

# A LEGISLATIVE HEARING ON EIGHT ENERGY INFRASTRUCTURE BILLS

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## HEARING BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER OF THE COMMITTEE ON ENERGY AND COMMERCE HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTEENTH CONGRESS SECOND SESSION

FEBRUARY 2, 2016

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## **A LEGISLATIVE HEARING ON EIGHT ENERGY INFRASTRUCTURE BILLS**

**TUESDAY, FEBRUARY 2, 2016**

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON ENERGY AND POWER,  
COMMITTEE ON ENERGY AND COMMERCE,  
*Washington, DC.*

The subcommittee met, pursuant to call, at 10:02 a.m., in room 2123 Rayburn House Office Building, Hon. Ed Whitfield (chairman of the subcommittee) presiding.

Members present: Representatives Whitfield, Barton, Olson, Shimkus, Latta, Harper, McKinley, Pompeo, Kinzinger, Griffith, Johnson, Long, Ellmers, Flores, Hudson, Upton (ex officio), Rush, McNerney, Tonko, Green, Capps, Doyle, Castor, Welch, and Pallone (ex officio).

Also present: Representative Kennedy.

Staff present: Gary Andres, Staff Director; Will Batson, Legislative Clerk; Allison Busbee, Policy Coordinator, Energy and Power; Rebecca Card, Assistant Press Secretary; Karen Christian, General Counsel; Patrick Currier, Senior Counsel, Energy and Power; Tom Hassenboehler, Chief Counsel, Energy and Power; A.T. Johnston, Senior Policy Advisor; Brandon Mooney, Professional Staff Member, Energy and Power; Dan Schneider, Press Secretary; Jeff Carroll, Democratic Staff Director; Rick Kessler, Democratic Senior Advisor and Staff Director, Energy and Environment; John Marshall, Democratic Policy Coordinator; Alexander Ratner, Democratic Policy Analyst; and Tuley Wright, Democratic Energy and Environment Policy Advisor.

### **OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY**

Mr. WHITFIELD. I would like to call the hearing to order this morning.

This is our second hearing in the Second Session of the 114th Congress. I want to take this opportunity to wish everybody on the committee and those in attendance a very happy and productive 2016.

This subcommittee has continuously examined legislation aimed at reducing red tape when it is standing in the way of economic development and development of energy infrastructure that would benefit this country. Projects that update and expand the Nation's energy infrastructure will create jobs and lead to greater supplies of affordable domestic energy for our homes and businesses. Afford-

able energy is very important because we are in a competitive world today. We are competing with other countries, and the price of electricity and energy goes a long way in determining where businesses locate and jobs are created. So, this is the unifying theme behind the eight bills that we are going to be discussing today.

H.R. 3021 is the AIR Survey Act of 2015, which was introduced by Mr. Pompeo. It is an overdue measure to incorporate data collected through aerial surveys into the approval process for natural gas infrastructure.

H.R. 2984, the Fair Rates Act, which was introduced by Mr. Kennedy, sets out a process to deal with those situations under the Federal Power Act in which FERC neither approves nor denies an electricity rate change such as when the Commission is deadlocked.

A draft bill entitled "A Bill to Amend Section 203 of the Federal Power Act" would serve to address an oversight in the Energy Policy Act of 2005. That law amended Section 203 of the Federal Power Act which pertains to the sale, disposition, merger, purchase, and acquisition of certain utility assets and facilities.

Along with these three bills making procedural changes, we also have before us five bills dealing with new hydroelectric projects on existing dams. Given the low cost and low emissions of hydropower, these projects ought to be among the least controversial issues of increasing the Nation's electricity supply.

However, the FERC-issued licenses for these projects have expired, or soon will expire, largely because of regulatory delays or unforeseen circumstances that have prevented construction. These bills extend the life of the license by 6 to 8 years, allowing these job-creating projects to move forward.

The result of the passage of these eight bills will be more jobs, more energy for the American people at an affordable price, and I would urge all my colleagues to support them.

So, that concludes my opening statement.

[The prepared statement of Mr. Whitfield follows:]

#### PREPARED STATEMENT OF HON. ED WHITFIELD

This subcommittee has continuously examined legislation aimed at cutting red tape where it is standing in the way of energy infrastructure that would benefit all Americans. Projects that update and expand the Nation's energy infrastructure will create jobs and lead to greater supplies of affordable domestic energy for our homes and businesses. That is the unifying theme behind the eight bills we will discuss today.

H.R. 3021, the "AIR Survey Act of 2015," introduced by Mr. Pompeo, is an overdue measure to incorporate data collected through aerial surveys into the approval process for natural gas infrastructure. The bill would enable the Federal Energy Regulatory Commission (FERC) to accept such data in its application process under the Natural Gas Act, subject to any verification through ground survey data that FERC deems appropriate. Given the growing importance of natural gas in our economy, we will all benefit from a measure such as this that will help facilitate the construction of new natural gas pipelines.

H.R. 2984, the "Fair RATES Act," introduced by Mr. Kennedy, sets out a process to deal with those situations under the Federal Power Act in which FERC neither approves nor denies an electricity rate change, such as when the commission is deadlocked. These rate changes still take effect, but currently there are limited opportunities for the public to challenge them because FERC did not officially issue an order. This bill would create an administrative process for members of the public who wish to challenge such rate changes.

A draft bill entitled "A Bill to Amend Section 203 of the Federal Power Act" would serve to address an oversight in the Energy Policy Act of 2005. That law amended section 203 of the Federal Power Act, which pertains to the sale, disposition, merger, purchase and acquisition of certain utility assets and facilities. It raised the minimum monetary thresholds for FERC jurisdiction from \$50,000 to \$10 million for three of these subcategories, but not for acquisitions. This bill would raise the minimum for acquisitions to \$10 million as well, thus avoiding FERC process for relatively small transactions.

Along with these three bills making procedural changes, we also have before us five bills dealing with new hydroelectric projects on existing dams. Given the low cost and low emissions of hydropower, these projects ought to be among the least controversial means of increasing the Nation's electricity supply. However, the FERC-issued licenses for these projects have expired, or soon will expire, largely because of regulatory delays or unforeseen circumstances that have prevented construction. These bills extend the life of the licenses by 6 to 8 years, allowing these job-creating projects to move forward.

The result of the passage of these eight bills will be more jobs and more energy for the American people, and I urge all my colleagues to support them.

[The proposed legislation appears at the conclusion of the hearing.]

Mr. WHITFIELD. At this time I would like to introduce and recognize the gentleman from Chicago, Mr. Rush, and also wish you a happy new year, Mr. Rush. He is recognized for 5 minutes.

#### **OPENING STATEMENT OF HON. BOBBY L. RUSH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS**

Mr. RUSH. Thank you, Mr. Chairman. I wish you a happy new year, and I wish all those who are in this committee room a happy new year also.

I want to thank you, Mr. Chairman, for holding today's hearing on these eight energy infrastructure bills. Mr. Chairman, while I support the majority of these bills before us today, I do have some concerns that I would look forward to addressing as we move forward through the legislative process.

In regards to the five bills extending the time period for expired hydropower licenses, I support each of these pieces of legislation. These bills would extend the construction time for hydropower projects across the country up to 8 years, and I commend my colleagues for sponsoring these important bills.

Hydropower is a renewable source of energy that has received widespread, bipartisan support from those on this subcommittee. Allowing these projects to commence will help increase the Nation's portfolio of clean, home-grown energy resources.

Mr. Chairman, I also support very strongly my colleague Mr. Kennedy's bill, the Fair Rates Act, which would provide the public with an opportunity to legally challenge rate changes approved by FERC essentially by new vote.

Mr. Chairman, five times in the past 14 years rate changes have been approved by default due to the Commission being deadlocked during a vote. Even when these rate changes negatively impact consumers, the public currently has no legal recourse to challenge these cases, as a deadlocked vote is not legally viewed as in order. The Fair Rates Act would rectify this inequity by treating new rate changes, including those go into effect by default, as a FERC order that can be challenged administratively and, very important, by consumers.

Protecting consumers and average Americans should be a primary objective of all the bills this committee considers. While I support most of these legislations that we are considering today, I am not sure that the remaining two bills meet that same high threshold.

Mr. Chairman, I look forward to engaging today's witnesses on both H.R. 3021, the AIR Survey Act of 2016, and the bill that will amend Section 203 of the Federal Power Act. For both of these pieces of legislation, I want to make sure that there aren't any unintended consequences that we are overlooking before we move forward in making these important policy changes.

My biggest concern is with H.R. 3021, which will require FERC to give the same equal weight to aerial survey data that it does ground survey data in the prefiling process and avoiding completion of an application for construction of our natural gas pipeline. Mr. Chairman, I look forward to hearing from our expert panelists on the practical impact of this change in policy for both landowners as well as the impact on the environment.

So, once again, Mr. Chairman, I applaud you for holding this timely hearing today and I look forward to hearing from all of our expert witnesses.

With that, I yield back the balance of my time.

Mr. WHITFIELD. Thank you, Mr. Rush.

At this time I would like to recognize the gentleman from New Jersey, Mr. Pallone, for 5 minutes.

**OPENING STATEMENT OF HON. FRANK PALLONE, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW JERSEY**

Mr. PALLONE. Thank you, Mr. Chairman and our ranking member, for this hearing today on a number of bills addressing programs and projects administered by FERC.

I am particularly pleased that the subcommittee is considering H.R. 2984, Representative Kennedy's Fair Rates Act, which would greatly improve the process by which FERC votes are reconsidered. This small but significant change to the Federal Power Act would ensure that, if there is a deadlocked vote amongst 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.

The need for this change became evident in the wake of a New England forward-capacity market auction in 2014. At that time, FERC had only four Commissioners and they split over the question of whether the auction results were just and reasonable. Since FERC didn't disapprove the auction results, wholesale electricity prices in New England increased dramatically. So, while rates went up, none of the affected parties could challenge the decision or resulting rate increase and, therefore, no rehearing or judicial review was possible.

There is an old saying, Mr. Chairman, that if you choose not to decide, you still have made a choice. And we should not deprive stakeholders of any recourse when a nondecision by FERC has real consequences for consumers, producers, and others. Representative Kennedy's bill doesn't favor one side or another. It merely provides those who want to challenge the outcome of an action the same



rights they would have if FERC made an affirmative decision. It is thoughtful and meaningful legislation that deserves to become law as soon as possible.

Unfortunately, I can't say the same about the AIR Survey Act of 2015. It is a reckless and brazen effort to further strip landowners and resource agencies of their ability to participate meaningfully in the gas pipeline siting process. The bill directs FERC and agencies responsible for implementing Federal environmental laws not just to allow data collected by AIR to be used in gas pipeline certification activities, but it goes so far as to tell scientists and regulators to give it the same weight in the decision process as data collected on the ground. We should not categorically make a decision that photos taken thousand of feet in the air are as accurate in cataloguing endangered plants and animals as surveys on the ground, nor should we second-guess scientists and other trained professionals in State environmental offices or at the Army Corps as to how best to collect data related to their implementation of the Clean Water Act.

Furthermore, this legislation is not needed. FERC already allows aerial data to be used in proceedings under Section 7 of the Natural Gas Act. The only reason to move the legislation is to shortcircuit meaningful environmental assessments and to get around the concerns of private landowners and in some cases local governments who have legitimately barred pipeline companies from surveying after those companies were caught acting illegally without proper authorization. It is a bad concept and a bad bill, and it should not move any further.

Mr. Pompeo's other legislative proposal is, on the other hand, something worth exploring. The committee print before us would add a \$10 million threshold to trigger FERC review of a merger or consolidation, since under current law no such threshold exists. I am particularly interested in hearing from Mr. Slocum regarding the concerns he raised with this legislation because this is not a change that we should undertake lightly. I look forward to working with my colleagues to see if there is a way forward on this issue.

Finally, I just want to say that I know of no major objection with regard to any of the five hydroelectric construction license extension bills before us. They have all bipartisan support, and I hope we will move quickly on them.

I appreciate the chair and the ranking member for holding this hearing, and the witnesses.

[The prepared statement of Mr. Pallone follows:]

#### PREPARED STATEMENT OF HON. FRANK PALLONE, JR.

I want to thank Chairman Whitfield and Ranking Member Rush for holding today's legislative hearing on a number of bills addressing programs and projects administered by the Federal Energy Regulatory Commission (FERC).

I am particularly pleased that the subcommittee is considering H.R. 2984, Rep. Kennedy's FAIR Rates Act, which would greatly improve the process by which FERC votes are reconsidered. This small, but significant change to the Federal Power Act would 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. The need for this change became evident in the wake of a New England Forward Capacity Market Auction in 2014. At that time, FERC had only four Commissioners and they split over the question of whether the auction results were just and reasonable. Since FERC didn't

disapprove the auction results, wholesale electricity prices in New England increased dramatically. So, while rates went up, none of the affected parties could challenge the decision or resulting rate increase, and, therefore, no rehearing or judicial review was possible.

There's an old saying that "if you choose not to decide, you still have made a choice." We should not deprive stakeholders of any recourse when a nondecision by FERC has very real consequences for consumers, producers and many others. Rep. Kennedy's bill doesn't favor one side or another, it merely provides those who want to challenge the outcome of inaction the same rights they would have if FERC made an affirmative decision. It is thoughtful and meaningful legislation that deserves to become law as soon as possible.

Unfortunately, I cannot say the same thing about the Air Survey Act of 2015: it is a reckless and brazen effort to further strip landowners and resource agencies of their ability to participate meaningfully in the gas pipeline siting process. The bill directs FERC and agencies responsible for implementing Federal environmental laws not just to allow data collected by air to be used in gas pipeline certifying activities, but it goes so far as to tell scientists and regulators to give it the same weight in the decision process as data collected on the ground! We should not categorically make a decision that photos taken thousands of feet in the air are as accurate in cataloging endangered plants and animals as surveys on the ground. Nor should we second guess scientists and other trained professionals in State environmental offices or at the Army Corps as to how best to collect data related to their implementation of the Clean Water Act.

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Mr. Pompeo's other legislative proposal is, on the other hand, something worth exploring. The committee print before us would add a \$10 million threshold to trigger FERC review of a merger or consolidation, since, under current law, no such threshold exists. I am particularly interested in hearing from Mr. Slocum regarding the concerns he raises with this legislation because this is not a change we should undertake lightly. I look forward to working with my colleagues to see if there is a way forward on this issue.

Finally, I just want to say that I know of no major objection with regard to any of the 5 hydroelectric construction license extension bills before us. They all have bipartisan support, and I hope we will move on them quickly.

I appreciate the chair and ranking member for holding this hearing, and I also thank the witnesses for participating today.

Mr. PALLONE. I would like to yield the remainder of my time to Mr. Kennedy.

Mr. KENNEDY. Thank you very much, Mr. Pallone. I am grateful.

And I want to thank the chairman and the ranking member for holding this important hearing.

My constituents face the highest energy rates in the continental United States. So, today's discussion about skyrocketing energy cost is, unfortunately, nothing new to my home State.

But what happened to us 2 years ago after rates were filed with FERC should never happen, no matter how expensive or cheap your energy bill is. The Commission, which at that time was down to four Commissioners, deadlocked. The rates become effective by operation of law, precluding any avenue for administrative redress.

As a result, any now protest of those rates were dismissed because, according to FERC and the Federal Power Act, there is no decision to rehear. That is unacceptable. But there is nothing my constituents could do to protest because of the flaw in the Federal Power Act.

My bill, H.R. 2984, the Fair Rates Act, is a simple technical fix to ensure that scenario doesn't happen again. It ensures all admin-

istrative and judicial avenues for redress are available whenever new rates take effect, including in the advent of a deadlocked Commission.

Today FERC once again is down only to four Commissioners, without a fifth so much as nominated, setting the stage for that event to play out again in the next weeks or in the month ahead.

I appreciate FERC's thoughts on the legislation and their work with both me and my staff over the past several years.

I look forward to hearing from the witnesses, and particularly Bill Bottiggi, who was willing to come down to Washington to share his expertise with us.

I yield back. Thank you.

Mr. WHITFIELD. The gentleman yields back, and that concludes our opening statements today.

So, we have two panels of witnesses. On our first panel we have two witnesses. I would like to welcome them first, Ann Miles, who is the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission, and the other witness is Max Minzner, who is General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission.

I thank both of you very much for taking time to be with us today to give your thoughts and ideas about these pieces of legislation.

Ms. Miles, I will recognize you first for 5 minutes for your opening statement.

**STATEMENTS OF ANN F. MILES, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION, AND MAX J. MINZNER, GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION**

**STATEMENT OF ANN F. MILES**

Ms. MILES. Thank you.

Mr. WHITFIELD. And be sure to turn the microphone on.

Ms. MILES. Good morning, Chairman Whitfield, Ranking Member Rush, and members of the subcommittee.

My name is Ann Miles, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission.

The Commission is responsible for siting infrastructure, including non-Federal hydropower projects, interstate natural gas pipelines and storage facilities, and liquefied natural gas terminals.

I appreciate the opportunity to appear before you to comment on the five hydropower bills to extend commencement of construction deadlines and on the Aerial Infrastructure Route Survey Act of 2015.

As a member of the Commission's staff, the views I express in this testimony are my own and not those of the Chairman, other than as specifically noted, or of any individual Commissioner.

I will first comment on the hydropower extension bills, H.R. 2080, H.R. 2081, H.R. 3447, the bill regarding Jennings Randolph Project No. 12715, and the bill regarding Cannonsville bill, Project No. 13287. Each of the bills seeks to extend the project's commencement of construction deadline to a total of no more than 10 years from the date the project license was issued. The last several

Commission Chairmen, as well as the current Chairman, have taken the position of not opposing legislation that would extend the commencement of construction deadline no further than 10 years from the date the licensing decision was issued. Because each of these bills provides for commencement of construction deadlines that do not exceed 10 years from the dates of the respective licenses being issued, I do not oppose these bills.

I note that all bills, except for H.R. 2081, contain a reinstatement provision, should the period required for commencement of construction expire prior to enactment of the Act. Congress may want to consider including a reinstatement provision in H.R. 2081.

Second, I will comment on the Aerial Infrastructure Route Survey Act, H.R. 3021. The bill would amend Section 7 of the Natural Gas Act to provide that data collected by aerial survey will be accepted in lieu of and given equal weight to ground survey data for the purpose of completing the Commission's natural gas project prefiling process and for completing applications associated with Federal authorizations related to such projects.

The bill provides that an agency may require that aerial survey data be verified through the use of on-the-ground survey data before project construction. Aerial surveys can be a useful tool for developing project routes and making initial determinations of resources that may be affected by a proposed project.

Currently, Commission staff accepts aerial survey data, especially where ground access is not available during the prefiling or application review process. However, most project applications include ground survey data for a significant portion of the right-of-way. I do have some concern that waiting to verify large amounts of aerial data until late in the project development process or after issuance of a certificate could in some cases pose difficulties.

For example, if it was not discovered until the preconstruction stage that a project might affect historic properties or endangered species, matters that can be difficult to determine with certainty in the absence of on-the-ground surveys, a project proponent might be required at a late stage to amend its approved route or to conduct additional mitigation, which could cause delay and additional expense.

This concludes my remarks, and I would be pleased to answer any questions you may have.

[The prepared statement of Ms. Miles follows:]

Testimony of

Ann F. Miles  
Director, Office of Energy Projects

Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC, 20426  
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Committee on Energy and Commerce  
Subcommittee on Energy and Power  
United States House of Representatives

Hearing on H.R. 2080, H.R. 2081, H.R. 3447, Bill Regarding Jennings Randolph  
Project No. 12715, Bill Regarding Cannonsville Project No. 13287, and H.R. 3021

February 2, 2016

Chairman Whitfield, Ranking Member Rush, and Members of the Subcommittee:

My name is Ann Miles and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (Commission). The Commission is responsible for siting infrastructure projects including: (1) the licensing, administration, and safety of non-federal hydropower projects; (2) the authorization of interstate natural gas pipelines and storage facilities; and (3) the authorization and safety of liquefied natural gas terminals.

I appreciate the opportunity to appear before you to comment on the five hydropower commencement of construction extension bills and the Aerial Infrastructure Route Survey Act of 2015. As a member of the Commission's staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

## **HYDROPOWER EXTENSION BILLS**

### **I. Background**

The Commission regulates over 1,600 hydropower projects at over 2,500 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 55.5 gigawatts of hydropower capacity, which is more than half of all the hydropower

capacity in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable, domestic energy source. Public and private hydropower capacity together total about nine percent of U.S. electric generation capacity.

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal land; (3) use surplus water from a federal dam; or (4) are located on non-navigable waters over which Congress has jurisdiction under the Commerce Clause, involve post-1935 construction, and affect interstate or foreign commerce.

The FPA authorizes the Commission to issue licenses for projects within its jurisdiction, and exemptions (a less rigorous type of license) for projects that would be located at existing dams or natural water features or located within conduits as long as these projects meet specific criteria. Licenses are generally issued for terms of between 30 and 50 years, and are renewable. Exemptions are perpetual, and thus do not need to be renewed.

The FPA provides limits on the time to commence construction of a licensed project. Specifically, section 13 of the FPA requires that licensees commence project construction by the deadline established in the license, which may be no longer than two years from the date of license issuance. The Commission may extend the deadline once,

for no longer than two years. If construction does not timely commence, section 13 requires the Commission to terminate the license by written order.

II. Comments on H.R. 2080, H.R. 2081, H.R. 3447, Bill Regarding Jennings Randolph Project No. 12715, and Bill Regarding Cannonsville Project No. 13287

**H.R. 2080**

On August 26, 2009, the Commission issued an original license for Clark Canyon Hydro, LLC's proposed 4.7-megawatt Clark Canyon Dam Hydroelectric Project No. 12429, to be located at the U.S. Department of the Interior, Bureau of Reclamation's Clark Canyon Dam on the Beaverhead River in Beaverhead County, Montana. The license required the company to commence project construction within two years of the issuance date of the license, or by August 25, 2011, the longest time period allowed by section 13 of the FPA. At the licensee's request, the Commission granted the one two-year extension of the commencement of construction deadline permitted by section 13, thus making the deadline August 25, 2013. The licensee did not commence construction by that date and, as required by section 13, the Commission terminated the license by order dated March 19, 2015. The Commission explained that the licensee could file a new license application and that Commission staff would work with the licensee to determine whether portions of the Commission's regulations could be waived to make the new license proceeding as expeditious as possible.



H.R. 2080 would require the Commission to reinstate the license for the Clark Canyon Dam Project and extend the commencement of construction deadline for the project for a three-year period beginning on the date of enactment of this Act.

**H.R. 2081**

On January 12, 2012, the Commission issued an original license for Gibson Dam Hydroelectric Company, LLC's proposed 15-megawatt Gibson Dam Hydroelectric Project No. 12478, to be located at the Bureau of Reclamation's Gibson Dam, on the Sun River, in Lewis and Clark County and Teton County, Montana. The license required the company to commence project construction within two years of the date of the license, or by January 12, 2014. At the licensee's request, the Commission granted the maximum allowable two-year extension of the commencement of construction deadline, thus making the deadline January 12, 2016. It is my understanding that the licensee is encountering difficulty obtaining lands, subject to a U.S. Fish and Wildlife Service conservation easement, which are needed for construction of the project's primary transmission line.

H.R. 2081 would authorize the Commission to extend, for six years, the commencement of construction deadline for the Gibson Dam Project. The extension would begin on the date of expiration of the Commission's latest extension order.

**H.R. 3447**

On July 17, 2012, the Commission issued an original license for Wilkesboro Hydroelectric Company, LLC's proposed 4-megawatt W. Kerr Scott Hydroelectric Project No. 12642, to be located at the U.S. Army Corps of Engineers' (Corps) W. Kerr Scott Dam and Reservoir, on the Yadkin River, in Wilkes County, North Carolina. The license required the company to commence project construction within two years of the issuance date of the license, or by July 17, 2014. At the licensee's request, the Commission granted the maximum allowable two-year extension of the commencement of construction deadline, thus making the deadline July 17, 2016. On June 19, 2015, the licensee filed an application with the Commission, seeking to amend the project license consistent with the results of its design consultation with the Corps. My staff is currently processing the application.

H.R. 3447 would authorize the Commission to extend, for up to three consecutive two-year periods, the commencement of construction deadline for the W. Kerr Scott Project. The extension would begin on the date of expiration of the Commission's latest extension order.

**Bill Regarding Jennings Randolph Project No. 12715**

On April 30, 2012, the Commission issued an original license for Fairlawn Hydroelectric Company, LLC's proposed 14-megawatt Jennings Randolph Hydroelectric Project No. 12715, to be located on the Corp's Jennings Randolph Dam and Lake, on the North Branch Potomac River in Garrett County, Maryland, and Mineral County, West

Virginia. The license required the company to commence project construction within two years of the issuance date of the license, or by April 30, 2014. At the licensee's request, the Commission granted the maximum allowable two-year extension of the commencement of construction deadline, thus making the deadline April 30, 2016. I understand that the licensee is working with the Corps to obtain construction authorization under section 14 the Rivers and Harbors Act of 1899.

This bill would authorize the Commission to extend, for up to three consecutive two-year periods, the commencement of construction deadline for the Jennings Randolph Project. The extension would begin on the date of expiration of the Commission's latest extension order.

**Bill Regarding Cannonsville Project No. 13287**

On May 13, 2014, the Commission issued an original license for the City of New York's proposed 14.08-megawatt Cannonsville Hydroelectric Project No. 13287, to be located on the city's existing Cannonsville Reservoir, on the West Branch of the Delaware River in Delaware County, New York.. The license required the company to commence project construction within two years of the issuance date of the license, or by May 13, 2016. There have been dam safety issues at the project site and I understand that the licensee seeks additional time to conduct engineering dam safety studies and develop a new design to safely construct the project.

This bill would authorize the Commission to extend, for up to four consecutive two-year periods, the commencement of construction deadline for the Cannonsville Project. The extension would begin on the date of expiration of the time period required for commencement of construction as prescribed in the license

### **Conclusion**

The last several Commission Chairmen, as well as the current Chairman, have taken the position of not opposing legislation that would extend the commencement of construction deadline no further than 10 years from the date that the license in question was issued. Where proposed extensions would run beyond that time, there has been a sense that the public interest is served by releasing the site for other purposes. Because each of these bills provides for commencement of construction deadlines that do not exceed 10 years from the dates the respective licenses were issued, I do not oppose these bills. I note that all bills except for H.R. 2081 contain a reinstatement provision should the period required for commencement of construction expire prior to enactment of the Act. Congress may want to consider including a reinstatement provision in H.R. 2081.

## **AERIAL INFRASTRUCTURE ROUTE SURVEY ACT OF 2015 (H.R. 3021)**

### **I. Background**

The Commission is responsible under section 7 of the Natural Gas Act (NGA) for authorizing the construction and operation of interstate natural gas pipeline and storage projects, and under section 3 of the NGA for the construction and operation of facilities necessary to permit either the import or export of natural gas by pipeline, or by sea as liquefied natural gas (LNG). As part of those responsibilities, the Commission conducts both a non-environmental and an environmental review of the proposed facilities. The non-environmental review focuses on the engineering design, and rate and tariff considerations. The environmental review, pursuant to the National Environmental Policy Act, is carried out with the cooperation of numerous federal, state, and local agencies; Indian tribes; and with the input of other interested parties. Since 2005, the Commission has authorized nearly 10,700 miles of interstate natural gas transmission pipeline, more than one trillion cubic feet of interstate storage capacity, and 28 LNG facility sites.

## II. Comments

H.R. 3021 would amend section 7 of the Natural Gas Act to provide that data collected by aerial survey will be accepted in lieu of, and given equal weight to, ground survey data for the purpose of completing the Commission's natural gas project pre-filing process and for completing applications associated with federal authorizations related to such projects. The bill provides that an agency may require that aerial survey data be verified through the use of ground survey data before project construction.

Aerial surveys can be a useful tool for developing project routes and making initial determinations of resources that may be affected by a proposed project. Currently, Commission staff accepts aerial survey data, especially where ground access is not available during the pre-filing or application review processes. However, most project applications include ground surveys for a significant portion of the right-of-way. I do have some concern that waiting to verify large amounts of aerial data until late in the project development process, or after issuance of a certificate, could in some cases pose difficulties. For example, if it was not discovered until the pre-construction stage that a project might affect historic properties or endangered species (matters that can be difficult to determine with certainty in the absence of on-the-ground surveys), a project proponent might be required at a late stage to amend its approved route or to conduct additional mitigation, which could cause delay and additional expense.

This concludes my remarks. I would be pleased to answer any questions you may have.

Mr. WHITFIELD. Ms. Miles, thanks very much for your opening statement.

Mr. Minzner, you are recognized for 5 minutes.

#### **STATEMENT OF MAX MINZNER**

Mr. MINZNER. Mr. Chairman, Ranking Member Rush, members of the subcommittee, thank you for inviting me to testify here today.

My name is Max Minzner. I am the General Counsel at the Federal Energy Regulatory Commission. Like Ms. Miles, I am also a staff witness and my remarks today don't necessarily reflect the views of the Chairman or any specific Commissioner.

I have been asked to testify today on two bills that would amend the Federal Power Act. One is a bill that would modify Section 203 of the Federal Power Act to set a minimum threshold value of \$10 million on the merger or consolidation of facilities belonging to public utilities that would be required for FERC approval.

And two, H.R. 2984, a bill that would amend Section 205 of the Federal Power Act, that would permit a party to seek rehearing and subsequent appellate review of any rate change filed under Section 205 that takes effect without Commission action.

The first proposed bill would amend a provision of the Federal Power Act, Section 203, that requires public utilities to seek Commission approval before engaging a wide range of corporate transactions. In particular, this bill would change the Act so that utilities would only need prior FERC approval to merge or consolidate facilities, subject to the Commission's jurisdiction, if the facility's value was in excess of \$10 million. In other words, mergers or consolidations of facilities with a value less than that amount would not need FERC approval.

This bill would align this provision of the FPA with the other subsections of Section 203(a)(1) which regulate other transactions by public utilities, each of which already contains a \$10 million de minimis threshold. In my view, the proposal to add the same de minimis threshold to Section 203(a)(1)(B) of the FPA could ease the administrative burden on Commission staff and the regulatory burden on industry without a significant negative effect on the Commission's regulatory responsibilities. Transactions below that threshold are unlikely to impose a significant negative impact on competition or the rates of utility customers.

Second, H.R. 2984 would permit rehearing and appellate review of changes to rates made under Section 205 when those rates take effect without Commission action. To change rates or other tariff provisions under Section 205, a public utility typically makes a filing with FERC and the Commission will take action on the proposal during a 60-day statutory time period. In very rare cases, the Commission has not acted on that filing within the time period, and the filing takes effect when the period expires.

In my view, rehearing and appellate review are not currently available when a filing submitted pursuant to Section 205 of the FPA takes effect by operation of law. Appellate review is an important procedural avenue, though, for those who do not prevail before an administrative agency. Where review in the court of appeals may be challenging under this legislation because the appellate

court will not be able to rely on the Commission's reasoning in the first instance, the possibility of a rehearing order or a remand from the court of appeals should reduce this difficulty and allow the court of appeals to effectively engage in review of the rate change.

That concludes my prepared testimony. I look forward to your questions.

[The prepared statement of Mr. Minzner follows:]



**Testimony of Max J. Minzner  
General Counsel  
Federal Energy Regulatory Commission  
Before the Committee on Energy and Commerce  
Subcommittee on Energy and Power  
United States House of Representatives  
February 2, 2016**

**Introduction**

Mr. Chairman, Ranking Member Rush, and members of the Subcommittee:  
Thank you for inviting me to testify today. My name is Max Minzner, and I am the General Counsel of the Federal Energy Regulatory Commission (FERC or the Commission). I appear before you as a staff witness, and the views I present are not necessarily those of the Commission or any individual Commissioner.

I have been asked to testify on two proposed bills that would amend the Federal Power Act (FPA or the Act): 1) a bill that would modify Section 203 of the FPA to set a minimum threshold value of \$10,000,000 on the merger or consolidation of facilities belonging to public utilities that would be subject to FERC approval; and 2) H.R. 2984, a bill that would amend Section 205 of the FPA to permit a party to seek rehearing and subsequent appellate review of any rate change filed pursuant to that provision that takes effect without Commission action.

**Background**

Part II of the Federal Power Act charges the Commission with oversight of the wholesale electric markets and the public utilities that transmit or sell electricity at wholesale in interstate commerce. FERC is required to ensure that the terms and conditions of services or, and rates charged by these utilities are just and reasonable, and not unduly discriminatory or preferential. The FPA provides the Commission with

multiple statutory tools to carry out this mission, two of which are at issue in the pending bills.

First, Section 203 of the Act requires public utilities to seek Commission approval before engaging in a wide range of corporate transactions. For example, under Section 203(a)(1)(A), public utilities may not sell certain facilities subject to Commission jurisdiction without prior approval from FERC. Similarly, Section 203(a)(1)(B) requires FERC approval before public utilities merge or consolidate facilities subject to the jurisdiction of the Commission.

Second, Section 205 provides that public utilities may not change their rates or other provisions of their tariffs without providing at least sixty days advance notice to the Commission and the public, although the Commission may authorize the change to take effect in a shorter period of time. In practice, a public utility typically makes a filing with FERC, and the Commission takes action on the proposal during the sixty-day period. In very rare cases, the Commission does not take action on the filing within that time period. In that situation, the public utility's filing goes into effect when the time expires.

#### **A Bill to Amend Section 203**

This proposed bill would add a minimum dollar value to Section 203(a)(1)(B) of the Act such that public utilities would only need prior FERC approval to "merge or consolidate" facilities subject to the Commission's jurisdiction if the facilities have a value in excess of \$10 million. In other words, mergers or acquisitions of facilities with a value less than that amount will not need FERC approval.

This bill would align this provision of the FPA with the other three subsections of Section 203(a)(1). Subsections (A), (C), and (D) only require Commission approval if

the transaction at issue exceeds \$10 million in value. Section 203(a)(1)(A) requires FERC approval before a public utility sells, leases, or otherwise disposes of facilities worth more than \$10 million. Section 203(a)(1)(C) imposes the same obligation for the acquisition of more than \$10 million in securities of another public utility. Finally, Section 203(a)(1)(D) mandates Commission approval before the acquisition of a generating facility worth more than \$10 million.

While the current statute is the result of the Energy Policy Act of 2005, the requirement for merger approval dates back to the original 1935 Federal Power Act. The prior version of Section 203 combined the current statutory mandates of Section 203(a)(1)(A)-(C) in a single subsection that included a \$50,000 threshold. Under this statutory language, FERC had issued regulations imposing a \$50,000 *de minimis* exception for all of the provisions. After the 2005 legislation that subdivided the section and imposed the three \$10 million thresholds, FERC interpreted the statute as eliminating the *de minimis* exception for the “merge and consolidate” clause. As a result, the requirement of approval now applies even to mergers that are less than \$50,000. Adding a \$10 million *de minimis* threshold to the “merge and consolidate” clause would, to some extent, return the statute to the situation that existed prior to the 2005 legislation where the same minimum threshold applies equally to every subsection of the statute.

