FUNDAMENTALS OF A FERC RATE PROCEEDING

PRESENTED BY
ALAN I. ROBBINS
OVERVIEW

- Authority to Regulate Rates – Basics
  - FPA Section 205 vs. FPA Section 206
  - Standard of Review
  - Burden of Proof
- Litigating a Rate Case – Procedure
  - What are the steps from the Rate Filing to FERC’s decision on the Rate Filing
  - Becoming a Party/Protesting a Rate Filing
  - Settlement Discussions
  - Trial Type Hearing – Discovery, Testimony, Cross Examination, Briefing, Initial Decision and FERC Order(s)/Opinion(s).
  - Appeal Rights
- Basics of Cost of Service
FERC Regulatory Authority – Basics

- FERC’s authority is derived from the Federal Power Act
  - Regulates “public utilities” as defined in the Federal Power Act (not to be confused with “public power” utilities).
  - Generally, FERC regulates the transmission of electric energy and sale of electric energy at wholesale in interstate commerce.

- A public utility may only charge customers the “filed rate” – a rate that the utility has submitted to FERC and that FERC has accepted.

- A public utility proposes an initial rate and/or changes existing rates by submitting a filing pursuant to Section 205 of the Federal Power Act.

- A customer may challenge an existing rate by filing a complaint under Section 206 of the Federal Power Act.
Standard of Review – Basics

- FERC must ensure that the proposed rate is “just and reasonable” and “not unduly discriminatory or preferential”
  - “just and reasonable”
    - The rate is based upon documentation of the actual cost of providing the service (plus a “reasonable” return); or has obtained “market based” rate authority (energy sales)
  - “not unduly discriminatory or preferential”
    - Similarly situated customers must be treated similarly
Burden of Proof – Basics

- Proceedings initiated under Section 205
  - Public utility bears the burden of proving that the initial rate or changes to the filed rate are just and reasonable and not unduly discriminatory or preferential
  - Utility does not have to prove that the existing rate is no longer just and reasonable
- Proceedings initiated under Section 206
  - Complaining customer (or Commission, if acting *sua sponte*) must first prove that the existing rate or provision on file with FERC is no longer just and reasonable or that the rate is unduly discriminatory or preferential
  - FERC must then set a “just and reasonable” rate
Litigating a Rate Case
The Filing

- **Section 205**
  - The public utility seeking to establish a tariff rate (initial or change to filed rate) must meet the filing requirements (18 CFR Part 35) (some requirements waived with move to formula rates)
  - FERC can reject the filing if incomplete (rarely happens these days)
  - Must also file bilateral agreements that provide for jurisdictional service

- **Section 206**
  - The complaining customer must provide sufficient evidence to substantiate its claim that the filed rate is no longer just and reasonable
Litigating a Rate Case
FERC Issues Public Notice

- FERC Issues Public Notice
  - Announces to the public that a rate filing was submitted
  - Assigns a docket number
  - Announces a “Comment Due Date”
    - This is the due date for interested parties to submit comments or protests to the filing
    - Interested parties must file a “motion to intervene” in order to become a party
Litigating a Rate Case
Interventions and Protests

- **Interventions**
  - An interested party must file a “motion to intervene” in order to become a party to the proceeding (filing a protest does not make one a party to the proceeding)
  - Must specify the interest in the proceeding
  - Must be a party to participate in settlement, hearing or to preserve appeal rights
  - Entity becomes a party only when FERC expressly grants the motion

- **Protests**
  - This is the opportunity to air grievances with the rate proposal – speak now
  - Must articulate your position concerning the proposal (or any part of the proposal) as well as basis in fact and law for position
  - Protests should be supported by documentation or affidavit where possible
  - Specify relief sought – rejection; maximum suspension; modification; hearing; compliance filing
  - No automatic right to hearing; protestor must convince FERC to order a hearing
Litigating a Rate Case
FERC’s Initial Order (Hearing Order)

