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Authority of the Federal Energy Regulatory Commission to Fix Electricity Rates and Charges and to Require Refund Payments by a Public Utility

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Summary

Sections 205 and 206 of the Federal Power Act concern rates and charges collected by a public utility in transmitting or selling electric energy in interstate commerce. These rates and charges are required to be just and reasonable. States retain jurisdiction over facilities for generation, distribution, or transmission of electric energy in intrastate commerce.

Section 205 requires a public utility to file a rate schedule with the Federal Energy Regulatory Commission (FERC or Commission). Rate changes are not permitted unless a new rate schedule has been filed.

Section 206 provides for the review of rates already in effect. The Commission has the authority to determine that an existing rate is unjust or unreasonable and set a new rate. In certain situations FERC may have authority to refund amounts paid in excess of just and reasonable rates. Case law is useful in determining when such a situation may exist.

Sections 205 and 206 of the Federal Power Act¹ concern rates and charges collected by a public utility in transmitting or selling electric energy in interstate commerce. These rates and charges “shall be just and reasonable, and any such rate or charge that is not just and reasonable” shall be unlawful.²

Section 206(a) of the Federal Power Act gives authority to change rates charged by covered utilities to the Federal Energy Regulatory Commission (FERC or Commission). The subsection states:

¹ 16 U.S.C. §§ 824d and 824e.

² 16 U.S.C. § 824d(a).

Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.³

FERC's authority to fix rates and charges is, as the above subsection of the Federal Power Act indicates, limited to transmission or sale of electric energy within its jurisdiction. This jurisdiction for the most part extends to the transmission of electric energy in interstate commerce and the sale of this energy at wholesale in interstate commerce.⁴ The states retain jurisdiction "over facilities used for the generation of electric energy or over facilities used in the local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."⁵

FERC's authority under section 206(a) has been noted by the courts. For example, in *Louisiana Public Service Commission v. FERC* the United States Court of Appeals for the District of Columbia Circuit stated: "[A]s to matters within its jurisdiction, the Commission has the duty—not the option—to reform rates that by virtue of changed circumstances are no longer just and reasonable."⁶ In *San Diego Gas & Electric Company*, the Commission acknowledged its ability to establish new rates if it determines that existing rates are unjust and unreasonable:

Under the Federal Power Act, upon complaint or on our own motion, the Commission may establish new rates only if it first has a record to

³ 16 U.S.C. § 824e(a).

⁴ "It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). See also 42 U.S.C. § 7172(a)(1)(B).

⁵ 16 U.S.C. § 824(b)(1).

⁶ 184 F.3d 892, 897 (DC Cir. 1999).

determine that the existing rates are unjust, unreasonable, unduly discriminatory or preferential. Further, once such a finding is made as to existing rates, the Commission must have a record to support the new rate it establishes as just and reasonable.⁷

In *Central Louisiana Electric Company*, the Commission identified the factors that it considers in determining whether undue discrimination exists: “The particular showing that is required to establish undue discrimination ‘will necessarily turn upon the facts of each case, including the characteristics of the customer class involved and the service requested, as well as myriad other potentially relevant factors.’”⁸

Section 205 of the Federal Power Act requires a public utility to file a rate schedule with the Commission. Rate changes are not permitted unless a public utility has filed a new rate schedule with the Commission. The new rate schedule is made available for public inspection.⁹ The Commission may suspend the operation of a new rate schedule and defer the use of new rates and charges for up to five months beyond the time when the changes would have gone into effect. If the Commission does not conclude its hearings concerning the proposed changes after this five-month period, the changes shall go into effect. However, the Commission has the authority to order the public utility to refund that portion of the increased rates or charges that it finds are not justified.¹⁰

In *East Tennessee Natural Gas Company v. FERC*, the United States Court of Appeals for the District of Columbia Circuit noted the Commission’s authority to order refunds if the Commission has determined that the proposed rates are not justified.¹¹ In discussing section 4 of the Natural Gas Act, the court stated: “If the Commission ultimately determines...that the rates are not just and reasonable, then § 4 authorizes the Commission to order that the pipeline pay refunds to any customers who purchased gas at the (filed) proposed rate, thereby retroactively changing that rate. Allowing these retroactive reductions in filed rates is a necessary compromise to accommodate delays in the approval process....”¹² The Natural Gas act and the Federal Power Act have been described as “substantially identical” in many aspects, and cases brought under either statute are often used interchangeably.¹³

Just as section 205 of the Federal Power Act allows the Commission to review rates at the time of filing, section 206, as discussed above, provides for the review of rates already in effect. Following a hearing, the Commission has the authority to determine that

⁷ 92 F.E.R.C. P 61,172, 1000 WL 1204898, *5 (2000).

