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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-6115

Majority (202) 225-2927
Minority (202) 225-3641

MEMORANDUM

February 9, 2016

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Subcommittee Markup of Twelve Energy and Environment Bills.

On Wednesday, February 10, 2016, at 5:00 p.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will convene a markup for the purpose of delivering opening statements on twelve bills:

- H.R. 4444, the EPS Improvement Act of 2016;
- H.R. 3021, the AIR Survey Act of 2015;
- H.R. 2984, the Fair RATES Act;
- H.R. 4427, a bill to amend section 203 of the Federal Power Act;
- H.R. 2080, a bill to reinstate and extend the deadline for commencement of construction of a hydroelectric project involving Clark Canyon Dam;
- H.R. 2081, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Gibson Dam;
- H.R. 3447, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the W. Kerr Scott Dam;
- H.R. 4416, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam;
- H.R. 4434, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Cannonsville Dam;
- H.R. 3797, the Satisfying Energy Needs and Saving the Environment (SENSE) Act;
- H.R. __, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act and
- H.R. 4238, a bill to amend the Department of Energy Organization Act and the Local Public Works Capital Development and Investment Act of 1976 to modernize terms relating to minorities.

The subcommittee will reconvene on Thursday, February 11, 2016, at approximately 11:00 a.m. in 2123 Rayburn House Office Building, to complete consideration of the bills.

I. H.R. 4444, THE EPS IMPROVEMENT ACT OF 2016

H.R. 4444, the "EPS Improvement Act of 2016", was introduced by Reps. Ellmers and DeGette on February 3, 2016.

A. Summary of the EPS Improvement Act

H.R. 4444 would amend the Energy Policy and Conservation Act to exclude external power supply (EPS) circuits, drivers, and devices designed to power light-emitting diodes (LEDs), Organic LEDs (OLEDs) and ceiling fans using direct current motors from energy conservation standards for external power supplies. In the absence of legislation, LED and OLED power supplies and ceiling fan direct current motors would continue to be included in DOE's energy conservation standards for external power supplies, which go into effect on February 10, 2016.[1]

Section 2 of the legislation preserves the Department of Energy's (DOE) authority to prescribe energy conservation standards for LED power supplies.

B. Impact of the EPS Improvement Act

At the January 12th subcommittee hearing, the American Council for an Energy-Efficient Economy (ACEEE) and the National Electrical Manufacturers Association (NEMA) testified that the energy conservation standards for external power supplies, while largely beneficial to consumers and businesses, could not be appropriately applied to solid state lighting (SSL) drivers found in LED lighting.[2] DOE's energy conservation standards for EPS require an EPS device to be tested when disconnected from a power-using load; for example, a plug-in laptop charger could be tested when disconnected from a laptop. LEDs and OLEDs that use SSL drivers are not designed to be disconnected from these drivers so they cannot be tested in a way that complies with the EPS conservation standards: the same applies to ceiling fans that use direct current motors. This legislation would prevent these energy saving devices from being regulated by a standard they cannot meet due to a design technicality.

H.R. 4444 does not attempt to exempt LEDs, OLEDs and ceiling fans with direct current motors from meeting any energy conservation standard. The bill makes DOE's authority to

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[1] U.S. Department of Energy, *Energy Conservation Program: Energy Conservation Standards for External Power Supplies*, 79 Fed. Reg. 7845 (Feb. 10, 2014) (final rule).

[2] House Committee on Energy and Commerce Subcommittee on Energy and Power, *Legislative Hearing on "H.R. ___, the EPS Improvement Act of 2016*, 114th Cong. (Jan. 12, 2016).

prescribe separate energy conservation standards for LED EPS explicit. Ceiling fans with direct current motors would be regulated under DOE's energy conservation standards for ceiling fans.[3]

II. H.R. 3021, THE AIR SURVEY ACT OF 2015

H.R. 3021, the Aerial Infrastructure Route Survey Act of 2015, was introduced by Rep. Pompeo on July 10, 2015.

