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PENDING LEGISLATION

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY

OF THE

COMMITTEE ON
ENERGY AND NATURAL RESOURCES
UNITED STATES SENATE

ONE HUNDRED FIFTEENTH CONGRESS

FIRST SESSION

ON

S. 186
S. 1059
S. 1337
S. 1457
S. 1799
S. 1860
H.R. 1109

OCTOBER 3, 2017



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CONTENTS

OPENING STATEMENTS

Page

Gardner, Hon. Cory, Subcommittee Chairman and a U.S. Senator from Colorado 1
Manchin III, Hon. Joe, Subcommittee Ranking Member and a U.S. Senator from West Virginia 2

WITNESSES

Danly, James, General Counsel, Federal Energy Regulatory Commission 7
McNamee, Bernard, Deputy General Counsel, U.S. Department of Energy 15

ALPHABETICAL LISTING AND APPENDIX MATERIAL SUBMITTED

American Chemistry Council:
Statement for the Record 3
Danly, James:
Opening Statement 7
Written Testimony 9
Responses to Questions for the Record 29
Edison Electric Institute:
Letter for the Record 33
Gardner, Hon. Cory:
Opening Statement 1
Inhofe, Hon. James M.:
Statement for the Record 35
Manchin III, Hon. Joe:
Opening Statement 2
Markey, Hon. Edward J.:
Statement for the Record 36
McNamee, Bernard:
Opening Statement 15
Written Testimony 17
Northeast Public Power Association:
Letter for the Record 38
Oklahoma Utilities:
Letter for the Record 39

The text for each of the bills which were addressed in this hearing can be found on the Committee's website at: https://www.energy.senate.gov/public/index.cfm/hearings-and-business-meetings?ID=4E54A5F4-134D-4D11-B6DC-41D3A59AFA06

PENDING LEGISLATION

TUESDAY, OCTOBER 3, 2017

U.S. SENATE,
SUBCOMMITTEE ON ENERGY,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:31 p.m. in Room SD–366, Dirksen Senate Office Building, Hon. Cory Gardner, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. CORY GARDNER, U.S. SENATOR FROM COLORADO

Senator GARDNER [presiding]. The Subcommittee will come to order.

Good afternoon, everyone. Thank you for being here.

The Subcommittee comes together today for a legislative hearing on a variety of legislation. As always, I appreciate the opportunity to work with the Subcommittee's Ranking Member, Senator Manchin, to address key topics in the energy space.

This legislative hearing will allow us the opportunity to receive testimony from and ask questions of key personnel from the two agencies that would be responsible for implementing the changes laid out in the various pieces of legislation before us today.

My bill, the Responsible Disposal Reauthorization Act, would extend the life of a uranium mill tailings disposal site in Western Colorado through 2048. This disposal site, itself, is a former uranium and vanadium mill that produced roughly 2.2 million tons of tailings during its 20-year operation. Those mill tailings were made available for use in the 1950s and 1960s as fill material and sometimes mixed with concrete and mortar.

We continue to find and remediate sites with these tailings mixed in them, and we need a safe and secure place to store them which is what the Grand Junction Disposal Site provides. The site is a valuable asset to the Department of Energy (DOE) which should continue to be used until it is full.

I am proud to be an original co-sponsor of Senator Heinrich's Energy Technology Maturation Act, a bill that would further the Department of Energy's ability to commercialize the technology that results from their R&D programs. Without an emphasis on this commercialization, we risk leaving too many great ideas on the shelves of our national labs. DOE needs a variety of tools at their disposal to get these worthwhile technologies to market, and this bill adds a few more of those to the toolbox.

The Ranking Member's bill, Capitalizing on American Storage Potential, looks to expand the eligibility of regional energy storage projects for the loan guarantee program.

We will also be discussing Senate bill 186, the Fair Ratepayer Accountability Transparency and Efficiency Standards Act; S. 1457, the Advanced Nuclear Technologies Act; S. 1860, the Parity Across Reviews Act; and H.R. 1109, to amend Section 203 of the Federal Power Act, a bill very similar to S. 1860.

I would like to welcome our two witnesses today, Mr. James Danly and Mr. Bernard McNamee.

I will first turn to Senator Manchin, for his opening comments.

STATEMENT OF HON. JOE MANCHIN III,
U.S. SENATOR FROM WEST VIRGINIA

Senator MANCHIN. Thank you, Chairman Gardner, and I want to thank you for holding this hearing and thank you all for being here today.

I would like to also thank our witnesses from the Department of Energy and FERC. It is very important to have you both here before us.

The proposals before Congress, before the Committee, cover a range of energy and electrical issues but I want to highlight two, in particular, which Chairman Gardner has just briefly gone over.

Senate bill 1799, the Energy Technology Maturation Act, led by Senators Heinrich and Chairman Gardner, will help the national laboratories work with the private sector to commercialize innovative energy technology. I was happy to co-sponsor this bill and look forward to ensuring it helps the National Energy Technology Laboratory, we know it as NETL, in Morgantown, West Virginia, as it works to bring the technology, the development around coal, rare earth elements and natural gas to market.

I would also like to briefly discuss my bill which is Senate bill 1337, the Capitalizing American Storage Potential Act which I introduced with my friend, Senator Capito, also from West Virginia. I ask consent that this statement from the American Chemistry Council, in support of Senate bill 1337, be submitted to the record.

Senator GARDNER. Without objection.

[The information referred to follows:]



American Chemistry Council Statement for the Record

Submitted to the Senate Energy and Natural Resources Subcommittee on Energy

Legislative Hearing on S. 1337

October 3, 2017

The American Chemistry Council (ACC) is pleased to submit a statement for the record in support of *S. 1337, the Capitalizing on American Storage Potential (CASP) Act*.

The CASP Act has the potential to turn the Appalachian Region into a major center of petrochemical and plastics products manufacturing in the United States, according to an ACC analysis, thanks to its world-class supply of energy resources and proximity to customers.

ACC's report, *The Potential Economic Benefits of an Appalachian Petrochemical Industry,* found that the quad-state region of West Virginia, Pennsylvania, Ohio and Kentucky could become a leader in America's chemical manufacturing renaissance.

The basic building blocks of innovation

Ethane and propane are natural gas liquids (NGLs) found in Appalachia's massive shale gas formations. They're also key raw materials that U.S. chemical manufacturers rely on to create materials and solutions used in countless products that make our lives safer, healthier, more comfortable, and more convenient.

That's a big reason why America's shale gas resources have been able to make the United States the most attractive place in the world to invest in chemical manufacturing – driving a manufacturing revival of the sort not seen in decades.

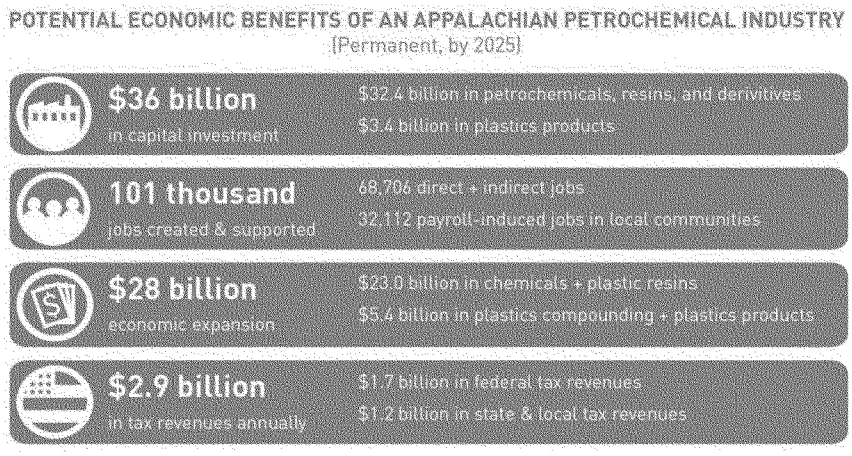
Thanks to abundant, affordable domestic natural gas, $185 billion in new chemical industry investment has been announced nationwide since 2010, supporting 310 projects including new factories, expansions, and restarts of facilities shuttered during the recession. The investment will translate into an estimated 823,000 permanent new jobs by 2025.

