Written Testimony of

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I. Introduction

Chairman Whitfield, Ranking Member Rush and Members of the Subcommittee:

My name is Bill Marsan and I am Executive Vice President and General Counsel at American Transmission Co. ("ATC"). ATC is a transmission-only electric utility company that constructs, owns and operates transmission facilities in Wisconsin and the Upper Peninsula of Michigan. ATC also has an ownership interest in transmission facilities in California.

ATC was formed in 2001 when vertically-integrated utilities operating in Wisconsin and Michigan transferred ownership of their transmission assets to form a new, stand-alone transmission company. ATC is privately-held and our ownership group includes investor-owned, cooperative and municipal utilities.

The transaction to create ATC required approval by the Federal Energy Regulatory Commission ("FERC") pursuant to section 203 of the Federal Power Act ("FPA"). Subsequent to ATC's formation, the company continued to acquire utility assets subject to FERC's section 203 regulation. I am testifying today as a result of ATC's on-going experience with section 203 and our concern that FERC's interpretation of the statute goes against Congressional intent.

II. Summary

For seventy years, section 203 of the FPA[1] was subject to a minimum monetary threshold of $50,000, which was interpreted by FERC to apply to <u>both</u> dispositions and acquisitions by public utilities of FERC-jurisdictional utility facilities (even though the minimum monetary threshold was expressly included by Congress only in the "disposition" language of FPA section 203).[2] This threshold served as a "floor" to ensure that the public utilities would only be required to file, and FERC to pre-approve, proposed transactions of some material significance.[3]

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1 *See* Exhibit A for the pre-EPAct 2005 version of FPA section 203.

2 *See* Exhibit B (FERC's pre-EPAct 2005 interpretation of FPA section 203(a) minimum monetary thresholds). Note that the "merge or consolidate" language of FPA section 203 has been broadly interpreted by FERC as applying to "acquisitions" of FERC-jurisdictional utility facilities, generally.

3 Each entity involved in a transaction (typically, but not always, a public utility) must independently determine whether it requires FPA section 203 prior authorization from the FERC before it may either acquire, or dispose of (as the case may be), FERC-jurisdictional electric utility facilities. Where the FPA section 203 minimum monetary threshold is equal for both acquisitions and dispositions, and the amount of electric utility facilities at issue is below the minimum monetary threshold established by Congress in the FPA, then those particular transactions can close without the necessity of either party applying for or obtaining FERC FPA section 203 prior authorization.

EPAct 2005 amended FPA section 203 to increase the dollar threshold, from $50,000 to $10,000,000, of FERC's authority to pre-approve transactions by public utilities involving FERC-jurisdictional utility facilities. This was done to reflect the changing marketplace from 1935 to 2005, ultimately relieving the burden on public utilities and keeping the administrative responsibilities of FERC focused.

Unfortunately, FERC's Order 669 implementing this change does not account for congressional intent. Specifically, in the face of an apparent drafting error regarding the text of the statute, FERC abandoned its own decades-old application of the minimum monetary threshold and adopted a literal interpretation, finding that the new section 203 eliminated the monetary threshold entirely for acquisitions or mergers of jurisdictional facilities. In other words, rather than increasing the threshold for a utility acquiring assets from $50,000 to $10 million, FERC eliminated the threshold completely so that even the acquisition of a fully-depreciated $0 facility required Commission pre-authorization under Section 203.

This has led to absurd results. For example, while the seller of a utility facility valued at $10 million or less may sell a transmission facility without regulatory approval, FERC requires the buyer of the same asset to get pre-approval. Indeed, FERC's interpretation requires prior approval for the acquisition of utility property that has <u>any</u> monetary value attached to it – or <u>no monetary value at all</u>. Due to the apparent drafting error, rather than *de minimis* transactions

no longer requiring approval, now virtually *all* acquisitions, even the purchase of a $1 switch (an actual example), require a FERC order approving the transaction.

FERC's interpretation frustrates the intent of the amendment to section 203 in EPAct 2005. Congress clearly intended to reduce the regulatory burden on utilities (as well as the administrative burden on FERC) by raising the threshold for FERC pre-approval. Congress did this with good reason. Public utilities routinely buy and sell utility assets that have minimal impact on the bulk electric system and do not affect FERC's ability to regulate. The historic threshold of $50,000 made no sense in 2005, let alone today's economy. Congress sensibly raised the threshold to $10 million in order to spare utilities, customers, and the Commission the administrative cost of the pre-approval process for smaller capital expenditures, while maintaining FERC's oversight on significant transactions with the potential to impact the grid.

