SUMMARY OF JUDICIAL OPINIONS
FOURTH 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 fourth quarter of 2008.

***FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58, 2008 U.S. App. LEXIS 25932 (1st Cir., Dec. 23, 2008)**

FPL Energy Maine Hydro LLC (FPL) held a license from FERC for a hydroelectric project it owned on the Kennebec River in Maine. Before the license could be renewed, FPL was required to obtain a certification from Maine's Department of Environmental Protection (DEP) that the project complied with state and federal water quality standards under the Clean Water Act (CWA). DEP staff provided that certification in November 2003. However, a number of entities filed an appeal of this determination with the DEP Board. While that appeal was pending, FERC granted FPL's application for a renewed license.[1] Subsequently, the DEP Board rescinded the earlier certification. As a result, FERC stayed its order and rejected FPL's rehearing request.[2] FPL filed an appeal in Maine state court challenging the rescission of the DEP's certification. FPL also petitioned the First Circuit for review of the FERC's stay order. The First Circuit held the proceeding in abeyance pending the state court proceeding. In 2007, the Maine Supreme Judicial Court affirmed a lower court decision upholding the DEP Board's rescission.[3] Before the First Circuit, FPL argued that the DEP Board's rescission was null because it had failed to act within the one-year timeframe required by the CWA. Thus, FPL argued that the DEP Board's decision was waived or that FERC should have exercised its discretion to disregard the rescission.

The court rejected FPL's petition, and concluded that it was bound by the doctrine of *res judicata* to give preclusive effect to the state court decisions finding the DEP Board's rescission to be effective. The court found that FPL had litigated the issue fully before the Maine courts, and that FPL had not shown that an exception to the doctrine was applicable in this case. The court also rejected FPL's argument that FERC cannot by its stay order "undo" a license that had already been granted. The court stated that FERC did not modify the license, and that the agency had unquestioned authority to revise a license in response to rehearing requests. Finally, the court rejected FPL's claim that FERC had the authority to disregard an untimely DEP decision and, therefore, the stay order should be remanded. The court noted that FPL's argument was based on the premise that the state action was indeed untimely, a premise rejected by the state courts.

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[1] *FPL Energy Me. Hydro LLC*, 106 F.E.R.C. ¶ 62,232 (2004).
[2] *FPL Energy Me. Hydro LLC*, 108 F.E.R.C. ¶ 61,261 (2004), *order on reh'g*, 111 F.E.R.C. ¶ 61,104 (2005).
[3] *FPL Energy Me. Hydro LLC v. Maine Dep't of Envtl. Prot.*, 926 A.2d 1197 (Me. 2007).

***Braintree Elec. Light Department v. FERC*, 550 F.3d 6 (D.C. Cir. 2008)**

Braintree Electric Light Department (Braintree) petitioned for review of FERC orders approving ISO-New England, Inc.'s (ISO-NE) 2005 and 2006 revenue requirements. Braintree challenged FERC's approval of ISO-NE's tariffs on the grounds that FERC failed to sufficiently determine that costs pertaining to "Government Affairs," "Public Information," and "Regulatory Affairs" were just and reasonable under Section 205 of the FPA.[4] In approving ISO-NE's rates, FERC drew a line between what the court described as recoverable "informational lobbying" costs on the one hand, and non-recoverable "political variants" on the other.[5] After reviewing "a detailed mass of [ISO-NE's] actual communications, in the form of speeches, correspondence, PowerPoint presentations and handouts . . . add[ing] up to nearly 600 pages,"[6] FERC concluded that ISO-NE's costs were recoverable. To enhance transparency, FERC ordered ISO-NE to publish "a monthly report concerning 'external affairs' and 'corporate communications,"[7] but on rehearing FERC excluded from the reporting requirement "certain ISO-NE communications, such as 'inquiries to or from executive branch officials' and the 'provision of information to state and federal, executive and legislative officials regarding the status of New England's bulk-power system."[8]

