Report of the Committee On Judicial Review

I. INTRODUCTION

This report summarizes federal appellate decisions issued in 1989 concerning the availability and timing of judicial review of actions of the Federal Energy Regulatory Commission (FERC or Commission), the Energy Regulatory Administration (ERA), and, in one case, the Nuclear Regulatory Commission (NRC). It focuses on the jurisdictional prerequisites, including ripeness, standing, and rehearing, to obtaining judicial review under the Federal Power Act (FPA),[1] the Natural Gas Act (NGA),[2] and the Natural Gas Policy Act of 1978 (NGPA)[3] because most of the cases decided in 1989 address those matters.

One purpose of this report is to integrate the past cases and recent decisions. A second is to advise practitioners before the Commission and the courts of appeals of the implications of the principles set out in these cases.

II. RIPENESS AND STANDING REQUIREMENTS

A. Ripeness

One of the most fundamental, and yet most problematic, principles of judicial review is the requirement that the issues raised be ripe for review. The basic test for ripeness applied by the courts is that set out in *Abbott Laboratories v. Gardner*[4] under which the courts look at the question essentially "in a two-fold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[5] Clear lines of demarcation between ripe and unripe cases are often difficult to discern.

One relatively stable line of demarcation the Commission and the courts have identified is that a Commission order accepting a tariff submission for filing and allowing it to go into effect subject to possible refund after further proceedings is generally not ripe for review.[6] In *Transcontinental Gas Pipe*

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1. Federal Power Act, 16 U.S.C. §§ 791-825r (1982 & Supp. V 1987).

2. Natural Gas Act, 15 U.S.C. §§ 717-717w (1982 & Supp. V 1987).

3. Natural Gas Policy Act, 15 U.S.C. §§ 3301-432 (1982 & Supp. V 1987).

4. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).

5. *Id.* at 148-49. The Court in *Abbott* looked to four factors in determining whether the case before it was ripe for review. The four *Abbott* criteria were summarized in Pennzoil Co. v. FERC, 742 F.2d 242 (5th Cir. 1984), as follows:

> (1) whether the issues presented are purely legal; (2) whether the challenged agency action constitutes "final agency action" within the meaning of the Administrative Procedure Act; (3) whether the challenged agency action has or will have a direct and immediate impact on the petitioner; and (4) whether the resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

6. Pennzoil Co. v. FERC, 742 F.2d 242, 244. *See* Papago Tribal Util. Auth. v. FERC, 628 F.2d 235 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980). Although *Papago* was decided under section 313(b) of the Federal Power Act, 16 U.S.C. § 8251 (1985), its holding is equally applicable to cases decided under section

Line Corp. v. FERC,[7] the D.C. Circuit applied that principal to the Commission's approval of interim gas sales rates in a contested settlement. The interim rates were to apply until the Commission's resolution of a cost allocation issue and were subject to refund from an escrow account. The court reasoned that, because the petitioner would obtain a refund of any charges ultimately found to be excessive, "the Commission's order approving the settlement (and its escrow provision) seems quite akin to the interlocutory acceptance of a filed rate in *Papago*."[8] It therefore held that the case was not ripe for review.

Similar reasoning led the Second Circuit to dismiss the petition for review in *Occidental Chemical Corp. v. FERC*.[9] In that case, the petitioners challenged a FERC order denying states the power to authorize rates for utility purchases from cogenerators and small power producers in excess of the utility's "avoided costs." Because the Commission had stayed its order and initiated a rulemaking proceeding on the avoided cost issue, the court ruled that none of the four *Abbott* criteria[10] were met and the case was not ripe for review. The court rejected arguments that the delay inherent in a rulemaking proceeding and the asserted need for certainty in the industry warranted immediate judicial review.

In *American Gas Association v. FERC*,[11] the court decided that challenges to the Commission's cost-absorption requirement for pipelines seeking to recover take-or-pay buyout and contract buydown costs through fixed charges under Order No. 500[12] were not ripe for review. No pipeline had petitioned for review of the Commission's denial of a proposal to recover costs through a fixed charge without absorbing a portion of the costs. However, some of the parties seeking review of Order No. 500 nevertheless urged the court to review the cost-absorption requirement because the Commission's imposition of a sunset date on filings under Order No. 500 had effectively precluded direct challenges. The court, having already ruled that the sunset provision adopted

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19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b) (1985). *E.g.*, United Mun. Distrib. Group v. FERC, 732 F.2d 202, 206 n.3 (D.C. Cir. 1984).

