REPORT OF THE JUDICIAL REVIEW COMMITTEE

This report summarizes cases reviewing significant decisions from United States appellate courts dealing with pertinent energy regulation issues. The time frame covered by this report is January 2014 through December 2014.[*]

I. ADMINISTRATIVE LAW

A. Failure to Provide Cost/Benefit Analysis: PJM Postage-Stamp Pricing

The United States Court of Appeals for the Seventh Circuit vacated and remanded to the Federal Energy Regulatory Commission (the FERC or Commission), for the second time, the FERC's finding that the PJM Interconnection, LLC's (PJM) postage-stamp cost allocation is just and reasonable for transmission facilities operated at 500 kilovolt (kV) and above.[1] The court found that the FERC once again failed to provide "evidence that postage-stamp pricing is an acceptable, or the only possible, alternative."[2]

* This report was chiefly prepared by Sarah Norcott, Justin P. Moeller, and Alexander B. Horning.

1. Illinois Commerce Comm'n v. FERC, 756 F.3d 556 (7th Cir. 2014).

2. *Id.* at 564.

In a 2007 order, the FERC found that allocating the cost of 500 kV facilities and above using a postage-stamp methodology produces a just and reasonable rate.[3] A postage-stamp cost allocation broadly socializes the cost of transmission facilities among all members of a Regional Transmission Operator (RTO) or Independent System Operator (ISO).[4] In this case, the cost of facilities constructed in eastern PJM for reliability purposes were allocated "in proportion to each utility's electricity sales, a pricing method analogous to a uniform sales tax."[5] In 2009, the Seventh Circuit vacated the FERC's Opinion No. 494, finding that the FERC had not identified an "articulable and plausible reason to believe that the benefits" to utilities in western PJM "are at least roughly commensurate with" the costs allocated to those same western PJM utilities.[6] On remand, the FERC again found that allocating the costs of 500 kV and above facilities using a postage-stamp methodology is just and reasonable, explaining that the reliability of such facilities will be shared by all in the PJM region, including the western part of PJM.[7] Petitioners, largely consisting of the western members of PJM, filed a timely petition for review of the Order on Remand to the Seventh Circuit.[8]

Writing for the majority, Judge Posner found that the FERC's failure to quantify the benefits of the 500 kV facilities to entities in western PJM was impermissible absent a demonstration "that even a rough estimate of the benefits to be conferred by the new eastern transmission facilities is impossible."[9] The court did not deem postage-stamp cost allocation impermissible *per se*, instead finding fault in the "absence from the Commission's orders of even an attempt at empirical justification. The Commission *assumes*—it does not demonstrate—that the benefits of the eastern 500-kV lines are proportionate to the total electric-power output of each utility. . . . It is a method guaranteed to overcharge the western utilities. . . ."[10] The Order on Remand was, once again, remanded to the FERC.[11]

In a dissenting opinion, Judge Cudahy wrote that "the majority is under the impression that somehow there is a mathematical solution to this problem, and I think that this is a complete illusion."[12] Judge Cudahy found indistinguishable an earlier Seventh Circuit decision by the same name, *Illinois Commerce Commission v. FERC*,[13] wherein Judge Posner, again writing for the majority, had upheld postage-stamp cost allocation for certain high voltage facilities in the Midcontinent Independent System Operator, Inc. (MISO) region.[14]

3. *PJM Interconnection, L.L.C.*, 119 F.E.R.C. ¶ 61,013 (2007), *order on reh'g*, 122 F.E.R.C. ¶ 61,082 (2008).

4. *Illinois Commerce Comm'n*, 756 F.3d at 559.

5. *Id.* at 558.

6. *Id.* at 559 (citing Illinois Commerce Comm'n v. FERC, 576 F.3d 470 (7th Cir. 2009)).

7. *PJM Interconnection, L.L.C.*, 138 F.E.R.C. ¶ 61,230 (2012), *order on reh'g*, 142 F.E.R.C. ¶ 61,216 (2013).

8. *Illinois Commerce Comm'n*, 756 F.3d at 556-57.

9. *Id.* at 561.

10. *Id.* (emphasis in original).

11. *Id.* at 565.

12. *Id.* (Cudahy, J., dissenting).

13. Illinois Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013).

14. *Illinois Commerce Comm'n*, 756 F.3d at 566.

B. Failure to Provide Reasoned Decision Making

1. Cost Causation

The D.C. Circuit vacated and remanded a FERC order on the basis that the FERC failed to support its decision with a reasoned basis.[15] The FERC decision found that costs associated with purchasing new base gas after two entities receiving firm gas storage service released their rights, but continued to exercise their rights to buy base gas, should be borne entirely by the replacement shippers: BNP Paribas Energy Trading GP (Paribas) and South Jersey Resources Group, LLC.[16] Paribas appealed this decision to the court.

The FERC rationalized its decision by providing that the case "present[ed] alternative methods of analyzing cost causation, depending upon whether the focus is on the pipeline's operations or on the events enabling each customer to join the system."[17] As such, the FERC found that the replacement shippers were "the 'most immediate and proximate' cause" for the need to purchase additional base gas.[18] The court found "the Commission's characterization of . . . alternative views as 'factually accurate'" to be "highly questionable."[19] The FERC also found that the equitable factor would determine how much weight to give each cause, which, in this case, was the fact that the historic shippers' provided base gas back to the field "during a period of severe gas shortages."[20]

The court offered three observations regarding cost causation: (1) it "generally calls for giving the same treatment to new and continuing customers, based on straightforward economic rationale[;]" (2) the "principle itself manifests a kind of equity[;]" and (3) sometimes "equitable factors . . . may on occasion trump that principle."[21] Based on these observations, the court believed the FERC's equitable reliance revealed two flaws in its decision.[22] One, that the "basis for imputing an exclusive or even primary causal role to the replacement shippers' demand is uncertain at best."[23] Next, the FERC failed to "explain why the historic shippers' earlier support for the project . . . gives them a special equitable claim in perpetuity."[24]

Finally, the court faulted the FERC's decision because it failed to adequately address Paribas' claim that the "decision was inconsistent with [the FERC's] application of cost causation to an analogous case in the electricity sector."[25] The court held that the "[FERC] brushed [Paribas' argument] off as 'not relevant to this case'" and that "[s]uch an opaque dismissal of an analogy falls well short of the [Administrative Procedure Act's (APA)] requirement that the [FERC]

15. BNP Paribas Energy Trading GP v. FERC, 743 F.3d 264 (D.C. Cir. 2014).

16. *Id.* at 265-66.

17. *Id.* at 268 (citing *Transcontinental Gas Pipe Line Corp.*, 139 F.E.R.C. ¶ 61,002 at P 65 (2012)).

18. *Id.*

19. *Id.*

20. *BNP Paribas Energy Trading GP*, 743 F.3d at 268.

21. *Id.* at 268-69.

22. *Id.* at 269.

23. *Id.*

24. *Id.*

25. *BNP Paribas Energy Trading GP*, 743 F.3d at 269 (citing *Midwest Indep. Transmission Sys. Operator, Inc. & the Midwest ISO Transmission Owners*, 129 F.E.R.C. ¶ 61,060 at PP 53-56 (2009)).

'provide an adequate explanation to justify treating similarly situated parties differently.'"[26]

2. Filed Rate Doctrine

In *West Deptford Energy, LLC v. FERC*, the D.C. Circuit upheld West Deptford Energy, LLC's (West Deptford) challenges to certain orders of the FERC in which the FERC ruled that West Deptford would be required to bear certain costs to obtain transmission service from PJM based on a PJM tariff provision that had been superseded more than three years before PJM tendered an interconnection agreement to the customer.[27] Under the Federal Power Act (FPA), "utilities are forbidden to charge any rate other than the one on file with the Commission, a prohibition that has become known as the 'filed rate doctrine.'"[28] The court found that the FERC failed to provide a reasoned explanation why applying the superseded provision was consistent with the filed rate doctrine and prior FERC precedent, and remanded the orders to the Commission for further consideration.[29]

This dispute arose out of a generator interconnection request submitted by West Deptford to PJM in 2006.[30] Prior to West Deptford's request, PJM had constructed network upgrades whose costs had been borne by two other generators.[31] The PJM tariff in effect at that time (the 2006 Tariff) permitted PJM to allocate the costs of a previously constructed network upgrade to a new applicant for interconnection services in the circumstances presented by West Deptford's request.[32] Accordingly, PJM proposed in its first study of West Deptford's project to allocate the costs of the prior upgrade to West Deptford.[33] In 2008, however, PJM revised its tariff such that a new customer in West Deptford's circumstances would not be required to bear the costs of a previously constructed network upgrade (the 2008 Tariff).[34] PJM performed two more studies of West Deptford's interconnection request, the last coming in 2011, and continued to state its intention to charge West Deptford for the prior upgrade despite the 2008 Tariff.[35]

In 2011, PJM tendered a draft interconnection agreement that imposed the full cost of the prior upgrade on West Deptford, and when West Deptford refused to agree to that allocation, filed the unexecuted agreement.[36] West Deptford argued that the 2008 Tariff should control cost allocation, but the FERC held that the 2006 Tariff, which was in effect when West Deptford entered the queue in 2006, placed it on notice that it could potentially be liable for the upgrade costs.[37]

26. *Id.* (citing Comcast Corp. v. FCC, 526 F.3d 763 (D.C. Cir. 2008)).
27. West Deptford Energy, LLC v. FERC, 766 F.3d 10, 12 (D.C. Cir. 2014).
28. *Id.* (citing NSTAR Elec. & Gas Corp. v. FERC, 481 F.3d 794, 800 (D.C. Cir. 2007)).
29. *Id.* at 12.
30. *Id.* at 15.
31. *Id.* at 14.
32. *West Deptford Energy, LLC*, 766 F.3d at 15.
33. *Id.*
34. *Id.*
35. *Id.* at 16.
36. *Id.*
37. *West Deptford Energy, LLC*, 766 F.3d at 16.

