

Electricity Law: Current Topics 2004

Table of Contents

Part One

Electric Reliability: Where is the Legal Accountability?

I.	Background	LA-1
II.	Federal Power Act Options	LA-2
	A. Regulation of wholesale contracts	LA-2
	B. Regulation of transmission tariffs	LA-2
	C. Regulation of RTOs	LA-2
	D. Regulation of asset dispositions	LA-2
	E. Financings	LA-2
	F. Oversight of NERC and the regional reliability councils	LA-2
	G. Possible requirement of public utilities to report reliability violations	LA-3
	H. PURPA Section 209	LA-3
	I. Hiring engineers at FERC	LA-4
	J. Encouragement and acceptance of industry initiatives	LA-4
III.	State Law Options	LA-6
	A. Utility obligation to serve	LA-6
	B. Utility quality of service requirements	LA-6
	C. Conditions on wholesale contracting	LA-6
	D. Conditions on utilities contracting to sell or buy transmission	LA-6
	E. PURPA contracts	LA-6
	F. Coordination with other states and RTOs	LA-6
IV.	Legal Uncertainties: Federal Power Act Preemption	LA-7
	A. Overview	LA-7
	B. The Scope of FERC's Transmission Powers: "Direct and "Indirect" Regulation of Reliability	LA-7

1.	The “Direct” vs. “Indirect” Distinction	LA-7
2.	Jurisdictional Limits on FERC's Regulation of Transmission Service: the <i>Northern States Power v. FERC</i> decision	LA-9
	a. Factual Background	LA-9
	b. 8th Circuit's Ruling	LA-10
3.	FERC's Jurisdiction over Unbundled Retail Transmission After <i>New York v. FERC</i>	LA-10
C.	Analysis of Implied Preemption of State Transmission Reliability Regulations	LA-13
	1. Background on Implied Preemption	LA-13
	2. Has Congress or FERC recognized a need for uniform national standards?	LA-14
	3. Has Congress legislated comprehensively on transmission service, occupying the entire field of regulation, and leaving no room for state supplementation?	LA-15
	4. Does state regulation of transmission reliability conflict with federal law such that compliance with both state and federal law is physically impossible?	LA-16
D.	To What Extent Do the History and Language of the Federal Power Act Reveal a Congressional Intent to Preserve State Reliability Regulation? ..	LA-19
E.	Federal Power Act complaints	LA-19

V. 2004 Proposed Amendments LA-20

A.	FERC certification of "electric reliability organization" (ERO)	LA-20
B.	FERC review of ERO-proposed reliability standards	LA-20
C.	ERO enforcement of its reliability standards	LA-20
D.	ERO delegation to regional entities	LA-20
E.	FERC enforcement of ERO reliability standards	LA-20
F.	No authority to order construction of additional generation or transmission capacity	LA-20
G.	No preemption of State actions consistent with ERO reliability standards	LA-20
	SEC. 1211. ELECTRIC RELIABILITY STANDARDS.	LA-20
	SEC. 215. ELECTRIC RELIABILITY.	LA-20

Part Two
Market Rates: FERC Sets "Rules of The Road"

I.	Limits and Penalties For Sellers Charging Market Rates	MR-1
	A. Background	MR-1
	B. Targeted Behaviors	MR-3
	C. Requirements	MR-3
	D. Legal authority	MR-3
	E. Relation of the new rules to RTO participation	MR-5
	Rules of the Road: Appendices A and B of the FERC’s Order	MR-8
II.	Interaffiliate Transactions: Extension of the <i>Edgar</i> Precedent to Cost-Based Sales	MR-11
III.	2004 Proposed Amendments	MR-12
	A. Price transparency rules	MR-12
	B. Regulatory relations between FERC and other entities	MR-12
	C. Prohibitions	MR-12
	D. Change in refund effective date	MR-12
	E. Applicability of FERC refund authority to public agencies	MR-12
	F. "Sanctity of contract"	MR-12
	SEC. 1281. MARKET TRANSPARENCY RULES.	MR-12
	SEC. 220. MARKET TRANSPARENCY RULES.	MR-12
	SEC. 1282. MARKET MANIPULATION.	MR-13
	SEC. 221. PROHIBITION ON FILING FALSE INFORMATION.	MR-13
	SEC. 222. PROHIBITION ON ROUND TRIP TRADING.	MR-13
	SEC. 1283. ENFORCEMENT.	MR-14
	SEC. 1284. REFUND EFFECTIVE DATE.	MR-14
	SEC. 1285. REFUND AUTHORITY.	MR-15
	SEC. 1286. SANCTITY OF CONTRACT.	MR-16

