

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

June 2, 2015

To: Subcommittee on Energy and Power Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “Discussion Draft on Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency”

On Wednesday, June 3, 2015 at 2:00 p.m. in room 2322 of the Rayburn House Office Building, the Subcommittee on Energy and Power will convene a legislative hearing on “Discussion Draft on Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency.” The Subcommittee will reconvene on Thursday, June 4, 2015, at 10:15 a.m. in room 2322 of the Rayburn House Office Building to hear from a second panel of witnesses. The hearing will focus on the majority’s discussion draft on “Title IV: Energy Efficiency and Accountability,” which was released on May 27, 2015.¹

Day one of this hearing will consist of one panel of federal witnesses from the Federal Energy Regulatory Commission (FERC) and the Department of Energy (DOE). Day two will feature one panel comprised of private sector witnesses.

I. ENERGY EFFICIENCY

On April 30, 2015, the Subcommittee on Energy and Power conducted a hearing on the majority’s energy efficiency discussion draft, however the federal government panel did not include a witness able to speak on the provisions of the legislation.² The participation of DOE in

¹ House Committee on Energy and Commerce, *#SubEnergyPower Announces Two-Day Hearing as Part of Banner Week for Architecture of Abundance* (May 27, 2015) (online at energycommerce.house.gov/press-release/subenergypower-announces-two-day-hearing-part-banner-week-architecture-abundance).

² House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on the Strategic Petroleum Reserve Discussion Draft and Title IV Energy Efficiency*, 114th Cong. (Apr. 30, 2015) (online at

tomorrow's hearing will give the administration the opportunity to present their views of the discussion draft. For further background information on the energy efficiency provisions, please see the [memo](#) from the previous hearing.

II. ACCOUNTABILITY

A description and analysis of the discussion draft's accountability provisions follows below.

A. Section 4211. FERC Office of Compliance Assistance.

1. Summary

Section 4211 amends part III of the Federal Power Act (FPA) to create a new Office of Compliance Assistance comprised of at least ten full time employees and headed by a commission-appointed Director. The Director is required to engage in a number of activities to “promote improved compliance with Commission rules and orders.” These activities include making recommendations regarding consumer protection, market integrity and consistent application of rules and orders; providing opportunities for regulated entities to obtain compliance guidance, including in “real time;” and informing the Commission and Congress with respect to energy policy matters in FERC's jurisdiction.

Additionally, the Director is tasked with issuing reports and guidance to the Commission and its regulated entities, “identifying and monitoring market practices, proposing initiatives, and addressing potential improvements to both industry and Commission practices.” The Director is also to perform outreach designed to promote improved compliance.

2. Analysis

The Office of Compliance Assistance that would be created by section 4211 appears to consolidate a number of functions already performed across various existing offices and divisions in one new office. The formulation bears some resemblance to existing section 319 of the FPA which authorized an Office of Public Participation that was never funded and the functions of that office, moreover, have long been dispersed throughout the Commission.

Because section 4211 provides no funding for the newly proposed office, pulls staff from various other offices, and duplicates certain functions –including outreach activities currently carried out by the Office of External Affairs – it is unclear what the ultimate purpose or effectiveness of this new entity would be. Finally, the mandate to provide “real-time” compliance guidance on complex matters is both unrealistic and risks drawing critical resources away from core functions such as natural gas pipeline certification, hydroelectric licensing, and electricity market oversight.

democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-strategic-petroleum-reserve-discussion-draft-and-title-iv-energy-efficiency-subco).

B. Section 4212. Improving Transparency In FERC Investigations.

1. Summary

Section 4212 is a standalone provision that requires FERC, within one year of enactment, to issue a rule altering its existing procedures with regard to investigations or “any proceeding in which the Commission may assess a civil penalty.”

The provision directs FERC to revise its procedures in four ways. First, FERC is required to disclose to the subject of an investigation or civil penalty proceeding any exculpatory or potentially exculpatory materials within seven days of issuing a preliminary findings letter. Second, FERC must provide access to official deposition transcripts “involving such entity or person” to that entity or person within a reasonable timeframe. Third, require all communications “regarding the merits of the investigation or proceeding” between FERC’s investigative staff and FERC’s advisory staff be carried out in writing and included in the formal record. Finally, FERC is required to allow the subject of such an investigation or proceeding to communicate directly with the Commissioners with regard to the substance of “settlement considerations.”

2. Analysis

Section 4212 appears to represent an effort on the part of the majority to implement a number of the recommended changes to FERC’s investigatory process put forth in a 2014 Energy Law Review Journal Article.³ The authors, who have represented a number of clients investigated by the Commission, criticized the FERC investigation process for denying the subjects of investigation “remotely comparable access to the Commission and any reasonable discovery rights” among other things.⁴

The section would require the application of the *Brady Rule* regarding exculpatory materials to the investigative phase of a FERC enforcement action. *Brady* requires a prosecutor in a criminal law case to disclose any evidence favorable to the accused.⁵ However, the section takes the unprecedented step of applying *Brady* to civil law and to the investigative phase rather than the adjudication (trial) phase of an action. The provision would also have a significant chilling effect on FERC’s investigative efforts through its extremely burdensome requirement that intra-staff communications during the investigation be carried out in writing and made part of the record. The language in this section that puts investigation subjects on equal footing with FERC’s own staff with regard to communicating directly with Commissioners during an investigation is, again, both unprecedented and potentially harmful to FERC’s enforcement efforts.

³ William S. Scherman et al., *The FERC Enforcement Process: Time For Structural Due Process And Substantive Reforms*, Energy Law Journal, at 101-149 (May 13, 2014).

