

TURF WARS: THE FERC's JURISDICTIONAL BATTLES

The Tenth Annual FERC Briefing
A Decade of Restructuring:
Where Do We Stand?
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TURF WARS: THE (FERC) EMPIRE STRIKES BACK



Turf Wars – Overview

- FERC-State jurisdictional conflicts have intensified in recent years as FERC attempts to impose its vision of how to restructure the electric industry.
- The extent to which FERC prevails on jurisdictional issues will have a significant impact on the structure of the industry at the end of the second decade of restructuring.

Retail Transmission Service – History

- FERC has jurisdiction over all transmission service in interstate commerce.
- FERC did not assert jurisdiction over any aspect of the delivery of power to retail customers, based on the fiction that bundled retail service does not include transmission service – just delivery of power to the customer.

Retail Transmission Service – Recent Developments

- The FERC held that if a state adopts retail choice, all transmission service is unbundled and subject to its jurisdiction. However, it has not required utilities to file their retail rates with FERC.
- The Supreme Court held that FERC has jurisdiction over unbundled retail transmission and could assert jurisdiction over bundled retail transmission to remedy undue discrimination.
- The Virginia legislature has twice considered terminating retail choice to ensure that the FERC does not assert jurisdiction over retail transmission.

Distribution Service – History

- FERC did not assert jurisdiction over any aspect of the delivery of power to retail customers, including local distribution service.
- The Federal Power Act exempts from FERC jurisdiction “facilities used in local distribution”.

Distribution Service – Recent Developments

- FERC approved a provision for retail customers to take distribution under the MISO OATT, stating that the facilities are FERC-jurisdictional because they are used for both wholesale and retail distribution.

- The Court of Appeals is arguing that FERC was attempting to rewrite the Federal Power Act and its argument was "fundamentally





Stranded Costs and Universal Service Charges – History

- In Order No. 888, FERC held that both the Commission and the states have the authority to address retail stranded costs:
 - FERC has jurisdiction over unbundled retail transmission.
 - The states have jurisdiction over local distribution facilities and the service of delivering energy to end users.
- FERC held that the states should address stranded costs associated with retail wheeling.

Stranded Costs and Universal Service Charges – Recent Developments

- In a case involving station service – a retail sale – FERC held that a state-filed charge for local distribution service cannot be assessed if no physical distribution facilities are involved, and that the charge would “appear to be” a double charge for transmission service.
- FERC ignored assertions that the charge was primarily for stranded costs and universal service charges. It stated that the state court and PSC cases should go forward with its guidance, but it did not order refunds.
- On rehearing, FERC denied the generator’s request for refunds, stating that this was up to the PSC.

Stranded Costs and Universal Service Charges – Recent Developments continued

- However, it stated that the utility should stop imposing such charges.
- The price charged for the service should be based on the cost of providing the service.
- FERC ordered the utility to stop imposing such charges.



Voluntary ISO Membership – History

- In Order No. 2000, FERC reiterated that ISO/RTO membership is voluntary. It did not state that it had the authority to mandate RTO membership.
- There has been speculation that FERC would attempt to force RTO membership under § 205 as a remedy for undue discrimination. That has not happened – yet.

Voluntary RTO Membership – Current Developments

- FERC issued an order making preliminary findings that Kentucky and Virginia law prevent AEP from joining PJM and that the Commission may exempt AEP from state law under § 205 of PURPA.
- The statute prohibits FERC from overriding state law if the state law is necessary for public health, safety or welfare.
- An initial decision is due



Joining and Withdrawing From ISO Membership – History

- FERC traditionally required utilities to submit applications under § 203 of the Federal Power Act only when they transferred ownership-like interests in their transmission assets.
- Transfers of control, instead of ownership, did not result in § 203 filings or approvals.

Joining and Withdrawing from ISO Membership – Recent Developments

- FERC held that transfers of control to RTOs under Section 203. Utilities who joined RTOs have submitted Section 203 applications.
- The Court of Appeals did not have the authority under § 203 to address the issue, the withdrawal of a utility from an RTO. V. The ruling would apply well.
- On remand, FERC stated that it had not adequately explained its reasoning and reiterated its intent to evaluate withdrawals under § 203.



Joining and Withdrawing from ISO Membership – Recent Developments continued

- The Court issued a stern order stating that FERC did not have such authority.
- FERC then asserted authority to approve a withdrawal under because withdrawal requires amendment of the Interconnecting Agreement.
- Rehearing petition



Curtailments of Native Load – History

- Traditionally, utilities provided highest-priority service only to their retail and wholesale native load customers.
- FERC did not challenge the “firm as native load” priority for sales or transmission service.

