SUMMARY OF JUDICIAL OPINIONS
THIRD QUARTER 2008

The Energy Bar Associations' Judicial Review Committee has provided the following summaries of key appellate decisions reviewing order of the Federal Energy Regulatory Commission (FERC). This report covers the third quarter of 2008.

***New England Power Co. v. FERC*, 533 F.3d 55 (1st Cir. July 16, 2008)**

On July 16, 2008, the First Circuit vacated and remanded FERC orders requiring New England Power Company (NEP) to charge a customer a lower interest rate than what has been set forth in NEP's tariff for late payments associated with the customer's early termination of a full requirements service contract.[1] In 1998, the Town of Norwood, Massachusetts (Norwood) terminated a full requirements service contract with NEP earlier than the contract term, which it was permitted to do provided that it pay a contract termination charge. NEP began charging the termination fee, including a late payment charge of 18 percent per year, consistent with its tariff. In an earlier First Circuit decision, the court directed FERC to determine whether the 18 percent late payment charge constituted an unreasonable penalty. In that same decision, the court rejected Norwood's claim that even if the 18 percent charge was applicable, it should not be applied to payments earlier than a February 2006 FERC order that approved the contract termination charge. The court stated that the relevant tariff language stated that interest would still accrue even if the amount billed was in dispute. On remand, FERC found that the 18 percent charge was unjust and unreasonable, and directed NEP to calculate interest in accordance with the agency's regulations. On rehearing, NEP argued that under section 206 of the Federal Power Act, FERC could only order prospective relief when rates are determined to be unreasonable and, accordingly, the 18 percent charge should apply prior to FERC's determination that the rate was unreasonable (and that the revised rate should be applied prospectively from that date). NEP argued that to do otherwise would violate the filed rate doctrine and the rule against retroactive ratemaking. FERC disagreed, explaining that the First Circuit had already decided the issue of the revised interest rate's effective date.

On appeal, a majority of the First Circuit panel rejected FERC's determination that the court had decided the issue, stating that the court did not evaluate NEP's retroactivity question, "nor would we have purported to decide such a complex question in a single sentence and without the benefit of briefing and argument from the parties."[2] Rather, the court explained that it had decided the narrow issue of whether Norwood owed any interest at all for the period before February 2006. The majority stated that the broader retroactivity question fell outside of the court's mandate to FERC. One judge on the panel dissented, however, arguing that FERC's decision was fair because it provided a remedy for Norwood's non-payment of the termination charge while denying NEP a windfall. The dissenting judge noted that the court's mandate to FERC "leaves no room for the Commission to shorten the period of assessment of reduced interest payments."[3] The dissent argued that this result would have promoted stability,

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[1] 533 F.3d 55 (1st Cir. 2008).
[2] *Id.* at 59.
[3] *Id.* at 61.

predictability, and judicial economy. The dissent also argued that NEP should have sought *en banc* rehearing or Supreme Court review of the mandate if it objected to its language. Finally, the dissent stated that "FERC acted reasonably in taking the court at its word that on remand, it should consider only the reasonableness of the interest rate to be applied to late payments."[4]

*Washington Gas Light Co. v. FERC*, 532 F.3d 928 (D.C. Cir. July 18, 2008)

On July 18, 2008, the D.C. Circuit granted Washington Gas Light Company's (WGL) petition for review of FERC's approval of the expansion of the Cove Point Liquefied Natural Gas (LNG) Terminal (Cove Point).[5] WGL, a local distribution company and recipient of natural gas from Cove Point, sought review of two FERC orders approving the Cove Point Expansion Project, which would increase Cove Point's LNG output and cause low heavy-hydrocarbon LNG not blended with traditional natural gas to flow to local distribution companies. WGL argued that the expansion project will cause severe leakage on its system, inconsistent with the public interest requirements of the Natural Gas Act (NGA).[6] FERC approved the expansion,[7] finding that WGL's use of hot tar while installing compression couplings on its system damaged the couplings' seals such that low heavy-hydrocarbon LNG, decreased operating pressure, or cold temperatures could cause increased leakage, and that unblended LNG would not have done so absent the installation damage. FERC concluded that WGL had sufficient time to repair its system to safely accommodate LNG before the expansion's in-service date and thus the expansion could proceed consistent with the public interest.[8]