West Deptford also argued that if it were required to pay for the prior upgrade, its costs should be offset by auction revenue rights (ARRs) received and exercised by the two other generators, but the FERC relied upon the 2008 Tariff to reject this claim as unripe.[38] The FERC upheld its decisions on rehearing.[39]

On appeal, the court determined that the FERC had failed to provide an adequately reasoned explanation for applying the superseded 2006 Tariff under the filed rate doctrine.[40] First, the court concluded that nothing in the 2008 Tariff or the Commission's order approving it provided notice that the August 1, 2008, effective date would not apply to all generators who signed their interconnection agreements subsequent to that date.[41] PJM made no such statement in the transmittal letter for the 2008 Tariff filing; it did reference that the next interconnection queue would begin on August 1, 2008, but the FERC did not reference that statement in accepting the filing, and "failed to provide any explanation of whether and how the bare mention of the next queue date, without endorsement by the Commission at the time of acceptance, could have legally operative force for purposes of the filed rate doctrine."[42]

Second, the court reviewed FERC precedent involving the applicability of superseded tariff provisions and concluded, that prior to the instant case, the FERC consistently held that interconnection agreements filed after the designated effective date of an amended tariff are governed by the amended tariff.[43] The FERC "failed to provide a reasoned explanation for why West Deptford's interconnection agreement should be treated any differently than those in predecessor decisions," and thus failed to justify its deviation from precedent.[44] Although the FERC asserted that it could reasonably apply a case-by-case approach in addressing effective date issues, the court stated that this would require the FERC to provide a reasoned explanation as to how such an approach would comport with the dictates of the FPA and the FERC's own statements regarding the importance of standardization of generator interconnection procedures.[45] In addition, it would require a reasoned analysis that would justify treating West Deptford differently than other generators that were subject to tariff provisions in effect at the time an agreement was filed or executed.[46] In this regard, the court noted that in a prior case involving the PJM tariff cost allocation provisions and the very same network upgrade, the FERC held that the applicable tariff was the one in effect at the time the interconnection agreement was executed.[47] The court held that the FERC's failure to explain why it treated West

38. *Id.*
39. *Id.* at 17.
40. *Id.* at 18.
41. *Id.*
42. *West Deptford Energy, LLC*, 766 F.3d at 19.
43. *Id.* (discussing *Midwest Indep. Transmission Sys. Operator, Inc.*, 125 F.E.R.C. ¶ 61,277 (2008)).
44. *Id.* at 20.
45. *Id.*
46. *Id.* at 21.
47. *Id.* (discussing *FPL Energy Marcus Hook, L.P. v. PJM Interconnection, L.L.C.*, 118 F.E.R.C. ¶ 61,169 (2007)).

Deptford differently, and, in fact, was the exact opposite of its previous decision, constituted unreasoned and arbitrary decision-making.[48]

The court also addressed the FERC's assertion that because West Deptford had been on notice, it could be allocated the upgrade costs at issue; the filed rate doctrine did not apply.[49] The court noted that the "notice exception" had been for the most part confined to scenarios involving formula rates or where judicial invalidation of Commission decisions resulted in retroactive rate adjustments.[50] The FERC argued that West Deptford had been on notice because PJM had clarified the applicability of the effective date in the tariff change proceeding, but the court noted that the "clarification" itself was ambiguous; moreover, West Deptford had not been a party to the tariff change proceeding.[51]

Finally, the court determined that the FERC improperly failed to address the impact of ARRs that had already been exercised on West Deptford's costs.[52] The court accepted the FERC's assertion that, with respect to ARRs that had not been exercised by the two other generators, West Deptford's claim would not become ripe until it executed the interconnection agreement.[53] However, the court found that the FERC had failed to explain why West Deptford's costs should not be offset by costs the two other generators already recovered through exercising their ARRs, and thus the court remanded the issue for further explanation.[54]

3. Denial of Refunds

The United States Court of Appeals for the District of Columbia remanded a FERC decision because the FERC failed to adequately and rationally explain its decision.[55] The FERC's decision reaffirmed its prior decision to deny refunds after a utility's practice of including interruptible load in assessing capacity costs was found to be unjust and unreasonable.[56]

Entergy Corporation (Entergy) has three public utility companies operating in Louisiana.[57] Pursuant to a Commission-approved agreement, these companies are able to "act as a single economic unit."[58] As such, the companies share electricity and allocate costs among themselves.[59] The Louisiana Public Service Commission (LaPSC) filed a complaint with the Commission arguing that Entergy's "inclusion of 'interruptible load' when calculating an operating company's capacity charge" was unjust and unreasonable.[60] The Commission dismissed the complaint.[61] However, after the LaPSC appealed, on remand, the

48. *West Deptford Energy, LLC*, 766 F.3d at 22.
49. *Id.*
50. *Id.*
51. *Id.* at 23.
52. *Id.* at 25.
53. *West Deptford Energy, LLC*, 766 F.3d at 24.
54. *Id.* at 25.
55. Louisiana Pub. Serv. Comm'n v. FERC, 772 F.3d 1297, 1298 (D.C. Cir. 2014).
56. *Id.* at 1300.
57. *Id.*
58. *Id.* (citing Louisiana Pub. Serv. Comm'n v. FERC, 184 F.3d 892, 894 (D.C. Cir. 1999) [*Louisiana I*]).
59. *Louisiana Pub. Serv. Comm'n*, 722 F.3d at 1300.
60. *Id.*
61. *Id.*

Commission determined that such practice was unjust and unreasonable, but refused to approve refunds of any overcharges since it could not find that the operating companies that paid refunds would be able to recover such refunds from its customers as required by section 206(c) of the FPA.[62] Again, the LaPSC appealed and the Court remanded because "the Commission had not adequately explained why it could not make the requisite section 206(c) finding."[63] Ultimately, the FERC determined on remand that "refunds were unwarranted."[64] The LaPSC petitioned for judicial review of that decision.[65] On review, pursuant to the APA, the court must decide whether the FERC acted arbitrarily or capriciously, abused its decision, or did not act in accordance with the law and if the FERC's factual findings are supported by substantial evidence.[66]

The LaPSC argued that the FERC's decision "conflicts with the core purpose of the [FPA], namely, the protection of consumers from excessive rates and charges."[67] The court disagreed.[68] It found that "even assuming the 'primary aim' of the FPA is to 'protect[] . . . consumers from excessive rates and charges,' there is no conflict with that purpose here."[69] The court found that "[t]o hold that refunds are mandatory every time there is an unjust or unreasonable rate would be contrary to Congress's use of the permissive 'may' in section 206(b)."[70] The court also rejected the argument from the LaPSC that the court should rely on *Exxon Co., USA v. FERC*[71] and *Public Service Co. of Colorado v. FERC*[72] because "there is a strong equitable presumption in support of making parties whole through refunds."[73] It found that '"[a]bsent some conflict with the explicit requirements or core purposes of a statute, [the court] ha[s] refused to constrain agency discretion by imposing a presumption in favor of refunds.'"[74]

Additionally, the LaPSC argued that the FERC failed to reasonably explain why it departed from its policy to grant refunds when rates are found to be unjust and unreasonable.[75] The Commission had found that a different policy applied in this case where Entergy's inclusion of interruptible load in allocating costs among the operating companies was a "zero-sum game" and not "a case of cost over-recovery."[76] In support of its decision, the FERC relied on *Southern Company*

62. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 106 F.E.R.C. ¶ 61,228 at P 88 (2004).

63. *Louisiana Pub. Serv. Comm'n*, 722 F.3d at 1300 (citing Louisiana Pub. Serv. Comm'n v. FERC, 482 F.3d 510, 520 (D.C. Cir. 2007) [*Louisiana II*]).

64. *Id.*

65. *Id.* at 1302.

66. *Id.*

67. *Id.* (internal quotations omitted).

68. *Id.*

69. *Id.* (citing Municipal Light Bds. of Reading & Wakefield v. FERC, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

70. *Id.*

71. 182 F.3d 30 (D.C. Cir. 1999).

72. 91 F.3d 1478 (D.C. Cir. 1996).

73. *Louisiana Pub. Serv. Comm'n*, 772 F.3d at 1303 (internal quotations omitted).

74. *Id.* (citing Town of Concord, Norwood & Wellesley v. FERC, 955 F.2d 67, 76 (D.C. Cir. 1992)).

75. *Id.*

76. *Louisiana Pub. Serv. Comm'n v. Entergy Corp.*, 142 F.E.R.C. ¶ 61,211 at P 61 (2013).

