# REPORT OF THE JUDICIAL REVIEW COMMITTEE

## I. ADMINISTRATIVE LAW

### *A. Jurisdiction – Nonreviewable Agency Discretion*

In *Baltimore Gas & Electric Co. v. FERC*,[1] the Petitioner appealed a Federal Energy Regulatory Commission (FERC) settlement of an enforcement action against a natural gas pipeline, asserting that the public should have the right to comment upon the settlement. The Petitioner argued that the settlement was inadequate to remedy the harm it claimed it incurred as a result of the pipeline's alleged unauthorized abandonments. The court dismissed for lack of jurisdiction, holding that the decision to settle an enforcement action was committed to the FERC's nonreviewable discretion under the Administrative Procedure Act (APA), as interpreted in *Heckler v. Chaney*. Under *Heckler*, there is a presumption that an agency's decision not to exercise its enforcement authority is committed to its absolute discretion. This presumption extends to a decision to settle. The court acknowledged that, while the *Heckler* presumption can be overcome, the Petitioner did not rebut the presumption with a showing that the statute provided guidelines to be followed by the agency. that "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers."[2] The court specifically held that the Natural Gas Act "lacks guidelines against which to measure FERC's exercise of its enforcement discretion."[3]

### *B. Jurisdiction—Ripeness*

In *Fourth Branch Associates (Mechanicville) v. FERC*,[4] the Petitioner, a co-licensee of a hydroelectric plant, appealed a FERC order that: (i) dismissed the Petitioner's complaint alleging anti-competitive behavior by the other co-licensee in violation of section 10(h)(1) of the Federal Power Act for attempting to limit the power output of the plant by refusing to purchase its power, and (ii) gave notice that the FERC intended to accept surrender of the project license under the doctrine of implied surrender, following further analysis. The court held that it lacked jurisdiction to consider the issue because the FERC had specifically stated that its finding of implied license surrender was not a final agency action. The court held further that the FERC's dismissal of the Petitioner's complaint was not arbitrary and capricious because the Petitioner failed to demonstrate anti-competitive conduct.

1. Baltimore Gas and Elec. Co. v. FERC, 252 F.3d 456 (D.C. Cir. 2001).
2. Heckler v. Chaney, 470 U.S. 821, 833 (1985); *see also* 5 U.S.C. § 702(a)(2) (1996).
3. Heckler, 470 U.S. at 833.
4. Fourth Branch Assocs. v. FERC, 253 F.3d 741 (D.C. Cir. 2001).

erators, while at the same time requiring an RTO's management be independent, makes Order No. 2000 arbitrary and capricious. The court held, however, that South Carolina would be aggrieved only if passive ownership occurs in the RTO approved for its region, and that a case-by-case adjudication is a better forum to address that concern. Therefore, the court dismissed South Carolina's petition.

*C. Jurisdiction – Standing*

In *DEK Energy Company v. FERC*,[13] the Petitioner, DEK Energy Company (DEK), challenged a FERC order approving the restructuring of a contractual relationship for the transportation and sale of gas from Canada to Southern California Gas Company. The parties alleged that the contract left Pan-Alberta with 100,000 MMbtu in excess capacity at favorable rates. DEK claimed that Pan Alberta's use of a lower tariff rate could injure DEK by enabling Pan Alberta to sell the 100,000 MMbtu per day in DEK's market and undercut DEK sales or force it to reduce its prices. The court dismissed the petition, finding that DEK had failed to show injury. Applying the "competitive standing" doctrine, which requires a competitor to show that the allegedly illegal transactions "will almost surely cause petitioner to lose business," the court found that DEK had not shown beyond mere speculation that it would be harmed.

