TIMELY REVIEW OF INFRASTRUCTURE ACT

OCTOBER 22, 2019.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

REPORT

[To accompany S. 607]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 607) to amend the Department of Energy Organization Act to address insufficient compensation of employees and other personnel of the Federal Energy Regulatory Commission, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

AMENDMENT

The amendment is as follows:
At the end, add the following:

SEC. 3. REPORT ON THE AUTHORITY OF THE SECRETARY OF ENERGY TO IMPLEMENT FLEXIBLE COMPENSATION MODELS.

Not later than 180 days after the date of enactment of this Act, the Secretary of Energy shall submit to Congress a report examining the full scope of the hiring authority made available to the Secretary by the Office of Personnel Management to implement flexible compensation models, including pay for performance and pay banding, throughout the Department of Energy, including at the National Laboratories, for the purposes of hiring, recruiting, and retaining employees responsible for conducting work of a scientific, technological, engineering, or mathematical nature.

PURPOSE

The purpose of S. 607 is to amend the Department of Energy Organization Act to address insufficient compensation of employees and other personnel of the Federal Energy Regulatory Commission (FERC or Commission).
BACKGROUND AND NEED

Because of its obligations regarding the permitting of energy infrastructure, FERC hires staff and consultants for the purpose of advising the Commission on matters of a scientific, technological, engineering, or mathematical nature. These positions are sometimes called STEM jobs, where STEM is an acronym for scientific, technological, engineering, and mathematical skills.

Because people with STEM skills are in high demand in the private sector, the rate of pay offered by FERC is often insufficient to attract and retain such employees. To ensure that FERC is able to carry out the functions of the Commission in a timely, efficient, and effective manner, this bill authorizes FERC, under certain conditions, to pay persons with STEM skills at a higher level than the rate allowed under the civil service in order to attract and retain such employees.

LEGISLATIVE HISTORY

S. 607 was introduced by Senators Cassidy, Gardner, and Murkowski on February 28, 2019. The Subcommittee on Energy held a hearing on the measure on September 11, 2019.

Related legislation, H.R. 1426, was introduced in the House of Representatives by Representatives Olson (R–TX), Doyle (D–PA), Thompson (D–MS), and Weber (R–TX) on February 28, 2019, and referred to the Energy and Commerce Committee. Representatives Hudson (R–NC), Gonzales (D–TX), Harder (D–CA), O’Halleran (D–AZ), and Crenshaw (R–TX) cosponsored at a later date.

During the 115th Congress, Senators Cassidy and Murkowski introduced a similar measure, S. 8, which was referred to the Committee on November 27, 2018. Senator Gardner was later added as a cosponsor. Representative Olson introduced a similar measure, H.R. 6552, in the House of Representatives on July 26, 2018, which was referred to the Committee on Energy and Commerce.

The Senate Committee on Energy and Natural Resources met in open business session on September 25, 2019, and ordered S. 607 favorably reported, as amended.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on September 25, 2019, by a majority voice vote of a quorum present, recommends that the Senate pass S. 607, if amended as described herein. Senators Stabenow, Hirono, and King asked to be recorded as voting no.

COMMITTEE AMENDMENT

During its consideration of S. 607 the Committee adopted an amendment to require the Secretary of Energy (Secretary) to report to Congress on the authority of the Secretary to implement flexible compensation models at the Department of Energy (DOE).

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 provides a short title to the bill.
Sec. 2. Addressing insufficient compensation of employees and other personnel of the Federal Energy Regulatory Commission

Section 2(a) amends section 401 of the Department of Energy Organization Act (Public Law 95–91) by adding a new subsection (k) to authorize the FERC Chairman to certify that compensation for a category of employees or other personnel of the Commission is insufficient to retain or attract employees and other personnel to allow the Commission to carry out its functions in a timely, efficient, and effective manner.

The new subsection (k)(2) requires that any such certification only apply to persons with STEM skills; specify a maximum amount of extra compensation; be valid for five years; be no broader than necessary; and include an explanation for why other approaches for retaining and attracting employees are inadequate.

The new subsection (k)(3) provides that prior to the expiration of a certification, the Chairman must determine whether certification should be renewed for a subsequent five-year period.

The new subsection (k)(4) requires that after the expiration of a certification, newly hired employees will not be eligible for compensation at the level that would have applied had the certification been in effect.