The D.C. Circuit held that FERC's conclusion that the installation-related defects caused the leakage was supported by substantial evidence, and refused to second-guess FERC in light of the deference due to the agency's evaluation of such technical matters.[9] However, the court granted WGL's petition because, while FERC attempted to satisfy its duty under the NGA to ensure that the expansion could proceed consistent with the public interest by finding that WGL could repair its system before the expansion's November 2008 in-service date, substantial evidence did not support that finding.[10] Thus, the court vacated FERC's orders to the extent that they approved the expansion, and remanded to FERC to "more fully address whether the Expansion can go forward without causing unsafe leakage."[11]

Remand Update: On October 7, 2008, FERC issued its Order on Remand,[12] in which it re-issued its prior authorizations for the expansion, addressing the safety concerns raised on appeal

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[4] *Id.* at 62.
[5] 532 F.3d 928, 929 (D.C. Cir. 2008).
[6] *Id.* at 929-30.
[7] The court also rejected WGL's claims that the process was inadequate, finding that WGL failed to explain why the technical issues "required more process than FERC normally has the discretion to afford." *Id.* at 933 n.5.
[8] *Id.* at 930-31. *See* Dominion Cove Point LNG, LP, 115 F.E.R.C. ¶ 61,337 (2006), *order on reh'g*, 118 F.E.R.C. ¶ 61,007 (2007).
[9] 532 F.3d at 929-32.
[10] *Id.* at 929, 931-33.
[11] *Id.* at 933.
[12] Dominion Cove Point LNG, LP, 125 F.E.R.C. ¶ 61,018 (2008).

by conditioning its re-authorizations on a cap on deliveries to the Columbia Gas Transmission Corporation system at Loudoun, Virginia, at currently authorized levels, which FERC stated will allow timely completion of the expansion while ensuring that no greater volume of regasified LNG is delivered to the WGL system as a result of the expansion.[13]

Pacific Gas and Electric Co. v. FERC, 533 F.3d 820 (D.C. Cir. July 22, 2008)

In *Pacific Gas and Electric Co. v. FERC*,[14] the D.C. Circuit reiterated its "collateral attack" rule, and refused to grant a petition for review that, "while cloaked in the guise of a challenge to [recent FERC orders], is in fact an impermissible collateral attack on a series of orders that FERC issued [long ago]."[15] The case arose from a dispute between Pacific Gas and Electric Co. (PG&E) and the FERC over whether interconnection studies would be conducted by the Transmission Provider (in this case, the California Independent System Operator (CAISO)), or by the Participating Transmission Owner (PTO) in which the study was to occur (*i.e.*, PG&E).[16] PG&E submitted compliance filings in 2004 and 2005, which proposed that each PTO would conduct the interconnection studies for interconnections occurring in their respective service territories, rather than the CAISO.[17] FERC rejected PG&E's request in four orders issued in 2005 and 2006, concluding that the CAISO would remain in control of the centralized study process, although PG&E could participate in the studies and retain review and recommendation rights.[18] Importantly, in the period of time before and during PG&E's series of compliance filings, FERC issued a series of orders (Order Nos. 2003, 2003-A, and 2003-B[19]), ruling that, as part of the *pro forma* interconnection procedures, interconnection studies would be performed under the control of the Transmission provider.[20] In fact, PG&E's compliance filings with Order Nos. 2003 and 2003-A were those in which PG&E submitted its ultimately-rejected interconnection study proposal.

The D.C. Circuit refused to allow PG&E to challenge the interconnection study rules in a petition for review of FERC's PG&E orders, on the ground that such challenges should have been brought in petitions for review of Order Nos. 2003, 2003-A, and 2003-B.[21] "If PG&E objected to that requirement, it therefore had to petition for review in this court no later than

[13] *Id.* at PP 3, 68-69, 73.
[14] 533 F.3d 820 (D.C. Cir. 2008).
[15] *Id.* at 822.
[16] *Id.* at 824.
[17] *Id.*.
[18] *See id.* at 823-24.
[19] See *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160, *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171 (2004), *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007).
[20] *Pacific Gas & Electric Co.*, 533 F.3d at 825.
[21] *Id.*

sixty days after December 20, 2004—the date the Commission issued Order No. 2003-B, which was the last order on rehearing that addressed that requirement."[22]

PG&E argued that its petition for review was not barred by the collateral-attack rule, on two grounds: (1) that FERC's Order Nos. 2003, 2003-A, and 2003-B did not give PG&E "sufficient notice" of the rule to which it objected;[23] and (2) that even if Order Nos. 2003-B gave sufficient notice of the rule, PG&E still filed its compliance filings prior to FERC's issuance of that order.[24] The D.C. Circuit rejected both of those arguments, concluding that all three orders in the Order No. 2003 series gave PG&E sufficient notice of the rule.[25]