In my view, the proposal to add a \$10 million *de minimis* threshold to Section 203(a)(1)(B) of the FPA could ease the administrative burden on the Commission staff and the regulatory burden on industry without a significant negative effect on the Commission’s regulatory responsibilities. Transactions below the proposed threshold are unlikely to impose a significant negative impact on competition or the rates of utility

customers. Despite this limited risk, the current practice is for Commission staff to examine each transaction closely in order to carry out our statutory mandate. In Fiscal Year 2015, FERC received 216 applications for approval under Section 203. About 20% of those applications were filed under Section 203(a)(1)(B) and fell below the \$10 million threshold. The time and effort of staff could be usefully redirected to other matters pending before the Commission rather than reviewing those applications.

One potential concern raised by the bill involves serial mergers. The Commission would no longer have the authority to review and approve mergers valued at less than \$10 million even in situations where the merger took place as one of a series of transactions that exceeded the limit in total. I believe that FERC has other tools available to it, though, to protect consumers and the public interest if such circumstances arose. For example, if an entity with market-based rates obtained the opportunity to exercise market power as a result of such transactions, the Commission could limit or eliminate its ability to engage in transactions at market rates. Additionally, the Commission has a range of market power mitigation measures that limit market power within the organized wholesale electric markets. Finally, if the exercise of market power involves market manipulation or violation of a Commission rule, regulation, order or tariff provision, the Commission can bring an enforcement action.

#### **H.R. 2984**

As discussed above, when a public utility seeks to modify its rates or other provisions of its tariff, it will file the proposed change with the Commission under Section 205 of the Act. The Commission then provides the public the opportunity to intervene in the proceeding and to comment on the proposed change. Before the

expiration of the sixty-day statutory time period, FERC will take action on the proposed rate or tariff provision. Any party aggrieved by the Commission action, either the public utility or an intervenor, may seek rehearing of the order. Once the Commission acts on the request for rehearing, review is available in the United States Courts of Appeals. Under the FPA, a request for rehearing, though, is a prerequisite for appellate review. Parties may not seek review from the Court of Appeals if they did not seek rehearing.

In unusual situations, FERC has permitted a public utility's filing under Section 205 to take effect without a Commission order. This is an exceedingly rare occurrence. I am familiar with only six occasions where this outcome has occurred under either the FPA or under the comparable provisions of the Natural Gas Act. As the Subcommittee may be aware, one such tariff amendment occurred in September 2014 in a matter relating to auction results in ISO New England (ISO-NE). At the time, FERC had only four sitting Commissioners. Public statements by the members of the Commission revealed that the Commission split 2-2 on the question of whether to accept the auction results. As a result, no order garnered the support of a majority of the members of the Commission.

When filings have taken effect under Section 205 without a Commission order, parties have occasionally sought rehearing. The Commission has dismissed those rehearing requests on the grounds that rehearing was not available because the Commission did not issue an order. The Commission followed this approach with respect to the rehearing requests in the ISO-NE case. That matter is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In that litigation,

FERC has taken the position that, consistent with relevant precedent, the absence of a Commission order precludes both rehearing and appellate review of the tariff change.

In my view, modifying Section 205 of the FPA to permit a party to seek rehearing and subsequent appellate review of any rate change filed pursuant to that provision that takes effect without Commission action would change this outcome for future cases. While I believe that rehearing and appellate review are not currently available where a filing submitted pursuant to section 205 of the FPA takes effect by operation of law, H.R. 2984 would treat Commission inaction in that situation as the equivalent of an order for purposes of Section 313 of the FPA. Section 313 provides the process for rehearing and appellate review of Commission orders. As a result, the proposed legislation would permit any party aggrieved by the filing to seek rehearing. After the Commission acts on a petition for rehearing, that aggrieved party could seek review in the Court of Appeals, if necessary.

The proposal has significant benefits. Appellate review is an important procedural avenue for those who do not prevail before an administrative agency. It would also correct an unusual outcome in a specific context that may arise when the Commission has four voting members. A party who manages to convince only one Commissioner, and loses on a 3-1 vote, may seek rehearing and appellate review. However, a party that makes a more persuasive case and manages to convince a second Commissioner will lose 2-2. Those parties are currently barred from either requesting rehearing at the Commission or seeking redress at a Court of Appeals. The proposal would avoid that outcome.

My chief concern is that it may present difficulties in practice for the Court of Appeals. When a federal appellate court is reviewing the action of an administrative agency, it typically reviews the order issued by the agency and evaluates the record established by the agency in support of its decision. Review in the Court of Appeals may be challenging under this legislation. Without an initial FERC order, the appellate court will not be able to rely on the Commission's reasoning in the first instance. However, two aspects of the process of appellate review should alleviate this difficulty. First, parties will still be required to petition for rehearing prior to seeking review from the Court of Appeals. In most cases, the Commission issues a separate order on rehearing that provides an additional opportunity to justify or explain its decision. If there is an order on rehearing, this order will be available for the appellate court to review. Second, if the Court of Appeals believes that it lacks the appropriate record to review the decision of Commission, it can remand the case to FERC for further proceedings.

#### **Conclusion**

Thank you for inviting me to testify on the proposed legislation. I look forward to working with you in the future and I am happy to answer any questions you have.

Mr. WHITFIELD. Mr. Minzner, thank you, and thank both of you for your testimony.

At this time I recognize myself for 5 minutes of questions, and I yield my time to the gentleman from Kansas, Mr. Pompeo.

Mr. POMPEO. Thank you very much, Mr. Chairman. Thank you for yielding to me as well.

Ms. MILES, thank you for being here this morning. I wanted to ask you a couple of questions about H.R. 3021.

Can you describe for me some of the benefits of having access to aerial route survey data for FERC?

Ms. MILES. Well, aerial survey can be very useful in making general determinations or in some resource areas more specific determinations. So, certainly, for getting the route and initial determinations, yes, it can be useful.

Mr. POMPEO. I appreciate that.

Yes, I want to talk about a couple of concerns that you expressed and try to understand them, so that we might be able to make some changes to accommodate them, if we need to.

In regard to endangered species, considering all the time and money spent to protect them, isn't it safe to assume that we know where those habitats are?

Ms. MILES. Not necessarily on a specific project. The details would be required for us as well as other Federal agencies who have responsibility for dealing with the species, the Fish and Wildlife Service, especially for pipeline projects.

Mr. POMPEO. But isn't it the case that the company that is intending to do this survey is going to do their best to identify that? That is, they don't want to have big amendments at the end, either. They have an enormous financial incentive to get this right.

Ms. MILES. Very understandable. As we are seeing and as I said in our projects so far, most companies, where they can have project access early, are gathering that data. We all want to do as much as we can during prefilings.

Mr. POMPEO. Yes. Yes. No, that makes perfect sense, and when you have ground access, that is great. But in those instances where I think this is most important is the places where ground access is not available; it has been denied. And so, the only other option would be being very disruptive to the landowner, either eminent domain or something of that nature. This is a way to mitigate the impact to those landowners and still get the information that we all need to make sure that that certificate is properly granted.

It seems to me we have struck the right balance here. Do you agree with that?

Ms. MILES. I think on a narrower course of that, it would be. I am not sure the bill is specific about the areas where there isn't access, there isn't on-the-ground access.

Mr. POMPEO. That makes sense. And the same thing with respect to historic sites, those are listed. Right? Most often, we don't have to guess. I suppose there is a handful that are unknown, but that has to be the rarest of creatures.

Ms. MILES. I am sorry, I missed what—

Mr. POMPEO. With respect to historic sites, you expressed some concern that a narrow survey might not adequately identify an his-



toric site. There is a registry of historic sites. I mean, that is not hard to figure out where they are.

Ms. MILES. I think that many of those, though, will require on-the-ground work. Yes, there is a register of historic sites, but sometimes there are sites along the way that haven't been identified. We know there are archaeological or cultural sites, but they haven't been identified and they are not on the register yet. And so, it could take on-the-ground survey to get at that information.

Mr. POMPEO. Yes, I just think about these companies that are trying to do this. They are going to try to get that right. They have the most vested interest in making sure that they do that right. And if they need a ground survey to do it, I am confident they will work through it. I just think it is important that they and FERC have access to this tool, so that we can be less disruptive to land-owners as we are working our way through the process.

Thanks for your testimony.

Mr. Minzner, a question for you on the amendment to the draft, to Section 203. Tell me what the scale of the burden that this would relieve on FERC is. Can you give me man-hours? If we adjust these limits to the place that is proposed, tell me what benefits accrue to FERC in terms of reduced burden.

Mr. MINZNER. Congressman, thank you for that question.

Mr. WHITFIELD. Mr. Minzner, be sure and pull your microphone closer. Interestingly enough, we have people watching this on the Internet, and they have complained that they didn't hear everything you said.

Mr. MINZNER. Thank you, Mr. Chairman.

And thank you for your question, Congressman.

I don't think I have an estimate of the number of man-hours that it would save the Commission. I do know that about 20 percent of the Section 203 applications that FERC considered in fiscal year 2015 would fall below the statutory threshold, and therefore, would not have needed approval if this bill were in place last year.

I can tell you that every filing that comes into the Commission under Section 203 otherwise looks at it closely and, if Commission action is required, a draft order is prepared for the Commission. And so, every filing is taken seriously and staff works on it intensively.

Mr. POMPEO. Do you see any downside risk from creating parity between acquisitions and dispositions? Right, they are very similar? Do you see any burden or any downside to what we are proposing in just making parity as between those two types of transactions?

Mr. MINZNER. Well, the value of the bill, of course, as you said, would bring parity between this provision of Section 203 and otherwise. It is, of course, a policy choice of how much oversight Congress wants these mergers to have at the Commission level. In my view, transactions that are below the de minimis threshold pose relatively limited risk to rates or competition.

Mr. POMPEO. Great. Thank you very much.

And thank you again for yielding, Mr. Chairman.

Mr. WHITFIELD. At this time I recognize the gentleman from Illinois, Mr. Rush, for 5 minutes.

Mr. RUSH. Thank you, Mr. Chairman.

Now, Ms. Miles, in your statement you note that, currently, “most project applications include ground surveys for a significant portion of the right-of-way.” You also state that “waiting to verify large amounts of aerial data until late in the project development process, or after issuance of a certificate, could in some cases pose difficulties.”

Are you concerned that policy change outlined in the AIR Survey Act of 2016 may impact, actually, the need to raise an additional cost for our pipeline projects rather than expediting these same projects? And can you explain your concerns?

Ms. MILES. I think if it is carried out similarly to now, where the companies are doing the on-the-ground surveys where they have access, and in the majority of the cases companies do have access to a good bit of survey route and are able to do the on-the-ground surveys in the earlier stage of the certification process, as long as that continues, I think that is fine. As I said in my testimony, aerial survey data can be useful where there is not on-the-ground access, as long as there is the opportunity to verify that later in the process by actual on-the-ground surveys for the resource areas where it would be necessary. It is not necessary for all resource areas.

Mr. RUSH. Thank you.

Mr. Minzner, in your statement you cited serial mergers as a possible concern with the merger in Section 203 of the Federal Power Act. You state that, “The Commission would no longer have the authority to review and approve mergers valued at less than \$10 million even in situations where the merger took place as one of a series of transactions that exceeded the limit in total.”

However, you also state that you believe that FERC has other tools available to protect consumers and the public interest if circumstances such as what I describe would arise. Can you explain what are these other tools that the FERC has at its disposal that would help in the situation that I describe?

Mr. MINZNER. Yes, Congressman. Thank you.

The Commission has a range of regulatory tools that it exercises in its oversight of public utilities regulated under the Federal Power Act. For instance, if a utility gains market power and is in a situation where it has authority to charge market-based rates, the Commission can modify or eliminate that authority to charge market-based rates.

To the extent that a public utility is operated in one of the Commission-approved organized wholesale electric markets, there are a range of Commission-approved mitigation measures that are designed to limit or eliminate the exercise of market power. And, of course, the Commission retains its enforcement authority to regulate misconduct that is a violation of Commission rule or order or rises to a level of market manipulation.

Those are three examples of mechanisms that the Commission would have to regulate the exercise of market power or other misconduct, even in the absence of the merger authority.

Mr. RUSH. Thank you, Mr. Chairman. I yield back.

Mr. WHITFIELD. The gentleman yields back.

At this time I recognize the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. OLSON. I thank the chair.

And welcome to our friends from FERC.

I am going to talk about natural gas and pipelines. The questions will be mostly for Ms. Miles, but, Mr. Minzner, if the spirit so moves you, please answer if you feel comfortable.

There has been big change in the last decade. Our electric grid relies heavily on natural gas. If the President's Clean Power Plan survives in court, that trend will continue and accelerate.

Gas is critical as a baseload power. It is immune to weather, and it is critical for ramping up and down wind and solar on our grids. But gas can't keep the lights on without a robust pipeline system. And that is why this committee examines legislation designed to make the permitting process more reasonable.

My first question is for you, Ms. Miles. It is a broad one on the pipeline landscape. I have a few specifics about siting.

First, what trends do you see in pipeline construction and what does this tell you about the future of natural gas?

Ms. MILES. We have seen a tremendous increase in the workload before us, both for natural gas pipelines as well as for liquefied natural gas facilities, at least doubling in the number of projects that are before us, in some cases tripling in the capacity that would move through those pipelines, and similar increases in interest in liquefied natural gas projects.

Mr. OLSON. Mr. Minzner, care to comment, sir?

Mr. MINZNER. Nothing to add to Ms. Miles.

Mr. OLSON. That is oK. That is fine.

Again, Ms. Miles, as FERC is a lead agency for siting natural gas pipelines that cross across State lines, you all are responsible for sending the schedule and coordinating all the various environmental permits, is that correct?

Ms. MILES. Yes, that is correct.

Mr. OLSON. Would you prefer to review those various permits, like Clean Water Act permits and all the other boxes that need to be checked, done concurrently on the order they are submitted as opposed to successively? Do you prefer that, concurrently as opposed to successively?

Ms. MILES. The more that we can work at the same time in gathering information and reviewing that information, working together on our environmental documents, yes, that is a good thing.

Mr. OLSON. Concurrently versus successive, oK, great.

Are you aware of any situations where a State agency, acting pursuant to a Federal delegated authority, has failed to meet the schedule established by FERC? Anytime this happened, a State agency not meeting your schedules? Are you aware of that?

Ms. MILES. I am sorry, I am not prepared to answer that today, but I would be happy to get back to you on it.

Mr. OLSON. Thank you.

Mr. Minzner, I would ask you to swing at that one, sir.

Mr. MINZNER. I also don't know the answer to that question, but I would second Ms. Miles' comment, to the extent that we can collaboratively with other agencies, that is an important and valuable thing for us to do.

Mr. OLSON. Final question about LNG. I have heard that FERC has slipped past in some deadlines recently on some LNG export

terminals. As you all know, the first export of LNG to scheduled to happen later this month, maybe early March, at Sabine Pass in Louisiana, right next to Texas, my own State.

With a weak Commander-in-Chief, the best tool we have to hurt OPEC, Iran, ISIS, and Russia is taking their money from our energy, getting on the global market, selling our natural gas to our allies.

What is FERC doing to address the energy exports in a timely manner, to make sure we get that energy on the market now and hurt OPEC, hurt Russia, hurt ISIS, and hurt Iran?

Ms. MILES. As with all the projects before us, both LNG and pipeline projects, we work to expedite them as best we can. Well, for LNG projects, they are required to use our prefilming process. We think that is a very good opportunity for all the agencies, tribes, as well as the company, to look at what issues and what information is needed. So that when the application is filed, it is a complete application and we are able to go as quickly as we can to our environmental analysis of the project.

Mr. OLSON. Yes, please, please expedite because another project right across the river from Sabine Pass is having some problems moving forward with the permitting process. So, please, please do that, because, then, that is the biggest tool we have to battle the guys who don't like us, again, OPEC, ISIS, Iran, and Russia.

I yield back. Thank you.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from California, Mr. McNerney, for 5 minutes.

Mr. MCNERNEY. I thank the chairman, and I thank the witnesses this morning.

Ms. Miles, what, if anything, would be missed by relying on aerial surveying in lieu of ground surveys?

Ms. MILES. I think the issue that we have is we need to make sure that we and the other agencies who have Federal permits that need to be carried out have the information they need in order to do that. For some resource areas, as I have said, it may require an on-the-ground survey. So, it can be done sequentially with an aerial survey first, as long as the data is collected before the certification or at least before construction occurs.

Mr. MCNERNEY. Well, in your opinion, can ground surveying be completely eliminated in any conditions?

Ms. MILES. I do not believe right now that ground surveys in some instances could be eliminated.

Mr. MCNERNEY. Although in your experience, though, there are some common causes for delayed—or what are some of the common causes for delays in construction time, start times?

Ms. MILES. The certificates that are issued will include requirements for the company to get any outstanding permits. I don't have data across the board, but in some projects we are needing to do water quality certification, have that certification from the agencies or Endangered Species Act consultation completed.

Mr. MCNERNEY. Well, are there any areas in which FERC can help improve the permitting, licensing, and construction processes?

Ms. MILES. I think what we are trying to do is to work during the prefilming. In pipelines, also, it is not a requirement that compa-

nies use the prefiling process, but we do encourage the large pipelines to do so, and they have been doing it routinely. It is during that prefiling process that both we and the companies are working with not only us, but the other agencies that are involved. Many, many agencies are cooperating agencies with us in our environmental document, and that is a very valuable thing to do.

Mr. MCNERNEY. I mean, so you are saying that the value is in the pre-application process, the work together cooperatively to find some of the hotspots and fix those beforehand. But what is the difference in terms of ultimate time between the initial application and the licensing if you take into account the time, the pre-licensing time?

Ms. MILES. As long as the application that is filed is complete, then we are able to move quite quickly to the environmental document. I am not quite sure—

Mr. MCNERNEY. I mean, ultimately, if you want to get a permit, how much time do you save by going through a pre-permitting process as opposed to just going into it and wrestling with FERC during the permitting process?

Ms. MILES. Our experience is that most projects move more quickly if they have used the prefiling process. There are some that it is not necessary on, where there aren't a lot of issues. But, where there are, it is a valuable thing to use.

Mr. MCNERNEY. OK. Thank you.

Mr. Minzner, you mentioned that FERC has tools to protect consumers and the public interest if a serial merger is taking place. How often does FERC use those tools and have they ever been used when reviewing actions under Section 203?

Mr. MINZNER. Well, our primary tool, when looking at actions under 203, is, in fact, the merger authority. The broad set of tools I referred to involves FERC's overall authority of the rates, terms, and conditions of the services of public utilities.

One of the goals of the Section 203 and the merger approval is to ensure that a merger does not have an effect on competition or rates. That is one mechanism that FERC carries out its statutory mission to ensure that electric rates are just and reasonable.

The other tools are other mechanisms. The Commission is constantly looking at the rates that are filed by electric utilities that operate in Commission markets. It has an active program of reviewing the market-based rates. It is also continually looking at the mitigation efforts in the organized wholesale markets. So, it is something the Commission does routinely as it is looking at the behavior of public utilities.

Mr. MCNERNEY. Can you answer briefly how many enforcement actions did FERC take in 2015?

Mr. MINZNER. I am not aware of the number of enforcement actions the Commission has taken in 2015. We will have to get back to you with that.

Mr. MCNERNEY. Thank you, Mr. Chairman.

Mr. WHITFIELD. At this time the Chair recognizes the gentleman from Illinois, Mr. Shimkus, for 5 minutes.

Mr. SHIMKUS. Thank you, Mr. Chairman.

I just have one issue. It is on, I think, the last bill noticed. Hopefully, I will be here for the second panel for Mr. Marsan's testimony.

But I want to weave the story about language of law, congressional intent, and, then, obviously, agency implementation, or lack thereof, which is a thing that we always talk about here and that our public always harasses about, because we have the language of law. We have Members who are present in the Conference Committee. We have the record, but, then, somehow through agency or Commission activities, things don't handle. And then, you fall into litigation and lawsuits and all this other stuff.

So, let me go back to the 2005 energy bill. Again, Mr. Marsan has it, I think, properly identified in his testimony. He is on the second panel. And I was lucky to serve on the Conference Committee for the passage of that bill, led by at that time Chairman Barton.

The sole purpose of one of the revisions was to update the pricing of the cost of doing a project from decades ago to a \$10 million threshold where, if it is under that, Commission involvement was not needed. We upped that dollar amount to what they needed to be, based upon \$10 million. So, I think the original threshold was \$50,000 40 years ago. That was the intent. That is what we did. The law was passed.

Now it seems that on the equation line there is a debate about purchases versus divestitures, and that our argument would be that the intent of the legislation in the 2005 energy bill was to set a new threshold for a dollar amount when the Commission should be involved. We don't think you all are doing that. That is why I think we have the last bill in this series of bills listed for the hearing, to address that.

We sought to address this issue in H.R. 8 last year, and we appreciate that we are staying committed, this committee, to make this simple fix once and for all on this piece of standalone legislation. We are just trying to really, unfortunately, fix something we don't think needs to be fixed, based upon Commission reading into intent of the language of law that was never meant to be intended by those who served on the Conference Committee.

Do you understand the weaving of the question and do you have any comments to that?

Mr. MINZNER. Yes, Congressman. I am not aware of any published legislative history in 2005.

Mr. SHIMKUS. Well, I can tell you what it is.

[Laughter.]

I was there. Some of us were there.

Mr. MINZNER. Yes, you are correct that, prior to that legislation, Section 203 contained a \$50,000 figure that the Commission had interpreted through its regulations as applying to all the provisions of Section 203. As a result of the change in EPAC 2005, and the statute was broken into subsections, three of which contained a \$10 million figure, and the one that we are discussing today currently does not. You are correct, the Commission has interpreted that as not imposing any de minimis threshold for mergers and consolidations. Obviously, this would add that provision into the statute and put us in a situation where the same financial threshold applies to

all provisions under Section 203, which was the case prior to EPAC 2005. Then, of course, it was \$50,000 rather than \$10 million.

Mr. MCNERNEY. Thank you. That is, actually, a great answer because I think, in answering that, you identified the problem. Three of the provisions were accepted under the \$10 million, and the Commission by themselves decided that one did not. We would argue that it was always the congressional intent for \$10 million to be that. So, I would hope that our colleagues would ask questions as we move this forward and get this fixed in an area that we probably shouldn't have needed to fix.

With that, Mr. Chairman, thank you, and I yield back.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from New York, Mr. Tonko, for 5 minutes.

Mr. TONKO. Thank you, Mr. Chair.

Ms. Miles and Mr. Minzner, thank you for being here today.

Ms. Miles, at what point during the natural gas pipeline application process are data from surveying used?

Ms. MILES. The data that is gathered would be used in our environmental document.

Mr. TONKO. So, your prefilings?

Ms. MILES. Once the application is filed, we would be looking to make sure that we have all the data that we need to analyze the issues that have been raised. And then, that would be analyzed in that document and made available to the public to comment on it.

Mr. TONKO. OK. Thank you. Today is FERC able to accept aerial survey data?

Ms. MILES. Yes, we are.

Mr. TONKO. And what about the Army Corps of Engineers or any of our State environmental agencies?

Ms. MILES. I am not able to speak for them. I understand that they do accept it differently, but I have not experienced that. So, I am not able to speak for them.

Mr. TONKO. OK. I appreciate that. I understand that FERC is the coordinating agency on these projects, but it seems to me that this bill is really about the data that other agencies, including non-Federal agencies, are willing to accept as they work on their studies as part of the application process. I think it would be important to hear from those agencies also.

Ms. Miles, this bill allows aerial data to be verified by ground surveys after the fact, is that correct?

Ms. MILES. Yes, after the certification would be issued, then where there is a need to verify the data by ground survey, that would be done then, before construction could begin.

Mr. TONKO. OK.

Ms. MILES. And the license would spell that out. I mean, the certification would spell out exactly what is needed for which resources.

Mr. TONKO. OK. And do you foresee the potential for problems or delays if an agency decides that it needs this data to be verified much later in the process?

Ms. MILES. As I said in my testimony, there are some cases where it has the potential to delay or add additional expense if

there is more analysis or perhaps even a rerouting of the pipeline at a later date.

Mr. TONKO. Thank you. And when a natural gas pipeline application is finalized and submitted, about how long does it take for FERC to make a decision on any given project?

Ms. MILES. I am sorry, could you restate the question, Congressman?

Mr. TONKO. Sure. When a natural gas pipeline application is finalized and submitted, about how long does it take for FERC to make its decision on a project?

Ms. MILES. That does vary from project to project, but our record shows that we have issued about 92 percent of our projects within 1 year from the filing of the application.

Mr. TONKO. So, pretty much an average of perhaps less than a year?

Ms. MILES. Yes.

Mr. TONKO. And since 2005, FERC has authorized a lot of natural gas pipeline infrastructure, over 10,000 miles of interstate transmission pipeline. Am I right in that assumption, in that fact?

Ms. MILES. I would need to check that fact.

Mr. TONKO. OK. This bill is a solution, I believe, in search of a problem. FERC is able to process applications currently at an appropriate speed while allowing for public discussion and thorough environmental review. My fear is that a transition to primarily aerial surveying would alter that dynamic and it would promote expediency at the expense of property owners' rights. So, with that, I think we should be somewhat concerned with these proposed changes and err on the side of property owners and their rights.

I thank you both again for your testimony today.

With that, Mr. Chair, I yield back the balance of my time.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from Ohio, Mr. Latta, for 5 minutes.

Mr. LATTI. Well, thank you, Mr. Chairman, for today's hearing, and thank you very much to our witnesses for being with us today. We appreciate your testimony today.

I know some of the questions, it is kind of like it might sound a little bit redundant, but we are just kind of asking, not quite asking the same questions the same way, but just with a little bit different twist.

Ms. Miles, I would ask you the first few questions. Do you think that the changes in H.R. 3021 work to balance environmental concerns while allowing FERC to more effectively fill its mission as the lead agency under Section 7 of the Natural Gas Act?

Ms. MILES. I think the changes, as I have said, the changes, we are accepting aerial survey data at present. However, the companies are tending to do on-the-ground survey when they have access, and that is the key.

Mr. LATTI. So, when you are saying you are accepting it right now, FERC doesn't have any objection right now for allowing aerial surveys for that information to come before you then?

Ms. MILES. We do not.



Mr. LATTA. OK. Would FERC object to a State agency using aerial survey data to issue a conditional Clean Water Permit when it is required for a FERC certificate?

Ms. MILES. I am not able to speak for the other agency.

Mr. LATTA. OK. And does FERC have any reason to oppose H.R. 3021?

Ms. MILES. I don't think there is a reason to oppose. We have mentioned what could possibly be a problem if we get a majority of the survey data through aerials late in the process.

Mr. LATTA. OK. Thank you.

Mr. Minzner, if I could turn to you, regarding the Fair Rates Act, in those situations when filings have taken effect under Section 205 without a Commission order, how does the Commission handle the rehearing requests of those parties that have sought rehearing?

Mr. MINZNER. Under the current structure of the Federal Power Act, my view and the stated view of the Commission is that rehearing does not lie. So, the rehearing conditions are simply dismissed. That has happened twice. So, rehearing is just not acted on.

Mr. LATTA. If the Commission dismisses these rehearing requests, what recourse do the parties have? Can they appeal the decision to the court of appeals?

Mr. MINZNER. Our position is, under the current version of the Federal Power Act, there is no opportunity for rehearing if the rates take effect as a matter of law. And because rehearing is a prerequisite to appellate review, there is no appellate review, either.

Mr. LATTA. Thank you.

And you note in your testimony that the Fair Rates Act would have significant benefits. Please explain on these benefits, particularly with respect to the parties seeking rehearing before the Commission and, also, parties seeking a redress in the court of appeals.

Mr. MINZNER. Rehearing and appellate review are important ways where individuals and entities that have not succeeded at the administrative stage could seek review of administrative action. It is an important procedural protection, and the primary benefit is that it would allow individuals who disagree with the action of the agency to seek redress in the court of appeals.

Mr. LATTA. Thank you.

Mr. Chairman, I am going to yield back the balance of my time.

Mr. WHITFIELD. OK. The gentleman yields back.

At this time the Chair recognizes the gentlelady from California, Mrs. Capps, for 5 minutes.

Mrs. CAPPS. Thank you, Mr. Chairman, for holding this hear and, also, to today's witnesses for your testimonies.

We all agree that we need to ensure a regulatory landscape that successfully addresses energy needs across this Nation. But decisions we make regarding our Nation's energy infrastructure could have both positive and negative impacts on our local economies, on public health, and environmental safety.

Some of these impacts have been seen, unfortunately, negatively in my District. Some of you may know that in May of last year an oil pipeline ruptured near the coast in my District, resulting in a spill that both polluted the land and the adjoining water. This oil fouled our beaches, and they are key for recreation and tourism in

the area, marred the pristine landscape, threatening the health of local plants and animals as well as the economy of the region. Questions about the safety of local seafood forced fisheries to close, resulting in lost wages, uncertainty in this industry, which is critical to the economy and culture of California's central coast.

Now cleanup efforts have remediated much of the immediate impact and fisheries have reopened, but we still have no idea what the long-term impacts will be. While I know that the AIR Survey Act that we are discussing today is focused on natural gas pipelines, the fact is that extraction, storage, and transportation of fossil fuels, whether oil or natural gas, this is a dirty and dangerous business.

The ongoing Aliso Canyon natural gas leak just south of my District is a clear example of this danger. Not only is the methane from this leak significantly increasing the region's greenhouse gas emissions, it is leading to adverse health impacts and it is forcing the relocation of nearby residents.

So, we must prioritize the health of our constituents, the safety of the environment, make sure we are working to ensure these priorities. One way to do that, of course, is to continue the push toward adopting clean renewable energy. And while we do that, we must also ensure that we are doing all we can to ensure safest practices for the development and operations of our Nation's energy infrastructure until we can fully replace fossil fuels.

Utilizing all the tools available to us when making decisions regarding public health and environmental safety makes a great deal of sense. However, I have several concerns regarding the replacement of one method with another when they may be fundamentally unable to produce the same results.

My question to you, Mrs. Miles, it touches on what many have been asking about, but I want to zero-in on the detail. Are aerial surveys able to identify all of the same details as ground surveys? For example, would aerial surveys be able to unequivocally state whether endangered or threatened species are present or if the landscape is a seasonal wetland, something of this nature?

Ms. MILES. Thank you, Congresswoman.

As I said, aerial surveys are not able to identify some particular resources in the detail that is needed to do an analysis and make a finding. Some of those that we have found that is the case to be, endangered species, cultural resources, and it could be wetlands also.

Mrs. CAPPS. Thank you.

You know, my fear is that the language in this bill requires different survey methods to be given equal weight and allows for one method to functionally replace the other, regardless of equivalency. Furthermore, while I appreciate that this discussion addresses one aspect of the energy infrastructure development, it is only the beginning of a much larger conversation we must have in this committee regarding not only pipeline siting, but also pipeline safety and supporting renewable energy technologies.

Mr. Chairman, I do look forward to continuing to work with you and other efforts to improve our Nation's energy infrastructure.

Thank you very much, and I have no further questions. I will yield back.

Mr. WHITFIELD. The gentlelady yields back.

At this time the Chair recognizes the gentleman from West Virginia, Mr. McKinley, for 5 minutes.

Mr. MCKINLEY. Thank you, Mr. Chairman.

Director Miles, if I could focus back on the five hydroelectric projects, there doesn't seem to be any real issue with those. So, I just wanted to look a little bit more. Is this common to seek an extension? How common is that to occur for an extension under the Section 13?

Ms. MILES. I don't have any statistics on it, but we do get some requests.

Mr. MCKINLEY. So, I am curious whether this is becoming more problematic. Do we need to do some things here to streamline the process to do that? You don't have any opinion on that then?

Ms. MILES. No. The one thing that I do see that is happening is we are issuing a lot more licenses for original construction of hydropower at existing dams. Years ago, 10 years ago, we were doing all relicensing.

Mr. MCKINLEY. Right.

Ms. MILES. So, there is a lot of interest now in adding hydropower at existing dams, so there are more projects out there to go through the task of getting to construction.

Mr. MCKINLEY. Director, if we didn't pass this, what would happen to the license? Would they have to start all over again?

Ms. MILES. Well, we would be required to terminate that license. It would expire. They would have to begin again. If the data is available and current enough, we would try to use as much as we possibly could, but we would need to go through the process with another public comment period.

Mr. MCKINLEY. So, essentially, it would delay the hydroelectric, it would delay the whole project, would it not?

Ms. MILES. It would delay construction, yes, to go through that process.

Mr. MCKINLEY. And I can remember about 3 years ago we had a representative of FERC here talking about, if we didn't start replacing some of the coal-fired power plants, particularly in the Mid-Atlantic, that we were going to see some rolling brownouts by next summer, mid-2017. So, I think it is very imperative that we keep moving to try to make that replacement as long as it is available.

I thank you for your testimony and I hope people will consider without any more question pushing these five projects.

Thank you very much. I yield back the balance of my time.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from Texas, Mr. Green, for 5 minutes.

Mr. GREEN. Thank you, Mr. Chairman and the ranking member, for holding the hearing.

I want to thank our witnesses for being here.

Ms. Miles, it is clear from today's hearing that FERC has a lot on its plate. Currently, natural gas exports, pipelines, the LNG, and hydropower liability all fall under FERC. In addition, if the House passed H.R. 8, it would expand FERC's permitting authorities to most of these sectors.

In your position as Director of the Office of Energy Projects, most of these issues fall in your office. Has the increased activity of the last few years affected your office? Have you required additional experts or have you been able to make do with the existing personnel?

Ms. MILES. We regularly review our resources to make sure they match with our tasks before us, and we discuss with the Chairman any needs for additional. We also use our contracting availability to help us with the peaks and valleys that are an inevitability of applications for pipelines, LNG, and hydropower projects.

Mr. GREEN. OK. We are on the horizon of another appropriations season. Does the Office of Energy Projects possess the resources to handle additional responsibility and activities or do you anticipate additional needs?

Ms. MILES. I think we are managing as we are able, and that is something that I talk about with our Chairman. It comes in as our budget requests.

Mr. GREEN. OK. FERC occupies such a unique role of coordinating with all the Federal agencies and State. Can you identify for us the top challenges facing the projects your office handles? What slows down the projects the most?

Ms. MILES. As I have said before, I think one of the most important things for the gas projects, and, actually, for the hydro projects also, is using our prefiling process, that it can be extremely valuable if everyone is active during that time.

The other thing that is very important is that the information that is needed for us to move forward and for other agencies also to do their permitting is collected during that prefiling stage. So that when the application is filed, it is complete and we are able to notice and go right to our environmental document.

Mr. GREEN. Let me follow up on that. Is there a particular Federal agency or State agency that doesn't respond as timely? Because I know prefiling helps a lot, but it still can be slowed down by agencies not getting back the information for you.