A. Summary of H.R. 3021

Under section 7 of the Natural Gas Act, the Federal Energy Regulatory Commission (FERC) reviews applications for the construction and operation of natural gas pipelines.[4] H.R. 3021, the Aerial Infrastructure Route Survey Act of 2015, would require FERC to accept aerial survey data and give it equal weight to ground survey data for any prefiling process and completion of an application for construction of a natural gas pipeline. The mandate would similarly apply to a federal or state agency responsible for a federal authorization as defined in section 15 of the Natural Gas Act, which includes the National Environmental Policy Act, the Endangered Species Act and the Clean Water Act among others. In the case of a federal authorization, the language provides that the agency may require the verification of aerial data through collection of ground survey data.

FERC currently accepts aerial survey data for these purposes. It is unclear if, and to what extent, aerial survey data is used by other federal authorizing agencies or state agencies with delegated authorities.[5] It is also unclear if aerial survey data is practical or useful for every federal or state agency.

B. Concerns Raised by H.R. 3021

When similar language was considered as part of H.R. 8, the North American Energy Security and Infrastructure Act of 2015, a number of Democrats raised concerns that such legislation could potentially allow companies working to build natural gas pipelines the ability to circumvent property owners' rights when surveying land. The construction of natural gas

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[3] U.S. DOE, *Energy Conservation Program: Energy Conservation Standards for Ceiling Fans*, 81 Fed. Reg. 1688 (Jan. 13, 2016) (notice of proposed rulemaking).

[4] U.S. Federal Energy Regulatory Commission (FERC), *FERC: Natural Gas Pipelines* (Jan. 29, 2016) (online at www.ferc.gov/industries/gas/indus-act/pipelines.asp).

[5] For example, the Army Corps of Engineers has authority to issue wetlands permits under section 404 of the Clean Water Act and authorizations affecting navigable waters under the Rivers and Harbors Act of 1899. The Fish and Wildlife Service is generally responsible for administering the Endangered Species Act, while the Bureau of Land Management is primarily responsible for issuing right-of-way permits for natural gas pipelines that cross federal lands. State environmental agencies have delegated authorities under the Clean Water Act and Clean Air Act for water quality certifications, water pollution discharge permits, and air emissions permits

pipelines is often controversial in the communities through which the pipelines will be built. Natural gas pipelines currently proposed in New Jersey, New York, Connecticut and other areas of the country have engendered significant local opposition.[6] In a number of cases, companies do not have the requisite permits to survey the land they are seeking to access and the language appears to be designed to allow them to sidestep that aspect of the application process.

III. H.R. 2984, THE FAIR RATES ACT

H.R. 2984, The Fair Ratepayer Accountability, Transparency, and Efficiency Standards Act, was introduced by Rep. Kennedy on July 8, 2015.

A. Summary of H.R. 2984

Under Section 313 of the Federal Power Act (FPA), individual citizens, utilities, states, municipalities, or state commissions have the right to contest an order issued by FERC, first by petitioning for a rehearing on the matter by FERC and then, if the order is not amended or rescinded, by initiating a challenge in the courts. H.R. 2984 amends section 205(d) of the FPA to ensure the right to a rehearing and judicial review is preserved in cases where FERC commissioners are deadlocked and no order is issued in a situation where electricity rates will be affected.

B. Need for Review of *De Facto* FERC Decisions

During review of one of the 2014 wholesale auctions in the New England power market (Forward Capacity Auction 8) there were only four commissioners at FERC as a result of an unfilled vacancy. The four commissioners did not agree on the question of whether the auction results were consistent with regulatory standards (e.g. that rates were just and reasonable). The four commissioners split their votes 2 each. As a result, no decision was issued. That inaction meant the rates could go forward since FERC did not disapprove the auction results. This resulted in dramatic increases in wholesale electricity prices in the New England market.[7] Because FERC had not issued a formal decision, none of the affected parties could challenge the decision or resulting rate increase and no rehearing or judicial review was possible.

H.R. 2984 amends the FPA to ensure that if there is a deadlocked vote among the commissioners, there will still be recourse for eligible parties to seek a review of rates resulting from a *de facto* decision by the commission.

IV. H.R. 4427, A BILL TO AMEND SECTION 203 OF THE FEDERAL POWER ACT

[6] ThinkProgress, *The Explosive Debate Over A New Natural Gas Pipeline Through The Northeast* (Sept. 30 2014) (online at thinkprogress.org/climate/2014/09/30/3567593/northeast-gas-pipeline-opposition).

