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Congress of the United States
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MEMORANDUM

June 21, 2017

To: Subcommittee on Energy Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Markup of H.R. 2910, the ''Promoting Interagency Coordination for Review of Natural Gas Pipelines Act''; H.R. 2883, the ''Promoting Cross-Border Energy Infrastructure Act''; H.R.__ , the ''Hydropower Policy Modernization Act of 2017''; H.R. 2786, the ''Promoting Small Conduit Hydropower Facilities Act of 2017'; and, H.R.__, to Amend the Energy Policy and Conservation Act to Provide Funding for States to Develop and Implement State Energy Security Plans

On **Thursday, June 22, 2017, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommitee on Energy will hold a markup of H.R. 2910, the ''Promoting Interagency Coordination for Review of Natural Gas Pipelines Act''; H.R. 2883, the ''Promoting Cross-Border Energy Infrastructure Act''; H.R.__ the ''Hydropower Policy Modernization Act of 2017''; H.R. 2786, the ''Promoting Small Conduit Hydropower Facilities Act of 2017''; and, H.R.__, To Amend the Energy Policy and Conservation Act to Provide Funding for States to Develop and Implement State Energy Security Plans.

For background on the Natural Gas Act (NGA) and the gas pipeline certification process, as well as the hydroelectric licensing provisions of Part I of the Federal Power Act (FPA), please refer to the memorandum for the May 3, 2017 Energy Subcommittee legislative hearing.

I. H.R. 2910, THE PROMOTING INTERAGENCY COORDINATION FOR REVIEW OF NATURAL GAS PIPELINES ACT

A. The Bill Being Brought Before the Subcommittee Is Practically a Different Bill From the Measure That Was Considered at the Legislative Hearing

This bill is almost entirely different from the draft legislation that was the subject of the May 3, 2017 legislative hearing and any previously considered proposal on this subject.

The previous version of the legislation amended section 15 of the NGA to, among other things, require the Federal Energy Regulatory Commission (FERC) to establish a schedule with deadlines for submission of information from other federal or state agencies, local governments or Indian tribes for a natural gas pipeline or liquefied natural gas project requiring FERC approval. Concurrent reviews by these federal or state agencies would be established to provide FERC with timely information for the purpose of complying with the National Environmental Policy Act of 1969 (NEPA) and other environmental statutes such as the Clean Water Act (referred to as "federal authorizations"). FERC would be allowed to pursue remedies or implementation plans if a federal or state agency failed to meet the schedule established by FERC under this section. That draft also would have required federal and state agencies to accept aerial survey data, and provided that such agencies may grant conditional approvals based on that data, conditioned further on data verification via subsequent onsite inspection.

In May 3, 2017 testimony before the Energy Subcommittee, FERC's Office of Energy Projects Director Terry Turpin noted that "some of the proposed NGA modifications would alter the Commission's role from one of collaboration with its fellow agencies to…monitoring other agency execution of their Congressionally-mandated duties. I am concerned that this…could lead to unproductive tension between the agencies involved in the review process." In questioning Mr. Turpin also noted that "in looking back at the data for all issuances for the Commission since 2009, on average it is 88 percent of the projects get issued within one year." Finally, Mr. Turpin noted that the single greatest factor in slowing down an application was the license applicant failing to provide FERC and other agencies with "timely and complete information necessary to perform Congressionally-mandated project reviews."

B. H.R. 2910 Does Not Address FERC's Concerns

H.R. 2910 does not address any of the concerns raised by FERC at the legislative hearing. In fact, the new bill does not directly amend the NGA at all, but instead is structured as standalone legislation that indirectly attempts to re-write key aspects of sections 3, 7 and 15 of the NGA. The legislation would create two new terms in federal law: "NEPA review" –defined as "the process of reviewing a proposed Federal action under section 102…" of NEPA and "Project-related NEPA review" defined as any NEPA review required to be conducted specifically "with respect to the issuance of an authorization under section 3…or a certificate of public convenience and necessity…." Whereas the previous draft allowed other agencies to be either "cooperating" or "participating," H.R. 2910 only provides for an agency to be designated as a "participating agency." H.R. 2910 also goes further to define a status for certain agencies called "non-designation" which prohibits such agencies from being able to "request or conduct a NEPA review that is supplemental to the project-related review conducted by the Commission…."

