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ANNE MARIE GARTI, ESQ.

PO BOX 15
BRONX, NEW YORK 10471

July 25, 2018

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Ave., NE
Washington, DC 20426

Re: Notice of Inquiry, Certification of New Interstate Natural Gas Facilities, Docket No. PL18-1

Dear Ms. Bose:

I wish to encourage the Federal Energy Regulatory Commission (FERC or Commission) to revise its policies for reviewing and certifying natural gas facilities to be more responsive to landowners, local interests, and members of both recognized and non-recognized tribes.

My experience with FERC began in the spring of 2012, when the Constitution Pipeline Company, LLC proposed a 125-mile long pipeline from Pennsylvania through the Southern Tier and Western Catskill Mountains of New York State. The termination was in Wright, NY, where it would have interconnected with two existing pipelines: the Iroquois and Tennessee, both of which are already filled with gas when there is a need for it. The group I helped form, and the people I trained to navigate through the regulatory process, succeeded in stopping the proposed Constitution Pipeline. Since 2014, I have assisted landowners, non profit organizations, and tribal historic preservation offices protect their rights as other pipelines are proposed on or near their properties, or in places they wish to protect.

The following answers to the questions posed in the Notice of Inquiry reflect the opinions of many of these landowners and other interested parties. While not directly retained by them to respond to this Notice of Inquiry, my understanding of their perspective may help the Commission.

(All responses are indented and appear after the questions that were posed.)

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A. Potential Adjustments to the Commission's Determination of Need

A1. Should the Commission consider changes in how it determines whether there is a public need for a proposed project?

Yes. Currently, FERC uses a pay to play model. If Transporters and Shippers are willing to pay for a pipeline, and have signed long term contracts to prove their willingness to pay, then FERC authorizes construction by issuing a certificate that enables the pipeline company to take private property through eminent domain. The industry's willingness to fund pipeline projects in order to get gas to higher priced markets is not proof of market need (defined here as end use by industry or consumers). Applicants are guaranteed a high rate of return by FERC and Shippers assume that selling gas at higher prices will offset their financial risk, thus assuring a profit. This distorts the public use requirement of the Fifth Amendment.

A2. In determining whether there is a public need for a proposed project, what benefits should the Commission consider? For example, should the Commission examine whether the proposed project meets market demand, enhances resilience or reliability, promotes competition among natural gas companies, or enhances the functioning of gas markets?

The Natural Gas Act was enacted eighty years ago and since then the country has been criss-crossed with a vast and robust grid of natural gas pipelines. The existing network already provides resilience, reliability, and competition. The gas markets function well and do not need enhancement. Therefore, there should be explicit and substantial proof of end user market demand (within the United States) before new pipelines are approved. Companies should not be granted the right of eminent domain if any of the gas they will be transporting will be exported.

A3. Currently, the Commission considers precedent agreements, whereby entities intending to be shippers on the contemplated pipeline commit contractually to such shipments, to be strong evidence that there is a public need for a proposed project. If the Commission were to look beyond precedent agreements, what types of additional or alternative evidence should the Commission examine to determine project need? What would such evidence provide that cannot be determined with precedent agreements alone? How should the Commission assess such evidence? Is there any heightened litigation risk or other risk that could result from any broadening of the scope of evidence the Commission considers during a certificate proceeding? If so, how should the Commission safeguard against or otherwise address such risks?

FERC should not rely on precedent agreements. Instead there should be substantial evidence of market need. (See Answers to A1 and A2.)

A4. Should the Commission consider distinguishing between precedent agreements with affiliates and non-affiliates in considering the need for a proposed project? If so, how?

The Commission should require substantial evidence of market need for both affiliates and non-affiliates. Precedent agreements indicate a willingness to risk the cost of the investment for a higher future return on investment. These agreements do not provide proof of an actual public need for the gas that would flow through the pipelines. In the case of the proposed Constitution Pipeline, the Shippers were affiliated with gas drillers, seeking higher prices for their gas. They had no actually customers for the gas in their specified markets.

A5. Should the Commission consider whether there are specific provisions or characteristics of the precedent agreements that the Commission should more closely review in considering the need for a proposed project? For example, should the term of the precedent agreement have any bearing on the Commission's consideration of need or should the Commission consider whether the contracts are subject to state review?

