



March 30, 2023

**Via Electronic Submission**

Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

RE: Oil Pipeline Affiliate Committed Service, Docket No. PL23-1-000  
Comments of Energy Infrastructure Council in Support of the Initial Comments of the  
Liquid Energy Pipeline Association

Dear Chairman Phillips and Commissioners Danly, Clements, and Christie,

The Energy Infrastructure Council (“EIC”) submits the following comments to the Federal Energy Regulatory Commission (“Commission” or “FERC”) in support of the Initial Comments of the Liquid Energy Pipeline Association (“LEPA”)<sup>1</sup> regarding the Proposed Policy Statement for Oil Pipeline Affiliate Committed Service (the “Proposed Policy Statement”).<sup>2</sup> As made clear by the LEPA Comments, and as argued by Commissioner Danly in his dissent,<sup>3</sup> the Proposed Policy Statement creates significant uncertainty for FERC-regulated entities, their investors, their customers, and consumers of crude oil and refined petroleum products. The uncertainty that would result from the Commission’s proposals regarding changes to commercial agreements after an open season and throughout the life of the agreement, as well as other facets of the Proposed Policy Statement that mark a departure from the current streamlined regulatory regime supporting the development of liquids pipeline infrastructure, will impede the ability of energy companies to raise capital for and invest in important energy infrastructure.

EIC is a non-profit trade association representing over 55 energy companies and other investors in energy-related infrastructure, and is dedicated to advancing the interests of companies that invest in, develop, and operate energy infrastructure. EIC’s members include a large segment of the pipeline investor community, including numerous Commission-regulated transporters and gatherers of natural gas, crude oil, natural gas liquids, and refined products, as well as investors in other critical energy-related infrastructure. Collectively, EIC’s members invest billions of dollars in U.S. energy infrastructure. EIC participates in Commission proceedings addressing core public policy issues affecting investment in U.S. energy infrastructure and that directly impact its member

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<sup>1</sup> Initial Comments of the Liquid Energy Pipeline Association, Docket No. PL23-1-000 (Feb. 13, 2023) (hereinafter “LEPA Comments”).

<sup>2</sup> *Oil Pipeline Affiliate Committed Service*, 181 FERC ¶ 61,206 (2022) (the “Proposed Policy Statement”).

<sup>3</sup> Proposed Policy Statement at PP 7, 9 (Danly, Comm’r, dissenting) (recognizing that commenters are justifiably skeptical of the Commission’s claim that the Proposed Policy Statement will “provide guidance to industry participants that will aid in the efficient deployment of capital” and stating: “It is a mistake for the majority to repropose a policy shown to have irremediable vulnerabilities under the APA and a near certain chilling effect on investment.”).

companies, such as the above-referenced proceeding. EIC is able to offer a unique perspective on how Commission policies impact regulated companies, including the effect Commission policies have on those companies' ability to attract and retain the capital investment necessary for the development of infrastructure and continued safe and reliable operations.

Billions of dollars of capital investment are required every year to plan, acquire, install, and operate the energy infrastructure necessary to the economic success of the United States. Investors historically have been willing to invest such significant sums in energy infrastructure development based upon the knowledge that investments in regulated assets face a relatively predictable regulatory regime. The degree of security and certainty in a project "drives both the decision to invest and the level of risk premium required" for the return on investment in infrastructure projects.<sup>4</sup> Without such security, businesses and investors "would not enter into such projects nor lend the necessary funds to make the projects possible."<sup>5</sup>

Liquids pipelines in particular are a vital component of the energy supply chain in the United States, enabling the safe and efficient transportation of crude oil and liquid commodities from production regions to refineries, processing facilities, and other downstream delivery points, and delivering gasoline and other fuels to consumers all across the country. According to the Pipeline and Hazardous Materials Safety Administration, there are nearly 225,000 miles of liquids pipelines in the United States,<sup>6</sup> which transport over 70% of the crude oil and petroleum products consumed in the country.<sup>7</sup> This expansive network helps to ensure that energy supplies are available to consumers in a timely and efficient manner, while also reducing the risk of supply disruptions due to factors such as extreme weather events or geopolitical tensions. In recent years, the United States has become a net exporter of crude oil and petroleum products,<sup>8</sup> in large part due to the buildout of the liquids pipeline infrastructure. The continued investment in this infrastructure is essential for the United States to maintain its economic competitiveness and enhance its energy security.

