



## FERC's Annual Charges Program: A Success Story in Promoting Government Accountability

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**National Hydropower  
Association Conference**

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# Objectives

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- Where We've Been:  
History of the successful annual charges litigation.
- Where We Are:  
Current status of the annual charges program.
- Where We're Going:  
Direction of the annual charges program.

## Background

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- FPA Section 10(e)(1), 16 U.S.C. § 803(e)(1):
  - Requires licensees of hydroelectric projects to “pay to the United States reasonable annual charges in an amount to be fixed by [FERC] for the purpose of reimbursing the United States for the costs of the administration of [Part I of the FPA], including any reasonable and necessary costs incurred by Federal and State fish and wildlife agencies and other natural and cultural resource agencies in connection with studies or other reviews carried out by such agencies for purposes of administering their responsibilities under [Part I of the FPA] . . . . and in fixing such charges [FERC] shall seek to avoid increasing the price to the consumers of power by such charges . . . .”

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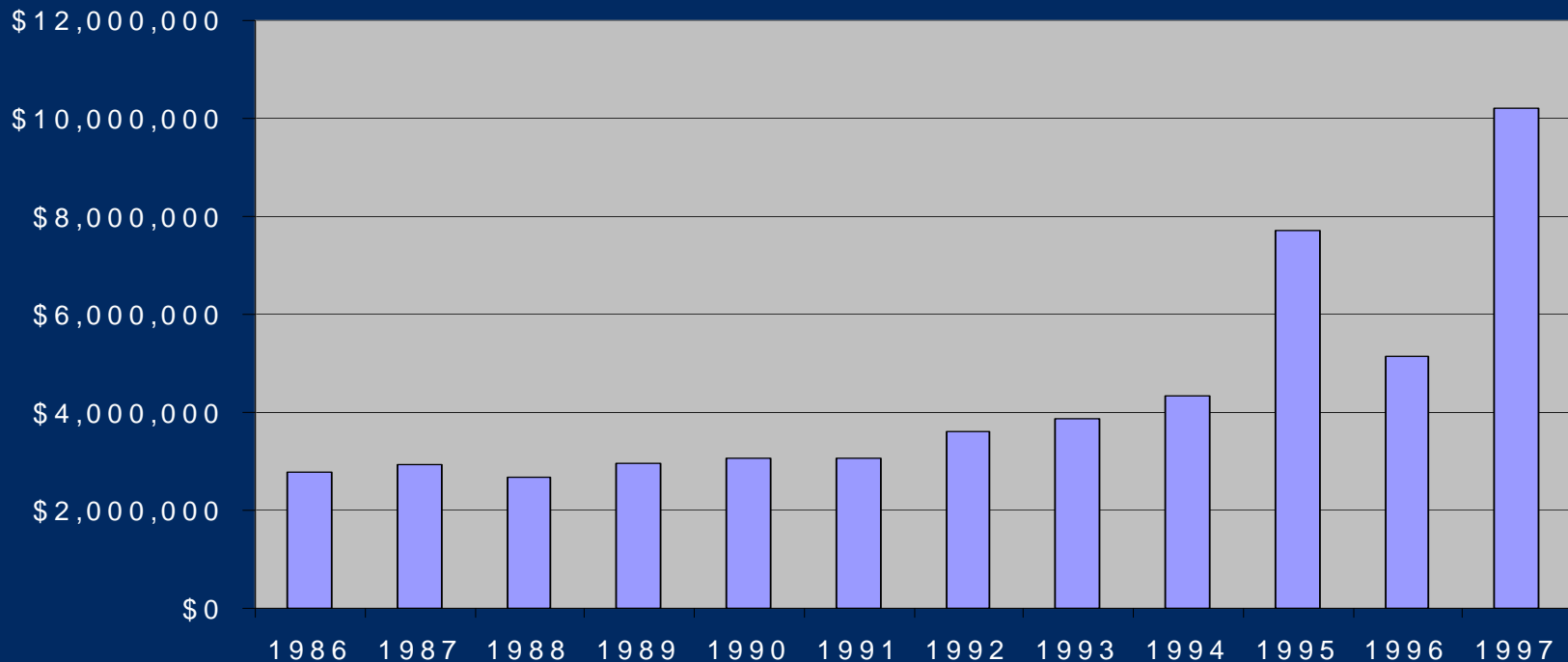
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- Components of FERC's Administrative Annual Charges Bills:
  - FERC's estimated administrative costs for current fiscal year.
  - "True-up" of previous fiscal year payment based on FERC's actual administrative costs.
  - Reported administrative costs of Other Federal Agencies (OFAs) incurred in previous fiscal year, which historically have consisted of:
    - U.S. Forest Service
    - National Marine Fisheries Service
    - Army Corps of Engineers
    - Various agencies, bureaus and offices within the Department of the Interior

