



## ***FERC 101 and Practice Tips***

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*The views expressed in this presentation are those of the presenter, and do not necessarily reflect the views of the Federal Energy Regulatory Commission, its Chairman, any individual Commissioner, or other members of its Staff.*

*The presenter cannot discuss the merits of contested, on-the-record proceedings currently pending before the Federal Energy Regulatory Commission.*

*In this presentation, “FERC” and “the Commission” are used interchangeably.*



# Topics

- Background
- Electric Regulation
- Natural Gas Regulation
- Oil Pipeline Regulation
- Hydroelectric Regulation
- FERC Process
- Practice Tips



# Background: A Brief History of FERC Time

- The Federal Power Commission (FPC), FERC's predecessor, was established in 1920 to regulate hydroelectric projects under what is now part I of the Federal Power Act (FPA). In 1935, Congress passed Parts II and III of the FPA.
- In 1938, Congress passed the Natural Gas Act (NGA), which provided the FPC with jurisdiction over the transportation of natural gas in interstate commerce, its sale in interstate commerce for resale, and natural gas companies engaged in such transportation or sale.
- The current Federal Energy Regulatory Commission was created by the Department of Energy Organization Act in 1977. FERC took over most of the responsibilities of the FPC.

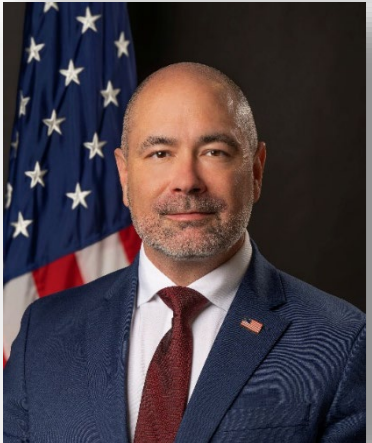


# Background: FERC's Structure

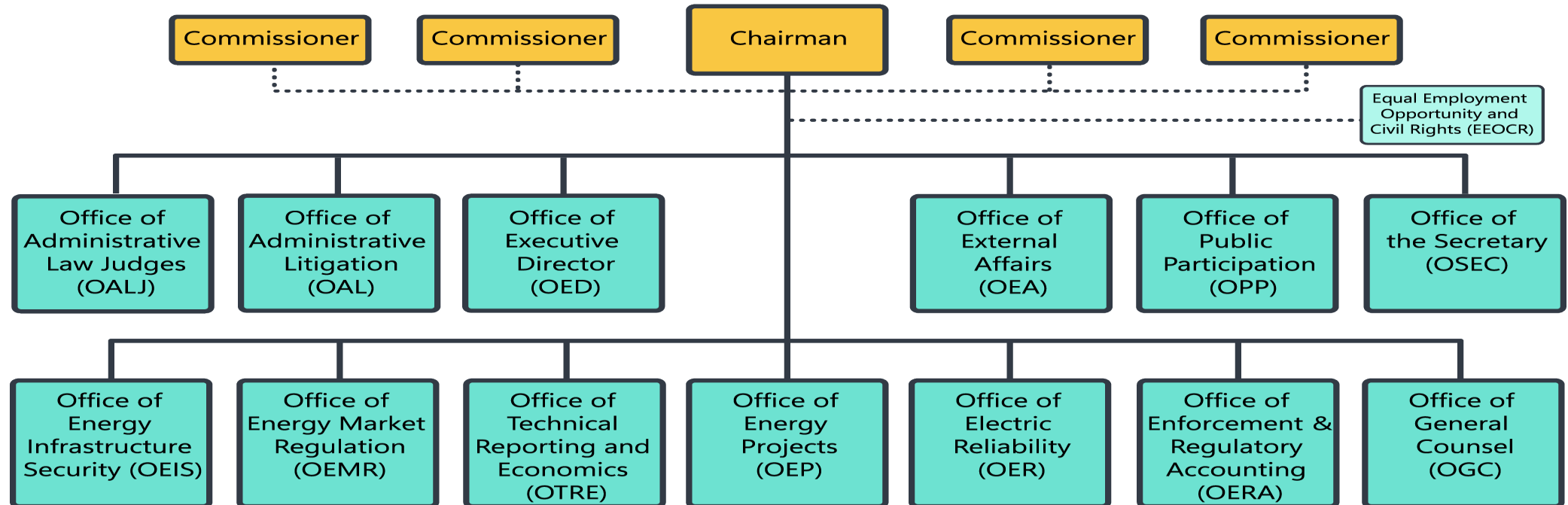
- Five-member Commission. Each Commissioner is nominated by the President and confirmed by the Senate. Commissioners serve staggered five-year terms. No more than three Commissioners can be from the same political party.
- The President designates the Chairman from among the sitting customers. This designation is not subject to Senate confirmation.
- Each Commissioner, including the Chairman, has one vote. FERC action requires a majority vote. *See, e.g., Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016).
- The Commission “speaks” through its orders. *See, e.g., Californians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 175 FERC ¶ 61,213, at P 13 (2021).



