REPORT OF THE JUDICIAL REVIEW COMMITTEE

I. INTRODUCTION

This report summarizes the major energy cases decided by judicial review in 2000, with a focus on cases at the appellate level.

II. ADMINISTRATIVE LAW

A. *Adjudicatory Rule Changes*

In *National Whistleblowers Center v. Nuclear Regulatory Comm'n*,[1] petitioner sought review of an order of the Nuclear Regulatory Commission (NRC) denying it intervention in a nuclear power plant license renewal proceeding. On reconsideration of an earlier decision by the court which had been *sua sponte* vacated, the court held that: (1) the NRC had authority to change an adjudicatory rule and apply an "unavoidable and extreme circumstances" test, in lieu of a "good clause" test, to assess requests for extensions of time in which to file contentions in support of its intervention in a nuclear power plant license renewal proceeding; (2) the NRC could adopt the new standard without notice and comment rulemaking; (3) the NRC's adoption of new standard was not arbitrary, capricious, an abuse of discretion, or otherwise not in accord with the law since the change merely refined an existing procedural standard and no affected party had detrimentally relied on the old "good cause" test; and (4) petitioner was not prejudiced by the NRC's application of the new standard since it had received two extensions of time and the alleged support for the additional request did not even satisfy the old "good cause" standard.

B. *Aggrievement*

In *Grand Council of the Crees (of Quebec) v. FERC*,[2] the court dismissed the petitioners' appeal after finding that the petitioners were outside of the "zone of interest" and, therefore, not aggrieved by the Federal Energy Regulatory Commission's (FERC or Commission) order. In this proceeding, the FERC authorized a Canadian utility to sell power at market-based rates in the United States under section 205 of the Federal Power Act (FPA).[3]

The petitioners, a coalition of consumers, birders, recreational canoeists, energy activists, and environmental organizations, claimed that the FERC's order "aggrieved" them because the order would result in exports of power to the United States, leading to an increase in the development of

1. National Whistleblowers Ctr. v. Nuclear Regulatory Comm'n, 208 F.3d 256 (D.C. Cir. 2000).
2. Grand Council of the Crees (of Quebec) v. FERC, 198 F.3d 950 (D.C. Cir. 2000).
3. Federal Power Act § 205, 16 U.S.C. § 824d (1994).

hydroelectric facilities, which in turn would harm wildlife and the environment. The court reasoned that, although a utility's rates may have environmental consequences, section 205 of the FPA only requires the FERC to ensure that a utility's rates are just and reasonable, not to examine whether the rates impact wildlife or the environment.[4] Under the judicial rule of "prudential standing," the court found that petitioners did not have standing to challenge the FERC's order because the petitioners raised interests that were outside of the "zone of interest" of section 205 of the-FPA.

The court also rejected petitioners' claims that the FERC should have prepared an environmental impact statement (EIS). The court reasoned that because the statutory provision in dispute does not require the FERC to consider environmental concerns, the petitioners were also outside of the zone of interest necessary to be considered "aggrieved" parties by the FERC's refusal to prepare an EIS.

C. *Evidentiary Hearing*

In an unpublished opinion in *Piedmont Natural Gas Co. v. FERC*,[5] the D.C. Circuit held that a petition for review of the FERC's decision to deny Piedmont Natural Gas Company's (Piedmont) request for an evidentiary hearing on Transcontinental Gas Pipe Line Corporation's (Transco) bypass application was not an abuse of discretion since no material issue of fact was in dispute and there was no allegation that Transco had engaged in any specific anti-competitive or discriminatory practices. The court also dismissed that portion of the appeal which challenged the FERC's standards concerning contract demand reductions in bypass cases since Piedmont acknowledged it would not lose firm service as a result of the bypass and there was no case or controversy.

D. *Petitions for Review—Jurisdiction*

In an unpublished order in *Amoco Production Co. v. FERC*,[6] the D.C. Circuit found that a petition for review was incurably premature, even if a rehearing petition filed by the same petitioner and still pending before the FERC raised issues different from those raised by the petition for review, because a party could not seek agency rehearing of an order or part thereof simultaneously with, or after, seeking judicial review of the same order or part thereof. The court noted that once the pending rehearing request was resolved, petitioners could seek judicial review of that order as well as the prior related orders.

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4. *See generally* 198 F.3d at 957.

5. Piedmont Natural Gas Co., Inc. v. FERC, No. 99-1256, 2000 U.S. App. LEXIS 11713 (D.C. Cir. May 1, 2000).

6. Amoco Prod. Co. v. FERC, No. 00-1060, 2000 U.S. App. LEXIS 15464 (D.C. Cir. May 19, 2000).

In *City of Oconto Falls, Wisconsin v. FERC*,[7] the court rejected the argument that it lacked jurisdiction over petitioner's appeal, because the petitioner failed to specify the order of which it was seeking review. In this case, the FERC issued a hydroelectric license to N.E.W. Hydro over the objections of the City of Oconto Falls (City) and the Wisconsin Department of Natural Resources (WDNR).[8] The City and WDNR sought rehearing of the FERC's order, which the FERC denied.[9] In its petition for review, WDNR failed to specify that it was seeking review of the License Order and instead only mentioned the Rehearing Order. The court held that a party seeking review of a FERC order must identify the aggrieving order. However, the court also held that because the petitioner's intention to challenge the License Order was clear from other pleadings it filed, the court found that it had jurisdiction over the appeal. The court also rejected the notion that the FERC could claim prejudice or surprise from the petitioner's flawed pleading.

In *Martin v. FERC*,[10] the court allowed a petitioner to appeal a FERC order even though the petitioner did not indicate with specificity in the petition the order being appealed. In this case, the FERC authorized Portland Natural Gas Transmission System to construct a new pipeline facility over a route that included the petitioner's property. The petitioner sought rehearing of the order[11] and the FERC denied the rehearing request.[12] In the petition for review, petitioner requested the court to review the Rehearing Order, but did not mention the Certificate Order. Simultaneously, the petitioner filed with the court a motion to stay the construction of the pipeline facilities. In response to petitioner's appeal, the FERC argued that, because the petitioner did not specifically mention the Certificate Order in the petition, the court lacked jurisdiction and the appeal should be dismissed. The court noted that it generally reviews only those orders that a petitioner designates in its petition. Further, the court acknowledged that an order denying rehearing in and of itself is unreviewable "except insofar as the request for rehearing is based upon new evidence or changed circumstances."[13] Nonetheless, the court held that the failure to identify an order in the petition for review is not fatal as long as the petitioner's intention can be fairly inferred from the documents filed with the petition. The court found that the petitioner's request to stay the construction of the pipeline facilities filed with the petition for review showed that the petitioner intended to challenge the Certificate Order as well. The court also ruled that the FERC would not be harmed by the court's review of the Certificate Order, because the FERC's filings indicate it understood

7. City of Oconto Falls, Wisc. v. FERC, 204 F.3d 1154 (D.C. Cir. 2000).
8. *N.E.W. Hydro, Inc.*, 81 F.E.R.C. ¶61,238 (1997) (License Order).
9. *N.E.W. Hydro, Inc.*, 85 F.E.R.C. ¶61,222 (1998) (Rehearing Order).
10. Martin v. FERC, 199 F.3d 1370 (D.C. Cir. 2000).
11. *Portland Natural Gas Transm. Sys.*, 80 F.E.R.C. ¶ 61,345 (1997) (Certificate Order).
12. *Portland Natural Gas Transm. Sys.*, 83 F.E.R.C. ¶ 61,080 (1998) (Rehearing Order).
13. 199 F.3d at 1371, *citing* ICC v. Brotherhood of Locom. Eng'rs, 482 U.S. 270, 278-80 (1987).

that the petitioner was challenging the Certificate Order.

In an unpublished order in *Municipal Electric Utilities Association of New York State v. FERC*,[14] the petitioner trade group appealed motions to dismiss the finding that the FERC's action did not constitute final agency action. The D.C. Circuit noted that when parties seek agency rehearing of an order in which they also have sought appellate review, the order is non-final and petitions for review are incurably premature. Further, agency action cannot be considered non-final for one purpose and final for another; once a party petitions the agency for reconsideration of an order or any part thereof, the entire order is rendered non-final as to that party.

E. Rulemaking

In *Appalachian Power Co. v. Environmental Protection Agency (EPA)*,[15] electric power companies and trade associations representing the chemical and petroleum industry petitioned for review of an EPA "guidance" document allegedly imposing unauthorized requirements on states in connection with their operating permit programs under the Clean Air Act.[16] The court held that: (1) the guidance document was a final document subject to judicial review since it represented EPA's settled position as to states' responsibility to review state and federal emission standards, and to impose more stringent standards in permits in the event the state found existing monitoring equipment inadequate; the document had legal consequences both for state agencies and parties subject to permit requirements; (2) the guidance document broadened the underlying EPA rule and its promulgation was thus improper absent compliance with formal rulemaking procedures; and (3) the proper remedy was to set aside the guidance document in its entirety.

F. Standard of Review of Agency Interpretation of Contracts

In *City of Kaukauna, Wisconsin v. FERC*,[17] the court acknowledged that, although a reviewing court generally defers to an agency's expertise when a court interprets an agency's orders, such deference does not extend to an agency's interpretation of a contract. Instead, the standard of review of an agency's interpretation of a contract is whether the "interpretation of the contract was reasonable and in full conformance with the law."[18] The issue was whether a 19th-century conveyance of water rights prohibited the FERC from assessing headwater benefit charges on the current owner of a hydroelectric facility in Wisconsin. After a thorough review of the water rights granted to the prior owners of the facility, the court held that an 1872 deed gave the then-owners (and by conveyance the current owner)

14. Municipal Elec. Util. Ass'n v. FERC, No. 99-1398 consolidated with No. 99-1400, 2000 U.S. App. LEXIS 4025 (D.C. Cir. Feb. 24, 2000).

15. Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000).

16. Clean Air Act § 307(d), as amended, 42 U.S.C. § 7607(d) (1984).

17. City of Kaukauna, Wisc. v. FERC, 214 F.3d 888 (7th Cir. 2000).

18. *Id.* at 895.

rights to water power enhancements. The court ruled that, although "headwater benefits" were not recognized at the time the water rights were conferred on the owners of the facility, the fact that the 1872 deed conveyed "rights to water power created by reason of any dam or other improvements"[19] is broad enough to include headwater benefits. In rejecting the FERC's attempt to impose headwater benefits charges on the petitioners, the court indicated that its interpretation of the 1872 deed simply held the government to its prior agreement.

G. *Substantial Evidence*

In *City of Centralia, Washington v. FERC*,[20] the court reinforced the requirement that the FERC must base its decisions on "substantial evidence."[21] The FERC order in this proceeding required an owner of a hydroelectric facility to study the impact of the hydroelectric facility on anadromous fish in the Nisqually River. The FERC asserted that the facility may adversely impact the fish. However, the court vacated the order after finding that the FERC did not show that a study was justified. The court found that FERC's order was devoid of reasoned decisionmaking because it ordered the petitioner to conduct the study based on "sheer speculation" of harm to the fish and in the face of evidence that the facility likely would not harm the fish. Such speculation is not "substantial evidence justifying a study,"[22] the court held. Further, the court found the FERC did not adequately balance power and non-power values when it required the petitioner to perform a study that the FERC admitted could be inconclusive.

