

U.S. Senate Committee on Energy and Natural Resources
September 28, 2021 Hearing: *A Review of the Administration of Laws*
Under the Jurisdiction of the Federal Energy Regulatory Commission
Questions for the Record Submitted to the Honorable James Danly

Questions from Ranking Member John Barrasso

Question 1: At last week’s FERC open meeting, you said the following; *“I am perplexed by my colleagues’ reluctance to employ our section 206 authority to address the widespread failures of CAISO’s markets. How much more serious do the problems in California have to become for my colleagues to agree that we must take affirmative steps to address what is clearly a crisis?”* And then you went on to say: *“Do we require a total breakdown of the CAISO power system and markets before we will act?”*

- Please elaborate on your comments regarding California markets. What course of action do you recommend?

RESPONSE:

I recommend a full Federal Power Act (FPA) section 206 investigation into the California markets to investigate evident problems those markets are suffering. Accurate price signals would attract and retain sufficient generation with the right attributes to ensure resource adequacy and system reliability. It would appear that the California ISO (CAISO) markets are failing to achieve that goal. Specifically, we should examine: 1) why CAISO suffers a chronic lack of sufficient generation capacity and has consequently needed to rely on imports of power from other states; 2) the effects of the price suppression in CAISO’s markets caused by state subsidies for intermittent generation; 3) the effect of, and justification for, CAISO’s wide-spread use of reliability must-run agreements which are meant to be rarely employed to relieve temporary reliability problems; 4) CAISO’s apparent over-estimation of the reliability benefits of intermittent and demand response resources; and 5) whether CAISO’s structure and tariff are capable of delivering just and reasonable rates and, if not, what replacement rate should be imposed.

Question 2: At Secretary Granholm’s nomination hearing, I asked, in writing, if the Secretary agreed that electricity prices should reflect the proper value of dispatchable resources. She responded, “The ability of generation capacity to respond when called upon is one of many important attributes of performance that **should be valued in markets.**” (emphasis added). I asked, in writing, the same question to Deputy Secretary Turk at his nomination hearing. He agreed with Secretary Granholm.

- Do you agree with Secretary Granholm that the ability of electric generation capacity to dispatch when called upon should be valued in wholesale markets? If so, how can FERC’s policies help or hinder.

RESPONSE:

The FPA clearly divides jurisdiction over the electric system between the states and FERC, reserving to the states the power to choose what type of generation is built within their borders. Our jurisdiction extends to the oversight of rates for wholesale sales of power in interstate commerce. Accordingly, observing that statutory

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limit, FERC could accept a tariff filing that reflects the dispatch characteristics and reliability benefits in market prices. All of our organized markets should immediately consider reforms to their markets to take these attributes into account.

Question 3: In your testimony concerning the Clean Electricity Performance Program, as reported by the House Committee on Energy and Commerce, “when markets will fail to produce correct price signals as a result of the new price signals and penalties, they are going to fail to accomplish the resource adequacy goals that the markets have taken over from the states... when we fail to have proper resource adequacy achieved by the markets then the lights don’t turn on.”

- Please elaborate on you prior statement and provide examples.

RESPONSE:

The competitive bulk power markets are designed to provide reliable electric service at lowest cost. Locational marginal prices signal when and where generation and other investments are needed. These signals, when properly formed by the markets, provide the incentives necessary to attract needed new entry and continue to provide the incentive to retain needed existing generation resources. If Congress were to superimpose a new regime of penalties and subsidies upon our markets, it would profoundly distort these market signals. Generators offering into the market will have to consider not only their own costs, but the offering generators will also have to factor in their performance metrics under the CEPP. These price distortions will warp the incentive structures that the markets rely upon to ensure resource adequacy. Worse yet, reliability will suffer. Under the CEPP, intermittent resources will become more valuable under the payment and penalty scheme and, despite the fact that they are inherently less reliable, they will be preferred by developers over more reliable, dispatchable generation.

The inevitable result of the systemic market failures caused by subsidy programs such as the CEPP is the failure to achieve resource adequacy and the reliability events that will ensue. We have seen such market failures most starkly in the recent reliability events in California. We will see more of them in different regions of the country as long as market prices are distorted by the entry of subsidized intermittent resources that can offer their capacity into the market at suppressed prices, driving the market clearing prices down, and depriving more expensive, dispatchable generation of the revenue needed to remain solvent.

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Question 4: During the hearing Commissioner Clements said, “RTO’s have been saving customers billions of dollars year after year after year for several decades now.”

- Please provide your own views on the matters discussed by Commissioner Clements.

RESPONSE:

It is clear that RTOs have saved customers billions of dollars on *electricity* costs, but the all-in costs of electric service to customers have not dropped as much as is commonly believed. At the end of the day, what matters to ratepayers is the all-in bill that they receive. That bill includes both the cost of the electricity consumed and the cost of the transmission service required to get the electric power to the ratepayer. As the markets have expanded, transmission costs make up an ever-growing proportion of consumers’ all-in energy bills. The Commission should not adopt policies that would encourage a rush to build transmission in the hope that ratepayers will benefit from inexpensive intermittent power without comprehensively studying the rate effects of the transmission service necessary to bring remotely produced intermittent power to ratepayers, and assuring itself that in every case in which transmission is built, that transmission provides economic or reliability benefits to the ratepayers who will ultimately bear the cost. Given the expense of transmission service, I am concerned that much-touted benefits of bringing intermittent power to ratepayers by means of a large-scale transmission build-out may prove illusory.

Commissioner Clements went on to state during the hearing that “RTOs have been saving customers billions of dollars year after year after year for several decades now[.] [W]e should be thinking about what are the things that are really hard to get done. . . . [O]nce you’ve been in an RTO past some number of years[,] it’s not hard to keep saving customers money.”¹ Her comments appear to imply that the value of RTO membership to the ratepayer is so self-evident that no public utility commission or utility would ever question the benefits of membership. If that, indeed, is the correct implication to be drawn from my colleague’s comments, I respectfully disagree. It is simply untrue that every state and utility believes that our organized markets deliver the best electric service for their citizens and ratepayers. Many regions of the country, like the Southeast, are not in an organized market and have made it clear that they do not want to be.² We know that, as recently as

¹ Full Committee Hearing To Review Administration Of Laws Within FERC’s Jurisdiction Before the Senate Committee on Energy and Natural Resources, 117th Cong. (Sept. 28, 2021), [Full Committee Hearing To Review Administration Of Laws Within FERC's Jurisdiction... \(senate.gov\)](#) (Comm’r Clements at 2:23:34-2:24:06).

