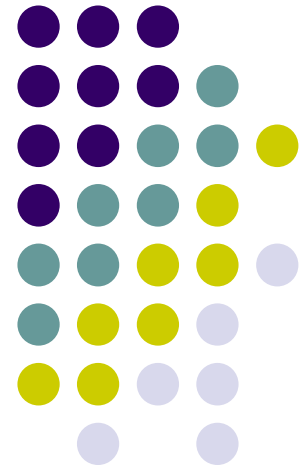


# An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities



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August 6, 2024

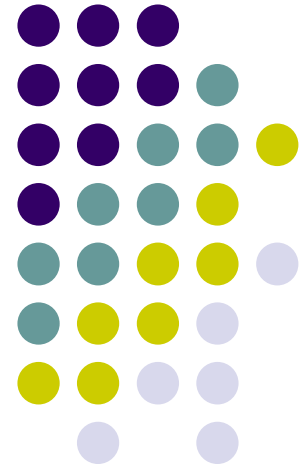


Note: The views expressed herein are the author's, and do not necessarily reflect the views of the Commission, individual Commissioners, or Commission staff members.

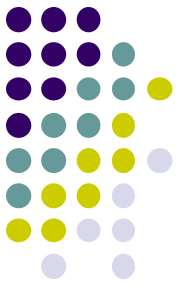
# Part I: The Federal Energy Regulatory Commission and Federal Regulation of Public Utilities



- 
- Who** – Commissioners and staff
  - What** – Jurisdiction
  - Where** – Location
  - When** – Timing of action
  - How** – Decision-making process



# Who is FERC?



- FERC is like “Fight Club” – What’s the first rule. . .

- 18 CFR 3c.2(b)

- FERC is a Federal Regulatory Agency

- Created in 1977 by the Department of Energy Organization Act, *see* 42 USC 7134, 7171(a), inheriting most (but not all – *see* 42 USC 7172) of the regulatory responsibilities of the Federal Power Commission (which dates back to 1920). Much of what it did not inherit went to DOE, but was subsequently delegated from DOE back to FERC (Dept. of Energy Delegation Order Nos. S1-DEL-FERC-2006 (May 16, 2006) and S1-DEL-RATES-2016 (Nov. 19, 2016)). DOE, in contrast, is focused on research & development, transmission permitting & facilitation, emergencies & security; i.e., DOE arguably is a policy-focused “promotion” agency.
- Why is there a Federal Agency? The Constitution essentially requires it - Article I, Section 8, Clause 3: “The Congress shall have Power . . . To regulate Commerce . . . among the several States.” *See generally Public Utilities Comm’n of Rhode Island v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927).

- FERC is an “Independent” Agency

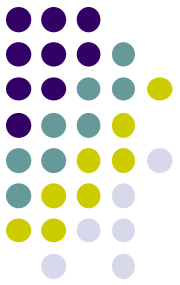
- Independent by statute, 42 USC 7171(a)
- But, paraphrasing John Donne, no Federal agency “is an island, entire of itself.”



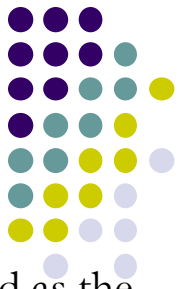
Nevertheless, “we” (old habits are hard to break (☺)) consider ourselves. . .

- Independent from improper political party influence: because no more than 3 Commissioners may come from one political party with the others coming from the other party
- Independent from direct Presidential/Congressional oversight: because FERC decisions are reviewed by a court and not the President or Congress
- Independent from improper private party influence: because private parties in contested case-specific proceedings are prohibited from having *private* discussions with the Commissioners and the Commission’s advisory staff by the Commission’s “ex parte” regulation (18 CFR 385.2201)

# Who are the Commissioners?



- Statutorily, five Commissioners (quorum requires at least three)
  - Chairman Willie Phillips–D (term expires June 30, 2026)
    - Chairman is appointed “Chairman” by the President – no separate Senate confirmation of “Chairmanship” is necessary
  - Commissioner Mark Christie–R (term expires June 30, 2025)
  - Commissioner David Rosner–D (term expires June 30, 2027)
  - Commissioner Lindsay See–R (term expires June 30, 2028)
  - Commissioner Judy Chang–D (term expires June 30, 2029)
- Nominated by the President and confirmed by the Senate
- Serve staggered, up-to-5-year terms (they can be re-nominated and re-confirmed), but pursuant to the Department of Energy Organization Act, 42 USC 7171(b), their terms can extend for a limited period beyond their nominal June 30 end date, if they have not been replaced and they choose to stay
- As just noted, no more than 3 Commissioners may be from the same political party
- Staff has so-called “delegated” authority to handle many types of largely uncontested matters (18 CFR 375.301-.315)