In *Londonderry Neighborhood Coalition v. FERC*,[14] the Petitioner, a nonprofit citizens group, challenged the FERC's approval of a pipeline expansion project. The court concluded it lacked jurisdiction to hear the case because the Petitioner had not filed a timely request for rehearing of the FERC's order as required by the Natural Gas Act (NGA). Although the FERC issued a later order for which the Petitioner sought rehearing, the court concluded that Petitioner was plainly "aggrieved" by the earlier order and that the NGA makes a clear distinction between the aggrieving order and the rehearing order that triggers the sixty day period for filing an appeal under section 19(b) of the NGA. While acknowledging that subsequent orders may modify an earlier order, so as to newly aggrieve a party and thereby trigger a new rehearing requirement, such was not the case here. Finally, the court rejected the Petitioner's argument that equitable considerations should excuse the Petitioner from strict adherence to the NGA's review provisions. In particular, the Petitioner argued that its rehearing request of the initial order would have been timely filed but for an error by the postal service. While declining to hold that there are no circumstances, no matter how extraordinary, that would toll the rehearing deadline under section 19(a), the court found that the facts of this case did not warrant such a waiver.

In *Niagara Mohawk Power Corp. v. FERC*,[15] Niagara sought relief from rates charged under long-term power agreements with qualifying co-

13. DEK Energy Co. v. FERC, 248 F.3d 1192 (D.C. Cir. 2001).

14. Londonderry Neighborhood Coalition v. FERC, 273 F.3d 416 (1st Cir. 2001).

15. Niagara Mohawk Power Corp. v. FERC, 162 F. Supp. 2d 107 (N.D.N.Y. 2001).

generation facilities. The Petitioners argued that New York law improperly allowed rates in excess of those allowed by the Public Utilities Regulatory Policies Act of 1978 (PURPA). The court dismissed Niagara's claim. First, the court held that the PURPA does not authorize a private right of action against the FERC for alleged failure to enforce the PURPA rate caps for electric power purchases from qualifying facilities—the PURPA only allows for the FERC to enforce state implementation of its regulations. Further, the court held that dismissal was also warranted because Niagara had a remedy against the New York Public Service Commission, which had approved the contracts. Finally, claims against the FERC for its refusal to modify PURPA contracts retroactively was within the Agency's discretion, and therefore not subject to review under *Heckler v. Chaney*.[16] The court also dismissed Niagara's claims against the New York Public Commission because of lack of subject matter jurisdiction. The court held that a procedural defect warranted dismissal of the petition. Finally, the court determined that the New York Commission was without power to alter previously approved contracts.

*D. Jurisdiction - Subject Matter Jurisdiction*

In *Windway Technologies, Inc. v. Midland Power Cooperative*,[17] the court granted Midlands' motion to dismiss for lack of subject matter jurisdiction. Windway contended that tariffs imposed by the defendants violated certain FERC regulations implementing the PURPA. Midland countered by arguing that the federal district court lacked subject matter jurisdiction. Midland asserted that Windway's PURPA claims must be brought in state court, which has exclusive jurisdiction to enforce any requirement of a non-regulated utility's PURPA implementation plan.

The court determined that, in evaluating questions of jurisdiction under section 210 (g) and (h) of the PURPA, a distinction must be drawn between claims challenging the implementation of regulations and claims challenging the application of such regulations. The court concluded that the PURPA limits federal court jurisdiction to "implementation claims" and that Windway's claims fell within the category of "as applied" claims. Therefore, the court concluded, the state court was the proper forum for the resolution of this issue.

*E. Jurisdiction - Preemption*

*NE Hub Partners v. CNG Transmission Corp.*,[18] related to certification of NE Hub Partners (NE Hub) natural gas storage facility in Pennsylvania. The FERC certificated the facility, and NE Hub brought a district court action seeking an injunction against Pennsylvania Environmental Hearing Board (EHB) proceedings to bar litigation of certain aspects of