- FERC may reject the filing
  - Current rates remain in effect (unless initial rate filing – then no rate in effect)
- FERC may accept the filing as filed, establish effective date
- FERC may accept the filing with modifications, but order no hearing
  - Can direct modifications without hearing; orders further compliance filings
- FERC may accept the filing, establish hearing procedures
  - FERC accepts the proposal for filing, but finds that the proposal “may not be just and reasonable or may be unduly discriminatory or preferential”
  - Allows rates to go into effect, subject to refund
  - May suspend the effective date (1 day minimum to 5 months maximum)
  - Orders a hearing to develop a record upon which a final determination may be made
  - May hold hearing in abeyance pending “settlement judge procedures”
Litigating a Rate Case  
Suspension/Refund

- FERC has the authority to suspend the effectiveness of the proposed rates for up to five months
  - Decision to suspend is announced in the hearing order
  - FERC may order a “nominal” suspension or up to the maximum five month suspension
  - New rates allowed to go into effect, subject to refund.

- Customers will receive a refund if the rates resulting from the proceeding are lower than the proposed rates
  - The amount of the refund is the difference between the amounts paid under the filed rate and the amount that would have been paid under the ultimately approved rate, plus interest
  - Refund calculations begin as of the refund effective date
Litigating a Rate Case
Settlement Judge Procedures

- Generally, FERC suspends the hearing and orders that the parties enter into settlement negotiations
  - The settlement process is assisted by a Settlement Judge (FERC Administrative Law Judge or “ALJ”) appointed by the Chief Judge
  - The Settlement Judge is essentially a mediator; no decisional authority in the case
  - Because the Settlement Judge is a mediator without decisional authority, the ex parte rules do not apply
    - Parties can and routinely do meet privately with the Settlement Judge
  - The ALJ selected as the Settlement Judge cannot serve as the Presiding Judge in the event that settlement efforts fail and the case proceeds to hearing
Litigating a Rate Case
Settlement Judge Procedures (cont.)

- Result of Settlement usually includes an agreement on certain facts or issues of the case
  - Settlement agreement can specify a rate
  - If the details used to calculate the rate are not part of the settlement, it is called a “black box” settlement
  - Can include moratoriums on rate changes or aspects of rate changes
- In the event of a partial settlement, the unsettled issues will continue to hearing
- The Settlement Judge must certify the settlement agreement to the Commission
- Parties and FERC Staff have the right to comment on the proposed settlement and to reply to other parties’ comments
- Parties can submit “contested” offers of settlement when a party (or parties) elects not to join in the settlement agreed upon by others
Litigating a Rate Case
Hearing Procedures

- Hearings are conducted before a Presiding Judge
  - Evidentiary hearings are “trial type” hearings
  - No formal rules of evidence, but there is a general reference to Federal Rules of Evidence from time to time
  - The Presiding Judge may have his or her own hearing rules concerning conduct, timing, briefing, examination, etc.
  - Discovery allowed; direct and answering testimony is prepared in writing, in advance of the hearing
  - Examination of witnesses at hearing is for cross-examination and redirect

- Role of FERC Trial Staff
  - Staff are an independent party in the proceeding, representing "the public interest"
  - Trial Staff takes its own positions, puts on its own witnesses, files separate briefs and often serves as a facilitator in settlement discussions
Litigating a Rate Case
Hearing Procedures (cont.)

- Parties submit post-hearing briefs to the Presiding Judge in advance of Initial Decision
- Initial Decision Issued by Presiding Judge
  - Presiding Judge makes findings of fact based upon the record evidence
  - Presiding Judge applies existing FERC policy and precedent to the facts
  - Initial Decision is essentially a non-binding recommendation submitted to the Commission
Litigating a Rate Case
Commission Issues Opinion on the Initial Decision

- Presiding Judge submits the Initial Decision to the Commission
- Briefs on Exceptions/Opposing Exceptions
  - Parties that take issue with any portion of the Initial Decision can file a Brief on Exceptions to the Commission
  - Briefs on Exception detail the errors that the party believes the Presiding Judge made in the Initial Decision
  - Parties that disagree with the positions in any Brief on Exceptions can file a Brief Opposing Exceptions outlining the disagreement
- Commission Opinion
  - The Commission reviews the Initial Decision and Briefs on Exceptions/Opposing Exceptions and issues the Commission’s Opinion
  - The Opinion is the final ruling in the case
  - Opinion is subject to rehearing and judicial review
Litigating a Rate Case

