REPORT OF THE JUDICIAL REVIEW COMMITTEE

I. ADMINISTRATIVE LAW

A. Jurisdiction

1. Federal-State Authority

In *New York v. FERC*,[1] the Supreme Court affirmed the decision of the Court of Appeals for the District of Columbia (D.C. Circuit) in *Transmission Access Policy Study Group v. FERC*,[2] which largely upheld the Federal Energy Regulatory Commission's (FERC or Commission) Final Rule in Order No. 888,[3] requiring the implementation of open-access and non-discriminatory electric transmission service to remedy unduly discriminatory practices in the bulk power markets. Order No. 888 requires a utility that unbundled transmission costs from energy costs in its retail billings to transmit competitors' electricity over its lines on the same terms that the utility applied to its own energy transactions. The order did not impose such a requirement on utilities, which offered only bundled retail sales. The Supreme Court ruled that the scope of the FERC's jurisdiction under the Federal Power Act (FPA)[4] encompasses all transmission of electricity over the interconnected national grids, including transmission for unbundled retail transactions, because such transmission constitutes interstate commerce. *New York v. FERC* presented two issues as to the scope of the FERC's jurisdiction under the FPA. First, the State of New York (New York) maintained that the FERC exceeded its jurisdiction by imposing open-access requirements on unbundled retail transmission of electric power.[5] Second, petitioner Enron Power Marketing, Inc. (EPMI) challenged the FERC's decision on the basis that it did not go far enough by failing to extend open-access requirements to bundled retail transmission.[6]

The Supreme Court's rejection of New York's challenge to the FERC's

1. New York v. FERC, 535 U.S. 1 (2002).
2. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000).
3. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities And Transmitting Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,306 (1996), 61 Fed. Reg. 21,540 (1996) (codified at C.F.R. pts. 35, 385) [hereinafter Order No. 888]; Order No. 888-A, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities And Transmitting Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), 62 Fed. Reg. 12,274 (1997) (codified at C.F.R. pts. 35) [hereinafter Order No. 888-A]; *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 81 F.E.R.C. ¶ 61,248 (1997); *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 82 F.E.R.C. ¶ 61,046 (1998).
4. 16 U.S.C. § 824 (2003).
5. *New York*, 535 U.S. at 16.
6. *Id.* at 25.

jurisdiction over unbundled retail transmission was unanimous.[7] On the issue of whether to extend jurisdiction to bundled retail transmission, a six to three opinion of the Court affirmed the FERC's decision to decline to regulate bundled retail transmission. Justice Thomas, joined by Justices Scalia and Kennedy, concurred in part and dissented in part on this issue.[8]

The Court held that section 201(b) of the FPA[9] provides the FERC with jurisdiction over retail transmission unbundled from retail sales of electricity because it extends to the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce.[10] The Court agreed with the D.C. Circuit that unbundled retail transmission clearly involves the transmission of electric energy in interstate commerce due to the nature of how the national grid operates. The Court determined that unlike the FERC's jurisdiction over sales to the wholesale market, nothing in the FPA's statutory language limits the FERC's jurisdiction over transmission.

The Court rejected New York's assertion that the FERC ignored the presumption against federal preemption of state law. The Court held that the FERC's open-access regulations do not involve a presumption against preemption, but rather involve a determination as to whether federal power can be exercised in an area of pre-existing state regulation.[11] The Court ruled that the FERC's exercise of jurisdiction over unbundled retail transmission was proper on the ground that the FPA gives the FERC jurisdiction over the interstate transmission of electric energy without regard to whether the transmissions are sold to a reseller or directly to a consumer.[12]

In addition, the Court dismissed New York's reliance on certain legislative history that purportedly showed a Congressional intent to safeguard pre-existing state regulation of electricity delivery to retail customers.[13] New York relied on legislative history that indicated Congress, in enacting the FPA in 1935, intended nothing more than to close the *Attleboro* gap[14] by providing for federal regulation of wholesale, interstate electricity transactions, which the Court previously held to be outside the reach of state authority. In casting aside New York's argument, the Court emphasized that the FPA authorized federal regulation of not only wholesale sales that had been beyond the reach of state power, but also wholesale sales that had previously been subject to state regulation.[15] With respect to the *Attleboro* gap, the Court held that the case did not dictate the scope of the FPA because federal jurisdiction under the Act encompassed regulation of interstate transmission, which was an area of no concern in *Attleboro*.[16] Furthermore, the Court observed that while the

7. *New York*, 535 U.S. at 16; *Id.* at 29 (Thomas, J. dissenting).

8. *Id.*

9. 16 U.S.C. § 824(b) (2003).

10. *Id.*

11. *New York*, 535 U.S. at 18.

12. *Id.* at 20.

13. New York v. FERC, 535 U.S. 1, 23 (2002).

14. Public Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83 (1927).

15. *New York*, 535 U.S. at 21.

16. *Attleboro*, 273 U.S. 83.

legislative history of the FPA reflects an intent to preserve state jurisdiction over local facilities, Order No. 888 does not appear to affect state jurisdiction over the three areas preserved for state regulation in section 201(b): (1) generation facilities; (2) transmission of electric energy in intrastate commerce; and (3) transmission of electric energy consumed by the transmitter. Additionally, the Court found the legislative history's relevance had been diluted by the transformation of the electric industry since the FPA's enactment in 1935, which did not anticipate the transition from natural monopolies to nationwide competition and electricity transmission or the unbundling of transmission from sales.

Finally, the Court rejected New York's claim that Order No. 888 would act contrary to sound energy policy, including the States' interest in overseeing the maintenance of transmission lines and the siting of new transmission lines. The Court held that while New York failed to provide a separate analysis of the impact of loss of control over unbundled retail transmissions, as opposed to loss of control over retail transmissions generally, Article III[17] courts cannot consider such policy arguments in any event.

The majority of the Court agreed with EPMI's argument that the FERC should have exercised its jurisdiction over bundled retail transmission of electricity. The goal of Order No. 888 was to facilitate competitive wholesale electric power markets. The FERC's decision to regulate wholesale transmission and unbundled retail transmission was sufficient to remedy the problems it identified in the wholesale market, which did not concern discrimination occurring in the retail market. The Court also concluded that even if the FPA gave the FERC authority to regulate the transmission component of a bundled retail sale of electricity, the FERC had the discretion to decline to assert jurisdiction in this context.

