Testimony of
Commissioner Linda Breathitt
Federal Energy Regulatory Commission
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Committee on Energy and Natural Resources
United States Senate

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Mr. Chairman and Members of the Committee:

Thank you for inviting me to appear before you this morning to discuss the need for Federal electricity restructuring legislation and the various bills currently pending before your Committee. Let me begin by commending you, Mr. Chairman, Senator Bingaman, and other Members of the Committee for advancing the important discussions on how best to achieve the restructuring that is needed in the U. S. electric industry in order to arrive at competitive and efficient wholesale and retail electricity markets. The bills that are before you are important and worthy of serious consideration by the Committee.

I believe that Federal electricity restructuring legislation is needed: (1) to address important and unresolved issues in the electric industry, such as reliability, jurisdiction, and transmission access; and (2) to enable the Federal Energy Regulatory Commission to advance its goals of achieving fair, open, and competitive bulk power markets.

In order to achieve these overarching goals, Federal legislation must address several specific policy areas. I would like to comment briefly on six issues that I believe are the most important: (1) open transmission access; (2) regional transmission

organizations; (3) Federal/State jurisdiction; (4) market power; (5) electric reliability; and (6) reform of certain existing laws.

In testimony presented before this Committee, Commission Chairman James J. Hoecker and Energy Secretary Bill Richardson have touched on these and other issues. I am in substantial agreement with their testimony on these issues. My testimony is intended primarily to supplement their comments and, in certain instances, to distinguish my views on these issues. I would also like to express my agreement with Chairman Hoecker and Secretary Richardson that the Administration's bill, S. 1047, appropriately addresses these policy issues and would produce significant benefits in wholesale electricity markets.

Open Transmission Access

The cornerstone of the Commission's efforts to create an open, non-discriminatory electric transmission system is the requirement that all public utilities that own, operate, or control interstate transmission facilities provide transmission service over their facilities to all wholesale buyers and sellers on a non-preferential basis. Such non-discriminatory open access to transmission services is essential to the development of competitive wholesale bulk power markets. Despite the Commission's efforts, however, certain impediments to full open access remain. One such impediment is that a significant portion of the Nation's transmission grid is owned and operated by utilities not subject to Commission open access requirements. Therefore, I would support a change in Federal law that would extend the Commission's open access regulatory authority to non-

public utilities that own, operate, or control transmission facilities, including Federal Power Marketing Administrations (PMA), the Tennessee Valley Authority (TVA), municipal utilities, and cooperatively-owned utilities. I believe such a provision would result in a more efficient Nationwide transmission grid and will greatly facilitate open transmission access. S. 1047 (Administration), S. 1273 (Bingaman), S. 2098 (Murkowski), and S. 516 (Thomas) contain provisions that would extend Commission authority in this manner.

Regional Transmission Organizations

On December 20, 1999, in a unanimous decision, the Commission issued Order No. 2000 on Regional Transmission Organizations (RTOs). In our order we found that RTOs "can address the operational and reliability issues now confronting the industry, and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility." Furthermore, we found that RTOs can benefit consumers through lower electricity rates resulting from a wider choice of services and service providers.

Order No. 2000 established minimum characteristics and functions that RTOs must satisfy. The four minimum characteristics are: (1) independence from market participants; (2) appropriate scope and regional configuration; (3) possession of operational authority for all transmission facilities under the RTO's control; and (4) exclusive authority to maintain short-term reliability. The eight minimum functions that RTOs must perform are: (1) administer its own tariff and employ a transmission pricing

system that will promote efficient use and expansion of transmission and generation facilities; (2) create market mechanisms to manage transmission congestion; (3) develop and implement procedures to address parallel path flow issues; (4) serve as a supplier of last resort for all ancillary services required in Commission Order No. 888 and subsequent orders; (5) operate a single OASIS [open access same-time information system] site for all transmission facilities under its control with responsibility for independently calculating total transmission capability (TTC) and available transmission capability (ATC); (6) monitor markets to identify design flaws and market power; (7) plan and coordinate necessary transmission additions and upgrades; and (8) ensure the integration of reliability practices within an interconnection and market interface practices among regions.