FERC's current interpretation of section 203 has imposed a new and unnecessary regulatory burden on public utilities. It has also increased the risk that public utilities will be targeted by the FERC Office of Enforcement for violations of section 203. At least one such FERC Enforcement action for failure to receive pre-approval for relatively *de minimis* acquisitions has been resolved, and it is reasonable to expect more. FERC has denied requests to revise its regulations to

conform to the intent of the EPAct 2005, and has made it clear that only a statutory change to section 203 will solve the problem.

On December 3, 2015, the House passed H.R. 8, the North American Energy Security and Infrastructure Act of 2015. Section 3222 of H.R. 8 clarifies FPA section 203 to expressly include a monetary threshold of greater than $10 million for FERC pre-approval of mergers and acquisitions of jurisdictional utility property, as Congress intended when it passed EPAct 2005. This change would serve at least three important purposes:

1. It would make FPA section 203 internally consistent between sales and acquisitions;
2. It would give clear instruction to FERC about its pre-approval authority; and
3. It would relieve an unnecessary regulatory burden on public utilities.

H.R. _____, a bill to amend section 203 of the Federal Power Act, adopts the language of section 3222 of H.R. 8 in a stand-alone bill. This legislation would clarify section 203 and enable a more rational regulatory approach by FERC.

FPA section 203 is not working as intended by Congress. Congress's effort to amend section 203 in the Energy Policy Act of 2005 ("EPAct 2005") to account for the operational and economic realities of today's bulk electric power system has been frustrated by FERC's interpretation of the statute. Only a legislative

solution can fix the perceived inconsistency in section 203 and clarify the correct scope of FERC's pre-approval authority regarding mergers and acquisitions of jurisdictional utility property by public utilities. H.R., _____, a bill to amend section 203 of the Federal Power Act, would accomplish this goal and ATC strongly supports its passage into law.

III. Discussion

In August 2005, EPAct 2005 became law. Section 1289 of EPAct 2005 divided FPA section 203 into separate statutory sub-sections, added a new sub-section granting FERC jurisdiction to review sales of certain generating facilities, and increased the minimum monetary threshold of $50,000 to $10,000,000 for three of the four statutory sub-sections.[4] As the result of an apparent drafting error (or perhaps with the expectation that FERC would continue its decades-long practice of "reading in" the applicable minimum monetary threshold for "acquisitions" of jurisdictional facilities), the EPAct 2005 FPA section 203 statutory sub-section pertaining to acquisitions of FERC-jurisdictional facilities did not include an express minimum monetary threshold of $10,000,000 (or any other amount).

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[4] *See* Exhibit C (excerpting Section 1289 from EPAct 2005). Note that the language in EPAct 2005's FPA section 203(a)(1)(b) (governing "acquisitions") is effectively identical to the statutory language that FERC had consistently interpreted as being subject to the same minimum monetary threshold imposed on "dispositions" from 1966 from 2006.)

In 2005, FERC initiated administrative rulemaking proceedings to promulgate revised regulations to implement Congressional directives set forth in EPAct 2005. During this Order No. 669 rulemaking proceeding, the Energy Power Supply Association ("EPSA"), a national trade organization representing competitive power suppliers, requested that FERC revise its proposed regulations implementing post-EPAct 2005 FPA section 203 to conform to FERC's long-standing practice of interpreting the section 203 minimum monetary threshold as applying to acquisitions as well as sales of jurisdictional facilities.[5] In Order No. 669, FERC refused to revise its proposed regulations as EPSA had requested and stated, essentially, that as a creature of statute it was required to strictly follow the letter of the law drafted by Congress, and since the relevant EPAct 2005 FPA section 203 sub-section included no express minimum monetary threshold, Congress must have intended for that minimum monetary threshold to be zero.[6]

FERC's action in Order No. 669 reversed a long-standing practice of applying a minimum monetary threshold to FPA section 203 "acquisition"

[5] *See* Exhibit D (excerpting relevant section of EPSA's Comments to FERC's Notice of Proposed Rulemaking).

