

**LEGAL ISSUES PRESENTED BY THE
FEDERAL ENERGY REGULATORY
COMMISSION (FERC) PROPOSED
STANDARD MARKET DESIGN**

By

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Introduction

The Federal Energy Regulatory Commission ("FERC") has issued a series of administrative orders authorizing individual electric utilities to file "market-based rate" tariffs for wholesale electricity service. FERC also issued a series of orders to foster creation and operation of private day-ahead and real-time electricity spot markets by new utilities called "independent system operators" ("ISOs") or "regional transmission organizations" ("RTOs"), which determine which generating plants will run. In these spot markets, wholesale rates for all units sold are set at the level of the hourly price demand of the seller of the last unit needed to satisfy demand. Rates demanded in and set by the spot markets are indefinite, uncertain, and not capable of calculation, as they fluctuate unpredictably based on seller behavior.

The individual market-based rate orders do not require the individual utilities to charge or demand just and reasonable rates, and the new utilities running the spot markets are not required to set just and reasonable rates. Rather, a "locational market price" ("LMP") is established based on what the market will bear at a given time and location. The actual day-ahead and real time rates demanded by sellers and established by the spot markets are not filed with FERC, and advance notice of changes in rate schedules showing new rates are not filed subject to normal FERC review and refund powers.

On July 31, 2002, FERC issued a notice of proposed rulemaking (NOPR) to establish a nationwide "standard market design" (SMD) for setting rates as described above for wholesale interstate sales of electricity and transmission service.¹ FERC proposes new regulations, including a new Subpart G to 18 CFR Part 35 defining a "Independent Transmission Provider."

¹ *Remedying Undue Discrimination through Open Access Transmission Service and Standard Electricity Market Design*, Dkt. No. RM01-12-000, Notice of Proposed Rulemaking, July 30, 2002 ("FERC SMD NOPR").

It is a new utility “that administers the day-ahead and real-time energy and ancillary services markets in connection with its provision of transmission services pursuant to the pro forma tariff [to be prescribed by FERC].” The Pro Forma Standard Market Design Tariff contains the rules for six spot markets: three day-ahead markets and three real-time markets. The markets are for (1) Energy, (2) Regulation service, and (3) Operating reserves. A maximum “safety net” bid cap of \$1,000 per MWH (\$1 per KWH) applies to all markets at all times. A generator specific bid cap will apply in areas with noncompetitive conditions. There is no apparent way for a purchaser to challenge any market rate on the ground that it is not just and reasonable, and get a refund. FERC has proposed a condition to be added to all market based rate tariffs which would make a seller’s market based rate subject to refund, but only if the seller is found to have engaged in market manipulation.²

Here we address a threshold legal question, whether FERC may adopt such a system of market-based pricing for electricity consistent with the Federal Power Act of 1935 (“FPA”). The issue is of great importance to consumers, especially those in states where retail utility service providers “restructured” and were allowed to divest their power plants. Power for consumers in those states increasingly is purchased from wholesale providers, whose rates are subject to regulation under the FPA, which now will be based on or influenced by the spot market prices.

² *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, Docket No. EL01-118-000, *Order Establishing Refund Effective Date and Proposing to Revise Market-Based Rate Tariffs and Authorizations*, Issued November 20, 2001. The proposal states: “As a condition of obtaining and retaining market-based rate authority, the seller is prohibited from engaging in anticompetitive behavior or the exercise of market power. The seller’s market-based rate authority is subject to refunds or other remedies as may be appropriate to address any anticompetitive behavior or exercise of market power.” *Id.*, at 4. Thus, absent market power exercise or anticompetitive conduct, a seller is free to demand what the market will bear.