Historic opportunity for Appalachian region

Much of the new chemical industry investment announced so far has been concentrated along the Gulf Coast, longtime center of the U.S. chemical industry, with more to come. The Appalachian region could be next to join in.

ACC's report projects that much-needed jobs and tax revenue could come to the quad-state region. It could result in about 100,000 permanent jobs, including 25,700 new chemical and plastic products manufacturing jobs, 43,000 jobs in supplier industries, and 32,000 payroll-induced jobs in communities where workers spend their wages. The new investment could also lead to $2.9 billion in new federal, state, and local tax revenue annually.

Several companies have already announced investment projects, and there is potential for a great deal more.



New energy infrastructure is the missing link

To touch off a new wave of investment in the Appalachian petrochemical industry, there needs to be a way to store and transport NGLs and chemicals. Only then will manufacturers have ready access to the resources needed to develop a community of petrochemical and derivative producers and support a supply chain of industries throughout the region.

What's needed is the *Appalachian Storage and Distribution Hub* — an NGL storage facility and pipeline distribution network. In ACC's report, we present a hypothetical scenario that includes the development of a storage hub for NGLs and chemicals, a 500-mile distribution network, petrochemical and plastics manufacturing, and potentially other energy infrastructure and manufacturing.

Policymakers must do their part

Private industry can develop the Hub, but Congress and the Administration need to help get things started:

- Uncertainty around financing is a key barrier to the development of energy infrastructure in the Appalachian region. Policymakers should affirm that the Hub is eligible for existing private-public financing programs.
- As Congress and the Administration consider infrastructure modernization legislation, the Appalachian Hub should be a priority.
- Ensuring a timely and efficient regulatory permitting process is essential.

In June, Senators Joe Manchin and Shelley Moore Capito introduced the *Capitalizing on American Storage Potential (CASP) Act (S. 1337).* The legislation would make a regional storage hub eligible for the U.S. Department of Energy's successful Title XVII loan guarantee program.

For decades, those who live in and study the Appalachian region have envisioned a thriving center of manufacturing activity. And they know that energy infrastructure — the Hub — will be critical to unlocking the opportunity. We urge the Committee to support this important piece of legislation.

Senator MANCHIN. West Virginia and the greater Appalachian region has an extraordinary opportunity in its hands. The quad states of West Virginia, Ohio, Pennsylvania and Kentucky possess certain attributes that make the region a prime location for an energy storage hub. The region's shale formations, the Marcellus and Utica, contain abundant wet natural gas and natural gas liquids (NGL) like ethane, butane and propane.

In order to access the vast resources of natural gas in Appalachia, we must also remove and separate out the NGLs. NGLs, like ethane, are the building blocks of thousands of other consumer products that you and I use every day, including clothing and footwear, electronics, food packaging and aerospace equipment.

I would also note that as cars become more fuel efficient they must become lighter which means the increased use of plastics out of manufacturing and the increased portions of NGLs. The environmental benefits are notable.

A reliable supply of these products is a critical piece of the consumer product's supply chain and, therefore, our national economy.

Coupled with expanding energy infrastructure in the region, geologic storage, which is naturally occurring, a storage hub for NGLs will play a role in attracting much needed manufacturing investment and associated economic activity. The development and construction of a hub to store these high-value products in underground geological formations could ultimately lead to a petrochemical manufacturing hub and a revitalization of the area's manufacturing center.

In fact, a report released earlier this year by the American Chemistry Council estimated that the development of a storage hub would drive up to $36 billion in new investment, 68,706 direct and indirect jobs and about $2.9 billion in annual tax revenues. West Virginia is a state that is rich in natural resources, and I believe the Appalachian storage hub offers an excellent chance for geographic diversification of our manufacturing sector.

Additionally, the hub will help insulate our nation from supply disruptions due to ongoing extreme weather events in the Gulf, and I don't think we have to elaborate on that. It is just horrible.

Senate bill 1337 highlights the importance of federal support and partnerships to innovative projects like this one. This bill reflects the role that the government can play in revitalizing the Appalachian region by further clarifying the scope of eligibility for the Title 17 loan program.

Mr. Chairman, you know as well as I do, the importance of R&D funding, particularly funding that partners the public and private sectors.

While I recognize the fiscal challenges we face, I believe that it is important, very important, that we work hard to ensure that effective programs are sustained.

I look forward to discussing this bill today because a storage hub is an efficient utilization of our natural energy resources and will lead to economic development and greater energy security.

I have been working diligently with the stakeholders involved, as well as with Secretary Perry, who visited West Virginia this summer to learn more about this opportunity and continues to work with us on it right now.

I look forward to working in a bipartisan way to find opportunities for this Committee to support that effort, and I want to thank the Chairman for being so kind and working with me.

Mr. Chairman.

Senator GARDNER. Thank you, Senator Manchin.

Mr. Danly is our first witness. He is the General Counsel for the Federal Energy Regulatory Commission. We will begin with your testimony.

STATEMENT OF JAMES DANLY, GENERAL COUNSEL, FEDERAL ENERGY REGULATORY COMMISSION

Mr. DANLY. Chairman Gardner, Ranking Member Manchin, I very much appreciate the opportunity to come today to testify.

My name is James Danly, and I am the General Counsel of the Federal Energy Regulatory Commission. Before I begin, I just want to mention that I'm coming here as a staff witness and the views that I present today are not those of the Commission as a body or those of any individual commissioner.

I've been asked to appear in order to testify on three bills today. The first two would modify Section 203 of the Federal Power Act, and the third would modify Section 205 of the Federal Power Act.

The first two bills, as I said, modify Section 203. Section 203 of the Federal Power Act subjects to the Commission's approval a number of different types of financial transactions among jurisdictional entities. These bills together seek to amend Section 203 in order to establish a $10 million cap for the "merge or consolidate" subsection of Section 2013. Right now, there is no such limit. The value of these bills is that they would both bring that "merge or consolidate" subsection into conformity with the remaining subsections of Section 203 and they would help relieve an administrative burden on the agency and relieve regulatory burden on the jurisdictional entities that are seeking to conduct these relatively small transactions. In my view, exempting the transactions that are below this reasonable $10 million threshold does not present any problem for market power or rate prices going forward.

The third bill, which modifies Section 205, is another matter. Ordinarily, when a public utility seeks to amend its tariff it has to make a filing under Section 205 with a 60-day time limit. In the almost invariable course of the Commission's activity the Commission takes action, one way or another, within that 60 days on that filing to amend the tariff. In exceptionally rare circumstances the Commission does not act within those 60 days and the tariff filings, the tariff changes go into effect by operation of law.

This bill seeks to alter Section 205 so as to allow for parties agreed in the 205 proceeding to seek rehearing should they not like the outcome of the rates going into effect by operation of law.

As the Subcommittee considers whether or not to adopt this legislation, I would urge it to keep in mind several points. The first one is that even as Section 205 is currently constituted there is still redress available for aggrieved parties under Section 206. Second, the legislation may not produce the intended relief that, I believe, the Subcommittee is looking for. It may not provide, as a practical matter, the relief that, I think, the bill might be thought to. And I can get into details with that, if you're interested, in questions.