Ms. MILES. Right. I think we work really well to bring all the agencies to the table during this prefiling time and have regular conversations with them. Things vary from project to project in different parts of the country. So, I can't speak to any one in particular.

Mr. GREEN. OK. I know from Texas, obviously, we always have a lot of natural gas pipelines and cross-border with Mexico because we are actually selling more gas to Mexico. I was just wondering if it was a particular problem.

As you know, this can be challenging and potentially when dealing with State and local officials that possess different points of view than the Commission or the applicants. What remedial steps can FERC take as the coordinating agency if State and local officials do not cooperate in a timely fashion?

Ms. MILES. Well, we try to work with them. If someone is not able to come to the table, to bring them to the table, so they do participate. If not, we certainly make sure they understand how to participate in the process. And then, we keep the process moving along.

Mr. GREEN. So, is there any problem with any individual State that they may not get back with you as quick as they can or participate?

Ms. MILES. I can't speak to any in particular agency that that is the case. On one project every now and then we will have to work a little harder at it.

Mr. GREEN. And could the same be said about a Federal agency, because you have to also coordinate all the Federal agencies along with the State?

Ms. MILES. Yes, many, many of the Federal agencies and State agencies who are carrying out Federal authorizations are cooperating agencies with us in our environmental document. That is a very good way to have a simultaneous look at effects on all resources. So, we encourage that, and most agencies are very interested in doing that.

Mr. GREEN. OK. Thank you, Mr. Chairman. I yield back.

Mr. WHITFIELD. The gentleman yields back 16 seconds.

At this time I recognize the gentleman from Virginia, Mr. Griffith, for 5 minutes.

Mr. GRIFFITH. Thank you, Mr. Chairman.

Ms. MILES. I have listened to your testimony in regard to H.R. 3021, the Pompeo bill. I think what you are saying makes a lot of sense. I like aerial surveying in the first place, but I do think that some of my friends on the other side aisle have raised some issues, and you have touched on it a little bit as well in regard to being able to identify everything on the ground. You have indicated that there ought to be something before construction, if we use an aerial survey, because you can't spot salamanders and certain small creatures or understory plants necessarily. You might spot areas that look like they might have that growth, but you can't do it.

Is there anything in the bill that we need to change to make sure we get to where you want? I want to see the aerial surveying be equal, at least in the initial stages, as you have indicated you are fine with. But is there anything in the language that is currently proposed that we ought to change or look at in order to assure that we are also making sure that we don't overlook some important ecological asset?

Ms. MILES. I am not looking at the bill this moment.

Mr. GRIFFITH. Yes, ma'am.

Ms. MILES. We would be happy, staff would be happy to work with the committee on that.

I think the one thing that I have commented on is that, where ground access is available, currently, we are finding that the companies—and they want to also—are providing that data. So, that is an important point.

Mr. GRIFFITH. And I agree with that. It is also good if you are trying to figure out where you want to a line. I think it is quick. Particularly, you may see some problems if you are looking at siting a gas pipeline, that you can do that sometimes a lot faster in the air than you can on the ground. So, there are advantages and disadvantages, I suppose, to both.

In regard to H.R. 2984, Ms. MILES, I am not going to ask you to comment, the Fair Rates Act. I would just have to say to Mr. Kennedy that I have a lot of constituents who are willing to dig coal,

ship it to you by train or truck. We can lower your electric prices. We don't even need FERC action. What we may need is a little EPA action. But if we were allowed to, we could take care of your high rates for you.

Mr. KENNEDY. You are a good man, my friend.

[Laughter.]

Mr. GRIFFITH. With that, Mr. Chairman, I yield back.

Mr. WHITFIELD. Thanks, Mr. Griffith.

At this time I recognize the gentleman from Vermont, Mr. Welch, for 5 minutes.

Mr. WELCH. Thank you very much, Mr. Chairman, and thank you for being here and helping us.

I want to just talk a little bit about the Kennedy bill. It seems like it is just our linguistic mistake that there can be no appeal when the statute essentially was designed to give the ratepayers an opportunity to appeal. Are there any policy reasons that would suggest that what the Kennedy bill is proposing would in any way interfere with the capacity of FERC to carry out its responsibilities? I guess I will ask you that, Mr. Minzner.

Mr. MINZNER. Well, the bill is aimed at a situation that, while it has occurred, is relatively unusual. It has not been a common occurrence that rates have changed without a Commission order.

Mr. WELCH. No, I get that, but it happens. So, the way it is working around here is that a lot of times we don't get the new person appointed, so we can have a two-two situation, not just in FERC, but otherwise. The problems we have in trying to get a person confirmed, or the Senate has, shouldn't be the ratepayer problem, I think is the point of the bill.

What I am asking you is that, if this bill were passed, and, then, it meant that if it were a two-two decision, ratepayers would be able to do what they are now entitled to do if it were a three-two decision or a five-zero decision. Would that in any way compromise the responsibilities of FERC?

Mr. MINZNER. I think the only difficulty I foresee with the bill is one of reviewability or administrative functionality at the court of appeals. Right now, when an action goes up to the DC Circuit, they review the Commission order and they review the action. The DC Circuit may have a more difficult challenge if there is nothing to review from the Commission, but—

Mr. WELCH. I don't understand it. If there is a two-two decision, there is a two-two decision, right?

Mr. MINZNER. That is not exactly right, Congressman. There is no Commission action because it is two-two. It is not a situation like you might see from the U.S. Supreme Court where there is an actual opinion with two votes on either side. Here it just takes effect and there isn't a decision, and that would be the difficulty in administrative review. The court of appeals wouldn't have anything to look at. I do think that is a difficulty that could be overcome, if you were concerned about that.

Mr. WELCH. Right, by writing a decision or having the two write their decision and the two write theirs. So, there would, then, be something to review.

Mr. MINZNER. When it has happened in the past, there is simply no Commission order. There is nothing on either side.

Mr. WELCH. No, I get that, and I think the effort here is to try to provide that opportunity. Because it just seems kind of bizarre, whichever side of the case you are on, that you have got a statutory right to appeal unless it is deadlocked at two-to-two. So, all right.

Let me just go on to the second thing. Anyway, Mr. Kennedy, thank you for that legislation, which I hope we can all support.

The Supreme Court decision on demand response, from my point of view, is a tremendous tool that is going to help FERC try to help ratepayers keep their costs down. Can you talk, Ms. Miles, I guess, a little bit about that, or Mr. Minzner, and how you see that as being a useful tool for FERC in trying to address ratepayer concerns? And that is commercially and individual.

Mr. MINZNER. Sure, I can answer that question. The Supreme Court largely agreed with the Commission's argument that there is Commission jurisdiction to allow demand response to participate in the wholesale electric markets, and that is something the Commission has done in the past. In my view, demand response can be an effective tool at helping keep rates down by allowing the opportunity to avoid paying high-priced energy at peak times.

Mr. WELCH. Right. Our largest utility, Mr. Chairman, Green Mountain Power, is a strong supporter of demand response, and our utility users seem to be very happy with it. That includes some of our major companies. So, keep up the good work on that.

Mr. MINZNER. Thank you.

Mr. WELCH. Thank you. And I yield back, Mr. Chairman.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from Ohio, Mr. Johnson, for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman, and I want to thank the panel for being with us today as well.

I represent a District in eastern/southeastern Ohio that borders the Ohio River, the Muskingum River. We have got a lot of hydro-power potential there.

I want to kind of take off on something that Representative McKinley said. Given that so many projects miss the 2-year and 4-year statutory deadlines, often due to issues that are beyond the project's control and the applicant's control, perhaps it makes sense to update the Federal Power Act to either provide FERC with greater discretion on setting those deadlines, maybe more flexible deadlines, or to increase the number of years that an applicant can have to commence construction. Does FERC have an opinion on that?

Ms. MILES. Speaking only for myself, given that, however, the Chairman and former Chairmen have said up to 10 years was all right, if FERC had that authority to just do it itself, then folks would not need to come to Congress.

Mr. JOHNSON. Right, right. OK. Well, that is good to know because we certainly need to work that because, with the plethora of Federal regulations and environmental studies and all kinds of things that applicants have to go through, it has lengthened out these project timelines to get all of this stuff approved. So, I appreciate that.

Ms. Miles, as you are aware, the committee is keenly interested in supporting new energy infrastructure projects. One of the oppor-

tunities we see is in the hydropower sector, specifically adding generation to existing nonpowered dams. We have some of those in Ohio. That is what we are talking about as part of today's hearing.

So, these low-impact, renewable, and clean energy resources—that is what they are—are important. Yet, we continue to hear of problems getting projects approved, financed, and built, particularly in comparison to other energy projects.

So, what is your view on these opportunities with hydropower adding power generation to existing dam structure and what is the reason we have not seen more of these type projects built?

Ms. MILES. My view is that there is a lot of hydropower potential in the U.S. at existing dams. I think the Department of Energy has issued reports to that effect.

Mr. JOHNSON. What is the holdup?

Ms. MILES. I think that we have worked very hard with the other agencies who need to issue permits on those projects to be able to move them through the process expeditiously while being thorough and fair in addressing all resource areas.

Mr. JOHNSON. Do you see it as a FERC issue? Is it a Corps issue? Is there anything that FERC can do and, more importantly, is there anything Congress can do that would help move these projects along more quickly?

Ms. MILES. I think that the issue is really trying to work through these things simultaneously or everybody working at it together. That does vary, depending on agencies that we are working with at some of these projects.

Mr. JOHNSON. Let me make sure I understand what you are saying. So, you are saying that—and I am paraphrasing—so, you are saying that sometimes these projects become serial agency to agency to agency rather than parallel agencies—

Ms. MILES. Correct.

Mr. JOHNSON [continuing]. Moving things along collaboratively? How do we solve that problem?

Ms. MILES. Well, we have been working with the other agencies where we—

Mr. JOHNSON. So, you do think it needs to be solved?

Ms. MILES. That is an issue. Frankly, I mean, we have worked with the Corps of Engineers quite a lot on this. We have a Memorandum of Understanding for how we will work together, and we are in the process right now of working further with them on how to have our processes work well together.

Mr. JOHNSON. But it is clearly still a slow process.

And my time is up. I am going to have to yield back.

Is it safe to say you agree that we need to do better collaboration between the agencies to parallel these things where we can? Is that what I am hearing you say?

Ms. MILES. Yes.

Mr. JOHNSON. OK.

Ms. MILES. At projects where that is not happening now, yes.

Mr. JOHNSON. All right. Thank you very much, and I yield back.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from Texas, Mr. Flores, for 5 minutes.

Mr. FLORES. Well, thank you, Mr. Chairman.



Ms. Miles, we talked a few minutes ago about the electricity rates of the Northeast being among the highest in the country. Can you tell me why that is? What is the reason for that?

Ms. MILES. I can't speak to that. Do you want to speak to it?

Mr. MINZNER. I can speak to it only in the most general sense. The electric rates vary across the country for a wide range of reasons. I don't think there is a specific reason.

Mr. FLORES. What would the top two or three reasons be?

Mr. MINZNER. It is really a mix of the location, generation, and load across the country. So, it is, frankly, the intersection of supply and demand of energy.

Mr. FLORES. OK. So, part of it could be the fuel sources that they are restricted to use, correct? I mean, Mr. Griffith sort of touched on this a few minutes ago. If there were more infrastructure to get natural gas pipelines in the Northeast, they could have natural-gas-fired electricity generation. Wouldn't they be better off? Wouldn't that solve a lot of the rate issues?

Mr. MINZNER. I am not sure I can speak specifically to that.

Mr. FLORES. Ms. Miles, can you speak to that?

Ms. MILES. I can't, either.

Mr. FLORES. Well, I was going to say I can answer it for you. The answer is yes. And so, I think that is the reason the aerial survey bill is very important to look at. I do agree you have got to have ground surveys as well, but I think the aerial surveys help with the initial siting, and so forth.

This is something I think you need to take a look at. How can the Northeast, how can New England be helped with their electricity rates? And the best thing is for better infrastructure. So, I would ask you to think about that as you are going through your permitting planning process in the future.

Thank you, Mr. Chairman. I yield back.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman. Mr. Barton, did you want to ask questions?

Mr. BARTON. No.

Mr. WHITFIELD. OK. Mr. Hudson of North Carolina is recognized for 5 minutes.

Mr. HUDSON. Thank you, Mr. Chairman, and thank you for holding this important hearing.

Thank you to our panel for participating.

I am proud to be a cosponsor of Representative Pompeo's bill to amend Section 203 of the Federal Power Act, as well as Representative Kennedy's Fair Rates Act. I am also glad to see Representative Foxx's bill move forward regarding the Kerr Scott Hydropower Project in Wilkes County, North Carolina. These are common-sense bills, and, Mr. Chairman, I appreciate your bringing them before this subcommittee.

To get to my questions, I would like to build on the line of questioning my colleague Mr. Johnson raised dealing with hydroelectric power. Ms. Miles, you note in your testimony that FERC has generally taken the position of not opposing legislation that would extend the commencement of construction deadlines no further than 10 years from the date that license in question was issued. So, because each of the hydro bills before us today provides for com-

mencement of construction deadlines that do not exceed 10 years from the dates the respective licenses were issued, is it true that FERC does not oppose any of these bills?

Ms. MILES. Yes, we do not; I do not.

Mr. HUDSON. Thank you.

Historically, hydropower has played a primary energy storage role with hydro pump storage currently providing 97 percent of energy storage in the U.S. What is your view on the energy storage and pump storage in particular?

Ms. MILES. Pump storage does provide considerable grid scale storage, and it can be very valuable. We have noticed an increase in applications for pump storage projects, especially in areas where there is a lot of wind and solar projects.

Mr. HUDSON. Well, what are the market issues that need to be addressed to support development of new pump storage and what can FERC do, either by itself or working with State PUCs and the ISOs, RTOs?

Ms. MILES. I am not really able to speak to market issues. Our primary responsibility is to analyze the projects that come before us in a very thorough, fair, and scientifically sound way, and to have a process that allows us to do that.

Mr. HUDSON. I appreciate that.

Have there been any issues working with State PUCs and others that could be addressed or better handled, either through your agency or things that we could do to support that?

Ms. MILES. The State PUCs typically are not involved with us as we do the environmental review and licensing of those kinds of projects, action on those kinds of projects.

Mr. HUDSON. OK. Would you agree that FERC has a significant level of expertise and experience in analyzing environmental effects of hydro projects under its jurisdiction?

Ms. MILES. Yes.

Mr. HUDSON. Does FERC currently employ biologists and other scientific experts to provide guidance on analyzing the environmental effects of hydro projects?

Ms. MILES. Yes. Our resources, we have experts in each resource area that we analyze.

Mr. HUDSON. What is the number and experience of the staff administering the licensing and regulation of hydro projects, the number of PhDs, master's degrees, et cetera?

Ms. MILES. I can't give you the specific number, but many of our staff have master's degrees; some have PhDs.

Mr. HUDSON. And if you could provide us that list?

Ms. MILES. The list of which do? Certainly.

Mr. HUDSON. That would be great. And master's degrees, just what the expertise levels are.

Ms. MILES. Certainly.

Mr. HUDSON. That would be great.

Regarding the FERC hydropower licenses generally, do you agree that the licensing processes could be shortened if the Commission had the ability to set enforceable deadlines and coordinate the other Federal and State approval involved?

Ms. MILES. I didn't come prepared really to testify on—I think you are getting at H.R. 8. However, I have spoken in the past that

enforceable deadlines can be a valuable, can be—I am going to move back and say I didn't come prepared, but we would be happy to answer questions.

Mr. HUDSON. OK. I would appreciate that, if you can provide us with an answer.

Ms. MILES. Sure.

Mr. HUDSON. All right. Mr. Chairman, that exhausts my line of questioning. I would yield back. Thank you.

Mr. WHITFIELD. The gentleman yields back.

At this time the Chair recognizes the gentleman from Mississippi, Mr. Harper, for 5 minutes.

Mr. HARPER. Thank you, Mr. Chairman.

And thanks to you, witnesses, for being here.

Just to comment, Ms. Miles, I believe you addressed it earlier with Mr. Johnson, but just as a side note, it is my understanding that four new hydro projects have been approved in Mississippi, and we appreciate FERC's diligence in those matters.

Mr. Minzner, you state in your testimony that the legislation to amend Section 203 of the Federal Power Act could ease the administrative burden on the Commission staff and the regulatory burden on the industry without a significant negative impact on the Commission's regulatory responsibilities. Can you please elaborate or briefly expand on these potential benefits of the legislation?

Mr. MINZNER. Thank you, Congressman. On the burden side, certainly every 203 filing requires review by Commission staff and action by the Commission through some sort of order. A de minimis threshold would mean that, for those falling below the \$10 million level the Commission would not need to take that action. And similarly, on the side of industry, they would not need to make the initial filing, which would ease their burden.

In terms of the effect on the regulatory program, the filings that come in for mergers or consolidations of smaller facilities, those below the \$10 million, are ones that are less likely to impose potential consequences on rates or on competition.

Mr. HARPER. Great. Thank you.

With the interest of time, Mr. Chairman, I will yield back.

Mr. WHITFIELD. The gentleman yields back.

At this time I want you all to know we are not trying to discriminate against Mr. Kennedy. He is a member of the Energy and Commerce Committee, but he is not a member of this subcommittee. Even though we are considering one of his bills today, he has patiently waited until everyone else has asked questions. So, at this time we will recognize Mr. Kennedy for 5 minutes.

Mr. KENNEDY. Mr. Chairman, thank you very, very much. I appreciate the opportunity to join you and squat in on the Energy and Power Subcommittee.

I appreciate the kind words from my colleagues on the other side of the aisle on the offer for both purchasing of coal, Mr. Griffith, very well noted. Thank you. And to the rest of my colleagues as well, thank you.

Mr. Minzner, a couple of questions for you, sir, to begin with. You mentioned in your testimony that Section 205 of the Federal Power Act includes a 60-day clock for review in which FERC will take action. Can you discuss what requirements the Commission

has within those 60 days and does FERC have an affirmative requirement to actually act?

Mr. MINZNER. The statute does not require the Commission to act. However, the Commission typically does take action on the filing by approving it, denying it, or requesting additional information from the utility. The consequences, though, if the Commission does not act in that time period, is the rates do take effect.

Mr. KENNEDY. And I know you are well aware, obviously, of what happened in New England in 2014 with that Capacity Auction No. 8 done by the Commission. You mentioned in your testimony and response to questions that that is an exceedingly rare occurrence. Does that only occur when there are four Commissioners present or has it happened when there is an even number—or excuse me—an odd number of Commissioners as well?

Mr. MINZNER. Rates have taken effect not solely as a result of a two-two split of the Commission. In fact, under the Federal Power Act, the situation you mentioned, ISO New England, I believe is only the second time that I am aware of that it has happened as a result of a two-two split. It has happened under other occasions, though.

Mr. KENNEDY. Can you just shine some light on what those other occasions, if you can recall what those other occasions were?

Mr. MINZNER. We don't know the reason for all of them. On one occasion, the Commission stated that the rates took effect inadvertently because of Commission failure to act.

Mr. KENNEDY. OK. Given that the Commission is currently down to four Commissioners, what tools does the Commission have to avoid a deadlock on any rate change filed across the country? I realize that most changes are noncontroversial and unlikely to result in a deadlock anyway, but this outcome is certainly, obviously, not impossible. Before we can, hopefully, get this bill across the finish line, what options are available to FERC to provide proper access to administrative and judicial review for ratepayers? There is, as you are well aware, an auction set to take place in New England next week. Given the fact that there are four—another Commission has noticed his intent to retire; no other nomination is currently in the pipeline—what, if any, tools does FERC have to make sure we don't end up in the same place?

Mr. MINZNER. I know the Commission staff and the Commissioners are very dedicated to working collaboratively to reaching outcomes that can have the support of the majority of the Commissioners. I think certainly the Commission has endeavored to do that in the past and has effectively managed to reach a majority vote on almost every occasion.

Mr. KENNEDY. But there is nothing—and I appreciate that and I understand that—but has there been any specific policy change internal to FERC where, with four Commissioners, in the advent of a hearing having to go through with four Commissioners, and that notice being put forth, that there would be some sort of review? Provided that this bill doesn't make it to the President's desk by the time that those Commission results are near, do the auction results need to be certified?

Mr. MINZNER. In my view, under the current version of the Federal Power Act, if the Commission does not act as a result of a two-

two split or otherwise, there would not be rehearing or appellate review available under the current statutory framework. Other than working to reach consensus and a majority vote, I am not aware of other internal policy changes.

Mr. KENNEDY. OK. Thank you. I yield back.

Mr. WHITFIELD. The gentleman yields back, and that concludes the questions for the first panel.

Ms. Miles and Mr. Minzner, thank you for being with us. We look forward to working with you, as we continue our efforts on all of this legislation.

At this time I would like to call up the witnesses on the second panel, if you all would come and have a seat.

I know that Mr. Kennedy is going to be introducing one of our witnesses. So, I will call on him to make that introduction at this time.

Mr. KENNEDY. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to introduce a fellow member of Massachusetts that has come down on relatively short notice to join us here today, Mr. Bottiggi, who runs the Braintree Power Plant, a municipal power plant, who has a deep knowledge in how our energy systems work in Massachusetts, how our capacity markets work, and the intricacies surrounding the increase of cost that we have seen in recent history in Massachusetts. He is one of the few people I have found, Mr. Chairman, on this planet that can actually explain this in language that people understand, for which I am eternally grateful.

So, we are grateful to have you here. I look forward to your testimony and the light that you can shine on how things are working and how they are not working in Massachusetts and across the country.

Thank you.

Mr. WHITFIELD. Well, thank you very much for that introduction. I will at this time introduce the other members of this panel.

First, we have Mr. Timothy Powell, who is the Director of Land, GIS and Permits at the Williams Company.

We have Mr. Edward Lloyd, who is the Evan Frankel Clinical Professor of Environmental Law at Columbia University School of Law. He is here today on behalf of the New Jersey Conservation Foundation and the Stony Brook-Millstone Watershed Association.

We also have Mr. Bill Marsan, who is the Executive Vice President and General Counsel and Corporate Secretary of the American Transmission Company.

We have Mr. Tyson Slocum, who is the Energy Program Director of Public Citizen, Inc.

And then, we have Mr. Jeffrey Leahey, who is the Deputy Executive Director for the National Hydropower Association.

We thank all of you for taking time in your very busy schedules for being with us today. I am going to call on each one of you, and you will be given 5 minutes for your opening statements. Be sure and pull the microphone close, and make sure the microphone is on.

Mr. Powell, we will recognize you first for your opening statement for 5 minutes.

**STATEMENTS OF TIM POWELL, DIRECTOR OF LAND, GIS AND PERMITS, THE WILLIAMS COMPANY, ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA; EDWARD LLOYD, EVAN M. FRANKEL CLINICAL PROFESSOR OF ENVIRONMENTAL LAW, COLUMBIA LAW SCHOOL, ON BEHALF OF THE NEW JERSEY CONSERVATION FOUNDATION AND THE STONY BROOK-MILLSTONE WATERSHED ASSOCIATION; BILL BOTTIGGI, GENERAL MANAGER, BRAINTREE ELECTRIC LIGHT DEPARTMENT, ON BEHALF OF THE NORTHEAST PUBLIC POWER ASSOCIATION; BILL MARSAN, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN TRANSMISSION COMPANY; TYSON SLOCUM, ENERGY PROGRAM DIRECTOR, PUBLIC CITIZEN, INC., AND JEFFREY LEAHEY, DEPUTY EXECUTIVE DIRECTOR, NATIONAL HYDROPOWER ASSOCIATION**

**STATEMENT OF TIM POWELL**

Mr. POWELL. Thank you, sir.

Mr. Chairman, Ranking Member, and members of the subcommittee, my name is Tim Powell, and I am the Director of Land, GIS and Permits for the Williams Companies. I am also appearing today on behalf of the Interstate Natural Gas Association of America, the industry association representing the interstate natural gas pipeline industry.

Mr. Chairman, I appear today to support House Resolution 3021, introduced by Representative Pompeo and cosponsored by Representatives Mullin, Schrader, and Meeks, which endeavors to address a permitting challenge facing jurisdictional pipelines, which I shall explain. We thank the committee for including a version of that language as part of H.R. 8.

FERC has long served as the lead agency for considering pipeline applications, pursuant to the Natural Gas Act. In Section 313 of the Energy Policy Act, this committee and this Congress instructed Federal and State agencies involved in the process to cooperate with the FERC and comply with the permitting schedule established by the Commission.

However, the permit process followed by some Corps of Engineer Districts and corresponding State agencies, pursuant to their Clean Water Act responsibilities, can cause them to fail to meet the FERC schedule, resulting in permit delays. This is most notable in the agency's deeming they have insufficient field survey data to initiate their review. These processes are not required by the Clean Water Act and could be modified to better conform with the FERC schedule. That is the goal of this legislation.

Often, the first time an affected landowner has face-to-face contact with the company is when an agent is knocking on their door and asking that landowner to sign a form giving the company permission to begin performing field surveys. These data are used to support the NEPA review, identify the least-damaging alternative, determine constructability, and obtain other permits and approvals, such as those required by the Clean Water Act.

Many landowners elect to participate in the process, but some elect to exercise their right to deny permission. In my experience,

Williams receives approximately 70 to 80 percent survey permission prior to the certificate filing.

For various reasons, the remaining landowners either delay survey approval or outright deny it. Williams and other INGAA member companies fully respect each landowner's right to decide if and how they participate in the project. The problem is that some Corps of Engineer Districts and State agencies with 401 water quality certification responsibility will require an applicant to conduct up to 100 percent full survey in order to deem a permit application complete. In other cases, the Corps and responsible State agency will begin processing applications, but will not make a decision without 100 percent field survey. This approach is not required and, indeed, in some cases the agencies will accept the best-available data and move forward with condition permit decisions.

If any agency is to require a percentage of field survey beyond which the company can obtain in order to deem an application complete, the company is placed in a classic Catch-22 situation. The FERC process anticipates that companies will submit applications for Federal approvals prior to or concurrent with the application for a certificate. Typically, the time between a certificate filing and an order is around 1 year. This is the same timeline that an agency administering the 401 water quality certification has to act once they deem an application complete. These two timelines can only align if the 404 application is deemed complete and runs in parallel to the certificate proceeding.

The solution is to direct all other agencies involved in issuing Federal authorizations to accept data gathered by means other than on-the-ground surveys. If the agency elects, any permits issued based on remote sensing could be conditioned upon ground survey verification once access has been obtained. This is an important point and bears emphasizing.

If the agency deems it necessary, no ground disturbance would occur on remote-sense tracks prior to verifying that data by on-the-ground survey. Non-field-survey data-gather methods may include satellite photography, sensors attached to fixed-wing aircraft, helicopter aerial photography, previous mapping, or by studying the area from accessible locations.

The proposal solution has a number of obvious benefits. It allows pipeline companies and regulators to assess likely impacts and make informed decisions, aligns the certificate proceeding with other Federal reviews, and allow FERC to effectively fulfill its lead agency mandate while minimizing the adversarial relationship between landowners and the pipeline company, when agencies require more ground survey than property owners want to provide.

In summary, Mr. Chairman, we believe the legislation being discussed is a win/win for all involved in the permitting process and we urge its adoption.

[The prepared statement of Mr. Powell follows:]

Statement of Tim Powell, Director of Land, GIS and Permits, The Williams Companies

On Behalf of the Interstate Natural Gas Association of America

before the Committee on Energy and Commerce,

Subcommittee on Energy and Power

February 2, 2016

Mr. Chairman, Ranking Member and members of the Subcommittee. My name is Tim Powell and I am the Director of Land, GIS and Permits for The Williams Companies. In my current role, I oversee the department responsible for developing the environmental elements of our Natural Gas Act filings as well as all natural and cultural resource data collection and reporting required to support Federal and state permitting in The Gulf of Mexico region and the Atlantic coast. Williams is a Tulsa, Oklahoma based company and is a leading provider of natural gas related infrastructure in the United States, including natural gas gathering systems, processing facilities and interstate pipelines. The Williams systems touch about 30% of the natural gas consumed in this country on a daily basis. I am appearing today on behalf of the Interstate Natural Gas Association of America, the industry association representing the interstate natural gas pipeline industry.

I am here today to express our support for H.R. 3021, introduced by Mr. Pompeo and co-sponsored by Reps. Mullin, Schrader and Meeks. This legislation, and the version of the language included in H. R. 8, would address one important cause of interstate pipeline project delays while protecting the integrity of the NEPA review and other related permitting processes.

Section 313 of the Energy Policy Act (2005) amended the Natural Gas Act to instruct Federal and state agencies considering an application for a Federal authorization relating to a project jurisdictional to the Federal Energy Regulatory Commission (FERC or Commission) to cooperate with FERC and comply with the permitting decision deadlines established by the Commission. Unfortunately, however unintended, the practices prescribed by some districts of the Corps of Engineers and state agencies acting under Sec. 404 and 401 of the Clean Water Act respectively, make compliance with the FERC schedule effectively



impossible. The good news is that fixing this problem is relatively simple and will decrease the acrimonious relations that can develop between companies and landowners over accessing the proposed right-of-way.

We need new natural gas infrastructure in this country but as this Committee has recognized, siting and permitting those pipelines is a complicated, time consuming process. FERC as the lead agency has the authority to establish a schedule for all Federal Authorizations to be issued by other agencies in accordance with 15 U.S.C. Section 717n(c)(1), but the other agencies rarely adhere to these deadlines. In the case of the Corps of Engineers districts and states acting under the Clean Water Act, this is because the type of data they believe they need can only be obtained once the developer has complete or near complete access to the route, but the delay in the permitting process caused by this position is in direct contradiction of the Natural Gas Act's intent for agencies to act within the permitting schedule.

By way of background, after a project is announced, companies begin the process of obtaining survey permissions, conducting all the required environmental, cultural and engineering studies, and drafting often voluminous reports regarding various environmental conditions along the route as well as other information, such as potential sites of cultural or historic significance, the presence of endangered species, soil conditions, etc. All this information is required as we make our application to FERC for a certificate of public convenience and necessity pursuant to the Natural Gas Act and our permit applications to other agencies who review specific aspects of the project.

Often the first time an affected landowner has face-to-face contact with a company is when an agent knocks on their door and asks the landowner to sign a form giving the Company permission to begin performing field surveys on their property in order to develop the information needed for the NEPA review and other permits. Landowners can be increasingly reluctant to grant that permission, and frankly, project opponents often rally landowners in an attempt to convince them to deny this permission. As companies, we respect the rights of landowners who choose not to cooperate in the process, but as I referenced above, the process itself, particularly when the Corps is involved, often mandates that we collect information from field

surveys actually conducted on the property in order to have our application deemed complete and processed.

As I indicated, this Committee and the Congress has recognized the complexity of the permitting process and in the Natural Gas Act has directed FERC, acting as the lead agency, to develop the Federal Environmental Assessment or Environmental Impact Statement and to set a schedule for other agencies to act on their permits. The purpose is to create a schedule for the agencies that dovetails with the timeline for FERC to reach a decision on whether or not to issue a certificate to allow the project to move forward. The provisions of H.R. 8 further define the role of FERC in this process.

While the Corps of Engineers, and state agencies providing the Section 401 Water Quality Certification, must follow the requirements of the Clean Water Act, they also have an obligation to fashion a process that allows them to complete their statutory obligations for permitting their portion of the project within the FERC schedule. These permits deal with how the project would impact wetlands and water bodies such as streams, creeks, and ponds and how the Company will mitigate impacts to these resources. Instead, some Corps of Engineers districts and state agencies with 401 water quality certification responsibility will require an applicant to conduct up to 100% field surveys in order to deem an application complete. In other cases, the Corps and the responsible state agency will begin processing applications, but will not make a decision without 100% field survey data. This means the if landowners refuse to grant survey permission, which is their right, the work required by the agencies cannot be completed.

It doesn't have to be this way. There are cases in which the agencies will accept the best available data and move forward with conditioned permit decisions. In each case we are dealing with same Section 404 and Section 401 authorizations but with a permitting process that is applied inconsistently. While we understand the Corps Districts and states involved in this process would prefer to have an applicant provide data based on actual ground surveys of a right-of-way, in practice, it is rarely accomplished prior to issuance of a final FERC Order. Requiring 100% field survey data may be fine for projects where a developer actually owns the property but in the case of linear facilities involving rights-of-way, we must

obtain permission from each landowner along the route which for major projects could number in the hundreds or even thousands.

An agency requirement to obtain 100% or near 100% ground survey data sets a bar that is increasingly beyond what landowners are willing to provide to a company and sets up a classic “catch-22” situation. On the one hand, the company must seek to gain access to the land in order to gather the data desired by the agencies and to attempt to remain on the timetable set forth by FERC, yet to the extent landowners choose not to cooperate, it becomes impossible for a company to produce a complete application. The situation is made worse when project opponents, whose principal objective is to stop pipeline development, have discouraged landowners from voluntarily providing access while simultaneously challenging FERC’s authority to issue a conditional certificate, which allows for the use of eminent domain, as a last resort, to obtain the required information.

In one recent case, Williams was forced to complete the FERC certificate process and then use the eminent domain authority granted under the Natural Gas Act to gain access to many parcels along the right-of-way to complete the data collection for the water permits for both the Corps of engineers and the state agency making the Sec. 401 certification. This approach totally disrupted the project schedule since the time involved to obtain possession, conduct season-appropriate field surveys, prepare drawings, submit supplemental data and begin the 12 month Section 401 regulatory clock resulted in a sequential approach to permitting adding one or more years to the process.

In another case, however, the Corps of Engineers and the state agency administering the 401 Water Quality Certification accepted less than 100% field survey for the purposes of administrative completeness and permit review. The Corps of Engineers plans to issue a conditional permit that requires the submittal of field survey data prior to construction in cases where landowner permission was previously denied. This problem isn’t a problem with the Clean Water Act, it’s a problem that some Corps Districts and State agencies are less flexible in how they allow an application to move forward.

Again, as the Pompeo bill reflects, this is not a problem that requires amending the Clean Water Act. All

that is required is to authorize FERC, as part of its lead agency role, to direct other agencies involved in issuing federal authorizations to accept data gathered by means other than by on-the-ground surveys and to allow the use of such data when necessary to comply with the FERC project schedule. Any permits issued based on remote sensing could be conditioned upon ground survey verification once access has been obtained. In other words, to the extent an applicant is unable to obtain ground survey data within the time required by FERC's Notice of Schedule for Environmental Review because access has been denied, agencies must rely upon the applicant's use of data gathered through the tools that use remote sensing techniques without disturbing the land owners. This could be data gathered by satellite photography, sensors attached to fixed wing aircraft, helicopter, aerial photography, previous mapping of an area, or by studying the area from accessible locations on either side of the proposed right-of-way.

