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U.S. GOVERNMENT
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Calendar No. 469

115TH CONGRESS, *2d Session* | SENATE | REPORT 115–278

FAIR RATEPAYER ACCOUNTABILITY, TRANSPARENCY, AND EFFICIENCY STANDARDS ACT

JUNE 18, 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 S. 186]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 186) to amend the Federal Power Act to provide that any inaction by the Federal Energy Regulatory Commission that allows a rate change to go into effect shall be treated as an order by the Commission for purposes of rehearing and court review, having considered the same, reports favorably thereon with an amendment, and recommends that the bill, as amended, do pass.

The amendment is as follows:

Strike all after the end of Section 1, the Short Title, and insert the following:

SEC. 2. AMENDMENT TO THE FEDERAL POWER ACT.

Section 205 of the Federal Power Act (16 U.S.C. 824d) is amended by adding at the end the following:

(g) INACTION OF COMMISSIONERS.—

(1) IN GENERAL.—If the Commission permits the expiration of the 60-day period established under the first sentence of subsection (d) because the members of the Commission are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission—

(A) the failure to act by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 313(a); and

(B) there shall be added to the record of the proceeding of the Commission—

(i) the proposed order;

(ii) notice of the division of the Commissioners with respect to the proposed order; and

(iii) the written statement of each member of the Commission explaining the views of the Commissioner with respect to the proposed order.

(2) APPEAL.—If any party to a proceeding of the Commission described in paragraph (1) seeks a rehearing under section 313(a) and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the members of the Commission are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, any party that sought the rehearing may appeal under section 313(b).

PURPOSE

The purpose of S. 186 is to amend the Federal Power Act (FPA) to provide that any inaction by the Federal Energy Regulatory Commission (FERC or Commission) that allows a rate change to go into effect shall be treated as an order by the Commission for purposes of rehearing and court review.

BACKGROUND AND NEED

Section 205 of the FPA requires rates charged by electric utilities to be just and reasonable and declares rates that are not just and reasonable to be unlawful. To enable the Commission to determine if rates are just and reasonable, section 205 requires any public utility wishing to change its rates to notify the Commission and the public 60 days before the utility changes its rates. (16 U.S.C. 824d.) The 60-day notice period gives the Commission time to consider the lawfulness of the rate change and for the public to contest the change. The Commission normally issues an order during the 60-day period, either (1) allowing the change to go into effect, (2) denying the change in its entirety, (3) denying the change until the electric utility submits other changes to its rates, or (4) suspending the change for up to 5 additional months to allow the Commission time to hold a hearing to consider the lawfulness of the change. If FERC fails to act within 60 days, then the changes will go into effect by operation of law without a Commission order.

Section 313 of the FPA gives any person that is aggrieved by a Commission order approving or denying a rate change the opportunity to request a rehearing from the Commission. The Commission must act on the rehearing request within 30 days or the request is deemed denied. To the extent such rehearing request is denied, the aggrieved party can then ask the U.S. Courts of Appeals to review the Commission's rate change order. But the FPA does not grant the courts jurisdiction to review rate changes if the party has not requested rehearing or if the Commission has not issued an order, in cases where the rate change went into effect by operation of law without a Commission order.

In only a very few instances has a rate change under section 205 gone into effect because the Commission failed to act within 60 days. In fact, on only six occasions since 1977 when FERC was established has this occurred. On the most recent occasion, only four Commissioners were available to act on a rate submittal within the required time period. According to their public statements, the Commissioners were divided two against two as to the action they wanted to take on the rate filing. Because of that split, the Commission did not issue an order, the rates took effect, and the utility (in this case, ISO New England, the Regional Transmission Organi-

zation for New England, or ISO–NE) was therefore allowed to charge the rates that it had submitted (See, Notice of Filing Taking Effect by Operation of Law, FERC Docket ER14–1409 (September 16, 2014)).

Public Citizen, Inc. and the State of Connecticut objected to ISO–NE's rate change and sought rehearing on the Commission's public notice, issued by the Commission's Secretary, that the change had taken effect by operation of law. Upon receipt of those rehearing requests, the Commission's Deputy Secretary issued a further public notice in the proceeding, acknowledging the requests for rehearing, and stating that the Secretary's earlier notice was not an order issued by the Commission, "[r]ehearing therefore does not lie," and concluding that the submittals asking for rehearing "are therefore dismissed" (Notice of Dismissal of Pleadings, FERC Docket ER14–1409 (October 24, 2014)). Public Citizen and Connecticut then sought review in the Court of Appeals, which held that it lacked jurisdiction since the Commission had not issued an order it could review. *Public Citizen, Inc.* v. *FERC,* 839 F.3d 1165 (D.C. Cir. 2016). In dismissing the case, the court acknowledged that the FPA comports, "with the "almost universally accepted common-law rule' that only a "majority of a collective body is empowered to act for the body.'" 839 F.3d 1169, *citing, Fed. Trade Comm'n* v. *Flotill Prods., Inc.,* 389 U.S. 179, 183 (1967). The court said that "whether analyzed under the statutorily-prescribed requirements for Commission action or under general institutional principles, we reach the same conclusion: FERC did not engage in collective, institutional action when it deadlocked." 839 F.3d 1170. Announcing its holding, the court said, "Any unfairness associated with this outcome inheres in the very text of the FPA. Accordingly, it lies with Congress, not this Court, to provide the remedy." *Id.* at 1174.

