REPORT OF THE JUDICIAL REVIEW COMMITTEE

I. INTRODUCTION

This Report summarizes the major energy cases decided by judicial review in 1998, with a focus on cases at the appellate level. The majority of 1998 appellate cases analyzed below involve review of orders of the Federal Energy Regulatory Commission (FERC or Commission).

II. ADMINISTRATIVE LAW

A. *Unlawful Taking; Due Process*

In *Eastern Enterprises v. Apfel*,[1] five justices for a divided U.S. Supreme Court agreed that it was in violation of the U.S. Constitution for the Commissioner of Social Security (Kenneth S. Apfel) to require Eastern Enterprises to pay health care benefits of coal industry retirees and their dependants under section 9706(a)(3) of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act). Eastern Enterprises sought declaratory judgment and injunction against the defendant and others, claiming that the Commissioner's action was an unconstitutional taking and a violation of substantive due process. The U.S. District Court denied plaintiff's motion for summary judgment, and the U.S. Court of Appeals for the First Circuit affirmed, rejecting the company's claims. On certiorari, the Supreme Court of the United States (Justice O'Connor, joined by Justices Rehnquist, Scalia, and Thomas) reversed and remanded, stating that section 9706(a)(3), as applied to Eastern Enterprises, was an unconstitutional taking, because Eastern had disengaged itself from the coal business by 1965, and the company should not have to bear the health care burden for retired miners based on the company's mining activities decades before the Coal Act was passed.

Observing that the Social Security scheme under the Coal Act could reach back forty to fifty years, the Court stated that while some retroactive effect may be permitted, in this case Congress had improperly placed a severe, disproportionate, and extremely retroactive burden on Eastern Enterprises.

The Court found it unnecessary to resolve the substantive due process claim. However, Justice Kennedy, concurring in the result, dissented on the basis for the ruling, viewing the facts as presenting a violation of substantive due process arising from the unprecedented retroactive effect of the Commissioner's action.

1. Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).

B. *Rules; Retroactive Effect*

In *Burlington Resources Oil & Gas Co. v. Department of Interior*,[2] the U.S. District Court for the District of Columbia upheld retroactive application of a 1990 Department of Interior (DOI) rule requiring dual accounting for purposes of determining payments under certain leases entered into on behalf of Indian tribes. The natural gas lessee, Burlington Resources, brought a declaratory judgment action against the DOI to determine the extent of its obligations under the leases. The court found that the lessee was collaterally estopped from arguing against dual accounting because one of its predecessors in interest previously argued the issue before the Tenth Circuit and lost.[3]

The court found that Burlington must perform the required dual accounting for the period from 1984 to 1989. In requiring the retroactive application of the 1990 DOI rule, the court observed that the *Supron* cases had required retroactivity to 1970. The court held that, while an agency may not impose retroactive requirements, it can enforce court-ordered retroactive requirements.

III. ANTITRUST LAW

A. *Standing to Challenger Merger*

In *City of Pittsburgh v. West Penn Power Co.*,[4] the Third Circuit affirmed that Pittsburgh lacked standing to challenge a merger between West Penn Power Co. (West Penn), doing business as Allegheny Power, and Duquesne Light Co. (Duquesne), the two electric utilities serving the greater Pittsburgh area. Pittsburgh's claims centered on two "Redevelopment Zones" located in Duquesne's service territory. Pittsburgh felt it essential that West Penn's power be available to the Redevelopment Zones, since West Penn's rates were substantially below Duquesne's. Pittsburgh petitioned the Pennsylvania Public Utility Commission (Pennsylvania Commission) to add the Redevelopment Zones to West Penn's service territory, thus creating overlapping service areas where West Penn and Duquesne could compete against each other. Allegheny intervened in support of Pittsburgh's petition and filed a corresponding application to provide service.

Duquesne and Allegheny subsequently executed a premerger agreement, and consistent with that agreement, Allegheny withdrew its supporting intervention and service application. Pittsburgh's plans for electric competition within the Redevelopment Zones fell through, prompting Pittsburgh to sue West Penn and Duquesne for treble damages under Sherman Act, section 1,[5] and to

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2. Burlington Resources Oil & Gas Co. v. Department of Interior, 21 F. Supp. 2d 1 (D.D.C. 1998).

3. Jicarilla Apache Tribe v. Supron Energy Corp., 782 F.2d 855 (10th Cir. 1986) en banc [hereinafter *Supron II*], *reh'g* 728 F.2d 1555 (10th Cir. 1984) [hereinafter *Supron I*] (adopting dissenting opinion in *Supron I*).

4. City of Pittsburgh v. West Penn Power Co., 147 F.3d 256 (3d Cir. 1998).

5. 15 U.S.C. § 1 (1994).

obtain a merger-blocking injunction under Clayton Act, section 16.[6] The court affirmed that Pittsburgh lacked standing because it failed to meet the antitrust injury requirements articulated by the Supreme Court in *Associated General Contractors of California v. California State Counsel of Carpenters*,[7] as restated by the Third Circuit in *Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*[8] The court found that Duquesne's service to the Redevelopment Zones, and any resulting impediment to business development, resulted not from any of the alleged activities of Allegheny or Duquesne, but from Pennsylvania's regulatory structure. Pittsburgh claimed that if Allegheny pressed its case, the Pennsylvania Commission would have permitted competition in the Redevelopment Zones. The court rejected Pittsburgh's claim as too speculative to confer antitrust standing.

B. *State Action Immunity; Preemption*

In *Destec Energy, Inc. v. Southern California Gas Co.*,[9] the court upheld its earlier dismissal of an antitrust action against a large Hinshaw pipeline over its transport-or-pay provisions. The court rejected the plaintiffs' arguments that the defendant pipeline could not assert a state-action immunity defense based on orders of the California Public Utility Commission (CPUC) on grounds that those orders were "in direct conflict with [the] FERC's policy to open competition in the California gas transportation market."[10] Although those orders may effectively hamper the ability of interstate gas utilities to compete in California's gas market, the court held that, under the Hinshaw amendment to the Natural Gas Act (NGA), Congress gave the state regulator exclusive jurisdiction over activities of such pipelines. Thus, preemption could not apply, irrespective of the state regulator's divergence from Commission policy.