Services, Inc.[77] The court found that "one decision does not constitute a line of precedent" as suggested by the FERC.[78] Notwithstanding that fact, the court further held that "the Commission's reliance on its 'policy' does not suffice to explain its decision."[79] The court further found that reasons previously identified by the FERC as support for denial of refunds were not at issue in this case and those that were mentioned were not supported or adequately explained.[80] The court held that the Commission "cannot reasonably apply a policy that is based on factors that it acknowledges are not present in a given case."[81] Thus, on remand, the court ordered that the Commission "consider the relevant factors and weigh them against one another, striking 'a reasonable accommodation among them.'"[82]

C. Issue Preclusion: State Action Precluded Federal Action

A split panel of the Third Circuit affirmed an order of the United States District Court for the Eastern District of Pennsylvania dismissing an action against the Pennsylvania Public Utility Commission and its individual commissioners in their official capacities (collectively, PaPUC) by Metropolitan Edison Company and Pennsylvania Electric Company (collectively, the Companies).[83] The court agreed with the district court that the Companies were barred by the doctrine of issue preclusion from seeking to overturn in federal court a decision of the Commonwealth Court of Pennsylvania that upheld a PaPUC ruling that denied the Companies recovery in their retail electricity rates of approximately $250 million of wholesale "line loss" charges the Companies paid to PJM under its FERC-jurisdictional tariff.[84]

After Pennsylvania introduced retail electricity competition, the Companies entered into a settlement with the PaPUC in 1998 that, among other features, extended a statutory moratoria on increases in the Companies' Transmission & Distribution (T&D) Charges to Pennsylvania retail customers through 2004 and on increases in their Pennsylvania generation rates through 2010.[85] In 2006, the FERC directed PJM to modify its charges for recovering the costs of "line losses" of electricity sold and delivered to wholesale customers under PJM's tariff.[86] The Companies incurred increased line loss charges after PJM's subsequent adoption of a marginal loss methodology.[87] In 2008, after the retail rate cap on their T&D Charges had expired, but while the cap on their generation rates remained in effect, the Companies filed proposals with the PaPUC to include their increased line loss charges in their retail rates.[88] Several customer groups opposed the Companies' proposals on the ground that the increased line loss charges were generation-

77. 64 F.E.R.C. ¶ 61,033 (1993).

78. *Louisiana Pub. Serv. Comm'n*, 772 F.3d at 1304.

79. *Id.*

80. *Id.* at 1304-05.

81. *Id.* at 1305.

82. *Id.* at 1306 (citing Las Cruces TV Cable v. FCC, 645 F.2d 1041, 1047 (D.C. Cir. 1981)).

83. Metro. Edison Co. v. Pennsylvania Pub. Util. Comm'n, 767 F.3d 335, 341 (3d Cir. 2014).

84. *Id.* at 340-41.

85. *Id.* at 344.

86. *Id.* at 345.

87. *Id.* at 346.

88. *Metropolitan Edison Co.*, 767 F.3d at 346.

related costs the recovery of which was barred by the 1998 settlement.[89] The Companies responded that the line loss charges were, instead, transmission-related charges (for which the 1998 settlement's rate cap had ended in 2004).[90]

After an evidentiary hearing and the submission of briefs, an administrative law judge (ALJ) of the PaPUC recommended approval of the Companies' requests to recover the increased line loss charges, finding them to be transmission costs.[91] After briefing on the customer groups' exceptions to the ALJ's recommended decision, the PaPUC ruled against the Companies, "concluding . . . that the Companies' line losses were generation costs subject to the . . . generation rate cap that was in effect through 2010."[92]

The Companies then sought review of the PaPUC order in Pennsylvania's Commonwealth Court. Sitting *en banc*, the commonwealth court unanimously upheld the PaPUC's decision.[93] In particular, the court noted, the commonwealth court considered and rejected the Companies' claims (1) that the PaPUC's classification of the line loss charges as generation costs violated the filed rate doctrine and the FERC's characterizations of such charges, and (2) resulted in an impermissible "trapping" of the Companies' wholesale costs.[94] The Companies subsequently petitioned unsuccessfully for an appeal to the Pennsylvania Supreme Court and for a writ of *certiorari* from the United States Supreme Court.[95]

While their petition for an appeal to the Pennsylvania Supreme Court was pending, the Companies filed suit in the district court against the PaPUC and its commissioners in their official capacities.[96] As described by the court of appeals, the Companies' complaint

> allege[d] that, by barring them from recovering the line-loss costs that PJM charged them under a FERC-mandated methodology, the [Pa]PUC Order violates the filed rate doctrine, the Supremacy Clause of the Constitution, the Fourteenth Amendment, and the FPA, and, to the extent the [PaPUC] and the Commonwealth Court relied on the [Pennsylvania] Electric Competition Act, that statute, as applied, is pre-empted by federal law.[97]

The district court granted the defendants' motions to dismiss all of the Companies' claims on the grounds of issue preclusion.[98] The Companies appealed that ruling.[99]

The court's majority emphasized that the issue before it was not whether the PaPUC was correct to classify the Companies' line loss costs as generation costs, rather than transmission costs.[100] Instead, the majority insisted, the question on appeal was whether "the Commonwealth Court's decision that the [Pa]PUC's

89. *Id.*
90. *Id.* at 347.
91. *Id.* at 346.
92. *Id.* at 347.
93. *Metropolitan Edison Co.*, 767 F.3d at 347.
94. *Id.* at 348.
95. *Id.*
96. *Id.*
97. *Id.* at 349.
98. *Metropolitan Edison Co.*, 767 F.3d at 349.
99. *Id.*
100. *Id.* at 350.

classification of line-loss costs did not violate the filed rate doctrine or impermissibly trap costs" precluded litigation of the Companies' claims in their federal action.[101]

The court stated that the preclusive effect of the commonwealth court's judgment must be determined under the Full Faith and Credit Statute.[102] As interpreted by the Supreme Court, that statute, in turn, requires federal courts to apply state law to determine the preclusive effect of a state court's ruling.[103] Evaluating the present case under a five-part test for preclusion stated by the Pennsylvania Supreme Court, the majority concluded that all of the Companies' federal court claims were barred.[104] The court noted that the Companies did not contest preclusion of their claim that the commonwealth court's decision caused cost-trapping in violation of the FPA and the filed rate doctrine.[105] Though disputed, the court reached the same conclusion regarding the Companies' other claims.[106] The court found the Companies' claim that the state court's ruling imposed a confiscatory rate in violation of the Fourteenth Amendment was based on their contention that the decision impermissibly trapped costs in violation of the filed rate doctrine, the same claim the court determined was precluded by the commonwealth court's decision.[107] Finally, the court ruled that, even if it had not been waived by failure to present it to the district court, the Companies' claim that the Pennsylvania Electric Competition Act was unconstitutional as applied to them also was precluded.[108] The court reasoned that this contention likewise depended on establishing that the PaPUC order violated the filed rate doctrine, a premise the commonwealth court had considered and unequivocally rejected.[109]

The panel majority then examined whether the Companies' claims qualified for any exceptions to preclusion under the Full Faith and Credit Statute. The court concluded that no such exceptions applied.[110]

The majority rejected the Companies' argument that the state proceeding was legislative, rather than judicial, in nature, determining that it should rely on how Pennsylvania law characterizes the relevant proceedings and concluding that the proceedings at issue in this case were of a judicial character.[111] The court similarly found misplaced the Companies' claim that the commonwealth court "applied the wrong standard of review and placed a substantially more onerous burden of persuasion on them than the Companies would face in this action."[112] Any complaint regarding the state tribunal's standard of review, the court stated, "was

101. *Id.*
102. *Id.* at 350 (citing 28 U.S.C. § 1738 (2012)).
103. *Metropolitan Edison Co.*, 767 F.3d at 350-51.
104. *Id.* at 368.
105. *Id.* at 351.
106. *Id.* at 353.
107. *Id.*
108. *Metropolitan Edison Co.*, 767 F.3d at 353.
109. *Id.*
110. *Id.* at 353-68.
111. *Id.* at 356.
112. *Id.*

something to be remedied on direct appeal" and did not open the PaPUC's decision "to collateral attack in federal court."[113]

The court considered the Companies' contention that their claims were not precluded because the PaPUC and the commonwealth court lacked subject matter jurisdiction to determine that the Companies could not recover their disputed line loss costs in their retail rates.[114] The court noted that the Companies had argued to both the PaPUC and the commonwealth court that they had no jurisdiction to prevent the Companies from recouping their line loss costs, and had repeated that argument in seeking review by the Pennsylvania Supreme Court and the United States Supreme Court.[115] The court observed that the state tribunals' determinations of their own jurisdiction generally would be treated the same as their other rulings for purposes of determining preclusive effect, but the Companies raised a question on which the court had not previously ruled: whether there should be an exception to preclusive effect for a tribunal's determination of its own jurisdiction when a federal statute entirely preempts the state agency from taking action.[116]

The court stated that federal courts generally hold a state judgment to be void for lack of jurisdiction only where the state court "lacked even an arguable basis for jurisdiction."[117] Meeting this standard with respect to a state tribunal's judgment on a federal question is difficult, the court said, because the states generally have concurrent jurisdiction over federal questions except where the Supremacy Clause limits such authority.[118] Thus, "the relevant question here is whether Congress divested state utility agencies or state courts of jurisdiction to hear cases requiring an adjudication of the filed rate doctrine's scope, and the answer to that is no."[119] The court thus rejected the Companies' contentions that preemption of several different legal types precluded the PaPUC and the commonwealth court from determining that the Companies' line loss costs were generation-related, rather than transmission-related.[120] In particular, the court concluded that "the FERC orders that the parties point us to require PJM to calculate line losses in a certain way but do not make the kind of categorical statements that lead to pre-emption."[121]

Finally, the court observed the Companies voluntarily elected to litigate their filed rate doctrine and preemption issues before the PaPUC and the commonwealth court, and admitted that they could have withdrawn those issues from the state tribunals and pursued them at the FERC.[122] Thus, the court said, the Companies presented a "classic 'heads I win, tails you lose' approach" in an

113. *Metropolitan Edison Co.*, 767 F.3d at 357.

114. *Id.*

115. *Id.* at 358-59.

116. *Id.* at 359.

117. *Id.* (citing United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 271 (2010)).