² See, e.g., Alabama Power Co., Docket No. ER21-1111-000, at 9 (filed Feb.12, 2021) (describing existing bilateral market and stating that as a result of the Southeast Energy Exchange Market “the bilateral market structure in the Southeast will remain relatively unchanged”); see also Ellie Potter, S&P Global Platts, *Low-cost renewable energy integration causes some experts to question RTO efficacy* (Jul. 23, 2021) (“While RTOs may work well in some regions, state-regulated, vertically integrated utilities are optimal for states like Georgia, said Tricia Pridemore, chairman of the Georgia Public Service Commission said [sic] during a July 22

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last month, the Louisiana Public Service Commission began actively considering withdrawal from MISO.³ Dominion availed itself of the fixed resource requirement (FRR) option (thereby relieving itself of its 3-year forward obligation) before the last PJM auction,⁴ and one of its affiliates is a filing party in the recent Southeastern Energy Exchange Market submission.⁵ As transmission costs rise and price-distortive subsidies imperil resource adequacy and system reliability, I predict more utilities and public utility commissions will see recent reliability events like those in California as admonitions to be heeded.

Question 5: During the hearing Chairman Glick responded to Senator Hoeven:

Commissioner Danly is correct in terms of how he characterizes the law. I think the problem is that the courts keep on telling us that we keep on getting it wrong. And we are not expediting things; what we are doing is delaying things because every time we're supposed to perform an EIS and we prepare an EA, we just ignore climate change altogether. The courts say you got it wrong, you've got to do it all over again. That costs billions of dollars and extra time for these pipeline projects. I think certainty is much more important than trying to decide whether we can do something quickly, and do it on the cheap. Every time we do it on the cheap, the courts tell us we got it wrong... We are attempting to expedite the process, Senator. Thanks for the question. I think one of the things, as we had the discussion several months ago, we were trying to prepare supplemental environmental impact

webinar hosted by the American Enterprise Institute . . . RTOs introduce more bureaucracy that increases costs for ratepayers, she added.”).

³ Amanda Durish Cook, RTO Insider, *La. Regulators Threaten MISO Departure over Tx Costs* (Oct. 21, 2021) (“Louisiana regulators this week said they will split with MISO if their ratepayers are forced to fund major transmission built in the northern reaches of the RTO’s footprint . . . Commissioner Eric Skrmetta said he favors giving MISO a one-year notice to remove Louisiana from membership if the transmission plan contains cost sharing between the RTO’s subregions. He also said he would author a motion to begin the exit process in November, if MISO moves forward with its provisional postage stamp allocation plan . . . ‘We have arrived at the moment where the cost of transmission is going to outweigh the value benefits provided under the market,’ Skrmetta said. ‘We are going to be a member of an organization that is simply going to be burdening our ratepayers with costs.’”).

⁴ See 2021 Dominion Energy Integrated Resource Plan at 11 (“The Company has participated in the [Reliability Pricing Model (RPM)] forward capacity market since 2007, and has satisfied its capacity obligation through the RPM auction through May 31, 2022. In April 2021, the Company elected the FRR alternative, with a five-year commitment beginning June 1, 2022, based on its analysis that FRR would provide customer benefits.”), available at: <https://cdn-dominionenergy-prd-001.azureedge.net/-/media/pdfs/global/company/2021-de-integrated-resource-plan.pdf?la=en&rev=25d10466dcd44193bcce2bd9cee55009>.

⁵ See, e.g., Dominion Energy South Carolina, Inc., Docket No. ER21-1112-002 (filed Feb. 12, 2021) (describing Dominion Energy South Carolina, Inc. as a member of the Southeast Energy Exchange Market and an indirect, wholly-owned subsidiary of Dominion Energy, Inc.).

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statements, where we see holes. As opposed to drafting a whole new, big environmental impact statement on everything. We are moving forward as quickly as we can. Some of these projects are moving forward and we will be considering them very shortly. But again, if we cut corners, all the courts are going to tell us to do is go back to the drawing board

Later, you addressed Senator Hoeven as follows:

Senator, can I say one thing on this subject . . . which is that there is a difference between a failure by an agency to properly conduct a NEPA review, which would be in the EA [Environmental Assessment] or the EIS [Environmental Impact Statement], and a problem from the agency from an Administrative Procedure Act standpoint, to properly explain the decisions that it made, partially informed by that NEPA document. In almost all of the cases where FERC has been, in one way or another, remanded, those cases are not because of failures in the NEPA document. They are failures of reasoning under the Administrative Procedure Act. Basically, the Court is saying you did not sufficiently explain the reason why you made this choice: connecting the choice made to the facts found. And so saying that we can fix that problem of APA violations by having different, or more robust, NEPA review is simply not the reality of the remands we have gotten from the courts.

Please elaborate on your answer to Senator Hoeven and explain your reasoning.

RESPONSE:

My answer to Senator Hoeven was in response to Chairman Glick's statement: "[W]hat we are doing is delaying things because every time we're supposed to perform an EIS and we prepare an EA, we just ignore climate change altogether. The courts say you got it wrong, you've got to do it all over again." I understand Chairman Glick to be saying that the Commission's climate change analysis in EAs cannot survive legal review, and that he bases his statement on three issuances from the U.S. Court of Appeals for the D.C. Circuit: *Vecinos para el Bienestar de la Comunidad Costera v. FERC (Vecinos)*, *Birckhead v. FERC (Birckhead)*, and *Sierra Club v. FERC (Sabal Trail)*.⁶

I respectfully disagree with Chairman Glick. First, in none of those cases did the court state the Commission was required to prepare an EIS, instead of an EA, when the Commission stated it could not determine whether the effects of a proposed project on climate change were significant. The cases *Vecinos* and *Sabal Trail* involved proceedings in which the Commission prepared an EIS. And while *Birckhead* involved a proceeding where the Commission prepared an EA, the court never suggested the Commission should have prepared an EIS. Instead, while *upholding* the Commission's certificate order, the court discussed in dicta how the Commission should request information on upstream and downstream environmental effects to determine

⁶ See Chairman Glick September 24, 2021 Letter to The Honorable John Barrasso, M.D., at 2 nn.3-4 (citing *Vecinos*, 6 F.4th 1321 (D.C. Cir. 2021); *Birckhead*, 925 F.3d 510 (D.C. Cir. 2019); *Sabal Trail*, 867 F.3d 1357 (D.C. Cir. 2017)).

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whether the Commission is required to consider those effects under NEPA. The court also stated in dicta, “*Sierra Club* hardly suggests that downstream emissions are an indirect effect of a project only when the project’s ‘entire purpose’ is to transport gas to be burned at ‘specifically-identified destinations.’”⁷

Second, when the court did issue remands—in *Vecinos* and *Sabal Trail*—the court did so because of the Commission’s failure to properly explain decisions that it made as required by the Administrative Procedure Act (APA).⁸ For example, in *Vecinos*, the court stated “[o]n remand, the Commission must explain whether 40 C.F.R. § 1502.21(c) calls for it to apply the social cost of carbon protocol or some other analytical framework, as ‘generally accepted in the scientific community’ within the meaning of the regulation, and if not, why not.”⁹ Similarly, in *Sabal Trail*, the court stated, “[w]e conclude that the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse [gas] emissions that will result from burning the natural gas that the pipelines will transport *or explained more specifically why it could not have done so.*”¹⁰

When a court remands for APA violations, the court in essence gives the agency an assignment to provide an adequate explanation of the connection between the choice made with the facts found. In the cases cited, the

⁷ *Birckhead*, 925 F.3d at 519.