Part Three
Holding Company Structures and the Mixing of Utility and Non-Utility Businesses: Will the States and FERC Replace PUHCA?

- I. State Restrictions on Utility Holding Companies: The 7th Circuit Upholds, With One Exception HCS-1**

- II. Does Bankruptcy Law Preempt State Utility Law? Expressly, If the State Law Relates to “Financial Condition: The *PG&E* Decision HCS-9**

- III. FERC's *Westar Energy* order: The Separation of Utility Debt from Nonutility Debt HCS-12**
 - A. Section 204 of the Federal Power Act HCS-12
 - 1. Overview HCS-12
 - 2. Overview of FPA Section 204 HCS-12
 - a. Summary of FPA Section 204 and CFR Part 34 HCS-12
 - b. Transactions Not Subject to Section 204 HCS-14
 - 3. FERC's Implementation of Section 204 Before *Westar Energy* (2003) HCS-14
 - a. Utility Investment in Nonutility Businesses: The *UtiliCorp* Decision HCS-15
 - b. Other Examples of Section 204 Authorizations HCS-18
 - 4. FERC's *Westar Energy* Decision HCS-19
 - a. Four Generic Requirements for All Utilities HCS-19
 - b. Critique HCS-20
 - 5. FERC’s Response to the KCC’s Critique HCS-24

IV.	FERC’s Cash Management Rule	HCS-29
A.	Statutory Basis for the Rule	HCS-29
B.	Applicability of the Rule to Registered Holding Companies	HCS-30
C.	Applicability of the Rule to Utilities Regulated by State PUCs	HCS-31
D.	Submission of Cash Management Agreements	HCS-32
E.	Notification Requirements	HCS-32
F.	Public Disclosure of Information	HCS-34
G.	Clarification of Documentation Requirements	HCS-34
V.	2004 Proposed Amendments	HCS-36
A.	Repeal of PUHCA	HCS-36
B.	Federal, state access to affiliate books and records	HCS-36
C.	Preservation of utility ratemaking in the context of interaffiliate transactions	HCS-36
D.	Utility-as-seller problem under state law	HCS-36
E.	Effect on existing interaffiliate transactions	HCS-36
F.	Effective date	HCS-36
	 SEC. 1263. REPEAL OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.	 HCS-36
	SEC. 1264. FEDERAL ACCESS TO BOOKS AND RECORDS.	HCS-36
	SEC. 1267. AFFILIATE TRANSACTIONS.	HCS-37
	SEC. 1271. SAVINGS PROVISIONS.	HCS-38
	SEC. 1273. TRANSFER OF RESOURCES.	HCS-38
	SEC. 1275. SERVICE ALLOCATION.	HCS-38

Part Four

Mergers, Acquisitions and Dispositions: Is the Law Settling Down?