III. ANTITRUST LAW

In *Columbia River People's Utility Distribution v. Portland General Electric Co.*,[23] Columbia River People's Utility District (Columbia) and Portland General Electric Co. (PGE) had entered into a settlement agreement that provided PGE with the right to serve a local paper plant, but which gave Columbia the right to acquire the facilities used to serve the plant for a fixed purchase price of $31 million. Columbia exercised this option shortly after the settlement was entered into, but later realized that it could have built the necessary facilities for approximately $2 million. Columbia brought the underlying action, alleging that PGE had violated section 1 of the Sherman Antitrust Act.[24] The district court granted summary judgment in favor of PGE, finding that PGE's actions had not injured competition. The circuit court affirmed, stating that Columbia was seeking to use the antitrust laws to replace PGE as a monopoly provider. Because the only issue was which party would

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19. 214 F.3d at 896.
20. City of Centralia, Wash. v. FERC, 213 F.3d 742 (D.C. Cir. 2000).
21. *See generally* 213 F.3d at 748. *See also* United States Dept. of Interior v. FERC, 952 F.2d 538, 545 (D.C. Cir. 1992)(stating the substantial evidence, and arbitrary and capricious standard of review).
22. 213 F.3d at 749.
23. Columbia River People's Util. Dist. v. Portland Gen. Elec. Co., 217 F.3d 1187 (9th Cir. 2000).
24. Sherman Antitrust Act, 15 U.S.C. § 1 (1994).

be the state-approved monopoly provider for the subject paper plant, Columbia had no recourse under the antitrust laws.

In *Indeck Energy Services, Inc. v. Consumers Energy Co.*,[25] the plaintiffs operated co-generation systems providing energy for large customers. After losing prospective business to the defendant public utility companies who offered discounted pricing and who contracted only with an affiliated producer to supply needed additional energy, Indeck Energy Services, Inc. (Indeck) sued under the Sherman Antitrust Act,[26] the Clayton Act,[27] and state law. The court affirmed the dismissal of the complaint finding Indeck lacked standing to bring the federal claims since: (1) the only harm allegedly suffered by Indeck was in their capacity as a competitor in the marketplace, not as a defender of marketplace competition, and (2) there was no indication that competition itself was harmed by any act of Consumers Energy Company. The court found that the antitrust damages alleged by Indeck were too indirect and speculative to justify assertion of federal antitrust jurisdiction.

In *Paladin Associates, Inc. v. Montana Power Co.*,[28] plaintiffs sold and marketed natural gas and natural gas services to customers on and downstream of Montana Power Company's (Montana Power) pipeline system. The plaintiffs alleged that Montana Power and other defendants engaged in certain acts of anti-competitive conduct relating to the offering of interstate and intrastate natural gas transportation and storage services. Montana Power moved for summary judgment, claiming that plaintiffs' claims were barred by the filed rate and state action doctrines. The filed rate doctrine bars antitrust claims that a rate on file with the appropriate regulatory agency was unreasonable, because it was the product of an antitrust violation. In this instance, the plaintiffs did not allege that the rate they were charged was unreasonable and the court held that the filed rate doctrine was not a valid defense in this case. With respect to the state action doctrine, the court stated that for an activity to be protected, the state must have articulated a clear and affirmative policy to allow the challenged conduct. Finding that the state had made no such declaration, the court denied Montana Power's request for summary relief. Plaintiffs claimed that Montana Power had illegally tied the provision of imbalance services to the purchase of a long-term assignment of firm transportation service. Finding that the proposed transaction did not involve two separate products or services, and thus no tying, the court rejected this claim. Plaintiffs also claimed that by forcing customers to purchase transportation services for a five-year term, Mountain Power was forcing these customers to boycott Paladin. The court found that the alleged actions were reasonable and that the plaintiffs failed to show the defendants had conspired to restrain

25. Indeck Energy Serv., Inc. v. Consumers Energy Co., No. 99-1433, 2000 U.S. App. LEXIS 25629 (6th Cir. Oct. 6, 2000)

26. Sherman Antitrust Act, 15 U.S.C. §§ 1-2.

27. Clayton Act § 3, 15 U.S.C. § 14 (1994).

28. Paladin Assocs., Inc. v. Montana Power Co., 97 F. Supp. 2d 1013 (D. Mont. 2000).

trade.

In *Town of Norwood, Massachusetts v. New England Power Co.,*[29] the Town of Norwood (Norwood), a long-time purchaser of power from New England Power Co. (NEPCO), had entered into antitrust settlements with NEPCO that, in Norwood's view, required NEPCO to provide Norwood with energy and capacity on a cost-justified basis at the same rate level as NEPCO offered to its affiliates. Pursuant to state-ordered restructuring, NEPCO divested itself of most of its generation assets, which had the effect of raising the price for power paid by Norwood. Norwood brought suit against NEPCO, raising various antitrust and breach of contract claims. The district court dismissed the antitrust claims and found that they were barred by the filed rate doctrine, which limits attacks on tariff rates filed and accepted by federal regulatory agencies. Norwood had claimed that NEPCO's actions amounted to a price squeeze that prevented it from competing with NEPCO's retail affiliates. Both the rates charged to Norwood and to NEPCO's affiliates were subject to the FERC's jurisdiction and the court held that the filed rate doctrine precluded an attack on these rates. The court also found that because NEPCO had sold off most if its generation assets and was obliged to provide open access transmission services, NEPCO did not appear to have the monopoly or near monopoly power Norwood alleged. Norwood also claimed that NEPCO's sale of its generation assets violated the antitrust laws because it enhanced market power in the relevant markets, and had the tendency to increase prices to the detriment of electric power purchasers. While expressing skepticism about the merits of Norwood's allegations, the court held that such claims are not precluded by the filed rate doctrine, and remanded to the district court. The court noted that the FERC's approval of the divestiture might ultimately preclude Norwood's antitrust claims on these issues.

In *United States v. Enova Corp.*,[30] the United States Department of Justice (DOJ) sued to enjoin the proposed merger between Enova Corporation (Enova), parent corporation of San Diego Gas & Electric Company, a major electric utility in California, and Pacific Enterprises (Pacific), parent corporation of Southern California Edison Company, the predominant natural gas pipeline system in Southern California. The DOJ was concerned that the merged entity could use its monopoly control over the transportation and storage of natural gas to raise prices and injure competition in California's electric markets. The parties entered into a consent decree that would require Enova to divest certain low-cost electric plants and obtain DOJ authorization before acquiring any other generation facilities. The court approved the consent decree. The court stated that in determining whether to accept a proposed consent decree, the court must determine whether to do so is consistent with the public interest. In making this determination, the court may consider factors such as the relationship between the allegations in the government's complaint and the remedies set forth in the consent decree,

29. Town of Norwood, Mass. v. New England Power Co., 202 F.3d 408 (1st Cir. 2000).

30. United States v. Enova Corp., 107 F. Supp. 2d 10 (D.D.C. 2000).

whether the enforcement mechanisms contained in the consent decree are adequate, whether acceptance of the consent decree would affirmatively prejudice others, and whether the proposed consent decree was overly ambiguous. However, the court is to defer to the DOJ in the first instance, and may only reject the consent decree if it has exceptional confidence that adverse antitrust consequences will result.

IV. ENERGY TAXES

In *Anadarko Petroleum Corp. v. FERC*,[31] the court clarified on rehearing its October 1999 opinion, in which it denied a generic waiver of interest with respect to producers' refunds of over collections of the Kansas *ad valorem* tax.[32] The court had set aside the FERC's decision regarding the starting date for refunds and remanded the case for entry of an order prescribing a date consistent with the court's finding that the relevant transaction is the sales transaction. The court stated that it is the overcharges paid in individual sales transactions which must be refunded, plus interest. The Commission filed for rehearing and sought clarification on the issue of the effective date for producer refunds. The Commission presented information indicating that the assumptions on which the court based its earlier opinion concerning the "start-date" issue were incorrect, i.e., that: (1) the tax assessment sent to the producers by the State of Kansas between October and November of a given year was for the same calendar year and not the previous year; and (2) producers most commonly sought reimbursement of the Kansas *ad valorem* tax from their customers in lump sum transactions and not by "raising their prices in individual transactions."[33] Accordingly, the Commission sought guidance from the court as to how to give effect to the court's holding that "it is the overcharges made in those individual transactions (plus interest) that the producers must now repay."[34] On rehearing, the court again found that the producers did not have notice until October 4, 1983, that their practice of seeking reimbursement with respect to the Kansas *ad valorem* tax was questionable. The court then concluded that:

> If the producers collected tax reimbursements from their customers after that date, whether by lumpsum transactions or by any other means, they did so unlawfully and must refund the amounts collected with interest, provided that the tax reimbursements caused their sales to exceed the maximum lawful price. We leave to the Commission the unenviable task of applying this principle to the facts of ancient transactions.[35]

31. Anadarko Petroleum Corp. v. FERC, 200 F.3d 867 (D.C. Cir. 2000).
32. Anadarko Petroleum Corp. v. FERC, 196 F.3d 1264, 1269-70 (D.C. Cir. 1999).
33. *Anadarko Petroleum Corp.*, 200 F.3d at 868.
34. *Id.*
35. *Anadarko Petroleum Corp.*, 200 F.3d at 868.

The court vacated that portion of its prior opinion inconsistent with its opinion on rehearing and remanded the question of refund dates to the Commission for "further proceedings consistent with this clarification."[36]

In *Dominion Resources, Inc. v. United States,*[37] at issue were two significant expenses that the appellant claimed entitled it to certain tax refunds. The first expense concerned approximately $10 million in prior rate overcharges to customers that were later required to be refunded. The second expense concerned approximately $2.2 million in environmental clean-up costs. The lower court had permitted a refund on the first expense, but disallowed a refund on the second expense. On appeal, the court affirmed the lower court, holding that: (1) the appellant's refund to its customers qualified for relief under section 1341 of the Internal Revenue Code[38] (which permits taxpayers to recomputed their taxes for the year of receipt if in a subsequent year it is determined that the taxpayer was not entitled to certain income); and (2) the clean-up costs were improvements and must be capitalized. In finding that the appellant qualified for a tax refund, the court rejected the Internal Revenue Service's (IRS) argument that a taxpayer only had a right to a refund if the facts on which it based its claim were apparent as of the close of the taxable year in question.

In *Big Horn County Electric Cooperation, Inc. v. Adams,*[39] at issue was an *ad valorem* tax assessed by the Crow Tribe (Tribe) on utility property within the boundaries of the Crow Reservation (Reservation). The Tribe appealed a district court summary judgment for the utility striking down the tax on the basis that the Tribe lacked regulatory jurisdiction over the utility for tax purposes. On appeal, the court affirmed in part and reversed in part the district court's holding. The court, in affirming the lower court, found that the Tribe's assessment of the tax did not qualify for an exemption from the general Montana rule that, absent a treaty or a federal law, a tribe does not have civil regulatory authority over tribal non-members.[40] The court, however, reversed the lower court holding that the Tribe must refund any taxes previously collected from the utility, finding that such requirement violated the Tribe's sovereign immunity, noting that, "[t]he Supreme Court has recognized that a retrospective award of taxes is barred by sovereign immunity."[41]

36. *Id.*
37. Dominion Res., Inc. v. FERC, 219 F.3d 359 (4th Cir. 2000).
38. 26 U.S.C. § 1341 (1994).
39. Big Horn County Elec. Coop., Inc. v. Adams, 219 F.3d 944 (9th Cir. 2000).
40. *See generally* Montana v. U.S., 450 U.S. 544, 564-65 (1981).
41. *Big Horn*, 219 F.3d at 954.