⁸ The APA requires agencies to support each finding with reasoned decisionmaking. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[An] agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁹ 6 F.4th at 1329-30. *See also id.* at 1329 (“Because the Commission *failed to respond* to significant opposing viewpoints concerning the adequacy of its analyses of the projects’ greenhouse gas emissions, we find its analyses deficient under NEPA and the APA.”) (emphasis added) (citation omitted); *id.* 1330 (“The Commission *has offered no explanation as to why*, in light of that finding, it chose to delineate the area potentially affected by the projects to include only those census blocks within two miles of the project sites for the purposes of its environmental justice analyses.”) (emphasis added).

¹⁰ *Sabal Trail*, 867 F.3d at 1374 (emphasis added). I acknowledge the court also stated, “[w]e conclude that at a minimum, FERC should have estimated the amount of power-plant carbon emissions that the pipelines will make possible. An agency conducting a NEPA review must consider not only the direct effects, but also the *indirect* environmental effects, of the project under consideration.” *Id.* at 1371. However, if this were strictly a NEPA violation, then the court would not have offered the Commission an opportunity to remedy the error in our order through reasoned decision-making (a requirement of the APA) on remand. *See id.* at 1374; *id.* at 1375 (“FERC must either quantify and consider the project’s downstream carbon emissions *or explain in more detail why it cannot do so.*”) (emphasis added).

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court has not said that the agency has to conduct a new environmental review ab initio or arrive at a particular outcome.

Questions from Senator James E. Risch

Question 1: The federal government controls significant swaths of land in the West. In Idaho, over 60 percent of the state is federal lands, and it takes decades to build new transmission projects. This Administration is seeking to bring more renewables onto the grid, but developers looking to build new transmission lines routinely find themselves stuck in a lengthy and difficult federal permitting process. How does FERC plan to address the issue of federal permitting delays associated with developing infrastructure projects that is plaguing the West?

RESPONSE:

The Commission does not have jurisdiction over the permitting or siting of electric transmission lines. RTO markets have rules to coordinate regional transmission planning and cost allocation, but the siting authority itself remains outside the Commission's jurisdiction.

Question 2: The cybersecurity of our nation's energy systems has received a lot of attention recently. Does FERC believe it has the authority it needs to properly oversee the cyber security of our energy systems?

RESPONSE:

No. As an economic regulator, the Commission has neither the statutory authority nor the requisite expertise to oversee the cybersecurity of our nation's energy system. Such oversight responsibility is best left to other federal agencies that possess the necessary understanding of the subject matter and the resources to take action when necessary. We collaborate with other federal agencies, the states, and industry to identify cyber security threats and develop best practices for use by industry, but our jurisdiction over cybersecurity is limited to the approval of mandatory standards for reliability of the bulk electric system (BES) and non-federal hydropower projects. The development of reliability standards by the North American Electric Reliability Corporation (NERC) and their approval by FERC employs a deliberate, stakeholder-driven process that typically permits ample time for industry compliance. FERC is a five-member deliberative body without knowledge of the subject matter and is therefore ill-equipped to undertake a mission requiring fast, decisive action in the face of emergent threats.

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Question 3: I've written to FERC in the past about the national security threat that other Huawei products – namely its solar inverters – pose to U.S. national security. Huawei voluntarily exited the U.S. solar inverter market in 2019, but nothing precludes them from reemerging in the future. The U.S. has already taken steps to prohibit the use of Huawei equipment in our telecommunications system. Has the Commission considered barring Huawei equipment, like its solar inverters, from being used on our electric grid?

RESPONSE:

Supply chain risks pose a significant threat to the reliability of the BES. On September 17, 2020, the Commission issued a Notice of Inquiry¹¹ seeking comments on strategies to mitigate any potential risks to the bulk power system posed by telecommunications equipment and services produced or provided by entities identified as risks to national security. The NOI identified Huawei Technologies Company and ZTE Corporation as examples of such entities because they provide communication systems and other equipment and services that are critical to bulk power system reliability.¹² To date, the Commission has not taken any action in that proceeding.

DOE, in its role as the Sector Risk Management Agency, issued a request for information in April 2021 on preventing exploitation and attacks by foreign threats to the U.S. supply chain and seeking recommendations on how it can inform and coordinate with regulators, including the Commission, as well as the utility industry. FERC and the DOE have enjoyed a longstanding collaboration on this subject and I have every expectation that our cooperation will continue.

Relatedly, in 2018, we approved the first set of NERC CIP reliability standards regarding supply chain risk management that focused on four objectives: 1) software integrity and authenticity; 2) vendor remote access protections; 3) information system planning; and (4) vendor risk management and procurement controls.¹³ Order No. 850 also identified potential reliability gaps for NERC to address. In March 2021, we approved revisions to these reliability standards to expand the scope of the assets subject to supply chain cybersecurity requirements and related obligations.¹⁴

¹¹ *Equip. & Servs. Produced or Provided by Certain Entities Identified as Risks to Nat'l Sec.*, 172 FERC ¶ 61,224 (2020).

¹² *Id.* P 3 & n.4.

¹³ *See Supply Chain Risk Mgmt. Reliability Standards*, Order No. 850, 165 FERC ¶ 61,020, at P 2 (2018).

¹⁴ *See N. Am. Elec. Reliability Corp.*, 174 FERC ¶ 61,193 (2021).

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Question 4: The Department of Energy and its national laboratories, including the Idaho National Lab, have very unique expertise and capabilities to test the security of products used on critical infrastructure. Does the Commission currently utilize the cyber expertise at our national laboratories, and do you think there are opportunities for better collaboration with these institutions to ensure the security of our electric grid?

RESPONSE:

While the Department of Energy (DOE) takes the lead role, FERC cooperates with the DOE and the national laboratories in their efforts to examine and better understand the risks to the reliability of the BES. FERC and the DOE have gained a great deal from our collaboration with the national labs and I expect our collaboration on cybersecurity matters to continue.

Question 5: There are efforts in some parts of the country to “electrify” the region’s natural gas system. These efforts are being advanced with the argument that we cannot achieve sufficient greenhouse gas emission reductions without the use of natural gas by industrial, commercial and residential consumers. In the Pacific Northwest, studies have shown that electrifying the natural gas industry in the region could cause the peak load of some electric utilities in the region to double, and pose risks to electric grid reliability and significantly increase costs to consumers. Does FERC have any concerns about the efforts of some states to eliminate the direct-use of natural gas and how that outcome can adversely impact grid reliability and consumer costs? If so, how can FERC engage to communicate or address those concerns?