IV. ENERGY TAXES

A. *Property Tax Valuation; Access to Federal Courts*

In *ANR Pipeline Co. v. Lafaver*,[11] the Tenth Circuit dismissed the appeal of the State of Kansas, vacated the district court's decision, and remanded the case to the district court with instructions to dismiss all claims against the remaining state defendants. ANR Pipeline argued that it is similarly situated vis-à-vis railroads and that it is an equal protection right to the same tax breaks provided the railroads. After losing at the state level, ANR Pipeline filed a suit with the district court alleging that the state tax property valuations violated its federal equal protection and due process rights. ANR requested both money damages and declaratory relief that would require the Division of Property Valuation to

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6. 15 U.S.C. § 26 (1994).
7. Associated Gen. Contractors of Cal. v. California State Counsel of Carpenters, 459 U.S. 519 (1983).
8. Barton & Pittinos, Inc. v. SmithKline Beecham Corp., 118 F.3d 178 (3d Cir. 1997).
9. Destec Energy, Inc. v. Southern Cal. Gas Co., 5 F. Supp. 2d 433 (S.D. Tex. 1997).
10. *Id.* at 465.
11. ANR Pipeline Co. v. Lafaver, 150 F.3d 1178 (10th Cir. 1998).

recertify to counties for subject and future tax years lawful values. The district court held that it had jurisdiction to hear this case and that it was not blocked by the Tax Injunction Act, the Rooker/Feldman Doctrine, or the Eleventh Amendment. The Tenth Circuit held that the Eleventh Amendment precluded federal court injunctive relief because the state's power to assess and level taxes within its borders implicates special state sovereignty interests. ANR Pipeline sought the protection of the *Ex Parte Young* doctrine, under which a suit against a state official seeking prospective equitable relief is not barred by the Eleventh Amendment. The court held that doctrine inapplicable to the pipeline's equitable claims for retrospective relief, and that the doctrine also failed to provide a window for challenging state action with regard to future taxes when the state provides an adequate state remedy. The court held access to the courts in Kansas was an adequate state remedy. With respect to the prospective application of the tax, the court held that claims against the state must be brought in state court.

V. FEDERAL POWER ACT—HYDROELECTRIC LICENSING AND RELATED ENVIRONMENTAL ISSUES

A. Interpretation of Power Purchase Agreement

In *Lupien v. Citizens Utilities Co.*,[12] the operator of a hydroelectric generating facility brought an action for breach of a power purchase agreement by the local utility company. The purchase agreement required the utility to purchase all power generated by the plant for thirty years at a "levelized" rate. It also required the plant to maintain security in an amount sufficient to cover the calculated Cumulative Present Value Difference (CPVD) between the contract price and market rates. If the facility exercised its right to terminate the agreement, it was obligated to pay a CPVD to the utility within thirty days. The plant went online in 1993, but never posted the required security. Two years later, the utility sent a default notice due to this failure. The plant brought suit and the utility counterclaimed for breach of the agreement.

The district court dismissed the plant's suit, holding that the purchase agreement unambiguously required the CPVD security and that the plant had failed to obtain it. The court disagreed with the plant's assertion that the utility waived the security requirement by waiting for over two years after the plant went online to serve its default notice. Under Vermont law, waiver must arise from unequivocal conduct, conduct not proven by the plant. The court also rendered judgment in favor of the utility on its counterclaim for damages in the full amount of the CPVD. On appeal, the district court's rulings were upheld, except that the CPVD judgment, seemingly based on a liquidated damages theory, was reversed as an impermissible recovery under the contract. On remand, the utility would be limited to actual damages.

12. Lupien v. Citizens Utils. Co., 159 F.3d 102 (2d Cir. 1998).

B. Removal and Jurisdiction Regarding Indemnity Claims

In *Dalrymple v. Grand River Dam Authority*,[13] a group of private citizens brought a class action in state court against the dam authority for damages arising from flooding of its properties. The Grand River Dam Authority is a conservation and reclamation district created under Oklahoma law, which operates the Pensacola Hydroelectric Project. The plaintiff class owns property upstream of the dam along three rivers that are impounded by the Pensacola Dam. Plaintiffs alleged a series of floods and asserted claims for inverse condemnation and consequential damages. The Authority removed the action to federal court and filed third party claims for indemnification against the FERC and the United States Army Corps of Engineers. The district court dismissed the third party claims and remanded the case to state court, citing a lack of jurisdiction.

On appeal, the Tenth Circuit held that since the district court's remand order was based on lack of jurisdiction, it was a nonreviewable order. As to the third party claims, the court found both the FERC and the Corps of Engineers were immune from indemnity liability on plaintiffs' tort claims; on the inverse condemnation claims, plaintiffs had asserted claims in excess of the $10,000 jurisdictional limit of the federal district court for claims against the federal government under 28 U.S.C. section 1346(a)(2). Thus, the Court of Federal Claims was the appropriate forum for resolution of those claims.

C. Appellate Procedure Regarding Hydroelectric Application

In *Rainsong Co. v. FERC*,[14] a builder sought review of the FERC's denial of its application for a license to build a hydroelectric facility in a national forest. In order to confer jurisdiction on the federal court, notice of appeal must have been filed within 60 days "after the order of the Commission."[15] Rainsong, the builder, filed its notice of appeal 63 days after the Commission posted a copy of its decision with the Division of Public Information, but within 60 days of the time that the Commission mailed the order to Rainsong. The jurisdictional issue turns on the meaning of "after the order of the Commission."

The Commission's regulations, in 18 C.F.R. section 385.2007(b), provide that its orders are deemed issued upon the earliest occurrence of either posting with the Division of Public Information, mailing to the parties, or making copies public. Under the Commission's interpretation, the court lacked jurisdiction. The court agreed for two reasons. First, Congress authorized the Commission to designate the manner in which its orders become effective. Second, the Commission regulation specifically applies to this situation: the order became effective when a copy of the decision was made public by posting in the Division. The burden was on the affected party to monitor the status of the order, and to comply with the appellate procedural requirement, regardless of the method by which the Commission's order became effective.

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13. Dalrymple v. Grand River Dam Auth., 145 F.3d 1180 (10th Cir. 1998).
14. Rainsong Co. v. FERC, 151 F.3d 1231 (9th Cir. 1998).
15. *Id.* at 1233, *quoting* 16 U.S.C. § 825(b) (1994).

D. Standing and Intervention Examined

In *City of Orrville v. FERC*,[16] the D.C. Circuit considered two FERC rulings adverse to the interests of applicants for hydroelectric projects in Ohio. Pike Island Hydro Associates (PIHA), a hydroelectric permit holder, complained that, after its intervention in an amendment proceeding for another project, it had not received information pertinent to its comment and intervention until after the amendment had been granted. The City of Orrville sought late intervention following conclusion of the amendment proceeding. The request was denied. Both parties sought rehearing, during which PIHA's permit expired. Rehearing was denied and the parties appealed.

The Court of Appeals upheld denial of PIHA's claim. To challenge FERC actions, a party must be an "aggrieved party" under the Federal Power Act (FPA) and must satisfy standing requirements of Article III of the U.S. Constitution. Infraction of a procedural regulation alone is insufficient to establish "injury-in-fact"—injury caused by the substance of an agency action or inaction is an essential element. There was no substantive injury, since PIHA no longer held a license for its project thirty miles downstream. As to Orrville's claim, the court held that a motion to intervene after a final decision need be granted by the FERC only upon a showing of "extraordinary circumstances." It was Orrville's burden to monitor any public notices and take affirmative action to protect its interest. Failure to do so until after a final order is not an "extraordinary circumstance" that justifys late intervention. Orrville also claimed that the FERC used the wrong standard, but, since the argument apparently was not presented to the FERC on rehearing below, it could not be considered on appeal.

