

**Statement of
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Before the

**Committee on Agriculture
Subcommittee on Conservation, Credit, Energy, and Research
United States House of Representatives**

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Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to be here this morning to discuss the provision of reliable electric service in rural America. My name is Cynthia Marlette, and I am General Counsel of the Federal Energy Regulatory Commission (Commission or FERC). I am appearing before you as a staff witness and do not speak for the members of the Commission.

My comments today will focus on the Commission's limited jurisdiction over rural electric cooperatives and on Commission policies that affect the provision of service by electric cooperatives.

As a general matter, the Commission has relatively little authority over the majority of rural electric cooperatives. It generally has no authority to regulate the rates and services of distribution-only utilities of any kind, including distribution cooperatives. To the extent a cooperative engages in wholesale sales of electric energy or transmission in interstate commerce, the Commission has authority to comprehensively regulate those activities only if the cooperative does not receive

funding under the Rural Electrification Act of 1936 (REA) and the cooperative sells four million or more megawatt hours of electricity per year. Of the more than 900 electric cooperatives in the United States, at this time only 15 are subject to such regulation by the Commission.

However, the Commission does have certain limited authorities that apply to REA-financed electric cooperatives and other “non-jurisdictional” entities. This includes authority to order them to provide interconnection and transmission access, authority to enforce their compliance with mandatory reliability standards for the bulk power system, authority to sanction manipulation by any entity in connection with Commission-jurisdictional transactions, and certain authority to require any market participant to disseminate to the public information regarding the availability and pricing of wholesale electric energy and transmission service. Additionally, electric cooperatives have long been power customer participants in FERC proceedings involving investor-owned public utilities, and the Commission’s policies clearly can affect rural cooperatives and the consumers they serve. These matters are discussed in further detail below.

Regulation of Public Utilities under the Federal Power Act

The Commission’s primary jurisdictional responsibilities involving the electric industry are found in the Federal Power Act (FPA). Under the FPA, the Commission regulates the rates, terms and conditions of wholesale sales of electric energy and transmission in interstate commerce by public utilities. It also

regulates certain corporate activities of public utilities and public utility holding companies. Most public utilities are investor-owned companies. They do not include governmental entities (such as municipal utilities, state power agencies and federal power marketing agencies) or REA-financed cooperatives. The FPA defines a public utility to include individuals and corporations that own or operate facilities used for wholesale sales of electric energy in interstate commerce, or for transmission of electric energy in interstate commerce. While some electric cooperatives meet this definition, the Commission historically interpreted the FPA to exempt from public utility regulation those electric cooperatives receiving REA financing. In 2005, Congress codified and expanded this exemption by amending the FPA to expressly exclude from the Commission's general FPA authority electric cooperatives that either receive REA financing or sell less than four million megawatt hours of electricity per year. As a result, the vast majority of electric cooperatives are now expressly excluded from rate regulation under the FPA.

For the handful of electric cooperatives that no longer have REA financing and that sell four million or more megawatt hours of electricity per year, the Commission must find the rates, terms and conditions of their wholesale power sales and transmission in interstate commerce to be just, reasonable and not unduly discriminatory or preferential, and their rate schedules or tariff authorizations must be on file at FERC. These electric cooperatives are also subject to regulation of some of their corporate activities. As noted above, only 15

of the over 900 electric cooperatives in the United States are subject to regulation by the Commission as public utilities under the FPA.¹

Other Regulation under the Federal Power Act

While most rural electric cooperatives are not subject to FERC regulation as public utilities, they may nonetheless be subject to certain provisions of the FPA that apply more broadly to the wholesale sale or transmission of electric energy in interstate commerce. Major provisions affecting electric cooperatives are discussed below.