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<sup>4</sup> KEVIN CHAVERS, ET AL., *BLACKROCK Infrastructure Investment: Bridging the Gap Between Public and Investor Needs*, 3 (2015), available at <https://www.blackrock.com/corporate/literature/whitepaper/viewpoint-infrastructure-investment-november-2015.pdf>.

<sup>5</sup> *Trunkline LNG Co.*, 22 FERC ¶ 61,245 at p. 61,442 (1983). One example of the consequences of regulatory uncertainty is the market's response to the Commission's March 2018 orders denying master limited partnerships an income tax allowance. See, e.g., *Inquiry Regarding the Commission's Policy for Recovery of Income Tax Costs*, 162 FERC ¶ 61,227 (2018), order on reh'g, 164 FERC ¶ 61,030 (2018).

<sup>6</sup> *Annual Report Mileage for Hazardous Liquid or Carbon Dioxide Systems*, PHMSA (Mar. 1, 2023), available at <https://www.phmsa.dot.gov/data-and-statistics/pipeline/annual-report-mileage-hazardous-liquid-or-carbon-dioxide-systems>.

<sup>7</sup> James Conca, *Which Is Safer For Transporting Crude Oil: Rail, Truck, Pipeline Or Boat?*, FORBES (Oct. 11, 2018), available at <https://www.forbes.com/sites/jamesconca/2018/10/11/which-is-safer-for-transporting-crude-oil-rail-truck-pipeline-or-boat/?sh=48ec5bd87b23>.

<sup>8</sup> The Energy Information Administration reports that, in 2022, the U.S. exported an average of 3.6 million barrels of crude oil and 5.97 million barrels of petroleum product per day. See *In 2022, U.S. crude oil exports increased to a new record, 3.6 million barrels a day*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 30, 2023), available at [https://www.eia.gov/petroleum/weekly/archive/2023/230315/includes/analysis\\_print.php](https://www.eia.gov/petroleum/weekly/archive/2023/230315/includes/analysis_print.php); *U.S. petroleum product exports set a record high in 2022*, U.S. ENERGY INFORMATION ADMINISTRATION (Mar. 20, 2023), available at [https://www.eia.gov/todayinenergy/detail.php?id=55880#:~:text=In%202022%2C%20the%20United%20States,d\)%20in%20distillate%20fuel%20oil](https://www.eia.gov/todayinenergy/detail.php?id=55880#:~:text=In%202022%2C%20the%20United%20States,d)%20in%20distillate%20fuel%20oil).

Despite the importance of the liquids industry in the United States and the need for continued investment in this critical energy infrastructure, the Commission's Proposed Policy Statement threatens to increase the risk of investing in liquids pipeline infrastructure, erode regulatory certainty for liquids pipelines, their customers, and consumers, and create ambiguity in the Commission's policies that will adversely affect infrastructure investment and development. The Commission suggests that the Proposed Policy Statement "will provide guidance to industry participants that will aid in the efficient deployment of capital"<sup>9</sup> to the benefit of all stakeholders. Yet if the proposed "guidance" is memorialized in a policy statement it would mark a significant change in Commission policy, as it would impose new burdensome and unsupported "safe harbors" and presumptions, based solely on hypothetical concerns, and undermine certainty and predictability. The content of the Proposed Policy Statement and what it requires of industry participants (or leaves unanswered) matters, and EIC agrees with Commissioner Danly<sup>10</sup> and LEPA<sup>11</sup> that—in contrast to the stated goals—the Proposed Policy Statement will shift additional project risk to liquids pipeline investors and result in further uncertainty and additional barriers to infrastructure investment.

As explained in the LEPA Comments, several aspects of the Commission's Proposed Policy Statement would undermine an investor's security and certainty in a project, discouraging investment and potentially increasing the level of risk premium required for the return on investments in infrastructure projects. First, the Proposed Policy Statement seeks comments on a proposal to eliminate the presumption of reasonableness and non-discrimination for affiliate contracts under the Interstate Commerce Act ("ICA") where, following a pipeline's holding of an open season, an affiliate is the only shipper to obtain contractually committed service ("Affiliate-Only Committed Service"), unless the pipeline meets one of two "safe harbor" options.<sup>12</sup> The elimination of the presumption of reasonableness and non-discrimination creates new uncertainty for any infrastructure project. It is not known in advance of an open season what entities will participate in the open season, and thus what presumptions may or may not apply to the project. The project sponsor thus cannot know the scope of commercial terms available to it until after the open season actually occurs, at which point the project sponsor already has invested significant resources into the project. As LEPA notes,<sup>13</sup> even if other entities do participate in the open season, if none of them subscribes for the tier of service elected by the affiliate, the pipeline would be subject to the new Proposed Policy Statement limitations. Only by following all of the onerous "safe harbor" requirements could a project sponsor know the new boundaries on its ability to develop the project, though as explained below, those requirements themselves impose significant project risk and uncertainty on the project.