The new subsection (k)(5) provides that for a category of existing employees paid at a higher level because of a certification, the Chairman has the discretion to retain that higher rate of compensation even after expiration of the certification.

The new subsection (k)(6) requires the Chairman to consult with the Director of the Office of Personnel Management in implementing subsection (k), including in the determination of the proper amount of compensation for each category of employee.

The new subsection (k)(7) authorizes the Chairman to obtain the services of experts and consultants in accordance with 5 U.S.C. 3109, and pay those experts and consultants for each day (including travel time) at rates not in excess of the rate of pay for level IV of the Executive Schedule under section 5315 of that title. This subsection further specifies that any contract with an expert or consultant must be subject to renewal no less than annually, and the Chairman must limit the use of such experts and consultants to the maximum extent practicable.

Section 2(b) directs that the FERC Chairman, within one year of enactment, and every two years thereafter for 10 years, submit to the House Energy and Commerce Committee and the Senate Energy and Natural Resources Committee a report on information relating to hiring, vacancies, and compensation at FERC, including an analysis of any relevant trends and compensation, and a description of the efforts to retain and attract employees or other personnel responsible for conducting work of a STEM nature.

Sec. 3. Report on the authority of the Secretary of Energy to implement flexible compensation models

Section 3 directs the Secretary, within 180 days of enactment, to submit a report to Congress that examines the full scope of the hiring authority made available to the Secretary by the Office of Personnel Management to implement flexible compensation models, including pay for performance and pay banding, throughout DOE, including at the National Laboratories, for the purposes of hiring, re-
cruting, and retaining employees responsible for conducting work of a STEM nature.

**Cost and Budgetary Considerations**

The Congressional Budget Office estimate of the costs of this measure has been requested but was not received at the time the report was filed. When the Congressional Budget Office completes its cost estimate, it will be posted on the internet at www.cbo.gov.

**Regulatory Impact Evaluation**

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out S. 607. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

While personal information is already collected on federal employees under existing law, no additional personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of S. 607, as ordered reported.

**Congressionally Directed Spending**

S. 607 as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff benefits as defined in rule XLIV of the Standing Rules of the Senate.

**Executive Communications**

The testimony provided by the Federal Energy Regulatory Commission at the September 11, 2019, hearing on S. 607 follows:

**Testimony of Anton C. Porter, Executive Director, Federal Energy Regulatory Commission**

Chairman Cassidy, Ranking Member Heinrich, and Members of the Committee:

My name is Anton C. Porter and I serve as the Executive Director for the Federal Energy Regulatory Commission. The Office of the Executive Director is responsible for providing administrative support services to the Commission, including human resources, financial management, information technology, security, procurement, logistics, and organizational management. It is my honor to provide testimony this afternoon responsive to S.607, the “Timely Review of Infrastructure Act” which would amend the Department of Energy Organizational Act to address insufficient compensation of employees and other personnel of the Federal Energy Regulatory Commission. As a member of the Commission’s staff, the views I express in this testimony are my own, and not necessarily those of the Commission or of any individual Commissioner.

The Federal Energy Regulatory Commission (FERC or Commission) is composed of twelve program offices that
support the agency’s mission of ensuring consumers can obtain economically efficient, safe, reliable, and secure energy services. Our largest program office, the Office of Energy Projects (OEP), is responsible for performing the engineering and environmental review of natural gas pipeline projects, liquefied natural gas facilities and non-federal hydroelectric projects. The Commission’s Office of Electric Reliability (OER) helps protect and improve the reliability and security of the nation’s bulk power system through effective regulatory oversight of the development of mandatory reliability and security standards. In addition, the Office of Energy Infrastructure Security provides leadership, expertise and assistance to the energy industry to identify, communicate and seek comprehensive solutions to potential risks of FERC-jurisdictional facilities from cyber-attacks and such physical threats as electromagnetic pulses. All three offices, which employ specialists in highly technical fields, would be impacted by S.607.

