REPORT OF THE JUDICIAL REVIEW COMMITTEE

This report summarizes cases reviewing decisions by the Federal Energy Regulatory Commission and other cases pertinent to energy regulation. The time frame covered by this report is January 2009 through December 2010.*

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I. ADMINISTRATIVE LAW

A. The Mobile-Sierra Doctrine

In *NRG Power Marketing*,[1] the Supreme Court addressed the question whether the *Mobile-Sierra* doctrine applies when wholesale electric capacity rates set by contract are challenged as unjust and unreasonable under section 206 of the Federal Power Act (FPA).[2] The case arose from the Commission's approval of a contested settlement agreement creating a "forward capacity market" in New England Independent System Operator.[3]

According to the settlement agreement, auctions would set capacity prices three years in advance of the time when the capacity would be needed, and a series of "transition-period payments" would be made to capacity-supplying generators for the three year gap between the first auction and initial provision of capacity pursuant to that auction's results.[4] The settlement agreement further provided that any challenge to either the auction-clearing prices or the transition payments would be governed by the "public interest" standard set forth four decades earlier in the *Mobile-Sierra* cases.[5]

As the Supreme Court explained in 2008,

> [u]nder the *Mobile-Sierra* doctrine, the Federal Energy Regulatory Commission (FERC or Commission) must presume that the rate set out in a freely negotiated wholesale-energy contract meets the "just and reasonable" requirement imposed by law . . . [and the] presumption may be overcome only if FERC concludes that the contract seriously harms the public interest.[6]

The forward capacity market settlement agreement was contested by various parties, many of whom petitioned for review in the U.S. Court of Appeals for the D.C. Circuit. They argued that *Mobile-Sierra's* heightened "public interest" standard could not apply to rate challenges brought by persons who had not joined the settlement agreement; instead, they argued, non-settling parties retain statutory rights to challenge the resulting rates under the lower unjust-and-unreasonable standard. The D.C. Circuit agreed, overruling the Commission and holding that to apply the *Mobile-Sierra* presumption to those

1. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 130 S. Ct. 693 (2010).
2. 16 U.S.C. § 824(e) (2006).
3. *NRG Power Mktg.*, 130 S. Ct. at 697.
4. *Id.* (citing *Devon Power LLC*, 115 F.E.R.C. ¶ 61,340 (2006)).
5. *Id.* at 697-98. The *Mobile-Sierra* doctrine was established in two decisions announced on the same day in 1965. United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1965); FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1965).
6. Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 554 U.S. 527, 530 (2008).

not parties to the contract would violate the rule that "a contract cannot bind a nonparty."[7]

Only three months after the D.C. Circuit issued its decision, the Supreme Court decided *Morgan Stanley Capital Group*,[8] another case involving proper application of the *Mobile-Sierra* presumption. There, the Court rejected arguments that the *Mobile-Sierra* presumption did not protect contractual rates that had not been filed and approved as just and reasonable by the Commission.[9] The Court held, categorically, that the "FERC may abrogate a valid contract only if it harms the public interest."[10] The Court also rejected the notion that the *Mobile-Sierra* doctrine unjustifiably departed from the text of the FPA, explaining that "the term 'public interest standard' refers to the differing *application* of that just-and-reasonable standard to contract rates."[11]

Thus, relying heavily on *Morgan Stanley's* characterization of the *Mobile-Sierra* doctrine, the Supreme Court in *NRG Power Marketing* reversed the D.C. Circuit, and held that the *Mobile-Sierra* doctrine applied to all challenges to contract rates, whether brought by settling or non-settling parties.[12]

In the course of the litigation, however, a dispute arose as to whether rates established by the forward capacity market auctions would qualify as contractually negotiated rates for purposes of *Mobile-Sierra*.[13] The objectors to the settlement asserted that they were not, "hence *Mobile-Sierra* is inapplicable."[14] The FERC argued, in response, that the rates "are not themselves contract rates to which the Commission was *required* to apply *Mobile-Sierra*," but "the Commission had discretion to do so."[15] Rather than decide the question itself, the Supreme Court remanded the case to the D.C. Circuit, where the questions had been "raised before, but not ruled upon."[16]

On remand, the D.C. Circuit held that it had jurisdiction to consider the issues remanded by the Supreme Court, rejecting the contention the issues had been waived,[17] but declined to decide the merits. The Court remanded the issue to the Commission for further explanation because the Commission's position on remand—i.e., that it has discretion to impose the *Mobile-Sierra* review to non-contract rates—is sustainable, because the FERC "never articulated *in its orders* a rationale for its discretion to approve a *Mobile-Sierra* clause outside of the contract context, or an explanation for exercising that discretion here."[18]

7. Me. Pub. Utils. Comm'n v. FERC, 520 F.3d 464, 478 (D.C. Cir. 2008).
8. *Morgan Stanley*, 554 U.S. 527.
9. *Id.* at 545-47.
10. *Id.* at 548.
11. *Id.* at 534.
12. NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 130 S. Ct. 693, 701 (2010).
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Me. Pub. Utils. Comm'n v. FERC, 625 F.3d 754, 758 (D.C. Cir. 2010).
18. *Id.* at 759.

B. Standing, Ripeness, and Aggrievement

In *Delaware Department of Natural Resources v. FERC*,[19] the D.C. Circuit dismissed Delaware's challenge to FERC orders conditionally approving the proposed Crown Landing liquefied natural gas terminal project based in New Jersey and extending so far into the Delaware River as to enter Delaware's portion of the river.[20] The court held that Delaware lacked injury-in-fact sufficient for standing because the orders under review were not immediately operative; they expressly would not go into effect until the project secured Delaware's "concurrence" under the Coastal Zone Management Act (CZMA).[21] In fact, Delaware already had refused to grant its concurrence for the project, such that FERC orders could not go into effect without subsequent modification.[22]

Delaware argued that although FERC orders were conditional and therefore not currently operative, Delaware was harmed by the mere existence of the conditional orders because the state may "face intense political pressure to acquiesce in FERC's conditional approval and reverse its own [CZMA] decision."[23] The court rejected that argument, concluding that it "could hardly recognize this conjectural political dynamic as representing a concrete injury or, indeed, any sort of legally-cognizable injury. Delaware essentially is asking us to prevent it from changing its own mind."[24]

In *Energy Transfer Partners, L.P. v. FERC* (*ETP II*),[25] the Fifth Circuit denied as unripe a petition for review challenging the FERC's jurisdiction to direct an administrative hearing before an Administrative Law Judge (ALJ) to adjudicate a FERC action for civil penalties for alleged market manipulation under section 22 of the Natural Gas Act (NGA).[26]

In 2007, after two years of investigation, the FERC issued a Show Cause Order announcing its preliminary determination that Energy Transfer Partners, L.P., and several affiliated entities (collectively, ETP) had violated the FERC's regulations under the NGA[27] and Natural Gas Policy Act (NGPA)[28] by engaging in manipulation of wholesale gas prices.[29] The order proposed a civil penalty of $82 million, disgorgement of unjust profits of approximately $70 million, and revocation of ETP's blanket certificate to sell natural gas.[30] The agency directed ETP to file an answer and suggested that the case would be tried in an agency

19. Del. Dep't of Natural Res. v. FERC, 558 F.3d 575 (D.C. Cir. 2009).

20. *Id.* at 576-77. That determination was made by the Supreme Court in an original action filed by Delaware. New Jersey v. Delaware, 552 U.S. 597, 622-23 (2008).

21. *Del. Dep't Natural Res.*, 558 F.3d at 577-79. The CZMA is codified at 16 U.S.C. §§ 1451-1466 (2006).

22. *Id.* at 578.

23. *Id.*

24. *Id.*

25. Energy Transfer Partners, L.P. v. FERC, 567 F.3d 134 (5th Cir. 2009).

26. 15 U.S.C. § 717t-1.

27. *Id.* §§ 717-717w.

28. *Id.* §§ 3301-3432.

29. *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 (2007).

30. *Id.* at p. 61,490.

proceeding before an ALJ.[31] ETP filed an expedited request for rehearing, arguing that the FERC lacked jurisdiction to adjudicate the alleged civil penalties because the NGA and NGPA provided for adjudication in federal district court. The FERC denied ETP's expedited request for rehearing, and ETP filed its first of two petitions for review in the Fifth Circuit. On April 28, 2009, the court dismissed ETP's first petition, granting the FERC's motion to dismiss for lack of jurisdiction.[32]

The FERC then issued a hearing order mandating a "trial-type evidentiary hearing before an administrative law judge (ALJ)" to investigate the factual issues presented by the FERC's Show Cause Order.[33] Regarding that order as a more definitive step outside the agency's jurisdiction, ETP sought rehearing and a stay of the hearing order.[34] The FERC denied ETP's second request for rehearing,[35] prompting ETP to file a second petition for review in the Fifth Circuit.

In its petition, ETP alleged that section 24 of the NGA granted it a "'statutory right to have its civil penalty liability determined, in the first instance, by a federal district court'"[36] and that the FERC's establishment of a hearing before an ALJ was unlawful. But the Fifth Circuit held that ETP was not "aggrieved" within the meaning of the jurisdictional statute,[37] because the dispute was not "ripe for review."[38] The court held that the FERC's hearing order was not a "definitive ruling or regulation" entitling ETP to appellate review.[39] To be considered "definitive," an order must have a "'substantial effect on the parties which cannot be altered by subsequent administrative action.'"[40] The court noted that ETP could prevail in the administrative proceeding before the FERC and held that this possibility "warrants the requirement that [ETP] pursue administrative adjudication, not shortcut it."[41] The court rejected ETP's argument that the company's compelled participation in the administrative litigation caused it irreparable injury justifying immediate appellate review, finding that the FERC's hearing order had "no 'legal force or practical effect' on ETP's daily business other than the disruption caused by litigation."[42] The court stated that the burden of litigation does not constitute the type of irreparable injury that would cause the action to be ripe for review.[43] Finally, the court distinguished Fifth Circuit precedent providing for "extraordinary exceptions" to the requirement under the Administrative Procedure Act (APA) that an order constitute final agency action prior to judicial

31. *Id.* at n.3.

32. Energy Transfer Partners, L.P. v. FERC, No. 07-61021 (5th Cir. Mar. 17, 2008).

33. *Energy Transfer Partners, L.P.*, 123 F.E.R.C. ¶ 61,168 at P 5 (2008).

34. *Id.*

35. *Energy Transfer Partners, L.P.*, 124 F.E.R.C. ¶ 61,149 (2008).

36. *Energy Transfer Partners, L.P.*, 567 F.3d at 137 (citing 15 U.S.C. § 717u (2006)).

37. 15 U.S.C. § 717r(b).

38. *Energy Transfer Partners*, 567 F.3d at 139 (citing Brooklyn Union Gas Co. v. FERC, 190 F.3d 369, 373 (5th Cir. 1999)).

39. *Id.* at 141.

40. *Id*. (quoting Atlanta Gas Light Co. v. FPC, 476 F.2d 142, 147 (5th Cir. 1973)).

41. *Id.*

42. *Id*.

43. *Id.* at 142 (citing Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 226 (5th Cir. 1994)).

review. The "extraordinary exceptions" under the APA apply where an agency order is alleged to have been "in plain contravention of a statutory mandate."[44] The court held that, assuming the "extraordinary exceptions" recognized under the APA could be applied to the review of a FERC order under section 19(b) of the NGA, the court could not conclude that a "plain violation" of the NGA had occurred.[45] The court emphasized, however, that it did not rule on the merits of ETP's claim that the administrative proceeding was unlawful.[46]

In *Green Island Power Authority v. FERC*, the Second Circuit decided two procedural disputes arising from the FERC's issuance of new forty-year license for School Street Hydroelectric Project (School Street).[47] Niagara Mohawk Power Corporation (Niagara Mohawk), School Street's operator, filed with Erie Boulevard Hydropower, L.P.'s (Erie) a joint application to the FERC for the transfer of School Street's license to Erie, and for the substitution of Erie in Niagara Mohawk's then-pending relicensing application.[48] The FERC granted the joint application and the license was transferred to Erie.[49] Erie later asked the FERC to consider the relicensing application as originally submitted by Niagara Mohawk, which included additional generation facilities that Niagara Mohawk had proposed and then abandoned.[50] The FERC issued no public notice of Erie's new proposal, and did not invite motions to intervene; it issued its final environmental assessment and set a deadline for comments.[51]

Three years later, Green Island Power Authority (Green Island) applied for a preliminary permit to study a proposed hydropower project downstream from School Street, and moved to intervene in the School Street proceedings. Green Island sought to justify its belated intervention on the grounds that it did not develop its alternative project proposal until 2004, and at that point concluded that the project would be viable only if School Street was decommissioned and the dam removed.[52] The FERC denied Green Island's permit application, but did not act on its motion to intervene.[53] Following Erie's submission of an Offer of Settlement, and Green Island's and others' joint Alternative Offer of Settlement for the dueling project proposals, the FERC rejected Green Island's Alternative Offer and its motion to intervene, concluding that Green Island had "impermissibly '[sat] on its rights.'"[54] As further proceedings ensued, the FERC approved Erie's Offer of Settlement and issued School Street a new forty-year license.[55]

44. *Id.* at 143 (citing *Veldhoen*, 35 F.3d at 225).
45. *Id.*
46. *Id*.
47. Green Island Power Auth. v. FERC, 577 F.3d 148 (2d Cir. 2009).
48. *Id.* at 152.
49. *Id.*
50. *Id.*
51. *Id.* at 152-53.
52. *Id.* at 153.
53. *Id.*
54. *Id.* at 155; *see generally id.* at 153-55.
55. *Id.* at 156.

On review, the Second Circuit held that Green Island was a "party" within the meaning of FPA section 313(b),[56] even though the FERC had denied its motion to intervene in the School Street proceedings, because Green Island was a party to the order denying its motion to intervene, and that denial was the focus of the petition.[57]

The court next held that another petitioner, a company involved in the development of hydroelectric projects on the Mohawk and Hudson Rivers, lacked standing to petition for review of the FERC's orders licensing the School Street Project, because it failed to identify any concrete, present interests affected by the FERC's licensing orders.[58] But it held that Green Island did have standing to challenge the FERC's denial of its motion to intervene in the School Street docket.[59]

Finally, the court held that the FERC's denial of Green Island's untimely motion to intervene was arbitrary and capricious because Erie's 2005 Offer of Settlement "materially amended" the application, requiring the FERC to reissue public notice and seek interventions.[60] The court further concluded that the FERC's error was "prejudicial," because the court could not "conclude that the outcome of the proceedings will be the same upon remand if Green Island is permitted to intervene."[61] Accordingly, the court vacated the FERC's School Street licensing order, and remanded the matter to the FERC for further proceedings.[62]

In *PNGTS Shippers' Group v. FERC*,[63] the D.C. Circuit dismissed a petition for review, finding that the petitioners were not aggrieved by the challenged FERC orders as required by section 19(b) of the NGA.[64] In the FERC proceedings, Portland Natural Gas Transmission System (PNGTS), an interstate natural gas pipeline in the Northeast, filed a petition for a declaratory order from the FERC to remove uncertainty regarding the certificated capacity of the pipeline.[65] When PNGTS was originally certificated in 1997, the capacity was not finally determined due to the potential effect of facilities expected to be built by an upstream pipeline.[66] The FERC granted the request for declaratory order, finding that PNGTS's certificated capacity was 168,000 Mcf per day.[67]

A group of shippers on the PNGTS pipeline objected, first arguing that the FERC's determination was actually an abandonment that should have been filed

56. 16 U.S.C. § 825*l*(b) (2006).

57. *Green Island Power Auth.*, 577 F.3d at 159 (citing, inter alia, N. Colo. Water Conservancy Dist. v. FERC, 730 F.2d 1509, 1515 (D.C. Cir. 1984)):

> It would be grossly unfair to deny judicial review to a petitioner objecting to an agency's refusal to grant party status on the basis that the petitioner lacks party status. Such a petitioner must obviously be considered a party for the limited purpose of reviewing the agency's basis for denying party status.

58. *Id.* at 160-61.

59. *Id.* at 161.

60. *Id.* at 163-65 (citing 18 C.F.R. § 16.9(b)(3) (1992)).

61. *Id.* at 165; *see also id.* at 165-68 (explaining that conclusion).

62. *Id.* at 169.

63. PNGTS Shippers' Grp. v. FERC, 592 F.3d 132 (D.C. Cir. 2010).

64. 15 U.S.C. § 717r(b) (2006).

65. *PNGTS Shippers' Grp.*, 592 F.3d at 133-34.

66. *Id.*

67. *Id.* at 135.

under section 7 of the NGA, not as a declaratory order.[68] The shippers further challenged the potential impact of the capacity determination on future rates on the PNGTS pipeline.[69] Because PNGTS had been put "at risk" for unsubscribed capacity, the shippers were concerned that definitively establishing the level of certificated capacity could increase their future rates above what those rates might otherwise be.[70] The FERC responded that the declaratory order did not prejudge the impact of the certificate capacity determination on PNGTS's future rates or rate determinants, nor was it changing the at-risk condition.[71] Thus, the PNGTS shippers were not aggrieved by the declaratory order and lacked standing to challenge it.[72]

On review, the court agreed that there was no injury-in-fact and consequently that the shippers were not aggrieved under section 19 of the NGA.[73] The court observed that the shipper group could "present its challenges to FERC's failure to require PNGTS to file an application for abandonment if and when it petitions for review of the rates established in [a future] section 4 proceeding."[74] Concluding that it lacked jurisdiction to address the shippers' claims, the court dismissed the petition.[75]

C. Exhaustion of Administrative Remedies

In *Tesoro Refining & Marketing Co. v. FERC*,[76] the D.C. Circuit denied petitions for review of FERC orders issued under the Interstate Commerce Act (ICA) because the petitioner failed to exhaust its administrative remedies before seeking judicial review.

In 2007, Tesoro Refining and Marketing Company (Tesoro) filed a complaint against Calnev Pipe Line LLC (Calnev) protesting the pipeline's inflation-based increases for interstate petroleum transportation rates. The complaint was based on a FERC order in *BP West Coast Products LLC v. SFPP*, holding that a complaint against an indexing rate increase could be maintained if it established that a pipeline was "'substantially over recovering its cost[s].'"[77] However, after Tesoro filed its complaint, the FERC issued an order on rehearing in BP West Coast Products case holding that a complainant must show: "'(1) that the pipeline is substantially over-recovering its cost of service and (2) that the indexed based increase *so exceeds* the actual increase in the pipeline's cost that the resulting rate increase would *substantially exacerbate* that over-recovery.'"[78] The FERC then dismissed Tesoro's complaint against

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 135-36.

72. *Id.* at 136.

73. *Id.* at 136-38 (referencing 15 U.S.C. 717r(b) (2006) and citing Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18 (D.C. Cir. 2002)).

74. *Id.* at 138.

75. *Id.* at 138-39.

76. Tesoro Ref. & Mrkg. Co. v. FERC, 552 F.3d 868 (D.C. Cir. 2009).

77. *Id.* at 870-71 (quoting *BP W. Coast Prods. LLC v. SFPP, L.P.*, 119 F.E.R.C. ¶ 61,241 at P 10 (2007)).

78. *Id.* at 871 (quoting with added emphasis *BP W. Coast Prods., LCC v. SFPP, L.P.*, 121 F.E.R.C. ¶ 61,141 at P 10 (2007)).

Calnev as insufficient in light of its order on rehearing in *BP West Coast Products*.[79]

Tesoro filed a petition for judicial review of the FERC's order dismissing Tesoro's complaint without first seeking rehearing from the agency itself—an explicit requirement for judicial review under the other statutes administered by the FERC, such as the NGA and FPA, but not an explicit requirement under the ICA.[80]

On review the court dismissed Tesoro's petition for having failed to raise its issues before FERC prior to seeking judicial review.[81] Tesoro invoked an exception to the exhaustion rule.[82] In *Arkansas Power*, the court allowed review of an issue that had not been raised before the agency because the NGA specifically provided for review where there was "reasonable" excuse for failing to raise it earlier, and the petitioner there had a reasonable excuse.[83] The court later limited *Arkansas Power* to situations where there was "'acknowledgment by the agency,' proved 'through subsequent revision of its practice, that its action under challenge had been unlawful.'"[84] The court here found that *Arkansas Power* did not apply because the Rehearing Order was not an acknowledgement that its action under challenge was unlawful.[85]

The court also rejected Tesoro's argument that the futility of seeking administrative review meant exhaustion requirements did not apply. Tesoro pointed to orders issued by the FERC after the FERC dismissed Tesoro's complaint on November 9, 2007, as proof of the futility of seeking rehearing. The court rejected this approach as "backwards," since parties invoking the futility doctrine must point to agency decisions which rejected the same argument in the past.[86] Tesoro only cited one FERC order that preceded the November 9, 2007 order,[87] and that order was not directly relevant. Also, to successfully assert futility as an exception to exhaustion requirements, Tesoro would have to show that the FERC was "certain" to reject their claims.[88] Tesoro submitted no relevant FERC order issued before its November 9, 2007 ruling which satisfied this strict standard.[89] Because no exception to the exhaustion of remedies requirement existed, the court refused to hear the merits of Tesoro's arguments.[90]

79. *Tesoro Ref. & Mktg. Co. v. Calnev Pipe Line, L.L.C.*, 121 F.E.R.C. ¶ 61,142 (2007).

80. *Tesoro Ref. & Mktg. Co.*, 552 F.3d at 872 (comparing the ICA, 49 U.S.C. app. § 17(9)(h), with section 19 of the NGA, 15 U.S.C. § 717r, and section 313 of the FPA, 16 U.S.C. § 825*l*).

