

**TESTIMONY OF
DONALD F. SANTA, JR.
PRESIDENT
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA**

**BEFORE THE
SUBCOMMITTEE ON ENERGY AND AIR QUALITY
COMMITTEE ON ENERGY AND COMMERCE
U.S. HOUSE OF REPRESENTATIVES**

**REGARDING
THE ENERGY POLICY ACT OF 2005: ENSURING JOBS
FOR OUR FUTURE WITH SECURE AND RELIABLE ENERGY**

FEBRUARY 16, 2005

Mr. Chairman and Members of the Subcommittee:

Thank you for inviting me to testify today. I am Donald F. Santa, Jr., President of the Interstate Natural Gas Association of America (INGAA). INGAA represents the interstate and interprovincial natural gas pipeline industry in North America. INGAA's members transport over 90 percent of the natural gas consumed in the U.S., through a 200,000 mile pipeline network. In addition, the association's members include the owners of all of the existing liquefied natural gas import terminals in the continental U.S., as well as the developers of several proposed new LNG terminals.

INGAA appreciates this opportunity to comment to the Subcommittee on the importance of enacting comprehensive energy legislation that addresses natural gas supply and infrastructure challenges. Infrastructure – which includes pipelines, storage and LNG import terminals – is a critical element in addressing the higher natural gas commodity prices we are experiencing today. During peak demand periods, a robust infrastructure

can mitigate market price volatility and help ensure that everyone who needs natural gas can get it at reasonable prices.

According to a July 2004 study sponsored by The INGAA Foundation, Inc., approximately \$61 billion of investment in new transmission pipeline and storage infrastructure will be needed by 2020 to keep pace with shifting supply sources and growing demand for natural gas in North America. This figure includes the Alaska Natural Gas Pipeline and pipeline expansions in Canada that would be needed to serve U.S. markets. The Alaska project and Canadian expansions, however, represent less than half of this total investment; **a majority of the investment will be needed for transmission pipeline systems and storage facilities in the Lower 48.**

Even as the Federal Energy Regulatory Commission (FERC) has made great strides in improving its performance, the approval and siting of natural gas infrastructure has become problematic in recent years due to conflicting federal laws and the ability of other federal and state agencies who administer these other statutes to delay or even halt new infrastructure development. This situation can be addressed conclusively only by the Congress acting to ensure that there is a single coherent and comprehensive process for reviewing, approving and siting natural gas infrastructure used in interstate and foreign commerce. INGAA supports establishing a consistent set of general procedures that would apply with equal force to interstate natural gas pipelines, interstate storage facilities, and LNG import terminals. INGAA's recommendations include:

- Establishing FERC’s clear authority as the “lead agency” under NEPA for approving natural gas pipeline, storage and import facilities and FERC’s authority to prescribe the schedule for all Federal and State administrative proceedings commenced under the authority of Federal law.
- Requiring that the FERC administrative record be used as the exclusive record for all subsequent administrative and judicial appeals of actions by other agencies involving a project authorized by FERC.
- Expedited judicial review of permitting decisions related to FERC-approved natural gas projects, in which unreasonable delay or conditioning of permits is alleged.
- Providing a federal forum in which to raise allegations that State tax policies discriminate against interstate natural gas pipelines.
- Clarifying Natural Gas Act section 3 authority for siting natural gas import facilities.
- Codifying FERC’s “Hackberry” policy for the regulatory treatment of LNG terminals.

WHAT WILL HAPPEN IF THE INFRASTRUCTURE IS NOT EXPANDED?

Inadequate natural gas infrastructure will result in both higher average natural gas prices and far greater price volatility, both of which would negatively affect consumers and the nation’s economy. It is important to emphasize that, even if natural gas supplies are

adequate, bottlenecks in the natural gas transportation infrastructure will cause natural gas prices to be higher and more volatile than otherwise would be the case.