# Background: Chairman and Commissioners



# Background: FERC's Structure



# Background: Core Regulatory Functions

- Rates and services for electric transmission and electric wholesale power sales (Federal Power Act (FPA) Parts II and III)
- Certification and decertification of “Qualifying Facilities” or “QFs,” and oversight of QF-utility dealings (Public Utility Regulatory Policies Act of 1978 (PURPA))
- Rates and services for natural gas pipeline transportation, certification of new facilities, and abandonment of existing facilities (Natural Gas Act (NGA))
- Rates and services for oil pipeline transportation (Interstate Commerce Act (ICA))
- Hydroelectric dam licensing and safety (FPA Part I)



# Electric Regulation

- Under the FPA, FERC has jurisdiction over the transmission of electric energy in interstate commerce and over the sale of electric energy at wholesale in interstate commerce (sales for resale).
- FERC’s jurisdiction in this regard is over “public utilities.” Public utilities are entities that own or operate jurisdictional transmission facilities or that make wholesale electric sales in interstate commerce.
  - E.g., investor-owned utilities, Independent System Operators and Regional Transmission Organizations, entities that sell wholesale electricity at market-based rates.
  - Public utilities do not include certain entities, including municipally-owned utilities, certain rural electric cooperatives, and federal power marketing administrations.



# Electric Regulation

- What's outside of FERC's regulatory ambit?
  - “Local” distribution.
    - To determine whether a facility is engaged in a transmission function or local distribution function, FERC applies a seven-factor test that takes a functional look at the facility.
  - Sales of electric energy to end users (i.e., sales at retail), and the rates, terms, and conditions of such sales.
  - The siting and construction of generating facilities (and, indeed, the choice to site and construct them at all).
    - But FERC does have licensing authority with respect to hydroelectric facilities subject to FPA Part I.
    - Note that wholesale rate recovery is subject to FERC's jurisdiction.
  - Transmission siting (with the exception of limited “backstop” siting authority under FPA section 216 and recent FERC Order No. 1977).



# Electric Regulation

- What's outside of FERC's regulatory ambit? (continued)
  - Generally, environmental and safety matters are outside of FERC's FPA jurisdiction, with the exception of issues associated with hydro licensing under FPA Part I.
  - FERC does not regulate *intrastate* commerce, and it does not regulate utilities in Alaska, Hawaii, Puerto Rico, the U.S. Virgin Islands. FERC also largely does not regulate utilities in the Electric Reliability Council of Texas, with limited exceptions (e.g., mandatory reliability standards, requests for transmission service under sections 210-212).
  - As noted above, “public utilities” under the FPA do not include municipal utilities, certain electric coops, and federal power marketing administrations (e.g., BPA, WAPA).



# Key Provisions of the FPA: Section 205

- Under section 205 of the FPA, public utilities must file the rates, terms, and conditions for jurisdictional services.
  - The burden is on the public utility to demonstrate that its proposal is just and reasonable and not unduly discriminatory or preferential.
  - Public utilities must provide 60-days' prior notice when they submit a section 205 filing, though FERC may grant waiver of the notice period for good cause shown. If a public utility makes a section 205 filing without providing the requisite notice, and waiver of the notice period is not granted, FERC will require the public utility to make time-value refunds.
  - FERC may suspend a public utility's filing for a maximum of five months. The maximum five-month suspension applies when a proposed rate increase is found to be, in FERC's analysis, substantially excessive.
  - If FERC suspends a filed rate and sets it for hearing, and later concludes that the rate was excessive, FERC can order refunds (with interest) of amounts over the rate found to be just and reasonable.



