

REPORT OF THE JUDICIAL REVIEW COMMITTEE

I. ADMINISTRATIVE LAW

A. Jurisdiction

1. Standing

In *Electric Power Supply Ass'n v. FERC*, the Petitioner, a national trade association representing participants in the competitive electric power industry and parties to FERC proceedings, challenged orders amending the FERC's *ex parte* regulations¹ to permit communications between FERC-approved regional transmission organizations (RTO) "market monitors" and the Commission's decisional employees regarding matters at issue in ongoing on-the-record proceedings.² Market monitors are private parties, not employed by, or paid by, the FERC, to ensure that markets in regions covered by an RTO do not result in unduly discriminatory or preferential wholesale transactions or operations, or present opportunity for the exercise of market power.³ The exemption from *ex parte* regulations was permitted as long as the market monitor was not a party, and did not appear on behalf of a party, to the on-the-record proceeding.

In holding that the FERC's orders were unlawful, because they violated the clear statutory ban on *ex parte* communications,⁴ the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) held that the Electric Power Supply Association (EPSA) had standing to challenge the FERC's rule and that the challenge was ripe.⁵ With respect to standing, the court rejected the FERC's argument that, because the market monitor exemption from the *ex parte* regulations is intended "to enhance the competitiveness and efficiency of regulated markets[,] it does not cause either current or future harm to the financial interests of EPSA or its members."⁶ The court found that "[a]s regular participants in contested FERC hearings, EPSA and its members have a right, protected by the Sunshine Act's proscription against *ex parte* communications, to 'fair decisionmaking' by the Commission."⁷ The court found that it was this right to fair decisionmaking, not financial interests, that is protected by section 557(d) of the Sunshine Act, and that was impaired by the FERC's market

1. The FERC's *ex parte* regulations implement the Government in the Sunshine Act which prohibits communications between an "interested person outside the agency" and an agency decision maker in a contested on-the-record proceeding. Government in the Sunshine Act, Pub. L. No. 94-409, § 4(a), 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 557(d)(1)(A) & (B) (2000)).

2. *Elec. Power Supply Ass'n v. FERC*, 391 F.3d 1255 (D.C. Cir. 2004).

3. Order No. 2000, *Regional Transmission Organizations*, [Regs. Preambles 1996-2000] F.E.R.C. STATS & REGS. ¶ 31,089, at p. 31,155 (2000), 65 Fed. Reg. 809 (2000) [hereinafter Order No. 2000], *order on reh'g*, Order No. 2000-A, F.E.R.C. STATS. & REGS. ¶ 31,092 (2000), 65 Fed. Reg. 12088 (2000), *dismissed sub nom.* Pub. Util. Dist. No. 1 v. FERC, 272 F.3d 607 (D.C. Cir. 2001) (codified at 18 C.F.R. pt. 35). Market monitors must report to the Commission "objective information about the markets that the RTO operates or administers," "evaluate the behavior of market participants," and recommend how markets can operate more competitively and efficiently. Order No. 2000, *supra*, at p. 31,156.

4. *Elec. Power Supply Ass'n*, 391 F.3d at 1265-67.

5. *Id.* at 1261-64. The Court's ruling on ripeness is discussed below at *infra* Section I.A.3.

6. *Elec. Power Supply Ass'n*, 391 F.3d at 1262.

7. *Id.* (citing *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982)).

monitor exemption.⁸ Failure to show a certain financial interest did not defeat EPSA's interest in enforcing procedural requirements. The court found that EPSA was not required to satisfy "normal standards for redressability and immediacy" in order to assert its particularized interests in fair decisionmaking.⁹

In *PPL Wallingford Energy LLC v. FERC*, PPL Wallingford Energy LLC (PPL) sought review of FERC orders rejecting PPL's Reliability-Must-Run (RMR) agreement with ISO New England (ISO-NE) to provide electric power on a cost-of-service basis.¹⁰ The FERC had based its rejection on reasoning set forth in a previously issued order rejecting RMR agreements between Devon Power, LLC and ISO-NE.¹¹ Although PPL was not a party to the rejected Devon contract, PPL sought review of orders rejecting those agreements, in addition to the orders rejecting its RMR contracts. PPL acknowledged that it sought only to challenge the reasoning of the *Devon Power LLC (Devon)* orders, not their reversal. The court ruled that PPL did not have standing to challenge the FERC's orders in *Devon*, because PPL was not a party to that proceeding and had not suffered injury as a result of the FERC's rejection of those contracts.¹² Thus, the court dismissed, for lack of standing, PPL's petition challenging the *Devon* orders. The court confirmed, however, that in challenging orders rejecting PPL's RMR agreement, PPL could challenge the reasoning articulated in *Devon*.¹³ The court then vacated the FERC's orders as arbitrary and capricious because they failed "to respond meaningfully"¹⁴ to the objections PPL raised in its request for rehearing.¹⁵

In *Consumers Energy Co. v. FERC*,¹⁶ the court held that the Consumers Energy Co. (CECo) had standing to challenge FERC orders denying another entity (Michigan Transco) reimbursement for costs CECo had incurred in developing the Alliance RTO, before CECo transferred its transmission facilities to that Michigan Transco.¹⁷ To develop the Alliance RTO, CECo had expended approximately \$8.3 million. The FERC then decided that the Alliance RTO companies should place their transmission facilities under the control of the existing Midwest Independent System Operator (MISO), but provided that a company that had expended funds to develop the Alliance RTO could seek reimbursement of prudently-incurred start-up costs, if the entity satisfied two conditions. First, the company must have been an Alliance RTO participant, and second, the company must have joined an RTO.¹⁸

Subsequent to the FERC's decision to require Alliance RTO Companies to

8. Elec. Power Supply Ass'n v. FERC, 391 F.3d 1255, 1262 (D.C. Cir. 2004).

9. *Id.* at 1262 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992)).

10. *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194 (D.C. Cir. 2005).

11. *PPL Wallingford Energy LLC*, 103 F.E.R.C. ¶ 61,185 at P 13, *reh'g denied*, 105 F.E.R.C. ¶ 61,324 at PP 10–11 (2003) (citing *Devon Power LLC*, 103 F.E.R.C. ¶ 61,082 at PP 31–32 (2003)), *order on reh'g*, 104 F.E.R.C. ¶ 61,123 (2003).

12. *PPL Wallingford Energy*, 419 F.3d at 1198.

13. *Id.* at 1200.

14. *PPL Wallingford Energy*, 419 F.3d at 1199 (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)).

15. *Id.* at 1198–2000.

16. *Consumers Energy Co. v. FERC*, 428 F.3d 1065 (D.C. Cir. 2005).

17. *Id.* at 1066.

18. *Consumers Energy Co.*, 428 F.3d at 1066–67.

place their transmission facilities into MISO, CECo sold its transmission facilities to Michigan Transco, which in turn, agreed to seek recovery of CECo's Alliance RTO costs, and to remit any recovered funds to CECo, in the event CECo were denied the ability to recover them on its own. In separate orders, the FERC denied the requests of both CECo and Michigan Transco for reimbursement of CECo's costs, because neither satisfied the prerequisites for recovery. CECo filed petitions for review of all of the orders. The FERC argued that CECo lacked standing to challenge the order rejecting payment to Michigan Transco on the grounds that CECo had not suffered an injury. The court rejected the FERC's argument, finding that the contract between CECo and Michigan "sufficiently connects CECo's injury and redress to FERC's order."¹⁹ The court found that CECo had a "'concrete personal stake' in the issue" in light of Michigan Transco's contractual obligation to seek recovery of CECo's Alliance costs, and because the only reason Michigan Transco had pursued such reimbursement was because of that contract.²⁰ The court found that the FERC's argument that the possibility that Michigan Transco could breach its obligation to pay CECo any recovered costs to be "far too speculative to sever the connection between the FERC's order and CECo's injury and redress."²¹ On the merits, the court sustained the FERC's orders, agreeing that the FERC's rejection of cost reimbursement was proper because both Michigan Transco and CECo had failed to satisfy the necessary prerequisites.²²

In *National Committee for the New River, Inc. v. FERC*, the court held that the Petitioner lacked standing to challenge FERC orders permitting East Tennessee Natural Gas Company (East Tennessee) to make route realignments in its Patriot Project.²³ The National Committee for the New River, Inc. (NCNR) argued that the FERC had approved pipeline route changes to such an extent that it no longer resembled the route originally approved. NCNR requested, among other things, a remand to FERC to permit new environmental impact studies on the revised route. The court held that NCNR lacked Article III standing to challenge the FERC's orders, because NCNR had failed to "describe a concrete and particularized injury in fact that is actual or imminent, causally linked to the conduct at issue, and redressable by the relief requested."²⁴ In particular, the court found that NCNR's affidavits describing harm that would result from constructing a pipeline around the New River constituted the same general and broad allegations that had been rejected when the court upheld the FERC's certification of the project.²⁵ The court found that standing to challenge route realignments required a showing of "specific environmental and aesthetic harms" to NCNR's members resulting from such realignments, and that NCNR had failed to make such a showing.²⁶ The court found further that NCNR lacked standing, because the claimed injuries would not be redressed by the relief

19. *Id.* at 1069.

20. *Consumers Energy Co.*, 428 F.3d at 1069 (quoting *APCC Servs., Inc. v. Sprint Commc'ns.*, 418 F.3d 1238, 1242 (D.C. Cir. 2005)).

21. *Id.* at 1069.

22. *Consumers Energy Co. v. FERC*, 428 F.3d 1065, 1070 (D.C. Cir. 2005).

23. *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005).

24. *Id.* at 832 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

25. *Nat'l Comm. for the New River, Inc.*, 433 F.3d at 832 (citing *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1334 (D.C. Cir. 2004)).

26. *Id.* at 832.

requested.²⁷ The court explained that, even if it agreed that the route realignments were too drastic, the remedy likely would be relocating the pipeline to its original location, not termination of the project.²⁸ The Court found that NCNR had failed to explain how moving the pipeline route would alleviate the general environmental and aesthetic harms alleged to be caused by the Project itself.²⁹

2. Rehearing Requirement

In *DTE Energy Co. v. FERC*, the court applied the jurisdictional requirements of section 313(b) of the Federal Power Act (FPA) and held that failure to seek rehearing or to file a petition for review of orders causing the aggrievement precluded review.³⁰ The court also found that failure to raise an argument in a request for rehearing constitutes a waiver of a petitioner's ability to present that argument to the court. This case involved a series of orders in which the FERC ruled that certain distribution and interconnection facilities were transmission facilities, subject to its jurisdiction. Detroit Edison and International Transmission (IT) are wholly owned subsidiaries of DTE Energy (DTE). In 2001, the FERC authorized the transfer of Detroit Edison's transmission facilities to IT, and subsequently approved the transfer of functional control of IT's jurisdictional transmission facilities to MISO. Following a protest to IT's list of jurisdictional facilities to be transferred, the FERC, on May 22, 2002, issued an order stating that the facilities in question appeared to be jurisdictional and requested additional information.³¹ DTE did not file a request for rehearing of that order.³² On March 13, 2003, the FERC found that the facilities in question performed a transmission function and that operational control should be transferred to MISO,³³ and on April 11, 2003, the FERC accepted a compliance filing of DTE and IT reflecting the transfer to MISO, and affirmed its March 13, 2003 order.³⁴ DTE and Detroit Edison filed requests for rehearing of the April 11, 2003 order. The FERC denied requests for rehearing of the March 13, 2003 and April 11, 2003 orders on November 17, 2003.³⁵

In their petitions for review, DTE and Detroit Edison named the May 22, 2002, March 13, 2003, and November 17, 2003 orders, but omitted the April 11, 2003 order. The court found first that DTE's failure to seek rehearing of the May 22, 2002 order precluded it from seeking review of that order under section 313(b) of the FPA, which requires the filing of a request for rehearing of an order as a prerequisite to seeking review.³⁶ The court found further that DTE Energy nevertheless could not have shown injury-in-fact as a result of the May 22, 2002 order, "because it was conditional, subject to a further compliance

27. *Nat'l Comm. for the New River, Inc.*, 433 F.3d at 832.