The INGAA Foundation study attempted to quantify the consumer costs associated with delays in constructing necessary natural gas infrastructure. The analysis assumed a two-year delay in all pipeline and LNG terminal construction and estimated that the cumulative cost to consumers in the form of higher natural gas commodity prices would be \$200 billion by 2020. Higher natural gas costs would be seen in all parts of the country. This analysis assumed that needed infrastructure eventually would be built, albeit after a delay. Should obstacles result in the abandonment of necessary expansions, the cost to consumers would be even greater.

This is an important point for the Congress to bear in mind as it considers proposals for streamlining the approval and siting process for natural gas infrastructure. While the opponents of natural gas pipeline, storage and LNG projects may assert that the status quo (*i.e.*, no action) is a risk free alternative, economic analysis strongly suggests otherwise. Natural gas is a commodity that must be moved through a transportation network in order to reach consumers and, unlike other fuels, natural gas cannot practicably be transported within North America using modes of transportation other than pipelines. If the pipeline delivery network is insufficient, all consumers will pay higher prices for natural gas and the products made using natural gas as a fuel or feedstock (e.g., plastics, fertilizers, aluminum, and electricity).

WHAT ARE THE OBSTACLES TO INFRASTRUCTURE EXPANSION?

The Natural Gas Act (NGA) requires the proponents of interstate natural gas pipelines and most storage facilities to seek an authorization from FERC that the proposed new facility is in the public convenience and necessity. FERC overall is doing an excellent job reviewing applications for these infrastructure improvements on a timely basis.

Pursuant to the National Environmental Policy Act (NEPA), FERC coordinates with the various other federal, state and local agencies that are responsible under other laws for the numerous environmental and land-use permits that must be obtained prior to constructing a natural gas pipeline or storage facility. Unfortunately, some federal and state agencies have chosen not to become fully engaged in the FERC NEPA process, and instead have waited until after FERC has made a determination in favor of the proposed project before beginning their work in earnest. This greatly adds to the time required to obtain all necessary authorizations to construct such projects and increases the likelihood that such other permitting agencies will impose conditions at odds with the authorization contained in the FERC certificate of public convenience and necessity. This disjointed process presents a tempting target for the opponents of natural gas infrastructure development and creates the opportunity for parochial concerns to trump FERC's overall determination, made following a careful balancing of competing concerns, that the proposed project is required by the greater good.

The Natural Gas Act confers on FERC broad, preemptive authority in the approval and siting of natural gas facilities used in interstate commerce. This was done in large part to

prevent one state from thwarting the construction of infrastructure that meets the broader public interest for a multi-state region. Where state law and regulations have come into conflict with the NGA, the federal courts (including the U.S. Supreme Court) have held that states are preempted in matters under the FERC's jurisdiction. Since the 1942 amendment of the NGA to add certificate authority to section 7, however, several federal statutes have been enacted that provide other federal agencies with the authority to issue permits required for constructing natural gas pipelines and storage facilities and, in some cases, these statutes have delegated such permitting authority to the states. Examples include the Coastal Zone Management Act (CZMA) and the Clean Water Act (CWA). Although state regulatory action typically would be preempted where it conflicts with the exercise of federal authority pursuant to the NGA, state action pursuant to federally-delegated authority presents a different legal question. Pipeline opponents, abetted by state government officials, have, in recent years, taken advantage of this situation by using the permitting authority under the CZMA and/or the CWA to frustrate pipeline projects already found by FERC to meet "the public convenience and necessity."

This end result would appear to fly in the face of the Congressional intent to provide FERC with exclusive authority over pipeline construction approvals and the purpose of the Commerce Clause of the U.S. Constitution to preclude states from erecting barriers to interstate commerce. It is unlikely, however, that this problem can be satisfactorily resolved by the courts, because legally the conflict is between competing federal statutes. Only the Congress is in the position to address this growing inconsistency conclusively.

