



N A R U C
National Association of Regulatory Utility Commissioners

October 28, 2009

The Honorable Barbara Boxer
Chairwoman
Environment & Public Works Committee
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510-6175

The Honorable James M. Inhofe
Ranking Member
Environment & Public Works Committee
United States Senate
456 Dirksen Senate Office Building
Washington, D.C. 20510-6175

Dear Chairman Boxer, Ranking Member Inhofe:

On behalf of the National Association of Regulatory Utility Commissioners (NARUC), I am writing to express our preliminary views on the Clean Energy Jobs and American Power Act (S. 1733). As regulators of our nation's utility companies, NARUC members have a critical stake in ensuring that consumers are not unduly burdened in the transition to a low-carbon economy. We appreciate the Committee's decision to provide a significant allocation of free emission allowances to regulated Local Distribution Companies (LDCs), in recognition of the key role that utility regulators play in protecting consumers. This will ensure that State regulators are able to pass through to consumers the value of these allowances.

However, while the LDC allocation is an important consumer protection, we are concerned that the bill is overly restrictive and will discourage States' creativity in sharing allowance benefits with consumers. In addition, we strongly oppose the allocation of free allowances to merchant generators, who have no obligation to share any proceeds with ratepayers. We stand ready to work with this Committee and Congress as this bill moves forward.

Since 2007, NARUC has advocated a well-designed, economy wide market-based approach for reducing carbon emissions. We believe such action will bring about much-needed certainty in the energy industry so that companies can finance the next round of utility infrastructure investment. To that end, if Congress pursues a cap-and-trade system for reducing carbon emissions, it should provide all free transitional allowances within the electricity sector to rate-regulated LDCs.

We are pleased that the Clean Energy Jobs and American Power Act contains House-passed language establishing a corporation to research and develop carbon-capture and sequestration technologies. We are also encouraged by the recent editorial penned by bill sponsor Sen. Kerry and Sen. Graham that stressed the need for nuclear power and a cost-containment mechanism, both of which will reduce the costs of compliance if the legislation is passed.

Although the Clean Energy Jobs and American Power Act, intends to allocate a significant amount of free allowances to LDCs, it provides an allocation to merchant generators as well. NARUC opposes providing any no-cost allowances to unregulated merchant generators, which have no obligation to pass through benefits to consumers. Operating in a competitive market, merchant

generators will likely retain the value of free allowances as profits, just as we saw in the European Union.

While the LDC allocation will serve to protect consumers, published studies have demonstrated that any merchant allocation could result in windfall profits and “unproductive costs” that will do nothing to incentivize clean energy technologies. Indeed, the draft legislation anticipates that merchant generators may receive windfall profits in Section 771, (c)(5)(B) by requiring the Environmental Protection Agency and Federal Energy Regulatory Commission to implement new rules if both agencies make “an affirmative finding of windfall profits or disparate treatment” resulting from this allocation. If Congress is concerned about windfall profits, it can solve this problem quite easily by not granting free emission allowances to merchant generators in the first place.

In addition, we have great concerns about the workability of the legislation. This draft and the House-passed bill include language significantly limiting how State commissions can distribute LDC allowance proceeds. Both bills require the benefits to be shared “ratably” and “equitably” within and among utility consumer classes. They also appear to require that industrial and residential consumers receive a direct cash rebate from allowance proceeds if it is proven that the cap-and-trade system caused their energy bills to increase.

These provisions are problematic because they foster uncertainty and potential litigation. Just who will determine what “ratably” and “equitably” mean, and how will that impact the decision to issue flat rebates when the industrial and residential consumers demonstrate that their power bills have increase? In addition, if Congress wants to encourage and help fund energy efficiency and clean energy projects, this language unnecessarily prohibits what could otherwise be a strong revenue stream that could be dedicated for these investments. State commissions have historically encouraged significant amounts of clean energy investment, and, as we have seen with the Regional Greenhouse Gas Initiative States, proceeds from the nation’s only functioning cap-and-trade market are being used for energy efficiency investment.

The current legislative language does not appear to comprehend that using the LDC allocation investments for energy efficiency and clean energy programs represent consumer benefits as well. If Congress strictly determines that proceeds can be used only for amorphous consumer rebates, it will make complying with the new carbon rules more difficult over the long term by limiting the amount of money that can be used to invest in clean energy and energy efficiency programs. We urge the Senate to think carefully before handcuffing State regulators’ ability to ensure that allocation proceeds truly benefit consumers, because the present legislative language is a recipe for litigation.

NARUC understands the need for federal oversight of what will undoubtedly be a significant amount of money flowing between LDCs and consumers. However we also believe that State commissions are far more accountable to ratepayers than distant bureaucracies in Washington, and are far more efficient at developing innovative and entrepreneurial clean energy programs. State commissions know their localities and constituents best, and we are obligated to ensure fair, just, and reasonable rates. The Senate should give States more leeway in distributing allowance proceeds so consumers can truly benefit.

While we are still reviewing the rest of the legislation, we would like to work with members of this Committee to address these workability concerns and make the Clean Energy Jobs and American Power Act a stronger product. We share your desire to protect consumers from higher electricity rates, particularly in a time when utility bills are increasing and customers are already pinched. In our view, a cooperative federal-State relationship that provides the flexibility necessary to tailor solutions to local energy markets is the most appropriate way to ensure that consumers are not overly burdened in the transition to a low-carbon future.

NARUC stands ready to assist you and your colleagues as the legislative process continues.

Sincerely,

A handwritten signature in black ink, reading "Frederick F. Butler". The signature is written in a cursive style with a large initial 'F'.

Frederick F. Butler
President, NARUC

CC: Members of the Senate Committee on Environment & Public Works