2. Standing

In *Interstate Natural Gas Association v. FERC*,[18] the D.C. Circuit affirmed, with certain exceptions, the FERC's rulemaking in Order Nos. 637, 637-A, and 637-B.[19] These orders implemented new and amended regulations designed to increase flexibility and competition in the natural gas industry. The court reversed and remanded on the issue of the five-year cap on the mandatory right of first refusal. Furthermore, the court reversed and remanded in part with respect to the limitations on pre-arranged releases of transportation capacity. Finally, the court remanded without reversing on the issue of forward hauls and backhauls to the same delivery point and the relation between the right of first refusal and tariff provisions. The court also dismissed the petitions for review as not ripe or for want of standing with respect to segmentation of reticulated

17. U.S. CONST. art. III, § 1.

18. Interstate Natural Gas Ass'n v. FERC, 285 F.3d 18 (D.C. Cir. 2002).

19. Order No. 637, *Regulation of Short-Term Natural Gas Transportation Services and Regulation of Interstate Natural Gas Transportation Services*, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,091, 65 Fed. Reg. 35,705 (2000) (to be codified at C.F.R. pts. 154, 161, 250, 284); Order No. 637-A, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,099, 65 Fed. Reg. 35,705 (2000); *Regulation of Short-Term Natural Gas Transportation Services*, 92 F.E.R.C. ¶ 61,062 (2000).

pipelines and point discounts, secondary point capacity allocation, and peak/off-peak rates.

The D.C. Circuit affirmed the FERC's decision to lift the cost-based rate cap previously imposed on short-term releases of pipeline capacity by shippers with long-term rights to such capacity for a two-year period. The court held that FERC was owed special deference in this regard in view of the fact that the waiver of rate ceilings was "explicitly experimental." The court cited to its long-established practice of providing special deference to federal agencies in developing similar types of experiments. The court also concluded that the FERC's action was capable of being reconciled with the basic premise of the Natural Gas Act (NGA)[20] that requires the FERC to regulate the rates of interstate natural gas pipelines. In addition, the court upheld the FERC's decision to lift the rate ceiling for short-term released capacity under the set of criteria[21] applied to review decisions by regulatory agencies to choose a more light-handed regulation than traditional cost-based regulation. The central criterion applied by the court was that such decisions could be justified by showing that the goals and purposes of the statute will be accomplished through the proposed changes. In this regard, the court concluded that the standard was satisfied by its conclusion that the rates resulting from lifting the rate ceiling could be expected to fall within a zone of reasonableness. Rates within this zone are neither less than compensatory nor excessive. A combination of non-factors and the FERC's continued general oversight ensures competition will drive rates into the zone of reasonableness and otherwise "check rates if it does not."[22] In addition, the court affirmed the FERC's retention of the rate ceiling for short-term pipeline releases of capacity by concluding that the FERC's decision to engage in gradual reform was not discriminatory or arbitrary and capricious.

The D.C. Circuit affirmed the FERC's decision to permit shippers to segment their capacity on interstate pipelines. The court ruled that section 5 of the NGA[23] does not require the FERC to make a detailed showing that every pipeline's existing tariff was unjust and unreasonable or that the new policy is just and reasonable. The court emphasized that the FERC may rely on generic findings of a systematic problem to support the implementation of an industry-wide remedy. According to the court, it was reasonable for the FERC to consider the remedy proportional to the identified problem by requiring segmentation on pipeline systems only where it is operationally feasible to do so.

The court rejected the argument that the segmentation rules effectively abrogate pre-existing contractual arrangements that limit primary rights to specific points by providing shippers with rights they never bargained or paid for. The court explained that it was not clear whether there are any pre-existing contract rights to be abrogated and that the segmentation rule presents a continuation of existing policy.

The D.C. Circuit denied petitions for review filed by two interstate

20. 15 U.S.C. §§ 717(a)-717(z) (2003).

21. Farmers Union Cent. Exch. v. FERC, 734 F.2d 1486 (D.C. Cir. 1984) (discussing the criteria).

22. *Id.* at 1509.

23. 15 U.S.C. § 717(d) (2003).

pipelines on the grounds that they lacked both statutory and constitutional standing. The pipelines challenged the FERC's decision to permit secondary point capacity allocation under the regulations on various grounds, including the effect on competition and administrative burden. The court did not consider the merits of the pipeline's arguments on the ground that they had not made an adequate showing that they were aggrieved by the regulations implemented under Order No. 637, as required by section 19(b) of the NGA[24]. With respect to the issue of the effect of competition, the court held that the law requires that the petitioner show that the challenged agency action will almost surely cause them to lose business. The court held that the petitioners' showing of harm was too conjectural in nature and failed to establish a substantial probability of injury. Similarly, on the issue of administrative burden, the court held that while compliance costs often may constitute an injury-in-fact, the arguments presented rested on a conclusory, vague, and unsupported assertion of cost increases.

The D.C. Circuit held that the arguments challenging the segmentation of capacity on reticulated pipeline systems were not ripe for review. The court reasoned that the only clear language in the orders on review required segmentation on straight-line portions of pipeline. The court ruled that the exact meaning of the FERC's requirement that segmentation be implemented where operationally feasible cannot be determined in order to present a concrete legal dispute without the need for additional factual development. On the same grounds, the court rejected as not ripe the arguments directed at the special class of reticulated pipeline systems involving the use of postage stamp rate structures.

The court in *Alabama Municipal Distributors Group v. FERC*[25] examined similar jurisdictional issues as explored above. The court dismissed on jurisdictional grounds the petitioners' challenge to a series of FERC orders that granted a section 7 certificate to Southern Natural Gas Company (Southern Natural) to provide service to Southern Company Services (SCS) at rates that were discounted to lower levels than what the petitioners' currently paid.

First, the court ruled that the petitioners lacked the necessary injury-in-fact to confer standing. The petitioners did not substantiate their claims that the alleged improper certification would increase demand for natural gas in the region and therefore would increase gas prices. The petitioners' further claimed that subsequent FERC approval of a discount adjustment by Southern Natural to reflect the rates charged to SCS were deemed to be too speculative to create an injury. The court held that any effect on the petitioners' rates would not be known until Southern Natural's next rate case under section 4 of the NGA.[26] Second, the court deemed the petitioners' challenge not ripe, as they failed to show that a delay in reviewing their claims would cause them immediate harm. Any impact of the certification on the petitioners' rates would not be triggered until Southern Natural's next rate case.

The court also dismissed the petitioners' contention that the potential collateral estoppel effect of the FERC's certificate orders in a future section 4

24. 15 U.S.C. § 717r(b) (2003).