In the SMD NOPR, FERC found that all of the “independent system operator” (“ISO”) spot markets approved by FERC in recent years have experienced, to varying degrees, price increases due to the exercise of market power.³ In addition to well known failures of the FERC-approved markets in California,⁴ experience in the other ISOs has demonstrated that large consumer injury can be inflicted in very short periods of time.⁵

The FERC SMD in Appendix C catalogs instances of alleged discrimination,⁶ and posits as part of the remedy, creation of new “independent transmission providers” (“ITPs”) to run the six spot markets with market based rates. Specifically, FERC found that:

- Operation of transmission systems under FERC’s current open access transmission tariff by vertically and non-vertically integrated providers permits “undue discrimination in the provision of transmission service;”
- Utilities owning transmission facilities and participating in power markets continue to possess substantial transmission market power and retain the ability to unduly discriminate in the provision of transmission service and spot energy market services;”

³ “The ISO markets have experienced numerous design flaws.” FERC SMD NOPR Appendix C, p. 23. “[E]xisting trading rules and design of wholesale power markets do not consistently prevent market manipulation or send proper price signals to participants or allocate scarce resources to those who value them most and thus could result in unjust and unreasonable rates.” FERC SMD NOPR, para. 104 at p. 62.

⁴ See Duane, “Regulation’s Rationale: Learning from the California Energy Crisis,” *Yale Journal on Regulation*, Summer 2002.

⁵ In just one day, June 26, 2000, “[a]ccording to the NYISO, consumers bore over \$100 million in excess costs before bid mitigation could be applied. As a result, and in light of FERC’s unwillingness to allow retroactive price corrections, the NYISO subsequently implemented an automated mechanism for mitigating bids prior to setting the market-clearing price” *Best Practices in Market Monitoring*, Synapse Energy Economics, *et al.*, Nov. 9, 2001, p. 18-19, *citing*, NYISO, “Exigent Circumstances Filing of the [NYISO], May 17, 2001, p. 8.

⁶ Some of the instances involve alleged favoritism of vertically integrated transmission providers in serving their retail customers, which is hotly disputed by many parties. For purposes of this discussion only, discriminatory conduct is assumed, as the issue here is whether a lawful remedy to alleged rate discrimination can ever be the adoption of market-based rates.

- “lack of standardized wholesale electric market design allows undue discrimination within and across regions, can result in unjust and unreasonable pricing and allocation of transmission and *permits the exercise of market power (and thus unjust and unreasonable rates)* in power markets;” and
- “proper price signals are not being sent to the marketplace, with the result that market-based rates in many places are distorted, and reasonably accurate price signals necessary for infrastructure additions and are not being sent.”⁷

As the emphasized language above reveals, FERC is establishing a system in which it will assume just and reasonable rates are established in competitive markets, and will stay its regulatory hand in the absence of proof that a participant exercised market power. Regulatory action regarding rate setting would be limited to such situations and would generally be prospective, such as setting maximum limits on rates demands in areas with insufficient competition.

The proposed “standard market design” regulations would substitute for the several existing ISO markets six new private spot markets to be run under standardized rules by new private utilities, “Independent Transmission Providers.” The proposed regulations do not require the ITP to file just and reasonable rates. The ITP instead will file a standard tariff attached to the SMD NOPR as Appendix B, whose terms are prescribed by FERC which says, in essence, the ITP will establish fluctuating rates based on the price demanded by the last seller whose output is needed to meet demand for the service at a given time and location. The new standard market design contains a number of design features of spot markets now operated by

⁷ FERC SMD NOPR, para. 105, at p. 63 (*Emphasis added*). FERC cites nothing in its statutory charter giving it the duty or power to see that “proper price signals are sent to the marketplace.”

PJM and NYISO.⁸

In addition, FERC proposes to assume jurisdiction over the transmission component of bundled retail rates.⁹ As a result, the proposed spot markets for energy and transmission services may have major impact on retail rates in many states that have not embraced the notion of retail electric competition.

The FERC SMD NOPR cites no statutory language expressly authorizing the change of regimen. Rather, FERC asserts legal authority to establish the new market regimen upon anti-discrimination provisions of sections 205 and 206 of the Federal Power Act, which, respectively, forbid utilities to discriminate in the rates they demand or charge, file and authorize FERC to fix rates found to be discriminatory. Notably, FERC’s action is not based on the duty of utilities to file reasonable rates for all services, or the power of the agency to fix just and reasonable rates.

