

C O M M E N T

# YOU CAN'T TAKE THEM LIKE THAT, IT'S AGAINST REGULATION

by Margaret H. Claybour

*Ms. Claybour is one of the four founding partners of Rock Creek Energy Group, LLP. She has over 18 years of experience counseling and representing a broad swath of electric industry participants on a wide range of federal energy regulatory and administrative litigation matters.*

My comments are from the perspective of a practicing attorney who represents clients on the issues addressed in Prof. Joshua C. Macey's article.<sup>1</sup> I want to start by acknowledging Professor Macey's work in laying out the history of the legal rules he argues should be "abandoned,"<sup>2</sup> but his "zombie" analogy is akin to a "slash and burn" approach when a surgical response would be more appropriate to address his concerns.

As a practitioner who concentrates on federal energy regulation, I want to focus on the filed rate doctrine, which is one of the zombie energy laws Professor Macey identifies—a doctrine that is alive and kicking and still particularly relevant today. I understand Professor Macey's perspective as to how it may be applied within the judicial system but, in practice before the Federal Energy Regulatory Commission (FERC), it is a tool that certainly I and other practitioners utilize both for vertically integrated utilities, as well as the customers of those vertically integrated utilities. The renewable energy generators discussed in the article tend to be customers of these vertically integrated utilities as interconnection customers, and they are also transmission customers. When you consider that rates include not only the amount that will be charged, but also the terms and conditions of taking service, a tool like the filed rate doctrine can help a customer assert the rights to which it is entitled under a particular tariff and challenge a utility's deviation from providing the delineated services that have been accepted by FERC. It is an important and useful tool within the industry.

Accordingly, perhaps Professor Macey's approach should be more surgical. To the extent the proposal is to limit or gut the filed rate doctrine, there should be some other mechanism, tool, or approach that could allow a litigant within the judiciary system to achieve its goals but not completely eradicate the availability of the filed rate doctrine within the regulatory or the administrative law scheme.

Furthermore, the concept of a utility in the article appears to be almost exclusively the vertically integrated utility, but keep in mind that a utility today can include merchant transmission owners, cooperatives, or municipally owned transmission organizations that choose to participate in markets subject to FERC regulation. In these cases, again, it is important for the customer to be able to utilize the filed rate doctrine as one of several tools that allow it to ensure the entity operating the market delivers the anticipated rate terms and conditions based on what is on file at FERC. The filed rate doctrine can be particularly useful in navigating open access transmission tariffs or market tariffs (and the business practice manuals on file that are attendant to these rules), in an effort to ensure that customers' service expectations are met.

Turning to Professor Macey's arguments about cost recovery, while there are mechanisms that allow vertically integrated utilities to recover generator fuel costs that *may* give them some edge in the competitive markets, this is not such a prolific problem to require the recommended approach. There are more surgical approaches to regulating the participation of generators in competitive markets, for example, the controversial minimum offer price rule in the PJM Interconnection, L.L.C. market, than the death knell Professor Macey proposes. From a transmission rate perspective, transmission rates are generally cost-based and, again, not exclusive to vertically integrated utilities. Cost-based rate regulation is still alive and well at FERC. The Federal Power Act and rate mechanisms provide transmission customers, interested parties, and FERC the

---

1. Margaret H. Claybour's Comment, the title of which references *Scene 2: Just Die Already*, Another Bleedin' Monty Python Website, [http://montypython.50webs.com/scripts/Holy\\_Grail/Scene2.htm](http://montypython.50webs.com/scripts/Holy_Grail/Scene2.htm) (quote modified from original), is based on an edited transcription of her remarks at the Environmental Law and Policy Annual Review conference. See 2020-2021 Environmental Law and Policy Annual Review Conference, available at <https://www.eli.org/environmental-law-policy-annual-review/2020-2021-ELPAR-conference>.

2. Joshua C. Macey, *Zombie Energy Laws*, 73. VAND.L.REV. 1077 (2020).

ability to scrutinize and challenge transmission rates on file with FERC.

Lastly, the article addresses market impacts with respect to the ability of a utility to recover its costs and raises concerns about efforts to manipulate the market—actions that would constitute blatant violations of law. There are systems within the competitive market as it stands today, however, to address these concerns—including regional transmission organization and inde-

pendent system operator market monitors, FERC market surveillance teams, and FERC enforcement staff. Thus, measures that would take away or remove the ability of utilities to recover costs based on this rationale should not be encouraged.

In sum, Professor Macey's article offers several interesting proposals from an academic perspective, some of which are worth further exploration, but ultimately not compelling in their current form from a practitioner's perspective.