# How is FERC organized?

- *Commissioners* – Each Commissioner, including the Chairman, has 1 vote
  - FERC action requires a quorum of at least three, and a majority vote of that quorum
- *Chairman* – Designated by the President; Senate confirmation is not required to be designated as the Chairman
  - FERC’s administrative leader
- *Staff* – approximately 1576 employees (requested for FY 2025)
  - By profession:
    - Lawyers; Engineers; Economists; Accountants; Ecologists; Geologists; Biologists; Etc.
  - As noted above, staff has so-called “delegated” authority to handle many types of largely uncontested matters (18 CFR 375.301-.315); in expectation of the absence of a quorum, Commission can grant and has granted “new” delegated authority (*Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017))
- *Budget* – approximately \$532 million (requested for FY 2025):
  - FERC receives an annual appropriation from Congress
  - But funds equal to FERC’s budget are reimbursed through: filing fees for individual filings assessed to the filing entity; and annual charges assessed generally to the regulated industries - so that FERC has a “0” effect on the overall Federal budget
  - *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 111-12 (D.C. Cir. 2018) (rejecting due process challenge to FERC decisions, which challenge was based on fact that FERC’s Congressional appropriation is repaid by industries regulated by FERC through fees and charges)

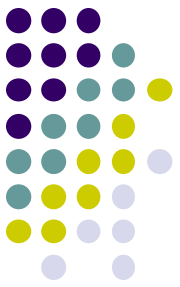
# What does FERC regulate – writ large?



- Rates and services for electric transmission and electric wholesale power sales – Principally under Parts II and III of the Federal Power Act
- Rates and services for natural gas pipeline transportation, certification of new facilities, and abandonment of existing facilities – Principally under the Natural Gas Act
- Rates and services for oil pipeline transportation – Principally under the Interstate Commerce Act
- Hydroelectric dam licensing and safety – Principally under Part I of the Federal Power Act
- Certification and decertification of “Qualifying Facilities” or “QFs,” and oversight of QF-utility dealings – Principally under the Public Utility Regulatory Policies Act of 1978
- But FERC is a creature of statute, and can only do what a statute allows it do. *E.g., California Independent System Operator Corporation v. FERC*, 372 F.3d 395, 398-99 (D.C. Cir. 2004).

1 DOE, in contrast, is focused on research & development, transmission permitting & facilitation, etc.

# The Standard by which FERC Judges Rates/Terms/Conditions of Jurisdictional Services



- Rates, terms and conditions *must be* “just and reasonable” (sometimes described by the shorthand “J&R”) and *must be* “not unduly discriminatory or preferential”
- Phrased differently: rates, terms and conditions *cannot be* “unjust or unreasonable” and *cannot be* “unduly discriminatory or preferential”
- What is a “just and reasonable” rate?
  - Cost-justified – using a traditional cost-of-service analysis
  - Market-justified – considering whether the seller does or does not have market-power
- What is a “not unduly discriminatory or preferential” rate?
  - Similarly-situated customers must be treated similarly
    - Discrimination *without* a reason is prohibited:
      - E.g., a difference in rates that is not cost-justified
    - Discrimination *with* a reason is allowed
      - E.g., a difference in rates that is cost-justified
  - Differences in treatment are **not** inherently prohibited
- Note: The same standard governs both FPA 205/NGA 4 proceedings, i.e., utility/pipeline-initiated proceedings, and FPA 206/NGA5 proceedings, i.e., complaint/FERC-initiated proceedings

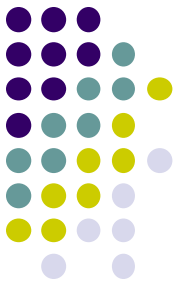
## Drilling down, electrically – what is within FERC’s “public utility”-related statutory authority (i.e., FPA Parts II and III)?



