

United States Senate

WASHINGTON, DC 20510

July 25, 2018

The Honorable Kevin McIntyre, Chairman; and Commissioners
Federal Energy Regulatory Commission
888 1st St. NE
Washington, D.C. 20426

Docket No. PL18-1-000

Notice of Inquiry – Certification of New Interstate Natural Gas Facilities

Dear Chairman McIntyre and Commissioners:

Thank you for accepting public comment on this important issue. For several years, Virginia constituents have shared with us their concerns over the Mountain Valley Pipeline (MVP) and Atlantic Coast Pipeline (ACP). We would like to share some of these concerns and propose a series of recommendations, all of which touch on the areas on which the Federal Energy Regulatory Commission (FERC) has requested comment.

1. FERC should more broadly scrutinize project need, including, in the case of multiple projects in close proximity, whether all such projects are needed.

The MVP and ACP originate in the same region, travel along roughly the same path, and terminate in the same regional market. Their regulatory timelines were similar enough that FERC approved them concurrently. This suggests that their need to exist should be evaluated through the cumulative scope of their impact on the region through which they both travel. This was not done, as the two received separate Environmental Impact Statements (EIS). Moreover, plausible routes to co-locate the two pipelines were dismissed due to “...significant delay to the delivery of the 3.44 BCF/d of natural gas to the proposed customers of both ACP and MVP.”

This rationale is not a satisfactory threshold for establishing “Public Convenience and Necessity.” If a developer makes a compelling case that a new gas pipeline will support grid reliability and affordable electricity and heating, FERC may decide that those benefits justify the impacts. In the MVP and ACP cases, FERC appears not to have sufficiently established the benefits of *both* pipelines in the same region, as well as whether those benefits justify not only two pipelines but two new greenfield rights-of-way when co-location alternatives for a single right-of-way exist. The Commission’s concern should be for the public interest as determined by its best judgment, not for the financial implications for the applicant companies.

FERC should set criteria under which a single EIS would be conducted for proximate pipeline applications, and it should lay out strictures for when a supplemental EIS is necessary,

particularly if more information comes out *after* a draft EIS than is *in* a draft EIS. The Commission should also make clear to applicants that potential cost increases are a risk applicants should be prepared to take if they wish to build a large project like this, particularly when seeking condemnation authority, per #2.

2. FERC should require applicants to more comprehensively spell out the public benefit justifying potential eminent domain authority.

Governmental authority to invoke the right of eminent domain to seize private land is meant to be used sparingly, as a last resort and with overwhelming evidence that the condemnation incurs a vital public benefit. Courts have generally ruled that interstate energy pipelines qualify as a public use. Yet it must be considered that there is a difference between a public asset that directly benefits the community around it – a public highway, a new hospital, an economic revitalization project – and a privately-owned asset that incurs potential risks for a community while the rewards flow elsewhere, primarily to the project’s private developer. If a developer seeks to assume the government’s right of eminent domain for a project like this, FERC should require it to more comprehensively present why the public interest justifies a condemnation that does not directly benefit the condemned party or the surrounding community. In addition, mitigation plans for unavoidable takings should be subject to public comment so the public can verify that mitigation is fair and proportionate to the impact.

3. In the case of environmentally significant land, FERC should require compensation for not just the monetary value of such land but also the lost conservation value.

The MVP and ACP routes required encroaching upon some dozen conservation easements, as well as a National Forest, a National Park, and a National Scenic Trail. Though mitigation was provided for the value of these lands, it should also be provided to make whole the lost conservation value of any conservation land. Many landowners in Virginia seek conservation easements for land to preserve its natural or rural character in a rapidly-urbanizing state. Their understanding is that these conservation agreements are “in perpetuity.” If a project is so important that it requires violating this covenant, it should be subject to this additional hurdle. And if such hurdles are too high, companies should reconsider whether it is cost-effective to build through conservation lands.