# Key Provisions of the FPA: Section 206

- FERC can institute proceedings under section 206 of the FPA in response to a complaint or on its own motion to modify a public utility's existing rates, terms, or conditions of tariffs and rate schedules that FERC finds to be unjust and unreasonable or unduly discriminatory or preferential.
  - The burden is on the complainant or FERC, as applicable, to demonstrate that the existing rate is unjust and unreasonable or unduly discriminatory or preferential.
  - In a section 206 complaint proceeding, there is a 15-month refund window, which can begin as early as the date of the complaint and as late as five months from the date of the complaint.
  - In a FERC-initiated section 206 case, the 15-month refund window can begin as early as the date notice is published in the *Federal Register* that the case has been initiated and as late as five months from such notice.



# Key Provisions of the FPA: Section 313

- Section 313 – Deadlines for seeking rehearing and judicial review of FERC orders.
  - Parties have 30 days from the date of the underlying order to file a request for rehearing.
  - Parties have 60 days from the date of the rehearing order to seek judicial review of final agency action. The petitioner must have been aggrieved by the Commission orders.
  - The entity seeking rehearing or appeal must be “aggrieved” by the Commission order. And Commission action must be final – i.e., the Commission issued an order “that imposes an obligation, denies a right, or fixes some legal relationship” as a consummation of the administrative process. *Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Comm’n*, 324 F.3d 726, 731 (D.C. Cir. 2003). Thus, in general, an order setting a matter for further hearing will not be considered “final.”
  - Unless otherwise ordered by the Commission, a request for rehearing does not stay the underlying order.



# Other Key Provisions of the FPA

- Section 203 - FERC authorization of certain acquisitions and dispositions of jurisdictional facilities, including mergers.
- Section 204 – FERC authorization of public utilities’ issuances of securities and assumptions of liabilities.
- Sections 210-212 – FERC authority to order a “transmitting utility” (which is broader than “public utility”) to provide transmission services.
- Section 215 – Mandatory electric reliability standards.
- Section 219 – Transmission rate incentives.
- Sections 220-222 - Enforcement-related provisions addressing market transparency, prohibitions on false statements, and prohibitions on energy market manipulation.
- Section 301 – Recordkeeping and accounting.
- Section 305 – Interlocking directorate rules.
- Sections 316/316A – Penalty authority.



# Issues in Electric Regulation (Big Picture)

- Open Access Transmission Service
- Generator Interconnection
- Transmission Planning and Cost Allocation
- Interconnection of Large Loads
- Capacity Market Structure
- Development of Day-Ahead Markets in the Western U.S.
- Transmission Rate Incentives
- Corporate Transactions
- Market-Based Rate Applications
- Mandatory Reliability Standards
- ....And a lot more!



# Public Utility Regulatory Policies Act of 1978

- Pursuant to PURPA, FERC issued rules requiring utilities to offer to purchase electric power from, or sell power to, certain qualifying cogeneration and small power production facilities (QFs).
  - The rates for utility's offers to purchase from QFs had to be just and reasonable to ratepayers, in the public interest, could not discriminate against QFs, and must not exceed the utility's "avoided cost" (i.e., the incremental cost to the utility of alternative electric energy).



# Natural Gas Regulation

- Sections 4 and 5 of the NGA address the rates, terms, and conditions of FERC-jurisdictional interstate natural gas service. These provisions operate much like sections 205 and 206 of the FPA, with some differences:
  - Under section 4, only 30 days' prior notice is required, unlike section 205's 60 days.
  - Section 5 of the NGA does not have the refund timing provisions contained in section 206.
- Under section 7 of the NGA, FERC certifies the construction and operation of interstate natural gas pipelines, upon a public convenience and necessity finding; FERC also must approve abandonment of facilities.
- Under section 3 of the NGA, FERC must authorize exports and imports of natural gas (e.g., exports from LNG facilities).
- The NGA has other provisions that are similar to FPA provisions, including provisions governing rehearing, enforcement, and penalty authority.



