

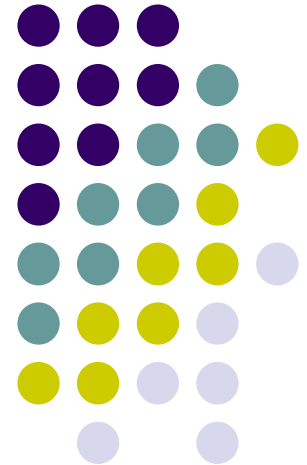
# An Overview of the Federal Energy Regulatory Commission and Federal Regulation of Public Utilities



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

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



**Who** – Commissioners and staff

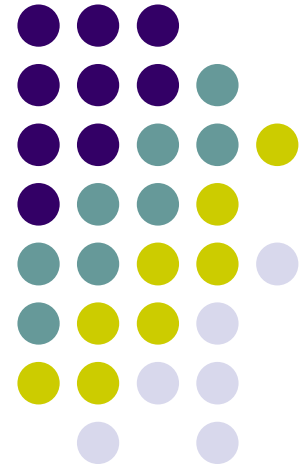
**What** – Jurisdiction of FERC

**Where** – Locations of FERC offices

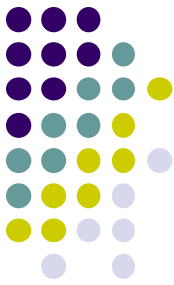
**When** – Timing of FERC action

**How** – Decision-making process

But **not** “**Why**” – Because Congress told us to do it



# Who is FERC?



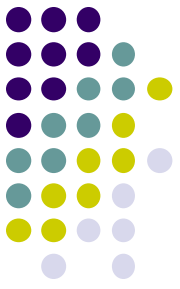
- FERC is a Federal Agency

- FERC was created in 1977 by the Department of Energy Organization Act, 42 USC 7134, 7171(a)
- FERC inherited many (but not all – *see* 42 USC 7172) of the responsibilities of the Federal Power Commission (which dates back to 1920); much of what it didn't inherit went to DOE, but was subsequently delegated from DOE to FERC (Dept. of Energy Delegation Order No. 00-004-00A (May 16, 2006))

- FERC is an “Independent” Agency

- Independent by statute, 42 USC 7171(a)
- But, paraphrasing John Donne, no Federal agency is an island.
- Nevertheless. . .
  - Independent from undue 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 four)



