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Testimony of Tyson Slocum
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Before the Committee on Energy and Commerce
Subcommittee on Energy and Power
United States House of Representatives
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I am Tyson Slocum and I am Energy Program Director at Public Citizen, Inc. Public Citizen is a not-for-profit, non-partisan consumer advocacy organization with more than 400,000 members and supporters across the country. We support policies that will provide affordable, reliable and sustainable energy for our members. I serve on the U.S. Commodity Futures Trading Commission Energy and Environmental Markets Advisory Committee, and I frequently intervene and comment in Federal Energy Regulatory Commission dockets on behalf of household consumers.

Thank you for the invitation to testify today on two FERC-jurisdictional bills. The first amends Section 203(a)(1)(B) of the Federal Power Act (FPA) to allow a merger or consolidation of facilities belonging to public utilities with a value of less than $10 million to evade FERC's merger review authority. **Public Citizen opposes this legislation.**

The second bill, HR 2984, amends Subsection (d) of Section 205 of the FPA with the following language: "Any absence of action by the Commission that allows a change to take effect under this section, including the Commission allowing the sixty days' notice herein provided to expire without Commission action, shall be treated as an order issued by the Commission accepting such change for purposes of section 313." **Public Citizen supports this legislation.**

FERC Merger Authorization

While Congress historically subjected the FPA to minimum dollar thresholds for the *disposition* of FERC-jurisdictional facilities, *statutes regarding the merging and consolation of assets have never been subject to such minimum dollar thresholds*. A disposition of assets occurs when a public utility transfers to another party a FERC-jurisdictional facility, including "paper facilities" (contracts, tariffs, etc), thereby resulting in a change in public utility control/ownership. This is, by far, the most common form of transaction reviewed under Section 203, and Congress has long allowed such transactions under a certain dollar threshold to not be subject to FERC authorization, per Section 203(a)(1)(A).

In contrast, Section 203(a)(1)(B) covers those transactions that result in a merger or consolidation of FERC-jurisdictional public utility facilities. And Congress has always been clear in treating mergers and consolations differently from disposition of assets or the acquisition of securities in that mergers and consolations have never featured a minimum dollar threshold for review. Prior to the passage of the Energy Policy Act of 2005, Congress made apparent that minimum dollar thresholds for review did not apply to mergers and consolations:

> *Sec. 203. (a) No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000,* ***or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person****, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so.*[1]

It is evident to me that this pre-EPAct2005 language intends that if "any part thereof" (with no dollar amount given at all) means that if jurisdictional facilities (which include filed rates and

[1] Section 203 Disposition of property; consolidation; purchase of securities, published January 1997 by the U.S. Government Printing Office as a Committee Print 105-F, 105th Congress, 1st session.

contracts) or any part of them are merged with jurisdictional facilities or any part of them owned by another person, the Commission must approve such consolidation of jurisdictional facilities.

Importantly, Congress preserved the distinction of mergers and consolidations not being subject to minimum dollar review thresholds when it passed the Energy Policy Act of 2005. Section 1289 of EPAct2005 reads:

> *(a) IN GENERAL.—Section 203(a) of the Federal Power Act (16 U.S.C. 824b(a)) is amended to read as follows: ''(a)(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so— ''(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000; ''**(B) merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever**; ''(C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or ''(D) purchase, lease, or otherwise acquire an existing generation facility— ''(i) that has a value in excess of $10,000,000; and ''(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for ratemaking purposes*."

It is plain that Congress designated dollar thresholds for every provision under (a)(1) *except* (B), for mergers and consolidations, which is consistent with pre-EPAct2005 language. This was important, as Congress recognized the need to protect consumers with a thorough review of mergers in the wake of the repeal of the Public Utility Holding Company Act of 1935. As Senator Russ Feingold said on the floor of the Senate just prior to the Senate voting to approve the conference report:

> *"The conference committee retained repeal of the pro-consumer Public Utility Holding Company Act, important New Deal-era legislation which has protected electricity consumers...**I do, however, recognize the efforts of the chairman and the ranking member to protect language providing the Federal Government more oversight of utility mergers, which is important and I support."***[2]

Congress understood that repealing PUHCA would result in increased mergers and consolidation in the utility industry. Therefore, Congress made sure that FERC had full authority over all mergers, and included clear legislative language that mergers and consolidations did not feature any

[2] Congressional Record—Senate, July 29, 2005, at S9337.

minimum dollar threshold for FERC review that were explicitly provided to the other subparts of Section 203(a)(1).

In March 2014, ITC Holdings Corp agreed to pay a $750,000 penalty, in part, for violations of Section 203(a)(1)(B) of the FPA by acquiring, in 20 transactions valued between $0 and $6.7 million between 2005 and 2011, certain FERC-jurisdictional facilities without first obtaining FERC authorization.[3] It is likely that this case is an inspiration for today's proposed legislation. But Public Citizen does not believe that the ITC case demonstrates the need for this bill, but rather this and other cases reveal the need for FERC to be able to review all mergers and consolidations, with no minimum dollar exemption.

Public Citizen believes it is ill-advised to exempt from FERC review any merger or consolidation under a value of $10 million, as we have encountered in recent complaints we have filed at FERC how a single facility or contract has the ability to be a pivotal supplier in a given market, providing the owner with an ability to unilaterally charge unjust and unreasonable rates.[4] Such facilities could easily fall under a $10 million value threshold on a facility-by-facility, or contract-by-contract, basis. Consumers need the Commission to have full flexibility to review all proposed mergers and consolidations, just as Congress has long intended.