FPA Sections 210 and 211 Interconnections and Transmission Service

Under FPA section 210, the Commission may order on a case-by-case basis the physical connection of certain generation and transmission facilities upon request and a determination by the Commission that, among other things, such interconnection is in the public interest. Under FPA section 211, the Commission may order the provision of transmission service upon request and, again, a determination that, among other things, the service is in the public interest. Any

¹ These electric cooperatives are: ACES Power Marketing LLC; American Cooperative Services Inc.; Continental Electric Cooperative Services, Inc.; Cooperative Energy Incorporated; Energy Cooperative of New York, Inc.; Energy Cooperative of PA, Inc.; Georgia Energy Cooperative; Golden Spread Electric Cooperative, Inc.; GS Electric Generation Cooperative; Newcorp Resources Electric Cooperative, Inc.; Old Dominion Electric Cooperative, Inc.; PNGC Power; Rainbow Energy Marketing Corp.; Wabash Valley Power Assoc.; and, Wolverine Power Supply Cooperative.

person that sells electric energy is subject to the possibility of a mandatory interconnection order under section 210. Any entity that owns, operates, or controls facilities used for the transmission of electric energy in interstate commerce and for the sale for electric energy at wholesale is subject to the possibility of a transmission order under section 211.

Sections 210 and 211 therefore apply not only to public utilities but also to government-owned utilities and electric cooperatives. This means that the Commission, upon application by an eligible wholesale power seller or power customer, may order cooperatives to provide access to, and transmission over, their wires. Similarly, cooperatives as customers have the ability to request such service from public utilities as well as otherwise non-jurisdictional entities by filing requests pursuant to sections 210 and 211. While the Commission has exercised its authority under section 210 and 211 to require public utilities to provide service to electric cooperatives on several occasions, the Commission to date has not directed an electric cooperative to provide service to others under sections 210 or 211.

Open Access Transmission and FPA Section 211A

Electric cooperatives also have certain transmission-related rights and obligations under the Open Access Transmission Tariff (OATT) required to be filed by public utilities pursuant to the Commission's Order No. 888, issued in April 1996. In that order, the Commission required all public utilities that own,

control or operate facilities used for transmitting electric energy in interstate commerce to offer non-discriminatory service on their transmission facilities pursuant to an OATT on file with the Commission. It also obligated such public utilities to “functionally unbundle” their generation and transmission services. This meant public utilities had to take transmission service for their own new wholesale sales and purchases of electricity under the open access tariffs and to separately state their rates for wholesale generation, transmission and ancillary services. Electric cooperatives that are wholesale sellers or wholesale buyers of electric energy may use the OATTs filed by public utilities to access transmission service on a non-discriminatory basis. This means that they, like other market participants, can reach alternative suppliers and buyers using the transmission systems of public utilities regulated by the FERC.

Last year, the Commission revisited the terms and conditions of the OATT and adopted several reforms to ensure that it continues to achieve its core objective of remedying undue discrimination in the provision of transmission service. Of particular interest to rural electric cooperatives, the Commission directed transmission providers to implement new service options for long-term firm point-to-point customers, increasing the ability to obtain transmission service when capacity is limited. The Commission also relaxed penalties for imbalances created by intermittent resources (such as wind) delivering power to the grid. The Commission directed transmission providers to implement open and coordinated processes for transmission planning and to develop consistent practices governing

the calculation of available transfer capability (ATC). Taken together, these and other reforms adopted by the Commission will better enable customers, including electric cooperatives, to obtain nondiscriminatory transmission service from public utilities.

It is important to note that, while the OATT obligations do not apply directly to most electric cooperatives, as a condition of an electric cooperative (or any other entity) taking service from a public utility under its open access tariff, the cooperative has an obligation to provide reciprocal transmission service to the public utility if the cooperative, or its affiliate, owns or controls transmission facilities. Unless the electric cooperative obtains a waiver of its obligation to provide reciprocal service, denial of service by the cooperative may result in denial of service by the public utility. Approximately 40 electric cooperatives have sought and obtained a full or partial waiver of the obligation to provide reciprocal transmission service. The Commission also established a voluntary “safe harbor” process whereby non-jurisdictional entities such as electric cooperatives could voluntarily submit their own OATTs to the Commission in order to meet the reciprocity condition and thus help avoid public utility complaints that they are not providing reciprocal service. Nine electric cooperatives have voluntarily submitted open access tariffs to satisfy their reciprocity obligations.²