16. Heckler v. Chaney, 470 U.S. 821(1985).

17. Windway Techs., Inc. v. Midland Power Coop., 2001 U.S. Dist. LEXIS 3430 (N.D. Iowa Mar. 5, 2001).

18. NE Hub Partners v. CNG Transmission Corp., 239 F.3d 333 (3d Cir. 2001).

NE Hub's proposed facilities that had been addressed by the FERC, citing federal preemption. The court of appeals, reversing a district court ruling, found NE Hub's challenge to the EHB appeal was ripe because preemption may operate to spare a party from the state process itself, not just specific rulings. The court rejected the EHB's contention that cases holding a state regulatory process to be preempted have involved only "field occupation preemption," and were not applicable in this case because under the NGA, the FERC has not occupied the field. The court of appeals observed, without deciding, that it strongly doubted the district court's conclusion that the case did not involve field occupation. Nonetheless, the court explained that "the process preemption cases do not confine themselves to the field occupation context."[19] The court then went on to discuss the interplay between field preemption and conflict preemption, noting that the different categories of preemption are not rigidly distinct, and that indeed field preemption may be understood as a species of conflict preemption. The court therefore held that state regulatory process may be preempted by conflict with federal law, as well as by field occupation. The court also rejected the district court's finding that NE Hub's action was a collateral attack on the FERC order requiring certain state approvals for the project. The court noted that NE Hub was not challenging the FERC's requirement that it obtain state permits and cooperate with state and local agencies, but simply contending that the EHB state proceedings are preempted to the extent the proceedings involve certain specific issues already decided by the FERC.

*F. Standard of Review – Deference to Agency Interpretation*

In *Murphy Exploration and Production Co. v. United States*,[20] Petitioner, a lessee of rights to oil and gas on federal land, appealed a district court's finding that the court lacked jurisdiction over the Appellant's suit against the Department of Interior (DOI) for a royalty refund. The Appellant had sued under the Federal Oil and Gas Royalty Simplification and Fairness Act (Royalty Act),[21] which confers jurisdiction on courts to consider challenges to "administrative proceedings" that the DOI fails to resolve within thirty-three months. The DOI promulgated regulations under the Royalty Act specifying that the thirty-three month period commenced at the time a party files a notice of appeal with the agency, not when the party files its initial refund request. The court of appeals reversed the lower court's finding that it lacked jurisdiction. Declining to apply *Chevron*[22] deference to the DOI's interpretation on the grounds that interpreting statutes is the exclusive province of the courts, the court concluded that the DOI's interpretation of the Royalty Act was not reasonable, and that the act's thirty-three month period begins to run when a party files a re-

19. *Id.* at 347.

20. Murphy Exploration & Prod. Co. v. United States, 252 F.3d 473 (D.C. Cir. 2001).

21. 30 U.S.C. § 1724(h) (1996).

22. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984).

quest for a refund. Judge Rogers dissented on the ground that the plain language, structure, and legislative history of the Royalty Act do not support the majority's finding that an administrative proceeding commences when a party requests a refund.

## II. ENVIRONMENTAL LAW

### *A. DOE Regulation of Nuclear Waste*

In *United States v. Kentucky*,[23] the Kentucky environmental protection agency sought review of a U.S. district court order finding that conditions the Kentucky agency imposed on nuclear waste disposal in a landfill in Kentucky operated by the U.S. Department of Energy (DOE) are preempted by federal regulation of radioactive materials. The Sixth Circuit affirmed the district court's order. The Sixth Circuit rejected Kentucky's argument that the regulations were proper under the Commonwealth's authority to regulate solid waste disposal, concluding that the Atomic Energy Act (AEA) preempts any state attempt to regulate covered materials for safety, and that the challenged permit conditions in this case specifically sought to limit "radioactivity" and "radionuclides," the source of which were materials covered by the AEA. The circuit court further found that the federal government had occupied the entire field of nuclear safety concerns, except for limited powers expressly ceded to the states. The circuit court also affirmed on the alternate ground that neither the AEA nor any other federal law waives federal sovereign immunity from regulation of DOE facilities by states with respect to materials covered by the AEA. The circuit court rejected Kentucky's argument that the district court should have abstained from hearing the case pending completion of a state case addressing the same matter.