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

In *Conservation Law Foundation v. FERC*,[42] the court found that the FERC gave adequate consideration to certain factors in re-licensing a hydroelectric facility in Maine. Petitioners argued that the FERC should not have treated existing conditions at the facility as the baseline, because that approach ignores the ongoing impacts of the facility. The court disagreed. The court found that the FERC had the "leeway" to conduct its comparative assessments using existing conditions as a baseline.[43] Further, the court indicated that the "baseline" argument is a red herring, because the real question in relicensing a hydroelectric facility is whether the FERC had fully examined options for environmental protection.[44] The court held that, as long as the Commission adequately examines both the power and the non-power impacts of recommended licensing conditions, the choice of a "baseline" is unimportant.[45] In addition, petitioners argued that the FERC failed to satisfy its obligation to give "equal consideration" to environmental issues.[46] The court again disagreed, finding that the requirement that the FERC give equal consideration to environmental issues does not require the FERC to give those issues "equal treatment."[47] The ultimate rejection of environmental concerns is not evidence that the FERC did not consider them.

VI. FEDERAL POWER ACT: ELECTRIC REGULATORY LAW

A. *Appeal of Order Nos. 888[48] and 889[49]*

Transmission Access Policy Study Group (TAPS) v. FERC[50] involved the appeal of FERC Order Nos. 888 and 889, which imposed open access requirements on owners of electric transmission lines. The opinion af-

42. Conservation Law Found. v. FERC, 216 F.3d 41 (D.C. Cir. 2000).

43. *Id.* at 46-47.

44. *See generally Conservation Law Found.* 216 F.3d at 46.

45. *Id.* at 46.

46. *Conservation Law Found.* 216 F.3d at 46.

47. *Id.* at 47.

48. Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Service by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, F.E.R.C. STATS. & REGS. ¶31,036, 61 Fed.Reg. 21, 540 (1996); *clarified*, 76 F.E.R.C. ¶61,009 and 76 F.E.R.C. ¶61,347 (1996); *on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶31,048, 62 Fed. Reg. 12,274; *clarified*, 79 F.E.R.C. ¶61,182 (1997); *on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶61,248, 62 Fed. Reg. 64,688 (1997); *on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶61,046 (1998).

49. Open Access Same Time Information System and Standards of Conduct, Order No. 889, F.E.R.C. STATS. & REGS. ¶31,035, 61 Fed. Reg. 21, 737 (1996); *on reh'g*, Order No. 889-A, F.E.R.C. STATS. & REGS. ¶31,049, 62 Fed. Reg. 12,484 (1997); *on reh'g*, Order No. 889-B, 81 F.E.R.C. ¶61,253 (1997).

50. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000)[hereinafter TAPS].

firmed the FERC in nearly all respects. As of the date of this report, three petitions for writ of certiorari have been filed. Two petitions were granted, but limited and consolidated, and the third was denied.[51]

The court remanded the case in only two respects. First, the court remanded Order No. 888 for the FERC to impose a "reasonable cap" on the term of competing offers that a firm transmission customer must match in order to exercise its right-of-first-refusal (ROFR) to extend its transmission service. Second, the court remanded Order No. 888 for the FERC to explain its treatment of energy costs under the "market option" in the stranded-cost rules. The rule gives former requirements customers a right to offset their stranded-cost exposure by purchasing and reselling the capacity and associated energy that they would have purchased from their historic supplier. The Investor Owned Utilities (IOUs) complained that the rule gives the former customer a possible windfall, because the customer has the right to purchase the associated energy at system average variable cost but can resell the energy at market value. The court remanded, because the FERC had not adequately explained the basis for its decision.

The following summary adopts the outline used in the court's opinion for ease of reference.

1. FERC's Authority to Require Open Access

a. Statutory Challenges to Open Access

The court relied on its reasoning in its prior opinion, *Associated Gas Distributors (AGD) v. FERC*,[52] upholding FERC's open access gas regulations to find that the FERC has the statutory authority under the Federal Power Act (FPA) sections 205 and 206,[53] to require public utilities to file open access transmission tariffs.[54] The court also upheld the FERC's decision to proceed by rulemaking under FPA section 206,[55] rather than case-by-case adjudication, to impose the tariff-filing requirement. The court agreed that the FERC had assembled enough evidence in the rulemaking to impose the tariff-filing requirement.[56]

51. TAPS, 225 F.3d 667, *cert. granted*, 2001 WL 178167 (U.S. Feb. 26, 2001) (No. 00-568) (*New York v. FERC*, limited to question one presented by the petition); *cert. granted*, 2001 WL 178167 (U.S. Feb. 26, 2001) (No. 00-809) (Enron Power Marketing, Inc. v. FERC, consolidated with No. 00-586); *cert. denied*, 2001 WL 178203 (U.S. Feb. 26, 2001) (No. 00-800) (Board of Water, Light & Sinking Fund Commissioners v. FERC).

52. Associated Gas Distribs. v. FERC, 824 F. 2d 981 (D.C. Cir. 1987).

53. Federal Power Act §§ 205-206, as amended, 16 U.S.C.A. §§ 824d, 824e (1994).

54. *TAPS*, 225 F.3d at 685-87.

55. 16 U.S.C.A. §824e.

56. *TAPS*, 225 F.3d at 687-88.

The court also affirmed the FERC's rejection of claims that the open access requirement unduly discriminates against transmission owners (or co-owners), who have invested millions of dollars in transmission facilities, requiring them to grant access on an equal basis to other customers who have paid nothing. The court said such entities are free to argue a FERC filing under FPA section 206 that the open access requirement is unduly discriminatory as applied to its particular circumstances, because "Order No. 888 merely shifts from a regulatory norm in which a user of transmission services must demonstrate to [the] FERC an individualized need for open access to one in which a provider of transmission services must present to FERC individualized circumstances requiring relief from open access."[57]

b. Constitutional Challenges to the Open Access Requirement

The court rejected claims that the open access requirement effects a "taking" of the property of transmission owners, in violation of the Fifth Amendment. The court said if there is a takings issue, it relates to whether the FERC's method of cost-based transmission ratemaking provides transmission owners "just compensation." Appeals alleging lack of just compensation must be brought in the Court of Claims under the Tucker Act.[58]

2. Federal v. State Jurisdiction Over Transmission Service

a. Bundled Retail Sales

The court found that it is bound by the applicable Supreme Court precedent to conclude that the FERC has authority to regulate wholesale and retail transmission service in interstate commerce, rejecting the arguments by the states that only they should regulate retail transmission service. The court, however, was not persuaded to go further and require the FERC to assert jurisdiction over all retail transmission service, even if bundled: "A regulator could reasonably construe transmissions bundled with generation and delivery services and sold to a consumer for a single charge as either transmission sources in interstate commerce or as an integral component of a retail sale."[59] The court, therefore, upheld the FERC's decision not to assert jurisdiction over bundled retail transmission.

b. FERC Jurisdiction Over Local Distribution Facilities

The court affirmed the FERC's two-pronged analysis of its jurisdiction over local distribution facilities: (1) if the facilities are used to effect a sale for resale in interstate commerce (wholesale sale), then the FERC has clear jurisdiction over them; and (2) if the facilities are used for unbundled

57. *Id.* at 689.

58. *TAPS,* 225 F.3d at 690. *See also* Tucker Act, 28 U.S.C. § 1491 (2000).

59. *TAPS,* 225 F.3d at 694.

retail sales (retail wheeling), then the FERC will use a seven-part functional test to determine whether the facilities are transmission facilities (subject to the FERC's jurisdiction) or local distribution facilities (subject to state jurisdiction). The court held that the FERC's two different statutory grants of jurisdiction (sales for resale v. transmission in interstate commerce) justify this differing treatment of what otherwise would be identical facilities.[60]

3. Reciprocity

The court rejected, as not ripe for review, the claim of a state power district that the requirement in the FERC's *pro forma* Open-Access Transmission Tariff (OATT) that a customer provide reciprocal transmission service to the transmission provider violated both the FPA and the Tenth Amendment to the Constitution. Noting that the state power district already provided open access transmission service under state law, the court found that "it is far from certain that the reciprocity provision will have any effect" on the power district.[61] The court also rejected the arguments of the IOUs that the reciprocity requirement should not just be limited to the public utility transmission provider, but should extend to all qualified entities (as the open access requirement does). The court agreed with the FERC that its concern about lack of jurisdiction over non-public utilities and the associated tax considerations, justified this limitation on the reciprocity requirement.[62]

4. Stranded Cost Recovery Provisions

a. Wholesale Stranded Costs

(i) The FERC's Authority To Provide for Stranded Cost Recovery

The court rejected the arguments of petitioners challenging the FERC's stranded cost recovery mechanism that: (1) public utilities could not have had a "reasonable expectation" of continuing to provide service past the end of the contract terms with their wholesale customers;[63] (2) the stranded cost recovery rules themselves violate FPA section 206 because they perpetuate undue discrimination;[64] (3) the FPA section 212 precludes the charging of transmission costs in transmission rates;[65] and (4) the stranded cost recovery provisions violate the D.C. Circuit's own decision in

60. *Id.* at 696.
61. *TAPS*, 225 F.3d at 697.
62. *Id.* at 698.
63. *TAPS*, 225 F.3d at 702.
64. *Id.* at 703.
65. *TAPS*, 225 F.3d at 703-04.

Cajun Electric Power Co-op, Inc. v. FERC.[66] In reaching this last holding, the court made clear that its *Cajun* decision was not an absolute bar on stranded cost recovery, but merely a direction to the FERC to "evaluate and justify the potential anticompetitive impact" of stranded cost recovery.[67]

(ii) Natural Gas Precedent and Conformance to Cost - Causation Principles

The court roundly rejected arguments that the FERC and judicial precedent concerning natural gas pipelines required the FERC to share stranded costs on an equitable basis between public utilities and their customers (rather than allowing public utilities to charge customers for 100% of stranded costs). The court found that different factual circumstances in gas and electric restructuring amply justified the FERC's differing policy courses.[68]

The court also rejected the claim that the FERC's stranded cost recovery provisions violate cost causation principles because they reflect in transmission rates costs public utilities previously incurred to provide generation-related services. According to the court, the FERC, in fashioning the stranded cost recovery rules, took great care to ensure that customers would be responsible only for the stranded costs they caused. The court rejected arguments that the charging of transmission rates with stranded cost allowances to former public utility customers, but not to other customers, constitutes undue rate discrimination and that stranded cost recovery violates the filed rate doctrine.[69]

(iii) The FERC's *Mobile-Sierra*[70] Findings

The court found that the FERC can make on a generic basis the necessary "public interest" findings that contracts between public utilities and their wholesale customers can be modified, thus overriding the *Mobile-Sierra* clauses in those contracts.[71] The court said it was "influenced" by the fact that the public utility would have to "prove that it had a reasonable expectation of continued service to a particular customer" before it could recover stranded costs, despite the generic public interest finding.[72] The court, however, "stress[ed] that generic *Mobile-Sierra* findings are appropriate only in rare circumstances," of which this is one.[73]

66. Cajun Elec. Power Coop., Inc. v. FERC, 28 F.3d 173 (D.C. Cir. 1994); *See also TAPS,* 225 F.3d at 704.

67. *TAPS,* 225 F.3d at 704.

68. *Id.* at 706-07.

69. *TAPS,* 225 F.3d at 708-09.

70. *See generally* FPC v. Sierra Pacific Power Co., 350 U.S. 348, 353-55 (1956); United Gas Pipeline Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 344-45 (1956).

