U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON ENERGY AND COMMERCE

April 24, 2015

TO: Members, Subcommittee on Energy and Power

FROM: Committee Majority Staff

RE: Committee Markup

I. INTRODUCTION

The Committee on Energy and Commerce will meet in open markup session on April 28 and 29, 2015, in 2123 Rayburn House Office Building. The Committee will consider the following:

- H.R. ____, Ratepayer Protection Act; and,
- H.R.___, Targeting Rogue and Opaque Letters Act

On Tuesday, April 28, 2015, the Committee will convene at 5:00 p.m. for opening statements only. The Committee will reconvene on Wednesday, April 29, 2015, at 10:00 a.m.

In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to peter.kielty@mail.house.gov. Any information with respect to an amendment's parliamentary standing (e.g., its germaneness) should be submitted at this time as well.

II. H.R. ___, RATEPAYER PROTECTION ACT

On March 23, 2015, Chairman Whitfield released a discussion draft of the "Ratepayer Protection Act," and on April 14, 2015, the Subcommittee on Energy and Power held a legislative hearing. On April 22, 2015, the Subcommittee forwarded the discussion draft by a vote of 17 ayes and 12 nays to the full Committee.

The legislation would allow for judicial review of any final rule issued by the Environmental Protection Agency (EPA) addressing carbon dioxide (CO2) emissions from existing fossil fuel-fired electric utility generating units before requiring compliance with the rule, and also allow States to protect households and businesses from significant adverse effects on electricity ratepayers or reliability. The legislation includes the following provisions:

Section. 1. Short Title.

This section provides the short title of "Ratepayer Protection Act of 2015."

Section. 2. Extending Compliance Dates of Rules Addressing Carbon Dioxide Emissions from Existing Power Plants Pending Judicial Review.

This section would extend the compliance dates of any final rule issued under section 111(d) of the Clean Air Act (CAA) addressing CO2 emissions from existing fossil fuel-fired electric utility generating units, including for submittal of State plans.

Section 2(a) provides that the term "compliance date" means the date by which any State, local, or tribal government or other person is first required to comply with the rule, including the date for submittal of State plans to the EPA.

Section 2(b) provides that the final rules subject to the Act include any final rule that addresses CO2 emissions from existing sources that are fossil fuel-fired electric utility generating units under section 111(d) of the CAA, including any final rule that succeeds the EPA's proposed rules published at 79 Fed. Reg. 34830 (June 18, 2014) or 79 Fed. Reg. 65482 (November 4, 2014).

Section 2(c) provides that the time period by which the compliance dates would be extended would be the period of time that begins 60 days after the final rule appears in the Federal Register, and ends on the date on which judgment becomes final, and no longer subject to further appeal or review, in all actions filed during the initial 60 days after the rule appears in the Federal Register seeking review of the rule, including actions pursuant to CAA section 307.

Section. 3. Ratepayer Protection.

This section provides that no State shall be required to adopt a State plan, and no State or entity within a State shall become subject to a Federal plan, pursuant to any final rule described in section 2(b), if the Governor of the State makes a determination, and notifies the EPA Administrator, that implementation of the State or Federal plan would have a significant adverse effect on 1) the State's residential, commercial, or industrial ratepayers, taking into account the rate increases necessary to implement the State or Federal plan, and other rate increases that have been or are anticipated to be necessary to implement other Federal or State environmental requirements; or 2) the reliability of the State's electricity system, taking into account the effects on the State's existing and planned generation and retirements, transmission and distribution infrastructure, and projected electricity demands.

This section further provides that, in making such a determination, the Governor consult with the State's energy, environmental, public health, and economic development departments or agencies, and the Electric Reliability Organization,[1] as defined in section 215 of the Federal Power Act.

[1] The reference to "Electric Reliability Organization" reflects a change from the draft approved by the Subcommittee which referred to the "regional entity" whose jurisdiction includes the State.

III. H.R.___, TARGETING ROGUE AND OPAQUE LETTERS ACT

Businesses and consumers across the nation have been victimized on a large scale by patent holders who mislead them with vague and deceptive demand letters into paying undue license or settlement fees. These types of scams typically, but not always, target end users of patented technology with little patent expertise and inadequate resources to defend against infringement allegations.