For example, OEP is made up of 345 specialists, including archeologists, biologists, geologists, engineers, environmental protection specialists, and recreation planners, engaged in infrastructure review. As industry invests in and develops more LNG projects, OEP’s workload will increase prospectively. At the same time, the level of expertise required to support FERC’s LNG program responsibilities is highly technical and scarce within the job market. FERC supports these responsibilities with professionals specializing in an array of engineering disciplines to include mechanical, civil, petroleum and fire protection. Due to this scarcity in the market, FERC has experienced difficulties recruiting and retaining staff in the Washington, DC area due to compensation constraints. Among its staff with engineering disciplines FERC has observed a separation rate of approximately 30% over the past 4 fiscal years. As such, we have been forced to replace a third of this valuable expertise over this term to keep pace with this rate of attrition.

During this period, the Commission has constantly attempted to recruit candidates to fill these positions to ensure OEP stays at the targeted 345 full-time equivalent staffing level, issuing 176 vacancy announcements. However, 39% of these postings failed to result in the identification of any desirable candidates after conducting initial screenings, interviews and/or reference checks. In postings that did return candidates with the needed professional and interpersonal skills, 18 percent of job offers were turned down, with the majority of those candidates indicating compensation constraints as a principal reason. As a result, OEP has not been able to keep pace with staff attrition. This issue has been more pronounced in extending job offers for LNG engineering positions where we have experienced a 50% success rate relative to acceptances.

Attracting qualified employees to work in the Washington, DC area has come with only marginal success. According to the Economic Research Institute, a compensa-
tion analysis firm, the annual median salary for a petroleum engineers in the Washington, DC area is $175,861. The current annual median salary for a Commission petroleum engineer is $122,605. This compensation analysis is based on salary survey data collected directly from employers in the Washington, DC area.

FERC has previously considered alternative approaches to supporting its technical workload, to include acquiring contractor support. In fact, it uses contractor engineering support on a limited basis to assist with LNG inspections. However, engaging contractors in a more extensive fashion presents unique challenges. The universe of qualified and capable firms that can support FERC’s LNG activities is very small. Industry leverages these consultants to a large extent in support of their activities. These existing relationships create organizational conflicts of interest that preclude FERC from leveraging this limited universe more extensively. Due to these constraints, Federal staff provide the optimal continuity for seamless execution of the agency’s related obligations.

FERC’s continued issues recruiting and retaining technical staff to be stationed in the DC area, and at FERC’s recently-announced office in Houston, Texas, will eventually have a negative impact on LNG program performance unless it finds other viable recruiting and compensation strategies to acquire and retain skilled staff.

These problems have not been confined to OEP. Many of the Commission’s other offices have had similar experiences. Over the past four years, many of our offices have experienced double digit attrition rates that have been difficult to address despite our aggressive hiring efforts due to compensation constraints.

The Commission has realized an unsteady hire rate in key Commission occupations within the last four fiscal years. Given the 9% average attrition rate of engineers, for example, our agency has not been able to rise above attrition. In FY 2016 engineers comprised 16% of the total number of agency-wide hires. Though there was growth in FY 2017, with Engineers making up 22% of total agency-wide hires, in FY 2018 that number plummeted to 13%, its lowest levels the past four fiscal years. It is a real concern that our agency will not be able to on-board as many Engineers as separate, leaving our Engineering ranks perpetually lacking.

In the annual 2018 Federal Employee Viewpoint Survey, administered by the U.S. Office of Personnel Management (OPM), 26% of Commission employees responded that they are considering leaving the Commission within the next year. Among those who are considering leaving within the next year, only 46% of them expressed satisfaction with their pay. Among the respondents who have Doctoral or Professional Degrees the overall satisfaction with pay (regardless of intent to leave) was the lowest, at 62%, compared to respondents with no degrees or other degrees. We are awaiting 2019 survey data results from OPM.
Over the past four fiscal years, the Commission has made hiring a strategic priority, working diligently to hire ahead of forecasted attrition. Over this period, our average time to hire has been under our 55 calendar days metric, with an average time to hire of 49 calendar days in FY 2018. While this has addressed our ability to be responsive to applicants, we remain challenged with attracting quality candidates to fill our positions. We have also maximized our use of available Title 5 recruitment incentives, including offering one-time recruitment and relocation bonuses, offering creditable service for annual leave accrual for non-Federal work experience and experience in uniformed service, as well as using superior qualifications for setting pay above the minimum rate. Once employees are on-board, we have also maximized our use of available Title 5 retention incentives, including investing just over $1 million annually in providing Student Loan Repayment Program incentives to staff. Even with these flexibilities, 18% of candidates that declined offers noted they did so to pursue private sector opportunities that provided greater compensation. These compensation issues are compounded in the Washington, DC Headquarters location and in our San Francisco Regional Office by higher costs of living.