118. *Metropolitan Edison Co.*, 767 F.3d at 359.

119. *Id.* at 360.

120. *Id.* at 362.

121. *Id.*

122. *Id.* at 367-68.

effort to "get a 'do-over' with a clean slate in federal court."[123] That option, the court ruled, was not available to them.[124]

In dissent, Circuit Judge Roth asserted that, "[c]ontrary to the Commonwealth Court's assessment . . . , FERC has clearly classified the component 'line loss' as a transmission related cost."[125] In her view, the FPA clearly ousts state courts from "redefin[ing]" any rate element that FERC has defined.[126] Therefore, the commonwealth court lacked jurisdiction to depart from the FERC's classification of the Companies' line loss costs.[127] Accordingly, Judge Roth would have reversed the district court's order dismissing the Companies' claims.[128]

D. Courts Without Jurisdiction to Hear "Reconnect" Decision

The D.C. Circuit Court of Appeals dismissed a petition for review of a FERC order directing Midland Power Cooperative (Midland) to "reconnect" to an Iowa farm generating wind power (Sweckers) and classified as a "qualifying facility" under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[129] The court held that it did not have jurisdiction to review the order.[130]

After the Sweckers stopped paying for retail power in protest of Midland's power purchase rates, Midland began to disconnect the Swecker farm, stopping both power purchases from and supply to the Sweckers.[131] The Sweckers challenged Midland's disconnection, and the FERC ordered Midland to reconnect to the Sweckers' farm.[132]

Midland and a joint petitioner, National Rural Electric Cooperative Association (together, Midland), sought review of the FERC's order to reconnect.[133] Though neither Midland nor the FERC challenged the court's jurisdiction, the court analyzed whether it had jurisdiction to review the order through FPA section 313(b) solely or through the FPA as it relates to PURPA section 210.[134]

The court first held that it did not have jurisdiction to review the order based solely on the FPA.[135] FPA section 313(b) in the United States Code grants the court jurisdiction over "[a]ny party to a proceeding under this *chapter* aggrieved by an order issued by the Commission. . . ."[136] The FERC issued the order pursuant to PURPA section 210, and it and the FPA are in the same United States

123. *Metropolitan Edison Co.*, 767 F.3d at 367 (internal citations omitted).
124. *Id.* at 368.
125. *Id.* (Roth, J., dissenting) (citations omitted).
126. *Id.* at 371.
127. *Id.*
128. *Id.* at 374.
129. Midland Power Coop. v. FERC, 774 F.3d 1 (D.C. Cir. 2014).
130. *Id.* at 2.
131. *Id.*
132. *Id.* at 3.
133. *Id.*
134. *Midland Power Coop.*, 774 F.3d at 3.
135. *Id.*
136. *Id.* (emphasis in original).

Code chapter, this provision seemed to grant the court jurisdiction.[137] However, the same provision in the Statutes at Large, controlling over the United States Code, instead granted jurisdiction to "[a]ny party to a proceeding under this Act aggrieved by an order. . . ."[138] Thus, the court did not have jurisdiction over the order because FPA section 313 "limits review to orders issued in proceedings under the [FPA]," and the FERC issued the order pursuant to PURPA section 210.[139]

Midland also argued "PURPA [section] 210(h) fits the orders here within the language of FPA [section] 313(b)."[140] Midland claimed that the order created rules regarding disconnection for non-payment and appears to enforce those rules against Midland.[141] According to Midland, PURPA section 210(h), which provides that certain qualifying facility requirements are "treated as [rules] enforceable under the Federal Power Act," applied to the FERC's actions.[142] Midland contended that the order fell within the court's jurisdiction pursuant to FPA section 313(b) because it concerned the application of rules under the FPA.[143]

Rejecting Midland's second argument for jurisdiction, the court held "that FERC never purported to adopt a general rule on disconnections by utilities whose customers refused to pay their bills" and there was "no rule-creating language in either of the orders."[144] The court also noted that PURPA section 210(h) only makes rules enforceable under the FPA "for purposes of enforcement," and the FERC was not seeking enforcement here.[145] Additionally, PURPA section 210(f)(1) only makes FERC rules enforceable that "relat[e] to the implementation of [section] 210 by state regulatory authorities vis-à-vis any 'electric utility for which it has ratemaking authority,'" and did not apply to Midland.[146]

The court continued to explain that its prior decisions "have repeatedly emphasized Congress's decision to leave [section] 210's enforcement to the district court. . . ."[147] In *dicta*, the court observed that it would deny jurisdiction to avoid conflicts with district courts even if the order actually created new rules.[148] The court acknowledged that the order could be construed as mandatory and potentially exposing Midland to significant penalties.[149] However, the court found that the order was declaratory because it contained no deadlines or consequences for non-compliance, fitting within the precedent denying jurisdiction.[150]

137. *Id.*
138. *Id.* (quoting 49 Stat. 860 § 313).
139. *Midland Power Coop.*, 774 F.3d at 3.
140. *Id.* at 4.
141. *Id.*
142. *Id.* (quoting PURPA § 210(h)(2)(A)).
143. *Id.*
144. *Midland Power Coop.*, 774 F.3d at 5.
145. *Id.* at 4-5.
146. *Id.* at 4.
147. *Id.* at 5.
148. *Id.* at 5-6.
149. *Midland Power Coop.*, 774 F.3d at 7.
150. *Id.*

II. FEDERAL POWER ACT (FPA)

A. Energy Policy Act (EPAct): Incentives Properly Granted to Encourage Transmission Infrastructure

In *North Carolina Utilities Commission v. FERC*, the United States Court of Appeals for the Fourth Circuit considered and upheld the FERC's 2008 decision to authorize the use of incentive rate treatments by Virginia Electric Power Company, doing business as Dominion Virginia Power (VEPCO), for five transmission projects under section 219 of the FPA.[151] VEPCO originally requested incentives, including 125 and 150 basis point return on equity (ROE) adders, for a suite of eleven projects with an aggregate cost of $877 million.[152] The North Carolina Utilities Commission (NCUC or Petitioner) protested VEPCO's request for the incentives with respect to six of the eleven projects, and continued to challenge the FERC's order approving incentives for five of the projects on appeal.[153] Specifically, Petitioner argued on appeal that the FERC: (i) erred by declining to apply in its 2012 Rehearing Order a 2010 change in incentive rate policy whereby the FERC began applying the nexus test under section 219 of the FPA to individual projects rather than to a suite of unrelated projects in aggregate; and (ii) abused its discretion by authorizing VEPCO to utilize incentive rate treatments for the five challenge projects.[154]

The Fourth Circuit first considered whether it had jurisdiction to hear NCUC's appeal with respect to application of the 2010 Policy Orders to the FERC's 2012 Rehearing Order.[155] VEPCO argued that the court lacked jurisdiction to address this question on appeal because Petitioner failed to raise the issue in a request for rehearing under 16 U.S.C. section 825*l*(b).[156] The court disagreed, finding Petitioner had good cause for failing to raise the issue in a rehearing request because its request for rehearing was filed two years before the FERC announced its new policy on aggregation of projects for incentive rate requests, and "absent extraordinary prescience it could not have done so."[157] However, on the merits, the Fourth Circuit sided with VEPCO, finding that the FERC acted within its discretion when it declined to apply the 2010 policy change on rehearing to VEPCO's incentive request for a suite of aggregated projects.[158]

The Fourth Circuit next considered NCUC's argument that five of VEPCO's projects do not qualify for FPA section 219 incentives under Order No. 679 and the FERC's related pre-2010 incentive rates policies.[159] The NCUC argued that

151. North Carolina Utils. Comm'n v. FERC, 741 F.3d 439, 452 (4th Cir. 2014); *Virginia Elec. & Power Co.*, 124 F.E.R.C. ¶ 61,207 (2008); *order on reh'g*, 139 F.E.R.C. ¶ 61,143 (2012).

152. *North Carolina Utils. Comm'n*, 741 F.3d at 444-45.

153. *Id.* at 445.

154. *Id.* at 448; *PJM Interconnection, L.L.C.*, 133 F.E.R.C. ¶ 61,273 (2010); *Oklahoma Gas & Elec. Co.*, 133 F.E.R.C. ¶ 61,274 (2010) [collectively, 2010 Policy Orders].

155. *North Carolina Utils. Comm'n*, 741 F.3d at 448.

156. *Id.*

157. *Id.* at 449.

158. *Id.* at 450 (the FERC exercised reasonable discretion in not applying new policy in a pending case).

159. 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, 119 F.E.R.C. ¶ 61,062 (2007); *North Carolina Utils. Comm'n*, 741 F.3d at 448.