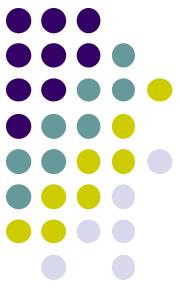
- FERC’s “bread-and-butter” – regulation of public utility transmission in interstate commerce and sales for resale in interstate commerce:
  - **Transmission of electric energy in interstate commerce by public utilities**, i.e., the rates, terms & conditions of interstate electric transmission by public utilities – FPA 201, 205, 206 (16 USC 824, 824d, 824e)
    - What is “interstate:” “Traveling electrons” – which cross state lines
    - What is “interstate:” “Commingled electrons” – which join the stream of commerce
  - **Sales of electric energy at wholesale in interstate commerce by public utilities**, i.e., the rates, terms & conditions of wholesale electric sales by public utilities – FPA 201, 205, 206 (16 USC 824, 824d, 824e)
    - Focus is on wholesale sales, i.e., a sale *to* “any person. . . for resale”
  - That is, FERC has *exclusive* jurisdiction over the “transmission of electric energy in interstate commerce,” *and* over the “sale of electric energy at wholesale in interstate commerce,” *and* over “all facilities for such transmission or sale of electric energy.” FPA 201(b) (16 USC 824(b))
    - Does *not* include “foreign commerce,” but. . . .



## What is also within FERC’s “public utility”-related statutory authority (i.e., FPA Parts II and III)?



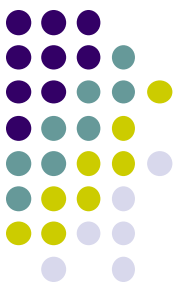
- Corporate activities and transactions by public utilities – mergers and FERC-jurisdictional facility dispositions, securities issuances, interlocking directorates – FPA 203, 204, 305(b) (16 USC 824b, 824c, 825d(b))
- Accounting by public utilities – FPA 301 (16 USC 825)
- Reliability of the bulk-power system, through oversight of the development/approval of and compliance with mandatory reliability standards – FPA 215 (16 USC 824o)
- Prohibition of energy market manipulation – FPA 222 (16 USC 824v)



## Reliability – A further word

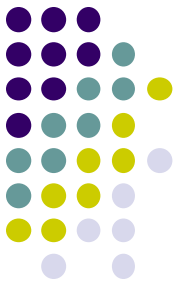
- Reliability does not go to “resource adequacy,” which is beyond Commission authority as the Commission cannot order construction of add’l transmission or generation and cannot set or enforce compliance with standards for resource adequacy – FPA 215(i)(2) (16 USC 824o(i)(2))
- Reliability instead goes to “reliable operation of the bulk power system” – FPA 215(a)(3) & (4) (16 USC 824o(a)(3) & (4))

# Siting of New Interstate Electric Transmission Facilities, as revised per the Infrastructure Investment and Jobs Act



- The predicate to Federal authorization of new interstate electric transmission facilities is the Secretary of Energy designating national interest electric transmission corridors – FPA 216(a)(2) (16 USC 824p(a)(2))
- The Commission may issue permits for new or modified electric transmission facilities in these corridors if – among other reasons – a state commission has denied an application for such permits – FPA 216(b)(1)(C)(iii) (16 USC 824p(b)(1)(C)(iii))
  - Such permits can provide eminent domain authority – FPA 216(e) & (f) (16 USC 824p(e) & (f))
  - But it doesn't apply within the Electric Reliability Council of Texas (ERCOT) – FPA 216(k) (16 USC 824p(k))

# An important limitation on who is subject to FERC regulation: “public utilities”



- Most sections found in Parts II and III of the FPA provide for FERC authority over the actions of a “public utility”
  - “Public utility” is defined by the FPA as “any person who owns *or* operates facilities subject to the jurisdiction of the Commission,” i.e., “any person who owns *or* operates” facilities for “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce” (16 USC 824(e) (emphasis added))
  - Includes not only traditional investor-owned utilities, but also power marketers, regional transmission organizations, and independent system operators
  - Facilities can be “paper facilities,” e.g., contracts, books & records, etc.
  - But some entities may be statutorily “exempt,” as discussed below
- FYI - “Public utilities” (16 USC 824(e)) are *not* the same as “electric utilities” (16 USC 796(22)) and are *not* the same as “transmitting utilities (16 USC 796(23))
- FYI - “Exempt Wholesale Generators” or “EWGs” and “Foreign Utility Companies” or “FUCOs”, which only have relevance in the context of the Public Utility Holding Company Act of 2005, are also different (18 CFR 366.1)