Precedent agreements should not be relied on to determine need. Substantial, objective evidence of market need should be required.

A6. In its determinations regarding project need, should the Commission consider the intended or expected end use of the natural gas? Would consideration of end uses better inform the Commission's determination regarding whether there is a need for the project? What are the challenges to determining the ultimate end use of the new capacity a shipper is contracting for? How could such challenges be overcome?

Yes. The gas network is robust and resilient, and there has been an unprecedented buildout of new pipelines over the past ten years. Unless there is substantial objective evidence of market need (in the U.S.), pipelines should not be built or expanded.

A7. Should the Commission consider requiring additional or alternative evidence of need for different end uses? What would be the effect on pipeline companies, consumers, gas prices, and competition? Examples of end uses could include: LDC contracts to serve domestic use; contracts with marketers to move gas from a production area to a liquid trading point; contracts for transporting gas to an export facility; projects for reliability and/or resilience; and contracts for electric generating resources.

Private property should not be taken for gas that will be exported. There must be publicly available substantial evidence in the record for any justification of need.

A8. How should the Commission take into account that end uses for gas may not be permanent and may change over time?

The country is moving away from the use of fossil fuels, and FERC should get ahead of that curve before consumers are saddled with the long-term costs of unnecessary pipelines.

A9. Should the Commission assess need differently if multiple pipeline applications to provide service in the same geographic area are pending before the Commission? For example, should the Commission consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area? Should the Commission change the way it considers the impact of a new project on competing existing pipeline systems or their captive shippers? If so, what would that analysis look like in practice?

Yes, the Commission should consider a regional approach to a needs determination if there are multiple pipeline applications pending for the same geographic area.

If the Commission stops relying on precedent agreements and instead requires substantial objective evidence of market need (in the U.S.), then there will be less impact on competitive pipelines.

A10. Should the Commission consider adjusting its assessment of need to examine (1) if existing infrastructure can accommodate a proposed project (beyond the system alternatives analysis examined in the Commission's environmental review); (2) if demand in a new project's markets will materialize; or (3) if reliance on other energy sources to meet future demand for electricity generation would impact gas projects designed to supply gas-fired generators? If so, how?

Yes to all three. FERC should force these companies to cooperate with each other and share space on their pipelines (and rights of way) with their competitors.

B. The Exercise of Eminent Domain and Landowner Interests

B1. Should the Commission consider adjusting its consideration of the potential exercise of eminent domain in reviewing project applications? If so, how should the Commission adjust its approach?

Yes. FERC should ask Congress to remove the eminent domain clause from the Natural Gas Act. Such a change would be in line with the deregulation of the pipeline industry. If market forces determine whether to build a pipeline, then market forces should also determine the price at which land is obtained for these pipelines.

It is possible to build large pipelines without the use of eminent domain, and Pennsylvania is proof of this. There, intrastate gathering lines are not granted the right of eminent domain, yet thousands of miles of them have been built over the last ten years. That happens because the pipeline companies negotiate with landowners to get permission.

B2. Should applicants take additional measures to minimize the use of eminent domain? If so, what should such measures be? How would that affect a project's overall costs? How could such a requirement affect an applicant's ability to adjust a proposed route based on public input received during the Commission's project review?

Yes. Pipeline companies should be required to build pipelines on the land of willing sellers via arms-length deals. In terms of adjusting routes, they could sign options until the route is approved. If a landowner does not want a pipeline on his or her property and would prefer to relocate, then the company should be required to buy the entire parcel, not just an easement, if that land is required for the pipeline.

B3. For proposed projects that will potentially require the exercise of eminent domain, should the Commission consider changing how it balances the potential use of eminent domain against the showing of need for the project? Since the amount of eminent domain used cannot be established with certainty until after a Commission order is issued, is it possible for the Commission to reliably estimate the amount of eminent domain a proposed project may use such that the Commission could use that information during the consideration of an application?

Yes, FERC should give greater weight to landowners' unwillingness to sell an easement to a pipeline company.

