

Calendar No. 420

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ 115-253

AMENDING SECTION 203 OF THE FEDERAL POWER ACT

MAY 21, 2018.—Ordered to be printed

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

R E P O R T

[To accompany H.R. 1109]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (H.R. 1109) to amend section 203 of the Federal Power Act, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. CLARIFICATION OF FACILITY MERGER AUTHORIZATION.

Section 203(a)(1) of the Federal Power Act (16 U.S.C. 824b(a)(1)) is amended by striking subparagraph (B) and inserting the following:

“(B) merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10,000,000, by any means whatsoever;”.

SEC. 2. NOTIFICATION FOR CERTAIN TRANSACTIONS.

Section 203(a) of the Federal Power Act (16 U.S.C. 824b(a)) is amended by adding at the end the following new paragraph:

“(7)(A) Not later than 180 days after the date of enactment of this paragraph, the Commission shall promulgate a rule requiring any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, to notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated if—

“(i) the facilities, or any part thereof, to be acquired are of a value in excess of \$1,000,000; and

“(ii) such public utility is not required to secure an order of the Commission under paragraph (1)(B).

“(B) In establishing any notification requirement under subparagraph (A), the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information.”.

SEC. 3. EFFECTIVE DATE.

The amendment made by section 1 shall take effect 180 days after the date of enactment of this Act.

SEC. 4. FEDERAL ENERGY REGULATORY COMMISSION REPORT.

(a) **IN GENERAL.**—Not later than 2 years after the date of enactment of this Act, the Federal Energy Regulatory Commission shall submit to Congress a report that assesses the effects of the amendment made by section 1.

(b) **REQUIREMENTS.**—In preparing the report under subsection (a), the Federal Energy Regulatory Commission shall—

- (1) take into account any information collected under paragraph (7) of section 203(a) of the Federal Power Act (16 U.S.C. 824b(a)) (as added by section 2); and
- (2) provide for public notice and comment with respect to the report.

PURPOSE

The purpose of H.R. 1109 is to amend section 203 of the Federal Power Act (FPA) to correct the misinterpretation by the Federal Energy Regulatory Commission (FERC or Commission) of the merge or consolidate clause within that section of the Act, and to thereby reduce the compliance burden of certain transactions valued under \$10 million, including significant legal and regulatory costs which are collected from customers.

BACKGROUND AND NEED

Between 1935 and 2005, section 203 of the FPA provided that no public utility could dispose or merge assets in excess of \$50,000 in value without first securing an order of the Commission authorizing it to do so. (*See* 16 U.S.C. 824d note.)

The Energy Policy Act of 2005 (EPAct '05, Public Law 109–58) amended the FPA to raise the threshold for review of certain transactions from the \$50,000 level established in 1935 to \$10 million. Section 1289 of EPAct '05 appeared to subdivide the Commission's authority to review merger or disposal of assets into four subsections. Three of these subsections explicitly identified a threshold of \$10 million, while also preserving the existing structure of the FPA. However, given that the existing structure of the Act was used in the 2005 amendment, the words “\$10 million” did not appear in the fourth subsection. Based on that absence, FERC interpreted that one subsection as eliminating the \$50,000 exception altogether, so that now FERC would require itself to review *every* covered transaction in that subsection, effectively *reducing* the transaction threshold to zero dollars, when the threshold had been \$50,000 since 1935. *Transactions Subject to FPA Section 203*, 113 FERC ¶ 61,315 at P 32 (2005) (Order No. 669).

FERC reasoned that “where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” Order No. 669 at P 32 (*quoting Russello v. U.S.*, 464 U.S. 16, 23 (1983)). FERC did not address the canon of statutory construction providing that when Congress reenacts provisions of an existing law in an amendment to that law, the reenacted provisions are considered a continuation of the previous law as they were previously understood and interpreted. *See 1A N. Singer, Statutes and Statutory Construction* § 22.33 at 392–396 (6th ed. 2002 rev.) (“Provisions of the original act or section which are repeated in the body

of the amendment, either in the same or equivalent words, are considered a continuation of the original law.”).

In 1935, the original section of the Act provided that:

“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.”

Breaking the sentence down structurally, this sentence provided that:

“No public utility shall [—]

[1] 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

[2] by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or

[3] 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.”

Prior to the creation of FERC in 1977, the Federal Power Commission (FPC) administered this part of the FPA, stumbling over certain aspects of this sentence. The FPC’s principal difficulty was over whether it applied to local distribution facilities. “Between 1944 and 1962, . . . the Commission no less than five times shifted its position as to the applicability of the ‘merge or consolidate’ clause to acquisitions of non-jurisdictional facilities.” *Duke Power Co. v. FPC*, 401 F.2d 930, 951 (D.C. Cir. 1968).