7. Transcontinental Gas Pipe Line Corp. v. FERC, 866 F.2d 477 (D.C. Cir. 1989).

8. *Id.* at 480 (citing *Papago*, 628 F.2d 235). The court noted that the Commission's pending inquiry would not address certain questions going to the legality of the interim allocation. However, it found that there was nonetheless no danger of irreparable injury because any illegality could be remedied upon review of the Commission's ultimate determination. *Id.* at 481.

9. Occidental Chem. Corp. v. FERC, 869 F.2d 127 (2d Cir. 1989).

10. *See, supra* note 5.

11. American Gas Ass'n. v. FERC, 888 F.2d 136 (D.C. Cir. 1989).

12. *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 52 Fed. Reg. 30,334 (Aug. 14, 1987), III F.E.R.C. Stats. & Regs. ¶ 30,761 (Interim Rule), *extension granted*, Order No. 500-A, III F.E.R.C. Stats. & Reg. ¶ 30,770, *modified*, Order No. 500-B, III F.E.R.C. Stats. & Reg. ¶ 30,772, *modified further*, Order No. 500-C, III F.E.R.C. Stats. & Regs. ¶ 30,786, *modified further*, Order No. 500-D, III F.E.R.C. Stats, & Regs. ¶ 30,800, *reh'g denied*, Order No. 500-E, 43 F.E.R.C. ¶ 62,234, *modified further*, Order No. 500-F, III F.E.R.C. Stats. & Regs. ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 46 FERC ¶ 61,148, *remanded, AGA v. FERC, supra, final rule adopted*, Order No. 500-H, 54 Fed. Reg. 52,344 (Dec. 21, 1989), III FERC Stats. & Regs. ¶ 30,867. In Order No. 500, the Commission decided, *inter alia*, to allow pipelines to recover between twenty-five and fifty percent of their buyout and buydown costs through fixed charges *if* the pipelines would agree to absorb a like percentage of those costs. *See* Order No. 500, 52 Fed. Reg. at 30,341, III F.E.R.C. Stats. & Regs. ¶ 30,761 at 30,784-785.

by the Commission was arbitrary and capricious,[13] found that, "absent the constraint of that deadline," "neither the fitness nor the hardship criterion [of *Abbott*] favors review now."[14] The fitness criterion was not met because none of the petitioners was "here challenging the Commission's denial of a particular proposed level of recovery. Thus, there is no concrete decision before us, nor any record upon which to evaluate the policy."[15] The hardship criterion was not met because the elimination of the sunset provision left the pipeline petitioners free, "at least until the completion of our review of the Commission's final order,"[16] to file for full fixed-charge recovery, then to seek judicial review of a Commission denial of full recovery, and finally to file for partial recovery if the court denied the petition.[17] The court therefore held that the issue was not ripe for review.[18]

In *Texaco, Inc. v. FERC*,[19] the Fifth Circuit refused to hear challenges to the FERC's approval, as part of a settlement, of penalties for monthly gas transportation imbalances where the approved rates and associated penalties had not been accepted by the pipeline and had therefore not gone into effect. Rejecting an argument that review was appropriate because the FERC allegedly had a "crystallized policy" of approving such penalties, the court explained:

> That [this] might be a burning issue to the industry . . . affords us no power under either § 19 of the Natural Gas Act or the constraints of Article III to engage in speculation on what some court, someday might hold.[20]

B. Standing

Section 19(b) of the Natural Gas Act[21] provides that a party must be "aggrieved" by an order of the Commission to petition for review of the order

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13. The court found the FERC's sunset date invalid largely because it took effect prior to judicial review of a final Commission order. The court left open the possibility that a sunset date falling after such review would pass muster. *American Gas*, 888 F.2d at 151. The Commission adopted such a sunset provision in Order No. 500-H, III F.E.R.C. Stats & Regs. ¶ 30,867, 54 Fed. Reg. 52,344 (1989) (to be codified at 18 C.F.R. pts. & 284).

14. *American Gas*, 888 F.2d at 151-52.

15. *Id.* at 152.

