

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 1, 2016**

**To: Subcommittee on Energy and Power Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Legislative Hearing on “H.R. 3021, the Air Survey Act of 2015; H.R. 2984, the Fair RATES Act; H.R. \_\_, 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. \_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam; and H.R. \_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Cannonsville Dam.”**

On Tuesday, February 2, 2016 at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a legislative hearing on “H.R. 3021, the Air Survey Act of 2015; H.R. 2984, the Fair RATES Act; H.R. \_\_, 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. \_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam; and H.R. \_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Cannonsville Dam.”

## **I. 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. 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.<sup>1</sup> 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 the extent to which federal authorizing agencies such as the U.S. Fish and Wildlife Services, the Army Corps of Engineers or state agencies delegated such authorities use or are able to use aerial survey data as a policy or practical consideration.

When similar language was considered as part of H.R. 8, 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 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.<sup>2</sup> 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 designed to allow them to sidestep that aspect of the application process.

## **II. 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. 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.

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<sup>1</sup> 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](http://www.ferc.gov/industries/gas/indus-act/pipelines.asp)).

<sup>2</sup> 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](http://thinkprogress.org/climate/2014/09/30/3567593/northeast-gas-pipeline-opposition)).

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.<sup>3</sup> 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 the rates that result from a *de facto* decision of the Commission.

### **III. H.R. \_\_\_\_, A BILL TO AMEND SECTION 203 OF THE FEDERAL POWER ACT**

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 revamping 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.

The draft committee print 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. Currently, without exception, a public utility must obtain FERC authorization to "merge or consolidate, directly or

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<sup>3</sup> *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](http://www.unionleader.com/article/20150315/NEWS05/150319395&source=RSS?noredirect=1#noredirect)).

indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever....”<sup>4</sup>

H.R. 8, North American Energy Security and Infrastructure Act of 2015, as reported by the Committee on Energy and Commerce, included language identical to that contained in the draft committee print. In the report accompanying H.R. 8, the Majority claimed that the language “would correct an apparent oversight that resulted in Congress’s intent in EPAct 2005 not being completely enacted by the Commission...”<sup>5</sup> Similar arguments have also been made by some industry supporters of the legislation. However, there is no evidence to support such a claim.

The committee-reported version of EPACT05, as authored by former Chairman Barton, did not contain a monetary threshold for this provision and no mention of such a threshold appears in House Report 109-215 or the conference report accompanying EPACT 2005. While establishing a \$10 million *de minimus* exemption in Section 203(a)(1)(B) of the FPA may be a desirable policy change, nothing in the record supports the view that the Committee or Congress ever intended to include a monetary threshold for FERC merger reviews in enacting EPACT05.

#### **IV. 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.<sup>6</sup> Legislation is required to reinstate the terminated license and extend the construction commencement deadline.

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<sup>4</sup>16 U.S.C. 824b

<sup>5</sup> H.Rept. 104-347

<sup>6</sup> 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](http://www.ferc.gov/whats-new/comm-meet/2015/031915/H-2.pdf)).

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.

**V. 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 authorizes FERC to extend for six years the date by which the licensee is required to commence construction.

**VI. 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 authorizes FERC to extend for six years the date by which the licensee is required to commence construction.

**VII. H.R. \_\_\_\_, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE JENNINGS RANDOLPH DAM**

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 authorizes FERC to extend for six years the date by which the licensee is required to commence construction.

**VIII. H.R. \_\_\_\_, A BILL TO EXTEND THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF A HYDROELECTRIC PROJECT INVOLVING THE CANNONSVILLE DAM**

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 Jennings Randolph Dam 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 authorizes FERC to extend for eight years the date by which the licensee is required to commence construction.

**IX. WITNESSES**

The following witnesses have been invited to testify:

**Panel 1**

**Ann F. Miles**

Director, Office of Energy Projects  
Federal Energy Regulatory Commission

**Max Minzner**

General Counsel, Office of the General Counsel  
Federal Energy Regulatory Commission

**Panel 2**

**Bill Bottiggi**

General Manager  
Braintree Light and Electric Department

**Jeffrey A. Leahey**

Deputy Executive Director  
National Hydropower Association

**Edward Lloyd**

Evan M. Frankel Professor of Environmental Law

Columbia University School of Law

*On behalf of the New Jersey Conservation Foundation and Stonybrook Millstone Watershed Association*

**Bill Marsan**

Executive Vice President, General Counsel and Corporate Secretary

American Transmission Company

**Timothy L. Powell**

Director of Land, GIS and Permits

Williams Company

**Tyson Slocum**

Energy Program Director

Public Citizen, Inc.