Testimony of James Danly
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Committee on Energy and Natural Resources
Subcommittee on Energy
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Introduction

Chairman Gardner, Ranking Member Manchin, and members of the Subcommittee:

Thank you for inviting me to testify today. My name is James Danly, and I am the General Counsel of the Federal Energy Regulatory Commission (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 three bills that would amend the Federal Power Act (FPA or the Act): (1 and 2) H.R. 1109 and S. 1860, bills that would modify Section 203 of the FPA to set a minimum threshold value of $10 million on the merger or consolidation of jurisdictional facilities that would be subject to Commission approval; and (3) S. 186, a bill that would amend Section 205 of the FPA to permit a party to seek rehearing after a rate change filed under Section 205 takes effect by operation of law due to Commission inaction.

Background

Part II of the FPA charges the Commission with oversight of wholesale electric markets and the public utilities that transmit or sell electricity at wholesale in interstate commerce. The Commission is required to ensure that the terms and conditions of jurisdictional services and the rates charged by public 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.

Second, Section 205 of the Act provides that public utilities may not change their rates or other provisions of their tariffs without providing at least 60 days' prior notice to the Commission and the public. In typical practice, a public utility makes a Section 205 filing with the Commission, and the Commission takes action on the filing within the 60-day period. If, however, the Commission does not take action on the filing within that period, the public utility's filing automatically goes into effect when the 60-day period expires.

A Bill to Amend Section 203

S. 1860 (the "Parity Across Reviews Act" or the "PARs Act" and H.R. 1109)

The bills are identical and would add a minimum dollar value to Subsection 203(a)(1)(B) of the FPA such that public utilities would only need prior Commission approval to "merge or consolidate" (that is, to acquire) 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 would not need Commission approval.

The bills 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. Subsection 203(a)(1)(A) requires Commission approval before a public utility sells, leases, or otherwise disposes of facilities worth more than $10 million. Subsection 203(a)(1)(C) imposes the same obligation for the acquisition of more than $10 million in securities of another public utility. Finally, Subsection 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 Subsections 203(a)(1)(A)-(C) in a single subsection that included a $50,000 threshold. Under this statutory language, the Commission had issued regulations imposing a $50,000 threshold exception for all of the provisions. After the 2005 legislation that subdivided the section, added what is now in Subsection (D), and imposed the three $10 million thresholds, the Commission interpreted the statute as precluding the Commission from applying a $10 million dollar threshold to the "merge and consolidate" clause. As a result, the requirement for approval now applies even to acquisitions of jurisdictional facilities that are less than $50,000. Adding a $10 million threshold to the "merge and consolidate" clause in Subsection 203(a)(1)(B) 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 threshold to Subsection 203(a)(1)(B) of the FPA would ease the regulatory burden on industry without impeding 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.

Previously, Commission staff has noted that one potential concern involves serial mergers. That is, under the proposed bill, the Commission would no longer have the authority to review and approve mergers and acquisitions valued at less than $10 million even in situations where the transaction took place as one of a series of transactions that exceeded the limit in total. I believe that the Commission would have tools to protect consumers and the public interest if such circumstances arose.

For one, the proposed bills would add a new Subsection 203(a)(7)(A) to establish an additional reporting requirement on certain transactions under the $10 million threshold. Specifically, a public utility undertaking a merger or acquisition where the facilities being acquired have a value in excess of $1 million but less than $10 million would have to notify the Commission of the transaction 30 days after consummation. This after-the fact reporting would be for informational purposes only – that is, the Commission would not take action as to any of these transactions. However, the notifications would provide the Commission and the public with greater transparency as to these types of transactions.

Moreover, I believe that the Commission has tools under its existing statutory framework. 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-based 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.

One concern I should note about the proposed bills is the placement of the $10 million threshold clause in revised Subsection 203(a)(1)(B). As revised, Subsection 203(a)(1)(B) would read: "No public utility shall, without first having secured an order of the Commission authorizing it to do so . . . (B) merge or consolidate, directly or indirectly, ~~such facilities or any part thereof~~ such facilities, or any part thereof, of a value in excess of [$10 million] with those of any other person, by any means whatsoever." There is some risk that the statutory language could be read as modifying the wrong set of facilities and imposing the $10 million threshold on the value of the pre-existing assets of the acquiring public utility rather than on the assets that are being acquired (that is, the assets merged or consolidated with the pre-existing assets of the acquiring public utility). Placing the $10 million threshold language after the "any other person" may address this concern. Proposed Subsection 203(a)(7)(A) presents a similar issue.