Dominion Transmission, Inc. v. FERC, 533 F.3d 845 (D.C. Cir. July 25, 2008)

On July 25, 2008, the D.C. Circuit vacated certain FERC orders on the basis that the challenged orders were inconsistent with the *Mobile-Sierra* doctrine,[26] which allows FERC to abrogate or modify privately negotiated contracts only if required by the public interest.[27] In the underlying proceeding, Dominion Transmission, Inc. (Dominion), a natural gas transporter subject to FERC jurisdiction under the Natural Gas Act (NGA), filed a request to increase its transportation and storage service rates under NGA section 4 in 2000. A settlement agreement was eventually filed and approved by FERC in 2001. Under the 2001 settlement, Dominion would not seek a section 4 rate increase before July 2003, and would submit as part of its next section 4 filing a fuel report that included 16 specific types of information. Dominion filed the fuel report in 2003 and 2004. A Dominion customer, KeySpan Corp. (KeySpan) was concerned that Dominion may have been subsidizing certain of its customers, and therefore filed a motion asking FERC to direct Dominion to include three additional types of information in the reports. While the motion was pending, the New York Public Service Commission (NYPSC) informed Dominion that it planned to file a complaint under section 5 of the act, arguing that Dominion's rates were excessive. Ultimately, Dominion and the NYPSC entered into a settlement agreement in 2005 that lowered Dominion's rates. The 2005 settlement included a moratorium on challenges to Dominion's generally applicable rates or fixed fuel retention percentages for a certain period. Although there was a moratorium period, FERC could still commence a section 5 proceeding against Dominion if it acted "on its own volition." Finally, Dominion would continue to file the fuel reports. FERC approved this settlement.

When Dominion filed a fuel report in 2005, KeySpan filed a second motion with FERC, asking it to direct Dominion to modify the report to include the additional information it had earlier requested. FERC agreed with KeySpan, finding that the 2005 settlement was unjust and unreasonable to the extent the fuel reports did not include the additional pieces of information, and directed Dominion to include that information for both past and future fuel reports. On

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[22] *Id.* (citing *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 298 (D.C. Cir. 2008)).
[23] *Id.* (citing *Southern Co. Servs. Inc. v. FERC*, 416 F.3d 39, 44-45 (D.C. Cir. 2005)).
[24] *Id.* at 827.
[25] *Id.* at 826-27.
[26] *See United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).
[27] 533 F.3d 845 (D.C. Cir. 2008)

rehearing, FERC generally upheld its earlier determination, although it agreed it could only require Dominion to include this information prospectively. FERC stated that the *Mobile-Sierra* standard of review did not apply, arguing that it had not modified the terms of the 2005 settlement but rather simply required that it be supplemented. In addition, FERC argued that its directive was consistent with the purpose and intent of the 2001 and 2005 settlements and thus did not implicate *Mobile-Sierra*. Finally, FERC asserted that it acted "on its own volition," consistent with the express language in the 2005 settlement.

On appeal, the court (after addressing procedural issues) concluded rejected the agency's arguments. First, the court found that FERC's argument that it was merely supplementing the 2005 settlement was unpersuasive, since the settlements contained unambiguous language that precisely set forth the specific types of information to be included in the fuel reports, and that FERC's direction to supplement was in fact a modification. Second, the court rejected FERC's argument that its action was consistent with the intent and purpose of the settlements. The court stated that the fuel report was an integral part of the 2005 settlement package. Moreover, the court rejected the agency's assertion that it could request additional information if important to carry out is statutory oversight responsibilities. Next, the court addressed whether FERC acted "on its own volition," noting that the agency acted at the request of KeySpan. Although FERC argued that it could act "on its own volition" if acting on a motion rather than a complaint, the court concluded that FERC's interpretation of the language was unreasonable, since it could effectively be nullified so long as an entity used a procedural vehicle other than a formal complaint to prompt FERC action.

