Federal Energy Regulatory Commission
December 7, 2006
Technical Conference on
PUHCA 2005 and FPA Section 203 Issues
AD07-2-000
Statement of
Chairman Joseph T. Kelliher

"I want to welcome everyone to today's technical conference on issues related to section 203 of the Federal Power Act (FPA) and the Public Utility Holding Company Act of 2005 (PUHCA 2005). In particular, I would like to thank two of our state regulatory colleagues, Commissioner Ray Baum from Oregon and Commissioner Robert Garvin from Wisconsin, for traveling so far to be with us today. We appreciate your help today.

Two of the Commission's earliest initiatives under the Energy Policy Act of 2005 were rulemakings addressing amendments to the Commission's corporate review authority under section 203 of the FPA and implementation of PUHCA 2005. The Energy Policy Act strengthened the ability of the Commission to prevent exercise of market power, by expanding our review authority to encompass transfers of generation-only facilities and certain holding company mergers and acquisitions.

I am pleased Congress gave us this new authority. I had personally asked Congress to grant us this power because I believed that we needed new regulatory tools to discharge our historic duty to protect customers against market power exercise. Congress agreed, and gave us the tools we needed. We moved quickly to implement our new merger review authority, issuing a final rule by unanimous vote.

While the merger language in the Energy Policy Act expanded the scope of the Commission's review, it also largely left intact the Commission's three part public interest test the Commission had established in the Merger Policy Statement. Under that test, the Commission's merger review concentrates on the impact on competition, rates, and regulation.

The new law made an important change to the public interest test, requiring the Commission to make specific findings that a proposed transaction will not result in cross-subsidization of non-utility associate companies within the holding company system or the pledge or encumbrance of utility assets for the benefit of an associate company, unless consistent with the public interest. Preventing cross-subsidization is not a new responsibility for the Commission; it has been a fundamental duty since 1935, a duty we discharge whenever we set rates. Preventing cross-subsidization at the point of a merger is a new responsibility for us.

There are questions about how the Commission should discharge this new responsibility. Some questions relate to the level of deference we should afford our state colleagues in this area. The subject of any safeguards against cross-subsidization, such as ring fencing, would seem to be largely a state-regulated matter. While the Commission must protect wholesale captive customers and transmission customers against inappropriate cross-subsidization of non-regulated activities, the primary beneficiary of any such safeguards would be the retail consumer, which is normally the charge of state regulators, not the Commission. As a general matter, state commissions have authority to protect retail consumers against cross-subsidization and most state commissions have authority to review utility mergers.

A basic question before us is whether in the exercise of our cross-subsidization authority, we should rely primarily on state commissions to exercise their authority to protect state interests and protect retail consumers, or whether we should act independently on behalf of retail consumers? If we act independently, it is possible that Commission actions to prevent cross-subsidization could conflict with actions by state commissions.

The question of whether the Commission should examine a merger's effect on retail customers has arisen before. When this question last arose, the Commission concluded in the merger policy statement, that "where the state commissions have authority to act on the merger, we intend to rely on the state commissions to exercise their authority to protect state interests." Unless a state lacks authority and specifically asks the Commission to step in, the Commission has reviewed impacts only on wholesale matters. The question is whether we should reach the same conclusion here.

PUHCA 2005 is a very different law from the 1935 Act. PUHCA 2005 is primarily a statute that gives the Commission and states increased access to the books and records of public utility holding companies and their members, if necessary to protect utility customers with respect to jurisdictional rates. With one minor exception, it does not give the Commission any new substantive authority.

Although these statutory changes did not take effect until February 8, 2006, the Commission was required by the Energy Policy Act to complete PUHCA implementation rules by December 8, 2005. The Commission met that deadline. Further, because of the interrelationship between PUHCA and some of the section 203 amendments, and the desire to give a measure of regulatory certainty as to what corporate transactions might be jurisdictional under the section 203 amendments, the Commission also completed its section 203 final rule in December 2005. The Commission subsequently refined both rules in several rehearing orders issued early this year. Today we fulfill a promise made in the final rules, and in the rehearing orders, to review a number of issues in a technical conference to be held no later than one year after the effective date of the new provisions.

Now that we have gained some experience under the new laws, our hope is that additional dialogue will help the Commission determine whether additional steps need to be taken to address our regulatory responsibilities or whether current policies and regulations are sufficient at this time. Our regulatory goal is to allow increased investment opportunities in the utility sector and removal of unnecessary regulatory burdens, as envisioned by Congress when it repealed PUHCA 1935, but at the same time ensure just and reasonable rates and the protection of energy customers.

We look forward to hearing today's panelists and we will hold the record open for other interested persons to file written comments by January 26, 2007."