The fact that the pipeline companies will acquire the right of eminent domain once a "conditional certificate" is issued is the main problem for landowners because it eliminates the companies' incentive to negotiate in good faith. If FERC helps to eliminate the right to use eminent domain, then pipelines would only be built on land where landowners agree to sell an easement – or the land – to pipeline companies.

Under the current situation, which enables the use of eminent domain, FERC could estimate the number of parcels that are likely to require eminent domain by tracking landowners' comments, postcards, or letters that explicitly state whether they will sign an easement agreement or not.

B4. Does the Commission's current certificate process adequately take landowner interests into account? Are there steps that applicants and the Commission should implement to better take landowner interests into account and encourage landowner participation in the process? If so, what should the steps be?

Landowners believe that their interests are largely ignored by both the pipeline company and FERC. There are many changes the Commission should make to assist landowners:

1. Offer better assistance to navigate the regulatory process.
2. Make the FERC website easier for people to use.
3. Support the elimination of eminent domain, which would level the playing field.
4. Offer site-specific analysis of environmental impacts. (FERC's environmental reviews are too generic and largely meaningless to landowners, as specific impacts to their land / investments are ignored).

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5. Until eminent domain is eliminated, do not issue conditional certificates, which allow pipeline companies to take property before it is known if the pipeline will be approved by all regulatory agencies.

B5. Should the Commission reconsider how it addresses applications where the applicant is unable to access portions of the right-of-way? Should the Commission consider changes in how it considers environmental information gathered after an order authorizing a project is issued?

The Commission should stop issuing certificates before the environmental information required by all agencies has been obtained. If the use of eminent domain were eliminated, then the problem of being unable to access property would disappear. Pipeline companies would then be proposing and building pipelines on the land of willing sellers via arms-length deals. In terms of adjusting routes, pipeline companies could sign options with landowners until the route is approved. If a landowner does not want a pipeline on his or her property and would prefer to relocate, then the company should be required to buy the entire parcel, not just an easement, if that land is (for some reason) required for the pipeline.

C. The Commission's Consideration of Environmental Impacts

C1. NEPA and its implementing regulations require an agency to consider reasonable alternatives to the proposed action. Currently the Commission considers the no-action alternative, system alternatives, design alternatives, and route alternatives. Should the Commission consider broadening its environmental analysis to consider alternatives beyond those that are currently included? If so, what specific types of additional alternatives should the Commission consider?

FERC's alternatives analysis is not sufficiently robust because it assumes an applicant's start and end points cannot be altered. For example, in the case of the proposed Constitution Pipeline, Docket No CP13-499, the applicant said the gas would be going to New York City and New England, but the proposed pipeline started in North Central Pennsylvania and traveled in a NNE direction – away from New York City. This meant that all of the alternatives reviewed by FERC were a study in absurdity, as they all increased the impacts and costs. This is because they all had to start and end at the points specified by the applicant.

The Commission should consider other efficiencies, such as resource sharing with other utility easements and other federal agencies. Pipeline companies should be required to share space on their pipelines, and should be required to share their right of ways with other companies. In addition, if new pipelines are required, and eminent domain remains in force, then pipelines should run along interstate highways, where land has already been taken from U.S. citizens by the federal government.

C2. Are there any environmental impacts that the Commission does not currently consider in its cumulative impact analysis that could be captured with a broader regional evaluation? If so, how broadly should regions be defined (e.g., which states or geographic boundaries best define different regions), and which environmental resources considered in NEPA would be affected on a larger, regional scale?

C3. In conducting an analysis of a project, should the Commission consider calculating the potential GHG emissions from upstream activities (e.g., the drilling of natural gas wells)? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these upstream impacts? If so, what criteria would be used to determine the significance of these impacts?

Yes, the Commission should calculate the potential GHG emissions from upstream activities. The information is already available because FERC already know the capacity of pipelines, and should assume that all of the gas that would be transported would require drilling.

Yes, the Commission should also evaluate the significance of these upstream impacts. Land clearing, water impacts, endangered species, etc, should all be considered. In addition, methane leakage from drilling and transporting the gas should be factored into the GHG analysis.