[7] *Next 4 Years of Electricity Costs Looking Bleak*, New Hampshire Union Leader (Mar. 14, 2015) (online at www.unionleader.com/article/20150315/NEWS05/150319395&source=RSS ?noredirect=1# noredirect).

H.R. 4427, a bill to amend section 203 of the Federal Power Act, was introduced by Rep. Pompeo on February 2, 2016.

From its enactment in 1935, the FPA has required FERC authorization for mergers or consolidations of any electric utility or parts of such a utility. Although prior to 2006, FERC interpreted the statute to provide for a *de minimus* exemption for such activities with a monetary value of less than $50,000. The FPA, together with the Securities and Exchange Commission-administered Public Utility Holding Company Act of 1935 (PUHCA), provided for strict, structural regulation of electric utilities and their holding companies.

The Energy Policy Act of 2005 (EPACT05) made significant changes to FERC's enforcement authorities as part of an overall revamp of federal electricity regulation and regulation of the utility industry. EPACT05 effectively repealed PUHCA and replaced its structural regulation of the utilities industry with increased direct enforcement authority and a broad prohibition on energy market manipulation.

One aspect of this overhaul included altering the authorities in FPA section 203 to address perceived regulatory gaps posed by the repeal of PUHCA. In particular, EPACT05 significantly revised and expanded section 203(a), adding five additional paragraphs. A version of the contents of the original section 203(a) was redesignated as section 203(a)(1) and divided into four subparagraphs, each addressing a specific activity requiring review and prior authorization by FERC. Three of the four activities outlined provided for an exemption from FERC review for transactions with a value of less than $10 million. However, Congress included no such *de minimus* exemption in the subparagraph (B) dealing with mergers and consolidations.

H.R. 4427 would amend section 203(a)(1)(B) of the FPA to include a $10 million threshold to trigger FERC review of a merger or consolidation. At the February 2, 2016 Energy and Power Subcommittee hearing, Mr. Tyson Slocum of Public Citizen testified that "a single facility or contract has the ability to be a pivotal supplier in a given market, providing the owner with an ability to unilaterally charge unjust and unreasonable rates" and that "such facilities could easily fall under a $10 million value threshold on a facility-by-facility, or contract-by-contract, basis."[8]

Currently, without exception, a public utility must obtain FERC authorization to "merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever…."[9]

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[8] House Committee on Energy and Commerce, Subcommittee on Energy and Power, Statement of Tyson Slocum, Public Citizen, *Legislative Hearing on H.R. 3797, the Satisfying Energy Needs and Saving the Environment Act (SENSE) Act and H.R. _____, the Blocking Regulatory Interference from Closing Kilns (BRICK) Act*, 114th Cong. (Feb. 2, 2016) (online at democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/Testimony-Slocum-EP_Leg_Hrg_2016-2-2.pdf).

[9] 16 U.S.C. 824b.

V. H.R. 2080, A BILL TO REINSTATE AND EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING CLARK CANYON DAM

H.R. 2080, a bill to reinstate and extend the deadline for commencement of construction of a hydroelectric project involving Clark Canyon Dam, was introduced by Rep. Zinke on April 28, 2015.

On August 26, 2009, FERC licensed the Clark Canyon Dam Project at the Department of Interior (Interior), Bureau of Reclamation's (Reclamation) Clark Canyon Dam on the Beaverhead River in Beaverhead County, Montana.

Section 13 of the Federal Power Act (FPA) requires licensees to commence construction of hydroelectric projects within the time fixed in the license, which shall be no more than two years from the issuance of the license, and authorizes FERC to issue one extension of the deadline, for no more than two years. In March 2015, FERC terminated the license for the Clark Canyon Dam hydroelectric project, after the licensee did not commence construction by the already extended deadline of August 2013.[10] Legislation is required to reinstate the terminated license and extend the construction commencement deadline.

The bill authorizes FERC to reinstate the terminated license for the Clark Canyon Dam hydroelectric project and to extend for six years the date by which the licensee is required to commence construction.

VI. H.R. 2081, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE GIBSON DAM

H.R. 2080, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Gibson Dam, was introduced by Rep. Zinke on April 28, 2015.