# Natural Gas Regulation

- FERC does not have NGA jurisdiction over *intrastate* natural gas pipelines, or over “Hinshaw” pipelines (local distribution pipelines that receive out-of-state gas *solely* for in-state end-user consumption).
- *However*, if those pipelines transport or sell gas for use in interstate commerce, then FERC regulates their rates, terms, and conditions under section 311 of the Natural Gas Policy Act/18 CFR Part 284. The rates set under these provisions must be “fair and equitable.” An intrastate pipeline may elect to use an approved cost-based rate on file with the state commission that regulates its intrastate business.



# Natural Gas Regulation

- The NGA does not provide FERC with jurisdiction over the production or gathering of natural gas.
  - However, these terms are undefined in the NGA. Similarly, the NGA does not define “transportation,” an activity over which FERC does have jurisdiction.
  - FERC’s “primary function” test applies six factors to determine the jurisdictional status of a pipeline.



# Natural Gas Regulation

- In Order No. 636, issued in 1992, FERC required pipelines to unbundle transportation and storage capacity services from services relating to the sale of gas as a commodity.
  - To ensure efficient use of pipeline capacity, Order No. 636 required pipelines to provide a mechanism that would allow firm shippers to voluntarily release their capacity to others when they were not using it.
  - In Order No. 637, FERC removed the maximum rate ceiling for short-term capacity releases for a two-year period. Subsequently, in Order No. 712, FERC concluded that the secondary market for short-term capacity releases was competitive and removed the rate ceiling permanently.



# Natural Gas Regulation – Interstate Pipelines



# Oil Pipeline Regulation

- Under the ICA, FERC regulates rates and practices of oil pipeline companies engaged in interstate transportation.
  - Establishes non-discriminatory service conditions to provide shippers with non-discriminatory access to oil pipeline transportation.
  - Establishes just and reasonable rates for transporting petroleum and petroleum products by pipeline.
  - Indexing: In accordance with Congress' instruction in the Energy Policy Act of 1992 for simplified and generally ratemaking procedures under the ICA, FERC established an indexing methodology that allows oil pipelines to change rates based upon an annual index as opposed to making cost-of-service filings.