This concept is not foreign in the realm of natural and cultural resource studies. Remote sensing is referenced in FERC's *Guidelines for Reporting on Cultural Resources Investigations for Pipelines* and the 1987 *Corps of Engineers Wetland Delineation Manual* establishes methodologies for identifying wetlands without field visits by relying on other data, or combining field delineated wetlands with remote sensed or other existing data for wetland identification. The manual even states that remote sensing is one of the most useful sources available for identification and delineation of wetlands. The technology has only improved since 1987.

If at the end of the day a project does not move forward, the rights of landowners seeking not be disturbed will have been honored. If a project does go forward, on-the-ground surveys can be conducted prior to the start of construction. Any variances between remote sensed and ground truthed data can be corrected and the mitigation adjusted accordingly.

This solution has a number of obvious benefits: It gives regulators information they need to make informed decisions, keeps the permitting process on track, doesn't require any changes to the Clean Water Act, allows FERC to effectively fulfill its lead agency mandate and does not put unwilling landowners and the pipeline company in an adversarial position over the sensitive question of access to private property.

We understand why the Corps and affected state agencies might prefer to have 100% ground survey data in hand before acting on a 404 permit or 401 request. Field collected data provides a more exact boundary for review and precise calculation of impacts. What is proposed here would require the agency to make a permitting decision based on very good, but not necessarily perfect data. However, this is again contemplated in the 1987 *Corps of Engineers Wetland Delineation Manual* which notes that subsequent field survey may be required to correct any variances. While the agency may prefer the former approach, if the methodology no longer yields a decision in a reasonable time, it is inconsistent with the Energy Policy Act and we believe Congress should direct the agency to take a different approach when necessary to meet the designated schedule. This is wholly consistent with the Corps' own process outlined in its 1987 manual.

As we have discussed this approach to Corps and state delegated permitting of interstate pipeline projects, several questions and concerns have been raised. I would like to address those concerns. Some have questioned whether or not the "conditional approval" approach works. Actually, most FERC certificates are conditioned on one or more follow up actions being completed and verified, so this is nothing new in the realm of pipeline permitting and the practice has been upheld by various courts. This approach is ideal where not all issues can be resolved within the time frame of the permitting schedule. In addition, as noted previously, the Corps of Engineers already contemplates this method and is using this remedy on a current project. Therefore, we are simply requesting this be applied consistently across all Corps districts and agencies administering Section 401.

Others have asked if companies will use this authority to avoid doing ground surveys altogether. The answer is definitely "no". FERC requires the Applicant to conduct ground surveys for a wide variety of environmental and cultural resource features. In addition, the Applicant must demonstrate that it has avoided and minimized impacts to the maximum extent practical and that the pipeline has been routed and designed for safe construction and operation. There is no advantage to the company from delaying this necessary survey work until the end of the process but before construction starts. The earlier in the process a company gathers this data the better information it has to make routing decisions while also

keeping on schedule. As noted earlier, having to wait to perform surveys until after the project certificate has been issued adds a year or more to the project schedule. The company has every incentive to gather this data as early in the process as possible so that it can demonstrate it has met the threshold for avoidance and minimization. Where landowners allow permission the company will continue to collect all necessary information.

The other primary concern that has been raised is that it somehow collecting data through remote means violates the landowner's rights. This concern is misplaced. There are no privacy rights that prevent over flights of areas or data being obtained from satellite photography. This entire country has been photographed, especially since the advent of aviation. As a landowner, I can refuse permission to someone for entering my property but I have no ability or right to create a personal "no fly" zone in the air above my property or to keep people from looking at my property from a public road. Rules may change over time and as companies we are required to follow those rules, but our proposal in no way weakens privacy rights and in fact, since this data is required by the government for our applications, it actually helps protect privacy rights.

In summary, Mr. Chairman, we believe the legislation being discussed is a win/win for all involved in the permitting process and we urge its adoption.

Mr. WHITFIELD. Thank you very much.

Mr. Lloyd, you are recognized for 5 minutes for your opening statement.

#### STATEMENT OF EDWARD LLOYD

Mr. LLOYD. Thank you, Mr. Chairman and Ranking Member, and members of the committee.

I take a different view than the last witness. Unfortunately, I don't think the aerial surveys are going to solve the problem that we all want to solve. Scientists for the New Jersey Conservation Foundation have looked at 1,000 plant and animal species in New Jersey that would have to be surveyed under the Endangered Species Act and other rare and specified species. We found that less than 1 percent of those species can be identified with aerial surveys.

So, the problem is that, if we begin to rely on aerial surveys, especially in the prefiling process, we are going to have to go back and verify. To me, at the end of the day, it is going to delay the process, not expedite it.

I think all of us want the best data we can have. The problem is that aerial surveys, by and large, are not going to get us the data that we need to do the proper analysis by the agency. Of the 1,000 species we looked at, there were only 1 percent that actually could be identified by aerial surveys. So, it means we are going to have to go on the ground and ground-truth it.

If we don't do it upfront, it could lead to having to revisit it. If we go to verification, then we have to revisit those surveys, and we may have to change the pipeline route. It is not efficient for any of us.

So, we would suggest that the aerial surveys are really not solving a problem and, in fact, may create more delay and drain more resources from the agency.

The other thing I wanted to mention is the impact on landowners. In New Jersey we have already experienced the use of aerial surveys. We have had a number of complaints from landowners that they have been disturbing, especially in rural areas, livestock and the peaceful privacy of homeowners. So, aerial surveys can have unintended negative consequences for homeowners, and I think we have to be very careful about how quickly we want to authorize those aerial surveys in place of the ground surveys, which give us much better data and, in fact, I think the data that is needed for the agency.

Finally, I just want to mention what we have seen, as this committee has heard this morning, a proliferation of pipeline proposals. There are now 80 pending proposals before FERC. We would highly recommend that FERC begin to look at these, instead of as individual pipelines, look at these on a regional basis.

I think a programmatic environmental impact statement is one way to address that, where, again, it would save agency resources if we look at these pipelines together on a programmatic basis. Then, there may be additional individual pipeline analyses we need to do, but the programmatic EIS would enhance our decision-making process, would enhance FERC's ability to make these analyses, and it would save resources for the companies and for FERC.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Lloyd follows:]



**Testimony of Edward Lloyd**

Evan M. Frankel Clinical Professor of Environmental Law  
Columbia Law School

on behalf of the  
New Jersey Conservation Foundation and  
the Stony Brook-Millstone Watershed Association

Before the U.S. House of Representatives Subcommittee on Energy and Power  
of the Committee on Energy and Commerce

A Legislative Hearing on Eight Energy Infrastructure Bills

February 2, 2016

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### **Summary**

Section 7 of the Natural Gas Act requires that a natural gas company seek approval from FERC in the form of a “certificate of public convenience and necessity” before constructing or extending facilities for transporting or selling natural gas. 15 U.S.C. § 717f (2012). FERC’s current approval process, however, has failed to adequately assess whether additional pipelines are required by public necessity. Despite the recent proliferation in pipeline proposals, FERC continues to evaluate these pipelines individually rather than examine them systematically or regionally to determine whether and how much new infrastructure is needed. Instead, FERC should embark on a regional or programmatic examination of the need and advisability of all of these proposals. A programmatic environmental impact statement (PEIS) is one method that FERC should consider to examine these proposals on a more systematic basis.

H.R. 3021, the AIR Survey Act of 2015, only encourages further deficient review by facilitating the approval of these pipelines without proper assessment of the environmental costs. The certificate application process requires the completion of a detailed environmental report that must include analysis of the project’s impact on, among other resources, plant and animal species and wetlands. Yet of the 1001 special concern, threatened and endangered plant and animal species found in New Jersey, only 8, or 0.8%, can even be identified through the use of aerial surveys. Similarly, aerial surveys are insufficient in identifying wetlands along proposed pipelines. The bill, therefore, allows for certification on the basis of a survey technique that is unable to catalog much of the data required for an effective review. This can have significant concerns for the property rights of affected homeowners. If FERC does not require verification of aerial data, then private companies will be able to exercise eminent domain indiscriminately.

The ability to expropriate rights-of-way should come only after proper analysis merits project construction.

### **I. Introduction**

New Jersey Conservation Foundation is a statewide land conservation organization founded in 1960 that has preserved over 130,000 acres of land throughout the state. Stony Brook-Millstone Watershed Association, founded in 1949, is a non-profit organization that works to protect New Jersey's water and environment through conservation, advocacy, science, and education.

The increase in hydraulic fracturing and other technologies has led, over the past few years, to a proliferation of applications at FERC to build new pipelines. In 2014 it was reported that since 2006 FERC had approved 451 out of 803 applications for pipelines and related infrastructure projects. However, this is not to say that FERC had rejected nearly half of all applications. Instead, of the 258 projects that had been denied or withdrawn, FERC could not provide further details regarding the number of projects that had been denied; one report found no denials of pipeline applications and only one denial of an application for a natural gas storage site. Peter Moskowitz, *With the Boom in Oil and Gas, Pipelines Proliferate in the U.S.*, YALE: ENV'T 360 (Oct. 6, 2014), [http://e360.yale.edu/feature/with\\_the\\_boom\\_in\\_oil\\_and\\_gas\\_pipelines\\_proliferate\\_in\\_the\\_us/2811/](http://e360.yale.edu/feature/with_the_boom_in_oil_and_gas_pipelines_proliferate_in_the_us/2811/); *Pipeline Routing and Siting Issues*, PIPELINE SAFETY TRUST, [http://pstrust.org/docs/PST\\_Briefing\\_Paper\\_09\\_1.pdf](http://pstrust.org/docs/PST_Briefing_Paper_09_1.pdf). Despite the increase in applications, there is no indication that FERC's decision-making process has become overly burdened or delayed; recent congressional debates on this issue revealed that 92% of natural gas pipeline applications are decided within twelve months. Pete Kasperowicz, *House Votes 252-165 to Speed up Natural Gas Pipeline Approvals*, HILL (Nov. 21, 2013),

<http://thehill.com/policy/energy-environment/191065-house-votes-to-speed-up-natural-gas-pipeline-approvals>. Furthermore, as of December 29, 2015, more than 80 applications for major pipeline projects were pending with FERC. *See Major Pipeline Projects Pending (Onshore)*, FERC (Dec. 29, 2015), <http://www.ferc.gov/industries/gas/indus-act/pipelines/pending-projects.asp>. If these pipeline applications are approved, they will have a significant impact on the environmental resources of the region, on landowners whose property will be impacted by project review and construction, and may result in wasted expenditures on redundant and unnecessary pipelines.

The AIR Survey Act of 2015 only exacerbates this problem by facilitating the approval of these pipelines without adequate review of the environmental impacts. Section 7 of the Natural Gas Act requires that natural gas companies obtain from FERC a “certificate of public convenience and necessity” prior to starting the construction or extension of any natural gas transportation project. 15 U.S.C. § 717f (2012). The application process for this certificate requires the completion of a detailed environmental report that includes thirteen resource reports assessing the proposed project’s impacts. 18 C.F.R. § 380.12 (2016). Resource Report 2, for example, requires detailed identification of wetlands, as well as proposed mitigation measures to reduce adverse effects on surface water, wetlands, and groundwater quality. *Id.* Resource Report 3 requires a description of fish, wildlife, and vegetation in the vicinity of the proposed project, as well as the expected impacts on these resources and potential impacts on biodiversity. *Id.* Both of these reports, by virtue of the information that needs to be collected, require extensive ground survey data from the proposed route of a project. The proposed bill, however, would allow for data collected by aerial survey to “be accepted in lieu of, and given equal weight to, ground survey data for the purposes of” completing either a prefiling process or formal application for a

certificate of public convenience and necessity, H.R. 3021, 114th Cong. (2015). The bill, therefore, allows for the approval of projects with significant environmental impact with a survey technique that is unable to catalog much of the required data for an effective review. This has a significant impact on both the privacy and property rights of affected homeowners. The collection of the aerial survey data requires extensive low-flying aircraft operations, which can startle livestock in rural farming communities and prevent homeowners from peaceably enjoying their land. The collected aerial data, which again is insufficient in properly identifying resource impacts, enables pipeline companies to exercise eminent domain after a certificate is granted. The ability to expropriate rights-of-way should come only after proper analysis merits project construction.

## **II. Current FERC Protocols: Public Necessity and Convenience**

FERC has failed to properly assess these pipeline proposals under its current mandate; therefore, the AIR Survey Act is entirely inappropriate, as it would only further weaken FERC's analysis of these projects.

Section 7 of the Natural Gas Act requires that a natural gas company seek approval from FERC in the form of a "certificate of public convenience and necessity" before constructing or extending facilities for transporting or selling natural gas. 15 U.S.C. § 717f (2012). Under this section, FERC shall approve applications if it is found that the applicant is willing and able to conform with FERC regulations and that the action "is or will be required by the present or future public convenience and necessity." *Id.*

### A. Public Necessity and Convenience

FERC's current approval process has failed to adequately assess whether pipeline proposals are in fact motivated by public necessity. The Northeast is already a net exporter of natural gas and the United States is estimated to be a net exporter of natural gas by 2017. Stephanie Ritenbaugh, *Marcellus to Become a Net Exporter of Natural Gas This Year*, PITTSBURGH POST-GAZETTE: POWERSOURCE (Sept. 1, 2015), <http://powersource.post-gazette.com/powersource/companies/2015/09/01/Marcellus-Shale-to-become-a-net-exporter-of-natural-gas-this-year/stories/201509010013>. When a particular region is a net exporter of natural gas, it undermines FERC's determination that additional pipelines for importing gas into the region are required by "public necessity." Some municipal governments have expressed this concern to FERC, noting the concerns that municipalities bearing all the costs of new pipeline projects, in the form of environmental degradation, will not receive any local benefits in return. See, e.g., *County of Mercer, New Jersey, Resolution No. 2014-591* (Nov. 13, 2014), Appendix 1 ("[T]he County Executive and the Mercer County Board of Chosen Freholders are concerned that [the PennEast] pipeline will be used to export natural gas from terminals in South Jersey, Delaware, Maryland and Virginia overseas for profit that does not have any benefit to the residents of Mercer County.").

Instead, FERC merely reviews whether a proposed pipeline has "contracts" for the purchase of gas when these "contracts" in some instances involve self-dealing with the corporate entities that are building the pipelines. In other instances, these "contracts" may replace gas purchases in other gas lines and leave those sunk costs unrecovered.

## B. Programmatic Environmental Impact Statement

Despite the proliferation of pipeline proposals, FERC continues to evaluate these pipelines individually rather than examine them systematically or regionally to determine whether and how much new infrastructure is needed. Instead of reviewing these proposals individually, FERC should embark on a regional or programmatic examination of the need and advisability of all of these proposals. A programmatic environmental impact statement (PEIS) is one method that FERC should consider to examine these proposals on a more systematic basis.

Examining the impacts of a number of pipelines in one region is more efficient, would preserve governmental resources, and avoids duplicative work. Council of Environmental Quality regulations governing an EIS provide that:

Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and . . . shall concentrate on the issues specific to the subsequent action.

40 C.F.R. § 1502.20 (2016).

Members of Congress, state legislators, municipalities, and NGOs have all requested that FERC undertake a PEIS or regional analyses of multiple pipelines. For example, on September 18, 2015, Representative Leonard Lance (Dist. 7 NJ) wrote a letter requesting that FERC conduct a PEIS to consider the existing pipelines and other pipeline proposals within the same region in order to “accurately and comprehensively establish the need for and impacts of the [PennEast] proposal.” *Letter from Leonard Lance to FERC* (Sept. 18, 2015), Appendix 2. On June 19, 2015, Representative Bonnie Watson Coleman (Dist. 12 NJ) wrote to FERC expressing her opposition to the PennEast pipeline. She cited concern for the valuable resources that the

pipeline would affect, noting that the piecemeal consideration of proposals may result in pipelines that are “duplicative, poorly sited, or built with excessive or inadequate capacity.” *Letter from Bonnie Watson Coleman to FERC* (June 19, 2015), Appendix 3. On August 24, 2015, Senator Tim Kaine of Virginia wrote to FERC with concerns regarding the Atlantic Coast Pipeline (ACP), such as environmental impacts, lack of local community benefit, and cumulative impacts. *Letter from Tim Kaine to FERC* (Aug. 24, 2015), Appendix 4.

N.J. State Senator Christopher Bateman, N.J. Assemblyman Jack Ciattarelli, and N.J. Assemblywoman Donna Simon also wrote to FERC requesting that it conduct a PEIS. *Letter from Christopher Bateman to FERC* (Oct. 6, 2015), Appendix 5. The letter emphasizes the historically significant and pristine nature of the agricultural area that the PennEast pipeline would intersect. *Id.* Holland Township, Hunterdon County, New Jersey called for a “thorough analysis of all proposed plans for the additional pipelines crossing Eastern Pennsylvania and New Jersey . . . and . . . a complete analysis of development of a mechanism to consolidate pipelines into utility corridors so as to minimize the number of separate, [discrete] pipelines.” *Township of Holland, Resolution* (Oct. 27, 2014), Appendix 6. Kingwood Township, Hunterdon County, New Jersey calls for consideration of PennEast “and other pipelines proposed or being constructed in the Delaware Basin as part of one network requiring a full environmental impact statement, and not in a segmented fashion.” *Township of Kingwood, Resolution No. 2014-98* (Oct. 29, 2014), Appendix 7. Mercer County, New Jersey, urged FERC “to give due and careful consideration to the overall cumulative impact of building a completely new pipeline through the County’s significant environmental resources.” Mercer County also cited a concern that the gas transported through this pipeline would be exported overseas, thereby depriving Mercer County



of any benefits from the profits. *County of Mercer, New Jersey, Resolution 2014-591* (Nov. 13, 2014), Appendix 1.

Natural Resources Defense Council (“NRDC”) recommends that FERC adopt a regional PEIS for natural gas pipelines, because “[n]atural gas transmission covers broad geographic areas, crosses political boundaries, impacts numerous ecosystems, and locks in projects for generations.” *NRDC, Comment Letter on Atlantic Coast Pipeline Scoping* (Apr. 28, 2015), Appendix 8.

These legislators, public officials, and others recognize the importance of looking at the region for cumulative impacts. This is a concern that the PEIS is well suited to address. The CEQ proposal on Effective Use of Programmatic NEPA Reviews is particularly suited in situations wherein “several energy development programs proposed in a region of the country are similar actions if they have similar proposed methods of implementation and best practice mitigation measures that can be analyzed in the same document.” 79 Fed. Reg. 50,578, 50,583 (Aug. 25, 2014). As the Northeast is a net exporter of natural gas, multiple proposals for new infrastructure calls for a programmatic review, at the very least, of the cumulative impacts.

### **III. AIR Survey Act of 2015**

H.R. 3021, the AIR Survey Act of 2015, would amend section 7 of the Natural Gas Act by adding a new subsection that would require FERC to accept data collected by aerial survey instead of, and give such data equal weight to, ground survey data. FERC would be required to accept this data during the pre-filing process and as part of an application for a Federal authorization or for a certificate of public convenience and necessity. As will be demonstrated below, aerial surveys are an inadequate substitute for ground survey data.

#### A. Aerial Survey Data Is Not an Adequate Substitute for Ground Survey Data

Data from aerial surveying is inadequate to fulfill the reporting requirements of the FERC process. The FERC process requires submission of an environmental report for certain natural gas projects, including the construction of facilities for transportation of natural gas and major pipeline construction projects using rights-of-way in which there is no existing natural gas pipeline. 18 C.F.R. § 380.12 (2016). The environmental reports include thirteen resource reports that require detailed information regarding the proposed project's impacts. *Id.* However, aerial surveying is inadequate to identify many of the natural and cultural features of an area that must be included in these reports.

For example, one of the thirteen resource reports focuses on the project's impacts on fish, wildlife, and vegetation. This report must include, among other things, descriptions of habitats, vegetation, and species that may be affected by the proposed action. It must also identify all state and federally listed or proposed special concern, threatened or endangered species and critical habitat that potentially occur in the vicinity of the project. 18 C.F.R. § 380.12(e). However, aerial surveys are inadequate to detect the overwhelming majority of endangered and threatened species and critical habitats that may be impacted by the proposed pipelines. In fact, out of the 15 federally listed species that are present in New Jersey, only 1 can be identified via aerial surveys. Table 1; *Federally Listed Species in New Jersey*, Annotated by Dr. Emile DeVito, Appendix 9. These numbers are even more staggering when reviewing state listed species. For example, of the 814 species of plants listed as endangered or of concern in New Jersey, only one may be detected by aerial survey and only under optimal conditions. Table 1; *List of Endangered Plant Species and Plant Species of Concern in New Jersey*, Annotated by Dr. Emile DeVito, Appendix

10 (noting that the Dwarf Mistletoe is the only plant that can be reliably detected via aerial survey because it lives as a parasite high in tree branches).

Additionally, unless there are no wetlands within an area in which a construction project will take place, applicants are required to prepare a report that identifies and describes wetlands that will be crossed. 18 C.F.R. § 380.12(d)(1) (2016). The report must also include a detailed discussion of mitigation measures to reduce adverse effects on wetlands from the proposed construction project. *Id.* § 380.12(d)(8)(2016). Identifying an area as a wetland requires an analysis of the area's soil to determine if it is hydric. Since a soil analysis requires studying soil-composition to determine if it is hydric, aerial surveys are inadequate for this task. Consequently, aerial surveys are insufficient to determine whether or not wetlands are present in the areas that will be impacted by pipeline projects.

#### 1. Difficulties of Detecting Endangered and Threatened Species

Scientists at the New Jersey Conservation Foundation have found that the vast majority of vulnerable species are difficult to detect by observers on the ground, because of one or more of the following factors:

- They are cryptic via camouflage (hidden in plain sight), hidden out of sight (beneath or within soil, vegetation, water, or other substrates), or their nocturnal habits, limited seasonal or daily activity cycles, lack of vocalization, or small size make them very difficult to observe.
- They are impossible to distinguish from common species without detailed observation, magnification (especially plants and insects), recording and analysis of calls, and even molecular studies.

- Their population density is low even when populations are healthy, so that the frequency of encounter is incredibly low and their habitats need to be sampled from within the confines of the habitat with recording devices, cameras, drift fences and other traps of infinite variety, or sufficient person hours on the ground at the appropriate time of day or year, and with the appropriate weather to make detection possible.
- They are dependent upon critical microhabitats that cannot be detected unless ground-based surveys are conducted. Such microhabitats include hibernation sites, caves, rock faces, tree cavities, riffles and pools, vernal ponds for breeding, unique soil types, unique microclimates, and other attributes which can be totally hidden from aerial view by tree cover, shadows, snow, etc.
- They (mostly insects) occur only in association with a particular plant species, which itself is difficult to observe and/or identify.

**Table 1: Summary of Aerial Survey Utility for New Jersey's Rare Species**

<b>Species Group</b>	<b># of Species for which AERIAL SURVEYS might be HELPFUL</b>	<b># of Species for which AERIAL SURVEYS provide NO INFORMATION</b>
Federally Threatened and Endangered Plant and Animal Species in New Jersey	1 of 15: 7%	14 of 15: 94%
State of NJ Threatened/Endangered Animal Species	2 of 67: 3%	65 of 67: 97%
State of NJ Special Concern Animal Species (RARE)	4 of 105: 4%	101 of 105: 96%
State of NJ Special Concern/Endangered Plant Species	1 of 814: 0.1%	813 of 814: 99.9%
<b>Total number of rare species in NJ = 1001</b>	<b>8 of 1001: 0.8%</b>	<b>993 of 1001: 99.2%</b>

Note: Table prepared by Dr. Emile DeVito, New Jersey Conservation Foundation.

Given the difficulty of confirming habitat suitability and detecting the presence of rare species, even through the use of many person-hours of ground survey work aided by sophisticated equipment, the concept of accomplishing these tasks via aerial survey, in order to rule out both the existence of potential habitat and the presence of rare species in those habitats has absolutely no scientific merit. A review of two examples of current species detection survey protocols demonstrates these deficiencies.

#### *Bog Turtle*

The U.S. Fish and Wildlife Service Guidelines for Bog Turtle Surveys clearly demonstrate the shortfalls of relying on aerial survey data to assess a project's potential impacts on endangered or threatened species. The bog turtle is a species of turtle that is listed at the federal level as threatened and in several states as endangered, primarily due to threats from habitat loss. *See Bog Turtle Fact Sheet*, N.Y. DEP'T OF ENVTL. PROTECTION, <http://www.dec.ny.gov/animals/7164.html> (last visited Jan. 31, 2016); NEW JERSEY BOG TURTLE PROJECT, N.J. DIVISION OF FISH AND WILDLIFE, <http://www.nj.gov/dep/fgw/bogturt.htm> (last visited Jan. 31, 2016). The survey guidelines were designed to "maximize the potential for detection of bog turtles at previously undocumented sites at a minimum acceptable level of effort." *Guidelines for Bog Turtle Surveys*, Annotated by Dr. Emile DeVito, Appendix 11. The guidelines proceed in two phases of analysis in order to first identify potential habitats and then to detect presence of the bog turtle. Phase 1 detection of "potential" turtle habitat requires an assessment of soil type, hydrology, and vegetation, factors that cannot be distinguished from the air. *Id.* If aerial survey data was used at phase 1, it would be the same as "skipping" phase 1 and proceeding to the costly phase 2 analysis in every site, since no conclusions regarding potential

habitat are possible based on aerial data and therefore no potential sites could be excluded from the phase 2 analysis. *Id.* Phase 2 surveys, which attempt to detect the presence of bog turtles, are so intensive and ground specific that no comparison can be made regarding the usefulness of aerial survey data. *Id.*

#### *Swamp Pink*

The swamp pink is a federally listed threatened plant species. *Guidelines for Swamp Pink Surveys*, Annotated by Dr. Emile DeVito, Appendix 12. The U.S. Fish and Wildlife Service published a request for a comprehensive search for swamp pink throughout New Jersey, which contains the majority of the remaining swamp pink populations. *Id.* The request included a detailed protocol for the detection of this plant. The swamp pink is generally characterized by its bright pink flower cluster, however only ten to fifteen percent of the plants in a flower population flower each season. *Id.* Excessive deer browse over the last thirty years and a general reduction in population size means that many populations of swamp pink have so few plants that one cannot expect to see flowers in every year. *Id.* Without the signature flowers, observers can only identify the swamp pink based on its “smooth, evergreen, lance-shaped leaves . . . , which lie almost flat on the ground.” *Id.* This has made detection of the species difficult for ground-based observers; so difficult, in fact, that the survey protocol requires ground-observers to survey the entire project impact area rather than a random transect. “An aerial survey is nothing more than a random transect that is far inferior to a random ground transect in its ability to detect swamp pink. . . . Thus, aerial survey cannot possibly be considered adequate to meet the [U.S. Fish and Wildlife Service] protocol for swamp pink.” *Id.*

## 2. Wetland Delineation and Hydric Soil Analysis

Hydric Soil is defined as a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part. *See* U.S. DEP'T OF AGRICULTURE, FIELD INDICATORS OF HYDRIC SOILS IN THE UNITED STATES (2010), [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs142p2\\_050723.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_050723.pdf). The field indicators, which were devised by scientists at the National Research Conservation Center (NRCC), are formed by the accumulation or loss of iron, manganese, sulfur and carbon compounds in saturated and anaerobic environments. Studying soil composition to identify whether or not the indicators are present in soil is helpful in determining whether or not soil is hydric in delineating wetland boundaries. *Id.*

While aerial surveys might be useful in documenting a site to determine how different landscape features contribute to the saturation of an environment, they are inadequate to determine if field indicators are present within soil to determine if it is hydric. The procedures recommended by NRCC for identifying field indicators require digging beneath the surface of the soil and assessing its coloration, composition, and texture to determine if it is hydric. *Id.* Aerial surveys are no substitute for this identification process. While the field indicators recommended by NRCC are not the only method for determining a soil's hydric status, on-site sampling of the soil is required to make a classification. Without determining if the soil in a given area is hydric, wetland boundaries cannot be properly delineated.

Since aerial survey data is insufficient to even determine whether an area may be a wetland or a potential habitat for an endangered species, reliance on this data to approve a permit will only result in duplicative surveying when the ground surveys are ultimately conducted to

gather the data that is actually needed to determine whether these important environmental resources may be impacted.

**B. Aerial Surveys Infringe Upon the Privacy and Property Rights of Homeowners.**

In addition to its scientific inadequacies, aerial surveying also raises significant privacy and property rights concerns for homeowners along proposed pipeline routes. Aerial surveys—whether conducted with airplanes, helicopters, or drones—impose serious burdens on farming communities along proposed pipeline routes. The proposed PennEast Pipeline, for example, is expected to go through several rural counties in Pennsylvania and New Jersey. And despite the fact that aerial surveys carry no weight under current law in certificate application approval, the PennEast Pipeline Company has conducted significant aerial survey operations along the proposed pipeline route. In response, affected municipalities and private landowners have already raised concerns about the impact of repeated, low-flying aircraft. In a letter to the PennEast Pipeline Company, Delaware Township in Hunterdon County, N.J. asked that the company provide advance notice of such overhead flights: “This is a rural, farming community. Overhead planes and helicopters alarm residents. They terrify livestock, especially horses.” *Letter from Delaware Township Committee to PennEast Pipeline Company* (Nov. 28, 2015), Appendix 13. Local conservation groups have made similar points: “The intensity of a horse’s reaction when spooked makes the animal unpredictable and places it, and any humans around it, in grave danger. Horses and farm animals are ubiquitous in Hunterdon County and along the proposed route of the pipeline. Landowners have expressed . . . that they feel they cannot leave their farms and animals because of the anticipated danger.” *Letter from Citizens Against the Pipeline to Hunterdon County Freeholders* (Nov. 23, 2015), Appendix 14. Frequent low-flying



survey operations have already affected homeowners' peaceful enjoyment of their properties. One homeowner reported a helicopter hovering over her home that upset her children. The Federal Aviation Administration confirmed that the helicopter was operating "on behalf of the PennEast Pipeline Project for the purpose of aerial survey along the proposed pipeline route." *Letter from FAA to Jacqueline Evans* (Jan. 14, 2016), Appendix 15. Although, a PennEast representative denied this when called by the homeowner, *Phone Conversation between Jacqueline Evans and Jeff England* (Jan. 4, 2016), Appendix 16. Such harassment and loss of privacy would only proliferate with the passage of the AIR Survey Act of 2015.

### **C. Eminent Domain Concerns**

Section 7 of the Natural Gas Act confers upon the holder of a certificate of public convenience and necessity the right to exercise eminent domain where it cannot acquire through agreement necessary rights-of-way for pipeline construction. 15 U.S.C. § 717f(h) (2012). Given that FERC has failed to exercise appropriate discretion when approving applications for certificates of public convenience and necessity for pipelines, the proposed bill raises significant property rights concerns. Pipeline companies could—upon receiving the certificate—expropriate private property and rights-of-way on the basis of intrusive, yet incredibly insufficient, aerial surveys.

While the proposed bill does include a provision allowing for verification of aerial survey data through ground survey data, this provision fails to protect homeowners' property rights. The provision provides that "[a]n agency accepting aerial survey data . . . may require, as a condition of approval of an application . . . that such aerial survey data be verified through the use of ground survey data before the construction or extension of a facility that is the subject of such

application." H.R. 3021, 114th Cong. (2015). Practically speaking, the proposed bill, even with this provision, will have one of two unsatisfactory results. If FERC does not require such verification, then private companies will be able to exercise eminent domain indiscriminately. If FERC does require verification, then ultimately meaningless aerial surveys will force the commission to waste resources reviewing such data, while unnecessarily invading the peace and privacy of homeowners and harming our rural farming communities. Further, if the verification demonstrates that the approved route is inappropriate, then multiple properties will have already been burdened with permanent easements. The bill does not address this situation where verification proves that the use of eminent domain was unwarranted.

In conclusion I thank the staff and experts of the New Jersey Conservation Foundation and the Stony Brook Millstone Watershed Association for their contributions to the preparation of this testimony. Credit goes to Dr. Emile DeVito, Dr. Mark Gallagher, Sharon Wander, Wade Wander, Tom Gilbert, Alix Bacon, Alison Mitchell, and Michael Pisauro, Esq.. I also thank Aaron Kleinbaum, Esq. and Jennifer Danis, Esq. of the Eastern Environmental Law Center, and the legal interns at the Columbia Environmental Law Clinic Isa Julson, Archan Jay Hazra, and Christian Benante for their contributions to the testimony. I nonetheless take full responsibility for the contents of this testimony.

[Additional information submitted by Mr. Lloyd has been retained in committee files and also is available at <http://docs.house.gov/meetings/IF/IF03/20160202/104387/HHRG-114-IF03-Wstate-LloydE-20160202-SD088.pdf>.]

Mr. WHITFIELD. Thank you.

Mr. Bottiggi, you are recognized for 5 minutes.

#### **STATEMENT OF BILL BOTTIGGI**

Mr. BOTTIGGI. Chairman Whitfield, Ranking Member Rush, and members of the committee, thank you for inviting me to speak at today's hearing. I also wish to extend a particular thanks to Congressman Kennedy for his work bringing attention to the problems with the forward-capacity market in New England and for inviting me to speak today.

I am Bill Bottiggi, the General Manager of the Braintree Electric Light Department. Braintree Electric is a nonprofit municipal utility owned by the residents of Braintree, Massachusetts. Our service territory is limited to just the town of Braintree, and we have been providing highly reliable electric service at the lowest reasonable rates since 1892 to the residents and businesses in Braintree.

Braintree Electric belongs to the Northeast Public Power Association, NEPPA, which represents municipal utilities in six New England States. I am testifying on behalf of NEPPA, but my views today are my own.

Braintree Electric also belongs to the American Public Power Association, which I am on the board of directors. These remarks are also a top priority of the American Public Power Association and the 48 million customers that they serve.

My remarks today will be focused on the forward-capacity market and the Fair Rates Act, H.R. 2984. Deregulation. In the 1990s in New England, in Massachusetts, deregulation of electric utility markets occurred, transitioning the historically vertically integrated utility markets, the utilities, to a centralized competitive market for wholesale power. The belief was that forcing investor-owned utilities to sell their generation assets would result in the private development of new high-efficient generation in a competitive market, driving down the cost of electricity.

Thousands of megawatts of generation, all natural gas, was built in the early 2000s. Surprisingly, though, the existing generation which was purchased from the investor-owned utilities did not retire as expected, and that created a large surplus of generation in New England.

The primary revenue stream at the time—this was before the forward-capacity markets started—was payments for the electricity that the generators produced. With a surplus of generating capacity, some plants were not running frequently enough to provide their owners with the revenue they needed to cover their fixed costs. As a result, there were several bankruptcies. A lot of the new plants declared bankruptcy because they had the high debt service to cover, and they weren't getting the revenue they needed to cover that.

So, ISO New England recognized the markets were not working and implemented the forward-capacity market, starting in 2007, with FERC approval. Unlike the energy market, where power plants bid their marginal cost into ISO New England, and the ISO called them the cheapest units to run first, these markets provided capacity payments to the generators in exchange for having a physical resource available to run, for just being there.