And lastly, I think that the language of the bill might be a little bit overbroad to accomplish that narrow goal.

So, with that, I just want to thank you for the chance to speak about these bills, and I look forward to any questions you might have.

[The prepared statement of Mr. Danly 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
October 3, 2017

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, 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.

Senator GARDNER. Thank you, Mr. Danly.

Mr. McNamee, the Deputy General Counsel for Energy Policy at the Department of Energy, thank you for joining us.

STATEMENT OF BERNARD MCNAMEE, DEPUTY GENERAL COUNSEL, U.S. DEPARTMENT OF ENERGY

Mr. MCNAMEE. Thank you, Senator.

Chairman Gardner, Ranking Member Manchin and members of the Subcommittee, I am the Deputy General Counsel for Energy Policy at the Department of Energy and it's a privilege and honor to represent the Department here today. I just want to thank you for the opportunity to testify before you on behalf of the Department.

The Department of Energy is an agency tasked with a number of important responsibilities, many of them you already know, but among them are assuring the nuclear readiness, overseeing the nation's energy supply, carrying out the environmental cleanup from the nuclear mission and managing the Department's 17 national labs.

In support of the Administration's goals of establishing energy dominance and economic competitiveness, the Department's energy and science programs are focused on research and development across the variety of technologies and variety of fuel sources.

By carefully setting priorities and focusing on the most promising research, the Department and its national laboratories will continue to support the world's best enterprise of scientists and engineers. These are the great men and women who create the innovations that help drive American prosperity, security and competitiveness for the next generation.

I've been asked to testify on multiple bills today which the Administration continues to review. They are: Senate bill 1059, the Responsible Disposal Reauthorization Act; Senate bill 1337, the Capitalization on America's Storage Potential Act; Senate bill 1457, the Advanced Nuclear Energy Technologies Act; and Senate bill 1799, the Energy Technology Maturation Act. I look forward to discussing these bills in further detail and answering your questions.

The Department also appreciates the ongoing bipartisan efforts to address our nation's energy challenges and looks forward to working with the Subcommittee and the entire Committee on legislation on today's agenda and into the future.

Our nation will achieve our economic, energy and environmental goals by ensuring that the United States continues to be a leader in energy technology, development and delivery and by unleashing America's ingenuity to unlock our natural resources.

Through research and development, collaboration at all levels of government and the private sector, the Department of Energy and our national labs aim to support America's energy renaissance.

The Administration looks forward to continuing to work with Congress on the legislation to enhance U.S. competitiveness and job creation as a whole.

I would ask that my written testimony be entered into the record. I thank you for the opportunity to be here and look forward to your questions.

Thank you.

[The prepared statement of Mr. McNamee follows:]

Testimony of Deputy General Counsel Bernard McNamee
U.S. Department of Energy
Before the
U.S. Senate Committee on Energy and Natural Resources
Subcommittee on Energy

October 3, 2017

Introduction

Chairman Gardner, Ranking Member Manchin, and Members of the Subcommittee, it is a privilege and an honor to serve at the Department of Energy, an agency tasked with, among other important responsibilities: assuring our nuclear readiness, overseeing the Nation's energy supply, carrying out the environmental clean-up from the nuclear mission, and managing the Department's 17 National Laboratories. Thank you for the opportunity to testify today on behalf of the Department of Energy (DOE) regarding legacy waste cleanup responsibilities, expanding the U.S.'s ethane storage infrastructure, commercializing DOE National Lab developed technologies, and accelerating the maturation of advanced nuclear energy.

In support of the Administration's goals of establishing energy dominance and economic competitiveness, resources within DOE's energy and science programs are focused on research and development (R&D) across a variety of technologies that support American energy independence and domestic job-growth. Through careful prioritization and ensuring funding goes to the most promising research, DOE, through its National Laboratories, will continue to support the world's best enterprise of scientists and engineers who create innovations to drive American prosperity, security and competitiveness for the next generation.
I have been asked to testify on multiple bills today, which the Administration continues to review.

The Department appreciates the ongoing bipartisan efforts to address our Nation's energy challenges, and looks forward to working with the Committee on the legislation on today's agenda and any future legislation.

S. 1059, Responsible Disposal Reauthorization Act of 2017

Legacy waste cleanup is a top priority for the Department of Energy. The Grand Junction, Colorado disposal site was authorized by Congress as part of the Uranium Mill Tailings Radiation Control Act of 1978.

The disposal site is the only active site available for receiving uranium mill tailings managed by DOE's Office of Legacy Management (LM). The Department works closely with local, state,

and federal officials to ensure the protection of public health, safety, and the environment by moving contaminated materials away from public places.

The Grand Junction Disposal Site contains about 4.5 million cubic yards of low-level radioactive waste and receives approximately 2,700 cubic yards of waste per year. The disposal site has sufficient space to receive an additional estimated 235,000 cubic yards indicating the site could operate for 87 more years at current rates.

New waste materials come from numerous locations - primarily the City of Grand Junction continues to excavate waste tailings previously used in roads, sidewalks, and homes. DOE-LM operates groundwater treatment systems at several sites that will continue to generate waste eligible for disposal in the Grand Junction Disposal Site, and that valuable capacity should continue to be utilized.

The Department of Energy looks forward to continuing to work with this subcommittee on responsible disposal management of the Nation's legacy sites.

Energy Landscape

There has been an American energy renaissance in the United States over the last decade. Through the increase in production of crude oil and other liquid fuels, refined petroleum products, and production of natural gas, the United States has become an energy powerhouse. Wind and solar power generation also play an important role in our energy mix and vehicles have reached historic levels of efficiency.

The United States is, however, at an energy crossroad. Our energy landscape is dramatically changing with implications for all parts of the energy sector and our economy as a whole. These rapid and dramatic changes have created enormous opportunities. At the same time, they pose a set of challenges for energy policy makers, investors, non-governmental organizations and industry.

The changing resource mix from traditional baseload generation, recent severe weather events, and the dynamic nature of grid technologies – including changes on the demand side – are bringing grid resilience to a new, more prominent place in the discussion. Specifically, as we keep one eye on day-to-day reliability and resource adequacy, we must also begin to incorporate resilience into the discussion. Weather events such as the Polar Vortex, Superstorm Sandy, or Hurricanes Harvey, Irma, and Maria are stark reminders of the need to have a bulk power system that can withstand stresses and recover quickly.

These challenges come in many forms, and addressing them will require action by many parties, including Congress, the private sector, and public sector. The Administration looks forward to working closely with the Congress on this important topic.

S. 1337, Capitalizing on American Storage Potential Act

This new energy landscape also presents opportunities. I appreciate the chance to discuss the legislation on hydrocarbon feedstock storage infrastructure in Appalachia. The Marcellus Shale and Utica Shale sites are blessed with an abundance of hydrocarbon feedstock, such as ethane, which can be used as a building block for plastics.

The U.S. Energy Information Administration estimates that natural gas production in the region has grown from just over 2 billion cubic feet per day (Bcfd) in 2010 to 23 Bcfd mid-2017. In the same period, natural gas liquids production has grown six fold (from 106,000 barrels per day to 621,000 barrels per day). With an increase in energy production, there is often a need for workforce development in the same region. The Department of Energy's National Energy Technology Lab (NETL) is supporting workforce development to support growth of ethane production and storage in the region.

This Administration believes that the private sector has the most important role to play in the development of late stage energy projects. The Administration is committed to reasserting the proper role of what has become a sprawling Federal Government and reducing deficit spending. To that end, the Administration supports an increased reliance on the private sector to fund later-stage research and development of energy technologies, and focuses Federal resources toward early-stage research and development.