81. *Id.* at 872 (citing ExxonMobil Oil Corp. v. FERC, 487 F.3d 945, 962 (D.C. Cir. 2007)).

82. *Id.* at 872-73 (citing Ark. Power & Light Co. v. FPC, 517 F.2d 1223 (D.C. Cir. 1975)).

83. *Id.* at 873 (citing *Ark. Power & Light Co.*, 517 F.2d at 1236).

84. *Id.* (quoting ASARCO, Inc. v. FERC, 777 F.2d 764, 774 (D.C. Cir. 1985)).

85. *Id.* at 873.

86. *Id.* at 874.

87. *Id.* (citing *SFPP, L.P.*, 113 F.E.R.C. ¶ 61,277 at P 129 (2005)).

88. *Id.*

89. *Id.*

90. *Id.* at 875.

D. Contractual Interpretation

In *Entergy Services, Inc. v. FERC*,[91] the D.C. Circuit denied a petition for review of FERC orders resolving a billing dispute between Entergy Services, Inc. (Entergy), and Arkansas Electric Cooperative Corporation (Arkansas Electric) under their 1977 Power Agreement.

Under the Power Agreement, Entergy distributed electricity that Arkansas Electric generated and billed Arkansas Electric for transmission services at various rates.[92] From 1977 until 2004, Entergy billed Arkansas Electric at what the Power Agreement termed a Substitute Energy rate when transmissions system operating constraints prevented Entergy from using Arkansas Electric's available capacity.[93] In July 2004, "Entergy unilaterally changed its billing procedures[,]" when it instead charged Arkansas Electric a premium "Replacement Energy" rate, which generally applied during outages when Arkansas Electric's units were out of service due to emergencies or planned maintenance.[94] Arkansas Electric filed a complaint against Entergy's new practice under section 206 of the FPA.[95] A FERC ALJ initially found in Entergy's favor, but the FERC disagreed, finding that the relevant contract provisions were ambiguous, but that the Power Agreement was best interpreted to bar Entergy's new billing practice.[96]

The parties disagreed as to when the "Replacement Energy" rate applied because the Power Agreement referred at times to Arkansas Electric's "availability" and at other times to its "capacity."[97] Entergy argued that, "whenever system operating constraints induce it to supply Arkansas Electric's customers with energy from other sources, that energy must be billed at the Replacement Energy rate because Arkansas Electric 'did not have sufficient . . . resources *available*' to satisfy its customers."[98] Arkansas Electric argued that "so long as there are no outages and its units are *capable* of meeting its customers' requirements, billing must be calculated at the cheaper Substitute Energy rate."[99]

The court affirmed the FERC's decision, holding that the contractual provisions were ambiguous, and that the FERC's interpretation was superior.[100] The FERC's reasonableness was reinforced by the fact that Entergy, for nearly twenty-three years, did precisely what it now claimed the Power Agreement forbade.[101]

91. Entergy Servs., Inc. v. FERC, 568 F.3d 978 (D.C. Cir. 1990).

92. *Id.* at 978.

93. *Id.*

94. *Id.* at 981.

95. 16 U.S.C. § 824e (2006).

96. *Ark. Elec. Coop. Corp. v. Entergy Ark., Inc*., 114 F.E.R.C. ¶ 63,015 (2006), *rev'd*, 117 F.E.R.C. ¶ 61,099 (2006), *reh'g denied*, 119 F.E.R.C. ¶ 61,314 (2007).

97. *Entergy Servs., Inc*., 568 F.3d at 980.

98. *Id*.

99. *Id*. at 981 (emphasis added).

100. *Id.* at 983-84 (emphasis added).

101. *Id.* at 984-85.

E. Agency Departures from Past Precedent

In *Honeywell International, Inc. v. Nuclear Regulatory Commission*, the D.C. Circuit rejected the denial of an exemption from a regulatory requirement by the Nuclear Regulatory Commission (NRC) because the NRC failed to differentiate the denial from two prior instances where exemptions were granted.[102]

Honeywell International (Honeywell) operates a uranium processing facility and "must provide financial assurance for the decommissioning" of the facility as part of the operating license it must obtain from the NRC.[103] A licensee may demonstrate financial assurance by showing that it has "'[t]angible net worth at least 10 times'" the cost of decommissioning and has a suitable bond rating.[104] This relieves the licensee from obtaining a surety or other third-party guarantee. In 2007 and 2008 the NRC granted Honeywell's applications for an exemption from the 10:1 ratio because the NRC found that the company's tangible assets and the intangible value of its goodwill would meet the requirements.[105] Goodwill is "'the expectancy of continued patronage.'"[106] In 2009 the NRC denied Honeywell's request for an exemption citing a continued decline in its net worth.[107] Honeywell appealed the decision and obtained a surety bond while its appeal was pending but did not seek another exemption during the appeal.[108]

The court rejected the NRC claim that the case was moot because the facts suggested that the actions in this case were "capable of repetition, yet evading review."[109] The court found that the requirement to apply for the exemption annually left too little time to permit the claim to be fully litigated and that there was a reasonable likelihood that Honeywell, as a regulated entity, would seek an exemption in the future.[110]

The court found that the lack of an explanation for NRC's denial of an exemption left it without "guideposts for determining the consistency of administrative action in similar cases, or for accurately predicting the future."[111] The court did not find any clear distinctions between the Commission's prior grants of an exemption and its current denial of an exemption and remanded the case back to the NRC for further proceedings.[112]

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102. Honeywell Int'l, Inc. v. NRC, 628 F.3d 568 (D.C. Cir. 2010).

103. *Id.* at 571.

104. *Id.* (quoting 10 C.F.R. pt. 30, app. C, § II.A).

105. *Id.* at 572.

106. *Id.* at 571, n.1. (quoting Newark Morning Ledger Co. v. United States, 507 U.S. 546, 555-56 (1993)).

107. *Id.* at 574.

108. *Id.*

109. *Id.* at 576 (quoting S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)).

110. *Id.* at 576-77.

111. *Id.* at 581 (quoting Hatch v. FERC, 654 F.2d 825, 834-35 (D.C. Cir. 1981)).

112. *Id.*

F. Intervention in FERC Proceedings

In *California Trout v. FERC*,[113] a divided panel of the Ninth Circuit affirmed the FERC's denial of out-of-time interventions in a hydropower license renewal proceeding.

The FERC established July 8, 2005, as the final date for filing motions to intervene and substantive comments in the licensing proceeding.[114] California Trout and Friends of the River did not file motions to intervene until almost two years later, after the FERC issued a draft environmental assessment in the proceeding.[115] Pursuant to Rule 214 of the FERC's Rules of Practice and Procedure (Rule 214),[116] which states that the filer of a late motion to intervene must establish good cause why its motion should be granted, the FERC rejected the motions to intervene, holding that neither entity had met the good-cause standard.[117]

The Court explained that it reviews the FERC's decisions under the arbitrary and capricious standard, reviews the FERC decisions not to permit late interventions specifically for abuse of discretion, and gives substantial deference to the FERC's interpretation of its own regulations and orders.[118] The Court also stated that the FERC has broad discretion to grant or deny an untimely motion to intervene pursuant to Rule 214, which discretion the FERC may choose to exercise based on an examination of factors listed in Rule 214(d) and/or other unenumerated factors determined by the FERC.[119]

The petitioners argued on appeal that the FERC's application of Rule 214 arbitrarily and capriciously ignored two facts purportedly establishing good cause for their untimely intervention.[120] First, petitioners claimed that the FERC's decision to issue a draft environmental assessment (EA), rather than an environmental impact statement (EIS), gave them good cause to intervene because National Environmental Policy Act (NEPA) regulations allow broader latitude to intervene in response to an EA than an EIS,[121] and the FERC regulations specifically allow for late intervention in response to an EIS.[122]

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113. Cal. Trout v. FERC, 572 F.3d 1003 (9th Cir. 2009).

114. *Id.* at 1010.

115. *Id.*

116. 18 C.F.R. § 385.214 (2008). Rule 214 contains several subsections, including subsection (d) discussed below.

117. *Cal. Trout*, 572 F.3d at 1012.

118. *Id.* at 1012-13.

119. *Id.* at 1013-15. The court noted that Rule 214(d)(1) states that, in acting on any motion to intervene out of time, the FERC :

> may consider whether (i) [t]he movant had good cause for failing to file the motion within the time prescribed; (ii) [a]ny disruption of the proceeding might result from permitting intervention; (iii) [t]he movant's interest is not adequately represented by other parties in the proceeding; (iv) [a]ny prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; and (v) the motion conforms to the regulation's basic procedural requirements.

Id. at 1014 (internal quotation marks omitted).

120. *Id.* at 1015.

121. *Id.* at 1016 (comparing 40 C.F.R. section 1503.4 with sections 1501.4(b) and 1506.6(a)).

122. *Id.* (citing 18 C.F.R. § 380.10).

Second, petitioners argued that new information revealed after the July 8, 2005 intervention deadline gave them good cause to intervene.[123]

The Court rejected petitioners' interpretation of the NEPA regulations and concluded that the newly revealed information was insufficient to establish good cause to intervene.[124] In the majority's view, the petitioners "essentially argue[d] that because they [were] about to be denied the benefits of intervention they should be deemed as having good cause to intervene."[125] However, if "losing one of the benefits of intervention constitutes 'good cause' under Rule 214, then that rule is truly toothless—no untimely petitioner will ever lack good cause, since by definition no petitioner can obtain the benefits of intervention until he actually intervenes."[126] The Court also rejected petitioner's contention that the FERC acted arbitrarily and capriciously in not assessing other discretionary factors listed in Rule 214(d),[127] and held that the FERC had not departed from past precedent.[128] The court concluded its analysis of the issues in the case with the observation that:

> [T]he Commission's procedural rules are no less important—and, therefore, no less deserving of respect—than our own code of procedure. Such rules provide for orderly decisionmaking and constitute advance notice of the process by which our institutions will conduct themselves. The petitioners knew the rules of the game and assumed the risks of their decision not to intervene. The Commission had no obligation, by statute or by rule, to provide relief for petitioners' failure to intervene in a timely fashion.[129]

Judge Gould dissented, explaining that he would have found that the Commission arbitrarily departed from its usual policies and precedent for granting late intervention, particularly where no risk of prejudice or disruption to the other parties had been shown.[130]

G. Obligation to Respond to Dissenting Commissioner's Arguments

American Gas Ass'n v. FERC[131] involved a rulemaking proceeding in which the FERC proposed regulations that would modify the financial forms and reporting requirements for interstate natural gas pipelines. The American Gas Association (AGA) filed comments in the rulemaking proceeding asking for additional and more detailed requirements than the FERC proposed and ultimately adopted in a final rule.[132] One of the FERC Commissioners dissented from the final rule, explaining why in his view the alternate reporting requirements desired by the AGA should have been adopted.[133]

The court began its analysis by noting that it reviews the "'FERC's orders under the arbitrary and capricious standard and uphold[s] FERC's factual

123. *Id.* at 1015.
124. *Id.* at 1015-20.
125. *Id.* at 1017.
126. *Id.*
127. *Id.* at 1020-22.
128. *Id.* at 1022-25.
129. *Id.* at 1026.
130. *Id.* at 1026-29 (Gould, J., dissenting).
131. Am. Gas Ass'n v. FERC, 593 F.3d 14 (D.C. Cir. 2010).
132. *Id.* at 18.
133. *Id.* at 19-21.

findings if supported by substantial evidence.'"[134] The court next observed that "[i]n cases where parties raise reasonable alternatives to the Commission's position, we have held that reasoned decisionmaking requires considering those alternatives,"[135] and that this requirement also applied to alternatives proposed by dissenting Commissioners.[136]

Concluding that FERC had not adequately addressed or explained the decision not to adopt the alternative reporting requirements endorsed by the dissenting Commissioner, the court granted the petition and remanded the case to FERC for further consideration.[137]

II. FEDERAL POWER ACT

A. Interstate Transmission Siting

Section 216 of the FPA,[138] added by the Energy Policy Act of 2005,[139] permits the FERC to approve the construction or modification of transmission facilities in a "national interest electric transmission corridor" when a state entity with authority to approve the siting of such facilities has "withheld approval for more than 1 year after the filing of an application" for a permit.[140] The FERC's rulemaking orders implementing this new statute interpreted the phrase "withheld approval" to include a state's denial of a transmission permit application.[141] In *Piedmont Environmental Council v. FERC*,[142] a divided panel of the Fourth Circuit vacated and reversed the FERC's interpretation of FPA section 216, holding that the statute allowed the FERC to exercise its backstop authority only when a state fails to act within one year, and not when a state agency denies the application outright.

The court held that section 216's use of the terms "'withheld approval for more than 1 year'" could only refer to "[t]he continuous act of withholding approval for more than a year," which "cannot include the finite act of denying an application within the one-year deadline."[143] The FERC's position would "change the clear meaning of the provision because the denial of a permit application *within* one year ends the application process, and there is nothing about that terminated process that would continue *for* more than one year."[144] Moreover, the majority concluded, the FERC's position would render superfluous the other provisions allowing the FERC to exercise backstop siting authority, such as when a state approves an application with conditions so

134. *Id.* at 19 (citing Fla. Mun. Power Agency v. FERC, 315 F.2d 362 (D.C. Cir. 2003); 15 U.S.C. § 717r(b)).

135. *Id.* (citing Laclede Gas Co. v. FERC, 873 F.2d 1494 (D.C. Cir. 1989)).

136. *Id.* (citing Chamber of Commerce v. SEC, 412 F.3d 133 (D.C. Cir. 2005)).

137. *Id.* at 21.

138. 16 U.S.C. § 824p (2006).

139. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

140. 16 U.S.C. § 824p(b)(1)(C)(i).

141. Order No. 689, *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, F.E.R.C. STATS. & REGS. ¶ 31,234, 71 Fed. Reg. 69,440 (2006), *reh'g denied*, 119 F.E.R.C. ¶ 61,154 (2007).

142. Piedmont Envtl. Council v. FERC, 558 F.3d 304 (4th Cir. 2009).

143. *Id.* at 313.

144. *Id.*

onerous as to effectively deny it.[145] Because the FERC's interpretation would effectively deny states any authority to deny transmission siting projects, the court determined that Congress would not have entirely preempted this historic state function without a clear statement to that effect.[146] Moreover, because the majority found the absence of such a directive to be a clear and unambiguous denial of the authority the FERC asserted, the court made its decision under *Chevron* step one and gave the FERC's interpretation no deference.[147]

Judge Traxler dissented from the court's interpretation, concluding that "if one year and one day after submission of an application a state has denied an application . . . , it has 'withheld approval for more than 1 year.' There is no other reasonable way to interpret those words."[148] He also argued that that legislative history demonstrated Congress's intent to eliminate any state obstruction of transmission siting in critical geographic areas, including outright application denials and not merely delays.[149]

Finally, the court unanimously held that the FERC's rules implementing section 216 did not violate the NEPA by not including an environmental assessment or environmental impact statement,[150] but that the FERC did violate Council on Environmental Quality (CEQ) regulations by failing to consult with CEQ before modifying the FERC rules implementing the NEPA.[151]

B. Hydroelectric Licenses

In *East Niagara Public Power Alliance v. FERC*,[152] the D.C. Circuit denied a petition for review challenging the FERC's renewal of a hydropower license. In 1958, FERC's predecessor agency issued the New York Power Authority (NYPA) a 50-year initial license pursuant to Part I of the FPA[153] for the construction and operation of the Niagara Power Project, a hydroelectric facility located near Niagara Falls, New York. In 2005, three years before the expiration of the initial license for the Niagara Power Project, the NYPA filed an application for a new license for the project.[154] In 2007, the FERC granted the project a new 50-year license.[155] The project's opponents petitioned for review, arguing that FERC's decision was "arbitrary and capricious[,] and unsupported by substantial evidence."[156]

The D.C. Circuit rejected each of petitioners' five arguments. First, it held that the FERC's 50-year grant—the statutory maximum—was not unreasonable,

145. *Id.* at 313-14.

146. *Id.* at 313.

147. *Id.* at 313, 315 (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

148. *Id.* at 323 (Traxler, J., dissenting).

149. *Id.* at 325-26.

150. *Id.* at 317-19.

151. *Id.* at 319.

152. E. Niagara Pub. Power Alliance v. FERC, 558 F.3d 564 (D.C. Cir. 2009).

153. 16 U.S.C. §§ 791a–823d.

154. *See generally* 18 C.F.R. § 4.30(b)(19) (defining a "new license" as "any license, except an annual license issued under section 15 of the [FPA], for a water power project that is issued under the [FPA] after the initial license for that project").

155. *E. Niagara Pub. Power Alliance*, 558 F.3d at 566.

156. *Id.* at 566.

given the FERC's policy to grant longer licenses for projects subjected (as in this case) by the license conditions.[157] Second, it held that the FERC did not err in relying upon a projected average of peak and off-peak rates of production, rather than attempting to more accurately predict the ratio of peak to off-peak operation of the project, because the FERC's resolution of the "difficult valuation question" was not unreasonable.[158] Third, the court held to be reasonable the FERC's evaluation of alleged environmental impacts.[159] Fourth, the court held that the FERC did not err in refusing to consider the consequences of "off-license" agreements (i.e., agreements that were not part of the FPA licensing process) with certain affected communities—which petitioners claimed improperly granted benefits to select communities to "buy off community opposition," while excluding similarly situated communities from such benefits—because such agreements were unrelated to the agency's statutory mandate under the FPA.[160] Finally, the court rejected the petitioners' direct challenge to the legality of the off-license agreements, finding that the petitioners lacked standing because the harm the off-system agreements allegedly caused the petitioners could not be legally attributed to the FERC.[161]

In *Keating v. FERC*,[162] the D.C. Circuit denied a petition for review of the FERC's decision to lift a stay of the four-year statutory deadline for commencing construction of a newly licensed hydroelectric facility. The FERC issued a license to Keating in 1992 to develop a hydroelectric power plant on land within the jurisdiction of the United States Forest Service.[163] The Forest Service required Keating to obtain a special use permit, which in turn, required him to obtain water rights before commencing construction.[164] The FERC granted Keating a two-year extension of the normal two-year statutory commencement-of-construction deadline.[165] After this extension expired, the FERC issued a stay order, which required Keating to file a license amendment application and pre-construction plans within six months of the order.[166] From 1997 through 2003, the FERC approved numerous extensions of the six-month deadline.[167] Throughout this period, Keating was unsuccessful in his attempts to obtain the necessary water rights.[168] After unsuccessfully attempting to confirm his water rights through litigation, in 2001, Keating applied for the appropriative water rights with the California State Water Resources Control Board (Water Board).[169] The Water Board concluded that it could not move forward on

157. *Id*. at 567.
158. *Id*.
159. *Id*.
160. *Id*. at 567-68.
161. *Id*. at 568.
162. Keating v. FERC, 569 F.3d 427 (D.C. Cir. 2009).
163. *Id.* at 428.
164. *Id.*
165. *Id*. at 429.
166. *Id*. at 430.
167. *Id.*
168. *Id.*
169. *Id.*

Keating's application until he could demonstrate that he could secure necessary rights of access over land.[170]

The FERC lifted the stay in 2007, expressing uncertainty as to Keating's prospects for obtaining the necessary water rights.[171] Keating requested a rehearing, arguing that he had diligently worked to satisfy the license requirements.[172] The FERC dismissed his request as deficient because it did not comply with the FERC's Rules of Practice and Procedure.[173] The FERC went on to reject Keating's arguments, explaining that "contrary to his argument in the rehearing request, Keating's diligence or lack thereof was not the deciding factor in the Commission's decision; rather, it was the 'prolonged, continuing, and indefinite delay' in obtaining 'water rights and other required pre-construction approvals.'"[174]

On appeal, the FERC argued that the jurisdictional requirements for the court to review the order lifting the stay were not satisfied because the FERC dismissed Keating's rehearing request based on a regulatory deficiency, and not on the merits.[175] The court evaluated the reviewability of the order "'in pragmatic terms,' 'by reference to its practical function.'"[176] Under this standard, the court found that the order was "'of a definitive character dealing with the merits of a proceeding before the Commission'" and therefore reviewable under section 313(b) of the FPA.[177] The Court concluded that even if the merits of Keating's objections to the order were not the ultimate reason for dismissal of the rehearing request, the Commission's "discussion and the consequent conclusion that the objections were 'without merit' assures the certainty of an adverse decision" if Keating seeks relief again on those grounds.[178]

Turning to the merits of the petition, the court rejected Keating's argument that the record did not support the FERC's conclusion that there was no reasonable basis to expect that Keating would commence construction in the foreseeable future. The court concluded that although the Water Board's actions and decisions were not directly under review, they were matters of fact appropriate for the FERC to consider in its assessment of Keating's prospects for starting construction.[179] Because FERC had "considered the factors relevant to its decision and articulated a rational connection between the facts found and the choices made, its conclusion was not arbitrary or capricious."[180] In addition, because the FERC "articulated rational reasons related to its statutory responsibility to provide for prompt development of licensed hydroelectric

170. *Id*.
171. *Id*. at 431.
172. *Id.*
173. *Id*.
174. *Id*.
175. *Id.* at 432.
176. *Id*. (quoting Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 239 (D.C. Cir. 1980)).
177. *Id*. (quoting FPC v. Metro. Edison Co., 304 U.S. 375, 384 (1938)).
178. *Id*. (quoting Tesoro Ref. & Mktg. Co. v. FERC, 552 F.3d 868, 873-74 (D.C. Cir. 2009)).
179. *Id.* at 433.
180. *Id*.