E. Notice and Alternative Relief

In *Mt. Lookout-Mt. Nebo Property Protection Ass'n. v. FERC*,[17] the City of Summersville obtained a license to build a hydroelectric plant and to lay an eighty-mile transmission line to a substation. The City sought to amend the license to run the transmission line across a river to a different substation. It submitted notice of the amendment. Following the comment period, American Whitewater Affiliation (AWA) and the Property Protection Association (PPA) filed for late intervention, which was granted. The FERC held another public meeting in which the parties submitted alternative proposed routes. The FERC's final environmental assessment found non-significant impacts by any of the proposed routes, and selected Summersville's route because it was shorter. Summersville also agreed to apply the Visual Resource Protection Plan to the entire project, rather than just the power plant as the Act required. The PPA and the AWA complained of inadequate notice and improper FERC review.

On appeal, the court found that the City notified three state agencies, four federal agencies, and twenty-three affected landowners of its amendment proceedings, and that notice was published in the Federal Register and a local

16. City of Orrville v. FERC, 147 F.3d 979 (D.C. Cir. 1998).

17. Mt. Lookout-Mt. Nebo Property Protection Ass'n v. FERC, 143 F.3d 165 (4th Cir. 1998).

newspaper. The PPA had been formed as a protest group after the initial comment period had expired, so its organizers had actual notice of the proceedings. Late comments were accepted by each, and the PPA participated in an additional public meeting. Late intervention was granted to the PPA and the AWA, and their issues were addressed by the FERC. As to the substantive issues raised, the court found that the record supported the FERC's determinations that no impact statement was required, and that the range of alternatives the FERC considered was also reasonable. Since the FERC determined an impact statement was not required, the National Enviromental Policy Act (NEPA) only requires brief discussions of the need for proposals, alternatives and impacts, and a listing of agencies and persons consulted. The range of the three alternatives from which the FERC selected was a reasonable range in view of the marginal difference in environmental impact among them.

VI. FEDERAL POWER ACT—ELECTRIC REGULATORY LAW

A. Depreciation Rate Changes

In *Alabama Power Co. v. FERC*,[18] the D.C. Circuit remanded a FERC order in which the Commission declared that public utilities are required to obtain FERC approval before changing the depreciation rates they use for accounting purposes. The court held that the FERC order amounted to an interpretative rule, and that the FERC violated section 302(b) of the Federal Power Act (FPA)[19] by issuing the rule before notifying state commissions and providing them an opportunity to present their views. The FERC order was insufficient to provide the state commission notice after adopting an interpretative rule, as the FERC had done.

The court further held that section 302(a) of the FPA[20] does not, as the FERC declared, require public utilities to obtain the FERC's approval before changing the depreciation rates used for accounting purposes. Although section 302(a) authorized the FERC to prescribe rules that require public utilities to charge only depreciation rates prescribed by the FERC, the court determined that the statute was not "self executing," and thus did not require public utilities to seek FERC approval in the absence of such FERC rules. The court contrasted section 302(a) with the more familiar section 205(d) of the FPA,[21] which is self-executing, and thus requires public utilities to obtain FERC approval before changing the rates charged for jurisdictional sales.

B. Market Based Rates

In *Louisiana Energy and Power Authority v. FERC*,[22] the Court of Appeals upheld FERC orders approving a public utility's application to sell electric

18. Alabama Power Co. v. FERC, 160 F.3d 7 (D.C. Cir. 1998).
19. 16 U.S.C. § 825a (1994).
20. 16 U.S.C. § 825a (a) (1994).
21. 16 U.S.C. § 824e (1994).
22. Louisiana Energy and Power Auth. v. FERC, 141 F.3d 364 (D.C. Cir. 1998).

energy at market-based rates. The court held that the petitioner, as a competitor of the selling utility, was aggrieved by, and thus had standing to challenge the Commission's orders. The challenge was ripe for review because the orders lifted a regulatory restriction on a competitor. The court rejected the petitioner's argument on the merits, however, finding that the Commission's decision approving the market-based rate authority was not arbitrary or capricious. The court noted that the utility's market share of eight point seven percent was too low to find market power under the FERC's precedent or to suggest that it had the ability to engage in predatory pricing. The court also rejected the petitioner's further argument that the utility could engage in predatory pricing because it was part of a tight oligopoly with an eighty-six percent market share, as unsupported by record evidence. The court found the FERC's prediction that its open-access transmission rules will allow new competitors to defeat attempts by an oligopoly to raise prices above competitive levels to be reasonable. The court further held that the FERC did not err in deciding these matters without holding an evidentiary hearing, since the FERC could resolve on the written record whether the seller utility was a member of an oligopoly capable of engaging in predatory pricing.

VII. NATURAL GAS ACT—PIPELINE RATE REGULATION

A. Ratemaking

1. *Iroquois Gas Transmission System v. FERC*[23]

The Commission excluded attorney's fees from the rate base for a newly constructed pipeline incurred in defending claims of environmental violations during construction. After finding that the Commission correctly focused on the prospect of ratepayer benefits from the underlying activity rather than the litigation, the court remanded the case because the Commission did not adequately explain which types of legal defense costs are presumed recoverable for ratemaking purposes or why the costs in the instant case were non-recoverable.

2. *Northern Border Pipeline Co. v. FERC*[24]

The court denied the petition of Northern Border Pipeline Co. (Northern Border) and Natural Gas Pipeline Co. of America (Natural) for review of a FERC order directing Northern Border to record the accumulated depreciation on the cost of a gas pipeline facility built by Natural and sold to Northern Border. Northern Border calculates its rates under a formula and failed to record the accumulated depreciation for the pipeline as a reduction to its rate base and to reflect that reduction in rates. The FERC directed Northern Border, in accounting for its purchase from Natural, to record the facility's depreciated original cost (defined as the original cost to Natural less accumulated

23. Iroquois Gas Transmission Sys. v. FERC, 145 F.3d 398 (D.C. Cir. 1998).

24. Northern Border Pipeline Co. v. FERC, 129 F.3d 1315 (D.C. Cir. 1997).

depreciation). Following the FERC's interpretation of its depreciation accounting rules as applying if a facility has depreciated below its original cost, the court rejected Northern Border's arguments that the FERC action was arbitrary and capricious in requiring the proposed accounting entry. The court disagreed that Northern Border could support the conclusion that the line passed the *United* [25] test without a rate proceeding under section 4 of the NGA, based in part on the finding that Northern Border never reported that the line's purchase price exceeded its depreciated original cost in its application in the NGA section seven proceeding approving the purchase from Natural.

3. *Burlington Resources Oil & Gas Co. v. FERC* [26]

Petitioners challenged the FERC's Policy Statement relating to negotiated rates and certain orders permitting pipelines to negotiate rates with customers. The court found, however, that the Policy Statement was not a rule, that the statement was not ripe for review, and that Petitioners were not aggrieved by it. The court further found that the substantive challenges to the orders approving negotiated rate tariff conditions, issued pursuant to the Policy Statement, likewise were not ripe for review and that Petitioners were not aggrieved.