16. *Id.*

17. The court rejected the argument that immediate review of the Commission's cost-absorption requirement was appropriate because pipelines would otherwise lose the time value of their eventual recovery. The court explained that "[c]onsideration of that interest would displace the ripeness doctrine quite generally, which we have neither the inclination nor the authority to do." *Id.*

18. The court also found that the Order No. 500 guidelines concerning gas inventory charges were not ripe for review because the Commission had issued those guidelines as a policy statement rather than as a firm rule and the court therefore did not yet have before it "a concrete case on a settled record." *Id.*

19. Texaco, Inc. v. FERC, 886 F.2d 749 (5th Cir. 1989).

20. *Id.* at 754. In *Colorado Interstate Gas Co. v. FERC*, 890 F.2d 1121 (10th Cir. 1989), petitioner Colorado Interstate Gas Co. (CIG) challenged conditions that the FERC had placed on its approval of individual transportation certificates issued under NGA § 7(c), 15 U.S.C. § 717f(c) (1982). The court held that three of CIG's challenges had become moot when CIG accepted a blanket transportation certificate, causing the individual certificates to expire. *Colorado Interstate*, 890 F.2d at 1126-28.

21. 15 U.S.C. § 717r(b) (1988).

in the court of appeals. In 1989 the courts had several opportunities to interpret this standing requirement.

In *New England Fuel Institute v. ERA*,[22] the court held that the petitioner (NEFI), an association of fuel oil distributors, had standing to oppose a pipeline's application under NGA section 3 to import Canadian natural gas for sale to two local distribution companies that competed with NEFI members. NEFI argued that the pipeline's proposed imports would not be "consistent with the public interest"[23] because the gas could not be priced by the distributors competitively with fuel oil sold by NEFI's members in certain markets. An intervenor challenged NEFI's standing to raise that argument on the ground that any such lack of competitiveness would necessarily mean that NEFI's members would not be injured by the imports. The court found that NEFI's response—that its members would be injured by price competition in other markets—was "not without support in the record" and was sufficient, under existing precedent, to place NEFI " ' at least "arguably" within the zone of interests sought to be protected by § 3 of the NGA.' "[24]

The D.C. Circuit reached the opposite conclusion with regard to a petitioner's standing in *Michigan Consolidated Gas Co. v. ERA*,[25] another case involving proposed imports under NGA section 3. In that case, MichCon challenged the ERA's approval of an application for National Steel Corporation, a former MichCon customer, to import gas supplies from Canada. The court noted that it had previously upheld the FERC's authorization to Panhandle Eastern Pipeline Company to provide service to National's plant, bypassing MichCon's distribution facilities,[26] and that MichCon thereafter had physically disconnected National from its distribution system. The court hence found that, absent a Supreme Court reversal of its affirmance of the FERC, "MichCon has no realistic prospect of regaining National as a customer."[27] It concluded that the ERA's approval of National's proposed imports thus "represent[ed] no cognizable injury to MichCon, and no injury at all that can be redressed by this court."[28] It therefore held that MichCon lacked standing to challenge the ERA's ruling.[29]

A very different standing issue was presented in *Southern Natural Gas Co. v. FERC*.[30] In that case, Southern filed alternative sets of tariff sheets, and the FERC accepted Southern's "Appendix A" sheets and rejected its "Appen-

22. New England Fuel Inst. v. ERA, 875 F.2d 882 (D.C. Cir. 1989).

23. 15 U.S.C. § 717(b) (1988).

24. *Id.* at 885 (quoting *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 822 F.2d 1105, 1109 (D.C. Cir. 1987)).

25. Michigan Consol. Gas Co. v. ERA, 889 F.2d 1110 (D.C. Cir. 1989).

26. *Id.* at 1111 (citing Michigan Consol. Gas Co. v. FERC, 883 F.2d 117 (D.C. Cir. 1989)).

27. *Michigan Consol. Gas*, 889 F.2d at 1111.

28. *Id.*

29. The ERA is required by 42 U.S.C. § 7174 (1988) to refer to the FERC for comment any proposed policy statement to be issued within a function formerly exercised by the Federal Power Commission. In *Independent Petroleum Ass'n v. ERA*, 870 F.2d 168 (5th Cir. 1989), the Fifth Circuit reaffirmed its prior holding in *Panhandle Producers & Royalty Owners Ass'n v. ERA*, 847 F.2d 1168 (5th Cir. 1988), that "remotely affected individuals" do not have standing "to bring a challenge on the FERC's behalf" to ERA's failure to carry out that responsibility. 847 F.2d at 1174.

