

# TURF WARS: THE FERC's JURISDICTIONAL BATTLES

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## Turf Wars – Overview

- FERC launched its restructuring of the electric industry ten years ago with the issuance of the Notice of Proposed Rulemaking that led to Order No. 888.
- 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.

# TURF WARS: THE FERC EMPIRE STRIKES BACK



## 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 service 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 “fundamental





## 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. However, it stated that the utility should stop imposing such charges prospectively.

## Stranded Costs and Universal Service Charges – Recent Developments continued



## 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 set for hearing the issue of whether Kentucky and Virginia law prevent AEP from joining PJM and whether the Commission may exempt AEP from state law under § 205 of PURPA.



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# Voluntary RTO Membership – Current Developments

continued

- The initial decision issued on March 12, 2004, held that:
  - AEP's commitment to join PJM was voluntary and designed to obtain economical utilization of facilities in the region;
  - Kentucky and Virginia law are precluding AEP from fulfilling its commitment;
  - Kentucky and Virginia law are not designed to protect public health and welfare;
  - AEP should be exempted from Kentucky and Virginia law to allow it to join PJM.

## Implications of the PJM/AEP Order

- The key issue is whether the prohibition against exempting utilities from state laws that are designed to protect the public health and welfare applies to laws that are designed to protect a state's retail consumers from higher prices, decreased reliability or loss of local control.
- The order continues the pattern of conflict between FERC and the states and may slow the movement toward RTO membership elsewhere.
- Kentucky "blinked". It entered into a settlement with PJM and AEP that allows AEP to join PJM on the basis of assurances that did not change Kentucky's control of the reliability of service to native load customers.

## Control Over 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 it had jurisdiction over transfers of control to RTOs under Section 203. All utilities that joined RTOs have submitted Section 203 applications.
- The Court of Appeals has affirmed FERC's jurisdiction to have the approval of a utility withdrawal from an RTO. With respect to the issue, the ruling would apply to all utilities.
- On remand, FERC explained its reasons for approving withdrawals under Section 203. FERC adequately explained its reasons for its decision to evaluate



## 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 that it has authority to approve a withdrawal under § 20. FERC requires amendment to the existing Agreement.
- FERC required PJM to provide that a withdrawal requires approval under § 20.



## 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 discounted transmission rates for point-to-point customers.
- The utility instead agreed to not modify its tariff to reflect state law.

# Curtailment of Native Load – Recent Developments

continued

- Kentucky has enacted a “retail native load priority” statute. The District Court initially abstained from ruling on a challenge to an order on the statute, pending action in state court, stating that FERC has no authority to regulate the adequacy of service to native load. On reconsideration, it decided to hear the case, stating that it should not pre-judge the issue.
- The Kentucky/AEP/PJM settlement does not affect the litigation.

## Retail Sales

- FERC does not have jurisdiction over retail sales.
- However, FERC staff has asserted that energy imbalance transactions (when a generator over-generates or a load overschedules) constitute sales for resale that must be reported to FERC.
- If FERC persists, retail service providers taking transmission service under OATTs may become public utilities subject to FERC jurisdiction, and may need to file power sales tariffs with FERC.

## Affiliate Transactions – History

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

## Affiliate Transactions – Recent Events

- The Virginia State Corporation Commission required Dominion Virginia Power to include in a FERC-filed service agreement with its affiliate a provision that the SCC has supervisory authority over affiliate transactions and can order Virginia Power to terminate the transaction.
- FERC rejected the provision, stating that states are preempted from reviewing rates, terms and conditions of wholesale energy transactions.
- The utility withdrew its service agreement, and does not engage in power sales with its affiliates.

## 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. The state siting board considers the impact on the transmission system, among other factors.

# 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 Kentucky order may be subject to Federal preemption. However, Order No. 2003-A may have "tilted" toward transmission providers so far that the Siting Board is satisfied.

## 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

- The issue of whether FERC can exempt utilities from laws that prevent them from joining RTOs may be tied up in litigation for some time. However, FERC probably would prevail with respect to forcing RTO membership if it asserts that membership is required to remedy undue discrimination.
- If FERC litigates the issue of whether § 203 gives it control over joining and withdrawing from ISOs, it will lose. However, its § 205 authority over rates and terms of service probably is sufficient to control whether utilities can withdraw from RTOs.
- 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 is likely to lose with respect to local distribution service issues and charges associated with retail sales. However, it may prevail in asserting that balancing sales are jurisdictional, and it will take a Court of Appeals decision to clarify that states can impose charges on end users even though no retail service or local distribution service is being provided.
- 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 FERC BE WITH YOU!**