[6] *See* Exhibit E (excerpting relevant section of FERC's Order No. 669 addressing EPSA's Comments). FERC did not explain in Order No. 669 its abrupt deviation from its forty-year practice of "reading in" a minimum monetary threshold for FPA section 203 acquisitions. It is apparent, however, that an obvious result of FERC's reversal in policy was a huge increase in the scope of FERC's FPA section 203 jurisdiction to regulate proposed transactions involving FERC-jurisdictional electric transmission facilities.

transactions that dated back to 1966.[7] Now, instead of EPAct 2005 increasing the minimum monetary threshold for FERC review of FPA section 203 transactions involving the acquisition or disposition of jurisdictional facilities from $50,000 to $10,000,000 (as Congress clearly intended), that minimum monetary threshold has instead been effectively decreased to $0. Since each proposed transaction typically involves two FERC-jurisdictional public utilities (one disposing and one acquiring), the practical effect of FERC's reversal in policy in its Order No. 669 rulemaking proceeding is that now each and every transaction involving public utilities' transfer of ownership of FERC-jurisdictional electric utility facilities must come before the Commission pursuant to FPA section 203 for a full review (because even if the "disposing" public utility is not subject to FPA section 203 because the value of facilities is under $10 million, the "acquiring" utility is now subject to a $0+ minimum monetary threshold for the acquisition and requires prior FERC authorization per section 203).

This rule change is a substantial administrative burden on FERC-regulated public utilities,[8] and, to the extent that FERC's post-EPAct 2005 policy change

[7] FERC's regulations (section 33.1(a)(2) required section 203 applications for mergers, consolidations and acquisitions of jurisdictional assets *only if they meet the $50,000 threshold.*

[8] For example, in 2013 ITC Midwest LLC submitted a fifty-two page FPA section 203 application to FERC requesting prospective authorization, pursuant to FPA section 203(a)(1)(B), for a past purchase of 1/10 of one mile of 34.5kV transmission line with a purchase price of $0, and a net book value of $1. *See ITC Midwest LLC*, Application for Approval of Acquisition of a Portion of a Transmission Line Pursuant to Section 203 of the Federal Power Act, Docket No. EC13-51-000, filed Dec. 14, 2012.

may not be common knowledge (or fully appreciated), also represents a substantial increase in compliance risk for public utilities. [9]

As noted above, FERC has declined to reconsider the reversal of its long-standing policy of applying a minimum monetary threshold to FPA section 203(a)(1)(B) "acquisition" transactions, and indicated that it would only re-institute such a threshold if expressly ordered to do so by Congress.

IV. Conclusion

H.R. ____, a bill to amend section 203 of the Federal Power Act, solves the issue of FERC's problematic interpretation of the law. This legislation would adopt the change to FPA section 203 contained in section 3222 of H.R. 8, the North American Energy Security and Infrastructure Act of 2015, to expressly include a minimum monetary threshold of $10,000,000 for merge/consolidate "acquisitions" of FERC-jurisdictional electric utility facilities, to mirror the

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[9] In March 2014, the Commission issued an Order Approving Stipulation and Consent Agreement ("ITC Order") following ITC*Transmission*, LLC's (and other affiliates/subsidiaries) ("ITC") self-report to FERC Office of Enforcement of, as relevant here, twenty FPA section 203(a)(1)(B) violations (i.e., transactions involving ITC's acquisition of FERC-jurisdictional electric transmission facilities for which ITC should have, but did not, require prior authorization from FERC before consummating). The ITC Order stated, in relevant part, that "[FERC] Enforcement determined that "[ITC] has acquired Commission-jurisdictional assets without the prior Commission authorization required under FPA section 203(a)(1)(B). In total, the ITC Companies engaged in 20 unauthorized transactions between 2005 and 2011, which included transactions ranging from $0 to approximately $6.7 million" and that the ITC Companies had "agreed to pay a civil penalty of $750,000 to settle this investigation." *See Int'l Transmission Co., et al*., 146 FERC ¶ 61,172, Stipulation and Consent Agreement at PP 8-9 (2014). To confirm, each of the twenty self-reported ITC FPA section 203(a)(1)(B) violations occurred after 2006 (and after FERC changed its policy regarding the minimum monetary threshold for FPA section 203 "acquisitions"), and had the $10 million minimum monetary threshold for FPA section 203 "acquisitions" been in place as Congress had intended in EPAct 2005, none of the twenty ITC transactions would have required Commission authorization under FPA section 203(a)(1)(B) (and thus ITC's failure to obtain such authorization would not have resulted in a violation of the Federal Power Act subjecting ITC to prosecution by FERC Office of Enforcement).

existing $10,000,000 minimum monetary threshold set forth in the other three subsections of § FPA 203(a)(1).[10]

This amendment is consistent with the intended outcome of EPAct 2005 and would accomplish several important goals. The amendment would require FERC to restore a previous, and long-standing, minimum monetary threshold applied to public utilities' acquisitions and dispositions of FERC-jurisdictional utility facilities; would correct an apparent oversight that resulted in Congress's intent in EPAct 2005 not being completely implemented by the Commission; would reduce the regulatory burden and potential enforcement liability on public utilities; and would increase administrative efficiency by ensuring that FERC reviews only those proposed transactions concerning FERC-jurisdictional facilities that are materially significant.[11]

On behalf of ATC, I want to thank the subcommittee for inviting me to testify today and I stand ready to answer any questions the Members may have of me.