71. *TAPS,* 225 F.3d at 710-11.

72. *Id.* at 710.

73. *TAPS,* 225 F.3d at 711.

The court-rejected arguments by stranded cost opponents that the FERC's generic evidence of financial harm to public utilities and remaining by stranded costs was insufficient.[74]

The court also rejected the IOUs' arguments that the contract reformation rules are unbalanced, in that customers can reopen all aspects of their wholesale supply contracts, while public utility suppliers are limited to seeking changes to the stranded cost provisions. The court found that the FERC's explanation that the public utilities had entered into these contracts at a time when they exercised monopoly control over access to their transmission facilities, was "perfectly rational."

(iv) Availability of Stranded Cost Recovery to Nonjurisdictional Utilities, and Generation and Transmission Cooperatives

The court rejected arguments by a rural electric cooperative that FERC had arbitrarily and capriciously failed to give nonjurisdictional utilities stranded cost recovery if they provided transmission service under the reciprocity requirement: "Given the limited scope of [the] FERC's stranded cost provisions, its lack of jurisdiction over entities like [the cooperative], and the ability of nonjurisdictional utilities to include stranded cost provisions in their open access tariffs, we see no reason to question [the] FERC's judgment on this issue."[75] Similarly, the court rejected the claims that the FERC should have provided a stranded cost recovery for transmission dependent utilities that own no transmission facilities. The court found that "open access does not cause their costs to be stranded their customers have always had an option to use other utilities' transmission services to purchase power."[76]

(v) Challenges to Technical Aspects of Stranded Cost Recovery

Stranded Cost Formula. The court upheld the FERC's decision to use the "revenues lost" formula to determine stranded costs, rejecting arguments that this method gives utilities little incentive to mitigate stranded costs and fails to accurately state stranded costs.[77]

The court rejected the IOU arguments that the FERC's method for estimating the price a customer would have paid for power had it continued purchasing from its former public utility supplier (which looked at the prior three years) does not take into account deferred costs.[78]

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74. *Id.* at 711-12
75. *TAPS,* 225 F.3d at 713.
76. *Id.*
77. *TAPS,* 225 F.3d at 714-15.
78. *Id.* at 715.

The court, however, had more sympathy for the IOUs' argument that under the FERC's market option for determining stranded costs, customers could pay the utility for energy at the average system variable cost, and then turn around and sell it at a market price, pocketing the difference. Saying that the FERC had misapprehended the IOUs' argument on this point and had, thus, never explained why customers should be able to get such a "windfall," the court remanded this issue to the FERC for further consideration.[79]

Recision of Notice of Termination Provision. The court rejected the argument that the FERC's prospective elimination of its regulation requiring that public utilities give advance notice before terminating wholesale power supply agreements unreasonably ignored the fact that many public suppliers still exercise considerable generation market power. The court said that Order No. 888 itself would move towards elimination of such market power. Moreover, those harmed by such a contract termination would still have the right to seek relief from the FERC under FPA section 206.[80]

Stranded Benefits. The court upheld the FERC's decision not to make generic findings that wholesale customers might have had a "reasonable expectation" of continuing low-cost power purchases from their suppliers past the end of their contract terms. The court said that the FERC had adequately explained why it had not made generic findings in favor of customers on this issue and that, again, adversely-affected customers could seek relief under FPA section 206.[81]

b. Retail Stranded Costs

The states and other stranded cost petitioners argued that the FERC should not have asserted jurisdiction over retail stranded cost recovery in cases where the states have no legal authority to grant stranded cost recovery. The court rejected these arguments.

(i) Stranded Costs Arising from Retail Wheeling

The court agreed with FERC that stranded costs (unlike rates) are not exclusively "jurisdictional" to either the states or to the FERC. The FERC, therefore, can include stranded generation costs in FERC-jurisdictional transmission rates, "in the highly unusual circumstances of this case," although in "most cases, the answer would be no. . . ."[82] The court said that generation-related retail stranded costs are a cost incurred to provide open access transmission service. The court also rejected claims that FERC had usurped state authority, noting that the FERC limited its

79. *TAPS*, 225 F.3d at 715-16.
80. *Id.* at 716.
81. *TAPS*, 225 F.3d at 716-17.
82. *Id.* at 719.

role to gap-filling where states had no legal authority.[83]

The court rejected IOU claims that the FERC had not gone far enough in exercising its jurisdiction over retail stranded cost claims. The court found that the FERC had no mandatory duty to consider proposals for retail stranded cost recovery.[84] The court also rejected the IOUs' argument that it would be unduly discriminatory for the FERC to permit some transmission rates to include a retail-related stranded cost component, and other transmission rates to include no such allowance.[85] The court found that, by making sure that IOUs have a forum to bring retail stranded cost claims (in the states or at the FERC if the state has no authority), the FERC has done just what was required of it in the court's *AGD* opinion.[86]

(ii) Stranded Costs Relating to Retail-Turned-Wholesale Customers

The states had argued that the FERC, in saying it would consider stranded cost cases arising from municipalizations or annexations, was overriding Congress' instruction to the states to protect retail customers. The court rejected this argument, agreeing with the FERC that such cases would arise because of the FERC's open access filing requirement, thus establishing a direct nexus that would merit the FERC's taking of jurisdiction over such cases.[87] Similarly, the court rejected the stranded cost petitioners' claims that the FERC lacks jurisdiction to decide retail-turned-wholesale stranded cost cases. The court found that "the FERC's exclusive jurisdiction over all aspects of wholesale sales gives [the] FERC all the authority it needs to include generation-related stranded costs in rates, including even costs originally incurred to provide retail service."[88] In the same vein, the court rejected the stranded cost petitioners' claims that beneficial "franchise competition" would be undermined if stranded cost recovery were allowed in municipalization cases. The court acknowledged this might be so, but found persuasive the FERC's argument that stranded cost recovery was meant neither to discourage or encourage municipalization, but rather to facilitate a fair transition to competition.[89] The court also rejected the claim that the FERC acted arbitrarily and capriciously in declaring itself the primary forum for stranded cost recovery in retail-turned-wholesale cases. The court pointed out that in retail-turned-wholesale cases, the customer in question becomes a wholesale customer subject to exclusive FERC jurisdiction, thus justifying the FERC's decision

83. *TAPS*, 225 F.3d at 719.
84. *Id.* at 720-21.
85. *TAPS*, 225 F.3d at 721.
86. *Id.* at 721.
87. *TAPS*, 225 F.3d at 723.
88. *Id.* at 723.
89. *TAPS*, 225 F.3d at 723.

to take jurisdiction.[90] The court also rejected the IOUs' claim that the FERC should have provided for stranded cost recovery in cases where a retail-turned-wholesale customer does not use its former public utility power supplier's transmission system to obtain its new power supplies (the "bypass" scenario). The court found that utilities could seek recovery of stranded costs in such instances in "individual rate proceedings."[91]

5. Credits for Customer-Owned Facilities and Behind-the-Meter Generation

The court rejected challenges to the FERC's requirement under the network service tariff that a network service customer must include its total loads behind each delivery point (or none of them), even though a customer might have "behind-the-meter" generation that it uses to serve loads at those points. The court upheld the FERC's decision to require network customers to include all of their loads at a delivery point if they wished to have network service provided at that point. The court noted that such customers could call on the transmission provider to serve their full load at the point if needed, when "for instance they experience blackouts or brownouts."[92] If the customer did not desire such full service, it could exclude all loads at that point and obtain point-to-point service instead. The court found that the petitioners' objections to the FERC's refusal to allow them to "split" points of delivery were "not well taken," because they had ignored "the technical problems with a split system."[93]

Turning to the issue of credits for existing customer-owned facilities, the court found that the petitioners were seeking "reduced prices for any and all behind the meter facilities they own."[94] The court supported the FERC's rejection of this blanket approach, noting that a case-by-case approach to credits was appropriate because "it depends on whether the customers' facilities are truly integrated with the transmission system, rather than merely interconnected."[95]

On the issue of transmission credits for new customer-owned transmission facilities (built after the commencement of open access service), the court found the petitioners were mistaken in arguing that the OATT imposed a "joint planning" requirement as a precondition to the awarding of such credits.[96] The court stated that Order No. 888 had not spoken to the status of new customer-owned transmission facilities that were not jointly planned with the transmission provider. The court found that the petitioners were using a "mistaken premise" to argue that transmission providers did not have to provide credits unless the facilities were jointly

90. *Id.* at 723-24.

91. *TAPS*, 225 F.3d at 724.

92. *Id.* at 726.

93. *TAPS*, 225 F.3d at 726.

94. *Id.*

95. *TAPS*, 225 F.3d at 726.

96. *Id.* at 727.

planned, and that their conclusion should be rejected.[97]

6. Liability, Interface Allocation, and Discounting

a. Liability and Indemnification

The IOUs argued that transmission customers should be required to indemnify transmission providers for damages arising from the provision of transmission service unless the providers were grossly negligent, but the OATT had an "ordinary negligence" exception. They claimed that the FERC had adopted this lesser standard in Order No. 888 without first notifying interested parties that it was contemplating such a "major policy change."[98] The court agreed with the FERC that the order "does not establish a new, simple negligence standard of liability for transmission providers."[99] The court also rejected the IOUs notice claims, because "a final rule need not be identical to the original proposed rule."[100]

b. Interface Allocation

The IOUs also challenged the allocation of interface capacity under the OATT, arguing that transmission customers should be limited to a load ratio share of each interface. The court relied on the FERC's reasoning in a prior decision, to uphold the FERC's policy choice on interface allocation, although the court noted that the FERC's recognition of the petitioners' concerns was "cursory" and its language was "oblique." [101]

c. Delivery-Point-Specific Discounting

Some petitioners challenged the FERC's policy allowing delivery-point-specific transmission rate discounting, arguing that this policy allowed transmission providers to discriminate by denying discounts to the delivery points used by their competitors, and in effect required customers to pay undiscounted rates for interruptible service that were equal to rates for firm service. The court noted that, although "petitioners hint at a statutory claim by alleging that FERC's orders result in undue discrimination," they had generally confined themselves to arguing that the FERC inexplicably departed from established policy.[102] The court found that the FERC had not appeared to change its "overall pricing policy at all, except to fine tune its guidance as to when discounting might be considered discriminatory."[103] The court said the petitioners' argument regarding discriminatory rate discounting by transmission providers in favor of their af-

97. *TAPS*, 225 F.3d at 727.

98. *Id.* at 728.

99. *TAPS*, 225 F.3d at 728.

100. *Id.* at 729.

101. *TAPS*, 225 F.3d at 730.

102. *Id.* at 731-32.