30. Southern Natural Gas Co. v. FERC, 877 F.2d 1066 (D.C. Cir. 1989).

dix B" sheets, which (unlike Appendix A) provided for a minimum commodity bill. Southern argued that it was aggrieved by the FERC's rejection of the Appendix B sheets in part on the ground that the FERC had addressed them on the merits and found that they failed on their face to meet its requirements for minimum bills. The court found that the Appendix B sheets had clearly been filed as an alternative to be considered only if the FERC rejected the Appendix A sheets. It therefore held that Southern, "having received what it asked for," "cannot have been aggrieved by the FERC's rejection of its minimum bill in any way that is redressible by this court."[31] The court therefore refused to reach the merits of the claim.

III. THE REHEARING REQUIREMENT

The FPA, the NGA, and the NGPA all require, as a predicate for judicial review, that the petitioner raise before the Commission, in a request for rehearing, any objections to the Commission's orders that will be raised on review.[32] The courts of appeals in 1989 found that a number of petitioners had failed to satisfy that requirement.[33]

In *Tennessee Gas Pipeline Co. v. FERC*,[34] the D.C. Circuit clarified the circumstances in which a party must seek further rehearing of a Commission order on rehearing before seeking judicial review. In that case, a petitioner had raised, in its request for rehearing, certain objections to the effective date of the FERC's elimination of Tennessee's minimum bill. The FERC's slight modification to that effective date on rehearing was potentially subject to the same objections, as well as to an additional one, all of which were raised by the petitioner on review without seeking further rehearing. The court observed: "It is of course a fine point to determine whether a subsequent [FERC] modification amounts to a new order or is merely a technical change of an existing order."[35] In the circumstances of that case, the court held that the petitioner was not required to seek further rehearing before seeking review of the objections it had raised in its rehearing request but that it could not obtain review of the additional objection arising from the Commission's rehearing order

31. *Id.* at 1070.

32. FPA § 313(b), 16 U.S.C. § 8251(b) (1988); NGA § 19(a), 15 U.S.C. § 717r(a); NGPA § 506(a)(2), 15 U.S.C. § 3416(a)(2) (1988).

The Commission also acts under other statutes, including the Interstate Commerce Act, which do not require an application for rehearing as a jurisdictional prerequisite to judicial review. In 1978, the Interstate Commerce Act was recodified as 49 U.S.C. §§ 10101-11917 (1982)). As recodified, this act does not apply to oil pipelines. 49 U.S.C. § 10501(a)(1)(C) (1982). Oil Pipelines are covered by this act as it existed before the recodification. *See* Recodification Act of 1978, Pub. L. No. 95-473, § 4(c), 92 Stat. 1466 (1978). Judicial review of Commission orders issued under the Interstate Commerce Act is governed by 28 U.S.C. §§ 2321-2323, 2341-2356 (1982).

33. In addition to the case discussed in the test *infra*, the courts held that parties had failed to preserve issues for review in the following cases: ANR Pipeline Co. v. FERC, 870 F.2d 717 (D.C. Cir. 1989); Colorado Interstate Gas Co. v. FERC, 890 F.2d 1121 (10th Cir. 1989); Independent Petroleum Ass'n of Am. v. FERC, 870 F.2d 168 (5th Cir. 1989); Mobil Oil Corp. v. FERC, 886 F.2d 1023 (D.C. Cir. 1989); Platte River Whooping Crane Trust v. FERC, 876 F.2d 109 (D.C. Cir. 1989); Railroad Comm'n of Tex. v. FERC, 874 F.2d 1338 (10th Cir.) *cert. denied*, United States, 110 S. Ct. 365 (1989).

34. Tennessee Gas Pipeline Co. v. FERC, 871 F.2d 1099 (D.C. Cir. 1989).

35. *Id.* at 1110.

without having raised it in a request for further rehearing.[36]

