

**Testimony of Jeff C. Wright
Director, Office of Energy Projects
Federal Energy Regulatory Commission
Before the Committee on Energy and Commerce
Subcommittee on Energy and Power
United States House of Representatives**

**Hearing on
*American Jobs Now: A Legislative Hearing on H.R. 3548, the North
American Energy Access Act*
January 25, 2012**

Mr. Chairman Whitfield and Ranking Member Rush and members of the subcommittee:

My name is Jeff Wright and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (FERC or Commission). The views I express are my own and not necessarily those of the Commission or of any individual Commissioner. I appreciate the opportunity to appear before you to discuss H.R. 3548.

Summary

1. We have no position on the proposed bill, H.R. 3548.
2. Although FERC is the federal agency with responsibility over the certification of interstate natural gas pipelines and storage facilities, the Commission has no authority over the siting of interstate oil pipelines. However, I am testifying today to offer technical comments on H.R. 3548 based on my expertise.

I. Background

The Office of Energy Projects is responsible for the certification of interstate natural gas pipelines and storage facilities; the authorization and oversight over the construction and operation of on-shore and near-shore liquefied natural gas (LNG) terminals; and the licensing, administration, and safety of non-federal hydropower projects. In reviewing applications for proposed projects, the Commission is required by the Natural Gas Act (NGA) and the Federal Power Act (FPA) to provide public notice and opportunity for hearing before acting, to explain the reasons for its decisions, and to authorize only those projects that it determines, in accordance with the provisions of the relevant statutes, are in the public interest.

II. H.R. 3548

H.R. 3548, the North American Energy Access Act, addresses the Keystone XL Pipeline Project (project). Should Congress direct the Commission to act on an application for the project, the Office of Energy Projects, as the Commission's infrastructure review branch, would likely take a primary role in advising the Commission on the matter. Therefore, I will offer comments on the proposed bill, with the goal of seeking to ensure that, if Congress gives this responsibility to the Commission, then the legislation should provide clear and effective procedures for conducting this review.

Before commenting on specific sections, I note that the authorization provided by the bill would differ substantially from either the NGA or the FPA 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.

I now turn to the specific provisions of the Act.

A. Section 3

Section 3(a) of the bill would require the Commission to approve the project within 30 days of receipt of an application and, if the Commission has not acted on the application within these 30 days, the application is deemed approved. The bill also states that the Commission is not required to issue a record of decision, as would normally be required when implementing the National Environmental Policy Act of 1969 (NEPA) under the NGA and FPA. Further, the 30-day deadline would not permit construction of an adequate record or allow for meaningful public comment in arriving at a decision. In fact, section 3 could be read as giving the Commission no discretion in the issuance of the permit (other than to choose not to act). This section also states that the permit is "to be implemented in accordance with the terms of the Final Environmental Impact Statement"; however, it is not clear whether the Commission or any other entity would have authority to ensure and enforce compliance with the measures required by that document. The bill provides no specific authority.

Section 3(b)(1) allows for the applicant or permit holder to propose a modification of the route or other terms of the final environmental impact

statement (FEIS) issued by the Department of State and for the Commission to authorize such a modification. The bill, however, does not articulate a standard or a process for such a decision.

Section 3(b)(2) of the bill states that the Commission will enter into a Memorandum of Understanding with the State of Nebraska for “an effective and timely review” under NEPA of any route modification of the project in the State of Nebraska. Upon approval of the modification by the Governor of Nebraska, the Commission will have 30 days to finish its review and to approve the modification.

Section 3(b)(3) provides that if the Commission has not acted within 30 days on an application for a modification approved by the Governor of Nebraska, then the modification shall be deemed approved.

The proposed process in this section is unclear. Typically, a federal agency develops a NEPA document in the course of reviewing a proposed action. The bill appears to contemplate that some entity – perhaps, but not necessarily, the Commission – will issue a NEPA document regarding a Nebraska modification, after which the Governor of Nebraska will have the opportunity to approve the proposal. The Commission then would have 30 days to “complete consideration of and approve” such modification. The section could be read to mean that the Commission has no discretion (other than to choose not to act), but to approve a Nebraska modification. Further, the section appears to allow for no process for public notice and comment, opportunity for hearing, or rehearing. As a result,

even assuming that the Commission has discretion, the Commission might have only limited information on which to act on a Nebraska modification. Also, if a modification proposed under section 3(b)(1) conflicted with a Nebraska modification under section 3(b)(2), the Commission would have to compare and select an alternative within 30 days, making reasoned decision making extremely difficult.

B. Section 4

Section 4 of the proposed legislation states that a “permit issued under this Act shall be the sole legal authority required to construct and operate” the pipeline except for the safety oversight of the Department of Transportation’s Pipeline and Hazardous Materials Safety Administration and the Commission’s rate and tariff authority. An FEIS contemplates that the project will be constructed and operated in compliance with permits from other agencies (e.g., the U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, Bureau of Land Management, Bureau of Reclamation, etc.); however, the language of Section 4 makes it unclear whether such permits would still be required. Further, while the Department of State is responsible for issuing the Presidential Permit that authorizes the border crossing facilities (and the requisite NEPA review), under the current law, individual states (or subdivisions thereof, depending on state law) currently have certain authority to site oil pipelines within their jurisdiction. This proposed legislation could be construed as providing that federal jurisdiction supplants local authority.

III. Conclusion

This concludes my testimony. I will be happy to answer any questions you may have.