In its petition for review, Braintree argued that by approving the tariffs, FERC violated its own precedents. The court rejected Braintree's arguments. First, the court identified that, although FERC's "prior statements on the subject had 'not always been clear,'"[9] a clear rule had been established: while it "would possibly be 'unfair' if such expenditures were presumed recoverable in all instances,"[10] such expenditures may be recoverable where "a utility demonstrated that the lobbying activities in question "could benefit . . . ratepayers."[11] FERC's orders were consistent with that rule. Second, the court rejected Braintree's argument that FERC's orders unreasonably assumed that ISO-NE operated in the best interests of its stakeholders. As the record on review demonstrated, FERC "did investigate the expenditures in question . . . , reviewing mounds of material from ISO-NE, and found that no party has provided any evidence that ISO-NE has acted imprudently or contrary to its core purpose and objectives."[12] In that respect, the FERC's orders were not comparable to previous cases in which the court vacated orders because "FERC appeared to have abdicated its role of verifying the reasonableness of prices paid by an ISO."[13] Similarly, the court rejected Braintree's argument that FERC lacked substantial evidence for its conclusion that ISO-NE's

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[4] *Braintree Elec. Light Dep't v. FERC*, 550 F.3d at 9.
[5] *Id.* at 10.
[6] *Id.* at 13 (emphasis omitted).
[7] *ISO New England Inc.*, 117 F.E.R.C. at P 52.
[8] 550 F.3d at 10 (quoting *ISO New England Inc.*, 118 F.E.R.C. ¶ 61,105 at P 39 (2007)).
[9] *Id.* at 11 (quoting *ISO New England Inc.*, 117 F.E.R.C. at P 47).
[10] *Id.* (quoting *Alabama Power Co.*, 24 F.P.C. 278, 286 (1960)).
[11] *Id.* (quoting *Williams Natural Gas Co.*, 73 F.E.R.C. ¶ 63,015, at 65,072-73 (1995)).
[12] *Id.* at 12 (quoting *ISO New England Inc.*, 118 F.E.R.C. at P 21).
[13] *Id.* (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007)).

claimed costs were recoverable, citing the "detailed mass of [ISO-NE's] *actual* communications" in the record.[14] The court also rejected Braintree's argument that the orders violated its First Amendment rights by compelling its speech in the form of charging it the cost of ISO-NE's communications, finding that ISO-NE's expenditures were "germane" to the purpose for which it was created, and as such did not give rise to unconstitutional compelled speech with respect to Braintree. The court again stressed the fact that the germaneness of ISO-NE's communications was evidenced not by hypotheticals but by actual review of the record. Finally, the court rejected Braintree's argument that FERC's exclusion of certain information from ISO-NE's new reporting requirements was arbitrary and capricious. Affording FERC's decision on remedies with the requisite "exceptional deference,"[15] the court concluded that "FERC's posting directive appears to be a reasonable balance of competing interests."[16]

***Public Service Commission of Wisconsin v. FERC*, 545 F.3d 1058 (D.C. Cir. 2008)**

In March 2004, the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) stakeholders formed a Regional Expansion Criteria and Benefits Task Force (Task Force), which was assigned the job of developing criteria for including transmission projects in the Midwest ISO's regional transmission expansion plan, as well as developing mechanisms for allocating and recovering the costs of such projects. In June 2005, the Midwest ISO published its 2005 transmission expansion plan, which listed upgrade projects as either "planned" or "proposed." "Planned" expansions were those that the preferred solution to an identified issue, while "proposed" expansions were tentative solutions. In September 2005, the Task Force adopted a policy for allocating the costs of upgrades, and the Midwest ISO submitted tariff revisions shortly thereafter. The proposed revisions included language stating that the cost allocation provisions would not be applicable to certain designated projects, which were designated as "planned" in the 2005 expansion plan and listed in proposed Attachment FF-1, as well as "some additions of proposed projects that the Transmission Provider has determined to [be] in the advanced stages of planning."[17] FERC approved the proposed cost allocation mechanism as just and reasonable, finding that it was a reasonable compromise that recognized the existing state of the transmission system, as well as planned transmission projects, and put transmission owners on an "equal footing."[18]

The Pubic Service Commission of Wisconsin and American Transmission Company LLC (ATCLLC) petitioned the D.C. Circuit for review of the orders, contending that FERC erred in giving weight to a "non-consensus" stakeholder process. The petitioners asserted that what FERC described as a "reasonable compromise" was not