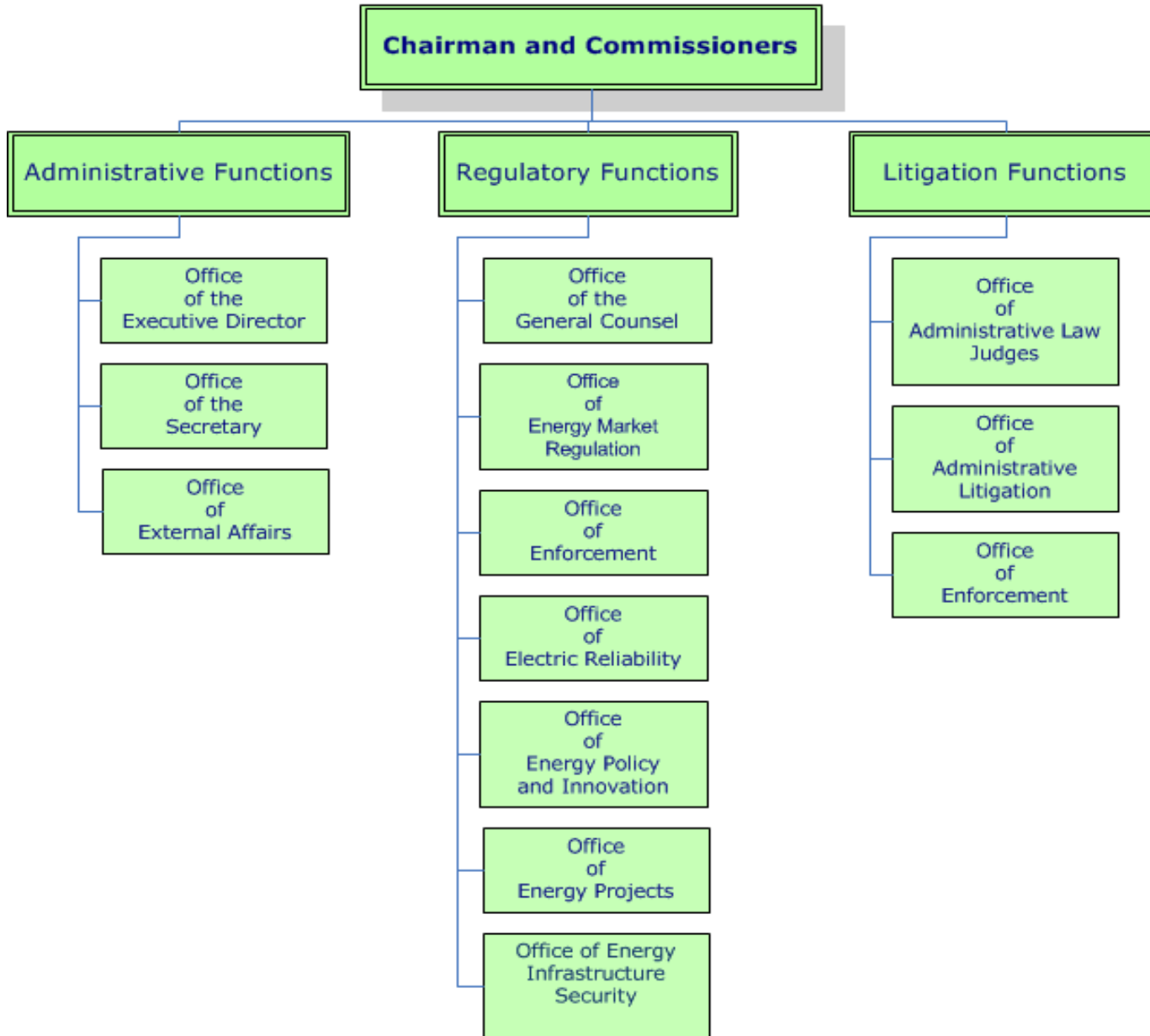
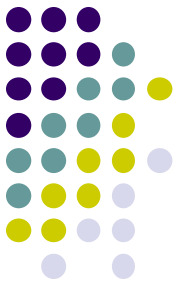
- Chairman Neil Chatterjee – R (term expires June 30, 2021)
- Commissioner Cheryl A. LaFleur – D (term expires June 30, 2019)
- Commissioner Richard Glick – D (term expires June 30, 2022)
- Commissioner Bernard L. McNamee – R (term expires June 30, 2020)
- Nominated by the President and confirmed by 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?



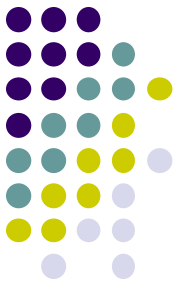
- *Commissioners* – Each Commissioner, including the Chairman, has 1 vote
  - FERC action requires a majority vote; Chairmen thus can be out-voted
- *Chairman* – Designated by the President; Senate confirmation is not required to be designated as the Chairman
  - FERC’s administrative leader
- *Staff* – approximately 1465 employees requested (FY 2019)
  - By program:
    - Electric – 836 (57%); Gas & Oil – 305 (21%); Hydroelectric - 325 (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)
- *Budget* – approximately \$370 million requested (FY 2019):
  - Annual appropriation from Congress
  - But funds equal to FERC’s budget are reimbursed through: filing fees assessed to the filing entity for individual filings; and annual charges assessed generally to the regulated industries - so that FERC has a “0” net 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)?

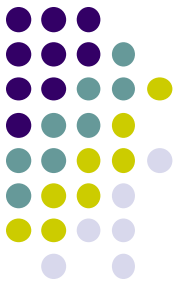
(drawn, in large part, from FERC's FY 2019 budget request)



- The **Office of Energy Projects** (OEP) approves and 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..
- 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 on policies to ensure the efficient development and use of transmission, generation, demand-side resources, storage, and emerging technologies, as well as wholesale and interstate energy markets more generally.
- The **Office of Electric Reliability** (OER) oversees the development and review of mandatory electric reliability and security standards, 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 2019 budget request)

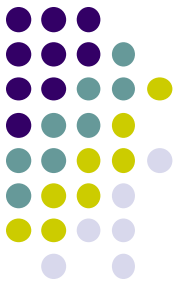


- The **Office of Energy Infrastructure Security** (OEIS) identifies and—working with other governmental agencies, industry, and other stakeholders—seeks comprehensive solutions to potential threats to FERC-jurisdictional infrastructure from cyber and physical attacks, including geomagnetic disturbance 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 involved 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 2019 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, e.g., orders, are issued by FERC. OSEC promulgates and publishes all FERC orders 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?