VEPCO's Lexington Tie and Idylwood Projects failed to meet the Order No. 679's nexus test because the projects are small in scale and the investments would be undertaken by VEPCO without ROE adders.[160] The court found that the FERC's determination that both projects satisfy the nexus test was supported by substantial evidence.[161] The court observed that the determination was consistent with the FERC's incentive rate policies, which impose no size limitations on projects eligible for incentives, and do not require a showing that the utility would not have undertaken the project but for the requested incentives.[162]

The court next rejected the NCUC's argument that VEPCO's Garrisonville and Pleasant View Projects failed to meet the nexus test because less expensive, above-ground alternatives existed for the two underground projects.[163] The court again found the FERC's determination that the projects met the nexus was supported by substantial evidence because "neither [section] 219 nor Order No. 679 require FERC to only grant incentives to the least expensive approach to a project."[164] Finally, the court rejected the NCUC's challenge to the FERC's grant of incentives to VEPCO's Proactive Transformer Replacement Project (PTRP).[165] The court found that the FERC apparently misstated the scope of the transformer replacement contemplated by the PTRP project in its order authorizing incentives and again in its order denying rehearing.[166] However, this error, while "troubling" to the court, was not fatal as the court determined that the FERC nevertheless "understood the nature of the PTRP" and therefore held that the FERC's grant of incentives to the project was supported by substantial evidence.[167]

B. Regulating Demand Response: Limits on FERC Jurisdiction

In *Electric Power Supply Association v. FERC*, the United States Court of Appeals for the District of Columbia vacated a FERC rule concerning incentivizing demand response.[168] FERC Order No. 745[169] required demand response providers who participate in the day-ahead and real time energy markets to be compensated at the same locational marginal price as generators clearing in those markets.[170] Electric Power Supply Association and four other energy associations (Petitioners) petitioned the D. C. Circuit for review of the rule arguing that the rule exceeded the authority of the agency and encroached upon the exclusive jurisdiction of the states.[171] In response, the FERC argued that it has congressional authority to promulgate the rule found in Order No. 745 and sections 205 and 206 of the FPA provide it with the authority to issue the rule

160. *North Carolina Utils. Comm'n*, 741 F.3d at 450-51.
161. *Id.* at 451.
162. *Id.*
163. *Id.*
164. *Id.*
165. *North Carolina Utils. Comm'n*, 741 F.3d at 451-52.
166. *Id.* at 452.
167. *Id.*
168. Elec. Power Supply Ass'n v. FERC, 753 F.3d 216, 218 (D.C. Cir. 2014).
169. Order No. 745, *Demand Response Compensation in Organized Wholesale Energy Markets*, F.E.R.C. STATS. & REGS. ¶ 31,322 (2011) (codified at 18 C.F.R. § 35.28(g)(1)(v)).
170. *Elec. Power Supply Ass'n*, 753 F.3d at 219.
171. *Id.* at 218.

"[b]ecause incentive-driven demand response affects the wholesale market."[172] Additionally, the FERC argued that step two of the *Chevron* doctrine[173] provided it with the authority because if "the statute is silent or ambiguous on the specific issue, [the court] must defer to the agency's reasonable construction of the statute" and its interpretation is permissible.[174] Finally, the FERC argued that the Energy Policy Act of 2005 provided it with the authority to issue the rule.[175]

When reviewing Order No. 745, the D.C. Circuit relied upon the APA, which requires a reviewing court to "hold unlawful and set aside agency action . . . in excess of statutory jurisdiction, authority, or limitations."[176] The D.C. Circuit disagreed with the FERC's argument regarding the scope of its authority.[177] The court found that the FERC's argument with respect to sections 205 and 206 of the FPA would create limitless jurisdiction of the agency.[178] The court instead looked to the statutory construction to determine the limits of the FPA and found that section 201(b)(1) provided that the FERC may only regulate those matters not reserved to the states and that the states "retain exclusive authority to regulate the retail market."[179] The court held that "[d]emand response–simply put–is part of the retail market."[180] As such, the court held under step one of the *Chevron* doctrine that the FPA unambiguously restricted the FERC from regulating the retail market and so there is no need to go to step two of *Chevron*.[181]

With respect to the FERC's argument regarding the Energy Policy Act of 2005, the court found that reliance on this policy does not provide the agency with necessary statutory power and that, in fact, such act "clarifies [the] FERC's authority over demand response is limited: its role is to assist and advise state and regional programs."[182] Finally, the court found that, even if the FERC did have the necessary authority to issue the rule, the rule still fails "because it was arbitrary and capricious."[183] The court held that the "FERC failed to properly consider–and engage–Commissioner Moeller's reasonable (and persuasive) arguments, reiterating the concerns of Petitioners and other parties, that *Order 745* will result in unjust and discriminatory rates."[184]

The Honorable Harry T. Edwards issued a dissenting opinion in this case because he believed that the FPA "is ambiguous regarding [the] FERC's authority

172. *Id.* at 221.

173. Chevron, U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984). Step one is a determination of whether Congress has "unambiguously" spoken on the precise question. If the statute is silent or ambiguous with respect to the question, the inquiry moves to step two, which is a determination of whether the agency's answer is based on a permissible construction of the statute. *Id.* at 842-43.

174. *Elec. Power Supply Ass'n*, 753 F.3d at 220 (citing City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)).

175. *Id.* at 223.

176. *Id.* at 220 (citing 5 U.S.C. § 706(2)(C) (2012)).

177. *Id.* at 218.

178. *Id.* at 222.

179. *Elec. Power Supply Ass'n*, 753 F.3d at 221-22.

180. *Id.* at 223.

181. *Id.* at 224.

182. *Id.*

183. *Id.*

184. *Elec. Power Supply Ass'n*, 753 F.3d at 225 (emphasis in original).

to require [Independent System Operators] and [Regional Transmission Organizations] to pay demand response resources," requiring the court "to defer under *Chevron* to the Commission's permissible construction of 'a statutory ambiguity that concerns the scope of the agency's statutory authority (that is, its jurisdiction).'"[185] Justice Edwards stated that section 201 of the FPA was ambiguous because said section speaks to sales of electricity and foregone consumption via demand response is not a sale of electricity.[186]

C. Order 1000: FPA Provides Authority for the FERC's Rules

The FERC's landmark rulemaking on electric transmission planning and cost allocation was upheld by the United States Court of Appeals for the District of Columbia.[187] FERC Order No. 1000, as reaffirmed and clarified in Order Nos. 1000-A and 1000-B (collectively the Final Rule), implemented a series of significant reforms related to the regional and interregional planning and development of electric transmission facilities.[188]

Forty-five petitioners and sixteen intervenors challenged the ruling arguing that the FERC acted beyond the scope of its authority under the FPA, that the Final Rule was arbitrary and capricious and unsupported by substantial evidence.[189] The seven-part, *per curiam* opinion of the court rejected all challenges.[190]

In Part I, the court applied *Chevron* deference to the FERC's decisions.[191] The court noted that "in rate-related matters, the court's review of the Commission's determinations is particularly deferential because such matters are either fairly technical or 'involve policy judgments that lie at the core of the regulatory mission'" and that "[t]he court owes the Commission 'great deference' in this realm because '[t]he statutory requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition.'"[192]

In Part II, the court held that FPA section 206 authorizes the FERC to require transmission providers to participate in a regional planning process. The court determined that the FERC reasonably concluded that transmission planning is a "practice" that affects transmission rates within the meaning of FPA section 206.[193] Further, FPA section 202 does not restrict the FERC from promoting and encouraging voluntary transmission interconnection and coordination because the FPA section 202 covers operational coordination, not planning prior to operation.[194] The court also found that the Final Rule did not infringe upon the

185. *Id.* at 227 (Edwards, J., dissenting) (citing City of Arlington v. FCC, 133 S. Ct. 1863, 1868 (2013)).

186. *Id.*

187. South Carolina Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014).

188. Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. STATS. & REGS. 31,323 (2011); *order on reh'g*, Order No. 1000-A, 139 F.E.R.C. ¶ 61,132; *order on reh'g*, Order No. 1000-B, 141 F.E.R.C. ¶ 61,044 (2012).

189. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 48.

190. *Id.* at 49.

191. *Id.* at 54-55.

192. *Id.* (citing Alcoa Inc. v. FERC, 564 F.3d 1342, 1347 (D.C. Cir. 2009); Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 532 (2008)).

193. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 55-59.

194. *Id.* at 59-62.

states' traditional regulation of transmission planning, siting, and construction in violation of FPA section 201(a).[195]

In Part III, the court held that there was substantial evidence of a theoretical threat of unjust and unreasonable rates for transmission service in the absence of Order No. 1000's regional planning reforms to support adoption of the Final Rule.[196] The court held that the FERC's determination of the necessity of transmission planning reform was not based on guesswork, but was supported by prior Commission proceedings (including Order No. 890) and comments from the Department of Energy, industry consultants, and FERC technical conferences.[197] The court found that the FERC is permitted to "rely on 'generic' or 'general' findings of a systemic problem to support imposition of an industry-wide solution."[198]

In Part IV, the court held that the FERC had the authority under FPA section 206 to require removal of rights of first refusal (ROFRs) from FERC-jurisdictional tariffs and agreements. The FERC reasonably concluded, "based upon reasonable predictions rooted in basic economic principles," that ROFRs posed a competitive barrier to entry that made the transmission market inefficient and amplified costs for transmission customers.[199] The court also declined to evaluate whether and how the *Mobile-Sierra* doctrine (i.e., the presumption that freely-negotiated contracts are just and reasonable unless found to seriously harm the public interest) will ultimately apply to particular contracts containing ROFR provisions.[200] The court found the issue not ripe because the FERC has deferred its analysis of contract-specific ROFRs to future proceedings regarding compliance filings made pursuant to the Final Rule.[201]

In Part V, the court held that the FERC acted within its authority under FPA section 206 to require allocation of costs of new transmission facilities among beneficiaries.[202] The court rejected Petitioners' argument that FPA section 206 forecloses the FERC from mandating the allocation of costs absent a pre-existing commercial relationship, finding "[n]o such limitation exists in the statutory text."[203] The court rejected Petitioners' argument that mandatory regional cost allocation constitutes an impermissible joint rate on the grounds that the Final Rule does "not require any rate, joint or otherwise, to be paid."[204]

In Part VI, the court held that the FERC reasonably determined that regional planning must include consideration of transmission needs driven by public policy requirements.[205] The FERC's public policy mandate is not impermissibly vague