RESPONSE:

Any policy that increases demand for electricity at the same time as it encourages increased development and deployment of intermittent resources will inevitably have an adverse impact on system reliability. While so far, these non-dispatchable resources have been accommodated in most regions of the country in relatively large quantities, they have been integrated alongside equally large quantities of reliable baseload and dispatchable natural-gas fired generation. As the penetration of intermittent resources continues, and the percentage of total capacity delivered by intermittent resources rises, the stability of the system will become increasingly difficult to maintain. As explained at a recent FERC technical conference the “electric power sector . . . is increasingly dependent upon reliable natural gas service”¹⁵ Policies that undermine the natural gas system by obstructing investment through regulatory uncertainty or which cause supply constraints will make the stability of the electric system ever more precarious. In my role as a Commissioner, I will continue to communicate these concerns in my separate statements. In its orders, FERC can address these concerns in two ways: first, by ensuring that our markets produce just and reasonable rates that properly compensate generators thereby ensuring resource adequacy. Second, by establishing clear, unambiguous policies for the review and assessment of NGA section 7 natural gas pipeline certificates in order to establish the regulatory certainty that

¹⁵ James B. Robb, et al., Statement of the North American Electric Reliability Corporation, 2021 Annual Reliability Technical Conference, Docket No. AD21-11-000, at 11 (filed Oct. 1, 2021).

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pipeline companies need to secure financing on reasonable terms and rationally allocate capital. This would help alleviate the chilling effect that the Commission's recent actions have had on investment and spur the development of much-needed pipeline infrastructure.

Question 6: Under the Clean Electricity Payment Program (CEPP), utilities have to provide customers with increasing amounts of electricity that the scheme defines as "qualifying," based on the rate of carbon emissions from its generation. Your testimony before the Committee indicated that you consider it likely that there rapidly will not be enough qualifying electricity.

In restructured electricity markets the price that generators are paid is the market clearing price. In other words, if the market needs 10,000 MW of power, the market buys the cheapest available power until the 10,000 MW need has been filled. If the least expensive power available to provide the last MW needed costs \$35/MWh, all of the generators who are selected to meet the 10,000 MW required get paid \$35/MWh, even if they bid in at \$20/MWh.

If there is a \$150/MWh payment to utilities for providing excess qualifying electricity, and, absent those payments, not enough qualifying electricity, why wouldn't we expect that suppliers of the qualifying electricity will increase their prices substantially, knowing there is high demand and limited supply? Would we see market prices approach \$150/MWh in such circumstances? Would prices increase by the amount of the penalty, or \$40/MWh above current market prices?

Can you please explain what the CEPP will do to consumer prices, particularly in restructured market areas?

RESPONSE:

It is difficult to predict the exact price behavior of the markets should the CEPP (or any similar program) be implemented. That is the very problem. As you correctly point out, the CEPP contemplates large per-megawatt payments to generators that produce qualifying electricity and a smaller, though significant, penalty assessed on a per-megawatt basis for those utilities that fail to achieve stated performance metrics. The CEPP presents two distinct problems, both of which threaten resource adequacy and electric system stability. First, as utilities chase the incentive payment, intermittent resources, which provide minimal reliability benefits, will become more valuable and will be more likely to be financed and built. As more intermittent resources enter the electric system and displace traditional baseload and dispatchable gas-fired generation, achieving system stability becomes increasingly difficult. Eventually, in the absence of sufficient dispatchable generation, reliability events become a near certainty. Second, the offer of incentives and imposition of penalties will skew the market prices we rely upon in the organized markets to produce the incentives to retain needed, existing generation and attract new generation. If the price signals are skewed, the orderly entry and exit of resources from the markets becomes impossible. Yes, it is likely that there will be price consequences for the ratepayer. Qualifying electricity, assuming no gamesmanship, will become valuable relatively quickly to the detriment of dispatchable generation. Nevertheless, I am less concerned about the consequences to rates qua rates, than I am about the effect this policy would have in undermining the markets we now rely upon to ensure resource adequacy.

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Questions from Senator Mike Lee

Question 1: What are the bounds (if any) of the effects that FERC should consider under NEPA?

RESPONSE:

The scope of the environmental effects that the Commission should consider pursuant to NEPA is limited by the Supreme Court case *Department of Transportation v. Public Citizen (Public Citizen)*¹⁶ and CEQ’s regulations.¹⁷ In *Public Citizen*, the Court held that NEPA limits an agency’s consideration of effects to those for which the agency is the legally relevant cause and has the discretion to prevent.¹⁸ The Court also said that “a ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations.”¹⁹ Rather, the Court explained, “NEPA requires ‘a reasonably close causal relationship’ between the environmental effect and the alleged cause” likened to the “familiar doctrine of proximate cause from tort law” and that “courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.”²⁰ The Court also explained that the “rule of reason” that is “inherent in NEPA” limits the scope of an agency’s review to information that is useful to the agency’s decision-making process.²¹

Consistent with *Public Citizen*, CEQ’s regulations—as updated in 2020—define the “effects” of a proposed action as “changes to the human environment . . . that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action . . .”²² CEQ’s updated regulations also clarify that “[a] ‘but for’ causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. . . . Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.”²³

¹⁶ 541 U.S. 752 (2004).

¹⁷ The Commission complies with CEQ’s regulations “except where those regulations are inconsistent with the statutory requirements of the Commission.” 18 C.F.R. § 380.1.

¹⁸ *See Pub. Citizen*, 541 U.S. at 767-70.

¹⁹ *Id.* at 767.

²⁰ *Id.* at 767 (quoting *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 & n.7 (1983) (*Metro. Edison*)).

²¹ *Id.* at 767 (citation omitted).

²² 40 C.F.R. § 1508.1(g).

²³ *Id.* § 1508.1(g)(2).

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Question 2: Should FERC consider “reasonably foreseeable” effects that are outside the agency’s jurisdiction and control? If so, why? And if not, why not?

RESPONSE:

No. We are prohibited by CEQ’s implementing regulations and by Supreme Court precedent from considering any environmental effects that FERC has no ability to prevent because the cause is outside our statutory authority to prohibit. CEQ’s regulations—which the Commission has expressly stated it follows²⁴—provide that agencies should not consider “effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action.”²⁵ Further, as in *Public Citizen*, the Commission’s consideration of effects that it has no ability to prevent would neither assist the Commission nor the public in the Commission’s decision-making process.²⁶ Put differently, the consideration of effects that an agency has no ability to prevent fails NEPA’s rule of reason.

Question 3: Is considering whether an effect is “reasonably foreseeable” analogous to considering “proximate cause” in tort law?

RESPONSE:

The Court has likened the NEPA requirement that environmental effects have a “reasonably close causal relationship” to the proposed action to the doctrine of proximate cause in tort law.²⁷ “Reasonable foreseeability” is an element of the proximate cause doctrine in tort law.²⁸ Another element of proximate cause is whether there is an unbroken causal connection between the act and the effect—that is, whether there was a

²⁴ See 18 C.F.R. § 380.1 (“The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.”).

²⁵ 40 C.F.R. § 1508.1(g)(2).

²⁶ See 541 U.S. at 767-70.

²⁷ *Id.* at 767 (citation omitted).

²⁸ See *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876) (“[I]n order to warrant a finding that negligence . . . is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.”); see also *Foreseeability*, *Black’s Law Dictionary* (11th ed. 2019) (“Foreseeability, along with actual causation, is an element of proximate cause in tort law.”).