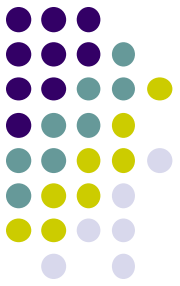
- Rates and services for electric transmission in interstate commerce and electric wholesale power sales in interstate commerce – Principally under Parts II and III of the Federal Power Act
- Rates and services for natural gas pipeline transportation, for storage facilities and for LNG facilities; certification 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
- 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+09 (D.C. Cir. 2004).

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



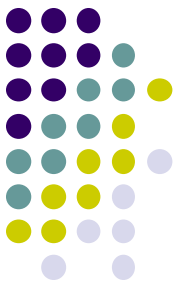
- Beginning with where half the Commission’s effort is devoted. . .
- FERC’s “bread-and-butter” – regulation of public utility transmission in interstate commerce and sales for resale in interstate commerce:
  - Transmission of electric energy in interstate commerce by public utilities, i.e., the rates, 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))
    - Federal authority “trumps” contrary state authority
    - 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) – with the Office of Electric Reliability overseeing the development of and compliance with the standards
- Prohibition of energy market manipulation – FPA 222 (16 USC 824v) – with the Office of Enforcement investigating claims of market manipulation

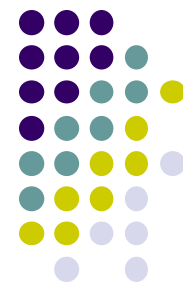
# “Public utility” status is the key to understanding many FPA Parts II and III jurisdictional questions



- 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)?

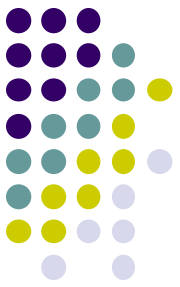
- FPA 201, 16 USC 824 -



- “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:

## FPA 215 - Reliability



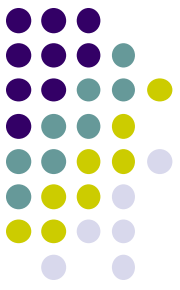
- Energy Policy Act of 2005 amended FPA to include new section 215, 16 USC 824o, establishing a mandatory electric reliability regime
- FPA 215 provides for an independent “electric reliability organization” (ERO), certified by the Commission, to develop and enforce mandatory reliability standards for “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



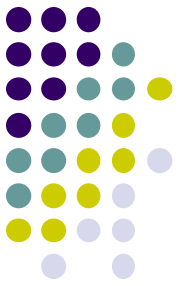
# What is within FERC's Natural Gas Act authority?

- 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 facilities, 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?

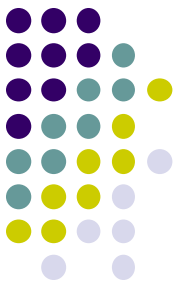


- FERC regulates rates and practices of oil pipeline companies engaged in interstate transportation
  - Establishes equal service conditions to provide shippers with equal access to oil pipeline transportation
  - Establishes reasonable rates for transporting petroleum and petroleum products by pipeline
- 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?

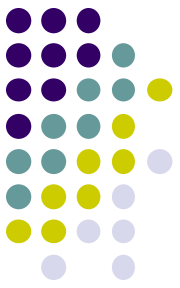
- Commissioners meets formally and publicly on the third Thursday of each month (except August, when there are no formal public meetings), in open session starting at 10 AM Eastern Time. These meetings are televised and web-streamed.
- Commissioners may meet in “closed meetings” to discuss enforcement 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



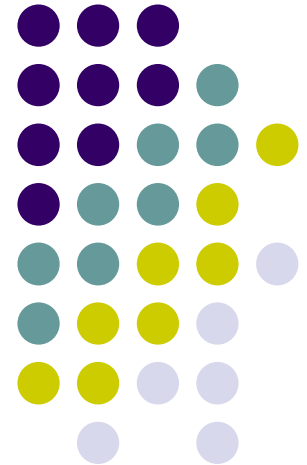
- **Generic, industry-wide decisions** – usually initiated by FERC or in response to a petition for rulemaking. E.g., . . .
    - Rulemaking (typically changing rules published in CFR)
    - Policy Statement (typically, but not always, *not* changing rules published in CFR)
  - **Party-specific, adjudicatory 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



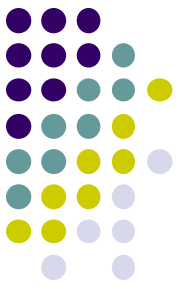
- **How do parties participate. . . .**
- **Rulemaking proceedings**
  - Participation by filing comments by FERC-specified comment date
  - FERC’s “ex parte” regulations **do not** apply in rulemaking proceedings (18 CFR 385.2201(a), (b), (c)(1)(ii))
- **Case-specific, adjudicatory proceedings**
  -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

# Part II: Rate Revision Process



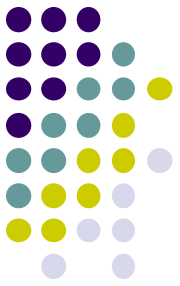


# Case-specific, adjudicatory proceedings – how does FERC protect customers from excessive rates and unreasonable terms and conditions?