First, we will discuss the general power of FERC to deregulate rates of the utilities under its jurisdiction by establishing new markets and approving market-based rates. Then we will turn to a closer examination of the rationales offered by FERC as legal authority to adopt market-based rates.

I

FERC LACKS POWER TO IMPLEMENT A MARKET-BASED RATE REGIMEN FOR THE WHOLESALE SALE AND TRANSMISSION OF

⁸ The less extreme market power exercise in the PJM and NYISO markets be due not to the superiority of their market design and rules but because (1) much generation in the PJM area is still controlled by retail utilities with durational rate cap obligations to their customers and (2) in the NYISO a public agency, the New York Power Authority, recently built many peaker plants in the areas with the most extreme market concentration, which when responsibly bid capture the market clearing price in enough hours to prevent extreme price gouging behavior.

⁹ SMD NOPR, para. 118.

ELECTRICITY

Overview of Agency Power to Establish Market-Based Rates

It is basic that a federal regulatory agency's powers are conferred by statute and must be grounded in statutory language:

As a federal agency, FERC is a "creature of statute," having "no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress." *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (emphasis added). Thus, if there is no statute conferring authority, FERC has none. *See id.*; *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1986) (recognizing that "an agency literally has no power to act ... unless and until Congress confers power upon it"). In the absence of statutory authorization for its act, an agency's "action is plainly contrary to law and cannot stand." 268 F.3d at 1081 (citing *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995) ("*APPI*"); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995)).

Atlantic City Electric Company v. FERC, ___ F.3d ___, (D.C. Cir. No. 97-1097, July 12, 2002).¹⁰

The question whether FERC has authority to create a market-based regimen requires an examination of the longstanding provisions of the Federal Power Act of 1935, the statutory fount of FERC's authority in electricity matters. The Federal Power Act is based on the classic federal regulated industry paradigm established by the Interstate Commerce Act of 1887. The essence of that paradigm is really quite simple:

- The statute adopts the traditional legal standard that all rates made, demanded, or received shall be just and reasonable, and that rates which are not just and reasonable are unlawful;¹¹

¹⁰ <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=dc&navby=case&no=971097A>

¹¹ "Just and reasonable rates. All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful." FPA Section 205(a), 16 U.S.C. §824(d)(a).

- Rates must be non-discriminatory;¹²
- Price visibility is achieved through initial public filing by every regulated entity of its schedules of rates, charges, contracts, terms and conditions, open for inspection by the public, purchasers, and potential competitors;¹³
- Sixty days notice of rate changes;¹⁴
- Administrative power of the regulatory body to ensure just and reasonable rates, by reviewing rates, and modifying them, with effective administrative refund remedies.¹⁵

¹² "Preference or advantage unlawful. No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. FPA § 205 (b), 16 U.S.C. § 824(d)(b).

¹³ "Schedules. Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services." FPA § 205 (c), 16 U.S.C. § 824(d)(c).

¹⁴ "Notice required for rate changes. Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." FPA Section 205(d), 16 U.S.C. § 824(d).

¹⁵ "e) Suspension of new rates; hearings; five-month period. Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would

The only statutory exception to the above regimen is the fuel adjustment cost provision, which allows rates to fluctuate in accordance with a filed formula based on the cost of fuel.¹⁶

FERC is demanding creation of a new utility, the “independent transmission provider,” to be the only operators of the transmission system and other FERC jurisdictional facilities,¹⁷ despite a recent court case indicating that utility participation in regional transmission organizations and their markets is purely voluntary.¹⁸ The ITP would adopt the SMD rules for the proposed six spot markets to be run by the ITP, and generally establish a national regimen of market-based rates for wholesale electricity and all transmission. No statutory language expressly giving FERC the power to do this exists and none is cited. Indeed, recent legislative

otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.” FPA Section 206, 16 U.S.C. § 824d(e)

¹⁶ “As used in this subsection, the term “automatic adjustment clause” means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate. FPA §, 16 U.S.C. § 824d(f)(4).

¹⁷ “We also propose that no later than September 30, 2004, or such date as the Commission may establish, only Independent Transmission Providers would operate Commission-jurisdictional facilities.” SMD NOPR, para. 109.