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superseding or intervening cause.²⁹ Accordingly, there are limits to the upstream and downstream effects that FERC can properly consider in its NEPA analysis for section 7 pipeline certificate applications. It is not always possible to know what the ultimate source or destination of the gas that will be transported through a pipeline will be. Such uncertainty means the effects are not reasonably foreseeable and therefore do not fall within the scope of our NEPA analysis. Similarly, many of the sources and destinations of natural gas (like upstream production facilities or downstream manufacturing) have alternate supplies of natural gas and are subject to state, not FERC jurisdiction. In such a case FERC would not be the legal proximate cause of any effects caused by those facilities and FERC would be unable, under the Supreme Court's decision in *Public Citizen*, to consider those effects.

Question 4: Do you believe there is any difference between “proximate cause” and “reasonable foreseeability”?

RESPONSE:

Please see my response to your Question 3.

Question 5: Does the Supreme Court's decision in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), impact your “reasonable foreseeability” analysis under NEPA? If so, how?

RESPONSE:

The Supreme Court's decision in *Public Citizen* states that the consideration of environmental effects is limited by the doctrine of proximate cause.³⁰ The Commission's consideration of environmental effects of the proposed projects therefore should be limited to those that are the natural and probable effects of the Commission action and where there is no independent, intervening cause between the Commission's action and the effect.

²⁹ See *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. at 475 (stating that the question for proximate cause is “[w]as there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury?”).

³⁰ See 541 U.S. at 767.

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Question 6: While NEPA uses the terms “environmental impacts” and “environmental effects” it does not mention the term “direct effect” or an “indirect effect” in the statute. How would you approach the decision on whether to consider “indirect” or “direct” effects in a decision before FERC?

RESPONSE:

The Commission’s consideration of environmental effects should be consistent with CEQ’s implementing regulations and *Public Citizen*. In July 2020, CEQ issued its final updated regulations implementing NEPA to be effective September 15, 2020.³¹ CEQ’s updated regulations abandoned the categories of “direct” and “indirect” effects in order to “reduce confusion and unnecessary litigation.”³² Instead, CEQ’s updated regulations “simpl[ified]”³³ the definition of environmental effects to “changes to the human environment from the proposed action . . . that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action”³⁴ The Commission’s regulations require the scope of environmental reviews that began on or after September 15, 2020, be consistent with CEQ’s updated regulations.³⁵

For environmental reviews that began before September 15, 2020, the Commission applies CEQ’s 1978 regulations (as amended in 1986). CEQ’s 1978 regulations defined “direct effects” as those “which are caused by the action and occur at the same time and place”³⁶ and “indirect effects” as those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”³⁷ CEQ’s 1978 regulations also provided examples of an indirect effect: “growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.”³⁸

³¹ Update to the Regulations Implementing the Procedural Provisions of the Nat’l Env’tl. Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pts. 1500-1508).

³² *Id.* at 43,343.

³³ *Id.*

³⁴ 40 C.F.R. § 1508.1(g).

³⁵ See 18 C.F.R. § 380.1 (“The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.”).

³⁶ 40 C.F.R. § 1508.8(a) (1978).

³⁷ *Id.* § 1508.8(b).

³⁸ *Id.*

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Although CEQ's 1978 regulations subdivided the term "environmental effects," the scope of an agency's environmental review under the prior regulations is the same as the current regulations. That is because *Public Citizen* held that an agency's consideration of effects under NEPA are limited to those for which the agency is the legally relevant cause and has the discretion to prevent.³⁹

Question 7: How do you reconcile the use of a "proximate cause" consideration with an "indirect" effect?

RESPONSE:

Under NEPA, an agency's consideration of environmental effects (including "indirect" effects under CEQ's superseded implementing regulations) is limited to effects that have "a reasonably close causal relationship" between the environmental effect and the alleged cause."⁴⁰ The Court has likened this limit to the "familiar doctrine of proximate cause from tort law,"⁴¹ meaning that an agency must be the legally relevant cause of the environmental effect. Put differently, FERC should only consider effects (including "indirect" effects for environmental reviews that began before September 15, 2021) for which there is no intervening actor and the agency had the statutory authority to prevent.

Questions from Senator Steve Daines

Question 1: Commissioner Danly, Europe and the United Kingdom are experiencing record high energy prices with LNG prices spiking to 500% over the previous year. The United States is blessed with an abundance of natural gas and hydraulic fracturing has resulted in the ability to access natural gas in a safe, reliable and economic way. Do you believe that actions taken by the Biden Administration to eliminate natural gas development, transportation, and electric generation could lead to similar increases in energy prices for American consumers?

RESPONSE:

Yes, recent Commission actions have created a great deal of regulatory uncertainty for the natural gas industry that will result in higher energy prices for American consumers. Natural gas pipelines require hundreds of millions of dollars to build and operate. Because natural gas pipeline companies no longer have clarity regarding the standards that will be applied in evaluating their project applications, the industry is now struggling to secure the capital necessary to pursue new projects or even upgrade existing projects. In a

³⁹ See *Pub. Citizen*, 541 U.S. at 767-70.

⁴⁰ *Pub. Citizen*, 541 U.S. at 767 (quoting *Metro. Edison*, 460 U.S. at 774).

⁴¹ *Id.* (quoting *Metro. Edison*, 460 U.S. at 774).

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properly functioning market, higher prices should create incentives for producers to invest in increased production. I worry that—even with prices rising—producers will be unable to attract the capital necessary to make the investments that would ultimately result in price stabilization.

Question 2: Commissioner Danly, do you believe the U.S. should play a role in supplying our allies with U.S. LNG?

RESPONSE:

It is strategically critical for our allies to have access to LNG from the United States. Abundant, inexpensive energy imports relieve our allies of reliance on other energy sources. LNG exports benefit the American economy and American workers.

Question 3: Commissioner Danly, do you agree that the development and use of natural gas for electricity has helped lead to lower greenhouse gas emissions?

RESPONSE:

It is generally accepted that the shale revolution has contributed to the reduction in greenhouse gas emissions. As natural gas has become more plentiful, prices have dropped, and natural gas-fired generators have replaced generators that employ other fuels with different emissions profiles.

Question 4: Commissioner Danly, do you believe that it is the Commission's role to affect the pace and adoption of energy transformation?

RESPONSE:

No. It is the Commission's role is to carry out its statutory duty to ensure just and reasonable rates for wholesale power sales and transmission service, approve mandatory reliability standards, and to issue certificates to natural gas pipelines found to be in the public convenience and necessity. The Federal Power Act reserves to the states the right to determine the type and location of electric generators within their borders.

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Questions from Senator John Hoeven

Question 1: Recent actions seem to indicate that the Commission is moving to put carbon emissions reductions ahead of its traditional role of facilitating the reliable delivery of natural gas and electricity to consumers. For example, FERC is delaying or even reopening pipeline certificates, the latter which may be questionable under FERC's authority under existing statutes, to further add carbon emissions considerations.

Moreover, the Clean Electricity Performance Program (CEPP), currently under consideration in the House of Representatives, would require a dramatic increase in the use of intermittent clean energy sources to generate electricity.