A Bill to Amend Section 205

S. 186 (The "Fair Ratepayer Accountability, Transparency, and Efficiency Standards Act" or "Fair RATES Act")

As discussed above, when a public utility seeks to change its rates or other provisions of its tariff, FPA Section 205 requires the utility to file the proposed change with the Commission sixty days in advance of when the change is to take effect. The Commission then provides the public the opportunity to intervene in the proceeding and to comment on the proposed change. Prior to expiration of the statutory, sixty-day notice period, the Commission will take action on the proposed rate or tariff provision, typically by issuing a Commission order. Under Section 313 of the FPA, any party aggrieved by a Commission order may seek rehearing of that order. Once the Commission acts on the request for rehearing (or fails to act within 30 days), review is available in the United

States Courts of Appeals. A request for rehearing, though, is a prerequisite for appellate review. Under Section 313, parties may not seek review from the Court of Appeals if they did not seek rehearing.

In exceedingly rare cases, a public utility's filing under Section 205 has taken effect by operation of law without a Commission order. 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. One such occurrence was in September 2014, when capacity auction results filed by ISO New England (ISO-NE) became effective by operation of law. At the time, the Commission had only four sitting Commissioners. Public statements issued by the Commissioners after ISO-NE's filing took effect revealed a 2-2 split on the question of whether to accept the auction results, which was why the Commission never issued an order regarding the filing.

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 that approach with respect to rehearing requests filed in the ISO-NE case, and, when challenged on appeal, the Commission's approach was affirmed by the United States Court of Appeals for the District of Columbia Circuit. The Court agreed with the Commission that, consistent with the current statutory language and relevant precedent, where there is no Commission order in a Section 205 proceeding, rehearing and appellate review are precluded.

S. 186 could partially change that outcome. Under the bill, absence of Commission action resulting in a filing taking effect by operation of law would constitute an order accepting the filing for purposes of rehearing and appeal under Section 313 of the FPA. As a result, the proposed legislation would permit any party aggrieved by the filing to seek rehearing. If the Commission acts on that request for rehearing, the aggrieved party could seek review in the Court of Appeals.

The proposed legislation offers the possibility for aggrieved parties to pursue further administrative and judicial process when a disputed rate goes into effect even though half of the seated Commission would not have accepted the rate in an order. Oddly, under the current statutory framework, a party who manages to persuade only one of four Commissioners, and loses on a 3-1 vote, may request rehearing at the Commission and seek redress at a Court of Appeals. However, a party that is perhaps more persuasive and manages to convince two of four Commissioners, resulting in a 2-2 split – and thus no Commission order – is currently barred from seeking rehearing and appellate review.

This bill potentially represents a step toward correcting this exceedingly rare, but not unimportant, problem. However, it is only a partial measure, and there are several issues that I would like to bring to the Subcommittee's attention as it considers this legislation.

First, the mere fact that aggrieved parties are foreclosed from requesting rehearing and subsequent appellate review does not mean that they are without means of redress under the current formulation of the FPA. Should a public utility's filing take effect by operation of law, and the aggrieved party believes those rates to be unjust and unreasonable or unduly discriminatory, they may avail themselves of the procedures afforded under section 206. They can file a complaint in a separate action and, if they meet their burden, they will be able to have the rates altered. While this option increases the cost to litigants and shifts the burden to the party filing the complaint, any amendment to the FPA should be adopted knowing that this alternative route to redress already exists.

Second, the bill may not afford the relief anticipated by the Subcommittee. Should the Commission's inaction be the result, as in the ISO-NE case, of a 2-2 split, a similar result could obtain for a later order on rehearing. In that case, there would be another 2-2 split and no order on rehearing would issue. In such a case, it would be exceedingly unlikely that a Court of Appeals would entertain a petition for review. Moreover, even if a Court of Appeals accepted the petition, the Court would almost certainly remand the case back to the Commission for further adjudication. When sitting in review of agency action, Courts of Appeals review the evidentiary record compiled below and the reasoning the agency employed – as reflected in its orders – to support its decision based on that record. In the case of a serial 2-2 split, no orders would issue and such a review would be impossible. Remand would appear to be the Court's only option.

Finally, the proposed language might be overbroad. As drafted, the bill's effects are not restricted to the occasion, like that presented in the ISO-NE case, of a deadlocked Commission, but instead apply to "[a]ny absence of action" by the Commission that allow rates to go into effect by operation of law. If the Subcommittee's primary objective is to provide remedy following inaction by a deadlocked Commission, it might consider narrowing the circumstances under which the bill's provisions would apply in order to limit unintended consequences.

In summary, while the Subcommittee may ultimately decide that this change to 205 is necessary, it is my view that it only partially advances the interests of an exceedingly narrow category of aggrieved parties in very rare occasions of Commission inaction. Given that the right to seek rehearing under such circumstances does not, as a practical matter, guarantee a rehearing order or appellate review, and given the fact that parties can always challenge rates under section 206, I would counsel discretion in your deliberations on whether to alter the central provision of the Federal Power Act. Unlike S. 1860, which seeks to ameliorate a serious problem that affects the whole of the regulated community and represents an administrative burden on the Commission, this bill, while perhaps defensible, is not required to ensure the success of the Commission's role regulating the wholesale power markets, nor to guarantee the rights of aggrieved parties.

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.