projects," the court found that the FERC had properly exercised its discretion in lifting the stay.[181]

Finally, the court rejected Keating's argument that his reliance on the stay should estop the FERC from lifting it.[182] After expressing doubt as to whether the principles of equitable estoppel could be applied at all in such circumstances, the court concluded that Keating did not demonstrate that the FERC "made a 'definite representation' to him that the stay of the construction deadline would extend indefinitely until he obtained the necessary water rights."[183]

In *Lichoulas v. FERC*,[184] the D.C. Circuit addressed the FERC's use of the "implied surrender doctrine" to terminate a hydroelectric license and whether, in the course of the proceeding leading up to the FERC's orders, the FERC engaged in impermissible ex parte contacts. Lichoulas was issued a license in 1986 to construct and operate a 346 kilowatt project in Lowell, Massachusetts.[185] From 1997 through 2006, FERC staff made numerous inquiries as to the status of the project and the steps that Lichoulas was taking to repair the project and place it in operation.[186] The FERC warned that failure to make the necessary repairs could result in termination of the license.[187] In 2006, the FERC received notice that the City of Lowell had obtained the project by eminent domain and that the project was in significant disrepair.[188] The FERC issued a notice of termination by implied surrender in 2007.[189] Thereafter, Lichoulas protested the FERC's notice, arguing that the project's dormancy did not reflect an intent to surrender the project, and Lichoulas filed a lawsuit in federal district court alleging that the City's taking of the project violated the FERC's license.[190] That case and a subsequent state court case were dismissed.[191] Meanwhile, in 2008, the FERC received various communications from the office of U.S. Congresswoman Niki Tsongas, including a telephone call from Tsongas, requesting procedural updates.[192] One email communication included a memorandum from Congresswoman's staff recommending that Tsongas pressure the FERC either to promptly issue an order terminating the license or to provide a timetable for such issuance.[193]

The FERC ultimately issued an order terminating Lichoulas's license, "conclud[ing] that he had impliedly surrendered the license pursuant to" express provisions in the license as well as the FERC's regulations in 18 C.F.R. § 6.4.[194] After the FERC denied Lichoulas's petition for rehearing and request for an

181. *Id*.
182. *Id.* at 434.
183. *Id*.
184. Lichoulas v. FERC, 606 F.3d 769 (D.C. Cir. 2010).
185. *Id.* at 771.
186. *Id*. at 771-73.
187. *Id.* at 772.
188. *Id*. at 773.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 774 (citing *James Lichoulas, Jr.*, 124 F.E.R.C. ¶ 61,255, 62,289, 62,291-92 (2008)).

evidentiary hearing,[195] Lichoulas appealed the FERC's orders, arguing that the FERC's implied surrender determination was arbitrary and capricious, that the FERC engaged in prohibited ex parte communications, and that the FERC abused its discretion by failing to establish an evidentiary hearing.[196] The court rejected each of these arguments.[197]

Citing to the FERC's evolving application of the implied surrender doctrine, under which the key element is the failure to live up to license conditions, the court noted that the FERC's determination that Lichoulas's actions and inactions, including "over a decade of project dormancy," supported the FERC's finding of implied surrender.[198] The court concluded that the FERC adequately considered the various obstacles raised by Lichoulas in determining that they did not negate the FERC's conclusion of Lichoulas's intent to abandon the project.[199] The court noted that the FERC's determination was consistent with prior rulings that the implied surrender doctrine may be applied "'even where the licensee has expressed an interest in continuing to operate the project.'"[200]

As to Lichoulas's allegations about communications from Congresswoman Tsongas's office, the court stated that it "will not undo FERC's action unless 'the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair.'"[201] The court ruled that Lichoulas failed to make that showing:

> [E]ven assuming *arguendo* the challenged contacts violated FERC regulations, there is no indication that they influenced the ultimate decision makers. FERC has stated that 'none of the members of the Commission' reviewed the email with [the memorandum attached] before approving the order terminating Lichoulas's license and therefore no member was influenced by it.[202]

The court further noted that "Lichoulas's charge of improper influence is undermined by the fact that the first identified contact from Tsongas's office came in March 2008, while FERC first told Lichoulas that he had impliedly surrendered his license over three years earlier, in September 2004."[203]

Finally, the court summarily rejected Lichoulas's argument that the FERC abused its discretion by failing to grant his request for an evidentiary hearing,

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195. *Id.* (citing *James Lichoulas, Jr.*, 125 F.E.R.C. ¶ 61,195 (2008)).

196. *Id.*

197. Before addressing the merits of Lichoulas's petition, the court rejected the FERC's argument that Lichoulas was not injured by its orders because he had lost ownership of the project through eminent domain. *Id.* at 774-75. The court noted that a successful appeal of the FERC's orders would "significantly increase the likelihood of [Lichoulas] prevailing in his eminent domain challenges," which, the court ruled, provides a proper basis for standing. *Id.* at 775.

198. *Id.* at 776-77 (citing *Mont. Power Co.*, 62 F.E.R.C. ¶ 61,166 (1993); *Fourth Branch Assocs. (Mechanicville) v. Niagara Mohawk Power Corp.*, 89 F.E.R.C. ¶ 61,194 (1999), *reh'g denied*, 90 F.E.R.C. ¶ 61,250 (2000), *aff'd*, Fourth Branch Assocs. (Mechanicville) v. FERC, 253 F.3d 741 (D.C. Cir. 2001); *John C. Jones*, 122 F.E.R.C. ¶ 61,053 (2008)).

199. *Id.* at 777.

200. *Id.* at 776 (quoting *John C. Jones*, 122 F.E.R.C. ¶ 61,053, 61,348).

201. *Id.* at 778 (citing Press Broad. Co. v. FCC, 59 F.3d 1365, 1369 (D.C. Cir. 1995) (quoting Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth., 685 F.2d 547, 564 (D.C. Cir. 1982) (footnote omitted)); Freeman Eng'g Assocs., Inc. v. FCC, 103 F.3d 169, 184 (D.C. Cir. 1997)).

202. *Id.* at 779 (citing 125 F.E.R.C. ¶ 61,195, 62,032 & n.26).

203. *Id*. at 779-80.

noting that Lichoulas failed to identify any issues that could not adequately be addressed on the papers.[204] The court ruled that an evidentiary hearing was not warranted simply because Lichoulas disagreed with the FERC's conclusion as to his intent to surrender the license, and the "FERC did not abuse its discretion in declining to provide one."[205]

C. Electric Rates

1. Incentive Rates for New Transmission Facilities

In *Connecticut Department of Public Utility Control v. FERC*,[206] the D.C. Circuit denied a challenge to the FERC's approval of a bonus to the return on equity (ROE) applied to certain new transmission projects undertaken by transmission-owning utilities within ISO New England, Inc. (ISO-NE). In conjunction with the transition of ISO-NE into a regional transmission organization (RTO), the FERC approved two ROE bonuses: 50 basis points (0.50%) to induce utilities to join the RTO,[207] and an additional 100 basis points (1.0%) to induce utilities to promptly complete certain key transmission projects.[208] Following an evidentiary hearing, the FERC ruled that the appropriate standard to assess the reasonableness of the ROE bonus was whether (i) the approved ROE fell within the zone of reasonable returns and (ii) there was a "link or nexus between the incentives being requested and the investment being made," demonstrating "that the incentives are rationally related to the investments being proposed."[209] The FERC subsequently limited the incentive to projects completed by December 31, 2008, after which incentives would be reviewed on a case-by-case basis consistent with the FERC's then-recently issued transmission incentives rulemaking.[210] Petitioners (mainly New England state regulatory commissions) challenged the FERC's orders on the basis that they were arbitrary and capricious and inconsistent with FERC precedent.[211] The D.C. Circuit denied the petition.[212]

Petitioners first argued that the FERC's "rationally related" nexus was so vague that nearly every transmission owner could satisfy the standard and

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204. *Id.* at 780.

205. *Id.*

206. Conn. Dep't of Pub. Util. Control v. FERC, 593 F.3d 30 (D.C. Cir. 2010) (*Connecticut DPUC*).

207. The 50-basis point ROE bonus was approved in *ISO New England Inc.*, 106 F.E.R.C. ¶ 61,280, *order on reh'g*, 109 F.E.R.C. ¶ 61,147 (2004), *aff'd sub nom.* Me. Pub. Utils. Comm'n v. FERC, 454 F.3d 278 (D.C. Cir. 2006).

208. The 100-basis point ROE bonus was approved in the orders under review in *Connecticut DPUC*. *See generally* Opinion No. 489, *Bangor Hydro-Elec. Co.*, 117 F.E.R.C. ¶ 61,129, at 61,683 (2006), *order on reh'g*, 122 F.E.R.C. ¶ 61,265 (2008).

209. 117 F.E.R.C. ¶ 61,129, at 61,697. The FERC reversed the administrative law judge's initial decision finding that the evidence did not support the "need" for the ROE bonus. *Bangor Hydro-Elec. Co.*, 111 F.E.R.C. ¶ 63,048 at PP 163-167 (2005).

210. 122 F.E.R.C. ¶ 61,265 at P 60 (citing Order No. 679, *Promoting Transmission Investment Through Pricing Reform*, F.E.R.C. STATS. & REGS. ¶ 31,222 (2006), *order on reh'g*, Order No. 679-A, F.E.R.C. STATS. & REGS. ¶ 31,236 (2006), *order on reh'g*, 119 F.E.R.C. ¶ 61,062 (2007), *appeal dismissed sub nom.* Am. Pub. Power Ass'n v. FERC, No. 07-1050 (D.C. Cir. May 14, 2007)).

211. *Conn. Dep't of Pub. Util. Control*, 593 F.3d at 32 (D.C. Cir. 2010).

212. *Id.*

thereby qualify for the 100-basis point ROE adder.[213] The court found that the FERC made sufficient findings, based on expert testimony, as to the urgent need for the projects to remedy congestion and reliability concerns.[214] As to petitioners' argument that the FERC should have required a "causal link" between the projects and the incentives, the court noted that the FERC was not concerned whether the projects eventually would be built; rather, it granted the incentives to ensure that they would be completed promptly.[215] As to that point, the court ruled that the FERC adduced substantial evidence that the incentives likely would accelerate completion of the projects, and concluded that, "[t]he idea that firms respond to financial incentives is, of course, hardly revolutionary."[216] The court further ruled that the FERC's "failure to pinpoint specific actions that utilities would take only because of the incentive is of no moment," stating that courts typically do not require such a showing when evaluating agency approvals of incentives.[217]

The court also rejected arguments that the FERC's decision to allow utilities to include the cost of "construction work in progress" (CWIP) in their rate base nullified the incentive to complete projects promptly because utilities could immediately begin earning a return on their investment.[218] The court noted that in order to recover CWIP, the utilities still had to incur the construction costs and file new rate schedules to reflect the CWIP balances.[219] Hence, "CWIP hardly nullifies the [ROE] adder's incentive effects."[220] The court also disagreed that the FERC overlooked the concern that the ROE adder may foster "over-building," noting the agency addressed this issue and expressed confidence that ISO-NE's approval process would protect against this possibility.[221]

Finally, the court discussed amici's argument that the FERC failed to cite any evidence that the transmission owners relied on the 100-basis point adder and that such reliance would not have been reasonable in light of the new incentive rules.[222] The court noted that the FERC's principal concern in retaining the bonus for projects completed prior to December 31, 2008, was the

> administrative burden that would result for both [the FERC] and the transmission owners from reconsidering the decision under the new standard, not with reliance as such . . . . Given that, as the [FERC] observed, 'an ROE incentive is not susceptible to a precise calculation,' . . . it was reasonable to conclude that any gain from

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213. *Id.*

214. *Id.* at 33-34.

215. *Id.* at 34.

216. *Id.* at 34-35 (citing Me. Pub. Utils. Comm'n v. FERC, 520 F.3d 464 (D.C. Cir. 2008), *rev'd in part on other grounds sub nom.* NRG Power Mktg., LLC v. Me. Pub. Utils. Comm'n, 130 S. Ct. 693 (2010)).

217. *Id.* at 35 (citing Pub. Utils. Comm'n of Cal. v. FERC, 367 F.3d 925 (D.C. Cir. 2004); *In re* Permian Basin Area Rate Cases, 390 U.S. 747 (1968); Farmers Union Cent. Exch., Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984); Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974)).

218. *Id.*

219. *Id.* (citing 18 C.F.R. § 35.25(c)).

220. *Id.*

221. *Id.* at 36.

222. *Id.* at 36-37.

> evidence that might have been obtained on remand would not improve the decision-making process enough to justify the burdens of doing so.[223]

2. Electric Reliability Organization Cost Allocation

In *Alcoa, Inc. v. FERC*,[224] the D.C. Circuit affirmed the FERC's methodology for funding the North American Electric Reliability Corporation (NERC), which was certified by the Commission in Order No. 672[225] as the Electric Reliability Organization (ERO) for the United States pursuant to section 215 of the FPA.[226] Alcoa preferred a methodology reflecting capacity-related fixed costs—a method commonly used to set electric transmission rates.[227] Finding that the FERC had adequately explained the basis for its decision to use the net energy for load methodology, the D.C. Circuit affirmed.[228]

In Order No. 672, the FERC set forth the requirements for certification as an ERO.[229] Among other things, the FERC found that the "net energy for load" methodology would be a "'fair, reasonable and uncomplicated method" for funding an ERO.[230] However, the FERC declined to rule out alternative funding mechanisms that could be found to be just and reasonable, leaving the ERO applicant(s) with "flexibility" to propose a funding methodology.[231] The only applicant for certification was NERC, which proposed to use net energy for load as the method for allocating costs among the bulk power users of the electricity grid.[232] Alcoa protested, arguing that NERC should use a cost allocation method that also accounted for capacity-related fixed costs in order to equitably distribute costs.[233] The FERC rejected Alcoa's arguments, finding that the proposed net energy for load methodology provided an equitable distribution of costs.[234] The FERC also rejected Alcoa's challenge on the basis that it constituted "'an impermissible collateral attack on Order No. 672.'"[235]

On review, the D.C. Circuit first addressed and rejected the FERC's jurisdictional argument that Alcoa's challenge was an impermissible collateral attack on Order No. 672.[236] The court found that because Order No. 672 did not make a final unconditional ruling on the cost allocation method, Alcoa "did not

223. *Id.* at 37 (internal citation omitted) (quoting *Bangor Hydro-Elec. Co.*, 122 F.E.R.C. ¶ 61,265, at 62,540 (2008)).

224. Alcoa, Inc. v. FERC, 564 F.3d 1342, 1344-45 (D.C. Cir. 2009).

225. Order No. 672, *Rules Concerning Certification of the Electric Reliability Organization*, 71 Fed. Reg. 8662 (2006); *see also* 16 U.S.C. § 824o(a)(2) (2006).

226. 16 U.S.C. § 824o.

227. *Alcoa*, 564 F.3d at 1345.

228. *Id.*; see also *id.* at 1345-49.

229. *Id.* at 1347-48.

230. *Id.* at 1344.

231. *Id.*

232. *Id.* at 1344-45.

233. *Id.* at 1345.

234. *Id.*

235. *Id.* at 1345 (citing Certification Order, *Order Certifying Northern American Electric Reliability Corporation as the Electric Reliability Organization*, 116 F.E.R.C. ¶ 61,062 at P 167 (2006)).

236. *Id*. at 1345-46.

suffer any actual or imminent injury as a result of Order No. 672 for which it could have sought review."[237]

Turning to the merits, the court rejected Alcoa's arguments that the net energy for load method was an unexplained departure from the FERC ratemaking precedent, or that it did not adequately reflect cost causation.[238] The court found that the FERC had adequately explained the basis for its decision under the "highly deferential" standard of review applied in ratemaking matters.[239] The court noted that it was unclear whether transmission ratemaking precedent was applicable in the context of determining a cost allocation method for funding an ERO, but even assuming it was, the FERC had still adequately explained its departure from that precedent.[240]

3. Capacity Markets

In *Connecticut Department of Public Utility Control v. FERC*,[241] the D.C. Circuit was confronted with a question it had previously deferred: whether the FERC has jurisdiction to review, approve, or modify the Installed Capacity Requirement (ICR), the regional transmission organization's estimation of the amount of capacity the system will require for reliability in the future.[242] On two prior occasions, the D.C. Circuit had noted the existence of this jurisdictional question but declined to answer it.[243] The court previously had approved the FERC's authority to create and review operation of the Forward Capacity Market, a pricing mechanism for long-term capacity based on the ICR.[244] In this case, the court similarly affirmed the FERC's jurisdiction to review, approve, or modify the ICR, despite petitioners' argument that the ICR is a matter of "'facilities used for the generation of electric energy,'" which is outside of the FERC's jurisdiction.[245]

The court noted that the case was "radically simplifie[d]" by two concessions: petitioners conceded that the FERC may determine just and reasonable capacity charges, and the FERC conceded that the FPA prohibits the FERC from directly regulating generating facilities.[246] This left only the question of whether regulating the ICR was a direct regulation of generation facilities, and the court answered "no."[247] States and municipal authorities retained authority to forbid the creation of new generation capacity, to retire existing capacity, and so forth. The purpose of the ICR is to estimate the peak capacity that underlies the Forward Capacity Market's market-clearing price.[248]

237. *Id.* at 1346.

238. *Id.*

239. *Id.* at 1347.

240. *Id* at 1348-49.

241. Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477 (D.C. Cir. 2009).

242. *Id.* at 480.

243. *See id.* (citing Me. Pub. Util. Comm'n v. FERC, 520 F.3d 464, 480 (D.C. Cir. 2008); Conn. Dep't of Pub. Util. Control v. FERC, 484 F.3d 558, 560-61 (D.C. Cir. 2007)).

244. *See id.* (citing *Me. Pub. Util. Comm'n*, 520 F.3d at 479-80).

245. *Id.* at 481 (citing 16 U.S.C. § 824(b)(1) (2006)).

246. *Id.*

247. *Id.*

248. *Id.*

Because petitioners already conceded that the FERC could directly set that market-clearing price, the court saw no jurisdictional problem with the FERC's regulation of that price through indirect means, so long as the FERC did not do so through direct regulation of generation capacity.[249] Rejecting petitioners' remaining arguments, the court concluded that because determination of the ICR affects rates within the FERC's jurisdiction, and does not directly regulate generation facilities, it comes within the FERC's statutory jurisdiction.[250]

In *Blumenthal v. FERC*,[251] Connecticut Attorney General Richard Blumenthal and others challenged the FERC's approval of ISO-NE's interim measures to ensure system reliability. The FERC had approved ISO-NE's "locational marginal pricing" plan, under which a generating unit's supply bid would be evaluated in terms of the feasibility of transmitting that power to the demand, and not merely in terms of prices.[252] The FERC also approved ISO-NE's use of Reliability-Must-Run (RMR) agreements, which allow high-cost generators to recover full above-market cost-of-service rates, but also require the generator to bid all of its capacity into the market at a predetermined marginal-cost price.[253] The RMR agreements would be available only to generators that cannot supply power without the cost-of-service based rates.[254] Finally, the FERC approved the use of Peaking Unit Safe Harbor (PUSH) bidding, allowing generators operating in supply-constrained areas to bid supply at a higher price than they could otherwise secure in the market.[255]

In court, the petitioners argued that the rates established by the FERC-approved rate structure were unjust and unreasonable because high-cost generators allegedly were using RMR agreements that guaranteed above-market prices, while low-cost generators reaped the margins between their low costs and the market prices that were "inflated" by high-cost generators' costs.[256]

The D.C. Circuit affirmed the FERC's orders, holding that the FERC-approved framework was not unjust or unreasonable.[257] The FERC need not establish that an entire market is competitive before approving market-based rates.[258] Profits gained by low-cost generators under market rates are not unjust and unreasonable merely because the rates exceeded their marginal costs.[259] And a "hybrid" rate structure, including both market- and cost-based components, is not "inherently unjust and unreasonable."[260] Finally, the court noted that petitioners' own alternative proposal was not shown to be just and

249. *Id.* at 481-82.
250. *Id.* at 483-85.
251. Blumenthal v. FERC, 552 F.3d 875 (D.C. Cir. 2009).
252. *Id.* at 878.
253. *Id.* at 878-81.
254. *Id.*
255. *Id.*
256. *Id.* at 880.
257. *Id.* at 881.
258. *Id.* at 881-83.
259. *Id.* at 883-84.
260. *Id.* at 884-85.

reasonable—in fact, the FERC already had found it to be unjust and unreasonable.[261]

In *City of Anaheim v. FERC*,[262] the D.C. Circuit granted a petition for review of FERC orders holding that a Reliability Capacity Services Tariff (RCST) filed by the California Independent System Operator Corporation was just and reasonable and should be made retroactively effective to June 1, 2006. The court vacated and remanded the FERC's orders to the extent they permitted RCST rates for transactions occurring before February 13, 2007—the date of the FERC's order accepting the RCST rates as just and reasonable—and remanded to the FERC for further consideration regarding when the RCST rates became legally fixed.[263]

The underlying FERC proceeding began in 2005 when electricity generators filed a complaint with the FERC, under section 206 of the FPA,[264] in which the complainants alleged that the so-called "must-offer obligation" in effect at that time did not justly and reasonably compensate generators and that RCST rates should replace the must-offer obligation.[265] On July 20, 2006, the FERC issued an order agreeing with the generators that the must-offer obligation was no longer just and reasonable; however, the FERC did not find at that time that the proposed RCST rates were just and reasonable, but instead stated that it would fix new rates in the future.[266] Seven months later, on February 13, 2007, the FERC issued an order determining that the modified RCST rates were just and reasonable, further granting a retroactive effective date of June 1, 2006.[267]

The FERC made three arguments in support of its decision to permit retroactive surcharges for the higher RCST rates: first, that such surcharges were permitted by section 206(b) of the FPA; second, that the imposition of surcharges was within the ambit of section 205 of the FPA; and third, that it was correcting legal error.[268] The court rejected each of these contentions.[269]

The court afforded the FERC no *Chevron* deference, finding that FERC's determination could not be squared with the plain text of section 206(a) of the FPA, which states that, "[a]fter finding a rate unreasonable, the FERC 'shall determine the just and reasonable rate . . . to be *thereafter* observed and in force,' and that the FERC 'shall fix' that rate by order."[270] The court then rejected each of FERC's arguments in support of the retroactive rate change.[271] First, the court found that section 206(b) provided for retroactive refunds for purchasers that

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261. *Id.* at 885.