195. *Id.* at 62-64.
196. *Id.* at 64.
197. *Id.* at 65.
198. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 67 (internal citation omitted).
199. *Id.* at 76-77.
200. *Id.* at 81.
201. *Id.*
202. *Id.* at 87.
203. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 84.
204. *Id.* at 86.
205. *Id.* at 90.

because the mandate merely requires regions to establish processes for identifying and evaluating public policies that might affect transmission needs.[206]

In Part VII, the court upheld the reciprocity condition, requiring that "non-public utilities must participate in transmission planning and cost allocation in exchange for open access."[207] The court found the reciprocity condition in the Final Rule to be fundamentally the same as that in Order Nos. 888 and 890, except broadened from transmission service to also include transmission planning and cost allocation.[208] The FERC provided a reasoned and adequate basis for this expansion and was not arbitrary or capricious in deciding to stop at a conditional rather than a categorical requirement for non-public utilities.[209] Finally, the court determined that FPA section 211A does not require the FERC to mandate non-public utility participation in planning and cost allocation, and the FERC reasonably declined to exercise its discretionary authority under section 211A to mandate participation in favor of the Final Rule's incremental and incentive-based approach.[210]

D. Fining of United States or Governmental Entity: FPA Does Not Authorize

In *Southwestern Power Administration v. FERC*, the United States Court of Appeals for the District of Columbia vacated and remanded the FERC's decision[211] affirming the North American Electric Reliability Corporation's (NERC) assessment of a monetary fine against the Southwestern Power Administration (Southwestern), a federal government entity.[212] The court found that the relevant sections of the FPA lacked the unequivocal waiver of sovereign immunity necessary to sustain the fine.[213] Southwestern did not contest the fact it could be subject to non-monetary sanctions under the FPA, and this issue was not before the court.[214]

The court noted that FPA section 215, added to the FPA by Congress in 2005, directs the FERC to certify an Electric Reliability Organization (ERO) to develop and enforce reliability standards for the bulk-power system, and that the NERC is that ERO.[215] Section 215(b)(1) of the FPA provides the FERC with jurisdiction over "all users, owners and operators of the bulkpower system, including but not limited to the entities described in section 824(f) of this title, for purposes of approving reliability standards established under this section and enforcing compliance with this section."[216] The entities referred to in section 824(f) (FPA section 201(f)) include "the United States, a State or any political subdivision of a State" that are generally exempt from the FERC regulation under the FPA.[217]

206. *Id.* at 91.

207. *Id.* at 92.

208. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 92-93.

209. *Id.* at 92.

210. *Id.* at 95-96.

211. *North Am. Elec. Reliability Corp.*, 140 F.E.R.C. ¶ 61,048, *reh'g denied*, 141 F.E.R.C. ¶ 61, 242 (2012).

212. Southwestern Power Admin. v. FERC, 763 F.3d 27 (2014).

213. *Id.* at 29.

214. *Id.* at 30.

215. *Id.* at 29.

216. *Id.*

217. *Southwestern Power Admin.*, 763 F.3d at 30.

Section 215(e) authorizes the ERO to impose "a penalty on a user or owner or operator of the bulk-power system for a violation of a reliability standard" approved by the Commission after notice and an opportunity for a hearing.[218] FPA section 316A allows the FERC to assess a fine of up to $1,000,000 per day on "any person."[219] As the court noted, the FPA defines a person in a manner that excludes the United States, i.e., as an individual or a corporation.[220]

The FERC, in the proceeding below, upheld the NERC's assessment of a monetary penalty of $19,500 against Southwestern for violating various reliability standards.[221] In overturning the FERC's decision and addressing sovereign immunity, the court stated that it is a "settled understanding that a waiver of sovereign immunity" must unequivocally be stated in the applicable statute and cannot be implied–any ambiguity in the statute must be construed in favor of finding that there has been no such waiver.[222] The court held that section 215 does not provide an unequivocal waiver of such immunity, and stated that section 215(e) makes no references to federal government at all, and thus did not unequivocally authorize the imposition of monetary penalties on the federal government.[223] The court rejected the FERC's claims that section 215(b)(1), including the statement that the reliability standards applied to the entities listed in section 824(f), constituted a waiver of sovereign immunity against monetary fines.[224] While acknowledging there was a certain logic to the FERC's position, and that section 215(b)(1) gives the FERC authority to enforce reliability standards against the federal government, the court found that there were sufficient ambiguities such that section 215(b)(1) could not be deemed a waiver of sovereign immunity against monetary fines.[225]

The court again stated the fact that the penalty provisions in section 215(e) do not include the reference to the entities in section 824(f), further creates ambiguity as to whether the general grant of jurisdiction in section 215(b)(1) applies to the federal government under section 215(e).[226] The court also held that the FERC's penalty authority under section 316A is limited to penalties assessed against a person—defined as an individual or corporation—and undisputedly does not authorize monetary penalties against the United States.[227]

Finally, the court declined to address the FERC's challenges to the standing of certain parties who intervened in support of Southwestern, stating it was unnecessary to resolve this issue as doing so would not affect the case's outcome.[228]

218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 30-31.
222. *Southwestern Power Admin.*, 763 F.3d at 31.
223. *Id.* at 31-32.
224. *Id.* at 32.
225. *Id.* at 32-33.
226. *Id.* at 33.
227. *Southwestern Power Admin.*, 763 F.3d at 35.
228. *Id.* at 36.

III. NATURAL GAS ACT (NGA)

A. Environmental Assessment Under NEPA: The FERC Cannot Segment Connected or Closely Related Projects

In *Delaware Riverkeeper Network v. FERC*, the United States Court of Appeals for the District of Columbia remanded to the FERC for further consideration the FERC's Environmental Assessment (EA) of a natural gas pipeline upgrade project.[229] The D.C. Circuit held that the FERC: (i) "impermissibly segmented the environmental review" of the project from other connected, closely related, and interdependent projects in violation of National Environmental Policy Act (NEPA); and (ii) "fail[ed] to include any meaningful analysis of the cumulative impacts" of these related upgrade projects in its EA.[230]

Section 7 of the Natural Gas Act (NGA) requires "[a]ny person seeking to construct or operate a facility for the transportation of natural gas in interstate commerce" to "first obtain a certificate of public convenience and necessity [section 7 Certificate] from the Commission."[231] Before issuing a section 7 Certificate, the Commission must first conduct an environmental review under NEPA. NEPA review requires the preparation of an EA, in which the agency decides whether to prepare an environmental impact statement or issue a finding of no significant impact.[232] An agency's EA must consider the impacts of connected actions, cumulative actions, and similar actions.[233] An agency is not permitted to "segment" NEPA review by dividing "connected, cumulative, or similar federal actions into separate projects" in a manner that "fails to address the true scope and impact of the activities that should be under consideration."[234]

In 2010, Tennessee Gas Pipeline Company, LLC (Tennessee Gas) commenced a series of upgrades to the Eastern Leg of the 300 Line, which delivers gas from Western Pennsylvania to New Jersey.[235] Tennessee Gas submitted four separate applications to the FERC for section 7 Certificates.[236] The upgrades were reviewed by the FERC, approved, and then constructed "in rapid succession between 2010 and 2013."[237] The FERC completed its EA for the third of the four upgrades–the Northeast Project–in November 2011, recommending a Finding of No Significant Impact and issuing a section 7 Certificate to Tennessee Gas to construct the Northeast Project in May 2012.[238]

Petitioners sought timely review to the D.C. Circuit, arguing that the FERC violated NEPA by failing to adequately consider the cumulative impacts of all four Eastern Leg upgrades in conducting its EA, and by impermissibly segmenting

229. Delaware Riverkeeper Network v. FERC, 753 F.3d 1304, 1309 (D.C. Cir. 2014).

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* (citing 40 C.F.R. § 1508.25(a) (2014)).

234. *Delaware Riverkeeper*, 753 F.3d at 1313.

235. *Id.* at 1307.

236. *Id.* at 1308.

237. *Id.*

238. *Id.*

consideration of the Northeast Project from the related Eastern Leg upgrades.[239] The D.C. Circuit agreed with the petitioners that the four Eastern Leg Projects were "similar" and "connected" under 40 C.F.R. section 1508.25(a) and therefore impermissibly segmented under NEPA.[240] The D.C. Circuit noted in particular that during the FERC's review of the Northeast Project's section 7 Certificate application,

> the other three projects . . . were either under construction or were also pending before [the FERC] for environmental review and approval. . . . The end result is a single pipeline running from the beginning to the end of the Eastern Leg. The Northeast Project is, thus, indisputably related and significantly "connected" to the other three pipeline upgrade projects.[241]

The D.C. Circuit also held that "[m]any of the same points" that support petitioners' segmentation claim "also sustain its contention that [the] FERC's EA is deficient in its failure to include any meaningful analysis of the cumulative impacts of Tennessee Gas's projects."[242]

The D.C. Circuit rejected the FERC's argument for separate NEPA review of the four Eastern Leg upgrades under the four-factor analysis in *Taxpayers Watchdog v. Stanley*, where the D.C. Circuit had previously held that segmented analysis is appropriate for a project that "(1) has logical termini; (2) has substantial independent utility; (3) does not foreclose the opportunity to consider alternatives; and (4) does not irretrievably commit federal funds for closely related projects."[243] The D.C. Circuit reminded the FERC that an agency's consideration of the scope of its NEPA review should be guided by the governing regulations—in this case, 40 C.F.R. section 1508.25(a)—and not only by the *Taxpayer Watchdog* factors.[244] The D.C. Circuit found that even under *Taxpayers Watchdog*, the FERC failed to demonstrate the first two factors (the only factors deemed relevant in this case) because (i) the Eastern Leg "is linear and physically interdependent, and it contains no physical offshoots;"[245] and (ii) none of the upgrade projects have any independent utility without the other upgrades since they are "inextricably intertwined" with the others, notwithstanding the FERC's argument that each of the four upgrades to the Eastern Leg were supported by separate shipping contracts.[246]

Judge Brown filed a concurring opinion noting she would have granted the petition for the FERC's failure to adequately address the cumulative impacts of the four upgrade projects.[247] Judge Brown would have, however, "declined to delve into the murky waters of backwards-looking segmentation review. . . ."[248]

Judge Silberman filed a concurring opinion joining the opinion of the court regarding improper segmentation because of the timing of upgrade projects while

239. *Delaware Riverkeeper*, 753 F.3d at 1308.

