

FERC Lite Legislation: The Future of "Low Calorie" FERC Regulation

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FERC Lite – Overview

- Section 1231 of the Energy Policy Act of 2005 added Section 211A to the Federal Power Act.
- Section 211A gives the Commission the discretion to require unregulated transmitting utilities (“UTUs”) to:
 - ✓ Provide transmission service; and
 - ✓ Comply with the rate changing provisions of the Federal Power Act.

FERC Lite – How Can FERC Take Action?

- FERC may take action by issuing regulations that apply to all UTUs.
- FERC may issue orders that apply to individual UTUs or that establish policies that apply to all UTUs.

What Is FERC Likely to Do?

- It is too early to say whether FERC will take action and, if so, what it will do.
- FERC's Notice of Inquiry on Preventing Undue Discrimination and Preference in Transmission Services asks three questions related to FERC Lite:
 - ✓ Should FERC require UTUs to provide comparable transmission service?
 - ✓ If so, should it proceed by rulemaking or on a case-by-case basis?
 - ✓ Can terms and conditions of service be both comparable and unduly discriminatory or preferential?

What Is FERC Likely to Do? *continued*

- It is likely that some investor-owned utilities and customers will argue for FERC to expand its jurisdiction to include UTUs.
- On the other hand, FERC has lots of other matters on its plate and may be convinced to defer action.
- NRECA will be addressing these questions in its comments on the NOI.



What Is the Problem that FERC Lite Will Solve?

- Evidently some industry participants believe that regulation of UTUs is necessary to eliminate discriminatory transmission service. However:
 - ✓ Since 1992, FERC has had the authority under Section 211 to require any electric utility or power marketing authority, including all UTUs, to provide transmission service.
 - ✓ FERC has issued 19 orders requiring Section 211 transmission service.
 - ✓ Only 6 orders involved UTUs; three of those involved TVA; and the other three involved service or utilities that are not covered by the FERC Lite statute.

THE MESSAGE TO FERC ON A FERC LITE RULEMAKING:

- The evidence indicates that FERC Lite regulation would capture only one "bad actor".
- This argues for a case-by-case process rather than generally-applicable rules and orders.

GREAT WASTE



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Who Is Potentially Subject to FERC Lite Regulation?

- All entities that own or operate facilities used for the transmission of energy in interstate commerce that are not otherwise subject to FERC regulation are potentially included.
 - ✓ RUS-financed cooperatives, munis and federal power marketing agencies are included.
 - ✓ ERCOT entities are not included.
- FERC Lite regulation does not apply to local distribution facilities.



Who Is Potentially Subject to FERC Lite Regulation? continued

- Entities that do not own transmission facilities that are necessary to the operation of an interconnected transmission system are exempt.
 - ✓ Owners of radial lines are exempt even if the lines are being used by transmission customers.
 - ✓ This exemption is broader than the exemption of public utilities under Order No. 888: they are exempt only if they are not providing FEC-jurisdictional transmission service.
- Entities that sell no more than 4 million MWH of energy per year are exempt.
 - ✓ Are sales by a G&T cooperative to its members included within the 4 million MWH calculation?

Who Is Potentially Subject to FERC Lite Regulation? continued

- FERC may exempt other entities if it concludes that doing so is in the public interest.
 - ✓ There is no guidance on what other exemptions might be appropriate.
 - ✓ NRECA will be evaluating whether to propose any additional exemptions.

- The FERC may terminate an exemption only if it concludes that the exemption unreasonably impairs reliability.
 - ✓ An exempt UTU will not lose its exemption as a result of an allegation of discriminatory conduct.

What Standards Would UTUs Have to Meet?

- A UTU would be required to provide transmission service at rates that are comparable to the rates it charges itself.
 - ✓ The standard is not the “just and reasonable” standard, so arguably the cost justification for the rates will not be evaluated.
 - ✓ Are rates for service to “itself” the rates the UTU charges its members? Or are they the rates it charges for its merchant sales to third parties?
 - ✓ If so, will FERC require the unbundling of UTUs’ requirements service rates to ensure comparability? [It did not do so for public utilities.]
 - ✓ Does “comparable” mean identical? Or should rates to members be lower than the rates for third party customers in recognition of their paid-in capital?

What Standards Would UTUs Have to Meet? continued

- A UTU would be required to provide transmission service on terms and conditions that are comparable to those that the UTU provides itself AND that are not unduly discriminatory or preferential.
 - ✓ The standard for review is not the “just and reasonable” standard but comparability.
 - ✓ The “safe harbor” for reciprocal transmission service under Order No. 888 tariffs requires customers to provide service that is comparable to the service they receive, not service that is comparable to what they provide themselves.