B. Refunds and Remedies

1. *Southeastern Michigan Gas Co. v. FERC* [27]

This case arose in response to an earlier remand by the court of the FERC's orders approving incremental rates for certain expansions by Great Lakes Gas Transmission Limited Partnership (Great Lakes).[28] In remanding the case, the court found that the FERC had failed to provide a reasoned explanation for having abandoned the *Battle Creek*[29] test in favor of a "commensurate benefits" test for determining whether or not to approve rolled-in rates.[30] On remand, the FERC determined that the *Battle Creek* test was governing its policy when it certificated the Great Lakes' expansions and that the application of that test required approval of rolled-in rates for the expansions.

Petitioners sought review of the FERC's orders on remand, raising various issues concerning the reasonableness of the FERC's approval of rolled-in rates, the ordering of refunds, and the calculation of interest. The court generally affirmed the FERC's decision on remand, finding that: (1) it was proper to apply the *Battle Creek* test to the Great Lakes' expansions; (2) the FERC could correct its legal error by applying the lawful rates retroactively and ordering the resulting refunds and additional charges with respect to both firm and interruptible/overrun rates; and (3) the FERC reasonably permitted Great Lakes

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25. *United Gas Pipe Line Co.*, 25 F.P.C. 26 (1961).

26. Burlington Resource Oil & Gas Co. v. FERC, 1998 WL 700156 (D.C. Cir. July 20, 1998) (unpublished opinion).

27. Southeasten Michigan Gas Co. v. FERC, 133 F.3d 34 (D.C. Cir. 1998).

28. TransCanada PipeLines Ltd. v. FERC, 24 F.3d 305 (D.C. Cir. 1994).

29. Battle Creek Gas Co. v. FPC, 281 F.2d 42 (D.C. Cir. 1960).

30. *TransCanada*, 24 F.3d at 310-11.

to retain the difference between the additional charges it was allowed to collect under the lawful rates and the refunds required under those rates. The court did modify the FERC's remand orders so as to require interest to apply on the refunds and additional charges from the date the lawful rates should have been in effect, instead of only prospectively from the date they went into effect after the FERC approved them on remand.

2. *Koch Gateway Pipeline Co. v. FERC*[31]

The court vacated the FERC's decision to order refund of monies realized pursuant to Koch Gateway Pipeline Co.'s (Koch) cash-in/cash-out procedures and remanded the matter to the Commission. The court found that the Commission abused its remedial discretion by ordering a refund since it found that Koch did not ultimately reap a windfall in the process of implementing a new tariff and procedure for resolving imbalances in the amount of gas shipped under its transportation tariffs.

Apart from finding that the refunds were an abuse of discretion, the court found ambiguity in Koch's tariff provision and that the Commission's interpretation of the tariff was not arbitrary. The court determined that the Commission did not err in finding Koch's accounting practices to be inconsistent with its tariff and remanded the proceeding.

3. *Pennsylvania Office of Consumer Advocate v. FERC*[32]

Following an order to show cause as to whether the court should change its decision, the court upheld a prior ruling affirming a FERC decision permitting a non-major pipeline to retain revenues resulting from the pipeline's assessment of penalties against its customers rather than using the revenues to offset future costs. Petitioners did not claim that they paid penalty revenues, and the court did not require the pipeline to return penalty revenues to its customers. The court clarified that its prior decision did not rest on whether the pipeline reported penalty revenues in a separate subaccount under Account No. 495, but rather on the deference given to the Commission in a rate proceeding.

4. *Amoco Production Co. v. FERC*[33]

The court remanded to the FERC its decision that pipelines, as a matter of policy, should not be required to flow penalty revenues through to their customers. The NorAm Gas Transmission Company (NorAm) instituted a rate case under section four of the NGA, wherein the Commission approved NorAm's proposal as just and reasonable. The proposal called for increasing the penalties which the pipeline would assess its customers for unauthorized overruns and failures to comply with Operational Flow Orders (OFOs), which are orders from NorAm to shippers that are issued to help keep the system in balance. The court denied petitioner's appeal of the Commission's decision to

31. Koch Gateway Pipeline Co. v. FERC, 136 F.3d 810 (D.C. Cir. 1998).
32. Pennsylvania Office of Consumer Advocate v. FERC, 134 F.3d 422 (D.C. Cir. 1998).
33. Amoco Production Co. v. FERC, 158 F.3d 593 (D.C. Cir. 1998).

accept the increase in OFO penalties, but remanded the Commission's decision to allow NorAm to keep $1.8 million in penalty revenues. The court found the Commission's decision on this point speculative and thus sought an explanation.

5. *Process Gas Consumers Group v. FERC* [34]

The court remanded the Commission's acceptance of the tariff of Texas Eastern Transmission Corporation's *pro rata* compensation plan for spreading payments from customers with curtailment exemptions to customers that are curtailed. Petitioners proposed alternative compensation plans based on actual damages or a predetermined amount that exceeds the cost of the most expensive gas. The court found that the Commission failed to explain why the petitioners' proposals were unworkable.

C. *Order No. 636 Compliance*

1. *Noram Gas Transmission Co. v. FERC* [35]

The court remanded the rate design and cost allocation methodology in a contested settlement filed by Tennessee Gas Pipeline Company. NorAm, a competitor, objected that the proposed settlement, which allocated costs based on a system-wide average, would have an anti-competitive effect on the formation of market centers in contravention of Order No. 636. NorAm contested the tariff's failure to separate production area costs and market area costs. The Commission had found no *per se* violation of any Commission policy with the continued use of a system-wide cost-of-service.

2. *Texaco Inc. v. FERC* [36]

The court denied the petitions of natural gas shippers with firm transportation contracts with Mojave Pipeline Company (Mojave) for review of the FERC's orders requiring the shift from the modified fixed-variable (MFV) to the straight fixed-variable (SFV) rate design, under Order No. 636. Mojave, in a post-Order No. 636 rate filing under section five of the NGA, sought FERC approval to retain MFV rates for existing customers. However, the Commission found that Mojave's retention of some MFV-based charges would threaten the coherence of Order No. 636s national policy concerning SFV rates and would distort the local gas market to the detriment of Mojave's competitors. The court applied the *Mobile-Sierra* doctrine to the existing Mojave contracts and held that the FERC's explanation satisfied its obligation to articulate a supportable and reasoned explanation for how the public interest required modification of private contracts.

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34. Process Gas Consumers Group v. FERC, 158 F.3d 591 (D.C. Cir. 1998).
35. Noram Gas Transmission Co. v. FERC, 148 F.3d 1158 (D.C. Cir. 1998).
36. Texaco Inc. v. FERC, 148 F.3d 1091 (D.C. Cir. 1998).