25. Alabama Mun. Distribs. Group v. FERC, 312 F.3d 470 (D.C. Cir. 2002).

26. 15 U.S.C. § 717c(b) (2003).

proceeding conferred standing on the petitioners. In so doing, the court observed, "it seems inescapable that neither standing nor ripeness could properly grow out of a harm predicated on a potential collateral estoppel effect."[27]

In *Dominion Resources, Inc. v. FERC*,[28] the D.C. Circuit granted a petition for review filed by the surviving parent corporation in a merger of an electric power company and a natural gas pipeline, on the ground that the FERC's order requiring a pipeline subsidiary to comply with the FERC's standards of conduct with respect to its dealings with all of its energy affiliates in the post-merger entity was arbitrary and capricious. The surviving parent corporation maintained that the FERC's order was far broader than the merger order on which it purportedly relied, because it had the effect of destroying integrations that existed prior to the merger. The court concluded that the FERC's interpretation of the merger order represented a dramatic departure from FERC precedent. In addition, the court held that the FERC's merger order lacked sufficient clarity, such that a surviving parent corporation could not reasonably have been expected to anticipate that the FERC would have interpreted the merger order to impose the standards of conduct on all energy affiliates, instead of on only electric affiliates. Therefore, the court ruled that the surviving parent corporation had standing to challenge the FERC's orders requiring this expansive application of the regulatory standards of conduct pertaining to affiliates.

3. Rehearing Requirement

In *California Department of Water Resources v. FERC*,[29] the D.C. Circuit dismissed a challenge to a trio of FERC orders addressing an issue involving the California Independent System Operator (ISO). The court held that the California Department of Water Resources (California Water Department) had failed to seek rehearing of the final order of the three and lacked standing to challenge the two earlier orders.

In the first order, issued on May 3, 1999 (May 1999 Order),[30] the FERC approved a proposal by the California ISO for firm transmission rights, including an auction mechanism for congested transmission capacity. The California Water Department, which was considering joining the California ISO as a contractual rights-holder (i.e., a holder of firm transmission rights) sought rehearing of the May 1999 Order, arguing that "contractual rightsholders should not be required to develop and use ISO pricing mechanisms because they do not apply to contractual rightsholders."[31] On August 2, 1999, the FERC granted the rehearing request, ruling in favor of the California Water Department's position (August 1999 Order).[32] California utilities then sought rehearing of the August 1999 Order, and on March 28, 2001, the FERC reversed its position (March

27. *Alabama Mun. Distribs.*, 312 F.3d at 474.
28. Dominion Res., Inc. v. FERC, 286 F.3d 586 (D.C. Cir. 2002).
29. California Dep't of Water Res. v. FERC, 306 F.3d 1121 (D.C. Cir. 2002).
30. *California Indep. Sys. Operator Corp.*, 87 F.E.R.C. ¶ 61,143 (1999).
31. *California Dep't of Water Res.*, 306 F.3d at 1124.
32. *California Indep. Sys. Operator Corp.*, 88 F.E.R.C. ¶ 61,156 (1999).

2001 Order).[33] In response, the California Water Department filed a petition for review without seeking a rehearing of the March 2001 Order.

The court found that, under the circumstances of this case, the California Water Department's failure to seek rehearing of the March 2001 Order constituted a jurisdictional bar to review. According to the court, the petitioner's position "must be that in determining whether there was enough of a change to require a rehearing petition, one must compare the original order with the last order, ignoring whatever orders issued in between."[34] However, the court noted, "[w]e doubt that our precedents support this approach."[35] Moreover, "even if they did, the March [2001] Order cannot be viewed as making only a minor variation to the May [1999] Order."[36] In the court's view, the later order "directed an outcome significantly different from the May and August Orders, not the same outcome with a new rationale."[37] Accordingly, review was barred by the failure of the petitioner to seek rehearing from the March 2001 Order. With respect to the two earlier orders, the court held that the California Water Department lacked standing because it was not aggrieved by the May 1999 Order and it had prevailed in the August 1999 Order.[38]

In *Alabama Municipal Distributors*,[39] the court considered the FERC's motion to dismiss intervenors because they had not sought rehearing of orders issued by the FERC. The intervenors had been granted leave to intervene and support the petitioners in the review of two FERC orders issued under the NGA.[40] The intervenors joined in the petitioners' brief, but did not individually seek rehearing from an adverse ruling (as the petitioners had done), prior to joining in this action.

The FERC argued that intervenors should be held to the same procedural requirements as petitioners. The court rejected this argument, finding that Federal Rule of Appellate Procedure 15(d)[41] governed petitions filed under the NGA. The court recognized the rule did not hold an intervenor to the same requirements as petitioners. By way of example, the court cited differences in the jurisdictional time petitioners have to seek review and intervenors have to intervene in that review process.[42] The court cautioned that if the intervenor intended to substitute for the original petitioner or to raise issues not raised by the petitioner, then it would be held to the same requirements as petitioners in seeking review. The court denied the FERC's motion to dismiss.

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33. *California Indep. Sys. Operator Corp.*, 94 F.E.R.C. ¶ 61,343 (2001).
34. *California Dep't of Water Res.*, 306 F.3d at 1125.
35. *Id.*
36. *California Dep't of Water Res.*, 306 F.3d at 1125.
37. *Id.* at 1126.
38. *California Dep't of Water Res.*, 306 F.3d at 1126.
39. Alabama Mun. Distribs. Group v. FERC, 300 F.3d 877 (D.C. Cir. 2002).
40. 15 U.S.C. § 717r (2003).
41. FED. R. APP. P. 15(d).
42. *See generally* Process Gas Consumers Group v. FERC, 912 F.2d 511, 514 (D.C. Cir. 1990).

4. Ripeness

In *Clifton Power Corp. v. FERC*,[43] a hydroelectric power project operator petitioned for review of orders imposing a $15,000 civil penalty for license violations while its second request to rehear the imposition of the penalty was still pending before the FERC. The court dismissed for lack of jurisdiction, finding that the pendency of the second rehearing request rendered the challenged orders non-final and the petition for review of those orders incurably premature. The court explained the remedy for a party filing such a request is to petition for review after the FERC has ruled on the second rehearing request. The court also rejected petitioner's contentions that (1) finality is merely a prudential consideration with which the court may dispense, rather than a jurisdictional requirement that cannot be waived and (2) a premature petition can be cured by virtue of the FERC's subsequent denial of the second rehearing request.

5. Subject Matter Jurisdiction

In *Niagara Mohawk Power Corp. v. FERC*,[44] petitioner appealed the district court's dismissal of petitioner's Public Utility Regulatory Policy Act (PURPA) and Administrative Procedure Act (APA) claims against the FERC, as well as petitioner's claims against the New York Public Service Commission (PSC), and PSC commissioners for allegedly violating the PURPA and the Supremacy Clause. The claims arose from petitioner's request from the FERC for relief from terms of power purchase agreements with qualifying cogeneration facilities (QCFs). The petitioner claimed these terms were a violation of the PURPA's avoided cost pricing requirement. The petitioner claimed that the PURPA's avoided cost requirement preempted the PSC's pricing requirement for the QCF contracts and the FERC failed to impose avoided cost limits on the contracts.