¹⁸ *Atlantic City Electric Company v. FERC*, _ F.3d __, (D.C. Cir. No. 97-1097, July 12, 2002).

efforts to grant FERC explicit authority to require RTOs and to adopt market-based rates failed to gain passage in Congress. Rather, as previously indicated, FERC for justification of the SMD relies upon its power to correct discriminatory rates, contained in Section 206.

The market-based rate regimen abandons the traditional statutory framework, in that it allows rates established by the ITP markets to fluctuate without notice based on the market price demanded by the seller whose bid clears the market. In the new FERC paradigm, rates are neither definite, nor capable of calculation in accordance with a fuel adjustment cost formula. The NOPR conflates “marginal cost” and “marginal price” concepts, suggesting a relationship between the rates being set by the spot market and marginal cost. In footnote 116 to paragraph 204, the NOPR states “[i]t is a widely accepted principle of economics that markets work efficiently when prices reflect marginal costs,” *id.*, (*emphasis added*) citing the textbook of a noted authority on regulatory economics, Alfred E. Kahn. Even assuming the it is appropriate to apply marginal cost doctrines for pricing electricity,¹⁹ there is no requirement in the NOPR for bidders in the proposed spot markets actually to offer their supply at their marginal costs. Rather, the sellers bid in “prices,” not necessarily their “costs,” and it is the price that ‘clears the market’ which sets the price for all. Rates constantly fluctuate, are not contained in filed tariffs or derivable from fuel cost adjustment formulae, are established by private entities who are excused from establishing just and reasonable rates, rates are not reviewed by the agency before being changed, rates demanded are secret except for the market clearing price, and rates may not be

¹⁹ It is questionable whether pricing all electricity at the marginal cost of the last peaker called upon to serve could ever correctly price the output of all energy, regardless of plant characteristics or fuel, e.g., baseload, peaker, hydro, nuclear, coal, natural gas. This extreme vision of marginal cost pricing would set rates for bus or subway fares at the level demanded by taxicabs, regardless of their differing capacities and cost structures.

subject to refund even if later found by the agency to be unreasonable.²⁰

The regulator's mission envisioned in the SMD also shifts, from trench level review of rate changes proposed by utilities, complaint determination, and rate investigations to a new and loftier role, that of market architect and overseer. In its "Strategic Goals," FERC has since 2001 indicated that it wants to "Foster nationwide competitive energy markets as a substitute for traditional regulation."²¹ Such a fundamental revision of the regulatory paradigm and reinvention by the agency of its mission is not within the agency's statutory charter. A recent GAO report questions the agency's capabilities and enforcement powers as a market monitor.²²

This quantum shift of the agency's role and mission was not contemplated by Congress when the FPA was enacted. The broad issue of FERC's authority to revamp the system of federal electricity regulation has yet to be addressed by the Supreme Court. The issue, however, is presented not only by the SMD, the latest and most elaborate proposal for market-based substitutes for direct regulation, but also in other contexts, such as approvals of market-based rates for individual utilities, RTO and ITP approvals.

Efforts of federal regulatory agencies to lighten traditional regulation, and to embrace market substitutes for direct rate making are not new. A trio of cases over a three decadespan illustrates that the Supreme Court has not looked with favor on agencies spontaneously revising

²⁰ Despite findings that rates were unreasonable in the California ISO market, FERC has held it cannot order full refunds. This is the subject of various pending legal challenges.

²¹ *FERC's Statement of Its Mission in the 1997, 2000, and 2001 Versions of Its Strategic Plan, Table 2, p. 69*, General Accounting Office Report, Energy Markets GAO-02-656. The 2002 Strategic Plan also includes a similar Goal.

²² "Energy Markets: Concerted Actions Needed by FERC to Confront Challenges That Impede Effective Oversight," (GAO-02-656 June 2002).

the method of regulation without congressional action to change the regulatory paradigm they are charged by statute to implement. Significantly, the Supreme Court has refused to allow deregulation even when the statutory scheme is deemed to be outdated and the agency's proposal for reinventing its role and adopting market substitutes for regulation may seem workable, attractive and more economically correct.

