

## REPORT OF THE LEGISLATION AND REGULATORY REFORM COMMITTEE

The push in Congress, begun in early 2001, to enact comprehensive energy policy legislation stalled yet again in 2004. Notwithstanding that fact, several provisions under discussion in that context, together with a handful of other legislative proposals, were passed by both houses of Congress in 2004 and signed into law by the President.

### I. COMPREHENSIVE NATIONAL ENERGY POLICY

In 2003, both the House of Representatives and the Senate approved national energy bills. The bills differed in many material respects, but they shared the same number—H.R.6. A House-Senate conference committee reconciled the two bills and produced a conference report in November 2003. The House approved the conference report, but the Senate did not, lacking two votes to break a filibuster and seven votes to overcome a budget point of order.

In the spring of 2004, in response to concerns about the \$31 billion cost of the 2003 energy bills, Senate Energy and Natural Resources Committee Chairman Domenici proposed a slimmed-down energy bill (S. 2095), estimated to cost approximately half as much as the 2003 energy bills. The Senate was unable to reach consensus to bring this bill to the floor. Various attempts were made to attach a comprehensive national energy policy bill to other vehicles making their way through Congress, but none of these efforts was successful.

However, in October 2004, a variety of provisions contained in the 2003 bills were passed by both houses of Congress and signed into law by the President. Provisions to jump-start an Alaska natural gas pipeline that had been under consideration for years became law as part of several different bills.

### II. ALASKA NATURAL GAS PIPELINE

As part of the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act,<sup>1</sup> Congress approved the Alaska Natural Gas Pipeline Act, which included an \$18 billion loan guaranty, streamlined permitting, provisions for environmental review, and expedited court review.<sup>2</sup> An assortment of other Alaska natural gas pipeline provisions was included in that Act. Additionally, the American Jobs Creation Act of 2004 (Jobs Act)<sup>3</sup> provided seven-year tax depreciation for the pipeline and confirmation that the enhanced oil recovery credit applied to the gas processing facilities that will be associated with the pipeline.

Several other noteworthy tax provisions were included in the Jobs Act. Two provisions are designed to further the Federal Energy Regulatory Commission (FERC) and/or state electric restructuring initiatives by removing potential tax barriers to transmission divestment and open access. In addition, the Act expands the class of entities qualified for the production tax credit for electricity produced from certain renewable sources and extends the tax credit

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1. Military Construction and Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, Pub. L. No. 108-324, 118 Stat. 1220 (2004).

2. Alaska Natural Gas Pipeline Act, Pub. L. No. 108-324, 118 Stat. 1255 (2004).

3. American Jobs Creation Act, Pub. L. No. 108-357, 118 Stat. 1418 (2004).

until January 1, 2006.<sup>4</sup>

Section 909 of the Jobs Act allows a utility making a qualified sale of property (or stock or partnership interest in a corporation or partnership whose principal trade of business consists of providing electric transmission services) used to provide electric transmission services to an independent transmission company to recognize the gain ratably over an eight-year period beginning in the year of the sale.<sup>5</sup> This deferred gain requires the seller to use its gain on the sale to purchase exempt utility property (i.e., property used for generating, transmitting, distributing, or selling electricity or natural gas) within four years of the year in which the sale or disposition occurs.<sup>6</sup> An independent transmission company is defined as one approved by the FERC (i.e., a regional transmission operator (RTO) or similar entity), or an entity that the FERC determines is not a market participant and whose transmission facilities are placed under the operational control of an independent transmission company no later than January 1, 2007, or an independent transmission organization approved by the Public Utility Commission of Texas.<sup>7</sup>

Section 319 of the Jobs Act provides tax relief to electric cooperatives that provide transmission or ancillary services to non-cooperative members pursuant to the FERC or an Energy Reliability Council Of Texas (ERCOT) approved open-access transmission tariff or an independent transmission provider agreement.<sup>8</sup> This provision creates an exception to the current restriction that eighty-five percent or more of the income of a cooperative be collected by members in order for the cooperative to qualify as exempt from taxation.<sup>9</sup> This provision does not apply to taxable years beginning after December 31, 2006.<sup>10</sup>

Section 710 extends the current inflation-adjusted 1.8 cents per kWh electricity tax credit to electricity produced from various new sources defined as renewable resources.<sup>11</sup> These new sources are open-loop biomass,<sup>12</sup> geothermal energy, solar energy, small irrigation power, municipal solid waste, and refined coal.<sup>13</sup> The tax credit applies to facilities placed in service before January 1, 2006 (except refined coal, which has until January 1, 2009) and extends the tax credit for wind and closed-loop biomass facilities to those facilities in service

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4. *See Id.* § 909.

5. American Jobs Creation Act of 2004, § 909(a)(i)(1)(B).

6. *Id.* § 909(a)(i)(1)(A)(i).

7. American Jobs Creation Act of 2004, § 909(a)(i)(4).

8. *Id.* § 319(a)(1)(ii).

9. 26 U.S.C. § 501(c)(12)(A) (2000).

10. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 319(a)(1), 118 Stat. 1418, 1471 (2004).