The bill prohibits FERC from considering any comments or other information provided by a non-designated agency or including its comments or supplemental information in the record. Other new language introduced in H.R. 2910 requires agencies responsible for federal authorizations to deem applications for such authorizations "sufficiently complete for the purpose of commencing consideration, regardless of whether supplemental information is necessary to enable the agency to complete the consideration required by law…."

II. H.R. 2883, THE PROMOTING CROSS-BORDER ENERGY INFRASTRUCTURE ACT

H.R. 2883 establishes a new permitting process for applicants seeking to construct, connect, operate, or maintain a border-crossing facility for importing or exporting oil, natural gas, or electricity from Canada or Mexico.[1] Under the new process, the relevant official must issue a "certificate of crossing" for a border-crossing facility within 120 days of final action under NEPA, unless the official finds that the project "is not in the public interest of the United States." This language replaces the existing federal approval process that requires oil and natural gas pipelines, and electric transmission lines that cross the U.S. border to obtain a presidential permit. The relevant officials are FERC for oil and natural gas pipelines, and the Secretary of Energy for electric transmission lines. FERC currently has no authority or experience with the siting of oil pipelines. Cross-border oil pipeline approval authority is currently delegated to the State Department.

The new process established by the bill effectively exempts such projects from environmental and safety review under NEPA by narrowing NEPA applicability to just the portion of the project actually crossing the border. The process created by the bill also tips the scale in favor of approving controversial projects by establishing a rebuttable presumption of approval. H.R. 2883 would allow a project that is found not to be in the public interest under the current permitting process to reapply under the new weaker process. The bill would exempt all modifications to existing cross-border pipelines, including major expansions of pipelines, from any requirement for federal review or approval.

The effect of these changes would allow large and long-lived cross-border energy projects to be approved with no understanding or consideration of their environmental impacts or to be exempted from any permitting requirement at all. The public, including communities and landowners directly affected by the projects, would have little or no information and no opportunity to object or request mitigating action, except to the extent provided under limited state laws in some states.

For a detailed section-by-section analysis of this legislation, please see the attached appendix.

III. HYDROELECTRIC POWER LEGISLATION

A. H.R. _, The Hydropower Policy Modernization Act of 2017

This draft legislation contains several wide-ranging hydropower policy initiatives.

[1] A similar proposal was considered as part of H.R. 8 in the 114th Congress. For further background information, please see this memo on section 3104. The Committee also considered H.R. 3301 during the 113th Congress. For further background information please see these memos from the related legislative hearing and markups on the bill.

The most significant provisions address the process for licensing hydroelectric facilities under the FPA, including designating FERC as the lead agency to coordinate the licensing process. The measure grants FERC authority to set deadlines for decisions by federal agencies, states and tribes administering other applicable laws (e.g. the Endangered Species Act, the Clean Water Act, etc.) and limits deadline extensions to a 90-day period, regardless of whether the agency's decision timelines under these respective statutes are feasible for evaluating the project. The extension of FERC's authority conflicts with states' rights to manage water quality and quantity. The bill also provides both license applicants and other stakeholders a new ability to challenge a mandatory resource protection condition or prescription, opening the door for protracted litigation.

The draft we will be considering at the markup is significantly different from the draft noticed for the legislative hearing. The bill now contains a very major change to the conditioning authority of the resource agencies. The bill requires the Federal agency that is proposing a condition to protect water quality, endangered species, fisheries, or other natural or cultural resources to demonstrate that they gave equal consideration to energy supply, navigation, flood control, and air quality. The resource agencies have no direction or obligation in their respective statutes or in the Federal Power Act to consider any of these matters in making a recommendation on a condition for a hydropower license. This provision is in direct contrast with current law and significantly undermines the ability of these agencies to protect natural and cultural resources. The bill also prevents the Secretaries of Agriculture, Commerce, and Interior from delegating authority to their respective regional offices that now do much of the work to review hydropower licenses and develop proposed conditions for those licenses. This constitutes another major change from the previous draft, and is more likely to slow the process of license approval.