In Order No. 2000, we adopted a voluntary approach to RTO formation. We found that a voluntary approach, in conjunction with innovative transmission pricing reforms, should achieve widespread formation of RTOs in a timely manner. I have great faith that such an approach, combined with our collaborative process in which transmission-owning utilities and market participants are presently working together on RTO implementation issues, will result in the timely formation of RTOs. Nevertheless, in Order No. 2000 we concluded that the Commission has sufficient authority, pursuant to the Federal Power Act (FPA), to order a public utility, on a case-by-case basis, to participate in an RTO upon finding, and where supported by the record, that the public utility is engaging in

unjust, unreasonable, unduly discriminatory or anticompetitive practices, and that participation in an RTO is a reasonable remedy for such behavior.

However, the FPA is not express with regard to the Commission's authority to order utilities to participate in RTOs. Therefore, I would support legislation that reinforces the Commission's conclusion that it is authorized to order utilities to join RTOs on a case-by-case basis if necessary to remedy undue discrimination or anticompetitive effects where supported by a case record.

S. 1047 (Administration) and S. 1273 (Bingaman) contain explicit authority for the Commission to order utilities to join RTOs. However, neither of these bills would specifically require a Commission finding, with the support of a case record, that participation in an RTO was necessary to remedy undue discrimination or anticompetitive effects. I recommend such a provision to reinforce the Commission's conclusion in Order No. 2000. I do not believe that the Commission's authority to require RTO participation need be broader than that.

S. 2098 (Murkowski) would seem to preclude the Commission from requiring the participation in RTOs even on the finding of undue discrimination. I recommend that S. 2098 be amended to grant the Commission such authority.

The RTO provisions of S. 2098 raise an additional concern for me. I agree with Chairman Hoecker's contention that S. 2098 applies restrictive standards for analyzing RTOs, which may or may not be the appropriate criteria for future RTOs as the industry evolves. Like him, I do not believe that Congress should legislate rigid RTO criteria or

standards which may be inconsistent with competitive wholesale power markets of the future.

Finally, as both Chairman Hoecker and Secretary Richardson have stated in their testimony, Federal legislation should grant the Commission express authority to require non-public utilities to participate in RTOs and should clarify the authority of Federal transmitting utilities (TVA and the Federal PMAs) to participate in RTOs. I agree. Only S. 1047 (Administration) and S. 1273 (Bingaman) contain such a measure.

Federal/State Jurisdiction

In his testimony, Chairman Hoecker discusses issues related to Federal/State jurisdiction. Perhaps the most important of these pertains to jurisdiction over bundled retail transmission. I have been satisfied with the arrangement established in the Commission's Order No. 888, which was issued in 1996. There the Commission concluded that it would have jurisdiction over unbundled retail transmission (that is, the transmission used to serve retail load in states that have adopted retail competition) and States would have jurisdiction over bundled retail transmission. Unfortunately, this arrangement has been clouded by the recent appellate court decision in Northern States Power Co. v. FERC, 176 F. 3d 1090 (8th Cir. 1999). As described by both Chairman Hoecker and Secretary Richardson, this decision has introduced a great deal of uncertainty regarding the Commission's jurisdiction to prevent a utility from denying transmission access to other users in favor of its own bundled retail load. Congress must enact legislation that erases this jurisdictional uncertainty. I urge Congress to codify the

jurisdictional arrangement established by the Commission in Order No. 888. That is, the Commission has exclusive jurisdiction over the rates, terms and conditions of unbundled retail transmission by public utilities in interstate commerce, and States have jurisdiction over bundled retail transmission and local distribution facilities and services. In addition, Congress must clarify that States are preempted from using jurisdiction over bundled retail transmission to discriminate against customers in other states or to interfere with interstate bulk power markets. I do not recommend, at this time, that Commission jurisdiction be extended to bundled retail transmission. If Congress acts as I have described above, such jurisdiction would be unnecessary. Furthermore, as I testified before the House Subcommittee on Energy and Power last October, the 25 or so states that have not implemented retail choice programs will probably do so at some point, at which time there will no longer be bundled retail sales and thus no need for Federal legislation in this regard.