PIPELINE LEGISLATIVE RECOMMENDATIONS

INGAA's recommendations deal primarily with improving and rationalizing the process for authorizing interstate pipeline, storage and importation infrastructure. Several of these provisions are part of the discussion draft being considered today, including using the FERC record for subsequent appeals of FERC-approved projects (Section 330) and creating an expedited appellate process (Section 1442). INGAA's recommendations are as follows:

- 1) Clear Authority for FERC to be the Lead Agency for NEPA, and to Establish the Schedule for all Federal and State Administrative Proceedings Commenced Pursuant to Federal Law.**

For decades, it has been accepted that FERC is generally the "lead agency" for purposes of environmental reviews required under the National Environmental Policy Act (NEPA) for an interstate pipeline proposed under section 7 of the NGA. Under FERC procedures, other federal and state agencies with relevant permitting responsibilities are solicited to review the proposed pipeline, make suggestions for mitigating environmental impacts, and reach agreement on permitting decisions. The process is inclusive, and under a recent Memorandum of Understanding, relevant federal agencies are encouraged to work together, concurrently and cooperatively, to reach decisions in a timely manner.

Recently, however, some federal agencies have questioned whether FERC is really the "lead agency" for NEPA reviews, and whether there should be "co-lead agencies"

instead. Of course, the concept of a “co-lead agency” would undermine the purpose of having a “lead agency” in the first place.

In addition, some permitting agencies, as mentioned previously, have chosen not to participate in the FERC NEPA review process, and instead have waited until after FERC makes a decision regarding approval of a project before weighing in on the permitting questions subject to their authority. Since these permits are a necessary requirement for pipeline construction, even projects that have been approved by the FERC can be thwarted by such agency’s “last-minute” objections. This allows a single state agency (or the regional office of a federal agency) to block the construction of a federally-approved, multi-state pipeline.

Although Congress largely would be clarifying what, until recently, was the accepted practice, a clear Congressional mandate that FERC is the lead agency for NEPA reviews relating to projects seeking authority pursuant to section 3 or section 7 of the NGA would send a powerful signal. In addition, FERC should be given clear authority to establish an administrative schedule for the NEPA review and associated permitting decisions by all of the relevant federal and state authorities. This would ensure a single, coordinated and comprehensive approach for reviewing a proposed natural gas project, rather than the current duplicative and multi-layered reviews that present a tempting target for the opponents of natural gas infrastructure development, add unnecessarily to the time required to obtain all necessary authorizations to construct such projects, and increase the

likelihood that such other permitting agencies will impose conditions at odds with the authorization contained in the FERC certificate of public convenience and necessity.

It is worth clarifying what this proposal is not. This proposal does not usurp or change federal and/or state agencies' existing authority over the substantive issues now entrusted to them. It would merely require that a relevant federal or state agency exercise its authority within a reasonable timeframe, and do so in a cooperative fashion with FERC and other agencies. In short, states would retain their existing, federally-delegated authority under such statutes as the CZMA and the CWA.

**2) Use the FERC Administrative Record as the Exclusive Record for all
Subsequent Appeals or Reviews.**

This proposal complements the preceding proposal and addresses two, related problems. First, as noted, other agencies at times have “sat-out” the FERC NEPA review and then subsequently conducted their own proceedings to administer their respective permitting authorities. Second, in connection with such proceedings, these agencies develop a separate administrative record.

The current, fragmented process is administratively inefficient, because it duplicates a task that could be performed more efficiently and consistently through one NEPA review. Multiple records add to the time required for obtaining all of the authorizations required to construct the pipeline and increase the likelihood that the permitting agency will base

its decision on a record that is inconsistent with that assembled as part of the FERC process. One example of such needless duplication is the administrative appeal process under the CZMA, pursuant to which the Department of Commerce has chosen to create *de novo* a new administrative record when reviewing appeals from consistency determinations made by state agencies. Substantively, the current process increases the likelihood of an inconsistent result on the merits. This process also is susceptible to manipulation by natural gas infrastructure opponents, who may choose to “sandbag” the FERC process and then “pour it on” in a state or local forum that they perceive to be more sympathetic to their views.