4. FERC should simplify and improve the public notice and comment process.

It is critical that FERC appreciate the complexity of this process for Americans who wish to participate but may not be energy policy experts. In previous correspondence with FERC, we have highlighted a number of concerns that Virginians shared with our offices on their experiences of participating in the MVP and ACP public input process:

- The website www.ferc.gov is not user-friendly and requires multiple steps to access the right portal for a particular project.
- Many Virginians on the path of the MVP or ACP commuted significant distances across rural mountainous areas to reach FERC public meetings, and waited hours to comment.
- In some cases, proponents of a certain point of view “packed” meetings, preventing a full range of perspectives from being offered.
- Due to time constraints and high public interest, many attendees had speaking slots of as little as 2-3 minutes.
- Meetings featured little meaningful dialogue. Many citizens attended not to state an already-formed viewpoint but to get more information and ask clarifying questions. Several reported that FERC representatives listened in silence but cited rules around *ex parte* communication for lack of real engagement.
- Information overload was a major challenge when a long stretch of right-of-way would be rerouted based on comments, requiring new scrutiny of a different long corridor.
- Public comment transcripts were found to be riddled with errors and gibberish, giving the impression that FERC had hired a stenographer but did not proof the transcripts because it had no expectation that policymakers would ever review citizen remarks.

Individually, these details may seem trivial, but cumulatively, they create a public impression that FERC’s notice and comment process is a formality, to pacify the public rather than seriously consider its input. This could be remedied by holding public comment meetings in every county through which a pipeline would pass, and at every stage in the process (draft EIS before final EIS, final EIS before Record of Decision, and supplemental EIS if applicable), and staffing those meetings with staff knowledgeable of the project and prepared to answer questions, so citizens could attend meetings near them and have greater opportunity to absorb the details.

5. FERC should end the practice of issuing “tolling orders” that freeze litigation over a project but allow construction to continue pending a decision on rehearing.

The MVP and ACP applications were approved on a 2-1 vote with two commissioner slots vacant – noteworthy given that 98% of FERC orders in the previous year were unanimous. FERC followed the letter of the law in duly rendering a decision with the minimum quorum, but in this case, a rehearing could have changed the outcome. At the very least, a rehearing vote with a full complement of commissioners would have added legitimacy to the final decision.

Statute allots FERC 30 days to decide on a rehearing request, but a tolling order can indefinitely extend that consideration time, during which legal options are frozen but construction may continue. This undermines the purpose of a rehearing option. If a pipeline application is overturned on rehearing but the pipeline is already constructed, the potentially

damaging impacts of construction will be irrevocable. FERC should decide on rehearing one way or the other so that citizens have meaningful ability to have their claims heard in court.

6. FERC should evaluate the climate impacts of these generational investments in fossil energy infrastructure.

Finally, FERC should make an agency decision to accept the scientific consensus that climate change is real and is driven in significant part by the burning of fossil fuels. FERC's actions in other areas of its jurisdiction – and statements by several of its commissioners – suggest that the Commission supports the broad goal of an energy sector that is cleaner and less carbon-intensive tomorrow than it is today. Historically, agencies have sidestepped the climate issue by finding that a single project has an insignificant impact on a global phenomenon like climate change. Just as FERC evaluates the impacts on clean water of pipeline construction proximate to waterways or aquifers, it should evaluate the impacts on climate goals of approving fossil fuel infrastructure that could be in service for 50 years – a time horizon during which the world is striving for major reductions in carbon pollution.

Conclusion


It is important that the public have confidence in the legitimacy of FERC's decisions and assurance that decisions were arrived at via thorough evaluations of the public good. The proliferation of pipeline controversies around the country suggests that there are deficiencies in this process. More projects will likely arise in the future – for instance, a third pipeline was initially proposed alongside MVP and ACP in the early stages. This issue is not going away, and we hope this Notice of Inquiry will provide FERC with information that enables it to make informed decisions and bolster public confidence in its work.

Thank you for your consideration.

Sincerely,



Mark R. Warner
U.S. Senator



Tim Kaine
U.S. Senator