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<sup>9</sup> Proposed Policy Statement at P 2.

<sup>10</sup> See, e.g., *id.* at P 9 (Danly, Comm'r, dissenting) (stating that the Proposed Policy Statement has been shown to have "irremediable vulnerabilities" and will have "a near chilling effect on investment").

<sup>11</sup> See, e.g., LEPA Comments at 14, 23, 25-27, 31-32.

<sup>12</sup> See *id.* at 23 (describing the two "safe harbor" options).

<sup>13</sup> See, e.g., *id.* at 5, 14, n.24, 37-39; *id.* at 15, n.27 ("The pipeline would not know in advance of the open season whether the result would be an 'affiliate-only' contract, and thus it is unclear under the Proposed Policy how affiliate-only contract terms would be implemented – in a subsequent open season, or otherwise, which could create significant uncertainty.").

The proposed “safe harbor” options themselves are *designed* to undermine the certainty of transportation service agreements—certainty that is fundamental not only to a project sponsor’s or investor’s decision to invest significant capital in a pipeline project, but to customers as well as they make further upstream and downstream commercial decisions and investments.<sup>14</sup> As LEPA notes, providing certainty to the pipeline and the shipper is “the fundamental purpose of a liquid pipeline transportation service agreement,” and the “bedrock principle underlying at least the past decade’s successful series of new projects.”<sup>15</sup> Yet both of the “safe harbor” options proposed by the Commission include a requirement that any shipper agreeing to a service agreement based on the open season be allowed to challenge the rates agreed to in the bilaterally negotiated service agreement, directly putting at risk the revenue on which the investment decision was made. This revenue reduction could surface after the open season, after significant investment has occurred but before service has commenced, or could be forced upon the pipeline years *after* service has started.<sup>16</sup> Neither of the “safe harbor” options presented by the Commission provide sufficient rate certainty that a liquid pipeline could rely on without incurring an unacceptable level of business risk on a major capital investment to provide the capacity being offered in the open season. Instead, the “safe harbor” options appear to be designed to undermine certainty in bilaterally negotiated contractual arrangements and (through the embedded presumptions, cost of service requirements, and use of a 100% load factor) designed to supplant the risk allocation and rate design agreed upon between pipelines and customers to place greater project risk directly on pipelines and their investors.<sup>17</sup>

The Proposed Policy Statement goes further and proposes to establish a presumption *against* the lawfulness of Affiliate-Only Committed Service when an affiliate remarkets capacity, even if that remarketing occurs years after the TSA is signed and after service has commenced.<sup>18</sup> With respect to this proposal, LEPA identifies a number of questions that the Commission has left unanswered and that, without adequate resolution, would result in “needless market uncertainty.”<sup>19</sup> Project sponsors will face greater capital costs if they and their investors are required to take on the risk of losing the pipeline’s contract rights entirely in the event the Commission finds that the affiliate’s remarketing of capacity caused the original open season contract to become unlawful.

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<sup>14</sup> See *id.* at 25-26.

<sup>15</sup> *Id.* at 25.

<sup>16</sup> *Id.* at 26 (noting that “under the Proposed Policy, the TSA could become a contract for capacity or other rights that the shipper could litigate throughout the term of the contract – the antithesis of rate certainty”).

<sup>17</sup> See *id.* at 24-25 (“Not only does the safe harbor improperly shift project risks to pipelines by requiring a 100% load factor assumption, but it would exacerbate the risk with a one-way right for the shipper to challenge the pipeline’s rates at the same time that the contract rate is binding on the carrier.”).

