

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

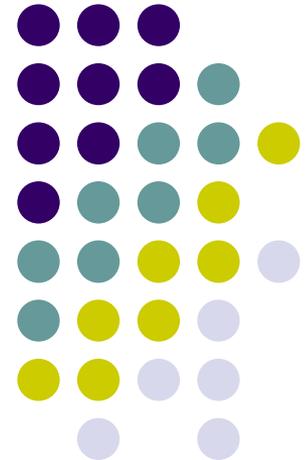


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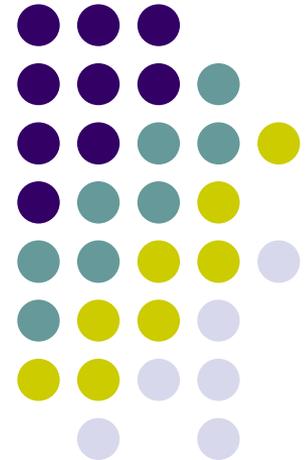
Note: The views expressed herein are the author's, and do not necessarily reflect the views of the Commission, individual Commissioners, Commission staff or individual Commission staff members.



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



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





## Who is FERC?

- A Federal 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; Dept. of Energy Delegation Order No. 00-004-00A (May 16, 2006)) of the responsibilities of the Federal Power Commission
- An “Independent” Agency
  - Independent by statute, 42 USC 7171(a)
  - But, paraphrasing John Donne, no Federal agency is an island, nevertheless. . .
  - Independent from improper political party influence: because no more than 3 Commissioners may come from one political party
  - Independent from direct Presidential/Congressional oversight: because FERC decisions are reviewed by a court
  - 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 staff by FERC’s “ex parte” regulation (18 CFR 385.2201)



## Who are the Commissioners?

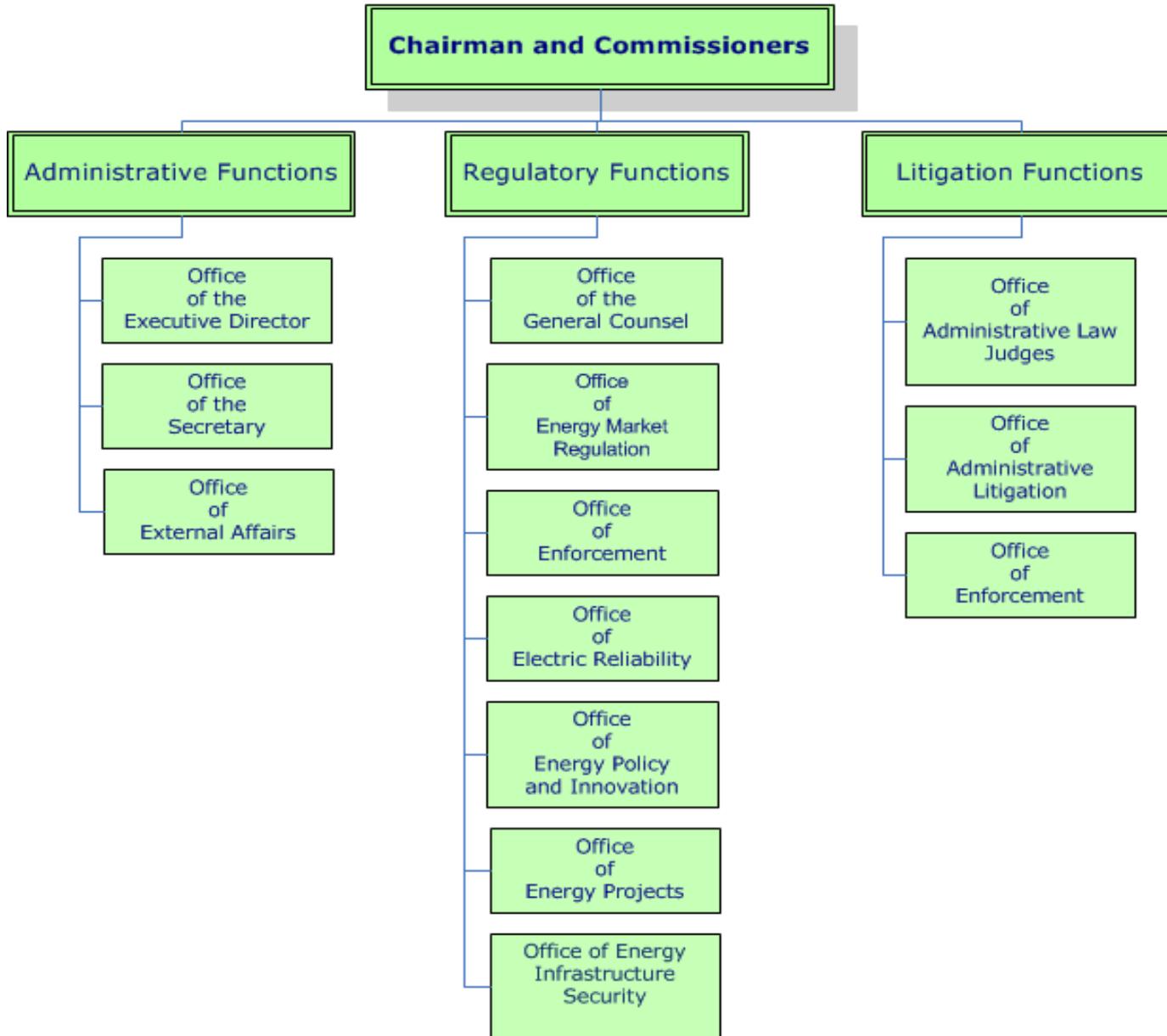
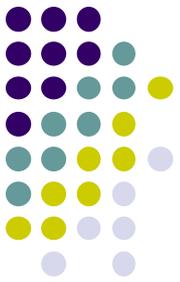
- Normally, five Commissioners (currently, only two)
  - Acting Chairman Cheryl A. LaFleur (D-MA)  
(Term expires June 30, 2019)
  - Commissioner Colette D. Honorable (D-AK)  
(Term expires June 30, 2017)
  - But quorum for FERC action is three Commissioners, which means. . .
  - Currently, staff is acting through authority previously delegated to it by the Commission: 18 CFR 375.301-.315; *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017)
- Nominated by the President and confirmed by the Senate
- Serve staggered 5-year terms
- As just noted, no more than 3 Commissioners may be from the same political party



