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HOUSE OF REPRESENTATIVES
REPORT
114–451

AMENDING SECTION 203 OF THE FEDERAL POWER ACT

MARCH 14, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce, submitted the following

R E P O R T

[To accompany H.R. 4427]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 4427) to amend section 203 of the Federal Power Act, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. CLARIFICATION OF FACILITY MERGER AUTHORIZATION.

Section 203(a)(1)(B) of the Federal Power Act (16 U.S.C. 824b(a)(1)(B)) is amended by striking "such facilities or any part thereof" and inserting "such facilities, or any part thereof, of a value in excess of $10,000,000".

SEC. 2. NOTIFICATION FOR CERTAIN TRANSACTIONS.

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

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

"(i) such facilities, or any part thereof, are of a value in excess of $1,000,000; and

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

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

SEC. 3. EFFECTIVE DATE.

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

PURPOSE AND SUMMARY

H.R. 4427, to amend section 203 of the Federal Power Act (FPA), was introduced by Rep. Mike Pompeo (R–KS) on February 2, 2016. The legislation amends section 203(a)(1)(B) of the FPA to expressly include a minimum monetary threshold of $10,000,000 for mergers and acquisitions of facilities subject to the jurisdiction of the Federal Energy Regulatory Commission (Commission or FERC), thereby mirroring the existing $10,000,000 minimum monetary threshold set forth in the other three subsections of FPA section 203(a)(1). The bill also requires any public utility seeking to merge or consolidate such facilities, pursuant to subsection 203(a)(1)(B) of the FPA, to notify the Commission within 30 days after the date on which the transaction is consummated if the facilities have a value in excess of $1,000,000 and less than $10,000,000.

BACKGROUND AND NEED FOR LEGISLATION

Section 203 of the FPA establishes, in part, requirements for the sale, disposition, merger, purchase, and acquisition of certain utility assets and facilities.[1] Pursuant to Section 203(a)(4) of the FPA, the Commission is required to approve proposed transactions that are determined to "be consistent with the public interest," which the Commission determines through the evaluation of three factors: (1) the effect of a proposed transaction on competition; (2) the effect of a proposed transaction on rates; and (3) the effect of a proposed transaction on regulation.

The Energy Policy Act of 2005 (EPAct 2005) amended Section 203 by dividing the section into separate statutory subsections, adding a new subsection granting FERC jurisdiction to review sales of certain generating facilities, and increasing the minimum monetary threshold from $50,000 to $10,000,000 for three of the four statutory sub-sections.[2] This monetary threshold serves as a "floor" to ensure that public utilities would only be required to file, and

[1] 16 U.S.C. § 824b.

[2] *See* EPAct 2005, § 1289. *See also* Testimony of Max Minzner, General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission, before the Subcommittee on Energy & Power (Feb. 2, 2016) (explaining that the pre-EPAct 2005 version of Section 203 "combined the current statutory mandates of Section 203(a)(1)(A)–(C) in a single subsection that included a $50,000 threshold. Under this statutory language, FERC had issued regulations imposing a $50,000 *de minimis* exception for all of the provisions.").

FERC to review, proposed transactions of a minimum material significance.

As amended by EPAct 2005, subsection 203(a)(1)(B) pertaining to mergers and consolidations of FERC-jurisdictional facilities did not include an express minimum monetary threshold of $10,000,000 (or any other amount). FERC interpreted this statutory change as eliminating the *de minimis* exception for mergers and consolidations. As a result, mergers and consolidations of any amount—no matter how *de minimis*—require FERC approval.

H.R. 4427 would amend Section 203 to expressly include a minimum monetary threshold of $10,000,000 for acquisitions of FERC-jurisdictional facilities, thereby mirroring the existing $10,000,000 minimum monetary threshold set forth in the other three subsections of FPA Section 203(a)(1). As explained by Max Minzer, General Counsel to FERC, "adding a $10 million *de minimis* threshold to the 'merge and consolidate' clause 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."[3] In addition, according to FERC, adding a $10,000,000 *de minimis* threshold to Section 203(a)(1)(B) of the FPA:

> could ease the administrative burden on the Commission staff and the regulatory burden on industry without a significant negative effect on 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.[4]

The Commission did, however, warn that the legislation, as originally introduced, could raise issues with respect to serial mergers, *i.e.*, a series of transactions that individually are below the limit but exceed the limit in the aggregate.[5] While FERC has other tools to address serial mergers and protect consumers and the public interest, FERC currently has no formal mechanism for obtaining the information necessary to know in a timely fashion whether such activity was occurring. The bill was, therefore, amended during full committee markup to provide a notice requirement in which applicants seeking to merge or consolidate FERC-jurisdictional facilities, pursuant to subsection 203(a)(1)(B), must notify the Commission within 30 days after the date on which the transaction is consummated if the facilities have a value in excess of $1,000,000 but less than $10,000,000.

HEARINGS

The Subcommittee on Energy and Power held a hearing on H.R. 4427 on February 2, 2016. The Subcommittee received testimony from:

- Ann Miles, Director, Office of Energy Projects, Federal Energy Regulatory Commission;
- Max Minzner, General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission;

[3] *Id.* at 4.
[4] *Id.* at 4–5.
[5] *Id.* at 5.