The Commission has used Federal Government-wide direct hire authorities for Information Technology professionals with information security experience over the past eight years. This year we have also expanded our use of Government-wide direct hire authorities granted for Economists, Biological Scientists, Fishery Biologists, General Engineers, Engineers, Physical Scientists, and Acquisition occupations. While the direct hire authority expedites the hiring process, we are often faced with not being able to offer competitive compensation for these needed skill sets.

In summary, the language contained in S.607, the “Timely Review of Infrastructure Act” will assist the Commission in attracting and retaining the needed workforce with additional compensation authorities. This concludes my testimony. I would be happy to answer any of your questions.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the changes in existing law made by S. 607, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

DEPARTMENT OF ENERGY
ORGANIZATION ACT

Public Law 95–91, As Amended
* * * * * * * *
TITLE IV—FEDERAL ENERGY REGULATORY COMMISSION

APPOINTMENT AND ADMINISTRATION

SEC. 401. (a) There is hereby established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.

(b)(1) The Commission shall be composed of five members appointed by the President, by and with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Members shall hold office for a term of 5 years and may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office. Not more than three members of the Commission shall be members of the same political party. Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of his term until his successor is appointed and has been confirmed and taken the oath of Office, except that such Commissioner shall not serve beyond the end of the session of the Congress in which such term expires. Members of the Commission shall not engage in any other business, vocation, or employment while serving on the Commission.

(2) Notwithstanding the third sentence of paragraph (1), the terms of members first taking office after the date of enactment of the Federal Energy Regulatory Commission Member Term Act of 1990 shall expire as follows:

(A) In the case of members appointed to succeed members whose terms expire in 1991, one such member’s term shall expire on June 30, 1994, and one such member’s term shall expire on June 30, 1995, as designated by the President at the time of appointment.

(B) In the case of members appointed to succeed members whose terms expire in 1992, one such member’s term shall expire on June 30, 1996, and one such member’s term shall expire on June 30, 1997, as designated by the President at the time of appointment.

(C) In the case of the member appointed to succeed the member whose term expires in 1993, such member’s term shall expire on June 30, 1998.

(c) The Chairman shall be responsible on behalf of the Commission for the executive and administrative operation of the Commission, including functions of the Commission with respect to (1) the appointment and employment of hearing examiners in accordance with the provisions of title 5, United States Code, (2) the selection, appointment, and fixing of the compensation of such personnel as he deems necessary, including an executive director, (3) the supervision of personnel employed by or assigned to the Commission, except that each member of the Commission may select and supervise personnel for his personal staff, (4) the distribution of business among personnel and among administrative units of the Commission, and (5) the procurement of services of experts and consultants in accordance with section 3109 of title 5, United States Code. The Secretary shall provide to the Commission such support and facili-
ties as the Commission determines it needs to carry out its functions.

(d) In the performance of their functions, the members, employees, or other personnel of the Commission shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent of any other part of the Department.

(e) The Chairman of the Commission may designate any other member of the Commission as Acting Chairman to act in the place and stead of the Chairman during his absence. The Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all sessions of the Commission and a quorum for the transaction of business shall consist of at least three members present. Each member of the Commission, including the Chairman, shall have one vote. Actions of the Commission shall be determined by a majority vote of the members present. The Commission shall have an official seal which shall be judicially noticed.

(f) The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions.

(g) In carrying out any of its functions, the Commission shall have the powers authorized by the law under which such function is exercised to hold hearings, sign and issue subpoenas, administer oaths, examine witnesses, and receive evidence at any place in the United States it may designate. The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions, except that nothing in this subsection shall be deemed to supersede the provisions of section 556 of title 5, United States Code relating to hearing examiners.

(h) The principal office of the Commission shall be in or near the District of Columbia, where its general sessions shall be held, but the Commission may sit anywhere in the United States.

(i) For the purpose of section 552b of title 5, United States Code, the Commission shall be deemed to be an agency. Except as provided in section 518 of title 28, United States Code, relating to litigation before the Supreme Court, attorneys designated by the Chairman of the Commission may appear for, and represent the Commission in, any civil action brought in connection with any function carried out by the Commission pursuant to this Act or as otherwise authorized by law.