C4. In conducting an analysis of a project, should the Commission consider calculating the potential GHG emissions from the downstream consumption of the gas? If so, should the Commission base this calculation on total consumption, or some other amount? What information would be necessary for the Commission to reliably and accurately conduct this calculation? Should the Commission also evaluate the significance of these downstream impacts? If so, what criteria would be used determine the significance of these impacts?

Yes, the Commission should calculate the potential GHG emissions from the downstream consumption of the gas. This should be based on the capacity of the proposed pipeline, and should assume that all of the gas that could be transported would be burned.

Yes, the Commission should evaluate the significance of these downstream impacts using the social cost of carbon. In addition, methane leakage from transporting the gas should be factored into the GHG analysis.

C5. How would additional information related to the GHG impacts upstream or downstream of a proposed project inform the Commission's decision on an application? What topics or criteria should be included in this additional information?

C6. As part of the Commission's public interest determination, should the Commission consider changing how it weighs a proposed project's adverse environmental impacts against favorable economic benefits to determine whether the proposed project is required by the public convenience and necessity and still provide regulatory certainty to stakeholders?

The Commission needs to more fully address the negative economic impacts of interstate pipelines in their calculation. While landowners subject to condemnation are paid fair market value for the easements, this does not include compensation for the loss of other property rights, such as the right to exclude and the loss of the right to determine whether and when to alienate their property. For many, their property is dear to them in a way that cannot be calculated by dollars and cents. As Gerald O'Hara said in Gone With The Wind, "[L]and is the only thing in the world worth working for, worth fighting for, worth dying for, because it's the only thing that lasts." That is why the Commission has a landowner rebellion on its hands, and the best way to address it is by eliminating the right to eminent domain.

C7. Should the Commission reconsider how it uses the Social Cost of Carbon tool in its environmental review of a proposed project? How could the Commission use the Social Cost of Carbon tool in its weighing of the costs versus benefits of a proposed project? How could the Commission acquire complete information to appropriately quantify all of the monetized costs/negative impacts and monetized benefits of a proposed project?

D. Improvements to the Efficiency of the Commission's Review Process

D1. Should certain aspects of the Commission's application review process (i.e., pre-filing, post-filing, and post-order-issuance) be shortened, performed concurrently with other activities, or eliminated, to make the overall process more efficient? If so, what specific changes could the Commission consider implementing?

It is not clear why there are three stages to an application instead of just one integrated process involving all agencies. If eminent domain were eliminated, and an applicant had to have options on land before they could file an application, then the information required by each and every agency could be acquired and analyzed concurrently, eliminating the need for conditional certificates.

D2. Should the Commission consider changes to the pre-filing process? How can the Commission ensure the most effective participation by interested stakeholders during the pre-filing process and how would any such changes affect the implementation and duration of the pre-filing process?

If the Commission continues using a pre-filing stage, then it should make sure it initiates consultation with tribal nations as soon as pre-filing begins. It must also allow such tribes, who are required to have ex parte communications with FERC, to intervene once an application is filed.

Unless eminent domain is eliminated, landowners have no incentive to cooperate with pipeline companies during the pre-filing process. However, if they are going to realize a profit from the building of a pipeline, then their interests might align with the applicant's.

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D3. Are there ways for the Commission to work more efficiently and effectively with other agencies, federal and state, that have a role in the certificate review process? If so, how?

The environmental reviews for all agencies should take place simultaneously, with subdockets assigned for each agency. FERC should wait for, and defer to agencies with expertise in a particular area before issuing its DEIS and FEIS. No certificate should be issued until all other state and federal agencies has issued their permits and / or licenses.

D4. Are there classes of projects that should appropriately be subject to a shortened process? What would the shortened process entail?

No. The Commission should also not allow the use of blanket certificates if that allows the expansion or alteration of projects to areas that have not been subject to environmental review, or would result in impacts that have not been studied.

Other Issues:

The Commission should be commended for implementing an open access eLibrary. However, redacting privileged documents, rather than making them completely inaccessible to the public, would improve this resource and the regulatory review process. Redaction is commonly used by SHPOs and other agencies, so the types of information that need to be kept private has been established. Also, FERC should implement a process that makes it easier for people and organizations who have intervened to obtain precedent agreements and other confidential information.

Thank you for considering these comments.

Respectfully submitted,

/s/ Anne Marie Garti, Esq.

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