Report of The Committee On Judicial Review

Since the publication of the last Report of the Committee, the appellate process has yielded numerous decisions helpful to the members of this Bar. This report will address a sampling of those decisions. Specifically, the focus will be on decisions that fill in missing pieces or provide instructive insight in commonly encountered areas such as standing, finality, contract interpretation, burden of proof, discrimination, price squeeze, the meaning of "just and reasonable" and, for future guidance, issues of legislative drafting and administrative construction.

Standing. In *Cities of Bethany v. FERC,* 727 F.2d 1131 (D.C. Cir. 1984), the Court rejected the arguments of the Federal Energy Regulatory Commission ("Commission") and the Cities that settlement by a class of cooperative customers protected that class from any adverse affect of the Commission's decision in that docket and therefore the cooperatives should not be permitted standing to appeal. The Court found that the cooperatives were sufficiently aggrieved by the Commission orders on cost allocation methods to be proper petitioners under Section 313(b) of the Federal Power Act, 16 U.S.C. § 8251(b). The Commission had permitted the cooperatives late intervention after a settlement to address adoption of a cost allocation method differing from the one underlying the settlement. The Court found that that allocation method was likely to affect the rates charged to the cooperatives.

Finality of Orders. Kansas Cities v. FERC, 723 F.2d 82 (D.C. Cir. 1983), reinforces the precepts laid down in *Borough of Lansdale* v. *FPC,* 494 F.2d 1104 (D.C. Cir. 1974) and similar cases. If a Commission order presents ambiguities that make it difficult to ascertain whether the order adversely affects an intervenor's interest, the Court will be lenient in determining the timeliness of petitions for rehearing and the issue of the finality of the order for purposes of an appeal.

Customer Classification. In *Cities of Bethany, supra,* the Court affirmed the Commission's validation of separate customer classifications for municipal and cooperative customers as a usual practice buttressed by cost of service and customer profile differences. The Court rejected the notion that some interclass similarities should force municipal and cooperative customers into one classification. The Court found that the Commission may properly grant utilities reasonable latitude in setting rate classifications based on *general characteristics* of customer groups.

Discrimination/Price Squeeze. In *Cities of Bethany, supra,* the municipal class of customers charged that the disparity between the rates arrived at under a Commission opinion and the rates charged the cooperatives under a negotiated settlement were unduly discriminatory under Section 205(b) of the Federal Power Act, 16 U.S.C. § 824d(b). The Court, affirming the Commission, found that under the principles of the Supreme Court's *Mobile-Sierra* doctrine, the existence of a settlement agreement reached through fair conduct and good faith may be treated as a factual difference that may justify a rate disparity under section 205(b).

The Court then went on to address and dismiss the novel argument of Cities that the Commission erred by its refusal to presume anticompetitive effects flowing from the settlement rate disparity. The rule for which Cities argued has its roots in the anticompetitive presumption attached to utility/customer competition on a retail level addressed in price squeeze cases. The Court concluded that the Commission's refusal to presume anticompetitive effects was not a departure from prior precedent. The Court made clear that the general, applicable Commission rule, to which price squeeze cases are the exception, is that anticompetitive danger must be proven in order to invalidate an otherwise reasonable rate disparity.

In another decision of major impact concerning price squeezes, the Court approved a procedure utilized by the Commission under which rates changed under Section 206, of the Federal Power Act, 16 U.S.C. § 825e, applying the just and reasonable burden of proof, can be put into effect when that just and reasonable rate has been determined, notwithstanding the fact that price squeeze proceedings are still outstanding. In *Kansas Cities v. FERC, supra,* the Court held that it is both permissible under the terms of the Federal Power Act and within the bounds of sound discretion for the Commission to make just and reasonable rates provisionally effective, with provision for refund, pending resolution of a price squeeze claim.

Contract Interpretation. In *Cities of Bethany, supra,* the Court provided useful insight into interpreting the parties' intent under a contract that, subsequent to the fixed 10-year term, provided for mutually agreed upon rates. The Commission had applied the Uniform Commercial Code and held that when parties cannot agree on rates, the Commission will fix them prospectively. The Court reversed on this point. The Court held that the applicable law would be the cases arising under the Federal Power Act and the *Mobile-Sierra* doctrine. The Court held that the meaning of the contract could be derived from scrutiny of the parties' course of conduct. It noted that subsequent to the expiration of the fixed terms, the Cities, for a period of seven years, had paid voluntarily and without protest the rate unilaterally filed for by the utility supplier. The Court therefore held that the rates should be effective from the effective date of the company's filing.

