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The Legal Framework of the Federal Power Act

The Federal Power Act (FPA or the Act) (16 U.S.C. §§ 791 *et seq.*) is the primary federal statute governing the wholesale transmission and sale of electric power, as well as the regulation of hydroelectric power. The Act is divided into a few discrete Parts. Part I (16 U.S.C. §§ 791-823d), initially enacted in 1920 as the Federal Water Power Act, created the Federal Power Commission (FPC) and gave the new agency the authority to regulate the construction, operation, and maintenance of nonfederal hydroelectric power generation. Part II (16 U.S.C. §§ 824-824w) authorized the FPC to regulate the interstate transmission and wholesale sale of electricity. Congress transferred the authorities and responsibilities of the FPC under FPA Parts I and II from the FPC to the Federal Energy Regulatory Commission (FERC or the Commission) pursuant to the Department of Energy Organization Act of 1977 (91 Stat. 565; 42 U.S.C. § 7101 note). Part III (16 U.S.C. §§ 825-825u) established a set of rules and procedures governing recordkeeping and proceedings before the FPC and its successor, FERC. The Act also includes Part IV (16 U.S.C. §§ 828-828(c)), which carved out exemptions from certain requirements in the Act “in order to facilitate the development and construction by States and municipalities of water conservation facilities.”

This In Focus provides an overview of the FPA, focusing largely on the first two Parts of the FPA. These Parts establish the framework for FERC regulation of two different energy industries: hydroelectric power generation, and wholesale electric energy sale/purchase and transmission.

FPA Part I: Hydropower Licensing

FERC licenses the construction and operation of nonfederal hydropower projects under Part I of the FPA. “Nonfederal hydropower” refers to any hydropower project not owned by the federal government, regardless of location.

Licensing Authority

Section 4(e) (16 U.S.C. § 797(e)) authorizes FERC to issue hydropower licenses, and sets forth some basic parameters for the application and review process, including a requirement that the Chief of Engineers and the Secretary of the Army approve plans for any hydropower project “affecting the navigable capacity of any navigable waters of the United States” prior to issuance of the license. Section 4(e) also provides that when deciding on a license, the Commission should not only “consider the power and development purposes for which licenses are issued,” but also “give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife ..., the protection of recreational opportunities, and other aspects of environmental quality.”

License Conditions

FPA Section 10 establishes several conditions applicable to all hydropower licenses issued pursuant to the FPA. Notably, Section 10(a) (16 U.S.C. § 803) requires FERC to give “equal consideration” to purposes other than power generation, including the environmental and recreational concerns listed in Section 4(e). Section 10 also requires licensees to refrain from substantial alterations to their facilities without approval from FERC, maintain and repair the facilities as necessary, pay certain fees and charges to the United States and to other hydropower licensees from whom they derive a benefit, and adhere to other conditions FERC deems appropriate, including those intended to protect fish and wildlife.

Navigation Facilities and Fish Passage

FPA Section 18 (16 U.S.C. § 811) specifically addresses a hydropower licensee’s obligation to construct, maintain, and operate “such lights and signals as may be required by the Secretary of the Department in which the Coast Guard is operating” and “such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.” While Section 10 references such obligations among others, Section 18 establishes them with specificity, and obliges the licensee to provide them at its own expense. FERC incorporates these requirements in licenses or reserves the right to mandate them as prescribed by the Department of the Interior at a later date.

Compliance

FPA Section 31(a) (16 U.S.C. § 823b) details FERC’s investigation and enforcement authority over hydropower facilities. The agency is empowered to investigate and monitor hydropower facilities for compliance with license terms and conditions.

FPA Part II: Regulation of Electric Utilities

Scope of Applicability

FERC’s jurisdiction over the electric power industry as set forth in Part II of the FPA is limited. Pursuant to Section 201, Part II applies only to “the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.” (16 U.S.C. § 824(b)). The FPA defines “wholesale” as sale for resale. (16 U.S.C. § 824(d)). Intrastate transmission and distribution of electricity, as well as intrastate and/or retail sales of electricity, are largely regulated by state agencies.

Interstate Transmission and Wholesale Power Rates Under FPA Sections 205 and 206

FERC derives much of its authority over the electric power industry from FPA Sections 205 and 206. Section 205 (16

U.S.C. § 824d) provides that “[a] rates and charges ... for or in connection with the transmission or sale of electric energy ... and all rules and regulations affecting or pertaining to such rates and charges shall be just and reasonable.” Section 206 (16 U.S.C. § 824e) empowers FERC to initiate a proceeding to address any “rate, charge or classification” related to the transmission or sale of electricity that the agency determines is “unjust, unreasonable, unduly discriminatory or preferential.”

