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ONE HUNDRED FOURTEENTH CONGRESS

Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

April 27, 2015

To: Committee on Energy and Commerce Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Full Committee Markup of H.R. ___, the "Ratepayer Protection Act of 2015," and H.R. ___, the "Targeting Rogue and Opaque Letters Act of 2015"

On Tuesday, April 28, 2015, at 5:00 p.m. in room 2123 of the Rayburn House Office Building, the full Committee on Energy and Commerce will meet to conduct opening statements for the markup of H.R. ___, the "Ratepayer Protection Act of 2015," and H.R. ___, the "Targeting Rogue and Opaque Letters Act of 2015." The Committee will reconvene on Wednesday, April 29, at 10:00 a.m. in 2123 Rayburn House Office Building.

I. H.R.___, THE RATEPAYER PROTECTION ACT OF 2015

The discussion draft relates to a proposed Environmental Protection Agency (EPA) rule to regulate carbon pollution from existing power plants, typically referred to as the "Clean Power Plan." Issued on June 2, 2014, the proposed rule establishes emission guidelines for states to follow in developing plans to control carbon pollution from existing coal-fired and natural gas-fired power plants under section 111(d) of the Clean Air Act.[1]

A. Legislative Hearing and Subcommittee Markup

On March 17, 2015, the Subcommittee on Energy and Power held a hearing on legal and cost issues associated with the Clean Power Plan. For further background information on the proposed Clean Power Plan, please see the memo from the previous hearing.[2] A discussion draft

[1] U.S. Environmental Protection Agency, *Carbon Pollution; Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 79 Fed. Reg. 34830 (June 18, 2014) (Proposed Rule) (online at www.gpo.gov/fdsys/pkg/FR-2014-06-18/pdf/2014-13726.pdf).

[2] House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on EPA's Proposed 111(d) Rule for Existing Power Plants: Legal Cost Issues*, 114th

of the Ratepayer Protection Act was released by subcommittee Chairman Whitfield on March 23, 2015, which was the subject of a legislative hearing in the Subcommittee on Energy and Power on April 14, 2015.

The subcommittee held a markup of the discussion draft on April 22, 2015; the subcommittee markup memo is available here on the Democratic Committee website. During the markup, Democratic members offered a number of amendments to highlight various deficiencies in the underlying bill. All amendments were defeated by a party line vote. Ultimately, the bill was favorably reported out of the subcommittee by a vote of 17 to 12, with no Democratic members supporting final passage.

Ranking Member Rush offered two amendments to highlight important benefits associated with the Clean Power Plan, and ensure they are considered by governors when making a determination under section 3 of the bill. The first amendment offered by Rep. Rush was defeated by a vote of 10 to 16, and would require any governor wishing to opt out of the Clean Power Plan, to certify that any ratepayer increases attributed to implementation of a state or federal plan must exceed the costs of responding to extreme weather events caused by climate change such as sea level rise, flooding, extreme storms, wildfires and drought.

Rep. Rush then offered a second amendment, rejected by a vote of 10 to 17, to require any governor wishing to opt out of the Clean Power Plan, to certify that the decision to opt out will not result in significant adverse effects on public health, including childhood asthma attacks, heart attacks, hospital admissions, and missed school and work days.

Further, Rep. Pallone offered an amendment that was similar to one recently offered by Senator Bennet (D-CO), which passed the Senate with the support of all Democratic Senators, and seven Republican Senators.[3] The Pallone amendment – to add a 'Sense of the Congress' that the federal government should promote national security, economic growth and public health by addressing human induced climate change through the increased use of clean energy, energy efficiency and reductions in carbon pollution – was defeated by a vote of 12 to 17.

B. Discussion Draft Summary and Analysis

The Whitfield discussion draft would adversely impact the Clean Power Plan in two very significant ways. First, the bill suspends implementation of the final Clean Power Plan and would extend all final compliance and submission deadlines by the amount of time needed to complete judicial review. Second, the bill would allow governors to effectively exempt their respective states from any requirements of a federal plan to reduce carbon pollution from

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Cong. (Mar. 17, 2015) (online at democrats.energycommerce.house.gov/index.php?q=hearing/hearing-on-epa-s-proposed-111d-rule-for-existing-power-plants-legal-and-cost-issues-subcommi).