# What is not within FERC's public utility-related statutory authority (i.e., FPA Parts II and III)?

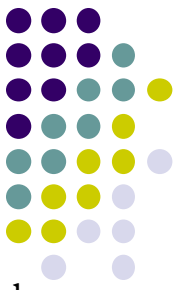
- FPA 201, 16 USC 824 -



- “Local” distribution of electric energy, and the rates, terms and conditions of such distribution
  - What is “local” distribution? It’s a Federal Power Act-focused analysis and not purely engineering-focused, and thus also focuses on the functional use of the facilities
  - In the context of Order No. 888, FERC adopted a so-called “7-factor” test:
    - (1) local distribution facilities are normally close in proximity to retail customers
    - (2) local distribution facilities are primarily radial in character (visualize the spokes of bicycle wheel)
    - (3) power flows into local distribution systems; it rarely, if ever, flows out
    - (4) when power enters a local distribution system, it is not re-consigned or transported on to some other market
    - (5) power entering a local distribution system is consumed in a comparatively restricted geographic area
    - (6) meters are based at the transmission/local distribution interface to measure flows into the local distribution system
    - (7) local distribution systems will be of reduced voltage
- Sales of electric energy to end users (i.e., sales at retail), and the rates, terms and conditions of such sales
- What generation gets built, including the choice, siting and construction of generation (other than hydroelectric generation, which is subject to FERC jurisdiction under Part I of the FPA).
  - But wholesale rate recovery of generation costs, as with wholesale rate recovery of any other cost, is subject to FERC review
- What transmission gets built, including the choice, siting and construction of transmission facilities (with the exception of so-called “backstop” siting authority under FPA 216 (16 USC 824p))
  - But wholesale rate recovery of transmission costs, as with wholesale rate recovery of any other cost, is subject to FERC review

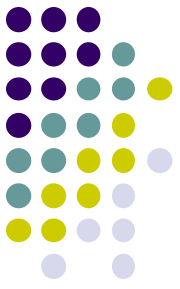
# What is not within FERC's public utility-related statutory authority (i.e., FPA Parts II and III)? . . . continued

## - FPA 201, 16 USC 824 -

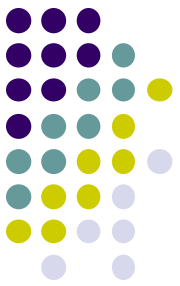


- Environmental matters (with the exception of hydroelectric generation-related environmental matters, which are subject to FERC jurisdiction under Part I of the FPA)
  - But wholesale rate recovery of environmental costs, as with wholesale rate recovery of any other cost, is subject to FERC review
- Safety matters (with the exception of hydroelectric generation-related safety matters, which are subject to FERC jurisdiction under Part I of the FPA)
- United States government and its agencies and instrumentalities, and States and their agencies and instrumentalities (including municipal utilities) - with certain limited exceptions, e.g., FPA 206(e), 222 (16 USC 824e(e), 824w)
- RUS-financed cooperatives and smaller (less than 4M kWh sales/year) cooperatives, and companies that they wholly own
- *Interstate v. Intrastate*: Alaska and Hawaii (where, given their electrical isolation, there is no *interstate* . . .); Electric Reliability Council of Texas (ERCOT) (for the same reason, but with certain limited exceptions); Puerto Rico and US Virgin Islands (for the same reason).
- That sellers and buyers may be located within a single state, and that there may be lines between them located within that same state, does *not* divest FERC of jurisdiction given the interconnected nature of the electric grid: “interstate commerce” has been interpreted to give FERC jurisdiction when the transmission system “is interconnected and capable of transmitting [electric] energy across the State boundary, even though the contracting parties and the electrical pathway between them are within one State,” i.e., if the transaction is made over the “interconnected interstate transmission grid.”
- One further thought to bear in mind: *sales v. purchases* – FPA 205 and 206 (16 USC 824d, 824e) are written from the perspective of the seller; that is, FERC has the exclusive authority to review the rates, terms and conditions of “sales” but *not* of “purchases” (“purchases” are the province of state commissions)

# What is within FERC's hydroelectric-related authority (i.e., FPA Part I)?



- Applies to hydroelectric facilities on navigable waters
  - Includes tidal or “hydrokinetic” facilities
- FERC licenses the construction of new projects
- FERC re-licenses existing projects
- FERC oversees ongoing project operations, including through dam safety inspections and environmental monitoring



# What is within FERC's Natural Gas Act authority?

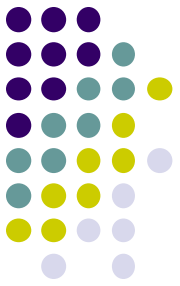
- NGA grants FERC authority to regulate “transportation of natural gas in interstate commerce”
  - Includes interstate natural gas pipelines, storage facilities, LNG facilities
  - Ensures that the rates, terms and conditions of service by interstate natural gas pipelines, including storage and LNG facilities, are just and reasonable and not unduly discriminatory
- FERC certifies construction and operation of interstate natural gas pipelines, including storage and LNG, upon a public convenience and necessity finding; FERC also must approve abandonment of facilities
- NGPA – grants FERC authority to regulate intrastate gas pipelines that operate in interstate commerce