<sup>18</sup> See *id.* at 29-33. As explained by LEPA, this portion of the proposed policy is unsupported and fails to recognize the countless commercial reasons for which an affiliate may remarket capacity that are unrelated to the Commission’s theoretical concerns. *Id.*

<sup>19</sup> *Id.* at 32, n. 68 (suggesting that the Proposed Policy Statement leaves open many unanswered questions regarding an affiliate’s remarketing of committed service including, for example, questions surrounding (1) the statute of limitations applicable to the remarketing of capacity; (2) which volumes would trigger a finding of unlawfulness; or (3) what the Commission will consider a permissible “business purpose” for an affiliated shipper remarketing capacity).

The risks accompanying this proposal could result in a complete lack of funding for certain projects, and therefore adversely affect FERC-regulated entities, their investors, their customers, and consumers of crude oil and refined petroleum products.

Finally, if adopted, the Proposed Policy Statement would create considerable uncertainty for liquids pipelines and their customers by signaling a marked shift from the fundamental framework FERC has applied to pipelines and shippers under the ICA<sup>20</sup> and a departure from existing FERC regulations.<sup>21</sup> FERC already has in place a system for utilizing petitions for declaratory order and shipper complaints and protests in order to ensure the reasonableness of the terms and conditions for service on FERC-regulated liquids pipelines.<sup>22</sup> This existing system works well and has supported the successful growth of pipeline infrastructure for more than the last decade, and would support continued infrastructure development.<sup>23</sup> As Commissioner Danly explained in his dissent, the Proposed Policy Statement was not prompted by the filing of a complaint or a public investigation into common carriers, and the Commission has otherwise failed to provide any “evidence that there is an actual problem to solve.”<sup>24</sup> Nevertheless, the Proposed Policy Statement would fundamentally change the way FERC regulates liquids pipelines, potentially in direct contradiction of the Congressionally recognized limitations of the ICA.<sup>25</sup> As explained above, FERC also would be dictating contract terms and allocating project risk in a manner contrary to the negotiated intent of market participants, usurping the role of the parties and upsetting the balance of market forces at play in the liquids pipeline industry. Some of these proposals are even inconsistent with the Commission’s ratemaking regulations and policies.<sup>26</sup> This type of unwarranted departure from and disruption to prior practice is precisely the type of regulatory action that causes investors to question the direction of the industry, the decision to invest in infrastructure, and the risk premium required to justify investments subject to the uncertain regulatory regime.

EIC supports the LEPA Comments, including specifically LEPA’s concern regarding the uncertainty created by the Proposed Policy Statement and the resulting chilling effect on investment in the liquids pipeline industry, and respectfully requests that the Commission be mindful of the impact that its policies have on the infrastructure investment community. Project sponsors and their investors, including EIC members, play a vital and necessary role in ensuring the country’s ability to continue to deliver low-priced energy from competitive sources to

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<sup>20</sup> See *id.* at 2, 6-11.

<sup>21</sup> See *id.* at 3, 22-28.

<sup>22</sup> See *id.* at 15, 28-29.

<sup>23</sup> Indeed, the Proposed Policy Statement ignores the competitive landscape of the liquid pipeline industry, which has only intensified in recent years as a result of the heightened demand for pipeline capacity. See generally PHAT V. LUONG, CRUDE OIL PIPELINE CONSTRAINTS: A TALE OF TWO SHALES (May 17, 2022) (discussing crude oil pipeline constraints resulting from increased production in the Permian and Williston Basins).

<sup>24</sup> Proposed Policy Statement at P 43 (Danly, Comm’r, dissenting) (stating that the Proposed Policy Statement has been shown to have “irremediable vulnerabilities” and will have “a near chilling effect on investment”).

<sup>25</sup> LEPA Comments at 9-10 (discussing how the Proposed Policy Statement contradicts the Commission’s regulation of the liquids pipeline industry following the promulgation of the Energy Policy Act of 1992).

<sup>26</sup> *Id.* at 24-25.

consumers. If the Commission is not vigilant about the impact of its policies on the investment community, U.S. consumers may lose the benefits provided by low-priced, competitively sourced energy and project shippers may lose the benefits of additional capacity. To encourage the continued investment in energy infrastructure, the market requires steady, long-term income streams from just and reasonable rates. If adopted, the Proposed Policy Statement would signal a significant departure from FERC's historically streamlined regulation of the liquids pipeline industry that would discourage the continued investment in needed transportation infrastructure to the detriment of FERC-regulated entities, their investors, their customers, and consumers of crude oil and refined petroleum products.

Sincerely,



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