Another major change involves alterations to the "trial-type hearing" process, established by the Energy Policy Act of 2005 (EPAct05) – at industry's request. Significantly, the legislation would require such hearings –which address issues related to mandatory conditions imposed by federal resource agencies-- to be conducted by a single FERC Administrative Law Judge (ALJ) rather than ALJs at the resource agency who have the requisite legal expertise to render decisions on conditions open to challenge. The FERC ALJ is not empowered to determine whether the original or alternative condition or prescription should be adopted. A decision by the FERC ALJ regarding challenges to a mandatory condition would be final and leave the Secretary originating that condition the choice to either adopt, modify, or withdraw the condition. Decisions of the ALJ under this section on disputed facts are not subject to further administrative review, but would be part of the consolidated record and subject to judicial review.

Other aspects of the legislative draft include provisions to expand the federal renewable energy purchase requirement established under EPAct05, and broaden the statutory definition of renewable energy to include all existing hydropower rather than just new hydropower capacity. The draft also provides FERC with the authority to grant longer periods for preliminary and construction permits and associated extensions under Sections 5 and 13 of the FPA. The legislation also provides FERC with new authority to approve qualifying project upgrades to an existing licensed project under a very streamlined process.

For a detailed section-by-section analysis of this legislation, please see the attached appendix.

B. H.R._2786,_The Promoting Small Conduit Hydropower Facilities Act of 2017

This legislation further expands the exemptions from hydropower licensing for conduit hydropower facilities that were enacted by Congress in 2013. Current law exempts qualifying small conduit hydropower facilities of less than five megawatts capacity from the FERC licensing process. Under this process, FERC must determine within 15 days after receipt of a notice of intent to construct a small conduit project by the developer if the project meets the qualifying criteria for exemption under the law. If FERC makes an initial determination that the project meets that criteria, current law requires FERC to publish a public notice of that determination and provide the public 45 days for an opportunity to comment on or contest FERC's determination.

H.R. 2786 would amend section 30 of the FPA to lift the five megawatt cap on conduit projects that could qualify for exemption. The bill would also reduce from 45 to 15 days the amount of time the public would have to comment on or contest FERC's determination of whether a project qualifies for exemption.

This bill differs significantly from the legislative draft that was covered by the May 3, 2017 legislative hearing. That legislation would have created a new sub-category of conduit hydropower projects of less than two megawatts that would qualify for expedited consideration for exemption by FERC.

IV. H.R.__, TO AMEND THE ENERGY POLICY AND CONSERVATION ACT TO PROVIDE FUNDING FOR STATES TO DEVELOP AND IMPLEMENT STATE ENERGY SECURITY PLANS

This bill amends the sections of the Energy Policy and Conservation Act pertaining to the State Energy Conservation Plans. It adds a new section that authorizes a state to use Federal financial assistance received through the State Energy Program (SEP) to implement, revise, and review a State Energy Security Plan. The bill sets out requirements for the contents of the State Energy Security Plan. To be eligible to receive assistance under the SEP, the bill requires the Governor of a state to submit a plan, a revision to the plan, or a certification that no revisions to the plan are necessary to the Secretary of Energy every year. The provision sunsets in 2022. The bill also reauthorizes the SEP from 2018 through 2022, although the amount of the authorization is to be determined.

The Committee has held no legislative hearings on the draft bill.

June 2017

Section-By-Section Summary of H.R. 2883

PROMOTING CROSS-BORDER ENERGY INFRASTRUCTURE ACT

Committee on Energy and Commerce, Democratic Staff

H.R. 2883 establishes a new permitting process for applicants seeking to construct, connect, operate, or maintain a border-crossing facility for the purpose of importing or exporting oil, natural gas, or electricity from Canada or Mexico. This replaces the existing requirement than an entire trans-boundary project, not just a segment, obtain a presidential permit. Below is a section-by-section analysis of the major provisions of the bill.