Two benefits would be achieved by requiring that the record developed during the FERC NEPA process be used as the record for all subsequent administrative appeals and judicial review from actions by agencies issuing permits in connection with a FERC-approved natural gas project. First, this would expedite the processing of such permits and any subsequent appellate reviews. Second, this would create a powerful incentive for such permitting agencies (as well as various stakeholder groups) to participate meaningfully in the FERC NEPA process in order to ensure that their views were reflected fully in the single record developed in connection with the proposed pipeline project.

3) Expedited Judicial Review of Matters Related to FERC-Approved Natural Gas Projects, in which Unreasonable Delay or Conditioning of Permits is Alleged.

This proposal complements the preceding two proposals by addressing judicial review. Should a federal or state permitting agency acting pursuant to federal law either fail to act within a reasonable timeframe or else attach unreasonable conditions to a permit that has the effect of frustrating a FERC-approved project, there must be a clear process for timely judicial review.

The proposed amendment would authorize expedited review by the U.S. Court of Appeals for the D.C. Circuit in these circumstances. Should the court determine that the permitting agency was unreasonable in its denial of a permit, its conditioning of a permit or its failure to act on a permit application, the court would be able to authorize the construction and operation of the pipeline as approved by the FERC and determine that all applicable federal statutory requirements had been met.

4) Federal Forum for Challenging State Tax Policies that Discriminate Against Interstate Natural Gas Pipelines.

Federal law currently protects interstate rail carrier, motor carrier, and air carrier transportation property from state property taxes that unreasonably burden and discriminate against interstate commerce. Pipelines are the only mode of interstate transportation that does not enjoy this protection under federal law.

Under federal law, a state may not assess rail transportation property (49 U.S.C. §11501), motor carrier transportation property (49 U.S.C. §14502), or air carrier transportation

property (49 U.S.C. §40116) at a value that has a higher ratio to the true market value of the property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other property. A state also may not levy an ad valorem property tax on the transportation property at a tax rate that exceeds the tax rate applicable to commercial and industrial property in the same assessment jurisdiction.

The benefit of federal protection can be easily demonstrated by observing its effect in Ohio. Currently, the tangible personal property of railroads, motor carriers, air carriers and water transportation is assessed at 25 percent of true value. The tangible personal property of natural gas pipelines is assessed at 88 percent of true value. This represents an assessment 352 percent greater than other modes of transportation.

With federal protection similar to that enjoyed by other modes of transportation, interstate natural gas pipelines would be authorized to bring an action challenging such discrimination in federal court. A showing of competition would not be required. The proof required would be that other commercial and industrial taxpayers are assessed at a lower rate.

This matter is within the jurisdiction of the Judiciary Committee, and legislation addressing state tax discrimination directed against pipelines (H.R. 4726) was introduced in the previous Congress by Representative John Carter. The pipeline industry has been advocating the equalization of state tax policies regarding interstate pipelines for almost

20 years. We ask that Congress bring fair resolution to this issue by including Rep. Carter's proposal in comprehensive energy legislation.

LIQUEFIED NATURAL GAS

The tight natural gas supply situation has caused a reemergence of liquefied natural gas (LNG) as a viable supply alternative. Access to LNG on the world market can serve as a "safety valve" on high domestic natural gas prices. U.S. natural gas prices are, at the moment, some of the highest in the world, and new LNG imports could mitigate some of this. A significantly increased role for LNG as part of the natural gas supply mix is an inescapable reality for the United States, even if we can increase North American supply by moderate levels. This is why INGAA supports the expansion of LNG import capacity.

Despite the importance of LNG, however, it should not be mistaken as a "cure all" that alone will solve the nation's natural gas supply problem. Our current natural gas supply challenges will not be solved only by expanding production in the Rocky Mountain region or the Outer Continental Shelf, or only by building an Alaska natural gas pipeline, or only by importing more LNG. In order to meet anticipated demand, the United States will have to adopt a portfolio approach that takes advantage of all these options.

