Response to 'Time to Put the Kibosh on Pancaking Section 206 Complaints'

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An April 2019 opinion article by Carmen Gentile urges FERC to "Put the Kibosh on Pancaking Section 206 Complaints." According to the Online Etymology Dictionary, "kibosh" may derive from the Turkish word, bosh – meaning empty talk, nonsense. Because Mr. Gentile and I have a warmly collegial relationship spanning three decades, I won't apply those aspersions to his article. But I will say that it's legally erroneous.

The refund provisions of Federal Power Act Section 206 were enacted through the 1988 Regulatory Fairness Act. A few years later, FERC found it statutorily appropriate to investigate Allegheny Generating's equity return, "despite the fact that [it was] … already investigating its equity return in another proceeding." Consumer Advocate Div'n v. Allegheny Generating Co., 67 FERC 61,288, at 61,200, on reh'g, 68 FERC 61,207 (1994) (Allegheny GenCo).

FERC reasoned that "The record in that proceeding is based, inter alia, on market data which ended early in 1992. This complaint relies on more recent information. In effect, the joint complainants bring a new claim, rather than reiterate their previous allegations. We thus find no effort to evade the strictures of the RFA's-month refund protection period."

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And FERC connected that explanation to statutory intent: "[T]he RFA was intended to add symmetry between the treatment of utility rate increase filings under section 205 of the FPA, and the treatment of complaints requesting rate decreases under section 206 of the FPA. Utilities are free to file for successively higher rate increases based on later common equity cost data without regard to the status of their prior requests, and a fair symmetry requires that complainants also be free to file complaints requesting further rate decreases based on later common equity cost data without regard to the status of their prior complaints."

Mr. Gentile does not cite this decision. Instead, he addresses it obliquely, contesting what he terms FERC's symmetry and changed circumstances rationales. As to symmetry, he argues that, "pancaking actually creates an

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asymmetrical relationship," because under a true symmetry, preclusion of additional complaints based on new evidence balances the fact that utilities seeking to increase their ROEs under Section 205 may be subject to refund.

But refund authority under Section 205 dates back to that section's original, 1935 enactment. As described by its principal sponsors (Arkansas Senator Dale Bumpers, and Illinois Representative Terry Bruce, in November 18, 1987 written statements to the Senate's Energy and Natural Resources Committee), the 1988 Regulatory Fairness Act was intended to effect a different balance – one that makes "the system for bringing utility rates down, similar to the system for bringing rates up."

That is, "when utility costs go up, utilities deserve a rate adjustment. We do not change that. But, when the economic factors go in the other direction, consumers deserve just and reasonable rate reductions," in "the same way that utilities receive just and reasonable rate increases."

Mr. Gentile argues, however, that FPA Section 206(a) compels FERC to lag economic factors by however many years it takes FERC to resolve a complaint – that as soon as the first of a series of complaints succeeds in changing the pre-existing ROE, all subsequent and still-pending complaints concerning the same utility's ROE become legal nullities, and cannot be retargeted to

Fig. 1 HYPOTHETICAL PANCAKING COMPARISON

Case	Filed	Decided (Filed + 32 mo.)	Refund Period	ROE When Complaint Filed	Study Period	Study Period Cost of Equity
A	July 1, 2012	Mar. 1, 2015	July 2012-Sept. 2013	11.0%	Apr.-Sept. 2013	10%
B	Oct. 1, 2013	June 1, 2016	Oct. 2013-Dec. 2014	11.0%	July-Dec. 2014	9.5%
C	Jan. 1, 2015	Aug. 1, 2017	Jan. 2015- Mar. 2016	11.0%	Oct. 2015-Mar. 2016	9.0%

address the revised ROE that is set in response to the first complaint.

This argument relies on a fatally flawed reading of the penultimate sentence of FPA Section 206(a), which directs that, "Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate ... *then in force*, and the reasons for any proposed change or changes therein."

