

## REPORT OF THE FERC PRACTICE & ADMINISTRATIVE LAW JUDGES COMMITTEE

This report of the FERC Practice and Administrative Law Judges Committee summarizes certain aspects of the operations of the Federal Energy Regulatory Commission (FERC or Commission). The report also summarizes a United States Circuit Court of Appeals for the District of Columbia opinion that is relevant to FERC practice and procedure. The time frame covered by this report spans from July 1, 2012, through June 30, 2013.\*

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### I. FERC OPERATIONS

#### A. FERC Budget Request

The FERC published its Fiscal Year (FY) 2014 Congressional Performance Budget Request in April 2013.<sup>1</sup>

	FY 2012 Actual	FY 2013 C.R. Level	FY 2014 Request
Appropriation	\$ 304,893,274	\$ 306,464,000	\$ 304,600,000
Full-Time Equivalent Employees (FTEs)	1468	1480	1480

The Commission's Budget Request states that it will support the Agency in its "reliability and critical infrastructure protection standards development and compliance processes; infrastructure siting and inspection responsibilities; enforcement efforts; and policy reforms related to competitive energy markets and regulatory policies, including removal of barriers to renewable resources and advanced technologies."<sup>2</sup> The report explains that

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1. FED. ENERGY REGULATORY COMM'N, DEP'T OF ENERGY, FY 2014 CONGRESSIONAL PERFORMANCE BUDGET REQUEST 2-3 (2013), available at <http://www.ferc.gov/about/strat-docs/fy14-budg.pdf>.

2. *Id.* at 3.

[t]he Commission recovers the full cost of its operations through annual charges and filing fees assessed on the industries it regulates as authorized by the Federal Power Act (FPA) and the Omnibus Budget Reconciliation Act of 1986. The Commission deposits this revenue into the Treasury as a direct offset to its appropriation, resulting in no net appropriation.<sup>3</sup>

*B. Consolidation of the FERC Office of Administrative Law Judges and Dispute Resolution*

On June 14, 2013 the Commission issued the press release reprinted below regarding the consolidation of Dispute Resolution Services and the Office of Administrative Law Judges.<sup>4</sup>

Federal Energy Regulatory Commission (FERC) Chairman Jon Wellinghoff announced today that the FERC Dispute Resolution Service is moving to the Commission's Office of Administrative Law Judges (OALJ). Until now, the Dispute Resolution Service had been part of the Office of Administrative Litigation (OAL).

With the addition of the Dispute Resolution Service, the new office will be named Office of Administrative Law Judges and Dispute Resolution (OALJDR).

The transfer will provide a seamless process for the referral and early identification of issues and proceedings that lend themselves to consensual resolution. This new structure will allow for a continuum of progressive Alternative Dispute Resolution (ADR) options when considering complex, multi-disciplinary energy initiatives facing the Commission and the nation.<sup>5</sup>

II. UNITED STATES CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA OPINION: *Southern California Edison Co. v. FERC*

In *Southern Cal. Edison Co.*,<sup>6</sup> Southern California Edison (SoCal Edison) challenged the Commission's methodology for determining return on equity (ROE) for incentive-based rate treatment for transmission project and its update of the ROE for the locked-in period.<sup>7</sup> The opinion by Judge Rogers, for a unanimous panel, denied the petition challenging the FERC's methodology and granted the petition challenging the FERC's ROE update, remanding the case back to the Commission to address contrary evidence that the Commission declined to consider on rehearing.<sup>8</sup>

The court considered tariff revisions filed to implement rate incentives granted to SoCal Edison to encourage the construction of three projects: the Rancho Vista Project, the Devers-Palo Verde II Project, and the Tehachapi Project.<sup>9</sup> Upon obtaining the rate incentives in 2007, "SoCal Edison filed revisions to its . . . tariff, pursuant to [FPA] section 205."<sup>10</sup> The revisions included implementation of the rate incentives and a proposal for a base ROE.<sup>11</sup>

3. *Id.* at 2.

4. Press Release, FERC, FERC's Dispute Resolution Service to Join Office Admin. Law Judges (June 14, 2013), available at <http://www.ferc.gov/media/news-releases/2013/2013-2/06-14-13.asp#.Ufcer-BU7f4>

5. *Id.*

6. *Southern Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013).

7. *Id.* at 178-79.

8. *Id.* at 179.

9. *Id.* at 179.

10. *Id.* at 179; see also 16 U.S.C. § 824d (2012).

11. *Southern Cal.*, 717 F.3d at 179.

