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The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, DC 20510
Via email: meghan_taira@schumer.senate.gov

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510
Via email: Tiffany_ge@mccconnell.senate.gov

Dear Sen. Majority Leader Schumer and Sen. Minority Leader McConnell,

The undersigned attorneys general write with strong opposition to the misnamed Energy Independence and Security Act of 2022 (the “Act”).¹ The Act contains assorted provisions that would effectively create a backdoor Clean Power Plan, allow the restricting of the electric grid by abrogating states’ traditional authority to set their own resource and utility policies, and upset the careful balance of state and federal authority that has been a cornerstone of the Federal Power Act (“FPA”) for nearly a century. Even Presidents Franklin Roosevelt and Lyndon Johnson never sought to disrupt this federalist system. And worse, it is being proposed with little to no time for the American people to be informed about the costs that will be imposed upon them when these misguided policies are implemented

¹ Draft of Energy Independence and Security Act of 2022 (EISA 2022 Draft), *available at* https://www.energy.senate.gov/services/files/EAB527DC-FA23-4BA9-B3C6-6AB108626F02?utm_source=DCS+Congressional+Email&utm_medium=Email&utm_term=https%3a%2f%2fwww.energy.senate.gov%2fservices%2ffiles%2fEAB527DC-FA23-4BA9-B3C6-6AB108626F02&utm_campaign=MANCHIN+RELEASES+COMPREHENSIVE+PERMITTING+REFORM+TEXT+TO+BE+INCLUDED+IN+CONTINUING+RESOLUTION (last visited Sept. 25, 2022).

The Act contains three interrelated provisions that, particularly when taken together, eviscerate states' ability to chart their own land-use and energy policies. First, it would authorize *private companies* to **use eminent domain against *state land*.** Second, it would authorize FERC to command utilities to **construct *entirely new transmission facilities* whenever and wherever FERC deems necessary.** And third, it would authorize companies to spread costs of constructing new transmission facilities onto ***residents of other states***, requiring citizens of one state to subsidize the agenda of politicians and bureaucrats in other states. These provisions eviscerate state sovereign authority, commandeer companies to carry out the will of a three-vote majority of FERC Commissioners, undermine the power of each citizen's vote to decide policies at the state level, and inevitably force the citizens of our states to subsidize the costs of expensive and unreliable energy policy preferences of California and New York.

If enacted, these ill-advised policies will in effect create substantially the same policies as the illegal and long-rejected Clean Power Plan. Certain states and companies favored by the current Administration and the current FERC majority will be empowered to distort other states' resource and energy policy, take state and private land to construct infrastructure in furtherance of these schemes, and force the citizens who did not adopt these policies in their states to foot the bill for it all.

Even worse, these drastic and draconian changes are being rushed through without committee hearings, markups, and the full debate expected of the world's greatest deliberative body. This utter lack of transparency is a manifestation of Congress' "new normal," under which laws are passed before the several States and their citizens can find out what is in them. Such hurried and agenda-driven laws provide the public no explanation of what the new laws are, why they are necessary, or how they will affect our Nation and the States. Whatever value there may be to other provisions in the Act, these provisions are poison pills. If Congress is to radically overhaul our nation's utility law, it should do so out in the open and not through rushed backroom deals mere weeks before a hotly contested midterm election.

The provisions of the Act that would establish this scheme are threefold.

***First*, the FPA currently provides that a company that gets a permit to construct a transmission facility may use eminent domain to obtain a right-of-way over other parties' property.**² But, importantly, the statute currently expressly forbids this mechanism from being used against property "owned by the United States or a state." The bill³ strips States of this protection by eliminating the phrase "or a state," allowing companies to run roughshod over state land and

² FPA § 216(e), 16 U.S.C. § 824p(e).

³ EISA 2022 Draft at 80

sovereignty to build their and FERC's favored projects in areas that previously had full sovereign prerogative.⁴ While FERC must first determine that the company has acted "in good faith," that phrase simply makes it easier for the Administration to enact its preferred agenda. A simple majority vote of the FERC will no doubt find that companies whose projects align with the Administration's worldview are acting in good faith. We have already seen this dynamic playing out at FERC though recently proposed GHG and "regional transmission planning" policies.

This drastic federal overstep has serious consequences. Sadly, this is not the first time Congressional Leadership have joined the Administration in seeking to trample on areas traditionally held by States. The proposed voting requirements in HR 1 similarly would have run roughshod on state authority. The attempted masking of young children in Head Start, the collective vaccine mandates, mask mandates on all public transportation, and eviction moratoriums each attempted to displace State authority in public health matters. Here, however, the federal government would provide an unrestrained mechanism for a private company's takeover of State land. For example, this provision would allow private companies to take over state park property, if FERC deemed it necessary, to build new transmission facilities deemed necessary to connect to solar or wind farms. Likewise, it would also permit FERC to authorize massive takings of private lands for such projects, displacing and replacing the American farmer with federally-facilitated solar farms, composed of panels manufactured from Chinese-mined minerals from foreign countries. Imagine our state forests taken over by transmission lines so coastal elites can sleep better at night knowing their electric vehicles and air conditioning are being powered by wind from the Midwest, purchased through the sacrifice of American energy independence. Indeed, the Act should be renamed the "*Sacrificing Energy Independence and Security Act of 2022*" based on this provision alone.