- a. Is FERC jeopardizing the reliability and stability of energy supply and delivery in order to emphasize a focus on carbon emission impacts?

RESPONSE:

Yes. I am concerned that the Commission's recent focus on carbon emissions will jeopardize reliability. The Commission's recent and anticipated actions in its natural gas certificate program have created a great deal of uncertainty and have the potential to dramatically increase the cost of transporting natural gas. These recent actions include those that I discuss below in response to your third question. Any increase in cost and interruption of the supplies of natural gas will have consequences for the reliability of the electric system because it depends upon natural gas-fired generation for system stability.

In addition, the Commission has taken actions, like the recent approval by operation of law of PJM's Focused MOPR, that effectively encourage price-distorting subsidies for intermittent generation. As intermittent generation makes up an ever-growing percentage of the capacity in our electric system, and as long as our markets do not take full account of generators' reliability attributes, ensuring the stability of the electric system will become increasingly challenging. We have already witnessed the consequences of such policies in the California reliability events of August 2020.

- b. If the proposed CEPP were to be enacted, would a focus on carbon emissions regarding the approval of natural gas pipelines and the build-out of high voltage transmission lines come at the potential expense of reliability?

RESPONSE:

Yes, please refer to my answer to part (a) of this question. In addition, the build-out of transmission can have an effect on reliability. Assuming the transmission projects are justifiable, i.e. they reduce ratepayer costs or provide reliability benefits to the transmission system, transmission projects that deliver inexpensive intermittent generation could displace needed, dispatchable resources which provide the reliability attributes required to ensure system stability.

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- c. Given the extreme weather events this year, which dramatically curtailed the delivery of electricity or resulted in large increases in electricity rates, should the Commission focus its primary responsibility to timely approve needed energy supply infrastructure, such as natural gas pipelines, and voluntary electric resource adequacy markets that will match supply to load?

RESPONSE:

The Commission is required to expeditiously review natural gas infrastructure applications in accordance with the Natural Gas Act (NGA). As I have indicated, uncertainty and delays chill investment and drive up risk premiums, which in turn increases transportation costs. Such a result is contrary to the principal purpose of the NGA “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”⁴² Further, unnecessary delays are inconsistent with the language in NGA section 7(e) that states the Commission “shall” issue certificates to proposed facilities that are in the public convenience and necessity.⁴³

In addition, I encourage all of our jurisdictional markets to consider tariff revisions that would recognize the actual reliability attributes of generation resources.

Question 2: We have heard from constituents regarding the Commission’s advanced notice of proposed rulemaking (ANOPR) pertaining to regional transmission planning and cost allocation (RM21-17). The ANOPR is seeking feedback on some 200 questions and proposals regarding complex transmission planning processes.

While transmission planning policies should be examined on a regular basis to ensure efficient transmission development, concerns have been raised that many of the proposals implied within the notice would interfere with existing, well-established processes currently in place within the regional transmission organizations.

Will you ensure that this proposed rulemaking will not impact grid resiliency, create unfair cost allocations, increase electric rates, or result in additional burdensome oversight in planning, siting, or constructing new transmission?

RESPONSE:

The Commission is still reviewing the comments submitted in the ANOPR proceeding, but maintaining reliability at just and reasonable rates is the Commission’s statutory responsibility.

⁴² *NAACP*, 425 U.S. at 669-70.

⁴³ 15 U.S.C. § 717f(e).

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The Federal Power Act does not confer upon the Commission the authority to regulate the planning, siting, or permitting of transmission facilities. The state public utility commissions bear responsibility for scrutinizing transmission projects, while the Commission’s authority is limited to approving or rejecting transmission service rate filings. Transmission rates are only just and reasonable if they follow the cost-causations principles articulated by the courts in which ratepayers can only be charged transmission rates that are “roughly commensurate” with the benefits they receive from that transmission.⁴⁴

Question 3: In recent months, natural gas prices in the U.S. have doubled, to over \$5 per million Btu. Certain areas of the country, including New England, are at risk of even higher price spikes because of dependence on natural gas from foreign sources, and competition from Europe, which faces a gas crisis of its own.

- a. Are you concerned about regions like New England that have been reliant on imports of natural gas from Russia and other foreign countries to keep the lights on and heat their homes during the winter?

RESPONSE:

As we witnessed last winter in Texas, reliable—affordable—supplies of natural gas are vital for the health, well-being, and prosperity of the American people. The Commission is charged with implementing the Natural Gas Act, which the Supreme Court said was enacted in order “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”⁴⁵

Commission staff recently issued the Winter Energy Market and Reliability Assessment 2021-2022 (Winter Assessment), which states, “[h]igh global LNG prices are likely to persist into the northern hemisphere’s winter, which has led to very high winter prices for the New England regional market, as it leans on LNG imports to meet peak season demand.”⁴⁶ The Winter Assessment also states, “LNG imports supplying New England limit the impact of pipeline capacity constraints in the region. These LNG imports include the Everett LNG terminal and the Northeast Gateway facility, both in Massachusetts, and the Canaport facility, located just north of the U.S.-Canadian border in New Brunswick. The expected high natural gas prices in New England this winter could encourage more imports into the region.”⁴⁷

⁴⁴ *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7th. Cir. 2009).

⁴⁵ *NAACP*, 425 U.S. at 669-70.

⁴⁶ FERC, *Winter Energy Market and Reliability Assessment 2021-2022*, at 22 (Oct. 21, 2021) <https://www.ferc.gov/media/winter-energy-market-and-reliability-assessment-2021-2022-report> (Winter Assessment).

⁴⁷ Winter Assessment at 16.

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Even if there are more imports, the gas transportation constraints faced by New England put them in a precarious position. Supply constraints will cause gas (and electricity) prices to rise and an actual disruption of natural gas pipeline service will result in both electric reliability problems and natural gas shortages.

- b. Will you support more pipeline infrastructure to ensure states are better connected to our abundant domestic gas resources?

RESPONSE:

Consistent with the mandate in section 7 of the NGA, I will vote to approve pipeline facilities that I find are in the public convenience and necessity.⁴⁸ I also acknowledge that, as the Supreme Court put it, the principal purpose of the NGA is “to encourage the orderly development of plentiful supplies of . . . natural gas at reasonable prices.”⁴⁹

- c. How can we improve and streamline the permitting process for new gas pipelines, and is this something Congress can also help address?

RESPONSE:

In my view, there are two ways that the permitting process for new natural gas pipelines can be improved. *First*, by the Commission complying with its statutory obligations under the NGA and the Administrative Procedure Act. *Second*, as you and twenty-four of your colleagues suggested, by not subjecting pending applications to a continually shifting regulatory terrain and newly contemplated considerations that are unnecessary, fall outside the current Certificate Policy Statement, or go beyond the Commission’s statutory authority.⁵⁰

⁴⁸ See 15 U.S.C § 717f(e) (“[A] certificate *shall be issued* to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity”) (emphasis added).

⁴⁹ *NAACP*, 425 U.S. at 669-70.