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[14] *Id.* at 13.
[15] *Id.* at 15 (citing, *inter alia*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008)).
[16] *Id.* at 16.
[17] Midwest ISO Tariff, Attachment FF.
[18] *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 F.E.R.C. ¶ 61,106 (2006).

a compromise midpoint between competing positions. Regardless, the petitioners argued that FERC had an independent duty under the FPA to assess whether the proposal was just and reasonable. Moreover, the petitioners contended that FERC's reliance on the Task Force's distinction between "planned" and "proposed" projects was arbitrary, arguing (among other things) that FERC failed to adequately explain why some projects were treated differently from others and that the proposal had the "perverse effect" of penalizing transmission owners that had been proactive in pursuing transmission upgrades while rewarding those that had been less diligent. The petitioners also contended that FERC deviated from an earlier order directing the Midwest ISO develop a cost recovery policy based on payment for upgrades by those who cause and benefit from them.

The court affirmed FERC. First, the court stated that, in concluding that the proposal was just and reasonable, FERC "articulated a rational connection between the facts found and the choice made"[19] and was consistent with its policy of deferring to "regional choices . . . on how to allocate the costs of transmission expansions."[20] The court explained that FERC often gives weight to proposals by Regional Transmission Organizations that are endorsed by a majority of stakeholders, even if there is not unanimous support. The court also dismissed the petitioners' concerns about whether the proposal was truly a "compromise," pointing out that FERC's independent assessment concluded that the proposal was just and reasonable. Next, the court rejected the petitioners' argument that the distinction between "planned" and "proposed" projects was arbitrary, finding that FERC's explanation for approving the distinction between "proposed" and "planned" additions – that the distinction was reasonable because it provided a "going forward" cost sharing mechanism that limits cost-sharing to those upgrades planned after the Midwest ISO's proposal was filed – was adequate. The court noted that ATCLLC itself would benefit from the cost-sharing mechanism, and stated that it would not be unfair to require ATCLLC to pay for the costs of projects that were planned prior to the introduction of the proposal. The court found that FERC reasonably concluded that the policy the Midwest ISO did adopt was consistent with cost causation principles.

***Louisiana Public Service Commission v. FERC*, 551 F.3d 1042, 2008 U.S. App. LEXIS (D.C. Cir. Dec. 30, 2008).**

In 2005, Entergy filed with a proposed revision to its "System Agreement" – an interconnection and pooling arrangement among the Entergy operating companies – that would reallocate generating capacity via a "paper transfer" among certain of the Entergy operating companies. The proposal would have the effect of lowering the production costs of Entergy Louisiana and Entergy New Orleans, but would raise the production costs of Entergy Gulf States (Gulf States). The Louisiana Public Service Commission (LA PSC) protested Entergy's filing, arguing that the allocations were discriminatory and

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[19] *Public Serv. Comm'n of Wis. v. FERC*, 545 F.3d at 1062 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).
[20] *Id.* (quoting *New England Power Pool*, 105 F.E.R.C. ¶ 61,300 (2003)).

harmed Gulf State's customers. The case was set for hearing. At hearing, the LA PSC learned that Entergy Arkansas had been making short-term capacity sales without first offering that capacity to the other operating companies, which it argued was contrary to Section 3.05 of the System Agreement.[21] The ALJ rejected this claim.[22] FERC agreed, finding that the issue did not involve the long-term allocation issues that were central to the hearing.[23] FERC also noted that it did not believe that Section 3.05 applied to such sales.

The LA PSC petitioned the D.C. Circuit for review of the FERC's orders, both with respect to the longer-term allocation question and the short-term capacity sales. The LA PSC argued that the short-term capacity sales "had substance independent of the resource allocation" issue because FERC's determination that the provision of the agreement did not apply to these sales allowed Entergy to sell cheap resources such that Louisiana customers were harmed.[24] With respect to the longer-term allocation question, the LA PSC contended that although equalizing production costs among the operating companies was a valid goal, Entergy's proposal simply made some of the operating companies' costs go up while at the same time making other companies' costs go down.