Nevertheless, the FPC does not appear to have stumbled over the absence of a dollar amount in the “merge or consolidate” clause. Although the codification of its rules, which first appeared in the Federal Register in 1947, said nothing about a dollar amount, the early case law shows that the FPC was already applying the \$50,000 threshold in the sell, lease, or otherwise dispose clause to the merge or consolidate clause even before the 1947 rule codification. See *California Electric Power Co.*, 4 FPC 601, 602 (May 31, 1944); *Idaho Power Co. and West Coast Power Co.*, 4 FPC 663, 664 (July 26, 1944); *Montana-Dakota Utilities Co.*, 4 FPC 1072, 1074 (Oct. 17, 1945); regarding codification of its rules, see 12 Fed. Reg. 8495 (Dec. 19, 1947).

The FPC eventually amended its rules in 1963 to reflect what was by then a decades-old interpretation. Section 33.1(2) of the FPC’s rules was amended to say that the FPC authority under section 203 extended to “The merger or consolidation, directly or indirectly of the facilities of a public utility with those of any other person having a value in excess of \$50,000.” 28 Fed. Reg. 2900 (Mar. 23, 1963).

The D.C. Circuit eventually addressed the question of whether the merge or consolidate clause applied to non-jurisdictional local distribution facilities, and in doing so, it confirmed that the FPC had correctly interpreted the \$50,000 threshold in that clause. In 1966, the FPC held that Duke Power's acquisition of Clemson University's distribution facilities, since they had a value of more than \$50,000, fell within the Commission's section 203 jurisdiction. The D.C. Circuit rejected that view of FPC's authority. *Duke Power Co. v. FPC*, 401 F.2d 930 (D.C. Cir. 1968). The court said that the text and legislative history of the FPA showed that the FPC's merger authority did not extend to non-jurisdictional facilities. While the question of the dollar threshold never came up, the court addressed the language in the merge or consolidate clause.

In particular, the court emphasized that the clause speaks of the merger or consolidation of "such facilities or any part thereof with those of any other person." 401 F.2d at 933. The FPC had no difficulty reading "such facilities" as referring to the acquiring utility's "facilities subject to the jurisdiction of the Commission" "[T]he Commission concede[d] that the meaning of 'such facilities' is crystallized by their grammatical antecedent, 'facilities subject to the jurisdiction of the Commission.'" Id. at 940. The dispute in the case was whether "the latter phrase also fixes the meaning of 'those.'" Id. "Duke argue[d] that the antecedent of 'those' is the phrase, 'such facilities,' language in turn referring to 'facilities subject to the jurisdiction of the Commission,' and point[ed] out that Clemson's [local] distribution system fell outside the latter category. The Commission, on the other hand, would have us ascribe to the phrase 'those (facilities) of any other person' sufficient breadth to include both jurisdictional and nonjurisdictional facilities." Id. at 933-934. The D.C. Circuit agreed with Duke rather than the FPC: "those" facilities referred to "such facilities," which referred to "facilities subject to the jurisdiction of the Commission," and, we may infer by extension, "or any part thereof of a value in excess of \$50,000."

The FPC amended its rules in 1970 to reflect the court's decision. Section 203, the FPC now said, extends to "The merger or consolidation, directly or indirectly of the facilities subject to the Commission's jurisdiction with those of any other person having a value in excess of \$50,000." 62 Fed. Reg. 5321 (Mar. 31, 1970).

The first sentence of section 203 was then amended in section 1289 of the Energy Policy Act of 2005. The purpose of the amendment was to raise the dollar threshold from \$50,000 to \$10 million and to add to the existing three clauses a fourth covering the "purchase, lease, or" other acquisition of an existing generation facility "that has a value in excess of \$10,000,000" that is subject to FERC's jurisdiction. Congress thus adopted a complete substitute to section 203(a) to add more structure and additional paragraphs. But the merge or consolidate clause itself, was reenacted, word-for-word, except for the addition of a new subparagraph designation, and the reordering of the "directly or indirectly" and the "by any means whatsoever" subclauses. The critical phrases "such facilities" and "those of any other person," which the FPC and FERC had long interpreted as referring to and incorporating by reference the dollar threshold in the sell, lease, or otherwise dispose clause into the merge or consolidate clause, were not changed.

This legislation clarifies the amendments made in the EAct '05, by explicitly providing that the threshold for Commission authority begins at \$10 million for disposals or mergers of utility assets. In addition, this legislation adds a notification requirement for certain merger or consolidation transactions in excess of a \$1 million threshold.

LEGISLATIVE HISTORY

H.R. 1109 was introduced on February 16, 2017, by Representatives Walberg, Dingell, Hudson, McNerney, and Mullin in the House of Representatives and referred to the Energy and Commerce Committee. On June 7, 2017, the Energy and Commerce Committee reported the bill by unanimous consent, and on June 12, 2017, H.R. 1109 passed the House by voice vote. On June 13, 2017, the Senate received it and referred it to the Committee on Energy and Natural Resources.

