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RPTR KERR

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MARKUP OF

H.R. 2042, RATEPAYER PROTECTION ACT;

H.R. _____, TARGETING ROGUE AND OPAQUE

LETTERS (TROL) ACT OF 2015

TUESDAY, APRIL 28, 2015

House of Representatives,

Committee on Energy and Commerce,

Washington, D.C.

The committee met, pursuant to call, at 5:03 p.m., in Room 2123, Rayburn House Office Building, Hon. Fred Upton [chairman of the committee] presiding.

Present: Representatives Barton, Whitfield, Shimkus, Burgess, Blackburn, Green, and Schakowsky.

Staff Present: Nick Abraham, Legislative Associate, E&P; Allison Busbee, Policy Coordinator, Energy & Power; Karen Christian,

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General Counsel; Graham Dufault, Counsel, CMT; Melissa Froelich, Counsel, CMT; Brittany Havens, Oversight Associate, O&I; Kirby Howard, Legislative Clerk; A.T. Johnson, Senior Advisor and Professional Staff Member; Peter Kielty, Deputy General Counsel; Paul Nagle, Chief Counsel, CMT; Tim Pataki, Professional Staff Member; Graham Pittman, Legislative Clerk; Olivia Trusty, Professional Staff, CMT; Michelle Ash, Minority Chief Counsel, Commerce, Manufacturing, and Trade; Jen Berenholz, Minority Chief Clerk; Christine Brennan, Minority Press Secretary; Jeff Carroll, Minority Staff Director; Lisa Goldman, Minority Counsel; Michael Goo, Minority Chief Counsel, Energy and Environment; Ashley Jones, Minority Director, Outreach and Member Services; Tim Robinson, Minority Chief Counsel.

Mr. Burgess. [Presiding.] The committee will come to order.

And the chair recognizes himself for 3 minutes for the purpose of an opening statement.

Today we are fortunate to vote on a very important piece of legislation in the Targeting Rogue and Opaque Letters Act. This legislation takes on a costly scam that by many accounts continues to worsen. Thus far, abusers of the patent system have successfully escaped meaningful punishment.

State attorneys general have obtained consent decrees and so has the Federal Trade Commission, all under provisions of law that the Targeting Rogue and Opaque Letters Act would not disturb. But State laws that authorize civil penalties for bad-faith demand letters are

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on suspect constitutional footing.

Regulating the communications about patent rights is unfortunately not as simple as prohibiting certain statements and requiring certain disclosures. It is worth reiterating that demand letters deal with the free speech rights related to a patent, which itself is a right protected from government interference pursuant to the Constitution.

We must also be careful not to fix concerns about overly broad patents or litigation costs through the Federal Trade Commission. Such measures are better addressed by other committees of jurisdiction. The very real problem of abusive patent demand letters does compel us to find a solution that is expressly designed to enable enforcement free of constitutional setbacks. Now, I know not everyone agrees with me on this point.

I know that several groups are seeking changes to the bill that are based on different interpretations of the constitutional issues. At best, removing the definition of "bad faith" would give a gigantic grant of authority to the Federal Trade Commission and the State attorneys general to make determinations about the scope of patent law, and that would also invite constitutional challenge.

We should be cautious about encouraging State attorneys general or the Federal Trade Commission to construe patents. But the bill does provide key elements that the parties have said that they need to start the process of determining whether a letter is legitimate or not.

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I should reiterate that the doors of the committee staff remain open. The committee process comes to a close today, but I am hopeful that this is not the end of the process for the Targeting Rogue and Opaque Letters Act. I look forward to working with interested stakeholders on the next steps toward the House floor and beyond.

[The prepared statement of Mr. Burgess follows:]

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Mr. Burgess. The chair then recognizes Mr. Green of Texas for 3 minutes, sir, for the purpose of an opening statement.

Mr. Green. Thank you, Mr. Chairman. And thank our ranking member for holding the hearing today.

The clean power plan has raised a number of justifiable concerns, and I am always glad to debate these issues. While I would like to find a solution for the issues issued by today's bills, I don't believe the present bill is the correct issue. For more than a decade, the focus of -- excuse me.

[Cell phone ringing.]

Mr. Green. I like George Strait, also.

For more than a decade, the focus of environmental debate in this committee has been on the greenhouse gas emissions. In that time, we passed two comprehensive bills while the Environmental Protection Agency has promulgated dozens of rules.

Now, I am not raising Cain with EPA. The Agency, backed by the Supreme Court, has the authority to regulate greenhouse gasses, including carbon. The Agency, however, has a different approach to regulating that I think many Members of Congress on both sides would prefer.

I acknowledge that global climate change issues are difficult and legislation would require compromise, and I think that is what we should be doing. But this bill doesn't accomplish that. Congress should create a regulatory framework for 21st-century economy and

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environment. We should recognize the human activity and impact to the climate, but that doesn't mean regulating sectors of our economy out of existence.