⁴ *Id.* at 103.

⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

It is important to note that Congress bolstered FERC's enforcement authorities in Energy Policy Act of 2005 (EPACT 05). In part, this was a response to Enron's manipulation of wholesale markets. However, EPACT 05 also made significant changes to FERC's enforcement authorities as part of an overall revamping of federal regulation of electricity (a regulated commodity) and the utility industry. In EPACT 05, Congress repealed the Public Utilities Holding Company Act and replaced its structural regulation of the utilities' industry with increased direct enforcement authority and a broad prohibition on energy market manipulation. The changes proposed in section 4212 would adversely affect FERC's ability to carry out these enhanced enforcement efforts and hinder its regulatory activities to ensure fair competition, functioning markets, and just and reasonable prices for regulated commodities.

C. Section 4221. Evaluating and Improving Wholesale Electricity Markets.

1. Summary

Section 4221 is a standalone provision that requires FERC, within 30 days of enactment, to direct each regional transmission entity—either a Regional Transmission Organization (RTO) or an Independent System Operator (ISO)—to develop a plan describing how its “current market rules, practices, and structures...meet, or fail to meet” ten criteria enumerated in proposed section 4221(b). The plan also requires the regional transmission entity to identify actions it must take to revise its market rules, practices or structures in order to meet ten specific criteria and to establish a timeframe for implementing those actions. Specifically, the provision requires the regional transmission entity's market rules, practices and structures to, among other things, result in just and reasonable rates; “properly value generation facilities” that possess certain “reliability attributes;” “facilitate fuel diversity, resource adequacy, and reliability, including the cost-effective retention and development of needed generation;” promote “equitable integration and treatment of generation resources, business models, and advanced grid technologies;” “ensure fairness and improved transparency in governance structures;” facilitate natural gas and electric transmission infrastructure; and, consider State and local resource planning.

2. Analysis

The purpose of section 4221 is not self-evident. The majority's hearing memo suggests that it may be an attempt to address certain defects that Republican Members perceive as having an effect on organized electricity markets, which

have led many market participants and States to call on FERC to undertake reforms to address a broad range of issues, ranging from price formation to governance and transparency to generation performance assurance.⁶

⁶ Memorandum from Majority Staff to Members of the Subcommittee on Energy and Power, *Hearing on a Discussion Draft on Accountability and Department of Energy Perspectives on Title IV: Energy Efficiency*, at 3 (Jun. 1, 2015).

The majority also asserts that “FERC has proven unable to develop...the reforms necessary to ensure fair, transparent and well-functioning competitive markets.”⁷

Perhaps, as a way to address these issues section 4221, in part, attempts to overlay certain requirements of traditional utility regulation on a market-based wholesale competitive structure. It is unclear what the ultimate effect of this provision would be, however, on existing markets, particularly in light of the lack of any recent oversight hearings on these matters.

D. Section 4231. PURPA Modernization.

1. Summary

Section 4231 amends section 210(m) of the Public Utility Regulatory Policies Act of 1978 (PURPA) to create a presumption that a “qualifying cogeneration facility”⁸ or “qualifying small power production facility”⁹ (QF) has nondiscriminatory access to wholesale markets.¹⁰ The section provides that a QF is presumed to have such access if it is eligible for service under certain FERC tariffs and interconnection rules, and the QF can participate in “competitive solicitations overseen by a State regulatory authority.” FERC is directed to revise its regulations to implement this section within 120 days of enactment.

2. Analysis

In enacting section 210 of PURPA, Congress began the move toward creating a competitive power sector and fostering the growth of renewable energy. This was accomplished by requiring 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 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 generating capacity (known as “avoided cost”). It also required utilities to sell electricity to such QFs at just and reasonable, non-discriminatory rates.

In EPACT 05, Congress recognized that there might no longer be a need for requiring utilities to sign mandatory purchase agreements with QFs in regions that had robust, functioning wholesale markets and competition. Congress provided for the end of the mandatory purchase requirement in instances where FERC finds that a QF has “nondiscriminatory access to” one of three market-related situations.¹¹ By requiring such findings, Congress established a trade-off that incented the development of regional wholesale markets in exchange for ending mandatory purchase requirements.

⁷ *Id.*

⁸ 16 U.S.C. § 796 (18)(B).

⁹ *Id.* at § 796 (17)(C).

¹⁰ 16 U.S.C. § 842a-3(m).

¹¹ *Id.*

The language in section 4231 of the majority's discussion draft fundamentally alters that trade-off. The provision deems a QF as having that nondiscriminatory access to the three competitive market situations, thus removing the mandatory purchase requirements even in areas where there is no competition. The result would likely be a significant adverse impact on efforts to promote renewable energy as well as wholesale competition in areas that currently lack markets.

III. WITNESSES

The following witnesses have been invited to testify:

Panel One:

Dr. Kathleen Hogan

Deputy Assistant Secretary for Energy Efficiency
U.S. Department of Energy

J. Arnold Quinn

Director, Office of Energy Policy and Innovation
Federal Energy Regulatory Commission

Larry Parkinson

Director, Office of Enforcement
Federal Energy Regulatory Commission

Panel Two:

Sue Kelly

President and Chief Executive Officer
American Public Power Association

John Shelk

President and Chief Executive Officer Electric Power Supply Association

William Scherman

Partner
Gibson Dunn & Crutcher LLP

Jonathan Weisgall

Vice President, Legislative and Regulatory Affairs
Berkshire Hathaway Energy

Christopher Cook

President and General Counsel
Solar Grid Storage LLC

Thomas Rumsey
Vice President for External Affairs, Consulting
Competitive Power Ventures, Inc.