[10] Section 3222 of H.R. 8 reads as follows: "*SEC. 3222. CLARIFICATION OF FACILITY MERGER AUTHORIZATION. Section 203 (a)(1)(B) of the Federal Power Act (16 U.S.C. 824(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"*.

[11] It is important to emphasize that the proposed change would not effect in any way FERC's jurisdiction over the rates, terms and conditions of service under section 205 of the FPA. Stated another way, once a company like ATC acquires a facility, FERC would continue to oversee the rate and transmission tariff governing that facility.

Exhibit A

Pre-EPAct 2005 § 203(a) of the FPA

As enacted in 1935, § 203(a) of the Federal Power Act provided:

> No public utility shall 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 $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. Upon 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. After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

16 U.S.C.A. § 824b(a) (1935) (subsequently amended by EPAct 2005)

Exhibit B

FERC's pre-EPAct 2005 Interpretation of FPA section 203(a) Minimum Monetary Thresholds

> In the case of acquisitions we have by regulation…limited the necessity to file applications pursuant to Section 203 to mergers or consolidations with facilities of another person having a value in excess of $50,000. Although the statute does not impose a $50,000 limitation for acquisition for facilities as it does for disposition, there is no reason why we cannot impose such a limitation by regulation. Section 309 of the Act provides that the Commission shall have power to issue regulations 'as it may find necessary or appropriate to carry out the provisions of this Act.'
>
> Re Duke Power Co., 64 P.U.R.3d 497 (1966)

Exhibit C

Post-EPAct 2005 § 203(a)(1) of the FPA

§ 203(a)(1) of the Federal Power Act, as amended by EPAct 2005, provides:

> (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 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 ratemaking purposes.

16 U.S.C.A. § 824b(a)(1)(A-D) (2006).

Exhibit D

Electric Power Supply Association's Request to Modify FPA § 33.1(a)(1)(ii)

In October 2005, FERC proposed modifications to its regulations to conform them to EPAct 2005's amendment of FPA §203. In November 2005, Electric Power Supply Association (EPSA) submitted its comments to FERC regarding the modifications. Set forth, below, is an excerpt from EPSA's comments on FERC's proposed changes to FERC regulations regarding "mergers or consolidations" (i.e., acquisitions) following Congress' EPAct 2005 amendment to §203 of the FPA.

> In proposed Section 33.1 of the Commission's regulations, the Commission neglected to propose any dollar threshold for mergers or consolidations, unlike the other transactions subject to Section 203. The failure to include the $10 million threshold appears to be an oversight. The currently effective regulations establish a $50,000 threshold for all transactions subject to Section 203, including mergers, consolidations and acquisitions of jurisdictional facilities and as the Commission notes, the $10 million threshold is similar to the prior $50,000 threshold.
>
> Congress did not intend to change this statutory and regulatory structure. The mergers and acquisitions clause of the currently effective Section 203 and Section 203 as amended by EPAct are substantially the same. Although the currently effective statutory language, like the newly enacted EPAct language, did not codify the monetary threshold of $50,000 with respect to mergers and consolidations, for decades the Commission, by regulation, limited the necessity to file applications pursuant to Section 203 with respect to mergers, consolidations and acquisitions only to those that met the then-effective $50,000 threshold.
>
> Importantly, if the Commission does not apply the $10 million threshold to transactions covered by the merger and consolidation clause of Section 203, it will have the perverse result of effectively nullifying the threshold applicable to dispositions of jurisdictional facilities. This will occur because the Commission has determined that the acquisition of jurisdictional facilities by a public utility constitutes a merger or consolidation that requires approval under Section 203. Accordingly, if two public utilities enter into a transaction to transfer a jurisdictional asset with a value of less than $10 million, the entity disposing of the asset (the seller) will not require Section 203 approval, but the entity acquiring the asset (the buyer) will require Section 203 approval. This result is clearly

> contrary to Congressional intent to simply raise the thresholds for transactions that were already subject to the Commission's jurisdiction under Section 203.
>
> The NOPR provides no reason for the Commission to change its interpretation of Section 203, or to alter its past practice of applying the statutory dollar threshold to all types of transactions requiring Section 203 approval, including mergers and acquisitions. Accordingly, the Commission should modify its proposed regulations to incorporate the $10 million threshold for mergers and consolidations (and therefore acquisitions) as well, similar to the language currently contained in Section 33.1(a)(2) of its existing regulations.