Capacity prices were set, and are still set today, based on the need for new generation. With a surplus of generation capacity, prices stayed low, capacity prices stayed low from the first auction held in 2007 through the seventh auction held in 2013. It is a forward auction, so that seventh auction is taking place starting in June of 2016 for 1 year.

Meanwhile, municipal utilities—Braintree Electric is one of them—were carved out from deregulation in the 1990s, and we were allowed to self-supply our own generation. We were left vertically integrated. We didn't have to sell our power plants. We were allowed to provide our own capacity to our own customers.

Self-supply allowed municipal utilities to build generation. That way, we could cover our own capacity needs. Braintree Electric built 115 megawatts of quick-start, gas-fired oil backup generation in 2009 under this self-supply provision, giving us price certainty for our capacity for a long time in the future.

This provided us and other municipal utilities with our ability to cover our own capacity cost. So, we weren't dependent on the forward-capacity auction, which creates a lot of variability in capacity cost, as you have seen in my written testimony.

Unfortunately, as our needs for capacity have grown, in the future, currently, we are unable to self-supply from capacity. In 2013, ISO New England petitioned the FERC, who removed the right for municipal utilities like Braintree Electric to provide their own capacity, their own self-supply. They thought we exerted too much buyer-side market power.

So, where are we today? In 2014, the eighth forward-capacity auction was held, and that was the first auction where new generation was needed. That big surplus that was created at the start of deregulation was gone. Part of that was Vermont Yankee, Brayton Point, Norwalk Harbor, and many other older plants finally were retiring for reliability reasons and environmental reasons.

These retirements in that one auction cycle totally 4300 megawatts of electricity, and only 1500 megawatts of new generation cleared that auction. So, that created an imbalance, driving up the cost-to-capacity payments to an administrated cap by ISO New England to \$15 a kilowatt month. As a reference, previous to that, it was \$3 a kilowatt month. So, prices jumped in one auction five-fold, from \$3 to \$15, which is what Congressman Kennedy referenced has happened in that auction, Forward-Capacity Auction No. 8.

Some believe the closure of Brayton Point manipulated the market, causing the shortage of capacity, driving up capacity payments for all generation, including the fleet of plants, in addition to Brayton Point, that was also owned by that same company.

All told, capacity starting in 2018 will cost New England consumers \$4 billion a year, up from \$1 billion a year in 2016. So, from 2016 to 2018, prices are quadrupling. That translates into \$21 a month on the average residential electric bill, just for the capacity portion, not all the other components that have gone up as well.

This dramatic increase demonstrates how dysfunctional the market is and should have presented an opportunity for the FERC to investigate the last-minute closure of Brayton Point. As we have been discussing earlier today, due to FERC's vacancy, the one Com-

missioner vacancy, they were unable to investigate because they had that two-two tie in the vote, and it was ordered a rule of law and the rate was enacted.

So, the Fair Rates Act is an important piece of legislation because it would make the same administrative review procedures currently approved by the Commission applicable to rates that just take effect by law, by operation of law. Many of us would like to see an investigation into what happened in the eighth forward-capacity auction, and those in public power would like to see the capacity markets fundamentally reformed, including our right to self-supply, so we could provide our own generation to our own customers.

However, this, while it is a narrow step, is a critical first step. This bill will ensure that, if the FERC is deadlocked again in the future over questionable rates, the problem does not reoccur in New England or other regions. With this Act, ratepayers will now have an avenue to challenge unfair rates.

In conclusion, I want to thank Congressman Kennedy for introducing the bill and the committee for holding this hearing on what can be a confusing topic, a confusing subject, on behalf of Braintree Electric, NEPPA, and APPA, and myself. I hope the committee will continue to examine mandatory capacity markets throughout New England and the rest of the country.

Thank you, sir.

[The prepared statement of Mr. Bottiggi follows:]

**WRITTEN TESTIMONY  
OF  
BILL BOTTIGGI  
GENERAL MANAGER, BRAINTREE ELECTRIC LIGHT DEPARTMENT  
ON BEHALF OF THE NORTHEAST PUBLIC POWER ASSOCIATION**

**Before the House Energy & Commerce Committee Subcommittee on Energy and Power  
“A Legislative Hearing on Eight Energy Infrastructure Bills”  
February 2, 2016**

Chairman Whitfield, Ranking Member Rush, and Members of the Committee: Thank you for inviting me to speak at today’s hearing. I wish to extend particular thanks to Congressman Joe Kennedy III for his work on this Committee and in Congress to bring attention to problems with the forward capacity market in New England and for inviting me to speak today.

My name is Bill Bottiggi; I am the General Manager of Braintree Electric Light Department. Braintree Electric is a non-profit, municipal utility owned by the residents of Braintree, Massachusetts. Our founder was Thomas Watson; co-inventor of the light bulb, who also started the Fore River Shipyard in Quincy, MA and the kindergarten program in Braintree. As a municipal utility, our service territory is limited to the Town of Braintree, and our mission is to provide highly reliable electric service at the lowest reasonable rates. Currently our residential electric rate is 14 cents/kw-hr (for reference, the investor-owned utilities surrounding our service territory charge 21 cents/kw-hr).

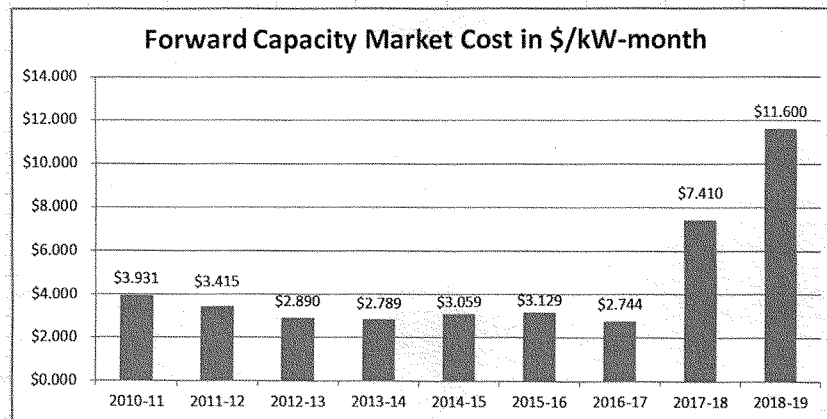
Braintree Electric is also a member of the Northeast Public Power Association (NEPPA), the trade group representing not-for-profit, consumer-owned electric utilities in the six New England States. I am pleased to speak on behalf of NEPPA on this matter, although the views expressed are my own.

## I. Background and History of New England's Forward Capacity Market

My remarks will focus on the forward capacity market and H.R. 2984, the Fair RATES Act. Since not all regions of the country have a capacity market, I will begin with a bit of history and background. In the late 1990s, New England undertook deregulation of the electric utility market. This involved a transition from a vertically-integrated marketplace – where a single utility company might own a power plant, transmission lines, and the distribution lines connecting to customer homes – to open access to transmission lines and a centralized, competitive market for generation administered by an RTO: ISO-New England. The belief was that forcing the vertically-integrated, investor-owned utilities to sell their generation assets would result in the private development of new, more efficient generation, thereby driving down the cost of electricity. Public power (including Braintree Electric) was exempt from the requirement to divest, because our not-for-profit business model is designed to keep costs low for consumers. As a result of deregulation, thousands of megawatts of generation were built in the early 2000's to take advantage of the competitive market, but the existing generation did not retire as expected. With the surplus of generating capacity, some plants were not running frequently enough to provide the owners with the revenue they needed to cover their fixed costs. Several declared bankruptcy.

Realizing the power plant owners needed additional revenue to stay in business, in 2007 ISO-New England created a new revenue stream: the forward capacity market. Unlike the market for *energy*, where power plants bid their marginal cost and the ISO calls on the cheapest resources to run, the market for electric *capacity* provides payment to generators in exchange for having a physical resource *available* to run. Like an option arrangement, it is the right to call on

a resource to produce electricity when needed – in the case of New England’s capacity market, that time is three years in the future. Capacity prices are set based on the need for new generation to meet the expected peak demand for that year. In theory, the results of the auction should provide a market signal that new power plants are needed. In practice, incumbent generators receive a windfall when new generation clears in the market causing New England customers to pay literally billions in annual capacity charges. Meanwhile, few new power plants are being built. This windfall is displayed in the graph below.

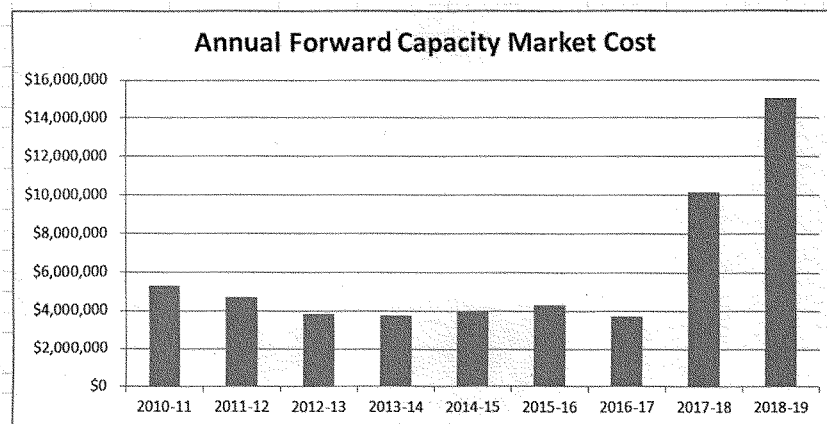


## II. The Forward Capacity Market Has Resulted in Extraordinary Costs to Consumers

Braintree Electric, NEPPA, and public power in New England generally, believe the capacity market is a fatally flawed construct. New generation generally requires long-term contracts to secure financing, as opposed to short-term, volatile capacity market prices and frequently changing rules. APPA studies have shown that 98 percent of new generation completed in recent years has been built with financing from direct ownership or long-term contracts while only 6 percent of new generation in 2013 was constructed within RTOs with



mandatory capacity markets. Instead of building new resources, incumbent generators are simply pocketing capacity payments for their existing plants. And consumers are paying the price. New England-wide, the cost of capacity after FCA-9 (starting in 2018) will be over \$4 billion. The impact on Braintree Electric's rate payers would have been an increase of \$11 million per year from 2010 until 2018 if Braintree Electric was not exempt from deregulation and still vertically integrated. In terms of the monthly electric bill Mr. Kennedy's constituents might be looking at, that translates to a \$21/month increase - just for the capacity portion of the bill. The graph below again shows what Braintree Electric's historic and projected capacity costs would be if they were not vertically integrated.



The modern operation of the forward capacity market has seen numerous “tweaks” from its inception, as ISO-New England struggles to adjust the market rules to achieve the desired result. Among the most harmful changes to not-for-profit utilities was the removal of our right to “self-supply,” i.e., use our own power plants to meet our own growing capacity needs – something we specifically bargained for when the capacity market was created. Because ISO-

New England mandates our participation in these markets, we would be required to purchase capacity from another generator if we build a new resource that isn't selected by the market. Of course, we would still have our own fixed costs to pay for that resource, on top of the capacity we would be forced to buy from the market. Self-supply allowed municipal utilities to control our capacity costs. Unfortunately, ISO-New England removed the right of municipal utilities to self-supply our own capacity, citing concerns about "buyer side market power," after Forward Capacity Auction (FCA) 7 in 2013.

### **III. FERC Deadlocks on Allegations of Manipulation in FCA 8, Rate Becomes Law**

In 2014, FCA-8 was the first auction where new generation was needed. The surplus of capacity had kept costs low in prior auctions, but many units retired due to the economics of the energy market. Two units, Vermont Yankee and Norwalk Harbor, closed that year. Just prior to the auction, a third plant – Brayton Point – abruptly withdrew from the market, despite that fact that it had just been purchased by a new owner. In all, 4300 MWs of generation retired and only 1500 MWs of new generation cleared the market. ISO-New England determined there was insufficient competition and administratively set capacity prices of \$15/kw-month for the affected region and \$7.025 for the rest of the power pool. For reference, these prices are up from approximately \$3.00/kw-month for the prior seven years. The total cost to the region was \$3 billion – triple the prior year's cost.

FCA8 demonstrated how dysfunctional this market really is. When ISO-New England filed a \$3 billion auction result with the Federal Energy Regulatory Commission (FERC), it should have presented an opportunity to investigate whether the last-minute closure of Brayton Point was an act of market manipulation by owners who realized they could receive higher payments for their fleet of plants by constraining supply, or whether the rules in place were

followed, but so fundamentally flawed as to allow a final rate that was unjust and unreasonable. Unfortunately, FERC was unable to step in because of a vacancy on the Commission – with two Commissioners voting to let the rate stand and two voting to review the results, there was a deadlock. Adding insult to injury, not only will New England consumers have to pay billions in capacity costs, the deadlock removed any mechanism to review or contest the results, as well. Under the Federal Power Act, the FERC's inaction meant that the rate became effective by operation of law, and customers cannot challenge the rate without a FERC order to protest.

#### **IV. The Fair RATES Act is a Needed, Reasonable Solution**

H.R. 2984 is an important piece of legislation to allow redress when unjust and unreasonable rates go into effect under operation of law. It would simply make the same administrative review procedures currently available to rates approved by the Commission applicable to rates that take effect by operation of law. I believe this change is necessary, because even though vacancies are a reality of life – even now, FERC only has four sitting Commissioners – it likely did not factor into the statutory scheme established in the Federal Power Act, creating the gap that left New England \$3 billion poorer and scratching our heads. The Fair RATES Act is an opportunity to rectify that.

This is a modest, technical fix to that gap in the statute. While many of us would have liked to see a complete and thorough investigation into FCA8, and those of us in the public power sector would like to see the capacity market fundamentally reformed, we cannot turn back the clocks. This bill finds a narrower target to ensure this problem does not recur in New England or any other region of the country. Should a questionable rate be filed in any of your home districts today, FERC may deadlock again and leave your constituents paying potentially

unjust and unreasonable utility bills. Pass the Fair RATES Act, and they will have an avenue to challenge those unfair costs tomorrow.

**V. Conclusion**

I commend Congressman Kennedy for introducing this bill, and the Committee for holding this important hearing on what can be an opaque and confusing subject. On behalf of Braintree Electric, NEPPA, and myself, I hope the Committee will continue to examine mandatory capacity markets and support reform to provide relief to New England consumers.

Mr. WHITFIELD. Thank you.

Mr. Marsan, you are recognized for 5 minutes.

#### STATEMENT OF BILL MARSAN

Mr. MARSAN. Thank you. Mr. Chairman, Ranking Member Rush, and members of the subcommittee, thank you for the opportunity to testify today in support of legislation to amend Section 203 of the Federal Power Act and make the law work as intended.

I am Executive Vice President/General Counsel to American Transmission Company. We construct, own, and operate electric transmission property in Wisconsin and the upper peninsula of Michigan, as well as hold ownership interest in transmission property in California.

ATC is a transmission-only utility which was formed in 2001, when other utility companies transferred their transmission assets to create the new company. This formative transaction was subject to Section 203 of the Power Act. Subsequent to our formation, ATC has continued to acquire utility properties, subject to FERC's Section 203 regulation.

The Energy Policy Act of 2005 amended Section 203 to increase the dollar threshold from \$50,000 to \$10 million on FERC's authority to preapprove dispositions by public utility of jurisdictional utility facilities. FERC's regulations and orders implementing this change have failed to account for congressional intent.

Specifically, FERC has relied on apparent oversight in the text of the statute to reverse its own decades-old application of the minimum monetary threshold. Finally, the new Section 203 eliminated the monetary threshold entirely for acquisitions or mergers of jurisdictional facilities.

This has led to some absurd results. For example, FERC has required preapproval, pursuant to Section 203, for the \$1 purchase of 10 miles of depreciated transmission line, as well as the purchase of an electrical disconnect switch and associated wiring for \$10. Conversely, the sellers of the same equipment I just described were not required to make any filings with FERC at all.

FERC's interpretation requires prior approval for the acquisition of utility property that has any monetary value attached to it or no monetary value at all. FERC's interpretation frustrates the intent of the amendment to Section 203 and EPAC 2005. Congress intended to reduce the regulatory burden on utilities by raising the threshold of FERC preapproval, and Congress did this with good reason.

Public utilities regularly buy and sell utility assets that have minimal impact on the bulk electric system and do not affect FERC's ability to regulate. The prior threshold of \$50,000 made no sense in 2005 and let alone today's economy.

Congress sensibly raised the threshold to \$10 million in order to spare utilities the administrative cost of the preapproval process for small transactions while maintaining FERC's oversight on transactions with a potential to impact utility operations and rates.

FERC's current interpretation of Section 203 has imposed a new and unnecessary regulatory burden on public utilities. It has also increased the risk that public utilities will be targeted by the FERC Office of Enforcement for violations of Section 203. At least

one such FERC enforcement action for failure to receive preapproval for relatively de minimis acquisitions has been resolved, and it is reasonable to expect more.

FERC has refused requests to revise its regulations to conform with the intent of EPAC 2005 and has made it clear that only a statutory change to Section 203 will force a shift in FERC policy.

On December 3rd, 2015, the House passed H.R. 8, the North American Energy Security and Infrastructure Act of 2015. Section 3222 of H.R. 8 clarifies Section 203 to expressly include a monetary threshold of greater than \$10 million for FERC preapproval of mergers and acquisitions of jurisdictional utility property, just as Congress intended when it passed EPAC 2005.

This change would serve at least three important purposes. It would make Section 203 internally consistent. It would give clear instruction to FERC about this preapproval authority. And it would relieve an unnecessary regulatory burden on public utilities.

The bill before the subcommittee today adopts the language of Section 3222 of H.R. 8 as a standalone measure. ATC strongly supports this legislation.

On behalf of ATC, I want to thank the subcommittee for inviting me to testify, and I stand ready to answer any questions the members may have. Thank you.

[The prepared statement of Mr. Marsan follows:]

**Written Testimony of**

**Bill Marsan  
Executive Vice President and General Counsel  
American Transmission Co.**

**Before the House Energy and Commerce Committee  
Subcommittee on Energy and Power  
“A Legislative Hearing on Eight Energy Infrastructure Bills”**

**February 2, 2016**

**I. Introduction**

Chairman Whitfield, Ranking Member Rush and Members of the Subcommittee:

My name is Bill Marsan and I am Executive Vice President and General Counsel at American Transmission Co. (“ATC”). ATC is a transmission-only electric utility company that constructs, owns and operates transmission facilities in Wisconsin and the Upper Peninsula of Michigan. ATC also has an ownership interest in transmission facilities in California.

ATC was formed in 2001 when vertically-integrated utilities operating in Wisconsin and Michigan transferred ownership of their transmission assets to form a new, stand-alone transmission company. ATC is privately-held and our ownership group includes investor-owned, cooperative and municipal utilities.

The transaction to create ATC required approval by the Federal Energy Regulatory Commission (“FERC”) pursuant to section 203 of the Federal Power Act (“FPA”). Subsequent to ATC’s formation, the company continued to acquire utility assets subject to FERC’s section 203 regulation. I am testifying today as a result of ATC’s on-going experience with section 203 and our concern that FERC’s interpretation of the statute goes against Congressional intent.

## **II. Summary**

For seventy years, section 203 of the FPA<sup>1</sup> was subject to a minimum monetary threshold of \$50,000, which was interpreted by FERC to apply to both dispositions and acquisitions by public utilities of FERC-jurisdictional utility facilities (even though the minimum monetary threshold was expressly included by Congress only in the “disposition” language of FPA section 203).<sup>2</sup> This threshold served as a “floor” to ensure that the public utilities would only be required to file, and FERC to pre-approve, proposed transactions of some material significance.<sup>3</sup>

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<sup>1</sup> See Exhibit A for the pre-EPAAct 2005 version of FPA section 203.

<sup>2</sup> See Exhibit B (FERC’s pre-EPAAct 2005 interpretation of FPA section 203(a) minimum monetary thresholds). Note that the “merge or consolidate” language of FPA section 203 has been broadly interpreted by FERC as applying to “acquisitions” of FERC-jurisdictional utility facilities, generally.

<sup>3</sup> Each entity involved in a transaction (typically, but not always, a public utility) must independently determine whether it requires FPA section 203 prior authorization from the FERC before it may either acquire, or dispose of (as the case may be), FERC-jurisdictional electric utility facilities. Where the FPA section 203 minimum monetary threshold is equal for both acquisitions and dispositions, and the amount of electric utility facilities at issue is below the minimum monetary threshold established by Congress in the FPA, then those particular transactions can close without the necessity of either party applying for or obtaining FERC FPA section 203 prior authorization.



EPAAct 2005 amended FPA section 203 to increase the dollar threshold, from \$50,000 to \$10,000,000, of FERC's authority to pre-approve transactions by public utilities involving FERC-jurisdictional utility facilities. This was done to reflect the changing marketplace from 1935 to 2005, ultimately relieving the burden on public utilities and keeping the administrative responsibilities of FERC focused.

Unfortunately, FERC's Order 669 implementing this change does not account for congressional intent. Specifically, in the face of an apparent drafting error regarding the text of the statute, FERC abandoned its own decades-old application of the minimum monetary threshold and adopted a literal interpretation, finding that the new section 203 eliminated the monetary threshold entirely for acquisitions or mergers of jurisdictional facilities. In other words, rather than increasing the threshold for a utility acquiring assets from \$50,000 to \$10 million, FERC eliminated the threshold completely so that even the acquisition of a fully-depreciated \$0 facility required Commission pre-authorization under Section 203.

This has led to absurd results. For example, while the seller of a utility facility valued at \$10 million or less may sell a transmission facility without regulatory approval, FERC requires the buyer of the same asset to get pre-approval. Indeed, FERC's interpretation requires prior approval for the acquisition of utility property that has any monetary value attached to it – or no monetary value at all. Due to the apparent drafting error, rather than *de minimis* transactions

no longer requiring approval, now virtually *all* acquisitions, even the purchase of a \$1 switch (an actual example), require a FERC order approving the transaction.

FERC's interpretation frustrates the intent of the amendment to section 203 in EPAct 2005. Congress clearly intended to reduce the regulatory burden on utilities (as well as the administrative burden on FERC) by raising the threshold for FERC pre-approval. Congress did this with good reason. Public utilities routinely buy and sell utility assets that have minimal impact on the bulk electric system and do not affect FERC's ability to regulate. The historic threshold of \$50,000 made no sense in 2005, let alone today's economy. Congress sensibly raised the threshold to \$10 million in order to spare utilities, customers, and the Commission the administrative cost of the pre-approval process for smaller capital expenditures, while maintaining FERC's oversight on significant transactions with the potential to impact the grid.

FERC's current interpretation of section 203 has imposed a new and unnecessary regulatory burden on public utilities. It has also increased the risk that public utilities will be targeted by the FERC Office of Enforcement for violations of section 203. At least one such FERC Enforcement action for failure to receive pre-approval for relatively *de minimis* acquisitions has been resolved, and it is reasonable to expect more. FERC has denied requests to revise its regulations to

conform to the intent of the EPAct 2005, and has made it clear that only a statutory change to section 203 will solve the problem.

On December 3, 2015, the House passed H.R. 8, the North American Energy Security and Infrastructure Act of 2015. Section 3222 of H.R. 8 clarifies FPA section 203 to expressly include a monetary threshold of greater than \$10 million for FERC pre-approval of mergers and acquisitions of jurisdictional utility property, as Congress intended when it passed EPAct 2005. This change would serve at least three important purposes:

1. It would make FPA section 203 internally consistent between sales and acquisitions;
2. It would give clear instruction to FERC about its pre-approval authority; and
3. It would relieve an unnecessary regulatory burden on public utilities.

H.R. \_\_\_\_\_, a bill to amend section 203 of the Federal Power Act, adopts the language of section 3222 of H.R. 8 in a stand-alone bill. This legislation would clarify section 203 and enable a more rational regulatory approach by FERC.

FPA section 203 is not working as intended by Congress. Congress's effort to amend section 203 in the Energy Policy Act of 2005 ("EPAct 2005") to account for the operational and economic realities of today's bulk electric power system has been frustrated by FERC's interpretation of the statute. Only a legislative

solution can fix the perceived inconsistency in section 203 and clarify the correct scope of FERC's pre-approval authority regarding mergers and acquisitions of jurisdictional utility property by public utilities. H.R., \_\_\_\_\_, a bill to amend section 203 of the Federal Power Act, would accomplish this goal and ATC strongly supports its passage into law.

### **III. Discussion**

In August 2005, EPAc 2005 became law. Section 1289 of EPAc 2005 divided FPA section 203 into separate statutory sub-sections, added a new sub-section granting FERC jurisdiction to review sales of certain generating facilities, and increased the minimum monetary threshold of \$50,000 to \$10,000,000 for three of the four statutory sub-sections.<sup>4</sup> As the result of an apparent drafting error (or perhaps with the expectation that FERC would continue its decades-long practice of "reading in" the applicable minimum monetary threshold for "acquisitions" of jurisdictional facilities), the EPAc 2005 FPA section 203 statutory sub-section pertaining to acquisitions of FERC-jurisdictional facilities did not include an express minimum monetary threshold of \$10,000,000 (or any other amount).

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<sup>4</sup> See Exhibit C (excerpting Section 1289 from EPAc 2005). Note that the language in EPAc 2005's FPA section 203(a)(1)(b) (governing "acquisitions") is effectively identical to the statutory language that FERC had consistently interpreted as being subject to the same minimum monetary threshold imposed on "dispositions" from 1966 from 2006.)

In 2005, FERC initiated administrative rulemaking proceedings to promulgate revised regulations to implement Congressional directives set forth in EPAct 2005. During this Order No. 669 rulemaking proceeding, the Energy Power Supply Association (“EPSA”), a national trade organization representing competitive power suppliers, requested that FERC revise its proposed regulations implementing post-EPAct 2005 FPA section 203 to conform to FERC’s long-standing practice of interpreting the section 203 minimum monetary threshold as applying to acquisitions as well as sales of jurisdictional facilities.<sup>5</sup> In Order No. 669, FERC refused to revise its proposed regulations as EPSA had requested and stated, essentially, that as a creature of statute it was required to strictly follow the letter of the law drafted by Congress, and since the relevant EPAct 2005 FPA section 203 sub-section included no express minimum monetary threshold, Congress must have intended for that minimum monetary threshold to be zero.<sup>6</sup>

FERC’s action in Order No. 669 reversed a long-standing practice of applying a minimum monetary threshold to FPA section 203 “acquisition”

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<sup>5</sup> See Exhibit D (excerpting relevant section of EPSA’s Comments to FERC’s Notice of Proposed Rulemaking).

<sup>6</sup> See Exhibit E (excerpting relevant section of FERC’s Order No. 669 addressing EPSA’s Comments). FERC did not explain in Order No. 669 its abrupt deviation from its forty-year practice of “reading in” a minimum monetary threshold for FPA section 203 acquisitions. It is apparent, however, that an obvious result of FERC’s reversal in policy was a huge increase in the scope of FERC’s FPA section 203 jurisdiction to regulate proposed transactions involving FERC-jurisdictional electric transmission facilities.

transactions that dated back to 1966.<sup>7</sup> Now, instead of EPAAct 2005 increasing the minimum monetary threshold for FERC review of FPA section 203 transactions involving the acquisition or disposition of jurisdictional facilities from \$50,000 to \$10,000,000 (as Congress clearly intended), that minimum monetary threshold has instead been effectively decreased to \$0. Since each proposed transaction typically involves two FERC-jurisdictional public utilities (one disposing and one acquiring), the practical effect of FERC's reversal in policy in its Order No. 669 rulemaking proceeding is that now each and every transaction involving public utilities' transfer of ownership of FERC-jurisdictional electric utility facilities must come before the Commission pursuant to FPA section 203 for a full review (because even if the "disposing" public utility is not subject to FPA section 203 because the value of facilities is under \$10 million, the "acquiring" utility is now subject to a \$0+ minimum monetary threshold for the acquisition and requires prior FERC authorization per section 203).

This rule change is a substantial administrative burden on FERC-regulated public utilities,<sup>8</sup> and, to the extent that FERC's post-EPAAct 2005 policy change

<sup>7</sup> FERC's regulations (section 33.1(a)(2)) required section 203 applications for mergers, consolidations and acquisitions of jurisdictional assets *only if they meet the \$50,000 threshold*.

<sup>8</sup> For example, in 2013 ITC Midwest LLC submitted a fifty-two page FPA section 203 application to FERC requesting prospective authorization, pursuant to FPA section 203(a)(1)(B), for a past purchase of 1/10 of one mile of 34.5kV transmission line with a purchase price of \$0, and a net book value of \$1. See *ITC Midwest LLC*, Application for Approval of Acquisition of a Portion of a Transmission Line Pursuant to Section 203 of the Federal Power Act, Docket No. EC13-51-000, filed Dec. 14, 2012.

may not be common knowledge (or fully appreciated), also represents a substantial increase in compliance risk for public utilities.<sup>9</sup>

As noted above, FERC has declined to reconsider the reversal of its long-standing policy of applying a minimum monetary threshold to FPA section 203(a)(1)(B) “acquisition” transactions, and indicated that it would only re-institute such a threshold if expressly ordered to do so by Congress.

#### IV. Conclusion

H.R. \_\_\_\_, a bill to amend section 203 of the Federal Power Act, solves the issue of FERC’s problematic interpretation of the law. This legislation would adopt the change to FPA section 203 contained in section 3222 of H.R. 8, the North American Energy Security and Infrastructure Act of 2015, to expressly include a minimum monetary threshold of \$10,000,000 for merge/consolidate “acquisitions” of FERC-jurisdictional electric utility facilities, to mirror the

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<sup>9</sup> In March 2014, the Commission issued an Order Approving Stipulation and Consent Agreement (“ITC Order”) following ITC Transmission, LLC’s (and other affiliates/subsidiaries) (“ITC”) self-report to FERC Office of Enforcement of, as relevant here, twenty FPA section 203(a)(1)(B) violations (i.e., transactions involving ITC’s acquisition of FERC-jurisdictional electric transmission facilities for which ITC should have, but did not, require prior authorization from FERC before consummating). The ITC Order stated, in relevant part, that “[FERC] Enforcement determined that “[ITC] has acquired Commission-jurisdictional assets without the prior Commission authorization required under FPA section 203(a)(1)(B). In total, the ITC Companies engaged in 20 unauthorized transactions between 2005 and 2011, which included transactions ranging from \$0 to approximately \$6.7 million” and that the ITC Companies had “agreed to pay a civil penalty of \$750,000 to settle this investigation.” See *Int’l Transmission Co., et al.*, 146 FERC ¶ 61,172, Stipulation and Consent Agreement at PP 8-9 (2014). To confirm, each of the twenty self-reported ITC FPA section 203(a)(1)(B) violations occurred after 2006 (and after FERC changed its policy regarding the minimum monetary threshold for FPA section 203 “acquisitions”), and had the \$10 million minimum monetary threshold for FPA section 203 “acquisitions” been in place as Congress had intended in EPCA 2005, none of the twenty ITC transactions would have required Commission authorization under FPA section 203(a)(1)(B) (and thus ITC’s failure to obtain such authorization would not have resulted in a violation of the Federal Power Act subjecting ITC to prosecution by FERC Office of Enforcement).

existing \$10,000,000 minimum monetary threshold set forth in the other three subsections of § FPA 203(a)(1).<sup>10</sup>

This amendment is consistent with the intended outcome of EPAAct 2005 and would accomplish several important goals. The amendment would require FERC to restore a previous, and long-standing, minimum monetary threshold applied to public utilities' acquisitions and dispositions of FERC-jurisdictional utility facilities; would correct an apparent oversight that resulted in Congress's intent in EPAAct 2005 not being completely implemented by the Commission; would reduce the regulatory burden and potential enforcement liability on public utilities; and would increase administrative efficiency by ensuring that FERC reviews only those proposed transactions concerning FERC-jurisdictional facilities that are materially significant.<sup>11</sup>

On behalf of ATC, I want to thank the subcommittee for inviting me to testify today and I stand ready to answer any questions the Members may have of me.

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<sup>10</sup> Section 3222 of H.R. 8 reads as follows: "*SEC. 3222. CLARIFICATION OF FACILITY MERGER AUTHORIZATION. Section 203 (a)(1)(B) of the Federal Power Act (16 U.S.C. 824(a)(1)(B)) is amended by striking "such facilities or any part thereof" and inserting "such facilities, or any part thereof, of a value in excess of \$10,000,000."*

<sup>11</sup> It is important to emphasize that the proposed change would not effect in any way FERC's jurisdiction over the rates, terms and conditions of service under section 205 of the FPA. Stated another way, once a company like ATC acquires a facility, FERC would continue to oversee the rate and transmission tariff governing that facility.



## **Exhibit A**

**Pre-EPAAct 2005 § 203(a) of the FPA**

As enacted in 1935, § 203(a) of the Federal Power Act provided:

No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

16 U.S.C.A. § 824b(a) (1935) (subsequently amended by EPAAct 2005)

## **Exhibit B**

**FERC's pre-EPAAct 2005 Interpretation of FPA section 203(a) Minimum Monetary Thresholds**

In the case of acquisitions we have by regulation...limited the necessity to file applications pursuant to Section 203 to mergers or consolidations with facilities of another person having a value in excess of \$50,000. Although the statute does not impose a \$50,000 limitation for acquisition for facilities as it does for disposition, there is no reason why we cannot impose such a limitation by regulation. Section 309 of the Act provides that the Commission shall have power to issue regulations 'as it may find necessary or appropriate to carry out the provisions of this Act.'

Re Duke Power Co., 64 P.U.R.3d 497 (1966)

## **Exhibit C**

**Post-EPAAct 2005 § 203(a)(1) of the FPA**

§ 203(a)(1) of the Federal Power Act, as amended by EPAAct 2005, provides:

(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so--

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000;

(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of \$ 10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility--

(i) that has a value in excess of \$10,000,000; and

(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes.

16 U.S.C.A. § 824b(a)(1)(A-D) (2006).

## **Exhibit D**

**Electric Power Supply Association's Request to Modify FPA § 33.1(a)(1)(ii)**

In October 2005, FERC proposed modifications to its regulations to conform them to EPAAct 2005's amendment of FPA §203. In November 2005, Electric Power Supply Association (EPSA) submitted its comments to FERC regarding the modifications. Set forth, below, is an excerpt from EPSA's comments on FERC's proposed changes to FERC regulations regarding "mergers or consolidations" (i.e., acquisitions) following Congress' EPAAct 2005 amendment to §203 of the FPA.

In proposed Section 33.1 of the Commission's regulations, the Commission neglected to propose any dollar threshold for mergers or consolidations, unlike the other transactions subject to Section 203. The failure to include the \$10 million threshold appears to be an oversight. The currently effective regulations establish a \$50,000 threshold for all transactions subject to Section 203, including mergers, consolidations and acquisitions of jurisdictional facilities and as the Commission notes, the \$10 million threshold is similar to the prior \$50,000 threshold.

