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Introduction

Mr. Chairman, Ranking Member Rush, and members of the Subcommittee: Thank you for inviting me to testify today. My name is Max Minzner, and I am the General Counsel of the Federal Energy Regulatory Commission (FERC or the Commission). I appear before you as a staff witness, and the views I present are not necessarily those of the Commission or any individual Commissioner.

I have been asked to testify on two proposed bills that would amend the Federal Power Act (FPA or the Act): 1) a bill that would modify Section 203 of the FPA to set a minimum threshold value of $10,000,000 on the merger or consolidation of facilities belonging to public utilities that would be subject to FERC approval; and 2) H.R. 2984, a bill that would amend Section 205 of the FPA to permit a party to seek rehearing and subsequent appellate review of any rate change filed pursuant to that provision that takes effect without Commission action.

Background

Part II of the Federal Power Act charges the Commission with oversight of the wholesale electric markets and the public utilities that transmit or sell electricity at wholesale in interstate commerce. FERC is required to ensure that the terms and conditions of services or, and rates charged by these utilities are just and reasonable, and not unduly discriminatory or preferential. The FPA provides the Commission with

multiple statutory tools to carry out this mission, two of which are at issue in the pending bills.

First, Section 203 of the Act requires public utilities to seek Commission approval before engaging in a wide range of corporate transactions. For example, under Section 203(a)(1)(A), public utilities may not sell certain facilities subject to Commission jurisdiction without prior approval from FERC. Similarly, Section 203(a)(1)(B) requires FERC approval before public utilities merge or consolidate facilities subject to the jurisdiction of the Commission.

Second, Section 205 provides that public utilities may not change their rates or other provisions of their tariffs without providing at least sixty days advance notice to the Commission and the public, although the Commission may authorize the change to take effect in a shorter period of time. In practice, a public utility typically makes a filing with FERC, and the Commission takes action on the proposal during the sixty-day period. In very rare cases, the Commission does not take action on the filing within that time period. In that situation, the public utility's filing goes into effect when the time expires.

A Bill to Amend Section 203

This proposed bill would add a minimum dollar value to Section 203(a)(1)(B) of the Act such that public utilities would only need prior FERC approval to "merge or consolidate" facilities subject to the Commission's jurisdiction if the facilities have a value in excess of $10 million. In other words, mergers or acquisitions of facilities with a value less than that amount will not need FERC approval.

This bill would align this provision of the FPA with the other three subsections of Section 203(a)(1). Subsections (A), (C), and (D) only require Commission approval if

the transaction at issue exceeds $10 million in value. Section 203(a)(1)(A) requires FERC approval before a public utility sells, leases, or otherwise disposes of facilities worth more than $10 million. Section 203(a)(1)(C) imposes the same obligation for the acquisition of more than $10 million in securities of another public utility. Finally, Section 203(a)(1)(D) mandates Commission approval before the acquisition of a generating facility worth more than $10 million.

While the current statute is the result of the Energy Policy Act of 2005, the requirement for merger approval dates back to the original 1935 Federal Power Act. The prior version of Section 203 combined the current statutory mandates of Section 203(a)(1)(A)-(C) in a single subsection that included a $50,000 threshold. Under this statutory language, FERC had issued regulations imposing a $50,000 *de minimis* exception for all of the provisions. After the 2005 legislation that subdivided the section and imposed the three $10 million thresholds, FERC interpreted the statute as eliminating the *de minimis* exception for the "merge and consolidate" clause. As a result, the requirement of approval now applies even to mergers that are less than $50,000. Adding a $10 million *de minimis* threshold to the "merge and consolidate" clause would, to some extent, return the statute to the situation that existed prior to the 2005 legislation where the same minimum threshold applies equally to every subsection of the statute.

In my view, the proposal to add a $10 million *de minimis* threshold to Section 203(a)(1)(B) of the FPA could ease the administrative burden on the Commission staff and the regulatory burden on industry without a significant negative effect on the Commission's regulatory responsibilities. Transactions below the proposed threshold are unlikely to impose a significant negative impact on competition or the rates of utility

customers. Despite this limited risk, the current practice is for Commission staff to examine each transaction closely in order to carry out our statutory mandate. In Fiscal Year 2015, FERC received 216 applications for approval under Section 203. About 20% of those applications were filed under Section 203(a)(1)(B) and fell below the $10 million threshold. The time and effort of staff could be usefully redirected to other matters pending before the Commission rather than reviewing those applications.