[3] U.S. Senate, Roll Call Vote on Agreeing to S. Amdt. 1014 to S. Con. Res. 11 (Mar. 26, 2015) (53 yeas, 47 nays) (online at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=114&session=1&vote=00115).

existing power plants. Under current law, EPA is required to develop and implement a federal section 111(d) plan for any state that fails to submit its own state plan. The Whitfield discussion draft would overturn this existing Clean Air Act requirement as it relates to the Clean Power Plan.

Section 2 of the discussion draft delays implementation of the final Clean Power Plan by extending all compliance deadlines until all pending judicial review is resolved. Under subsection (b), the compliance or submission date extension applies to "any final rule to address carbon dioxide emissions from existing sources that are fossil fuel fired electric utility generating units under section 111(d) of the Clean Air Act." Also, subsection (b) specifically references and applies to rules that grow out of both the Clean Power Plan and the November 4, 2014 supplemental proposal covering Indian Country and U.S. Territories.[4]

Section 2, subsection (c) establishes a uniform time period for all Clean Power Plan compliance and submission deadline extensions. Under the proposed legislation, the time period would start 60 days after the final rule appears in the Federal Register, and it would end when "judgment becomes final, and no longer subject to further appeal or review."[5]

Section 3 of the discussion draft restates current law, that no state is required to submit a 111(d) plan. Subsection (a) further allows any governor to decide that the state shall not be subject to a federal 111(d) plan, if the governor makes a determination that state or federal plan implementation would "have a significant adverse effect on the State's residential, commercial, or industrial ratepayers", or would "have a significant adverse effect on the reliability of the State's electricity system."[6]

In making a determination on the state or federal plan's impact on ratepayers and electric reliability, the governor shall take into account a number of specific factors. Regarding the potential impact on ratepayers, a governor must consider any rate increases that are either associated with, or necessary for, implementation of the state or federal plan, as well as "other rate increases that have been or are anticipated to be necessary to implement, or are associated with, other Federal or State environmental requirements."[7] Further, the governor must consider the state's existing and planned electricity generation, retirements, transmission and distribution infrastructure, and projected demand when determining the state or federal plan's impact on electric reliability.[8]

Section 3, subsection (b) requires the governor to consult with the public utility commission or public service commission of the state, state environmental protection, public

[4] H.R.__, the "Ratepayer Protection Act of 2015," at § 2(b).

[5] *Id.* at § 2(c).

[6] *Id.* at § 3(a).

[7] *Id.* at § 3(a)(1).

[8] *Id.* at § 3(a)(2).

health and economic departments, and any regional transmission organization or independent service operator with jurisdiction over the state.

C. Issues Raised by the Discussion Draft

This legislation raises several major issues. In summary, the discussion draft would suspend implementation of the Clean Power Plan and effectively prevent EPA from ever controlling carbon pollution from existing power plants to any significant degree, if a state fails—or outright refuses—to comply with the requirements of section 111(d) of the Clean Air Act. At the legislative hearing, Janet McCabe, EPA's Acting Assistant Administrator for Air and Radiation, said the Agency views the bill, "as premature, unnecessary and ultimately harmful."[9] Public health groups noted that the discussion draft "would put lives at risk by dramatically weakening and delaying vital Clean Air Act safeguards."[10]

The discussion draft's proponents argue that legislation is needed to delay implementation of the Clean Power Plan 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, the Clean Power Plan 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.

At the 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."[11] She further explained that the blanket extension in the discussion draft would

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[9] Testimony of the Honorable Janet McCabe, Acting Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, Committee on Energy and Commerce, Subcommittee on Energy and Power, *Legislative Hearing on H.R. __, the Ratepayer Protection Act of 2015*, 114th Cong. (Apr. 14, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-McCabe-EP-Ratepayer-Protection-2015-04-14.pdf).

[10] Letter from the Allergy & Asthma Network, American Lung Association, American Public Health Association, Asthma and Allergy Foundation of America, Healthcare Without Harm, and Trust for America's Health, to the House Energy and Commerce Committee (Apr. 13, 2015).