# What is within FERC's Interstate Commerce Act authority?

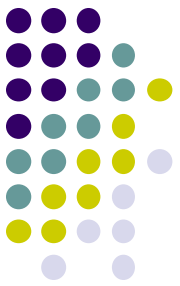


- FERC regulates rates and practices of oil pipeline companies engaged in interstate transportation
  - Establishes equal service conditions to provide shippers with equal access to oil pipeline transportation
  - Establishes reasonable rates for transporting petroleum and petroleum products by pipeline
- But it is more light-handed regulation, compared to the regulation of the electric, hydroelectric, and natural gas pipeline industries



# Where is FERC?

- Headquarters:
  - 888 First Street, N.E., Washington, D.C. 20426
- Satellite/Regional offices (OEP only):
  - Atlanta, Chicago, New York, Portland, San Francisco, Houston
- Satellite/Regional offices (OEMR only)
  - MISO
  - CAISO
  - NY/New England



## When/How does FERC act?

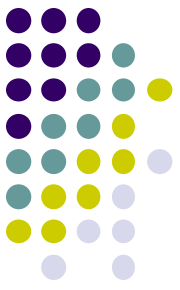
- Commissioners meet formally and publicly on the third Thursday of each month, except August (when there are no formal public meetings), in open session starting at 10 AM Eastern Time. These meetings are web-streamed.
- Commissioners may meet in “closed meetings” to discuss enforcement and litigation matters
- Commissioners may vote “notationally,” i.e., without a formal meeting, at any time of the year
- FERC also acts, in uncontested proceedings, through authority delegated to its staff

# FERC's decision-making options



- **Generic, industry-wide decisions** – usually initiated by FERC or in response to a petition for rulemaking. E.g., . . .
    - Rulemaking (typically changing rules published in CFR)
    - Policy Statement (setting policy, but typically, but not always, *not* changing rules published in CFR)
  - **Party-specific, adjudicatory decisions** – usually taken in response to submittals from jurisdictional companies, their customers, other market participants, or following a proceeding initiated by FERC.  
E.g., . . .
    - Changing rates, terms and conditions of jurisdictional services
    - Approval/disapproval of mergers and reorganizations of public utilities
    - Certification of the building and operation of a natural gas pipeline
    - Authorization of the siting of an LNG terminal
    - Licensing of the construction and operation of a hydroelectric project
    - Issuance of an order following an Office of Enforcement investigation
- But, . . . even party-specific, adjudicatory decisions can be precedential

# Overview of Participation in FERC Proceedings



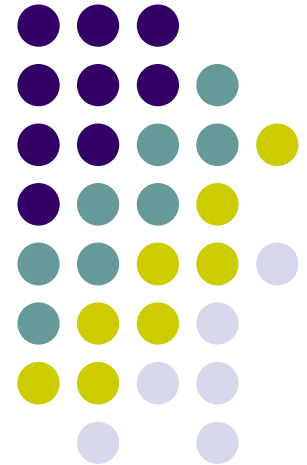
- **Rulemaking proceedings**

- Participation by filing comments by FERC-specified comment date
- FERC’s “ex parte” regulations **do not** apply in rulemaking proceedings (18 CFR 385.2201(a), (b), (c)(1)(ii))

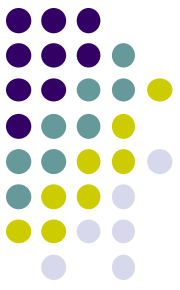
- **Case-specific, adjudicatory proceedings**

- Participation by intervening (18 CFR 385.214)
  - Intervention is necessary for “party” status, and “party” status is necessary, not only in order to receive copies of other parties’ pleadings and FERC’s orders, but also to participate in the proceeding – including the right to ask FERC to grant rehearing/reconsideration of its decision and the right to seek subsequent judicial review (16 USC 825)
- Participation by protesting a filing, but a protestor is not a “party” (18 CFR 385.211)
- Participation by separately filing a formal complaint (18 CFR 385.206)
- FERC’s “ex parte” regulations **do** apply in contested case-specific, adjudicatory proceedings (18 CFR 385.2201(a), (b), (c)(1)(i))

# Part II: Rate Revision Process



# Case-specific, adjudicatory proceedings: how does FERC protect customers from excessive rates and unreasonable terms and conditions?



