TESTIMONY OF
DONALD F. SANTA
PRESIDENT AND CEO
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

BEFORE THE
SUBCOMMITTEE ON RAILROADS, PIPELINES AND HAZARDOUS MATERIALS
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES

REGARDING
THE STATE OF RAILROAD, PIPELINE AND HAZARDOUS MATERIALS SAFETY REGULATIONS AND OPPORTUNITIES FOR REFORM

APRIL 26, 2017

Mr. Chairman and Members of the Subcommittee:

Good morning. My name is Donald Santa, and I am President and CEO of the Interstate Natural Gas Association of America (INGAA). INGAA represents the interstate natural gas pipeline industry. INGAA's members transport the vast majority of the natural gas consumed in the United States through a network of approximately 200,000 miles of interstate transmission pipeline. These transmission pipelines are analogous to the interstate highway system; in other words, they are large-capacity transportation systems spanning multiple states or regions.

Thank you for the opportunity to share INGAA's perspective at this hearing. My remarks are focused on the rulemaking process at the Pipeline and Hazardous Materials Safety Administration (PHMSA), not the substance of the agency's rulemakings. The process by which rules are developed, proposed, made available for public comment and then finalized is critical to ensuring that the substance of any rule is reasonable, practicable, and advances the public safety goals embodied in the law. In this testimony, I will present opportunities to improve stakeholder dialogue and consensus building early in PHMSA's rulemaking process.

We all want PHMSA to be an effective regulator, and that includes the ability to promulgate important regulations on a timely basis. It also includes the ability to rescind legacy regulations that more recent rules have rendered redundant. Timely rulemakings are essential to PHMSA fulfilling its stated mission "to protect people and the environment by advancing the safe transportation of energy and other hazardous materials that are essential to our daily lives."[1] The timeliness of PHMSA's action on rulemakings also is material for the pipeline industry and other stakeholders affected by these regulations. The inability to complete important rulemakings on a timely basis retards improvements in pipeline safety and creates uncertainty surrounding the industry's investment in the facilities and pipeline inspection tools that will be subject to anticipated regulations.

[1] PHMSA's mission is described on its website: https://www.phmsa.dot.gov/about/mission.

The time needed to complete a rulemaking is affected, in part, by the quantity and quality of dialogue with affected stakeholders. Apart from satisfying the legal requirements of the Administrative Procedure Act, there is great value for all in the dialogue that occurs as part of the notice and comment rulemaking process. Furthermore, beyond formal rulemakings, the goals of pipeline safety regulation can be advanced by a robust dialogue involving PHMSA, the pipeline industry and other stakeholders. Some of the greatest improvements in pipeline safety have occurred when industry, other stakeholders and government have worked together. These include collaborative efforts around technology research and development, damage prevention, safety management systems, and cyber and physical security.

Stakeholder dialogue is especially important when the subject of the rulemaking is a complex, technical topic such as pipeline safety regulation. The pending natural gas transmission and gathering rule provides a good example of why an appreciation of the capabilities and limitations of pipeline infrastructure and the technologies and practices used to manage pipeline integrity is so important to achieving effective and technically workable pipeline safety rules. New rules should leverage stakeholder knowledge and expertise to facilitate the deployment of new technologies that may be more effective, more efficient, and less disruptive than the legacy technologies that may be endorsed by existing regulations.

Unfortunately, PHMSA's recent approach to fulfilling its rulemaking responsibilities has resulted in less, rather than more, constructive dialogue in developing pipeline safety rules. PHMSA has foregone robust dialogue with all stakeholders prior to publishing a proposed rule for public comment. Foregoing this dialogue on the front end of the process has resulted in both delay in the rulemaking process and problematic technical content in PHMSA's proposals.

We recognize that the development of proposed rules, the notice and comment process and the production of a final rule can be a multi-year exercise. Still, the PHMSA process has become unusually protracted. The case in point is the natural gas transmission and gathering rule to implement the mandates in the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011. It has been more than five years since the law was enacted. A proposed rule was not published until more than four years after enactment and we likely will see the six-year anniversary of enactment before a final rule is issued. This delay is the cumulative result of three flaws in the rulemaking process. The first is the failure to embrace consensus building as an early step in developing the rulemaking proposal. The second is the agency's choice to address too much in a single rulemaking. Third, the "pre-filing" process used by the White House Office of Management and Budget (OMB) compounded the consequences of these choices.

The natural gas transmission and gathering rule is a gigantic proposed rule that was created by assembling what could be 16 separate rules into one rulemaking. (Colloquially, some have referred to this as the "mega" rule). Advancing this proposal to a final rule has been especially daunting due to the complexities of dealing with multiple proposals addressing disparate topics. Broken into components, many of these individual initiatives could have been (and still could be) implemented in a comparatively short time, and thus complete many of the unfulfilled congressional mandates. We suggest that PHMSA avoid these catch-all mega rules in the future.

INGAA suspects PHMSA proceeded this way out of concern it would not succeed in getting OMB approval for the full array of separate rules needed to implement all applicable congressional mandates and National Transportation Safety Board recommendations. While PHMSA clearly hoped that its strategy would facilitate addressing a multitude of important tasks in one giant step, the size of the mega rule itself ultimately, and ironically, frustrated any hope of quickly completing the pre-filing negotiation.

OMB's recent invention of "pre-filing" was intended to facilitate an expedited substantive review of proposed rules before the rule was filed with OMB and before notice and comment occurred. This OMB pre-filing review is unnecessary, since the APA notice and comment process provides ample opportunity to vet the merits of a proposed rule and its associated cost-benefit analysis. OMB's critical role in an efficient and timely rulemaking process was subverted by the pre-filing requirement created by the last administration. We urge the new administration to discontinue the OMB pre-filing obligation.

