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BEFORE THE HOUSE COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER

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Thank you, Chairman Whitfield, Ranking Member Rush, and distinguished Members of the Subcommittee, for the opportunity to testify today concerning the Energy Diplomacy Discussion Draft.

I am a Professor of Law at the George Washington University Law School, and am also a member-scholar of the not-for-profit regulatory think-tank, the Center for Progressive Reform. My expertise relates to energy, environmental, and administrative law. I have authored numerous books, articles, and book chapters on these topics, and have particularly emphasized: (1) the links between administrative process and agency decisionmaking in the fields of energy and environmental law; and (2) the relationship of cost, reliability, and environmental attributes of electricity fuel sources to the wholesale electricity markets and the electricity fuel mix. Early in my career, I practiced as a civil engineer; that experience and training allows me to bring a technical perspective to energy and environmental law.

As a professor asked to testify due to my expertise, not as a partisan or representative of any organization, I will focus my testimony on three aspects of the Discussion Draft: (1) Section 3102, North American Energy Diplomacy; (2) Section 3104, Authorization of Cross-Border Infrastructure Projects; and (3) Section 3106, Authorization to Export Natural Gas.

Background

The field of energy represents a complex interaction between energy resources, energy markets, and environmental externalities. Policies that do not consider these interactions have led to numerous dysfunctions. Consider the example of the electric grid. Since the 1970s, the United States has pursued two policies: ever-more-efficient markets, and an ever-greener grid.[1] But because these policies have evolved in a piecemeal, uncoordinated fashion, the wholesale electricity markets fail to fully value grid reliability or the environmental characteristics of fuel sources or electricity services. As a result, we are seeing decreased diversity in electricity fuel sources, which threatens both grid reliability and our ability to flexibly respond to the climate change imperative. For example, we are increasingly seeing natural gas as an electricity fuel even as we are losing parts of the nuclear fleet in areas with wholesale markets.[2] Yet both these fuels offer climate and reliability benefits that compliment increasing renewables penetration. The bottom line is that energy decisionmaking must include consideration of relative mix of fuel sources as well as the environmental implications of that mix.

As you well know, energy issues also attract significant industry, public, and other stakeholder attention. Many energy issues—like liquefied natural gas, hydraulic fracturing, and spent nuclear fuel—trigger deeply held perceptions of risk that make it difficult, as a public policy matter, to move forward on the basis of consensus.[3] But procedures are valuable in at least smoothing the process: when people feel they have a trustworthy, neutral, transparent decisionmaker, and when they have a voice in the process, they are more likely to accept government decisions—even those contrary to their policy preferences.[4] Conveniently, the basic framework of administrative law—which emphasizes participation, deliberation, and transparency—reinforces those norms.[5] In considering procedural requirements for energy agencies, therefore, it is critical to keep in mind the value of administrative procedure.

These observations relate to my primary concerns with the Discussion Draft, which I outline according to their sections below: energy policy can do better in accounting for the reliability, diversity, and environmental implications of decisionmaking; and it should permit the energy agencies to undertake their work in a participatory, deliberative, transparent, and well-reasoned manner.

Section 3102. North American Energy Diplomacy.

A critical challenge for energy policy in the United States is that it has evolved in a piecemeal fashion, focusing on specific energy resources through source-specific federal and state agencies. Creating an Interagency Task Force, as this Section does, is an important step in bridging the gaps between the enumerated agencies' particular statutory mandates. Indeed, agencies stand to be more successful—in achieving stakeholder support and in avoiding litigation—when they coordinate their efforts and ensure that their diverse perspectives are brought to bear on major policy matters.[6]

But the composition of the Task Force has significant gaps that will hinder—not help—the development of comprehensive energy policy. Most critical is the absence of agencies with environmental expertise like the Environmental Protection Agency (EPA), the Army Corps of Engineers (Corps), and the Department of the Interior (DOI). Not only do energy projects implicate traditional environmental concerns—like water use and water quality, air pollution, and ecosystem protection—but, as recognized in the Quadrennial Energy Report (QER), the energy sector is at the heart of climate change policy.[7] One need look no further than the debates surrounding EPA's Clean Power Plan and MACT Rule,[8] the Federal Energy Regulatory Commission's (FERC's) Order 745 governing demand response,[9] and the Nuclear Regulatory Commission's (NRC's) Rule on Storage of Spent Nuclear Fuel[10] to see that the lines between energy and the environment are more blurred than ever.

I urge you instead to take steps to better integrate energy and environmental policy, and to consider the policy ramifications of energy decisions on jobs and the economy as well. With that in mind, I am also concerned that other critical agencies, like those whose missions relate to jobs and economic development, are also omitted from the Task Force.

As demonstrated by the QER Interagency Task Force, all of these agencies can successfully work together toward developing and implementing policies governing energy resources and related environmental issues.[11] Indeed, agencies that fail to consult with one another risk judicial remand,[12] while the public suffers the consequences of delay and the United States loses its effectiveness on the international energy stage.

Finally, these concerns are deepened because the list of policymaking criteria in the Discussion Draft does not include environmental issues. By failing to include such issues—and especially, climate change—in the policymaking criteria, the Task Force will deepen the current dysfunctions in our energy regulatory system and energy markets. In addition, this section calls for participation of too narrow a set of stakeholders. Most importantly, the public is not given a seat at the table. At the very least, there should be an opportunity for comment by *any* interested person on the interagency coordination plan, followed by a mandate that the Task Force consider all input in developing a final interagency coordination plan.

These same concerns relate to the Canada-Mexico Plan, which likewise should include environmental considerations and robust participation in the Plan's development.

Section 3104, Authorization of Cross-Border Infrastructure Projects.