Congress did not intend to change this statutory and regulatory structure. The mergers and acquisitions clause of the currently effective Section 203 and Section 203 as amended by EPAAct are substantially the same. Although the currently effective statutory language, like the newly enacted EPAAct language, did not codify the monetary threshold of \$50,000 with respect to mergers and consolidations, for decades the Commission, by regulation, limited the necessity to file applications pursuant to Section 203 with respect to mergers, consolidations and acquisitions only to those that met the then-effective \$50,000 threshold.

Importantly, if the Commission does not apply the \$10 million threshold to transactions covered by the merger and consolidation clause of Section 203, it will have the perverse result of effectively nullifying the threshold applicable to dispositions of jurisdictional facilities. This will occur because the Commission has determined that the acquisition of jurisdictional facilities by a public utility constitutes a merger or consolidation that requires approval under Section 203. Accordingly, if two public utilities enter into a transaction to transfer a jurisdictional asset with a value of less than \$10 million, the entity disposing of the asset (the seller) will not require Section 203 approval, but the entity acquiring the asset (the buyer) will require Section 203 approval. This result is clearly



contrary to Congressional intent to simply raise the thresholds for transactions that were already subject to the Commission's jurisdiction under Section 203.

The NOPR provides no reason for the Commission to change its interpretation of Section 203, or to alter its past practice of applying the statutory dollar threshold to all types of transactions requiring Section 203 approval, including mergers and acquisitions. Accordingly, the Commission should modify its proposed regulations to incorporate the \$10 million threshold for mergers and consolidations (and therefore acquisitions) as well, similar to the language currently contained in Section 33.1(a)(2) of its existing regulations.

Rulemaking Comment of the Electric Power Supply Association under RM-05-34 at pp. 5-6 (November 7, 2005) *citing Duke Power Company*, Opinion No. 503, 36 FPC 399 at 403 (1966), *overturned on other grounds, Duke Power Company v. FPC*, 401 F.2d 930 (D.C. Cir. 1968)

## **Exhibit E**

### FERC's Response to Electronic Power Supply Association's Request

On December 23, 2005, FERC issued Order No. 669 regarding transactions subject to FPA § 203. In that order, FERC addressed EPSA's comments regarding the proposed changes to FERC regulations. An excerpt is set forth, below:

Electric Power Supply Association (EPSA) requests that the Commission modify the text of proposed section 33.1(a)(1)(ii)<sup>12</sup> to clarify that any merger or consolidation must exceed the \$10 million threshold before section 203 filing approval is required. It states that the Commission should not alter its past practice of applying the statutory dollar threshold to all types of transactions requiring section 203 approval, including mergers and acquisitions. EPSA explains that the mergers and acquisitions clause of the currently effective section 203 and section 203 as amended by EPAAct 2005 are substantially the same and do not specify a value amount. EPSA points out, however, that although the currently effective statutory language, like the newly enacted EPAAct 2005 language, did not codify the monetary threshold with respect to mergers and consolidations, for decades the Commission's regulations (section 33.1(a)(2)) have required section 203 applications for mergers, consolidations and acquisitions only if

<sup>12</sup> 18 C.F.R. sec. 33.1, resulting from the Order No. 669 FERC administrative rulemaking proceeding, currently provides:

§ 33.1 Applicability, definitions, and blanket authorizations.  
**(a) Applicability.** (1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:  
 (i) Sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value **in excess of \$10 million**;  
**(ii) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever;**  
 (iii) Purchase, acquire, or take any security with a value **in excess of \$10 million** of any other public utility; or  
 (iv) Purchase, lease, or otherwise acquire an existing generation facility:  
**(A)** That has a value **in excess of \$10 million**; and  
**(B)** That is used in whole or in part for wholesale sales in interstate commerce by a public utility.  
 (2) The requirements of this part shall also apply to any holding company in a holding company system that includes a transmitting utility or an electric utility if such holding company seeks to purchase, acquire, or take any security with a value **in excess of \$10 million** of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of \$10 million.

18 C.F.R. sec. 33.1 (2015) (emph. added).

they meet the \$50,000 threshold (which on February 8, 2006 will become \$10 million). EPSA states that the NOPR provides no reason for the Commission to change its interpretation of section 203...

We reject EPSA's request that we revise proposed section 33.1(a)(1)(ii) to clarify that any merger or consolidation must also exceed a monetary threshold before section 203 filing approval is required. *The plain language of amended section 203(a)(1)(B) does not permit such an interpretation.* Under amended section 203(a)(1)(B): "No public utility shall... merge or consolidate, directly or indirectly, such facilities [facilities subject to the jurisdiction of the Commission] or any part thereof with those of any other person, by any means whatsoever." *This provision, on its face, does not impose a dollar threshold on mergers or consolidations* and proposed section 33.1(a)(1)(ii) is consistent with the statutory provision. *While Congress included a \$10 million threshold for amended subsections 203(a)(1)(A), (C), (D), and 203(a)(2) (dispositions of jurisdictional facilities; acquisitions of securities of public utilities; purchases of existing generation facilities; holding company acquisitions), Congress clearly did not adopt a monetary threshold for mergers and consolidations in amended subsection 203(a)(1)(B).* We note that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In light of the unambiguous statutory language, we are not convinced by EPSA's unsupported assertion that the failure to include a monetary threshold as to mergers and consolidations was an "oversight" and that "Congress did not intend to change [the currently effective] statutory and regulatory structure." *While our regulations previously applied a dollar threshold to mergers and consolidations, such an approach is no longer tenable, since it is inconsistent with the plain language of amended section 203. Thus, we will not revise section 33.1(a)(1)(ii) to include a \$10 million threshold.*

Order No. 669 – Final Rule regarding transaction subject to FPA § 203 under RM05-34 at pp. 14-16 (December 23, 2005) (emph. added).

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Mr. WHITFIELD. Thank you very much.  
Mr. Slocum, you are recognized for 5 minutes.

#### STATEMENT OF TYSON SLOCUM

Mr. SLOCUM. Thank you very much, Chairman Whitfield, Ranking Member Rush, members of the committee.

My name is Tyson Slocum, and I direct the Energy Program at Public Citizen. Public Citizen is a national nonprofit, nonpartisan consumer advocacy organization funded in part by the more than 400,000 members and supporters we have across the country.

In my capacity as Energy Program Director, I serve on the United States Commodity Futures Trading Commission Energy and Environmental Markets Advisory Committee, and I also frequently intervene and comment in a number of FERC proceedings.

So, I am here to talk about two pieces of legislation. One is the bill that would exempt from FERC review any merger or consolidation under \$10 million, and the second is the Fair Rates Act, H.R. 2984.

On the legislation that would extend a \$10 million threshold to exempt mergers and consolidations, on the face of it, that might seem reasonable. But, when you understand the way that energy markets operate, you quickly understand that it is not necessarily the dollar value of a transaction, but what the impact of that facility has on the operation of an energy market. With power facilities, these are known as what is known as pivotal suppliers.

In two landmark market manipulation cases that I have brought before FERC that are still under review, it was either one power plant in the case of New England or a very small collection of power plants that, had it been a merger or consolidation, very likely would have been under that \$10 million threshold.

And so, it is very important that Congress retain the language that was plainly included in the Energy Policy Act of 2005 because, remember, the Energy Policy Act of 2005 repealed one of the landmark utility regulations in this country, the public utility holding company, after 1935. As part of that agreement to repeal that long-standing utility regulation, Congress was very aware of the need to ensure that FERC had full authority over all mergers and consolidations. That is why they explicitly did not include that threshold dollar figure in the plain language of the Energy Policy Act of 2005.

On the second piece of legislation, the Fair Rates Act, H.R. 2984, this is a great piece of legislation that directly addresses a market manipulation case that I brought before FERC in 2014 that has been much talked about at today's hearing, the 2014 forward-capacity auction in ISO New England.

We made an allegation in our FERC filing that a Cayman-Islands-based private equity firm named Energy Capital Partners had acquired a fleet of power plants in New England, and six weeks after closing on that transaction, announced the retirement of one of them. That retirement moved the New England market from a surplus to a deficit, thereby triggering a significant price increase by about \$1 billion in that auction.

We filed our market manipulation complaint saying that their actions were the subject of market manipulation and that the result-

ing rates were unjust and unreasonable. As has been explained, FERC deadlocked two-to-two on my complaint. And so, they did not set for hearing whether or not to consider if the rates were lawful. Instead, they issues this notice that the rates had become effective by operation of law.

We asked for rehearing. FERC denied our rehearing. We, then, filed a petition to review in Federal court. FERC made a motion to dismiss. The court did not grant FERC's motion to dismiss, and we have filed initial briefs and reply briefs, and the court is actively considering this reviewability question.

It is clear that the Fair Rates Act of H.R. 2984 would help alleviate this problem if it were to occur in the future. That is why Public Citizen supports that legislation.

Thank you.

[The prepared statement of Mr. Slocum follows:]



215 Pennsylvania Avenue, SE • Washington, DC 20003 • 202/588-1000 • www.citizen.org

Testimony of Tyson Slocum  
Energy Program Director  
Public Citizen, Inc.  
Before the Committee on Energy and Commerce  
Subcommittee on Energy and Power  
United States House of Representatives  
February 2, 2016

I am Tyson Slocum and I am Energy Program Director at Public Citizen, Inc. Public Citizen is a not-for-profit, non-partisan consumer advocacy organization with more than 400,000 members and supporters across the country. We support policies that will provide affordable, reliable and sustainable energy for our members. I serve on the U.S. Commodity Futures Trading Commission Energy and Environmental Markets Advisory Committee, and I frequently intervene and comment in Federal Energy Regulatory Commission dockets on behalf of household consumers.

Thank you for the invitation to testify today on two FERC-jurisdictional bills. The first amends Section 203(a)(1)(B) of the Federal Power Act (FPA) to allow a merger or consolidation of facilities belonging to public utilities with a value of less than \$10 million to evade FERC's merger review authority. **Public Citizen opposes this legislation.**

The second bill, HR 2984, amends Subsection (d) of Section 205 of the FPA with the following language: "Any absence of action by the Commission that allows a change to take effect under this section, including the Commission allowing the sixty days' notice herein provided to expire without Commission action, shall be treated as an order issued by the Commission accepting such change for purposes of section 313." **Public Citizen supports this legislation.**

### FERC Merger Authorization

While Congress historically subjected the FPA to minimum dollar thresholds for the disposition of FERC-jurisdictional facilities, statutes regarding the merging and consolidation of assets have never been subject to such minimum dollar thresholds. A disposition of assets occurs when a public utility transfers to another party a FERC-jurisdictional facility, including “paper facilities” (contracts, tariffs, etc), thereby resulting in a change in public utility control/ownership. This is, by far, the most common form of transaction reviewed under Section 203, and Congress has long allowed such transactions under a certain dollar threshold to not be subject to FERC authorization, per Section 203(a)(1)(A).

In contrast, Section 203(a)(1)(B) covers those transactions that result in a merger or consolidation of FERC-jurisdictional public utility facilities. And Congress has always been clear in treating mergers and consolidations differently from disposition of assets or the acquisition of securities in that mergers and consolidations have never featured a minimum dollar threshold for review. Prior to the passage of the Energy Policy Act of 2005, Congress made apparent that minimum dollar thresholds for review did not apply to mergers and consolidations:

*Sec. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.<sup>1</sup>*

It is evident to me that this pre-EPA2005 language intends that if “any part thereof” (with no dollar amount given at all) means that if jurisdictional facilities (which include filed rates and

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<sup>1</sup> Section 203 Disposition of property; consolidation; purchase of securities, published January 1997 by the U.S. Government Printing Office as a Committee Print 105-47, 105th Congress, 1st session.



contracts) or any part of them are merged with jurisdictional facilities or any part of them owned by another person, the Commission must approve such consolidation of jurisdictional facilities.

Importantly, Congress preserved the distinction of mergers and consolidations not being subject to minimum dollar review thresholds when it passed the Energy Policy Act of 2005. Section 1289 of EPCA2005 reads:

*(a) IN GENERAL. -- Section 203(a) of the Federal Power Act (16 U.S.C. 824b(a)) is amended to read as follows: "(a)(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so -- "(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$10,000,000; "(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever; "(C) purchase, acquire, or take any security with a value in excess of \$10,000,000 of any other public utility; or "(D) purchase, lease, or otherwise acquire an existing generation facility -- "(i) that has a value in excess of \$10,000,000; and "(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes."*

It is plain that Congress designated dollar thresholds for every provision under (a)(1) *except* (B), for mergers and consolidations, which is consistent with pre-EPCA2005 language. This was important, as Congress recognized the need to protect consumers with a thorough review of mergers in the wake of the repeal of the Public Utility Holding Company Act of 1935. As Senator Russ Feingold said on the floor of the Senate just prior to the Senate voting to approve the conference report:

*"The conference committee retained repeal of the pro-consumer Public Utility Holding Company Act, important New Deal-era legislation which has protected electricity consumers...I do, however, recognize the efforts of the chairman and the ranking member to protect language providing the Federal Government more oversight of utility mergers, which is important and I support."*<sup>2</sup>

Congress understood that repealing PUHCA would result in increased mergers and consolidation in the utility industry. Therefore, Congress made sure that FERC had full authority over all mergers, and included clear legislative language that mergers and consolidations did not feature any

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<sup>2</sup> Congressional Record—Senate, July 29, 2005, at S9337.

minimum dollar threshold for FERC review that were explicitly provided to the other subparts of Section 203(a)(1).

In March 2014, ITC Holdings Corp agreed to pay a \$750,000 penalty, in part, for violations of Section 203(a)(1)(B) of the FPA by acquiring, in 20 transactions valued between \$0 and \$6.7 million between 2005 and 2011, certain FERC-jurisdictional facilities without first obtaining FERC authorization.<sup>3</sup> It is likely that this case is an inspiration for today's proposed legislation. But Public Citizen does not believe that the ITC case demonstrates the need for this bill, but rather this and other cases reveal the need for FERC to be able to review all mergers and consolidations, with no minimum dollar exemption.

Public Citizen believes it is ill-advised to exempt from FERC review any merger or consolidation under a value of \$10 million, as we have encountered in recent complaints we have filed at FERC how a single facility or contract has the ability to be a pivotal supplier in a given market, providing the owner with an ability to unilaterally charge unjust and unreasonable rates.<sup>4</sup> Such facilities could easily fall under a \$10 million value threshold on a facility-by-facility, or contract-by-contract, basis. Consumers need the Commission to have full flexibility to review all proposed mergers and consolidations, just as Congress has long intended.

#### **H.R. 2984**

H.R. 2984 is another bill under consideration today by this Committee. This legislation directly relates to an active federal lawsuit brought by Public Citizen against FERC,<sup>5</sup> and we support this bill because it would make clear that certain FERC actions constitute an order for purposes of rehearing and court review.

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<sup>3</sup> [www.ferc.gov/enforcement/civil-penalties/actions/2014/146FERC61172.pdf](http://www.ferc.gov/enforcement/civil-penalties/actions/2014/146FERC61172.pdf)

<sup>4</sup> FERC Dockets Nos. EL15-70 and ER14-1409.

**Background of *Public Citizen, Inc. v. Federal Energy Regulatory Commission***

ISO New England (ISO-NE), the private “independent system operator” authorized by FERC to administer New England’s electrical transmission grid and wholesale electricity markets, conducts annual “forward capacity auctions” to establish rates for wholesale electric capacity to be provided three years later in the New England region. The eighth such auction, conducted in 2014, was held in concededly noncompetitive conditions resulting from the withdrawal of capacity from the market in advance of the auction by a Cayman Islands-based private equity firm, Energy Capital Partners, and yielded rates that will increase electricity prices for New England consumers by well over \$1 billion.

Although the company closed one power plant, Energy Capital Partners controlled others in ISO-NE through a variety of means, including exploiting a financial product called a Total Return Swap, allowing these other facilities to reap significantly higher revenues from the resulting high-priced auction results. The company, therefore, was able to earn more money operating one fewer power plant through its execution of the scheme. In many ways, such economic withholding is quite similar to strategies utilized by Enron during the West Coast deregulation crisis of 2000-01.

As required by the settlement agreement and tariff establishing the auctions, ISO-NE filed the auction results with FERC under FPA section 205, in what is known as a “compliance filing.” As permitted by section 205 and the settlement agreement and tariff, Public Citizen intervened, challenging the rates under section 205(a)’s “just and reasonable” standard and seeking a hearing.

Because of a two-to-two division among the four commissioners then sitting, FERC refused to set the rates’ lawfulness for hearing. Absent a majority vote, FERC issued a “notice” on September 16, 2014, stating that the rates filed by ISO-NE had become effective “by operation of law.” FERC simultaneously released statements by the commissioners explaining the views that led to the rejection of our challenge to the rates’ lawfulness under section 205.

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<sup>5</sup> [www.citizen.org/documents/public-citizen-ferc-iso-ne-petitioner-brief.pdf](http://www.citizen.org/documents/public-citizen-ferc-iso-ne-petitioner-brief.pdf)

Then-Commission Chair LaFleur's statement asserted that FERC had no authority to consider the justness and reasonableness of the rates because they were the result of an auction carried out in accordance with a FERC-approved tariff. Then-Commissioner LaFleur specifically rejected the proposition that FERC had the power "to independently assess whether the resulting auction rates themselves are just and reasonable." According to Commissioner LaFleur, FERC's approval of the tariff setting forth the auction rules, which she considered the "pertinent filed 'rate,'" precluded any review under section 205 of the lawfulness of the "resulting rates" established in the auction, even if those rates reflected the exercise of market power by participants in the auction. Commissioner LaFleur characterized the filing of the auction results as a mere "informational filing" that could not trigger review of the actual rates under section 205's just-and-reasonable standard.

Commissioners Clark and Bay, by contrast, would have set the rates for hearing because ISO-NE had not carried its burden of establishing that the auction results are just and reasonable. They pointed out that, in approving the settlement agreement establishing the capacity auctions, FERC had expressly stated that auction results would be reviewed in section 205 proceedings to ensure that they were just and reasonable, and that Chair LaFleur's view that such review was unavailable contradicted those assurances and the requirements of section 205. As the dissenting Commissioners explained: "[t]hat the Commission would have an opportunity to ensure that the results of the auctions were just and reasonable—and not merely the process leading to them—was an important underpinning of New England's forward capacity market." They emphasized that filing of auction results was not merely an "informational" requirement; rather, "[i]n order to guard against unexpected outcomes .... ISO-NE was required to file the auction results with the Commission under section 205 of the FPA, and to carry the burden of establishing that those results were just and reasonable and not unduly discriminatory or preferential." Thus, "[t]he Commission would abdicate its responsibility under section 205 of the FPA

if it treated the FCA 8 Results Filing as a mere informational filing and determined without further review that the prices resulting from the auction must necessarily be just and reasonable.”

Commissioners Clark and Bay also pointed out that there was reason to believe ISO-NE had not complied with tariff provisions requiring mitigation of market power, and they noted the irony that the very auction rules whose approval by FERC formed the basis of Commissioner LaFleur’s conclusion that the auction results were unassailable were themselves “the subject of a unanimous Commission order under section 206 of the FPA that finds those rules may be unduly preferential or discriminatory.”

In October 24, 2014, FERC dismissed Public Citizen’s timely rehearing request. Public Citizen filed its timely petition for review on November 14, 2014. FERC contested the Court’s jurisdiction by filing a motion to dismiss arguing that FERC’s action was not a reviewable “order” under FPA section 313(b). A motions panel denied the motion but directed that the parties argue jurisdiction in their merits briefs, which Public Citizen filed in September 2015.

Public Citizen Supports H.R. 2984 because it would affirmatively resolve our pending case and any future similar disputes by clearly allowing for petitioners to seek rehearing and court review.

### **Conclusion**

Public Citizen opposes legislative efforts to apply minimum dollar threshold exemptions to FERC’s merger and consolidation review authority. Public Citizen supports H.R. 2984 that allows certain FERC decisions on rate changes to be treated as an order for purposes of rehearing and court review.

Mr. WHITFIELD. Thank you.

Mr. Leahey, you are recognized for 5 minutes.

#### STATEMENT OF JEFFREY LEAHEY

Mr. LEAHEY. Thank you, Chairman Whitfield, Ranking Member Rush, and members of the subcommittee.

I am Jeffrey Leahey, Deputy Executive Director of the National Hydropower Association, and I am pleased to be here to discuss legislation to reinstate and extend the deadline for the commencement of construction for five licensed hydropower projects and how these projects demonstrate new growth potential we see in the hydropower industry.

The U.S. hydropower fleet is made up of 2200 plants with a capacity of almost 80 gigawatts. These plants provide roughly 7 percent of all electricity and close to half of all renewable electricity, making hydropower the largest provider of renewable power in the United States.

Hydropower's contributions to the electric grid are many: base-load power, peaking power, load following, energy storage, reliability, and more. Because of the need for more of these services, the industry has grown in recent years. In fact, the U.S. experienced a net capacity increase of 1.4 gigawatts from 2005 to 2013, and that is to power over half-a-million homes.

A prime growth area is on existing infrastructure, such as nonpower dams and conduits. The projects today showcase these opportunities. Two would add generation to Bureau of Reclamation dams, two to Army Corps of Engineers dams, and another dam owned by New York City. They are all small projects, ranging from 4 to 15 megawatts, and together, they will add 51.7 megawatts to the system, enough to power close to 21,000 homes.

Of the 80,000 dams in the United States, only 3 percent have electric-generating facilities. The vast majority were built for other purposes, water supply, navigation, irrigation.

The Department of Energy recognized this untapped potential of nonpower dams and in 2012 released a report of these projects. The map you see on the screen depicts the size and locations of the top prospects.

The study showed 12 gigawatts of total potential, with 8 gigawatts available at the top 100 sites alone. Eighty-one of the top 100 sites were located on Corps of Engineers dams. These types of projects, including the five here today, are some of the lowest-impact developments in the energy sector. No new dams need to be built, and the projects aim to utilize existing flows. What better way to maximize the benefit of this infrastructure by also generating renewable carbon-free power?

These projects can face a variety of obstacles that push back construction timelines, thus, requiring the action that the subcommittee is taking today. Speaking generally, these include delays in post-licensing construction approvals, refinements in project design, negotiations on power purchase agreements, and others.

To begin, hydropower has the most complex development timeline of any renewable resource. It can take 10 years or longer from the start of licensing through construction to being placed in service. It also requires considerable upfront financial commitment

from the developer for the studies needed for Federal and State approvals.

Water is a public resource, and NHA recognizes the need for thorough review of new project applications. However, the overall process can also be a factor for delays in moving to start of construction. For example, when adding generating facilities to non-powered Federal dams, FERC may issue a license; yet, that project cannot start construction until it receives additional approvals from the Federal dam owner. If there are unanticipated delays for those approvals, no work can commence.

NHA notes that the House passed H.R. 8 and the Senate is debating is S. 2012, energy bills that contain bipartisan provisions to address inefficiencies and improve coordination in the hydropower process. We note the Water Resources Reform and Development Act of 2014 provided direction to the Corps to prioritize hydro development and complete permitting in a timely and consistent manner.

Also, S. 2012 specifically aims to address the issue at hand today. It contains a provision allowing applicants to receive an extension of the commence construction deadline for up to 8 additional years. NHA strongly supports all of these efforts.

Further, design changes for projects at Federal facilities can result from discussions with the Federal owners as developers move to construction. Working cooperatively, developers must show the final construction plans will not interfere with the original purposes of the Federal dam and, also, not harm its integrity.

There have been instances where design changes were proposed post-licensing and pre-construction that differed from the design that was originally licensed. As such, more consultation was needed between the developer FERC and the Federal owner to approve these changes.

Lastly, industry members also report difficulty securing power purchase agreements. In testimony before the subcommittee last year, Cube Hydro, a developer, stated that regulatory uncertainty and risk of delays can negatively impact acquiring PPAs, and that failure to obtain one, in turn, inhibits the ability to obtain project financing. This can include post-licensing financing to cover construction costs, which can also impede the ability to meet the start construction deadline.

To conclude, hydropower projects have a critical role to play in meeting our Nation's energy, climate, and economic development objectives. The five projects the subcommittee considers today are prime examples of the tremendous growth potential at existing water infrastructure across the country.

It is NHA's hope that the time granted by these extensions allow the projects to complete the process and protect the significant investment of time and financial resources, both by the developers and also the Federal Government.

I thank the subcommittee for inviting me to testify, and I look forward to answering your questions.

[The prepared statement of Mr. Leahey follows:]



**Written Testimony of**

**Jeffrey Leahey  
Deputy Executive Director**

**On behalf of**

**The National Hydropower Association**

**Before the**

**U.S. House of Representatives Energy and Commerce Committee  
Energy and Power Subcommittee**

**Regarding**

**Legislative Hearing on Eight Energy Infrastructure Bills –  
Hydropower Extension of Commence Construction Deadlines**

**February 2, 2016**



**Executive Summary**

1. The existing hydropower system provides roughly 7 percent of all U.S. electricity generation and close to half of all renewable electricity generation, making hydropower the single largest provider of renewable electric power in our country.
2. Hydropower also has significant growth potential, particularly at existing non-powered dams. These types of projects, exemplified by those before the Subcommittee today, are some of the lowest impact developments in the energy sector.
3. Projects can face a variety of obstacles that push back construction timelines. These include delays in necessary post-licensing construction approvals, additional environmental permits, refinements in final project design, continuing negotiations on power purchase agreements, securing financing, and others.
4. NHA supports the bipartisan efforts in both the House and Senate to address regulatory inefficiencies and to improve coordination in the overall hydropower project approval process, including the issues that lead to the need for commence construction deadline extensions.
5. New small hydropower projects, such as these on existing water infrastructure, have a critical role to play in meeting our nation's energy, climate, and economic development objectives and will add to our portfolio of renewable, carbon-free resources.

### **Introduction**

Good morning Chairman Whitfield, Ranking Member Rush and members of the Subcommittee. I am Jeffrey Leahey, Deputy Executive Director of the National Hydropower Association (NHA). I am pleased to be here to discuss several pieces of hydropower legislation to reinstate and extend the deadlines for the commencement of construction for several licensed hydropower projects and how these projects are illustrative of the new growth potential we see in the U.S. hydropower industry. The bills include: H.R. 2080, 2081, 3447, as well as two bills yet filed for Federal Energy Regulatory Commission (FERC) projects 12642 and 12715.

As background, NHA is a nonprofit national association dedicated to promoting clean, affordable, renewable U.S. hydropower – from conventional hydropower to pumped storage to marine and hydrokinetics. NHA represents more than 220 companies, from Fortune 500 corporations to family-owned small businesses. Our members include both public and investor-owned utilities, independent power producers, developers, equipment manufacturers and other service providers, and academic professionals.

### **U.S. Hydropower and Growth Potential**

Currently, the U.S. hydropower fleet is made up of almost **2200 individual plants** with a total capacity of approximately **80 GW**.<sup>1</sup> These plants provide roughly **7 percent** of all U.S. electricity generation and close to **half** of all renewable electricity generation – making

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<sup>1</sup> 2014 Hydropower Market Report, Department of Energy, Office of Energy Efficiency and Renewable Energy, Wind and Water Power Technologies Office and Oak Ridge National Laboratory, Executive Summary P. V. <http://energy.gov/eere/water/downloads/2014-hydropower-market-report>

hydropower the single largest provider of renewable electric power in our country.<sup>2</sup> These figures do not include the additional **42 hydropower pumped storage plants** with approximately **22 GW** of capacity – projects that make-up almost all, **97 percent**, of utility-scale energy storage in the U.S. today.<sup>3</sup>

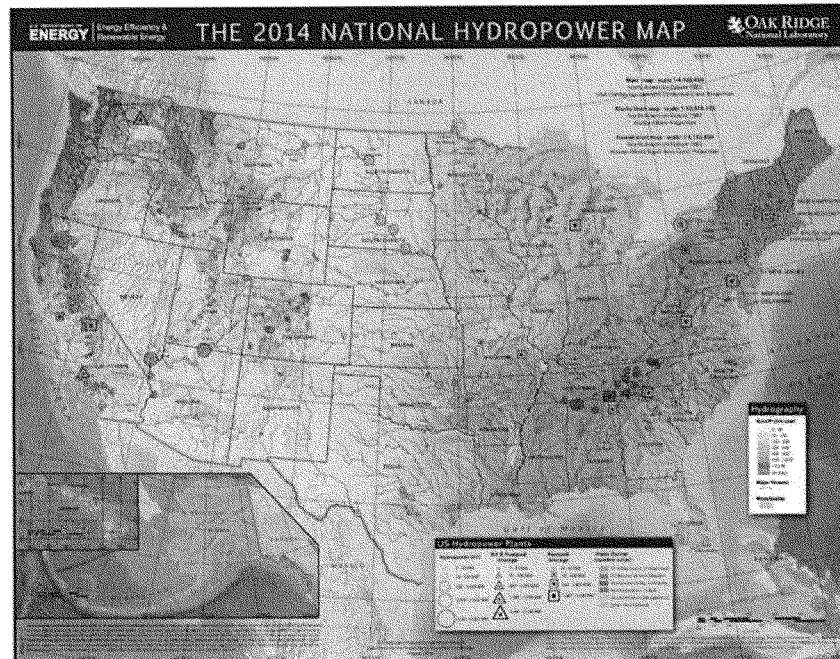
Hydropower generation avoids millions of metric tons of carbon emissions each year. In fact, regions that rely on hydropower as a primary energy source reap the benefits of significantly cleaner air with some of the lowest carbon intensity rates in the country. In addition to this clean and renewable energy, hydropower infrastructure provides other important benefits, including managing river flow for species and habitat protection, flood control and drought management, water supply as well as others.

The map on the following page was developed by the Department of Energy (DOE) through Oak Ridge National Laboratory (ORNL) and provides a visual representation of the size and location of projects for both the federal and non-federal hydropower systems. Existing hydropower assets are located in all but two states (Delaware and Mississippi), though every state receives the benefit of the clean renewable generation that these projects provide.

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<sup>2</sup> 2014 Hydropower Market Report and Energy Information Administration data.  
[http://www.eia.gov/electricity/monthly/epm\\_table\\_grapher.cfm?t=epmt\\_1\\_1\\_a](http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_1_1_a)

<sup>3</sup> 2014 Hydropower Market Report, Executive Summary P. VIII.



The contributions of the existing hydropower fleet to the electric grid are many (baseload power, peaking generation, load-following, energy storage, reliability and more). And it is because of the need for more of these benefits and services that NHA has seen the hydropower industry grow and expand in recent years. In fact, the United States experienced a net capacity increase of **1.4 GW**<sup>4</sup> from 2005 to 2013, enough to power over half a million homes<sup>5</sup>, with even more

<sup>4</sup> 2014 Hydropower Market Report, Executive Summary P. VI.

<sup>5</sup> An Assessment of Energy Potential at Non-Powered Dams in the United States, Department of Energy, Office of Energy Efficiency and Renewable Energy, Wind and Water Power Technologies Office and Oak Ridge National Laboratory, April 2012, Executive Summary P.VII, Footnote 1.  
[http://nhaap.ornl.gov/sites/default/files/NHAAP\\_NPD\\_FY11\\_Final\\_Report.pdf](http://nhaap.ornl.gov/sites/default/files/NHAAP_NPD_FY11_Final_Report.pdf)

projects in licensing or in the construction phase today. And this despite an approval process that takes years longer than that of other renewable resources.

One of the prime areas of this growth in the hydropower industry is on existing infrastructure, such as non-powered dams or conduits. The projects highlighted in the hearing today showcase these opportunities: two are proposals to add generation to Bureau of Reclamation dams; two are proposals to add generation to Corps of Engineers dams; and another is a proposal to add generation at a dam owned by a locality, in this case New York City. It is interesting to note that while most view hydropower as a west coast renewable resource, these projects are located across the country outside of the hydropower-rich states of Washington, Oregon and California. One is proposed in the Northeast (New York). One is proposed on the Maryland-West Virginia border. One in the Southeast (North Carolina). And two in Montana.

Taking a moment to discuss the details of the projects further, they are all small hydropower projects ranging in capacity from the 4.0 MWs to 15 MWs:

- W. Kerr Scott project (North Carolina) – 4.0 MW;
- Clark Canyon hydroelectric project (Montana) – 4.7 MW;
- Cannonsville Dam project (New York) – 14 MW;
- Jennings Randolph Dam project (Maryland) – 14 MW; and
- Gibson Dam hydroelectric project (Montana) – 15 MW.

Added together, these small projects, once built, will add **51.7 MW** of capacity to the system, enough to power close to another **21,000 homes**.<sup>6</sup>

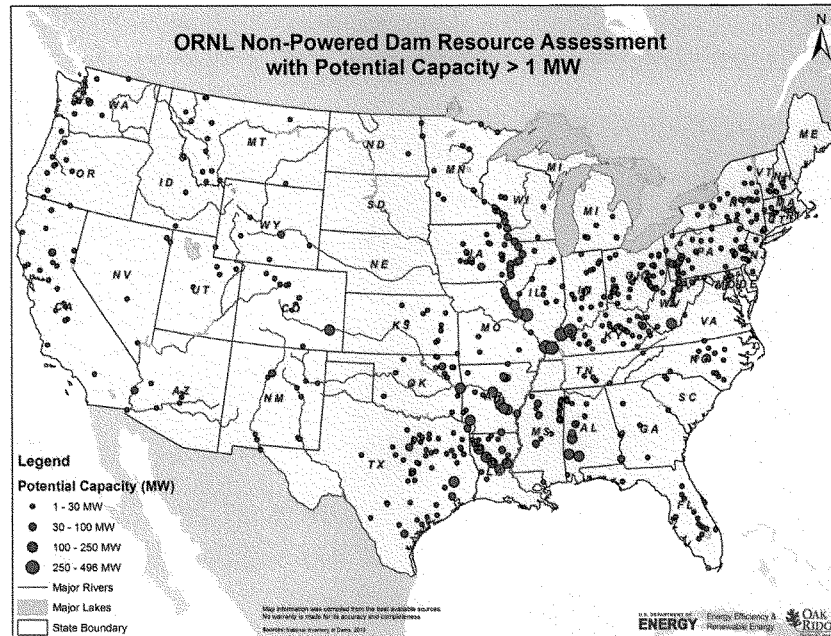
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<sup>6</sup> 2012 Non-powered Dams Report, Executive Summary, P.VII, Footnote 1.

These projects exemplify the broader opportunities that exist to build on the nation's existing infrastructure. Of the approximately 80,000 dams in the U.S. today only 3 percent have electric generating facilities. Put another way, 97 percent of our dams do not produce power and were built for other purposes such as water supply, irrigation, navigation and recreation. NHA recognizes that not every existing dam may be a suitable candidate to add power generating equipment, as many factors come into play in development decisions: project economics; generation potential; natural resource considerations; transmission needs; dam safety; etc. However, what this statistic shows is the large untapped universe of potential opportunities that exist.

Those dams that are candidates for hydropower development are infrastructure that will continue to exist, operate and release flows to meet water supply, irrigation, flood control, and other purposes for which they were originally constructed – regardless of whether hydropower facilities are installed. It is good public policy to take advantage of these existing releases to capture the energy currently untapped at these sites to add to our portfolio of renewable, carbon-free resources.