## III. EPA – CLEAN AIR ACT

In *Appalachian Power Company v. EPA*,[24] the court of appeals considered various challenges by Midwestern and Southern utilities to an EPA final rule to control nitrogen oxide (NOx) emissions pursuant to section 126 of the Clean Air Act (CAA). First, the court held that the 1990 Amendments to the CAA contained a scrivener's error in section 7410(a)(2)(D) of title 42 of the United State Code that, if read literally, would restrict the EPA to take action under the rule. The court found that the EPA demonstrated such error was clearly at odds with Congressional intent. Second, the court rejected arguments that the EPA's direct regulation of sources under section 126 of the CAA was inconsistent with the EPA's requirement in a related case that states file revised CAA State Implementation Plans. The court held that section 126 and the right to request revised plans were independent statutory tools. Third, the court re-

23. United States v. Kentucky, 252 F.3d 816 (6th Cir. 2001).

24. Appalachiam Power Co. v. EPA, 249 F.3d 1032 (D.C. Cir. 2001).

jected arguments that the EPA erred by not making findings as to how individual sources "significantly contributed" to non-attainment of NOx limits in down-wind states, concluding that the EPA may treat any state's entire man-made emissions as the controlling aggregate both for whether an individual state significantly contributes to non-attainment in other states as well as whether individual sources significantly contribute. Fourth, the court remanded to the EPA for further explanation certain aspects of its emission limitations which the court concluded had been based on unreasonable projections. The court also (1) agreed that section 126(b) of the CAA was broad enough to include restrictions on "future" sources of NOx, (2) remanded the portion of the Rule applicable to co-generators, finding that the EPA had not adequately explained its classification of co-generators as electric generating units, and (3) considered and rejected several source-specific and facilities-specific objections to the rule.

## IV. FEDERAL ARBITRATION ACT

In *Bowen v. Amoco Pipeline Co.*[25] Amoco appealed an arbitration award arising out of an oil leak that damaged the Petitioner's property. A district court previously reviewed the arbitration award under the standard set forth in the Federal Arbitration Act (FAA) even though the standard of review provision in the parties' arbitration agreement was more expansive than the standard of review under the FAA. The Tenth Circuit affirmed the lower court's holding. Explicitly disagreeing with the holdings of the Fifth and Ninth Circuits on the same issue, the Tenth Circuit held that parties may not contract for expanded judicial review of arbitration awards. Amoco also argued that the abatement requirement of the arbitration ruling was within the exclusive jurisdiction of the Oklahoma Corporation Commission (OCC). While acknowledging it as a close question, the court noted that the "exclusive jurisdiction" of the OCC under Oklahoma statutes may refer only to the OCC jurisdiction relative to other agencies, not to the courts. The court further noted that the public rights doctrine supported upholding the arbitration award, explaining that the liability of one individual to another under the law is a private right and not an attack upon the public rights function of the OCC to regulate and administer the conservation laws and policies of the state. With respect to damages, the court found that (1) allotting funds for cleanup did not amount to a legal award of damages, which may have raised double recovery concerns, and (2) the punitive damages award did not exceed the arbitrator's authority under the agreement and was not inconsistent with Oklahoma law.

25. Bowen v. Amoco Pipeline Co., 254 F.3d 925 (10th Cir. 2001).

## V. FEDERAL POWER ACT

### *A. Electric Utility Regulation*

In *Alliant Energy Corp. v. FERC*,[26] the Petitioners, certain members of the Mid-Continent Area Power Pool (MAPP), an association of energy transmission utilities, generators and marketers, petitioned for review of the FERC orders directing the MAPP to refund "third party" charges assessed on transmission into or outside of the MAPP's geographic area. Transmission within MAPP's geographic area incurred only a discounted distance-based rate. The court rejected the Petitioners' argument that the refund order violated the rule against retroactive ratemaking. The court found that the Commission's refund order was a permissible application of existing law (Order No. 888), and that MAPP could not have reasonably relied on pre-Order No. 888 acceptance of a similar tariff provision when it refiled the provision as part of its Order No. 888 compliance filing. Enron, a MAPP member, and refund beneficiary, petitioned for review on the ground that the Commission should have refunded not only the discriminatory third-party charges, but also the difference between a border utility's tariff rate and the discounted intra-MAPP rate. The court denied Enron's petition, concluding that the FERC properly held that Enron's petition did not challenge the justness and reasonableness of the individual border utility transmission rates.