## How Did the Appeals Process Begin?

- Prior to the 1995 bills, the OFAs' component of FERC's annual charges bills was largely stable and unchanged.

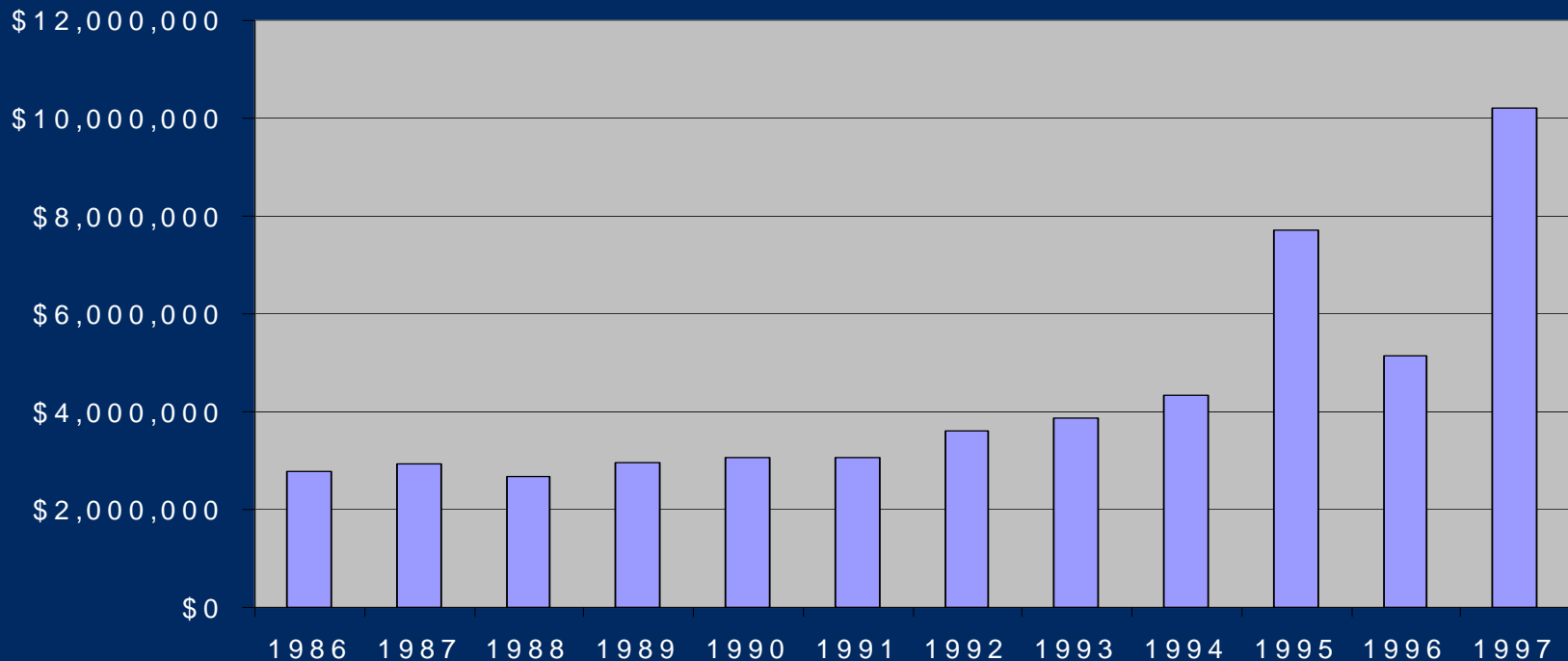
OFA Charges, 1986-1997



## How Did the Appeals Process Begin?

- Beginning with the 1995 bills, the OFAs' component of the annual charges bills nearly doubled.