The court first affirmed FERC's approval of the reallocation proposal, noting that "[w]here the subject of our review is, as here, a predictive judgment by FERC about the effects of a proposed remedy for undue discrepancies among operating companies, our deference is at its zenith."[25] In this case, the court found itself "unconvinced by the [LA PSC's] arguments for second-guessing FERC's judgment."[26] The court explained that while the ALJ did note the rise in Gulf States' costs, he could not attribute it only to the paper transfer and that the ALJ pointed to record evidence that tended to contradict the direct correlation between the paper transfer and the change in production costs, as well as evidence that the rise in Gulf States' production costs could also be attributed to the rise in natural gas prices. Turning to the question of whether FERC erred in stating that Section 3.05 of the System Agreement did not apply to short-term capacity sales, the court held that FERC's statement was not a final decision on the matter; rather, it was dicta that signaled where the agency might ultimately come down on the issue. Accordingly, the court found that the LA PSC was not harmed by FERC's dicta because it could raise this issue in another proceeding.

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[21] Section 3.05 of the System Agreement provided that each of the operating companies wanted to have its proportionate share of "Base Generating Units available to serve its customers either by ownership or purchase," and that if any of them had excess capacity, it "shall offer the right of first refusal for this capacity and associated energy to the other Companies…."

[22] *Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 63,077 (2005).

[23] *Entergy Servs., Inc.*, Opinion No. 485, 116 F.E.R.C. ¶ 61,296, *order on reh'g*, Opinion No. 485-A, 119 F.E.R.C. ¶ 61,019 (2007).

[24] *Louisiana Pub. Serv. Comm'n*, 2008 U.S. LEXIS at *6.

[25] *Id.* at *7-8.

[26] *Id.* at *8.

***Albany Engineering Corp. v. FERC*, 548 F.3d 1071 (D.C. Cir. 2008)**

In 2002, FERC had issued hydroelectric licenses to the Hudson River-Black River Regulating District (District), a New York state agency with authority to operate the Conklingville Dam and the Great Sacandaga Lake, because a project located on the dam used the District's facilities to generate hydroelectric power. State law permitted the District to recover its capital, maintenance, and operating costs through assessments on those that benefited by the construction of dams and reservoirs. Albany Engineering, Inc. (Albany), an operator of a downstream project, filed a complaint against the District at FERC. According to Albany, Section 10(f) of the FPA empowers FERC with the authority to determine the level of reimbursement for costs associated with headwater benefits. FERC concluded that the District's recovery of interest, maintenance, and depreciation costs under state law was preempted by Section 10(f).[27] However, FERC also found that it lacked authority to require the District to rescind assessments that it made or to provide refunds. FERC decided not to convene a settlement conference and stated that any further involvement would require the affected entity to request a headwater benefits determination. At that time, FERC stated that it could determine whether a settlement conference would be appropriate.

On appeal, the court noted that there is a "familiar presumption against preemption," but that "presumption may be overcome if…the court finds that the preemptive purpose of Congress was 'clear and manifest.' "[28] The court looked to Supreme Court precedent regarding the circumstances under which the FPA preempted state law in the area of hydroelectric regulation, and noted that the Court found that the FPA enacted "a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation."[29] Thus, given Congress' "commitment to comprehensive federal regulation, and preclusion of dual licensing authority," the court found it "hard to imagine why Congress would have countenanced disparate state reimbursement schemes" including those that might assess charges on downstream projects located in a different state.[30] The court went on to state that Section 10(f) reflects a balancing of the goal of compensating upstream owners and the goal of protecting downstream ones, but that FERC's orders, finding that the statute and the legislative history did not prevent the District from assessing charges other than interest, maintenance, and depreciation, did not take this balancing into account.[31] Further, the court believed that FERC's orders "would generate complex issues of meshing state charges with FERC-approved ones,"[32] which would disrupt Congress'

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[27] *Fourth Branch Assocs. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 117 F.E.R.C. ¶ 61,321 (2006).
[28] *Albany Engineering, Inc.*, 548 F.3d at 1075 (quoting *Geier v. American Honda Motor Co.*, 166 F.3d 1236, 1237 (D.C. Cir. 1999)).
[29] *Id.* (quoting *First Iowa Hydro-Elec. Coop v. FPC*, 328 U.S. 152, 180 (1946) (internal citations omitted)).
[30] *Id.*
[31] *Id.* at 1076-77.
[32] *Id.* at 1078.

