

THE FEDERAL POWER ACT

What is it?
Why do I care?

By Lynn Hargis¹

Q. WHAT IS IT?

A. The Federal Law Passed To Protect Consumers From Excessive Wholesale Electricity Rates. Courts said States could not set electricity rates between States, so the Federal Power Act (FPA) was passed in 1935 to enable the Federal Energy Regulatory Commission (FERC) to regulate rates and charges for interstate wholesale electric sales.

Q. WHAT'S A "WHOLESALE ELECTRICITY" SALE?

A. It's the price of electric generation (power and energy) sold to another utility or to a power marketer or trader, to be ultimately resold as "retail sales" to end users, such as businesses and residential consumers like you and me.

Q. WHY HAVE I NEVER HEARD OF THE "FPA" OR "FERC" BEFORE?

A. For over fifty years, State utility commissions have regulated most electricity sales in the U.S.; in the last twenty years, however, FERC's jurisdiction has grown enormously while the State role in regulation has diminished. Sales for resale of electricity, which FERC regulates, accounted for only a small percentage of electric generation for many years. In 1992, congress exempted the owners of certain wholesale electric generators from regulation and many utilities stopped building regulated power plants and built exempt generators instead. Some States actually required utilities to sell off their generating plants and to buy back power from deregulated plants at wholesale. Now, 50% or more of electric energy sales are subject to FERC's rate jurisdiction.

Q. HOW DOES THE *FEDERAL POWER ACT (FPA)* WORK?

A. The FPA requires rates be filed in advance with and reviewed by FERC; if FERC finds they are excessive, refunds are made to consumers with interest.

- Rates must be "just and reasonable," which means within a "zone of reasonableness." If not, the FPA says they are unlawful.
- For 60 years, FERC said "just and reasonable" is a utility's legitimate costs plus a reasonable return on investment but in recent years FERC has dropped this standard.

Q. WHY DO I CARE?

A. Your Electricity Bills Are Shooting Up Because FERC Is Denying Consumers Most FPA Protections Under FERC's So-Called "Market-Based Rate Regime."

Without a necessary change in the statute, FERC deregulated most wholesale electric rates in the 1990s by allowing utilities to ignore the FPA statutory filing and review requirements, and by allowing utilities to set their own rates "by agreement" as long as FERC thought they lacked "market power." FERC's "market-based rate" regime effectively eliminates the following FPA consumer protection mandates:

1. **Eliminated:** Notice by advance filing of proposed electric rates for review by FERC and public. §§ 205(c) and (d). FERC now allows utility "tariffs" to merely state that rates will be "by agreement" between seller and buyer.
2. **Eliminated:** Opportunity for suspension of increased rates. § 205(e). Market rate "tariffs" don't reflect rate "increases," so none can be suspended.
3. **Eliminated:** Immediate refund protection for increased rates. § 205(e). The "tariff" doesn't change so no rate "increases" occur; thus there is nothing to which immediate refund protections could apply even when rates go up.

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4. **Eliminated:** Opportunity for full hearings on rate increases with the burden of proof on the seller. § 205(e). FERC never holds hearings for rate "increases," since they aren't recognized under its market rate regime, so the burden to justify increases is never on the seller.
5. **Eliminated:** Opportunity to file complaints and have existing rates reviewed to determine whether rates are exorbitant and outside the "zone of reasonableness." FERC only reviews rates to see if sellers have engaged in "anti-competitive" behavior.
6. **Eliminated:** Requirement that FERC fix a new "just and reasonable" rate if the existing one is found to be unlawful. § 206(a). FERC doesn't do it; instead, FERC simply starts a new rulemaking or other proceeding to try to get "market rates" right next time.
7. **Eliminated:** Objective standard (other than "competitive market") for determining "just and reasonable rates." § 205(a). FERC used to review rates based on costs; now FERC claims it needs no objective standard to determine if "competitive rates" are really "just and reasonable."
8. **Eliminated:** Objective standard for determining whether "market-based rates" are unduly preferential or discriminatory. § 205(b). FERC's only standard for determining whether rates are unduly discriminatory or preferential is whether different rates are charged for similar-cost services. However, under a "market-based rate regime," the seller's costs are unknown and irrelevant, and "services" can be anything the parties decide "by agreement."
9. **Eliminated:** Refund protection for consumers once rates are found to be unjust and unreasonable. § 205(e). FERC only makes manipulating sellers disgorge "unjust profits" and allows the rest of the market, to keep its profits; there are no longer refunds for consumers of all unjust and unreasonable rates they paid.²

Q. CAN'T THE STATES DO ANYTHING?

- A. States must pass along FERC-accepted wholesale electricity prices in retail rates because the Supremacy Clause of the U.S. Constitution requires that States defer to a federal statute such as the Federal Power Act.

Q. WHO LOOKS OUT FOR CONSUMERS AT FERC?

- A. In the past, FERC's staff challenged utility rate proposals to get the lowest rates for consumers. Now, instead, FERC and its staff concentrate on promoting "markets" and "market participants," regardless of the impact on consumers.

Q. HOW HAS FERC GOTTEN AWAY WITH DROPPING FPA CONSUMER MANDATES WHILE ELECTRIC RATES SHOOT UP?

- A. Write or call your Members of Congress and ask them why. Tell them you demand that your FPA consumer utility bill protections must be enforced by FERC and that all nominees for FERC commissioner must agree to enforce such rate protections!

² Public Citizen, along with a number of State Attorneys General and Consumer Advocates, is suing FERC for illegal agency deregulation under the FPA in CADC No. 04-1238, consolidated in No. 04-1168.