11. *Id.* § 710(a). The current electricity production tax credit only applies to wind, closed-loop biomass, and poultry waste. Closed-loop biomass is "organic material from a plant which is planted exclusively for purposes of being used at a qualified facility to produce electricity." 26 U.S.C. § 45(c)(2) (2000).

12. Open-loop biomass refers to agricultural livestock waste, forest related resources, and solid wood waste materials, except municipal solid waste and recycled paper. American Jobs Creation Act of 2004, § 710(a).

13. Refined coal "is a liquid, gaseous, or solid synthetic fuel produced from coal . . . or high carbon fly ash" that when used in the production of steam will result in at least a twenty percent reduction in emissions of nitrogen oxide and either sulfur dioxide or mercury compared to ordinary coal. *Id.*

before January 1, 2006.<sup>14</sup>

In addition to the Alaska natural gas pipeline provisions noted previously, the Jobs Act also contained several provisions for the natural gas industry. Among those was a credit for production of oil or gas from marginal wells, which is only available when oil is \$18 a barrel or higher and gas is \$2 per MMbtu or higher.<sup>15</sup>

Additionally, the Working Families Tax Relief Act of 2004 contained at least one energy related provision. Scheduled to start phasing out last year, the Tax Relief Act postponed the reductions for the tax deduction for hybrids and other alternative-fuel vehicles, as well as the credit for fully electric vehicles.<sup>16</sup> Hybrid drivers and owners of alternative-fuel automobiles can still claim the full deduction on their 2004 returns. However, in 2006, the deduction drops and it will disappear in 2007. Similarly, the reduction of the tax credit for purchasers of fully electric autos is postponed until 2006. This larger tax break – a \$4000 credit – will remain in effect for electric cars bought in 2004 and 2005 before being phased out by 2007.<sup>17</sup>

### III. PIPELINE SAFETY

In November 2004, Congress approved the Norman Y. Mineta Research and Special Programs Improvement Act.<sup>18</sup> Among other important purposes, the bill established a Pipeline and Hazardous Materials Safety Administration within the Department of Transportation (DOT).<sup>19</sup> This legislation ensures the continued improvement and effectiveness of the pipeline safety and hazardous materials transportation safety programs within DOT. The bill provides an institutional complement to the strengthened Office of Pipeline Safety program mandated by Congress in the Pipeline Safety Improvement Act of 2002.<sup>20</sup> It also strengthens the related program currently administered by the Office of Hazardous Materials Safety that oversees the safety of transportation of hazardous materials. Additionally, the bill also shifts most of the programs under the DOT's research branch, the Research and Special Programs Administration, along with the Bureau of Transportation Statistics, to a new DOT entity called the Research and Innovative Technology Administration.<sup>21</sup>

### IV. COMMUNICATIONS

Federal power marketing administrations will likely be affected by the passage of the Commercial Spectrum Enhancement Act.<sup>22</sup> The Act is intended to

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14. American Jobs Creation Act of 2004, § 710(b).

15. *Id.* § 341.

16. Working Families Tax Relief Act of 2004, Pub. L. No. 108-311, §§ 318, 319, 118 Stat. 1166, 1182 (2004).

17. *Id.*

18. Norman Y. Mineta Research and Special Programs Improvement Act, Pub. L. No. 108-426, 118 Stat. 2423 (2004).

19. *Id.* § 2.

20. Pipeline Safety Improvement Act of 2002, Pub. L. No. 107-355, 116 Stat. 2985 (2002).

21. Norman Y. Mineta Research and Special Programs Improvement Act, § 4.

22. Commercial Spectrum Enhancement Act, Pub. L. No. 108-494, 16 Stat. 3986, 3991 (2004).

facilitate reallocation of the 1710–1755 megahertz (MHz) radio spectrum, among others, to the telecommunications industry for third-generation commercial uses. Currently, federal entities use the 1710–1755 MHz radio spectrum. The Communications Act of 1934 was amended in the late 1990s to provide for an auction of that spectrum to the private sector.<sup>23</sup> The Commercial Spectrum Enhancement Act establishes the Spectrum Relocation Fund to collect the spectrum auction proceeds and reimburse federal agencies' reallocation costs.<sup>24</sup> The Federal Communications Commission recently announced that the auction will occur in July 2006.

While the federal power marketing administrations (PMA), such as the Bonneville Power Administration and the Tennessee Valley Authority, are exempt from this reallocation,<sup>25</sup> the Act allows a PMA to seek reimbursement of its relocation costs if it decides to relocate voluntarily from the 1710–1755 MHz spectrum. The Act defines the reimbursable relocation costs as those "costs incurred by a Federal entity to achieve comparable capability of systems, regardless of whether that capability is achieved by relocating to a new frequency assignment or by utilizing an alternative technology."<sup>26</sup> Consequently, the Act should allow a PMA to be reimbursed for costs incurred to ensure the reliability of relocated communications facilities should that PMA voluntarily relocate.

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23. *Id.* § 203.

24. Commercial Spectrum Enhancement Act, § 204.

25. *See* 47 U.S.C. § 923(c)(4) (2000).

26. Commercial Spectrum Enhancement Act, § 202.

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