3. *City of Nephi v. FERC*[37]

The City of Nephi petitioned for review of the FERC's orders which denied it rate relief or mitigation of its pipeline supplier's shift to the SFV rate design. The court denied the petition in part and dismissed it in part, finding that (1) the FERC's decision not to provide for mitigation was supported by reasoned decision-making, and (2) the remainder of Nephi's challenges should be dismissed because they were beyond the court's jurisdiction, represented an untimely collateral attack on Order No. 636, or were not timely raised before the FERC, and should be dismissed because they were beyond the court's jurisdiction.

4. *Chevron U.S.A. Inc. v. FERC*[38]

In this unpublished, *per curiam* opinion, the court upheld several Commission orders: (1) requiring Transcontinental Gas Pipeline Corporation (Transco) to delete certain language from its Form of Service Agreement that would have permitted it to hold capacity on itself by authorizing it to act as transportation agent for its gas customers; (2) imposing a ninety percent revenue-crediting provision on Transco's interruptible transportation feeder lines; (3) accepting Transco's proposed unbundled gathering rates without a full evidentiary hearing; and (4) authorizing shippers using Transco's capacity release program to charge rates based on Transco's highest multi-zone rate paid by the shipper rather than by an amount based on the zone(s) in which the capacity is sold.

5. *Tennessee Valley Municipal Gas Ass'n v. FERC*[39]

The court remanded the Commission's decision regarding the eligibility of a pipeline's former indirect small customers for one-part sales service. The court found that the treatment of these customers under Order No. 636 had not yet been finally determined by the Commission and the issues raised by Petitioners were before the Commission on rehearing of Order No. 636-C. The court also dismissed a challenge to incremental rates for newly constructed facilities. Given the Commission's deferral of a final decision on rolled-in versus incremental rates to a subsequent rate case, the court found the issue was not ripe.

D. Settlement Issues

In *Southern California Edison Co. v. FERC*,[40] the controversy involved the propriety of FERC's refusal either to hold up a settlement of an El Paso Natural Gas Company (El Paso) rate case pending resolution of Southern California Edison Company's (Edison) objections as an indirect customer, or to sever Edison from the settlement in both its capacity as an indirect and a direct

37. City of Nephi v. FERC, 147 F.3d 929 (D.C. Cir. 1998).
38. Chevron U.S.A. Inc. v. FERC, 159 F.3d 636 (D.C. Cir. 1998).
39. Southern Cal. Edison v. FERC, 140 F.3d 1085 (D.C. Cir. 1998).
40. Tennessee Valley Mun. Gas Ass'n v. FERC, 162 F.3d 116 (D.C. Cir. 1998).

customer. While the FERC had found Edison's objections as a direct customer should be severed for a determination on the merits, it found that Edison's objections as an indirect customer should not be severed. The court reversed, finding the FERC's action to be inconsistent with the settlement precedents of both the Commission and the court. The court found that the congruency between the interests of direct and indirect customers was lacking since, in part, it had not been established that the state regulatory body would provide adequate protection of Edison's interests as an indirect customer.

E. Suspension

The court, in *Northeast Energy Associates v. FERC*,[41] remanded to the Commission for further justification of its departure from precedent in denying Northeast Energy Associates (Northeast) a shortened suspension period for a proposed decrease in its incremental rates. The Commission had directed a five-month suspension of all rates in a general rate increase filed by Transcontinental Gas Pipe Line Corporation. This decision departed from prior Commission precedent wherein decreases in incremental rates were suspended for a shorter period while other rate increases in the same application were suspended for five months.

The court also rejected the FERC's contention that Northeast lacked standing, finding that the FERC's departure from its policy on incremental rate decrease filings injured Northeast, since Northeast could not recover the excess funds paid to the pipeline during the longer suspension period.

F. Contract Issues

1. *San Diego Gas & Electric Co. v. Canadian Hunter Marketing Ltd.*[42]

The court affirmed the decision below and found that the district court did not usurp the jury's role in interpreting the powers of the CPUC under Performance Based Ratemaking (PBR). San Diego Gas & Electric Company (San Diego G&E) entered into a purchase agreement with Canadian Hunter Marketing Ltd. (Canadian Hunter), subject to the laws of Alberta, Canada, in which the contract price for gas depended upon the CPUC's determination of San Diego G&E's weighted average cost of gas (WACOG) inclusive of purchases specifically transported from the Southwest to California. San Diego G&E then sought and received CPUC approval to change from the Energy Cost Adjustment Clause (ECAC), which included Southwest purchases in the WACOG determination and was the basis of the contract price, to the PBR method.

Canadian Hunter sought to void the contract on impossibility grounds under Alberta Law. San Diego G&E filed a complaint to enforce the contract. The court granted Canadian Hunter's request for summary judgment, holding that the

41. Northeast Energy Assoc. v. FERC, 158 F.3d 150 (D.C. Cir. 1998).
42. San Diego Gas & Elec. Co v. Canadian Hunter Mktg. Ltd., 132 F.3d 1303 (9th Cir. 1997).

contract between the two parties was voidable under Alberta law, after finding that the shift to PBR made it impossible to set the price in the contract.

San Diego G&E appealed the district court decision, arguing that the court erred because disputed facts existed and the court made evidentiary decisions on a motion for summary judgement. The court rejected the arguments on appeal that it was improper for the lower court to examine extrinsic evidence going to the intent of the parties on a motion for summary judgment. The court found that, under the agreement, the final price can be ascertained only after CPUC approval or disapproval takes place, which is a third party valuation under section 12(1) of the Alberta Sale of Goods Act. The court held that no material disputed factual issues remained since, under PBR, the CPUC is no longer capable of making the WACOG determination required to set the price under the agreement.

2. *JN Exploration & Production v. Western Gas Resources, Inc.*[43]

The Eighth Circuit reversed the district court's decision granting summary judgment in favor of JN Exploration and Production Company (JN) on an unjust enrichment theory. The court further remanded the proceeding for a determination of whether Western Gas Resources (Western) engaged in fraudulent concealment when it failed to share $15 million it received from Montana Dakota Utilities, Inc. (MDU) in exchange for releasing MDU from a take-or-pay contract under which MDU agreed to pay Western the highest price under federal price regulations for natural gas from JN's properties. JN's contract with Western stated that JN's predecessor in interest would receive fifty to sixty percent of the proceeds Western received for the sale of natural gas shipped and processed from properties owned by JN. Several years after executing the contract with JN, Western then released MDU from its contractual obligation to purchase thirty million BTU of JN natural gas in exchange for $15 million in commitment payments, none of which Western distributed to JN. The court found that, where a contract exists, claims for unjust enrichment will not lie under North Dakota law, but held that the issue was whether the $15 million Western received in settlement of its contract with MDU constituted net proceeds under the JN-Western contract. The court, therefore, remanded the proceeding for a determination of JN's contract claims and whether Western engaged in fraudulent concealment.

3. *Williamson v. Elf Aquitaine, Inc.*[44]

The court reversed the district court's grant of Williamson's motion for summary judgment and rendered judgment for Elf Aquitaine. The court held that Williamson, as a lessor/royalty owner, was not entitled to recover as royalties, a portion of the settlement proceeds between Elf Aquitaine and the Tennessee Gas Pipeline Company.