Regardless of the public outreach conducted by the Agency, regulatory overreach can occur. I don't think allowing each successive administration to prescribe policies that affect so much of our way of life is the correct course of action. We need to recognize that our industries and, more importantly, our workers need time to adjust to new environmental realities and implement changes, both technological and educational.

I know many of my colleagues agree that our job as legislators should be to ensure that each of our constituencies is equally represented. I prefer that we sit down and craft a bill that addresses the many challenges we face not only domestically, but as a world leader.

Unfortunately, the present bill doesn't address the issues I laid out in a balanced and complete way. Allowing for endless legal challenges or partisan political discussions is not the proper way to handle an issue that affects the entire scope of the environment and the economy.

Today's bill addresses only part of that challenge, the part that directly is in front of us, and I don't agree with the approach. I would like the opportunity to sit down with my colleagues and draft a fair and comprehensive legislation that reasonably balances the

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interest of all parties rather than a sector-by-sector approach that balances none. I want folks in my district to get what they need. I would take the opportunity to bring all sides together.

I have heard from many different groups, and they all want the same thing: Certainty. They want to be certain that our companies will be profitable, that their livelihoods will be protected, and their grandchildren will have a clean environment. We can accomplish these goals, but not with endless delay or Agency decree.

I want to thank the chair of our subcommittee, Chairman Whitfield, for addressing part of the problem, but let's work together to solve the whole problem.

For these reasons, I oppose the bill and urge my colleagues to -- Mr. Chairman, I am over my time. I would like to place the remaining of my statement on the TROL Act into the record.

And I yield back my time.

[The prepared statement of Mr. Green follows:]

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Mr. Burgess. The gentleman yields back. The chair thanks the gentleman.

The chair reminds Members that, pursuant to committee rules, all Members' opening statements will be made part of the record.

For further opening statement, I recognize the vice chairman from Tennessee, Mrs. Blackburn. 3 minutes for an opening statement.

Mrs. Blackburn. Thank you, Mr. Chairman.

I am so pleased to see that Mr. Green is a George Strait fan and has such an exciting ringtone on his phone, and I think that is a good thing.

Abusive patent letters have become an expensive part of a problem for businesses and for consumers across the country. The tactics cost our economy billions of dollars every year. They stifle innovation, particularly in Tennessee.

According to an April 1, 2015, article in The Tennessean, a record number of patents were issued by the U.S. Patent and Trade Office to Tennessee residents last year. We are very pleased with that.

Needless to say, many of those are in the automotive industry, the healthcare informatics industry, and, of course, the entertainment industry, to bring wonderful individuals like Mr. Green great ringtones from great artists like George Strait.

The Tennessean article notes that raising capital continues to be a challenge for local startups and innovators. Innovators should be able to focus on getting their businesses off the ground rather than

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dealing with patent trolls looking to extort money from them.

The Targeting Rogue and Opaque Letters Act would crack down on the patent trolls by zeroing in on those persons who engage in a pattern or practice of sending demand letters and who act in bad faith when communicating or failing to communicate information within such correspondence.

I thank the chairman, the staff, and other committee Members who have worked on this.

And I yield back my time.

[The prepared statement of Mrs. Blackburn follows:]

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Mr. Burgess. The chair thanks the gentlelady. The gentlelady yields back.

The chair recognizes Ms. Schakowsky. 3 minutes for an opening statement.

Ms. Schakowsky. Thank you, Mr. Chairman. I appreciate your holding this markup and allowing us to make these opening statements.

The Ratepayer Protection Act I believe is an irresponsible proposal that would undermine the EPA's clear authority to protect public health and the environment. It should not pass, and I urge my colleagues to oppose it.

The TROL Act is an honest attempt to address the issue of patent assertion entities or patent trolls. I am interested in finding a solution that protects businesses and consumers against patent trolls, and this solution must also recognize the legitimate rights of patent holders to protect their ideas and technology.

Unfortunately, the current version of the bill does not appropriately address the issue. I appreciate the manager's amendment offered at the subcommittee markup that closed a glaring loophole, the affirmative defense provision. However, there are a number of remaining issues that must be addressed if this bill is to restrict trolling while allowing inventors to protect against patent infringement.

This bill requires the FTC to prove, quote, bad faith, unquote, by showing that the sender of a patent demand letter knowingly made

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false statements or was aware that the recipient would be deceived. That provision makes the legislation virtually unenforceable.

The TROL Act also sets arbitrary caps on penalties for unfair or deceptive practice assertions. I believe the punishment should fit the crime and that the scope of the crime and the ability to pay should be considered in determining fines for violations of this act.

This bill also preempts 21 existing State laws that hold patent trolls accountable, including one in my home State of Illinois. In many ways, the State protections exceed those that would be guaranteed under the TROL Act.

We should not preempt State laws with a weaker Federal standard. I anticipate that amendments to address some of these issues will be offered during tomorrow's markup, and it is my expectation that those amendments will be supported.

I look forward to working to improve this legislation to make sure that it adequately addresses the issues of patent trolls. Thank you.

And I yield back.

[The prepared statement of Ms. Schakowsky follows:]

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Mr. Burgess. The chair thanks the gentlelady. The gentlelady yields back.