In *Central Maine Power Company v. FERC*,[27] the Petitioners sought review of a FERC order rejecting a proposal by the ISO New England to institute a $0.17/kW-month installed capability (ICAP) deficiency charge and ordering the ISO New England to reinstate an $8.75/kW-month ICAP charge. The court of appeals remanded the order to the FERC for further explanation of why a substantial ICAP charge was still required to enforce reserve obligations, why $8.75 was selected as the proper figure, given evidence of lower costs of present peaking capacity (the identified measure for the charge), and why alternatives proffered by opponents were inadequate. The court upheld the FERC's summary rejection of the $0.17 charge on grounds that the FERC has authority to summarily reject noncompliant filings and that it reasonably explained its decision. The court also rejected objections that the FERC should have held a hearing, finding that paper hearing procedures, including submission of affidavits, was adequate.

In *Power Company of America, L.P. v. FERC*,[28] the court denied a petition for review of a bankrupt power marketer that challenged the FERC orders holding that the sixty-day notice of termination requirement in the FERC's regulations did not apply to almost two dozen power sales contracts terminated by counter-parties of the power marketer. The court

26. *Alliant Energy Corp.*, 253 F.3d 748 (D.C. Cir. 2001).

27. Central Me. Power Co. v. FERC, 252 F.3d 34 (1st Cir. 2001).

28. Power Co. of Am. v. FERC, 245 F.3d 839 (D.C. Cir. 2001).

agreed with the FERC that the sixty-day notice requirement generally applicable to power sales contracts was not triggered as the contracts at issue were not themselves "required to be on file" under section 35.15(a) of title 18 of the Code of Federal Regulations.

In response to the Petitioner's claim that the refusal to apply the notice of termination requirement violated the FPA, the court concluded that the FERC's reliance on quarterly report filing requirements for market-based rate transactions was properly within its discretion. The court also denied the Petitioner's assertion that the FERC had retroactively applied a change to its previous policy of requiring notices of termination for similar agreements. The court held that the FERC's conclusion that the equities favored retroactive application of its new rule was sound. As the court stated, "[t]he 60-day notice provision would have created a serious obstacle to competition in view of the fact that parties are entering into discretionary sales agreements that may last for only days or hours."[29]

In *Public Utilities Commission of California v. FERC*,[30] the CPUC challenged a FERC order allowing the California ISO to enter into "Reliability Must Run" (RMR) contracts with non-jurisdictional entities and to pass through the costs of such contracts without filing the contracts with the FERC under section 205 of the Federal Power Act. The court denied the PUC's petition, upholding the FERC's finding that the ISO rate was a formula rate and that a change in formula input (i.e., RMR contracts) did not require a section 205 filing. The court found that the Commission had not abused its discretion in declining to review the RMR contracts for market power problems, and that section 206 of the FPA provided an adequate statutory remedy for parties challenging the formula rate.

### *B. Hydroelectric Licensing*

In *Friends of the Cowlitz v. FERC*,[31] the Petitioners sought review of a FERC order granting summary disposition of a complaint alleging that a hydro-electric project licensee failed to comply with its project license requirements concerning preservation of fish stocks. The Petitioners' complaint was based, in part, on an agreement between the licensee and the Washington Department of Fisheries and Wildlife. The court held that the FERC had erred as a matter of law in dismissing the complaint on the ground that the agreement between the licensee and state agency was not part of the license. The court further found that the FERC erred in granting summary disposition where Petitioners' allegations, if true, would amount to a license violation. The court also held that it was legal error to grant summary disposition based, in part, on the FERC's preference to address potential license violations through the relicensing process. Notwithstanding these findings, the court dismissed the petition on grounds that

29. *Id.* at 848.

30. Public Utils. Comm'n of Cal. v. FERC, 254 F.3d 250 (D.C. Cir. 2001).

31. Friends of Cowlitz v. FERC, 253 F.3d 1161 (9th Cir. 2001), *amended by* 2002 WL 272551 (9th Cir. 2002).

the FERC's choice not to enforce the license would be committed to its discretion and non-reviewable under *Heckler*.[32] The court found that neither the license enforcement provisions of the FPA nor the FERC's regulations removed the issue from the FERC's discretion.