# How is FERC organized – Part 1?

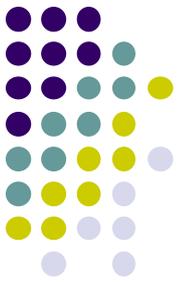
- *Commissioners* – Each Commissioner, including the Chairman, has 1 vote
  - FERC action requires a majority vote
- *Chairman* – Designated by the President; Senate confirmation is not required to be designated as the Chairman
  - FERC’s administrative leader
- *Staff* – approximately 1480 employees (FY 2017)
  - By program:
    - Electric – 829 (56%); Gas & Oil – 329 (22%); Hydroelectric - 321 (22%)
  - By profession:
    - Lawyers; Engineers; Economists; Accountants; Ecologists; Geologists; Biologists; Etc.
  - Have so-called “delegated” authority to handle many types of uncontested matters (18 CFR 375.301-.315; “new” delegated authority: *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 (2017))
- *Budget* – approximately \$347 million (FY 2017):
  - 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 budget
  - *Delaware Riverkeeper Network v. FERC*, No. 16-cv-416 (TSC), slip op. at 18-20 (D.D.C. March 22, 2017) (fact that the industries regulated by FERC pay fees and charges does not “create[] unconstitutional bias”)

# How is FERC organized – Part 2?



# How is FERC organized – Part 3 (Individual Offices)?

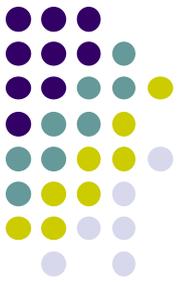
(drawn, in large part, from FERC's FY 2017 budget request)



- The **Office of Energy Projects** (OEP) oversees hydroelectric, natural gas pipeline, natural gas storage, and liquefied natural gas projects that are in the public interest.
- The **Office of Energy Market Regulation** (OEMR) analyzes filings submitted by public utilities and natural gas and oil pipelines to ensure that rates, terms, and conditions of service are just and reasonable and not unduly discriminatory or preferential. OEMR also analyzes filings submitted by the Electric Reliability Organization (ERO) dealing with its budget, rules of procedure, and bylaws.
- The **Office of Enforcement** (OE) oversees energy markets, identifying and remedying market problems, assuring compliance with rules and regulations, and detecting and investigating market manipulation.
- The **Office of Energy Policy and Innovation** (OEPI) advises FERC on policies to ensure the efficient development and use of transmission, generation, and demand-side resources, to remove barriers to the participation of emerging technologies and resources, and to create a platform for innovation in wholesale energy markets.
- The **Office of Electric Reliability** (OER) oversees the development and review of mandatory reliability and security standards by the ERO, and ensures compliance with the approved mandatory standards by the users, owners, and operators of the bulk power system.

# How is FERC organized – Part 3 (Individual Offices)?

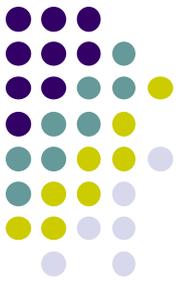
(drawn, in large part, from FERC's FY 2017 budget request)



- The **Office of Energy Infrastructure Security** (OEIS) identifies and—working with other governmental agencies, industry, and other stakeholders—seeks comprehensive solutions to potential threats to FERC-jurisdictional infrastructure from cyber and physical attacks, including geomagnetic disturbance and electromagnetic pulse events.
- The **Office of the General Counsel** (OGC) provides legal counsel to FERC and FERC's staff, and assists in the development of draft FERC orders, rulemakings and other decisions. OGC also represents FERC before the courts, and advises other government agencies, regulated entities and the public on matters within FERC's jurisdiction.
- The **Office of Administrative Litigation** (OAL) provides expert and independent legal and technical analyses in cases set for trial-type hearing, building evidentiary records in contested cases and leading negotiations to achieve consensual settlements.
- The **Office of Administrative Law Judges and Dispute Resolution** (OALJDR) oversees the development of evidentiary records in contested cases set for trial-type hearing, issues “initial,” i.e., recommended, decisions in contested cases set for trial-type hearing, and assists interested parties engaged in disputes to achieve consensual resolution through services such as mediation, negotiation, conciliation, arbitration, and facilitation.