I.	What Does FPA Section 203 Mean?	MD-1
A.	Departures from an RTO: <i>Atlantic City Electric Company v. FERC</i> and its aftermath	MD-1
	1. D.C. Circuit Opinion	MD-1
	2. Aftermath of <i>Atlantic City</i>	MD-4

3.	Application: FERC's 2004 Order conditionally approving SPP	MD-5
B.	Dispositions of generation	MD-6
II.	Utility Acquisitions of New Generation: Will They Impair Wholesale Competition? The <i>Oklahoma Gas & Electric</i> Case	MD-8
A.	Horizontal Market Power	MD-8
1.	General Concepts	MD-8
2.	Factors Suggesting Horizontal Market Power	MD-8
B.	Vertical Market Power	MD-9
C.	Summary of FERC Market Screen Analysis	MD-10
1.	Define the Relevant Product Markets	MD-10
2.	Define the Geographic Markets	MD-10
3.	Measure the Merger's Impact on Market Concentration	MD-10
4.	Draw Conclusions	MD-11
III.	2004 Proposed Amendments	MD-19
A.	DOE study of duplication in FERC authority	MD-19
B.	FERC report on conditions imposed	MD-19
C.	Changes to section 203	MD-19
	SEC. 1291. MERGER REVIEW REFORM AND ACCOUNTABILITY.	MD-19
	SEC. 1292. ELECTRIC UTILITY MERGERS.	MD-20

Part Five
Transmission and Interconnection Initiatives

I.	Generators Interconnect to the Grid: FERC Orders 2003 and 2003-A	TII-1
A.	Overview	TII-1
B.	General obligation to provide interconnection service	TII-1

C.	Comparability Principle	TII-2
D.	Term	TII-2
E.	Types of Service	TII-2
F.	Negotiation Procedures	TII-3
G.	Responsibility for Construction: Options	TII-4
H.	Cost Responsibility for Network Upgrades	TII-5
I.	Jurisdiction	TII-6
II.	Transmission Incentives	TII-7
A.	The 2003 Proposed Policy Statement	TII-7
B.	Application to PJM	TII-7
III.	2004 Proposed Amendments	TII-10
A.	Siting of interstate transmission facilities	TII-10
B.	Real-time transmission system monitoring	TII-10
C.	Open access obligation for non-jurisdictional utilities	TII-10
D.	Sense of Congress: transmission owners should join RTOs voluntarily ..	TII-10
E.	FERC progress report on RTOs	TII-10
F.	"Remand" of standard market design	TII-10
G.	Native load service obligation	TII-10
H.	Transmission infrastructure incentives	TII-10
I.	Allocation of upgrade costs	TII-10
SEC. 1221.	SITING OF INTERSTATE ELECTRIC TRANSMISSION FACILITIES.	TII-10
SEC. 1223.	TRANSMISSION SYSTEM MONITORING.	TII-16
SEC. 1231.	OPEN NONDISCRIMINATORY ACCESS.	TII-16
SEC. 1232.	SENSE OF CONGRESS ON REGIONAL TRANSMISSION ORGANIZATIONS.	TII-18
SEC. 1233.	REGIONAL TRANSMISSION ORGANIZATION APPLICATIONS PROGRESS REPORT.	TII-18
SEC. 1234.	FEDERAL UTILITY PARTICIPATION IN REGIONAL TRANSMISSION ORGANIZATIONS.	TII-19
SEC. 1235.	STANDARD MARKET DESIGN.	TII-21
SEC. 1236.	NATIVE LOAD SERVICE OBLIGATION.	TII-21
SEC. 1241.	TRANSMISSION INFRASTRUCTURE INVESTMENT.	TII-23
SEC. 1242.	VOLUNTARY TRANSMISSION PRICING PLANS.	TII-25

Part Six
Preemption: New Issues Under the Federal Power Act
and the Public Utility Regulatory Policies Act

I.	Cost Allocation on a Multistate System: Entergy Louisiana v. Louisiana Public Service Commission	PRE-1
A.	Background	PRE-1
B.	<i>Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n</i> (U.S. 2003)	PRE-1
II.	PURPA Section 205: When Must State Law Give Way to a Utility's Voluntary Coordination Actions?	PRE-7
	Questions	PRE-24

Part Seven
The 2004 Federal Electricity Amendments:
Big Change or Little Change?

I.	Review of Proposed Changes	FEA-1
II.	Long-Term Effects	FEA-4
III.	Questions	FEA-5

Part Eight
The State-Federal Gridlock:
How Did We Get Here, Why Does It Matter, and
How Do We Fix It?