In *High Country Resources v. FERC*,[33] the Petitioners appealed the FERC's denial of licenses for hydroelectric projects. The FERC concluded that granting the licenses would be inconsistent with section 7(a) of the Wild and Scenic Rivers Act (Act),[34] which precludes the licensing of projects on designated wild and scenic rivers. The Petitioners argued that the FERC erred: (1) by misconstruing section 7(a) of the Act to find that proposed projects were precluded by section 7(a); and (2) by relying on U.S. Forest Service findings regarding the effect of projects on the river, which findings were purportedly inconsistent with previous findings and barred by *res judicata*. In a decision that produced three separate opinions from a three-judge panel, two judges held that the Petitioners' statutory construction argument had not been raised on rehearing, and the court, therefore, did not have jurisdiction to hear the objection. One judge dissented, finding that the argument was sufficiently raised before the FERC. The dissent also found that the FERC's statutory interpretation was flawed. As to the second argument, the two judges in the majority found that the FERC was not in a position to judge the validity of another agency's findings, and that the *res judicata* argument should have been raised with the Forest Service. The third judge found that his conclusion as to the statutory construction argument rendered the Forest Service's finding inapplicable.

In *Wisconsin Valley Improvement v. FERC*,[35] the Petitioner sought review of an order imposing conditions on its license to operate a hydroelectric facility. In its order, the FERC required Wisconsin Valley to implement a "wild rice enhancement plan" and imposed an annual fee on Wisconsin Valley for its use of submerged federal lands. Wisconsin Valley argued that the conditions were arbitrary because the FERC has authority to condition a project located within federal reservations, but that Wisconsin Valley's project does not operate within such a reservation because there is no federal protectable property interest affected by the operation of the plant.

The court held that the FERC did not act arbitrarily in imposing the enhancement plan, but did arbitrarily impose the annual fee. The court held that, because the United States owns an interest in lands flooded by Petitioner's reservoir, the FERC reasonably concluded that it could condition use of such interest. Thus, the condition was reasonable. The Petitioner argued that the FERC's condition constitutes a taking in violation of the Fifth Amendment. However, the court held that it lacked jurisdiction

32. Heckler v. Chaney, 470 U.S. 821(1985).

33. High Country Res. v. FERC, 255 F.3d 741 (9th Cir. 2001).

34. 16 U.S.C. § 1278 (2000).

35. Wisconsin Valley Improvement v. FERC, 236 F.3d 738 (D.C. Cir. 2001).

to address the takings claim. Under the Tucker Act, the court held such claim must be raised before the Court of Federal Claims.

The court also held that the FERC's requirement to implement a wild rice enhancement plan was based on substantial evidence. Both the proponents and opponents of the enhancement plan filed testimony on the plan. The court held that, given the presence of disputing expert witnesses, the court must defer to the "informed discretion" of the FERC and that the FERC had sufficient evidence to establish a connection between the facts and the choice made. Thus, the court held that the decision was based on adequate evidence.

As for the imposition of an annual fee, the court recognized that the FERC's prior license of the plant did not impose a fee on the licensee. The court held that the FERC did not adequately explain why a fee was not necessary in the prior license, but was appropriate in the later license. Under the doctrine that a federal agency cannot depart from its prior holdings absent adequate explanation, the court held that the FERC's "sudden" imposition of a fee without explanation was arbitrary and capricious.

