Akin®

Congress Passes Energy Legislation on FERC's Merger Review and Judicial Review of FERC Inaction on Rate Filings

Sep 20, 2018

Reading Time : **4 min**

By: Scott Daniel Johnson, Shawn Whites (paralegal)

The "merge or consolidate" bill will benefit industry by easing the regulatory burdens and costs of obtaining prior authorization for certain low-value transactions—and the FERC Enforcement risks for failing to do so—while enabling FERC to spend its limited time and resources on more significant matters. The Fair RATES Act is more consumer-oriented, giving consumers and other affected energy market participants a chance to appeal rate changes that automatically take effect through FERC inaction. Rate approvals through FERC inaction are rare, but they do occur—which is what motivated the legislation—and are more likely to occur when, as now, FERC is operating with only four of its usual five Commissioners, and therefore, has the potential to deadlock.

H.R. 1109

Section 203(a)(1)(B) of the FPA currently requires that public utilities obtain prior FERC authorization to "merge or consolidate, directly or indirectly, [FERC-jurisdictional] facilities or any part thereof with those of any other person, by any means whatsoever."[1] As the Senate Energy and Natural Resources Committee explained in its report on H.R. 1109, amendments to Section 203 resulting from the Energy Policy Act of 2005 raised the value threshold for FERC's review of certain categories of transactions from $50,000 to $10 million,[2] but omitted a value threshold for FERC's review of "merge or consolidate" transactions under Section 203(a)(1)(B).[3] This omission, the Committee notes, has led FERC to interpret Section 203(a)(1)(B) as reducing the applicable transaction value threshold to zero dollars, causing FERC to review transactions of minimal economic value (and, thus, minimal-to-no potential harm to the market).[4]

H.R. 1109 amends Section 203(a)(1)(B) by adding a $10 million value threshold for "merge or consolidate" transactions to conform with the $10 million value threshold present in other parts of Section 203(a). The bill also requires FERC to promulgate regulations, within 180 days of enactment, governing the filing of "notices of consummation" of certain such transactions. Those regulations would require a public utility to notify FERC within 30 days of the consummation of any covered transaction if (i) the jurisdictional facilities involved have a value greater than $1 million, and (ii) the transaction does not require FERC authorization under revised Section 203(a)(1)(B).

As we discussed here and here, several companies have been subject to FERC Enforcement action in recent years for failing to obtain FERC authorization before consummating "merge or consolidate" transactions involving low-value facilities. Adding a $10 million value threshold to Section 203(a)(1)(B) will reduce the number of such transactions that require prior FERC authorization, which Rep. Walberg notes could "save money for consumers" by "allow[ing] FERC and energy producers to focus on providing affordable energy rather than dedicating time and resources to redundant government red tape."

Market participants should note that the bill does not alter any of the existing regulatory obligations, burdens, or risks associated with higher-value "merge or consolidate" transactions that remain subject to FERC review.

H.R. 1109 now awaits the President's signature.

The Fair RATES Act

Under Section 205 of the FPA, FERC has 60 days to act on a public utility rate filing by issuing an order approving, denying, or setting the proposed rate for administrative hearing. If FERC fails to act within this timeframe—i.e., it does not approve, deny, or set the proposed rate for hearing—the proposed rate automatically takes effect.[5]

Approval-through-inaction has consequences for interested parties' ability to seek rehearing and judicial review, as occurred with the 2014 capacity market auction rate filing by ISO New England, Inc. (ISO-NE) that took effect after a four-member Commission split on whether to approve or set the proposed rate for hearing. The day after the 60-day period expired, FERC's Office of the Secretary issued a Notice of Filing Taking Effect by Operation of Law (Notice), which stated that ISO-NE's filing "became effective by operation of law" pursuant to Section 205 "in the absence of Commission action." On appeal of the Notice (and a subsequent

notice denying rehearing of the Notice), the U.S. Court of Appeals for the D.C. Circuit found that FERC's "deadlock [did] not constitute agency action" and thus the notices "describing the effects of the deadlock [were] not reviewable orders under" FPA Section 313(b).[6]

Sen. Markey explains that the Fair RATES Act was designed to prevent similar outcomes by "provid[ing] an outlet for consumers to challenge rate increases." To accomplish this, the bill adds a new subsection to Section 205 which provides that, if FERC fails to act within the 60-day statutory timeframe because its members "are divided two against two as to the lawfulness of the change, as a result of vacancy, incapacity, or recusal," such inaction constitutes an order subject to rehearing under FPA Section 313(a). Then, if FERC fails to act on the merits of a rehearing request of such "order" within 30 days—again because Commissioners are deadlocked—a party that sought rehearing may seek judicial review under FPA Section 313(b). Finally, the bill requires that an adequate record be compiled in instances of FERC inaction on rate filings, which shall include (i) the proposed order upon which the FERC is deadlocked; (ii) notice of FERC's division regarding the proposed order; and (iii) a written statement from each Commissioner explaining their views on the proposed order.

A companion bill introduced by Rep. Joe Kennedy (D-MA) has already passed the House, but minor differences between the bill texts may need to be reconciled before heading to the President's desk.

---

[1] 16 U.S.C. § 824b(a)(1)(B) (2012).

[2] *See, e.g.*, *id.* § 824b(a)(1)(A) (requiring prior FERC authorization for a public utility to "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").

[3] S. Rep. No. 115-253, at 2 (2018).

[4] *Id.*

[5] 16 U.S.C. § 824d(d).

[6] *Public Citizen, Inc. v. FERC*, 839 F.3d 1165, 1172 (D.C. Cir. 2016); 16 U.S.C. § 824*l*.

Categories

Energy Regulation, Markets & Enforcement

Lobbying & Public Policy

Power

Renewable Energy