240. *See, e.g.*, *id.* at 1314.

241. *Id.* at 1308, 1314.

242. *Id.* at 1319.

243. *Id.* at 1315 (citing Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 298 (D.C. Cir. 1987)).

244. *Delaware Riverkeeper*, 753 F.3d at 1315.

245. *Id.* at 1315-16.

246. *Id.* at 1317.

247. *Id.* at 1320 (Brown, J., concurring).

248. *Id.*

expressing his view that the cumulative impact issue was the stronger ground for the decision.[249] Judge Silberman also issued a strongly-worded warning that briefs may be rejected if they fail to comply with D.C. Circuit's admonitions to avoid uncommon acronyms.[250]

IV. OTHER STATUTES AND ACTS

A. Clean Air Act: Final Rule of the EPA Regarding Emission Standards on Hazardous Air Pollutants from Coal and Oil Generating Units Upheld

In *White Stallion Energy Ctr., LLC v. EPA*, the D.C. Circuit upheld the EPA's hazardous air pollutant emission standards for coal and oil-fired electric utility steam generating units (EGUs) over industry and environmental group challenges.[251] Under the Clean Air Act (CAA), Congress directed EPA to list certain sources that emit hazardous air pollutants and promulgate emission standards for those sources.[252] EGUs are regulated under CAA with an additional requirement. Before listing EGUs for emissions regulation, EPA must conduct a utility study of "the *hazards to public health* reasonably anticipated" as a result of the hazardous air pollutant emissions and "shall regulate [EGUs] under this section, if the Administrator finds such regulation is *appropriate and necessary* after considering the results of the study. . . ."[253]

EPA conducted the required utility study and listed EGUs as a hazardous air pollutant source in 2000.[254] EPA concluded listing was appropriate under CAA section 112(n)(1)(A) because mercury emissions from coal and oil fired EGUs were a threat to public health and the environment.[255] Listing was necessary because the CAA's other provisions would not adequately address these threats.[256]

In 2005, EPA revised its interpretation of CAA section 112(n)(1)(A) and delisted EGUs.[257] Then in 2012, EPA reversed its 2005 delisting decision, explaining in a Final Rule that the original 2000 listing decision and regulation of EGUs was "appropriate and necessary" under CAA section 122(n)(1)(A).[258] EPA reversed its 2005 interpretation, concluding that its "appropriate" determination under CAA section 12(n)(1)(A): (1) could be based solely on environmental factors; (2) could consider the cumulative impacts of all hazardous air pollutant emissions in regulating EGUs; (3) does not need to evaluate public health hazards after implementation of CAA requirements; and (4) could not consider other factors like costs.[259] EPA also revised its 2005 interpretation that regulation under

249. *Delaware Riverkeeper*, 753 F.3d at 1320-21 (Silberman, J., concurring).
250. *Id.* at 1321.
251. White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1229 (D.C. Cir. 2014).
252. *Id.* at 1230 (citing 42 U.S.C. § 7412 (1999)).
253. *Id.* at 1230-31 (emphasis and alterations in original) (quoting 42 U.S.C. § 7412(n)(1)(A) (2012)).
254. *Id.* at 1231-32.
255. *Id.*
256. *White Stallion*, 748 F.3d at 1231.
257. *Id.* at 1232.
258. *Id.*
259. *Id.* at 1232-33.

CAA section 112(n)(1)(A) was "necessary" only if no other CAA provision could reduce hazardous air pollutant emissions to acceptable levels.[260]

Applying the *Chevron*[261] test, the D.C. Circuit upheld EPA's 2012 interpretation of CAA section 112(n)(1)(A) over multiple industry group challenges.[262] Industry groups argued that EPA inappropriately relied on delisting criteria under CAA section 112(c)(9) in its CAA section 112(n)(1)(A) "appropriate and necessary" determination.[263] EPA explained that it relied on the delisting criteria to interpret an ambiguous term—"hazard to public health"—and did not use these criteria solely to determine what was "appropriate and necessary."[264] The D.C. Circuit upheld this construction as a reasonable interpretation of the statute.[265]

Industry groups also challenged EPA's conclusion that it lacked authority to consider costs in its "appropriate and necessary determination."[266] The D.C. Circuit upheld EPA's interpretation because the word "costs" is not included in CAA section 112(n)(1)(A) whereas it appeared in other CAA sections, the term "appropriate" is ambiguous, and costs are already considered in setting the maximum achievable control technology standards which are based on standards certain units already achieve.[267] Additionally, failing to consider costs would not render the term "appropriate" meaningless: "it requires EPA to apply its judgments in evaluating the results of the [statutorily required utility] study."[268]

The D.C. Circuit similarly upheld EPA's consideration of environmental harms in its "appropriate and necessary" determination.[269] Industry groups argued that CAA section 112(n)(1)(A) requires EPA to make its "appropriate and necessary" determination after conducting a utility study to identify public health hazards, and thus only public health hazards are an appropriate consideration in the "appropriate and necessary" determination.[270] Acknowledging that this interpretation was a plausible reading of CAA section 112(n)(1)(A), the D.C. Circuit upheld EPA's interpretation that the utility study was a "mere condition precedent" to the "appropriate and necessary" determination.[271]

The D.C. Circuit rejected a number of other industry challenges to EPA's regulation of hazardous air pollutant emissions from EGUs. Industry groups unsuccessfully argued that the "appropriate and necessary" determination should consider solely public health hazards caused by EGUs and not cumulative

260. *Id.* at 1233.

261. *Chevron*, 467 U.S. at 837.

262. *White Stallion*, 748 F.3d at 1234-35. Threshold challenges to EPA's 2000 notice and comment procedures were cured by EPA's 2012 notice and comment procedures. *Id.* at 1234.

263. *Id.* at 1235.

264. *Id.* (quoting CAA § 112(n)(1)(A)).

265. *Id.* at 1236.

266. *Id.*

267. *White Stallion*, 748 F.3d at 1236-39.

268. *Id.* at 1239. The dissent suggests the costs of the Final Rule would be prohibitively expensive, but EPA explained in notice and comment that the benefits of the rule would greatly outweigh the costs and a very small percentage of United States' coal power plants would be forced out of business. *Id.* at 1240.

269. *Id.* at 1242.

270. *Id.*

271. *Id.*

hazardous air pollutant emissions, EPA's use of the maximum achievable control technology standards to regulate EGUs instead of a separate "appropriate and necessary" regulatory regime, and EPA's decision to regulate all listed hazardous air pollutants emitted by EGUs, not only those it determined cause an environmental or health hazard.[272] These and other challenges were rejected because EPA acted reasonably and explained its decisions.[273]

Environmental groups challenged provisions of EPA's Final Rule regulating emissions from EGUs that would allow compliance through emissions averaging and "options for non-mercury [hazardous air pollutant] emissions monitoring."[274] The D.C. Circuit upheld emissions averaging because CAA section 112(d) "neither expressly allows nor disallows emissions averaging among multiple units."[275] EPA's decision not to require a "discount factor" of additional emissions reductions for facilities using emissions averaging as it did in the Hazardous Organic NESHAP Rule was reasonable because, unlike the sources regulated by the Hazardous Organic NESHAP Rule, EGUs are generally similar and there are other safety factors in the Final Rule.[276] Alternatives to continuous emissions monitoring, the D.C. Circuit concluded, were reasonably explained and "provide[ed] sufficient assurance of compliance with the applicable emission standards."[277]

Finally, the D.C. Circuit held that an energy company that would enjoy increased product demand from stricter emission standards did not fall within the zone of interests protected by the CAA.[278] Concurring in part and dissenting in part, Judge Kavanaugh disagreed with the majority's decision that EPA could exclude consideration of costs in its "appropriate and necessary" determination.[279]

B. Clean Air Act: Defining EPA's Regulation Authority

On June 23, 2014, in *Utility Air Regulatory Group v. EPA*, a divided United States Supreme Court, in a decision authored by Justice Scalia, affirmed in part and reversed in part a decision by the D.C. Circuit that had upheld regulations by EPA that were intended to implement the Supreme Court's ruling in *Massachusetts v. EPA*.[280]

The Court rejected regulations that would have potentially expanded EPA's regulation to sources not already regulated under EPA's air pollutant regulations.[281] Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented to this part of the decision.[282]

272. *White Stallion*, 748 F.3d at 1242-45.
273. *Id.* at 1245-52.
274. *Id.* at 1252.
275. *Id.* at 1253.
276. *Id.* at 1254.
277. *White Stallion*, 748 F.3d at 1255.
278. *Id.* at 1256-58.
279. *Id.* at 1273 (Kavanaugh, J., dissenting).
280. Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427, 2449 (2014) (discussing Massachusetts v. EPA, 549 U.S. 497 (2007)).
281. *Id.*
282. *Id.* at 2449-55.