What Standards Would UTUs Have to Meet? continued

- ✓ The FERC Lite comparability standard arguably would allow a UTU to comply without offering “pro forma” OATT service.
- ✓ Should a “safe harbor tariff” be deemed to meet the comparability standard?
- ✓ Why did Congress add the “not unduly discriminatory or preferential” standard to terms and conditions but not to rates?

What Rate Authority Does FERC Have over UTUs?

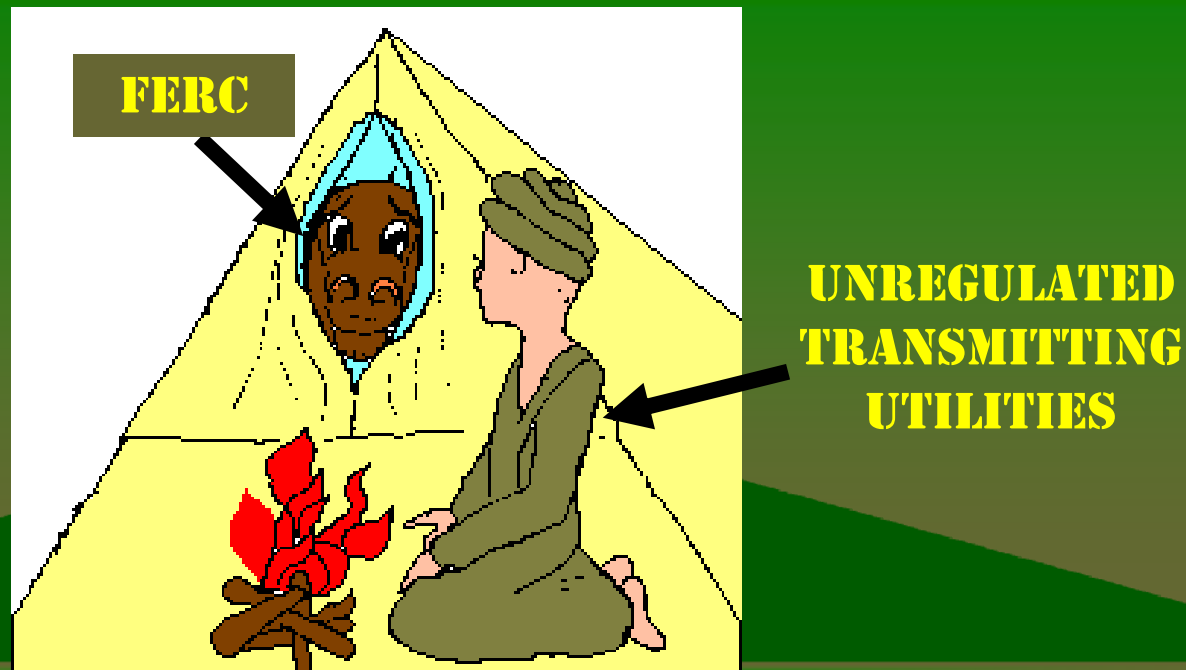
- The “rate changing” provisions of Section 205(c) and (d) would apply to UTUs.
 - ✓ The rate changing provisions apply only to the extent that FERC actually regulates the transmission rates of UTUs.
 - ✓ Section 205(a) and (b) and Section 206 “just and reasonable” criteria do not apply.
 - ✓ UTUs therefore should not have to cost-justify their rates in the way that public utilities do.
 - ✓ Does the “rate changing” reference mean that terms and conditions need not be filed? [It seems unlikely.]
 - ✓ Must UTUs file all of their existing rates or must they file only if they change those rates?

What Rate Authority Does FERC Have over UTUs? *continued*

- FERC's remedy is to remand rates to the UTU if it finds they don't meet the comparability requirement. It may not establish the rates itself.
- May FERC modify terms and conditions of UTU service that it finds are not comparable? May it remand them to the UTU?

Are RTOs in Our Future?

- The Statute provides that Section 211A does not give FERC the authority to require a UTU to transfer control to an RTO or ISO.
- However: remember the adage about the camel: Once the camel's nose is in the tent the rest is sure to follow.



What Message Should You Take Home To Your Members?



If you don't want a beer-drinking camel in bed with you, file comments telling FERC to not initiate a rulemaking on FERC Lite.