State of Louisiana
DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
BATON ROUGE
70804-9005

Jeff Landry
Attorney General

December 12, 2022

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@mcconnell.senate.gov

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

The undersigned Attorneys General write to again express our strong opposition to the renewed attempt to make sweeping changes to the Federal Energy Regulatory Commission's (FERC) authority. The only recently released draft of the misnamed Building American Energy Security Act (the Act)[1] does little, if anything, to address important concerns about the far-reaching consequences of this eleventh-hour attempt to again make major changes to energy policy without adequate deliberations. Our prior letter of September 26, 2022, opposing the last proposal of these measures, also objected to such hasty and ill-considered action.

The complete lack of regular process, hearings, findings, and debate is even *more* egregious now than in September. Congress is now in its "lame duck" session, after the people of the nation have elected a new, Republican House majority. And the attempt by the Act's supporters to insert it into the crucial National Defense Authorization Act hijacks and holds hostage crucial national security funding. And making matters worse, the language of the Act will increase inflation and grant FERC extraordinary power to raise rates for electricity – without even a week's notice

[1] Draft of Building American Energy Security Act of 2022 (the Draft Act), *available at* https://www.energy.senate.gov/services/files/FAED4818-E382-4210-B452-5A3D0D8D58A8 (last visited Dec. 9, 2022).

to the public. Americans already are suffering from ill-advised decisions about energy policy imposed by the Executive Branch without notice and comment. The Congress should not impose even higher costs on Americans to heat their homes by over-empowering FERC with no deliberations regarding the consequences.

The Act still contains three interlocking provisions that, especially when taken together, gut states' traditional authority over energy and land-use policies.

Specifically, the language, proposed by Senator Manchin, still strips state land from protection against the use of eminent domain by private companies.[2] It still gives FERC unprecedented authority to order utilities to construct entirely new transmission facilities.[3] And it would still expand utilities' ability to spread the costs of those facilities to citizens and ratepayers in other states.[4] These provisions undermine the Federal Power Act's central division of sovereign authority,[5] which reserves for the States core issues of generation balance and siting decisions.

The revisions to the Act do virtually nothing to address our concerns, and in some cases are facially toothless. First, there is *no* revision to the provision that would strip state land of protection against eminent domain. Second, before FERC can order the construction of new transmission facilities, it would now need to make a finding that the state in question doesn't allow for the same order, or won't let the company in question apply for the order *because the company doesn't actually provide that state's residents with electricity*.[6] But this is no real respect for state prerogatives; it simply says "you do what we want you to do yourself, or we'll do it instead." It raises the prospect that FERC and its favored companies can order new transmission facilities to be built across a state—even on that state's own property, perhaps even on a state park—even when those facilities and lines will not actually service that states' residents. While the Act now offers a fig leaf "consultation" requirement prior to issuing these orders,[7] our States have seen consultation requirements ignored and given short-shrift before and, in any event, this provision offers the States no actual ability to protect their prerogatives.

---

[2] Draft Act at 71, proposing to strike the words "or a state" from 16 U.S.C. § 824p(e)(1).
[3] *Id.* at 67-69.
[4] *Id.* at 71-72.
[5] *See* 16 U.S.C. § 824(a) (while "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" is to be subject to Federal regulation, "such Federal regulation, however, [is] to extend only to those matters which are not subject to regulation by the States.").
[6] Drat Act at 68.
[7] *Id.* at 70.

And third, while some effort appears to have been made to tighten the "cost allocation principles" language somewhat,[8] it is still open-ended enough to invite attempts to shift costs onto a broader swathe of citizens, under a broader range of theories, than under the current statute and FERC's longstanding precedents. (Notably, this cost-allocation authority would *not*, as with the new-construction-order authority, be limited to cases where FERC finds existing state law and procedures to not meet its own preferences, making its impact on states and their ratepayers all the more burdensome.) It is no mystery why utilities and others who have over-invested in untested generation sources that are not viable without massive subsidies are now seeking to shift their costs to the residents of states who have pursued more prudent policies. What *is* a mystery is how anyone can think it's appropriate to sneak these changes into law without a word of debate.

Ensuring that our nation has a reliable, affordable supply of energy is too important to be left to these back-room, last-minute maneuvers. If the next Congress wishes to take these matters up through regular order, the right way to proceed would be to consult with the States and their duly-constituted utility commissions and other stakeholders as to what problems they are seeing and how those might be best addressed. Appropriate legislation requires hearings, debate, committee procedures, and legislative fact-finding. The newly released draft Act went through *none* of these processes, does not address any of the core concerns expressed in the previous letter, and should be roundly rejected.

Sincerely,

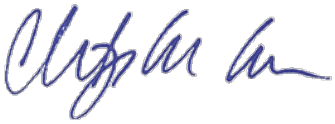
Jeff Landry
Louisiana Attorney General

Treg Taylor
Alaska Attorney General

Steve Marshall
Alabama Attorney General

Leslie Rutledge
Arkansas Attorney General

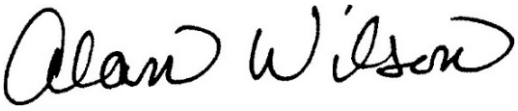
[8] *See id.* at 71-72.



Christopher Carr
Georgia Attorney General

John M. O'Connor
Oklahoma Attorney General

Todd Rokita
Indiana Attorney General



Alan Wilson
South Carolina Attorney General

Daniel Cameron
Kentucky Attorney General

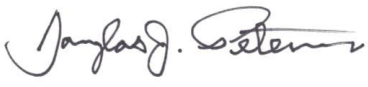
Ken Paxton
Texas Attorney General

Lynn Fitch
Mississippi Attorney General

Jason S. Miyares
Virginia Attorney General

Austin Knudsen
Montana Attorney General

Sean D. Reyes
Utah Attorney General



Doug Peterson
Nebraska Attorney General