Rehearing

- Parties that disagree with FERC’s Order/Opinion may seek rehearing of the Opinion asking FERC to reconsider its decision.
- Seeking and obtaining Order on Rehearing is necessary before seeking judicial review of a FERC order (agency decision is not final until order on rehearing is issued).
- Requests for rehearing must be filed within 30 days of the Opinion.
  - Statutory deadline; no exceptions.
- Party seeking rehearing include a Statement of Issues and a Specification of Errors identifying FERC’s errors of fact and law.
- The FPA requires the Commission to issue an order on the Request for Rehearing within 30 days.
  - The Commission routinely issues tolling orders to eliminate the 30-day “pocket denial”
  - Once the Commission issues a tolling order, there are no time limits.
Litigating a Rate Case
Judicial Review

- Once FERC issues final order, party may seek judicial review in the United States Court of Appeals for the DC Circuit or any Circuit in which the regulated utility is located.
What is “Cost of Service”

- With the procedural framework in mind, we can discuss what is generally meant by “Cost of Service”
- Many rate proceedings today involve transmission investment and recovery of Regional Transmission Organization (“RTO”) services through transmission and market tariffs
- Generation rates can be set by market rules (tariffs) or pursuant a utility’s market based rate authority (exceptions – market power mitigation)
Historical Rate Design (Transmission)

- FERC allowed different rates for different classes of customers.
- In such instances, the Annual Transmission Revenue Requirement ("ATRR") would be allocated among the different customer classes.
- Rate design often differed by class.
- FERC also allowed different rates for different services.
  - Services include:
    - Firm Service
    - Non-firm Service
    - Long Term
    - Short Term
Open Access Tariff Rate Design

- Since FERC issued Order No. 888 in 1996
  - Uniform rate for the system
  - Services provided under an Open Access Transmission Tariff (“OATT”)
    - Network Integration Transmission Service (“NITS”)
      - Stated Rate
      - Load ratio share
    - Point to Point
    - Short term
    - Firm and non-firm
    - Ancillary service rates
  - The rates for the various transmission services all derive from the ATRR
  - RTOs will have many different rate designs and cost allocation methodologies for the very many differing charges that RTOs assess
Cost of Service

- Determining the Annual Transmission Revenue Requirement
  - Investment in the physical plant
  - Operation and Maintenance (“O&M”) expense
  - Reasonable rate of return on equity (“ROE”)
  - FERC-approved rate incentives
- All of the public utility’s costs (including its ROE) are totaled in a formula to arrive at the ATRR
- The ATRR is divided by a measure of system capability (usually a measure of peak demand) to arrive at a unit rate
  - The public utility must justify all categories of its costs and demonstrate that its ROE falls within a zone of reasonableness
  - If set for hearing, the testimony and other evidence address the details of the company’s rate methodology, cost support and rate of return on equity
In a Formula Rate, the formula is the rate and the product of that formula is the charge that customers pay

- Rate formulas are updated annually
  - Traditional formulas rely on most recent Form 1 historical data
  - “Forward looking” formulas will use estimates of new plant in service during the rate year
  - All formulas have annual “true ups” to reconcile projected costs and loads to actual costs and loads
  - Some refunds/surcharges are carried forward to next ATRR, some are refunded directly to customers

- Public utilities adopt “customer protocols”
  - The Public Utility will inform its customers of the changes to the values of each variable and the charge that will result from inputting all of the new values into the Formula Rate, with customer meetings, informal discovery and challenge procedures
Questions and Comments

Alan I. Robbins
Jennings Strouss & Salmon, PLC
1350 I Street, NW - Suite 810
Washington, D.C. 20005-3305
(202) 371-9030
arobbins@jsslaw.com