

Testimony of

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**Before the Committee on Energy and Commerce
Subcommittee on Energy and Power**

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Hearing on H.R. 3301

“North American Energy Infrastructure Act”

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Mr. Chairman and Members of the Subcommittee:

My name is Jeff Wright and I am the Director of the Office of Energy Projects (OEP) at the Federal Energy Commission (FERC or Commission). I appreciate the opportunity to appear before you to discuss H.R. 3301, entitled the “North American Energy Infrastructure Act” (Act). As a member of the Commission’s staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

I. Background

The Commission is responsible under section 7 of the Natural Gas Act (NGA) for authorizing the construction and operation of interstate natural gas pipeline and storage projects and under section 3 of the NGA for the construction and operation of facilities necessary to permit either the import or export of natural gas by pipeline or by sea (via liquefied natural gas). As part of those responsibilities, the Commission conducts both a non-environmental and an environmental review of the proposed facilities. The non-environmental review focuses on the engineering design, and rate and tariff considerations. The environmental review, pursuant to the National Environmental Policy Act (NEPA), is carried out with the cooperation of numerous federal, state and local agencies, and with the input of other interested parties. The Energy Policy Act of 2005 (EPAct 2005) amended several sections of the NGA to provide additional authorities and responsibilities to the Commission related to natural gas facilities. In particular, EPAct 2005 states that the Commission is the lead federal agency for

coordinating all applicable Federal authorizations and for the purpose of NEPA compliance. As the designated lead agency, the Commission, which is ultimately responsible for making the overall public interest determination, coordinates the regulatory review among federal agencies and maintains a single, consolidated federal record for any subsequent appeals or judicial reviews.

To streamline the permitting process, FERC establishes an expeditious publicly-noticed schedule for all decisions or actions taken by other federal agencies and/or state agencies delegated with federal authorizations. This includes federal authorizations issued by both federal and state agencies under the Clean Water Act, the Clean Air Act, the Coastal Zone Management Act, and others.

There are several distinct phases to the review process for interstate natural gas facilities under the jurisdiction of FERC:

- Project Preparation: the project sponsor defines customers and a proposed project prior to formally engaging with FERC;
- Pre-Filing Review: FERC staff begins work on the environmental review and engaging with stakeholders with the goal of resolving issues before the filing of an application;
- Application Review: the project sponsor files an application with FERC under NGA section 7 for interstate pipeline and storage facilities, and FERC staff completes and issues the environmental document, and analyzes the non-environmental aspects of projects related to the public interest determination; and

- Post-Authorization Compliance: FERC staff works with the project sponsor and stakeholders to ensure compliance with any conditions to FERC approval prior to the commencement of and during construction. The Commission is committed to making the regulatory process as short as possible while also providing public notice and opportunity for hearing before acting, to explain the reasons for the Commission's decision, and, authorize only those projects that are determined to be in the public interest. Since 2000, this process has led to the certification of nearly 16,000 miles of interstate natural gas transmission pipeline and almost 1.2 trillion cubic feet of interstate storage capacity.

II. The North American Energy Infrastructure Act

The proposed legislation, as it pertains to the Commission, requires the Commission to approve new pipeline projects at the national boundary of the U.S. to either export or import natural gas to or from Canada or Mexico within 120 days of receiving the request for approval of the project (unless the proposal is not in the national security interests of the U.S.). The Act also proposes to eliminate the requirement for a Presidential Permit for a U.S. natural gas facility at either the Canadian or Mexican border. The Act states that this proposed legislation would not apply to any border facility that: is currently in operation, has already received a Presidential Permit, or has previously been approved pursuant to this proposed legislation. Further, the Act states that no approval or Presidential Permit would be required for the following modifications of the aforementioned facilities:

reversal of flow direction, change in ownership, volume expansion, downstream interconnection, or adjustments to maintain flow. Finally, the proposed legislation would repeal section 202(e) of the Federal Power Act (FPA).

I have and will continue to support the timely approval of the facilities necessary for the import or export of natural gas from or to Mexico and Canada. The Commission's review process is thorough, efficient, and has resulted in substantial additions to the nation's natural gas infrastructure, especially the pipeline facilities necessary to import or export natural gas. These results have been substantiated by a thorough and robust environmental analysis under the NEPA. I will now turn to the specific provisions of the proposed legislation.

Section 3(b)(1) of the bill states that the Commission shall approve the project within 120 days of receipt of a request to construct and operate border facilities – unless the project is not in the national security interests of the U.S. – and that, under proposed section 3(b)(3), approval “shall not be construed to constitute a major Federal action” under NEPA. I note that this authorization proposed would differ substantially from the NGA in that the proposed Act does not make any explicit provision for procedures such as public notice, public comment, issuance of an order supporting a Commission decision, rehearing, or judicial review in conjunction with the Commission's consideration of an application. A 120-day deadline would not permit construction of an adequate record, enable important agency consultation, or allow for meaningful public interaction in arriving at a decision. In fact, the proposed language could be read

as giving the Commission no discretion in the issuance of an authorization to construct border facilities, unless there are national security concerns. The Commission, by statute, is the lead agency in the approval of interstate pipeline facilities in the U.S. and at its borders; however, depending upon the location of the proposed facilities, there are other federal statutes that are administered by federal and state agencies that require authorizations prior to the Commission's approval. Even if the Commission issues conditional authorization, construction cannot begin until the other federal authorizations are issued.