[11] Testimony of Melissa Hoffer, Assistant Attorney General, Chief of the Energy and Environment Bureau, Massachusetts Attorney General's Office, Committee on Energy and Commerce, Subcommittee on Energy and Power, *Legislative Hearing on H.R. __, the Ratepayer Protection Act of 2015*, 114th Cong. (Apr. 14, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Testimony-Hoffer-EP-Ratepayer-Protection-2015-04-14.pdf).

"create powerful incentives for frivolous litigation in an effort to stall and avoid compliance with the Clean Power Plan."[12]

The discussion draft's proponents have also argued that the legislation is needed to provide a "safe harbor" for states that cannot –or will not—comply with the requirements of the Clean Power Plan. Under current law, EPA sets the emissions reduction goals under section 111(d) and it is up to the states to decide how to best achieve these reductions. States are not required to develop or implement their own plans for reducing carbon emissions from existing power plants, but EPA is required to step in with a federal 111(d) plan when a state does not implement its own. The Clean Air Act's use of cooperative federalism ensures that environmental risks are addressed, either by state action or by federal action where a state fails to act.

The discussion draft's opt-out provision disregards decades of success under the Clean Air Act's use of cooperative federalism. Instead, the draft would allow governors to refuse to comply unconditionally with the federal requirements of the Clean Power Plan. A governor would be able to take the "Just Say No" approach to reducing carbon emissions by simply determining that compliance with a phantom plan would adversely impact ratepayers or electric reliability. As discussed by a number of environmental groups, this provision "would destroy the national guarantee that makes the Clean Air Act work by simply letting any state just 'opt out' of meeting national carbon pollution standards."[13]

Under the discussion draft, a state could be exempted from the federal plan requirement, so long as its governor makes an adverse impact determination. The proposed legislation provides little detail, however, as to the requisite level or quality of information to support such findings and the resulting determination. For those governors who are either not inclined or may not intend to develop a state plan or submit to the oversight of a workable federal plan, a gubernatorial finding of adverse impact could prove to be too alluring an option – essentially giving any governor the ability to opt out of the proposed Clean Power Plan rule with minimal effort.

II. H.R.___, TARGETING ROGUE AND OPAQUE LETTERS (TROL) ACT

A. Hearings and Subcommittee Markup

On February 26, 2015, the Subcommittee on Commerce, Manufacturing, and Trade held a hearing and received witness testimony on patent demand letter practices and potential solutions. Subsequently, on April 16, 2015, the subcommittee held a legislative hearing on a discussion draft of the TROL Act, which was the same draft that passed out of the subcommittee last year, in the last Congress.

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[12] *Id.*

[13] Letter from various Environmental Organizations to the House Energy and Commerce Committee (Apr. 13, 2015) (online at democrats.energycommerce.house.gov/sites/default/files/documents/Letter-EP-Oppose-Whitfield-111%28d%29-2015-4-14.pdf).

The subcommittee held a markup of the discussion draft on April 22, 2015. During the markup, two Democratic amendments were offered, which were voted down along party lines.

Subcommittee Ranking Member Schakowsky offered an amendment that would have directed the FTC to issue rules regarding what constitutes unfair and deceptive demand letters and removed barriers to FTC and state enforcement, including eliminating the cap on civil penalties. Rep. Kennedy offered another amendment to address some of the major concerns with the TROL Act. Specifically, the Kennedy amendment would have removed the pattern-or-practice and bad-faith requirements and the affirmative defense. It also would have clarified the limited state preemption and removed barriers to state enforcement. Both of the Democratic amendments were rejected by separate votes of 10-7.

One manager's amendment, which closed a loophole created by the affirmative defense provision, was adopted by voice vote at the markup. Another manager's amendment was offered and withdrawn, which would have provided for a presumption of bad faith if the sender did not timely respond to recipient's written request for certain information.

Ultimately, the bill was favorably reported out of the subcommittee by a vote of 10 to 7, with no Democratic members supporting final passage.