- Review of public utility (FPA 205, 16 USC 824d)/natural gas pipeline (NGA 4, 15 USC 717c) filings asking to establish or change rates/terms/conditions
- Review of customer/competitor/state commission/attorney general/etc. complaints (FPA 206, 16 USC 824e or NGA 5, 15 USC 717d) asking to change rates/terms/conditions
- Independent FERC review of rates/terms/conditions, i.e., FERC review *not* initiated by a public utility filing or a customer/competitor complaint (FPA 206, 16 USC 824e or NGA 5, 15 USC 717d)

# Ditto - The Standard by which FERC Judges Rates/Terms/Conditions

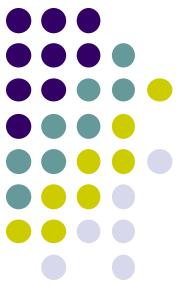


- Rates, terms and conditions *must be* “just and reasonable” (sometimes described by the shorthand “J&R”) and *must be* “not unduly discriminatory or preferential”
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- Note: The same standard governs both FPA 205/NGA 4 proceedings, i.e., utility/pipeline-initiated proceedings, and FPA 206/NGA5 proceedings, i.e., complaint/FERC-initiated proceedings



# The Commission's case-specific, adjudicatory process

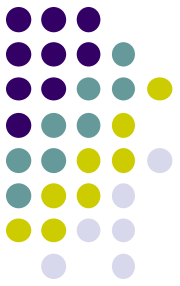
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- The process:

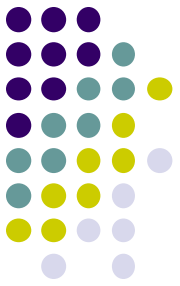


# Act I - In the Beginning. . .



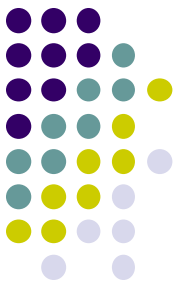
- The Hearing Order Will. . .
  - With a Sufficient Record. . .
    - Render a decision on the matters at issue. This tends to be the Commission’s preference.
  - With an Insufficient Record. . .
    - Order a “paper” hearing.
      - Most typically used when the issue is more a policy issue
    - Order a “trial-type evidentiary” hearing,
      - Most typically used when the issue requires more traditional fact-gathering
    - Order a technical conference.
      - Most typically used when the issue is a discrete issue and involves more a matter of understanding the particulars of the case
    - Refer the case to the Dispute Resolution Service
      - Most typically used when there is a sense that the case is settle-able and that DRS can be helpful
    - Provide for other forms of alternative dispute resolution
      - 18 CFR 385.604, .605 – including mini-trials and binding arbitration
      - Used when the parties ask to use them; these tools are voluntary

# Act II - The Middle Way. . .



- Trial-Type, Evidentiary Hearing Before a Presiding Judge
  - Discovery: 18 CFR 385.401-.411
  - Evidence: 18 CFR 385.505-.510
  - Prepared Written Testimony: 18 CFR 385.507-.508
  - Oral Testimony and Cross-Examination: 18 CFR 385.505-.506
- How Does It End?
  - Settlement (Contested or Uncontested)
    - 18 CFR 385.602
  - Initial Decision of the Presiding Judge
    - 18 CFR 385.701-08
    - But the Initial Decision can be waived, 18 CFR 385.710
  - Regardless, a FERC decision will ultimately issue

# Act III - At the End of the Day. . .

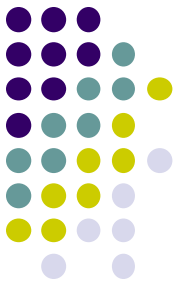


- **Settlement – 18 CFR 385.602**
  - Initial comments are due 20 days from the date of filing of the settlement, and reply comments are due 30 days from the date of filing of the settlement; a failure to file comments constitutes a waiver of any objections – 18 CFR 385.602(f)
  - Uncontested settlements:
    - A presiding judge can certify a settlement if it is uncontested – 18 CFR 385.602(g)(1)
    - An uncontested settlement can be approved by the Commission if it “appears to be fair and reasonable and in the public interest” – 18 CFR 385.602(g)(3)
    - Uncontested settlements and orders approving uncontested settlements do not, however, constitute binding Commission policy.
  - Contested settlements:
    - A contested settlement is no different than any contested matter, and is dealt with accordingly, most typically either by a Commission decision on the merits if the record contains substantial evidence upon which to base a decision or by the Commission establishing procedures to take additional evidence or by the severing of contested parties so that they may continue to litigate – 18 CFR 385.602(h)
  - *And ultimately a Commission order*