The Department of Energy recognized this opportunity and in 2012, through the Oak Ridge National Laboratory, released an assessment of potential capacity at non-powered dams for projects greater than 1MW. The map below on the following page depicts the size and location of the top projects of that survey with capacity greater than 1 MW.



The results of the study show that over 12 GW of potential exist across the existing system with 8 GW of potential available at the top 100 sites.<sup>7</sup> Also of interest, 81 of the top 100 sites were located on federal facilities, in particular, Army Corps of Engineers dams.<sup>8</sup>

These types of projects, including the five proposals here today, are some of the lowest impact developments in the energy sector. No new dams need to be built and the projects aim to utilize existing flows through the projects. This water is already moving through the system, what better way to maximize the benefits of this infrastructure by also generating clean, renewable power with them.

<sup>7</sup> 2012 Non-Powered Dams Report, Executive Summary P.VII and VIII.

<sup>8</sup> 2012 Non-Powered Dams Report, Executive Summary P.VIII.

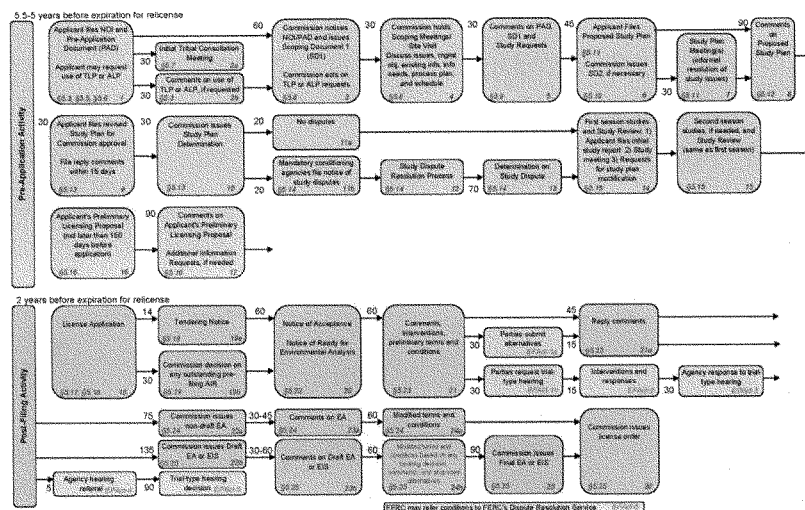
**Addressing the Need for Hydropower Project Extensions**

The projects subject to this hearing, as well as others, can face a variety of obstacles that push back construction timelines, thus necessitating the action the Subcommittee is taking today. Speaking generally, these can include delays in necessary post-licensing construction approvals, additional environmental permits, refinements in final project design, continuing negotiations on power purchase agreements, and others.

To begin, hydropower has the longest, most complex development timeline of any of the renewable energy technologies, with projects taking 10 years or longer from the start of the licensing process through construction to being placed-in-service. This process requires a considerable up-front financial commitment from the developer to undertake the engineering and environmental studies required for various federal and state approvals. The chart below on the following page outlines the integrated licensing process or ILP, the default process for authorizing hydropower projects.



**Integrated Licensing Process**  
(Section 241 of the Energy Policy Act of 2006)



\*Section 241 of the Energy Policy Act of 2005 in pink.

A multitude of federal and state agencies, as well as the public and other stakeholders, play a major and important role in the process. And in the chart above, additional authorizations such as those required by the federal dam owners are not included, coming at the end of the timeline after the FERC issuance of the license.

Water is a public resource and NHA and the industry recognize the necessity and need for thorough review of new project applications. However, this overall process can also be a reason for delays in projects moving to start of construction. For example, for projects adding generating facilities to non-powered federal dams, FERC may issue a license, yet that project

cannot commence construction until it has received additional approvals from the federal owner of the dam. If there are unanticipated delays for those additional needed approvals, no work can commence.

NHA notes that the House of Representatives has passed legislation (the North American Energy Security and Infrastructure Act, H.R. 8) and the Senate is currently debating a bill (the Energy Policy Modernization Act, S. 2012) that contain bipartisan provisions to address regulatory inefficiencies and to improve coordination in the overall hydropower approval process. In addition, the Water Resources Reform and Development Act of 2014 also provided direction to the Corps of Engineers to make the development of non-Federal hydroelectric power at Corps civil works projects a priority and requiring Corps permitting be completed in a timely and consistent manner. Finally, S.2012 specifically aims to address the issue at hand for these hydropower projects before the Subcommittee today, containing a provision that provides for an applicant to receive an extension of the commence construction deadline for up to an additional 8 years. This would alleviate the need for individual project developers to get these congressionally-approved extensions. NHA strongly supports all these efforts.

Secondly, design refinements and changes for projects at federal facilities are an issue that can, on occasion, result from the interaction and discussion with the federal owners as developers proceed to construction. In working cooperatively with the federal owners, developers must show that the final construction plans will not interfere with the original purposes of the federal dam and also not harm the integrity of the dam, which is completely appropriate.

There have been instances, where through these discussions, design changes were proposed post-licensing and pre-construction, which materially differed from the design of the project as originally licensed by FERC. As a result, additional consultation between the developer, FERC and the federal owner has been needed to approve these changes.

Lastly, securing power purchase agreements is another area where industry members report difficulties. In fact, in testimony before this Subcommittee last year, Cube Hydro, a project developer, testified:

“Regulatory uncertainty and the ever-present risk of project delays make it difficult to acquire power purchase agreements (PPA) for the sale of power from the plant, as potential off-takers are reluctant to sign up for long term agreements for uncertain projects. The failure to obtain a PPA, in turn, inhibits a developer’s ability to obtain project financing creating a vicious cycle that has caught many proposed hydropower projects.”<sup>9</sup>

As Cube Hydro also testified, and other NHA members have reported, the uncertainty and delays impact the ability to secure financing, including post-licensing financing to cover construction costs, which then also impede the developer’s ability to meet the start construction deadline. Hydropower projects have many merits (long life spans, low fuel costs, low O&M costs and more), however, the near-term risks and uncertainties can affect both the decisions by investors on where and when to commit their capital and the ability to secure PPAs.

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<sup>9</sup> Energy and Power Subcommittee Hearing, Discussion Drafts Addressing Hydropower Regulatory Modernization and FERC Process Coordination under the Natural Gas Act. Testimony of John Collins, Cube Hydro, P. 7. <http://energycommerce.house.gov/hearing/discussion-drafts-addressing-hydropower-regulatory-modernization-and-ferc-process>

**Conclusion**

New hydropower projects have a critical role to play in meeting our nation's energy, climate, and economic development objectives. The five projects the Subcommittee considers today are prime examples of the tremendous growth potential that exists by utilizing existing water infrastructure across the country. These projects involve partnerships between private developers, the Bureau of Reclamation, and the Corps of Engineers. And in one case, the developer itself is the city of New York.

Until Congress comprehensively addresses hydropower licensing, cases such as these, requiring special legislation from Congress to extend construction deadlines, will continue. It is NHA's hope that the additional time granted by these extensions will allow the projects to complete the process and protect the significant investment of time and financial resources by both the developers and the federal government.

I thank the Subcommittee for providing me this opportunity to testify and I look forward to answering your questions.

Mr. WHITFIELD. Thank you, Mr. Leahey, and thank all of you for your opening statements.

At this time I will recognize myself for 5 minutes of questions.

Mr. Bottiggi and Mr. Slocum, let me ask you, the Cayman Group that purchased these power plants in the Northeast, how many did they purchase and what did they pay for it? What was the purchase price?

Mr. SLOCUM. I can't remember the exact number of power plants. I believe it was a deal that included, I think, five or six total power plants in two different geographic markets in PJM and in ISO New England.

I don't know if there was a public purchase price. Because Energy Capital Partners is a private equity firm, it doesn't have to submit Securities and Exchange Commission filings. But it was most likely in excess of \$10 million, and it also was not a merger; it was a disposition.

Mr. WHITFIELD. So, FERC did approve the acquisition?

Mr. SLOCUM. Yes, sir.

Mr. WHITFIELD. And so, Brayton Point is the plant that was closed? Is that the one you refer to in your testimony?

Mr. BOTTIGGI. Yes, sir. That was a 1500-megawatt, coal-fired power plant.

Mr. WHITFIELD. Now, Mr. Slocum, you said market manipulation. If it is coal, I would think environmental had something to do with it as well.

Mr. BOTTIGGI. Well, the low price of natural gas has put pressure on coal-fired electricity.

Mr. WHITFIELD. Right.

Mr. BOTTIGGI. So, it was closed for economic reasons—

Mr. WHITFIELD. Yes.

Mr. BOTTIGGI [continuing]. Is what they claimed.

Mr. WHITFIELD. But the EPA regulation on existing coal plants also makes a big difference.

Mr. BOTTIGGI. Right.

Mr. WHITFIELD. But, whatever the reason, they closed that down and that created a shortage of supply, is that correct?

Mr. SLOCUM. Yes, sir.

Mr. BOTTIGGI. Correct.

Mr. WHITFIELD. And so, that contributed to these higher rates?

Mr. BOTTIGGI. It did.

Mr. WHITFIELD. Now, on the capacity markets, I am certainly not an expert on capacity markets, and I know it is pretty complicated, but it is my understanding there are two areas of the country that have mandatory capacity markets, is that correct?

Mr. SLOCUM. Yes.

Mr. WHITFIELD. OK. And one of them is ISO New England, and one, is it PJM?

Mr. SLOCUM. Yes, sir.

Mr. WHITFIELD. OK. Now why do they feel like they are necessary, say, in New England, these mandatory capacity markets, but they are not necessary in other parts of the country?

Mr. BOTTIGGI. In other parts of the country where there are no Regional Transmission Authorities, RTOs, which ISO New England is one of them, they still use a cost-of-service model to finance

power plants. A utility will still be vertically integrated and will still own their own capacity, their own power plants. So, they will develop and construct a power plant and go to the State regulators, and the State regulators will review the cost structure. As long as it is just and reasonable, they will pay the utility the full cost to construct and maintain that power plant.

Mr. WHITFIELD. And did I understand that the ISO New York has not allowed you to self-supply anymore? Is that correct?

Mr. BOTTIGGI. ISO New England, correct.

Mr. WHITFIELD. I mean ISO New England.

Mr. BOTTIGGI. Yes, correct. We are grandfathered for our existing power plants, municipal utilities are, but if we want to build a new plant in the future now, we can't build it just on the backs of our own ratepayers to satisfy our own—

Mr. WHITFIELD. So, when you were talking about reforming the capacity markets, were you primarily focusing on the ability to self-supply or is there other area of reform you were referring to?

Mr. BOTTIGGI. Well, the forward-capacity market for all utilities, for all generation in New England, setting aside self-supply for the moment, what happens is, if an old power plant is still in existence, like many still are, when an auction clears like the 8 forward-capacity auction, new generation gets paid that very high price. It was \$15 a kilowatt month. But existing generation gets an average price. So, in this case, existing generation went from being paid \$3 a kilowatt month to \$7 a kilowatt month. Putting that in dollar terms—we have an old power plant, so I am familiar with the numbers—we currently get about \$2.5 million a year in capacity payments. It is really value because we self-supply.

Mr. WHITFIELD. Right.

Mr. BOTTIGGI. It is \$2.5 million a year, and it costs us about \$2.5 million a year to maintain that plant. So, just to have it sit there is a break-even proposition.

After FCA 8 went through, if we were an independent generator, that \$2.5 million for our old power plant jumps to \$6 million a year. So, it is a windfall for the old plants that are just hanging around.

The next auction in 2019, when FCA 9 cleared—and this will happen—that old power plant that we have would go from \$2.5 million to \$6 million, now to \$9.5 million a year we are going to get just for sitting there, just for hanging around. So, that is why this \$1 billion in 2016 is jumping to \$4 billion in 2018.

Mr. WHITFIELD. Yes. OK. Well, I wish we could talk more about this. My time has expired.

So, Mr. Rush, you are recognized for 5 minutes.

Mr. RUSH. Thank you, Mr. Chairman.

Mr. Slocum, the bill amending Section 203 that would exempt mergers or consolidation of facilities with a value of less than \$10 million from FERC's merger review authority has been portrayed as a very innocuous bill that would simply correct a drafting error from EPAC 2005 language. However, in your testimony you take a decidedly different view on this legislation. You are stating that, even with mergers or consolidations under \$10 million, it is possible that—and I am quoting you—“a single facility or contract has the ability to be a pivotal supplier in a given market, providing the

owner with an ability to unilaterally charge unjust and unreasonable rates.” End of quote.

Can you give an example of how allowing this exemption from FERC review of mergers under \$10 million might result in unjust and unreasonable rates?

Mr. SLOCUM. Yes, sir. Let’s take this Brayton Point facility that has been the subject of parts of this hearing. As the chairman pointed out, that was not a merger and it also was in excess of \$10 million. But let’s assume, theoretically, that the Brayton Point facility was a standalone company that Energy Capital Partners was going to merge with in order to combine the two companies into one. It is likely that, because of the age of the Brayton Point facility, that that transaction could have been valued at less than \$10 million. And therefore, FERC, under this proposed legislation, would not be able to review that transaction. And that would be a problem because, as we identified in our market manipulation complaint, that single facility was what economists term “a pivotal supplier” in that market, and therefore, not allowing FERC the discretion to look at that kind of transaction I think is problematic.

It is important to note that it isn’t like FERC is a difficult place to submit a merger application. I cannot find in the last 20 years a single merger consolidation proposal that FERC has rejected outright. So, this is not necessarily a difficult process.

I understand that the \$10 million threshold sounds like it is a reasonable proposal, but there are a number of examples where instituting this threshold would deny FERC the opportunity to review pivotal supplier transactions.

Mr. RUSH. Well, Mr. Minzner from the first panel indicated that FERC has other tools at its disposal to protect consumers, even in a situation where a series of mergers take place, but not individually meet the \$10 million standard. What do you think about that statement?

Mr. SLOCUM. Well, I think that in the case of the transaction of the Energy Capital Partners’ acquisition of a portfolio of power plants, FERC approved that transaction. And yet, the result of that transaction was that one entity was able to utilize the capacity of one power plant to have a billion-dollar swing in energy prices.

And so, in this case, FERC reviewed the transaction, approved it, and then, did not have safeguards in place. Even after we brought our market manipulation complaint, FERC still did not rule on it because they deadlocked two-to-two.

So, at its core, the Federal Power Act is all about reviewing transactions. We think it is very important that FERC retain the ability to be able to review any and all mergers and consolidations of facilities under its jurisdiction.

Mr. RUSH. I want to thank you, Mr. Chairman.

Mr. WHITFIELD. Mr. Marsan, you look like, did you want to say something?

Mr. MARSAN. Thank you, Mr. Chairman.

I don’t think anything that Mr. Slocum is saying frustrates the intent of Section 203. As he stated, he is bringing a complaint for market manipulation right now, and FERC still has, as the general counsel stated, market power authority over all rates. And folks like Mr. Slocum and other citizens who want to bring a contest to

market suggesting market power can do so, and FERC has full authority to review that. So, I don't think any change to Section 203 frustrates FERC's ability to monitor these things.

Mr. WHITFIELD. The gentleman's time has expired.

At this time, Mr. Flores, you are recognized for 5 minutes.

Mr. FLORES. Thank you, Mr. Chairman.

Mr. Powell, a couple of quick questions for you.

Mr. POWELL. Yes, sir.

Mr. FLORES. Would allowing an agency to utilize aerial data and to condition a permit on a followup ground survey interfere in any way with the integrity of the environmental review?

Mr. POWELL. No, sir, I don't believe that it would. It is very common practice, even today. Landowners routinely deny survey permission. That is very common in every proceeding. FERC uses its conditional authority to require us to go back and close any gaps that those other agencies administering those Federal reviews require.

Mr. FLORES. OK. Well, let's go ahead and build on that. In Mr. Lloyd's testimony, the testimony appears to be driven by his dissatisfaction with the FERC public interest review rather than any substantive criticism of H.R. 3021, outside of the notion that, for some reason, that FERC wouldn't require air survey data to be verified by a ground survey.

So, two parts to this. In your experience with these permitting decisions, do you have any reason to believe that an agency would ignore the authority provided in H.R. 3021, which states very clearly—and I quote—“An agency accepting aerial survey data may require, as a condition of approval, that such aerial survey data be verified through the use of ground survey data before the construction or extension of a facility that is subject of such application.”? Unquote. Do you have any reason to believe that FERC or any other agency would ignore that authority that is provided in H.R. 3021?

Mr. POWELL. I would say, as a general rule, no. I think there might be some specific places where, I would say particularly a State agency that is administering 401, might because they may want 100 percent before they would deem the application complete, which is why this legislation is that important.

Mr. FLORES. OK. Good. Do you think that Mr. Lloyd's concerns are well-founded, given that it is verified by a ground survey?

Mr. POWELL. Not in my experience, sir.

Mr. FLORES. OK.

Mr. POWELL. As a matter of practice, prior to prefiling, applicants approach the regulatory agencies, the Fish and Wildlife Service or the State agency administering their listed species program, the SHPO—I'm sorry—State Historic Preservation Office, and discuss which species should be considered in a particular project, what the survey protocol should be for those resources. As you might imagine, most species don't occur across all geographies.

And so, it tends to be a very small subset of the overall list, and they tend to be unique to specific habitats, which you can identify by and large. You may not be able to determine specifically whether the individual is there today, but you can very much limit the area that requires resurvey, as a general rule. There are other spe-



cies that are more broadly distributed and you would need to do that.

Mr. FLORES. OK. I have got a little bit of time left. Do you have any general comments on anything that has been said about FERC's environmental review process today?

Mr. POWELL. Well, I think FERC's environmental review process is very good.

Mr. FLORES. OK.

Mr. POWELL. They strongly encourage applicants to work with the landowners, and we do that. We do that throughout the process. We do that all the way to the very end of a process. We want to obtain survey permission, and we want to do the required surveys to complete the record. There is really no benefit to us to having an incomplete record that late in the project. So, we do very diligently try to get that, but what is needed is a solution.

There are going to generally be some landowners that are going to say no, and we need a mechanism where a regulatory agency can't say, well, this one individual said no. Therefore, I don't have to review your permit, and I can wait until after the certificate and after the order and after imminent domain, until you can gain access. And, oK, now my regulatory review clock starts. And that happens.

Mr. FLORES. OK. Thanks, Mr. Powell. I thank the rest of the witnesses for their testimony.

Mr. Chairman, I yield back the balance of my time.

Mr. WHITFIELD. The gentleman yields back.

Mr. McNerney is recognized for 5 minutes.

Mr. MCNERNEY. I thank the chairman, and I thank the witnesses this morning.

Mr. Slocum, what would be the practical effects of the merger legislation?

Mr. SLOCUM. The practical effects would be that any merger or consolidation under \$10 million would not be subject to FERC review.

Mr. MCNERNEY. So, you think there would be a rush of unquestioned mergers at that point?

Mr. SLOCUM. I don't know if there would be a rush, but I think that, theoretically and practically, you could have a merger or consolidation structured in a way to ensure that you get under that threshold amount.

Mr. MCNERNEY. OK.

Mr. SLOCUM. And particularly as we see a lot of older generation, whether they are older nuclear power plants or older coal-fired units, that for a variety of reasons, by themselves are not worth very much, but as part of a larger portfolio could be extremely valuable. We just think that it is not prudent policy to not allow FERC to review those transactions when they are first proposed.

Mr. MCNERNEY. Thank you.

Mr. Leahey, in your testimony you mention that S. 2012 contains provisions to extend construction timelines to 8 years. What are some of the biggest obstacles that prevent construction post-licensing?

Mr. LEAHEY. Sir, thank you. As I mentioned in my testimony, particularly on these pieces of infrastructure, these existing dams

that are owned by the Federal facilities, once FERC issues the license for the project, there still may be supplemental permits that are required to get either from the Bureau of Reclamation or from the Army Corps of Engineers. Delays in that permitting process can, then, cause those delays that require the applicants or the licensees to come back to Congress individually.

The cases before you also have a variety of other issues that come up post-licensing. In one of the cases, I believe it was getting easements for purposes of the transmission line. In others, there were unexpected issues that resulted when work started at the dam. So, a variety of things can pop up post-licensing that could cause those delays.

Mr. MCNERNEY. Mr. Lloyd, would you please explain——

Mr. WHITFIELD. Your microphone.

Mr. MCNERNEY. Oh, thank you. We lost power or something. I will speak up.

Can you please explain if an aerial surveying can effectively identify the full range of critical mass in the environment and cultural resources on the ground from such a distance?

Mr. LLOYD. Unfortunately, I think the answer is no. The data that we have looked at shows that often endangered species are underground. Often, if you have to delineate a wetland, you have to do digging in the ground to find out the kind of soils that are there. I wish I could tell you the aerial surveying would solve the problem, but for a large number of species that we have looked at it will not solve the problem.

If I may, our experience has been that FERC is not getting enough environmental data to adequately do its job. What we are finding is, when a State permitting agency has to come in and do permits, they have to look at those permits in a much more granular way, generate a lot more environmental data. It enables them to make a better decision. We think that that information ought to be in front of FERC when FERC makes its decision in the first place, and that that would help the process, not harm it.

Mr. MCNERNEY. Well, another one of the things you mentioned is that some folks might be offended by aerial activities. What about drones, unmanned drones? How is that going to fit into this?

Mr. LLOYD. I don't think we have experienced it yet. We have had concerns about helicopters and low-flying aircraft. To be honest with you, given where the technology is going in this country, I think drones may be the next step. We may all need to look at that to see whether that is not an invasion of the use of private property by using drones to go over private property.

Mr. MCNERNEY. I mean, in my career prior to coming to Congress, I did a survey of a competitor's equipment. I don't think they would have been too happy if they had known about it, but they didn't have any way to stop me.

[Laughter.]

Is that the kind of thing we are talking about?

Mr. LLOYD. It is the kind of thing we are talking about. Landowners in New Jersey have already experienced adverse impacts from helicopters. As I have said, I expect that drones might be even more invasive, and I don't think we have addressed that issue at all as yet.

Mr. MCNERNEY. All right. Thank you, Mr. Chairman.

Mr. WHITFIELD. Well, I think that concludes our questions, except for our friend Mr. Kennedy. So, we will recognize him for 5 minutes as well.

Mr. KENNEDY. Thank you, Mr. Chairman. I appreciate the time, and I appreciate the witnesses being here and your testimony. And if you guys stick around for me, I will ask you a couple of questions as well.

Mr. Bottiggi I heard also say that the market rules are vital to ensuring reliability. I was wondering if you could share your take on that? Are capacity markets the only way to make sure that new generation gets built?

Mr. BOTTIGGI. Electric utilities have been around since the 1800s, including Braintree Electric, and we think we have provided very reliable service in that 120 years. Capacity markets have been around since 2007. So, there was a way to do it before the capacity markets. I do not think they are vital. I think generators have to be paid enough revenue to cover their costs, but paying this wind-fall to old generation I don't believe is necessary.

Mr. KENNEDY. So, I was interested in analyses that showed that over 90 percent of new generating capacity has been constructed under bilateral contracts or utility ownership, but not solely for sale in the capacity markets run by RTOs. What do you think this finding says about the ability of capacity markets to achieve the needed generation mix to meet the reliability and policy goals?

Mr. BOTTIGGI. The forward-capacity market as we experience it, in my opinion, drives short-term decisionmaking. A long-term decision for a utility is 40 years, whether it is electrical infrastructure or generation assets. So, the RTOs drive utilities to make short-term or the owners of generation to make a fairly short-term decision. Seven years now is what you get paid for capacity if you clear the auction as a new resource. That is a short-term decision.

Those same decisions, that same short-term window is only 1 year. Each year is a new market for existing generation. So, the nuclear power plants that are closing in New England, Vermont Yankee, Pilgrim Nuclear Power Plant, and, then, in New York, FitzPatrick, they are all basing that decision on a short-term window.

When you get out of the RTO markets and you get down South and they are still building generation under the old cost-of-service model, that long-term view of the world that you need for these major expenses, that is why those assets are being built down there and they aren't being built in New England.

Mr. KENNEDY. You mentioned that Braintree has been able to self-supply its capacity, but that auction was taken away for further generation. What does that mean for your ratepayers going forward and how does the current ratemaking process for Braintree work within the structure of capacity markets? Finally, with regard to that, in your opinion, how critical is a review by the Federal regulator to ensure that rates are, in fact, just and reasonable?

Mr. BOTTIGGI. Braintree Electric being a municipal utility, for the most part, is not regulated. We set our own rates. I report to a three-member light board. The rates that we control within town, like our distribution system, we are not regulated. The capacity

markets are regulated at the State and regional level in New England by ISO New England.

When deregulation occurred, since we were allowed to stay vertically integrated and own our own generation, the next step was, when the capacity markets was started, the ISO New England agreed you can self-supply your own generation. You don't get paid for it as a generator and your load doesn't pay for it. You are revenue-neutral. So, off we went and I built the 115-megawatt new state-of-the-art gas turbines that way.

The ISO was led to believe that we had market power, the little municipal utilities had market power over New England. We only have a few hundred megawatts of generation in this 33,000 megawatts of generation, but they were convinced that that gave us market power to manipulate the system. So, they took that self-supply option away from us.

Flash forward to today. We have an old combined-cycle power plant, about 40 years old now, that we would like to replace with new modern generation. If we could self-supply, I could go to the town, borrow money, general obligation bonds at a very low rate, build a new power plant. Our ratepayers would pay off the debt service, and we would provide that capacity for our own needs.

Since we can't self-supply, we need to bid against other private companies into the forward-capacity market in order to try to replace that old generation. It is much harder to do. We have been at it for 3 years. We would be well underway replacing that generation now if we knew we could with certainty get paid, will get credit for that capacity.

Mr. KENNEDY. Thank you.

Chairman, I yield back.

Mr. WHITFIELD. I think we need to spend more time on these capacity markets.

[Laughter.]

Mr. BOTTIGGI. I can come back.

[Laughter.]

Mr. WHITFIELD. Mr. Rush, do you have additional questions?

Mr. RUSH. Thank you, Mr. Chairman. I do have an additional question for Mr. Lloyd.

Mr. Lloyd, recent studies have suggested that many of the States in the Northeast region do not require new natural gas infrastructure to meet their energy needs. According to Post-2014 State-of-the-Market Report, the Northeast is a net exporter of natural gas, as in the summer of 2014 the attorney general of Massachusetts commissioned a study that determined the New England States do not need new infrastructure to meet their energy needs.

Given the Northeast region is a net exporter of natural gas, is there a risk of overbuilding natural gas infrastructure in the Northeast? And how does FERC's policy of certification of new interstate natural gas pipeline facilities address the possibility of overbuilding?

Mr. LLOYD. Thank you, Congressman.

I think there is a risk of overcapacity, and this goes directly to the FERC process. As I said, it has got 80 pipelines pending in front of it right now. Many of them are in the Northeast. They are looking at those pipelines on an individual basis and they are as-

sessing the need for those pipelines by looking at whether those pipelines have a contract for gas.

Now we have some examples where the companies contracting for gas are related corporate entities to the companies that are building the pipelines. So, there is self-dealing going on there, and it doesn't appear that FERC is going beyond just looking at the contract.

So, what we are seeing, I don't think FERC is adequately examining all of the infrastructure at once. They are looking at it pipeline-by-pipeline. And then, we don't have an opportunity to look at what is the infrastructure that we actually need in the Northeast. Do we need 12 pipelines, for instance, crossing the Delaware River or could we meet our needs with far fewer pipelines?

As you pointed out, because the Northeast, and New Jersey in particular, are net exporters of gas now, it is a real question about whether there is a need for gas. And if we build the new infrastructure, the danger is we are going to be taking gas from the existing infrastructure and we are going to end up with wasted assets.

And we have experienced this. If I may, we experienced this in New Jersey with the nuclear industry where, in fact, we began to look at three nuclear power plants. We spent a billion dollars in looking at those plants and never built any of them.

Now the good news is, because we didn't build them, there was no environmental impact. The bad news is, because we didn't have a mechanism in place, a regulatory mechanism in place to review those expenses before the utilities made them, the ratepayers ended up paying them.

I fear that we may face the same situation with natural gas infrastructure where we are building pipelines that ultimately we may not need. And then, we will have to pay for those investments in one way or the other.

Mr. RUSH. Thank you, Mr. Chairman.

Mr. WHITFIELD. Let me just ask a question. We have had a lot of hearings on the supply of gas in the Northeast. I was not aware that the Northeast is considered a net exporter of natural gas. Is that the case or is that not the case?

Mr. LLOYD. As the congressman said, the attorney general of Massachusetts did just an analysis and said that they were a net exporter. This was, as I understand it, in regard to pipelines that were proposed to serve Massachusetts.

We have had the same experience in New Jersey where, in fact, we have no net need for gas right now. One of the bases that the companies are justifying the pipeline is redundancy, but this is a question I think that FERC needs to address: should we have a redundant supply in New Jersey, in the Northeast, or anywhere? And I don't think FERC has mechanisms in place to examine that.

One way we have suggested that they might get at that is through a programmatic environmental impact statement which would look at a number of pipelines, not just one pipeline, and see what, in fact, the overall need is. And perhaps it would lead to a decision that assures that we have adequate supply for the Northeast and for New Jersey, but also assure that we are not overbuilding, to leave ratepayers with a bill that they may not want to pay.

Mr. WHITFIELD. Did you have a comment on that, Mr. Powell?

Mr. POWELL. No, sir.

Mr. WHITFIELD. OK.

Mr. POWELL. I am not expert on market.

Mr. WHITFIELD. OK.

Mr. RUSH. Mr. Chairman, if I might respectfully request that you ask the attorney general of Massachusetts——

Mr. WHITFIELD. I am going to go up there and see him.

[Laughter.]

Mr. RUSH. Well, take me with you.

Mr. WHITFIELD. I will.

[Laughter.]

I have been wanting to go up there to Braintree, anyway.

[Laughter.]

I do want to ask one additional last question for Mr. Marsan because in his written testimony he said that, since enactment of the Energy Policy Act of 2005, that FERC has been interpreting I think Section 203 to mean that any acquisition of any utility property, that they would have to get preapproval. I was just curious if you might just give us a couple of examples of that which you consider particularly maybe egregious.

Mr. MARSAN. Correct. I can speak from my own experience on this. I will just give you three of our own company's transactions we have had to seek 203 approval for: a 12-kilovolt line and land rights for \$1,513; a relay for \$2,802, and miscellaneous substation equipment, \$2,874.

Mr. WHITFIELD. I'm sorry, would you just turn your microphone on, so that our transcriber can hear?

Mr. MARSAN. OK. Can you hear me better now?

OK. I will just go through those again: \$1,513 for a 12-kilovolt line and land rights; \$2,802 for relays, and \$2,874 for miscellaneous substation equipment. So, in each of those cases we had to take the expense of drafting a 203 application, the legal fees and such associated with it, file it with FERC. FERC had to do their due diligence, as the general counsel of FERC stated before, on transactions that would have no impact whatsoever on the grid.

Mr. WHITFIELD. Well, thank you very much for that, and thank you all for your testimony. We look forward to additional contact with you, as we try to decide what we are doing with this legislation.

I also would ask unanimous consent that we enter into the record a letter of support from Advanced Hydro Solutions, a statement for the record from Clark Canyon Hydro, a statement from Congressman Zinke in support of H.R. 2080 and 2081, and a statement of record from the American Rivers. I think you all have seen this.

Mr. RUSH. No objection, Mr. Chairman.

Mr. WHITFIELD. No objection?

[The information appears at the conclusion of the hearing.]

Mr. WHITFIELD. So, that will conclude today's hearing, and the record will remain open for 10 days.

We look forward to working with you all. Thank you very much for your time and your testimony.

That concludes today's hearing.

[Whereupon, at 12:42 p.m., the subcommittee was adjourned.]  
[Material submitted for inclusion in the record follows:]

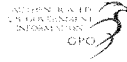
PREPARED STATEMENT OF HON. FRED UPTON

Today we will examine eight bills as part of our ongoing bipartisan work to strengthen our domestic energy infrastructure to help keep costs affordable and reliable for consumers and job-creators.

Three of these bills make process changes at the Federal Energy Regulatory Commission (FERC), the result of which will be more streamlined agency oversight of the Nation's natural gas infrastructure and electricity system. Specifically, they will allow greater use of aerial survey data in natural gas infrastructure approvals, create a new process for public challenges to certain electric rate changes previously not subject to redress, and raise the monetary threshold for FERC jurisdiction over electricity acquisitions which will help facilitate increases in transmission capacity for the utilities that need it. These are small but important changes that will help yield a more effective regulatory process at FERC, and ultimately a more affordable and reliable supply of energy delivered to folks in Michigan and across the country.

Five of the bills before us today extend the licenses of hydroelectric power projects. Renewable hydropower is a critical component of our all-of-the-above energy strategy, and its benefits are many. Hydro is cheap and reliable and has minimal environmental impacts. Each of these hydroelectric projects will create many high-paying construction jobs and expand the electricity supply for the communities directly served. They are precisely the kinds of power projects that both sides of the aisle can, and should, get behind. But as the law currently stands, the FERC licenses for these five projects have or will soon expire before construction has started, and for reasons outside the control of the companies undertaking them. These bills would extend the licenses and allow construction to commence in the future.

All eight of these bills are steps in the right direction for American energy, and I urge my colleagues to support them.



114TH CONGRESS  
1ST SESSION

# H. R. 3021

To amend the Natural Gas Act to allow the use of aerial survey data for certain applications, and for other purposes.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 10, 2015

Mr. POMPEO (for himself, Mr. MULLIN, Mr. SCHRAMMER, and Mr. MEEKS) introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

To amend the Natural Gas Act to allow the use of aerial survey data for certain applications, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the “Aerial Infrastructure  
5 Route Survey Act of 2015” or the “AIR Survey Act of  
6 2015”.



1 **SEC. 2. AERIAL SURVEY DATA ALLOWED FOR CERTAIN AP-**  
2 **PLICATIONS.**

3 Section 7 of the Natural Gas Act (15 U.S.C. 717f)  
4 is amended by adding at the end the following new sub-  
5 section:

6 “(i) AERIAL SURVEY DATA.—

7 “(1) DATA COLLECTED BY AERIAL SURVEY.—

8 Data collected by aerial survey shall be accepted in  
9 lieu of, and given equal weight to, ground survey  
10 data for the purposes of—

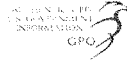
11 “(A) completing any prefiling process es-  
12 tablished to facilitate the formal application  
13 process for obtaining a certificate of public con-  
14 venience and necessity under this section; or

15 “(B) completing an application associated  
16 with a Federal authorization (as defined in sec-  
17 tion 15(a) with respect to an application for a  
18 certificate of public convenience and necessity  
19 under this section).

20 “(2) VERIFICATION.—An agency accepting aer-  
21 ial survey data pursuant to paragraph (1)(B) may  
22 require, as a condition of approval of an application  
23 associated with a Federal authorization described in  
24 such paragraph, that such aerial survey data be  
25 verified through the use of ground survey data be-

- 1 fore the construction or extension of a facility that
- 2 is the subject of such application.”.

