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Finding New FPA Authority, FERC Makes Policy Change to Authorize Retroactive Surcharges (and Maybe More)

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Historically, the Federal Energy Regulatory Commission ("FERC" or the "Commission") has maintained a policy whereby it will not order refunds stemming from rate design and cost allocation rulings, reasoning that it was statutorily barred from instituting offsetting surcharges. **[1]** In June 2019, however, FERC altered this policy to allow it to grant such refunds. FERC based its policy change on its determination that, at least with respect to Federal Power Act ("FPA") § 206**[2]** proceedings, FPA § 309 grants the agency broad remedial authority to require retroactive surcharges.

In *Black Oak Energy, LLC v. PJM Interconnection, L.L.C.***[3]** ("Black Oak Energy Order") FERC granted rehearing and reversed orders issued in 2011, 2012, 2015, and 2016**[4]** in which it declined to require refunds of over-collections from Financial Marketers. On rehearing, FERC ordered PJM to "pay refunds, with interest, *and collect surcharges necessary to collect funds with which to pay those refunds*."**[5]** Further, the Commission announced a new policy that, instead of declining to order refunds, "the Commission will consider whether to require refunds in cost allocation and rate design cases based on the specific facts and equities of each case, *even where such refunds must be funded through surcharges on certain parties*."**[6]**

FERC's ruling is based on its view of the relationship between its authority under FPA § 309**[7]** and its refund authority under § 206. Section 309 states, in relevant part, "[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."**[8]** FERC characterizes Section 309 as providing it "with broad remedial authority, including the ability to act retroactively to correct unjust situations and to ensure that what 'should have been done' is done."**[9]**

FERC's action follows the D.C. Circuit's opinion in *Verso Corporation v. FERC*.**[10]** As characterized by FERC:

[S]ection 206(a) of the FPA authorizes the Commission to fix rates prospectively, after it concludes that a rate is inappropriate, and that section 206(b) permits the Commission to order refunds where the previous rate was unfairly high, effectively setting the rate as of the date that the section 206 proceeding began. The court noted that, while no concomitant authority exists to retroactively correct rates that were too low, section 309 of the FPA gives the Commission expansive remedial authority to advance remedies not expressly provided by the

FPA, as long as they are consistent with the FPA.[11]

FERC further clarified that its previous reliance on *FPC v. Tennessee Gas Transmission Co.*[12] and *City of Anaheim v. FERC*[13] to support Section 206(b)'s prohibition on retroactive surcharges was in error.

In *Tennessee Gas Transmission Co.*, the Supreme Court held that FERC lacks authority to impose retroactive surcharges in rate cases filed under Section 4 of the Natural Gas Act.[14] In the Black Oak Energy Order, the Commission discussed the relevance of whether a rate proceeding involves a not-for-profit entity, such as a regional transmission organization ("RTO") or an independent system operator ("ISO"). FERC concluded that the Supreme Court's ruling "does not prohibit retroactive surcharges in all circumstances, and refunds and surcharges are allowable in situations such as" PJM's.[15] Specifically, the Commission's view is that investor-owned sellers, such as the pipeline in *Tennessee Gas Transmission Co.*, have the capacity to absorb the cost risk of any refunds ordered without relying on surcharges from under-paying customers.[16] On the other hand, not-for-profit entities, such as RTOs and ISOs, do not have that same capacity because they simply administer rates and do not have capital.[17] Therefore, the Commission reasons, surcharges in those cases are necessary to rectify "unjust situations."[18]

In *City of Anaheim*, the D.C. Circuit held that the language of Section 206(a) "prohibits FERC from setting rates retroactively" in Section 206 proceedings.[19] The Commission explained that its previous application of this holding was inaccurate and that *City of Anaheim* "does not prohibit surcharges in a case in which the retroactive surcharges are necessary to permit the exercise of the Commission's ability to order refunds pursuant to section 206(b)" because that case involved a "*direct* imposition of retroactive surcharges to effectuate" an unforeseeable rate increase.[20] Again, the Commission observed that, because PJM is a not-for-profit entity, Section 309 permits surcharges since the Commission is ordering them "to implement the goals of the statute to correct unjust situations."[21]

The full breadth of FERC's view of its authority under Section 309 is unclear. One can imagine many circumstances in which FERC may want to act "to correct unjust situations and to ensure that what 'should have been done' is done"[22] regardless of prior policies or other legal constraints. It seems logically inconsistent that the reasoning of the Black Oak Energy Order would be constrained to Section 206 proceedings, as the same issues and equitable concerns would seem to apply to Section 205 proceedings involving RTOs and ISOs. Further, if the only check on FERC's ability to rely upon Section 309's broad language is that its action—in its own view—is consistent with the FPA, then the section could provide FERC with a seemingly unlimited range of authority.

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[1] See *Black Oak Energy, LLC v. PJM Interconnection, L.L.C*, 136 FERC ¶ 61,040 at PP 25–26 n. 35 & 36 (2011):

The Commission has two lines of precedent on refunds, each dealing with a different situation. When a case involves a company over-collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. *See, e.g.*, *Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009); *Consol. Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 972 (D.C. Cir. 2003).

By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds. *See, e.g.*, *La. Pub. Serv. Comm'n v. Entergy Corp.*, 135 FERC ¶ 61,218 (2011); *Portland Gen. Elec. Co.*, 106 FERC ¶ 61,193, at P 5 (2004) (accepting rate design change on a prospective basis); *Consumers Energy Co.*, 89 FERC ¶ 61,138, at 61,397 (1999) (same); *Union Elec. Co.*, 58 FERC ¶ 61,247, at 61,818 (1992) (same); *Commonwealth Edison Co.*, 25 FERC ¶ 61,323, at 61,732 (1983); *accord Second Taxing Dist. v. FERC*, 683 F.2d 477, 490 (D.C. Cir. 1982) (affirming determination to make rate design changes prospective only); *Batavia v. FERC*, 672 F.2d 64 (D.C. Cir. 1982) (same).

[2] 16 U.S.C. § 824e.

[3] 167 FERC ¶ 61,250 (2019).

[4] *Black Oak Energy, LLC v. PJM Interconnection, L.L.C*, 136 FERC ¶ 61,040 (2011); 139 FERC ¶ 61,111 (2012); 153 FERC ¶ 61,231 (2015); 155 FERC ¶ 61,013 (2016).

[5] Black Oak Energy Order at P 34 (emphasis added).

[6] *Id.* at P 27 (emphasis added).

[7] 16 U.S.C. § 825h.

[8] Black Oak Energy Order at P 16 n.34.

[9] *Id.* at P 16.

[10] 898 F.3d 1 (D.C. Cir. 2018).

[11] Black Oak Energy Order at P 19 (internal citations omitted).

[12] 371 U.S. 145 (1962).

[13] 558 F.3d 521 (D.C. Cir. 2009).

[14] *See Tennessee Gas Transmission Co.*, 371 U.S. at 154–55.

[15] Black Oak Energy Order at P 26.

[16] *See id.* at PP 25–26.

[17] *See id.* at P 26 (citing *Verso Corp. v. FERC*, 898 F.3d 1, 13 (D.C. Cir. 2018)).

[18] *See id.* at PP 24–27.

[19] *City of Anaheim v. FERC*, 558 F.3d 521, 522 (D.C. Cir. 2009).

[20] Black Oak Energy Order at P 24.

[21] *Id.*

[22] *Id.* at P 16.