"intent to create a comprehensive scheme of hydropower development."[33] The court envisioned that different states could use different accounting methods for cost recovery, which could result in duplicative charges or "the creation of an accounting mess that some institution – FERC or a court – would have to sort out."[34] The court also noted that FERC's interpretation would allow states to apportion costs among downstream owners in a manner that will ultimately allow recovery of charges in excess of the actual benefit that is received.[35] The court did not address the issue of whether FERC erred in refusing to require refunds or to convene a settlement conference, and pointed out that its decision here would change the context for the agency's consideration of these issues. Accordingly, the court remanded these issues to FERC for further consideration.

In concurrence, Judge Brown stated that he was not, at this point, "willing to say that FERC's orders are irredeemable, or that…we need to resolve the scope of § 10(f)'s preemption."[36] Therefore, Judge Brown wanted to remand the case back to FERC for a fuller explanation of its decision.

***Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008)**

In this case, the court affirmed FERC orders issuing a new license to Puget Sound Energy, Inc. (Puget Sound) for its Snoqualmie Falls Hydroelectric Project. FERC had rejected requests by the Snoqualmie Indian Tribe (Tribe) to decommission the project or otherwise return the site to its natural condition in order to increase water flows and water mist to enhance the Tribe's religious experiences at the falls. However, FERC did impose more stringent minimum flow requirements than otherwise required by state water quality certifications. Both the Tribe and Puget Sound appealed FERC's decision.

The court rejected the Tribe's claim that FERC violated the federal Religious Freedom Restoration Act (RFRA), noting that FERC actually took a closer look at the concerns than what was actually required under RFRA. The court also rejected the Tribe's claims that FERC was required to consult with the Tribe under the National Historic Preservation Act. Next, the court rejected Puget Sound's argument that FERC should not have imposed stricter minimum flow requirements. The court stated that FERC is permitted to add conditions on a license if they do not conflict with or weaken protections provided under the Clean Water Act's water quality certification requirement. The court concluded that FERC appropriately balanced the beneficial public purposes specified in Section 10 of the FPA in issuing the new license.

***Missouri Coalition for the Environment v. FERC*, 544 F.3d 955 (8th Cir. 2008)**

AmerenUE's Taum Sauk Pumped Storage Project's upper reservoir collapsed in 2005, and AmerenUE sought FERC approval to reconstruct it. In response, FERC issued

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[33] *Id.*
[34] *Albany Engineering, Inc.*, 548 F.3d at 1078.
[35] *Id.*
[36] *Id.* at 1081.

a Final Environmental Assessment (FEA), which found that the reconstruction activity would not be a major federal action significantly affecting the quality of the human environment. The FEA was focused on the impact of the reconstruction itself, and did not look at the potential impacts of operating the project once its existing license expired in 2010. FERC also issued a letter order approving AmerenUE's request. Several organizations requested rehearing, arguing that the relicensing of the project in 2010 was a "reasonably foreseeable future action" and that, under the National Environmental Policy Act (NEPA), FERC was required to consider the cumulative environmental impact from *both* the reconstruction of the project and its operation under a future license.

On appeal, the court rejected arguments that relicensed operation was reasonably foreseeable because the reconstruction activity makes licensing more likely.[37] The court pointed to FERC's letter order, which expressly stated that the approval of the dam reconstruction did not prejudge a determination of the relicense application.[38] The court distinguished precedent cited by the petitioner, finding that none of the cited cases addressed the relationship between reconstruction under an existing license and future operation under a new license.[39] In response to the petitioner's note that the U.S. Forest Service filed comments stating that reconstruction and future operation were connected actions, the court pointed out that, under NEPA, an agency does not have to accept the input of other agencies.[40]

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[37] *Missouri Coalition for the Env't*, 543 F.3d at 958-59.
[38] *Id.* at 958.
[39] *Id.* at 958-59.
[40] *Id.* at 959.