○



114TH CONGRESS  
1ST SESSION

# H. R. 2984

To amend the Federal Power Act to provide that any inaction by the Federal Energy Regulatory Commission that allows a rate change to go into effect shall be treated as an order by the Commission for purposes of rehearing and court review.

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## IN THE HOUSE OF REPRESENTATIVES

JULY 8, 2015

Mr. KENNEDY (for himself, Mr. NEAL, Mr. MULLIN, Mr. KINZINGER of Illinois, Mr. LANGEVIN, Mr. MOULTON, Mr. KENTING, Mr. LYNCH, Ms. CLARK of Massachusetts, Mr. WELCH, Ms. KUSTER, Ms. PINGREE, Mr. CICILLINE, Mr. MCGOVERN, Mr. CAPRANO, and Ms. TSONGAS) introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

To amend the Federal Power Act to provide that any inaction by the Federal Energy Regulatory Commission that allows a rate change to go into effect shall be treated as an order by the Commission for purposes of rehearing and court review.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2       This Act may be cited as the “Fair Ratepayer Ac-  
3 countability, Transparency, and Efficiency Standards  
4 Act” or the “Fair RATES Act”.

5 **SEC. 2. AMENDMENT TO THE FEDERAL POWER ACT.**

6       Subsection (d) of section 205 of the Federal Power  
7 Act (16 U.S.C. 824d(d)) is amended by adding at the end  
8 the following: “Any absence of action by the Commission  
9 that allows a change to take effect under this section, in-  
10 cluding the Commission allowing the sixty days’ notice  
11 herein provided to expire without Commission action, shall  
12 be treated as an order issued by the Commission accepting  
13 such change for purposes of section 313.”.

○

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(Original Signature of Member)

11TH CONGRESS  
2D SESSION

**H. R.**

To amend section 203 of the Federal Power Act.

IN THE HOUSE OF REPRESENTATIVES

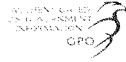
Mr. POMPEO introduced the following bill; which was referred to the  
Committee on

**A BILL**

To amend section 203 of the Federal Power Act.

*Be it enacted by the Senate and House of Representa-*  
*tives of the United States of America in Congress assembled,*  
**SECTION 1. CLARIFICATION OF FACILITY MERGER AU-**  
**THORIZATION.**

Section 203(a)(1)(B) of the Federal Power Act (16  
U.S.C. 824b(a)(1)(B)) is amended by striking “such facili-  
ties or any part thereof” and inserting “such facilities, or  
any part thereof, of a value in excess of \$10,000,000”.



114TH CONGRESS  
1ST SESSION

# H. R. 2080

To reinstate and extend the deadline for commencement of construction of a hydroelectric project involving Clark Canyon Dam.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 28, 2015

Mr. ZINKE (for himself, Mr. SIMPSON, and Mr. LABRADOR) introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

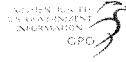
To reinstate and extend the deadline for commencement of construction of a hydroelectric project involving Clark Canyon Dam.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION OF TIME FOR A FEDERAL ENERGY**  
4 **REGULATORY COMMISSION PROJECT IN-**  
5 **VOLVING CLARK CANYON DAM.**

6 Notwithstanding the time period described in section  
7 13 of the Federal Power Act (16 U.S.C. 806) that would  
8 otherwise apply to the Federal Energy Regulatory Com-  
9 mission project numbered 12429, the Federal Energy  
10 Regulatory Commission (referred to in this section as the

1 “Commission”) shall, at the request of the licensee for the  
2 project, and after reasonable notice and in accordance  
3 with the procedures of the Commission under that section,  
4 reinstate the license and extend the time period during  
5 which the licensee is required to commence construction  
6 of project works for the 3-year period beginning on the  
7 date of enactment of this Act.



11TH CONGRESS  
1ST SESSION

# H. R. 2081

To extend the deadline for commencement of construction of a hydroelectric project involving the Gibson Dam.

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## IN THE HOUSE OF REPRESENTATIVES

APRIL 28, 2015

Mr. ZINKE introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

To extend the deadline for commencement of construction of a hydroelectric project involving the Gibson Dam.

1 *Be it enacted by the Senate and House of Representa-*

2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION OF TIME FOR FEDERAL ENERGY**

4 **REGULATORY COMMISSION PROJECT IN-**

5 **VOLVING GIBSON DAM.**

6 (a) IN GENERAL.—Notwithstanding the require-

7 ments of section 13 of the Federal Power Act (16 U.S.C.

8 806) that would otherwise apply to the Federal Energy

9 Regulatory Commission project numbered 12478–003, the

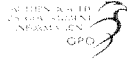
10 Federal Energy Regulatory Commission (referred to in



1 this section as the “(Commission”) may, at the request of  
2 the licensee for the project, and after reasonable notice  
3 and in accordance with the procedures of the Commission  
4 under that section, extend the time period during which  
5 the licensee is required to commence construction of the  
6 project for a 6-year period that begins on the date de-  
7 scribed in subsection (b).

8 (b) DATE DESCRIBED.—The date described in this  
9 subsection is the date of the expiration of the extension  
10 of the period required for commencement of construction  
11 for the project described in subsection (a) that was issued  
12 by the Commission prior to the date of enactment of this  
13 Act under section 13 of the Federal Power Act (16 U.S.C.  
14 806).

○



114TH CONGRESS  
1ST SESSION

# H. R. 3447

To extend the deadline for commencement of construction of a hydroelectric project.

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## IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 8, 2015

Ms. FOXX introduced the following bill; which was referred to the Committee on Energy and Commerce

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## A BILL

To extend the deadline for commencement of construction of a hydroelectric project.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

### 3 **SECTION 1. EXTENSION.**

4 (a) IN GENERAL.—Notwithstanding the time period  
5 specified in section 13 of the Federal Power Act (16  
6 U.S.C. 806) that would otherwise apply to the Federal En-  
7 ergy Regulatory Commission project numbered 12642, the  
8 Commission may, at the request of the licensee for the  
9 project, and after reasonable notice, in accordance with  
10 the good faith, due diligence, and public interest require-

1 ments of that section and the Commission's procedures  
2 under that section, extend the time period during which  
3 the licensee is required to commence the construction of  
4 the project for up to 3 consecutive 2-year periods from  
5 the date of the expiration of the extension originally issued  
6 by the Commission.

7 (b) REINSTATEMENT OF EXPIRED LICENSE.—If the  
8 period required for commencement of construction of the  
9 project described in subsection (a) has expired prior to the  
10 date of the enactment of this Act, the Commission may  
11 reinstate the license effective as of the date of its expira-  
12 tion and the first extension authorized under subsection  
13 (a) shall take effect on the date of such expiration.

FAM14\MCKINLAMCKINI\_090.XML

(Original Signature of Member)

114TH CONGRESS  
2D SESSION

**H. R.**

To extend the deadline for commencement of construction of a hydroelectric project.

IN THE HOUSE OF REPRESENTATIVES

Mr. McKINLEY introduced the following bill; which was referred to the Committee on

**A BILL**

To extend the deadline for commencement of construction of a hydroelectric project.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. EXTENSION.**

(a) IN GENERAL.—Notwithstanding the time period specified in section 13 of the Federal Power Act (16 U.S.C. 806) that would otherwise apply to the Federal Energy Regulatory Commission project numbered 12715, the Commission may, at the request of the licensee for the project, and after reasonable notice, in accordance with

1 the good faith, due diligence, and public interest require-  
2 ments of that section and the Commission's procedures  
3 under that section, extend the time period during which  
4 the licensee is required to commence the construction of  
5 the project for up to 3 consecutive 2-year periods from  
6 the date of the expiration of the extension originally issued  
7 by the Commission. Any obligation of the licensee for the  
8 payment of annual charges under section 10(e) of the Fed-  
9 eral Power Act (16 U.S.C. 803(e)) shall commence upon  
10 conclusion of the time period to commence construction  
11 of the project, as extended by the Commission under this  
12 subsection.

13 (b) REINSTATEMENT OF EXPIRED LICENSE.—If the  
14 period required for commencement of construction of the  
15 project described in subsection (a) has expired prior to the  
16 date of the enactment of this Act, the Commission shall  
17 reinstate the license effective as of the date of its expira-  
18 tion and the first extension authorized under subsection  
19 (a) shall take effect on the date of such expiration.

## [DISCUSSION DRAFT]

114TH CONGRESS  
2D SESSION**H. R.** \_\_\_\_\_

To extend the deadline for commencement of construction of a hydroelectric project.

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## IN THE HOUSE OF REPRESENTATIVES

Mr. GIBSON introduced the following bill; which was referred to the Committee on \_\_\_\_\_

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**A BILL**

To extend the deadline for commencement of construction of a hydroelectric project.

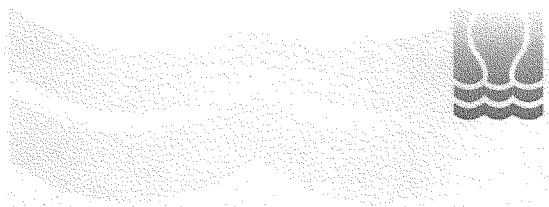
1 *Be it enacted by the Senate and House of Representa-*  
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. EXTENSION.**

4 (a) IN GENERAL.—Notwithstanding the time period  
 5 specified in section 13 of the Federal Power Act (16  
 6 U.S.C. 806) that would otherwise apply to the Federal En-  
 7 ergy Regulatory Commission project numbered 13287, the  
 8 Commission may, at the request of the licensee for the  
 9 project, and after reasonable notice, in accordance with

1 the good faith, due diligence, and public interest require-  
2 ments of that section and the Commission's procedures  
3 under that section, extend the time period during which  
4 the licensee is required to commence the construction of  
5 the project for up to 4 consecutive 2-year periods from  
6 the date of the expiration of the time period required for  
7 commencement of construction prescribed in the license.

8 (b) REINSTATEMENT OF EXPIRED LICENSE.—If the  
9 period required for commencement of construction of the  
10 project described in subsection (a) has expired prior to the  
11 date of the enactment of this Act, the Commission may  
12 reinstate the license effective as of the date of its expira-  
13 tion and the first extension authorized under subsection  
14 (a) shall take effect on the date of such expiration.



*Advanced  
Hydro Solutions*

3000 Auburn Drive, Suite 430  
Beachwood, Ohio 44122  
Tel: 216 472 5581  
www.advancedhydrosolutions.com  
January 29, 2016

The Honorable Ed Whitfield  
Chairman  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
United States House of Representatives  
2125 Rayburn House Office Building  
Washington, DC 20515

The Honorable Bobby Rush  
Ranking Member  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
United States House of Representatives  
2322A Rayburn House Office Building  
Washington, DC 20515

Re: Jennings Randolph Hydroelectric Project

Dear Chairman Whitfield and Ranking Member Rush,

Thank you for the opportunity to express Advanced Hydro Solutions' (AHS) support for legislation to extend the Federal Energy Regulatory Commission's (FERC) authority to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam.

The Jennings Randolph project is a proposed hydropower project in Mineral County, West Virginia, and Garrett County, Maryland. This \$43 million project will utilize an existing Federal dam without disrupting its authorized purpose or affecting the environment or the operations of that facility. Additional public benefits of the project include clean, renewable energy to power over 6,000 homes, offsetting approximately 107,000,000 pounds of CO<sub>2</sub> emissions, 678,000 pounds of SO<sub>2</sub> emissions, and 305,000 pounds of NO<sub>x</sub> emissions; construction employment and permanent employment positions for project operators; and new business and property taxes to be paid by AHS.

This project has been under development since 2005 and during that time our company has worked through the extensive licensing process before FERC, which resulted in an original license being issued in April 2012 to our subsidiary company Fairlawn Hydroelectric Company LLC (Fairlawn). This project is supported by the local county commissions in both states, and our company has an excellent working relationship with both State agencies and the US Army Corps of Engineers (Corps) on whose property this project will be built.

Since the license was issued in 2012, Fairlawn has continued to apply for and obtain the balance of permits required, secure financing, and select contractors and equipment suppliers. Currently the project is delayed due to a pending application before the Corps to approve the construction at the federally owned Jennings Randolph Dam under Section 14 of the Rivers and Harbors Act of 1899 (33 U.S.C. 408), which we filed with the Corps in December of 2013. This delay, in turn, has held up action by Maryland Department of Environmental Protection on the required Water Appropriation Permit.

Congressional action is needed to preserve AHS's ability to move forward with the project once all regulatory requirements are met. Section 13 of the Federal Power Act (16 U.S.C. 806) requires hydropower licensees to begin construction within two years of licensing, and authorizes FERC to extend that deadline once, for a second two-year period. Here, FERC granted the license in 2012 and granted a



two-year extension of the construction deadline in 2014. Since AHS is still unable to initiate construction due to permitting delays, its license will expire unless Congress statutorily authorizes FERC to grant additional extensions of time to begin construction.

For these reasons, AHS strongly supports this proposed legislation. It will protect AHS's \$2.5 million investment in the project to date. It will preserve a project that has received widespread local support, and which has been approved by many federal and state resource agencies. And it will protect a project that will extend the tax base of local communities, provide jobs, and generate clean, carbon-free, renewable energy.

AHS appreciates the Committee's consideration of this bill and respectfully requests favorable consideration of the extension it would authorize.



David C. Sinclair  
President, Advanced Hydro Solutions LLC

CC:

The Honorable Fred Upton  
The Honorable Frank Pallone, Jr.  
The Honorable David McKinley  
The Honorable John DeFaney  
The Honorable John Sarbanes

Statement of Alina Osorio, Director  
Clark Canyon Hydro, LLC

Before the  
United States House of Representatives  
Energy and Commerce Committee  
Subcommittee on Energy and Power

February 2, 2016

Chairman Whitfield, members of the House Energy and Commerce Committee, Subcommittee on Energy and Power, thank you for the opportunity to submit testimony in support of HR 2080 —A bill to reinstate and extend the deadline for commencement of construction of a hydroelectric project involving Clark Canyon Dam.

I am also grateful to Representative Zinke for introducing this legislation providing an opportunity for the Clark Canyon Hydro project to come to fruition and provide benefits to the people of Montana and Idaho.

The Clark Canyon Hydro project will provide jobs, reliable and renewable electricity, tax revenue for Montana and power during the hottest months of the year when electricity demand is high. The hydro project being developed on the Clark Canyon Dam located in Montana, draws on the existing dam owned by the Bureau of Reclamation. The project is for a net capacity of 4.7 MW supplying an estimated 17,900 MWh of clean, renewable electricity per year, enough to power approximately 1,770 average homes per year. As you know, hydro power is stable, reliable and a renewable resource whose assets typically last for 50 to 100 years. Unlike some other forms of renewable electricity, hydropower has a number of ancillary benefits which help to provide stability to the electric transmission and distribution system.

Environmental benefits include reducing an estimated 18,000 tonnes/year of CO<sub>2</sub> and supplementing the dissolved oxygen into the Beaverhead River below the dam by way of an aeration system. The Beaverhead River has ongoing challenges with low oxygen levels, the Montana Department of Environmental Quality has provided a 401 water quality certification for the project. The Bureau of Reclamation owns and operates this dam which was built in 1964, the project draws on already existing potential power without creating adverse impacts to the Beaverhead River.

Economic benefits include, creating 30 to 40 jobs during construction and 1 to 2 full time operating jobs for the life of the project, which is anticipated to be 50 or more years. In addition to the job benefits, state and federal tax revenues that will be realized during the first five years will be approximately \$611,000. Because the electricity is considered renewable, the renewable electricity credits (RECs) will be an additional economic value.

Clark Canyon Hydro LLC (CCHL) acquired the project from a former developer who was not able to complete the work. The delays that occurred were due in large part by the former developer's mismanagement and neglect to file the necessary updates and project plans in a timely fashion to the Federal Energy Regulatory Commission (FERC). Despite the prior developer's errors, the FERC

Commissioners continue to support development of the project and uniquely expressed that support in the FERC Order terminating the license:

*Although we are required to terminate the license, we are sympathetic to efforts to develop the project -- indeed, the Commission previously issued Clark Canyon a license because the Commission concluded that the Clark Canyon project was in the public interest -- and those efforts need not end with our holding here. In a number of instances, Congress has, at the request of developers of projects that failed to timely commence construction, enacted legislation authorizing us to reinstate terminated licenses and grant additional extensions of the time to commence construction<sup>1</sup>.*

We are grateful that your Subcommittee is considering the extension of the license as suggested by FERC.

Other interested government entities with jurisdiction over the Clark Canyon Hydro project also support the project completion. The Bureau of Reclamation has been extremely cooperative with CCHH, since the company took over the project by providing guidance and recommendations such that the project design will quickly achieve final approval. The Montana Department of Environmental Quality (DEQ) in November 2014 published a report indicating the Beaverhead River, which feeds the Clark Canyon Dam and ultimately the hydro turbines, is low in oxygen which hurts native aquatic species. (As stated earlier, the Montana DEQ provided water quality certification for the project.)

Clark Canyon Hydro LLC looks forward to the opportunity to complete this project and deliver all of the anticipated environmental and economic benefits to the people of Montana and Idaho.

Mr. Chairman, thank you again for the opportunity to submit testimony on behalf of Clark Canyon Hydro, LLC in support of HR 2080.

Respectfully submitted,

Alina Osorio  
Director  
Clark Canyon Hydro, LLC

---

<sup>1</sup> 150 FERC ¶ 61,195, United States of American Federal Energy Regulatory Commission, Clark Canyon Hydro, LLC Project No. 12429-013, Order Terminating License (Issued March 19, 2015)

**Written Statement from Representative Ryan Zinke (MT-AL)**  
**“A Legislative Hearing on Eight Energy Infrastructure Bills”**  
**House Committee on Energy and Commerce**  
**Washington, DC**  
**Tuesday, February 2, 2016**

Mr. Chairman, Mr. Ranking Member, and Members of the Committee and Subcommittee on Energy and Power:

I wish to offer my sincere thanks for your willingness to host a legislative hearing highlighting the importance of energy infrastructure legislation. I am proud to have two bills included in today's discussion: H.R.2080, which reinstates and extends the deadline for construction of the Clark Canyon Dam hydroelectric project, and H.R.2081, which extends the deadline for the Gibson Dam hydroelectric project. Senate companion bills were also introduced by Montana Senators Steve Daines and Jon Tester, which have since passed the Senate Committee on Energy and Natural Resources.

Montana possesses an abundance of valuable resources that offer remarkable opportunities for our energy development potential. From solar and coal to hydropower and oil and gas, we sit on some of the most diverse and rich natural resources that create jobs, promote our energy security, and strengthen our economies. Hydro projects are a critical component of this equation; not only is it a clean, stable, and reliable energy source, but hydropower is also affordable, allowing residents throughout the West to turn on their lights and heat or cool their homes. However, as is typical with federal government, the permitting and certification process for dams across the country are bound up in endless bureaucracy. Even projects that are of great importance to local communities face delays and terminations, which is why Congress has taken to introducing legislation to authorize these projects independently of government agencies.

Due to bureaucratic delays with U.S. Fish and Wildlife Service, neither the Clark Canyon nor Gibson Dam projects have been able to begin construction. The Clark Canyon Dam, located outside Dillon, Montana, will provide critical electricity to both Montana and Idaho customers, which is why we are proud to have the entire

Idaho delegation as co-sponsors on both House and Senate versions of the bill. Formally licensed in 2009 by the Federal Energy Regulatory Commission (FERC), the project was granted a two year extension in 2011. Because project construction failed to begin by the deadline of August 25, 2013, the license was terminated. The Gibson Dam, stationed northwest of Augusta, Montana, is a partnership between Greenfields Irrigation District of Fairfield, Montana, and Tollhouse Energy of Bellingham, Washington. The project was officially licensed by FERC in 2014; a two year extension was also granted in that same year. The deadline for the project to commence construction just passed on January 12, 2016. Unfortunately, both projects are ready to go, but never-ending and redundant hurdles are getting in the way.

The Clark Canyon and Gibson projects are of great importance to Montana, as they will power our local farming and ranching communities while protecting pivotal wildlife and water quality resources. I find it to be incredibly unfortunate that the federal government has failed to help advance the infrastructure needed to get them across the finish line. It is not solely a benefit to my state of Montana, but it is also an opportunity for our nation to embrace our energy abundance and stand by an all-of-the-above energy approach that is critical for our energy independence. I appreciate the House Committee on Energy and Commerce for beginning these incredibly important conversations as we move toward legislative action and look forward to hearing the testimonies of the participants. Again, I sincerely appreciate your consideration of H.R.2080 and H.R.2081.



February 3, 2016

The Honorable Ed Whitfield, Chairman  
 The Honorable Bobby L. Rush, Ranking Member  
 Subcommittee on Energy and Power  
 Committee on Energy and Commerce  
 U.S. House of Representatives

Dear Chairman Whitfield and Ranking Member Rush:

We are writing to express our views on the following five bills being considered by the subcommittee.

- H.R. 2080, a bill to reinstate and extend the deadline for commencement of construction of a hydroelectric project involving the 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.

Section 13 of the Federal Power Act requires hydropower licensees to commence construction within two years of receiving a federal license from the Federal Energy Regulatory Commission (FERC). The Commission may extend the construction deadline once for an additional two-year period. If a licensee fails to begin construction by this extended deadline, its license expires and is terminated through a written order by the Commission. Each of these five bills would extend the statutory deadline for commencement of construction for a hydroelectric project. Four of the five projects that are seeking a statutory extension for the Federal Power Act's construction deadline have already received a two-year extension from the Commission. Two of the bills would reinstate licenses that have already been terminated by FERC.

American Rivers does not support individual license extension bills like the ones currently being considered by the committee. The vast majority of hydroelectric projects are able to commence construction within FERC's statutory deadline, and we generally look with disfavor on attempts to evade regular order in proceedings before FERC. We are concerned about the precedent set when Congress passes earmarks to waive regular order at specific dam sites or FERC projects. We want to make clear that our objection is to the practice of earmarking FERC projects in general, and not with any of the specific projects before the Committee at this time.

These bills are also a symptom of a larger issue with hydropower development. All of these projects involve retrofitting existing non-powered dams with new hydroelectric facilities. American Rivers generally supports policies, like the Hydropower Regulatory Efficiency Act of

2013, that would encourage the responsible development of hydropower on existing non-powered water infrastructure.

As you know, our organization strongly opposed the hydropower provisions in H.R. 8, which would dramatically weaken environmental standards for hydropower projects. The hydropower industry has argued that these changes – which would weaken bedrock environmental laws like the Clean Water Act and the Endangered Species Act, along with key protections for public land, Native American treaty obligations, recreation, and fisheries – are necessary to “expedite” the FERC licensing process. Members of the industry, arguing before this Committee, have consistently identified the hydropower licensing process – particularly sections of the law that protect these critical public values – as the greatest obstacle to new hydropower development.

We believe that the facts – demonstrated, in part, by the existence of these five bills – tell a very different story. FERC’s regulations envision a five-year licensing process, with three years of pre-filing activities and two years of processing after an application is filed. While some projects take longer, there are many examples of hydroelectric projects that receive FERC licenses in a much shorter period of time. Between 2006 and 2012, FERC issued 46 hydropower licenses in *fewer than twelve months* each.

All of the projects here are consistent with FERC’s ordinary licensing timelines. The completed license applications for each of these projects were processed in fewer than two years, with an average processing time of fewer than 16 months. All of the developers of these projects received their licenses within 10-21 months of filing an application that was complete and ready to be processed.<sup>1</sup> The two projects with the longest licensing times (Clark Canyon, at 38 months and W. Kerr Scott at 21 months) involved a “delay” between the filing of the licensing application and FERC’s determination that the license application was complete and ready for processing. FERC deemed the application for the W. Kerr Scott project deficient, and the application for the Clark Canyon project was deemed deficient *twice*.

At all five of these projects, post-licensing activities have been the primary obstacle to successful development. With the exception of the Cannonsville Dam project (where the license has not yet expired but where emergency repairs needed at the dam will prevent the project from being constructed anytime soon), each of the projects in question has held a FERC license for a period that is greater than the time it took for FERC to process the license in the first place, anywhere from 3 to 6 years. The average time it took for licensees to obtain their licenses for these projects (16 months) is far less than the time that has elapsed since they received those licenses and failed to commence construction (an average of 46 months and counting). On average, these developers have held these licenses without generating a single kilowatt or even breaking ground on the facility for nearly *three times as long as* it took FERC to process their licenses in the first place. The FERC licensing process is not holding back any of these projects.

The National Hydropower Association (NHA) continues to argue before Congress that the licensing process – particularly those portions of the process are intended to protect the environment – are the greatest source of delay in bringing new hydropower online. Yet elsewhere, NHA downplays this concern. In a recent letter regarding the Administration’s Clean

<sup>1</sup> Time from FERC “notice of ready for environmental analysis” to issuance of license order.

Energy Incentive Program (CEIP), NHA argues that many hydropower projects can be licensed and constructed without significant delay:

Even under hydropower's current licensing process there are many examples of projects being licensed and built within the timeframes outlined in the CEIP. For example, the Federal Energy Regulatory Commission (FERC) maintains a list of projects that were expedited in less than one year, and between 2006 and 2012, 46 hydropower licenses were issued in under twelve months representing over 39,000 kW's. For small hydropower developers seeking a FERC exemption the median project timeline between exemption application and commercial operation is 2.5 years, and the median timeline between start construction to placed-in-service is 17 months. Similarly, under the Hydropower Regulatory Efficiency Act of 2013 (HREA), Congress removed certain small conduit hydropower projects from FERC jurisdiction and since HREA's passage, 57 projects have received "qualifying conduit" status, representing over 24,000 kW's. For these projects it takes FERC between two and three months to issue a determination. Finally, the Bureau of Reclamation's Lease of Power Privilege (LOPP) process demonstrates hydropower projects can meet the CEIP's timeframes. Under the LOPP, Reclamation has approved a number of projects representing over 49,000 kW's. On average, these projects, from project initiation to operation, takes between 2.5 and 3 years.<sup>2</sup>

NHA argues elsewhere that the licensing process is *not* the most significant source of delay in developing new hydropower projects. In a recent comment letter before FERC, NHA referenced the Department of Energy's 2014 Hydropower Market Report<sup>3</sup> in support of its argument that FERC's annual charges for hydropower licensees (which fund FERC's licensing activities) should not apply to unconstructed hydroelectric projects:

"Examining the major licensing milestones of sixteen projects between 2005 and 2013, the Market Report found that the **phase of licensing and project development between license issuance and the start [sic] construction took the most time, more than four years, typically, longer than obtaining the license itself.**" [emphasis added]

Our own review of the data used to inform figure 7 (p. 20) in DOE's Market Report – which involves projects that are very similar to the ones addressed in these five bills – suggests that NHA is correct: Hydropower projects can indeed be licensed and constructed quickly, and licensing is far from the greatest source of delay when it comes to getting new hydropower projects online. Rather, the period of time between the receipt of a FERC license and commencement of construction is a much more significant source of delay:

<sup>2</sup> National Hydropower Association Comments on Docket No. EPA-HQ-OAR-2015-0199, Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations. <http://www.hydro.org/wp-content/uploads/2016/01/NHA-Comments-on-EPA's-Clean-Energy-Incentive-Program.pdf>

<sup>3</sup> <http://energy.gov/eere/water/downloads/2014-hydropower-market-report>



- The average time it took to license a project was just shy of 2.5 years (an average of four years for licenses and six months for exemptions).
- FERC's licensing process contemplates a five-year licensing period. Only six new projects exceeded this period. The average delay was 16 months; the maximum delay was slightly less than eight years (again, much less than the industry's "10 year delays" talking point).
- By contrast, the period of time between the receipt of a FERC license and commencement of construction was a much larger source of delay: on average 5.21 years (7.36 years for licenses and 2.5 years for exemptions). These delays are unrelated to environmental concerns, as Clean Water Act certifications, ESA consultation, and other environmental issues were resolved before license issuance.

The five bills currently under consideration by this committee provide further evidence that licensing is not the greatest of the hydropower industry's problems. Rather, the problem appears to be with developers' ability to actually get projects built once they have received a license.

We recognize that there are other legitimate factors beyond the control of these developers which may have contributed to the delay in the start of construction at these five projects. For example, two of the projects in question involve development at dams owned by the federal government and operated by the U.S. Army Corps of Engineers. Developers must comply with the Corps' section 408 permitting process, via which the Corps determines that constructing a hydropower project "will not be injurious to the public interest and will not impair the usefulness" of the underlying federal dam. The Corps' 408 process typically begins *after* the FERC licensing process is complete, and is a widely-acknowledged source of delay in licensing. In testimony before this committee in May of 2015, Ann Miles, the Director of FERC's Office of Energy Projects, suggested that it might be more efficient to take FERC out of the permitting of these projects altogether:

Many of those are Corps of Engineers or Bureau of Reclamation Dams, and one thing that is in my testimony is perhaps a suggestion for trying not to have duplicative federal agencies, is that those agencies whose dams those are take on the responsibility for siting the nonfederal projects at their dams and remove FERC's jurisdiction.<sup>4</sup>

The vast majority of potential hydroelectric capacity on non-powered dams is at Federal facilities. The U.S. Bureau of Reclamation is already successfully permitting hydropower on its facilities without FERC's involvement via its Lease of Power Privilege process. American Rivers would welcome a discussion with the hydropower industry on how we can jointly support legislation that, rather than undercutting bedrock environmental protections like H.R. 8 does, would instead allow agencies like Reclamation and the Corps to permit the expeditious non-federal development of hydropower on their own facilities without the need for FERC's involvement.

<sup>4</sup> Hearing on Discussion Drafts Addressing Hydropower Regulatory Modernization And Ferc Process Coordination Under The Natural Gas Act. U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy and Power. Washington, D.C. Wednesday, May 13, 2015.  
<http://docs.house.gov/meetings/IE/IEF03/20150513/103443/HHRG-114-IEF03-Transcript-20150513.pdf>

We also understand that other post-licensing activities (securing financing, obtaining generating equipment, etc.) can result in delays, and we believe that the public interest might be served by giving developers more time to complete these activities before their licenses are terminated. We would be interested in potentially supporting legislation that – instead of weakening protections for clean water, public lands, and endangered aquatic species – would extend the statutory construction deadlines for all FERC licensees to better account for these unforeseen circumstances and encourage the responsible development of new hydropower capacity.

Thank you for the opportunity to provide comments.

Sincerely,



Jim Bradley  
Vice President for Government Relations and Policy  
American Rivers

FRED UPTON, MICHIGAN  
CHAIRMAN

FRANK PALLONE, JR., NEW JERSEY  
RANKING MEMBER

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 1202/225-2627  
Minority 1202/225-3611

February 24, 2015

Ms. Ann F. Miles  
Director of the Office of Energy Projects  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, DC 20426

Dear Ms. Miles:

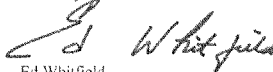
Thank you for appearing before the Subcommittee on Energy and Power on Tuesday, February 2, 2016, to testify at the hearing entitled "A Legislative Hearing on Eight Energy Infrastructure Bills."

During the hearing, Members asked you to provide additional information for the record, and you indicated that you would provide that information. Descriptions of the requested information are provided in the attached document. The format of your responses should be as follows: (1) the name of the Member whose request you are addressing, (2) the complete text of the request you are addressing in bold, and (3) your answer to that request in plain text.

To facilitate the printing of the hearing record, please respond to these requests with a transmittal letter by the close of business on March 9, 2016. Your responses should be mailed to Will Batson, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to [Will.Batson@mail.house.gov](mailto:Will.Batson@mail.house.gov).

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Ed Whitfield  
Chairman  
Subcommittee on Energy and Power

cc: The Honorable Bobby Rush, Ranking Member, Subcommittee on Energy and Power

Attachment

FEDERAL ENERGY REGULATORY COMMISSION  
WASHINGTON, DC 20426

March 9, 2016

The Honorable Ed Whitfield, Chairman  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
U.S. House of Representatives  
2125 Rayburn House Office Building  
Washington, D.C. 20515

Dear Representative Whitfield:

Thank you for the opportunity to appear before the Subcommittee on Energy and Power on Tuesday, February 2, 2016, to testify at the hearing entitled "A Legislative Hearing on Eight Energy Infrastructure Bills." Attached are my responses to the Supplemental Questions for the Records.

Sincerely,



Ann F. Miles  
Director, Office of Energy Projects

Additional Comments for the Record  
Ann F. Miles

The Honorable Pete Olson

1. Are you aware of any situations where a state agency, acting pursuant to a federal delegated authority, has failed to meet the schedule established by FERC?

A. Anytime this happened, are you aware of a state agency not meeting your schedules?

Answer: In the Energy Policy Act of 2005, Congress directed the Federal Energy Regulatory Commission (Commission) to establish schedules for all federal authorizations for jurisdictional natural gas projects. Section 157.22 of the Commission's regulations, promulgated to implement this authority, requires that federal or state agencies issue final decisions on requests for federal authorizations no later than 90 days after the Commission issues its final environmental document, unless a schedule is otherwise established by federal law.

Commission staff monitors the status of permit applications for federal authorizations during the pre-filing review period, the application review period, and the environmental review analysis. Commission regulations require that applicants identify each federal authorization that a project will require, the date the applicant requested the authorization, and any reasons why such a request has not been made by the time of the formal application.

Some statutes -- such as the Clean Water Act, which gives a state agency up to one year to act on a request for water quality certification -- provide timeframes that may allow an agency longer to act than the Commission's schedule. Also, some agencies ask applicants to refrain from submitting federal permit applications until the applicant has obtained information, such as identification of plant and animal species and cultural resources that can only be gathered by on the ground surveys. Where landowners decline to allow access to their property, this information can only be obtained after the Commission issues certification, which carries eminent domain rights. In these cases, a federal or state agency will not comply with the schedule set by the Commission. Rather, the Commission order will require action on federal authorizations before construction may begin. Commission staff does not track the timing of permits issued after Commission action on the project.

In situations where an applicant has made the necessary request for a determination to the permitting agency, the Energy Policy Act of 2005 provides an avenue for the permit applicant to seek judicial review of federal or state agency inaction if it extends past the deadline established by the Commission. There has been one case in which the applicant has sought this remedy: *Dominion Transmission, Inc. v. Summers* (D.C. Cir. No. 13–1019), July 19, 2013. In this case, the Maryland Department of the Environment, acting on delegated federal authority under the Clean Air Act, refused to process Dominion’s application for an air quality permit. The Court directed the agency to process the permit application. It did so and issued a construction permit to Dominion.

**The Honorable Richard Hudson**

- 1. What is the number and experience of the staff administering the licensing and regulation of hydropower projects (the number of PhDs, master’s degrees, etcetera)?**

Answer: Of the 250 scientists and engineers in the three Divisions that administer the licensing, compliance, and dam safety of hydropower projects, 144 (58%) have advanced degrees.