Curtailment of Native Load – Recent Developments

- FERC Order No. 888 requires transmission providers to curtail transmission for native load and point-to-point transmission on a pro rata basis.
- The Court of Appeals held that where state law required native load to be curtailed last, FERC's curtailment policy was impermissibly regulating retail transmission. It reversed the Commission's order requiring the utility to adopt "pro rata" curtailment provisions.

Curtailment of Native Load – Recent Developments

continued

- On remand, FERC required the utility to ensure that point-to-point customers have redispatch options before they are curtailed and also required the utility to provide service to point-to-point customers.
- The utility instead agreed to provide service to point-to-point customers in violation of the law.
- Kentucky has enacted a “repeal” statute. The Court of Appeals abstained from issuing an order on the statute, pending a decision from the Supreme Court that FERC has no authority to require service to native load.



Affiliate Transactions – History

- Many states have statutes or regulations governing affiliate transactions, including restrictions on affiliate power sales.
- FERC increased its oversight of affiliate power sales when market-based rates were approved. However, it has jurisdiction over all wholesale sales, regardless of whether affiliates are involved.

Affiliate Transactions – Recent Events

- The Virginia State Corporation Commission required Virginia Power to include in a FERC-filed service agreement with its affiliate a provision that the utility could terminate the transaction over affiliate transactions and terminate the transaction.
- FERC rejected the provision as it preempted FERC from reviewing wholesale energy transactions.
- The utility withdrew its service agreement.



Generator Interconnections – History

- FERC traditionally did not concern itself with where generators were located or what transmission arrangements were made to connect them to the grid.

Generator Interconnections – Recent Developments

- FERC held that generator interconnection service is an aspect of transmission service. It therefore asserted jurisdiction over the rates, terms and conditions of interconnection service.
- Kentucky law prohibits the construction of merchant generation without a certificate. Among the factors the state siting board considers is the impact on the transmission system.

Generator Interconnections – Recent Developments

continued

- The Board approved the siting of a merchant's 1500 MW mine-mouth coal plant on the condition that all the costs of upgrades to the transmission grid must be borne by the generator and not by retail customers.
- The Board also required the generator to obtain an order from FERC providing for the generator to incur all of the upgrade costs.
- The FERC on the other hand is requiring socialization of grid upgrades for generator interconnections.
- The Kentucky order may be subject to Federal preemption.



Non-Jurisdictional Entities – History

- FERC has traditionally not asserted jurisdiction over rates, terms and conditions of service by municipalities and cooperatives.
- In 1996 FERC began exercising “light handed” regulation of munis and coops that provide open access transmission service under “reciprocity” tariffs.
 - Terms and conditions must be consistent with or superior to Order 888.
 - Transmission provider must charge itself the tariff rates.
 - Transmission provider must comply with the Standards of Conduct.

Non-Jurisdictional Entities – New Developments

- In evaluating the California ISO's rates, FERC allowed a muni to use the nearby utility's ROE and depreciation rate and did not subject its revenue requirement to "just and reasonable" review.
- The Court of Appeals remanded the case to FERC for an explanation of why CAISO's rates are just and reasonable with the muni's revenue requirement included. It rejected assertions that the muni's revenue requirement must itself be just and reasonable.

Non-Jurisdictional Entities – New Developments

continued

- FERC set the muni's rates for hearing to ensure that the CAISO's rates are "just and reasonable".
- More recently, FERC ignored the limits of its rate review authority of non-jurisdictional transmission providers. Where Basin Electric Power Cooperative and Powder River Electric Cooperative jointly filed a transmission tariff with Black Hills Power, FERC set all three providers' revenue requirements for hearing under the "just and reasonable" standard. It did not discuss the limited standard of review that applies to munis and coops.

Turf Wars – Who is winning?

- FERC is winning the battles on retail transmission, and ultimately will win the war.
- When FERC wins the retail transmission war, it also will win on curtailments for native load.
- FERC will prevail on affiliate sales transaction if utilities decide to challenge state affiliate laws. So far, they have not.
- FERC will prevail on review of muni and coop rates – at least in the context of OATT service. Munis and coops also will participate in regional markets subject to FERC control and be subject to FERC oversight.

Turf Wars – Who is winning? continued

- FERC is likely to lose with respect to forcing ISO membership under PURPA. It could prevail if it asserts that membership is required to remedy undue discrimination.
- FERC will lose with respect to § 203 control over joining and withdrawing from ISOs. Its § 205 authority over rates may be an insufficient basis to assert jurisdiction over transfers of control. However, the “undue discrimination” argument may justify its controlling transfers of control.
- FERC ultimately will prevail with respect to generation interconnections and pricing policy, but it may take a while to override state siting decisions.

Turf Wars – Who is winning? continued

- FERC will lose with respect to all local distribution service issues and charges associated with retail sales.
- The bottom line is that while states may prevail on some issues, and may delay FERC inroads in other areas, FERC will exert increasing control over utility operations.

MAY THE FEREC BE WITH YOU!