- Timothy L. Powell, CEP, Director of Land, GIS and Permits, Williams Company;
- Edward Lloyd, Evan M. Frankel Clinical Professor of Environmental Law, Columbia University School of Law, *on behalf of the New Jersey Conservation Foundation and Stonybrook Millstone Watershed Association;*
- Bill Bottiggi, General Manager, Braintree Light and Electric Department;
- Bill Marsan, Executive Vice President, General Counsel and Corporate Secretary, American Transmission Company;
- Tyson Slocum, Energy Program Director, Public Citizen, Inc.; and,
- Jeffrey A. Leahey, Esq., Deputy Executive Director, National Hydropower Association.

COMMITTEE CONSIDERATION

On February 10 and 11, 2016, the Subcommittee on Energy and Power met in open markup session and forwarded H.R. 4427 to the full Committee, without amendment, by a voice vote. On February 24 and 25, 2016, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 4427 reported to the House, as amended, by a voice vote.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 4427 reported. A motion by Mr. Upton to order H.R. 4427 reported to the House, as amended, was agreed to by a voice vote.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H.R. 4427 is to amend section 203 of the FPA to expressly include a minimum monetary threshold of $10,000,000 for acquisitions of FERC-jurisdictional facilities, thereby mirroring the existing $10,000,000 minimum monetary threshold set forth in the other three subsections of FPA section 203(a)(1).

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 4427, would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that

H.R. 4427 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974. At the time this report was filed, the estimate was not available.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

At the time this report was filed, the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974 was not available.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 4427 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 4427 specifically directs to be completed no rule makings within the meaning of 5 U.S.C. 551.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION–BY–SECTION ANALYSIS OF THE LEGISLATION

Section 1. Clarification of facility merger authorization

Section 1 amends section 203(a) of the FPA to expressly include a minimum monetary threshold of $10,000,000 for mergers and acquisitions of FERC-jurisdictional facilities, thereby mirroring the existing $10,000,000 minimum monetary threshold set forth in the other three subsections of FPA section 203(a)(1).

Section 2. Notification of certain transactions

Section 2 amends section 203(a) to require any public utility seeking to merge or consolidate FERC-jurisdictional facilities, pursuant to subsection 203(a)(1)(B) of the FPA, to notify the Commission within 30 days after the date on which the transaction is consummated if the facilities have a value in excess of $1,000,000 but less than $10,000,000. In establishing such notification requirement the Commission shall, to the maximum extent practicable, minimize the paperwork burden resulting from the collection of information. In meeting this requirement to "minimize the paperwork burden," the Committee encourages the Commission to minimize the amount of information to be collected, requiring only such information as necessary to meet the Commission's obligations under this section. The Commission should seek to reduce the burden related to completing and submitting the notice, including minimizing the length of the notice form and by providing an option for the online submission of such notice.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

FEDERAL POWER ACT

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

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DISPOSITION OF PROPERTY; CONSOLIDATION; PURCHASE OF SECURITIES

SEC. 203. (a)(1) No public utility shall, without first having secured an order of the Commission authorizing it to do so—

(A) sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $10,000,000;

(B) merge or consolidate, directly or indirectly, [such facilities or any part thereof] *such facilities, or any part thereof, of a value in excess of $10,000,000* with those of any other person, by any means whatsoever;

(C) purchase, acquire, or take any security with a value in excess of $10,000,000 of any other public utility; or

(D) purchase, lease, or otherwise acquire an existing generation facility—

(i) that has a value in excess of $10,000,000; and

(ii) that is used for interstate wholesale sales and over which the Commission has jurisdiction for rate-making purposes.

(2) No holding company in a holding company system that includes a transmitting utility or an electric utility shall purchase, acquire, or take any security with a value in excess of $10,000,000 of, or, by any means whatsoever, directly or indirectly, merge or consolidate with, a transmitting utility, an electric utility company, or a holding company in a holding company system that includes a transmitting utility, or an electric utility company, with a value in excess of $10,000,000 without first having secured an order of the Commission authorizing it to do so.

(3) Upon receipt of an application for such approval the Commission shall give reasonable notice in writing to the Governor and State commission of each of the States in which the physical property affected, or any part thereof, is situated, and to such other persons as it may deem advisable.

(4) After notice and opportunity for hearing, the Commission shall approve the proposed disposition, consolidation, acquisition, or change in control, if it finds that the proposed transaction will be consistent with the public interest, and will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

(5) The Commission shall, by rule, adopt procedures for the expeditious consideration of applications for the approval of dispositions, consolidations, or acquisitions, under this section. Such rules shall identify classes of transactions, or specify criteria for transactions, that normally meet the standards established in paragraph (4). The Commission shall provide expedited review for such transactions. The Commission shall grant or deny any other application for approval of a transaction not later than 180 days after the application is filed. If the Commission does not act within 180 days, such application shall be deemed granted unless the Commission finds, based on good cause, that further consideration is required to determine whether the proposed transaction meets the standards of paragraph (4) and issues an order tolling the time for acting on the application for not more than 180 days, at the end of which additional period the Commission shall grant or deny the application.

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

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

(i) such facilities, or any part thereof, are of a value in excess of $1,000,000; and

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

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

(b) The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may from time to time for good cause shown make such orders supplemental to any order made under this section as it may find necessary or appropriate.

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