**Testimony of Marc Spitzer**
**Commissioner, Federal Energy Regulatory Commission**
**Before the Committee on Energy and Natural Resources**
**United States Senate**
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The first and noblest mission of utility regulation is the protection of the rate-paying public. The Federal Energy Regulatory Commission (FERC) and state utility commissions share this important mission through a matrix of federal and state rules. The primary obligation of FERC is to ensure reliable wholesale energy supplies at just and reasonable rates. As described in Chairman Kelliher's testimony, FERC has adopted a number of mechanisms to fulfill its statutory obligations.

In the Energy Policy Act of 2005 (EPAct 2005), Congress expanded those obligations by amending Section 203 of the Federal Power Act (FPA) to require FERC to consider, among other things, whether a proposed merger or other corporate transaction will result in the improper impairment of utility assets or subsidization of non-utility affiliates. EPAct 2005, section 1289.

In response to EPAct 2005, FERC undertook several rulemaking proceedings to establish regulations and policies governing cross-subsidization and asset impairment attendant to review of transactions under FPA Section 203. A primary objective of these proceedings, particularly in light of the repeal of the Public Utility Holding Company Act of 1935 (PUHCA 1935), was to address potential harm to captive ratepayers.

Among the interests balanced in the FERC rulemakings were how to faithfully discharge the Congressionally-mandated obligation without unnecessarily or counterproductively interfering in the long-standing tradition of “ring-fencing” decisions by state utility commissions. I believe the FERC’s policies achieve the correct balance. In ensuring compliance with the requirement that an applicant demonstrate that a proposed transaction will not result in inappropriate cross-subsidization, FERC has deferred, and I believe should defer, to state utility commissions’ findings regarding ring-fencing. FERC will impose protections regarding cross-subsidization or asset impairment only if prophylactic authority does not exist under state law or if specific state regulatory protections are insufficient to protect captive customers.

FERC’s imposition of additional ring-fencing measures is best exercised as a “backstop” authority rather than as a mechanism to preempt state action. State utility commissions have long employed tools to protect their retail customers from asset impairment and cross-subsidization in various contexts, including proceedings regarding mergers and acquisitions. Thus, where states are willing and able to address cross-subsidization, FERC generally should defer to lawful and effective state utility commission orders.

As Chair of the Arizona Corporation Commission (Arizona Commission), I presided over an application to acquire UniSource Energy Corporation, the parent corporation of Tucson Electric Power Company. *In the Matter of the Reorganization of UniSource Energy Corporation*, Decision No. 67454, ACC Docket No. E-04230A-03-0933 (Jan. 4, 2005). In that case, the Arizona Commission borrowed liberally from the 1997 decision of the Public Utility Commission of Oregon (Oregon Commission) approving the acquisition of Portland General Electric Company by Enron Corp. In approving the 1997 acquisition, the Oregon Commission adopted several ring-fencing provisions that have been described as the "gold standard" for the protection of retail ratepayers from asset impairment and cross-subsidization in the context of a utility merger. The "proof in the pudding," so to speak, is that, due to the ten ring-fencing conditions that the Oregon Commission imposed on that merger transaction, the bankruptcy of Enron Corp. resulted in no negative impacts upon the regulated Oregon utility. Testimony of Commissioner Ray Baum of the Public Utility Commission of Oregon, Technical Conference on Public Utility Holding Company Act of 2005 and Federal Power Act Section 203 Issues, FERC Docket No. AD07-2-000, at 24 (Dec. 7, 2006).

The Arizona case raised potential asset impairment and cross-subsidization concerns. Consequently, the Arizona Commission examined, at great length, all of the potential adverse ratepayer impacts of the acquisition of an Arizona utility by out-of-state interests. This review resulted in the parties to the proceeding, including the Arizona Commission staff, stipulating to the Oregon Commission's ring-fencing language with modest revisions arising from and consistent with Arizona law.

FERC should not presume states are unwilling to protect their retail ratepayers from asset impairment or cross-subsidization. The cases decided by state utility commissions, including my own experience on the Arizona Commission, suggest the contrary is true. Therefore, FERC properly has adopted a "backstop" for those circumstances where the states are without statutory authority, or are unwilling, to impose cross-subsidization protections.

In fact, since the passage of EPAct 2005, FERC has not preempted a state utility commission's ring–fencing determination nor has it imposed views potentially inconsistent with state rules. It is incorrect, however, to contend FERC has failed to fulfill its statutory obligations. For example, in *Puget Energy, Inc.*, 123 FERC ¶ 61,050 (2008), FERC recently approved an FPA Section 203 acquisition conditioned on the Washington Utilities and Transportation Commission (Washington Commission) approval of proposed ring–fencing provisions. If, however, the Washington Commission's cross-subsidization requirements are not adequate to protect customers, the Commission will consider requiring additional ring-fencing protections.

State utility commissions are generally best situated to craft effective ring-fencing conditions to protect utility assets, and most importantly, their own ratepayers. Therefore, where state utility commissions are willing and able to impose adequate ring-fencing rules that protect consumers, the FERC should not preempt or require additional, potentially conflicting, measures.