

*Report of The Committee
On Regulations — Parts II and III
of The Federal Power Act*

I. INTRODUCTION

1983 was the year of the Federal Energy Regulatory Commission's long-awaited decision on rate-making treatment for Construction Work in Progress (CWIP). Compared to what we have since seen of 1984, however, calendar year 1983 was a relatively quiet time for FERC, in which many pending initiations remained incomplete. The Commission's decisions were sustained to a remarkable degree on appeal during 1983.

Section II below summarizes Commission rulemaking orders issued during the 1983 calendar year; Section III, Commission opinions in 1983; and Section IV, court decisions in 1983; all as relevant to Parts II and III of the Federal Power Act.

II. RULEMAKING PROCEEDINGS

During 1983, the Commission issued final rules in six rulemaking proceedings encompassing a wide range of subjects. Three of the new rules implement significant policy decisions of the Commission, while the remaining three new rules are directed toward a continuation of the Commission's effort to reduce unnecessary reporting requirements and toward minor procedural matters.

A. Policy Rulings

1. The most controversial of the Commission's new rules was issued in Docket No. RM81-38 and deals with the ratemaking treatment of utility investment in construction work in progress. Prior to the institution of Docket No. RM81-38, the Commission's rules, established pursuant to Order No. 555 (Docket No. RM75-13), permitted the inclusion in rate base of investment in construction work in progress related to pollution control and conversion facilities, while permitting the inclusion of other investment in construction work in progress only upon a showing of severe financial distress. Pursuant to its Final Order No. 298 issued in Docket No. RM81-38, 23 FERC ¶ 61,224 (1983), the Commission amended its rules so as to permit the inclusion in rate base of up to 50% of a utility's investment in construction work in progress, without regard to the financial condition of the utility. Order No. 298 left unchanged the ratemaking treatment of investment in construction work in progress related to pollution control and conversion facilities. During the first two years of the Commission's new construction work in progress rule, rate increases attributable to the inclusion in rate base of investment in construction work in progress (other than that related to pollution control and conversion facilities) may not exceed six percent per year. The new rule is codified at 18 C.F.R. § 35.26.

Order No. 298 was appealed to the United States Court of Appeals for the District of Columbia Circuit by a variety of parties. The appeals were consolidated and are pending before the Court in *Mid-Tex Electric Cooperative, Inc. v. FERC*, Case Nos. 83-2058, *et al.*

2. In another area, the Commission issued a final rule which reversed the long-standing interpretation of its suspension authority under the Federal Power Act and the Natural Gas Act. In its Order on Rehearing, Clarifying Prior Order, and Reinterpreting Statutory Suspension Authority issued in *Middle South Energy, Inc.*,¹ the Commission, on May 24, 1983, held that the traditional interpretation of its suspension authority, applied for nearly 40 years and repeatedly sustained,² which permitted suspension of changes in existing rates, but which precluded suspension of initial rates, was too narrow and was inconsistent with the Commission's responsibility to insure that *all* rates are just and reasonable. The Commission thus held that the suspension authority granted by the Federal Power Act extended to initial rate filings, as well as to rate changes. In accordance with its holding in *Middle South Energy, Inc.*, the Commission, on the same day, issued Order No. 303 in Docket No. RM83-21, 23 FERC ¶ 61,278, *rehearing denied*, 24 FERC ¶ 61,205 (1983), and thereby revised its rules to provide for the suspension of initial rates filed under the Federal Power Act and the Natural Gas Act.

3. The third policy decision by the Commission was issued in Order No. 352 in Docket No. RM83-62, 25 FERC ¶ 61,378 (1983). Order No. 352 amends the Commission's rule governing expenses which may be reflected in the fuel adjustment clause. Under the amended rule, all costs (both reservation and energy) associated with purchases of economic energy are eligible for reflection in the fuel adjustment clause. However, several tests must be met under the Commission's new rules in order for such costs to qualify for fuel adjustment clause reflection. First, the purchases must be for periods of twelve or fewer months. Second, the purchases must be made solely for economic, and not for reliability, purposes. The question of whether the purchase is a reliability purchase rather than solely an economic purchase is to be answered on a case-by-case basis, based upon reasonable forecasts of conditions expected to occur on the purchasing utility's system for the duration of the purchase, with reference to the reliability criterion of the individual purchasing utility. Third, the total purchase cost must be less than the buyer's total avoided variable cost. This total cost test must be met both at the beginning, and at the end, of the purchase transaction. Thus, if the total purchase cost of the transaction is initially estimated to be less than the purchasing utility's total avoided variable cost but it is later determined that the actual total purchase cost exceeds total avoided variable costs, then the purchasing utility must include the difference between the total cost of the purchase and the total avoided variable cost as a credit in its fuel adjustment clause calculation for the first adjustment period after the purchase. The revised rule is codified in 18 C.F.R. § 35.14.