# How is FERC organized – Part 3 (Individual Offices)?

(drawn, in large part, from FERC's FY 2017 budget request)



- The **Office of the Secretary** (OSEC) serves as the focal point through which all filings are made for all proceedings before FERC, through which notices of proceedings are given, and from which all official actions are issued by FERC. OSEC promulgates and publishes all FERC orders, rules, and regulations.
- The **Office of External Affairs** (OEA) is responsible for communications and public relations. OEA provides informational and educational services to: Congress; federal, state and local governments; the news media and the public; regulated industries; and consumer and public interest groups. OEA is also FERC's liaison with foreign governments.
- The **Office of the Executive Director** (OED) provides administrative support services to FERC, including: human resources; procurement; information technology; organizational management; financial support; and logistics.

# What does FERC regulate – writ large?



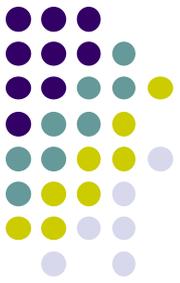
- Rates and services for electric transmission and electric wholesale power sales— Principally under Parts II and III of the Federal Power Act
- Certification and decertification of “Qualifying Facilities” or “QFs,” and oversight of QF-utility dealings – Principally under the Public Utility Regulatory Policies Act of 1978
- Hydroelectric dam licensing and safety – Principally under Part I 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
- 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).

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



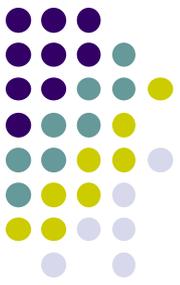
- FERC’s “bread-and-butter” – regulation of public utility transmission in interstate commerce and sales for resale in interstate commerce:
  - Transmission of electric energy in interstate commerce by public utilities, i.e., the rates, terms & conditions of interstate electric transmission by public utilities – FPA 201, 205, 206 (16 USC 824, 824d, 824e)
    - “Traveling electrons” – which cross state lines
    - “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)
    - Includes 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”

## 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)

# “Public utility” status is the key to understanding many FPA Parts II and III jurisdictional questions



- Most sections found in Parts II and III of the FPA provide for FERC authority over the actions of a “public utility,” and a “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.
- “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))
- “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)?

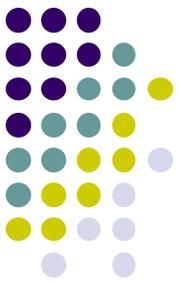
- FPA 201, 16 USC 824 -



- “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
    - (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 municipalities) - with certain limited exceptions, e.g., FPA 206(e), 222 (16 USC 824e(e), 824w)
- RUS-financed cooperatives and smaller cooperatives
- *Interstate v. Intrastate*: Alaska and Hawaii (where, given their electrical isolation, there is no *interstate* . . .); Electric Reliability Council of Texas (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)

# Other Electric-Related Authority: Public Utility Regulatory Policies Act of 1978 (PURPA) - Cogeneration and Small Renewables



- PURPA 201 (codified at 16 USC 796(17) & (18)) and PURPA 210 (codified at 16 USC 824a-3)
- Congress' directive: "encourage" cogenerators and small renewable generators
  - *Who is encouraged* – cogenerators and small power producers – 16 USC 796(17) & (18), 824a-3(a); 18 CFR 292.101(b)(1), 292.203-07
  - *How are they encouraged* - "mandatory purchase obligation" – 16 USC 824a-3(a); 18 CFR 292.303(a)
  - *How are they encouraged* - "avoided cost" rates – 16 USC 824a-3(b), (d); 18 CFR 292.101(b)(6), 292.304
    - FERC sets the relevant considerations; states set the rates – 18 CFR 292.304
    - Enforcement through judicial oversight, FERC litigation, private party litigation – 16 USC 824a-3(g) & (h)
  - Relief is available to utilities from mandatory purchase obligation & avoided cost rate if there is access to robust markets – 16 USC 824a-3(m)

# Other Electric-Related Authority:

## FPA 215 - Reliability

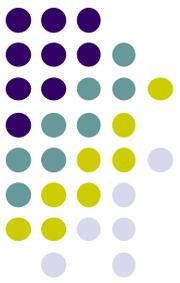


- Energy Policy Act of 2005 amended FPA to include new section 215, 16 USC 824o, establishing a mandatory electric reliability regime
- FPA 215 provides for an independent “electric reliability organization” (ERO), certified by the Commission, to develop and enforce mandatory reliability standards for “reliable operation” of the nation’s bulk-power system
- FERC’s role: certify an entity as the ERO (FERC, in fact, certified NERC as the ERO); approve proposed standards; review NERC-imposed penalties; and exercise independent enforcement authority

# 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



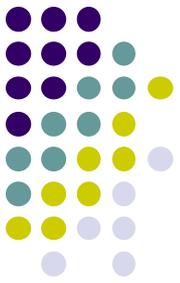
# What is within FERC's Natural Gas Act authority?