262. City of Anaheim v. FERC, 558 F.3d 521 (D.C. Cir. 2009).

263. *Id.*

264. 16 U.S.C. § 824e (2006).

265. *City of Anaheim*, 558 F.3d at 523. The FERC had imposed the must-offer obligation *in re*sponse to the California energy crisis in 2001. The must-offer obligation "required most wholesale electricity generators serving California markets to supply available electrical capacity – that is, capacity that had not already been contracted for – at specified rates to electricity purchasers." *Id.* at 522.

266. *Id.* at 523.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* (quoting 16 U.S.C. § 824e(a) (2006)).

271. *Id.* at 525.

were overcharged, not surcharges for sellers.[272] The court next found that because the proceeding had been instituted and ruled upon under section 206, and because sections 205 and 206 contained different standards and served different purposes, that the FERC could not now base its decision on section 205 of the FPA.[273] Finally, the court rejected the suggestion by the FERC that it was remedying legal error, finding that the cases cited by the FERC, which were based on judicial reversals, were not on point where there had been no such reversal.[274] The court vacated the FERC's approval of the retroactive date (though remanding to the FERC to determine the correct effective date) concluding that, "[i]n the end, as in the beginning, the plain language of § 206(a) controls."[275]

In *Westar Energy, Inc. v. FERC*,[276] the D.C. Circuit upheld the FERC's decision to use the "sale test," rather than the "sink-based" test, to determine whether a wholesaler possesses market power for purposes of authorizing or prohibiting market-based rates. Under the FERC's sale-based test, the FERC determines whether the wholesaler has market power in the region where the power is sold; if so, then the wholesaler must charge cost-based rates, rather than market-based rates.[277] The sink-based test, by contrast, would ask whether the wholesaler has market power at the point of ultimate consumption, not point of sale.[278] The FERC previously used the sink-based test, but changed course in 2006 and began using the sale test; it formalized its rejection of the sink-based test in 2007's Order No. 697.[279]

Petitioners—wholesalers of electricity operating with market power—challenged Order No. 697 and subsequent proceedings as arbitrary and capricious.[280] The D.C. Circuit held that the FERC's orders were not arbitrary or capricious because Order No. 697 was well-reasoned, particularly in light of the substantial feasibility problems that administering the sink-based test could impose.[281] Moreover, wholesalers may still charge consumers outside mitigated areas market-based rates, as long as the wholesaler ensures that title passes to the purchaser outside the mitigated area.[282] Finally, the court held that the FERC did not fail to sufficiently identify and justify its change in policy.[283]

4. Cost Recovery for Interconnection Facilities

In *Exxon Mobil Corp. v. FERC*, the D.C. Circuit denied petitions for review challenging the FERC's resolution of numerous complaints relating to

272. *Id.* at 524.
273. *Id.*
274. *Id.*
275. *Id.* at 525.
276. Westar Energy, Inc. v. FERC, 568 F.3d 985 (D.C. Cir. 2009).
277. *Id.* at 987.
278. *Id.* at 987.
279. *Id.* at 987-88 (citing, inter alia, Order No. 697, 72 Fed. Reg. 39,904 (July 20, 2007).
280. *Id.* at 988.
281. *Id.*
282. *Id.*
283. *Id.* at 989.

interconnection service.[284] The complaints concerned the proper classification of transmission equipment as either Interconnection Facilities or Network Upgrades under interconnection agreements approved before the FERC's adoption of standardized classifications in Order No. 2003.[285] Among other changes, the new regime requires interconnecting generators to pay for Interconnection facilities but requires utilities to grant interconnecting generators transmission service credits equal to the cost of Network Upgrades initially funded by the interconnecting generator.[286]

After the new FERC policy took effect, generators who executed agreements under the old regime filed a series of complaints under section 206 of the FPA[287] asking that the FERC reclassify Interconnection Facilities as Network Upgrades and order the utilities to issue transmission service credits equal to the amount the Generators paid to fund their construction. The FERC granted the complaints, but held the utilities owed nothing to the generators because the transmission service the generators took before the refund period under FPA section 206 began (i.e., 60 days after filing) consumed all the credits and the agency could not reduce those past transmission rates.[288]

The generators and Southern Company, one of the affected utilities, petitioned for review.[289] Because Southern Company faced no liability, the court rejected the petition for lack of standing.[290]

The generators lost on the merits.[291] They disputed the FERC's holding that granting relief would amount to illegal retroactive rate making—changing transmission charges the generators already paid in advance of the refund period.[292] Rather, the interconnection payments to which the credits applied amounted to a loan, which the generators urged, the prohibition did not cover.[293] But the court held that unless the dispute concerned rates, the FERC would have no authority in the matter.[294] And, if the dispute concerned rates, the FERC could not change them retroactively.[295]

Moreover, the generators conceded that they objected to the transmission charges, not the interconnection payments.[296] The panel reasoned that the generators had to challenge the transmission payments from the start of service

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284. Exxon Mobil Corp. v. FERC, 571 F.3d 1208 (D.C. Cir. 2009).

285. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,146, 68 Fed. Reg. 49,846 (Aug. 19, 2003), *order on reh'g*, Order No. 2003-A, F.E.R.C. STATS. & REGS. ¶ 31,160, 69 Fed. Reg. 15,932 (Mar. 26, 2004), *order on reh'g*, Order No. 2003-B, 109 F.E.R.C. ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 F.E.R.C. ¶ 61,401 (2005), *aff'd* Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007).

286. *Exxon Mobil Corp.*, 571 F.3d at 1213 (citing Order No. 2003, 68 Fed. Reg. at 49,849-50).

287. 16 U.S.C. § 824e (2006).

288. *Exxon Mobil Corp.*, 571 F.3d at 1214-15.

289. *Id*.

290. *Id.* at 1219-20.

291. *Id.* at 1219.

292. *Id.* at 1220.

293. *Id.* at 1215.

294. *Id.*

295. *Id.* at 1215-17.

296. *Id.* at 1216.

and that the FERC was reasonable in concluding that the FPA prohibited reductions in those past rates.[297]

Finally, the court held that, although the FERC failed to meet its statutory obligation to explain why it took more than 180 days to resolve the complaints, the generators suffered no harm as a result of the agency's lack of an explanation.[298]

5. Cost Allocation for Transmission Expansions

In *Illinois Commerce Commission v. FERC*,[299] a transmission line owner and two state utility commissions challenged a FERC decision concerning the reasonableness of rates for existing transmission facilities and new facilities within the PJM Interconnection (PJM), a regional transmission organization spanning the Mid-Atlantic region between New York and North Carolina and running from the ocean to the Midwest.[300]

The first dispute, brought by American Electric Power Services Corporation (AEP) and the Public Utilities Commission of Ohio, concerned existing facilities used to transmit electricity between the Midwest and the East.[301] PJM sought, and the FERC approved, a rate based on American Electric's marginal cost of transmission.[302] American Electric wanted also to include the cost incurred by the company when it built its transmission facilities.[303] Judge Posner, writing for the majority, agreed with PJM and the FERC, holding that AEP was attempting to shift the financial burden of "sunk" costs away from its customer base.[304] Because AEP's facilities were built prior to PJM's formation, they were always intended to serve its customers only.[305] Its ability to recoup costs from outside its base could not have affected its initial decision to invest in those facilities.[306] The FERC had also made clear that American would be able to apply these costs for any new or upgraded facilities to its rate for transmission to other utilities.[307]

The second dispute pitted the interests of PJM's Midwestern utilities against their Eastern counterparts regarding the financing of new facilities in PJM's region.[308] Under the old method, all new facilities had been financed by the region's utilities on the basis of the benefits that each utility received from those facilities.[309] Under the new method, new facilities with capacities of 500 kV or greater would be financed on a pro rata basis regardless of the benefits received.[310] Since the Midwestern utilities preferred building low-voltage

297. *Id.* at 1217.
298. *Id.* at 1218.
299. Ill. Commerce Comm'n v. FERC, 576 F.3d 470 (7th Cir. 2009).
300. *Id.* at 473.
301. *Id.*
302. *Id.*
303. *Id*.
304. *Id.*
305. *Id.* at 474.
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.*
310. *Id.*

facilities while the Eastern utilities preferred building high-voltage ones, this left an "asymmetry" that could disadvantage Midwestern utilities.[311] In initially approving the new pricing method, FERC ignored this asymmetry. Instead, it emphasized that determining who benefits and by how much is a difficult task that generates litigation, unnecessary here since everyone benefits from higher-voltage facilities that increase the entire network's reliability.[312] But the court rejected this reasoning: the "FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members."[313] On remand, the court directed the FERC to show that the Midwestern utilities would receive benefits from the higher-voltage facilities sufficient to justify the costs it seeks to shift to those utilities.[314] It also directed the FERC to assess approximately how much more difficult it is to determine the benefits from a high- versus low-voltage facility.[315]

Judge Cudahy dissented from the court's decision on the second issue, relying primarily on the D.C. Circuit's opinion in Midwest ISO, in which the court held that "'upgrades designed to preserve the grid's reliability constitute system enhancements that *are presumed to benefit the entire system*.'"[316] Cudahy reasoned that the burden was therefore on the utility, rather than the FERC, to show whether the Midwestern utilities would or would not benefit from a more reliable network.[317] He also used Midwest ISO to argue that the majority incorrectly required a strict cost-causation analysis to show benefits.[318] Instead, it should have allowed the FERC to employ a broad understanding of the benefits gained by general network improvements.[319]

In *Florida Municipal Power Agency v. FERC*,[320] the D.C. Circuit denied a petition for review challenging orders issued by the FERC regarding the rate base for network transmission service using the facilities of Florida Power & Light Company (Florida Power), a vertically-integrated electric utility in Florida.

The FERC orders under review concerned whether certain facilities owned by Florida Municipal Power Agency (Florida Municipal) should have been considered to be "integrated" with Florida Power's transmission system, and thus, eligible for pricing credits.[321] One of the factors for determining whether transmission facilities are integrated into a transmission system is whether the facility provides only unneeded redundancy; such facilities are not eligible for

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311. *Id.* at 475.

312. *Id.*

313. *Id.* at 476.

314. *Id.*

315. *Id.* at 477.

316. *Id.* at 480 (Cudahy, J., concurring in part and dissenting in part) (quoting Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361, 1369 (D.C. Cir. 2004)).

317. *Id.*

318. *Id.*

319. *Id.* at 480-82 (Cudahy, J., concurring in part and dissenting in part) (citing *Midwest ISO*, 373 F.3d at 1371).

320. Fla. Mun. Power Agency v. FERC, 602 F.3d 454 (D.C. Cir. 2010).

321. *Fla. Power & Light Co.*, 122 F.E.R.C. ¶ 61,159, *order on reh'g*, 125 F.E.R.C. ¶ 61,344 (2008).

cost recovery.[322] The FERC had concluded that a test used by Florida Power in 2005 to evaluate its own facilities was comparable to the test used in 1994 by Florida Power to evaluate certain Florida Municipal facilities.[323]

On appeal, the D.C. Circuit reviewed the evidence evaluated by the FERC and found that the FERC could reasonably have concluded that Florida Power comparably tested Florida Municipal's facilities in 1994 and its own in 2005 to determine whether the tested facilities were necessary for Florida Power to be able to serve the relevant loads.[324] Noting that the substantial evidence standard "'requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence,'"[325] the court held that the FERC had established that its finding that the 2005 and 1994 tests were comparable was supported by substantial evidence in the record.[326]

The court also rejected Florida Municipal's alternative argument that, even if the 1994 and 2005 tests were comparable, the FERC violated the comparability principle required by sections 205 and 206 of the FPA,[327] which requires that rates or charges for electric transmission or sale be just and reasonable and not unduly discriminatory.[328] The D.C. Circuit found that this claim failed in light of the fact that there was substantial evidence in the record that Florida Power applied comparable tests both to its own facilities in 2005 and Florida Municipal's facilities in 1994.[329] Therefore, the D.C. Circuit denied the petition for review.[330]

6. Independent System Operator/Regional Transmission Organization Rates

In *Sacramento Municipal Utility District v. FERC*,[331] the D.C. Circuit addressed challenges to four FERC orders that approved the California Independent System Operator Corp.'s (CAISO) proposal to restructure the California electricity market following the California energy crisis in 2000-2001.[332] The key feature of the CAISO restructuring proposal was the adoption of "locational marginal pricing" (LMP) to set wholesale electricity prices.[333] LMP incorporates the cost of congestion into energy pricing to provide market participants with an incentive to avoid energy transactions over constrained transmission paths.[334] As the D.C. Circuit had previously noted, under LMP,

322. *Fla. Mun. Power Agency*, 602 F.3d at 457; *Fla. Power & Light Co.*, 110 F.E.R.C. ¶ 61,058 at P 13 (2005).

323. *Fla. Power & Light Co.*, 122 F.E.R.C. ¶ 61,159 at PP 9-10.

324. *Fla. Mun. Power Agency*, 602 F.3d at 458-462.

325. *Id.* at 460 (citing Fla. Mun. Power Agency v. FERC, 315 F.3d 362, 365-66 (D.C. Cir. 2003)).

326. *Id.* at 460-62.

327. 16 U.S.C. §§ 824d, 824e (2010).

328. *Fla. Mun. Power Agency*, 602 F.3d at 462-64.

329. *Id.* at 464.

330. *Id.*

331. Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520 (D.C. Cir. 2010).

332. *Cal. Indep. Sys. Operator Corp*., 116 F.E.R.C. ¶ 61,274 (2006); *Cal. Indep. Sys. Operator Corp.*, 119 F.E.R.C. ¶ 61,076 (2007); *Cal Indep. Sys. Operator Corp.*, 120 F.E.R.C. ¶ 61,023 (2007); *Cal. Indep. Sys. Operator Corp.*, 124 F.E.R.C. ¶ 61,094 (2008).

333. *Sacramento Mun. Util. Dist*., 616 F.3d at 524.

334. *Id.*

"'scarce transmission capacity is allocated to those who value it most instead of being physically rationed.'"[335]

As part of the LMP regime, the CAISO's proposal provided for "marginal" transmission losses, under which the cost of transmission losses are recovered on a transaction-by-transaction basis.[336] Another aspect of the proposal at issue was the CAISO's adoption of "zonal pricing," under which consumers in a given load zone would pay LMPs that reflected the average of the LMPs paid to each supplier within the zone.[337] Zonal pricing was intended to "protect consumers in congested areas from the sudden increase in costs that otherwise would result from the switch to an LMP-based market."[338] The CAISO proposal imposed a "local resource adequacy requirement," under which load-serving entities that serve load in constrained areas, known as "local capacity areas" or "load pockets," must acquire certain minimum amounts of generation capacity within the local capacity areas even if those entities had acquired enough overall generation capacity to meet their total load requirements.[339] The CAISO proposal included a "congestion revenue rights" (CRR) component to enable consumers to hedge against price uncertainty resulting from LMP congestion costs.[340] CRRs are financial instruments that entitle the holders to be paid the congestion costs incurred to deliver electricity between two specified points on the transmission system.[341] Four separate petitions for review were filed challenging these specific aspects of the FERC's approval of the CAISO proposal, and the court denied each of the petitions.[342]

Marginal Transmission Losses: Sacramento Municipal Utility District (SMUD) and Imperial Irrigation District (Imperial) each challenged the marginal loss component of the CAISO proposal, arguing that, in approving this proposal, the FERC departed without explanation from earlier rulings addressing the costs and benefits of marginal losses.[343] SMUD and Imperial also argued that the FERC's conclusions as to the benefits lacked substantial evidence.[344]

As to the first argument, the court stressed that the concern expressed in CAISO went to the implementation costs at the inception of the program.[345] The court noted that, there, as in the orders under review, the FERC consistently spoke of the "efficiency gains associated with marginal loss pricing."[346] The court also ruled that the FERC adequately addressed arguments challenging the overall costs and benefits of marginal losses, even if certain evidence in the record "could have supported a different conclusion."[347] The court noted that the

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335. *Id.* at 524-25 (quoting Wis. Pub. Power, Inc. v. FERC, 493 F.3d 239, 250-51 (D.C. Cir. 2007)).

336. *Id.* at 525.

337. *Id.* at 525-26.

338. *Id*.

339. *Id.* at 526.

340. *Id.* at 527.

341. *Id.* (citing Wis. Pub. Power, Inc. v. FERC, 493 F.3d 239, 251 (D.C. Cir. 2007)).

342. *Id.* at 543.

343. *Id.* at 528-29 (citing *Cal. Indep. Sys. Operator Corp.*, 107 F.E.R.C. ¶ 61,274 (2004)).

344. *Id.* at 528, 529-30.

345. *Id.* at 529.

346. *Id*.

347. *Id.* at 530.

FERC adequately addressed testimony challenging the efficiency gains under the CAISO's marginal loss proposal, ruling that the FERC's orders do not lack substantial evidence "simply because petitioners offered some contradictory evidence."[348] The court also rejected the argument that the FERC's findings rested "solely on theoretical postulates,"[349] reiterating that, under D.C. Circuit precedent, "it was perfectly legitimate for the [FERC] to base its findings about the benefits of marginal loss charges on basic economic theory, given that it explained and applied the relevant economic principles in a reasonable manner."[350]

SMUD further argued that because the CAISO did not develop a mechanism for customers to hedge against marginal loss charges, the FERC could not find that the CAISO's proposal was "consistent with or superior to" the tariff provisions adopted by the FERC in Order No. 888, under which transmission customers could reduce loss charges by self-supplying the lost energy.[351] The FERC acknowledged that customers would be exposed to unhedgeable loss charges, but determined that the benefits of LMP, including marginal losses, outweighed those costs.[352] The court found that this "determination involved a 'policy judgment[] . . . at the core' of FERC's 'regulatory mission,' and we therefore afford it substantial deference."[353] The court accorded deference to the FERC's determination that the marginal loss provisions were not inferior to the Order No. 888 tariff provisions simply because customers could not predict marginal losses with sufficient certainty to self-supply those losses.[354]

The court determined that the FERC had substantial evidence showing that having customers pay "zonal" rather than "nodal" charges would not undermine the economic efficiencies of marginal losses,[355] and that the FERC satisfactorily addressed Imperial's "cost-causation" challenges through a pro rata refund mechanism that treated all customers fairly.[356]

Imperial further argued that the FERC exceeded its statutory authority by imposing losses incurred on its municipally-owned transmission lines that were not within the CAISO's balancing authority area.[357] The court disagreed that the

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348. *Id*. (quoting Ariz. Corp. Comm'n v. FERC, 397 F.3d 952, 954-55 (D.C. Cir. 2005) (internal quotation marks omitted)).

349. *Id.* (internal citations and quotation marks omitted).

350. *Id.* at 531 (distinguishing Elec. Consumers Res. Council v. FERC, 747 F.2d 1511, 1518 (D.C. Cir. 1984) and Transmission Access Policy Study Group v. FERC, 225 F.3d 667, 688 (D.C. Cir. 2000)).

351. *Id.*

352. *Id.* at 532.

353. *Id.* (citing Alcoa, Inc. v. FERC, 564 F.3d 1342, 1347 (D.C. Cir. 2009)). The court further found that the FERC's determination in this regard was not a "departure" from the FERC's approval of transitional mechanisms in *Midwest Indep. Trans. Sys. Operator, Inc.*, 108 F.E.R.C. ¶ 61,163 (2004), noting that SMUD never requested such a mechanism.

354. *Id.* at 532-33.

355. *Id*. at 534.

356. *Id.* at 534-35. The court found that the FERC adequately explained that it was impossible to determine a cost below the marginal cost for any individual customer: "Although treating every customer as the marginal customer results in over-collection *in the aggregate*, that treatment is reasonable for each customer." *Id.* at 535.

357. *Id.* at 536.