⁸ 70 F.E.R.C. P 63,015, 1995 WL 76820, *7 (1995) (citing *Southern California Edison Company*, 46 F.E.R.C. P 61,052, 61243 (1989)).

⁹ 16 U.S.C. § 824d(d).

¹⁰ 16 U.S.C. § 824d(e).

¹¹ 863 F.2d 932 (DC Cir. 1988).

¹² *East Tennessee Natural Gas*, at 942.

¹³ See, e.g., *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 577 n.7 (1981); *FPC v. Sierra Pacific Power Company*, 350 U.S. 348, 353 (1956); *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 70 (DC Cir. 1992).

an existing rate is unjust or unreasonable and set a new rate.¹⁴ The Commission may also establish a refund effective date and order a public utility to refund amounts paid in excess of the rates which would have been just and reasonable for the period subsequent to the refund effective date through fifteen months after this date.¹⁵

Courts have also recognized the Commission's ability to order refunds for past periods when the Commission has committed legal error. For example, in *Tennessee Valley Municipal Gas Association v. Federal Power Commission*, the Commission erroneously dismissed a claim brought under section 5 of the Natural Gas Act.¹⁶ The Tennessee Valley Municipal Gas Association alleged that the rates charged by its supplier were excessive. Instead of investigating the matter, the Commission dismissed the claim on the basis that the record was too "stale" to form the basis for a prospective ruling and that the initiation of a section 5 proceeding was probably not in the public interest.¹⁷ The court found that the Commission's failure to reopen the matter for further hearings was legal error. Thus, the court concluded that the Tennessee Valley Municipal Gas Association "must be put in the same position that it would have occupied had the error not been made."¹⁸

Further, in *Office of Consumers' Council v. FERC*, the court found that the Commission committed legal error when it failed to remedy a violation of section 5 of the Natural Gas Act.¹⁹ Although the Commission found that certain clauses in Columbia Gas Transmission Corporation's contracts violated section 5, it maintained that remedies were not necessary if Columbia's current practices did not violate section 5. The Office of Consumers' Council of Ohio and Associated Gas Distributors argued that they were entitled to remedies beginning on the date of the Commission's determination. They contended that these remedies were within the prospective nature of section 5 relief. The court agreed with the Office of Consumers' Council and Associated Gas, finding that "[i]mposing the proper remedy 'retroactively' to the date of the Commission's determination would merely put Columbia's customers 'in the same position that [they] would have occupied had the error not been made.'"²⁰

Although these two cases indicate that the Commission has ordered refunds for past periods outside the periods provided by sections 205 and 206 of the Federal Power Act, the emphasis of legal error present in the circumstances of these cases must be considered. The plain language of the two statutory provisions and judicial interpretation of them would seem to support the Commission's limited ability to order refunds.²¹

¹⁴ 16 U.S.C. § 824e(a).

¹⁵ 16 U.S.C. § 824e(b).

¹⁶ 470 F.2d 446 (DC Cir. 1972).

¹⁷ *Tennessee Valley Municipal Gas Association*, at 449.

¹⁸ *Tennessee Valley Municipal Gas Association*, at 452.

¹⁹ 826 F.2d 1136 (DC Cir. 1987).

²⁰ *Office of Consumers' Council*, at 1139.

²¹ See, e.g., *Public Service Company of New Hampshire v. FERC*, 600 F.2d 944 (DC Cir 1979), in which the court noted the Commission's inability to award reparations on the basis that a properly filed rate or charge has in fact been unreasonably high or low.