(j) In each annual authorization and appropriation request under this Act, the Secretary shall identify the portion thereof intended for the support of the Commission and include a statement by the Commission (1) showing the amount requested by the Commission in its budgetary presentation to the Secretary and the Office of Management and Budget and (2) as assessment of the budgetary needs of the Commission. Whenever the Commission submits to the Secretary, the President, or the Office of Management and Budget, any legislative recommendation or testimony, or comments on legislation, prepared for submission to Congress, the Commission shall concurrently transmit a copy thereof to the appropriate committees of Congress.
(k) Addressing Insufficient Compensation of Employees and Other Personnel of the Commission.—

(1) In general.—Notwithstanding any other provision of law, if the Chairman publicly certifies that compensation for a category of employees or other personnel of the Commission is insufficient to retain or attract employees and other personnel to allow the Commission to carry out the functions of the Commission in a timely, efficient, and effective manner, the Chairman may fix the compensation for the category of employees or other personnel without regard to chapter 51 and subchapter III of chapter 53 of title 5, United States Code, or any other civil service law.

(2) Certification requirements.—A certification issued under paragraph (1) shall—

(A) apply with respect to a category of employees or other personnel responsible for conducting work of a scientific, technological, engineering, or mathematical nature;

(B) specify a maximum amount of reasonable compensation for the category of employees or other personnel;

(C) be valid for a 5-year period beginning on the date on which the certification is issued;

(D) be no broader than necessary to achieve the objective of retaining or attracting employees and other personnel to allow the Commission to carry out the functions of the Commission in a timely, efficient, and effective manner; and

(E) include an explanation for why the other approaches available to the Chairman for retaining and attracting employees and other personnel are inadequate.

(3) Renewal.—

(A) In general.—Not later than 90 days before the date of expiration of a certification issued under paragraph (1), the Chairman shall determine whether the certification should be renewed for a subsequent 5-year period.

(B) Requirement.—If the Chairman determines that a certification should be renewed under subparagraph (A), the Chairman may renew the certification, subject to the certification requirements under paragraph (2) that were applicable to the initial certification.

(4) New hires.—

(A) In general.—An employee or other personnel that is a member of a category of employees or other personnel that would have been covered by a certification issued under paragraph (1), but was hired during a period in which the certification has expired and has not been renewed under paragraph (3) shall not be eligible for compensation at the level that would have applied to the employee or other personnel if the certification had been in effect on the date on which the employee or other personnel was hired.

(B) Compensation of new hires on renewal.—On renewal of a certification under paragraph (3), the Chairman may fix the compensation of the employees or other personnel described in subparagraph (A) at the level established for the category of employees or other personnel in the certification.
(5) RETENTION OF LEVEL OF FIXED COMPENSATION.—A category of employees or other personnel, the compensation of which was fixed by the Chairman in accordance with paragraph (1), may, at the discretion of the Chairman, have the level of fixed compensation for the category of employees or other personnel retained, regardless of whether a certification described under that paragraph is in effect with respect to the compensation of the category of employees or other personnel.

(6) CONSULTATION REQUIRED.—The Chairman shall consult with the Director of the Office of Personnel Management in implementing this subsection, including in the determination of the amount of compensation with respect to each category of employees or other personnel.

(7) EXPERTS AND CONSULTANTS.—
   (A) IN GENERAL.—Subject to subparagraph (B), the Chairman may—
      (i) obtain the services of experts and consultants in accordance with section 3109 of title 5, United States Code;
      (ii) compensate those experts and consultants for each day (including travel time) at rates not in excess of the rate of pay for level IV of the Executive Schedule under section 5315 of that title; and
      (iii) pay to the experts and consultants serving away from the homes or regular places of business of the experts and consultants travel expenses and per diem in lieu of subsistence at rates authorized by sections 5702 and 5703 of that title for persons in Government service employed intermittently.
   (B) LIMITATIONS.—The Chairman shall—
      (i) to the maximum extent practicable, limit the use of experts and consultants pursuant to subparagraph (A); and
      (ii) ensure that the employment contract of each expert and consultant employed pursuant to subparagraph (A) is subject to renewal not less frequently than annually.

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