The statutory text speaks only of what must be stated when *initiating* a Section 206 proceeding. Mr. Gentile, however, reads it as implying that if the existing rate identified in this statement changes, the proceeding becomes a legal nullity.

But a parallel requirement to state what rate is in force at the time a rate change proceeding is initiated appears in Section 205(d), which provides that notice of Section 205 rate changes "shall be given by filing with the Commission new schedules stating plainly the change or changes to be made in the schedule *then in force*."

The relevant text of Sections 205(d) and 206(a) is virtually identical. The principal difference is that Section 206(a) omits the adverb "plainly," suggesting that the statement requirement of Section 206 is, if anything, less stringent than that of Section 205.

Thus, if it were the case that a rate change made in one proceeding nullifies all unresolved rate change filings that had identified the rate thereby superseded as the pre-existing rate, then that rule would have to apply symmetrically to Sections 205 and 206.

The Commission, however, has long entertained, and addressed on their cost-based merits, pancaked rate increase filings under Section 205.

Indeed, Mr. Gentile has made such filings. For example, Opinion No. 53, Boston Edison Co., 8 FERC 61,077 at 61,277 (1979) addressed – on the merits – the third of four pancaked rate increase filings.

> **Barring pancaked complaints would further undermine Congressional intent, and would increase FERC's regulatory burdens.**

The statutory language and history discussed above make clear that the Commission must symmetrically consider the cost-based merits of Section 206 rate decrease filings.

More fundamentally, modern legal practice has long rejected demurrer pleading rules that focus on complaint-wording formalisms. In Conley v. Gibson, 355 U.S. 41, 48 (1957), the Supreme Court explained that "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome, and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

In a foundational FPA case, the Supreme Court held that the statute embodies instead the modern practice of following the evidence to do substantial justice, and provides for evidence-based ROE reductions under Section 206 even in cases that began under Section 205: "If the proceedings here satisfied in substance the requirements of § 206(a), it would seem immaterial that the investigation was begun as one into the reasonableness of the proposed rate, rather than the existing contract rate." FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353 (1956).

Section 206 requirements are satisfied in substance where complaints seeking to reduce the allowed ROE to the equity-cost level provide adequate notice that such reduction is at issue, even if, over the course of extended FERC proceedings, the pre-remedy rate has changed. Bedrock FPA case law thus rejects Mr. Gentile's theory, under which a statement of the last-filed rate made at the outset of a Section 206 proceeding would preclude applying the evidence developed therein to support reduction of a subsequent rate.

As to the other prong of Allegheny Genco – its reasoning that evidence of changed financial market circumstances justifies a second complaint – Mr. Gentile claims that FERC's

reasoning "could not apply to multiple complaints against an ROE which is the same in all periods."

This claim contradicts his other theory – which maintains, as discussed above, that granting a first complaint changes the allowed ROE to something not identified in the pleading that initiated a subsequent second complaint. In any case, the changed circumstances issue is not whether the prior ROE has changed; it is whether the cost of equity has changed.

In that regard, consider Mr. Gentile's hypothetical example, in which Complaints A, B, and C, each concerning the same utility's ROE, are filed at fifteen-month intervals. Figure One reproduces that hypothetical and adds the seven shaded entries in order to clarify the issues.

The penultimate column reflects the fact that for each complaint, FERC would apply a different six-month study period to find cost of equity. See, Belmont Municipal Light Department et al. v. Central Maine Power Co. et al., 162 FERC 61,035, P 12 (2018).

See Figure One.

As in the original hypothetical, FERC's decision on Complaint A, issued March 1, 2015 (thirty-two months after A was filed), reduces utility's ROE from 11 percent to 10 percent, based on the equity cost found for April-September 2013. Correspondingly later, FERC finds that equity cost 9.5 percent during the Complaint B study period (July-December 2014), and 9 percent during the Complaint C study period (October 2015-March 2016).