FERC essentially had compelled Imperial to become a CAISO transmission owner, stating that the "FERC merely permitted the [CAISO] to charge Imperial for the costs incurred by the [CAISO] when Imperial conducts transactions that cause transmission losses on the [CAISO] grid."[358] The court further noted that the FERC ordered the CAISO to honor specific loss provisions in Imperial's transmission ownership agreements.[359] Finally, the court rejected Imperial's argument that marginal losses will deter future transmission investment, ruling that the FERC had substantial evidence that marginal losses send more accurate price signals as to the location where new transmission facilities are needed.[360]

Local Resource Adequacy: The City and County of San Francisco (San Francisco) challenged the FERC's approval of the CAISO's requirement that utilities demonstrate that a portion of their capacity could be delivered to local load.[361] San Francisco argued that the CAISO's local resource adequacy requirement ignored contracts under which San Francisco could import electricity, which, San Francisco contended, are as good as having electricity locally generated.[362] The court ruled that the FERC approved minimum local resource adequacy requirements "because the physical limits of transmission facilities make it impossible to reliably meet the demand for energy in load pockets with outside resources alone . . . . The fact that San Francisco has contracted for imported power is irrelevant to this reality."[363] The court further ruled that the FERC did not abrogate existing import contracts, even though utilities face a new local resource obligation that may not have existed at the time those contracts were entered into.[364] That San Francisco's import contracts may be less valuable as a result of the CAISO's local resource adequacy requirement "does not render FERC's decision to uphold the requirement arbitrary or capricious."[365]

Congestion Revenue Rights: The CAISO proposed an initial CRR allocation based on transmission usage between April 2006 and March 2007.[366] Two challenges were raised to the CAISO's CRR proposal. The first challenge, raised by San Diego Gas & Electric Company (SDG&E), was that SDG&E will be allocated insufficient revenue rights, because during the 2006-2007 period, SDG&E's transmission usage was anomalously low.[367] SDG&E further argued that there would be insufficient CRRs available to it in later stages of the allocation process.[368] The court found that the FERC considered that problem and adjusted the CAISO rules to provide load-serving entities such as SDG&E with a greater level of certainty.[369] The court agreed that the FERC's remedy

358. *Id.*
359. *Id.* at 537-38.
360. *Id.* at 538.
361. *Id*. at 539.
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id*.
366. *Id*. at 540.
367. *Id.*
368. *Id.*
369. *Id.* at 541.

was reasonable, stating that it grants the FERC "great deference" in selecting remedies.[370] The court went on to state that it would "extend this deference to a 'predictive judgment by FERC about the effects of a proposed remedy.'"[371] The court further noted that SDG&E had the right to petition the FERC pursuant to section 206 of the Federal Power Act if future allocation processes result in an unjust outcome.[372]

The second challenge, raised by SMUD, involved the CAISO's decision to adopt "obligation" CRRs (under which the holder is entitled to receive congestion payments or obligated to make congestion payments if the energy price were higher at the source point than at the delivery point) and not "option" payments (under which the holder has the option to receive congestion payments but is not obligated to make congestion payments).[373] SMUD argued that customers would never face the payment obligation under the Order No. 888 physical model that predated the LMP model, so customers would be worse off under the CAISO proposal.[374] The court noted that the FERC had relied upon expert testimony explaining why the CRR obligation model was equivalent to the physical rights model, and found that the FERC's decision, therefore, "was rationally based on record evidence."[375]

In *Southern California Edison v. FERC*,[376] the D.C. Circuit vacated a series of FERC orders approving monthly, rather than hourly, netting for station power charges assessed to generators in the CAISO market.[377] The FERC had ruled that because the CAISO tariff provided monthly netting periods for purposes of determining transmission charges, the tariff also must provide for monthly netting in determining retail charges for station power. The FERC also ruled that monthly netting was required under its station power precedent.[378] Petitioner Southern California Edison Company (SCE) argued that the FERC exceeded its jurisdiction by dictating the netting period for retail station power charges.

The FERC first argued that its jurisdiction over transmission authorized FERC to determine whether a retail sale (which would be subject to retail stranded cost or consumption charges) had taken place, relying on the court's prior decision in *Niagara Mohawk Power Corp. v. FERC*.[379] The court found

370. *Id.*

371. *Id.* (quoting La. Pub. Serv. Comm'n v. FERC, 551 F.3d 1042, 1045 (D.C. Cir. 2008)).

372. *Id.* at 542 (citing 16 U.S.C. § 824e (2006)).

373. *Id.*

374. *Id.* at 543.

375. *Id.* (citing Williston Basin Interstate Pipeline Co. v. FERC, 519 F.3d 497, 499 (D.C. Cir. 2008)).

376. S. Cal. Edison v. FERC, 603 F.3d 996 (D.C. Cir. 2010).

377. *Duke Energy Moss Landing, LLC v. Cal. Indep. Sys. Operator Corp.*, 109 F.E.R.C. ¶ 61,170 (2004), *reh'g denied*, 111 F.E.R.C. ¶ 61,451 (2005); *Cal. Indep. Sys. Operator Corp*, 111 F.E.R.C. ¶ 61,452 (2005), *order on reh'g*, 125 FERC ¶ 61,072 (2009). "Station power" is the energy that generators use, self-generated or not, for on-site purposes, such as lighting and air conditioning. Before the electric energy markets were unbundled, generation-owning utilities would subtract—or "net"—their station power use against their gross output.

378. *PJM Interconnection, L.L.C.*, 94 F.E.R.C. ¶ 61,251, at 61,891-92 (2001), *reh'g denied*, 95 F.E.R.C. ¶ 61,333 (2001); *Nine Mile Point Nuclear Station, LLC v. Niagara Mohawk Power Corp*., 105 F.E.R.C. ¶ 61,336 (2003).

379. Niagara Mohawk Power Corp. v. FERC, 452 F.3d 822 (D.C. Cir. 2006).

that the FERC had over read Niagara, which, the court explained, was resolved based on a concession made by petitioners in that case that the FERC could dictate an hourly netting period for retail sales.[380] In this case, there was no such concession, as SCE maintained that the FERC lacked "authority to set *any* netting period to determine whether a retail sale occurs" or whether utilities can "impose consumption charges."[381] The court determined, therefore, that it must consider the FERC's arguments independent of Niagara.

The court went on to state that the FERC's claim that there would be no encroachment on state jurisdiction if a generator were net-positive in a month "implicitly concedes [that] . . . whether a retail sale occurs depends . . . on the length of the netting period."[382] That, the court found, is "rather arbitrary and unprincipled," particularly "as a jurisdictional standard."[383] The court stated that it did not understand why the FERC could conclude that "a retail sale has *not* taken place unless it can claim that the transaction is, instead, a wholesale sale or a transmission . . . . Unless a transaction falls within FERC's wholesale or transmission authority, it doesn't matter how FERC characterizes it."[384]

The court also rejected the FERC's alternative argument that allowing states to set netting periods for retail sales of station power would cause a conflict with the FERC's netting period for transmission.[385] The court saw no conflict there, however, because unbundling created separate markets for wholesale sales, retail sales, and transmission and distribution that do not automatically require consistent pricing techniques.[386] The court rejected the FERC's argument that its netting rules had only an indirect impact on state jurisdiction, finding that the FERC's orders did not merely "sideswipe" state jurisdiction, as in prior cases upon which the FERC relied, but "attack[ed] it frontally."[387] The court found that, under different netting periods, the "FERC [could] conclude that no transmission for station power took place in a month in which California would recognize retail sales of [station] power, but that is hardly a conflict."[388] Because transmission and power are procured separately in unbundled markets, the court concluded that the netting periods need not be the same.[389] Finally, the court noted that, despite the FERC's policy concern about how the state's netting period might impact the competitive position of independent generators, the FERC did not explain why that concern would

380. *S. Cal. Edison*, 603 F.3d at 999. The court noted that in *Niagara*, it could not find a principled distinction between hourly and monthly netting with respect to the FERC's jurisdiction.

381. *Id.* at 1000. The court further rejected the FERC's argument that the *Niagara* court not have rested on the concession because courts have an independent obligation to determine the agency's jurisdiction. *Id.* The court explained that its only obligation is to ensure its own jurisdiction, not that of the agency. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 1000-01.

385. *Id.* at 1001.

386. *Id.*

387. *Id.* (distinguishing Conn. Dep't of Pub. Util. Control v. FERC, 569 F.3d 477 (D.C. Cir. 2009), and Nat'l Ass'n of Regulatory Comm'rs v. FERC, 475 F.3d. 1277 (D.C. Cir. 2007)). The court also rejected intervenors' theory that inconsistent netting methodologies would create "trapped" generator costs, distinguishing Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

388. *Id.* at 1002.

389. *Id.* (citing Niagara Mohawk Power Corp. v. FERC, 452 F.3d 822, 830 (D.C. Cir. 2006)).

justify preempting state authority to set the pricing mechanism (including the netting period) for retail station power charges.[390]

In *Transmission Agency of Northern California v. FERC*,[391] the D.C. Circuit denied petitions for review objecting to the FERC's approval of CAISO's mechanism for pricing imports and exports of power between CAISO and certain external balancing authority areas. The CAISO proposal, known as the Integrated Balancing Authority Area (IBAA) mechanism, applied proxy locational marginal prices to interchange transactions between the CAISO and a single balancing authority area for purposes of its IBAA pricing proposal composed of the Sacramento Municipal Utility District (SMUD) and Turlock Irrigation District (Turlock). Parties could avoid application of the default proxy prices by providing the CAISO with information regarding the resources used to support the interchange transactions.

The court rejected the objections to the FERC's approval of the CAISO IBAA mechanism raised by the petitioners, SMUD and Turlock. The court upheld the FERC's finding that the IBAA price-setting mechanism did not exceed the FERC's jurisdiction under the FPA by regulating the rates of non-jurisdictional municipal utilities. The court observed that "'[the Commission] may analyze and consider the rates of non-jurisdictional utilities to the extent that those rates affect jurisdictional transactions.'"[392] The court found that the FERC "is only regulating the CAISO's actions and the manner in which it calculates rates on the CAISO-controlled grid," and the objecting entities would only be affected by the proposal to the extent they chose to use such facilities.[393] The court explained, "the Commission's regulation of a jurisdictional entity, such as the CAISO, 'may, of course, impinge as a practical matter on the behavior of non-jurisdictional ones,'" but this does not mean that the FERC has exceeded its FPA jurisdiction.[394]

Applying "[a] variation of the two-step analysis" under *Chevron*, the court also found the FERC's determination that the IBAA proposal did not conflict with an existing contractual arrangement, as claimed by petitioners, to be reasonable.[395] The court likewise upheld the FERC's conclusion that the IBAA pricing mechanism was not unduly discriminatory, even though it applied, for the time being, only to the SMUD-Turlock balancing authority area. Further, the court observed that "[t]he Commission identified no other entities suitable for IBAA treatment at the time of the challenged orders, and thus the Commission cannot be said to be treating similarly situated entities differently."[396] Finally, the court affirmed the FERC's conclusion that the specific default proxy prices used in the IBAA pricing mechanism were just and reasonable, finding that the CAISO's assumptions underlying the selection of proxy prices were supported by the record. Moreover, the court rejected the petitioners' argument that the

390. *Id.* at 1002.

391. Transmission Agency of N. Cal. v. FERC, 628 F.3d 538 (D.C. Cir. 2010).

392. *Id.* at 545 (quoting Transmission Agency of N. Cal. v. FERC, 495 F.3d 663, 671 (D.C. Cir. 2007)).

393. *Id.* at 546.

394. *Id.* (quoting Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277, 1280 (D.C. Cir. 2007)).

395. *Id.* at 546-49.

396. *Id.* at 550-51 (citing Sacramento Mun. Util. Dist. v. FERC, 474 F.3d 797, 802 (D.C. Cir. 2007)).

FERC's acknowledgement that the pricing mechanism could at times lead to artificially low prices meant that the FERC had erred in approving the proxy price for imports into CAISO. The court reasoned that this argument amounted to a suggestion that "the proxy price could never deviate from the market price without becoming unlawful," a position inconsistent with D.C. Circuit precedent "that proxy prices can be just and reasonable, if supported by record evidence."[397]

7. "Changed" Versus "Initial" Rates

In *TNA Merchant Projects, Inc. v. FERC*,[398] the D.C. Circuit vacated the FERC's orders and remanded the case because the FERC "failed to respond to Chehalis' argument that its rate could not be classified as 'changed' since it was not previously filed."[399]

In February 2005, Chehalis Power Generating, LLC (Chehalis) (at the time a wholly owned subsidiary of TNA Merchant Projects) entered into an agreement with the Bonneville Power Administration (BPA), which permitted Chehalis to seek compensation for providing reactive power to the BPA. Chehalis then filed a proposed rate schedule with the FERC and in an accompanying letter characterized the rate as an "initial rate." Rejecting Chehalis' characterization of the rate, the FERC said Chehalis had been providing the BPA with reactive power, through an interconnection agreement, free of charge. The FERC explained that an initial rate required a new customer and a new service. The FERC thus found that the proposed rate was a change in rate and under FPA section 205(e)[400] suspended the rate for a nominal period and made it subject to refund pending a hearing.

Challenging FERC's decision, Chehalis argued that "the only rates that are subject to section 205(e)'s suspension and refund provisions are those that change a rate already on file with FERC." The FERC did not dispute that Chehalis did not previously file such a rate schedule. However, the FERC argued before the court that the previous interconnection agreement between Chehalis and the BPA should have been filed. Chehalis maintained it was not required to file the agreement because it was "a BPA interconnection agreement and not a Chehalis rate schedule."[401]

The Court reviewed the FERC's interpretation of the FPA section 205(e) under the second step of the two-step *Chevron* framework.[402] In the Rehearing Order, the FERC failed to respond to Chehalis' statutory interpretation argument. The absence of a response prevented the court from determining if FERC's interpretation of what the FPA meant by initial or changed rates was reasonable under the second step of *Chevron*. The Court vacated FERC's orders and remanded the case back to FERC to provide an explanation.

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397. *Id.* at 553-54 (citing OXY USA, Inc. v. FERC, 64 F.3d 679, 695 (D.C. Cir. 1995)).

398. TNA Merchant Projects, Inc. v. FERC, 616 F.3d 588 (D.C. Cir. 2010).

399. *Id.* at 589.

400. 16 U.S.C. § 824d(e) (2006).

401. *TNA Merchant Projects*, 616 F.3d at 592.

402. *Id.* at 591.

III. NATURAL GAS ACT

A. Preemption of State Law

In *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council*,[403] the First Circuit held that section 3(e) of the NGA preempts not only state regulation of liquefied natural gas (LNG) facilities per se, but also ancillary off-site activities necessary for terminal operations, such as dredging.

The Rhode Island Coastal Resources Management Council (Rhode Island) argued that the state's laws regulating the dredging of submerged lands held by the state in the public trust prevented Weaver's Cove Energy, LLC (Weaver's Cove) from dredging Rhode Island waters to facilitate LNG tanker vessel transits to and from its FERC-approved LNG terminal proposal in Massachusetts. Specifically, the court held that the FERC's "exclusive authority" over LNG terminal "construction" and "operations" preempted the state law.[404] The court stressed that the FERC "carefully reviewed the very dredging Rhode Island seeks to further regulate and, after considering environmental impacts, authorized the project."[405] Thus, Rhode Island's law conflicted with, and was preempted by, section 3 of the NGA.[406]

The court also refused to dismiss Weaver's Cove's claims on grounds of standing, ripeness, or mootness. It held that Weaver's Cove's claims were justifiable even though Weaver's Cove would need other permits and approvals prior to constructing and operating the LNG terminal.[407]

In *Colorado Interstate Gas Co. v. Wright*,[408] a federal district court held that Kansas laws regulating underground natural gas storage facilities in interstate commerce are preempted by the NGA[409] and the Pipeline Safety Act.[410] The Kansas statute and Kansas Commerce Commission regulations at issue "were enacted and adopted in 2001, in direct response to an incident in January 2001 . . . involving underground storage of natural gas."[411] The state laws required natural gas storage facilities to apply for permits and submit to reporting and compliance requirements, with the possibility of shut-down orders to be issued for noncompliance.[412]

Citing the Supreme Court's decision in *Schneidewind v. ANR Pipeline Co.* for the proposition that the storage of gas in interstate commerce falls within the Natural Gas Act's preemptive regulation of interstate natural gas

403. Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council, 589 F.3d 458 (1st Cir. 2009). NGA section 3(e) gives FERC "exclusive authority to approve or deny an application for the siting, construction, expansion, or operation of [a liquefied natural gas ('LNG')] terminal." 15 U.S.C. § 717b(e)(1).

404. *Id.* at 472-74.

405. *Id.* at 473.

406. *Id.* at 473-74

407. *Id.* at 467-69.

408. Colo. Interstate Gas Co. v. Wright, 707 F. Supp. 2d. 1169 (D. Kan. 2010).

409. 15 U.S.C. §§ 717-717w (2006).

410. 49 U.S.C. §§ 60101–60137.

411. *Colo. Interstate Gas Co.*, 707 F. Supp. 2d at 1172.

412. *Id.* at 1178-79 (citing Kan. Stat. Ann. § 55-1,115(a); Kan. Admin. Regs. 82-3-1002, 82-3-1003).

transportation,[413] and the fact that the facilities in question had received a FERC certificate of public convenience and necessity,[414] the district court concluded that Kansas's "efforts are plainly focused upon regulating a field exclusively occupied by the FERC's permitting authority."[415] The court rejected the state's argument that the FERC's preemptive authority reached only "economic regulation, not safety regulation,"[416] as well as the state's related contention that the Department of Transportation's jurisdiction over pipeline safety (pursuant to the Pipeline Safety Act) demonstrates that federal authority over pipeline safety does not displace state authority.[417]

B. Collateral Attacks on Certificate Orders

In *American Energy Corp. v. Rockies Express Pipeline*,[418] the Sixth Circuit held that the party affected by a FERC-certified interstate natural gas pipeline could not use the state courts to effectively veto the FERC's issuance of a certificate of public convenience and necessity under section 7 of the Natural Gas Act,[419] or avoid the federal district court's jurisdiction over a pipeline-related condemnation action.

In 2007, Rockies Express Pipeline filed an application with the FERC for a certificate of public convenience and necessity under NGA section 7(c) to construct and operate a natural gas pipeline running from Missouri to Ohio. Several coal companies opposed the application, arguing that the pipeline would interfere with their mining operations. The FERC granted the certificate, adding a condition that required Rockies Express to "collaborate with [the coal companies] to develop a construction and operations plan."[420] The pipeline subsequently submitted its "construction and operations plan," which also was protested by the coal companies. The FERC approved the plan and authorized construction, denying the coal companies' request for rehearing.[421] The coal companies then filed a petition for review of FERC's orders in the D.C. Circuit, which was still pending when the instant case came before the Sixth Circuit.[422] In addition, the pipeline contemporaneously exercised its right under NGA section 7(h) to file a condemnation suit in federal district court in Ohio to acquire easements by eminent domain needed to construct the pipeline the FERC

413. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 295 n.1 (1988).

414. *Colo. Interstate Gas Co.*, 707 F. Supp. 2d at 1179; *see also Colo. Interstate Gas Co.*, 50 F.P.C. 588 (1973) (issuing the certificate).

415. *Id.* at 1179.

416. *Id.* at 1179-81.

417. *Id.* at 1181-85.

418. Am. Energy Corp. v. Rockies Express Pipeline, 622 F.3d 602 (6th Cir. 2010).

419. 15 U.S.C. § 717f (2006).

420. *Rockies Express Pipeline LLC*, 123 F.E.R.C. ¶ 61,234 at P 97 (2008), *order on reh'g*, 128 F.E.R.C. ¶ 61045 (2009).

421. Rockies Express Pipeline, LLC, Unpublished Letter Order, Docket No. CP07-208 (FERC Mar. 19, 2009), *reh'g denied*, Rockies Express Pipeline, LLC, 128 F.E.R.C. ¶ 61,045 (2009).

422. The coal companies' petition for review was subsequently denied in Murray Energy Corp. v. FERC, No. 09-1207 (D.C. Cir. Jan. 7, 2011).

had authorized. That case was also still pending when the instant case came before the Sixth Circuit.[423]

Adding yet another branch of litigation to the existing mix, the coal companies filed a state court conversion action in Ohio, alleging that they would be injured by the construction and operation of the pipeline. The pipeline removed this case to federal district court, which dismissed the suit due to the pending D.C. Circuit appeal of the FERC's certificate order and the district-court condemnation suit.[424]

On appeal, the Sixth Circuit affirmed the dismissal. The court ruled that the mining companies' claims seeking injunctive relief based on the alleged inadequacy of the pipeline's mitigation plans were exclusively within the FERC's jurisdiction under NGA section 7(c). Thus, under the judicial review provision in section 19 of the NGA,[425] the FERC's decision to issue the certificate could only be challenged in the United States Court of Appeals on direct review of the FERC's orders granting the certificate—a case already before the D.C. Circuit.[426] "[T]he Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court."[427] The Sixth Circuit further ruled that the coal companies' claim for monetary damages for the alleged wrongful conversion of their property rights was also barred under NGA section 7(h). The entire point of that provision was to designate the procedure for appropriately compensating landowners affected by the FERC's issuance of a certificate of public convenience and necessity to construct a pipeline under NGA section 7(c).[428] Moreover, it is settled law that federal courts "entertaining FERC condemnation actions use 'the law of the state in which the condemned property is located . . . in determining the amount of compensation due.'"[429] Thus, issues relating to the scope of damages to the mining operations were the very issues that would be litigated in determining the appropriate compensation in the condemnation proceeding, and were squarely within the jurisdiction of the federal district court hearing that action. The coal companies would, of course, be able to appeal an adverse decision by the district court in a subsequent appeal to the Sixth Circuit, if the coal companies so desired.[430]

C. Liquefied Natural Gas

In *Florida Gas Transmission Co. v. FERC*, the D.C. Circuit affirmed in part and reversed in part FERC orders establishing new gas quality and interchangeability standards for Florida Gas Transmission Company, LLC's

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423. *See, e.g.*, Rockies Express Pipeline, LLC v. 4.895 Acres of Land, More or Less, in Butler County, Ohio, No. 2:08-CV-554 (S.D. Oh. Dec. 28, 2010) (determining the condemnation price for one of several parcels of land).

424. Am. Energy Corp. v. Rockies Express Pipeline, LLC, No. 2:09-CV-284 (S.D. Oh. July 14, 2009).

425. 15 U.S.C. § 717r (2006).