## VI. NATURAL GAS ACT REGULATION

In *Pan-Alberta Gas, Ltd. v. FERC*,[36] the Petitioner challenged FERC orders authorizing Northwest Pipeline Corporation (Northwest) to add capacity and sell such capacity to Duke Trading and Marketing, L.L.C. (Duke), a marketing company, as arbitrary, not based on substantial evidence, and inconsistent with prior orders and Northwest's tariff. The Petitioner argued that, because Duke had a contract for 40,000 Dth/d of capacity and Northwest was now selling Duke another 50,000 Dth/d of the expanded capacity, Duke would control 90,000 Dth/d of capacity, which would give Duke too much control over Northwest's capacity. The FERC held, and the court agreed, that because Duke had released its initial 50,000 Dth/d of capacity on the existing segment of the pipeline, Duke would not control too much pipeline capacity. The court held that because of the release of previously-held capacity, Duke only controlled capacity on the newer facilities. The court also rejected the Petitioner's claim that Duke's payment of a usage charge based on its 40,000 Dth/d rather than its original 50,000 Dth/d violates Northwest's tariff requirement that a shipper pay a usage charge for each dekatherm it controls. The court held that Duke satisfied the tariff because Duke pays Northwest for each of its dekatherms, but the payments for the replacement capacity are credited to its contract for the released capacity.

In *Amoco Production Company v. FERC*,[37] the Petitioner challenged orders approving a rate settlement for an interstate pipeline. All parties except Amoco had agreed to the settlement. The FERC ruled, however, that based on a subsequent rate filing by the pipeline, Amoco's opposition

36. Pan-Alberta Gas, Ltd. v. FERC, 251 F.3d 173 (D.C. Cir. 2001).

37. Amoco Prod. Co. v. FERC, 271 F.3d 1119 (D.C. Cir. 2001).

to the settlement was rendered moot. The FERC therefore extended the settlement to cover Amoco. The FERC reasoned that, under the facts of the case and the applicable refund floor, there was no way that Amoco could benefit from pursuing its opposition to the settlements in the prior rate case. The court affirmed the FERC's approval of the settlement as to the other parties because all the non-Amoco shippers agreed to the settlement and, thus, the FERC was only required to find that the settlement was fair and reasonable and not that it was based on "substantial evidence." The court also affirmed the FERC's analysis of the refund floor issue and the FERC's finding that Amoco could not benefit from litigating its issues in the prior rate case.

*Canadian Ass'n of Petroleum Producers v. FERC*[38] was a multi-issue cross-appeal from a 1992 Northwest Pipeline rate case under section 4 of the NGA. The court determined that the pipeline could include cost overruns in its rates because the parties had ample notice and the costs were known and measurable. The court held that the FERC's approval of surcharges to collect excess costs was not barred by the filed rate doctrine, where the parties had adequate notice. The court also ruled that the pipeline customers had failed to preserve the issue of the FERC's analysis of business risk where the Petitioners had filed for rehearing of a previous order on the issue but had not pursued the issue in several intervening subsequent orders on the same subject. However, the court remanded the orders to the FERC to explain its choice of an average rate, rather than a midpoint or mean rate, of similarly situated proxy company rates when choosing the appropriate return on equity.

## VII. PETROLEUM MARKETING PRACTICES ACT

In *Interstate Petroleum Corp. v. Morgan*,[39] franchisees of gasoline and petroleum products appealed a district court judgment in favor of Appellee Franchisor, on the grounds that the district court lacked subject matter jurisdiction over the case. Federal question jurisdiction was ostensibly premised on the Petroleum Marketing Practices Act (PMPA). In an *en banc*, six to four decision, the court reversed the district court, finding that, while the PMPA specifically authorizes suits by franchisees against franchisors, it does not authorize actions brought by a franchisor against a franchisee. The majority further found that federal question jurisdiction did not exist under the theory that the "right to relief necessarily depended on resolution of a substantial question of federal law."[40] The dissent concluded that discussions of the PMPA at trial sufficiently raised the issue of whether or not Appellee had violated the PMPA, and thus federal question jurisdiction existed.

38. Canadian Ass'n of Petroleum Producers v. FERC, 254 F.3d 289 (D.C. Cir. 2001).

39. Interstate Petroleum Corp. v. Morgan, 249 F.3d 215 (4th Cir. 2001).

40. *Id.* at 220, *quoting* Franchise Tax Bd. v. Construction Laborers Vacation Trust for S. Cal., 463 U.S. 1, 13 (1983).