Section 3104's provisions relating to electricity transmission also raise several concerns and warrant further consideration. First, this section would repeal the requirement, found in the Federal Power Act (FPA), to secure authorization from FERC to transmit electricity to a foreign country.[13] But this provision of the FPA directs FERC to consider such transmission would impair the sufficiency of electric supply or impeded coordination within the United States.[14] The Discussion Draft now places authorization authority with DOE—which currently has Presidential Permit authority under Executive Order 12,038—but the Discussion Draft does not require DOE to implement these safeguards for grid reliability.

Second, the Discussion Draft's conforming amendments regarding state regulations could undermine grid reliability and have unforeseen consequences under the FPA. Currently, *intrastate* electricity may be transmitted across an international boundary without transforming the transmitter into a public utility under the FPA, *unless* FERC finds that such State regulation would impair U.S. electricity supply or impede coordination in the United States.[15] Again, repeal of this state provision would take away the backstop for grid reliability that is wisely a part of the current FPA, and it could leave a significant gap with respect to State activity.[16]

Third, on the surface it may not seem too big a leap to make DOE the authorizing agency for cross-border electric transmission, and to revoke the Presidential Permit requirement for electricity transmission because DOE currently is responsible for such permitting. But important decisionmaking requirements are lost along the way. For example, DOE currently considers the environmental impacts of proposed transmissions as well as how the transmission would impact the bulk power system.[17] The Discussion Draft

contemplates that DOE would ensure consistency with grid reliability standards, but it creates an ambiguity whether environmental factors may be considered. Overall, it leaves uncertainty whether DOE's current approach could continue under this new regime.

Section 3106. Authorization to Export Natural Gas.

Finally, I want to highlight some issues with the deadline requirements of this section of the Discussion Draft. The 30-day deadline for DOE to act on applications is of concern. Even if DOE is able to act quickly in some circumstances, it needs more flexibility given the incredibly complex issues at stake for LNG exports. Indeed, imposing a rigid deadline like this perversely threatens even more delay. First, deadline suits, like those contemplated in the Discussion Draft, impose additional delays even if they are successful. And second, the stakes are so high—and there are so many stakeholders in LNG decisions—that we can easily predict lawsuits regardless of DOE's ultimate decision on such an application. If DOE is rushed in making its decision, the record is less likely to be carefully developed and the agency's reasoning may suffer, making it vulnerable to a judicial remand and imposing even further delays.[18]

Conclusion

The relationship between energy and the environment must be considered as the United States seeks a uniform energy policy. Failure to integrate the two thus far has contributed to market flaws, reliability concerns on the electric grid, and enormous public health and environmental harms. Moreover, careful attention to administrative procedure—and its role in promoting good government—must accompany any new energy statutes. If we move forward in energy policy with these principles in mind, we can make substantial improvements for the future.

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

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[1] Emily Hammond & David B. Spence, *The Regulatory Contract in the Marketplace*, – VAND. L. REV. – (forthcoming), *available at* http://ssrn.com/abstract=2584619; *see also*
[2] Hammond & Spence, *supra* note 1, at 21; IHS ENERGY, THE VALUE OF US POWER SUPPLY DIVERSITY (July 2014), *available at* https://www.ihs.com/info/0714/power-diversity-special-report.html.
[3] Emily Hammond, *Nuclear Power, Risk, and Retroactivity*, -- VAND. J. TRANSNAT'L L. -- (forthcoming), *available at* http://ssrn.com/author=649887.
[4] Tom Tyler, *Social Justice, Outcome and Procedure*, 35 INT'L J. OF PSYCHOL. 117, 121 (2000).
[5] Emily Hammond & David L. Markell, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 322-26 (2013).
[6] *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1146-49 (2012); *cf.* Emily Hammond, *Presidential Control,*

Expertise, and the Deference Dilemma, 61 DUKE L.J. 1763, 1785-90 (2012) (documenting problematic dispute between DOE and NRC and collecting further examples).

[7] DOE, QER REPORT: ENERGY TRANSPORTATION, STORAGE, AND DISTRIBUTION INFRASTRUCTURE, 1-14 (Apr. 2015); *see also* JOEL B. EISEN ET AL., ENERGY, ECONOMICS, AND THE ENVIRONMENT __ (4th ed. 2015) (describing negative environmental externalities associated with the energy sector).

[8] Proposed Rule: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34,830 (June 18, 2014) [hereinafter Clean Power Plan]; National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) [hereinafter Utility MACT Rule].

[9] Demand Response Compensation in Organized Wholesale Energy Markets, 134 FERC 61,187 (Mar. 15, 2011) [hereinafter Order 745].

[10] Final Rule, Continued Storage of Spent Nuclear Fuel, 79 Fed. Reg. 56,238 (Sept. 19, 2014) (finding reasonable assurances of safety of long-term spent fuel storage).

[11] *See* DOE, QER REPORT: ENERGY TRANSPORTATION, STORAGE, AND DISTRIBUTION INFRASTRUCTURE, 10-20 n.*d* (Apr. 2015) (listing members of QER Interagency Task Force).

[12] Del. Dep't Natural Resources v. EPA, – F.3d – (D.C. Cir. May 1, 2015) (holding arbitrary and capricious EPA's failure to consult with FERC regarding back-up generator rule).

[13] *See* 16 U.S.C. § 824a(e).

[14] *Id.* § 824a(e).

[15] 16 U.S.C. § 824a(f).

[16] *Id.* § 824a(e).

[17] DOE, INTERPRETIVE GUIDANCE ON THE REQUIREMENTS OF 10 C.F.R. § 205.322.

[18] Emily Hammond, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722, 1739-52 (2011).