The court affirmed the district court's rejection of petitioner's PURPA and APA claims against the FERC. The court found there was no claim against the FERC because the Commission was not a proper defendant under PURPA and the petitioner had an adequate forum for relief before the PSC. Furthermore, the court held that the district court properly dismissed petitioner's PURPA claim against the PSC and its commissioners. Additionally, the court agreed the petitioner did not exhaust their remedies by first properly petitioning the FERC for the enforcement of PURPA against the PSC. Therefore, the court affirmed that it lacked subject matter jurisdiction, as well as the district court's dismissal of the petitioner's Supremacy Clause claim on the same grounds. The court found that the Supremacy Clause and PURPA claims against the PSC and its commissioners were the same in substance and that petitioner could not avoid the exhaustion requirement by making the same claim under a different label. The Second Circuit did not rule on the district court's rationale for having dismissed the Supremacy Clause claim, but noted it strongly doubted the accuracy of the lower court's grounds for taking such action.

43. Clifton Power Corp. v. FERC, 294 F.3d 108 (D.C. Cir. 2002).

44. Niagara Mohawk Power Corp. v. FERC, 306 F.3d 1264 (2d Cir. 2002).

B. Standard of Review

In *Association of Oil Pipelines v. FERC*,[45] the D.C. Circuit affirmed in part and remanded in part the FERC's orders that established a formula for changes in the following years' price caps for interstate oil pipelines. The FERC chose the Producer Price Index for Finished Goods minus one percent (PPI-1) to derive the annual change in the caps.[46] The petitioner challenged the FERC's action as being arbitrary and capricious on the ground that the report, which supported the use of the PPI-1 index, used statistical methods that deviated from the FERC's previous methodology without apparent justification. The petitioner also asserted that the FERC failed to account for special factors that potentially altered the pattern of future changes.

The D.C. Circuit held that the FERC's use of a floating weight methodology to determine annual changes in oil pipeline costs, for the purpose of deciding on the formula for changes in ensuing years' price caps, constituted an unexplained deviation from its previous methodology, requiring remand.[47] The court also held that remand was required because of the FERC's refusal to remove statistical outliers when determining annual changes in oil pipeline costs, amounting to an unexplained departure from the FERC's previous methodology. The D.C. Circuit reached the same conclusion with respect to the FERC's refusal to use "net plant" to estimate a portion of a oil pipelines capital cost changes.[48] However, the court ruled that the FERC's decision not to adjust the index for post one-time productivity gains and anticipated future regulatory costs was not arbitrary and capricious. Furthermore, the court held that the FERC's refusal to engage in speculation as to how future cost changes may deviate from the historical trend was appropriate.

In *Sithe/Independence Power Partners v. FERC*,[49] the D.C. Circuit granted a petition for review in part and remanded the case with respect to the FERC's approval of the locational-based marginal pricing method for wholesale sales of electricity and transmission services in New York, as well as its endorsement of a refund mechanism. The case involved the propriety of the transmission owners of the New York Independent System Operator (NYISO) proposed pricing for transmission losses (meaning the amount of electric energy lost when electricity flows across a transmission system). The court held that the FERC's decision was arbitrary and capricious for having failed to provide an adequate explanation of its decision to depart from its established cost-causation principle in approving a certain component of the proposal. In addition, the D.C. Circuit held that the FERC did not justify its refusal to insist on equitable refunds, based on its approval of a presumably discriminatory tariff.[50] The D.C. Circuit ruled that it applies a standard when considering whether rate tariffs are just and

45. Association of Oil Pipelines v. FERC, 281 F.3d 239 (D.C. Cir. 2002).

46. *Id.* at 240.

47. *Association of Oil Pipelines*, 281 F.3d at 245.

48. *Id.* at 247.

49. Sithe/Independence Power Partners v. FERC, 285 F.3d 1 (D.C. Cir. 2002).

50. *Id.* at 5.

reasonable under section 205(a) of the FPA[51] that is akin to the APA substantial evidence inquiry. The court explained that the substantial evidence inquiry is a subset of the APA's arbitrary and capricious standard. Under this standard, the court emphasized that the FERC's approval of an unreasonable rate was arbitrary and capricious.[52]

II. FEDERAL POWER ACT

A. Ratemaking

In *Sithe New England Holdings, LLC, v. FERC*,[53] the First Circuit upheld the FERC's decision not to make retroactive its imposition of a higher installed capacity deficiency charge (ICAP) on retail utilities in New England that failed to contract for adequate capacity to serve their peak loads. On August 28, 2001, the FERC accepted a new ICAP charge for New England utilities of $4.87 per kilowatt/month to be effective beginning September 1, 2001.[54] However, in a subsequent order, the FERC declined to make the new ICAP charge retroactive to the preceding thirteen-month period, over the objections of various wholesale electric utilities that had been advocating a higher charge.[55]

On review, the court rejected claims advanced by both supporters and opponents of retroactivity who asserted that their positions were mandated by the FPA. On one hand, the court held that sellers of wholesale power were not statutorily entitled to higher retroactive ICAP payments, because those payments "are simply not part of the compensation to sellers required by the statute."[56] On the other hand, the opponents of higher ICAP payments were not protected by the rule against retroactive ratemaking, because they were on notice from the outset that higher payments could eventually be required for the period in question.[57] In the court's view, that left the question whether the FERC's discretionary decision not to make the higher ICAP charges retroactive was arbitrary and capricious from a policy standpoint. On that question, the court accepted the FERC's conclusion that making the higher charge retroactive would not necessarily further the policies for which the ICAP charge was originally adopted. "Absent time travel," the court concluded, "whatever investment decisions sellers made prior to September 1, 2001, are history, and so too are the risks taken by buyers who did not purchase adequate reserves for that period."[58]

In *Pacific Gas & Electric Co. v. FERC*,[59] the D.C. Circuit remanded the case to the FERC to articulate a clearer standard for evaluating whether the rates of an ISO are just and reasonable when they include the rates of a non-

51. 16 U.S.C. § 824d (2003).
52. Sithe/Independence Power Partners v. FERC, 285 F.3d 1, 5 (D.C. Cir. 2002).
53. Sithe New England Holdings, L.L.C. v. FERC, 308 F.3d 71 (1st Cir. 2002).
54. *ISO New England Inc.*, 94 F.E.R.C. ¶ 61,237, 61,844-45 (2001).
55. *ISO New England Inc.*, 96 F.E.R.C. ¶ 61,359 (2001).
56. *Sithe New England*, 308 F.3d at 77.
57. *Id.* at 78.
58. *Sithe New England*, 308 F.3d at 78.
59. Pacific Gas & Elec. Co. v. FERC, 306 F.3d 1112 (D.C. Cir. 2002).