Another Federal/State jurisdictional issue that is raised by S. 2098, S. 1273, and S. 1047 pertains to siting authority for new transmission facilities. These various provisions would grant siting authority to the Commission under certain circumstances. I believe there could be an appropriate role for the Commission, in conjunction with State commissions, in the siting of new facilities. However, it is my hope that the regional transmission planning and expansion provisions in Order No. 2000 would facilitate the siting of new facilities without express Federal siting authority. In Order No. 2000, the Commission determined, among other things, that RTOs should: (1) encourage market-

motivated operating and investment actions for preventing and relieving congestion; and (2) accommodate efforts by State regulatory commissions to create multi-state agreements to review and approve new transmission facilities.

Market Power

I share Chairman Hoecker's and Secretary Richardson's concern that the Commission currently has insufficient authority to address and remedy market power problems that threaten to impede or impair competitive bulk power markets. It is imperative that the Commission have the authority necessary to prevent the inappropriate exercise of market power in the marketplace. For this reason, I support the remedial measures for market power contained in S. 1047 (Administration).

Electric Reliability

Many in the industry, including the North American Electric Reliability Council (NERC), recognize the lack of clear Federal authority for establishing or enforcing reliability standards for the electric industry and the importance that electric reliability be maintained as the industry is restructured. I believe that emerging competition in the electric industry necessitates a change in the manner in which the reliability of the interconnected electric system is overseen and managed. The present model of voluntary compliance by electric utilities of regulatory rules and criteria established by NERC and its member Regional Reliability Councils has worked effectively for over three decades. However, given the profound changes taking place in the industry, I believe this voluntary system should be replaced with one in which a self-regulated independent reliability

organization, with oversight by the Commission, establishes and enforces mandatory reliability standards. A similar system would be created by S. 1047 (Administration), S. 1273 (Bingaman), S. 2098 (Murkowski), S. 516 (Thomas), and S. 2071 (Gorton).

I recognize and understand the concerns expressed by State commissions and the National Association of Regulatory Utility Commissioners (NARUC) regarding the need for an explicit State role in ensuring that reliable service to retail customers be preserved. My empathy on this matter comes from the years I spent as Commissioner and Chairman of the Kentucky Public Service Commission. I believe that States should have an appropriate role in preserving reliability. However, I also understand the need for unequivocal Federal authority to protect reliability across State borders. For this reason, I am unsure that a "state savings clause", as has been suggested by NARUC and included in S. 2098 (Murkowski) and S. 516 (Gorton), is the appropriate approach for Congress to take. I share Chairman Hoecker's concern that such a clause might not protect the national interest in preserving the reliability of the interstate transmission grid, which serves customers in multiple states. Given my understanding of the concerns on both sides of this issue, I am especially encouraged by the recent discussions between NARUC and NERC, as alluded to in the testimony presented to this Committee by both of these groups. These discussions are intended to produce consensus language that clarifies the role of the States in ensuring reliable electric service to retail customers. It is my hope that these discussions are productive and that appropriate consensus language can soon be presented to the Committee.

Reform of Certain Existing Laws

The repeal or reform of the Public Utility Holding Company Act (PUHCA) and the Public Utilities Regulatory Policy Act (PURPA) is a feature of several of the pending bills. Many believe that developments in the electric industry have called into question the need for these laws. I support the prospective repeal of PUHCA on the condition that the Commission and State authorities have sufficient access to books and records of all companies in a holding company system. I also support the prospective repeal of the mandatory purchase requirement in Section 210 of PURPA.

Conclusion

Federal electric restructuring legislation is needed to address important and unresolved issues in the industry and to enable the Commission to advance its goal of achieving fair, open, and competitive bulk power markets. The bills currently pending before this Committee are important and worthy of serious consideration. The task before you will be difficult and challenging. But it is a task that is necessary for the overall health of this Nation's vital electric industry. Thank you for seeking my recommendations on these important issues.