28. *Id.*

29. *Nat'l Comm. for the New River, Inc. v. FERC*, 433 F.3d 830, 832 (D.C. Cir. 2005).

30. *DTE Energy Co. v. FERC*, 394 F.3d 954 (D.C. Cir. 2005).

31. *Id.* at 958 (citing *Int'l Transmission Co.*, 99 F.E.R.C. ¶ 61,211, at p. 61,888 (2002)).

32. Detroit Edison did not intervene in the proceeding until July 2002. *DTE Energy*, 394 F.3d at 958.

33. *Id.* at 959 (citing *Detroit Edison Co.*, 102 F.E.R.C. ¶ 61,282 (2003)).

34. *DTE Energy*, 394 F.3d at 959.

35. *Id.*

36. *DTE Energy Co. v. FERC*, 394 F.3d 954, 959 (D.C. Cir. 2005); 16 U.S.C. § 825l(a) (2000).

filing, and thus was without binding effect on DTE Energy.”³⁷ That order thus did not cause aggrievement. Rather, the court explained, the April 11, 2003 order, which accepted the compliance filing, was the aggrieving order. DTE Energy did not, however, seek review of the April 11, 2003 order. Therefore, the court held that it was jurisdictionally barred from considering DTE’s challenge.³⁸ The court found that only Detroit Edison’s petition for review of the March 13, 2003 and November 17, 2003 orders could be considered.³⁹

With respect to Detroit Edison’s petition, the court held that Detroit Edison had failed to raise in its request for rehearing arguments it had presented in its brief to the court, and had failed to offer any reason for this failure.⁴⁰ The court found that, as a consequence, Detroit Edison had waived the arguments.

Similarly, in *Save Our Seabasticook v. FERC*, the court found that it could not hear objections to a FERC order approving the surrender and partial removal of a hydroelectric dam, because the Petitioner had failed to raise them in its request for rehearing, and did not present reasonable ground for that failure.⁴¹ The court rejected Petitioner’s argument that its claims should be construed liberally because it was not represented by counsel in the proceeding before the FERC. The court found that the Petitioner’s statement in its request for rehearing that the FERC has a “duty to consider all relevant facts” could not have alerted the FERC to the Petitioner’s arguments and did not comply with section 313(b) of the FPA.⁴² The court also found that the Petitioner failed to advance reasonable ground for not presenting objections in its request for rehearing, stating that the reasonable ground exception requires a demonstration of an “extraordinary situation.”⁴³ The court rejected petitioner’s argument that presenting its objections in its request for rehearing would have been useless, because the FERC would have rejected them anyway.⁴⁴

3. Ripeness

In *Electric Power Supply Ass’n v. FERC*⁴⁵ the court found that EPSA’s challenge to the FERC’s market monitoring exemption to the *ex parte* regulation was ripe for review, finding that EPSA had raised a “straightforward legal question—whether the market monitor exemption, on its face, violates the requirements of the Sunshine Act[.]” and that the FERC’s orders were final.⁴⁶ The court found that, where the issue can be resolved by analyzing the Sunshine Act, its legislative history, and its construction by relevant case law, neither the court nor the FERC has any interest in postponing review. In addition, the court found that where the legal issue is clear, the ripeness doctrine’s hardship prong is

37. *Id.* at 960–61.

38. *DTE Energy*, 394 F.3d at 961.

39. *Id.*

40. *DTE Energy*, 394 F.3d at 961–62 (citing *OMYA, Inc. v. FERC*, 111 F.3d 179, 181 (D.C. Cir. 1997)).

41. *Save Our Seabasticook v. FERC*, 431 F.3d 379, 381–82 (D.C. Cir. 2005).

42. *Id.* at 380; 16 U.S.C. § 8251(b) (2000).

43. *Save Our Seabasticook*, 431 F.3d 379, at 381–82 (citing *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004)).

44. *Id.* at 382.

45. *Elec. Power Supply Ass’n v. FERC*, 391 F.3d 1255, 1261 (D.C. Cir. 2004), discussed *supra* at Section I.A.1.

46. *Id.* at 1262–63.

“largely irrelevant.”⁴⁷ Nevertheless, the court found that EPSA’s hardship outweighed any interest in postponing review, because the market monitor exemption has a “direct and immediate” impact on the ability of EPSA and its members to represent themselves in pending and future contested FERC proceedings.⁴⁸ Moreover, the court found that finding EPSA’s claim to be unripe would be “absurd,” because the FERC has stated that only *ex parte* communications relied on will be included in the official record, thus forcing “EPSA to guess about when *secret* communications between market monitors and the Commission violate the Sunshine Act.”⁴⁹

In *The Toca Producers v. FERC*, the court dismissed a challenge to the FERC’s orders as unripe finding that, although the issue was purely legal and arose in a concrete setting, the agency’s action was not sufficiently final, given the “peculiar circumstances” of the case.⁵⁰ The Petitioners were a group of producers operating upstream of three natural gas processing plants located near Toca, Louisiana, and partially owned by affiliates of the producers. The producers delivered gas containing a high liquefiable hydrocarbon content into the natural gas pipeline system of Southern Natural Gas Company (Southern) at locations upstream of the processing plants. Traditionally, Southern had waived the gas quality specifications of its tariff for the “rich” gas of these producers, because Southern knew the gas would be processed downstream. When the processing plant operators notified Southern of their intent to shutdown the plants, Southern informed the producers that it would begin enforcing its tariff, and as a result, producers not satisfying Southern’s tariff would be required to either reduce or shut-in their production. The producers filed a complaint at the FERC asserting that Southern’s threatened refusal to accept their gas was discriminatory under sections 4 and 5 of the Natural Gas Act (NGA), because at points downstream of the Toca plant, Southern accepted gas with higher liquefiable hydrocarbon concentrations than the gas processed at the Toca plant. The producers contended that Southern’s tariff was discriminatory because it contained no safe harbor gas quality specification, and they asked the FERC to conduct an evidentiary hearing to revise Southern’s tariff accordingly.⁵¹ The FERC dismissed the complaint, holding that the producers had not demonstrated that Southern’s tariff was unjust and unreasonable, and denied the request for an evidentiary hearing. The FERC, however, did require Southern to submit a filing to include in its tariff an “aggregation methodology, including [a] flexible [gas quality specification] standard.”⁵² Southern subsequently submitted the tariff filing, which was pending before the FERC.

To determine whether the producers’ claim was ripe for review, the court “‘evaluate[d] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration[,]”⁵³ and “‘balance[d] the interests of the court and the agency in delaying review against the petitioner’s

47. *Elec. Power Supply Ass’n*, 391 F.3d at 1263.

48. *Id.* (citing *Better Gov’t Ass’n v. Dep’t of State*, 780 F.2d 86, 93 (D.C. Cir. 1986)).

49. *Elec. Power Supply Ass’n*, 391 F.3d at 1264.

50. *The Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005).

51. *Id.* at 264–65.

52. *The Toca Producers*, 411 F.3d at 265 (alteration in original) (quoting *The Toca Producers*, 104 F.E.R.C. ¶ 61,300 at P 26 (2003)).

53. *Id.* at 265 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)).

interest in prompt consideration of allegedly unlawful agency action.”⁵⁴ The court found that, while the issue of whether Southern’s tariff is unjust and unreasonable was purely legal and arose in a concrete setting, the FERC’s action was not “sufficiently final” in the “peculiar circumstances” presented, because Southern’s pending tariff filing could result in a resolution of the issues raised in the appeal.⁵⁵ Therefore, the court found that a substantial institutional “interest in deferring resolution” existed, because the producer’s issue “may not require adjudication at all,” and judicial review is available at the conclusion of the ongoing proceeding involving Southern’s tariff filing.⁵⁶ The court also found that the producers had not demonstrated any “cognizable hardship” that would offset the institutional interest in deferring judicial resolution.⁵⁷ In this regard, the court found that uncertainty with respect to the validity of the legal rule is not a hardship under the ripeness analysis.⁵⁸

4. Mootness

In *Entergy Services, Inc. v. FERC*, the Petitioners, Entergy Services Inc. (Entergy Services), Southern Company Services (Southern Company), and Nevada Power Company (Nevada Power) challenged FERC orders holding that certain costs that customers incur to connect their generators to the Petitioners’ electric transmission networks must be allocated among all customers, instead of assigned directly to the respective generator customers.⁵⁹ In each case, the FERC relied on its “at or beyond” rule, under which connection facilities “located ‘at or beyond’ the point of connection to the [transmission] network” are considered “network upgrades” rather than direct assignment facilities.⁶⁰ The court dismissed the petitions of Entergy and Southern Company as moot, because the interconnection agreements at issue in those cases had been cancelled or terminated.⁶¹ Moreover, the court found that in failing to demonstrate an injury in fact, these Petitioners did not establish standing.⁶²

With respect to mootness, the court rejected the arguments of Entergy and Southern Company that, because “there is a reasonable chance of the dispute arising again between the government and the same [petitioner],” their petitions were not moot.⁶³ Instead, the court found that the Petitioners had “abandoned the case” by terminating the interconnection agreements.⁶⁴ The court also found that, because the contracts had terms of ten years or longer, they allowed adequate time for administrative and judicial review, the challenge did not fall

54. *The Toca Producers*, 411 F.3d at 265 (quoting *Fed. Express Corp. v. Mineta*, 373 F.3d 112, 118 (D.C. Cir. 2004)).

55. *Id.* at 266.

56. *The Toca Producers v. FERC*, 411 F.3d 262, 266 (D.C. Cir. 2005) (quoting *Friends of Keeseville, Inc. v. FERC*, 859 F.2d 230, 235 (D.C. Cir. 1988)).

57. *Id.* at 266.

58. *The Toca Producers*, 411 F.3d at 266 (citing *Nat’l Park Hospitality Ass’n v. Dep’t of Interior*, 538 U.S. 803, 811 (2003)).

59. *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1242 (D.C. Cir. 2004).

60. *Id.* at 1242.

61. *Entergy Servs.*, 391 F.3d at 1244–45.

62. *Id.* at 1245.

