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ONE HUNDRED FIFTEENTH 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

January 17, 2018

To: Subcommittee on Energy Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on "Legislation Addressing LNG Exports and PURPA Modernization"

On **Friday, January 19, 2018 at 9:15 a.m. in room 2322 of the Rayburn House Office Building**, the Subcommittee on Energy will hold a hearing titled "Legislation Addressing LNG Exports and PURPA Modernization."

I. H.R. 4476, PURPA MODERNIZATION ACT OF 2017

A. Background

In 1978, Congress enacted the Public Utility Regulatory Policies Act (PURPA) to promote the wholesale distribution of electric energy, increase energy efficiency, and ensure electric consumers receive fair retail rates.[1] Among other things, PURPA established rules to foster cogeneration and generation from both small, independent producers and from renewable energy sources.[2]

Section 210 of PURPA requires utilities to purchase power from certain qualifying renewable energy projects, small power production, and cogeneration facilities. The requirement took the form of mandatory contracts the utility had to sign with Qualifying Facilities (QFs) to purchase electricity at a rate (set by each state's public utility commission) reflective of the cost the utility would have incurred if it had used its own resources to provide that additional

[1] Federal Energy Regulatory Commission, What is a Qualifying Facility? (accessed Jan. 16, 2018) (www.ferc.gov/industries/electric/gen-info/qual-fac/what-is.asp).

[2] Public Utility Regulatory Policies Act, Pub. L. No. 95-617.

generating capacity (known as "avoided cost"). It also required utilities to sell electricity to such QFs at just and reasonable, non-discriminatory rates.[3]

Through the Energy Policy Act of 2005 (EPACT 05), Congress recognized there may not be a need for requiring utilities to sign mandatory purchase agreements with QFs in regions with robust, functioning wholesale markets and competition. In adding a new subsection (m) to section 210, Congress ended the mandatory purchase requirement in instances where the Federal Energy Regulatory Commission (FERC) finds that a QF has "nondiscriminatory access to" one of three market-related situations.[4] By requiring such findings, Congress established a trade-off that incentivized the development of regional wholesale markets in exchange for ending mandatory purchase requirements.

As a part of its Powering America series, the Subcommittee conducted an oversight hearing on September 6, 2017, to evaluate PURPA's objectives and impact on consumers since enactment. Additional detail on PURPA background and specific issues addressed during this hearing can be found here.

B. Summary and Analysis

Rep. Walberg (R-MI) introduced H.R. 4476, the "PURPA Modernization Act of 2017," on November 29, 2017.

Section 2 of the legislation is a stand-alone provision requiring FERC to revise its regulations implementing Section 210 of PURPA to provide a rebuttable presumption regarding the definition of a QF. The rebuttable presumption states that facilities located more than a mile away from each other are not located at the same site and facilities located within a mile of each other are co-located. The section further lays out conditions for rebutting the presumption.

Section 3 directly amends section 210(m) of PURPA to add a new provision creating a presumption that qualifying small power production facilities of 2.5 megawatts (MW) or larger have nondiscriminatory access to wholesale markets, interconnection, and transmission services. The provision fundamentally alters the application of section 210 for most QFs, flipping the burden such that developers of projects of 2.5 MW or greater would now have to prove in fact that lack nondiscriminatory access to markets and services. Under current law, the burden of proof lies with incumbent utilities to prove such access for qualifying small power production facilities of less than 20 MW.

Section 4 also amends section 210 to propose that states or non-regulated utilities (e.g. rural cooperatives and municipal utilities) could determine whether an electric utility needs to purchase power from small power producers or provide services to a QF. Under section 4, either the appropriate state regulatory agency or non-regulated utility could make this determination by finding that there is no need for the utility in question to purchase such power or that the utility

[3] 16 U.S.C. § 796 (18)(B).

[4] 16 U.S.C. § 842a-3(m).

procures long-term generation resources through a competitive process and uses integrated resource planning.

II. LIQUEFIED NATURAL GAS EXPORTS

A. Background

In May 2011, DOE granted an authorization for liquefied natural gas (LNG) exports from the Sabine Pass project in Louisiana. Since then, as a result of low domestic natural gas prices in the United States, companies have filed more than 50 applications with the Department of Energy (DOE) to export natural gas. To date, DOE has granted final authorizations for LNG exports to non-Free Trade Agreement (FTA) countries on 29 applications, and conditional authorizations on one application.[5] The approved applications authorize the export of 21.35 billion cubic feet per day (Bcf/d) of natural gas to non-FTA countries,[6] and the pending applications collectively seek an additional 31.96 Bcf/d of LNG. According to the Energy Information Administration (EIA), the U.S. became a net exporter of natural gas in 2017.[7]

Section 3 of the Natural Gas Act (NGA) prohibits the import or export of natural gas without prior approval from DOE. An application to export natural gas to the 20 FTA countries "shall be deemed to be consistent with the public interest," and DOE must "grant them without modification or delay."[8] DOE is required to grant an application to export natural gas to a non-FTA country unless it finds that the proposed export is not consistent with the public interest. Notices of non-FTA applications are posted in the Federal Register for public comment, which ultimately inform DOE's evaluation of an application's consistence with the public interest. DOE evaluates a range of factors when performing a public interest review of a non-FTA application, including economic impacts, international considerations, U.S. energy security, and environmental considerations.