OFA Charges, 1986-1997



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# Appeals Process

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- July 1997: In response to the precipitous increase in OFA costs, a group of FERC hydro licensees (the “Idaho Falls Group”) appealed their annual charges bills.
  - Required FOIA requests to obtain documentation of the OFAs’ reported costs.
  
- July 1997 – June 2001: Complex Administrative Litigation.
  - Involved discovery-like procedures and data requests from the OFAs.
  - Required organization and expert analysis of voluminous financial information.
  - Included multiple appeals of bills over several years.
  - Resulted in two settlement agreements, one of which was not accepted by FERC.
  - Involved retroactively applied changes in FERC’s certification policies.
  - Resulted in five separate FERC orders:
    - Letter Order of Deputy Chief Financial Officer (March 25, 1998)
    - *City of Idaho Falls*, 87 FERC ¶ 61,114 (1999) (“*Idaho Falls I*”)
    - *City of Idaho Falls*, 93 FERC ¶ 61,145 (2000) (“*Idaho Falls II*”)
    - *City of Idaho Falls*, 95 FERC ¶ 61,126 (2001) (“*Idaho Falls III*”)
    - *City of Tacoma*, 95 FERC ¶ 61,465 (2001)

## Appeals Process (con't)

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- *Idaho Falls II* adopted several changes to FERC's annual charges program.
  - Imposed minor changes to the OFA annual charges program by requiring the OFAs to certify that their cost reports conform with federal standards.
    - OMB Circular No. A-25
    - Federal Standards Advisory Board's *Managerial Cost Accounting Concepts and Standards for the Federal Government: Statement of Financial Accounting Standard No. 4*.
  - Ordered new certifications for pending appeals of the 1997 – 2000 bills.
  - Rejected the Idaho Falls Group's request to require OFAs to submit supporting documentation of their cost reports, leaving FOIA as the only vehicle for licensees to obtain the OFAs' cost data.

## Appeals Process (con't)

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- *Idaho Falls II* also rejected most of the Idaho Falls Group's legal and policy arguments challenging the OFAs' costs.
  - FERC rejected the argument that a certified statement does not amount to "substantial evidence," as required by FPA Section 313(b).
  - FERC rejected the argument that it had failed to ensure that the OFAs' costs were "reasonable," as required under FPA Section 10(e)(1). FERC held that the reasonableness requirement is met through its "rate design" and does not require it to ensure the reasonableness of the costs themselves.
  - FERC rejected the argument that some of the OFAs' reported costs, including indirect costs (overhead, etc.), training costs, conference fees, litigation costs, and other costs not directly associated with "studies or other reviews" as provided in FPA Section 10(e)(1), were not recoverable through annual charges.
  - FERC rejected the argument that costs incurred by the OFAs in other federal programs (NEPA, ESA, NHPA, etc.) are not recoverable through annual charges.
  - FERC agreed with the Idaho Falls Group, however, that the OFAs could not, without prior notice, retroactively adjust their previous annual cost reports.

## Appeals Process (con't)

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- July 2001: Idaho Falls Group filed a petition for judicial review before the D.C. Circuit.
- July 2002: FERC stopped including the OFAs' costs in its annual charges bills, pending judicial review and subsequent remand.
- June 2003: The D.C. Circuit ruled in favor of the Idaho Falls Group and remanded the appeals back to FERC. *City of Tacoma v. FERC*, 331 F.3d 106 (D.C. Cir. 2003).
  - The court held that FERC has an affirmative obligation under FPA Section 10(e)(1) to fix "reasonable" annual charges and to "seek to avoid increasing the price to the consumers of power by such charges."
  - The court held that FERC's practice of simply relying on the OFAs' certified cost statements failed to discharge these statutory responsibilities.