43. JN Exploration & Prod. v. Western Gas Resources, Inc. 153 F.3d 906 (8th Cir. 1998).

44. Williamson v. Elf Aquitaine, Inc., 138 F.3d 546 (5th Cir. 1998).

4. *Texas Eastern Transmission Corp. v. Amerada Hess Corp.*[45]

The court affirmed the district court's holding that a substitution clause of a take-or-pay contract between Texas Eastern Transmission Corporation (Texas Eastern) and Amerada Hess Corporation (Amerada) only permitted Amerada to substitute similar quantities of gas under Louisiana contract law.

VIII. NATURAL GAS ACT (NON-PIPELINE RATE REGULATION)

A. Acquiring Offsystem Capacity

The Commission ruled, in *Colorado Interstate Gas Co. v. FERC*,[46] that interstate pipelines may acquire offsystem capacity, that is, capacity rights on other pipelines. However, unlike their competitors, interstate pipelines must first obtain advance approval from the Commission to do so. On review, the court held that the Commission failed to offer sufficient reasons for this distinction, which the Commission readily admitted placed pipelines at a competitive disadvantage, particularly for short-term transportation services. The court rejected the pipelines' arguments that the Commission's regulation in section 284.223(a) already gave pipelines a right to acquire offsystem capacity without prior Commission approval.[47] The Commission's interpretation of this regulation was found sufficiently reasonable.

B. Jurisdictional Facilities; Standing

The Commission held, in *Williams Gas Processing-Gulf Coast Co., v. FERC*,[48] that a portion of new gas pipeline facilities that Shell proposed to construct on the outer continental shelf would constitute "transportation" facilities and thus be subject to the Commission's NGA jurisdiction. While Shell sought no judicial relief from that order, Williams did. Williams had a proceeding pending before the Commission to declare that certain, apparently similar, offshore facilities it was considering acquiring by spindown from an interstate pipeline affiliate were gathering facilities and thus non-jurisdictional under section 1(b) of the NGA. Williams was concerned about the precedential effect of the Shell orders. The court dismissed Williams' petition on the ground that it was not a "person aggrieved" by the Commission's orders. The court reaffirmed the long-standing rule that standing cannot rest solely on a claim of "supposed adverse precedential effect."[49] The court rejected Williams' "novel path-dependency theory"[50] that it had standing because, in determining whether a particular pipeline is gathering or transportation, the Commission often looks to how other facilities in the near vicinity are characterized. The court

45. Texas E. Transmission Corp. v. Amerada Hess Corp., 145 F.3d 737 (5th Cir. 1998).

46. Colorado Interstate Gas Co., v. FERC, 146 F.3d 889 (D.C. Cir. 1998).

47. 18 C.F.R. § 284.223(a) (1998).

48. Williams Gas Processing-Gulf Coast Co. v. FERC, 145 F.3d 377 (D.C. Cir. 1998).

49. *Id.* at 378.

50. *Id.*

concluded that the weight the Commission gives to this "vicinity" factor was too modest for Williams to be aggrieved.

C. *No-Notice Service*

UGI Utilities, Inc. (UGI), which provides retail gas service in Pennsylvania, had long obtained no-notice, firm sales from Columbia Gas Transmission Corporation (Columbia), although physical delivery to UGI for nine delivery points was made by Texas Eastern Transmission Corporation (Texas Eastern). As part of its Order No. 636 restructuring, Columbia offered to assign to UGI all of Columbia's capacity on Texas Eastern for these nine UGI delivery points, but UGI complained because Texas Eastern's no-notice service was less flexible and more expensive. The court, in *UGI Utilities, Inc. v. FERC*,[51] refused to upset the Commission's orders approving Columbia's restructuring over UGI's objections and denying UGI's claim that it should receive mitigation for the increased costs it incurred from the reassignment. The Commission's orders were found to have been sufficiently reasoned and not arbitrary or capricious.

D. *Federal-State Jurisdiction*

The Commission held, in *Public Utilities Commission of California v. FERC*,[52] that the CPUC had impermissibly infringed on federal jurisdiction when it authorized Southern California Gas Company (SoCal), a Hinshaw pipeline, to charge interstate shippers for access to local service. The Commission declined to order the Hinshaw pipeline to refund the $800,000 in access fees that it collected from interstate shippers. In a detailed decision addressing the jurisdictional boundaries of the overlapping interstate/intrastate nature of Hinshaw pipelines, the court upheld the Commission's orders that, in approving SoCal's access fees, the state regulator was improperly attempting to regulate interstate service because SoCal's access fee was not for any service rendered by SoCal and thus the Commission had exclusive jurisdiction over such service and charges. However, the court rejected the Commission's refusal to order a refund. Deference to the local regulators, or comity, was not appropriate in this matter because the CPUC did not have "overlapping jurisdiction" with the Commission.

E. *Eminent Domain*

1. *Northern Border Pipeline Co. v. 86.72 Acres of Land*[53]

In an eminent domain proceeding under section 7(h) of the NGA, the Seventh Circuit affirmed the district court's decision that an interstate pipeline was not entitled to equitable relief in the form of a preliminary injunction to obtain immediate possession of the land at issue. Because the condemnation authority in the NGA expressly looks to state procedure, and because the

51. UGI Utils., Inc v. FERC, 144 F.3d 868 (D.C. Cir. 1998).
52. Public Utils. Comm'n. of Cal. v. FERC, 143 F.3d 610 (D.C. Cir. 1998).
53. Northern Border Pipeline Co. v. 86.72 Acres of Land, 144 F.3d 469 (7th Cir. 1998).

applicable state law did not authorize "quick-take" possession in these circumstances, the condemning pipeline had no legal right of possession before the conclusion of the condemnation proceedings.[54]

2. *Portland Natural Gas Transmission System v. 4.83 Acres of Land*[55]

In this eminent domain proceeding under section 7(h) of the NGA, the court rejected various motions by the landowner to upset the interstate pipeline's condemnation efforts. The court rejected the landowner's argument that it lacked subject-matter jurisdiction because the pipeline filed its action before complying with the Commission's "Condition 31" that construction be deferred until the Commission approves various cultural resource reports and treatment plans. The court further ruled that the landowner was not entitled to ninety days prior notice under 42 U.S.C. section 4651(5) (on construction of public improvements) or under related federal regulations for "displaced persons" before having to move his farming operations. Further, the court rejected the landowner's arguments that the court had jurisdiction (at least without prior exhaustion of administrative relief from the Commission) to ensure that the pipeline complied with the Commission's conditions in its certificate of public convenience and necessity.