63. *Entergy Servs.*, 391 F.3d at 1245 (alternation in original) (quoting *Legal Assistance for Vietnamese Asylum Seekers v. Dep’t of State*, 74 F.3d 1308, 1311 (D.C. Cir. 1996)).

64. *Id.* at 1245.

under the exception of “capable of repetition yet evading review.”⁶⁵

The court also found that the Petitioners lacked standing to present their challenge, thus rejecting the argument that, because they were asserting a facial challenge to an ongoing policy, they were presenting a “justiciable controversy.”⁶⁶ The court held that the FERC’s “at or beyond” rule will not affect either “Entergy or Southern [Company] until they are confronted with it in a matter before the Commission regarding a ‘live’ interconnection agreement” and the issue is no longer “hypothetical.”⁶⁷

With respect to the petition for review of Nevada Power, the court addressed whether the FERC’s determination that the interconnection facilities at issue provide a benefit to the entire network was supported by substantial evidence, and whether the “at or beyond” rule constituted an unjustified departure from past precedent.⁶⁸ First, the court upheld, as adequately supported, the FERC’s finding that system expansion was a benefit to the network. In addition, the court agreed that FERC’s order was supported by its policy of providing “credits for customer-funded network upgrades”⁶⁹ With respect to the issue of whether network costs should include (1) costs *from* the point where the generator connects to the grid (excluding costs of facilities necessary to establish the connection) or (2) costs “at or beyond” the interconnection, which would include the cost of facilities on the generator’s side of the interconnection with the grid, the court found that the FERC had failed to distinguish the two tests or to explain its departure from the “from” test when applying the “at or beyond” test.⁷⁰ The court thus remanded the case to the Commission for further explanation.

In a concurring opinion, Judge Tatel agreed with the dismissal of the claims of Entergy and Southern Company, but disagreed with the court’s jurisdictional analysis.⁷¹ In particular, he argued that the petition of Entergy and the second petition of Southern Company should have been dismissed on standing grounds alone. Judge Tatel noted that Entergy had filed its petition for review ten days after FERC acceptance of the proposed termination of the interconnection agreement. Southern Company filed its second petition for review after the interconnection agreement was cancelled. Consequently, with respect to these petitions, Judge Tatel argued, neither entity was a party aggrieved at the time they commenced their actions—a necessary prerequisite for standing.⁷²

With respect to Southern Company’s first petition, however, Judge Tatel acknowledged that the analysis was more complicated, because Southern Company had standing at the time it filed its petition.⁷³ He argued, however, that the court’s determination of jurisdiction over Southern Company’s first petition should not turn on a reevaluation of its standing, but whether the challenge had

65. *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1245–46 (D.C. Cir. 2004) (citation omitted).

66. *Id.* at 1246.

67. *Entergy Servs.*, 391 F.3d at 1246.

68. *Id.* at 1247.

69. *Entergy Servs.*, 391 F.3d at 1248 (emphasis omitted) (quoting *Consumers Energy Co.*, 96 F.E.R.C. ¶ 61,132, at p. 61,560 (2001)).

70. *Id.* at 1249–51.

71. *Entergy Servs., Inc. v. FERC*, 391 F.3d 1240, 1252 (D.C. Cir. 2004) (Tatel, D., concurring).

72. *Id.* at 1252.

73. *Entergy Servs.*, 391 F.3d at 1253.

become moot or was unripe.⁷⁴ Under either analysis, Judge Tatel would have found that the court lacked Article III jurisdiction.

In *Southern Co. Services, Inc. v. FERC*, Petitioner, Southern Company, challenged FERC orders that had rejected rollover restrictions in two transmission agreements.⁷⁵ The original service agreements at issue—one between Southern Company and Oglethorpe Power Corp. (Oglethorpe), and the other between Southern Company and Williams Energy Marketing & Trading Co. (Williams)—contained rights whereby Oglethorpe and Williams could elect to roll over the agreements. Oglethorpe and Williams both sought to roll over the original service agreements, and Southern Company then filed the rollover agreements with the FERC. These rollover agreements contained restrictions, which had not appeared in the original service agreements, on the ability of Oglethorpe and Williams to roll those agreements over in the future. While the FERC accepted both agreements, it rejected the limitations on future rollovers, concluding that Order Nos. 888 and 888-A⁷⁶ required that any limitation on rollover rights must be included in the original service agreements.⁷⁷

Over the course of the FERC proceedings concerning the Oglethorpe service agreement, Oglethorpe had continued to request rollovers from Southern Company such that the original service agreement remained in effect at the time of the court's review of the FERC order. In considering Southern's petition of the FERC order concerning the Oglethorpe service agreement, the court dismissed FERC's argument that Southern Company's appeal was an impermissible "collateral attack on Order Nos. 888 and 888-A."⁷⁸ The court reasoned that although Order No. 888-A specified that rollover restrictions must be included in the "contract" at execution, Order No. 888-A did not support the FERC's argument that "contract" referred only to the original service agreement and not to subsequent rollover agreements.⁷⁹ The court thus granted Southern Company's petition of the Oglethorpe order, vacating and remanding the order as arbitrary and capricious.⁸⁰

Unlike Oglethorpe, Williams had allowed its service agreement with Southern Company to expire by the time Southern Company's petition reached the court. Southern Company argued that its petition nevertheless remained justiciable by meeting "the mootness exception for cases that are 'capable of repetition, yet evading review'"⁸¹ The court, however, rejected this

74. *Id.* at 1253–54.

75. *S. Co. Servs., Inc. v. FERC*, 416 F.3d 39 (D.C. Cir. 2005).

76. Order No. 888, *Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, [Regs. Preambles 1991–1996] F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), 61 Fed. Reg. 21,540 (1996) (codified at 18 C.F.R. pts. 35 and 385), *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048 (1997), 62 Fed. Reg. 12,274 (1997) (codified at 18 C.F.R. pt. 35) [hereinafter Order No. 888-A], *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in relevant part sub nom.*, *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub. nom.*, *New York v. FERC*, 535 U.S. 1 (2002).

77. *S. Co. Servs., Inc.*, 108 F.E.R.C. ¶ 61,174 at P 21 (2004); *S. Co. Servs., Inc.*, 102 F.E.R.C. ¶ 61,201 at P 12 (2003), *reh'g denied*, 104 F.E.R.C. ¶ 61,140 (2003).

78. *S. Co. Servs.*, 416 F.3d at 41.

79. *Id.* at 45–46.

80. *S. Co. Servs.*, 416 F.3d at 48.

81. *Id.* at 43 (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)).

argument, finding that Southern Company had failed to show that the FERC order was of such a short duration that it could not be litigated prior to expiration.⁸² In fact, the vitality of Petitioner's challenge to the Oglethorpe orders showed that a challenge to the FERC's "original agreement" policy was possible.⁸³ The court therefore, held that Petitioner had not satisfied its burden of demonstrating that the challenge would typically evade review.⁸⁴

5. Subject Matter Jurisdiction

In *Xcel Energy Services, Inc. v. FERC*, the D.C. Circuit issued a *per curiam* opinion dismissing Xcel Energy Services, Inc.'s (Xcel) petition for lack of jurisdiction.⁸⁵ The court based its dismissal on its interpretation of the Public Utility Regulatory Policies Act (PURPA), finding that PURPA vests jurisdiction for review of the FERC implementing regulations under PURPA in federal district court.⁸⁶ Under section 210 of PURPA, the FERC promulgates rules "requiring electric utilities to offer to sell electricity to, and to purchase electricity from, 'qualifying facilities' (QFs)."⁸⁷ The FERC must ensure that the rate at which a QF sells electricity is no more than the purchasing utility's "avoided cost," [i.e.,] 'the cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.'"⁸⁸ State public utility commissions implement the FERC's rules and set the QF's rates.

In recent years, many states have required electric retailers "to generate renewable energy, to purchase such energy, or to purchase tradeable certificates representing renewable energy credits (RECs)," and in 2003, several QFs petitioned FERC to issue an order finding that "avoided cost contracts" executed under PURPA "do not inherently convey to the purchasing utility" any RECs as part of the sale of energy[,]" unless the contract so provides.⁸⁹ The FERC issued such an order, but "expressly left open the possibility that state law might provide otherwise."⁹⁰

Xcel opposed the petition before the FERC, sought rehearing, and filed a petition for review before the D.C. Circuit under section 313(b) of the FPA, claiming that the FERC's order "'interprets, and violates, the definition of small power production facilities' in the FPA."⁹¹ The court rejected this argument, noting that Xcel conceded in its brief that the status of QFs was not relevant to its arguments, and that the FERC had made no ruling relevant to any provision of the FPA.⁹² The court held, therefore, that review of FERC orders interpreting PURPA must first be brought in district court, and that the court of appeals has

82. *S. Co. Servs., Inc. v. FERC*, 416 F.3d 39, 43-44 (D.C. Cir. 2005).

83. *S. Co. Servs.*, 416 F.3d at 44.

84. *Id.* at 44.

85. *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005).

86. *Id.* at 1243-44.

87. *Xcel Energy Servs.*, 407 F.3d at 1243; 16 U.S.C. § 824a-3(a) (2000), as amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, §1253, 119 Stat. 594.

88. *Xcel Energy Servs.*, 407 F.3d at 1243 (quoting 16 U.S.C. § 824a-3(b) (2000)).

89. *Id.* at 1243.

90. *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242, 1243 (D.C. Cir. 2005).

91. *Id.* at 1244.

92. *Xcel Energy Servs.*, 407 F.3d at 1243.

no jurisdiction until that statutory requirement had been satisfied.⁹³

6. Final Agency Action

In *Industrial Customers of Northwest Utilities v. Bonneville Power Administration*, the United States Court of Appeals for the Ninth Circuit held that a decision by the Bonneville Power Administration (BPA) to trigger a Cost Recovery Adjustment Clause (CRAC) for rates it charges for federal power, was not a final agency action subject to review, when the clause requires approval by the FERC before becoming effective.⁹⁴ The court dismissed the petitions for review for lack of jurisdiction, finding that the trigger does not “‘mark the ‘consummation’ of the agency’s decisionmaking process” under *Bennett v. Spear*.⁹⁵

The BPA is a federal agency with authority to market almost all the electric power generated at federal hydroelectric facilities located in the Pacific Northwest.⁹⁶ The BPA also oversees the federal transmission system used to deliver federal and non-federal power to its customers.⁹⁷ The BPA derives its general and ratemaking authorities from several statutes.⁹⁸ Under the Pacific Northwest Electric Power Planning and Conservation Act of 1980, the BPA establishes its power rates, subject to approval by FERC.⁹⁹ The BPA is a self-financing agency, and its power rates are its revenue source. The BPA’s rate structure contains several CRACs, each designed to permit the BPA to address certain types of financial shortfalls without having to increase its base rates.¹⁰⁰ Any proposal to increase BPA’s rates requires publication of a notice in the *Federal Register*, a hearing, an opportunity for the submission of written comments and information, and an on-the-record decision developed during the hearing process.¹⁰¹ The BPA then issues a Record of Decision (ROD), but the FERC must approve the rate change before it can become final.¹⁰² The FERC’s review of BPA’s proposed rates is restricted to determining whether they satisfy the statutory mandates of the several statutes under which BPA derives its authority.¹⁰³ The FERC does not have the authority to modify the rate or to review BPA’s trigger determination.¹⁰⁴

In 2003, the BPA determined that the agency was at risk of failing to meet a treasury payment, and decided to trigger its “Safety-Net CRAC.” Following the required public notification, hearing and comment processes, the BPA issued a Record of Decision (ROD), and then submitted its Safety-Net CRAC proposal and the ROD to the FERC for approval. Petitioners, who are public utilities and

93. *Id.* at 1243.