103. *TAPS*, 225 F.3d at 732.

filiates' delivery points was "plausible." But it found more persuasive the FERC's contrary argument that "requiring transmission providers to apply discounts to all unconstrained transmission paths could discourage discounting generally, resulting in higher rates for all."[104]

7. Tariff Terms and Conditions

a. Headroom Allocation

Some petitioners argued that a network customer should be permitted to use the "headroom" in its transmission entitlement for off-system sales without further charges, in order to be able to attain the same efficiency in transmission use that a customer taking flexible point-to-point service can achieve. On the same issue, but from a different perspective, three IOUs argued that equivalent restrictions should be put on point-to-point customers. The court upheld the FERC, however, finding that it had "properly insisted on maintaining its basic distinctions between network service and point-to-point service," noting the variable nature of network customers' rights.[105]

b. Headroom Prioritization

Petitioners also complained that the OATT gives firm transmission customers using secondary points a priority below non-firm transmission customers using these same points. The court found that the FERC had sufficiently explained why this was so—firm customers were paying no extra charge to use secondary points and hence could be allotted a lower priority. The court noted that the FERC had also said it would reexamine this priority scheme if tradable electric transmission capacity rights could be developed.[106]

c. Duplicative Charges

The court rejected arguments that the FERC's new rules caused customers to be double-charged in the case of power exchanges. The court noted the FERC's responsive argument that typically, such transactions are two one-way transactions, and said that it "will not disturb the Commission's approach."[107] Similarly, the court rejected a claim that the OATT would double-count network load served by two different suppliers at the same point, if two different entities were supplying the same load under their own network service arrangements. The court confessed difficulty in comprehending petitioners' complaint, saying it could not see why both a power purchaser and a power supplier would designate the same load under their network service agreements. In any case, the court found that pe-

104. *Id.* at 732.

105. *TAPS*, 225 F.3d at 733.

106. *Id.* at 733-34.

107. *TAPS*, 225 F.3d at 734.

titioners could seek relief from the Commission if their circumstances warranted an adjustment.[108]

d. Multiple Control Areas

The court affirmed the FERC's rulings on the OATT provisions affecting customers with loads and resources in multiple control areas, finding that the parties raising this issue were seeking to have power moved from one transmission provider's control area to another's "free of charge."[109] The court noted that the FERC's treatment of this issue was also consistent with its decision in *Fort Pierce Utilities Authority v. FERC*.[110]

e. Right of First Refusal

Petitioners argued that the FERC erred in failing to impose an upper limit on the contract term firm transmission customers had to match in exercising their rights under the ROFR in the OATT. The court noted that the FERC had conceded error on this point at oral argument, in light of the court's decision in the Order No. 636 appeal, *United Gas Distribribution Cos. v. FERC*.[111] The court, therefore, remanded this issue to the Commission so that it could "provide a reasonable cap on contract extensions."[112]

8. National Environmental Policy Act (NEPA) and Regulatory Flexibility Act (RFA) Compliance

a. NEPA

An IOU argued that the FERC had erred in using a "base case" in its environmental impact studies that contemplated continued mergers and mandatory transmission orders, instead of a "frozen" status quo. The court rejected this argument, finding that NEPA "does not require that a certain alternative be adopted as the base case."[113] The IOUs argued that the FERC had acted arbitrarily and capriciously by failing to adopt any mitigation measures as part of Order No. 888 to deal with the "downwind utility" problem. The court dismissed this argument, saying the small increases in emissions from open access transmission did not require mitigation measures, and the FERC had discussed mitigation measures and explained why it was rejecting them.[114] The court held that the FERC's conclusion that emissions issues are best addressed by the states and EPA

108. *Id.* at 734.

109. *TAPS*, 225 F.3d at 734.

110. Fort Pierce Util. Auth. v. FERC, 730 F.2d 778 (D.C. Cir. 1984). *See also* TAPS, 225 F.3d at 732.

111. United Gas Distrib. Co. v. FERC, 88 F.3d 1105, 1138-40 (D.C.Cir. 1996).

112. *TAPS*, 225 F.3d at 735.

113. *Id.* at 735-36.

114. *TAPS*, 225 F.3d at 736-37.

was "hardly arbitrary or capricious."[115]

b. RFA

Some petitioners claimed that the FERC failed adequately to consider the impact of Order Nos. 888 and 889 on non-jurisdictional utilities, thus violating the RFA.[116] The court agreed with the petitioners and the FERC that this case was to be judged by the RFA provisions in place before certain 1996 amendments. The court said that this meant its scope of review was quite narrow.[117] The court noted the FERC's analysis that the orders, in their entirety, would only have an impact on nonjurisdictional utilities in the limited circumstances of reciprocity, and thus would not have a substantial impact on a large number of small entities.

B. Other Electric Energy Regulatory Cases

In *Alabama Power Co. v. FERC*,[118] the court remanded FERC orders which, *inter alia*, rejected a rate component of "turbine assembly costs" for inclusion in a transmission agreement between several power companies (collectively, Southern Companies) and the City of Tallahassee, Florida. The Southern Companies had executed with the City and filed with the FERC, a Unit Power Sales (UPS) Agreement that provided for the sale of certain electric power capacity, including a monthly reactive control charge for the costs associated with the generator-supplied reactive power. The FERC approved the contract, but took issue with two cost components which Southern proposed to include in its agreement: turbine assembly costs and heating loss costs. The court remanded on the first exclusion on the ground that the FERC permitted the recovery of such costs in an earlier FERC case, and in denying such recovery for the Southern Companies, did not explain such a disallowance. With respect to heating loss costs, the court affirmed the FERC's rejection of Southern's calculation of heating loss costs. However, the court also remanded on this point and urged the FERC to reconsider whether the Southern Companies had incurred unrecovered heating loss costs or heating loss costs that could be more equitably recovered.

In *Automated Power Exchange, Inc. v. FERC*,[119] the court of appeals upheld FERC orders finding that a power exchange was a public utility subject to FERC's jurisdiction under the FPA. In its orders, the FERC found that a power exchange owns "facilities"[120] used for wholesale electricity sales, and thus is a public utility under the FPA if the exchange exercises "effective control"[121] over such sales and exercises such effective

115. *Id.* at 737.

116. Regulatory Flexibility Act, 5 U.S.C. § 605 (Supp. II 1996).

117. *TAPS*, 225 F.3d at 737-38.

118. Alabama Power Co. v. FERC, 220 F.3d 595 (D.C. Cir. 2000).

119. Automated Power Exch., Inc. v. FERC, 204 F.3d 1144 (D.C. Cir 2000).

120. *See generally id.* at 1147.

121. *Automated Power Exch., Inc.*, 204 F.3d at 1147.

control when it determines the market price thereby becoming an integral part of the sales transaction. The court noted that this power exchange set the wholesale price within a range established by the buyer and seller, and did not simply facilitate trades between buyers and sellers who agreed upon a price. Finding that the FPA did not address the precise question at issue, the court upheld as reasonable the FERC's interpretation of "facilities" used for wholesale sales to encompass a power exchange's facilities used to exercise effective control over such sales. The court rejected arguments that the FERC was obligated to distinguish prior orders in which it did not assert jurisdiction over power brokers who do not take title to power. The court concluded that the FERC had reasonably found that the power to set a transaction's price was sufficient to demonstrate that the exchange exercised effective control over the transaction. The court upheld as reasonable the FERC's imposition of filing requirements on this power exchange that differed from the requirements imposed on public utilities with market-based rate authority.

In *Boston Edison Co. v. FERC*,[122] a public utility sought review of FERC orders requiring rate decreases and refunds under contracts governing sales from a nuclear power plant to utilities owning entitlements to the plant's output. After an investigation, the FERC found the existing rates of return on equity under the contracts to be unjust and unreasonable, and ordered reductions and refunds. The court of appeals vacated and remanded, concluding that the contracts had fixed the rates of return, and under the *Mobile-Sierra* doctrine, the FERC could only reduce the rates of return if they were contrary to the public interest. In rejecting the FERC's interpretation of the contracts, the court concluded that the parties had bargained for a specific rate of return and that agreement implicated the *Mobile-Sierra* doctrine unless the parties had negated that implication. The court criticized the FERC's tendency to "re-write deals"[123] that the parties had made "under the aegis of *Mobile-Sierra*,"[124] but noted that the FERC had prospective authority to require that all contracts preserve the FERC's ability to order changes under the just and reasonable standard or to prescribe the contractual terms necessary to invoke *Mobile-Sierra* protection. The court further held, with one judge dissenting, that the termination agreements that the parties had entered in conjunction with the sale of the nuclear plant to another utility did not waive the customers' refund claims.

In *Central Vermont Public Service Corp. v. FERC*,[125] the court denied a petition for review of a FERC order which rejected a proposed transmission rate surcharge that would have allowed Central Vermont Public Service Corp. (Central Vermont) to recover stranded costs from its affiliate's (Connecticut Valley) retail customers. Central Vermont sought to use the

122. Boston Edison Co. v. FERC, 233 F.3d 60 (1st Cir. 2000).

123. *Id.* at 68.

124. *Boston Edison*, 233 F.3d at 68.

125. Central Vermont Pub. Serv. Corp. v. FERC, 214 F.3d 1366 (D.C. Cir. 2000).

stranded costs policy articulated in Order No. 888 to recover such alleged costs from the retail customers of its subsidiary, Connecticut Valley, a wholesale requirements customer. The FERC denied this attempt, reasoning that Order No. 888 only permitted utilities to recover stranded costs from wholesale customers, not from the retail customers of the utility's wholesale customers. The court affirmed the FERC orders, rejecting Central Vermont's arguments that its transmission surcharge proposal fit within one of the categories that the FERC had identified as potentially warranting stranded cost treatment. The court saw no basis for questioning the FERC's rejection of Central Vermont's surcharge proposal. In its view, nothing in Order No. 888 permits evasion of the FERC's decision to allow Central Vermont to recover stranded costs only from a wholesale requirements customer.

In *East Texas Electric Coop., Inc. v. FERC,*[126] the court remanded the FERC orders which approved the open access transmission tariff of the CSW Operating Companies (CSW) or service to three Texas electric cooperatives (collectively, Texas Electric). The court found that the FERC erred in summarily approving a part of the CSW Compliance Tariff without explaining whether the new rates contained therein were just and reasonable. Texas Electric argued that the FERC accepted certain rates included in CSW's proposed rates, but rejected and ordered modification of another. In its compliance filing, CSW not only responded to the FERC's directive regarding modification of the specified rate, it also eliminated a different rate which Texas Electric argued, had been accepted and was, therefore, not supposed to be eliminated. The FERC accepted CSW's compliance filing, including the alleged rate change resulting from the elimination of the rate earlier accepted. Texas Electric argued that CSW failed to show that the rate change was just and reasonable as required by the FPA, and that the FERC's acceptance, without explanation, of CSW's compliance filing and its resulting approval of CSW's elimination of the previously accepted charge (thereby effecting a rate change) also failed to satisfy the FERC's duty under the Administrative Procedure Act. Texas Electric further contended the new rates were unduly discriminatory, and that the FERC violated its duty under the FPA to assure that the rates were not unduly discriminatory. The court concluded that the FERC's order did not provide sufficient notice to the customer that CSW could eliminate the approved intra-SPP rate. The threshold issue of whether the customer had adequately preserved the issue on rehearing was resolved in the customer's favor. As for the merits of Texas Electric's arguments, the Court concluded that the FERC's summary approval of the compliance tariff could not be regarded as a finding that the modification beyond the modifications directed was just and reasonable. The court, therefore, remanded for reconsideration.

126. East Texas Elec. Coop., Inc. v. FERC, 218 F.3d 750 (D.C. Cir. 2000).

In *El Paso Electric Co. v. FERC*,[127] the court of appeals affirmed in part, reversed in part, and remanded FERC orders requiring a public utility to sell power at wholesale to a city that sought to supplant the public utility as the retail provider of electricity in the city. Upon the city's application, the FERC ordered the public utility to sell wholesale power to the city under section 202(b) of the FPA.[128] The utility argued on appeal that the FERC had no authority to order the sale, because the city was not currently engaged in the transmission or sale of electric energy in the geographic area it sought to serve under the order. The FERC refused to read this limitation into section 202(b) and the court upheld the FERC's reading as consistent with the unambiguous wording of the statute. The court also upheld the FERC's construction of section 202(b) to allow the FERC to order wholesale sales as well as interconnections if in the public interest. The court held, however, that the FERC arbitrarily failed to give reasoned consideration to the utility's evidence that the city's potential condemnation might impair the utility's ability to serve its customers outside the city and, thus, remanded the case for further proceedings.