⁵⁰ See U.S. Senators John Hoeven, Joe Manchin III, John Barrasso, M.D., Jon Tester, Shelley Moore Capito, Kyrsten Sinema, Bill Cassidy, M.D., John Cornyn, Kevin Cramer, Mike Crapo, Ted Cruz, Steve Daines, Bill Hagerty, Cindy Hyde-Smith, James M. Inhofe, James Lankford, Roger Marshall, M.D., Jerry Moran, James E. Risch, M. Michael Rounds, Dan Sullivan, Thom Tillis, John Thune, Pat Toomey, and Roger F. Wicker, Letter, Docket No. PL18-1-000, at 1 (filed April 30, 2021) (“Delaying and moving regulatory goalposts on

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Over the last nine months, the Commission has not met its statutory obligations and has unexpectedly changed its rules and process without explanation—creating regulatory uncertainty and unnecessary delay. I will highlight a few examples. First, in February the Commission reopened a final, non-appealable certificate order to consider imposing air quality and pipeline safety measures.⁵¹

Second, in March, the Commission established an “eyeball test” to determine the significance of greenhouse gas emissions from the proposed project facilities.⁵² I dissented in this proceeding and equated the majority’s “eyeball test” to posting a speed limit with a question mark instead of a number, leaving it to the police officer to decide whether you were speeding.⁵³

Third, in May through July, Commission staff, under the supervision of the Chairman, announced it would issue supplemental Environmental Impact Statements (EISs) for seven project proposals for which it had issued Environmental Assessments (EAs).⁵⁴ Four of those were published last year.⁵⁵ Chairman Glick has stated that

projects filed in good faith is contrary to the otherwise equitable application of the Policy Statement that all stakeholders expect. At a minimum, these projects should not be subject to newly contemplated considerations that fall outside the scope of the current Policy Statement or go beyond the Commission’s statutory authority.”).

⁵¹ *Algonquin Gas Transmission, LLC*, 174 FERC ¶ 61,126 (2021).

⁵² *See N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (2021); Catherine Morehouse, *Glick, Danly spar over gas pipeline reviews as FERC considers project’s climate impacts for first time*, Utility Dive (Mar. 19, 2021), <https://www.utilitydive.com/news/glick-danly-spar-over-gas-pipeline-reviews-as-ferc-considers-projects-eli/597016/> (“‘We essentially used the eyeball test,’ he said, adding that based on that analysis, ‘it didn’t seem significant in terms of the impact of those emissions on climate change.’”) (quoting Chairman Glick).

⁵³ *N. Nat. Gas Co.*, 174 FERC ¶ 61,189 (Danly, Comm’r, dissenting at P 16).

⁵⁴ *See ANR Pipeline Company et al.*, Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket Nos. CP20-484-000 and CP20-485-000 (July 7, 2021); Tennessee Gas Pipeline Company, L.L.C. et al., Commission Staff Notice Intent to Prepare an Environmental Impact Statement, Docket Nos. CP20-50-000 and CP20-51-000 (June 30, 2021); North Baja Pipeline, LLC, Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-27-000 (May 27, 2021); Iroquois Gas Transmission System, L.P., Commission Staff Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-48-000 (May 27, 2021); Tennessee Gas Pipeline Company, L.L.C., Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-493-000 (May 27, 2021); Columbia Gulf Transmission, LLC, Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP20-527-000 (May 27, 2021); Adelpia Gateway, LLC, Notice of Intent to Prepare an Environmental Impact Statement, Docket No. CP21-14-000 (May 27, 2021).

⁵⁵ *See ANR Pipeline Company et al.*, Environmental Assessment, Docket Nos. CP20-484-000 and CP20-485-000 (Dec. 4, 2020); Iroquois Gas Transmission System, L.P., Environmental Assessment, Docket No. CP20-48-000 (Sept. 30, 2020); North Baja Pipeline, LLC, Environmental Assessment, Docket No. CP20-

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these supplemental Environmental Impact Statements “ensure that our certificate orders are legally durable documents on which project developers can rely.”⁵⁶ Chairman Glick supports his statement by citing three opinions issued by the U.S. Court of Appeals for the D.C. Circuit.⁵⁷ None of those cases state that an EA is inadequate and an EIS is required where the Commission states it cannot determine the significance of a project’s impact on climate change.

Among the projects that have been delayed, five have had their Final EISs issued—and they reach the same conclusion that the EAs did: that FERC staff is unable to assess the project’s impact on climate change.⁵⁸ It should be recognized that the purpose of NEPA “is not to generate paperwork . . . but to provide for informed decision making and foster excellent action.”⁵⁹

This new practice affects all pending certificate projects. It is evident that the Commission currently has a de facto practice of preparing an EIS for proposed projects that add any incremental capacity or compression. Since issuing the notices, the Commission has issued only two EAs: 1) in the Mountain Valley Pipeline Amendment Docket No. CP21-57-000;⁶⁰ and 2) in the Texas Eastern Perulack Compressor Units Replacement Project Docket No. CP21-31-000.⁶¹ Notably, the Mountain Valley Project involves no changes to operations or service,⁶² and the Texas Eastern Project is a replacement project that involves no incremental service and results in a decrease of greenhouse gas emissions.⁶³ Commission staff has announced no plans to issue other EAs

27-000 (Sept. 8, 2020); Tennessee Gas Pipeline Company, L.L.C., et al., Environmental Assessment, Docket Nos. CP20-50-000 and CP20-51-000 (Aug. 24, 2020).

⁵⁶ Chairman Glick September 24, 2021 Letter to The Honorable John Barrasso, M.D., at 2.

⁵⁷ *Id.* at 2 nn.3-4 (citing *Vecinos*, 6 F.4th 1321; *Birckhead*, 925 F.3d 510; *Sabal Trail*, 867 F.3d 1357).

⁵⁸ *See, e.g.*, Columbia Gulf Transmission, LLC, Final Environmental Impact Statement, Docket No. CP20-527-000, at 1 (Sept. 21, 2021) (“FERC staff continues to be unable to determine significance with regards to climate change impacts.”).

⁵⁹ 40 C.F.R. § 1500.1(a).

⁶⁰ Mountain Valley Pipeline, LLC, Environmental Assessment, Docket No. CP21-57-000 (Aug. 13, 2021).

⁶¹ Texas Eastern Transmission, LP, Environmental Assessment, Docket No. CP21-31-000 (June 4, 2021).

⁶² *See* Mountain Valley Pipeline, LLC, Environmental Assessment, Docket No. CP21-57-000 at 3-4.

⁶³ *See* Texas Eastern Transmission, LP, Environmental Assessment, Docket No. CP21-31-000 at 43-44.

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before the end of 2021. Further, other than a proposal to abandon a project in place,⁶⁴ none of the remaining pending projects have received a notice announcing Commission staff's intent to prepare an EA or the schedule of an EA.

Prior to this change, the Commission's predominantly issued EAs. It takes more than double the time to complete the EIS process than the EA process.⁶⁵ Due to delays and uncertainty, two pipelines have withdrawn their applications.