In *Southern Natural Gas Co. v. FERC*,[37] the D.C. Circuit clarified further that a party need not seek further rehearing of a change in the FERC's *rationale* for a decision prior to seeking judicial review of that decision. Southern had petitioned for review of, *inter alia*, the Commission's rejection of Southern's proposed tariff sheet governing transportation for an individual Southern customer. The FERC challenged Southern's petition on the grounds that Southern: (1) had not objected in its request for rehearing to a particular cost rationale that FERC claimed to have relied on in its initial order; and (2) had not sought further rehearing after the FERC based its denial of rehearing solely on the cost rationale.[38] The court held first that the cryptic (at best) nature of the FERC's reference to the cost rationale in the initial order gave Southern a "reasonable ground"[39] for failing to object to that rationale in its request for rehearing. Treating the FERC's reliance on the cost rationale in its rehearing order as a change in rationale, the court held further that a change in rationale by the FERC, as opposed to a change in result, does not require a further rehearing request:

> Regardless of where that line [between a change requiring a new rehearing request and a technical change not requiring further rehearing] may be drawn with respect to a modification in the *result* reached in the original order, when FERC makes no change in the result, but merely supplies a new improved *rationale* upon realizing that its first one won't wash, it does not thereby transform its order denying rehearing into a new "order" requiring a new petition for rehearing before a party may obtain judicial review.[40]

In *Pennsylvania v. FERC*,[41] the Third Circuit rejected the Commission's claim that petitioner had failed to comply with the rehearing requirement. In that case, the petitioner raised certain arguments for the first time in a request for rehearing, and the FERC, on review, challenged the petitioner's failure to

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36. The court also held that a party held that a party failing to raise a then-applicable objection in its request for rehearing of the Commission order may not cure that error by raising the objection in a request for rehearing of a subsequent Commission order in the same proceeding. *Id.* at 1110 n.18, 1111-12.

In a related ruling, the court also held that the FERC (prior to judicial review) may act *sua sponte* to reconsider and modify portions of its orders to which no parties have objected in timely requests for rehearing. The FERC had treated a "motion for clarification" of Tennessee, which was filed after the period for filing rehearing requests had expired, as a request for reconsideration and had purported to grant reconsideration. The court found the FERC's inconsistent practice of treating late-filed rehearing requests as requests for reconsideration "disturbing," *id.* at 1107 n.12, but affirmed FERC's modification of its order as a *sua sponte* action.

37. Southern Natural Gas Co. v. FERC, 877 F.2d 1066, 1071-73 (D.C. Cir. 1989).

38. The FERC had stated in its initial order that it was rejecting the tariff sheet governing transportation for that customer on the ground that Southern had not obtained the necessary certificate authorizing that service, but acknowledged on rehearing that Southern had in fact obtained certificate authority. In the initial order, FERC had also observed that Southern's proposed transportation rates were not cost-based, but had not explicitly based its rejection of the tariff sheet on that failing, and indeed had not rejected tariff sheets for 17 other customers applying rates calculated on the same basis. On rehearing, FERC adopted the cost rationale as its sole basis for rejecting the one Southern tariff sheet, but again did not reject the other 17 sheets.

39. *See* 15 U.S.C. § 717r(b) (1988).

40. *Southern Natural Gas*, 877 F.2d at 1073 (emphasis in original).

41. Pennsylvania. v. FERC, 868 F.2d 592 (3d Cir. 1989).

seek additional rehearing after those arguments were rejected by the Commission. The court agreed with the FERC that "[t]he routine and perhaps desirable practice may be, as the Commission suggests, for a party to seek rehearing on an issue raised for the first time in a petition for rehearing."[42] However, it found that "the Commission has failed to point to any statute, rule or decision of the Commission to support the proposition that such second petition is *required*."[43] The court therefore held that it had authority to address the merits of the arguments.

IV. EXCLUSIVE JURISDICTION OF THE UNITED STATES COURTS OF APPEAL

In *Williams Natural Gas Co. v. City of Oklahoma City*,[44] the Tenth Circuit reaffirmed the principle, stated in *City of Tacoma v. Taxpayers of Tacoma*,[45] that the federal courts of appeal have exclusive jurisdiction to review orders issued under the FPA, NGA, and NGPA, and that parties therefore may not reserve issues for subsequent state or federal court litigation. The Commission had issued a certificate to Williams Natural Gas Company (Williams) to build a short extension of its existing interstate pipeline to deliver gas to the PowerSmith Cogeneration Project. Oklahoma Natural Gas Company (ONG), which holds a state franchise to sell, transport, and distribute natural gas in Oklahoma City, objected to Williams' application, claiming that the proposed service and facilities were local in nature and should be regulated by the local agency rather than the Commission. Subsequently, a state court, in a proceeding brought by ONG, held that ONG's franchise insulates it from competition and that the FERC certificate does not preempt ONG's franchise and enjoined the construction and operation of the FERC-certificated pipeline. Thereafter, a federal district court issued an order condemning the necessary rights of way but refused to grant injunctive relief or decide the preemption issue because that issue had first been considered by the state court. However, the district court did certify an immediate appeal to the Tenth Circuit.