# Act III - At the End of the Day. . .



- **Initial Decision** – 18 CFR 385.711
  - Briefs on exceptions are due 30 days from the date of issuance of an initial decision, and briefs opposing exceptions are due 20 days from the date of filing of briefs on exceptions – 18 CFR 385.711(a)(1)
  - Briefs are limited to 100 pages – 18 CFR 385.711(a)(2)
  - Bear in mind that from the perspective of the Commission what is precedential are Commission decisions, and **not** Initial Decisions that have **not** been affirmed by the Commission.
  - *And ultimately a Commission order*



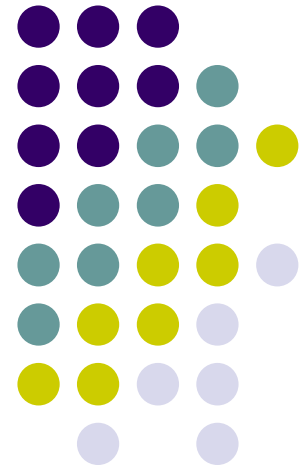
Thank you!  
[www.ferc.gov](http://www.ferc.gov)



# Appendix A:

## Rate Revision Process - Federal Power Act Section 205

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# Federal Power Act Section 205

## - What Must Be Filed -

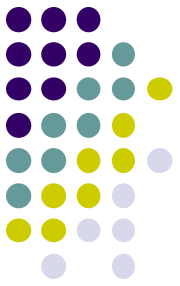


- Public utilities must file the rates, terms and conditions for interstate electricity transmission and wholesale electricity sales:
  - Rates, terms and conditions must be filed
  - Rates, terms and conditions must be public
  - But, there are some exceptions to the filing requirement: e.g., individual customer-specific rates, terms and conditions need not be filed if they conform to model *pro forma* agreements that are filed (with individual customer-specific rates reported in quarterly reports known as “EQRs”), or if they are market-based power sales rates (with individual customer-specific rates reported in quarterly reports known as “EQRs”)<sup>32</sup>



# Federal Power Act Section 205

## - When Must Utility Filings Be Filed -



- Absent waiver, public utilities must file at least 60 days before any proposed rate, term or condition is to become effective, i.e., absent waiver, utilities must give at least 60 days' prior notice
- Waiver can be granted to allow proposed rates, terms or conditions to become effective on less than 60 days' prior notice
- If public utilities do not file timely, and waiver is not granted, they must provide “time value” refunds, i.e., “interest” refunds, to their customers for the period of time the rates were collected without authorization

# Federal Power Act Section 205

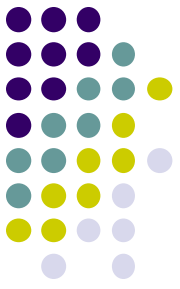
## - When Must Responses Be Filed -



- Public notice of a filing is issued, providing a time for responses
  - For typical filings, unless a notice is issued providing otherwise, 21 days is normally allowed for responses (bear in mind that FERC often has a statutory 60-day action date – so FERC’s ability to grant extensions is limited) (18 CFR 35.8)
  - Timely response is essential to preserving a party’s rights, as discussed above
  - Note: In Natural Gas Act section 4 filings (the counterpart to Federal Power Act section 205 filings), for typical filings, unless a notice is issued providing otherwise, 12 days is normally allowed for responses (bear in mind that FERC often has a statutory 30-day action date – so FERC’s ability to grant extensions is limited) (18 CFR 154.210(a))

# Federal Power Act Section 205

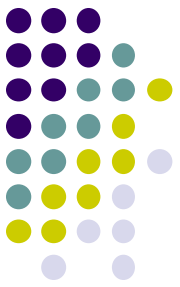
## - What Can FERC Do -



- FERC can find the filing deficient, i.e., incomplete
- FERC can accept the rates, terms and conditions, i.e., rule “on the paper”
- FERC can reject the rates, terms and conditions, i.e., rule “on the paper”
- FERC can “suspend,” i.e., defer, the effectiveness of the rates, terms and conditions
  - “Suspension” is for up to 5 months
  - At the end of the “suspension period,” the rates, terms and conditions become effective subject to refund unless, by that date, FERC has issued a final order
  - At the end of the case, FERC can order refunds back to the effective date (or provide other remedies) for rates, terms and conditions that are “unjust and unreasonable” or that are “unduly discriminatory or preferential”
- FERC can send the rates, terms and conditions to trial-type, oral hearing (typically coupled with settlement judge/alternative dispute resolution procedures) or can order a technical conference
- FERC can choose some combination of the above