On September 20, 2021, Eastern Gas Transmission and Storage, Inc. withdrew an application for a section 7 certificate which it filed nearly six months prior, requesting permission to build minor upgrades to three compressor stations in Pennsylvania and Virginia.⁶⁶ It did so because, in their words, "[d]espite [the project's] limited scope, the Commission has not taken action to prepare an Environmental Assessment"⁶⁷

More recently, on October 12, 2021, Adelpia Gateway, LLC (Adelpia) withdrew its request to install and operate an additional electric-motor-driven compressor unit at its already authorized Marcus Hook Compressor Station.⁶⁸ It did so because "as a result of the extension of the environmental review through the supplemental EIS process and a prolonged Commission review process, the Project has been delayed well beyond Adelpia's expectations and, more specifically, there is significant uncertainty regarding when an order will issue in this docket. In light of this, Adelpia has decided not to continue the development of the Project."⁶⁹

I am concerned that more pipelines will similarly withdraw their applications because of these delays and uncertainty. Of the remaining six pending certificate applications that received a supplemental EIS, on average,

⁶⁴ See Transcontinental Gas Pipe Line Company, Happytown Abandonment Project, Docket No. CP21-134-000 (Notice of Schedule issued October 15, 2021).

⁶⁵ The average number of months for completing the EAs process for NGA section 3 and section 7 in calendar years 2011 to 2016 was 9.4 months and from 2017 to 2021 was 10.5 months. In comparison, the average number of months for completing the EIS process in calendar years 2011 to 2016 was 21.4 months and from 2017 to 2021 was 26.1 months.

⁶⁶ Eastern Gas Transmission and Storage, Inc., September 20, 2021 Withdrawal of Project Application, Docket No. CP21-97-000 (Accession No. 20210920-5156).

⁶⁷ *Id.* at 1.

⁶⁸ Adelpia Gateway, LLC, October 12, 2021 Withdrawal of Prior Notice, Docket No. CP21-14-000 (Accession No. 20211012-5713).

⁶⁹ *Id.* at 2.

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those applications were filed 18.3 months ago.⁷⁰ It is unclear how much longer the pipeline, its investors, and shippers can wait.

Questions from Senator James Lankford

Question 1: Commissioner Danly, at the Energy & Natural Resources Committee hearing, there was a discussion regarding the need to provide natural gas infrastructure project developers guidance on how FERC considers climate in the project review process. How will the social cost of carbon be utilized as you consider projects?

RESPONSE:

The Commission has explained in numerous orders that the use of the Social Cost of Carbon is not appropriate in project-level NEPA review, and cannot meaningfully inform the Commission's decisions on whether a proposed project is in the public convenience and necessity.⁷¹ The Courts have repeatedly upheld the Commission's determination in this regard in the face of repeated challenges. Whether to use the Social Cost of Carbon is one of the many subjects at issue in the Commission's pending Notice of Inquiry on the Certification of New Interstate Natural Gas Facilities.⁷² My expectation is that, should the Commission reverse course and begin employing the Social Cost of Carbon in reviewing NGA section 7 certificate applications, the results of that analysis will be used either to determine what type and magnitude of mitigation to impose upon a project, or it will be used to inform the Commission's determination as to whether the benefits of the project outweigh its harms. I am skeptical as to the legality of the imposition of such mitigation and without clear guidelines, the employment of the Social Cost of Carbon to determine project impacts may ultimately result in a series of arbitrary, ad hoc decisions which will further chill investment in much-needed infrastructure.

⁷⁰ As of November 1, 2021: North Baja Pipeline, LLC, December 16, 2019 Application, Docket No. CP20-27-000 (pending 686 days); Iroquois Gas Transmission System, L.P., February 3, 2020 Application, Docket No. CP20-48-000 (pending 637 days); Tennessee Gas Pipeline Company, L.L.C. and Southern Natural Gas Company, L.L.C., February 7, 2020 Application Docket Nos. CP20-50-000 and CP20-51-000 (pending 633 days); ANR Pipeline Company and Great Lakes Gas Transmission Limited Partnership, June 22, 2020 Application, Docket Nos. CP20-484-000 and CP20-485-000 (pending 497 days); Tennessee Gas Pipeline Company, L.L.C., June 30, 2020 Application, Docket No. CP20-493-000 (pending 489 days); Columbia Gulf Transmission, LLC, September 24, 2020 Application, Docket No. CP20-527-000 (pending 403 days).

⁷¹ See, e.g., *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043, at P 296 (2017), *order on reh'g*, 163 FERC ¶ 61,197, at PP 275-297 (2018), *aff'd*, *Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, at *2 (D.C. Cir. Feb. 19, 2019) (“[The Commission] 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.”).

⁷² See *Certification of New Interstate Nat. Gas Facilities*, 174 FERC ¶ 61,125, at P 17 (2021).

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Question 2: Commissioner Danly, is it FERC's role to affect the pace of the energy transition? If so, does this directive exist in statutory law?

RESPONSE:

No. It is the Commission's role is to carry out its statutory duty to ensure just and reasonable rates for wholesale power sales and transmission service, approve mandatory reliability standards, and to issue certificates to natural gas pipelines found to be in the public convenience and necessity. The Federal Power Act reserves to the states the right to determine the type and location of electric generators within their borders.

Question 3: Commissioner Danly, do you believe that natural gas exports can lower emissions by displacing other heating sources like wood and fuel oil?

RESPONSE:

Though the decision to export natural gas is outside of FERC's jurisdiction, natural gas exports can have many benefits including the displacement of fuels with less desirable attributes. Access to affordable and reliable energy, like natural gas, also provides benefits by alleviating poverty and improving the quality of life.

Questions from Senator Catherine Cortez Masto

Questions: As we look to deploy more Electric Vehicles (EV) on our nation's roads and build out necessary charging infrastructure, researchers and industry groups are working to identify where new cyber vulnerabilities may arise.

With this in mind, I've pushed a package of bills to advance EV adoption – including an *EV Commission and National Strategy* (S. 2040) that was included in the bipartisan infrastructure package. Federal agencies, along with the public and private sectors, must work together on a plan to effectively identify opportunities and barriers – such as bulk power and cyber threats – to properly make this transition in transportation.

- a. What are FERC's plans to ensure that the national electric grid can support EV charging for both public and private medium and heavy duty fleets?

RESPONSE:

Should electrification of transportation increase demand for electricity, FERC must ensure that the price signals in our organized markets create the correct incentives to attract and retain the generation needed for resource adequacy. Beyond our role in setting rates for interstate wholesale sales of electricity, FERC's jurisdiction is limited. Most EV charging will happen at the distribution level, which is a subject matter that is reserved to the states to regulate.

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- b. Could an EV Commission help boost collaboration among federal agencies, as well as with local, state, and industry stakeholders, to help the grid withstand cyber threats in the future?

RESPONSE:

A deliberative body, such as a commission, is ill-suited to the task of responding to the continually evolving threat of cyber-attacks. To the extent government action is necessary, that responsibility should be placed in the hands of an executive branch agency that understands the subject matter and is able to respond to rapidly-developing threats.