## VIII. PUBLIC UTILITY REGULATORY POLICIES ACT

In *North American Natural Resources, Inc. v. Strand*,[41] the Appellants, Commissioners of the Michigan Public Service Commission (MPSC), appealed a district court order that certain aspects of Michigan's electric restructuring plan violated the PURPA. At issue was the effect that MPSC's treatment of stranded costs would have on the Plaintiffs, a group of qualifying facilities (QFs) under the PURPA. The court agreed with the MPSC that jurisdiction was lacking for want of a case or controversy, finding that the parties' dispute was purely hypothetical given that the Michigan restructuring plan did not affect the QF's contracts with utilities, provided for full avoided cost recovery by the utilities as stranded costs through 2007, and no case had been made that there would ever be any injury or dispute. The court remanded to the district court with instructions that the case be dismissed.

## IX. ALL WRITS ACT

In *California Power Exchange Corp.*,[42] the court denied petitions for writs of mandamus that were filed under the All Writs Act by the California Power Exchange Corporation (PX) and the City of San Diego, California (San Diego). Filed in response to non-final FERC orders addressing the California wholesale electric market failures, the petitions were denied for a failure to satisfy the standards for mandamus relief.

On December 15, 2000, the FERC issued an order in response to problems in the California electricity market.[43] In that order, the FERC eliminated the mandate that utilities (IOUs) sell power into the PX markets; terminated the PX's wholesale tariff and rate schedule pursuant to section 206 of the FPA; and established a temporary $150/MWh cap in the PX's wholesale markets. The PX filed a petition for writ of mandamus in order to stay these findings. Noting that mandamus relief was an extraordinary remedy, the court used a three-part test to determine if the PX was entitled to such a relief. Under the three-part test, (1) the plaintiff's claim must be clear and certain; (2) the duty must be ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy must be available. The court only reached the first requirement of this test to dismiss the PX's petition. The court held that the PX failed to establish that any of its three claims were clear and certain. The court reasoned that, because section 206 of the FPA gives the FERC considerable latitude, it was in no way certain that the PX would prevail had the orders been reviewed in the normal course of appeal.

In its petition, the City of San Diego argued that the FERC had delayed in its consideration of San Diego's request for refunds and, there-

41. North Am. Natural Res., Inc. v. Strand, 252 F.3d 808 (6th Cir. 2001).

42. *In re* California Power Exchange Corp., 245 F.3d 1110 (9th Cir. 2001).

43. Order Directing Remedies for California Wholesale Electric Markets, *San Diego Gas & Elec. Co.*, 93 F.E.R.C. ¶ 61,294 (2000).

fore, the court should direct the FERC to address San Diego's request. Employing a five-part test to determine whether the FERC's delay in addressing San Diego's request for refunds was so egregious as to warrant relief, the court denied the petition. The court ruled that the FERC had not delayed action on refunds to such a degree that the conventional path of awaiting a final order was inadequate. In reviewing earlier mandamus cases, the court noted that egregious delays have involved years, not months, and that the FERC's four-month delay was not unreasonable.

## X. OUTER CONTINENTAL SHELF LANDS ACT

In *Duke Energy Field Services Assets, L.L.C. v. FERC*,[44] gas pipeline operators challenged FERC Order No. 639, which requires facility owners in OCSLA areas to publicly file rates charged for transportation service as violative of the OCSLA. The claim was dismissed because of a failure to comply with section 1349(a)(2) of title 43 of the United States Code, which requires that notice under oath of an OCSLA violation be given sixty days prior to commencing a lawsuit. The Petitioners argued that the notice provision was constructively met when the issue was raised in signed briefs filed on rehearing within the sixty-day period, citing *Diamond Shamrock Exploration Company v. Hodel*.[45] The court declined to follow *Hodel*, holding that the notice under oath was an explicit requirement. Finally, the court held that the APA does not confer any independent jurisdiction on district courts, such that the notice requirement could be overlooked.

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44. Duke Energy Field Servs. Asset, L.L.C. v. FERC, 150 F. Supp. 2d 150 (D.D.C. 2001).
45. Diamond Shamrock Exploration Co. v. Hodel, 1990 WL 136756 (E.D.La. 1990).