- 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
- Satellite/Regional offices (OEMR only)
  - MISO
  - CAISO
  - NY/New England
- Satellite/Regional office (OER only):
  - Hagerstown, MD



## When/How does FERC act?

- Commissioners meets 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 televised and 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 (18 CFR Part 375)

# 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 (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 (18 CFR 385.211)
  - Participation by filing a complaint (18 CFR 385.206)
  - FERC’s “ex parte” regulations **do** apply in case-specific, contested proceedings (18 CFR 385.2201(a), (b), (c)(1)(i))

# FERC Office of Enforcement Investigations



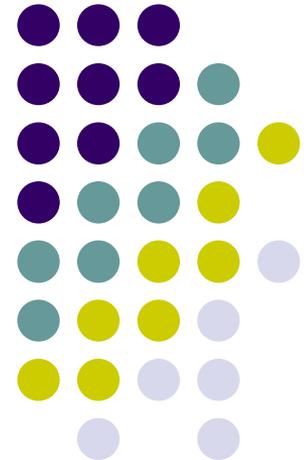
- Initiated by FERC under 18 CFR Part 1b – initiated in response to:
  - e-mail or call to the FERC Hotline ([hotline@ferc.gov](mailto:hotline@ferc.gov) or 1-888-889-8030) (18 CFR 1b.21),
  - “self-report,”
  - referral from an RTO/ISO market monitor,
  - referral from another agency,
  - recommendation from another office within FERC, or
  - recommendation from within FERC’s Office of Enforcement itself as a consequence of its own oversight/surveillance of markets
- can be preliminary (18 CFR 1b.1, 1b.6) or formal (18 CFR 1b.1, 1b.5), non-public or public (18 CFR 1b.9) – they typically would **not** have “parties” (18 CFR 1b.11)
- outcome of investigation may be a finding of no violation, an order to show cause (with subsequent orders in response to the submittals) or a settlement



# Alternative Dispute Resolution

- Dispute Resolution Service (DRS)
  - small group of employees within the Office of Administrative Law Judges with specialized skill in negotiation, facilitation, and convening techniques
  - “800” number: 877-FERC-ADR (877-337-2237)
  - e-mail: [ferc.adr@ferc.gov](mailto:ferc.adr@ferc.gov)
- Settlement Judges
  - process detailed in 18 CFR 385.603
  - can be ordered by FERC or requested by parties
- Other forms of Voluntary Dispute Resolution, e.g., Arbitration
  - described in detail in 18 CFR 385.604-.606

# Part II: Rate Revision Process

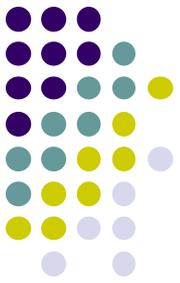


# Case-specific, adjudicatory proceedings: how does FERC protect customers from excessive rates and unreasonable terms and conditions?



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

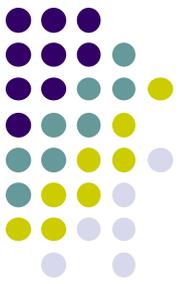
# The Standard by which FERC Judges Rates/Terms/Conditions



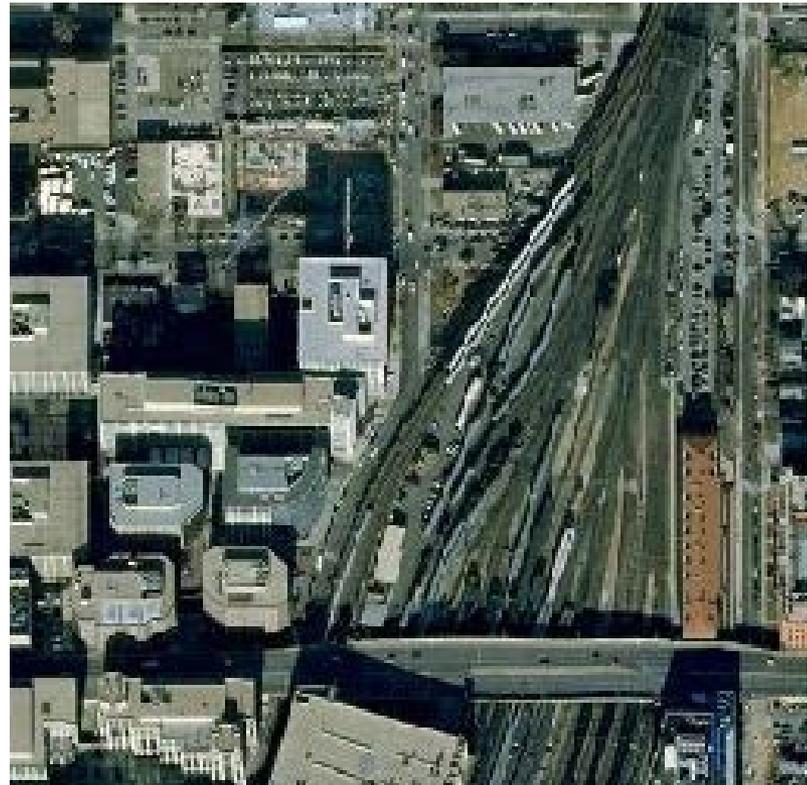
- Rates, terms and conditions *must be* “just and reasonable” and *must be* “not unduly discriminatory or preferential”
- Phrased differently: rates, terms and conditions *cannot be* “unjust or unreasonable” and *cannot be* “unduly discriminatory or preferential”
- Note: The same standard governs both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