jurisdictional municipal utility as a component. This case arose out of the efforts of the California ISO to encourage non-jurisdictional municipal utilities to join the ISO along with the major jurisdictional utilities in the state. For jurisdictional utilities, the FERC directly reviews their transmission revenue requirements (TRRs) to determine whether they are just and reasonable. For non-jurisdictional entities, however, the FERC does not review the TRRs directly, but rather as a component of cost in the overall TRR of the ISO.[60]

The D.C. Circuit approved, in concept, the FERC's approach to non-jurisdictional utilities' TRRs. According to the court, "[the] FERC's approach is to allow a non-jurisdictional entity to file its costs directly with the FERC" and then to review those filed costs "to evaluate whether the . . . [ISO's] jurisdictional rates are permissible, a form of indirect regulation."[61] Relying on Supreme Court precedent involving small gas producers, the court found that "in principle . . . there is no objection to the general approach taken by FERC."[62] However, the court could not discern in the FERC's opinions an "explanation as to how or why FERC's review of . . . [the non-jurisdictional entity's] TRR produced the necessary result, namely, just and reasonable rates for the . . . [ISO]."[63] Accordingly, the case was remanded to FERC to supply such an explanation.

B. Refunds

In *Mid-Continent Area Power Pool v. FERC*,[64] the Eighth Circuit upheld the FERC's ruling on the merits that the Mid-Continent Area Power Pool (MAPP) had failed to file certain Transmission Service Agreements (TSAs) on time, but remanded to the Commission the question whether refunds were appropriately awarded under the circumstances. The precise issue was whether Order No. 888 and subsequent orders had sufficiently put MAPP on notice that it was required to file TSAs for short-term firm and non-firm transmission on behalf of its own members. The court found that neither of the relevant orders "specifically required power pools to file TSAs for short-term firm or non-firm service within the pool" and therefore noted that "we can see how MAPP might have been confused about the exact meaning of the Commission's prior orders."[65]

Nonetheless, the court upheld the FERC's determination that its prior orders required the filings, stating that "we must give deference to the Commission's interpretation of its own orders."[66] However, in light of the apparent confusion created by the prior orders, the court remanded the matter to the FERC "for further consideration of whether to waive the refund in this case."[67]

60. *Id.* at 1114.

61. *Pacific Gas & Elec.*, 306 F.3d at 1116.

62. *Id.*

63. *Pacific Gas & Elec.*, 306 F.3d at 1121.

64. Mid-Continent Area Power Pool v. FERC, 305 F.3d 780 (8th Cir. 2002).

65. *Id.* at 783.

66. *Mid-Continent Area Power*, 305 F.3d at 783.

67. *Id.*

C. Electric Utility Regulation

In *Atlantic City Electric Co. v. FERC*,[68] petitioners, nine utility members of the PJM Interconnection, sought review of FERC orders approving their proposed ISO agreement on condition that they modify the agreement to relinquish their right to unilaterally file for tariff rate changes under section 205 of the FPA and to prohibit members from withdrawing from the ISO without prior FERC approval under section 203 of the FPA.[69] One utility petitioner also challenged the orders to the extent they required reformation of preexisting wholesale power contracts.

The court determined that under section 205 of the FPA[70], the individual PJM utility members have the right to initiate or propose changes to their existing rates, unless they voluntarily choose, by contract, to give up those rights and that the FERC lacks the authority to require public utilities to cede their section 205 FPA rights. The court further found that nothing in section 206 of the FPA[71] permits the FERC to deny public utilities their right to unilaterally file rate and term changes under section 205 of the FPA. Pursuant to section 205, the FERC is limited to only authorizing changes to existing utility rates and practices that are found to be unjust and unreasonable, or unduly discriminatory or preferential.[72]

The court also found that the Commission's decision to prohibit PJM members from leaving the ISO without obtaining prior FERC approval under section 203 of the FPA was inconsistent with the structure and meaning of that statutory provision and inconsistent with past FERC practice. Finally, the court found that the FERC failed to make the necessary public interest findings required by the *Mobile Sierra* doctrine when it required the generic reformation of pre-Order No. 888 wholesale power sales contracts to reflect transmission pricing under the new PJM ISO regime.

In *Idaho Power Co. v. FERC*,[73] the court remanded the FERC orders that prohibited the petitioner, Idaho Power Company (Idaho Power), from entering into a ten year contract with its merchant affiliate, IP Merchant Group, and instead required Idaho Power to renew an eighteen month service contract providing transmission to Arizona Public Service (APS). The court ruled that the FERC's orders that required Idaho Power to continue to provide service to APS, relied on a "nonsensical construction" of the right-of-first-refusal (ROFR) provision in Idaho Power's open-access transmission tariff (OATT).

The FERC ordered that APS should be permitted to renew its transmission service agreement with Idaho Power for eighteen month terms using another customer's rights that could not be exercised until a transmission expansion took place. When Idaho Power sought authorization from the FERC to favor the ten year bid from its merchant affiliate, which requested service downstream of the

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68. Atlantic City Elec. Co. v. FERC, 295 F.3d 1 (D.C. Cir. 2002).

69. 16 U.S.C. § 824b (2003).

70. 16 U.S.C. § 824d (2003).

71. 16 U.S.C. § 824e (2003).

72. *Atlantic City*, 295 F.3d at 10.

73. Idaho Power Co. v. FERC, 312 F.3d 454 (D.C. Cir. 2002).

system constraint, the FERC denied the request on the basis that the APS and IP Merchant requests were dissimilar in available terms of service. Furthermore, the FERC stated that it would be inappropriate to take the IP Merchant bid over the APS bid.

In rejecting the FERC's rationale, the court first held that Idaho Power had standing to contest the agency rulings. The court concluded "it is inconceivable that Idaho Power could be subjected to a FERC order requiring it to enter into a specific contract concerning the use of its property but lack standing to challenge that order."[74] The court then examined the FERC's construction of the ROFR tariff provision and held that its interpretation was inconsistent with Idaho Power's OATT, Order Nos. 888 and 888-A, as well as prior FERC rulings which held that the ROFR tariff provision in the pro forma OATT, section 2.2, plainly directs the incumbent customer to match the term of service offered by the new customer. The court concluded that it was irrelevant whether APS was limited by system constraints to only eighteen-month increments for service on Idaho Power's transmission system.

"These are economic factors that may always affect an incumbent's ability to exercise a right of first refusal. However, these contingencies of the marketplace do not alter the substantive parameters of the right of first refusal."[75] The court accordingly reversed and vacated the FERC's orders so that "appropriate" ones could be issued.

