proceeding. As you indicated, the Final Environmental Impact Statement (FEIS) for the project is scheduled for issuance in two weeks on March 15, 2022. With a completed environmental review, the Commission can then consider the record and act on the certificate application.

Thank you for the opportunity to continue to engage with you on these important matters. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

Richard Glick
Chairman

[10] *See supra n.7.*

[11] Spire Storage West, LLC, CP21-6-000