I.	Areas of Gridlock	SFG-1
	A. Transmission	SFG-1
	B. System Reliability	SFG-1
	C. The Role of Competition	SFG-1
	D. Industry Structure	SFG-1
II.	Other Areas of Sensitivity	SFG-2
III.	Causes: Is "State-Federal Tension" a Proxy for Other Disputes?	SFG-2
IV.	Implications for the Electric Industry	SFG-2
V.	Possible Solutions	SFG-2

Part Nine
Checklist for Regulatory Readiness

I.	Why is Utility Regulation So Difficult?	CRR-1
II.	Statutory Review	CRR-3
III.	Institutional Review	CRR-4

Electric Reliability: Where is the Legal Accountability?

I. Background

II. Federal Power Act Options

III. State Law Options

IV. Legal Uncertainties: Federal Power Act Preemption

V. 2004 Proposed Amendments

Electric Reliability: Where is the Legal Accountability?

Table of Contents

I.	Background	LA-1
II.	Federal Power Act Options	LA-2
A.	Regulation of wholesale contracts	LA-2
B.	Regulation of transmission tariffs	LA-2
C.	Regulation of RTOs	LA-2
D.	Regulation of asset dispositions	LA-2
E.	Financings	LA-2
F.	Oversight of NERC and the regional reliability councils	LA-2
G.	Possible requirement of public utilities to report reliability violations	LA-3
H.	PURPA Section 209	LA-3
I.	Hiring engineers at FERC	LA-4
J.	Encouragement and acceptance of industry initiatives	LA-4
III.	State Law Options	LA-6
A.	Utility obligation to serve	LA-6
B.	Utility quality of service requirements	LA-6
C.	Conditions on wholesale contracting	LA-6
D.	Conditions on utilities contracting to sell or buy transmission	LA-6
E.	PURPA contracts	LA-6
F.	Coordination with other states and RTOs	LA-6
IV.	Legal Uncertainties: Federal Power Act Preemption	LA-7
A.	Overview	LA-7
B.	The Scope of FERC's Transmission Powers: "Direct and "Indirect" Regulation of Reliability	LA-7
1.	The "Direct" vs. "Indirect" Distinction	LA-7

2.	Jurisdictional Limits on FERC's Regulation of Transmission Service: the <u>Northern States Power v. FERC</u> decision	LA-9
a.	Factual Background	LA-9
b.	8th Circuit's Ruling	LA-10
3.	FERC's Jurisdiction over Unbundled Retail Transmission After <u>New York v. FERC</u>	LA-10
C.	Analysis of Implied Preemption of State Transmission Reliability Regulations	LA-13
1.	Background on Implied Preemption	LA-13
2.	Has Congress or FERC recognized a need for uniform national standards?	LA-14
3.	Has Congress legislated comprehensively on transmission service, occupying the entire field of regulation, and leaving no room for state supplementation?	LA-15
4.	Does state regulation of transmission reliability conflict with federal law such that compliance with both state and federal law is physically impossible?	LA-16
D.	To What Extent Do the History and Language of the Federal Power Act Reveal a Congressional Intent to Preserve State Reliability Regulation? . .	LA-19
E.	Federal Power Act complaints	LA-19
V.	2004 Proposed Amendments	LA-20
A.	FERC certification of "electric reliability organization" (ERO)	LA-20
B.	FERC review of ERO-proposed reliability standards	LA-20
C.	ERO enforcement of its reliability standards	LA-20
D.	ERO delegation to regional entities	LA-20
E.	FERC enforcement of ERO reliability standards	LA-20
F.	No authority to order construction of additional generation or transmission capacity	LA-20
G.	No preemption of State actions consistent with ERO reliability standards	LA-20
	SEC. 1211. ELECTRIC RELIABILITY STANDARDS.	LA-20
	SEC. 215. ELECTRIC RELIABILITY.	LA-20