What is the cost of this delay and inefficiency? INGAA's members are committed to the goal of zero incidents, and progress toward that target must continue whether new regulations are issued, or not. Still, the practical consequence of this delay is that operators may be reluctant to dedicate the enormous resources needed to implement voluntary pipeline safety commitments. This hesitancy is rooted in the risk that the final rules ultimately adopted by PHMSA might compel a repeat of certain steps in an operator's pipeline safety action plan. This "do-over risk" is not insignificant. For example, testing pipelines for material strength is both costly and disruptive to service because pipelines are removed from operation to complete the testing – operators would not want to conduct this testing twice. This delay in proposing and finalizing rules also has diminished public confidence in PHMSA as a regulator and, derivatively, public confidence in the safety of the pipelines that it regulates.

Another opportunity for improvement concerns PHMSA's recent use of "interim final rule" (IFR) authority under the APA and federal pipeline safety law. The IFR process allows a federal regulator to determine that there is "good cause" for issuing a regulation without notice and public comment, because such notice and public comment would be "impracticable, unnecessary, or contrary to the public interest." PHMSA used the IFR process for the underground gas storage rule and for a new regulation on emergency order authority.

While an IFR may be appropriate in some cases, it produced a flawed underground gas storage rule. This "ready, fire, aim" process resulted in a rule that PHMSA and the regulated community now are trying to untangle. The underground gas storage IFR includes clear mistakes that could have been identified and easily fixed had the normal notice-and-comment procedure been used. Instead, those mistakes now are part of an "interim final rule" that took effect 30 days after publication.

Yes, PHMSA can correct these mistakes in a final rule, and INGAA understands that PHMSA plans to do so. INGAA, along with three other trade associations representing pipeline

operators, petitioned PHMSA for reconsideration in January. The agency has yet to respond and now is over a month past its own deadline for doing so.[2]

These mistakes, and the delays in resolving them, led INGAA and others to seek judicial review of the rule, just to preserve our options should PHMSA not correct its mistakes upon reconsideration or in a final rule. This illustrates a pitfall of the IFR process. The effectiveness of the interim rule, and the potential consequences of failure to comply, compel regulated entities to pursue litigation and put themselves in an adversarial posture with the regulator far earlier than should be necessary. This outcome is especially ironic in the case of the underground gas storage rule, because INGAA was among the advocates for creating this rule in the first place.

PHMSA's regulations also provide for something called a "direct final rule," which can be an alternative to an IFR, if PHMSA adopts a standard developed under a consensus process. With a direct final rule, there is front-end buy-in and communication with the stakeholders. A rule is issued with the proviso that it will become final unless there is significant objection. It is an approach that is much more likely to result in a consensus-driven rule that can be implemented quickly. We respectfully suggest that this approach could have been used for the underground gas storage rule and believe that rule would have been every bit as effective as that which PHMSA and Congress intended.

Collaboration in the rulemaking process is fully consistent with PHMSA's statutory mandate. The Pipeline Safety Act requires that a safety standard be "practicable" and designed to meet gas pipeline safety needs and protect the environment. Achieving this balance requires PHMSA to consider outside input. Yet, PHMSA recently seems to have eschewed seeking this input in the formative stages of its rulemaking initiatives. This is unfortunate, especially because PHMSA has the means to do so via the Gas Pipeline Advisory Committee (GPAC).

The GPAC membership is equally divided among representatives of the public (such as advocacy groups or first responders), government agencies, and industry. The stated role of the GPAC is to review PHMSA's proposed regulatory initiatives to ensure the technical feasibility, reasonableness, cost-effectiveness and practicability of each proposal. The committee also evaluates the cost-benefit analysis and risk assessment information of the proposals. Given its diverse membership, the GPAC is a useful forum for stakeholder outreach and input, and therefore should be involved early and often during the rulemaking development and drafting process.

PHMSA earlier this year initiated a series of GPAC meetings to consider the proposed natural gas transmission and gathering rule. While we welcome the opportunity for dialogue provided by these meetings, one must wonder whether it would have been more productive to solicit the views of the GPAC in the formative stages of the proposal when important threshold decisions were being made.

[2] INGAA withdrew from the petition for reconsideration on April 17 to perfect its intervention in the proceeding before the US Court of Appeals for the 5th Circuit in which the Texas Railroad Commission has sought judicial review of the underground storage IFR. The other three trade associations will continue to pursue administrative reconsideration through the petition mentioned above.

The Congress remains mindful of PHMSA's need for outside input given the ripples that may be created by the agency's rules. For example, as part of the Pipeline Safety, Regulatory Certainty and Job Creation Act of 2011, the Congress directed PHMSA to consult with the chairman of the Federal Energy Regulatory Commission and with state regulators in developing timeframes for the completion of pipeline testing that consider potential consequences for public safety and the environment and that minimize costs and service disruptions. Based on the extensive preamble to the proposed natural gas transmission and gathering rule, it does not appear that PHMSA engaged in such consultations as part of the development of its proposal.

In conclusion, let me reiterate that INGAA continues to support the fundamental mission of PHMSA, including completing the various statutory mandates for new regulations. We suggest that the end results of PHMSA's rulemakings can be improved with better stakeholder outreach and involvement, and with internal improvements to the regulatory process. The pitfalls that have undermined the pending natural gas transmission and gathering rule and the underground gas storage IFR hopefully can be avoided in future rulemakings. We also suggest that it is not too late to apply the lessons learned to the development of final rules in these two proceedings. It is important for natural gas pipeline operators to have the certainty that will come with finalizing these regulations.

Thank you once again for the opportunity to testify today.