H.R. 2984

H.R. 2984 is another bill under consideration today by this Committee. This legislation directly relates to an active federal lawsuit brought by Public Citizen against FERC,[5] and we support this bill because it would make clear that certain FERC actions constitute an order for purposes of rehearing and court review.

[3] www.ferc.gov/enforcement/civil-penalties/actions/2014/146FERC61172.pdf
[4] FERC Dockets Nos. EL15-70 and ER14-1409.

Background of *Public Citizen, Inc. v. Federal Energy Regulatory Commission*

ISO New England (ISO-NE), the private "independent system operator" authorized by FERC to administer New England's electrical transmission grid and wholesale electricity markets, conducts annual "forward capacity auctions" to establish rates for wholesale electric capacity to be provided three years later in the New England region. The eighth such auction, conducted in 2014, was held in concededly noncompetitive conditions resulting from the withdrawal of capacity from the market in advance of the auction by a Cayman Islands-based private equity firm, Energy Capital Partners, and yielded rates that will increase electricity prices for New England consumers by well over $1 billion.

Although the company closed one power plant, Energy Capital Partners controlled others in ISO-NE through a variety of means, including exploiting a financial product called a Total Return Swap, allowing these other facilities to reap significantly higher revenues from the resulting high-priced auction results. The company, therefore, was able to earn more money operating one fewer power plant through its execution of the scheme. In many ways, such economic withholding is quite similar to strategies utilized by Enron during the West Coast deregulation crisis of 2000-01.

As required by the settlement agreement and tariff establishing the auctions, ISO-NE filed the auction results with FERC under FPA section 205, in what is known as a "compliance filing." As permitted by section 205 and the settlement agreement and tariff, Public Citizen intervened, challenging the rates under section 205(a)'s "just and reasonable" standard and seeking a hearing.

Because of a two-to-two division among the four commissioners then sitting, FERC refused to set the rates' lawfulness for hearing. Absent a majority vote, FERC issued a "notice" on September 16, 2014, stating that the rates filed by ISO-NE had become effective "by operation of law." FERC simultaneously released statements by the commissioners explaining the views that led to the rejection of our challenge to the rates' lawfulness under section 205.

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[5] www.citizen.org/documents/public-citizen-ferc-iso-ne-petitioner-brief.pdf

Then-Commission Chair LaFleur's statement asserted that FERC had no authority to consider the justness and reasonableness of the rates because they were the result of an auction carried out in accordance with a FERC-approved tariff. Then-Commissioner LaFleur specifically rejected the proposition that FERC had the power "to independently assess whether the resulting auction rates themselves are just and reasonable." According to Commissioner LaFleur, FERC's approval of the tariff setting forth the auction rules, which she considered the "pertinent filed 'rate,'" precluded any review under section 205 of the lawfulness of the "resulting rates" established in the auction, even if those rates reflected the exercise of market power by participants in the auction. Commissioner LaFleur characterized the filing of the auction results as a mere "informational filing" that could not trigger review of the actual rates under section 205's just-and-reasonable standard.

Commissioners Clark and Bay, by contrast, would have set the rates for hearing because ISO-NE had not carried its burden of establishing that the auction results are just and reasonable. They pointed out that, in approving the settlement agreement establishing the capacity auctions, FERC had expressly stated that auction results would be reviewed in section 205 proceedings to ensure that they were just and reasonable, and that Chair LaFleur's view that such review was unavailable contradicted those assurances and the requirements of section 205. As the dissenting Commissioners explained: "[t]hat the Commission would have an opportunity to ensure that the results of the auctions were just and reasonable—and not merely the process leading to them—was an important underpinning of New England's forward capacity market." They emphasized that filing of auction results was not merely an "informational" requirement; rather, "[i]n order to guard against unexpected outcomes …, ISO-NE was required to file the auction results with the Commission under section 205 of the FPA, and to carry the burden of establishing that those results were just and reasonable and not unduly discriminatory or preferential." Thus, "[t]he Commission would abdicate its responsibility under section 205 of the FPA

if it treated the FCA 8 Results Filing as a mere informational filing and determined without further review that the prices resulting from the auction must necessarily be just and reasonable."

Commissioners Clark and Bay also pointed out that there was reason to believe ISO-NE had not complied with tariff provisions requiring mitigation of market power, and they noted the irony that the very auction rules whose approval by FERC formed the basis of Commissioner LaFleur's conclusion that the auction results were unassailable were themselves "the subject of a unanimous Commission order under section 206 of the FPA that finds those rules may be unduly preferential or discriminatory."

In October 24, 2014, FERC dismissed Public Citizen's timely rehearing request. Public Citizen filed its timely petition for review on November 14, 2014. FERC contested the Court's jurisdiction by filing a motion to dismiss arguing that FERC's action was not a reviewable "order" under FPA section 313(b). A motions panel denied the motion but directed that the parties argue jurisdiction in their merits briefs, which Public Citizen filed in September 2015.

Public Citizen Supports H.R. 2984 because it would affirmatively resolve our pending case and any future similar disputes by clearly allowing for petitioners to seek rehearing and court review.

Conclusion

Public Citizen opposes legislative efforts to apply minimum dollar threshold exemptions to FERC's merger and consolidation review authority. Public Citizen supports H.R. 2984 that allows certain FERC decisions on rate changes to be treated as an order for purposes of rehearing and court review.