94. *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638 (9th Cir. 2005).

95. *Id.* at 646 (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)).

96. *Indus. Customers of Nw. Utils.*, 408 F.3d at 641.

97. *Id.*

98. *Indus. Customers of Nw. Utils.*, 408 F.3d at 641.

99. *Id.* (citing 16 U.S.C. § 839e (2000)).

100. *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 641–42 (9th Cir. 2005) (internal citations omitted).

101. *Id.* at 642.

102. *Indus. Customers of Nw. Utils.*, 408 F.3d at 642.

103. *Id.* at 645–46.

104. *Indus. Customers of Nw. Utils.*, 408 F.3d at 644–45.

private consumers, challenge BPA's ROD.

The court found that BPA's trigger determination was not a final agency action subject to review. Rather, "because the trigger determination was a component of the rate, it is not subject to judicial review until final agency action with respect to the rate."¹⁰⁵ The court rejected Petitioners' contention that appellate jurisdiction is found in the Northwest Power Act's "catchall" jurisdiction provision, which states that "[n]othing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator."¹⁰⁶ Explaining that the Northwest Power Act does not define final action, the court sought guidance from other decisions, including *Bennett v. Spear*, which provides that an agency action is final if it "mark[s] the 'consummation' of the agency's decisionmaking process" and determines rights or obligations "from which 'legal consequences will flow.'"¹⁰⁷ The court concluded that, rather than mark the end of the decisionmaking process, the Safety-Net CRAC trigger determination marked the beginning. As such it is not a final agency action, even though the determination may have economic consequences.

B. Standard of Review

In *Electricity Consumers Resource Council v. FERC*, the D.C. Circuit denied petitions for review of FERC orders approving a rate design for the installed capacity (ICAP) market administrated by the New York Independent System Operator, Inc. (NYISO).¹⁰⁸ In addition to arguing that the FERC's orders violated the FPA's "just and reasonable" standard and the Administrative Procedure Act's (APA) "arbitrary and capricious" standard, the Electricity Consumers Resource Council (ELCON) urged the court to apply "a heightened standard of review for 'incentive ratemaking'" that would require that the FERC "demonstrate that the rate increase is no more than necessary to achieve its purpose of encouraging investment in new generation facilities in New York State."¹⁰⁹ The court declined to apply a heightened review standard, sustained the FERC's orders under the FPA and the APA, and denied the petitions for review.

In 2003, the FERC approved NYISO's proposal to implement an ICAP Demand Curve to be used in monthly auctions for determining the quantity and price of required ICAP to be purchased by load serving entities (LSEs).¹¹⁰ The purpose of the ICAP Demand Curve¹¹¹ was to moderate the volatility of ICAP prices and encourage investment in new generation facilities. ELCON, representing industrial electric consumers, opposed the new rate design, "arguing that it would increase electricity prices . . . without [encouraging] investment in new generation capacity, and that it violated incentive ratemaking case law

105. *Id.* at 645.

106. *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 645 (9th Cir. 2005) (alteration in original) (quoting 16 U.S.C. § 839f(e)(3) (2000)).

107. *Id.* at 646 (citing *Bennett v. Spear*, 520 U.S. at 177-78).

108. *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232 (D.C. Cir. 2005).

109. *Id.* at 1234.

110. *New York Indep. Sys. Operator, Inc.*, 103 F.E.R.C. ¶ 61,201 (2003).

111. *Elec. Consumers Res. Council*, 407 F.3d at 1234-35 (describing the ICAP Demand Curve in some detail).

because the ICAP Demand Curve was not carefully calibrated to increase investment in new generation facilities without granting a windfall to existing capacity suppliers.”¹¹² ELCON argued that, because the ICAP Demand Curve was “neither market-based nor cost-based,” but was instead “administratively constructed” to facilitate investment in new generation, it constituted “incentive ratemaking” and required that the FERC demonstrate that it was “in fact needed, and is no more than is needed, for the purpose.”¹¹³ ELCON also argued that the ICAP Demand Curve violated the FERC’s 1992 Policy Statement on incentive ratemaking, stating that rates above cost required a “correlation between the incentive and the result to be induced[.]”¹¹⁴ because the new rate design “increased revenues to all capacity suppliers, regardless of whether they invest in new generation facilities.”¹¹⁵

As an initial matter, the court accepted the technical explanation advanced by the FERC and Intervenor that the sloped ICAP Demand Curve does not impose an incremental rate increase, and more importantly, that the new rate design encourages new generation capacity investment by promoting “increased stability in ICAP revenues,” not by imposing generically higher rates.¹¹⁶ The court noted that “the ICAP Demand Curve restructures ICAP prices to ‘more realistically reflect[] the economic value of capacity reserves’ and to ‘send better price signals to encourage the construction of generation before a shortage occurs.’”¹¹⁷ As such, the court found that FERC’s explanation that “stable ICAP revenues will reduce the risk and cost of financing investment in new generation capacity and thus reduce the cost of electricity to consumers in the long term” was supported by substantial record evidence.¹¹⁸ The court next rejected ELCON’s reliance on two earlier decisions of the United States Court of Appeals for the First Circuit, finding that neither relied on incentive ratemaking cases, nor required a heightened standard of review.¹¹⁹

The court then evaluated the FERC’s orders under the Administrative Procedure Act’s (APA) arbitrary and capricious standard of review. First, the court rejected ELCON’s argument that the FERC failed to respond to objections that the ICAP Demand Curve produced ICAP charges that “were too high and that the slope of the Demand Curve was too gradual.”¹²⁰ The court noted that the FERC had required NYISO to monitor Demand Curve results, and deferred to the FERC’s evaluation of the experimental rate design.¹²¹ Second, the court deferred to the FERC’s judgment that the ICAP Demand Curve would result in long-term benefits to electricity consumers, and that it adequately considered the

112. *Id.* at 1235.

113. *Elec. Consumers Res. Council*, 407 F.3d at 1236 (quoting *City of Detroit v. FPC*, 230 F.2d 810, 817 (D.C. Cir. 1955)).

114. *Id.* at 1237 (quoting *Incentive Ratemaking for Interstate Natural Gas Pipelines*, 61 F.E.R.C. ¶ 61,168, at p. 61,594 (1992)).

115. *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1237 (D.C. Cir. 2005).

116. *Id.* at 1237 (quoting *N.Y. Indep. Sys. Operator Inc.*, 103 F.E.R.C. ¶ 61,201 at P 44 (2003)).

117. *Elec. Consumers Res. Council*, 407 F.3d at 1237–38 (alteration in original) (quoting 103 F.E.R.C. ¶ 61,201 at P 31).

118. *Id.* at 1238.

119. *Elec. Consumers Res. Council*, 407 F.3d at 1238.

120. *Id.* at 1239.

121. *Elec. Consumers Res. Council v. FERC*, 407 F.3d 1232, 1239–40 (D.C. Cir. 2005).

effect of short-term costs.¹²² The court also found that the FERC had adequately responded to concerns “that the ICAP Demand Curve will not encourage investment in new generation” facilities, and that it would replace price volatility with more harmful quantity volatility.¹²³ Finally, the court rejected ELCON’s objection that FERC had “failed to consider alternatives to the ICAP Demand Curve” and “‘ignored . . . evidence that supply conditions in New York are not critical’” and do not justify the ICAP Demand Curve charges.¹²⁴

II. THE FEDERAL POWER ACT

A. Ratemaking

In *Michigan Public Power Agency v. FERC*, the D.C. Circuit remanded for further explanation, FERC orders permitting a transmission-owning public utility to pass through to non-jurisdictional municipal entities a share of annual charges that had been passed through to the public utility from MISO.¹²⁵

The FERC is required to recover its costs from the industries it regulates, and does so by assessing annual charges directly to public utilities.¹²⁶ The FERC’s current methodology for calculating annual charges, adopted in Order No. 641,¹²⁷ is based only on the transmission of electricity in interstate commerce by public utilities, and does not assess annual charges on municipal utility systems.¹²⁸ Consistent with this methodology, the FERC assesses annual charges to MISO, rather than to individual transmission customers, such as the Michigan Electric Transmission Company (METC) located in the region MISO serves. MISO then may recover the annual charges proportionately from various transmission owners through its rates.¹²⁹ The transmission owners then pass the charges through to their customers, regardless of whether they are jurisdictional utilities.¹³⁰ In 2003, the Michigan Public Power Agency and Michigan South Central Power Agency (Michigan Agencies), municipal power agencies purchasing transmission service for their members within the METC pricing zone, objected to METC’s proposal to pass annual charges through to them. “They argued that as municipal agencies, they are not ‘public utilities’ . . . and that, as co-owners of the METC transmission system,” they previously had not been assessed such charges.¹³¹ The FERC authorized the pass-through, reasoning that METC incurred such costs “‘based on the Michigan Agencies’ capacity entitlement being transmitted by [MISO] over the [MISO] transmission system, under the [MISO open access transmission tariff], within the METC

122. *Id.* at 1240.

123. *Elec. Consumers Res. Council*, 407 F.3d at 1240–41.

124. *Id.* at 1241–42.

125. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8 (D.C. Cir. 2005).

126. *Id.* at 9–10.

127. Order No. 641, *Revision of Annual Charges Assessed to Public Utilities*, [Regs. Preambles 1996–2000] F.E.R.C. STATS. & REGS. ¶ 31,109 (2000), 65 Fed. Reg. 65,757 (2000) (codified at 18 C.F.R. pt. 382), *order denying reh’g*, Order No. 641-A, 94 F.E.R.C. ¶ 61,290 (2001).

128. See *Mich. Pub. Power Agency*, 405 F.3d at 10–11 (describing how the FERC assesses annual charges).

129. *Id.* at 11.

130. *Mich. Pub. Power Agency*, 405 F.3d at 11.