One potential concern raised by the bill involves serial mergers. The Commission would no longer have the authority to review and approve mergers valued at less than $10 million even in situations where the merger took place as one of a series of transactions that exceeded the limit in total. I believe that FERC has other tools available to it, though, to protect consumers and the public interest if such circumstances arose. For example, if an entity with market-based rates obtained the opportunity to exercise market power as a result of such transactions, the Commission could limit or eliminate its ability to engage in transactions at market rates. Additionally, the Commission has a range of market power mitigation measures that limit market power within the organized wholesale electric markets. Finally, if the exercise of market power involves market manipulation or violation of a Commission rule, regulation, order or tariff provision, the Commission can bring an enforcement action.

H.R. 2984

As discussed above, when a public utility seeks to modify its rates or other provisions of its tariff, it will file the proposed change with the Commission under Section 205 of the Act. The Commission then provides the public the opportunity to intervene in the proceeding and to comment on the proposed change. Before the

expiration of the sixty-day statutory time period, FERC will take action on the proposed rate or tariff provision. Any party aggrieved by the Commission action, either the public utility or an intervenor, may seek rehearing of the order. Once the Commission acts on the request for rehearing, review is available in the United States Courts of Appeals. Under the FPA, a request for rehearing, though, is a prerequisite for appellate review. Parties may not seek review from the Court of Appeals if they did not seek rehearing.

In unusual situations, FERC has permitted a public utility's filing under Section 205 to take effect without a Commission order. This is an exceedingly rare occurrence. I am familiar with only six occasions where this outcome has occurred under either the FPA or under the comparable provisions of the Natural Gas Act. As the Subcommittee may be aware, one such tariff amendment occurred in September 2014 in a matter relating to auction results in ISO New England (ISO-NE). At the time, FERC had only four sitting Commissioners. Public statements by the members of the Commission revealed that the Commission split 2-2 on the question of whether to accept the auction results. As a result, no order garnered the support of a majority of the members of the Commission.

When filings have taken effect under Section 205 without a Commission order, parties have occasionally sought rehearing. The Commission has dismissed those rehearing requests on the grounds that rehearing was not available because the Commission did not issue an order. The Commission followed this approach with respect to the rehearing requests in the ISO-NE case. That matter is currently pending in the United States Court of Appeals for the District of Columbia Circuit. In that litigation,

FERC has taken the position that, consistent with relevant precedent, the absence of a Commission order precludes both rehearing and appellate review of the tariff change.

In my view, modifying Section 205 of the FPA to permit a party to seek rehearing and subsequent appellate review of any rate change filed pursuant to that provision that takes effect without Commission action would change this outcome for future cases. While I believe that rehearing and appellate review are not currently available where a filing submitted pursuant to section 205 of the FPA takes effect by operation of law, H.R. 2984 would treat Commission inaction in that situation as the equivalent of an order for purposes of Section 313 of the FPA. Section 313 provides the process for rehearing and appellate review of Commission orders. As a result, the proposed legislation would permit any party aggrieved by the filing to seek rehearing. After the Commission acts on a petition for rehearing, that aggrieved party could seek review in the Court of Appeals, if necessary.

The proposal has significant benefits. Appellate review is an important procedural avenue for those who do not prevail before an administrative agency. It would also correct an unusual outcome in a specific context that may arise when the Commission has four voting members. A party who manages to convince only one Commissioner, and loses on a 3-1 vote, may seek rehearing and appellate review. However, a party that makes a more persuasive case and manages to convince a second Commissioner will lose 2-2. Those parties are currently barred from either requesting rehearing at the Commission or seeking redress at a Court of Appeals. The proposal would avoid that outcome.

My chief concern is that it may present difficulties in practice for the Court of Appeals. When a federal appellate court is reviewing the action of an administrative agency, it typically reviews the order issued by the agency and evaluates the record established by the agency in support of its decision. Review in the Court of Appeals may be challenging under this legislation. Without an initial FERC order, the appellate court will not be able to rely on the Commission's reasoning in the first instance. However, two aspects of the process of appellate review should alleviate this difficulty. First, parties will still be required to petition for rehearing prior to seeking review from the Court of Appeals. In most cases, the Commission issues a separate order on rehearing that provides an additional opportunity to justify or explain its decision. If there is an order on rehearing, this order will be available for the appellate court to review. Second, if the Court of Appeals believes that it lacks the appropriate record to review the decision of Commission, it can remand the case to FERC for further proceedings.

Conclusion

Thank you for inviting me to testify on the proposed legislation. I look forward to working with you in the future and I am happy to answer any questions you have.