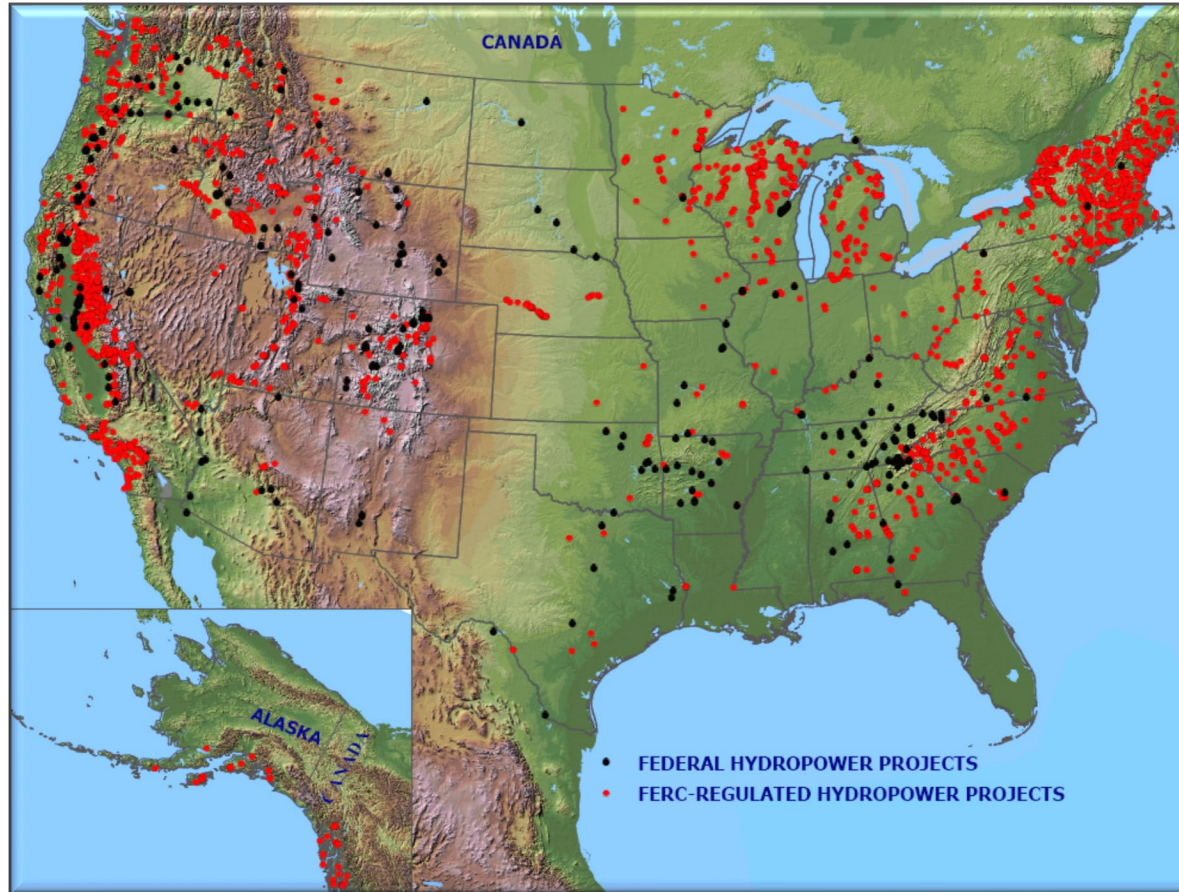


# Hydroelectric Regulation

- FERC's jurisdiction over non-federal hydroelectric projects is set forth in Part I of the FPA.
  - FERC's hydropower responsibilities include:
    - issuance of preliminary permits;
    - determinations regarding qualifying conduit facilities;
    - issuance of licenses for the construction and operation of new projects;
    - issuance of relicenses for existing projects;
    - investigation and assessment of headwater benefits;
    - oversight of all ongoing project operations, including dam safety and security inspections, public safety, and environmental monitoring.
  - FERC does not have jurisdiction over federal hydroelectric projects, which are those owned by other federal agencies (e.g., Army Corps of Engineers, Bureau of Reclamation, Tennessee Valley Authority).



# Hydroelectric Projects in the U.S.



U.S. Hydropower Capacity ~  
102.58 GW

Providing - 7.9% of U.S.  
Generating Capacity

U.S. Hydropower Capacity  
under FERC Regulation ~ 56  
GW



# FERC Process: Rules of Practice and Procedure

- FERC's Rules of Practice and Procedure (18 C.F.R. Part 385) are important in setting forth the procedural requirements surrounding FERC proceedings, such as:
  - Moving to intervene in proceedings, including late-filed interventions.
  - When answers to filings are permitted.
  - What should be included in complaints.
  - Notice and service of filings.
  - Many other things!



# FERC Process: Commission Orders v. Delegated Orders

- Filings submitted by regulated entities are addressed by FERC through orders (FERC “speaks through its orders”).
- Commission-voted orders are issued in proceedings where there are protests, adverse comments, or otherwise raise novel legal, policy, or technical issues.
- Commission staff may issue orders on filings through delegated authority. These are typically in cases where there are no adverse protests/comments and where the entity’s filing is uncontroversial.
- The courts have confirmed that delegated orders carry precedential value. See *Baltimore Gas & Elec. Co. v. FERC*, 954 F.3d 279, 285 (D.C. Cir. 2021).



# FERC Process – Hearing Orders

- If a filing raises issues of material fact that cannot be resolved on the existing record, the Commission will set the matter for an evidentiary hearing before an Administrative Law Judge (ALJ) for further development of the record.
- In most cases, the Commission will hold a hearing in abeyance to allow parties an opportunity to settle their differences.
- If the parties settle, the Commission will issue an order on the settlement.
  - The Commission and its advisory staff are not involved in hearing and settlement processes. The public interest in those processes is represented by FERC's Office of Administrative Litigation.