In *Potomac Electric Power Co. v. FERC*,[129] the court upheld a FERC dismissal of a complaint brought under section 206 of the FPA.[130] The complaint sought the unilateral modification of a long term, fixed-rate power transmission agreement between PEPCO and the Allegheny Power System (APS). The FERC dismissed the complaint on the grounds that the mere fact that the agreement had become uneconomic was not sufficient to modify a contract that PEPCO initially supported and the FERC had originally determined to be just and reasonable. In denying the complaint, the FERC applied the "public interest" standard of the *Mobile-Sierra* doctrine which governs FERC review of contracts containing provisions restraining unilateral rate changes. The court upheld the FERC's dismissal as a reasonable exercise of its authority. In reviewing the FERC's actions under the strict "public interest" standard, the court noted that PEPCO failed to offer any evidence that the contract rates were unduly discriminatory or excessively burdensome on PEPCO ratepayers. PEPCO's assertions that there was a rate disparity between the prevailing contract rate and the rate which APS now charged under its open access transmission tariff (OATT), and that a reduction in the contract rate would therefore benefit its ratepayers, were wholly inadequate to sustain a public interest challenge to its contract with APS. The court upheld the FERC's discretion in concluding that the rates in the agreement which PEPCO itself fully supported at one time, were not contrary to the public interest.

127. El Paso Elec. Co. v. FERC, 201 F.3d 667 (5th Cir. 2000).
128. Federal Power Act §202(b), as amended, 16 U.S.C. § 824a(b) (2000).
129. Potomac Elec. Power Co. v. FERC, 210 F.3d 403 (D.C. Cir. 2000).
130. Federal Power Act §206, as amended, 16 U.S.C. § 824e (2000).

In *Town of Norwood, Massachusetts v. FERC*,[131] the court denied petitions for review of FERC orders which denied Norwood's petition for a declaratory order that its wholesale power contract with NEPCO had terminated on October 31, 1998 and that NEPCO, therefore, had no basis for claiming any contract termination charges after that date. The FERC had denied the petition, holding instead that Norwood had extended the contract through October 31, 2008 by a July 25, 1990 letter and that NEPCO's failure to file the letter with the FERC was irrelevant. The court affirmed the FERC's reasoning in construing the contract to extend Norwood's obligation to take its requirements from NEPCO until October 31, 2003. The court concluded that the FERC did not act contrary to the FPA or its own regulations in giving effect to the unfiled July 25, 1990 letter as an election by Norwood to extend the term of the contract. The court dismissed Norwood's claim that the notice of election had to be filed in order to have any binding effect since giving effect to the notice did not circumvent any filing requirement or contradict any extant filing.

VII. NATURAL GAS ACT: PIPELINE RATE REGULATION

Exxon Corp. v. FERC[132] arose out of the efforts of Transcontinental Gas Pipe Line Corporation (Transco) to change provisions of its tariff that had been previously approved pursuant to a 1991 settlement approved under section 4 of the Natural Gas Act (NGA).[133] In particular, Transco and its customers had agreed on a rate structure that included an "IT-feeder-service" subject to a one part volumetric rate. Transco filed pursuant to section 4 of the NGA proposing two part straight fixed variable (SFV) rates to the wellhead. These rates were rejected by the FERC. The FERC also rejected firm two part rates under section 5 of the Act. The court found that the FERC had not engaged in reasoned decisionmaking under section 4 and, therefore, it was not necessary to address the section 5 issues. The court found unpersuasive the various arguments for rejecting the change to SFV rates, finding the IT-feeder service to be only nominally interruptible and that the SFV rate design is the predominant rate for firm service. As put by the court, the central issue before it was: if SFV rates are permissible and predominant for firm service in the production area and Transco is providing firm service, how can the proposed rate not be just and reasonable? The court found the contract argument advanced by the FERC to be unpersuasive since the contracts contained "Memphis" clauses that permitted the pipeline to file to change rates. The court found that the FERC had not explained why the court decisions that resulted in the institutionalization of the Memphis clause did not affect its decision. Additionally, the court found unpersuasive the FERC's arguments that the customers were entitled to a second choice, because the pipeline and the customers had agreed upon a Memphis clause provision, which permitted

131. Town of Norwood, Mass. v. FERC, 217 F.3d 24 (1st Cir. 2000).

132. Exxon Corp. v. FERC, 206 F.3d 47 (D.C. Cir. 2000).

133. Natural Gas Act §4, 15 U.S.C. § 717c.

the pipeline to change rates pursuant to section 4. Judge Randolph dissented, finding that the settlement constituted a customer choice.

In *Missouri Public Service Comm'n v. FERC,*[134] on review of the FERC's decisions regarding rates for Williams Natural Gas Company (Williams), the court found that the FERC was not required to impute to the company the capital structure of the corporate parent, that the FERC was not required to adjust the company's return on equity downward, and that the FERC did not use the proper method to project company costs for cleaning up polychlorinated biphenyl (PCB). First, the court found that, as Williams issued its own non-guaranteed debt and had its own bond rating, Williams own capital structure could be used. Second, the court rejected the proposition that the FERC's decision should be overturned because it had looked at an equity ratio outside the bounds of the proxy group normally used in a rate of return analysis. The court stated that "[j]udges are hardly in a position to play this numbers game,"[135] when the difference was only two percent above the highest in the proxy group. The court also noted that the petitioner had not taken advantage of ways in which to protect its record before the FERC and therefore a number of the arguments at the judicial level were not adequately supported. Finally, the court remanded the case for a look at the inclusion in rates of approximately $4.2 million for PCB cleanup. Williams had presented evidence and the Administrative Law Judge had permitted an amortization of such costs. The FERC rejected amortization in favor of a test period approach and there was a substantial argument before the court as to the evidence to support different methodologies. The court ultimately found the FERC had not supported its decision and remanded for further explanation.

In *Missouri Public Service Comm'n v. FERC,*[136] the petitioner state public service commission sought review of the FERC's order setting initial rates for natural gas transportation by a pipeline company. The pipeline company had protested the FERC's rate setting, claiming it would be bankrupted thereby, and asked that its then-current rates be grandfathered pending further proceedings. The FERC granted this request. Petitioner objected, challenging the FERC's conclusion that the FERC-determined rates would be higher than the current rates that the pipeline would agree to pending further proceedings, and arguing the FERC failed to demonstrate the approved rates were in the public interest as required by section 7 of the NGA.[137] The court agreed, granted the petition, and remanded the case to the FERC, holding that the FERC failed to demonstrate that the initial rates met the requisite "public interest" standard under the statute and did not satisfy its decisionmaking obligation by satisfactorily articulating the basis for its decision.

134. Missouri Pub. Serv. Comm'n v. FERC, 215 F.3d 1 (D.C. Cir. 2000).

135. *Id.* at 4.

136. Missouri Pub. Serv. Comm'n v. FERC, 234 F.3d 36 (D.C. Cir. 2000).

137. Natural Gas Act §7, 15 U.S.C. § 717f.

In *Washington Water Power Co. v. FERC*,[138] on review of a settlement approved by the FERC, the court held that shippers were not required to seek further rehearing of an order denying their motion for rehearing, that the FERC policy defining maximum rates for replacement shippers as equivalent to rates paid by post-expansion shippers was valid, and that shippers were not entitled to mitigation based on rate shock. The court rejected the FERC's argument that replacement shipper petitioners could not challenge its ruling for failure to file a further rehearing of an order on rehearing. Citing its previous holding in *Southern Natural Gas Co. v. FERC*,[139] the court held that when the FERC reaches the same result, but merely supplies a new rationale, parties did not have an obligation to seek a further rehearing. The court noted that any other result would lead to an endless cycle of rehearing requests and orders. On the substantive issue of whether replacement shippers can be required to pay rates that are higher than those of releasing shippers, the court first noted that the FERC left open the issue of how to price capacity releases in the context of a system with incremental rates. The court likewise rejected the argument that the FERC had lifted the rate cap since the FERC had merely redefined the rate cap in the context of an incrementally priced system. The court rejected arguments based on reliance on prior policy, noting that when the first replacement shipper contracted for the released capacity, the FERC had already announced that the question of incremental versus rolled-in rates would be addressed when the pipeline submitted its next rate filing. The court noted that the replacement shippers were paying rates lower than the rates to which they would have been exposed and that none of the petitioners had alleged competitive injury. The court rejected arguments based on the contention that replacement shippers are not similarly situated and that the settlement was unduly discriminatory towards them as a result. The court concluded that, because replacement shippers are similarly situated to expansion shippers and because their rates are lower than the rates of expansion shippers, the undue discrimination argument must fail. The court rejected an argument contesting a provision of the settlement pursuant to which the pipeline refunds a certain percentage of the tariff paid by Pacific Gas and Electric Co. (PG&E) in exchange for an agreement by the California Public Utilities Commission to withdraw two appeals relating to the pipelines transition cost recovery under Order No. 636. The court found that it was reasonable for the FERC to conclude that the benefit of the refund is consistent with the policy of facilitating settlements related to transition cost issues and that PG&E still pays a significantly higher proportion amount of the transition cost tariff than any other shipper. The court dealt in short order with two remaining issues. First, the court rejected the "rate shock" argument, noting that the rate shock policy applies only when rate shock results from either a change from SFV rate design or from a transition from incremental to rolled-in rates. The

138. Washington Water Power Co. v. FERC, 201 F.3d 497 (D.C. Cir. 2000).

139. Southern Natural Gas Co. v. FERC, 877 F.2d 1066 (D.C. Cir. 1989).

change that petitioner complained of had nothing to do with either, but rather with a new non-mileage based charge. Second, the court rejected one petitioner's argument due to the petitioner's failure to file comments on the settlement on a timely basis.

In *Williston Basin Interstate Pipeline Co. v. FERC*,[140] addressing contract interpretation issues, the court found that whether it deferred to the FERC or whether it applied the arbitrary and capricious standard was irrelevant because the result it reached would be the same under either standard of review. Turning to the contract at issue, which involved a rate calculation under a Volume 2 rate schedule that was based on the pipeline's open access FT-1 rate as it might be in effect from time to time, the court concluded that the FERC's decision that refunds were in order when the FT-1 rate was subject to refund was appropriate. In doing so, the court rejected arguments that this resulted in unlawful retroactive ratemaking.