As the court observed, legislation could remedy this situation. The bill provides that where the Commission fails to act because it is divided two against two as to the lawfulness of that rate change, the absence of an order by the Commission shall itself be considered an order for purposes of rehearing and subsequent judicial review. It also seeks to ensure that in the rare, unusual, and disfavored situation where the Commissioners cannot come to a majority vote that there will be an adequate administrative record for the court to review. Finally, the bill requires each of the Commissioners to articulate formally and publish his or her views about the rate filing at issue. Having the benefit of these statements may discourage ties by highlighting more precisely the reasoning that leads each Commissioner to his or her views and, consequently, to enable the fashioning of an order that could attract a majority vote.

LEGISLATIVE HISTORY

S. 186 was introduced on January 23, 2017, by Senators Markey, Warren, Whitehouse, and Reed. The Senate Subcommittee on Energy held a hearing on S. 186 on October 3, 2017.

The Committee on Energy and Natural Resources met in open business session on March 8, 2018, and ordered S. 186 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 S. 186, if amended as described herein.

COMMITTEE AMENDMENT

During its consideration of S. 186, the Committee adopted an amendment to require the Commission to compile an adequate administrative record of the proceeding for a court to review and to adjust the scope of S. 186 to cover situations where a rate change takes effect at the end of the 60-day notice period by operation of law because the Commission is evenly divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission rather than any inaction that allows a rate change to take effect. The amendment is further described in the section-by-section analysis.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 contains the short title.

Section 2. Amendment to the Federal Power Act

Section 2 amends section 205 of the FPA (the Act of June 10, 1920, Chapter 285, as amended)) by adding at the end a new subsection (g), entitled *Inaction of Commissioners.*

The new subsection 205(g)(1) provides that if the Commission permits the expiration of the 60-day period for action because the members of the Commission are divided two against two as to the lawfulness of the change, then the failure to act by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 313(a) of the Federal Power Act. Further, that then there shall be added to the record of the proceeding of the Commission: (i) the proposed order; (ii) notice of the division of the Commissioners with respect to the proposed order; and (iii) the written statement of each member of the Commission explaining the views of the Commissioner with respect to the proposed order.

The new subsection (g)(2) provides for appeal under certain conditions. Specifically, if any party to a proceeding of the Commission described above seeks a rehearing under section 313(a) of the FPA and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request, any party that sought the rehearing may appeal under section 313(b) of the FPA.

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 (FPA), the Federal Energy Regulatory Commission (FERC) is responsible for ensuring that rates, terms, and conditions set by public utilities related to interstate transmission and sales of electricity are just and reasonable. Sec-

tion 205 of that act requires public utilities to notify FERC of any changes to such rates, terms and conditions. Under current law, FERC has 60 days to review proposed changes and issue an order determining whether such changes can take effect. Affected parties can seek a rehearing of FERC's decision and a subsequent review by an appellate court. If, however, FERC fails to issue an order within 60 days, any proposed changes take effect automatically. In the absence of an official decision by FERC, affected parties cannot request a rehearing.

S. 186 would amend section 205 of the FPA to specify circumstances under which a failure by FERC to issue an order related to a proposed change in rates or other terms would be considered an order to allow such changes. Thus, under the bill, affected parties could seek rehearing and appellate review.

By expanding the number of cases in which proposed rate changes could result in rehearings, S. 186 could increase FERC's workload. However, using information from FERC about the small number of cases that would be affected by the proposed change, CBO estimates that any increased administrative costs to the agency would be insignificant in any given year. Furthermore, because FERC recovers 100 percent of its costs through user fees, any change in its costs (which are controlled through annual appropriation acts) would be offset by an equal change in fees, resulting in no net change in federal spending.

Enacting S. 186 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting S. 186 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

S. 186 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

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 S. 186. 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 S. 186, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

S. 186, 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 S. 186 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. 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 rel-

evant 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.

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

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Rate and Charges; Schedules; Suspension of New Rates

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or

sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * *

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

* * * * * * *

(g) INACTION OF COMMISSIONERS.—

(1) IN GENERAL.—If the Commission permits the expiration of the 60-day period established under the first sentence of subsection (d) because the members of the Commission are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal on the Commission—

(A) the failure to act by the Commission shall be considered to be an order issued by the Commission accepting the change for purposes of section 313(a); and

(B) there shall be added to the record of the proceeding of the Commission—

(i) the proposed order;

(ii) notice of the division of the Commissioners with respect to the proposed order; and

(iii) the written statement of each member of the Commission explaining the views of the Commissioner with respect to the proposed order.

(2) APPEAL.—If any party to a proceeding of the Commission described in paragraph (1) seeks a rehearing under section 313(a) and the Commission fails to act on the merits of the rehearing request by the date that is 30 days after the date of the rehearing request because the members of the Commission are divided two against two, as a result of vacancy, incapacity, or recusal on the Commission, any party that sought the rehearing may appeal under section 313(b).

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