# The Commission's case-specific, adjudicatory process

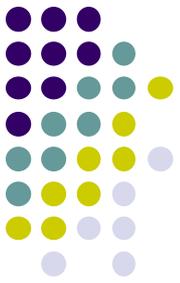
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- The process:



# 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 DRS can be helpful
    - Provide for other forms of alternative dispute resolution
      - 18 CFR 385.604, .605 (2014) – including mini-trials and binding arbitration
      - Most typically used when the parties ask to use them; these tools are voluntary

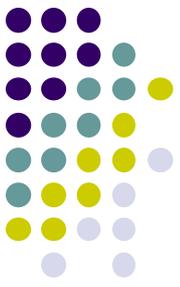
# Act II - The Middle Way. . .



- Trial-Type, Evidentiary Hearing Before a Presiding Judge
  - Discovery: 18 CFR 385.401-11
  - Evidence: 18 CFR 385.505-10
  - Prepared Written Testimony: 18 CFR 385.507-08
  - Oral Testimony and Cross-Examination: 18 CFR 385.505-06
- 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. . .

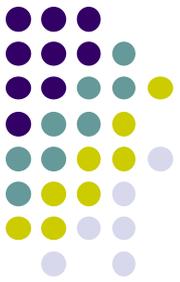


- **Settlement – 18 CFR 385.602**
  - Initial comments are due 20 days from the date of filing of the settlement, and reply comments are due 30 days from the date of filing of the settlement; a failure to file comments constitutes a waiver of any objections – 18 CFR 385.602(f)
  - Uncontested settlements:
    - 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

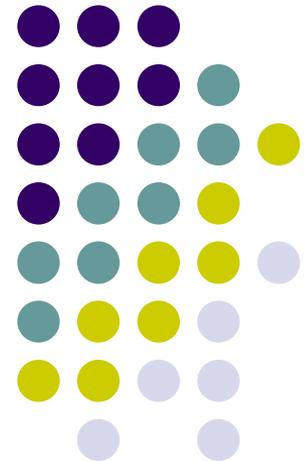
[www.ferc.gov](http://www.ferc.gov)

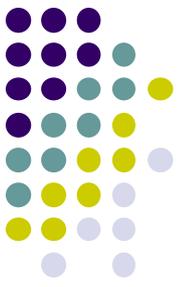


# Appendix A:

## Rate Revision Process - Federal Power Act Section 205

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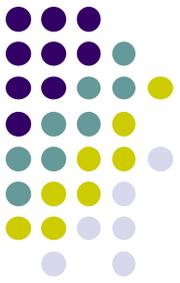
# Federal Power Act Section 205

## - 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>37</sup>

# Federal Power Act Section 205

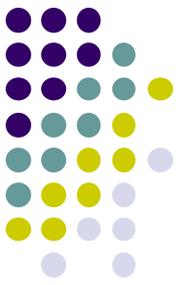
## - When Must Utility Filings Be Filed -



- 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 your rights, as discussed above
  - Note: For those of you interested 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

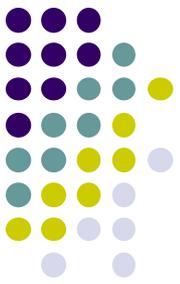
## - What Can FERC Do -



- 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 those interested in NGA 4 filings, essentially the same standard applies there as well

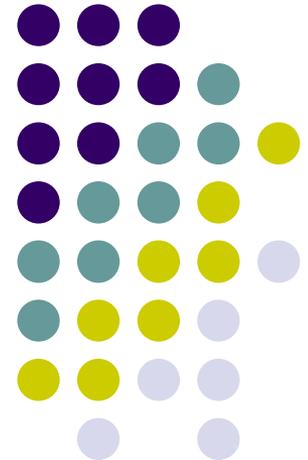


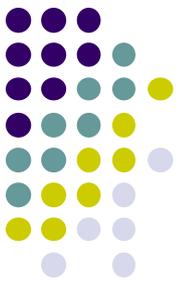
# Federal Power Act Section 205

## - 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

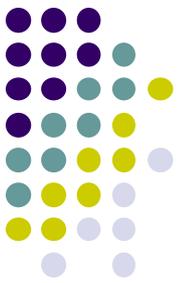
### - The Basics -

- 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

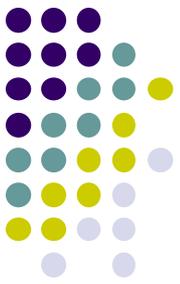


- FERC remedies in complaint/FERC-initiated proceedings are typically prospective, i.e., forward-looking, only; that is, from the date of the FERC order (1) finding an existing rate, term or condition is not just and reasonable or is unduly discriminatory or preferential, and (2) specifying a new rate,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

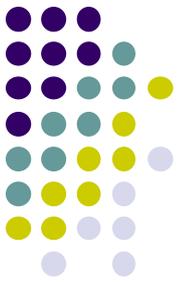


- Additional Exceptions:
  - Violations of “filed rate”: refunds and/or disgorgement of profits may be ordered for failure to abide by the “filed rate” in past years/months
  - Formula rates: refunds may be ordered for abuse of formula rates in prior years