² These electric cooperatives are: Basin Electric Power Cooperative; Big Rivers Electric Corporation; East Kentucky Power Cooperative; Hoosier Energy

To address the Commission's lack of direct jurisdiction to order electric cooperatives and other non-jurisdictional entities to provide non-discriminatory open access (i.e., access to all eligible customers) transmission services, in the Energy Policy Act of 2005 Congress provided the Commission with authority in new section 211A of the FPA to direct unregulated transmitting utilities to provide transmission service to third parties on a basis that is comparable to the service they provide themselves, at rates that are comparable to those they charge themselves. This authority is in addition to the open access reciprocity condition contained in public utility open access tariffs and the Commission's authority to order transmission on a case-by-case basis under FPA section 211, discussed above. Section 211A can be applied, however, only to those unregulated transmitting utilities that sell four million or more megawatt hours of electricity per year. To date, the Commission has found the voluntary reciprocity approach sufficient and no electric cooperative has been directed to provide transmission service pursuant to new section 211A.

FPA Section 215 Mandatory Reliability Standards

All users, owners and operators of the bulk power system, including electric cooperatives, are now subject to mandatory reliability standards approved

Rural Electric Cooperative; Southern Illinois Power Cooperative; Southwest Transmission Cooperative; Sunflower Electric Power Corporation; Tri-State G&T Association; and, Umatilla Electric Cooperative Association.

by the Commission pursuant to section 215 of the FPA, which was enacted by Congress in the Energy Policy Act of 2005. There currently are 94 mandatory reliability standards that have been developed by the North American Electric Reliability Corporation (NERC) and approved by the Commission after receiving notice and comment from industry participants, including electric power cooperatives. Under section 215, NERC may impose penalties for violations of these mandatory reliability standards, subject to review by the Commission, or the Commission itself may impose such penalties directly.

FPA Section 220 Electricity Market Transparency

The Energy Policy Act of 2005 directed the Commission to facilitate price transparency in markets for the sale and transmission of electric energy in interstate commerce and authorized the Commission to issue rules requiring any market participant to disseminate to the public information regarding the availability and prices of wholesale electric energy and transmission service. This permits the Commission to require information to be provided by otherwise non-jurisdictional entities such as electric cooperatives, unless they have a de minimis market presence. However, the Commission to date has not issued any rules or orders under this new authority.

FPA Sections 221 and 222 Prohibitions on Filing False Information and Energy Market Manipulation

The Energy Policy Act of 2005 granted the Commission authority to prosecute the willful and knowing reporting to a federal agency of false information related to the price of electricity sold at wholesale or the availability of transmission capacity if the person or any other entity knew the information to be false at the time of the reporting and intended to fraudulently affect the data being compiled by the federal agency. It also gave the Commission authority to sanction the use of manipulative or deceptive devices in connection with the purchase or sale of electric energy or transmission subject to the Commission's jurisdiction. These provisions apply to any entity and, therefore, prohibit electric cooperatives from engaging in such false reporting or manipulative behavior.

Policies for Interconnecting Generators to the Transmission Grid

In order to facilitate the interconnection of new generation facilities to the transmission grid, the Commission has adopted standard procedures and agreements for the interconnection of generation facilities with the transmission facilities of jurisdictional public utilities. In the past, transmission providers with their own generating facilities had the incentive and ability to deny, delay, or make expensive the interconnection of rival generating facilities. The Commission eliminated that ability of public utilities to discriminate through a series of rulemaking proceedings to standardize the generator interconnection process. The

resulting procedures and agreements vary depending on the size and nature of the generation facility, providing flexibility for small facilities and non-synchronous technologies, such as wind plants. Taken together, these standardized procedures and agreements offer comparable, open access to rival generators, including electric cooperatives seeking to interconnect with their local transmission provider. It should be noted, however, that the Commission's interconnection authority extends only to transmission facilities. It does not extend to local distribution facilities that are not used for wholesale sales.