The Department looks forward to continuing our general dialogue on ethane-related issues. Recently, the Secretary of Energy had the opportunity to participate in a very productive roundtable discussion with relevant stakeholders, and the Department looks forward to engaging this subcommittee further.

S.1799, Energy Technology Maturation Act of 2017

As a science agency, the Department of Energy plays an important role in the innovation economy. DOE's 17 National Laboratories engage in research that expands the frontiers of scientific knowledge and generates new technologies that address the Nation's greatest energy challenges.

Accelerating the transition of technologies from the laboratory bench to the marketplace is an important component of increasing America's economic prosperity and energy security. This mission is the focus of the Department of Energy's Office of Technology Transitions, which oversees the technology transfer programs across the National Laboratories, including industry and other stakeholder engagement for the purpose of private sector access to lab-developed technologies and capabilities for the purpose of moving these to the marketplace.

DOE-funded energy R&D will continue to prioritize early-stage R&D where the federal role is strongest and reflect an increased reliance on the private sector to fund later-stage research, development and commercialization of energy technologies. DOE is actively working with the National Laboratories to reduce barriers to industry engagement with the laboratories to accelerate energy innovation in America. DOE has made it a priority to strengthen the engagement between National Laboratories and industry and other partners.

In response to investors and corporate partners, the DOE Office of Technology Transitions and its recently launched Energy Investor Center are streamlining industry-lab connections and access with a broad strategy of both live interaction through workshops and other events and with web-based tools to increase, improve and integrate information flow through the Lab Partnering Service.

DOE currently uses its Technology Commercialization Fund (TCF), to assist the private sector increase the commercial impact and number of National Laboratory-developed energy technologies transitioned into commercial development. Just last month the Department announced $19.7 million in funding to help businesses move promising energy technologies from DOE's National Laboratories to the marketplace. This funding supported through the Office of Technology Transitions' TCF - which requires that government funds be matched by private sector capital - will support 54 projects across 12 National Laboratories involving more than 30 private-sector partners.

Through these efforts, DOE is fostering an environment that promotes responsible investment, increased efficiency and development of new technologies, as well as predictability and ease of access by the private sector to the National Laboratories and Facilities.
I look forward to continuing our dialogue on how to bring to market National Lab technologies.

Nuclear Energy Research

Nuclear energy is a key part of our diverse energy mix, providing essential reliability and resiliency services for our grid. Early-stage research into advanced reactors, including advanced small modular reactor technologies (SMRs), is a key part of the DOE's goal to enable the development of safe, clean and affordable nuclear power options. The Department recognizes the potential transformational value that advanced SMRs can provide to the Nation's economic, energy security and environmental outlook.

S. 1457, Advanced Nuclear Energy Technologies Act

Nuclear energy is clean, reliable, and safe, but the nuclear power industry needs to continue to innovate.

Advanced reactors, including small modular reactors, hold great promise as a clean, reliable, and secure power source for our nation. The Department recognizes that advanced reactors face challenges to ultimately achieving commercialization. Accordingly, the Department plans to partner with nuclear technology developers, including those involved with existing fleet, small modular reactor and other advanced reactor designs, in cost-shared early-stage research and development.

In addition to cost-shared early-stage research and development, as well as specific funding opportunities, the Administration supports prioritized investments in nuclear energy research infrastructure to enable private sector innovation.

Conclusion

Our Nation will achieve our economic, energy, and environmental goals by ensuring the United States continues to be a leader in energy technology, development and delivery, and by unleashing America's ingenuity to unlock our natural resources. Through research and development, collaborations at all levels of government and the private sector, the Department of Energy and our National Labs aim to support an efficient transition during our Nation's energy revolution.

The Administration looks forward to continuing to work with Congress on legislation to boost U.S. competitiveness and job creation.

Thank you again for the opportunity to be here today, and I look forward to your questions.

Senator GARDNER. Thank you.

Your written testimony will be entered into the record. Thank you for that.

Thank you both for being here today.

Senator Heinrich, Senator Manchin and I have already bragged about your legislation in our opening comments. Did you want to make a few opening comments here? We will get to you in questions in a little bit, but do you want to make an opening statement?

Senator HEINRICH. I will keep it short and just say, I sure appreciate you holding this hearing and we are excited to get this legislation moving. Thank you for participating and being a co-sponsor, both you and the Ranking Member.

Thank you very much.

Senator GARDNER. We will start with our questions.

Mr. McNamee, in your testimony you talked about the Grand Junction disposal site, that it is the only active site managed by the Department of Energy's Office of Legacy Management and that it collects low-level radioactive waste, primarily from the local area.

Could you talk about the assessment that went behind the support of finding the cost effectiveness of extending the facility authorization for another 25 years is appropriate? Is it appropriate, in your judgment, to extend the facility use period?

Mr. MCNAMEE. The Department has not taken a specific position on the bill for the actual disposal site itself. As you're aware, there's about—there's sufficient space in order to keep that site available and taking what has been on average, about 2,700 cubic yards of material a year and it could be extended for up to 85 years. So your legislation is within that time period.

Senator GARDNER. Great.

I understand that it has about 250,000 cubic yards of additional material that the site could accommodate, so thank you.

Mr. MCNAMEE. That's correct.

Senator GARDNER. I want to turn to the Heinrich/Manchin/Gardner legislation. The bill under discussion would expand the authorization for the Department of Energy and its national labs to focus on the commercialization of innovative technologies, as we have discussed.

Could you talk a little bit more about the effectiveness of the existing Technology Commercialization Fund program at DOE and what we have seen from that existing fund?

Mr. MCNAMEE. The existing fund has available to it, under the way that Congress has structured funding, about $20 million a year in order to provide funding. And it is focused currently on providing a way to bring the technologies that's being developed by the labs and the other national entities under DOE in order to help not only create the innovation but also giving an opportunity for the private sector. And that has been under this Administration, particularly Secretary Perry, trying to make sure that there's more access.

This bill enhances that approach making sure that, especially, small businesses would have access to that technology and have an ability to tap into certain funds in order to bring that to market.

Senator GARDNER. Is that one of the biggest challenges the current fund has, that inability or perhaps not quite as robust ability

to have the participation from the private sector partnerships that you have just described?

Mr. MCNAMEE. I don't have the specific information about the challenges they've had, in that sense, but clearly, being able to make sure that small businesses have access to the great technology and insights that the labs have is an important thing. And so, therefore, this legislation is consistent with that.

Senator GARDNER. Thank you.

Senator Manchin.

Senator MANCHIN. Thank you, Mr. Chairman.

Mr. McNamee, on the proposed Appalachian storage hub, it is a regional hub providing storage for natural gas liquids. I think you are familiar with what we are trying to accomplish. It is in a quad state—West Virginia, Pennsylvania, Ohio and Kentucky.

I have been encouraged by Secretary Perry's interest in the project. He came to West Virginia and we went over the entire project, the opportunities we might have. And the storage hub promotes the efficient utilization of the natural resources, energy resources, we have.

So I would like to give you a chance today to provide the Committee with a DOE perspective on that hub, if you all had a chance to go in depth on it? And for the security of our nation? And the other part of my question is going to be—it has been a very busy hurricane season, as we have seen, and every time we hear of a hurricane even coming close to the coast in the Southwest, we know gasoline prices, shortages—there will be every excuse in the world and every reason in the world to start changing the flow of energy. This would stabilize, I believe, the entire country. Your insight on that would be very much appreciated.

Mr. MCNAMEE. Thank you, Senator Manchin.