The most significant immediate challenge facing the LNG industry is public perception regarding safety and security. Fear of the unknown appears to be the greatest hurdle, followed closely by the various misconceptions about LNG. Such misconceptions are

difficult to overcome. All of us – industry, regulators, the Executive Branch and the Congress – have a role to play in educating the public, so that we can make informed decisions about constructing needed energy infrastructure.

Are there risks associated with LNG? Of course there are. Still, just as with any activity, this must be placed in perspective. LNG has a long and outstanding safety record. The robust worldwide trade in LNG that takes place every day is proof that LNG can be handled safely and securely. And here in the United States, FERC and the Coast Guard, working with the Department of Transportation's Pipeline and Hazardous Materials Safety Administration, can mitigate risk to an even greater extent through their safety/security regulations and enforcement. We need your help, and your leadership, in getting that message out to the public.

Another challenge for new LNG terminal expansion is the regulatory process for both terminal construction and any subsequent economic regulation. FERC has done an exemplary job on both of these fronts, but further guidance and statutory clarification from Congress will increase FERC's effectiveness in this area. INGAA's legislative recommendations include the following:

LNG LEGISLATIVE RECOMMENDATIONS

1) Clarification of Natural Gas Act Section 3 Authority for the Siting of Natural Gas Import Facilities.

Over the last year, some have questioned whether FERC has the statutory authority to site LNG import terminals. Section 3 of the Natural Gas Act states that: “no person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order from the Commission [FERC] authorizing it to do so.”

INGAA believes that FERC has gotten it right on both the law and the policy with regard to LNG import terminal siting authority. The federal appellate courts have interpreted the NGA to provide FERC with the authority to site an LNG import facility and to attach the necessary conditions to its determination. If siting of these LNG facilities were left to states only, they would almost certainly be subject to inconsistent regulation.

Additionally, if these facilities were subject to traditional public utility regulation or other burdens they likely would not be constructed at all. The nation as a whole would suffer if the ability to enhance the capacity to import this critical source of supplemental natural gas supply were frustrated. FERC jurisdiction is important to ensuring that the larger, national public interest is served, rather than just local, parochial interests.

Some have suggested that a clarification of this authority would usurp states rights and/or create new powers for FERC. INGAA believes that, in exercising exclusive jurisdiction over the siting of LNG import facilities, FERC is acting within the bounds of the authority already conferred by the Congress under section 3 of the NGA. Still, to the extent that it would “clear the air” and permit worthy LNG projects to proceed without what may be perceived to be a cloud over jurisdiction, such an amendment would be good public policy.

Let us be clear about the role of state agencies under this process. States currently have significant permitting authority delegated to them under federal statutes such as the CZMA and the CWA. INGAA does not propose that this authority be removed. We ask only that there be a single, coordinated review process that includes all of the relevant stakeholder agencies, and that once permitting reviews and decisions have been completed, the FERC be given the final say as to a terminal’s approval and/or siting.

2) Codification of FERC “Hackberry” Policy for the Regulatory Treatment of LNG Terminals.

In 2002, FERC issued the “Hackberry” decision in which it waived the longstanding policy that LNG facilities must be subject to the same open access policies that apply to interstate natural gas pipelines. This order responded to the assertions by a number of LNG terminal developers that “open-access” and “open-season” regulation would be an impediment to financing and developing new LNG terminals. Statutory codification of this policy would send the signal to developers, and the financial community, that these

regulatory changes will remain in place over the lifetime of an LNG project, and thus help to encourage additional terminal development. In addition, the policy should be extended to both proposed terminals, and capacity expansions at existing terminals. The discussion draft addresses this issue in Section 320.

CONCLUSION

Mr. Chairman, INGAA appreciates the opportunity to share its views on the aspects of comprehensive energy legislation that directly and uniquely affect the interstate natural gas pipeline industry. After years of debate and negotiation, the need for legislation to address national energy policy has never been greater. The natural gas supply and infrastructure situation, in particular, is crying out for policy solutions. We hope that in the weeks ahead we will be able to work with you in enacting an effective energy bill.

Thank you.