Recently, the Commission has expressed concern regarding the growing backlog of generator interconnection requests. In some regions, many interconnection requests that are pending in study queues appear to be for speculative or unlikely projects. Because interconnection requests are studied on a first come, first served basis, the resulting backlog in study queues is causing delay for projects that wish to move forward. This problem seems to be particularly prevalent in markets operated by regional transmission organizations (RTOs) and independent system operators (ISOs), which have attracted significant new entry to the marketplace. RTOs and ISOs are non-profit entities that, except for the ERCOT region of Texas, are regulated by the Commission as public utilities. They operate transmission facilities within a single state or within a region encompassing many states. They are not affiliated with any market participant and provide non-discriminatory access to the interstate transmission grid. They also operate organized real-time energy markets, and some also

operate day-ahead markets.³ Earlier this year, the Commission provided guidance to RTOs and ISOs regarding possible reforms that could be implemented to alleviate the backlog in processing generator interconnections. In response, interconnection queue reform proposals have been filed by the California ISO and the Midwest ISO. The Commission acted on the California ISO proposal earlier this month, while the Midwest ISO proposal remains pending.

Regional Transmission Planning

As noted above, last year the Commission directed public utility transmission providers to update their open access tariffs to include an open, coordinated and transparent process for transmission planning. This reform bears special mention given that transmission planning is vital to ensuring that customers, including rural electric cooperatives, have robust and reliable access to markets. In the past, however, there were very few specific requirements regarding how customers should be treated in the transmission planning process. As a result, transmission providers had the ability to unduly discriminate when planning for system expansions, potentially favoring access to their own resources over those of their customers.

³ Currently there are six such entities regulated by the Commission: California Independent System Operator Corp. (California ISO); ISO New England Inc. (ISO New England); Midwest Independent System Operator, Inc. (Midwest ISO); PJM Interconnection LLC (PJM); New York Independent System Operator, Inc. (NYISO); Southwest Power Pool, Inc. (SPP).

To remedy that potential for undue discrimination, the Commission directed all public utility transmission providers to develop and implement planning processes that allow for customer involvement on a local and regional level. In adopting this reform, the Commission noted the particular emphasis that Congress placed on the development of transmission infrastructure in the Energy Policy Act of 2005. By opening the transmission planning process and granting customers access to planning-related studies and information, the Commission has ensured that investments in transmission infrastructure are made in coordination with the customers that are being served.

Incentives for New Transmission and Allocating the Cost of Transmission Upgrades

Pursuant to a directive from Congress in the Energy Policy Act of 2005, the Commission within one year of the statute's enactment put in place rules to provide incentive-based rate treatment for new transmission facilities. In new section 219 of the FPA, Congress specified that these incentives must be “for the purpose of benefitting consumers by ensuring reliability and reducing the cost of delivered power by reducing transmission congestion.” A number of incentive requests have been filed under the new rules, some of which involved projects to allow location-constrained resources, such as wind power, to reach the transmission grid and other upgrades necessary to meet state renewable energy

portfolio standards. These types of upgrades can benefit both suppliers and customers of renewable energy.

With the nation's need for new transmission facilities and upgrades comes the difficult task of determining who will pay for that investment. This can be a particularly difficult issue for remote facilities needing to interconnect from long distances. The Commission's policy has been to encourage regional, consensual cost allocation solutions where possible. As part of the open and transparent planning processes discussed above, the Commission directed public utilities to work with their stakeholders to address the issue of cost allocation for new projects that do not fall under existing rate structures. The Commission has acted on a number of filings by public utilities seeking to comply with these provisions, while others remain pending before the Commission.

Competitive Power Markets

In addition to the Commission's policies and requirements regarding open access, interconnection, transmission planning, and incentives and cost allocation for new transmission facilities, Commission policies supporting the development of competitive power markets also may affect rural electric cooperatives both as power buyers on behalf of their members and as power sellers in those markets. In recent years, the Commission has encouraged the creation of RTOs, discussed above, to operate the transmission system as well as operate real-time and day-ahead auction-based markets for the purchase and sale of wholesale electric

power. Two-thirds of the United States population is supplied by wholesale markets operated by Commission-approved RTOs. Earlier this year, the Commission instituted a rulemaking proceeding to consider reforms to RTO markets that would improve their operation, ensuring that they remain competitive and responsive to the needs of customers.