Second, the Act would allow FERC to order the construction of new facilities by private companies.⁵ The provisions of the Act would effectively allow three appointed members of the FERC to order the wholesale construction or modification of additional facilities that the Secretary of Energy determines in the national interest. Given past practice, the Secretary will likely delegate this authority to FERC. This would create the scenario where FERC would have the authority to determine the national interest and require companies to build what it orders and where. This is a *massive* expansion of FERC's authority which currently only allows FERC to order public utilities to physically connect their existing transmission lines.⁶

⁴ Some may argue this would simply harmonize the FPA with the Natural Gas Act as construed by the United States Supreme Court in *PennEast v. New Jersey Pipeline Co.*, 141 S. Ct. 2244 (2021). Not so: that Act contains no express prohibition on the object of companies' exercise of eminent domain, but the FPA does. Asymmetrically removing the protection of state sovereignty from the FPA departs (*with no explanation*) from the careful choices that Congress originally made in providing that protection.

⁵ *Id.* at 77.

⁶ FPA § 202(b), 16 U.S.C. § 824(a)(b).

The current system is built on common sense to ensure that necessary interconnections are constructed to protect the grid and its customers. However, even this commonsense authority is cautiously used, at least in part because FERC Order 888 has, for a generation, promoted open, non-discriminatory access of transmission services by public utilities.

The Act would turn this commonsense authority on its head, converting FERC into a super-agency that can require new construction on state or private land. This is a gross expansion of agency authority without hearings, debate, public input, or even knowledge by the public of what is about to be foisted upon them. Our system of government should not embrace the idea that we would allow an agency, potentially *sua sponte*, to commandeer companies to construct facilities without even the fig-leaf of bottom-up demand. Even if the Act would require an application from a state commission or company, it would still allow a state or company in one region to use FERC to rework other states' transmission fleets. This will no doubt result in lengthy and expensive litigation as one state attempts to prohibit being subject to another's policy goals. A simultaneous incursion on the autonomy of private companies *and* the States is bad policy compounding bad policy.

Third, the Act would create new authority for companies to file tariffs with FERC to allocate the cost of these new transmission facilities ordered under the novel authority described above.⁷ According to the Act, these tariffs shall consider a “broad range of reliability, economic, *and other reasonably anticipated benefits*” from the new facilities (emphasis added). This goes well above and beyond FERC's traditional core mission, which is to ensure a reasonably priced and reliable supply of electricity. And this vague, open-ended language will no doubt be used to claim spurious climate benefits as a justification for imposing potentially back-breaking costs on residents who may see no true energy benefit whatsoever.

The Act further provides that the costs shall be allocated “to customers within the transmission planning region or regions that benefit from the facilities in a manner that is at least roughly commensurate with the estimated benefits.” This likewise invites attempts to build out renewables in a state or planning area that elect that policy beyond what the actual economic situation in the direct service area can justify—and then pass on the costs to citizens of those states who have chosen a different path. And because the statute speaks of putative benefits to “regions,” plural, companies and this FERC majority may even take the position that *the entire country* benefits from what are in reality local projects. This Act would also provide that offshore wind facilities can take advantage of this novel cost-allocation authority. This again ensures that spurious benefit claims will stick citizens in inland states who may never have access to or be unable to afford potential new offshore electricity generation with the bill for these massive and massively expensive projects. Indeed, a Louisiana farmer's land may be taken to supply the demands of an Oregonian's

⁷ EISA 2022 Draft at 81-82.

Tesla, and to add insult to injury that very same farmer will be required to pay for it. The residents of Utah, Oklahoma, Louisiana, Kentucky, Indiana, Ohio, and West Virginia should not have to pay for boondoggle projects in states such as California, Oregon, and Washington.

If this sounds uncannily like the Clean Power Plan, the *ultra vires* 2015 EPA rule that would have effectively forced all states and regions to adopt the cap-and-trade, renewable-subsidizing policies that to date only some states and regions have chosen, that's because it is in large part the same policy—but this time with no meaningful public notice, explanation, discussion, input, or legal recourse. As the Supreme Court held earlier this year, the Clean Power Plan was illegal—but at least it was openly proclaimed by President Obama, undertaken through public notice and comment, and subject to full judicial review.⁸ To attempt changes on this order without any notice and under rushed timing is completely unacceptable.

In sum, the Act contains sweeping new authority for FERC that could upend the traditional authority between the states and the federal government, and ultimately implement the Clean Power Plan by other means. It would allow private companies to exercise eminent domain against the states and private landowners, draft companies into building projects FERC deems necessary, and then impose costs on the citizens of states who may not want such projects or be able to pay for them and would effectively receive no benefit from them. States did not spend nearly a decade successfully defending the rule of law against the overreaching and illegal Clean Power Plan only to have similar policies rushed into law through procedural gamesmanship and without hearings, debate, or discussion.

Sincerely,



Jeff Landry
Louisiana Attorney General



Steve Marshall
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⁸ *West Virginia v. EPA*, 142 S. Ct., 2587 (2022).



Treg Taylor
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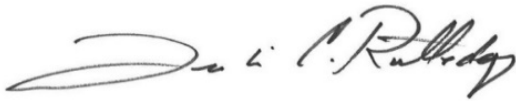
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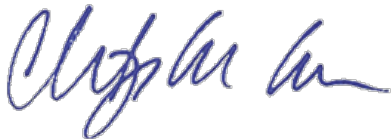
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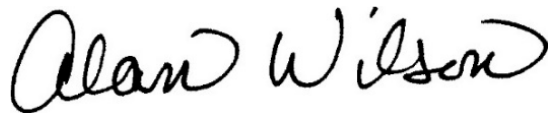
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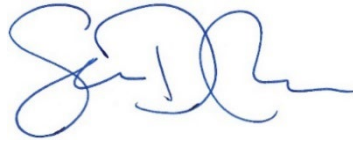
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