3. *Tennessee Gas Pipeline Co. v. New England Power*[56]

In this eminent domain proceeding under section 7(h) of the NGA, the court granted the interstate pipeline's request for an injunction to prevent a lessee of the landowner from interfering with the pipeline's use of the land at issue for its Commission-authorized pipeline project. The court exercised its equitable powers to grant immediate entry and possession where such relief is essential to the pipeline construction schedule. The court held that the Uniform Relocation Assistance and Real Property Acquisitions Policies Act did not require Tennessee to prepay the lessee for the costs of removing trucks and other equipment stored or located on the land at issue. Without citing any state law, the court also ruled that it had "the equitable [authority] to grant immediate entry and possession where such relief is essential to the pipeline construction schedule" imposed by the Commission.[57]

54. This holding conflicts with Tennessee Gas Pipeline Co. v. New England Power, 6 F. Supp. 2d 102, 104 (D. Mass. 1998) and USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee, 1 F. Supp. 2d 816 (E.D. Tenn. 1998) (collecting cases), which are both discussed below. Neither of these cases found it necessary to look to state law in determining that they had the equitable authority to grant immediate possession.

55. Portland Natural Gas Transmission v. 4.83 Acres of Land, 26 F.Supp. 2d 332 (D.N.H. 1998).

56. Tennessee Gas Pipeline Co. v. New England Power, C.T.L., Inc., 6 F.Supp. 2d 102 (D. Mass. 1998).

57. *Id.* at 104.

4. *Tennessee Gas Pipeline Co. v. Massachusetts Bay Transportation Authority*[58]

In another section 7(h) eminent-domain action relating to the same Tennessee pipeline project, the court granted summary judgment on Tennessee's right of condemnation. The court rejected the landowners/landusers' attack on the Commission's certificate of public convenience and necessity on grounds that proper notice of the Commission proceedings had not been given and that there was no present need for the pipeline project. Any such attack in this action, the court ruled, would be an impermissible collateral attack on the Commission's orders. Furthermore, the court ruled that the NGA preempted a state law that prohibited the taking of property "within the location of any railroad."[59]

5. *USG Pipeline Co. v. 1.74 Acres in Marion County, Tennessee*[60]

In another eminent domain action under section 7(h) of the NGA, the court held that the defendant landowners could not collaterally attack the facial validity of the Commission's certificate of public convenience and necessity on grounds that the pipeline at issue would not serve the public interest and that the Commission denied them due process by not affording proper notice and hearing. While the NGA requires that the condemning pipeline company must first attempt good faith negotiations before filing suit, the court found, after an evidentiary hearing, that the pipeline satisfied this obligation. Although the NGA does not itself authorize the pipeline company to obtain immediate possession pending the condemnation action, the court nonetheless concluded that "it had the inherent power under its equitable jurisdiction to order immediate possession."[61]

F. Bypass

Over the objection of Atlanta Gas Light Company (Atlanta Gas) and others, the Commission, in *Atlanta Gas Light Co. v. FERC*,[62] approved a settlement for Southern Natural Gas Company (Southern) to provide gas service directly to a large industrial plant, thereby obviating the need for the plant to continue purchasing gas from Atlanta Gas. In upholding the bypass orders, the court held that the Commission used rational decision making in finding "public

58. Tennessee Gas Pipeline Co. v. Mass. Bay Trans.Auth., 2 F. Supp. 2d 106 (D. Mass. 1998).

59. *Id.* at. 110.

60. USG Pipeline Co. v. 1.74 Acres in Marion County, Tenn., 1 F. Supp. 2d 816 (E.D. Tenn. 1998).

61. *Id.* at 825.

62. Atlanta Gas Light Co. v. FERC, 140 F.3d 1392 (11th Cir. 1998).

convenience and necessity"[63] for the bypass, it did not err in not holding an evidentiary hearing, and followed the applicable procedures required under section 7 of the NGA. In light of the settlement, the court vacated as moot the Commission's earlier orders on its power under the NGA to order pipelines to construct a bypass. The court also dismissed a petition by the City of Dalton, which complained that, under the Commission's orders, Southern could also bypass Dalton's distribution facilities to provide direct service to other industrial end-users. Because no such bypass of Dalton's facilities was currently at issue, the court concluded that Dalton's petition was not yet ripe for review; if and when Southern or any Dalton customer might seek any such bypass, further Commission proceedings would be required and Dalton could intervene and assert its objections at that time.

G. Pre-Granted Abandonment; No-Bump Rule

In connection with South Georgia Natural Gas Company's restructuring proceedings under Order No. 636, the Commission, in *Georgia Industrial Group v. FERC*,[64] approved tariff provisions: (1) providing for a "pre-granted abandonment"[65] requirement that firm transportation service of a year or more would automatically end upon expiration of a service agreement, with a right of first refusal thereafter for continued service, but that exempted certain customers who had converted from sales to firm transportation between February 1991 and May 1992; and (2) that continued in effect the pipeline's historic "no-bump" rule that imposed scheduling penalties and loss of queue priorities for certain volumetric changes by interruptible transportation shippers. The court dismissed the petitioners' attack of the pre-granted abandonment requirement as being discriminatory against non-exempt customers. That requirement was imposed by Order No. 636 and thus could not be collaterally attacked at these later proceedings. The court upheld the Commission's orders on the pipeline's monthly "no-bump" rule as a reasonable, justified choice between the alternatives of a monthly "no-bump" rule and a permanent "no-bump" rule.

H. Capacity Release; Delivery Points

Southwest, a local distribution company, appealed two regulations under the FERC's Order No. 636. The first regulation requires pipelines to release previously purchased but unneeded firm transportation capacity to third parties. The second regulation requires pipelines to provide their firm shippers with flexibility to choose the receipt and delivery points for gas the pipeline moves on their behalf. The court, in *Southwest Gas Corporation v. FERC*,[66] denied Southwest's petitions finding that its challenges were either moot, previously disposed of, or without merit under the applicable standards of review.

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63. *Id.* at 1397.
64. Georgia Industrial Group v. FERC, 137 F.3d 1358 (D.C. Cir. 1998).
65. *Id.* at 1359.
66. Southwest Gas Corp. v. FERC, 145 F.3d 365 (D.C. Cir. 1998).

I. Gas Contracts; Federal Question Jurisdiction

In *Yankee Gas Service Co. v. Connecticut Light & Power Co.*,[67] the plaintiff had a contract to provide gas service to defendant, Connecticut Light & Power Co. (CP&L). But CP&L later entered into a contract with Algonquin Gas Transmission Company (Algonquin) to provide the same service, for which Algonquin obtained Commission approval over the plaintiff's objection. After the plaintiff sued CP&L and Algonquin for various state-law claims, the defendants removed the action to federal court on the basis of federal question jurisdiction. The district court remanded the action to state court. While the NGA may preempt some or all of the plaintiff's claims, the court concluded that such preemption could not serve as a basis of removal. The court rejected the defendants' argument that the NGA "completely preempts" the field relating to interstate transportation of natural gas.

IX. PUBLIC UTILITY HOLDING COMPANY ACT

Holding Company Act Reorganization; CERCLA Successor Liability

In *North Shore Gas Company v. Salomon, Inc.*,[68] the Seventh Circuit reviewed the company's reorganization under the Holding Company Act of 1941, and reversed the district court's declaration that North Shore Gas Company could not be held liable under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Salomon, Inc. appealed and raised arguments requiring the court's resolution of whether the equitable doctrine of successor liability applied to North Shore Gas Company. The Seventh Circuit found that a 1941 plan to reorganize the control of the eventual CERCLA site under the Holding Company Act "shuffled the deck," but allowed the players to remain. The court reviewed the corporate changes under a de facto merger analysis.