You're correct that the idea of this energy hub has created great interest. As you mentioned, Secretary Perry, I believe in July, attended a conference dealing with this in Morgantown, West Virginia.

Senator MANCHIN. Right.

Mr. MCNAMEE. And clearly the energy renaissance that has taken place in this country has been phenomenal in terms of not only in its gas production, but its natural gas production and especially in the Utica and Marcellus shale production.

What's happened in this area of the country, especially where your legislation and where the discussion about the energy hub would be, would be in the center of one of the major centers for that and also expand from it, centers that are usually perceived for this sort of activity in the Southwest United States.

The——

Senator MANCHIN. Did you all consider the protection as far as the natural geographical location and protection from the severe weather storms that we are having?

Mr. MCNAMEE. Yes, sir.

It clearly, that even being in this central location of the country away from the hurricane centers, makes a large difference. It also makes a difference that the resource is there and so there's not as much transportation cost.

Senator MANCHIN. Right.

Mr. MCNAMEE. You know, through the pipelines or otherwise and that will also provide—I believe as I've understood it, that the theory behind this hub is also that it will attract other businesses to the area in order to create an economic engine to provide new jobs to a region that's been so hard hit.

Senator MANCHIN. Right.

Mr. MCNAMEE. You know, because of the challenges on environmental issues and coal issues.

Senator MANCHIN. Yes. It would be a win/win for all of us.

Mr. Danly, if I may. Last week, as a follow-up to a report that was released in August, Secretary Perry sent a proposal to FERC directing FERC to write a rule which will enhance reliability and resilience of our electric grid by more appropriate valuing of the central reliability services that many plans and financial straits offer but are not compensated for. Do you know?

It is especially timely because we have seen several recent natural disasters putting the grid in danger. I know how close we came in January 2014 during the Polar Vortex—the frigid temperatures resulted in a record of 141,132 megawatts called up on in PJM to meet the demand. We came close to lights out and we have had them testify before us before, all the different carriers, and PJM especially.

Following the winter of 2014, AEP reported that nearly 90 percent of its coal plants that were scheduled for retirement ran during the vortex. That means without that, the lights would have gone off.

So we keep talking about the reliability that we have to have in the grid system. I am curious what FERC intends to do following the order and what are the Commission's next steps?

Mr. DANLY. Thank you, Senator.

You're right. Last week under Section 403 the Secretary exercised his privilege to initiate a rulemaking. Today, the Commission issued a notice, a schedule notice, that invited comments and reply comments. Right now the Commission is internally reviewing the Notice of Proposed Rulemaking (NOPR) that was put forward by the Secretary. We're reviewing the options that are available and we are in the process of building the record by soliciting these comments and reply comments. Once they're assembled we're going to review them and take the appropriate action within the 60-day timeframe established by the NOPR.

Senator MANCHIN. I know FERC is very much aware of the baseload plants and basically I think we have baseload today, and the definition of baseload means uninterruptible power, that is going to be coal and nukes.

Natural gas plants are coming on strong replacing a lot of the baseload plants. Natural gas is considered a baseload today in our grid delivery, in the delivery system to the grid, but it is still interruptible and it can still have some concerns with that.

I do not know how you all are weighing that on potential disasters we may have or with blackouts or terrorist attacks or cyberattacks and things of that sort?

Mr. DANLY. It would be premature at this point, with the Notice of Proposed Rulemaking only having come out on Friday and us noticing the request for comments to assemble the record at this

point, for me to even imagine what the method of approach in the subject is going to be. Rest assured the Commission is diligently working and reviewing the rulemaking proposal, and it is attempting to assemble as many comments as it can.

Senator MANCHIN. Thank you.

Thank you, Mr. Chairman.

Senator GARDNER. Thank you, Senator Manchin.

Senator Heinrich.

Senator HEINRICH. Mr. McNamee, as you know DOE's recent staff report on power markets actually concluded that the grid is currently operating reliably. I was surprised by Secretary Perry's directing FERC to implement cost-based rates in fully competitive markets for bulk power in what is an apparent attempt to subsidize both nuclear- and coal-fired generation.

What was the basis for the Secretary to conclude that there is an urgent need based on reliability given the outcome of that report and its conclusions?

Mr. MCNAMEE. Thank you, Senator.

As you know, the reasons for issuing the NOPR were stated by the Secretary, both in his letter and the preamble to the NOPR.

But to your specific question, the difference was pointed out both in the letter and in the grid study about the difference between reliability and resiliency.

And so, as discussed in the NOPR and identifying both from the grid study, the staff report by DOE, comments by NERC and others, there is a difference between reliability and resiliency and that the conclusions in those commentaries, both the staff report and by NERC, observed and to be honest, FERC has had a technical conference trying to deal with some of the resiliency issues, to identify that there are issues about fuel security being able to be available, not just today, but during extreme events. That's the driving thrust and the difference between reliability and resiliency, sir.

Senator HEINRICH. Mr. Danly, what has been FERC's approach to addressing long-term issues of grid reliability and resiliency? Does FERC pick generation technologies and fuels in competitive markets or is that a matter best left to state and local officials?

Mr. DANLY. Senator, historically, FERC has not decided what fuel would be used. Our job is to, or I should say, the Commission's job is to ensure that when the electricity is generated we can make certain that the wholesale markets produce just and reasonable rates.

Senator HEINRICH. I think that is a very reasonable approach. I would just want to warn all of my colleagues, I think if you want to go down this slope of picking winners and losers without letting the markets make those decisions, it may take you places you did not expect to go.

Senator GARDNER. Thank you, Senator Heinrich.

We will go another round here. We both have additional questions.

Mr. Danly, I want to talk a little bit about the Section 205 issue that you brought up and a question of whether it actually provides the kind of relief that, I think, was intended by the legislation, whether or not the expansion might be a little too broad and not get to the relief that they are looking for.

Regarding Senate bill 186, is it possible that this legislation could limit the delegation of authority of the FERC Commissioners to staff in the event of a loss of a quorum?

Mr. DANLY. I'm sorry, can you say that again?

Senator GARDNER. Is it possible that Senate bill 186 could limit the delegation authority of the FERC Commissioners to staff in the event of a loss of a quorum?

Mr. DANLY. I have not thought about that subject specifically, Senator, but I don't see why delegation orders aren't still possible given this bill, if it's passed.

Senator GARDNER. Okay.

I understand that the proposed bill tries to resolve some infrequent situations of an activity at FERC, but would you talk a little bit about how the incentives for action or inaction would be different under the proposed law versus current law——

Mr. DANLY. Um.

Senator GARDNER. ——and would we end up with additional split decisions as a result?

Mr. DANLY. Right.

So, the—thank you.

The reason why this may not practically affect the relief that I think the bill is aiming toward is that should we have a case of a deadlock and that be the reason for inaction and therefore, the reason for the rates going into effect by operation of law, like we did in the ISO New England Forward Capacity Auction rate case which everybody here presumably remembers pretty well.

The likelihood of the party, the aggrieved party, seeking rehearing and then getting an order on rehearing is virtually zero. If you have a deadlock in the first instance, you're likely to have a deadlock in the second.

Though it is important that we have procedures for review, both in the form of rehearing at the Commission and then judicial review after the fact, the under—courts that sit in review of agency decisions have to review an order of that agency that sets out the reasoning that the agency has for the decision.

Even if we were to afford the possibility of a rehearing which would not produce an order under these circumstances and even if it managed to get into a Court of Appeals, which it likely wouldn't given the precedent from the DC Circuit, the Court of Appeals would simply remand back to the agency anyway because there would be no reasoning upon which to base its review of the action. So I simply believe it to be, probably, not a promise of relief to the parties who are aggrieved by the rates that go into effect.