## Remand & New Procedures

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- June 2004: FERC issued its remand order, establishing new procedures for OFAs' cost submissions. *City of Idaho Falls*, 107 FERC ¶ 61,277, *on reh'g*, 109 FERC ¶ 61,040 (2004).
  - By December 31 of each year, OFAs must submit their cost reports to FERC.
    - The cost report must include a new FERC-required form that itemizes the agency's costs, and which must be certified by the agency's Chief Financial Officer.
    - OFAs must submit "detailed cost accounting reports or cost allocation analyses which support each cost category listed on the form."
    - While FERC will presume that all costs supported in the report or analyses are reasonable, any costs not so supported will not be passed through to licensees.
  - By January 14 of each year, FERC will make all the OFAs' certifications, reports and analyses publicly available.
  - In March of each year, FERC staff will convene a technical conference to discuss the OFAs' cost reports and answer licensees' questions.
  - All OFA costs that are certified and documented are presumed "reasonable."
  - If licensees' concerns are not resolved by the technical conference, they may appeal the bill following its issuance.

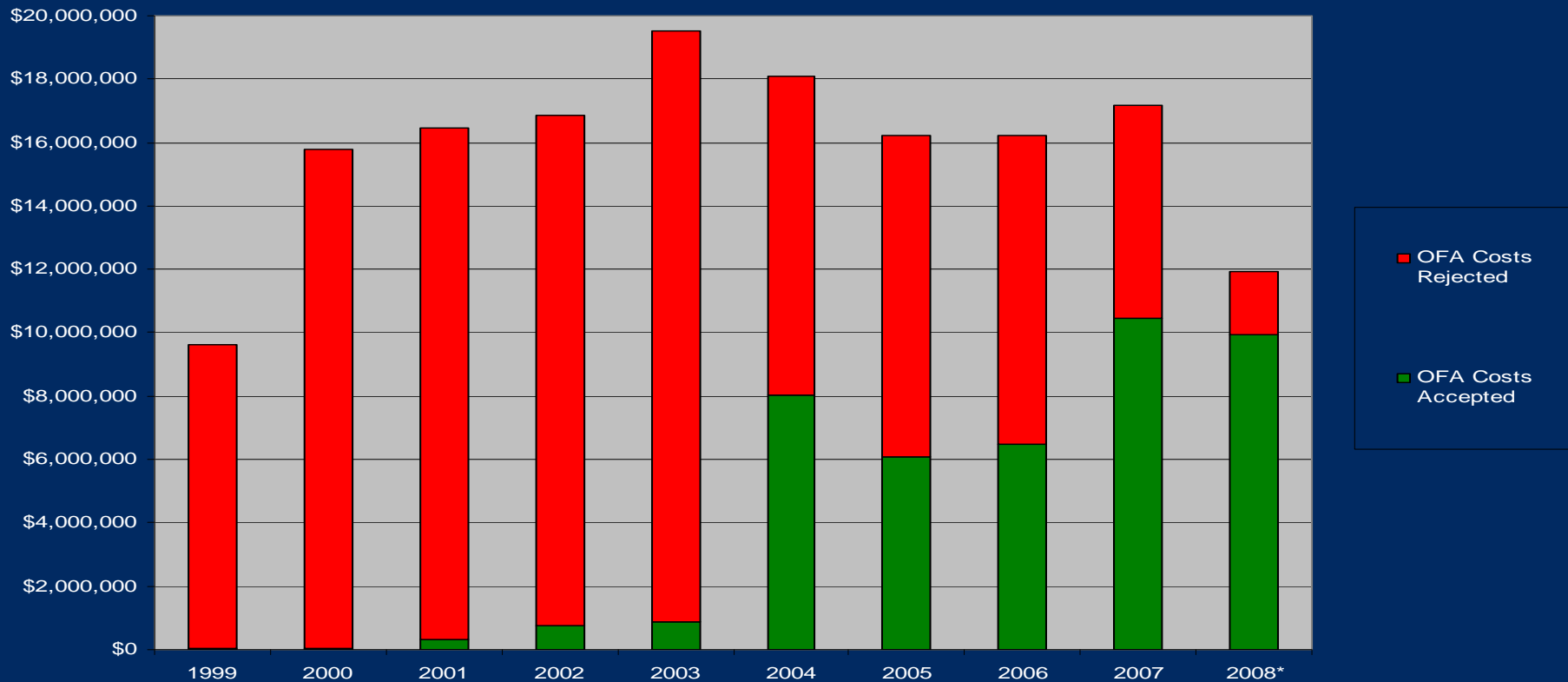
## Application of New Procedures

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- June 2006: Following its remand order, FERC applied these new procedures to the pending appeals (1999 – 2001) and unbilled OFA costs (2002 – 2004).
- 2006 – 2008: FERC applied the new procedures to the OFAs' submitted costs on an annual basis.
- In implementing new procedures, FERC Staff undertakes a rigorous review of the OFAs' cost reports.
  - OFAs must demonstrate that they have viable accounting systems that accurately capture, isolate, and report FPA Part I costs.
  - OFAs must demonstrate that their accounting systems or analyses rationally allocate municipal and non-municipal costs.
  - Staff ensures that the certified costs can be traced to, and reconciled with, the submitted reports and analyses.
  - OFAs must explain the rationale behind their indirect (overhead) costs.

# Application of New Procedures (con't)

Implementation of New OFA Procedures