Sec. 2(a)(2): Certificate Of Crossing

This section requires the relevant official to issue a "certificate of crossing" for a border-crossing facility of a project within 120 days of final action under the National Environmental Policy Act (NEPA), unless the official finds that the project "is not in the public interest of the United States." The relevant officials are FERC for oil and natural gas pipelines, and the Secretary of Energy for electric transmission lines. Right now, cross-border oil pipeline approval is delegated to the State Department. Moving this responsibility to FERC could lead to delays since FERC currently has no authority or experience with the siting of oil pipelines.

Unlike the existing process, this provision establishes a rebuttable presumption of approval, tipping the scale in favor of the project. Instead of requiring an agency to affirmatively find that a project is in the public interest, it shifts the burden of proof to opponents of the project to show that it is not in the public interest. Further a "border-crossing facility" is defined as the portion of the project "that is located at an international boundary of the United States." Trans-boundary pipelines and transmission lines are multi-billion dollar infrastructure investments that stretch hundreds of miles, last for decades, and pose environmental risks well beyond the border crossing. This language limits the scope of review for federal approval to just a sliver of a much larger project and makes it extremely difficult for an agency to prove an application as contrary to the public interest.

Sec. 2(a)(3): Exclusions

This section temporarily excludes from the new permitting process any cross-border project with permit approval pending on the date of enactment. This exclusion ends when the application is denied, or two years later for any application still pending. This provision would give controversial projects incentive to simply wait until the exclusion expires, and would give any project denied a presidential permit a second bite at the apple under the new, rubber-stamp process.

Sec. 2(b): Importation or Exportation of Natural Gas to Canada and Mexico

Subsection (b) amends section 3 of the Natural Gas Act to require DOE to grant authorization for the export or import of liquefied natural gas (LNG) to or from Canada or Mexico, within 30 days. Currently, companies wishing to export LNG to Canada or Mexico must obtain federal approval before doing so. These applications are relatively simple filings, and approvals can include conditions, such as prohibitions against simply using Canada or Mexico as a pass-through before shipping the gas to another country. The sets a deadline for DOE to grant authorization, but provides no mechanism for a deadline extension or denial of an application. If DOE is faced with rigid deadlines it cannot meet, the result will likely be unnecessary application denials rather than expedited approvals.

Sec. 2(e): Modifications to Existing Projects

Subsection (e) says that no certificate of crossing or presidential permit is required for modifications to existing projects. Under this section, modifications include a change in ownership, volume expansion, downstream or upstream interconnection, or adjustments to maintain flow (such as an increase or decrease in the number of pump or compressor stations). As a result, controversial modifications to existing cross-border pipelines or transmission lines would not require federal approval and would not be subject to any environmental review. Many modifications, as defined by this bill, could have environmental impacts just as significant as those resulting from an entirely new project.

June 2017

Summary of the "Hydropower Policy Modernization Act of 2017"
Committee on Energy and Commerce, Democratic Staff

H.R. __, the Hydropower Policy Modernization Act of 2017 is a Discussion Draft circulated by Chairman Fred Upton that will be brought to markup before the Subcommittee on Energy on June 22, 2017. Following is a brief summary of the major provisions of the draft.