Senator GARDNER. Thank you.

Mr. McNamee, nuclear energy made up roughly 20 percent of the utility scale generation in the U.S. in 2016. It is a no-carbon-footprint source of energy, a reliable source.

How important is it to the energy security of the United States that we continue the research and development of nuclear sector technology?

Mr. MCNAMEE. Thank you, Senator.

You're correct that nuclear is an important part of both the reliability of the—reliability and resiliency—of the electric grid, as demonstrated in the staff report.

But I think your question also goes further in discussing it more broadly and its best we, in regards to the legislation before you talked about it, advanced nuclear technology, that we don't take a particular position on this legislation. It is clear that the Department has been very robust in trying to develop advanced nuclear reactors and making sure that America continues to be a leader in nuclear technology.

That is something, you know, whether it be small nuclear reactors or the various types of water reactors, it's something that's important that the Department is engaged in every day. I understand that this legislation's intent is to advance that as well.

Senator GARDNER. Thank you, Mr. McNamee.

Mr. McNamee, again, the 2005 Energy Policy Act amended the Federal Power Act in an attempt to reduce the 203 review workload of FERC by streamlining its review structure and raising the monetary threshold that triggered the reviews which had not been changed from the $50,000 level it was set at in 1935.

Can you explain how unclear language in 2005, in the Energy Policy Act (EPAct 2005), actually had the opposite effect of increasing the workload?

Mr. MCNAMEE. I believe, Senator, that might be more appropriate for my colleague to answer.

Senator GARDNER. Mr. Danly?

Mr. DANLY. You're asking about the amendment for 203 to make the $10 million threshold?

Senator GARDNER. Correct.

Mr. DANLY. As written before there was a single provision rather than the split provisions for the different types of transactions in Section 203, and with EPAct 2005 that was split into different sections and a $10 million threshold was applied to each of the sections with the exception of the "merge or consolidate" section which is the one that's at issue here.

When that happened, we had before had a $50,000 threshold for everything because it was a single provision with that single value. And now, every one of the different types of transactions are subject to a threshold of $10 million except for "merge or consolidate."

The effect after the Commission gave its reading of what the statutory language meant was that there was no minimum conception whatsoever from "merge or consolidate" and this would be a step in bringing the entirety of 203 back to the effective regime we had in the previous version which was to allow a threshold for all of the different types of transactions subject to Commission approval.

Senator GARDNER. Mr. Danly, Mr. McNamee, we have run out of Senators here, so thank you very much for your time and testimony today on the legislation before us.

We will keep the record open until tomorrow, close of business, if any member wishes to submit questions for the record, and we ask for your timely response should additional questions be submitted.

Thank you, to both of you, for your time and testimony today.

With that, the Committee is adjourned.

[Whereupon, at 3:00 p.m. the hearing was adjourned.]

APPENDIX MATERIAL SUBMITTED

United States Senate Committee on Energy and Natural Resources
Subcommittee on Energy
October 3, 2017 Hearing: Pending Legislation
Questions for the Record Submitted to Mr. James Danly

Questions from Chairman Lisa Murkowski

Question 1: How often since the Commission was established in 1977 has it permitted a Section 205 rate filing to become effective by operation of law? How many of these proceedings were uncontested? How many of these proceedings involved a Commissioner issuing a statement which described circumstances related to the failure to take action?

Answer 1:

Research by FERC staff identified five Federal Power Act (FPA) section 205 filings that became effective by operation of law since 2002, the earliest discovered instance. All five filings were contested.

In two of the five proceedings, two or more Commissioners issued separate statements reflecting their stance on the subject filing. None of the statements specifically explained the Commission's failure to take action, but the nature of the statements suggests that no particular approach garnered a majority vote. Further details regarding these proceedings are provided below in response to Question 4.

Two other filings apparently became effective due to the Commission mistakenly not acting in time, with the filings becoming effective by operation of law as a result. In both cases, soon after the filings took effect, the Commission instituted proceedings under FPA section 206 to investigate the rates. In one of the section 206 orders, the Commission explained that, in fact, it inadvertently failed to act on the filing under section 205.

The fifth filing involved a utility's withdrawal of its initial section 205 filings; both the withdrawal and the filings were contested. Withdrawals of section 205 filings are themselves considered section 205 filings, and, as explained in the Secretary's notice regarding this particular withdrawal, the Commission "allowed" the withdrawal to be accepted and become effective by operation of law.

Question 2: For more than 80 years, the right of FERC (and FPC, as predecessor) to avoid acting could have been a helpful option in the toolbox of possible FERC options when dealing with a rate change. How would the broader dynamic of moving toward consensus and compromise among the Commissioners be hampered by taking away that option?

Question 3: Under current law, it would appear that a 2-2 split at FERC is highly unlikely because of the consequences of failing to take action. But if those consequences change, and become less severe, then Commissioners are relieved of pressure to resolve their internal disputes. Thus, a law allowing appeal from 2-2 splits potentially could have the result of the

United States Senate Committee on Energy and Natural Resources
Subcommittee on Energy
October 3, 2017 Hearing: Pending Legislation
Questions for the Record Submitted to Mr. James Danly

Commissioners arriving at more 2-2 splits. As you see it, how are the incentives to avoid 2-2 splits likely to change if S. 186 becomes law?

Answers 2 and 3:

For the reasons you note, it is possible that enactment of S. 186 could alter the dynamics among and incentives for the Commissioners in their consideration of section 205 filings. As I explained in my testimony, the mere fact that an order will be deemed to have been issued when a section 205 filing goes into effect by operation of law following a 2-2 deadlock will not change the fact that there will likely be a subsequent 2-2 split when the issue appears before the Commission again on rehearing. If it does, then there will be no order at either the initial or the rehearing stage for an appellate court to review. While this might indicate that the incentives would not be drastically altered by the enactment of S. 186, it is difficult to know how much the current provisions of section 205 have influenced past commissioners' decisions, especially in light of how rarely such splits have occurred. Likewise, it is difficult to predict the effect of the incentives created by the new regime contemplated by S. 186. It is unclear how much effect this change would have given how rarely 205 filings go into effect by operation of law.

Question 4: If it can be determined, how often has FERC taken no action and allowed rates to go into effect after a 2-2 deadlock? Please describe the circumstances surrounding each such decision to take no action after a 2-2 deadlock.

Answer 4:

Staff's data indicates that since 2002, a 2-2 deadlock has twice resulted in rates submitted under FPA section 205 taking effect by operation of law.

In the most recent case, in 2014, ISO New England, Inc. submitted an FPA section 205 filing reflecting the rates resulting from its eighth Forward Capacity Auction (FCA 8 results). Protestors argued that the rates resulted from the unmitigated market power of certain resource owners, and that ISO-NE might have violated its Tariff in conducting the auction. One day after the statutory 60-day notice period expired, the Secretary issued a notice informing the public that the rates had taken effect by operation of law. On the same day, the four sitting Commissioners issued statements expressing their individual opinions regarding the FCA 8 results; the statements revealed a 2-2 split. In individual statements, Chairman LaFleur and Commissioner Moeller stated that, if they had an opportunity to vote on an order, they would have voted to accept the auction rates. In a joint statement, Commissioners Clark and Bay stated that they would have set the matter for hearing to evaluate the justness and reasonableness of the auction rates.