The Court affirmed the EPA regulations that applied to emission sources already regulated under EPA's pollutant regulations (referred to in the decision as "anyway" sources).[283] Justice Alito, joined by Justice Thomas, dissented to this part of the decision.[284]

Following the Supreme Court's ruling in *Massachusetts v. EPA*, EPA issued regulations for emissions of greenhouse-gas emissions by stationary sources under titles I and V of the CAA.[285] EPA determined that a mix of six greenhouse-gases–carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perflourocarbons, and sulfur hexafluoride–comprised a single air pollutant for purposes of its greenhouse gas regulations.[286] The EPA regulations at issue would have required a permit to be obtained to modify or construct a major emitting facility in any area in which EPA's "Prevention of Significant [Air] Deterioration" or "PSD" program applied.[287] Although EPA had "tailored" its regulations to reduce the impact on the large number of new sources that would have been affected by the regulations, the Court nonetheless rejected EPA's regulations, concluding that:

> The fact that EPA's greenhouse-gas-inclusive interpretation of the PSD and Title V triggers would place plainly excessive demands on limited governmental resources is alone a good reason for rejecting it; but that is not the only reason. The EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in the EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate "a significant portion of the American economy," . . . we typically greet its announcement with a measure of skepticism.[288]

The Court further explained that "*Massachusetts* does not strip EPA of authority to exclude greenhouse gases from the class of regulable air pollutants under other parts of the Act where their inclusion would be inconsistent with the statutory scheme."[289]

After finding that EPA regulations applicable to new sources were not "compelled" by the CAA, the Court then asked if the regulations could be upheld as a "permissible" interpretation under a *Chevron* analysis.[290] The Court concluded that requiring permits solely based on the level of greenhouse gas emissions was "'incompatible' with 'the substance of Congress' [CAA] regulatory scheme'" and that deference in these circumstances was not required.[291] The Court further found that EPA's effort to mitigate the impact of its rules by adjusting the emissions threshold that would trigger the permitting requirement

283. *Id.* at 2449.

284. *Id.* at 2455-58.

285. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2436; *see also* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 114 (D.C. Cir. 2012).

286. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2437.

287. *See, e.g.*, *id.*

288. *Id.* at 2444 (internal citations omitted) (quoting Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000)).

289. *Id.* at 2441.

290. *Id.* at 2442 (discussing Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984)).

291. *Util. Air Regulatory Grp.*, 134 S. Ct. at 2443.

was itself an impermissible departure from the unambiguous statutory requirements that had specified those thresholds.[292]

Having determined that EPA overstepped its statutory authority by requiring permits for emissions of greenhouse gases from any source that had the potential to emit greenhouse gases, the Court then turned to the question of whether the result should be the same for sources already subject to emissions limitations (referred to as "anyway" sources) of other pollutants using "best available control technology" or "BACT."[293] Here, the Court reached a different result, again using a *Chevron* analysis, and concluded that requiring such sources to extend existing requirements to use BACT to also limit greenhouse-gas emissions was a permissible interpretation by EPA of the CAA.[294] The Court went on, however, to confine this part of its decision, explaining that:

> We acknowledge the potential for greenhouse-gas BACT to lead to an unreasonable and unanticipated degree of regulation, and our decision should not be taken as an endorsement of all aspects of the EPA's current approach, nor as a free rein for any future regulatory application of BACT in this distinct context. Our narrow holding is that nothing in the statute categorically prohibits EPA from interpreting the BACT provision to apply to greenhouse gases emitted by "anyway" sources. However, EPA may require an "anyway" source to comply with greenhouse-gas BACT only if the source emits more than a *de minimis* amount of greenhouse gases.[295]

C. PURPA: Creation of a Legally Enforceable Obligation

In a split decision issued on September 8, 2014, the United States Court of Appeals for the Fifth Circuit in *Exelon Wind 1, L.L.C. v. Nelson* upheld certain regulations promulgated by the Public Utility Commission of Texas (Texas PUC), under PURPA, prohibiting wind subsidiaries of Exelon Corporation (Exelon) from forming legally enforceable obligations (LEO) adopting time-of-obligation rates for the purpose of selling power to Southwestern Public Service Company.[296]

The FERC regulations issued under PURPA permit a Qualifying Facility (QF) (i.e., an eligible generator), when establishing an LEO, to select from two different pricing options: time-of-obligation or time-of-delivery.[297] Exelon challenged both a Texas rule (the Rule), which permits only QFs that generate "firm power" to enter into an LEO specifying the time-of-obligation rate, and a Texas PUC order finding that Exelon's QFs offered only non-firm power, and thus are restricted to time-of-delivery rates.[298] Exelon initially challenged the Texas PUC order in state court, but it also petitioned the FERC for an order declaring Texas' firm power limitation was inconsistent with PURPA and the FERC's regulations.[299] The FERC held that its regulations require all QFs, whether offering firm or non-firm power, to be able to choose among the pricing options.[300]

292. *Id.* at 2445.
293. *Id.* at 2447.
294. *Id.* at 2448-49.
295. *Id.* at 2449.
296. Exelon Wind 1, L.L.C. v. Nelson, 766 F.3d 380, 400 (5th Cir. 2014).
297. *Id.* at 385 (citing 18 C.F.R. § 292.304(d)(2) (2014)).
298. *Id.* at 390, 393; 16 TEX. ADMIN. CODE § 25.242(c) (2015).
299. *Id.* at 387-88.
300. *Id.* at 387 n.5.

Exelon withdrew its state court action, and initiated an action in federal court to enjoin the Texas PUC from enforcing the Rule.[301] The district court found it had subject matter jurisdiction over all claims, and enjoined the Texas PUC from enforcing its Rule.[302]

The Fifth Circuit reversed and remanded the district court's order enjoining the Rule, and vacated the district court's finding of subject-matter jurisdiction over Exelon's challenges to the Texas PUC's order.[303] First, addressing subject-matter jurisdiction, the Fifth Circuit found that it lacked jurisdiction over Exelon's challenges to the Texas PUC order that applied the Rule to Exelon's facilities.[304] PURPA grants federal courts jurisdiction only over claims that a state has not lawfully implemented PURPA (implementation challenges), but leaves to the state court claims that a state has unlawfully applied PURPA to individual QFs (as-applied challenges).[305] The Fifth Circuit thus barred Exelon's challenge to the Texas PUC order addressing Exelon's facilities, explaining that the Texas PUC, in the order, expressly avoided a categorical ruling barring all wind facilities from obtaining LEOs.[306] In so doing, the Fifth Circuit also declined to defer to the FERC's characterization of Exelon's claim as an implementation challenge, because the Fifth Circuit has an independent obligation to determine its own subject-matter jurisdiction.[307]

By contrast, the Fifth Circuit found that Exelon's challenge to the Rule is an implementation challenge properly within its jurisdiction.[308] Exelon's challenge does not raise constitutional concerns, and is otherwise consistent with *FERC v. Mississippi*, the Fifth Circuit explained, because Texas opted to implement PURPA through regulations, rather than through case-by-case determinations in the state courts.[309]

Turning to the merits, the court next addressed whether the Rule barring non-firm resources from obtaining an LEO with time-of-obligation pricing fails to properly implement PURPA and the FERC's regulations.[310] The Fifth Circuit first found that PURPA and the FERC's regulations do not specifically address this issue.[311] Next, the Fifth Circuit determined that it was constrained by its earlier decision in *Power Resources Group v. Public Utility Commission*, to hold that under PURPA, it is Texas, not the FERC, "that defines the parameters for when [QFs] may form [an LEO]."[312]

On this issue, the Fifth Circuit again declined to defer to the FERC's interpretation of its own regulation as requiring that all QFs be permitted to form

301. *Exelon Wind*, 766 F.3d at 387.
302. *Id.* at 388.
303. *Id.* at 394.
304. *Id.* at 393.
305. *Id.* at 388.
306. *Exelon Wind*, 766 F.3d at 390.
307. *Id.* at 392.
308. *Id.* at 393.
309. *Id.* at 394 (citing FERC v. Mississippi, 456 U.S. 742 (1982)).
310. *Id.*
311. *Exelon Wind*, 766 F.3d at 395.
312. *Id.* at 395-96 (discussing Power Res. Grp., Inc. v. Tex. Pub. Util. Comm'n, 422 F.3d 231 (5th Cir. 2005)).

LEOs and to choose among the two pricing options.[313] Exelon conceded that the FERC's interpretation was not entitled to deference, but the Fifth Circuit held that it could not, in any event, defer to an agency's interpretation that conflicts with the Fifth Circuit's own prior construction of the regulation.[314]

Finally, the Fifth Circuit noted that allowing all QFs, not just firm resources, to choose between the two pricing options, would render superfluous a separate section of the FERC's regulations, 18 C.F.R. section 292.304(d)(1), which provides that QFs providing energy on an as-available basis may select only time-of-delivery pricing.[315] In the Fifth Circuit's view, "it makes sense that only [firm power resources] should be able to select between the rate options."[316]

In a partial dissent limited to the merits of the Rule, Judge Prado explained that the majority opinion departs from the plain language of the FERC's regulation, which affords all QFs the option to form an LEO.[317] And even if the plain language did not bar Texas' restriction, Judge Prado concluded that the majority should have deferred to the FERC's expert interpretation of its own regulation.[318]

313. *Id.* at 397-98.

314. *Id.* at 397 (citing Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982 (2005)).

315. *Id.* at 399.

316. *Exelon Wind*, 766 F.3d at 400.

317. *See, e.g.*, *id.* at 402-04 (Prado, J., dissenting).

318. *Id.* at 413.

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