The Tenth Circuit reversed and remanded holding that section 19(b) of the NGA[46] "provided the exclusive course for judicial review of the FERC decision and barred collateral attack in either the state or federal district courts as to those issues that could have been raised in the FERC proceeding or appeal."[47] The court held that "ONG could have and should have raised the preemption issued before the FERC originally or upon its motion for rehearing. The issue may be advanced by direct attack, pursuant to the appellate structure of § 19 (b), or not at all."[48]

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42. *Id.* at 596.

43. *Id.* (emphasis added). FERC did not contend that new arguments could not be raised in a request for rehearing. *See id.*.

44. Williams Natural Gas Co. v. City of Okla. City, 890 F.2d 255 (10th Cir. 1989).

45. City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958).

46. 15 U.S.C. § 717r(b) (1988).

47. *Williams Natural Gas*, 890 F.2d at 266.

48. *Id.* at 264.

The court also stated that "[i]t makes no sense to permit the parties to chart their own route and thus allow piecemeal and unending litigation to ensue." Accordingly, it found that the state court proceedings "enjoining Williams' exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA."[49] The court held that the condemnation proceedings did not provide "an additional forum to attack the substance and validity of a FERC order"[50] and that the federal district court should have enjoined the enforcement of the state court injunction.

V. MISCELLANEOUS ISSUES

In *Energy Probe v. United States Nuclear Regulatory Commission*,[51] the court ruled that the petitioners had failed to file their joint petition for review within the sixty-day period provided by sections 2342(4) and 2344 of the Hobbs Act.[52] The court held that the sixty-day period had begun to run on September 13, 1988 when the NRC's Director of Nuclear Reactor Regulation had issued a letter informing the petitioners of the NRC's final action, rather than on September 26, 1988, when one of the petitioners had received the letter.[53] The court therefore dismissed as untimely the joint petition for review which had not been filed until November 23, 1988.

The courts in 1989 applied several other general principles of judicial review. For example, in *Tennessee Gas Pipeline Co. v. FERC*,[54] the court refused to uphold a Commission action based on a rationale asserted by Commission counsel but on which the Commission itself had not relied. In *ANR Pipeline Co. v. FERC*,[55] the court held that, where counsel for the petitioners had not raised a claim for retroactive refunds in response to a mootness challenge, the court would not hear that claim for the first time in a petition for rehearing. In *City of New Orleans v. FERC*,[56] the court ruled that, where it had previously upheld the Commission's jurisdiction to issue the underlying order but had remanded to the FERC for further explanation, the petitioners on subsequent review could not properly again raise their jurisdictional

49. *Id.*

50. *Id.* The court also held that Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), does not require federal courts to defer to the state court decisions on the preemption issue. 890 F.2d at 264-66. According to the court, "the deference afforded the decisions of state courts under *Rooker* is not warranted where, as here, a state court has erroneously taken appellate jurisdiction over issues that have been previously decided by a federal agency, or when review of those issues could have and should have been sought pursuant to the federal statutory scheme." *Id.* at 265.

51. Energy Probe v. NRC, 872 F.2d 436 (D.C. Cir. 1989).

52. Administrative Orders Review Act, 28 U.S.C. §§ 2342(4), 2344 (1982).

53. The court observed that the other joint petitioner had received the letter promptly and that the delay in receipt of the letter by the one petitioner was primarily due to its failure to inform the NRC of its change of address. The court also noted that even the late receipt by the one petitioner had left it ample time to file a timely petition for review. *Energy Probe*, 872 F.2d at 437-48.

54. Tennessee Gas Pipeline Co. v. FERC, 867 F.2d 688, 691 (D.C. Cir. 1989).

55. ANR Pipeline Co. v. FERC, 885 F.2d 937 (D.C. Cir. 1989).

56. City of New Orleans v. FERC, 875 F.2d 903, 905 (D.C. Cir. 1989).

challenges.[57]

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57. The Committee thanks former Judicial Review Committee Chairman J. Paul Douglas for his assistance in the preparation of this report.