Section 1 – Short Title

Section 2 – Hydropower Regulatory Improvements

- Has five major parts. First it inserts a Sense of the Congress that hydropower is a renewable resource and that the U.S. should increase hydropower resources.
- Amends Section 203 of the Energy Policy Act of 2005 by increasing the goal for the amount of renewable electric energy consumed by the federal government from 7.5 percent to 15 percent for 2017 and each fiscal year thereafter. This section also changes the definition of renewable energy to include all existing hydropower in the list of renewable energy sources that can be used to meet the federal renewable energy consumption goal.
- Amends section 5 of the Federal Power Act (FPA) to extend the time periods that the Federal Energy Regulatory Commission (FERC) can provide when granting a preliminary permit for a hydropower construction project. It also changes the number of permit extensions allowed and sets the maximum period for all permit extensions to 8 years.
- Amends the section of the FPA that governs the term of hydropower licenses granted by FERC (section 15(e)). The bill directs FERC to consider investments made by a licensee on their project when FERC determines the length of a license upon renewal of the existing license. FERC is directed to give equal consideration to both mandatory and discretionary investments made by the licensee.
- Finally, amends section 33 of the FPA one of the sections of the FPA which addresses the authorities of federal agencies to impose conditions on a hydropower license. There are four amendments to this section, one of which corrects an omission to the text. The first substantive amendment changes the term "deems" to "determines". This change requires the Secretary of a federal agency imposing conditions on a license to address resource or wildlife issues to provide more substantial documentation and evidence to support their choice of the specific condition to protect the resource in question. This section of the bill also eliminates the dispute resolution provisions in this section to conform to the change made later in the discussion draft with respect to trial-type hearings. Lastly, a new paragraph is added to section 33 to apply all the changes in this section to three other sections of the FPA, sections 4(e), 6, and 18.

Section 3 – Hydropower Licensing and Process Improvements

- Section 34 defines a Federal authorization as any authorization required under Federal laws to obtain a license, license amendment, or exemptions under Part I of the FPA.
    - Designates the Commission as the lead agency to coordinate all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act (NEPA).
    - Directs FERC to issue a rule to establish a schedule for the review of a license application and for obtaining all the necessary authorizations, conditions, and permits required by Federal law.
    - Contains a number of specific directions to FERC regarding the provisions that must appear in the final rule.
    - The rule must provide for consultation between FERC and other federal, state and local government agencies and Indian tribes, notification of all parties to the license proceeding, a

specific dispute resolution mechanism, and the rule must facilitate the completion of Federal and state agency studies prior to or concurrent with FERC's preparation of their National Environmental Policy Act (NEPA) document.

- Participants in the license review process are required to comply with the deadlines in the schedule. If a federal or state agency or Indian tribe cannot meet the schedule for the license review, they must apply to FERC for an extension that cannot exceed 90 days.
- Requires a federal agency that proposes conditions to protect wildlife or other natural or cultural resources on a license to submit a written statement demonstrating that the Secretary gave equal consideration to energy supply, flood control, navigation, air quality and other aspects of environmental quality.
- Prohibits the Secretaries of Agriculture, Commerce, and Interior from delegating their authority to regional offices.

- Section 35 establishes new procedures for trial-type hearings on disputes over conditions imposed by federal resource agencies to protect fish, wildlife, or other natural or cultural resources.
  - Designates the establishes the venue for the trial-type hearing to be the Administrative Law Judge (ALJ) within the Office of Administrative Law Judges and Dispute Resolution of the Commission, a venue the industry believes will be more receptive to their concerns. Current law requires these hearings to be conducted by the ALJ in the respective Department of the Secretary that imposed the condition under dispute.
  - Establishes a decision on a disputed issue of material fact by the ALJ as final and not subject to further administrative review. This is true even if later information demonstrates the finding on the fact to be wrong.
- Section 36 includes several provisions to improve the studies done in support of a licensing decision.
  - Directs the Commission to consult with Federal and State agencies and the public and to develop a catalog of current best practices for evaluating all environmental impacts of a project, and to compile a comprehensive set of studies and data accessible to the public that could be used to inform license proceedings.
  - Also directs the Commission and Federal, State, and local government agencies and Indian tribes to use current, accepted science in support of their actions, and requires parties in the licensing process to demonstrate that a study requested is not duplicative of current existing studies that are applicable to the project.
  - Includes a subsection to facilitate regional and basin-wide plans and studies.
- Section 37 establishes a new program to expedite the consideration of applications for amendments to existing licenses. It establishes criteria for the types of amendments that can be considered for expedited application processing and the specific steps that FERC must take in considering these applications with specific deadlines for FERC's and other agencies' actions.

Section 4 –Technical and Conforming Amendments

- Amends sections 4(e) and 18 of the FPA to conform with other changes in the bill made in subsection 2(f) in which the term "deems" is replaced by the term "determines" and through the addition of the new Section 35 on trial-type hearings in Section 3.