# Federal Power Act Section 205

## - What Standard Does FERC Use –



- Rates, terms and conditions *must be* “just and reasonable” and *must be* “not unduly discriminatory or preferential”
- Phrased differently: rates, terms and conditions *cannot be* “unjust or unreasonable” and *cannot be* “unduly discriminatory or preferential”
- Note: The same standard governs both FPA 205 proceedings, i.e., utility-initiated proceedings, and FPA 206 proceedings, i.e., complaint/FERC-initiated proceedings
  - Further note: For NGA 4 filings, essentially the same standard applies there as well

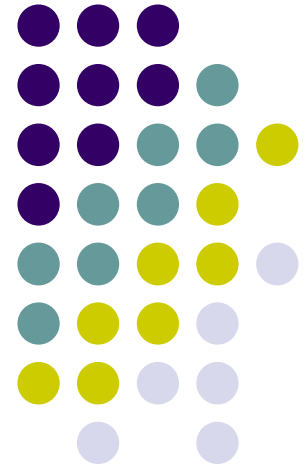
# Federal Power Act Section 205

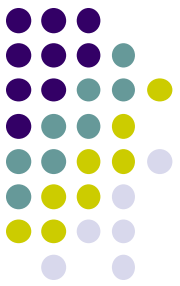
## - What Standard Does FERC Use - . . . Continued



- What is a “just and reasonable” rate?
  - Cost-justified
  - Market-justified
- What is a “not unduly discriminatory or preferential” rate?
  - Similarly-situated customers must be treated similarly
    - Discrimination *without* a reason is prohibited:
      - E.g., a difference in rates that is not cost-justified
    - Discrimination *with* a reason is allowed
      - E.g., a difference in rates that is cost-justified
  - Differences in treatment are not inherently prohibited
- Again, the same standards govern both FPA 205 proceedings, i.e., utility-initiated proceedings, and FPA 206 proceedings, i.e., complaint/FERC-initiated proceedings

# Appendix B: Rate Challenge Process - Federal Power Act Section 206





## Federal Power Act Section 206

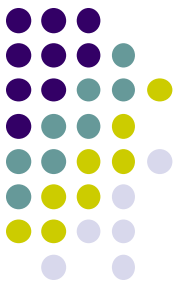
### - The Basics -

- FERC, *either* pursuant to a complaint *or* on its own: (1) may find that an existing rate, term or condition is not just and reasonable or is unduly discriminatory or preferential; and (2) specify a new rate, term or condition that is just and reasonable and not unduly discriminatory or preferential and that is to be thereafter used
- Complaints may be filed by any person – including a customer or a competitor

# Federal Power Act Section 206

## - Remedies -

### Part 1



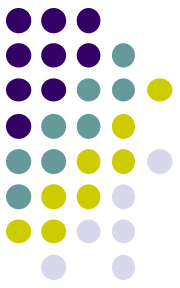
- FERC remedies in complaint/FERC-initiated proceedings are typically prospective, i.e., forward-looking, only; that is, from the date of the FERC order (1) finding an existing rate, term or condition is not just and reasonable or is unduly discriminatory or preferential, and (2) specifying a new rate, term or condition that is just and reasonable and is not unduly discriminatory or preferential and that is to be thereafter used



# Federal Power Act Section 206

## - Remedies -

### Part 2



- Exceptions:
  - *Complaint-initiated cases*: 15 month “refund window” – i.e., up to 15 months of refunds are allowed, which can begin as early as the date a complaint is filed or as late as 5 months from the date a complaint is filed
  - *FERC-initiated cases*: 15 month “refund window” – i.e., up to 15 months of refunds are allowed, which can begin as early as FERC publishes a notice that a case has been initiated or as late as 5 months from the date FERC publishes a notice that a case has been initiated
  - Note: For NGA 5 proceedings, there is no comparable 15-month “refund window” – remedies are prospective, i.e., forward-looking, only

# Federal Power Act Section 206

## - Remedies -

### Part 3



- Additional Exceptions:
  - Violations of “filed rate:” refunds and/or disgorgement of profits may be ordered for failure to abide by the “filed rate” in past years/months
  - Formula rates: refunds may be ordered for abuse of formula rates in prior years