FERC has exercised its authority under FPA Sections 205 and 206 to reshape the electric power industry over the last 24 years. In 1996, the Commission issued Order No. 888 (61 Fed. Reg. 21540 (July 9, 1996)), finding that the existing framework, in which utilities who owned both power generation and transmission facilities could refuse to deliver the electricity generated by competitors, was unduly discriminatory under Section 205 of the FPA. FERC then invoked its Section 206 authority to order functional “unbundling” of generation and transmission services within its jurisdiction and to require entities providing jurisdictional transmission to do so on a nondiscriminatory basis, often referred to as “open access.” In *New York v. FERC* (535 U.S. 1 (2002)), the Supreme Court held this to be a legitimate exercise of FERC’s authority under FPA Part II. In 1999, FERC issued Order No. 2000, which encouraged the formation of Regional Transmission Organizations (RTOs). RTOs are independent organizations that control and regulate electricity transmission over large areas and who FERC tasks with providing reliable, nondiscriminatory transmission service. FERC continues to regulate RTOs and other complex transactions for the transmission and wholesale sale of electric power pursuant to FPA Sections 205 and 206.

Grid Reliability: Section 215

The first iterations of the FPA did not address grid reliability. Section 1211 of the Energy Policy Act of 2005 (P.L. 109-58) added Section 215 to the FPA (16 U.S.C. § 824o). Section 215 directs FERC to certify an “Electric Reliability Organization” (ERO) tasked with developing mandatory and enforceable reliability standards for electric power. FERC subsequently issued Order No. 672 (71 Fed. Reg. 8662 (February 17, 2006)), which designated the North American Electric Reliability Corporation as the ERO, and adopted reliability standards to be enforced by that organization, subject to FERC oversight.

Transmission Siting: Section 216(h)

Although the FPA directs FERC to regulate interstate electricity transmission pricing and service, siting of transmission facilities is largely left to the states. This contrasts with the Commission’s role in permitting and siting interstate natural gas facilities under the Natural Gas Act (15 U.S.C. § 717f).

Section 1221 of the Energy Policy Act of 2005 added Section 216 of the FPA (16 U.S.C. § 824p), which carves out a small role for FERC and other federal agencies in siting interstate electric transmission facilities. This section

authorizes the Secretary of Energy, in consultation with the affected states, to designate areas experiencing electricity transmission constraints or congestion as “national interest electric transmission corridors” (NIETCs). This section grants FERC “backstop” authority to issue permits for interstate electricity transmission facilities in designated NIETCs. Generally, this authority can be exercised only if the state that has authority to approve the facilities has “withheld approval for more than one year.” (16 U.S.C. § 824p(b)(1)(C)(ii)).

Two judicial decisions have hamstrung the exercise of the Section 216 authority granted to the agencies. In *Piedmont Environmental Council v. FERC* (558 F.3d 304 (4th Cir. 2009)), the U.S. Court of Appeals for the Fourth Circuit held that FERC may not permit transmission facilities if a state has denied the applicant’s request to site transmission facilities; FERC may permit the transmission facilities only in the event the state has not acted on the applicant’s request. And in *California Wilderness Coalition v. U.S. Dep’t of Energy* (631 F.3d 1072 (9th Cir. 2011)), the U.S. Court of Appeals for the Ninth Circuit vacated the Department of Energy’s first two NIETC designations, finding that the agency had failed to consult adequately with the states as required by the FPA. Since the Ninth Circuit’s 2011 decision, the Secretary of Energy has made no further NIETC designations.

Prohibition on Energy Market Manipulation: Section 222

The Energy Policy Act of 2005 also added Section 222 of the FPA (16 U.S.C. § 824v) to ban energy market manipulation. FPA Section 222 prohibits any entity subject to FERC’s FPA jurisdiction from using “any manipulative or deceptive device or contrivance ... in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of electric ratepayers.” This expansion of federal jurisdiction was enacted just as FERC was completing an investigation, finding that market manipulation had played a role in triggering the California blackout crisis of 2000. FERC adopted its market manipulation regulations in Order No. 670 (71 Fed. Reg. 4244 (January 26, 2006)).

FPA Part III: Recordkeeping and Administrative Rules

FPA Part III includes several procedural, accounting, and recordkeeping requirements. For example, Section 301 (16 U.S.C. § 825) requires all licensees and public utilities to keep accounts and records to the extent required by FERC regulations, and Section 307 grants FERC broad enforcement authority to investigate potential violations of the FPA, aid in enforcing or promulgating regulations under the FPA, or obtain information to serve as the basis for legislative recommendations.

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