VIII. NATURAL GAS ACT: CERTIFICATE AND OTHER REGULATION

In *ANR Pipeline Co. v. FERC*,[141] petitioner, ANR Pipeline Co. (ANR) operated a gas pipeline offshore where it received gas from several offshore blocks, including Ship Shoal Block 207 and from Manta Ray Offshore Gathering Company (Manta Ray), which was then transported on shore in Louisiana. Manta Ray is owned by affiliates of Shell Offshore, Inc., Marathon Oil Co., and Leviathon Gas Pipeline Cos., L.P. Affiliates of those three companies formed the Nautilus Pipeline Co., L.L.C. (Nautilus) to build a new pipeline from Ship Shoal Block 207 to the onshore pipeline grid. Nautilus filed an application with the FERC under section 7(c) of the NGA for permission to construct and operate 101 miles of 30-inch diameter pipe. One month later, ANR applied for a certificate to expand its capacity by adding main line loop, and filed a motion to consolidate the ANR and Nautilus proceedings, and set the projects for a comparative hearing under *Ashbacker Radio Corp. v. FCC*.[142] The FERC denied the motion, approved the Nautilus application, and issued a preliminary determination that ANR's certificate application was also in the public interest, subject to completion of an environmental assessment. ANR requested a rehearing and sought a stay, which was denied both by the FERC and by the court. The FERC ultimately granted ANR's certificate and denied its motion for rehearing. On appeal, the court rejected ANR's *Ashbacker* argument. First, the court cited the FERC's decision that the proposals, while sharing similar routes, did not necessarily serve the same production areas or customers and noted that ANR was in a position to compete with Nautilus in other projects for markets and shippers. While the court acknowledged that ANR was at something of a disadvantage since Nautilus was already in place and on a short-term basis the pipe-

140. Williston Basin Inter. Pipeline Co. v. FERC, 215 F.3d 875 (8th Cir. 2000).

141. ANR Pipeline Co. v. FERC, 205 F.3d 403 (D.C. Cir. 2000).

142. Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

lines were "in some sense exclusive,"[143] the court found the FERC's decision that they were not exclusive for *Ashbacker* comparative hearing purposes reasonable. Second, the court rejected ANR's argument that reliance on market forces is inconsistent with the premise of the NGA and found that the FERC could not adequately address the public interest without taking into account future demand. The court rejected the argument that the affiliation with Manta Ray was suspect because, in the court's view, Manta Ray has the same incentive to minimize shipping costs as any other producer in the competitive market. The court found nothing inherently suspicious about vertical integration between Nautilus and Manta Ray. The court also rejected the argument that the FERC's decision was in conflict with the policy of issuing certificates for public convenience and necessity, on grounds that it was a nonbonding policy statement and that the FERC had adequately explained that the change in regulatory approach was in response to technological changes in the industry, in particular new gas production from very deep waters. Finally, the court responded to ANR's remaining argument that the FERC had violated the National Environmental Policy Act (NEPA) by finding that ANR had not alleged any environmental injury as a result of the FERC's action and, therefore, was not aggrieved and had no standing to appeal. The court found that ANR's "economic interest is not within the zone of interests protected by NEPA."[144]

In *Midcoast Interstate Transmission, Inc. v. FERC*,[145] three companies appealed a FERC order granting Southern Natural Gas Co.'s (Southern) application to construct a pipeline and denying alternative proposals for serving the same markets submitted by Midcoast Interstate Transmission, Inc. (Midcoast). The petitioners contended that the FERC failed to evaluate competing environmental and economic factors and violated its own policy by approving "rolled-in" rates. On appeal, the court held that the FERC properly considered the issues of competition and the environment. While conceding that the Midcoast alternative would be favored environmentally, the FERC had balanced that finding against the improvement in competition resulting from the Southern expansion and found the benefit of the latter outweighed the former. The court found that the FERC was entitled to rely on a general economic theory that the introduction of competition to a market benefits consumers and did not have to make specific findings of fact on competition. Regarding the approval of rolled-in pricing, the FERC contended that the issue was not ripe for review. The court disagreed, finding that Midcoast would suffer immediate harm, by virtue of new contracts Southern had entered into with two current Midcoast customer cities to be served by the Southern expansion. As to the merits of this issue, the court found that the FERC had supported allowing rolled-in treatment by substantial evidence relating to the benefits to be conferred

143. *ANR Pipeline*, 205 F.3d at 406.

144. *Id.* at 408.

145. Midcoast Inter. Transmission, Inc. v. FERC, 198 F.3d 960 (D.C. Cir. 2000).

by the expansion and the fact that the anticipated eventual rate increase of 1.8% fell well below the 5% maximum set out in the FERC's Pricing Policy of 1995.[146] The court approved the FERC's denial of alternative proposals because Midcoast had failed to provide required supporting evidence, including conducting an open season to assess project size and demonstrate market support for its proposals. The final challenge came from parties asserting that the expansion would result in an improper exercise of eminent domain through the taking of private property for rights-of-way in violation of the Fifth Amendment. The court dismissed this challenge because the FERC had rationally determined that the project was in the public interest.

In *Midwestern Gas Transmission Co. (Midwestern) v. McCarty*,[147] plaintiff, an interstate natural gas company,[148] contracted to transport gas out of the state. The facilities of both ultimate consumers lay within the geographic area served by the defendant local gas distribution company pursuant to authority granted by the state utility regulatory commission. Plaintiff contended its bypass connections were under the sole regulatory jurisdiction of the FERC and that the NGA[149] preempted the Indiana State Code[150] as it applied to its bypass connections. Plaintiff sought to enjoin administrative proceedings affecting its bypass agreements pending before the state commission. The court rejected plaintiff's arguments that federal law barred the state commission from even considering the issue of jurisdiction and determined that the state commission proceedings were judicial in nature for purposes of abstention under the *Younger*[151] doctrine. The court found that the basic elements of *Younger* abstention were present and that none of the exceptions to *Younger* abstention urged by plaintiff applied on the facts of the case. The court found that plaintiff pipeline could have its position considered by the state commission and state courts. The court granted defendant's motions to dismiss, but held that the Eleventh Amendment did not bar plaintiff's action for prospective equitable relief against defendant commissioners in their official capacities, since pursuant to principles of comity and federalism, abstention under the *Younger* doctrine was appropriate.

Lomak Petroleum, Inc. v. FERC,[152] involved an appeal by a gas producer from the FERC's approval of an application by Columbia Gas Transmission Corp. to abandon certain pipeline facilities by sale to Norse Pipeline and designating the line as an exempt gathering facility. The court rejected the producer's assertion that the Commission had acted arbitrarily. First, it held that the FERC had reasonably applied the "primary

146. *See generally* Pricing Policy for New and Existing Facilities Constructed by Interstate Natural Gas Pipelines, 71 F.E.R.C. ¶ 61,241 (1995)[hereinafter Pricing Policy].

147. Midwestern Gas Transmission Co. v. McCarty, 120 F. Supp. 2d 1155 (Ind. 2000).

148. *See also* 15 U.S.C. §717a (2000).

149. Natural Gas Act, 15 U.S.C.S. §717.

150. IND. CODE ANN. §§ 8-1-2-87, 87.5 (Michie 2000).

151. Younger v. Harris, 401 U.S. 37 (1971).

152. Lomak Petro., Inc. v. FERC, 206 F.3d 1193 (D.C. Cir. 2000).

function" test and found that four of the test's factors (size, geographic configuration, operating pressure, and absence of processing plants) clearly indicated a gathering function. Second, it observed that the FERC had also considered "non-physical" criteria (the sole business activity of the purchaser was operating gathering facilities), which weighed on the side of gathering. The producer presented cases in which the same factors had mitigated against a gathering designation. The Court rejected this assertion as well, citing the FERC's reasoned analysis of the multiple factors, the supporting evidence, and the underlying deference to the Commission's exercise of discretion. The producer alleged that the result conflicted with a settlement agreement between the pipeline and the FERC. Since the producer was not a party to the settlement, this argument carried little weight. Nevertheless, the Court considered the issue and held that the FERC's interpretation of its settlement was reasonable. The final challenge was that the producer had been denied due process because of the lack of a technical conference. In light of the FERC's findings that the record was complete and there were no material facts in dispute, the Court affirmed that technical conferences must be held only when the issue cannot be determined upon written submissions, which was not the case here.

IX. OIL PIPELINE REGULATION

In *Tesoro Alaska Petroleum v. FERC*,[153] petitioners, two petroleum companies, filed complaints with the FERC assailing certain aspects of the prevailing formula that determined the adjustment of crude oil rates for the Trans Alaska Pipeline System. One petitioner challenged the distillation methodology formula used and the other petitioner contested the specific valuation of two cuts of petroleum. Unhappy with the FERC's orders, petitioners appealed the decisions. The D.C. Circuit held that both petitioners apparently offered evidence that was new in relation to what was before the FERC in its earlier rate determinations and the evidence was sufficiently compelling to require reconsideration of the earlier determinations. The court reversed and remanded the case for the FERC to reconsider the adoption of the distillation methodology, and the pricing of West Coast naphtha and West Coast vacuum gas oil or to provide a suitable explanation for why it should not.

X. PUBLIC UTILITIES HOLDING COMPANY ACT

In *Central Power & Light Co. v. Public Utilities Comm'n of Texas*,[154] a number of parties appealed a decision of the Public Utility Commission of Texas (PUCT) reducing the Central Power & Light Company's (CP&L) electric utility rates. One issue on appeal was whether the PUCT was preempted under the Public Utility Holding Company Act (PUHCA) from dis-

153. Tesoro Alaska Petrol. v. FERC, 243 F.3d 1286 (D.C. Cir. 2000).

154. Central Power & Light Co. v. Pub. Util. Comm'n of Texas, No. 03-99-00111-CV, 2000 Tex. App. LEXIS 4905 (2000).

allowing CP&L from recovering approximately $2.6 million in affiliate expenses that were allocated in accordance with regulations promulgated by the United States Securities & Exchange Commission (SEC) under its PUHCA authority. Holding that PUHCA was meant to supplement state regulation rather than supplant it and that state commissions retained the right to review the application of the SEC-mandated allocation methodology, the court held that the PUCT's actions were not pre-empted.

XI. PUBLIC UTILITY REGULATORY POLICIES ACT

In *Agrilectric Power Partners, Ltd. v. Entergy Gulf States, Inc.*,[155] Agrilectric Power Partners, Ltd. (Agrilectric) sold power from a qualifying facility (QF) to Entergy Gulf States, Inc. (Entergy) under a contract that contained a regulatory-out clause that allowed Entergy to reduce the rates from the contract level in the event Entergy was legally prevented from recovering the costs under the contract from its retail ratepayers. In 1997, the PUCT found that the rate paid under the contract exceeded Entergy's avoided costs and ordered Entergy to credit its customers the amounts of these overpayments. The FERC also determined that Entergy could not recover these overpayments from its customers in the future. Entergy exercised the regulatory-out provisions and reduced the amount it was paying to Agrilectric to the amount it could recover from its retail customers. Agrilectric filed suit in United States district court, claiming that regulatory-out provisions were unenforceable and preempted by the Public Utility Regulatory Policy Act (PURPA).[156] The trial court found that the provisions were enforceable. The court of appeals affirmed, stating that while PURPA prohibited regulatory agencies from altering wholesale price terms in QF contracts, any such effect from the FERC's and PUCT's actions was "derivative." The FERC and the PUCT had the authority to determine whether Entergy was entitled to pass through to its ratepayers the costs associated with its agreements with the QF, which was what they did here.