In *Enron Power Marketing, Inc. v. FERC*,[76] an electric power marketer petitioned for review of Commission orders accepting a utility's amendments to source and sink tariff requirements. The amendments provided that: (1) prospective customers must designate a specific source at which the particular point-to-point transmission will begin and a specific sink at which it will end; (2) a generator or generator-only control area cannot be designated as a sink, and a load or load-only control area cannot be designated as a source; and (3) the scheduled amount of point-to-point transmission on the utility's system is limited to the rated capacity of the designated source and the maximum allowable load of the designated sink.

The court affirmed that the FERC reasonably found the amendments to be consistent with or superior to the FERC's own *pro forma* open-access transmission tariff and comparable to the terms and conditions on which point-to-point transmission service was offered to affiliated and non-affiliated customers alike. The court also rejected petitioner's assertion that the FERC inexplicably reversed its purported policy of deferring to the North American Electric Reliability Council (NERC) on reliability matters, finding that the Commission neither has, nor could it have, a policy of deferring to the NERC.

In *Arkansas Electric Energy Consumers v. FERC*,[77] petitioners sought review of FERC Opinion Nos. 385 and 385-A[78], approving the merger of the

74. *Id.* at 461.

75. *Idaho Power*, 312 F.3d at 464-65.

76. Enron Power Mktg., Inc. v. FERC, 296 F.3d 1148 (D.C. Cir. 2002).

77. Arkansas Elec. Energy v. FERC, 290 F.3d 362 (D.C. Cir. 2002).

78. *Entergy Services, Inc. & Gulf States Utilities Co.*, 65 F.E.R.C. ¶ 61,332 (1993).

Entergy and Gulf States' electric utility systems under section 203 of the FPA and approving an amendment to the Entergy System Agreement (System Agreement) under section 205 of the FPA[79] to add Gulf States as an Electric Operating Company (EOC) upon consummation of the merger. The petitioners principally contended that the FERC's action violated the prohibition against undue discrimination in section 205 of the FPA because the System Agreement treated Gulf States, which had no history of cost-sharing with respect to the Entergy system generating facilities, similarly to petitioners' operating companies which have long histories of such cost-sharing. The petitioners also contended that the FERC erred in not holding an evidentiary hearing on wholesale electric competition before approving the merger.

The court ultimately denied the petitions. First, the court found that the petitioners did preserve their contentions for judicial review. The FERC argued that the petitioners were making an impermissible attack on the hearing order, which stated that the hearing would focus solely on whether the EOCs would be adversely affected by Gulf States' integration into the System Agreement. However, the court determined that the hearing order also stated the effect of the merger on rates and costs would be taken into account and that petitioners had reasonable grounds to refrain from raising their contentions regarding undue discrimination until a decision on the merits was rendered. In this regard, the court noted that the FERC had addressed petitioners' arguments on the merits on rehearing, never suggesting in its rehearing order that petitioners had waived their contentions. The court therefore held the petitioners preserved their arguments for judicial review.[80]

On the merits, the court first found that the petitioners failed to show that the FERC erred in determining that the amendment of the System Agreement to add Gulf States was not unduly discriminatory. The court agreed with the FERC that the petitioners' claim of undue discrimination based on production cost equalization was not contrary to FERC precedent and ignored the undisputed net benefits of the merger to all of the EOCs participating in the System Agreement, including significant savings of net production costs, non-fuel operations, and management expenses. The court also agreed the FERC properly rejected petitioners' proposed modifications to the amended System Agreement, because such modifications would discriminate against Gulf States. The court concluded the FERC adhered to established practice on the Entergy System in subjecting Gulf States to virtually the same System Agreement terms as the existing EOCs, and petitioners had failed to show, given the relationship of the amended System Agreement to the merger, that the FERC's decision was unreasonable or not based on substantial evidence.[81]

The court also rejected petitioners' contention the FERC improperly disposed of the competition issue without an evidentiary hearing. The court held that petitioners had not identified any material issue of fact that could not be properly resolved by the FERC on the written record. The court pointed to the

79. 16 U.S.C. § 824d (2003).

80. *Arkansas Elec.*, 290 F.3d at 366.

81. *Id.* at 369.

FERC's finding that the merger would expand Entergy's open-access tariff to Gulf States' service territory and this would mitigate any increase in market power in the relevant geographic and product market. The court also agreed that the record supported the FERC's finding that petitioners had not demonstrated pre-merger competition between Gulf States and Entergy Systems to be more than *de minimis*. The court concluded that the FERC did not abuse its discretion in declining to conduct an evidentiary hearing on the wholesale competition issue.[82]

D. Hydroelectric Licensing

In *Coalition for Fair and Equitable Regulation of Docks v. FERC*,[83] a group of lakefront property owners sought judicial review of orders which determined that the FERC had authority to allow a licensee to assess user fees on docks extending into a lake that was part of a hydroelectric power project. The court rejected petitioner's principal argument that the FERC was not empowered by the FPA to regulate anyone other than the licensee regarding use of project lands. The court also rejected petitioner's corollary arguments that: (1) the user fees were a tax, which can only be levied by Congress; (2) the license violated the non-delegation doctrine, because there was no intelligible statutory principle to which the permit program was required to conform; and (3) the permit program violated the Coalition's Fifth Amendment equal protection rights.

In *California Trout, Inc. v. FERC*,[84] the court denied a challenge by an environmental organization to the FERC's decision to not revoke an annual license for a hydroelectric plant owned by Southern California Edison Company. The petitioner asserted the FERC's issuance of an annual license was a licensing action that triggered the compliance requirements of the state certification requirement of section 401 of the Clean Water Act (CWA).

The court disagreed with the petitioner. The court held that under section 15(a)(1) of the FPA,[85] the issuance of an annual license was a ministerial and non-discretionary act that required the FERC to authorize the project's continued operation under the terms and conditions of the original license. The issuance of such a license was not an action that triggered the certification requirements of the CWA. The court admonished the FERC, however, by observing that the CWA and the FPA were to be read consistently with one another. In this regard, the court noted that a new project license or license amendment can be issued in the absence of state certification compliance and hydroelectric projects cannot operate in perpetuity under annual licenses.