\* Preliminary analysis for 2008.

## Application of New Procedures (con't)

	OFA Reported	FERC Accepted	FERC Rejected	% Rejected
1999	\$9,625,038	\$32,707	\$9,592,331	99.7%
2000	\$15,790,513	\$27,397	\$15,763,116	99.8%
2001	\$16,441,707	\$314,439	\$16,127,268	98.1%
2002	\$16,877,635	\$772,791	\$16,104,844	95.4%
2003	\$19,525,755	\$855,005	\$18,670,750	95.6%
2004	\$18,085,074	\$8,044,416	\$10,040,658	55.5%
2005	\$16,227,980	\$6,083,294	\$10,144,686	62.5%
2006	\$16,240,744	\$6,487,968	\$9,752,776	60.1%
2007	\$17,179,420	\$10,468,503	\$6,710,917	39.1%
2008*	\$11,943,386	\$9,950,624	\$1,992,762	16.7%
<b>TOTAL</b>	<b>\$157,937,252</b>	<b>\$43,037,144</b>	<b>\$114,900,108</b>	<b>72.8%</b>

\* Preliminary analysis for 2008.

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# What Did the Hydroelectric Industry Gain from the Annual Charges Appeals?

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## ■ Strengths:

- Requires transparency in OFA cost reporting. (No more FOIA!)
- Results in annual FERC Notice reporting Staff's analysis of OFA cost reports.
- Allows for resolution of OFA cost disputes prior to billing.
  - Alleviates need to pay disputed bill under protest.
- Reduces number of annual charges appeals.
- Fosters better understanding among hydroelectric industry, FERC Staff and OFAs.
- Lowers OFAs' component of FERC's annual charges bills: Up to \$115 million savings for industry since 1999.
  - Attributable to better cost-accounting practices by the OFAs?
  - Attributable to increased scrutiny by FERC Staff?
  - Attributable to overall decrease in FERC licensing activity?

## ■ Limitations:

- Analyzes and makes a reasonableness determination of the OFAs' costs only on accounting principles.
  - Affords opportunity for licensees to raise issues of "reasonableness" both prior to billing and in appeals of bills.

## What's Next?

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- Stay Involved! This is an industry-wide watchdog effort.
- Review the OFAs' annual cost submissions and report any anomalies in the annual technical conference and in comments to FERC Staff.



For more information

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