On January 12, 2012, FERC licensed the Gibson Hydroelectric Dam project to be located at Reclamation's Gibson dam on the Sun River in Lewis and Clark County and Teton County, Montana. However, the licensee for the Gibson Hydroelectric Dam project did not commence construction by the already extended deadline of January 12, 2016. Legislation is required to extend the construction commencement deadline.

The bill would authorize FERC to extend for six years the date by which the licensee is required to commence construction.

[10] U.S. Federal Energy Regulatory Commission (FERC), *Order Terminating License*, 150 FERC ¶ 61,195 (Mar. 19, 2015) (online at www.ferc.gov/whats-new/comm-meet/2015/031915/H-2.pdf).

VII. H.R. 3447, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE W. KERR SCOTT DAM

H.R. 3447, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the W. Kerr Scott Dam, was introduced by Rep. Foxx on September 8, 2015.

On July 17, 2012, FERC licensed the W. Kerr Scott Hydropower project to be located at the U.S. Army Corps of Engineers' (Corps) W. Kerr Scott Dam on the Yadkin River in Wilkes County, North Carolina. The licensee for the W. Kerr Scott Hydropower project is not expected to commence construction by the already extended deadline of July 17, 2016. Legislation is required to extend the construction commencement deadline.

The bill would authorize FERC to extend for six years the date by which the licensee is required to commence construction.

VIII. H.R. 4416, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE JENNINGS RANDOLPH DAM

H.R. 4416, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam, was introduced by Rep. McKinley on February 1, 2016.

On March 29, 2012, FERC licensed the construction of a hydroelectric facility at the Corps' Jennings Randolph Dam located on the North Branch of the Potomac River in Maryland and West Virginia. The licensee for the Jennings Randolph Dam project is not expected to commence construction by the already extended deadline in April 2016. Legislation is required to extend the construction commencement deadline.

The bill would authorize FERC to extend for six years the date by which the licensee is required to commence construction.

IX. H.R. 4434, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE CANNONSVILLE DAM

H.R. 4434, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Cannonsville Dam, was introduced by Rep. Gibson on February 2, 2016.

On May 13, 2014, FERC licensed the construction of a hydroelectric facility at the Cannonsville Reservoir located on the West Branch of the Delaware River in Delaware County, New York. The licensee for the Cannonsville Reservoir project is not expected to commence

construction by the deadline in May 2016. The additional reviews and repairs to the dam which are necessary to commence construction of the hydroelectric project will delay commencement of construction beyond the expiration date of the original license and the two year extension which FERC is authorized to grant. Legislation is required to extend the construction commencement deadline in light of these circumstances.

The bill would authorize FERC to extend for eight years the date by which the licensee is required to commence construction.

X. H.R. 3797, THE SATISFYING ENERGY NEEDS AND SAVING THE ENVIRONMENT (SENSE) ACT

H.R. 3797, the Satisfying Energy Needs and Saving the Environment (SENSE) Act, was introduced by Rep. Rothfus on Oct. 22, 2015. For additional information, please see the memo from the February 3, 2016 Energy and Power Subcommittee hearing here.

H.R. 3797 seeks to provide special considerations under both EPA's Cross-State Air Pollution Rule (CSAPR) and Mercury and Air Toxics Standards (MATS) for existing power plants that convert coal refuse into energy.

Section 2(b) relates to the treatment of coal refuse facilities under CSAPR. Power plants that use coal refuse derived from bituminous coal would maintain the same allocation of Phase 1 SO_2 emissions allowances under Phase 2. In the absence of this provision, Phase 2 allowance allocations would likely have decreased for all, or at least most, of these units. Subsection 2(b)(2) prohibits increasing a state's emissions budget in Phase 2 to account for the extra allowances allocated to coal refuse units. This provision is ostensibly to limit the impact of increased pollution from coal refuse facilities on downwind states, however the result of this provision would be that other power plants in a given state that are covered by CSAPR will have to drastically cut their emissions to make up the difference.