In *FPL Energy Maine Hydro, LLC v. FERC*,[86] petitioner, a hydroelectric facility that was operating under a previously issued FPA license due for renewal, sought review of the FERC orders determining that the stream on which

82. *Arkansas Elec.*, 290 F.2d at 370.
83. Coalition for Fair & Equitable Regulation of Docks v. FERC, 297 F.3d 771 (8th Cir. 2002).
84. California Trout, Inc. v. FERC, 313 F.3d 1131 (9th Cir. 2002).
85. 16 U.S.C. § 808 (2003).
86. FPL Energy Me. Hydro, L.L.C. v. FERC, 287 F.3d 1151 (D.C. Cir. 2002).

it was located was navigable under section 3(8) of the FPA[87] and that it must be licensed pursuant to section 23(b)(1) of the FPA.[88] The court denied the petitions, finding that the FERC's interpretation of the statute governing navigability was reasonable and supported by substantial evidence.

Relying on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[89] the court stated that it would defer to the agency's interpretation of an ambiguous statute so long as it was reasonable. The court found that the FERC's interpretation of the FPA in determining when a waterway was "suitable for use . . . in . . . commerce" and, therefore, navigable within the meaning of the statute was reasonable.[90] While all parties agreed that the stream had never been used for commercial traffic, the court found that the FERC's reliance on three test canoe trips and the stream's physical characteristics were reasonable and entitled to deference. The court relied on the Supreme Court holding in *United States v. Utah*[91] stating that the capacity of a waterway to meet the needs of commerce "may be shown by physical characteristics and experimentation as well as by the uses to which the stream [has] been put."[92] The *FPL Energy* court found that the FERC acted consistently with Supreme Court precedent in relying on the three test canoe trips.

The court further held that the test was whether the waterway is presently "suitable for use for the transportation of persons or property in interstate or foreign commerce," not whether the waterway is presently suitable for a specific type of commercial activity.[93] The court determined that the stream was suitable for transporting persons or property downstream to the Kennebec River and that it was not necessary for the FERC to identify a specific type of commerce associated with that transportation. While the court acknowledged that the evidence of navigability was not "overwhelming", it upheld the FERC's determination.

III. NATURAL GAS ACT

A. Ratemaking

In *Canadian Association of Petroleum Producers v. FERC*,[94] the D.C. Circuit rejected a challenge to the FERC's decision setting the allowed rate of return on equity for the Northwest Pipeline Corporation (Northwest). This case involved a narrow issue regarding the application of the FERC's established methodology for determining the equity rate of return of a gas pipeline company. Under that methodology, the FERC performs a discounted cash flow analysis of the required return on equity for a proxy group of publicly traded gas pipeline

87. 16 U.S.C. § 796(8) (2003).
88. 16 U.S.C. § 817(1) (2003).
89. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
90. *FPL Energy*, 287 F.3d at 1156.
91. United States v. Utah, 283 U.S. 64 (1931).
92. *Id.* at 83.
93. *FPL Energy*, 287 F.3d at 1154.
94. Canadian Ass'n of Petroleum Producers v. FERC, 308 F.3d 11 (D. C. Cir. 2002).

companies in order to derive a range of returns for the industry as a whole. It then determines the median return from that range and, in a second step, assesses where the particular gas pipeline company at issue should fall relative to the median. In this case, the FERC had awarded Northwest a return on equity equal to the median of the proxy group.

The Canadian Association of Petroleum Producers (CAPP), representing shippers, challenged the FERC's determination that Northwest's return on equity should be set at the proxy group median. The court held, however, that CAPP had waived its principal argument against the FERC's result by not raising it explicitly in its request for rehearing. "The CAPP's decision upon rehearing to focus its argument about the differences between Northwest and the proxy companies solely upon the initial calculation of the range of ROEs denied the Commission the opportunity to consider the precise challenge the CAPP now raises for judicial review," the court stated.[95] "This we cannot countenance."[96] On the merits of the remaining issue raised by CAPP (whether Northwest was sufficiently affected by competition to warrant setting its return equal to the proxy group median), the court found substantial evidence to support the FERC's conclusion.[97]

In *Village of Bethany v. FERC*,[98] several small municipal utility customers of Natural Gas Pipeline Company of America (Natural) challenged the FERC's approval of Natural's proposal to allocate available transportation capacity using an auction that would award capacity based on the net present value of the reservation charges a prospective customer would pay. The municipal customers maintained that this approach discriminated against them, as they paid special one-part rates that did not include reservation charges. The customers also contested the FERC's approval of Natural's use of auction reserve prices that could vary based on factors other than cost-to-serve (*e.g.*, market competition).

The court affirmed the FERC's orders. In doing so, the court noted the municipalities agreed that because of the structure of their one-part rates, they did not pay as much as they would under two-part rates that included a reservation charge.[99] Given this fact, the court found that the FERC's policy goal of allocating capacity to those that valued it most was a reasonable basis for rejecting an allocation method that would have allowed the municipal customers to obtain the capacity for less than another bidder.[100] The court also upheld the FERC's approval of the use of auction reserve prices based on factors other than cost-to-serve, explaining that "the general concept of market-based discounts is

95. *Id.* at 15.

96. *Canadian Ass'n*, 308 F.3d at 15.

97. *Id.* at 16.

98. Village of Bethany v. FERC, 276 F.3d 934 (7th Cir. 2002).

99. *Id.* at 942.

100. *Village of Bethany*, 276 F.3d at 943. Although it upheld the FERC's ruling, the court declined to afford deference to the Commission's policy of net present value capacity allocation following the *Chevron* precedent. The court found the policy in *Bethany*, which had been articulated in several previous cases, was not entitled to *Chevron* deference because "the policy was not subjected to formal rulemaking and we see no reason to assume that Congress intended policies announced in the Commission's individual case decisions to have the force of law . . . ." *Id.* at 942.

firmly embedded in the Commission's official policies and has been approved by the courts."[101] The court reasoned further that the municipal customers would have an opportunity in Natural's next rate case to show that discounts afforded to other customers did not benefit the municipalities and should not affect their rates.[102]

B. Natural Gas Regulation

In *Board of Water, Light and Sinking Fund Commissioners of the City of Dalton, Georgia v. FERC*,[103] the petitioner, a municipal gas utility, challenged FERC orders authorizing construction of a direct delivery connection between a gas supplier and a customer. The court rejected petitioner's contention that the FERC intruded on state jurisdiction over local distribution service by approving the bypass.

In *Process Gas Consumers Group v. FERC*,[104] the petitioners, an association of industrial natural gas users, sought review of the FERC orders approving a pipeline company's proposed net present value (NPV) method for allocating pipeline capacity and processing requests for meter amendments. The court found that the FERC's decision to allow the pipeline company to allocate pipeline capacity according to a NPV method, and to impose no cap on the length of bids for that capacity, was reasonable because existing regulatory controls already adequately limited the pipeline's market power and ability to induce lengthy contracts. The court also found application of the NPV methodology to meter amendment requests to be reasonable in light of the fact that the pipeline company was not obligated to give existing shippers a preference, and that the point allocation method allowed the pipeline company to promote the sale of available mainline capacity to shippers who valued it the most.