426. Am. Energy Corp. v. Rockies Express Pipeline, LLC, 622 F.3d 602, 605 (6th Cir. 2010).

427. *Id.*

428. *Id.* at 606.

429. *Id.* (quoting Columbia Gas Transmission Corp. v. Exclusive Natural Gas Storage Easement, 962 F.2d 1192, 1199 (6th Cir. 1992)).

430. *Id.* at 607.

(Florida Gas) interstate natural gas system.[431] Florida Gas owns and operates an interstate natural gas pipeline system that runs from Texas to Florida. The facilities in the state of Florida comprise the Market Area, and the facilities west of the Florida-Alabama border comprise the Western Division.[432] Florida Gas and AES Ocean Express, LLC (AES), a pipeline that would transport regasified LNG, sought to negotiate an interconnection between the AES pipeline and the Florida Gas system. When negotiations failed, AES filed a complaint against Florida Gas with the FERC, alleging, among other things, that Florida Gas insisted on unnecessary and onerous terms, including certain conditions relating to gas quality and interchangeability.[433] The FERC required Florida Gas to adopt new gas quality and interchangeability standards for the Market Area, including for gas received from the Western Division.[434]

Under section 5 of the NGA,[435] the FERC shall fix just and reasonable tariff provisions once it has found the existing tariff provisions to be unjust, unreasonable, unduly discriminatory, or preferential. A finding that the existing tariff provisions are unjust or unreasonable is a prerequisite for the FERC to exercise its authority under section 5 of the NGA.[436] On review, the D.C. Circuit found that the FERC's orders did not justify the geographic scope of the required gas quality and interchangeability standards because the FERC had failed to show any evidence that gas flowing from the Western Division had ever caused problems in the Western Division or in the Market Area.[437] Because the FERC had failed to make any such findings, the D.C. Circuit held that the FERC's decision imposing the new gas quality and interchangeability standards on gas entering the Market Area from the Western Division was arbitrary, capricious, and contrary to section 5 of the NGA.[438]

With respect to the challenges brought by Florida Power & Light Co., one of Florida Gas's shippers, the D.C. Circuit found that substantial evidence supported the FERC's interchangeability standards for imported LNG delivered to the Florida Gas system,[439] and that the FERC correctly determined that it lacked jurisdiction to require nonjurisdictional parties (such as LNG suppliers and shippers) to reimburse mitigation costs incurred by other nonjurisdictional parties (such as electric generators and local distribution companies).[440]

In *Washington Gas Light Co. v. FERC*, the D.C. Circuit denied a petition for review of FERC orders approving the proposed expansion of the Cove Point LNG Terminal.[441] In 2006, FERC approved the proposed expansion of the LNG

431. Fla. Gas Transmission Co. v. FERC, 604 F.3d 636 (D.C. Cir. 2010).

432. *Id.* at 638.

433. *AES Ocean Express, LLC v. Fla. Gas Transmission Co.*, 119 F.E.R.C. ¶ 61,075 at P 4, *order on reh'g*, 121 F.E.R.C. ¶ 61,267 (2007).

434. 119 F.E.R.C. ¶ 61,075 at P 16.

435. 15 U.S.C. § 717d (2006).

436. *Fla. Gas Transmission Co.*, 604 F.3d at 640 (citing Sea Robin Pipeline Co. v. FERC, 795 F.2d 182, 186-87 (D.C. Cir. 1986); ANR Pipeline Co. v. FERC, 771 F.2d 507, 514 (D.C. Cir. 1985)).

437. *Id.* at 641.

438. *Id.* at 641-43.

439. *Id.* at 643-46.

440. *Id.* at 646-48.

441. Wash. Gas Light Co. v. FERC, 603 F.3d 55 (D.C. Cir. 2010).

terminal under sections 3 and 7 of the NGA.[442] Washington Gas Light Company (WGL), a downstream natural gas local distribution company, appealed the FERC's orders, arguing that the expansion was not consistent with the "public interest" requirements of NGA sections 3 and 7 because it posed the risk of unsafe natural gas leakage resulting from the increased volumes of regasified LNG that would be delivered over the WGL system. In 2008, the Court held that the FERC failed to explain adequately its analysis of WGL's safety concerns, and remanded the case with directions that the FERC "more fully address whether the [e]xpansion can go forward without causing unsafe leakage."[443]

On remand, the FERC explained that it limited post-expansion LNG deliveries to the pre-expansion amounts.[444] The Court ruled that "[b]y doing so, FERC ensured that the Expansion could not be said to increase the risk of unsafe natural gas leakage; after all, the same amount of regasified LNG could have been delivered even if the Expansion had never occurred."[445] The Court went on to state that, "[b]y imposing a post-Expansion limit that matches the pre-expansion limit, FERC has satisfactorily ensured that the Expansion will not result in an increased risk of unsafe natural gas leakage."[446]

D. Initial Rates

In *Missouri Public Service Commission v. FERC*,[447] the D.C. Circuit granted a petition for review filed by the Missouri Public Service Commission (MoPSC) challenging the FERC's allowance of an alleged "acquisition premium" in the initial rates authorized for a new interstate natural gas pipeline under section 7 of the NGA.[448] Characterizing the FERC's decision as "the antithesis of 'reasoned decisionmaking,'"[449] the court vacated the FERC's orders and remanded the matter for "resolution of the question of the alleged acquisition premium."[450]

The case involved an application to merge two intrastate pipelines, operated as "Hinshaw" pipelines with one interstate pipeline, Missouri Interstate Gas, LLC (MIG), into a single FERC-regulated interstate natural gas pipeline company to be called MoGas Pipeline LLC (MoGas).[451] Over the MoPSC's objections, the FERC granted MoGas a certificate of public convenience and necessity under NGA section 7 and approved initial rates for the pipeline. The MoPSC contended that the initial rates proposed by MoGas reflected an acquisition premium in contravention of FERC ratemaking policy because the

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442. 15 U.S.C. §§ 717b(a), 717f(c) (2006).

443. Wash. Gas Light Co. v. FERC, 532 F.3d 928, 933 (D.C. Cir. 2008).

444. *Dominion Cove Point LNG, LP*, 125 FERC ¶ 61,018 (2008), *order on reh'g*, 126 F.E.R.C. ¶ 61,036 (2009).

445. *Wash. Gas Light Co.*, 603 F.3d at 57.

446. *Id.* The Court rejected Washington Gas Light Co.'s other arguments as without merit. *Id.*

447. Mo. Pub. Serv. Comm'n v. FERC, 601 F.3d 581 (D.C. Cir. 2010).

448. 15 U.S.C. § 717f (2006).

449. *Mo. Pub. Serv. Comm'n*, 601 F.3d at 583 (quoting Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 375 (1998)).

450. *Id*.

451. *Id.* at 583-84.

MIG's rates reflected a premium above net book value from a previous sale of MIG's assets. At the time of the application, MIG's rates were under review by the FERC in a separate docket, and the MoPSC had raised its acquisition premium objections in this proceeding. The FERC reasoned that, because it was approving the merged MoGas pipeline with combined rates, the MoPSC's objections to the alleged acquisition premium in MIG's rates were moot. On rehearing, the FERC reaffirmed its conclusion, finding further that: (1) addressing the MoPSC's objections to the acquisition premium would transform a pipeline certificate proceeding into a time-consuming rate case; (2) the MoPSC was trying to "cherry-pick" one rate issue for detailed review; and (3) initial rates under NGA section 7 are approved based on estimates.[452] The FERC also pointed to its 2002 acceptance of MIG's initial rates as grounds for its refusal to pursue the acquisition adjustment issue raised by the MoPSC.

The D.C. Circuit held the FERC's treatment of the MIG acquisition premium to be arbitrary and capricious. Under the FERC's ratemaking policies, an acquisition premium is not allowed to be recovered through jurisdictional rates unless a pipeline can satisfy the "benefits exception" by showing specific dollar benefits resulting directly from the acquisition of the assets.[453] There was no dispute, the court observed, that the FERC did not apply the specific dollar benefits test. The FERC's reliance on its earlier approval of initial rates for MIG, the court found, was "entirely inadequate" to justify inclusion of the acquisition premium in MoGas' rates in view of uncontested evidence submitted by the MoPSC indicating that MIG's rates included an acquisition premium, and the absence of any evidence from MoGas to justify carrying over any such acquisition premium into its rates.[454] The court also found that the FERC had applied its benefits test to exclude acquisition premiums included in the rates of the two Hinshaw pipelines with which MIG was merging to form MoGas.

The court likewise rejected the FERC's arguments that rate-setting in a certificate proceeding under NGA section 7 is not as rigorous as in a rate case under NGA section 4,[455] and that detailed evaluation of the MIG acquisition premium issue could be deferred to MoGas' initial rate case under section 4. While acknowledging that "the public interest standard governing the establishment of initial rates in section 7 proceedings is not coterminous with the just and reasonable standard governing the establishment of permanent rates in a section 4 proceeding,"[456] the court held that FERC did not "provide a reasoned explanation for why" the alleged acquisition premium could not be evaluated in the section 7 proceeding.[457] The court explained that the FERC has a duty to use its initial rate-setting authority under NGA section 7 to protect consumers, and, indeed, the FERC's general practice is to apply the same ratemaking policies in a section 7 proceeding that apply in rate cases under NGA section 4 "to the extent

452. *Id.* at 585.

453. *Id.* at 583-84.

454. *Id.* at 586.

455. 15 U.S.C. § 717c (2006).

456. *Mo. Pub. Serv. Comm'n*, 601 F.3d at 587 (citing Mo. Pub. Serv. Comm'n v. FERC, 337 F.3d 1066, 1070 (D.C. Cir. 2003)).

457. *Id.*

practicable."[458] Further, while NGA section 7 initial rates are typically based on estimates because new pipelines usually have no operating history, the existence of the acquisition premium in MIG's rates, the court reasoned, "appears to be a straightforward accounting question," that the FERC could have resolved based on the uncontested record evidence.[459] Application of the benefits exception test does not require prospective data in all cases, and, in fact, the FERC applied the benefits test to exclude other acquisition premiums in this case.

The court dismissed the FERC's rationale that MoPSC was "cherry picking" a single issue and that addressing the acquisition premium would transform the NGA section 7 proceeding into a rate case.[460] The FERC's argument was unpersuasive given that MoPSC had submitted uncontested evidence documenting the existence of the acquisition premium. Finally, the issue could not simply be deferred until a rate case under NGA section 4 because the rate case would not consider the validity of the initial rates under NGA section 7.

E. Capacity Release

In *Interstate Natural Gas Ass'n of America v. FERC*,[461] a natural gas pipeline trade association and several interstate pipelines challenged the FERC's decision in Order No. 712 to retain cost-based price ceilings on the rates that interstate natural gas pipelines are permitted to charge for short-term (one year or less) pipeline capacity sales while permanently lifting price caps on shippers' short-term capacity releases.[462]

As a threshold matter, the court rejected petitioners' argument that the court's earlier decision upholding the FERC's removal of the price caps on short-term capacity releases for a limited two-year period in *Interstate Natural Gas Association of America v. FERC*[463] (*INGAA I*) was inapplicable to the current dispute because the earlier case had considered an experimental program by the FERC rather than a permanent policy change. The purpose of court deference to the FERC's experimental programs is "to give the agency a chance to generate 'real world' data on which to base more lasting policies," and the FERC "may adjust or reaffirm its policies" in light of those data.[464] The FERC's decision to adopt permanently the rules it had previously implemented on an experimental basis did not make the court's *INGAA I* analysis irrelevant; rather, "[t]he relevant distinction . . . is that here we expect FERC to support its decision with substantial record evidence to justify a permanent change in policy, rather than a temporary experiment."[465] Accordingly, the court applied its analytical

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458. *Id.* (citing *Mo. Pub. Serv. Comm'n*, 337 F.3d at 1070 (quoting *Kan. Pipeline Co.*, 97 F.E.R.C. ¶ 61,168, 61,785 (2001))).

459. *Id.*

460. *Id.* at 588.

461. Interstate Natural Gas Ass'n of Am. v. FERC, 617 F.3d 504 (D.C. Cir. 2010) (*INGAA II*).

462. *See Promotion of a More Efficient Capacity Release Market*, 123 F.E.R.C. ¶ 61,286 (Order No. 712), *order on reh'g*, Order No. 712-A, 125 F.E.R.C. ¶ 61,216 (2008).

463. Interstate Natural Gas Ass'n of Am. v. FERC, 285 F.3d 18 (D.C. Cir. 2002) (*INGAA I*).

464. *INGAA II*, 617 F.3d at 509 (citing Pub. Serv. Comm'n of the State of N.Y. v. Fed. Power Comm'n, 463 F.2d 824 (D.C. Cir. 1972)).

465. *Id*.

framework from *INGAA I*, which focused on whether light-handed regulation was justified under the court's decision in *Farmers Union Central Exchange, Inc. v. FERC*,[466] and whether the FERC had justified its disparate treatment of pipelines and their shippers based on reasonable distinctions.

The court rejected the petitioners' contention that not lifting price ceilings for pipelines resulted in "impermissible asymmetric regulation," explaining that this argument was "based on the flawed premise that the FERC must regulate every category of market participant in precisely the same manner."[467] The NGA, the court explained, permits the FERC "to treat pipelines and shippers differently based on 'reasonable distinctions.'"[468] In this case, the FERC identified such reasonable distinctions, namely the concern that pipelines would be able to wield market power if the short-term price ceiling was lifted. Pipelines, the FERC had also found, might try to earn scarcity rents in short-term markets by limiting construction of new capacity, which the court characterized as "a plausible concern, informed by economic theory."[469]

Petitioners also pointed to the FERC's finding that the short-term capacity market was "generally competitive," and argued that this conclusion obligated the FERC to remove pipeline price ceilings as it had for releases of capacity by shippers.[470] The court, however, held that the FERC had reasonably concluded, based on "real world" information in the record, that the short-term capacity market might not remain competitive if price ceilings were removed from pipelines' short-term capacity sales.[471] The court also rejected the argument that the FERC's rule would give shippers an unfair competitive advantage and impose economic injuries on pipelines, crediting the FERC's position that pipelines are adequately compensated on a cost-of-service basis. Although declining to resolve the issue, the Court observed that petitioners' position that any revenues from pipelines' short-term market-based sales would not have to be credited to shippers "reinforces the concern that motivated FERC to retain the price ceilings on pipelines" because pipelines might exercise market power without an adequate remedy for the resulting harm to customers.[472]

In response to the petitioners' contention that the FERC had not adequately addressed their argument that the FERC's rule would create a bifurcated market for transportation capacity, the court observed that it had rejected a similar argument in *INGAA I*, explaining that "'distortions of [the market] seem likely in any such compromise, [which] is within the Commission's purview so long as it rests on reasonable distinctions.'"[473] The FERC, moreover, had acknowledged the concerns about the cost of arbitrage and had taken steps to address the issue. Further, in balancing the possible market bifurcation against the potential exercise of pipeline market power, "FERC made a reasonable judgment to 'err

466. Farmers Union Cent. Exchange, Inc. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984).

467. *INGAA II*, 617 F.3d at 509.

468. *Id.* (quoting *INGAA I,* 285 F.3d at 36; citing TransCanada Pipelines, Ltd. v. FERC, 878 F.2d 401, 413 (D.C. Cir. 1989)).

469. *Id.* at 510.

470. *Id.*

471. *Id*.

472. *Id*. at 510-11.

473. *Id*. at 511 (quoting *INGAA I*, 285 F.3d at 36).

on the side of enhanced protection against market power,'" consistent with the purposes of the NGA.[474]

F. Lease Agreements for Interstate Transportation

In *Apache Corp. v. FERC*,[475] the D.C. Circuit remanded for further explanation FERC orders concerning a lease agreement for the transportation of natural gas. In 2006, two natural gas pipelines entered into a lease agreement under which the larger interstate pipeline would transport natural gas over the smaller intrastate pipeline. The pipelines filed the lease with the FERC for approval and Apache—a natural gas producer that transports nearly all of its gas over the intrastate pipeline under an interruptible rate—objected that the lease would inflict unduly discriminatory harm on Apache and other customers of the intrastate pipeline.[476] The FERC rejected Apache's arguments, approved the lease, and denied Apache's request for rehearing.

On review, the D.C. Circuit determined that remand was required because the FERC appeared to have altered its standard for approving natural gas pipeline leases without explanation. The court noted that the FERC's established practice since 2002 had been "to approve a pipeline lease if: '(1) there are benefits for using a lease arrangement; (2) the rate under the lease is less than comparable transportation service; and (3) the lease arrangement *does not adversely affect existing customers*.'"[477] The FERC's orders under review had cited this standard,[478] but altered the third prong in finding that the lease at issue would "not have an *unduly* adverse impact on Enogex's existing services."[479] The FERC's failure to "provide[] a reasoned explanation for its decision" in its orders under review required remand.[480] However, the court did not vacate the FERC's orders, noting the "a serious possibility that the Commission will be able to substantiate its decision on remand."[481]

G. Lost and Unaccounted-For Gas

In *Colorado Interstate Gas Co. v. FERC*,[482] the D.C. Circuit denied a petition for review of FERC orders interpreting a natural gas pipeline's tariff provision for recovering lost and unaccounted for gas. In October 2006, the pipeline operated by petitioner Colorado Interstate Gas Co. (CIG) experienced an enormous leak at its facility in Fort Morgan, Colorado. After the leak was fixed, CIG sought the FERC's approval to increase the percentage of gas CIG retains for its own use from its customers' gas shipments in order to recover the

474. *Id*. (quoting Order No. 712, 123 F.E.R.C. ¶ 61,286 at P 108 (2008)).

475. Apache Corp. v. FERC, 627 F.3d 1220 (D.C. Cir. 2010).

476. *Id.* at 1222.

477. *Id*.

478. *Id.* (citing Midcontinent Express Pipeline, LLC, 124 F.E.R.C. ¶ 61,089 at P 31 (2008) (*Midcontinent Express*)).

479. *Id.* at 1222. (quoting, with emphasis, *Midcontinent Express*, at P 32).

480. *Id.* at 1223 (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983)).

481. *Id.* (quoting Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993)).

482. Colo. Interstate Gas Co. v. FERC, 599 F.3d 698 (D.C. Cir. 2010).

gas lost during the Fort Morgan accident.[483] Several shippers protested CIG's filing, contending that CIG could only increase its retention percentage to account for normal operating losses and not for accidents like the Fort Morgan leak.[484] FERC denied CIG's application.[485]

On review, the D.C. Circuit explained that it reviews challenges to the FERC's interpretation of a tariff "under the Administrative Procedure Act's arbitrary and capricious standard of review, using a two-step, *Chevron*-like analysis."[486] The court found that CIG's tariff was ambiguous and declined to resolve the case under *Chevron* step 1.[487] Moving to *Chevron* step 2, the Court found the FERC's interpretation of the tariff reasonable for at least three reasons. First, the court agreed that standard trade usage of "lost and unaccounted for"—or L&U—gas applies to gas lost during normal daily operations, not lost as the result of accidents.[488] Second, the court found that the Commission's construction of the replacement provision gave effect to other portions of the tariff concerning regular true up measurements, while CIG's interpretation would render those true-up inspections meaningless and thus render that portion of the tariff a nullity contrary to standard maxims of construction.[489] Third, the court agreed that the FERC's interpretation of CIG's tariff was consistent with the agency's interpretation of similar provisions in the tariffs of other pipelines.[490] Finally, the court rejected CIG's claim that FERC had erred in holding that the Fort Morgan leak was not a "normal operating event."[491]

IV. INTERSTATE COMMERCE ACT

A. Just and Reasonable Rates

In *Flint Hills Resources Alaska, LLC v. FERC*,[492] the D.C. Circuit rejected various challenges to Commission orders finding interstate rates filed by oil carriers for the Trans Alaska Pipeline System (TAPS) to be unjust and unreasonable. Previously, oil pipeline companies owning the TAPS charged shippers rates based on the methodology established by a 1985 settlement agreement between carriers and Alaska (but no shippers), which had been approved by the Commission as just and reasonable under the Interstate Commerce Act.[493]

The "TAPS Settlement Methodology," or "TSM," was intended to compute the pipeline's interstate rates until 2011, but when carriers filed rates for 2005

483. *Id.* at 701.

484. *Id.*

485. Colo. Interstate Gas Co., 121 F.E.R.C. ¶ 61,161 (2007), *reh'g denied*, 123 F.E.R.C. ¶ 61,183 (2008).

486. *Colo. Interstate Gas Co.*, 599 F.3d at 701 (citing 5 U.S.C. § 706(2)(A) (2006) and Old Dominion Elec. Coop., Inc. v. FERC, 518 F.3d 43, 48 (D.C. Cir. 2008)).

487. *Id.* at 702.

488. *Id.*; *see also id.* at 703 (quoting the rehearing order under review and other FERC precedent). Colorado Interstate Gas Co.'s petition placed significant reliance on its tariff's insertion of a comma in the phrase "lost, unaccounted-for" gas. *Id.* at 702.

489. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (2009)).

490. *Id.* at 703-04 (citing cases).

491. *Id.* at 704.