As Allegheny GenCo held, the question of what equity cost during each of these distinct study periods cannot be resolved without considering on their merits Complaints B and C. The finding that equity cost 10 percent during the Complaint A study period in mid-2013 does not resolve the question whether equity cost less than 10 percent during the later study periods of Complaints B and C.

The effect of dismissing those complaints on Mr. Gentile's spurious grounds would be to leave consumers paying ROEs of 11 percent and 10 percent for October 2013-February 2015, and March 2015 forward, respectively, even though the cost of equity for the associated study periods was 9.5 percent and 9 percent.

That outcome would fail to honor the Congressional intent, as quoted above, that "when the economic factors decline, consumers deserve just and reasonable rate reductions."

> **FERC should stop placing undue significance on the erratic, largely random level of the highest proxy result among dozens.**

Barring pancaked complaints would further undermine Congressional intent, and would increase FERC's regulatory burdens, by giving Section 206 respondents every incentive to litigate and delay the resolution of complaints.

The 1988 Regulatory Fairness Act legislative history noted that because the original version of Section 206 offered rate reductions only prospectively from the end of litigation, respondents were incented to litigate complaints, slowly, regardless of their merits. See, S. Rep. No. 100-491 at 3.

The same undesired incentive would apply if the pendency of one complaint precluded the filing of a second complaint. Where Mr. Gentile hopes that, "eliminating pancaking will facilitate speedier decisions by allowing litigants and FERC to concentrate on one disputed ROE at a time," experience teaches that if the pendency of one complaint confers immunity to any further complaint, parties benefited by the immunity will find ways to prolong it.

Mr. Gentile concludes with the thought that future parties may wonder what today's pancaking fuss was all about. So, let's record its origin here. Under FERC Opinion No. 531 and its application in subsequent cases, allowed ROEs would have been set above the central indication of empirical cost-of-equity methods, until such time as undefined anomalous financial market conditions had dissipated, sometime in "the very near future." See Opinion No. 531, PP 129-130 & n.285. The D.C. Circuit vacated that ruling because it was arbitrary and capricious. See Emera Maine v. FERC, 854 F3rd 9, 28-31 (D.C. Cir. 2017).

Since then, FERC seems to have abandoned the anomaly theory and the associated above-center placement of allowed ROEs. See, e.g., Coakley v. Bangor Hydro-Elec. Co., 165 FERC 61,030, P 44 (2018). But while it was extant, ratepayer representatives had every reason to file follow-on complaints, in order to test whether, as of the later study period associated with a subsequent complaint, the anomaly had ended such that allowed ROEs would again reflect the empirical center.

With Opinion No. 531 no longer posing an obstacle, the statutory way to discourage unmeritorious follow-on complaints, without improperly burdening meritorious ones, is straightforward.

FERC should stop placing undue significance on the erratic, largely random level of the highest proxy result among dozens; avoid the temptation to reverse-engineer its stated approach so as to rationalize a result determined by other means; and adhere consistently to an empirical approach that accurately estimates what utility equity costs at any given time.

ROE litigation at FERC isn't cheap,

and ratepayer representatives know that ratepayers ultimately bear both sides' litigation costs. Accordingly, they file and prosecute ROE complaints only when they predict that equity costs will be found to have declined substantially below the ROEs stated in rates.

If FERC's empirical approach is transparent, known, and stable, and produces predictable results – if the pervasive uncertainty caused by FERC's Opinion No. 531 turns out to have been, well, anomalous – then all stakeholders will be able to predict litigation outcomes.

With such predictability, complaints will be brought only when a utility's equity cost as measured by FERC's known empirical approach has declined significantly and is expected to stay low or decline further. For the same reason, complaints that pass such screening and land at FERC will generally be settled – unless keeping a complaint pending is allowed to create immunity from a further complaint.

In short, under Section 206 as under Section 205, the Commission should focus on a merits comparison between the rates that customers pay and study-period costs. It should put the kibosh on legally erroneous attempts to make rates exceed costs. PUF