C. Offshore Non-Jurisdictional Gathering

In *ExxonMobil Gas Marketing Company v. FERC*,[105] the D.C. Circuit examined a FERC determination classifying lengthy portions of a Sea Robin offshore pipeline system as non-jurisdictional gathering facilities and not jurisdictional transportation facilities under the NGA.[106] In its orders, the FERC revisited the old controversy over the distinction between, as well as the definition of, gathering and transportation facilities, for purposes of jurisdiction under the NGA.

The court examined the FERC's actions under an "arbitrary, capricious, [and] abuse of discretion" standard,[107] seeking a reasonable basis for the FERC's actions. The court analyzed the history of the gathering versus transportation

101. *Village of Bethany*, 276 F.3d at 944.

102. *Id.* at 945.

103. Board of Water, Light & Sinking Fund Comm'rs v. FERC, 294 F.3d 1317 (11th Cir. 2002).

104. Process Gas Consumers Group v. FERC, 292 F.3d 831 (D.C. Cir. 2002).

105. ExxonMobil Gas Mktg. Co. v. FERC, 297 F.3d 1071 (D.C. Cir. 2002).

106. 15 U.S.C. § 717(b) (2003).

107. 5 U.S.C. § 706(2)(A) (2003).

controversy, beginning with the long-standing FERC definition of gathering as "the collecting of gas from various wells and bringing it by separate and several individual lines to a central point where it is delivered into a single line."[108] The court noted that the "behind-the-plant" and "central-point-in-the-field" tests, later subsumed in the "primary function" test, with its list of criteria to be considered,[109] were problematic in this case, because they were primarily developed for onshore activities. Offshore operations present a different set-up of facilities, employing long lines to gather hydrocarbons from various producing platforms and moving them long distances toward shore, where further processing and delivery into main transportation lines occurs. This required special consideration of the "primary function" test factors.

The Sea Robin system under consideration consisted of some 438 miles of pipe in the Gulf of Mexico laid out in a rough Y-shape, where the two arms gathered raw hydrocarbons from more than sixty offshore platforms and brought them to the junction of the "Y." There, a large compression platform pushed the gas another seventy miles to shore, gathering gas from four more platforms along the way.

The FERC held that all operations above the junction of the "Y," at the compression plant, were non-jurisdictional gathering lines and that the long line to shore was a jurisdictional transportation line. In so doing, it offered a detailed analysis of the criteria typically considered in applying the primary function test, focusing on the central aggregation that occurred at the compression platform.

The court denied the petitions for review, finding that, "[w]e are generally 'unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn . . . are patently unreasonable, having no relationship to the underlying regulatory problem.'"[110] The petitioners' argument that the FERC had unreasonably drawn a line of demarcation was not borne out by the record. In rejecting the argument, the court stated, "[the] FERC's jurisdiction over natural gas pipelines 'demands the drawing of jurisdictional lines, even when the end of gathering is not easily located.' Although we might draw a different line, we cannot say that the Commission acted unreasonably . . . ."[111]

IV. NORTHWEST POWER PLANNING AND CONSERVATION ACT

In *Puget Sound Energy, Inc. v. United States*,[112] the Ninth Circuit rejected as untimely a challenge to certain components of the charges imposed by the Bonneville Power Administration (BPA) on a utility, Puget Sound Energy, that purchased transmission capacity from the BPA. The court held that, because the dispute involved the "implementation of a rate"[113] by the BPA, by the Northwest

108. *Barnes Transp. Co., Inc.*, 18 F.P.C. 369, 372 (1957).

109. *ExxonMobil*, 297 F.3d at 1077.

110. *Id.* at 1085 (quoting Cassell v. FERC, 154 F.3d 478, 485 (D.C. Cir. 1998)).

111. *ExxonMobil*, 297 F.3d at 1089 (quoting Sea Robin Pipeline Co. v. FERC, 127 F.3d 365 (5th Cir. 1997)).

112. Puget Sound Energy, Inc. v. United States, 310 F.3d 613 (9th Cir. 2002).

113. *Id.* at 616.

Power Planning and Conservation Act,[114] which required any challenge to be brought within ninety days of final action on the rate, governed it. In the court's view, the relevant final action under the parties' contract was BPA's June 4, 1998 response to an audit conducted by the purchasing utilities. Since Puget Sound's court claim was not filed until July 1, 1999, the court found it barred by the time limit in the statute.

V. COASTAL ZONE MANAGEMENT ACT

In *Mountain Rhythm Resources v. FERC,*[115] the petitioner sought review of the FERC's denial of licenses for construction of hydroelectric plants thirty miles from the coastline of the State of Washington (Washington). The petitioner encountered problems when it was determined that the proposed plants were to be located within an area designated by the State as a coastal zone. The Coastal Zone Management Act (CZMA)[116] requires the FERC to cooperate with applicable state agencies in ensuring that proposed hydroelectric projects are consistent with that state's coastal zone management plan. The FERC directed petitioner to obtain appropriate approval from Washington.

So advised, the petitioner filed a compliance certificate with Washington, essentially claiming that, because the proposed plant location was thirty miles inland, Washington's designation as a coastal zone was improper. Washington asked petitioner to submit more required information and directed petitioner to obtain a county-approved Shoreline Management Act (SMA) permit.

Five years later, upon completion of the FERC's environmental impact assessment, petitioner had not cured the deficiencies noted by Washington. Petitioner filed for a declaratory order from the FERC that the proposed location was not a coastal zone. The FERC denied the request and dismissed the application for hydroelectric licenses.

In denying the petition for review, the court noted that the National Oceanic and Atmospheric Administration (NOAA), which has the special expertise to assess the evidence supporting the designation, had approved the original coastal zone designation. It viewed petitioner's FERC proceeding as an impermissible collateral attack on NOAA's decision. The court noted that petitioner could have lodged a complaint with the Secretary of Commerce to override Washingtons's objections,[117] however, petitioner did not do this. It argued that Washington had waived its right to object to its project by failing to lodge a protest within the required six-month period.[118] The court rejected this

114. 16 U.S.C. § 839 (2003).

115. Mountain Rhythm Res. v. FERC, 302 F.3d 958 (9th Cir. 2002).

116. 16 U.S.C. § 1451 (2003).

117. *See also* 16 U.S.C. §§ 1456(c)(3)(A)-(B)(iii) (2003).

118. *See also* 15 C.F.R. § 930.60 (2003).

argument, observing that Washington had requested information required by the CZMA that petitioner had failed to provide. Therefore, petitioner's failure to provide that information effectively tolled the running of that time period.

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