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AMENDMENTS TO SECTION 205 OF THE FEDERAL POWER ACT MAY NOT HAVE INTENDED RESULT

To Our Clients and Friends:

Last week, President Trump signed into law the America's Water Infrastructure Act of 2018 (the "Act") that, among other things, amends Section 205 of the Federal Power Act to make it easier to challenge new electric transmission rates for utilities regulated by the Federal Energy Regulatory Commission ("FERC" or "the Commission").

In recent years problems have arisen when the FERC Commissioners are evenly split on an issue (*i.e.*, two-to-two with one Commissioner seat vacant) and when the Commission lacks a quorum of Commissioners (*i.e.*, three or four Commissioner seats are vacant). In either case, the Commission is unable to issue an order on the merits and thus the Section 205 applications are deemed accepted as a matter of law after 60 days. Also problematic in these instances is that, because there is no written order, there is nothing to appeal. Congress passed the Act to, among other things, address this problem and allow for an appeals process.

Under Section 205 of the Federal Power Act, absent waiver, FERC-jurisdictional electric utilities must give the Commission and the public 60-days' notice of any proposed changes to the rates, terms and conditions for transmission service or wholesale sales of electricity. 16 U.S.C. § 824d. In that 60-day period, the Commission may issue an order accepting, amending, or rejecting the proposed rates, terms and conditions. It may also take other action such as ordering a trial-like hearing. Entities displeased with the order may appeal it to the federal courts, but only after they have sought and the Commission has denied a request for rehearing.

If the Commission takes *no action* in that 60-day period, then the rates become effective automatically but, without a written order from the Commission. This has happened only rarely. But if it does happen, and there is no written order, then there is no order upon which to request rehearing and thus no avenue for seeking judicial appeal.

In recent years there have been multiple prolonged vacancies at the Commission, resulting in either a lack of quorum or two-to-two splits on a matter. As a result, there may be instances in which the Commissioners are split two-to-two and thus are unable to act upon a Section 205 filing within the statutory 60-day period.

This problem first gained lawmakers' attention after a contentious ISO New England capacity auction in 2014 whose results were filed with FERC for approval under Section 205. At that time, FERC had four Commissioners who were split two-to-two on whether to approve the auction results. Consequently, the auction results went into effect by default when the 60-day notice period expired and there was no order

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for aggrieved parties to challenge before the Commission or in court. *See* Notice of Filing Taking Effect by Operation of Law, *ISO New England Inc.*, Docket No. ER14-1409-000 (Sept. 16, 2014).

The Act amends Section 205 of the Federal Power Act to address similar results when the Commission is split "two against two . . . as a result of vacancy, incapacity, or recusal, or if the Commission lacks a quorum." In those circumstances, the new law provides that "the failure to issue an order accepting or denying" a changed rate "shall be considered to be an order issued by the Commission accepting the change," and requires each Commissioner to issue a written statement with his or her views on the change. In addition, the Act provides that if "the Commission fails to act on the merits of the rehearing request [within 30 days] because the Commissioners are divided two against two . . . or if the Commission lacks a quorum, such person may appeal [to federal court]." This language appears in the new Section 205(g).

Perhaps unintentionally, the amended law does not fully resolve the problem Congress seeks to correct as there are at least two ways in which the objective can still be undermined. Importantly, while the Act permits a path forward towards filing an appeal, entities remain statutorily required to first file requests for rehearing. In instances where the Commission is divided two-to-two, it could issue a tolling order on the request for rehearing (which is very often done), and this order would indefinitely toll the statutory deadline for issuing a decision on the rehearing request. Notably, these circumstances are only present when the Commission is split two-to-two, and do not apply when the Commission lacks a quorum.

If FERC instead wishes to "kick the can down the road" until five Commissioners are seated, it can issue an order tolling the 30-day deadline and explicitly stating that it needs more time to deliberate and that it is *not* issuing the tolling order due to a two-to-two split but instead is doing so for some other reason. Because the new language in Section 205(g) applies only when the Commission fails to issue an order due to a two-to-two split, a tolling order that is specifically *not* issued for that reason would fall outside the new law's purview. The rehearing request could remain undecided and un-appealable indefinitely.

A second, thornier problem could arise if a four-member Commission issues a tolling order for a rehearing request but does not explain *why* it is being issued. This is a likely scenario, as most tolling orders are brief and boilerplate. An aggrieved party could interpret FERC's silence to mean that the Commission is divided two-to-two on the merits. Accordingly, that party could understand that the new Section 205(g) applies and that the rehearing request is denied as a matter of law after 30 days pass without a FERC order on the merits, and seek judicial review. The court would need to decide whether it has jurisdiction under the new law, and in turn decide novel questions like whether the challenging party or FERC has the burden to prove that the Commission did or did not issue the tolling order due to a two-to-two split.

Because the Commission is currently short a member, and there may be prolonged periods in the future when the Commission lacks five members, the coming months may test the new law's efficacy.

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Gibson Dunn's Energy, Regulation and Litigation lawyers are available to assist in addressing any questions you may have regarding the developments discussed above. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or the authors:

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