In an earlier case, in 2004, PJM Interconnection, L.L.C. (PJM) submitted a section 205 filing to permit market-based rate offers, subject to a cap, for regulation

United States Senate Committee on Energy and Natural Resources
Subcommittee on Energy
October 3, 2017 Hearing: Pending Legislation
Questions for the Record Submitted to Mr. James Danly

service in an expanded region of PJM. Protestors argued, among other things, that any such filing should be based on actual, not expected, regulation supply in the expanded region. Sixty days after the filing, the Secretary issued a notice informing the public that the filing would take effect by operation of law. The Secretary's notice stated that Chairman Wood and Commissioner Kelly, two of the four Commissioners at the time, were dissenting in a joint statement. In their joint statement attached to the notice, Chairman Wood and Commissioner Kelly explained that they would have retained mitigation for certain suppliers until new evidence, based on actual experience, demonstrated lack of market power. The two other seated Commissioners, Brownell and Kelliher, issued no statements, but the circumstances indicated that the Commission deadlocked in a 2-2 split.

Questions from Ranking Member Maria Cantwell

Question 1: In your testimony regarding S. 186, you stated that in a case in which the Commission deadlocks, a similar deadlock could occur on a petition for rehearing. You continued, "[i]n 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." Given that any Section 205 proceeding would have an associated record, the length of which is a matter the Commission controls, why would you presume that a court would not consider substantive issues raised in a petition for review?

Answer 1:

Treating Commission inaction under section 205 as an order could potentially allow a court to review the merits of the Commission's "acceptance" of a rate change, if an aggrieved party first seeks rehearing. Seeking judicial review, however, would pose significant challenges. Although it is true that the record in a section 205 proceeding could contain substantial pleadings and evidence, it is unclear how an appellate court would evaluate that record, especially since the Commission would not have weighed the competing evidence and arguments or provided reasoning for its decisions. This is critical because appellate courts are required, when sitting in review of agency action, to consider not just the agency's result, but also the agency's reasoning. *See Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007) ("We therefore require more than a result; we need the agency's reasoning for that result."). Thus, were a section 205 filing to become effective by operation of law, and were an order deemed to have issued under S. 186, the lack of Commission reasoning would render the Commission's "order" effectively unreviewable.

Question 2: In your testimony, you stated that there is already a remedy for aggrieved parties that are foreclosed from requesting a rehearing under Section 205 of the Federal Power Act

United States Senate Committee on Energy and Natural Resources
Subcommittee on Energy
October 3, 2017 Hearing: Pending Legislation
Questions for the Record Submitted to Mr. James Danly

(FPA) under the procedures available under Section 206 of that Act. However, whereas Section 205 places the burden on the proposer of a rate revision to demonstrate that rates are just and reasonable, under Section 206, the burden is on the aggrieved parties to demonstrate that the existing rates are unjust and unreasonable. Do you disagree that the burden on aggrieved parties is significantly different under Section 206 of the FPA than under Section 205?

Answer 2:

As you note, a party that submits a complaint under section 206 of the FPA bears an additional burden compared to a party that files an intervention and protest of a filing submitted under section 205. It is true that this remedy is more burdensome than that faced under section 205, but there is a path available for aggrieved parties to seek redress as the statute is currently constituted.



Edison Electric
INSTITUTE

Thomas R. Kuhn
President

October 3, 2017

The Honorable Cory Gardner
Chairman
Subcommittee on Energy
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Joe Manchin
Ranking Member
Subcommittee on Energy
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Lisa Murkowski
Chairman
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

The Honorable Maria Cantwell
Ranking Member
Energy and Natural Resources Committee
United States Senate
Washington, DC 20510

Dear Subcommittee Chairman Gardner, Subcommittee Ranking Member Manchin, Chairman Murkowski, and Ranking Member Cantwell:

On behalf of the Edison Electric Institute (EEI), I want to express our strong support for S. 1860, "Parity Across Reviews Act," introduced by Senators Inhofe and Heinrich. This legislation is necessary to clarify Federal Energy Regulatory Commission (FERC) authority over mergers and acquisitions and to achieve common-sense consistency under section 203 of the Federal Power Act (FPA). As Senators Inhofe and Heinrich noted, enactment of S. 1860 will enable FERC to operate more efficiently while reducing barriers for grid infrastructure investments.

In the 2005 Energy Policy Act (EPAct 05), Congress amended FPA section 203 to, among other things, increase the minimum dollar threshold from $50,000 to $10 million for FERC authority to pre-approve certain facilities transactions. FERC has strictly interpreted the law to eliminate the monetary threshold entirely for acquisitions—but not for sales or other transactions—involving jurisdictional facilities. As a result, FERC requires prior approval for the acquisition of utility property that has any value (or no monetary value at all), leading to obvious regulatory delays and costly business inefficiencies. Unfortunately, legislation is required to correct this problem.

The solution to this problem is not partisan or controversial. The House more than once has passed legislation to clarify FPA section 203 to expressly include a monetary threshold of greater than $10 million for FERC pre-approval of mergers and acquisitions of jurisdictional utility property, as Congress intended when it passed EPAct 05. In the 114th Congress, such language

was passed as part of H.R. 8, the comprehensive energy bill. Most recently, on June 12, 2017, the House passed by voice vote H.R. 1109, bipartisan legislation that also was approved by unanimous voice vote in the Energy and Commerce Committee earlier in June. Further, FERC has testified in support of the $10 million threshold for both sales and acquisitions.

EEI appreciates the promptness with which the Senate Energy Subcommittee is holding a hearing on S. 1860. We urge the Committee to expeditiously advance this bill for Senate floor consideration to ensure consistent, common-sense, implementation of FPA section 203. We look forward to working with you on this and other important energy-related issues.

Sincerely,

Thomas R. Kuhn
President

cc: Senator James Inhofe
Senator Martin Heinrich

STATEMENT OF SENATOR JAMES M. INHOFE ON S. 1860, PARITY ACROSS REVIEWS ACT, AT THE OCTOBER 3, 2017 SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES SUBCOMMITTEE ON ENERGY

October 3, 2017

Thank you, Chairman Gardner and Ranking Member Manchin, for holding this Subcommittee hearing on S. 1860, the Parity Across Reviews Act (PARs ACT). I am proud to work with Senator Heinrich on this bipartisan, common-sense legislation.

The law should be clear and fair when it comes to the Federal Energy Regulatory Commission's (FERC) merger and consolidations authority. By holding all reviews under Section 203 of the Federal Power Act to the same standard, the PARs Act empowers FERC to operate more efficiently and eliminate burdensome requirements – saving consumers money.

In 2005, Congress passed the Energy Policy Act of 2005. This important legislation updated antiquated $50,000 review thresholds to $10,000,000. In updating these thresholds, the Energy Policy Act of 2005 was inadvertently - and unfortunately - silent on Section 203(a)(1)(B). This silence led to interpretations consistent with the letter of the law, and not its spirit. The PARs Act will restore the intent of the Energy Policy Act of 2005.

The PARs Act will also allow electricity providers, including municipalities and cooperatives, to better serve their customers. Filing transactions for review with FERC is costly – it may cost hundreds of thousands of dollars to submit a complete application. For smaller assets, these costs can be prohibitive. The PARs Act will let electricity providers decide what is in their customers' best interest. In some cases, it will be to utilize Section 203(a)(1)(B) of the Federal Power Act and to redeploy transaction proceeds to improve reliability for the rest of their transmission or distribution system or to invest in rural broadband.

Thank you again, Chairman Gardner and Ranking Member Manchin, for holding this Subcommittee hearing. I look forward to working with you and the full Committee as you consider the PARs Act.

Statement of Senator Edward J. Markey (D-Mass.)
on
S. 186, Fair Ratepayer Accountability, Transparency, and Efficiency Standards (RATES) Act
Senate Committee on Energy and Natural Resources
Subcommittee on Energy
October 3, 2017

Chairman Gardner, Ranking Member Manchin, thank you for holding today's hearing on legislation that I have introduced, the Fair RATES Act.