Texaco, Inc. v. FPC: Lightened Regulation of Small Natural Gas Producers

In 1974, the Supreme Court considered a situation where FERC's predecessor, the Federal Power Commission, attempted to change the mode of regulation of smaller producers of natural gas, substituting an agency-devised regimen intended to relax direct price regulation but nonetheless achieve the statutory goal of reasonable rates through market forces. The Supreme Court upheld the flexibility of the agency to utilize novel rate setting techniques, but firmly rejected reliance on market prices to set rates:

For the purposes of the proceedings that may occur on remand, we should also stress that, *in our view, the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Act.* It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas. * * * * In subjecting producers to regulation because of anticompetitive conditions in the industry, *Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price.* * * * *

In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. It may be, as some economists have persuasively argued, [footnote omitted] that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the

Legislature, where the public interest may be considered from the multifaceted points of view of the representational process.

FPC v. Texaco, Inc., 417 U.S. 380, 398 - 400 (1974) (*Emphasis added*) ("*Texaco*"). The *Texaco* decision is not merely interesting history or a useful prism through which to view FERC's contemporary effort to shift from traditional regulation to a regimen of market-based rates. At the time *Texaco* was decided, the rate making provisions of the Natural Gas Act and the Federal Power Act provisions were the same, and precedents under those statutes were cited and followed interchangeably by the courts, without distinction between natural gas and electricity cases.²³ The passage of time since *Texaco* was decided does not erode its force. Any argument to disregard it

misconceives the deference this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes. Adherence to precedent is, in the usual case, a cardinal and guiding principle of adjudication, and "[c]onsiderations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 - 173 (1989). There has been no sufficient intervening change in the law, or indication that First Iowa has proved unworkable or has fostered confusion and inconsistency in the law, that warrants our departure from established precedent. Cf. *id.*, at 173."

California v. FERC, 495 U.S. 490, 494 - 495 (1990). Although the natural gas regulatory scheme has since been changed by Congress, the "filed rate" paradigm for electricity has not, and so the principles of *Texaco* still have continued vitality and full force with respect to

FERC's latest assertions of power to implement a market-based rate regimen.²⁴ Like the Natural Gas Act at the time of *Texaco*, the Federal Power Act does not grant FERC authority to relax direct price regulation and approve market mechanisms to set just and reasonable rates. FERC's current goal to supplant price regulation with market-based rates is at total odds with *FPC v. Texaco*, and as will be discussed later, efforts to distinguish the case are unavailing.

MCI v. AT&T: Lightened Regulation of Non-Dominant Long Distance Carriers

More recently, the Supreme Court reined in the Federal Communications Commission when that regulatory agency, seeking to spur competition and deregulation, waived rate filing by non-dominant long distance telephone carriers (who the agency believed lacked market power), notwithstanding blanket provisions of the statute requiring all providers to file their rates, not just those with market power. Writing for the Court, Justice Scalia stated:

What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long distance common carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.

As we noted earlier this Term, there is considerable "debate in other forums about the wisdom of the filed rate doctrine," * * * and, more broadly, about the value of continued regulation of the telecommunications industry. But our estimations, and the Commission's estimations, of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. *For better or worse, the Act establishes a rate regulation, filed tariff system for common carrier*

²³ "*Montana-Dakota Utilities* was a case under the Federal Power Act rather than under the Natural Gas Act, but as we have previously said, the relevant provisions of the two statutes "are in all material respects substantially identical." *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956).

²⁴ No intervening statutory changes since *Texaco* authorize FERC to adopt a market-based rate regimen. The enactment by Congress of the Energy Policy Act of 1992 fostered the entry of new competitors to sell electricity, but did not authorize market-based rates. Although some merchant generators were granted exemption from holding company act requirements, the law did not amend Sections 205 or 206 of the Federal Power Act, the key rate making provisions. These are the provisions, discussed in more detail later, that still require filing by utilities of "just and reasonable" rates and contracts for the wholesale sale of energy, and notice of any changes in rates, all subject to review, revision and refund by the agency.