In essence, section 2(b) picks winners and losers – tipping the scales in favor of bituminous coal refuse units, at the expense of all other covered units within a state. This provision would artificially reallocate emissions allowances, alter the CSPAR trading system, create inequities in the market, and impede a state's right to determine how to best comply with the requirements of the rule. Further, if a state did wish to allocate additional allowances to coal refuse plants, it can already do so through the state implementation plan (SIP) process.

Section 2(c) relates to the treatment of coal refuse facilities under MATS.[11] Specifically, section 2(c)(2)(v) provides an additional compliance option for the hydrogen chloride (HCl) and SO_2 standard, allowing coal refuse facilities to capture and control 93 percent of SO_2 emissions. It is not known how many facilities would opt for this additional compliance option, but the end result is likely additional emissions of air pollutants.

[11] *Note*: section 2(c) is not limited just to waste coal units burning bituminous coal.

XI. H.R. ___, THE BLOCKING REGULATORY INTERFERENCE FROM CLOSING KILNS (BRICK) ACT

For additional information, please see the memo from the February 3, 2016 Energy and Power Subcommittee hearing here.

A. Summary of the BRICK Act

Section 2 of the discussion draft delays implementation of the final Brick and Structural Clay Products rule and the final Clay Ceramics Manufacturing rule, by extending all compliance deadlines based on pending judicial review. Under subsection (b), the compliance or submission date extension applies to "any final rule to address national emission standards for hazardous air pollutants (NESHAP) for brick and structural clay products manufacturing or clay ceramics manufacturing under 112 of the Clean Air Act," or any subsequent rule.[12]

Subsection (c) establishes a uniform time period for all compliance deadline extensions. Under the legislation, the time period starts 60 days after the final rule appears in the Federal Register, and ends when "judgment becomes final, and no longer subject to further appeal or review."[13]

B. Analysis of the BRICK Act

The discussion draft's proponents argue that legislation is needed to delay implementation of EPA's Brick and Clay rules until all legal challenges are resolved by the courts. However, legal challenges to final EPA rules are routine and courts have the power on their own to stay the effectiveness of regulations under court challenge.

The discussion draft throws out the existing judicial process by legislatively granting a blanket extension for any compliance deadline, regardless of the merits of the legal challenge or the final outcome. Under the legislation, EPA's Brick and Clay rules would automatically be delayed by however much time it takes to conclude litigation, providing encouragement both for frivolous challenges and additional appeals in order to extend the ultimate compliance time. Previous attempts to grant blanket compliance extensions for EPA rules have been met with similar criticism.[14]

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[12] H.R.__, the "Blocking Regulatory Interference from Closing Kilns (BRICK) Act" at § 2(b).

[13] *Id.* at § 2(c).

[14] *See, e.g.*, H.R. 2042, the Ratepayer Protection Act. At the April 14, 2015 legislative hearing, Massachusetts Assistant Attorney General, Melissa Hoffer, pointed out that the current judicial process for delaying a rule "has withstood the test of time, and ensures that courts will undertake a careful balancing of interests before granting a stay of agency action," and she further explained that the blanket extension in the discussion draft would "create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power

XII. H.R. 4238, A BILL TO AMEND THE DEPARTMENT OF ENERGY ORGANIZATION ACT AND THE LOCAL PUBLIC WORKS CAPITAL DEVELOPMENT AND INVESTMENT ACT OF 1976 TO MODERNIZE TERMS RELATING TO MINORITIES

H.R. 4238, a bill to amend the Department of Energy Organization Act and the Local Public Works Capital Development and Investment Act of 1976 to modernize terms relating to minorities, was introduced by Rep. Meng on Dec. 11, 2015.

H.R. 4238 strikes outdated, offensive racial terms in DOE's Office of Minority Economic Impact and the Minority Business Enterprise departments and replaces them with more culturally appropriate language. Specifically, Section 211(f)(1) of the Department of Energy Organization Act is amended by striking the term ''a Negro, Puerto Rican, American Indian, Eskimo, Oriental, or Aleut or is a Spanish speaking individual of Spanish descent'' and is replaced by the term ''Asian American, Native Hawaiian; a Pacific Islander, African American, Hispanic, Puerto Rican, Native American, or an Alaska Native''

All 48 House Members of the Congressional Asian Pacific American Caucus are cosponsors of this measure. The Congressional Black Caucus also supports the legislation.

Plan." (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).