Rulemaking Comment of the Electric Power Supply Association under RM-05-34 at pp. 5-6 (November 7, 2005) *citing Duke Power Company*, Opinion No. 503, 36 FPC 399 at 403 (1966), *overturned on other grounds*, *Duke Power Company v. FPC*, 401 F.2d 930 (D.C. Cir. 1968)

Exhibit E

FERC's Response to Electronic Power Supply Association's Request

On December 23, 2005, FERC issued Order No. 669 regarding transactions subject to FPA § 203. In that order, FERC addressed EPSA's comments regarding the proposed changes to FERC regulations. An excerpt is set forth, below:

> Electric Power Supply Association (EPSA) requests that the Commission modify the text of proposed section 33.1(a)(1)(ii)[[12]] to clarify that any merger or consolidation must exceed the $10 million threshold before section 203 filing approval is required. It states that the Commission should not alter its past practice of applying the statutory dollar threshold to all types of transactions requiring section 203 approval, including mergers and acquisitions. EPSA explains that the mergers and acquisitions clause of the currently effective section 203 and section 203 as amended by EPAct 2005 are substantially the same and do not specify a value amount. EPSA points out, however, that although the currently effective statutory language, like the newly enacted EPAct 2005 language, did not codify the monetary threshold with respect to mergers and consolidations, for decades the Commission's regulations (section 33.1(a)(2)) have required section 203 applications for mergers, consolidations and acquisitions only if

[12] 18 C.F.R. sec. 33.1, resulting from the Order No. 669 FERC administrative rulemaking proceeding, currently provides:

> § 33.1 Applicability, definitions, and blanket authorizations.
> **(a)** *Applicability*. (1) The requirements of this part will apply to any public utility seeking authorization under section 203 of the Federal Power Act to:
> **(i)** 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 million**;
> **(ii) Merge or consolidate, directly or indirectly, such facilities or any part thereof with those of any other person, by any means whatsoever**;
> **(iii)** Purchase, acquire, or take any security with a value **in excess of $10 million** of any other public utility; or
> **(iv)** Purchase, lease, or otherwise acquire an existing generation facility:
> **(A)** That has a value **in excess of $10 million**; and
> **(B)** That is used in whole or in part for wholesale sales in interstate commerce by a public utility.
> **(2)** The requirements of this part shall also apply to any holding company in a holding company system that includes a transmitting utility or an electric utility if such holding company seeks to purchase, acquire, or take any security with a value **in excess of $10 million** 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 million.

18 C.F.R sec. 33.1 (2015) (emph. added).

> they meet the $50,000 threshold (which on February 8, 2006 will become $10 million). EPSA states that the NOPR provides no reason for the Commission to change its interpretation of section 203…
>
> We reject EPSA's request that we revise proposed section 33.1(a)(1)(ii) to clarify that any merger or consolidation must also exceed a monetary threshold before section 203 filing approval is required. *The plain language of amended section 203(a)(1)(B) does not permit such an interpretation*. Under amended section 203(a)(1)(B): "No public utility shall… merge or consolidate, directly or indirectly, such facilities [facilities subject to the jurisdiction of the Commission] or any part thereof with those of any other person, by any means whatsoever." *This provision, on its face, does not impose a dollar threshold on mergers or consolidations* and proposed section 33.1(a)(1)(ii) is consistent with the statutory provision. *While Congress included a $10 million threshold for amended subsections 203(a)(1)(A), (C), (D), and 203(a)(2) (dispositions of jurisdictional facilities; acquisitions of securities of public utilities; purchases of existing generation facilities; holding company acquisitions), Congress clearly did not adopt a monetary threshold for mergers and consolidations in amended subsection 203(a)(1)(B).* We note that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." In light of the unambiguous statutory language, we are not convinced by EPSA's unsupported assertion that the failure to include a monetary threshold as to mergers and consolidations was an "oversight" and that "Congress did not intend to change [the currently effective] statutory and regulatory structure." *While our regulations previously applied a dollar threshold to mergers and consolidations, such an approach is no longer tenable, since it is inconsistent with the plain language of amended section 203. Thus, we will not revise section 33.1(a)(1)(ii) to include a $10 million threshold.*

Order No. 669 – Final Rule regarding transaction subject to FPA § 203 under RM05-34 at pp. 14-16 (December 23, 2005) (emph. added).

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