# Federal Power Act Section 206

- Remedies -

Part 4



- As a result of the Energy Policy Act of 2005, . . .
  - Market manipulation is now prohibited, FPA 222 (16 USC 824w)
  - FERC now has authority to impose penalties up to \$1 million per violation per day, FPA 316A (16 USC 825o-1)



## Appendix C: Some FERC Orders of Interest

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### **Preemption:**

*FERC v. EPSA* and *Hughes v. Talen Energy Marketing, LLC*

### **Transmission:**

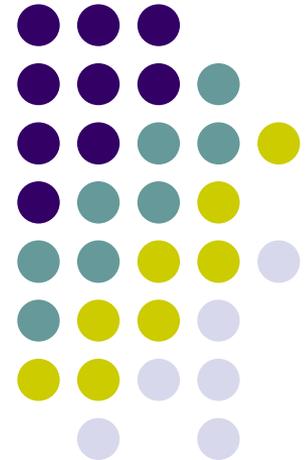
Open Access Transmission & Transmission Planning

Incentive Transmission Rates

Merchant Transmission

### **Generation:**

Demand/Load Response

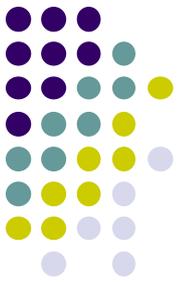


# Preemption by the FPA – What Sayeth the Supreme Court. . . .



- *FERC v. Electric Power Supply Assoc.*, No. 14-840 (U.S. Jan. 25, 2016)
  - Demand response participation in RTO/ISO markets – exclusively within FERC’s authority
- *Hughes v. Talen Energy Marketing, LLC*, No. 14-614 (U.S. April 19, 2016)
  - Wholesale sales and rates in RTO/ISO markets – exclusively within FERC’s authority

## Order Nos. 888 and 888-A – “Open Access” Transmission



*Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002)

**Issue:** Undue discrimination in the provision of transmission service. . . .

– which impedes competitive power markets – bearing in mind that kwh’s are fungible

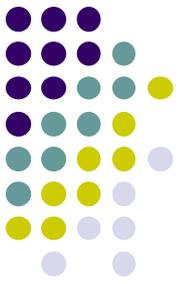
**Goal:** Non-discriminatory open access transmission service. . . .

– which promotes competitive power markets – again, bearing in mind that kwh’s are fungible

**Means:** *Pro Forma* Open Access Transmission Tariff or “OATT,” providing “comparable” treatment of all users of the transmission system, coupled with “functional” (not corporate) unbundling”

**And** . . . Non-public utilities may have “reciprocity” open access transmission tariffs (18 CFR 35.28(a) & (e))

# Open Access Transmission Tariffs



- All public utilities that own, control or operate jurisdictional transmission facilities are required to have open access transmission tariffs (18 CFR 35.28(a) & (c)) – the goal is to eliminate undue discrimination/preference.
  - That tariff must track the FERC-mandated *pro forma* open access transmission tariff, unless a waiver has been granted. That is, every public utility must file, and provide transmission service under, the *pro forma* open access transmission tariff – which specifies the rates, terms and conditions pursuant to which they will provide transmission service. Changes are allowed only if they are “consistent with or superior to” the *pro forma* open access transmission tariff.
  - Not just third-party customers, but the public utilities themselves must take service pursuant to this tariff. That is, public utilities must treat themselves and others *comparably* – they must take transmission service under the same terms and conditions, and under the same rates, as others (unless they’re “taking transmission service” to serve their native load).
- All transmission customers of FERC-jurisdictional public utilities must offer comparable “reciprocity” transmission service in return if they wish to avoid a denial of transmission service. A FERC finding of “reciprocity” provides a so-called “safe harbor,” ensuring that the non-public utility is entitled to transmission service from a public utility.

# Functional Unbundling



- Public utilities must functionally unbundle, i.e., separate, generation and transmission – they must offer stand-alone transmission service at stand-alone transmission rates
- Public utilities must separate their personnel and operations to ensure functional separation of generation and transmission

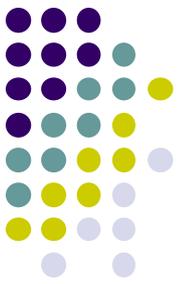
# Order Nos. 890 and 890-A – Improvements in Open Access Transmission, e.g., Transmission Planning



*Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, FERC Stats. & Regs. ¶ 31,241, *order on reh'g*, Order No. 890-A, FERC Stats. & Regs. ¶ 31,261 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009) – Order Nos. 890 and 890-A sought to make improvements to its *pro forma* OATT, and better achieve the goal of eliminating undue discrimination/preference

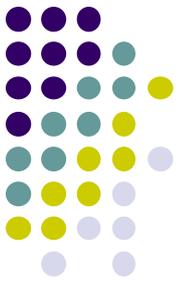
- One principal reform was with respect to transmission planning – with adoption of FERC-mandated coordinated, open and transparent transmission planning
  - Order No. 888 (and 888-A) *pro forma* OATT, in section 28.2, for example, required simply that the transmission provider plan and construct additional transmission facilities so as to be able to serve network customers “on a basis comparable to the Transmission Provider’s delivery of its own generating and purchased resources to its Native Load Customers.” While FERC encouraged joint planning with customers and other utilities, and also regional planning, FERC did not mandate such planning.
  - To better ensure that planning and construction occur in a non-unduly discriminatory manner, Order No. 890 (and 890-A) took the next step – mandating coordinated, open and transparent transmission planning on a local and regional level. FERC explained that, in light of a decline in investment relative to load growth resulting in increased congestion and a reduced access to alternative sources of energy, as well as a disincentive to remedy congestion on a non-unduly discriminatory basis, reform of the Order No. 888 (and 888-A) *pro forma* OATT was needed.