# FERC Process – Hearing Orders

- If the parties do not settle, an evidentiary hearing will commence. FERC's Rules of Practice and Procedure set forth rules governing discovery, the filing of testimony, examination of witnesses, and other relevant matters.
- After the hearing, the ALJ will issue an Initial Decision. Parties will then file briefs on exceptions to the Initial Decision, as well as briefs opposing exceptions.
- The Commission will subsequently issue an order on the Initial Decision, taking into account the record developed at hearing and in the post-decision briefs.



# Practice Tips!

- General
- Intervening in Proceedings
- Answers
- Rehearing Requests
- *Ex Parte* Rules



# Practice Tips: General

- We want to hear from you in the cases in which you have an interest. To be most effective in your pleadings, here are a couple of thoughts to bear in mind:
  - Do not assume that the reader knows all the ins and outs of areas within your expertise, such as state laws, regulations, initiatives, and programs.
  - Be clear about what you are seeking from the Commission, e.g., spell out clearly the relief you want.
  - Ensure that the relief you are seeking is not outside the scope of the proceeding.
  - Keep in mind that in rate cases, FERC is looking at the filing before it to determine whether it is just and reasonable and not unduly discriminatory or preferential; FERC is not looking at whether alternative approaches raised by parties are “more” just and reasonable. See, e.g., *Cities of Bethany v. FERC*, 727 F.2d 1131, 1136 (D.C. Cir. 1984).



# Practice Tips: Intervening in Proceedings

- State regulatory commissions can intervene in FERC proceedings as a matter of right by filing a timely notice of intervention. 18 C.F.R. 385.214(a)(2).
  - Most other state entities – e.g., Attorney General offices, offices of consumer advocate – must file a motion to intervene, similar to any other entity.
- If the intervention is untimely (including from state commissions), a motion to intervene out of time must be filed. Rule 214(d) sets out the requirements for untimely motions to intervene. 18 C.F.R. 385.214(d).
- Burden on late intervention is very high if it is filed after FERC issues a dispositive order.
- Intervening in a proceeding gives entities party status, such that they can file requests for rehearing and appeals of FERC orders.



# Practice Tips: Answers

- Under Rule 213 of FERC's Rules of Practice and Procedure, answers to protests and answers to answers are prohibited unless otherwise decided by the decisional authority. 18 C.F.R. 385.213.
- In practice, FERC has accepted otherwise prohibited answers when they assisted the Commission in its decision-making process.
- To the extent that an entity seeks to file an otherwise prohibited answer, it should include a motion for leave to answer and explain why FERC should accept its answer.
- However, there is a bright-line rule prohibiting answers to rehearing requests. See 18 C.F.R. 385.713(d)(1).



# Practice Tips: Rehearing

- The rehearing request must be submitted on time! Courts have held this is a statutory deadline that FERC cannot waive. See, e.g., *City of Campbell v. FERC*, 770 F.2d 1180, 1183 (D.C. Cir. 1985). Rehearing requests submitted after the 5:00 pm EST deadline have been rejected. See, e.g., *Yuba Cnty. Water Agency*, 168 FERC ¶ 61,056 (2019) (request for rehearing rejected because filing received at 5:23 p.m. was deemed filed the following day).
- Clearly specify the alleged errors in the underlying order.
- Be sure to include a “Statement of Issues,” which lists each issue in a separately enumerated paragraph and that includes representative judicial and FERC precedent. See 18 C.F.R. 385.713(c)(2).



# Practice Tips: *Ex Parte* Rules

- FERC is subject to *ex parte* rules that apply to Commissioners and staff, and these rules may differ from individual state and other federal agency *ex parte* rules.
- FERC Commissioners and staff cannot have communications with external entities about the merits of contested, on-the-record proceedings. This includes adjudicatory proceedings that are protested or are subject to adverse comments. Typically, this limitation also applies after an initial order is issued and the rehearing deadline has not passed.
- Please be aware of the status of a proceeding if you are seeking to talk with a Commissioner or staff about a filing.
- The *ex parte* rules do not apply to generic rulemaking proceedings.