In *Brazos Electric Power Coop., Inc. v. FERC*,[157] Brazos Electric Power Cooperative, Inc. (Brazos) had in 1993 entered into a agreement to purchase energy and capacity from Tenaska IV Texas Partners, Ltd. (Tenaska), which developed and owned a QF in Cleburne, Texas. Brazos had voluntarily entered into the power sales agreement because its avoided cost level (and thus the amount Tenaska could charge at the time the contract was entered into) was less than rates non-QF public utilities would have charged. The thermal output from the facility was used to produce distilled water, which in turn was sold to the City of Cleburne (City). For most of the period in question, the City took the water and released it into its sewer system. In late 1997, the City began to sell the water to a company in a nearby industrial park. By 1997 and 1998, the rates Brazos was obliged to pay under the contract were no longer below the prevailing market rates. Brazos filed a motion with the

155. Agrilectric Power Partners, Ltd. v. Entergy Gulf States, Inc., 207 F.3d 301 (5th Cir. 2000).

156. Public Utilities Regulatory Policy Act of 1978, 16 U.S.C. § 2601 (2000).

157. Brazos Elec. Power Coop., Inc. v. FERC, 205 F.3d 235 (5th Cir. 2000).

FERC seeking the revocation of Tenaska's QF status. Brazos claimed that the use of the thermal output to produce distilled water that was dumped into the City's sewer system was not a useful output and, thus, the facility failed to meet the FERC's QF qualifications. The FERC rejected Brazos' request holding that use of steam to produce distilled water was a common economic process and that its inquiry ended there. The court affirmed the FERC's findings. The court held that the FERC could properly determine that the use of the steam to produce distilled water was a common industrial process. The court also held that the FERC's policy of not inquiring into the economics of any such process was consistent with PURPA's goals of encouraging cogeneration and was a proper exercise of the FERC's discretion. In addition, allowing parties to attack the thermal output's usefulness after operation of a facility began would provide a disincentive to the construction of such facilities, contrary to PURPA's intent. The FERC's regulations also prohibited utilities from holding more than a 50% equity stake in a QF. Three utility affiliates owned a combined 45% equity interest in Tenaska and held a 38.9% voting stake. Brazos claimed that because any significant action by Tenaska required the vote of 70% of its executive board, this ownership interest was enough to block any major actions by the QF's ownership, thereby giving the utilities effective control in violation of the FERC's ownership limitations. The court rejected this claim, finding that the ability of one party to block actions does not give it the ability to control the facility's operations.

In *City of Boulder, Colorado v. Colorado Pubic Utilities Comm'n*,[158] the Colorado Public Utilities Commission (Colo. PUC) issued a certificate of public convenience and necessity (CPCN) to the Public Service Co. of Colorado (PSCo) that had the effect of reducing PSCo's avoided cost of producing power and reducing the amount it paid to a number of QFs owned by members of the Colorado Independent Energy Association, one of the petitioners. The QFs' contracts with PSCo contained provisions under which the energy payments could change as PSCo's avoided cost level changed. Petitioners challenged the Colo. PUC's order, claiming that PURPA prohibited the Colo. PUC from issuing the CPCN because it lowered the payment due to the QFs. Finding that such contracts were consistent with both the FERC's and the Colo. PUC's regulations, the court upheld the CPCN. The court also held that nothing in PURPA prevented the proposed upgrade or allowed the petitioners to collaterally attack the Colo. PUC's contracting process at this late date.

In *Connecticut Valley Electric Co. v. FERC*,[159] Connecticut Valley Electric Co. (Connecticut Valley) purchased power at avoided cost rates from Wheelebrator Claremont Co. (Claremont), which had been certified as a QF by the FERC, pursuant to a settlement approved by the controlling state public utility commission. While the settlement did not specify whether the output Connecticut Valley was obliged to purchase was the net output of the

158. City of Boulder v. Colorado Pub. Utils. Comm'n, 996 P.2d 1270 (Colo. 2000).

159. Connecticut Valley Elec. Co. v. FERC, 208 F.3d 1037 (D.C. Cir. 2000).

facility or the gross output, Claremont later revealed that the output was the gross output. Connecticut Valley filed a complaint with the FERC, complaining this was contrary to the FERC's regulations. At some point after the contract between Connecticut Valley and Claremont had been entered into, the FERC determined that use of a gross output contract would result in payments that exceed the purchasing utility's avoided costs and exceeded the cost levels allowed by PURPA. The FERC agreed Claremont's use of gross output was indeed a violation of its regulations, but noted that the standards had not been clear at the time the contract had been entered into. Pointing to its prior decisions not to disturb contracts that had been entered into prior to the date that the FERC had clarified this standard, the FERC declined to provide any relief to Connecticut Valley. On appeal, the court affirmed. Connecticut Valley claimed that the FERC's actions violated PURPA's requirement that the FERC caps QF rates at the full avoided cost. The court held that this requirement only required FERC to implement regulations limiting the rate charged by a QF to the full avoided cost rate, which the FERC had done. The court also noted that if Connecticut Valley believed the state commission had violated PURPA by requiring it to pay a rate that was in violation of its full avoided cost rate, the appropriate forum under PURPA was the United States district court. The court also found that because the relevant statutory language governing whether the use of gross output was appropriate was vague, the FERC properly exercised its discretion in determining not to revoke the QF status facilities whose underlying contracts were entered into before the policy was clarified.

In *New York State Electric & Gas Corp. v. Saranac Power Partners*,[160] New York State Electric & Gas Corp. (NYSEG) filed a petition with the FERC to modify existing power sales agreements with Saranac Power Partners, L.P. and another QF (collectively, Saranac) on the basis that the prices under the power sales agreements exceeded avoided costs over the life of the contracts, and thus was contrary to PURPA. The FERC denied NYSEG's petition on the basis that its regulations did not prohibit rates that are based on an avoided cost level estimated at the time a contract is signed, even if the rates exceed the utility's avoided cost at the time service commences. NYSEG then brought this action in United States district court. The court dismissed NYSEG's complaints. The court held that PURPA prohibited the FERC from requiring a rate that was in excess of the utility's avoided costs and that the FERC's regulations did not require such a rate. The FERC had recognized that the utility's actual avoided cost might fluctuate over the life of the contract, but determined that a QF that had entered into a long-term contract was entitled not to have the contract's pricing terms modified because of changed circumstances. The court also held that under PURPA, which disavows application of the just and reasonable standards, the FERC does not have authority to modify the subject contracts after the fact.

160. New York State Elec. & Gas Corp. v. Saranac Power Partners, 117 F. Supp. 2d 211 (N.D.N.Y. 2000).

In *Potomac Electric Power Co. v. Panda Brandywine*,[161] the Potomac Electric Power Co. (PEPCO) initiated this action in United States district court against Panda Brandywine, L.P. (Panda), seeking a finding that Panda was not a QF as defined in the FERC's regulations, despite a FERC determination to the contrary. PEPCO also sought monetary damages. The court refused to hear the dispute, holding that all claims were within the FERC's primary jurisdiction, or the jurisdiction of the United States Courts of Appeals.

XII. FEDERAL CLAIMS

In *City of Burbank, California v. United States*,[162] the Bonneville Power Administration (BPA), a United States government agency, entered into a contract for the sale of electric power with the City of Burbank (City). The City claimed a breach of contract under the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act)[163] alleging the defendant failed to adhere to the contract's provisions concerning the conversion and reversion between the two different modes of the contract's operation, and the application of new rates for the sale of power to the City. Filing a motion to dismiss, BPA argued that the City's claims fell under the Contract Disputes Act (CDA)[164] and that the City had neglected to meet the jurisdictional prerequisites of the CDA. The CDA streamlines the process by which an aggrieved contractor makes its claim concerning disputes arising from contracts with executive agencies. It provides a specific process that must take place before the contractor files suit in the United States Court of Federal Claims. Under the Regional Act, Congress created BPA to serve the needs of the Pacific Northwest for electric power. The Regional Act regulates every aspect of the sale and exchange of electric power that BPA undertakes. The Regional Act states that extra-regional sales by themselves are final actions subject to the exclusive jurisdiction of the United States Court of Appeals for the Ninth Circuit. Both parties asserted that the City's claims are based solely on contractual provisions and the specific relationship created by the contract between plaintiff, and defendant did not involve final actions by BPA, thus placing them outside the bounds of the Regional Act. However, the Federal Claims court found "the court must determine whether the contractual provisions themselves were included pursuant to statutory authority and mandate."[165] The Federal Claims court determined, looking at the substance of the City's claims, which both involved BPA's administrative decisions made in the execution of a BPA final action, namely the sale of elec-

161. Potomac Elec. Power Co. v. Panda Brandywine, 99 F. Supp. 2d 681 (D. Md. 2000).

162. City of Burbank v. United States, 47 Fed. Cl. 261 (2000).

163. Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 832-839 (1994 & Supp. II 1996).

164. Contract Disputes Act, 48 C.F.R. § 33.201 (2000)

165. *City of Burbank*, 47 Fed. Cl. at 267.

tric power outside the Pacific Northwest.[166] In concluding, the Federal Claims court held that the City's claims fell under the exclusive jurisdiction preserved for the Ninth Circuit under the Regional Act and dismissed the City's complaint. In addition, the Federal Claims court determined that, even if the Regional Act did not divest the court of jurisdiction and the claims were subject to the CDA, the City lacked the claim certification required by the CDA which also would result in a dismissal.

In *Southern California Edison Co. v United States*,[167] the United States (Western Area Power Agency, hereinafter Western) and several third-parties appealed the decision of the Court of Federal Claims holding that the methodology adopted by Western to refund excess revenues collected under energy sales contracts was unreasonable, and ordering Western to calculate the appropriate refund to which plaintiffs were entitled. The primary dispute in the case centered on the refund methodology adopted by Western to distribute surplus funds that it held at the end of the contract period, although some consideration was given to the jurisdiction of the court over the third party appellants. The regulatory basis for the refund was under the contract and regulations relating to the Boulder Canyon Project Adjustment Act.[168] Under that Act, adjustments are to be made through refunds or collections as the Secretary determines necessary to assure that the revenues shall be sufficient but not more than sufficient to "cover the construction, operating, and maintenance costs of the Hoover Dam project."[169] Western, after considering various refund methodologies, decided that the refunds should be based on the percentage of firm power each of the third parties was entitled to purchase under its contracts. The court reversed the decision of the Court of Federal Claims determining that it failed to give deference to the reasonable regulatory interpretation of Western. The case contains an analysis of when a contract between a governmental agency is to be given an objective analysis versus when the agency's interpretation of the contract terms should be given deference. Because the statutory regulation (which had been embodied in the contract) had deferred to the agency, the methodology for refunds and the agency had no economic stake in the outcome, deference to the agency's decision was proper.

XIII. STATE REGULATION

In *Tampa Electric Co. v. Garcia*,[170] the Florida Supreme Court addressed the issue of whether the Florida Public Service Commission (FPSC) has the statutory authority to grant a determination of need under the Florida Electrical Power Plant Siting Act (Act) and the Florida Energy Efficiency & Conservation Act for an electric power company's proposal

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166. 16 U.S.C. § 839c (1994).
167. Southern Cal. Edison Co. v United States, 226 F.3d 1349 (Fed. Cir. 2000).
168. Boulder Canyon Project Adjustment Act, 43 U.S.C. §§ 618-618p (1994).
169. *Id.* at Article 14(c), *quoted by Southern Cal. Edison Co.*, 226 F.3d at 1356.
170. Tampa Elec. Co. v. Garcia, 767 So.2d 428 (Fla. 2000).

to build and operate a merchant plant in Volusia County. The Court reversed the FPSC's order and held that the FPSC did not possess the authority to grant such a determination of need, because the merchant plant was not a Florida retail utility regulated by the commission. The express words of the Act define the term "applicant" as "any electric utility which applies for certification pursuant to the provisions of this act."[171] The Court concluded that "the present statutory scheme was intended to place the PSC's determination of need within the regulatory framework allowing Florida regulated utilities to propose new power plants to provide electrical service to their Florida customers at retail rates."[172] The Court further held that its decision did not violate the Commerce Clause, because power-plant siting and the need determination were areas that Congress had expressly left to the states.

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171. *Id.* at 434.
172. *Tampa Elec. Co.*, 767 So.2d at 435.