492. Flint Hills Res. Alaska, LLC v. FERC, 627 F.3d 881 (D.C. Cir. 2010).

493. 49 U.S.C. §§ 1-15 (1976).

and 2006 and shippers protested, the Commission "scuttl[ed] the TSM" and instead "applied a methodology that it had developed for oil pipeline ratemaking generally in *Williams Pipe Line Co*., 31 FERC ¶ 61,377 (1985) (*'Opinion No. 154-B'*)."[494] The Commission concluded that the filed 2005-2006 rates were unjust and unreasonable, that the just and reasonable rates were less than the 2004 rates, and limited refunds to the difference between the 2005-2006 rates and the prior unchallenged (2004) rates.[495]

The D.C. Circuit affirmed the Commission's orders, rejecting in series the myriad challenges brought by various parties. For example, it held that the Commission was not arbitrary and capricious in using, for TAPS's rate base, the balance of initial capital cost not yet recovered by accelerated depreciation as of the end of 2004.[496] It held that the Commission was not arbitrary and capricious in concluding carriers were not entitled to a one-time "write-up" of their rate base, even though carriers were allowed such a rate base increase in 1985's Opinion No. 154-B, because this case involved none of the "transition" problems or reasonable investor expectations that justified the Opinion No. 154-B's write-up.[497] It held that section 15(7) of the ICA does not forbid the Commission's imposition of refunds based on the new ratemaking methodology when the refunds are limited to the previous filed rates.[498] And it held that Alaska could not successfully claim refunds for allegedly discriminatory rates (i.e., filed interstate rates substantially higher than the intrastate rates) when "Alaska has shown no competitive injury."[499] Finally, the court rejected various other challenges as unripe.[500]

B. Reparations

In *SFPP, L.P. v. FERC*,[501] the D.C. Circuit affirmed a FERC order requiring SFPP, L.P. (SFPP) to pay reparations under section 8 of the ICA[502] for amounts it had collected from shippers where SFPP had failed to file at the FERC the contract rates that it was charging for the use of SFPP's Watson Station drain-dry facilities.[503] SFPP argued that the FERC's decision was arbitrary and capricious in light of an earlier FERC ruling in the same proceeding that special circumstances justified enforcement of the unfiled rate contracts, and that the FERC had abused its discretion in not considering equitable arguments for declining to order reparations.[504]

The court noted that the FERC's earlier ruling declining to require reparations was predicated on an erroneous decision that the contracts did not need to be filed (a decision that had been earlier vacated and remanded to the

494. *Flint Hills Res. Alaska, LLC*, 627 F.3d at 884.
495. *Id.*
496. *Id.* at 884-85.
497. *Id.* at 885.
498. *Id.* at 887.
499. *Id.* at 888.
500. *Id.* at 889-90.
501. SFPP, L.P. v. FERC, 592 F.3d 189 (D.C. Cir. 2010).
502. 49 U.S.C. § 8 (1976).
503. *SFPP, L.P.*, 592 F.3d at 190.
504. *Id.*

FERC by the D.C. Circuit in *BP West Coast Products v. FERC*[505]) and that the rates were grandfathered under the Energy Policy Act of 1992.[506] The court, however, concluded that in this case "an entirely different question was presented to FERC, and its answer . . . was in no sense a deviation from past policy."[507] The court upheld the FERC's conclusion that reparations should not be excused by SFPP's alleged good faith error concerning the need to file the relevant rates.[508] The court also agreed that the record adequately established the level of damages incurred by the complaining shippers.[509] Finally, the court found that the FERC had "carefully exercised" its discretion by explaining the basis for its decision to order reparations.[510]

V. OTHER STATUTES AND LAWS

A. Department of the Interior Offshore Drilling Moratorium

In *Hornbeck Offshore Services, L.L.C. v. Salazar*,[511] the U.S. District Court for the Eastern District of Louisiana issued a preliminary injunction enjoining the Secretary of the Interior from enforcing a six-month moratorium on deepwater drilling operations in the Gulf of Mexico imposed in the wake of the BP Deepwater Horizon accident. Although suggesting that it would have jurisdiction to consider plaintiffs' challenge under the Outer Continental Shelf Lands Act (OCSLA),[512] the court agreed with plaintiffs that the judicial review provisions of the APA were applicable in this case.[513]

The court found that the plaintiffs, providers of support services for offshore oil and gas drilling, likely would be able to show that the Secretary had acted arbitrarily and capriciously in contravention of the APA in imposing the moratorium.[514] The court found, in particular, that there was no relationship between the findings in the administrative record and the comprehensive scope of the drilling moratorium because much of the record was "incident-specific and driven," focusing on the BP Deepwater Horizon accident.[515] The court cited a lack of evidence that the Secretary, in imposing the moratorium, "balanced the concern for environmental safety with the policy of making leases available for development,"[516] as mandated under the OCSLA or consideration of alternatives to the broad moratorium.

Having concluded that plaintiffs had a substantial likelihood of success on the merits, the court found that irreparable harm and lack of harm to the public

505. BP W. Coast Prods., LLC v. FERC, 374 F.3d 1263 (D.C. Cir. 2004).

506. *SFPP, L.P.*, 592 F.3d at 190-91 (citing Pub. L. No. 102-486, 106 Stat 2776, 3011, *reprinted in* 42 U.S.C. § 7172 note).

507. *Id.* at 193.

508. *Id.* at 194.

509. *Id.*

510. *Id.* at 195.

511. Hornbeck Offshore Servs., L.L.C. v. Salazar, 696 F. Supp. 2d 627 (E.D. La. 2010).

512. *Id.* at 633, 634 n.6, 636 n.7 (citing 43 U.S.C. § 1349(a) (2006)).

513. *Id.* at 634, 636 (discussing applicability of 5 U.S.C. §§ 704 & 705).

514. *Id.* at 634-35, 636-38.

515. *Id.* at 637.

516. *Id.* at 638.

interest, the other prerequisites for issuance of a preliminary injunction, were also satisfied. Explaining that a validly-supported drilling moratorium might be in the public interest notwithstanding the impact on the plaintiffs, the court pointed to its finding that plaintiffs would likely be able to show that imposition of the moratorium was arbitrary and capricious, and concluded that "[a]n invalid agency decision to suspend drilling of wells in depths of over 500 feet simply cannot justify the immeasurable effect on the plaintiffs, the local economy, the Gulf region, and the critical present-day aspect of the availability of domestic energy in this country."[517]

Despite the Fifth Circuit's subsequent finding that the Secretary's appeal of the preliminary injunction was moot due to the Secretary's rescission of the moratorium on May 28, 2010 and issuance of a new moratorium on July 12, 2010,[518] the district court declined to dismiss the plaintiffs' suit. It found the case was not moot under "the voluntary cessation exception to mootness."[519]

B. Commodity Exchange Act

In *Hershey v. Energy Transfer Partners, L.P.*,[520] the Fifth Circuit addressed a putative class action under the Commodity Exchange Act (CEA) in which the plaintiffs alleged that Energy Transfer Partners, L.P., and its affiliates (ETP) manipulated natural gas futures and options prices, which caused prices on the New York Mercantile Exchange (NYMEX) to fluctuate artificially, thereby adversely effecting the Plaintiffs' NYMEX natural gas futures and options contracts. The plaintiffs' allegations mirrored allegations against ETP made by the FERC[521] and by the Commodity Futures Trading Commission (CFTC).[522] The court affirmed the district court's dismissal of the complaint,[523] ruling that the Plaintiffs failed to sufficiently allege that the Defendants specifically intended to manipulate NYMEX natural gas futures contracts.

During the period in question, the Defendants made substantial natural gas purchases and sales through the "Houston Ship Channel" (HSC), which is a major natural gas trading hub. ETP then allegedly used natural gas futures "basis swaps" (purely financial instruments that carry no delivery obligation) to arbitrage the difference between the settlement prices of NYMEX natural gas futures contracts for a given month[524] and the monthly HSC price index for that month. As the court explained, "the wider the gap between the prices at the Henry Hub and the HSC, the more money [ETP] stood to make from [its] basis

517. *Id.* at 639.

518. Hornbeck Offshore Servs., L.L.C. v. Salazar, 396 F. App'x 147 (5th Cir. 2010).

519. Hornbeck Offshore Servs., L.L.C. v. Salazar, 2010 WL 3523040 at *7 (E.D. La. Sept. 1, 2010).

520. Hershey v. Energy Transfer Partners, L.P., 610 F.3d 239 (5th Cir. 2010).

521. *Energy Transfer Partners, L.P.*, 120 F.E.R.C. ¶ 61,086 (2007). The FERC case settled. *Energy Transfer Partners, L.P.*, 128 F.E.R.C. ¶ 61,269 (2009).

522. Complaint for Injunctive and Other Equitable Relief and Civil Monetary Penalties Under the Commodity Exchange Act, CFTC v. Energy Transfer Partners, L.P., No. 3:07-CV-01301, 2007 WL 2211178 (N.D. Tex. July 26, 2007). The CFTC case also settled. CFTC v. Energy Transfer Partners, L.P., No. 3:07-CV-01301, 2008 WL 1971314 (N.D. Tex. Mar. 17, 2008).

523. *In re* Energy Transfer Partners Natural Gas Litig., No. 4:07-CV-3349 (S.D. Tex. Mar. 25, 2009), *reconsideration denied*, 2009 WL 2633781 (S.D. Tex. Aug. 26, 2009).

524. The spot price for physical delivery of natural gas at the Henry Hub in Erath, Louisiana is used to set the NYMEX natural gas futures prices regardless of whether the futures actually go to physical delivery.

swaps."[525] The plaintiffs, who purchased "long" positions in NYMEX natural gas futures and later sold those positions at a loss, alleged that [ETP] used its dominant market position to suppress prices at HSC, which, in turn, the plaintiffs alleged, resulted in lower NYMEX prices.[526] The plaintiffs' argument was that ETP made sales at artificially low prices at the HSC, which prices then were published in the HSC monthly price indices, to earn greater profits from the spread between HSC and Henry Hub prices.[527] The monthly HSC index caused the NYMEX price to fluctuate artificially, which, the plaintiffs argued, resulted in lower NYMEX prices that reduced the value of the plaintiffs' NYMEX natural gas futures and options contracts.[528]

The court noted that private actions under the CEA require a plaintiff to demonstrate that a defendant had a specific "intent to deceive, manipulate, or defraud."[529] The court further explained that under the CEA, the actionable manipulation must be directed at the price of the commodity underlying the futures contracts at issue.[530] In this case, the "underlying" contracts were the plaintiffs' NYMEX natural gas futures contracts, so the plaintiffs must allege, the court ruled, that the Defendants intended to manipulate those contracts.[531] As the court further explained, because NYMEX futures contracts are tied to Henry Hub prices, the Plaintiffs must allege that the Defendants intended to manipulate the price at the Henry Hub.[532]

But the plaintiffs alleged that the Defendants intentionally manipulated the price of natural gas at HSC.[533] Their theory was that the artificially low prices reported to the index publishers "likely influenced the price of gas at the Henry Hub, thus impacting the price of NYMEX natural gas futures contracts."[534] The plaintiffs alleged that ETP knew or should have known that their actions at HSC would suppress prices at Henry Hub and thus reduce the prices of NYMEX futures contracts.[535]

The court, however, disagreed that manipulation at HSC was legally equivalent to manipulation at Henry Hub. Citing to rulings in prior class actions, the court ruled that the CEA required the plaintiffs to allege that ETP specifically intended to manipulate Henry Hub prices, because it is those prices that directly influence the commodity underlying the NYMEX natural gas futures prices.[536] In this case, the court ruled, ETP's alleged manipulation was directed at HSC and the "effect on the Henry Hub, and NYMEX futures contracts, was merely an unintended consequence of the Defendants' manipulative trading."[537] The court

525. *Hershey*, 610 F.3d at 243.
526. *Id.* at 244.
527. *Id.*
528. *Id*. at 244.
529. *Id.* at 246 (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976)).
530. *Id.* at 247 (citing 7 U.S.C. § 25(a)(1)(D) (2006)).
531. *Id.* at 247.
532. *Id.*
533. *Id.*
534. *Id.*
535. *Id.*
536. *Id.* (citing *In re* Amaranth Natural Gas Commodities Litig., 587 F. Supp. 2d 513, 524 (S.D.N.Y. 2008); *In re* Natural Gas Commodity Litig., 337 F. Supp. 2d 498, 502 (S.D.N.Y. 2004)).
537. *Id.* at 249.

concluded that the "alleged manipulation had only a tangential, although perhaps foreseeable, effect on the price of natural gas delivered at the Henry Hub and the price of NYMEX natural gas futures contracts,"[538] which was not sufficient to sustain a claim under the CEA.

C. *Common Law Fraud*

In *Rio Grande Royalty Co. v. Energy Transfer Partners*,[539] the Fifth Circuit affirmed the district court's dismissal of suit brought by Rio Grande Royalty Company, Inc. against Energy Transfer Partners, L.P. (ETP) alleging that ETP had engaged in fraud by reporting the prices for natural gas transactions in Houston Ship Channel (HSC) to the trade press. Rio Grande alleged that the prices reported by ETP, while truthful, were nevertheless fraudulent because ETP's alleged monopolization of the Houston spot market served to lower prices artificially on long-term contracts[540] (or, as the Fifth Circuit characterized matters, Rio Grande accused ETP of "dumping" supply into the market.)[541] And on that basis, Rio Grande attempted to bring a class action suit on behalf of all other natural gas sellers who recouped lower prices resulting from ETP's alleged anticompetitive behavior.[542]

Rio Grande's fraud claims were submitted as part of an amended complaint after the district court had already dismissed Rio Grande's antitrust claims against ETP.[543] The district court denied Rio Grande's motion to amend the complaint to include the fraud claims, holding that Rio Grande failed to state a proper claim.[544] The Fifth Circuit affirmed, holding that ETP could not have engaged in fraud by accurately reporting prices used in a price index, even if the prices it reported were arguably tainted by fraud.[545] If a trade-press index is merely "representative of transactions," then it is a "mundane fact" that the index does purport to represent a "true market price."[546] Thus, there can be no fraud in reporting to a price index the true price and terms of actual transactions with real economic substance.[547]

D. *Nuclear Waste Policy Act*

Under the Nuclear Waste Policy Act of 1982 (NWPA),[548] the federal government was to assume responsibility for the disposal of commercially-generated spent nuclear fuel and high-level radioactive waste by charging utilities to be paid into the Nuclear Waste Fund in return for the Department of Energy's performance of waste disposal services beginning no later than January

538. *Id*.
539. Rio Grande Royalty Co. v. Energy Transfer Partners, 620 F.3d 465 (5th Cir. 2010).
540. *Id.* at 466-67.
541. *Id.* at 467.
542. *Id.*
543. *Id.*
544. *Id.* at 468.
545. *Id.* at 468-69.
546. *Id.* at 469.
547. *Id.*
548. Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10131-10270 (2006).

31, 1998.[549] Pursuant to the NWPA, the Department of Energy created a "Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste."[550] Boston Edison signed that contract in 1983 for spent fuel and radioactive waste generated at its Pilgrim Nuclear Power Station.[551]

But when "it became evident that [the Department of Energy] would not meet its obligations under the Standard Contract, Boston Edison was forced to either increase the storage capacity of [its spent fuel pool], store spent fuel elsewhere, or, once spent fuel storage space was exhausted, cease operations."[552] Boston Edison chose to install high-density racks in the spent fuel pool, with the approval of the NRC,[553] and Entergy (which had been assigned Boston Edison's contract[554]) brought suit against the United States for damages arising from the cost of increasing Pilgrim's storage capacity; for damages arising from the NRC's imposition of fees attributed to the Department of Energy's contractual breach; and for damages arising from increased cost of capital—i.e., costs of securing money to spend on mitigating the government's breach.[555]

Finding that the costs attributed to increasing storage capacity were a foreseeable result of the government's breach and would not have been caused "but for" the government's breach, the court awarded damages to Entergy.[556] The court similarly awarded damages for the fees assessed by the NRC.[557] But the court refused to award "cost of capital" damages, finding that Entergy presented no "evidence of segregated borrowing to meet its mitigation needs," such that it "failed to establish that its claimed financing costs were directly related to required borrowing through specific debt instruments."[558] Finally, the court denied the government various requests for set-offs against the awarded damages.[559]

E. Indian Mineral Leasing Act

In *Jicarilla Apache Nation v. United States Department of the Interior*, the Jicarilla Apache Nation (Jicarilla) challenged the Department of the Interior's denial of its claim for additional royalties for natural gas leases in force between January 1984 and June 1995.[560] The D.C. Circuit found that "Interior failed to consider an important aspect of the problem when it retrospectively applied regulations intended to only have prospective effect and failed to engage in

549. Bos. Edison Co. v. United States, 93 Fed. Cl. 105, 111 (2010).

550. 42 U.S.C. § 10222(a)(1); *Bos. Edison Co.*, 93 Fed. Cl. at 111 (referencing N. States Power Co. v. United States, 224 F.3d 1361, 1364 (Fed. Cir. 2000)).

551. *Bos. Edison Co.*, 93 Fed. Cl. at 111.

552. *Id.*

553. *Id.* at 112.

554. *Id.* at 111.

555. *Id.* at 112-13.

556. *Id.* at 115-18.

557. *Id.* at 131.

558. *Id.* at 133. *See generally id.* at 131-33.

559. *Id.* at 133-39.

560. Jicarilla Apache Nation v. U.S. Dep't of Interior, 613 F.3d 1112 (D.C. Cir. 2010).

reasoned decisionmaking when it made an unacknowledged volte-face on the applicability of the Jicarilla methodology."[561]

Jicarilla, a federally recognized Indian Tribe, obtains royalty payments from natural gas leases on their reservation in northwest New Mexico.[562] The Minerals Management Service (MMS) helps manage the leases.[563] Due to concerns about the absence of arm's length transactions, the leases contain provisions describing how to calculate the value of the natural gas for royalty purposes.[564] Terms not defined in the lease were defined by Interior Department regulations issued in 1988.[565]

In 1996, the MMS and Jicarilla began developing a new methodology to calculate the royalty for the natural gas leases.[566] The MMS relied on Jicarilla's sales data from its royalty-in-kind program.[567] The Jicarilla methodology involved the MMS using the prices Jicarilla received for the natural gas to extrapolate the sales price for the gas sold by the lessees.[568] The MMS used the Jicarilla methodology to calculate major portion prices for leases during the period from January 1984 to June 1995 and issued orders directing lessees to pay additional royalties.[569]

Interior initially upheld the use of the Jicarilla methodology to calculate royalties, finding that it was "consistent with the 1988 regulations."[570] However, in a later case which "neither cited nor mentioned the [earlier] contrary result," Interior found the Jicarilla methodology "inconsistent with the 1988 regulations."[571] On appeal Jicarilla challenged Interior's unexplained shift.[572] Jicarilla alternatively argued that the later case's reasoning could not be applied to the period from January 1984 to February 1988 because the 1988 Regulations were not in effect during that period.[573] The District Court rejected Jicarilla's argument and did not address the alternative argument.[574]

The Interior Department argued that Jicarilla waived its argument because Jicarilla did not raise it during the later case despite the fact that Interior's own rules excluded Jicarilla from participating in that case, asserting that Jicarilla could have had MMS raise the argument on its behalf.[575] The court rejected the argument finding that parties should not be required to use "off-the-record" meetings with agency officials to protect their claims.[576]

561. *Id.* at 1114-15.
562. *Id.* at 1115.
563. *Id.*
564. *Id.*
565. *Id.*
566. *Id.*
567. *Id.*
568. *Id.*
569. *Id.*
570. *Id.* at 1116.
571. *Id.*
572. *Id.*
573. *Id.*
574. Jicarilla Apache Nation v. U.S. Dep't of the Interior, 604 F. Supp. 2d 139 (D.D.C. 2009).
575. *Jicarilla Apache Nation*, 613 F.3d at 1116-17.
576. *Id.* at 1117-18.

The D.C. Circuit concluded that Interior "failed to consider an important aspect of the problem," as required under *State Farm*, when it applied the 1988 regulations to the period between January 1984 and February 1988.[577] The court held that Interior's failure to explain its shift between cases based on similar facts was arbitrary and capricious.[578]

F. Clean Air Act

In *United States v. Cinergy Corp.*, the Seventh Circuit reversed a district court decision that had favored the government and dismissed the government's cross appeal, in a suit relating to modifications made by Cinergy Corporation affiliates (collectively, Cinergy) to several coal-fired power plants located in the Midwest.[579] Specifically, the U.S. Environmental Protection Agency (EPA) alleged that Cinergy failed to obtain permits required by regulations issued under the Clean Air Act for the modifications,[580] potentially subjecting Cinergy to penalties of $25,000 per day per violation and an injunction that could require it to shut down the plants.[581]

Judge Posner's opinion for the court noted it was the second appeals court decision relating to this case.[582] In the first, on an interlocutory appeal, the court (in an opinion also authored by Judge Posner) had found that the impact of a modification was appropriately measured by actual annual increases in generation (the actual-emissions standard) rather than increases in hourly capacity.[583] The distinction was important because Cinergy's modifications had increased the total number of hours that units could operate, but not necessarily the hourly limitation, thus potentially allowing more overall pollution over an annual period.[584]

After *Cinergy I*, the district court held a jury trial relating to fourteen modifications made to three plants. The jury found Cinergy liable for failing to obtain permits for four projects at one plant that would increase the plant's annual emissions of sulphur dioxide and nitrogen oxide.[585] On appeal, Cinergy argued that the rules in effect at the time it made the modifications—applicable pursuant to an EPA-approved state Clean Air Act implementation plan—did not require it to obtain permits for modifications that could increase the annual emissions of sulphur dioxide.[586] In opposition, the government asserted that even if the rules had not yet been changed, Cinergy was on notice that they would be changed and thus should be held to the stricter actual-emissions standard.[587] In fact, it took twelve years for the state to propose and the EPA to

577. *Id.* at 1119 (citing Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

578. *Id.* at 1120.