# Order Nos. 890 and 890-A – Improvements in Open Access Transmission, e.g., Transmission Planning. . . continued



- FERC identified nine planning principles in Order No. 890 that must be satisfied for a transmission provider’s planning process to be considered compliant with that order:
  - (1) **Coordination** – the process for consulting with transmission customers and neighboring transmission providers;
  - (2) **Openness** – planning meetings must be open to all affected parties;
  - (3) **Transparency** – access must be provided to the methodology, criteria, and processes used to develop transmission plans;
  - (4) **Information Exchange** – the obligations of and methods for customers to submit data to transmission providers must be described;
  - (5) **Comparability** – transmission plans must meet the specific service requests of transmission customers and otherwise treat similarly-situated customers (e.g., network and retail native load) comparably in transmission system planning;
  - (6) **Dispute Resolution** – an alternative dispute resolution process to address both procedural and substantive planning issues must be included;
  - (7) **Regional Participation** – there must be a process for coordinating with interconnected systems;
  - (8) **Economic Planning Studies** – study procedures must be provided for economic upgrades to address congestion or the integration of new resources, both locally and regionally; and
  - (9) **Cost Allocation** – a process must be included for allocating costs of new facilities that do not fit under existing rate structures, such as regional projects.

# Order Nos. 1000, 1000-A, and 1000-B – Regional Transmission Planning



*Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

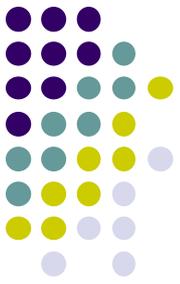
- Order Nos. 1000, 1000-A, and 1000-B build on Order Nos. 890 and 890-A, and the Order No. 890/890-A planning principles
- Order Nos. 1000, 1000-A, and 1000-B are process-focused, and do not dictate particular transmission planning results

# Order Nos. 1000, 1000-A, and 1000-B – Regional Transmission Planning... continued



- Order No. 1000 requires each public utility transmission provider to:
  - *Participate in a regional transmission planning process* that produces a regional transmission plan
    - FERC supports active state participation in the regional planning process, as well
  - In addition to identifying reliability and economic transmission needs, such processes must provide an opportunity, with stakeholder input, to identify transmission needs that are driven by public policy requirements established by local, state, or federal statutes or regulations, and then to evaluate potential solutions to those needs
    - FERC is *not* seeking to preempt state authority over siting, permitting, or construction
    - FERC is *not* making any statutes or regulations part of the regional plan, but rather requires that they be *considered* in evaluating transmission needs just as reliability and economic concerns are considered when identifying transmission needs
  - Coordinate between neighboring transmission planning regions with respect to interregional transmission facilities
  - Remove from FERC-jurisdictional tariffs and agreements any federal “right of first refusal” (essentially, an incumbency preference) to build new transmission facilities selected in a regional transmission planning process
    - FERC is *not* seeking to preempt state authority over siting/permitting/construction
    - And, in more recent compliance orders, FERC has clarified that state/local “rights of first refusal” can be recognized in the planning process, and early in that process

# Order Nos. 1000, 1000-A, and 1000-B – Regional Transmission Planning. . . continued



- Order No. 1000 requires each public utility transmission provider to participate in a regional transmission planning process that has:
  - An ex-ante regional cost allocation method to allocate the cost of new transmission facilities selected by the region
  - An ex-ante interregional cost allocation method to allocate the cost of new interregional transmission facilities
  - The cost allocation methods must satisfy 6 (4 discussed here) principles:
    - Allocation of costs roughly commensurate with benefits
    - Method for determining benefits and beneficiaries must be transparent
    - No involuntary allocation of costs to non-beneficiaries
    - Cost allocation should be within (across) the region(s) unless there is a geographically broader voluntary assumption of costs
  - Transmission project is eligible for regional cost allocation only if “selected in the regional transmission plan for purposes of cost allocation”
- Non-public utility transmission providers may participate, but are not required to <sup>58</sup> participate (but participation would be a necessary part of a reciprocity tariff)

## Order Nos. 1000, 1000-A, and 1000-B – Regional Transmission Planning. . . continued



- And now for the rest of the story. . . Order No. 1000 was affirmed! – *South Carolina Public Service Authority v. FERC*, 762 F.3d 41 (D.C. Cir. 2014)
- FERC is now in the midst of overseeing the region-by-region implementation of Order No. 1000