- 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)

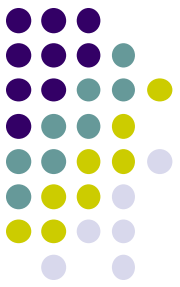
# The Standard by which FERC Judges Rates/Terms/Conditions



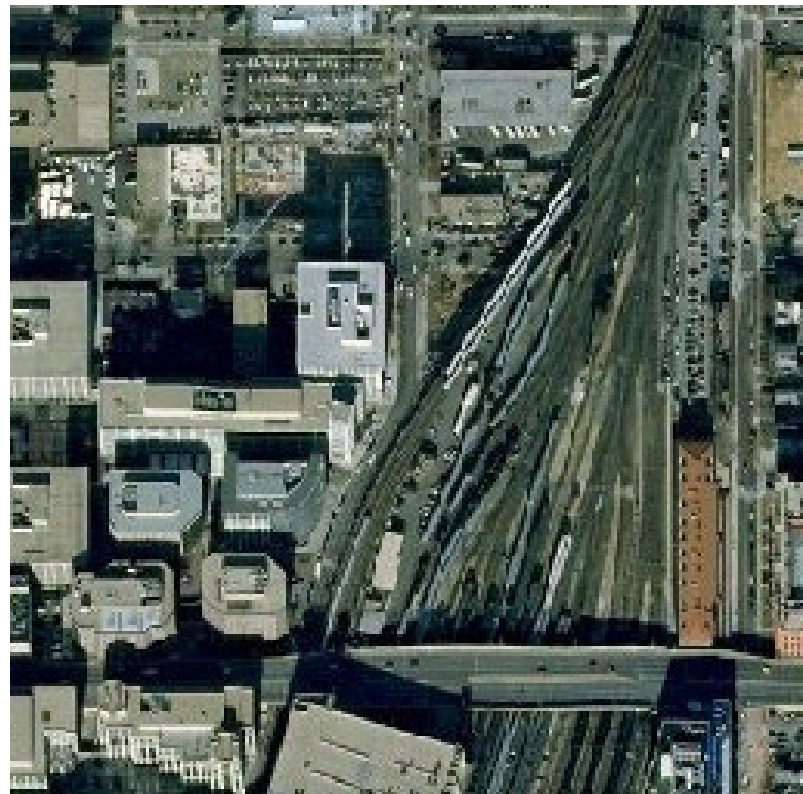
- Rates, terms and conditions *must be* “just and reasonable” and *must be* “not unduly discriminatory or preferential”
- Phrased differently: rates, terms and conditions *cannot be* “unjust or unreasonable” and *cannot be* “unduly discriminatory or preferential”
- Note: The same standard governs both 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

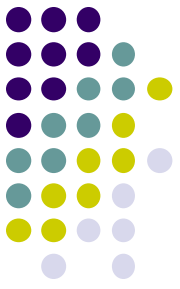
-- seen from above --



- The process – a drama in three acts:

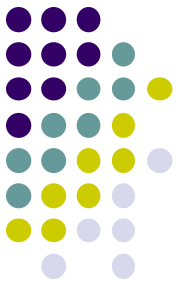


# Act I - In the Beginning. . .



- 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 – 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

### ● Action on uncontested settlements:

- 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.

### ● Action on contested settlements:

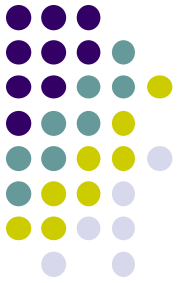
- A contested settlement is no different than any contested matter, and is dealt with accordingly, most typically either by a Commission decision on the merits if the record contains substantial evidence upon which to base a decision or by the Commission establishing procedures to take additional evidence or by the severing of contested parties so that they may continue to litigate – 18 CFR 385.602(h)

### ● *Ultimately, there will be a Commission order*

## ● **Initial Decision** – 18 CFR 385.711

- 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.

### ● *Ultimately, there will be a Commission order*



Thank you

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