I want to also thank Chairman Murkowski and Ranking Member Cantwell for working with me on this legislation and their tremendous commitment to bipartisanship. I believe that the Fair RATES Act should present just such an opportunity to work together on a bipartisan basis to ensure that consumers can always be protected when it comes to energy rates.

S. 186 would address an infrequent but important problem when it comes to how the Federal Energy Regulatory Commission (FERC) approves energy rate changes.

The Fair RATES Act would allow for ratepayers or other aggrieved parties to appeal a FERC energy rate change decision when there is a deadlock at the Commission, either because of a vacancy or recusal or if FERC fails to take action on a rate decision. Right now, consumers can find themselves unable to appeal a rate change if there is a tie vote at FERC on approving an energy rate change or if FERC fails to act. That opportunity to appeal whether rates are just and reasonable is afforded to the public in every other scenario when FERC approves a rate decision. But not if the Commission is deadlocked, which may in fact be the cases where such an appeal is most needed.

Right now, if the Commission has a vacancy and deadlocks 2-2, rate decisions go into effect through operation of law even though they are not approved by a majority of commissioners and there is no official order. That would also be the case if FERC were to fail to act within the timeframes allowed on approving a rate decision.

This prevents the public or other entities from challenging decisions in such an instance. Because FERC does not issue an official order in such a scenario, the way the law is written, there is nothing to actually challenge.

While these sorts of situations have happened relatively rarely, that does not minimize their potential impact when they do occur. In fact, we found ourselves in just such a situation in New England in 2014 following the eighth Forward Capacity Auction for our region. FERC split 2-2 on approving the results of the Forward Capacity Auction, amidst questions about some actions that had been taken by market participants prior to that auction.

As a result, a rate increase of roughly $2 billion went into effect even though a majority of FERC commissioners had not approved it as being just and reasonable. Despite having two FERC Commissioners raising concerns about circumstances in that auction, there was no remedy for

ratepayers in our region who will have to bear those increased costs. Indeed, ratepayers in New England are going to start having to endure those increased costs later this year.

We should ensure that ratepayers are fully protected from any potential unjust increases in energy rates. Without the Fair RATES Act there is nothing to ensure that consumers in New England or elsewhere in the country will not find themselves in a similar situation in the future. Indeed, the DC Circuit Court of Appeals has concluded that because of the way that the Federal Power Act is written, it is up to Congress to correct this issue.

Some have argued that there is no need to ensure that ratepayers or aggrieved parties can challenge such a rate decision under Section 205 of the Federal Power Act (FPA) because they have an ability to seek remedy under Section 206. But this claim misses the fact that burden under Section 206 is significantly different than under Section 205. Under Section 205, the Commission must determine that rates are just and reasonable. Section 206 flips that presumption on its head and parties seeking a challenge must instead show that the rates are unjust and unreasonable – a significantly higher burden. We should ensure that FERC does not forego its responsibility to ensure that rates are just and reasonable and consumers are protected under Section 205 of the FPA.

There has already been bipartisan support for the Fair RATES Act. It passed the House of Representatives by voice vote in March 2016 and again by voice vote in this Congress in January 2017.

I thank the Chairman and Ranking Member for holding this hearing today and I look forward to working with the Committee on a bipartisan basis on this legislation.

Thank you.

Northeast Public Power Association
est. 1965

October 6, 2017

The Hon. Lisa Murkowski, Chair
Senate Committee on Energy
and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

The Hon. Maria Cantwell, Ranking Member
Senate Committee on Energy
and Natural Resources
304 Dirksen Senate Office Building
Washington, DC 20510

The Hon. Cory Gardner, Chair
Subcommittee on Energy
354 Russell Senate Office Building
Washington, DC 20510

The Hon. Joe Manchin III, Ranking Member
Subcommittee on Energy
306 Hart Senate Office Building
Washington, DC 20510

Dear Senators:

On behalf of the Northeast Public Power Association (NEPPA), the trade association representing 78 not-for-profit electric companies in the six New England States, I want to thank you for holding a hearing on S. 186, the "*Fair Ratepayer, Accountability, Transparency and Efficiency Standards (RATES) Act*." The bill makes a critical change to the Federal Power Act to allow consumers to challenge rates that go into effect under operation of law, and I write to offer NEPPA's endorsement of and support for this bill.

As you may know, most NEPPA members participate directly in the mandatory capacity markets administered by ISO-New England. We have observed firsthand as these markets have become more complex, and more costly, as they try to increase revenue to generators. Since public power systems are motivated by consumer objectives, rather than by profit, the capacity market is particularly challenging for us.

After the cost of capacity skyrocketed in Forward Capacity Auction 8, many of us had questions about whether the market rules had produced a rate that was just and reasonable. Had this legislation been law at that time, we believe the consumers we serve could have gotten an answer to that question. While we believe there is much work to be done to reform the capacity markets, the Fair RATES Act is an important first step.

To that end, please do not hesitate to call on me, any member of my staff, or other NEPPA members to provide technical expertise, local experience, or independent analysis you may need related to this issue.

Again, thank you for your on-going commitment to fighting for consumers.

Sincerely,

David F. White, Executive Director
NEPPA

October 2, 2017

The Honorable James M. Inhofe
205 Russell Senate Office Building
U.S. Senate
Washington, DC 20510

Dear Senator Inhofe:

On behalf of the undersigned Oklahoma utilities, we are writing to express our appreciation for introducing the Parity Across Reviews Act, and to offer our support as it moves through the legislative process.

The Oklahoma Municipal Power Authority (OMPA) is a consumer-owned public power entity that provides electrical power and energy to 42 municipally-owned electric systems in Oklahoma. Tri County Electric Cooperative (TCEC) is a not-for-profit distribution cooperative owned and controlled by its members that serves approximately 23,000 households and businesses in the Oklahoma Panhandle. GridLiance is an independent electric transmission company currently partnering with OMPA and TCEC to develop customized solutions to their transmission challenges, including planning and constructing transmission upgrades for their benefit. GridLiance currently owns and operates over 400 miles of transmission lines and related substation facilities in Oklahoma's panhandle, which it acquired from TCEC in 2016. That sale allowed TCEC to focus on distribution system improvements.

As you know, by failing to hold all energy transactions to the same standard, the 2005 Energy Policy Act's provisions governing Federal Energy Regulatory Commission (FERC) authority over mergers and acquisitions of jurisdictional utility property have proven extremely problematic for industry, utility customers and FERC alike, and cry out for rebalancing. In our experience in Oklahoma, these requirements are prohibitively expensive for prospective buyers and sellers of small utility transmission assets and are unnecessarily increasing customer costs. Further, they've led to costly business and regulatory inefficiencies and delayed our efforts to provide customers requested service upgrades and reliability improvements. By ensuring that section 203(a)(1)(b) transactions below $10 million avoid FERC approval, your legislation will bring needed parity between the types of transactions FERC reviews. On a more tangible local level, this narrow statutory change will ensure that the additional transmission asset-only transactions we're considering are consummated without undue delay. Finally, eliminating the considerable cost and effort required to prepare and file such applications will allow us to better focus these resources on serving our Oklahoma utility customers.

Thank you for your leadership on this important issue affecting Oklahoma utilities and the broader electric power industry. We look forward to working with you and your staff to see that your legislation is passed swiftly.

Sincerely,

Calvin Crowder
President and CEO, GridLiance

Zac Perkins
CEO, TCEC

David Osburn
General Manager, OMPA