# “Incentive Rates” – providing an incentive to construct additional transmission infrastructure



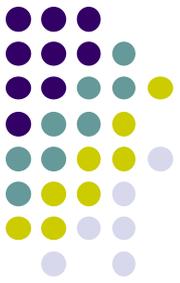
- FPA 219 (16 USC 824s) – Congress told FERC to establish incentives to foster investment in transmission infrastructure
- *Promoting Transmission Investment through Pricing Reform*, Order No. 679, FERC Stats. & Regs. ¶ 31,222 (2006), *order on reh’g*, Order No. 679-A, FERC Stats. & Regs. ¶ 31,236, *order on reh’g*, 119 FERC ¶ 61,062 (2007) – FERC found that incentives were warranted where, case-by-case:
  - Applicant demonstrated that facilities for which it sought incentive either ensured reliability or reduced cost of delivered power by reducing transmission congestion (with rebuttable presumption that this demonstration had been made when the project either resulted from a fair and open regional planning process, or had received construction approval from the appropriate state authorities), and
  - Applicant demonstrated a nexus between requested incentive and investment being made (that is, incentives were “rationally tailored to the risks and challenges faced by a project”)
  - Typical incentives that could be authorized include:
    - Incentive adders to a base return on equity (incentive ROE adder)
    - 100% of prudently-incurred costs cancelled/abandoned due to factors beyond Applicant’s control
    - 100% of construction work in progress in rate base (100% CWIP)
    - Hypothetical capital structures
    - Accelerated depreciation
    - 100% of prudently-incurred pre-commercial operation costs

# “Incentive Rates” – providing an incentive to construct additional transmission infrastructure . . . continued



- *Promoting Transmission Investment Through Pricing Reform*, Policy Statement, 141 FERC ¶ 61,129 (2012) –
  - Addressing the “how’s it working out?” question. . .
  - Reframes the “nexus” test previously used, no longer focusing on the “routine”/“non-routine” nature of the project and instead focusing on the need for each individual incentive as well as the total package of incentives
  - Establishes an expectation that applicants will take reasonable steps to mitigate risks, including seeking risk-reducing incentives such as 100% CWIP, and to do so before seeking incentive ROE adder
    - To still recover incentive ROE adder, there must be a showing that a project’s risks are not already accounted for in the base ROE or addressed through, e.g., risk-reducing incentives
    - To still recover incentive ROE adder, there should be a showing that alternatives to the project were considered
    - To still recover incentive ROE adder, the applicant is expected to commit to limiting the application of the incentive ROE to a cost estimate, e.g., to the last cost estimate used at the time of RTO approval or to the last cost estimate relied upon in a regional transmission planning process
  - The showings described should promote project and cost transparency

# Merchant Transmission



- Previously, in order to be allowed negotiated transmission rate authority, merchant transmission developers had to show that they had conducted a more formal “open season,” i.e., a more formal solicitation of interest, and provide FERC a post-open season report – to ensure against undue discrimination in the allocation of transmission capacity
  - FERC would evaluate the terms and conditions of the open season to ensure no undue discrimination, and to ensure no affiliate preference
  - FERC allowed some, but generally not 100%, anchor customer presubscription to the transmission capacity, with the rest allocated in a subsequent open season at essentially the same terms and conditions provided to the anchor customer



# Merchant Transmission . . . continued

- *Allocation of Capacity on New Merchant Transmission Projects, et al.*, Policy Statement, 142 FERC ¶ 61,038, *reconsid. dismissed*, 142 FERC ¶ 61,213 (2013) –
  - Transmission developer may select – based on not unduly discriminatory or preferential criteria – a subset of potential transmission customers and negotiate directly with those anchor customers on rates, terms and conditions of transmission service, and it can be for up to the full amount, i.e., 100%, of available capacity
    - Other, non-anchor customers’ service can be at different rates, terms and conditions
  - In order to do so, the transmission developer:
    - Must openly and broadly, but it can be informally, solicit interest in the project from potential transmission customers
    - Must disclose the results and demonstrate to FERC that the process satisfied solicitation, selection and negotiation criteria (e.g., criteria to rank potential customers should be objective, and throughout the process, the various criteria should be not unduly discriminatory)
  - FERC will allow, in short, greater informality/flexibility, but it must be coupled with greater transparency
  - The same approach will not only be applied to new merchant transmission projects, but also will be applied to new non-incumbent, cost-based participant-funded transmission projects

# Demand/Load Response



- *Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, FERC Stats. & Regs. ¶ 31,322, *order on reh'g*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *order on reh'g*, Order No. 745-B, 138 FERC ¶ 61,148 (2012)
  - FERC claimed jurisdiction over demand response in the RTO/ISO-run markets based on its effect on wholesale electricity prices
  - FERC ordered payments based on LMP: when demand response has the capability to balance supply and demand; and when demand response is cost-effective – i.e., FERC provided for comparable treatment for generation and demand response
- *EPSA v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *reversed sub nom. FERC v. EPSA*, No. 14-840 (S. Ct. Jan. 25, 2016)
  - Is demand response at the wholesale level FERC-jurisdictional? The appeals court said “no,” but the Supreme Court said “yes”
  - Should demand response get LMP-based payments, like generation? The appeals court said “no,” but the Supreme Court said “yes”