The burden of proof attendant to particular contract classifications also was discussed in *Kansas Cities v. FERC, supra.* The Commission opinion held that certain contracts between an electric utility and its customers established a just and reasonable standard for rate changes. The customers had argued that the strict *Mobile-Sierra* standard of proof should apply to any rate changes. Although the interpretation of each contract at issue before the Commission or the courts will depend upon its specific language, the case recognizes three contractual regimes for electricity rate changes. First, and most favorable to the utility, there are unilaterally initiated rate changes under Section 205 to which the just and reasonable standard applies. Second, and most favorable to customers, there are rates which may be changed only after the utility has established that the "public interest" standard of Section 206 requires changes. Third, there are rates which may be changed in proceedings initiated by Commission, applying the just and reasonable standard of Section 206 to establish rates with *prospective* application. The language of the Court in *Kansas Cities* and *Papago Tribal Utility Authority v. FERC,* 723 F.2d 950 (D.C. Cir.), *cert. denied,* 52 U.S.L.W. 3891 (1984). ("Papago II"), with its observations that the

public interest standard is "almost insurmountable", would foreclose the second option except in very extreme cases.

Just and Reasonable. In the past several years, the Commission, by its own or outside initiative has been faced with challenges to changing times — generic ratemaking, assessing whether changes in ways of doing business require differences in the types of rates offered and set. Two examples of such challenges coming before appellate tribunals are given here. In *Richmond Power & Light v. FERC,* 574 F.2d 610 (D.C. Cir. 1978), the D.C. Circuit upheld the Commission's rejection of a request for "through rates" for wheeling transactions crossing two or more electrical systems. The Court held in that case that refusal is arbitrary only if the individual rates were unjustly or unreasonably high and the utilities had a duty to wheel. in *Fort Pierce Utilities Authority v. FERC,* 730 F.2d 778 (D.C. Cir. 1984), the Court once again rejected through rates, but articulated some standards that might determine whether and when they would be justified. The petitioners had argued that even if the rates set reflected the proper application of accepted costing methods, through rates were warranted because the two utilities had so fully integrated their transmission systems that they, in fact, did function as a single unified network. The Court did not find it necessary to address this "effect of a unitary system argument on rates" since it found that the evidence was sufficient to support the Commission's premise that the two transmission networks were not functionally merged. The Court found that a high degree of coordination involving frequent exchanges of power between adjoining utilities does not indicate that the utilities' corporate boundaries have no functional significance.

In sharp contrast is the Court decision in *Farmers Union Central Exchange v. FERC,* 734 F.2d, 1486 (D.C. Cir. 1984), in which the Court reviewed and remanded a Commission decision establishing a generic ratemaking methodology for oil pipelines. The Court found the decision arbitrary, capricious and contrary to the statute on a large number of grounds. The decision contains an excellent and thorough review of the underpinnings of the concept of just/reasonable rates. The Court considered cavalier and a departure from standard the Commission's findings that oil pipeline rate regulation is unimportant to consumers at large and best left to regulation by market forces. It was this rationale, rejected by the Court, which was the foundation for the FERC conclusion that oil pipeline ratemaking should protect against only "egregious exploitation and gross abuse", "gross overreaching and unconscionable gouging".

Statutory Interpretation. There is a temptation to call this section after the boy scout motto — be prepared. The Supreme Court in *Aluminum Company of America v. Central Lincoln Peoples Utility District* ___ U.S. ___ , 104 S.Ct. 2472 (1984), made it clear that unless statutory language and legislative history are unequivocal, its present intent is to give the agency administering the statute broad latitude in interpreting the statute. The statute in question was the Pacific Northwest Regional Act, the players were Direct Services Industrial ("DSI") customers and preference customers. The Court held that since the statute did not dictate contractual terms to be included in a DSI contract and merely provided that the amount of power allocated in the 1975 contracts would remain allocated to them, the terms could be

set by the administrator of the federal marketing agency. The administrator had provided terms governing the situations in which power could be interrupted that were far more favorable than those in the 1975 contract. The dissent argued that by giving better quality of power, reallocation exceeded the amount allocated in the 1975 contract. The plain language reading of the dissent was more persuasive from a legislative drafting viewpoint than the majority opinion. However, the lesson is that legislative solutions solve nothing unless they end conflicts and to do so requires better articulation of Congressional goals than those found in the statute under review.

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