On September 26, 2017, similar legislation, S. 1860, was introduced by Senators Inhofe and Heinrich, which was referred to the Committee on Energy and Natural Resources. The Senate Subcommittee on Energy held a hearing on H.R. 1109 and S. 1860 on October 3, 2017.

The Committee on Energy and Natural Resources met in open business session on March 8, 2018, and ordered H.R. 1109 favorably reported, as amended.

COMMITTEE RECOMMENDATION

The Senate Committee on Energy and Natural Resources, in open business session on March 8, 2018, by a majority voice vote of a quorum present, recommends that the Senate pass H.R. 1109, if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of H.R. 1109, the Committee adopted an amendment in the nature of a substitute. The substitute amendment makes clear that the threshold for Commission authority begins at \$10 million for disposals or mergers of utility assets. In addition, the substitute amendment adds a notification requirement for certain merger or consolidation transactions in excess of a \$1 million threshold. The amendment is further described in the section-by-section analysis.

SECTION-BY-SECTION ANALYSIS

Section 1. Clarification of facility merger authorization

Section 1 amends section 203(a)(1)(B) of the FPA to ensure that the threshold is for facilities to be acquired having a value in excess of \$10 million.

Section 2. Notification for certain transactions

Section 2 establishes a notification requirement for merger or consolidation transactions in section 203(a)(1)(B) of the Act that exceed a \$1 million threshold. For those transactions exceeding \$1 million, but less than \$10 million, this section provides that the

public utility is not required to seek an order of the Commission under section 203(a)(1)(B) of the Act.

Section 3. Effective date

Section 3 provides that the amendment made by section 1 shall take effect 180 days after the date of enactment.

Section 4. Federal Energy Regulatory Commission report

Section 4 requires FERC to submit a report to Congress on the effects of the amendment made by section 1 within two years of enactment.

COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) oversees and regulates interstate transmission of electricity, natural gas, oil, and a variety of other energy-related activities. Under section 203 of that act, public utilities subject to its provisions must seek FERC's approval before engaging in certain transactions, including corporate mergers and consolidations of facilities. Currently, FERC must review all such mergers and consolidations. H.R. 1109 would amend that section to specify that only mergers and consolidations involving facilities valued at more than \$10 million would require FERC's approval. The legislation also would require FERC to report to the Congress, within two years of enactment, on the subsequent effects of that proposed change.

CBO estimates that implementing H.R. 1109 would have no significant net effect on the federal budget. Using information from FERC about average annual costs to review mergers and consolidations under current law, CBO estimates that specifying a minimum threshold for such reviews would reduce the agency's administrative costs by less than \$500,000 annually. However, because FERC recovers 100 percent of its costs through user fees, any change in that agency's costs (which are controlled through annual appropriation acts) would be offset by an equal change in fees that the commission charges, resulting in no net change in federal spending.

Enacting H.R. 1109 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 1109 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 1109 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On June 12, 2017, CBO transmitted a cost estimate for H.R. 1109 as ordered reported by the House Committee on Energy and Commerce on June 7, 2017. The two versions of the legislation are similar, and the estimated budgetary effects are the same.

The CBO staff contact for this estimate is Megan Carroll. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

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 H.R. 1109. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No 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 H.R. 1109, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

H.R. 1109, 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 and Regulatory Commission at the October 3, 2017, hearing on H.R. 1109 follows:

TESTIMONY OF JAMES DANLY, GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION, BEFORE THE UNITED STATES SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, SUBCOMMITTEE ON ENERGY

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 sub-

section 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 Com-

mission 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.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the original bill, 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):

FEDERAL POWER ACT

The Act of June 10, 1920, Chapter 285, as Amended

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PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

* * * * *

DISPOSITION OF PROPERTY; CONSOLIDATION; PURCHASE OF SECURITIES

SEC. 203. (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;] *(B) merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with the facilities of any other person, or any part thereof, that are subject to the jurisdiction of the Commission and have a value in excess of \$10,000,000, 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.

* * * * *

(6) For purposes of this subsection, the terms “associate company”, “holding company”, and “holding company system” have the meaning given those terms in the Public Utility Holding Company Act of 2005.

(7)(A) Not later than 180 days after the date of enactment of this paragraph, the Commission shall promulgate a rule requiring any public utility that is seeking to merge or consolidate, directly or indirectly, its facilities subject to the jurisdiction of the Commission, or any part thereof, with those of any other person, to notify the Commission of such transaction not later than 30 days after the date on which the transaction is consummated if—

(i) the facilities, or any part thereof, to be acquired are of a value in excess of \$1,000,000; and

(ii) such public utility is not required to secure an order of the Commission under paragraph (1)(B).

(B) In establishing any notification requirement under subparagraph (A), the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information.

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