Remand Update: On October 23, 2008, FERC issued an order accepting the 2008 fuel report filed by Dominion, but rejecting (consistent with the D.C. Circuit decision) the three pieces of additional information that it had required Dominion to add.[28]

***Klamath Water Users Ass'n v. FERC*, 534 F.3d 745 (D.C. Cir., July 25, 2008)**

In this case[29] the D.C. Circuit dismissed a petition for review of FERC orders[30] that considered whether a rate contract included in the terms of an original hydroelectric project license would be included in an annual license issued to the project while relicensing proceedings were ongoing, pursuant to section 15(a)(1) of the Federal Power Act (FPA). The court dismissed the case on jurisdictional grounds, finding that Petitioner Klamath Water Users Association (Klamath Water Users) lacked standing to challenge the FERC orders. The hydroelectric project at issue – the Klamath Hydroelectric Project – consists in part of the Link River Dam, constructed in 1917 by a predecessor company to PacifiCorp (the current licensee).[31] Pursuant to a 1917 contract with the United States, PacifiCorp provided water and low-cost electric power to the United States and Klamath Water Users. In the 1950s, the Federal Power Commission (FPC) (predecessor agency to FERC) determined that the Klamath Hydroelectric Project was subject to its licensing authority. As part of its order granting the project a license,

[28] *Dominion Transmission, Inc*., 125 F.E.R.C. ¶ 61,087 (2008).
[29] 534 F.3d 745 (D.C. Cir. 2008)
[30] *See PacifiCorp*, 114 F.E.R.C. ¶ 61,051, *reh'g denied*, 115 F.E.R.C. ¶ 61,075 (2006).
[31] All references to "PacifiCorp" refer to either PacifiCorp or its predecessor company.

the FPC required PacifiCorp to re-negotiate and file the 1917 contract with the same or substantially similar terms, and with a term equal to the 50-year term of the project license. PacifiCorp filed a revised contract in 1956, under which it agreed to provide electric power at fixed rates to the United States and Klamath Water Users. The revised contract was for a 50-year term commencing on the date it was approved by the California and Oregon public utility commissions. Both the revised contract and the project license were thus set to expire in 2006.

In 2004, PacifiCorp filed an application to relicense the Klamath Hydroelectric Project. Under section 15(a)(1) of the FPA, PacifiCorp was entitled to receive an annual license for the project "under the terms and conditions of the existing license" while relicensing proceedings were ongoing. Anticipating the 2006 expiration of the original project license and the 1956 contract, the Interior Department sought a declaratory ruling from FERC that the terms of any annual license for the project issued under FPA section 15(a)(1) would include the 1956 contract (and the fixed electric power rates in that contract). FERC denied the request, concluding that the 1956 contract would expire by its own terms, and thus would not be included in the annual license. Further, FERC stated that it never purported to approve the retail electric power rates in the 1956 contract when it order that the contract be included in the terms of the license; rather, it found only that the contract would adequately compensate the United States for use of its property, in accordance with section 10(e) of the FPA.[32] FERC noted that both Oregon and California had already exercised their independent authority to replace the rates in the 1956 contract with new rates.

On appeal, Klamath Water Users argued that section 15(a)(1) of the FPA requires that any annual license include the 1956 contract and the retail electric power rates in that contract, since both were express conditions of PacifiCorp's original license. The court did not reach the merits of this argument, however, concluding that Klamath Water Users lacked standing to challenge the FERC orders at issue. Specifically, the court held that Klamath Water Users failed to satisfy the third of the minimum constitutional requirements for standing – "that it is likely as opposed to merely speculative that the [claimed] injury will be redressed by a favorable decision of the court."[33] Assuming that Klamath Water Users were claiming injury from the loss of the low electricity rates in the 1956 contract, the court found that they had "offered no reason to believe that a decision requiring FERC to include the 1956 contract in PacifiCorp's annual license" would result in either California or Oregon changing the retail rates each state had already approved to replace the rates in that contract.[34] In fact, the court noted, both states were cognizant of the ongoing FERC proceedings, but nonetheless proceeded to adopt new retail rates

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[32] FPA section 10(e) provides that where a hydroelectric project involves the use of government dams or other structures owned by the United States, FERC must fix a reasonable charge for the use of such property.

[33] *Klamath Water Users Ass'n*, 534 F.3d at 738. The "'irreducible constitutional minimum'" requirements to establish standing to seek court review of an administrative agency order are "that the petitioner suffered an injury-in-fact, that the injury is fairly traceable (causally connected) to the challenged agency action, and that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision of the court." *Id., citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

[34] *Klamath Water Users Ass'n*, 534 F.3d at 740.

to replace those in the 1956 contract.[35] Further, Klamath Water Users did not respond in their reply brief to this redressability problem (which FERC raised in its brief), a fact which the court found "dispositive" since "the burden of establishing redressability falls upon the petitioner."[36]