B. Summary of the Draft Bill

1. Unfair or Deceptive Acts or Practices

Under section 2 of the discussion draft, a pattern or practice of sending demand letters that does not comply with the conditions set forth in the bill would be an unfair or deceptive act or practice in violation of section 5 of the FTC Act. Specifically, it would be unfair or deceptive for: (1) the sender to make certain false or misleading statements or representations in bad faith, including that the person sending the demand letter is not the person with the right to enforce or license the patent; litigation has been filed against the recipient or others or will be filed against the recipient; the sender is the exclusive licensee of the patent; people other than the recipient purchased a license for the patent; an investigation of the alleged infringement occurred; or the sender previously filed a lawsuit for infringement based on activity that is the subject of the demand letter and that activity had been held in a final determination not to infringe; or (2) the sender to seek compensation in bad faith for an invalid or unenforceable patent, for activities that occurred after the expiration of a patent, or activities that the sender knew were authorized.

Also under section 2, it would be an unfair or deceptive practice for the sender of demand letters to fail to include, in bad faith, the following disclosures: (1) the identity of the person attempting to enforce the patent, including any parent entity and ultimate parent entity for non-public companies; (2) the identity of at least one patent allegedly infringed; (3) the identity, to the extent reasonable under the circumstances, of the infringing product; (4) a description, to the extent reasonable under the circumstances, of how the product infringes an identified patent and patent claim; and (5) contact information for a person with whom the assertions in the letter may be discussed.

Currently, to bring a claim against a patent troll on the basis of unfair or deceptive acts or practices, the FTC and state attorneys general do not have to prove any element of knowledge or falsity. However, for these enforcers to find violations of section 2(a) in the discussion draft, they must establish "bad faith" on the part of the sender. Section 5 of the discussion draft defines "bad faith" to mean that the sender made knowingly false or knowingly misleading statements, made the statements with reckless disregard as to the false or misleading nature of the statements, or made the statements, with awareness of the high probability of the statements to deceive and the sender intentionally avoided the truth.

Section 2 also includes an affirmative defense that statements, representations, and omissions were not made in bad faith if the sender can demonstrate that false statements or omissions were a bona fide error.

2. Enforcement

Section 3 of the discussion draft provides for enforcement of this proposed law by the FTC and allows the agency to seek civil penalties for violations of section 2. Section 3 also includes a savings clause that explicitly states that nothing in this act limits or affects the authority of the FTC under any other provision of law.

Section 4 preempts state laws, regulations, or other provisions having the force and effect of law expressly relating to patent assertion communications.[14] The preemption provision includes language that, according to the United States Supreme Court, would expressly preempt state common law as applied to patent demand letters.[15] Such language appears to be in direct conflict with the savings clause that states that this act does not preempt or limit other state laws, including state consumer protection laws, any laws relating to acts of fraud or deception, or any state trespass, contract, or tort laws.

Section 4 also provides for enforcement of this act by state attorneys general in cases in which the state attorney general believes that residents of the state have been adversely affected by violations of section 2. All legal actions brought under this act would be required to be brought in federal court. The remedies available to state attorneys general are limited to an injunction and civil penalties capped at $5,000,000 for all actions brought by all state attorneys general relating to the same violation of section 2. This section also provides for intervention by the FTC at the agency's discretion.

In addition to not being able to sue under their own law and limiting the amount of civil penalties a state could seek, preemption would have a number of other effects. For example, some of the existing state statutes allow their attorneys general and private entities to seek additional remedies not permitted under this bill.

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[14] Currently, 21 states have laws specific to patent assertion communications and nine more states are currently considering such legislation. Other states may have common law, standards, or requirements relating to patent assertion communications.

[15] *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014).

C. Issues Raised by the Draft Bill

Stakeholders have raised a few issues with the bill as currently drafted. Many are concerned that the pattern-or-practice and bad-faith requirements place unacceptable burdens on FTC and state enforcement of the Act. Neither of those requirements are typical in consumer protection law, and they potentially pose insurmountable barriers to enforcement. In addition, this bill preempts the 21 state laws that address abusive patent demand letters, some of which are stronger than the TROL Act.