The chair recognizes the gentleman from Kentucky, the subcommittee chairman on the Subcommittee on Energy. 3 minutes for opening statement, sir.

Mr. Whitfield. Thank you very much, Mr. Chairman.

And I am delighted this afternoon to speak in favor of H.R. 2042, the Ratepayer Protection Act, that I introduced. I want to thank Morgan Griffin for cosponsoring it along with Sanford Bishop and Collin Peterson. This bill is being introduced to try to slow down the extreme and unprecedented regulation of EPA on existing coal plants.

When the Clean Air Act was adopted, no one ever imagined that CO2 would be regulated under the Clean Air Act. In fact, there were a couple of votes on it, and it was specifically rejected. But because of a court decision, it is now being regulated by EPA.

And because EPA is not a legislative body and is doing it because of a court decision, we in the legislative branch have every right, obligation, and responsibility to come forward with a commonsense approach to deal with this extreme regulation.

I say "extreme" because no one ever anticipated that they would be trying to regulate it under section 111(d). We have had extensive hearings on this. We know that rates will go up dramatically in many States. NERC and others have indicated that reliability is going to be affected. Larry Tribe, a respected constitutional lawyer from

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Harvard, has said, "It is the equivalent of burning the Constitution. That is why you are going to see so many lawsuits filed against this."

We have had Seminole Power from Florida and elsewhere come up and talk about the loss of stranded assets in the millions of dollars. We see mandates to the States. We see a Federal takeover of the electric generating and distribution system, which has never occurred before. And we also know that this is not going to have any effect on the climate. It is not going to reduce climate change. Even the Administrator of EPA said that.

So we are simply trying to introduce a commonsense bill that simply says: Because this is so extreme, unprecedented, let's allow the courts to render a decision before we take this radical action. We are not repealing the regulation, but let's let the courts render a decision.

And I know there are parts of this bill that other people don't like. And Mr. Green from Texas made the comment let's work with him. Well, I would invite him -- and I enjoy working with Mr. Green and Ms. Schakowsky and all of them.

But if you don't like the bill, come forth with a proposal and let's sit down and see if we can make it better. I don't think it is extreme to simply say let's wait, let the courts make a decision, and then let's move forward.

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

[The prepared statement of Mr. Whitfield follows:]

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Mr. Burgess. The chair thanks the gentleman. The gentleman yields back.

The chair now recognizes the gentleman from Texas, Mr. Barton, 3 minutes for an opening statement, please.

Mr. Barton. I thank the gentleman from Texas for recognizing me.

Mr. Chairman, I have good news and bad news. We have two bills tomorrow that we are going to mark up. Ratepayer Protection Act, which Chairman Whitfield just spoke strongly in favor of -- and I echo his statement -- I don't think we can improve it. So I will simply say that I support the Ratepayer Protection Act and I am prepared to vote for it tomorrow at the markup.

I can't say the same thing about the subcommittee bill that has come out of my good friend Dr. Burgess' subcommittee. I want to be for that. The committee staff statements, you know, describing the bill I strongly support.

But, Mr. Chairman, I won't say I have been besieged by telephone calls today, but I have gotten a fair number of calls from my constituents in my district. And I have been in a meeting that the national realtor group, the homebuilder group, the retail store group, the big grocery store group, all came in and told me in no uncertain terms that they oppose the bill as currently drafted.

If I had to vote today, I would vote against that bill, but I am told that we are going to have a fair and open markup tomorrow. And I will work with you, Mr. Chairman, and the full committee chairman

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to see if some amendments could be accepted that would improve the bill, but I am very troubled.

I am not on your subcommittee; so, I am not as well informed as I should be. But I do think, when some of the biggest trade groups that have grassroots organizations like the homebuilders and the realtors are opposing the subcommittee bill, it is something that we need to pay attention to.

And, with that, Mr. Chairman, I yield back.

[The prepared statement of Mr. Barton follows:]

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Mr. Burgess. The chair thanks the gentleman. The gentleman yields back and would assure the gentleman that there will be a fair and open markup tomorrow.

Seeing no other Members seeking time for opening statements, the chair calls up H.R. 2042, the Ratepayer Protection Act, and asks the clerk to report.

The Clerk. H.R. 2042, to allow for judicial review of any final rule addressing carbon dioxide emissions from existing fossil fuel-fired electric utility generating units before requiring compliance with such rule and to allow States to protect households and businesses from significant adverse effects on electricity ratepayers or reliability.

Mr. Burgess. Without objection, the first reading of the bill is dispensed with, and the bill will be open for amendment at any point. So ordered.

[The bill follows:]

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Mr. Burgess. For the information of Members, we are now on H.R. 2042. The committee will reconvene at 10 a.m. tomorrow morning.

I remind the Members that the chair will give priority recognition to amendments offered on a bipartisan basis. And I look forward to seeing you all tomorrow.

Till then, the committee stands adjourned.

[Whereupon, at 5:20 p.m., the full committee was adjourned.]