131. *Id.* at 11–12.

pricing zone.”¹³² Acknowledging its policy of excluding non-jurisdictional entities from paying annual charges, the FERC nevertheless stated that “‘as transmission customers,’ municipal utilities ‘may, of course, be charged rates by the transmission provider that reflect annual charges assessed to the transmission provider’”¹³³ In their petition for review, the Michigan Agencies did not challenge assessment of annual charges when the transmission they take exceeds their ownership interest, but they challenged the FERC’s approval of METC’s pass-through of annual charges for the portion of the transmission they take under their ownership interests.¹³⁴

As an initial matter, the court agreed that the Michigan Agencies’ status as non-jurisdictional municipal entities did not exempt them from indirectly incurring annual charges when they use a FERC-regulated public utility’s system to take transmission pursuant to their ownership interests.¹³⁵ The court ruled that there was no jurisdictional bar to the FERC including all of the transmission in calculating the applicable annual charges and “permit[ting] a public utility to pass through a proportionate share of its annual charge[s] to” the public agencies.¹³⁶

The court found, however that in allowing pass-through, the FERC’s failure to distinguish between the Michigan Agencies’ “use as owners and their use as customers, [constituted] an unreasoned departure from . . . past [agency] practice.”¹³⁷ The court explained that the Michigan Agencies’ ownership interests derive from operating agreements executed with METC before issuance of Order No. 888 and MISO’s creation, and that they are not subject to MISO’s open access transmission tariff, or its rates, terms, or conditions. The preamble to the FERC’s order establishing its new methodology for calculating annual charges, however, provides that such charges be based on transmission provided pursuant to an ISO’s tariff or rate schedules. Consequently, the court reasoned that, because the Michigan Agencies take transmission pursuant to their ownership interests, and not pursuant to MISO’s tariff or rate schedules, the FERC had not explained the basis for allowing the annual charges pass-through to the Michigan Agencies.¹³⁸ The court explained further that, although the FERC’s regulations contemplate basing annual charges on “all unbundled transmission,” the FERC did not rely on that regulation to justify its action in this case.¹³⁹ Moreover, FERC “Order No. 641 . . . contemplate[d] . . . indirect assessment of annual charges to municipal utilities only [in their capacity as] ‘transmission customers,’” not owners.¹⁴⁰ Finally, the court found that the FERC had “failed to address the . . . argument that [the Michigan Agencies] are not paying a filed tariff rate to MISO or METC when they take transmission

132. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12 (D.C. Cir. 2005) (alterations in original) (quoting *Mich. Elec. Transmission Co.*, 104 F.E.R.C. ¶ 61,236 at P 18 (2003), *order on reh’g*, 106 F.E.R.C. ¶ 61,064 (2004)).

133. *Id.* (quoting *Mich. Elec. Transmission Co.*, 106 F.E.R.C. ¶ 61,064 at P 18).

134. *Mich. Pub. Power Agency*, 405 F.3d at 13.

135. *Id.* at 13.

136. *Mich. Pub. Power Agency*, 405 F.3d at 13.

137. *Id.* at 13–15.

138. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12, 14 (D.C. Cir. 2005).

139. *Id.* at 14 (emphasis omitted) (quoting 18 C.F.R. § 382.201(c)(1)).

140. *Mich. Pub. Power Agency*, 405 F.3d at 15.

pursuant to their ownership interests.”¹⁴¹ Consequently, the court reasoned, “the discussion about recovering costs through ratemaking appears not to support the pass-through of annual charges here.”¹⁴² The court concluded that the FERC had failed to justify passing through annual charges, given “the Michigan Agencies’ status as co-owners of the METC’s transmission facilities and as municipal . . . utilities,” and that the FERC had failed to explain its departure from past practices.¹⁴³ The court, therefore, remanded the case for further explanation.

In a concurring opinion, Judge Henderson expressed her concern that the FERC had not explained the statutory authority for allowing pass-through of annual charges to the Michigan Agencies at all, given their status as non-jurisdictional under the FPA.¹⁴⁴

In *Public Service Commission of Kentucky v. FERC*, the D.C. Circuit partially granted a petition for review of the FERC orders addressing the rate of return on equity component of MISO’s transmission rates.¹⁴⁵ The court sustained the FERC’s choice of a proxy group and use of a midpoint, but rejected the FERC’s addition of a fifty-point premium to the midpoint, because the FERC had failed to provide adequate notice that it would consider such a premium.¹⁴⁶

In 2001, MISO and certain of its member transmission owners filed a request to increase its rate of return on equity component from 10.5% to 13.0%. The administrative law judge (ALJ) selected a proxy group consisting of publicly-traded parent companies of certain of the MISO transmission owners to determine the appropriate range of rates of return. She then selected the midpoint of the range, rejecting the mean number, advocated by FERC Staff, and the median, advocated by certain intervenors. The FERC affirmed the ALJ, but increased *sua sponte* the final allowed rate of return by fifty basis points in order to create an incentive for companies to join RTOs.¹⁴⁷ The FERC rejected arguments that its notice of the adder was insufficient, explaining “that [P]etitioners should have been aware of the possibility, . . . given [the FERC’s] statutory power to amend proposals to ensure just and reasonable rates.”¹⁴⁸ The FERC stated also that, because the final rate of return value remained less than that originally proposed, it thus was within the Petitioners’ range of expectations. After petitions for review had been filed, the FERC requested a voluntary remand so that it could further consider the rate of return. The FERC reaffirmed its prior order, but offered a new justification for selecting the midpoint of rates of return. The FERC explained that, given this case’s unique circumstances, where the return value will apply to diverse companies, “the midpoint provides the best measure because it emphasizes the endpoints of the proxy group range, ensuring that outlier as well as average [transmission owners] receive just and fair compensation.”¹⁴⁹

141. *Id.* at 15.

142. *Mich. Pub. Power Agency*, 405 F.3d at 15.

143. *Id.* at 16.

144. *Mich. Pub. Power Agency v. FERC*, 405 F.3d 8, 12, 16–17 (D.C. Cir. 2005) (Henderson, K., concurring).

145. *Pub. Serv. Comm’n of Ky. v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005).

146. *Id.* at 1012.

147. *Pub. Serv. Comm’n of Ky.*, 397 F.3d at 1007.

148. *Id.* at 1007–08.

149. *Pub. Serv. Comm’n of Ky.*, 397 F.3d at 1008 (citing *Midwest Indep. Transmission Sys. Operator*,

With respect to the selected proxy group, the court rejected Petitioners' contention that, because the transmission owners' parent companies had businesses extending beyond transmission they were inappropriate proxy choices. The court held that such criticism was "nibbling at the margins" of the "pragmatic exercise" of ratemaking, and that the Petitioners' failed to demonstrate that the FERC's resolution was improper under the APA's deferential arbitrary and capricious standard of review.¹⁵⁰ The court found also that the FERC's review of the ALJ's determination satisfactorily responded to the Petitioners' arguments, and that the FERC had not improperly shifted the burden of proof to the intervenors. In addition, the court upheld the use of the midpoint, finding that the FERC's explanation, that it must apply to a diverse set of companies, constituted reasoned decisionmaking.

The Court held, however, that the FERC's *sua sponte* decision to increase the rate of return by fifty basis points, without prior notice, violated due process.¹⁵¹ The court explained that the FERC had previously rejected MISO's request for a 100 point adder, and that the ALJ also had refused to consider any premium-related proposals.¹⁵² Consequently, the record contained no evidence on the need for, or the proper size of, an adder.¹⁵³ The court rejected the FERC's argument that due process had been provided at the rehearing stage of the proceeding, holding that considering arguments on rehearing is not a substitute for allowing Petitioners to present evidence on the issue.

B. Electric Utility Regulation

In *Edison Mission Energy, Inc. v. FERC*, the D.C. Circuit vacated and remanded FERC orders allowing the NYISO to implement a comprehensive market mitigation plan under which bid prices that generators and marketers submit to sell power in New York State could be automatically mitigated, even in circumstances where the FERC would determine no mitigation should occur.¹⁵⁴ In 2002, NYISO proposed to implement a comprehensive market mitigation plan that included automatic, real-time bid price mitigation procedures that previously had been approved only for the summer season peak demand time frame, because of the FERC's concerns that such procedures "may mitigate bids in situations where market power is not the cause for high or volatile bids"¹⁵⁵ The FERC approved the automatic mitigation plan (AMP), with no time limits, and rejected arguments that, outside New York City, the AMP would permit mitigation in circumstances where price increases were caused by temporary shortages, not market power, and would "deprive suppliers of scarcity rents and would deter new suppliers from entering the market."¹⁵⁶

The court vacated the FERC's orders, first finding that, contrary to the FERC's claim, the Petitioner had supported its claims with affidavits and examples. The FERC had failed to respond, except with "vague generalities"

Inc., 106 F.E.R.C. ¶ 61,302 at PP 5–14 (2004)).

150. *Id.* at 1009.

151. *Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005).

152. *Id.*

153. *Pub. Serv. Comm'n of Ky.*, 397 F.3d at 1012.

154. *Edison Mission Energy, Inc. v. FERC*, 394 F.3d 964 (D.C. Cir. 2005).

155. *Id.* at 966–67.

156. *Edison Mission Energy*, 394 F.3d at 967.

and perfunctory conclusions that neither responded to Petitioners' evidence nor attempted to reconcile the FERC's previous "acceptance of the workably competitive character of New York power markets outside New York City," and its prior view that the AMP was not appropriate for markets that did not have structural defects.¹⁵⁷ In effect, the court held that the FERC had failed to demonstrate that the approved mitigation plan would not do more harm than good.¹⁵⁸

In *Southern California Edison Co. v. FERC*, the D.C. Circuit vacated and remanded orders denying individual transmission owners the ability to recover from existing and new customers "additional [costs] arising out of the formation and maintenance of an [ISO,]" even though the ISO tariff, which established principles governing individual transmission owners' tariffs, expressly authorized such recovery.¹⁵⁹ In a hearing addressing the individual transmission owners' tariffs, the ALJ had ruled that, despite the ISO tariff, such cost differentials could not be passed through to new customers, and the FERC affirmed. The FERC reasoned that, although the ISO tariff provided that the ISO would assess costs to each transmission owner, it was silent regarding how the transmission owners could recover these costs.¹⁶⁰ Finding the ISO tariff to be clear, the court rejected the FERC's arguments that the ISO tariff did not control, and that "cost causation principles" required the costs be recovered only from existing customers.¹⁶¹ The court ruled that the plain language of the ISO tariff applied and that the FERC could not simply disregard it in order to disapprove the transmission owners' actions taken in conformance with that tariff.¹⁶²

In *Florida Municipal Power Agency v. FERC*, the D.C. Circuit held that the FERC's refusal to consider whether physical impossibility provided a proper basis for an exception to full load ratio pricing was arbitrary and capricious.¹⁶³ In requiring that public utilities offer a network transmission service, Order No. 888 also endorsed a cost allocation method that allocated costs "based on the ratio of each customer's load to the entire load on the system."¹⁶⁴ In Order No. 888-A, in response to FMPA's comment that network customers "should not be charged a network rate to use their own transmission (or distribution) system to serve loads that are located beyond the transmission owner's system," the FERC explained that "a customer may exclude 'the entirety of a discrete load' from its network load (and obtain point-to-point service as necessary for that load), but it cannot exclude merely part of that discrete load, even if that part is served by behind-the-meter generation."¹⁶⁵

In 2000, Florida Power & Light Company (Florida Power) filed a settlement to resolve issues relating to a proposal to comprehensively modify its tariff structure. The Florida Municipal Power Authority (FMPA) sought to

157. *Id.* at 968–69.

158. *Edison Mission Energy*, 394 F.3d at 969.

159. *S. Cal. Edison Co. v. FERC*, 415 F.3d 17, 18 (D.C. Cir. 2005).