Although SoCal Edison proposed a base ROE set at the midpoint of a range established by a proxy group, the Commission determined that the ROE should be set at the median of the range of an altered proxy group.<sup>12</sup> Moreover, the Commission determined that the ROE should be reduced “to reflect the most recently available . . . data . . . on the ten-year [U.S.] Treasury” bond rate.<sup>13</sup>

SoCal Edison challenged the Commission’s decision to determine the ROE using the median of the proxy group as an arbitrary and capricious shift from established procedure.<sup>14</sup> The Commission traditionally determined the ROE of single electric utilities’ average risk using the midpoint of results produced by a discounted cash flow (DCF) analysis of a proxy group of publicly traded companies.<sup>15</sup> In *Golden Spread Electric Cooperative, Inc.*,<sup>16</sup> the Commission rejected the midpoint as a means for determining ROE for a single electric utility, concluding that the best measure of average risk for a single utility is the median.<sup>17</sup> SoCal Edison contended that this policy shift is unjustified, citing the Commission’s continued use of the midpoint methodology for electric utilities applying jointly as part of a group.<sup>18</sup> SoCal Edison attempted to demonstrate that the median methodology poses a disadvantage to electric utilities that file individually.<sup>19</sup> The Commission relied on several gas cases to demonstrate that the median method offers benefits for handling skewed distributions and is more accurate.<sup>20</sup> The Commission further explained that “there is no longer a sufficient basis for divergent approaches to determining the middle of the range of reasonable returns in the gas and electric industries.”<sup>21</sup> Applying the highly deferential arbitrary and capricious standard of review to the Commission’s policy determination, the court found that the Commission made a reasoned decision and denied SoCal Edison’s challenge to the median methodology.<sup>22</sup>

SoCal Edison also challenged the Commission’s decision to alter its private cost of capital based on the change in U.S. Treasury bond yields.<sup>23</sup> The updated bond yields resulted in a 1.01% reduction in SoCal Edison’s base ROE.<sup>24</sup> SoCal Edison argued that the Commission violated section 556(e) of the Administrative Procedure Act (APA)<sup>25</sup> by taking official notice of the change in Treasury bond yields yet refusing to afford SoCal Edison the opportunity to refute the updated

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12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 179, 182-83.

16. *Golden Spread Elec. Coop., Inc.*, 123 F.E.R.C. ¶ 61,047 (2008).

17. *Southern Cal.*, 717 F.3d at 182-83.

18. *Id.* at 183.

19. *Id.* at 183, 186.

20. *Id.* at 182 (citing *Transcontinental Gas Pipe Line Corp.*, 84 F.E.R.C. ¶ 61,084 (1998); *Northwest Pipeline Corp.*, 99 F.E.R.C. ¶ 61,305 (2002)).

21. *Id.* at 184 (quoting *Southern Cal. Edison Co.*, 131 F.E.R.C. ¶ 61,020 at P 93 (2010)) (internal quotation marks omitted).

22. *Id.* at 181 (applying 5 U.S.C. § 706(2)(A) (2012)).

23. *Id.* at 187.

24. *Id.* at 188.

25. 5 U.S.C. § 556(e).

information.<sup>26</sup> “The Commission took official notice . . . of the average ten-year U.S. Treasury bond yields during the locked-in period,” after the record had closed.<sup>27</sup> On rehearing, SoCal Edison filed an affidavit of its expert attempting to demonstrate that the updated yields were not an accurate “proxy for its private cost of capital.”<sup>28</sup> The economic conditions of 2008 led to an anomalous inverse relationship between U.S. Treasury bond yields and corporate bond rates.<sup>29</sup> The Commission refused to consider the affidavit, relying on its general rule disallowing new evidence on rehearing.<sup>30</sup> Further, the Commission contended that precedent requiring updated ROE’s existed and that the ten-year bond index, notwithstanding short-term variations, continued to be an accurate proxy for market conditions.<sup>31</sup> The circuit judge held that “[a]lthough the Commission responded to SoCal Edison’s objections at an abstract level,” it failed to appropriately address SoCal Edison’s effort to “parry the effect’ of the officially noticed [bond yield] information.”<sup>32</sup> Accordingly, the circuit judge held that SoCal Edison is entitled to relief under APA section 556(e) and remanded the issue to the Commission for further proceedings.<sup>33</sup>

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26. *Southern Cal.*, 717 F.3d at 187.

27. *Id.*

28. *Id.*

29. *Id.* at 187-88.

30. *Id.* at 188.

31. *Id.*

32. *Id.*

33. *Id.*

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