In order for entities that are subject to the Commission's ratemaking jurisdiction to sell electric energy into an RTO-operated energy market, they must obtain authorization to sell power at market-based rates. Such authorization is considered on a case-by-case basis and requires a showing that the requesting entity and its affiliates lack market power. The Commission has permitted market-based rates for generation sales by a variety of sellers, including traditional investor-owned utilities, independent generators, and independent and affiliated power marketers. Entities located outside of the RTO markets, or selling under bilateral contracts, may also seek authorization to make wholesale sales at market-based rates, again upon a showing that they and their affiliates lack market power. Of the 15 electric cooperatives subject to the Commission's ratemaking jurisdiction, all but one have sought and obtained market-based rate authority.

Hydropower Licensing and PURPA

In addition to the Commission's ratemaking jurisdiction under Part II of the FPA, the Commission has additional responsibilities under Part I of the FPA regarding the licensing of nonfederal hydropower projects located on navigable

waterways or federal lands, or connected to the interstate electric grid. In order to grant a license, the Commission must ensure that the project to be licensed is best adapted to a comprehensive plan for developing the waterway for beneficial public purposes. To the extent an electric cooperative owns or operates a hydropower project, the licensing requirements of Part I of the FPA may apply. To date, 14 electric cooperatives have sought and obtained licenses from the Commission for 21 hydropower projects.

The Commission also has responsibilities under the Public Utility Regulatory Policies Act of 1978 (PURPA) to enforce the obligations of electric utilities to purchase electric energy from and sell electric energy to qualifying cogeneration and small power production facilities (QFs). Under PURPA, electric utilities were generally required to offer to purchase available energy from QFs, and to provide electric service to QFs, at just, reasonable and nondiscriminatory rates. These mandatory purchase and sale obligations apply to all electric utilities, which PURPA defines broadly to include all entities selling electric energy. Electric cooperatives are therefore subject to the mandatory purchase and sell obligations imposed by PURPA.

In the Energy Policy Act of 2005, however, Congress amended PURPA to direct the Commission to lift the mandatory purchase and sale obligation if it finds, in effect, that there is a sufficiently competitive market for the QF to sell its power. The Commission implemented this directive through a rulemaking proceeding in 2006, providing a process by which electric utilities may apply to be

relieved of the requirement that they enter into new contracts or obligations for the purchase of electric energy from QFs. Prior to these reforms, a number of electric cooperatives had sought and obtained waiver from the Commission of the mandatory purchase and sale obligation. To date, no electric cooperative has requested termination of the purchase and sale obligation pursuant to the amendments adopted in the Energy Policy Act of 2005.

Conclusion

The Commission generally has no jurisdiction over distribution-only utilities, including rural distribution cooperatives. To the extent a cooperative engages in wholesale power sales or transmission in interstate commerce, relatively few of such cooperatives are subject to regulation by the Commission as public utilities.

The Commission does have limited authority over cooperatives under certain sections of the FPA, including interconnection and wheeling authority under sections 210 and 211, the enforcement of reliability standards under section 215, the wholesale market transparency provisions of section 220, and the prohibition of false reporting and manipulative behavior under sections 221 and 222. While the Commission has limited experience with, and jurisdiction over, cooperatives, its policies clearly can affect the consumers served by rural cooperatives. Cooperatives have nondiscriminatory access to transmission service under the Commission's open access policies, with corresponding obligations to

provide service to public utilities from which they receive service. Cooperatives also may use the Commission's non-discriminatory procedures for interconnecting generating facilities with the transmission facilities of public utilities. Further, they have access to competitive power markets, including the organized markets operated by RTOs, that enhance their ability to purchase and sell electricity generated from their resources.

To the extent an electric cooperative owns or operates a hydropower project, it may be required to obtain a license for that project under Part I of the FPA. To the extent it has not obtained a waiver from the Commission, an electric cooperative also will be required to offer to purchase and sell electricity to and from QFs under PURPA.

I would be happy to answer any questions that members of the Subcommittee may have.