Further, the proposed legislation states, in proposed section 3(b)(3) that approval of border facilities "shall not be construed to constitute a major Federal action for purposes of the National Environmental Policy Act of 1969." Border facilities when considered on their own do not usually constitute a major project. Nevertheless, a finding of no significant environmental impact (the conclusion of an environmental assessment as opposed to an environmental impact statement which is pursued when there is a finding of significant environmental impact) still requires the Commission staff to conduct an environmental analysis to be able to make such a conclusion. In addition, many border facilities require Commission-jurisdictional pipeline facilities, pursuant to section 7 of the NGA, to be constructed. Typically, greenfield pipeline construction requires an environmental impact statement since there will be significant environmental impact. Under NEPA, an agency is charged with reviewing the cumulative impacts of a project. In such a situation, the related NGA section 7 facilities cannot be considered apart

from the related border facilities. To consider these facilities separately would invite charges of project segmentation and could result in a court reversal of a Commission decision. Therefore, the proposed 120-day approval process would negate the ability of the Commission to consider stakeholder concerns and severely curtail the Commission's ability to conduct a thorough analysis of a project involving border facilities, resulting in a decision whose sustainability is questionable.

Also, the Commission is not equipped to make decisions on the national security interests of the U.S. regarding border facilities. Currently, the Presidential Permit process solicits the opinions of the Secretaries of State and Defense regarding the import of gas from or export of gas to Canada or Mexico. If there were national security concerns, these concerns would be expressed by the Departments of State and Defense as part of the Presidential Permit process; however, section 3(c) of the proposed legislation would eliminate the need for a Presidential Permit. Even with the elimination of the need for the Presidential Permit, the Commission would still need to consult with the Departments of State and Defense. In addition, agency consultation may be necessary with, for example, the Department of Homeland Security, to further determine the national security interests of the U.S. regarding a proposal to construct border facilities.

With respect to section 5 of the bill, which would repeal section 202(e) of the FPA, 16 U.S.C. § 824a(e), and make conforming changes to other sections of the FPA, while not within my area of expertise, I understand from discussions

with others at the Commission that repeal could have an unintended potentially adverse effect on the Commission’s ability to ensure non-discriminatory open access transmission service over the U.S. electric transmission grid.

The Commission’s authority under the FPA, as relevant here, currently extends to the “transmission of electric energy in interstate commerce,” and “over all facilities for such transmission.” 16 U.S.C. § 824(b)(1). In April 1996, the Commission adopted regulations that provide that all transmission service in interstate commerce must be non-discriminatory open access transmission service, 18 C.F.R. § 35.28, and that requirement has paved the way for the wholesale power markets and the merchant generation industry the U.S. has today.

Transmission between the U.S. and Canada and Mexico is considered to be transmission of electric energy in foreign commerce and, as a consequence, such transmission service and the facilities for such service were not originally subject to the Commission’s requirement of non-discriminatory open access transmission service. Transmission providers that owned or controlled the transmission lines between the U.S. and Canada and Mexico, i.e., facilities in foreign commerce, thus could discriminate in providing service, and even deny service outright. Foreign generators could be denied access to United States markets, or be required to pay discriminatory charges to access those markets, and U.S. generators could be denied access to foreign markets, or be required to pay discriminatory charges to access those markets.

In Delegation Order No. 00-004.00A, in particular section 1.3, the Secretary of Energy – relying in part on section 202(e) of the Federal Power Act – has delegated to the Commission the authority “to regulate access to, and the rates, terms, and conditions for, transmission services over permitted international electric transmission facilities to the extent the Commission finds it necessary and appropriate to the public interest...for the sole purpose of authorizing the Commission to take actions necessary to implement and enforce non-discriminatory open access transmission service over the United States portion of those international electric transmission lines required by the Secretary [of Energy] to provide such service.” Through this Delegation Order, the Secretary of Energy has vested the Commission with the authority to do what the Commission otherwise was not authorized to do: ensure non-discriminatory open access transmission over electric transmission facilities in foreign commerce. Repealing section 202(e) of the Federal Power Act, however, potentially calls into question the continuing validity of this Delegation Order.

To address this possibility, if Congress chooses to repeal section 202(e) of the Federal Power Act, it may be appropriate to adopt in its place statutory language – in section 3 of the bill, or elsewhere – that would either: (1) explicitly vest the Commission with the same authority that the Secretary of Energy has delegated to the Commission, that is, the authority to ensure that transmission service in foreign commerce is non-discriminatory open access transmission service; or (2) given the bill’s granting, in section 3, to the Secretary of Energy the

authority to approve the construction or operation of electric transmission facilities that cross the national boundary of the United States, explicitly authorize the Secretary of Energy to again delegate to the Commission the authority to ensure that transmission service in foreign commerce is non-discriminatory open access transmission service.

III. Conclusion

The current siting process for natural gas facilities, including those facilities at the U.S. border with Canada and Mexico, has resulted in a significant increase in the natural gas infrastructure in the U.S. meeting the needs and answering the concerns of all stakeholders with decisions that are fair, thorough, and legally sustainable. The proposed legislation raises questions as to conflicting federal authorities and procedures that would be followed to authorize natural gas border facilities.

Regarding the repeal of section 202(e) of the FPA, I have suggested two remedies that, if this bill were to become law, should be considered to ensure that transmission service in foreign commerce continues to maintain its non-discriminatory open access properties.