160. *Id.* at 20–21.

161. *S. Cal. Edison*, 415 F.3d at 22.

162. *Id.* at 22–23.

163. *Fla. Mun. Power Agency v. FERC*, 411 F.3d 287, 288 (D.C. Cir. 2005).

164. *Id.* at 289.

165. *Fla. Mun. Power Agency*, 411 F.3d at 289–90 (quoting Order No. 888-A, *supra* note 76, at pp. 30,257–58).

reserve the issue of whether Florida Power should be able to charge FMPA for network transmission service to serve load Florida Power is physically precluded from serving.¹⁶⁶ The FERC refused to address the issue of “whether physical impossibility warrants an exception to the general rule against permitting partial load ratio pricing for network customers[,]” claiming that the issue had been raised and resolved in Order Nos. 888 and 888-A.¹⁶⁷ The court disagreed, finding that the FERC had not addressed physical impossibility in its prior orders and that Order No. 888 had explicitly contemplated the evaluation of exceptions in the refusal. The court held that the FERC’s refusal to consider them now was arbitrary and capricious and remanded the case for further consideration.¹⁶⁸

In *FPL Energy Marcus Hook, L.P. v. FERC*, the D.C. Circuit vacated and remanded FERC orders that allocated to Marcus Hook the costs of an interconnection that had become unnecessary, holding that the FERC had failed to explain its new rationale.¹⁶⁹ Marcus Hook had requested an interconnection to PJM Interconnection, L.L.C., (PJM) facilities. PJM conducted a facilities study that evaluated the combined effect the proposed projects of Marcus Hook and two others, called A13 and A19, that had earlier priority in the interconnection queue. The study indicated that the system had sufficient capacity for A13, but that A19 and Marcus Hook required system upgrades. Pursuant to its open access tariff, PJM allocated the cost of the system upgrades to A19 and Marcus Hook. When the system upgrades were substantially completed, A13 withdrew from the interconnection queue, rendering the upgrades for A19 and Marcus Hook unnecessary. Marcus Hook claimed it no longer was responsible for the costs of the interconnection and sought relief at the FERC.¹⁷⁰

The FERC characterized the issue as “‘which entity bears the risk’ of cost responsibility for upgrades” subsequently made unnecessary when an earlier project withdraws, and determined that PJM’s tariff placed the risk on the interconnecting customer.¹⁷¹ The FERC also found that the upgrade at issue provided no system benefit. The court characterized the issues as “(1) whether PJM had a duty to reevaluate the completed [system] upgrade at all; (2) to whom could PJM have reallocated costs should such a reallocation have been required; and (3) whether system benefit obviated Marcus Hook’s cost responsibility even if reallocation to other customers was not an option.”¹⁷² With respect to the first issue, the court concluded that despite the order’s confusing language, the FERC had assumed PJM had the duty to reevaluate the system upgrade.¹⁷³ On the second issue, the court determined that the FERC’s interpretation of PJM’s tariff regarding cost allocation was not unreasonable.¹⁷⁴ With respect to the third issue, the court stated, the “FERC’s two orders reach the same conclusion by two different routes,”¹⁷⁵ and that the FERC had failed to explain why it offered two

166. *Id.* at 290.

167. *Fla. Mun. Power Agency*, 411 F.3d at 291.

168. *Id.* at 291–92.

169. *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441 (D.C. Cir. 2005).

170. *Id.* at 444–45.

171. *FPL Energy Marcus Hook*, 430 F.3d at 445.

172. *Id.* at 447.

173. *FPL Energy Marcus Hook*, 430 F.3d at 447.

174. *Id.* at 448.

175. *FPL Energy Marcus Hook, L.P. v. FERC*, 430 F.3d 441, 448 (D.C. Cir. 2005).

rationales.¹⁷⁶ The court also doubted that the FERC's reasoning would withstand scrutiny.¹⁷⁷

C. Refunds

In *Bonneville Power Administration v. FERC*, the Ninth Circuit held that the "FERC does not have refund jurisdiction under [section 206 of the FPA] with respect to governmental entities and non-public utilities."¹⁷⁸

In 2001, the FERC initiated an investigation under section 206 of the FPA to determine whether wholesale electricity prices charged in single price auction markets operated by the California Independent System Operator (CAL-ISO) and California Power Exchange (PX) during the 2000–2001 California energy crisis were just and reasonable. The FERC found that excessive rates charged in those markets during the period October 2, 2000 through June 20, 2001 would have to be refunded, and that all sellers in those markets, including governmental entities and other non-jurisdictional entities would have to make refunds. Petitioners, public entities that had sold electric energy in the Cal-ISO/CalPX-controlled markets during this time, challenged FERC orders.

The court began its *de novo* review of the FERC's authority by reviewing the FPA's language and concluded that the statute's plain text unambiguously excluded sellers like the Petitioners from the FERC's refund authority.¹⁷⁹ The court started with section 201(f), which states that no provision of Part II of the FPA applies to governmental entities, unless the statute expressly specifies.¹⁸⁰ Sections 205 and 206, which authorize the FERC to order refunds of unjust and unreasonable rates and charges, are contained in Part II and are expressly limited to rates assessed by a public utility, which, by definition, excludes a governmental entity.¹⁸¹ Similarly, the court pointed out that FERC decisions hold that electric cooperatives financed under the Rural Electrification Act are not "public utilities" subject to the FERC's jurisdiction.¹⁸²

The court found that congressional intent to exclude governmental utilities from the FERC's jurisdiction under sections 205 and 206 was plain from the FPA's text, and the FERC's interpretation to the contrary was entitled to no deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.¹⁸³ In addition, the court found that the FERC's legislative history arguments not only were irrelevant, but inconsistent with FERC orders in other recent cases finding that the legislative history reflects an intent to deny FERC jurisdiction over non-public utilities.

The court rejected the FERC's argument that it was simply resettling prices in the CAL-ISO and PX markets, based on the fact that the FERC's order clearly was determining refunds under section 206, and was not resettling transactions.¹⁸⁴ The court also rejected the FERC's contention that its general

176. *Id.* at 448–49.

177. *FPL Energy Marcus Hook*, 430 F.3d at 449.

178. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 926 (9th Cir. 2005).

179. *Id.* at 914.

180. *Bonneville Power Admin.*, 422 F.3d at 915.

181. *Id.* at 916–18.

182. *Bonneville Power Admin.*, 422 F.3d at 917.

183. *Id.* at 920 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

184. *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 919–20 (9th Cir. 2005).

subject matter jurisdiction over wholesale electric power sales conferred jurisdiction to order refunds, despite the clear limitations of sections 201(f), 205, and 206. Rather, the court explained that under principles of statutory construction, such specific limitations trump general grants of regulatory authority.¹⁸⁵ Finally, the court rejected the FERC's argument that it had acquired jurisdiction to require refunds through sellers' waiver or agreement, ruling that only Congress can confer regulatory jurisdiction.¹⁸⁶ Jurisdiction cannot be derived through a seller's agreement, waiver, or voluntary participation in a FERC-regulated market.

D. Hydroelectric Licensing

In *Rhineland Paper Co. v. FERC*, the D.C. Circuit sustained FERC orders issuing a subsequent license and rejecting the licensee's proposal to remove a large portion of property from the project boundary and requiring the licensee to develop and implement a plan to monitor invasive plant species.¹⁸⁷ First, the court rejected Petitioner's contention that the lands it sought to exclude from the project boundary were not "necessary" to operate the project. Instead, the court deferred to the FERC's construction of section 10(a)(1) of the FPA as imposing on the FERC and the licensee "statutory obligations to protect project shoreline and aquatic resources[,] and to ensure that a 'project boundary encompass a 'buffer zone area' adequate to protect the surrounding environment.'"¹⁸⁸ The court found that the Petitioner had submitted inadequate information to determine whether the project reservoir required such buffers, and that the FERC's requirement that the Petitioner submit a land management plan in order to establish an appropriate reservoir buffer zone, understand the extent of residential development around the reservoir, and ascertain where a new project boundary would best serve the public interest was reasonable.¹⁸⁹

Second, the court upheld the FERC's requirement that the Petitioner develop and implement an exotic species control plan. Applying *Chevron's* two step analysis,¹⁹⁰ the court upheld the FERC's broad interpretation of FPA section 10(j)'s requirement to "protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project" as requiring a plant control plan.¹⁹¹ The reasonableness of the FERC's interpretation was further supported by concessions of Petitioner's counsel at oral argument that project operations affect fish and wildlife habitat and could even increase the spread of invasive species.¹⁹²

In *Brady v. FERC*, the D.C. Circuit sustained FERC orders issuing a license amendment to permit the expansion of a commercial marina located on project property, and rejected arguments of lakefront property owners that, because the cove where the marina is located had exceeded its carrying capacity,

185. *Id.* at 920.

186. *Bonneville Power Admin.*, 422 F.3d at 924.

187. *Rhineland Paper Co. v. FERC*, 405 F.3d 1 (D.C. Cir. 2005).

188. *Id.* at 5 (citing *Georgia Power Co.*, 76 F.E.R.C. ¶ 61,281, at p. 62,438 (1996)).

189. *Rhineland Paper*, 405 F.3d at 4–6.

190. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

191. *Rhineland Paper*, 405 F.3d at 6 (emphasis added) (quoting 16 U.S.C. § 803(j)(1) (2000)).

192. *Id.* at 6–7.

thus precluding further growth, the expansion was not consistent with the public interest.¹⁹³ The court concluded that the FERC did not abdicate its statutory duty under section 4(e) of the FPA to give "equal consideration" to non-developmental values or to "ensure that the project is 'best adapted to a comprehensive plan' that incorporates such non-development purposes"¹⁹⁴ The court explained that, under its deferential standard of review, it could not find that the FERC failed to consider non-developmental values. The court noted, however, that because the Petitioners did not challenge whether the FERC could properly consider "'employment, tax revenues and tourism'" as development benefits, the court could not consider that issue.¹⁹⁵ With respect to the Petitioners' argument that the FERC erroneously assumed that the lake had not exceeded its carrying capacity, the court found that the FERC did not ignore this evidence, and moreover, that FERC precedent made clear that a carrying capacity analysis does not necessarily establish a limit on development.¹⁹⁶ Similarly, the court found that the FERC did not act outside its FPA authority in refusing to impose a moratorium on development pending completion of a comprehensive shoreline management plan, or in refusing to require that the marina conform to the rules and regulations of the Grand River Dam Authority.¹⁹⁷

III. NATURAL GAS ACT

A. *Ratemaking/Tariffs*

In *Tennessee Gas Pipeline Co. v. FERC*, the court upheld FERC orders requiring that Tennessee Gas Pipeline Company (Tennessee) cease collecting full reservation charges from shippers if Tennessee elects to suspend service for failure to maintain creditworthiness requirements.¹⁹⁸ The court found that the FERC requirement was reasonable, because reservation charges are paid both to reserve capacity and also to have gas moved on the pipeline upon demand.¹⁹⁹ The court reasoned that when service is suspended, the pipeline continues to reserve the capacity pending the shipper's compliance with creditworthiness requirements, but it refuses to transport gas for the shipper.²⁰⁰ The court went on to state that in some future case that may be brought before the FERC, some value of service determination might be appropriate whereby some portion of reservation charges should continue to be applicable to suspended service.²⁰¹ However, the court observed that Tennessee is requesting to continue charging full reservation charges without providing the reciprocal full measure of service, and concluded that the FERC is entitled to deference in its determination to disallow that particular request.²⁰²

193. *Brady v. FERC*, 416 F.3d 1 (D.C. Cir. 2005).

