Written Testimony of Carolyn Elefant, Law Offices of Carolyn Elefant on HB 1817: An Act Authorizing the Commonwealth of Pennsylvania to join the Mid-Atlantic Area Natural Gas Corridor Compact

Before the House Consumer Affairs Committee
(Hearing September 8, 2010)

My name is Carolyn Elefant and I am the founder and principal attorney of the Law Offices of Carolyn Elefant in Washington D.C. (www.carolynelefant.com). Since founding my firm in 1993 following employment as an attorney for the Federal Energy Regulatory Commission (FERC) and a national energy practice, I have represented landowners, municipalities, conservation groups and trade associations in the federal siting process for conventional hydroelectric, LNG and natural gas pipelines. Last year, I represented a group of landowners known as the Brandywine Five in an eminent domain proceeding brought by a pipeline in the federal district court in Philadelphia, Pennsylvania. Though the landowners prevailed and were recently awarded a modest amount of attorneys fees, the case took a substantial toll on these citizens.[1]

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[1] *See Transcontinental Gas Pipeline v. "Brandywine 5,"* Docket Nos. 09-1396, 09-1385, 09-1402 (E.D. Pa. August 19, 2010)(awarding

At the invitation of the Honorable Representative Curt Schroder, I am providing brief comments to this Committee on HB1817, which would establish an interstate compact known as the Mid-Atlantic Area States Council. The Council would have the power to govern the siting of interstate natural gas pipelines within member states' jurisdiction, replacing the Federal Energy Regulatory Commission (FERC) which currently exercises exclusive authority over the interstate pipeline certification process.

For the reasons discussed, HB 1817 represents a reasoned and thoughtful approach to increase the role of states in the interstate gas-pipeline siting process.

I. From a legal perspective, HB 1817 is consistent with both the NGA and the United States Commerce Clause.

Generally, the Natural Gas Act (NGA) confers exclusive authority on FERC to grant certificates to interstate natural gas pipelines. But the NGA also contains an exception: states may enter into interstate compacts for transportation of natural gas and

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attorneys fees for eminent domain action filed April 2009 and abandoned August 2009).

conservation of resources. *See* 15 U.S.C. §717j (referencing interstate compacts and FERC's role in supporting their creation). Thus, although the Mid-Atlantic Council will have authority over pipeline siting decisions, creation of the Council is fully authorized by the NGA.

Likewise, HB 1817 does not implicate commerce clause concerns under United States Constitution. The Commerce Clause prohibits states from passing laws that interfere with interstate commerce. Congress, however, is not similarly restricted and may approve or consent to laws that may burden interstate commerce. HB 1817's requirement that Congress must approve the Mid-Atlantic Council thus preempts any argument that the law violates the Commerce Clause.

From a policy perspective, HB 1817 is consistent with prevailing national trends towards regional planning in the energy planning and siting process. Finally, from a fairness perspective, HB 1817 ensures that those directly impacted by siting maintain a voice in the process closer to those directly impacted by it and protects

local landowners and businesses from the threat of federal eminent domain.

II. From a policy perspective, HB 1817 is consistent with national trends towards regional planning and provides more opportunity for states to play a meaningful role.

A. Regional planning

In recent years, I have observed a shift in the energy industry away from top down, federal siting towards regional planning and collaboration. Though to be sure, energy is a national priority, increasingly, even a federal agency like FERC is acknowledging that states and regions have a strong economic interest in coordinating planning and resources development on a regional basis.

Consider the electric utility industry. Already, utilities in most parts of the country participate in regional transmission organizations or are part of coordinated control areas. FERC's recent rulemaking on electric transmission planning and cost allocation (FERC Docket RM 10-23) specifically proposes that utilities consider state policies such as renewables portfolio standards (RPS) in FERC mandated transmission planning process.

States are also recognizing that development of in-state resources may require collaboration with other states. Thus, many Atlantic Coast states recently formed a consortium to facilitate siting of offshore wind farms in conjunction with the federal Bureau of Ocean Energy Management (formerly MMS) which has authority over siting decisions in offshore federal waters.

In this context, an interstate compact governing natural gas siting represents a step forward rather than a step back. An interstate compact encourages collaboration and regional planning rather than a top down, federal system that pushes projects through without adequate impact from states.

B. Meaningful role for states

HB 1817's compact approach also ensures that states will have a chance to exercise their authority in siting decisions. Various federal laws, such as the Clean Water Act, Coastal Zone Management Act and National Historic Preservation Act give states the power to issue permits for pipelines – and indeed, require that states issue these permits as a prerequisite for federal action. Yet, for the past few years, FERC has taken the position that it may issue a pipeline

certificate in advance of necessary state permits, thus putting states in the uncomfortable position of vetoing a FERC sanctioned project. As conceived by HB1817, the Mid-Atlantic Council would formulate procedures for siting which will presumably give states an opportunity for meaningful input, *i.e.*, before a final siting decision is made, not after.

II. From a fairness perspective, HB 1817 ensures that those who bear the brunt of a siting decision have a voice in the process and are shielded from the toll of federal eminent domain.

I must confess that before I became engaged with the Brandywine Five, I never realized the toll that a federal eminent domain process has on local landowners. For most landowners, their home and property is their most significant asset. As such, the threat of a taking or diminution of value is stressful to say the least. Even worse, the emotional stress is compounded by the fact that landowners must defend their property from taking in a sterile federal courthouse, often far from the site of the actual taking and outside of the immediate community. Thus, they stand at a significant disadvantage to well funded pipelines with experienced attorneys because there are few more reasonably priced, smaller

firms such as mine that have a unique expertise in federal eminent domain.

Last year, I represented five landowners (Brandywine Five) in an eminent domain proceeding brought by Transcontinental pipeline in federal district court in Philadelphia. *See Transcontinental Gas Pipeline v. "Brandywine 5,"* Docket Nos. 09-1396, 09-1385, 09-1402 (E.D. Pa. August 19, 2010). Transco pressed forward with the case against my clients even though the Pennsylvania DEP initially denied Transco a necessary environmental permit to allow it to direct drill through the Brandywine Creek. Instead, the DEP directed Transco to submit a plan for horizontal direct drill (HDD) which if employed, would avoid the Brandywine Five's property.

In light of the lack of a permit and the likelihood that HDD would be required (and the property avoided), the simplest solution would have been for Transco to simply dismiss the suit. Instead, it refused to do so, thus requiring my clients and I to prep for hearing and travel to Philadelphia. Ultimately, after several hours, we reached a negotiated, temporary settlement. Thereafter, Transco was not able to get a permit for direct drill, so it abandoned its original

plan for the pipeline and dismissed the suit against my clients who were just awarded a modest amount of attorneys fees as a result.

Though the outcome here was positive, the case was extremely stressful not to mention costly (though a year later, the landowners will recoup some of their costs in the form of an attorneys fees award, which is, incidentally, highly unusual). There is no reason to burden local landowners with these proceedings, particularly when they do not realize any benefits from pipeline construction.

Indeed, that is the most important aspect of HB1817: it will give those who are most impacted by a proposed pipeline a meaningful voice in the siting process. Just as basic principles of ratemaking recognize that those who reap the benefits should bear the costs, so too in siting, those who are impacted by a project built for the benefit of others should have a say in the matter.

Thank you for this invitation to submit testimony. I am available to discuss these comments further if required.