Section 3 also provides the FERC with authority to license the siting, construction, and operation of LNG export facilities. FERC's separate permitting process is subject to environmental review under the National Environmental Policy Act (NEPA). Rather than preparing a separate environmental review to fulfill its NEPA requirements, DOE relies on FERC's review of the environmental impacts of an export facility.

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[5] Department of Energy, *Long Term Applications Received by DOE/FE to Export Domestically Produced LNG from Lower-48 States* (Jan. 4, 2018) (energy.gov/sites/prod/files/2018/01/f46/Summary%20of%20LNG%20Export%20Applications.pdf).

[6] DOE includes authorizations for export of compressed natural gas in this estimate.

[7] Energy Information Administration, *Short Term Energy Outlook – January 2018*, at 11 (Jan. 11, 2018) (www.eia.gov/outlooks/steo/pdf/steo_full.pdf).

[8] Natural Gas Act § 3(c).

DOE recently proposed a rule to expedite the approval of "small-scale natural gas exports."[9] The rule would deem small-scale exports to non-FTA countries to be in the public interest, so long as applications propose to export LNG at a volume of not more than 0.14 Bcf/d and DOE's approval of the application does not require an environmental review under NEPA.[10] DOE will grant applications meeting the criteria on an expedited basis, without the need for notice or comment. Notably, DOE asserts "this proposed rule, and the 45 day comment period for this proposed rule, would constitute the notice and opportunity for hearing on all prospective small-scale natural gas export applications."[11] The small-scale LNG rule is expected to be finalized in February.[12]

B. H.R. 4605, Unlocking Our Domestic LNG Potential Act

Rep. Johnson (R-OH) introduced H.R. 4605, the "Unlocking Our Domestic LNG Potential Act," on December 11, 2017. The bill amends NGA section 3, removing the prohibition on the import or export of natural gas without prior approval from DOE. This removes longstanding consumer protections, and prevents DOE from ensuring exports of LNG to non-FTA countries are consistent with the public interest. As a result, the public would not have an opportunity to know about, or provide input on, exports of LNG to any country at any level. Furthermore, having a mechanism for the federal government to know the source and destination of LNG imports and exports is critical for protecting our national security. FERC's ability to impose conditions for export facilities could also be jeopardized by the bill, since FERC's permitting authority is delegated by DOE.

The bill will disrupt the functioning approval process for pending and future LNG export applications by removing DOE's authority to review the applications. Automatically allowing LNG exports without meaningful public interest review would result in the export of approximately 53 Bcf/d of LNG, based on current and pending applications. An unrestricted export policy could lead to even higher levels of LNG exports, which could have significant impacts on domestic natural gas prices and adversely affect American consumers and manufacturers.

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[9] Department of Energy, *Small-Scale Natural Gas Exports*, 82 Fed. Reg. 41570 (Sept. 1, 2017) (proposed rule).

[10] DOE may determine that an application qualifies for a categorical exclusion from the preparation or adoption of an environmental impact statement or environmental assessment under NEPA. DOE's list of categorical exclusions can be found at 10 CFR part 1021.410, appendices A and B.

[11] *See* note 9 at 41573.

[12] Office of Management and Budget, Office of Information and Regulatory Affairs, View Rule – Small-Scale Natural Gas Exports (Section 610 Review) (www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1901-AB43) (accessed Jan. 16, 2018).

C. H.R. 4606, Ensuring Small Scale LNG Certainty and Access Act

Rep. Johnson also introduced H.R. 4606, the "Ensuring Small Scale LNG Certainty and Access Act," on December 11, 2017. The bill amends NGA section 3(c) to deem applications for "importation or exportation of a volume of natural gas that does not exceed 0.14 billion cubic feet per day" to be in the public interest.

This bill is ostensibly intended to codify DOE's small-scale LNG rule, yet it fails to include the proposed rule's requirement that applications qualify for a categorical exclusion from NEPA. According to the Congressional Research Service, Eagle LNG Partners Jacksonville LLC is the only project that does not merit a categorical exclusion but would still meet the capacity requirements of the small-scale LNG rule. Since the bill does not include a categorical exclusion provision. Consequently, Eagle LNG Partners Jacksonville LLC is the only current project to benefit from this new expedited process. Even if H.R. 4606 did include all aspects of the small-scale LNG rule, qualifying small-scale applications could be approved without any public notice or comment, or need for a public interest determination. Additionally, because there is no limit on the number of small-scale applications an entity could have, an applicant could skirt requirements for larger exports by breaking a proposal into smaller pieces. As noted above, an unrestricted export policy could lead to LNG exports at levels that could significantly affect domestic natural gas prices.

III. WITNESSES

The following witnesses have been invited to testify:

Panel I

The Honorable Steven Winberg
Assistant Secretary for Fossil Energy
Department of Energy

James Danly
General Counsel
Federal Energy Regulatory Commission.

Panel II

Mr. Timothy Sparks
Vice President, Electric Grid Integration
CMS Energy, Consumers Energy

Mr. Travis Kavulla
Vice Chairman
Montana Public Service Commission

Karl R. Rábago
Executive Director
Pace Energy and Climate Center

Charlie Riedl
Executive Director
Center for Liquefied Natural Gas

Paul Cicio
President
Industrial Energy Consumers of America