194. *Id.* at 6 (quoting 16 U.S.C. §§ 797(e), 803(a)(1) (2000)).

195. *Brady*, 416 F.3d at 6.

196. *Id.* at 6–9.

197. *Brady*, 416 F.3d at 9–10.

198. *Tenn. Gas Pipeline Co. v. FERC*, 400 F.3d 23 (D.C. Cir. 2005).

199. *Id.* at 26–27.

200. *Tenn. Gas Pipeline Co.*, 400 F.3d at 27.

201. *Id.* at 26–27.

202. *Tenn. Gas Pipeline Co.*, 400 F.3d at 25.

In *ChevronTexaco Exploration & Prod. Co. v. FERC*,²⁰³ the court denied a petition for review by shippers contesting the FERC's approval under section 4 of the NGA of a pipeline's revised annual surcharge.²⁰⁴ The filing was designed to cash out imbalances between gas volumes that shippers deliver into a pipeline and then receive from the pipeline over a specified period, in conformance with an approved rate formula.²⁰⁵ In reviewing the annual filing, the FERC found the formula was no longer just and reasonable, and instituted a proceeding under section 5 of the NGA to establish a just and reasonable formula.²⁰⁶ The Petitioners argued that the FERC should have also rejected the annual surcharge filing, or accepted it subject to refund upon the conclusion of the section 5 proceeding.²⁰⁷

The court agreed with the FERC that the formula is itself an approved rate, and that having already approved the rate formula, the FERC was confined to examining the prudence of the costs and the calculation of the input data with each annual filing of the surcharge.²⁰⁸ The court ruled that the FERC had no authority to reject the pipeline's NGA section 4 filing once those two determinations are made with each annual update of the specific numerical value calculated by the approved method.²⁰⁹ The court further held that the method could be changed only prospectively under NGA section 5.²¹⁰ The FERC's rejection of the pipeline's surcharge calculation as no longer just and reasonable was held to be effective prospectively only, and the petition seeking refund protection was denied.²¹¹

In *The Industrials v. FERC*,²¹² the FERC upheld FERC orders approving a proposal by Northern Natural Gas Company (Northern) to modify its cash-out mechanism to eliminate shippers' ability to manipulate imbalances on the pipeline's system in order to take advantage of price arbitrage opportunities.²¹³ Under the proposal, a shipper taking more gas than it "delivered in the course of a month would pay Northern for the net excess at the highest of the five weekly average prices applying to that month. If a shipper took out less than it delivered, Northern would pay the shipper at the lowest of the five weekly averages."²¹⁴ The FERC "approved a slightly modified version of Northern's proposal."²¹⁵

The court found that in Order No. 637,²¹⁶ the FERC had contemplated that

203. *ChevronTexaco Exploration & Prod. Co. v. FERC*, 387 F.3d 892 (D.C. Cir. 2004).

204. *Id.*

205. *ChevronTexaco Exploration & Prod. Co.*, 387 F.3d at 894.

206. *Id.*

207. *ChevronTexaco Exploration & Prod. Co.*, 387 F.3d at 895, 897.

208. *Id.* at 895-96.

209. *ChevronTexaco Exploration & Prod. Co. v. FERC*, 387 F.3d 892, 896-97 (D.C. Cir. 2004).

210. 15 U.S.C. § 717d(a) (2000).

211. *ChevronTexaco Exploration & Prod. Co.*, 387 F.3d at 897.

212. *The Industrials v. FERC*, 426 F.3d 405 (D.C. Cir. 2005).

213. *Id.* at 408.

214. *The Industrials*, 426 F.3d at 406.

215. *Id.*

216. Order No. 637, *Regulation of Short-Term Natural Gas Transportation Services, and Regulation of Interstate Natural Gas Transportation Services*, [Regs. Preambles 1996-2000] F.E.R.C. STATS. & REGS. ¶ 31,091 (2000), 65 Fed. Reg. 10,156 (2000) (to be codified at 18 C.F.R. pts. 154, 161, 250 and 284), *order on reh'g*, Order No. 637-A, F.E.R.C. STATS. & REGS. ¶ 31,099 (2000), 65 Fed. Reg. 35,705 (2000), *order denying*

pipelines could modify how they cash out imbalances in order to eliminate incentives for shippers to borrow gas from the pipeline when the cash out price is below the market price.²¹⁷ The court found that this suggested that pipelines “may adjust their cash-out mechanisms to ‘eliminate’ arbitrage incentives without showing that the change is necessary to prevent the impairment of reliable service.”²¹⁸ The court further found that the Petitioners “failed to show that [FERC’s] orders deviated from these principles.”²¹⁹ The court found that Northern’s former mechanism provided shippers the opportunity to engage in price arbitrage, and that “the record contained substantial evidence of under-recovery by Northern”²²⁰ Consequently, the court found that the FERC’s orders were supported by substantial evidence and consistent with the prior decisions.²²¹

In *American Gas Ass’n v. FERC*,²²² the D.C. Circuit sustained FERC orders removing the cap on the contract length that an existing customer exercising its right of first refusal (ROFR) must match in order to retain service when other potential shippers submit competing bids for that capacity. The court also upheld FERC’s orders allowing a shipper to make “‘forwardhaul’ and ‘backhaul’ gas deliveries ‘to a single point in an amount greater than the shipper’s contracted for capacity at’ that point.”²²³

The FERC had held that an existing customer is adequately protected by its ROFR right if the customer is required to both pay the maximum approved rate and match the contract term of a rival bidder in order to retain its capacity. The court agreed that “existing regulations adequately control the exercise of market power,” and that “‘no justification [exists] for distorting the bidding process and not allocating scarce pipeline capacity to the shipper placing the highest value on obtaining’ it.”²²⁴ The court rejected Petitioners’ argument that pipelines “exercise market power merely because scarcity deprives existing customers of alternatives or forces them to bid higher terms than they desire.”²²⁵

The court also rejected Petitioners’ arguments that the FERC had failed to consider the “greater risks faced by local distribution companies (LDCs) bound by retail access programs that threaten their market share while simultaneously obligating them to serve as suppliers of last resort[,]” and that this obligation will force LDCs to “‘enter into long-term pipeline contracts now to serve markets they may not serve in the future.’”²²⁶ The court found that these arguments were based on two false assumptions: “(1) that existing regulations without a term cap leave pipeline market power unregulated and (2) that [section] 7(b) [of the NGA] obligates FERC to guarantee shippers the ability to renew their contracts

reh’g, Order No. 637-B, 92 F.E.R.C. ¶ 61,062 (2000).

217. *The Industrials*, 426 F.3d at 407.

218. *Id.*

219. *The Industrials v. FERC*, 426 F.3d 405, 407 (D.C. Cir. 2005).

220. *Id.* at 408.

221. *The Industrials*, 426 F.3d at 409.

222. *Am. Gas Ass’n v. FERC*, 428 F.3d 255 (D.C. Cir. 2005).

223. *Id.* at 257 (quoting *Interstate Natural Gas Ass’n of Am.*, 258 F.3d 18, 40 (D.C. Cir. 2002)).

224. *Am. Gas Ass’n*, 428 F.3d at 258–59 (quoting *Regulation of Short-Term Natural Gas Transp. Servs., and Regulation of Interstate Natural Gas Transp. Servs.*, 106 F.E.R.C. ¶ 61,088 at P 17 (2004)).

225. *Id.* at 260.

226. *Am. Gas Ass’n*, 428 F.3d at 261 (emphasis omitted).

indefinitely rather than simply provide them the opportunity to do so.”²²⁷ The court found that “the Commission reasonably concluded that the ROFR gives existing shippers the competitive advantage that [section] 7(b) [of the NGA] requires while allowing for the most efficient allocation of capacity.”²²⁸

The court also rejected Petitioners’ contention that allowing shippers to make “‘forwardhaul’ and ‘backhaul’ . . . deliveries to a single point in an amount greater than the shippers’ contracted for capacity at that point” effectively modified existing contracts in violation of the *Mobile-Sierra* standard.²²⁹ The court noted that Petitioners did not challenge the FERC’s contention that its segmentation and flexible point policy create two types of firm service, primary and secondary, with only the former amounting to guaranteed service. Therefore, the court concluded that secondary transactions, while firm, are not guaranteed and are not covered by existing contracts.²³⁰ The court therefore found that the terms for primary service for which the parties have bargained remain unchanged, and that the FERC’s decision did not modify contracts, even though contracts may be affected. The court found that the FERC was not obligated to make a public interest finding under *Mobile-Sierra*, or to make a section 7 finding.²³¹ The court found, instead, that the FERC was required only to make the necessary “just and reasonable” findings under section 5 of the NGA concerning the replacement of an existing rate or tariff provision with a new one. The court also held that the FERC’s finding that these transactions are “just and reasonable” under section 5 of the NGA is supported, because permitting these transactions “‘creates additional supply alternatives . . . and enhances competition on the pipeline’s system”²³²

In *ExxonMobil v. FERC*, the D.C. Circuit sustained FERC orders which had denied a proposal by Transcontinental Gas Pipe Line Corporation (Transco) to initiate a “firm to the wellhead” (FTW) rate structure on its natural gas pipeline.²³³ The FERC had rejected the proposal, finding that it would grant primary rights to certain shippers on Transco’s supply laterals, requiring modification to those shippers’ contracts. The FERC had found that the rights granted under the FTW proposal are primary rights, “because Transco would be forced to reserve capacity on the supply laterals” for certain shippers.²³⁴ The FERC found that forcing a shipper to pay for additional primary service would impermissibly modify the shipper’s contract and require them to pay increased reservation charges for access to the supply laterals.

The court agreed and concluded that the “FERC did not act arbitrarily or capriciously in rejecting Transco’s NGA [section] 4 filing.”²³⁵ The court further concluded that Petitioners had not shown that the public interest in certain

227. *Id.* at 261; 15 U.S.C. § 717f(b) (2000).

228. *Am. Gas Ass’n v. FERC*, 428 F.3d 255, 261 (D.C. Cir. 2005).

229. *Id.* at 257; *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

230. *Am. Gas Ass’n*, 428 F.3d at 263.

231. *Id.* at 263; 15 U.S.C. § 717f (2000).

232. *Am. Gas Ass’n*, 428 F.3d at 263–64 (quoting *Regulation of Short-Term Natural Gas Transp. Servs.*, and *Regulation of Interstate Natural Gas Transp. Servs.*, 106 F.E.R.C. ¶ 61,088 at P 52 (2004)).

233. *ExxonMobil v. FERC*, 430 F.3d 1166 (D.C. Cir. 2005).