The court found that a divestment under the Act would not make de facto merger analysis inapplicable. Moreover, the court found that a reorganization under the Holding Company Act could not be used to circumvent CERCLA liability. Accordingly, the court remanded the case to determine if a predecessor company (now liquidated, the North Shore Coke & Chemical Company) was directly liable under CERCLA, despite the 1941 reorganization that severed the predecessor company's mining business from the utility business. The court found it equitable, if the predecessor company were directly liable, to hold the North Shore Gas Company accountable under the successor liability doctrine.

67. Yankee Gas Servs. V. Conecticut Light & Power Co., No. CIV. 3-97-CV-1025 WWE, 1998 WL 698763 (D. Conn. Mar. 16, 1998).

68. North Shore Gas Co. v. Saloman, Inc., 152 F.3d 642 (7th Cir. 1998).

X. PUBLIC UTILITY REGULATORY POLICIES ACT

A. United States Court of Appeals

1. *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*[69]

Orange & Rockland Utilities, Inc (O&R), the utility-purchaser of the output from a qualifying facility (QF) operated by Crossroads, filed a petition with the New York Public Service Commission (NYPSC). O&R sought a determination that its original contract with Crossroads was approved by the NYPSC, and did not require it to purchase the output from a turbine that was added to the facility after the initial contract was entered into. After the NYPSC issued a decision finding that its initial order did not impose such a requirement, and while this finding was on appeal before the state courts, Crossroads filed in federal district court an action against O&R, alleging breach of contract by the utility. The district court granted summary judgment in favor of O&R, ruling that adverse findings of the state agency precluded Crossroads from the suit in another venue.

On appeal from the district court's order, the Third Circuit realized that the Public Utility Regulatory Policies Act (PURPA) may preclude a state agency from modifying the terms of a power sales contract between a utility and a QF after the agreement had been approved. The court found that PURPA does not, however, prevent the agency from issuing further orders interpreting its earlier decisions. The court also held that PURPA was not a bar to the application of the general rule that the findings of a state agency were to be afforded the same effect for purposes of claim preclusion in a federal court as they would receive in state court.

B. United States District Courts

1. *Grays Ferry Cogeneration Partnership v. PECO Energy Co.*[70]

Grays Ferry Cogeneration Partnership (Grays Ferry) brought suit against PECO Energy Co. (PECO). Grays Ferry sought a preliminary injunction to prevent PECO from breaching the purchased power agreements (PPAs) it had entered into with Grays Ferry, and to compel PECO to seek a ruling from the Pennsylvania Public Utility Commission (PPUC) that costs of the PPAs were above-market costs recoverable under Pennsylvania's restructuring act. Grays Ferry also sought to join the PPUC as an indispensable party to the action. The court refused to join the state commission, stating there was no case or controversy between Grays Ferry and the PPUC. The court went on to dismiss the case, finding that while the partnership had certain rights under the PURPA, because the suit involved only a contract claim, it did not give rise to a federal question for jurisdictional purposes. Thus, the court was without jurisdiction to hear the case.

69. Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc., 159 F.3d 129 (3d Cir. 1998).

70. Grays Ferry Cogeneration Partnership v. PECO Energy Co., 998 F. Supp. 542 (E.D. Pa. 1998).

2. *Foster Wheeler Penn Resources, Inc. v. UGI Utilities, Inc.*[71]

Foster Wheeler Penn Resources, Inc. (Foster Wheeler), the owner of a yet-to-be constructed qualifying facility located in Pennsylvania, brought an action alleging breach and anticipatory breach of contract by UGI. In its suit, Foster Wheeler maintained that UGI, which had previously entered into an agreement to purchase the output of the Foster Wheeler facility, claimed the passage of Pennsylvania's restructuring act constituted a *force majeure* which made performance under the agreement impossible. UGI sought to dismiss the case, or to stay the case pending PPUC's resolution of UGI's request for the recovery of its contract costs.

Finding that this case required the PPUC's special expertise, the court deferred to that agency's primary jurisdiction, and stayed the case pending the outcome of UGI's request for recovery of the contract costs. The court also noted that, depending on the outcome of the PPUC proceeding, Foster Wheeler's claims might become moot.

C. State Courts

1. *Phoenix Power Partners v. Colorado Public Utilities Commission*[72]

Phoenix Power Partners (Phoenix) challenged a ruling by the Colorado Public Utilities Commission (Colorado PUC) that its 1993 amendment to a 1988 purchased power agreement was so different from the original contract as to amount to a new contract, subject to a less advantageous scheme for the determination of the utility-purchaser's avoided costs. Under the original contract, Phoenix's predecessor agreed to sell the output from a hydro-electric facility. The amendment reflected a change in the location of the facility, a change in the nature of the facility from hydro-electric to gas-fired, and a change in the facility's output, as well as a change in the entity that would own and operate the facility. The Colorado PUC found that these changes were so significant that the 1993 amendment amounted to a new contract, subject to a different set of rules for determining the appropriate avoided cost level.

On appeal, Phoenix argued that under the PURPA, the Colorado PUC had limited authority to review the amendment. The court disagreed, finding that the PURPA did not come into play until the Colorado PUC determined whether the 1993 amendment constituted a new contract. Applying Colorado contract law, the court found that the agency properly found the modifications were so substantial as to amount to a new contract, and affirmed the PUC's findings.

2. *Petition of Atlantic City Electric Co.*[73]

Intervenors sought review of a ruling by the New Jersey Board of Public Utilities allowing a utility to recover in its rates its costs of purchasing power

71. Foster Wheeler Penn Resources, Inc. v. UGI Utils., Inc., 1998 U.S. Dist. LEXIS 5955 (E.D. Pa. Apr. 17, 1998).

72. Phoenix Power Partners v. Colorado Pub. Utils. Comm'n., 952 P.2d 359 (Colo. 1998).

73. Petition of Atlantic City Elec. Co., 708 A.2d 775 (N.J. Super. Ct. App. Div. 1998).

from QFs. Consistent with the Third Circuit's holding in *Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of New Jersey*,[74] the court upheld the agency's finding that under the PURPA, once a state commission approved a contract between a utility-purchaser and a QF, the PURPA pre-empted any attempts by that commission to reconsider approval of the contracts or deny passthrough of the relevant costs. The court also indicated that these parties should have challenged the utility's projected energy costs (which factored into the determination of the appropriate avoided cost level) at the time the contract was being considered by the Commission, rather than years after it had been approved.

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74. Freehold Cogneration Assocs., L.P. v. Board of Regulatory Comm'rs of N.J., 44 F.3d 1178 (3d. Cir. 1995), *cert. denied*, 516 U.S. 815 (1995).