Written Testimony of Cheryl A. LaFleur

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Subcommittee on Energy
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Hearing on the Natural Gas Act
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Chairman Pallone, Ranking Member Walden, Chairman Rush, Ranking Member Upton, and members of the Committee:

My name is Cheryl LaFleur, and I am honored to appear before you today. From July 2010 through August 2019 I was a Commissioner (including for two years Chairman or Acting Chairman) of the Federal Energy Regulatory Commission (FERC). However, I am appearing today as a private citizen.

My testimony will focus on two aspects of the Natural Gas Act (the Act)—applications to construct pipelines under Section 7, and petitions for rate reductions under Section 5.

When the Natural Gas Act was enacted in 1938, and for many decades thereafter, the nation's supply of natural gas was thought to be confined to pockets of gas in geographically constrained regions, mostly in the Southwest and Gulf of Mexico. The purpose of the Act--as demonstrated in its language and legislative history--was to make sure that those geographically limited gas supplies were shared with other regions of the country that had no indigenous gas reserves and had relied on gas manufactured from coal. The thrust of the law was to be sure that people that needed gas had access to it. FERC over time established a practice of using market signals to establish need for a pipeline—if the company constructing the pipeline had contracts in place to sell the gas (usually with gas distribution companies), it was in essence presumed that the pipeline must be needed. As part of its public interest review, the Commission reviewed siting, environmental and safety issues, and rates, but did not independently ascertain the need for the gas beyond the existence of precedent agreements that were not subsidized by existing pipeline customers.

That system seemed to work well—or at least with far less controversy than today—for a long time. However, in the early part of the 21st century, the extraction of gas from shale through hydraulic fracturing revolutionized our understanding of how much natural gas the United States has. Instead of being located in small geographic areas, it is now understood that gas can be extracted from vast shale plays spanning multiple states and population centers in the Southwest, Midwest and MidAtlantic regions. This greater availability made gas much cheaper, made it a dominant fuel for electric generation, and spawned an industry of liquefying and exporting US natural gas around the globe.

With these changes has come tremendous growth in applications for pipelines, and far greater public attention and opposition to both extraction methods and pipeline construction.

FERC's well-established pipeline regime, developed in a different supply era, has come under public attack and has been heavily debated at the Commission itself. One key issue is how FERC should determine need and balance pipeline benefits and costs in making its public interest determination. I have believed for some time that, given the far greater availability of natural gas and the resultant potential for overbuilding, FERC should no longer rely simply on precedent agreements. Instead, FERC should build a factual record on the need for the gas, considering the proposed end uses, the region's energy supply plans, and the regional need for natural gas. When multiple pipelines are proposed for the same region, I believe their impacts should be considered together (a point I made in dissenting from the Atlantic Coast and Mountain Valley pipelines). A fuller record, which FERC could obtain by requiring more information from pipeline applicants, would allow FERC to more carefully balance the need for pipeline construction with its environmental and landowner consequences.

Another controversial issue is how the FERC considers the climate impacts of pipelines, including the greenhouse gases created by the combustion of the gas that pipelines transport. I have often observed that natural gas has a complicated relationship with the climate. As gas began to be widely used for electric generation a decade ago, it was lauded for its environmental benefits because it displaced much more polluting and carbon-intensive coal generation, both in the US and abroad. However, natural gas generation has far greater climate impact than zero-carbon renewable generation. As new renewable technologies have grown in scale and affordability, and an increasing number of states, cities and companies have set carbon reduction targets, concern has grown about overbuilding pipelines and the need to consider how they fit in with long-term climate objectives.

Due to all of these emerging issues, far more of FERC's pipeline orders have been appealed to the federal courts. In the 2017 *Sierra Club* case about the Sabal Trail pipeline, the US Circuit Court of Appeals for the DC Circuit ruled that FERC was required to consider downstream GHG emissions of pipelines. Since that case, Commissioners have disagreed strongly as to how it should be interpreted. When I was on the Commission, I dissented from the Commission's ruling on remand and in several related cases because I believed the majority did not fairly apply the Sabal Trail ruling. I believed the majority did not properly disclose or consider the significance of climate impacts. After that time, in those cases in which I voted for proposed pipelines, I did my own GHG analysis in my concurrence as part of my consideration of the public interest.

Beyond the Sabal Trail decision, there has been increasing appellate litigation about other aspects of the pipeline process, including the use of eminent domain, the use of tolling orders on rehearing, whether pipelines have satisfied the conditions FERC placed on pipeline construction, how states carry out their Clean Water Act review, and many other issues.

In April 2018, FERC opened a Notice of Inquiry to take a comprehensive look at its pipeline process, including how it determined need, environmental reviews of pipelines, landowner issues, and the efficiency of the process. However, FERC has taken no further action in that docket. I know that FERC is busy on many other matters, but I believe they should return to that Notice of Inquiry to find a way forward on the issues in that docket. I believe a new process that FERC developed itself—ideally in a bipartisan consensus order-- would likely be

more fair, clear, and efficient than one dictated piece by piece by an iterative succession of court orders.

The second topic I want to discuss is more limited in scope, but is important to pipeline customers, particularly gas distribution companies and the consumers they serve. It relates to Section 5 of the Natural Gas Act, under which a pipeline customer or FERC itself can file a petition seeking a rate reduction.

Under the Federal Power Act, the parallel law on which much of the Natural Gas Act was patterned, an electric company can file an action to INCREASE rates under Section 205 of the Federal Power Act, and a customer or FERC can file to DECREASE rates under Section 206. In either case, FERC establishes a "refund date", generally five months after the filing date. Once a just and reasonable rate is determined, often after a lengthy trial process, customers pay the new rate as of the refund date--paying more if the rate goes up and receiving refunds back to the refund date if the rate goes down.

Under the Natural Gas Act, if a pipeline seeks a rate INCREASE, it files a case under Section 4, and FERC sets an effective date, generally five months in the future, as of which the new rate if any will take effect. If a pipeline customer or FERC itself seeks to DECREASE the pipeline rate, it files an action under Section 5 of the Natural Gas Act. However, Section 5, unlike Section 4 and Sections 205 and 206 of the Federal Power Act, does not allow FERC to set a refund date. Even if the rate is not just and reasonable, it is not decreased until the end of the proceeding, which can be lengthy given the need for factual trial rate components and issues involved. As a result, pipelines have the incentive to prolong litigation, resist settlement, and make the process as expensive and slow as possible to avoid reducing rates, and to discourage customers from filing complaints in the first place.

This asymmetry in the Natural Gas Act also allows a pipeline against whom FERC or a customer files to DECREASE rates to threaten its own application to INCREASE rates, and use the threat of an effective date for the rate increase as leverage to pressure customers to settle or drop the Section 5 case. This is not a hypothetical example but drawn from actual experience.

Another consequence of the lack of a refund date in Section 5 was apparent when Congress passed the Tax Cuts and Jobs Act in 2017, reducing the corporate tax rate. FERC was able to take prompt action to ensure that electric companies passed the tax savings along to their customers in rates. But because of the lack of a refund date in Section 5, it was much more difficult and slower for FERC to provide the same relief to gas pipeline customers.

I have long advocated that Congress amend Section 5 of the Natural Gas Act to allow FERC to set a refund date, similar to Section 4 of the Act and the parallel sections of the Federal Power Act.

Thank you again for the opportunity to testify, and I look forward to your questions.