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FERC Asserts Right to Impose Retroactive Surcharges

January 22, 2018

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Historically, Sections 205[1] and 206[2] of the Federal Power Act ("FPA") have been viewed as authorizing the Federal Energy Regulatory Commission ("FERC" or the "Commission") to order refunds when a rate has been suspended and placed in effect subject to refund pursuant to Section 205 or a refund effective date has been established pursuant to Section 206. It has long been held, however, that the filed rate doctrine and the related rule against retroactive ratemaking bar the Commission from imposing retroactive rate increases or surcharges for previously provided service.

This longstanding understanding of the FPA is currently being challenged by FERC in the U.S. Court of Appeals for the District of Columbia. Specifically, in *Verso Corp., et al. v. FERC,* Docket No. 15-1098, FERC is arguing that it has broad equitable authority to direct regional transmission organizations ("RTO") to impose surcharges on its customers where necessary to pay refunds ordered under Section 206 of the FPA.

The *Verso Corp* case involves a series of FERC orders addressing a Section 206 complaint challenging the allocation of System Support Resource ("SSR") agreements within the footprint of American Transmission Company ("ATC") located in the market operated by the Midcontinent Independent System Operator, Inc. ("MISO"). Traditionally, the costs of SSR agreements—which are intended to provide financial support for generators at risk of retirement that are deemed necessary to preserve reliability—were allocated to all Load Serving Entities ("LSEs") within the ATC footprint on a *pro rata* basis. However, in April 2014, the Public Service Commission of Wisconsin ("Wisconsin PSC") filed a complaint arguing that the allocation of SSR costs on a *pro rata* basis was inconsistent with cost causation principles and, instead, that costs should be allocated on the basis of the benefits received by each LSE. In a July 2014 order, the Commission agreed, finding that the costs of SSR agreements should be allocated on the basis of the benefits received by LSEs from the agreement at issue. After several studies and related proceedings before FERC, FERC directed MISO to make refunds to those LSEs that had overpaid SSR costs based on the previous cost allocation methodology for the period following the date the Wisconsin PSC filed its complaint. However, since MISO is a non-profit entity and lacks funds to pay refunds, the Commission also authorized MISO to assess retroactive surcharges on LSEs that had underpaid for SSR costs under the old method in order to fund the refunds that it had ordered.

In response, a number of cities, cooperatives, and utilities in Michigan, which would be required to pay surcharges under the Commission's order, petitioned the D.C. Circuit for review of the

Commission's orders on the basis that FERC has no authority under Section 206 to order retroactive surcharges. The petitioners argue that FERC's authority to remedy an unjust rate under Section 206(a) is prospective only, because it may determine a new rate "to be thereafter observed and in force." While the petitioners concede that Section 206(b) authorizes FERC to establish a refund effective date, they argue that this language is only intended to permit FERC to order refunds associated with a retroactive decrease in rates and that there is no statutory authority permitting a rate increase, even where necessary to implement Commission-ordered refunds. In support, the petitioners point to the D.C. Circuit's decision in *City of Anaheim v. FERC*, 558 F.3d 521, 523 (D.C. Cir. 2009), finding that "[o]n its face, § 206(a) prohibits retroactive adjustment of rates," and argue that surcharges would violate the filed rate doctrine and rule against retroactive ratemaking. The petitioners recognize that Section 309 of the FPA permits FERC to "perform any and all acts . . . necessary or appropriate to carry out the provisions of the FPA"; however, the petitioners maintain that the language of Section 309 does not provide a basis for circumventing the express limitations on the Commission's authority set out in Section 206 of the FPA and argue that FERC's authority to order retroactive surcharges under Section 309 of the FPA is limited to remedying legal errors on the part of the Commission.

In response, FERC argues that it has broad remedial authority under Section 309 of the FPA to order both refunds and surcharges to the extent necessary to effectuate the purposes of the FPA. While some courts have previously found that Section 309 does not allow FERC to grant relief that is otherwise prohibited under the FPA (*e.g.*, retroactive surcharges), FERC argues that the D.C. Circuit's recent decision in *Xcel Energy Svs. v. FERC*, 815 F.3d 947 (D.C. Cir 2016) supports a conclusion that the broad grant of remedial authority in Section 309 is not constrained by the limits of Section 206 in limited circumstances. More specifically, FERC argues that, in *Xcel*, the court rejected FERC's contention that FPA Section 206(a) prohibits FERC from exercising its remedial authority under FPA Section 309 to direct an RTO to provide refunds of amounts collected while the rate at issue was subject to hearing and settlement procedures after FERC committed a legal error by allowing the rates to go into effect immediately and without making the rates subject to refund. FERC also points to the court's decision in *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (D.C. Cir 2017), which concerned whether Section 309 of the FPA authorizes FERC to grant a request by a utility to recoup refunds from a non-jurisdictional utility where the refunds had been paid in accordance with an earlier FERC policy that was modified after refunds had been made. These orders, according to FERC, support a finding that FERC has authority to require surcharges where the Commission determines that refunds under Section 206 of the FPA are warranted by the equities and surcharges are necessary to implement those refunds due to the non-profit status of the system operator.

The manner in which the court resolves the dispute in *Verso* will likely have significant implications for FERC's authority to order refunds under Sections 205 and 206 of the FPA. A decision endorsing FERC's interpretation of its statutory authority would appear to give FERC authority to require the assessment of retroactive surcharges where equity requires. Conversely, a decision that such a result was prohibited by the filed rate doctrine and rule against retroactive ratemaking would appear to limit FERC's authority to require refunds in cases involving rate design or cost allocation issues in the application of Section 206(b) to the rates of pass-through non-profit entities such as RTOs while, at the same time, providing customers with certainty that they will not be retroactively surcharged additional amounts for the same service in the future.

[1] 16 U.S.C. § 824d.

[2] 16 U.S.C. § 824e.