579. United States v. Cinergy Corp., 623 F.3d 455 (7th Cir. 2010) (*Cinergy II*).

580. *Id.* at 456; Clean Air Act, 42 U.S.C. §§ 7401-7671(q), 7475(a) (2006).

581. *Cinergy II*, 623 F.3d at 456.

582. *Id.* at 456-57.

583. *Id.* (citing United States v. Cinergy Corp., 458 F.3d 705 (7th Cir. 2006) (*Cinergy I*)).

584. *Id.* at 457.

585. *Id.*

586. *Id.*

587. *Id.* at 458.

approve the revisions after the state first agreed to make the change to the actual-emissions standard.[588]

While sympathizing with the EPA's concern over the impact of the modifications, the appeals court ruled that "notice" could not trump the actual language of the regulations relating to sulphur dioxide that were in effect when the modifications were made:

> The agency's frustration is understandable. It embraced the actual-emissions standard, which for the reasons explained in our previous opinion and repeated earlier in this one makes better economic sense, before [the revised regulations were] . . . presented for its approval. It should have disapproved it; it didn't; but it can't impose the good standard on a plant that implemented the bad when the bad one was authorized by a state implementation plan that the EPA had approved. The blunder was unfortunate but the agency must live with it.[589]

Cinergy next argued that the ruling relating to nitrogen oxide increases should be reversed due to a faulty evidentiary ruling that allowed expert testimony that the plant modifications would increase nitrogen oxide beyond levels allowed by the state implementation plan.[590] Finding that the testimony was based on an analysis of baseload generation, rather than the kind of cycling plant at issue in the hearing, the court ruled the testimony should have been excluded and, therefore, reversed the district court judgment on the issue of increased nitrogen oxide emissions as well (the government did not contest Cinergy's claim that if the testimony was excluded Cinergy would be entitled to judgment).[591]

The opinion noted, but did not address various other arguments, including the government's cross-appeal, finding them to be either "too feeble to merit discussion" or "academic" in light of the court's analysis.[592]

G. Coastal Zone Management Act

In *Coastal Habitat Alliance v. Patterson*,[593] the Fifth Circuit affirmed an order of the U.S. District Court for the Western District of Texas dismissing appellant Coastal Habitat Alliance's (Alliance) suit for lack of standing. The Alliance had sought declaratory and injunctive relief against two Texas agencies on the grounds that the agencies had not provided for an environmental consistency review or public comment regarding proposed wind farms along the Texas Gulf Coast.[594] The Alliance maintained that, even though the Texas statute providing for such procedures had been repealed, the defendant agencies had agreed to such procedures in exchange for funding under the CZMA, and that failure to implement the procedures violated preemptive federal law and violated the Alliance's due process rights under the U.S. Constitution.[595]

588. *Id.*
589. *Id.* at 459.
590. *Id.*
591. *Id.* at 460.
592. *Id.* at 461.
593. Coastal Habitat Alliance v. Patterson, 385 F. App'x. 358 (5th Cir. 2010).
594. *Id.* at 359.
595. *Id.*

Reviewing the district court's decision de novo, the Fifth Circuit affirmed the court's ruling that Alliance had failed to demonstrate that it suffered a concrete and particularized legally-cognizable harm.[596] The court acknowledged that the Fifth Circuit recognizes "an implied right of action to enjoin state regulation preempted by federal" statute or the U.S. Constitution,[597] but found that the CZMA is not an independent cause of preemption except in cases of actual conflict between state and federal law.[598] Here, there was no actual conflict with the CZMA because nothing in the CZMA required the procedural rights the Alliance was seeking the state agencies to provide. The CZMA generally only requires that the Secretary of the Interior (Secretary) find that a state's coastal management program provides for "an adequate planning process and general techniques for control of land use involving the construction of energy facilities."[599] The procedures the Alliance was seeking to invoke had been required under the repealed Texas statute, not the CZMA.[600] The court found, moreover, that,

> [a]s the duties outlined in the [CZMA] are directed primarily at the Secretary, we do not find that a State's purported failure to comply with the pre-requisites for a [state coastal management] plan's approval create an "actual conflict" between State and federal law, giving rise to a private-party preemptive "procedural right" of enforcement.[601]

The court explained further in this regard that the CZMA "articulates its own method of ensuring a State's continuing compliance with the Act, namely suspension and withdrawal of federal funding."[602] It was "telling," the Court observed, that the CZMA contained such an enforcement mechanism without mentioning a private right of action.[603]

Finally, the court noted that, even though it had recognized an implied right of action to enjoin state or local laws preempted by federal law, where the "benefit" sought by the Alliance was the procedural right to challenge wind farm construction, and no such right existed under the CZMA that the Texas law was impeding, the Alliance lacked standing.[604]

H. National Environmental Policy Act

In *New Jersey Department of Environmental Protection v. United States Nuclear Regulatory Commission*, the Third Circuit addressed whether the NRC was required to "examine the environmental impact of a hypothetical terrorist attack" during its relicensing of a nuclear power facility.[605] The New Jersey Department of Environmental Protection (NJDEP) sought to intervene in proceedings before the NRC concerning the relicensing of the Oyster Creek

596. *Id.* at 361.

597. *Id*. at 359-60 (citing Planned Parenthood of Hous. & Se. Tex. v. Sanchez, 403 F.3d 324, 334 (5th Cir. 2005)).

598. *Id*. at 360 (citing Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 591 (1987)).

599. *Id*. at 360 (citing 16 U.S.C. § 1455(d)(11) (2006)).

600. *Id*.

601. *Id*.

602. *Id*. (citing 16 U.S.C. § 1458).

603. *Id*. at 360-61 (quoting George v. N.Y.C. Dep't of City Planning, 436 F.3d 102, 103 (2d Cir. 2006)).

604. *Id*. at 361 n.1.

605. N.J. Dep't of Envtl. Prot. v. NRC, 561 F.3d 132, 133 (3d Cir. 2009).

Nuclear Generating Station (Oyster Creek). NJDEP asserted that NRC was delinquent in its duties under NEPA when it failed to consider the effects of a terrorist attack on Oyster Creek.[606]

The court determined that NRC was not required to consider such effects in its NEPA analysis because there was no "'reasonably close causal relationship' between the Oyster Creek relicensing proceeding and the environmental effects of a hypothetical aircraft attack."[607] The court further noted that NRC sufficiently addressed the environmental impact of a potential terrorist attack through its Generic Environmental Impact Statement and site-specific Supplemental Environmental Impact Statement.[608]

NEPA, the court explained, aims to "insure a fully informed and well-considered decision" and apprise the public of its analysis.[609] The court of appeals also looked to Supreme Court precedent applying NEPA. In *Metropolitan Edison Co. v. People Against Nuclear Energy*, the Supreme Court "explained that NEPA attaches only when there is a 'reasonably close causal relationship between a change in the physical environment and the effect at issue.'"[610] In another case discussing NEPA analysis, *Department of Transportation v. Public Citizen*, the Supreme Court strengthened the reasonably close causal relationship standard: in instances where an "agency has no authority to prevent [an] effect," the agency could not be held responsible for that effect under NEPA.[611] Thus, the Third Circuit reasoned that the "NRC's lack of control over airspace supports [the] holding that a terrorist attack lengthens the causal chain beyond the 'reasonably close causal relationship' required."[612] It also analyzed the issue of how a potential terrorist attack acts as a "[superseding] intervening force" as explained by section 442 of Restatement (Second) of Torts.[613]

The court went on to distinguish and depart from the Ninth Circuit's holding in *San Luis Obispo Mothers for Peace v. NRC*.[614] There, the Ninth Circuit held that "the possibility of terrorist attack is not so 'remote and highly speculative' as to be beyond NEPA's requirements."[615] The Third Circuit disagreed with this holding but also noted the factual differences between the two cases. San Luis Obispo involved "the proposed construction of a new facility—a change to the physical environment arguably with a closer causal relationship to a potential terrorist attack than the mere relicensing of an existing facility."[616]

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606. *Id.*

607. *Id.* at 136.

608. *Id.* at 136, 143-44.

609. *Id.* at 133-34 (quoting Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978)).

610. *Id.* at 137 (quoting Metro. Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 774 (1983)).

611. Dep't of Transp. v. Pub. Citizen, 541 U.S. 752, 767 (2004).

612. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 140.

613. *Id.*

614. San Luis Obispo Mothers for Peace v. NRC, 449 F.3d 1016 (9th Cir. 2006).

615. *Id.* at 1031.

616. *N.J. Dep't of Envtl. Prot.*, 561 F.3d at 142 (citing *Mothers for Peace*, 449 F.3d at 1021).

The Court concluded by repeating that, although not the case, even if the NRC had been required under NEPA to examine the effects of a potential terrorist attack at Oyster Creek, either its Generic Environmental Impact Statement or Supplemental Environmental Impact Statement satisfied any such obligation.[617]

In *Theodore Roosevelt Conservation Partnership v. Salazar*,[618] the D.C. Circuit affirmed a district court order granting summary judgment for the government against claims for injunctive relief made by several environmental groups who sought to stop the drilling of new wells in the Atlantic Rim Natural Gas Field Development Project, which encompasses 270,000 acres of publicly and privately owned land in Wyoming.

The Bureau of Land Management (BLM), an agency within the Department of the Interior, established the Atlantic Rim Project through a record of decision released in 2007 pursuant to the bureau's authority under the Federal Land Policy and Management Act of 1976 (FLPMA),[619] following BLM's preparation of an environmental impact statement (EIS) under NEPA.[620] The Theodore Roosevelt Conservation Partnership and the Natural Resources Defense Council each appealed the BLM's record of decision to the Department of Interior Board of Land Appeals and separately challenged the BLM's record of decision in federal district court, which consolidated the cases and granted the government's motions for summary judgment against them.[621]

On appeal, the D.C. Circuit affirmed the district court's decision and the underlying record of decision on all grounds, rejected each of appellants' six arguments. First, the Court found that the scope of the Atlantic Rim Project did not exceed the scope of BLM's 1990 Great Divide Resource Management Plan (and thus did not violate either FLPMA or NEPA on that ground).[622] Second, BLM's use of a particular mathematic model—the "Scheffe method"—to predict ozone concentration effects produced by anticipated drilling activities and associated development in the Atlantic Rim Project was not arbitrary and capricious, rebuffing the petitioners' claims that the Scheffe method had become obsolete because NEPA regulations requiring federal agencies to ensure the scientific integrity of their environmental analyses "do[] not require that an agency employ the best, most cutting-edge methodologies."[623] Third, BLM did not act arbitrarily and capriciously or contrary to NEPA by excluding two potential nearby development projects near the Atlantic Rim area from the EIS's assessment of cumulative environmental impacts, because the impacts of those projects were not reasonably foreseeable; and on this point, the Court affirmed the district court's exclusion of appellants' evidence not contained within the

617. *Id.* at 143-44.

618. Theodore Rossevelt Conservation P'ship v. Salazar, 616 F.3d 497 (D.C. Cir. 2010).

619. Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1787 (2006). As pertinent here, the FLPMA requires the BLM to "manage the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a).

620. 42 U.S.C. §§ 4321-4370h (2006).

621. Theodore Roosevelt Conservation P'ship v. Salazar, 605 F. Supp. 2d 263 (D.D.C. 2009).

622. *Theodore Roosevelt Conservation P'ship*, 616 F.3d at 508-10.

623. *Id.* at 511 (construing 40 C.F.R. § 1502.24).

administrative record.[624] Fourth, the EIS and record of decision's evaluation of mitigation measures sufficed to satisfy NEPA's requirements that the decision consider mitigation measures and take a "hard look" at environmental impacts before actions are taken.[625] Fifth, BLM did not abuse its discretion in determining how to achieve FLPMA's "multiple use and sustained yield" objectives under 43 U.S.C. § 1732(a), emphasizing the agency's "wide discretion to determine how those principles should be applied."[626] And sixth, BLM did not deprive the public of an adequate opportunity to comment on its environmental assessment.[627]

I. Tax Injunction Act and The Comity Doctrine

In *Levin v. Commerce Energy, Inc.*,[628] the Supreme Court considered the application of the Tax Injunction Act (TIA)[629] and the Court's comity doctrine to a challenge brought under the Commerce and Equal Protection Clauses of the U.S. Constitution seeking to enjoin the State of Ohio from providing more favorable tax treatment to local distribution companies (LDCs) to the alleged detriment of independent marketers (IMs). Generally, LDCs maintain networks of natural gas pipeline facilities to provide retail customers with transportation and distribution service sold bundled together with the natural gas commodity. On the other hand, IMs do not own transportation or distribution facilities but sell only the natural gas commodity, which is transported on the facilities of LDCs and sold to retail consumers separately from transportation and distribution services which are purchased from LDCs.

Under Ohio law, LDCs are afforded several statutory tax advantages that are denied to IMs. Whereas IMs must pay the state sales and use tax, LDCs are entitled to pay instead the lower state gross receipts excise tax.[630] Also, LDCs are exempt from the commercial activities tax levied upon the taxable gross receipts of IMs.[631] Finally, the sales of natural gas between LDCs are exempt from the gross receipts tax, while IMs must pay the tax on gas purchased from LDCs.[632]

The respondents in the case, two IMs that sell natural gas to retail customers in Ohio and one of their customers, originally brought suit against the Tax Commissioner of Ohio (Commissioner) in the U.S. District Court for the Southern District of Ohio, invoking federal question jurisdiction under 28 U.S.C. § 1331. The respondents sought declaratory and injunctive relief to prevent the state from recognizing or enforcing the tax provisions considered favorable to LDCs. The respondents sought in their suit only to end the tax advantages available to LDCs, and did not seek to obtain the favorable tax treatment for IMs.

624. *Id.* at 512-15 (construing 40 C.F.R. § 1508.7).
625. *Id.* at 517.
626. *Id.* at 518 (citing Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004)).
627. *Id.* at 518-19.
628. Levin v. Commerce Energy, Inc., 130 S. Ct. 2323 (2010).
629. Tax Injunction Act, 28 U.S.C. § 1341 (2006).
630. *Levin*, 130 S. Ct. at 2328.
631. *Id*.
632. *Id*.

The Commissioner moved for summary judgment, alleging that the district court should refuse jurisdiction pursuant to the TIA and the comity doctrine. The TIA provides that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."[633] The TIA prohibits "state taxpayers from instituting federal actions to contest their [own] liability for state taxes,"[634] but it does not prohibit third parties "from pursuing constitutional challenges to tax benefits in a federal forum."[635] The comity doctrine, described by the Court as "more embracive than the TIA," restrains federal courts from entertaining claims that risk disrupting state tax administration.[636]

The district court held that the TIA did not bar its jurisdiction to hear the suit, finding that respondents' requested relief "would not disrupt the flow of tax revenue" to the state.[637] Nevertheless the district court granted the Commissioner's motion and dismissed the suit, invoking the comity doctrine. The district court stated that in seeking to compel the state legislature to levy taxes upon LDCs, the respondents were seeking to draw federal courts into "a particularly inappropriate involvement in a state's management of its fiscal operations."[638]

On review, the Sixth Circuit upheld the district court's determination that the TIA did not bar the respondents' suit, but overturned the lower court on its application of the comity doctrine.[639] The Sixth Circuit ruled that the district court's invocation of the comity doctrine was too expansive. The appellate court relied upon language in a footnote in the 2004 decision in *Hibbs v. Winn*, which observed that the Supreme Court "has relied upon 'principles of comity' to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection."[640] The Sixth Circuit found that the case at bar was seeking to compel rather than arrest state tax collection and was indistinguishable from *Hibbs*. The Sixth Circuit ruled that the district court's broad application of the comity doctrine would effectively render the TIA superfluous, and remanded the case to the district court for a decision on the merits.

The Supreme Court reversed the Sixth Circuit and held that under the circumstances presented in the proceeding, the claim brought by the respondents was properly refused by the district court under the comity doctrine and therefore must be brought initially in state court. The court explained that the comity doctrine instructs lower federal courts to refuse to adjudicate cases within their jurisdiction where doing so would improperly interfere with the states' function within the federal system. In particular, the Court has cautioned lower federal courts from taking cases that bear upon the constitutionality of state taxation of

633. 28 U.S.C. § 1341.

634. *Levin*, 130 S. Ct. at 2332 (quoting Hibbs v. Winn, 542 U.S. 88, 108 (2004)).

635. *Id*.

636. *Id*. at 2325.

637. *Id*. at 2329.

638. *Id*.

639. Commerce Energy, Inc. v. Levin, 554 F.3d 1094 (6th Cir. 2009).

640. Hibbs v. Winn, 542 U.S. 88, 107 n.9 (2004) (citation omitted).

commercial activity since this is the primary means by which states fund their governmental functions.[641]

In approving the district court's refusal to hear the case under the comity doctrine, the Court observed that federal courts generally grant significant deference to state legislatures when reviewing constitutional challenges to economic legislation, particularly on the subject of taxation, where such legislation does not "employ classifications subject to heightened scrutiny or impinge on fundamental rights."[642] "[T]he Constitution simply calls for *equal treatment*," but does not specify how such equal treatment is to be accomplished.[643] The remedy typically imposed by reviewing courts finding state legislation to be unconstitutionally discriminatory is to reform the legislation to implement what is supposed to be the purpose of the state legislature had it been made aware of the constitutional infirmity.[644] Given the expertise of state tribunals in this area, the Court prefers cases to be remanded to the state courts to fashion an appropriate remedy where unconstitutional discrimination is found.[645] The Court pointed to problems that would arise in situations where such actions were initially brought in federal court. Specifically, under the TIA, federal courts would be unable to grant any relief that had the effect of diminishing a state's tax revenues "even if such relief is the remedy least disruptive of the state legislature's design."[646] Also, a reviewing federal court would be unable to remand such a proceeding to a state court—the tribunal assumed to have the proper authority and expertise in fashioning a suitable remedy—"because federal tribunals lack authority to remand to the state court system an action initiated in federal court."[647]

The Court distinguished its ruling in *Hibbs* and the footnote cited by the Sixth Circuit from the case at bar. In *Hibbs*, the Court held that neither the TIA nor the comity doctrine barred a federal district court from adjudicating an Establishment Clause challenge to a state tax credit that allegedly funneled public funds to parochial schools.[648] The Court stated that it had not had "prior occasion to consider, under the comity doctrine, a taxpayer's complaint about allegedly discriminatory state taxation framed as a request to increase a competitor's tax burden."[649] Unlike the third-party challengers to the tax credits in *Hibbs*, who faced no tax liability of their own under the challenged program, the respondents in Commerce Energy actively objected to their own tax position, "measured by the allegedly more favorable treatment accorded LDCs."[650] In

641. *Levin*, 130 S. Ct. at 2330.

642. *Id.* at 2333.

643. *Id*.

644. *Id*.

645. *Id*. at 2334.

646. *Id*.

647. *Id*.

648. *Id*. at 2329-30. In so doing, the Court resolved a split among the federal circuit courts regarding the impact of the Courts statements in *Hibbs* upon its comity jurisprudence. *Compare* Coors Brewing Co. v. Mendez-Torres, 562 F.3d 3 (1st Cir. 2009); Commerce Energy, Inc. v. Levin, 554 F.3d 1094 (6th Cir. 2009); Levy v. Pappas, 510 F.3d 755 (7th Cir. 2007); Wilbur v. Locke, 423 F.3d 1101 (9th Cir. 2005) *with* DIRECTV, Inc. v. Tolson, 513 F.3d 119 (4th Cir. 2008).

649. *Id.* at 2332.

650. *Id.* at 2335.

characterizing the respondents in Commerce Energy as seeking the aid of a federal court to improve their own competitive position, the Court distinguished them from the plaintiffs in *Hibbs*. Additionally, the only remedy that could have alleviated the alleged Establishment Clause infirmity in *Hibbs* was the invalidation of the tax credit, inevitably increasing the state's tax receipts. Application of this remedy is well within the authority of a reviewing federal court, and it would not require the federal court to engage in speculation as to the remedy that might best suit the state legislature's preferences, as a court would likely be called upon to do in the case under review.[651] The Court clarified that it did not intend the footnote cited by the Sixth Circuit "to recast the comity doctrine; it intended the note to convey only that the Establishment Clause-grounded case cleared both the TIA and comity hurdles."[652]

With regard to the Sixth Circuit's concern that the district court's application of the comity doctrine would have rendered the TIA "superfluous," the Court noted that "the [TIA] may be best understood as but a partial codification of the federal reluctance to interfere with state taxation,"[653] and that "the principle of comity which predated the [TIA] was not restricted by its passage."[654] The Court observed that the TIA was passed by Congress to address the trend of lower federal courts to circumvent the comity doctrine by questioning the nature of relief available under state law.[655] The Court also contrasted the mandatory jurisdictional proscription of the TIA with the discretionary nature of the comity doctrine. "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."[656] The case was reversed and remanded to the Sixth Circuit.

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651. *Id*. at 2336 ("Because state courts would have no greater leeway than federal courts to cure the alleged violation, nothing would be lost in the currency of comity or state autonomy by permitting the *Hibbs* suit to proceed in a federal forum.").

652. *Id*. at 2335-36.

653. *Id.* at 2331-32 (quoting Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 590 (1995)).

654. *Id.* at 2331. Because it determined that the case was properly dismissed under the comity doctrine, the Court did not rule on the issue of whether the case would have been barred by the TIA. *Id*. at 2336-37.

655. *Id*. at 2331 & n.3, 2336.

656. *Id*. at 2336 (quoting Ohio Bureau of Emp't Servs. v. Hodory, 431 U.S. 471, 480 (1977)).

JUDICIAL REVIEW COMMITTEE