234. *Id.* at 1172.

235. *ExxonMobil*, 430 F.3d at 1176; 15 U.S.C. § 717c (2000).

pricing benefits of Transco's proposal outweighed the harm of the cost re-allocation. The court concluded, therefore, that the "FERC did not abuse its discretion in deciding not to implement the FTW plan under [section] 5 of the NGA."²³⁶

B. Settlements

In *Arizona Corp. Comm'n v. FERC*, the court denied petitions for review of FERC orders modifying three previously approved settlements between El Paso Natural Gas Company, an interstate natural gas pipeline, and its customers.²³⁷ The court held that the FERC properly applied the *Mobile-Sierra*²³⁸ public interest standard to modify the settlements and prevent imposing an excessive burden on third parties. Under the settlements, El Paso had been obligated to meet certain customers' full requirements, and to continue to provide their full requirements needs as their service demands increased. At the time the settlements were executed, El Paso had a surplus of capacity, but as capacity became constrained over time, El Paso was forced to implement *pro rata* capacity cutbacks. By modifying the settlements, the FERC converted the full requirements contracts to contract demand contracts, under which the customers were required to pay for increased capacity needs caused by growth in their demand.²³⁹

The court rejected arguments that the FERC's modification of the settlements lacked substantial evidence support. The court found that most of the Petitioners had complained to the FERC about cutbacks caused by capacity constraints, and the court inferred that the reason the Petitioners subsequently changed their position before the court regarding capacity constraints, was not based on their belief that a remedy no longer was needed, but on their dislike of the FERC's chosen remedy.²⁴⁰ The court further held that the FERC was acting to protect the broader public interest, that is, the threat posed by the allowing customers with full requirements contracts to continue to obtain unrestricted rights to increasing amounts of capacity that the pipeline was incapable of satisfying. Finding that the FERC had shown a reasonable basis for reforming the contracts, the court concluded: "The *Mobile-Sierra* doctrine permits generalized findings of public interest when intervening circumstances affect a class of contracts in the same manner."²⁴¹

In *Brooklyn Union Gas Co. v. FERC*, the court sustained FERC orders refusing to permit a subsequent settlement to upset provisions of a previously executed settlement, where parties to the first settlement opposed the second settlement.²⁴² The Petitioners, a group of customers of Equitrans, L.P. (Equitrans), challenged the FERC's rejection of a proposed settlement that would have permitted Equitrans' to leave its existing rates in place until at least March 31, 2005, in return for approval of a merger between Equitrans and its affiliate,

236. *Id.* at 1177; 15 U.S.C. § 717d (2000).

237. *Ariz. Corp. Comm'n v. FERC*, 397 F.3d 952 (D.C. Cir. 2005).

238. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

239. *Ariz. Corp. Comm'n*, 397 F.3d at 953.

240. *Id.* at 954.

241. *Ariz. Corp. Comm'n*, 397 F.3d at 955-56.

242. *Brooklyn Union Gas Co. v. FERC*, 409 F.3d 404 (D.C. Cir. 2005).

Carnegie Interstate Pipeline Company, even though a previous settlement between Equitrans and its customers had required Equitrans to file a new rate case to become effective no later than August 1, 2003.

The FERC approved the merger, but rejected the proposed moratorium on the effective date of a new general rate case application based on the objection of the Independent Oil & Gas Association of West Virginia (IOGA), a signatory to the earlier settlement. The FERC agreed with IOGA that the FERC's policy of promoting settlements would be compromised if parties were unable to rely on the binding nature of approved settlements. The FERC reasoned that its pro-settlement policy is undermined when parties are placed at risk that a settlement will be supplanted when a subset of parties file a new proposal that modifies a key term of an approved settlement.²⁴³

The court found that the FERC's orders did not conflict with its past practice, and that the FERC was reasonable in relying on the first settlement as a basis for rejecting the second settlement.²⁴⁴ In particular, the court cautioned that the Petitioners should not have agreed to the mandatory sunset date for current rates provided for in the first settlement if they wished to pursue a further extension of the period that the current rates must remain in effect.²⁴⁵

C. Gathering

In *Columbia Gas Transmission Corp. v. FERC*, the D.C. Circuit reversed FERC orders requiring Columbia Gas Transmission Corp., an interstate natural gas pipeline to install and pay for meters on the gathering system of Nicole Gas Production, Ltd., to whom Columbia had sold 143 natural gas wells.²⁴⁶ The FERC had interpreted Columbia's tariff to require the pipeline to install and pay for meters at these wells after they were transferred. Columbia disagreed with the FERC's interpretation of the tariff, and also disputed the FERC's jurisdictional authority to require the installation of gathering facilities.

The court vacated the FERC's orders, because under section 1(b) of the NGA, the FERC has no jurisdiction over the production or gathering of natural gas.²⁴⁷ The court declined to address the issue of the interpretation of Columbia's tariff, holding that the FERC's lack of jurisdiction rendered any tariff language arguably speaking to gathering facilities unenforceable. The court rejected the FERC's argument that Columbia's voluntary filing of its tariff provision could be construed as extending the FERC's statutory authority, ruling that the FERC cannot acquire jurisdiction by an agreement of the parties.²⁴⁸

In *Jupiter Energy Corp. v. FERC*, the court granted a petition for review of the FERC orders that had found that the offshore system of Jupiter Energy Corp. (Jupiter) was a transmission system, rather than a gathering system.²⁴⁹ The FERC had denied Jupiter's request that its two natural gas pipelines that move gas from an offshore platform to the system of Transco perform a non-

243. *Id.* at 407.

244. *Brooklyn Union Gas*, 409 F.3d at 406–07.

245. *Id.* at 408.

246. *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459 (D.C. Cir. 2005).

247. 15 U.S.C. § 717(b) (2000).

248. *Columbia Gas Transmission*, 404 F.3d at 463 (quoting *Am. Mail Line Ltd. v. FMC*, 503 F.2d 157, 170 (D.C. Cir. 1974)).

249. *Jupiter Energy Corp. v. FERC*, 407 F.3d 346 (D.C. Cir. 2005).

jurisdictional gathering function.²⁵⁰ In the 1960s, the FERC's predecessor agency, the Federal Power Commission, had declared that these two Gulf of Mexico lines provide transportation services, and a two to one majority of the FERC rejected Jupiter's request for a reclassification now.²⁵¹

The court reversed the FERC, finding that its classification of the lines as gathering was inconsistent with its 2001 ruling that Transco's lines are gathering lines at the point where Jupiter delivers gas into Transco's system.²⁵² The court found that there could be only one point where the gathering functions ends and the transportation function begins. The court found that the FERC's orders were fatally flawed in holding that the gathering function ended at the platform and that the transportation function is then performed by Jupiter, only to have Transco perform more gathering services downstream of the point where it receives gas from Jupiter's system.²⁵³ Since the FERC found that gathering occurred at both ends of Jupiter's system, the court found that Jupiter must also be performing a gathering function. The court stated that "the inconsistency generated in relation to the downstream non-jurisdictional line infects the whole of the Commission's decision."²⁵⁴

D. Pipeline Right of Way

In *Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Trust*,²⁵⁵ the district court held in a summary judgment action that a certificate of public convenience and necessity issued by the FERC to Williston Basin Interstate Pipeline Company (Williston) authorizing it to construct and operate the Grasslands Project facilities is a grant of a permanent 50-foot-wide right-of-way, despite the FERC's failure to so state in its certificate orders, because a permanent easement was what Williston stated that it was seeking in the underlying application to the FERC.²⁵⁶ The court held that the FERC has the authority to grant perpetual or permanent easements, and that the court may not alter such an authorization or otherwise place arbitrary time limitations on such easements granted pursuant to the NGA.²⁵⁷ Further, the court noted that, while the certificate limits the capacity of the pipeline that was certificated under the Grasslands Project, Williston has stated its intent to seek further authorization from the FERC to expand the pipeline project. For that reason, the court rejected the contention of the landowners in a condemnation proceeding that Williston should be required to institute a second condemnation proceeding if the FERC subsequently increases the capacity authorization. Instead, the court ruled that the instant condemnation proceeding should take into account the potential expansion of the pipeline capacity as a factor for the jury to consider in making a damage award.²⁵⁸

250. *Id.* at 348.

251. *Jupiter Energy Corp.*, 407 F.3d at 348.

252. *Id.* at 350.

253. *Jupiter Energy Corp.*, 407 F.3d at 351.

254. *Id.* at 351.

255. *Williston Basin Interstate Pipeline Co. v. Dolyniuk Family Trust*, No. A1-03-66, 2005 U.S. Dist. LEXIS 11635 (D. N.D. June 7, 2005).

256. *Id.* at *6.

257. *Williston Basin*, 2005 U.S. Dist. LEXIS at *8-10.

258. *Id.* at *11.

In *Texas Eastern Transmission v. Perano*,²⁵⁹ the district court granted a preliminary injunction to prevent owners and operators of a mobile home park from interfering with an interstate natural gas pipeline's use of a right-of-way across the land owned and operated by the Defendant landowners. The court found sufficient evidence that two pipeline easements were created in the 1940s by predecessors-in-interest to the land, and that transmission lines have been in place underground of the right-of-way since that time. The pipeline, Texas Eastern Transmission (Texas Eastern), sought to enforce a 25-foot-wide right-of-way from the centerline of two transmission lines. The defendants were aware of Texas Eastern's claims and proceeded to put a mobile home within the right-of-way despite communications from the pipeline.²⁶⁰

The court applied the four-factor test by which the Plaintiff pipeline must prove its entitlement to preliminary injunctive relief in reaching the following conclusions: (1) the pipeline is likely to prevail on the merits to maintain the right-of-way because it has established the existence of the easements, and the need to use the 25-foot right-of-way to maintain the transmission lines from rupture, leaks, and explosion;²⁶¹ (2) there is immediate irreparable harm that cannot be compensated by money alone because of major public safety concerns, including the potential for serious injury and loss of life;²⁶² (3) a balancing of hardships indicates that the defendants will suffer minimal harm by a grant of the preliminary injunction because the pipeline will pay to move the mobile home and also post a \$50,000 bond, whereas the hardship on the pipeline will be significant by a denial of the motion because the interference with the right-of-way compromises its ability to maintain the transmission lines safely and efficiently;²⁶³ and (4) a preliminary injunction serves the public interest by minimizing both the risk of serious harm to life and surrounding property, and the risk of the cutoff of natural gas service, particularly in winter months with serious implications.²⁶⁴ Having found that Texas Eastern made these showings, the court ordered the defendants to remove the mobile home, and enjoined them from any further interference with the right-of-way pending a final hearing and determination of the underlying case.

259. *Tex. E. Transmission v. Perano*, No. 04-3915, 2005 U.S. Dist. LEXIS 1683 (E.D. Pa. Feb. 4, 2005).

260. *Id.*

261. *Tex. E. Transmission*, 2005 U.S. Dist. LEXIS at *13-22.

262. *Id.* at *22-25.

263. *Tex. E. Transmission*, 2005 U.S. Dist. LEXIS at *25-27.

264. *Id.* at *27-28.

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