***Fall River Rural Electric Cooperative, Inc. v. FERC*, No. 06-71944 (9th Cir., Sept. 10, 2008)**

In this decision,[37] the Ninth Circuit denied a petition for review filed by Fall River Rural Electric Cooperative, Inc. (Fall River) regarding FERC's dismissal of Fall River's hydroelectric license application. Back in 2001, FERC had granted Fall River a three-year preliminary permit to conduct investigations to determine the feasibility of a hydroelectric project at Hebgen Dam in Montana. Fall River cooperated with Pennsylvania Power and Light Montana (PPL Montana), which held a license from FERC for a hydroelectric project that was also located at Hebgen Dam. In May 2004, Fall River filed a final license application for its proposed project, which proposed several modifications to the existing project licensed to PPL Montana. FERC subsequently informed Fall River that it could not approve a proposal that would modify the existing project without PPL Montana's concurrence, consistent with section 6 of the Federal Power Act (FPA), and it therefore condition its processing of Fall River's application on a showing that PPL Montana would not rule out agreement to the modifications. In 2005, PPL Montana terminated negotiations with Fall River, and filed a letter to that effect with FERC. In a status report to FERC, Fall River expressed its intent to continue working with PPL Montana to resolve differences and requested that FERC hold the proceeding in abeyance. However, PPL Montana responded that it did not intend to resume negotiations. Subsequently, FERC dismissed the license application under section 6 of the FPA and rejected the request to hold the proceeding in abeyance, citing PPL Montana's unwillingness to resume negotiations. Fall River sought rehearing, which was denied. FERC noted several of the proposed modification to the existing project, finding that there were not insubstantial.

On review, the court first noted that section 6 of the FPA provides that a proposed project must substantially alter an existing one, and that FERC may authorize *de minimis* changes. The court also stated that FERC precedent explains that whether an existing project is substantially altered is primarily a case-specific issue. The court looked to see whether FERC's determination was supported by substantial evidence, and concluded that it was. Specifically, the court stated that by "[c]hoosing to focus on the impact of each of the[ ] proposed modifications individually, Fall River apparently does not appreciate the cumulative impact of its proposed project….Collectively, these alterations fundamentally change the physical characteristics of the" existing project.[38] The court also found that FERC appropriately distinguished the cases cited by Fall River in support of its contention that it was not making an insubstantial modification. Further, the court rejected Fall River's argument that the challenged orders were inconsistent with its regulations and its issuance of a preliminary permit. The regulations and precedent provide that unless there is a permanent legal barrier that does not permit FERC from

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35 *Id.*
36 *Id*.
37 No. 06-71944 (9th Cir. 2008).
38 Slip op. at 13.

licensing a project, it will issue a preliminary permit. However, the court noted that had Fall River and PPL Montana reached agreement, there was no indication that there would have been any such permanent legal barrier, and thus concluded that the challenged orders were consistent with the regulations and the issuance of the preliminary permit. Finally, the court dismissed Fall River's argument that FERC did not adequately consider whether PPL Montana implicitly consented to Fall River's proposal by not protesting or commenting on the preliminary permit application or the final license application. According to the court, Fall River failed to cite any case for the proposition that FERC must "thoroughly analyze each and every argument in order to engage in reasoned decision making . . . ."[39] In any event, the court stated that it was unaware of any precedent holding that consent could be implied. Thus, the court "harbor[ed] no doubt that FERC recognized Fall River's implied consent argument and rejected it."[40]

***State Water Contractors, et al. v. FERC*, No. 06-74506 (9th Cir. 2008)**

In a brief unpublished memorandum decision, a Ninth Circuit panel concluded that FERC's approval of a "flat" transmission rate and its rejection of petitioners' argument that time-of-use rates were required under the California Independent System Operator Corporation's (CAISO) congestion management system was not arbitrary and capricious. In the underlying orders, FERC largely approved the CAISO's proposed Transmission Access Charge (TAC), which was based on a flat MWh rate. FERC also summarily affirmed an Administrative Law Judge's initial decision rejecting time-of-use rates. On rehearing, parties argued that the rejection of time-of-use rates violated cost causation principles. Parties also asserted that FERC had previously concluded that the CAISO's congestion management system, which was a component that FERC relied upon in approving the CAISO's original TAC (that included a flat rate), was unjust and unreasonable. FERC rejected these arguments, finding that the TAC rate would send proper price signals and encourage efficient usage of the transmission grid.

The court noted that a time-dependent rate is not required under existing law and that FERC's decision did not violate its own policy of requiring rates to send price signals. Indeed, the court stated that FERC's finding that the flat rate included in the CAISO's tariff sends proper signals was supported by substantial evidence.

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[39] Slip op. at 18.
[40] *Id.* at 19.