As of today, twenty State laws have been enacted—each within the last two years—addressing abusive demand letters.[2] The State laws generally list a series of prohibited bad acts with respect to patent demand letters. Four States include an exhaustive list of bad acts defining whether a demand letter is unlawful,[3] and the other sixteen States allow a State court to draw upon any other factor the court finds relevant in determining whether a demand letter is unlawful.[4] To date, no State attorney general has brought a case under a State law that specifically addresses demand letters. As witnesses before the Subcommittee have testified, cases brought under State patent demand letter laws may be precluded under the Federal Circuit's *Noerr-Pennington* doctrine, unless they also allege bad faith on the part of the defendant.[5] Moreover, because *Noerr-Pennington* is rooted in the First Amendment, it may preclude certain Federal enforcement as well, unless it only addresses bad faith conduct.[6] Four State attorneys general have taken action against a single patent assertion entity, but those investigations were conducted under State consumer protection laws of general applicability.[7] These general consumer protection laws, which are preserved by the base draft, often are referred to as "mini-FTC Acts" for their resemblance to the Federal Trade Commission's (FTC) organic statute.[8]

The Targeting Rogue and Opaque Letters (TROL) Act addresses the abusive demand letter problem by authorizing the FTC to seek civil penalties where patent demand letters make certain misstatements or omissions in bad faith. Under its current Section 5 authority, the FTC cannot obtain civil penalties unless a defendant has violated an FTC rule or a consent order. In a recent action against MPHJ, an entity that directed over 31,000 letters through thirty-one subsidiaries, the FTC obtained a consent decree barring MPHJ from making deceptive representations when asserting patent rights.[9] To allow the FTC to bring cases involving

---

[2] Alabama, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.
[3] Illinois, Oklahoma, Tennessee, and Wisconsin.
[4] *See, e.g.*, H.B. 1163, 64th Leg. (ND 2015).
[5] *Update: Patent Demand Letter Practices and Solutions: Hearing Before the Subcomm. on Commerce, manuf., and Trade*, 114th Cong. 12 (2015) (statement of Paul R. Gugliuzza, Associate Professor of Law, Boston University School of Law) ("Although no court has yet applied this standard to the new state statutes, it seems to ensure that most tactics employed by bottom-feeder trolls will remain legal.").
[6] *Globetrotter Software, Inc. v. Elan Computer Grp.*, Inc., 362 F.3d 1367 (Fed. Cir. 2004) (holding that *Noerr-Pennington* shields communications such as demand letters from both state and federal laws, unless they are narrowed to bad faith conduct).
[7] Nebraska, Vermont, and Minnesota each have brought suits under consumer protection laws against abusive demand letter activity.
[8] *See Vermont v. Int'l Collection Serv., Inc.*, 594 A.2d 426, 430-31 (Vt. 1991).
[9] https://www.ftc.gov/news-events/press-releases/2014/11/ftc-settlement-bars-patent-assertion-entity-using-deceptive.

misstatements or omissions not enumerated in the TROL Act, the bill would preserve the FTC's Section 5 authority to enjoin unfair or deceptive acts or practices. Although the TROL Act preempts State laws specifically addressing patent demand letters, it also preserves the authority of State attorneys general to enforce their own mini-FTC Acts and authorizes State attorneys general to enforce the provisions of the TROL Act.

Section. 1. Short Title.

This section provides the short title of "Targeting Rogue and Opaque Letters Act of 2015."

Section. 2. Unfair or Deceptive Acts or Practices in Connection with the Assertion of a United States Patent.

This section establishes that it is an unfair or deceptive act or practice under the FTC Act to engage in a pattern or practice of sending demand letters if the communications, in bad faith, include any of the twelve prohibited elements enumerated in paragraphs (1) or (2), or fail to include any of the five elements enumerated in paragraph (3). Section 2 also sets forth an affirmative defense that was altered at Subcommittee markup. The new affirmative defense provides that statements, representations, or omissions were not made in bad faith if the sender can demonstrate that such statements, representations, or omissions were mistakes, which may be demonstrated by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

Section. 3. Enforcement by Federal Trade Commission.

Section 3 establishes that a violation of section 2 shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under the FTC Act. This enables the FTC to seek civil penalties for violations; whereas, under its current authority, it could only seek an injunction against a sender of an unfair or deceptive demand letter. Section 3 also clarifies that the FTC's existing powers and enforcement authority are preserved.

Section. 4. Preemption of State Laws on Patent Demand Letters and Enforcement by State Attorneys General.

Section 4 preempts State laws, rules, regulations, standards, and other provisions having the effect of law expressly relating to the transmission or contents of patent demand letters, while preserving other State laws of general applicability, such as the State consumer protection laws of general applicability. Section 4 also permits State attorneys general to enforce the Act and to seek civil penalties for violations. Section 4 requires the attorney general of a State to provide the FTC with prior written notice of any action taken to enforce the law and also provides the FTC authority to intervene in the action. It further provides that no State action may be brought if the FTC has a civil action pending against any named defendant.

Section 5. Definitions.

Section 5 defines certain terms used throughout the draft legislation, including "bad faith" as it pertains to the representations or omissions enumerated in section 2.

IV. STAFF CONTACTS

If you have any questions regarding the markup, please contact Committee staff at (202) 225-2927. For H.R. __, "Ratepayer Protection Act," please contact Mary Neumayr or Tom Hassenboehler; for H.R. ___, "Targeting Rogue and Opaque Letters Act of 2015," please contact Paul Nagle or Graham Dufault.