B. Reporting Requirements and Procedural Matters

1. With respect to its efforts to reduce unnecessary reporting requirements, the Commission issued Order No. 353 in Docket No. RM83-9, 25 FERC ¶ 61,376 (1983), addressing the cost of service data reporting requirements adopted under

¹Docket No. ER82-616, 23 FERC ¶ 61,277 (1983), *rehearing denied*, 24 FERC ¶ 61,206 (1983), *petition for review docketed*, No. 82-1362 (D.C. Cir. June 9, 1983) (argued March 8, 1984).

²See, e.g., *Indiana & M.M.D.A. v. FERC*, 659 F.2d 1193 (D.C. Cir. 1981).

Section 133 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2643 (PURPA). By Order No. 353, the Commission revised the data reporting requirements so as to reduce somewhat the PURPA data which must be filed and so as to permit the data to be filed biennially either on June 30 or concurrently with the filing of a retail rate case. In addition, by Order No. 353, the Commission granted an exemption from the PURPA Section 133 data reporting requirements to all small utilities, and to a long list of other individual utilities which had demonstrated that the filing of the data served no useful purpose and/or was not cost beneficial.

2. Further reductions to reporting requirements were made by Order No. 282 issued in Docket No. RM82-10, 22 FERC ¶ 61,135 (1983). Docket No. RM82-10 was instituted to revise the Commission's Form 12, "Power System Statement." Pursuant to Order No. 282, the Commission deleted several schedules and certain data elements from Form 12 to be filed in 1983 covering the year 1981, reduced the number of utilities required to submit Form 12, and eliminated the requirement to file Form 12 for years after the 1981 collection period. The former contents of this form, however, are still being collected in large part by DOE on a replacement form.

3. On the procedural front, the Commission issued Order No. 289 in Docket No. RM83-58, 23 FERC ¶ 61,065 (1983), pursuant to which the Commission adopted, with one exception, the latest edition of *A Uniform System of Citation* (the "blue book") as the preferred method of citation in documents filed with the Commission.

C. Pending Rulemakings

At the end of 1983, the Commission's rulemaking calendar included the following dockets pending under Parts II and III of the Act:

- RM84-1 FOIA request fees (final rule issued 4/20/84, 27 FERC ¶ 61,095 (1984),
- RM83-68 contested settlement procedure,
- RM83-66 revisions of Uniform System of Accounts,
- RM83-34 interlocking positions (final rule issued 5/10/84, 27 FERC ¶ 61,228 (1984),
- 83-11 Form 423 revision,
- RM-83-1 rules of practice and procedure (final rule issued 5/16/84, 27 FERC ¶ 61,260 (1984),
- RM82-38 FERC fees,
- RM82-35 FERC fees,
- RM80-36 generic rate of return on common equity, and
- RM79-52 reporting capacity shortages (interim rule issued).

III. COMMISSION OPINIONS

A. Commission Jurisdiction and Authority

The Commission held in *Public Service Company of New Mexico*, Opinion No. 164, 23 FERC ¶ 61,218 (1983), that it is not required to find each rate component, such as

return on equity, unjust and unreasonable in a Section 206 proceeding as a prerequisite to establishing new rates. Rather, the Commission stated that it must find that existing *rates* are unjust and unreasonable in order to establish new rates, and once it does so find, the Commission is not controlled by any specific element of existing rates in setting new just and reasonable rates.

In *Arizona Public Service Company*, Opinion 177, 23 FERC ¶ 61,419 (1983), the Commission held that it has authority under Section 206 of the Federal Power Act to adjust rates upward if the return actually earned under existing rates is less than that found to be the minimum reasonable return in a current proceeding.

See also Order No. 303, reinterpreting the Commission's authority to suspend initial rate filings, discussed in Section II above.

B. *Cost of Service*

1. *Rate Base*

a. *Accrued unbilled revenues.* In *Southwestern Public Service Company*, Opinion No. 162, 22 FERC ¶ 61,341 (1983), the Commission ruled that amounts which reflect fuel costs incurred, but not yet billed, under a fixed rate (as opposed to cost of service) fuel clause, do not represent an asset of the utility and therefore may not be included in rate base. Consequently, the Commission stated that, where accrued unbilled revenues have been improperly included in rate base, it is necessary to make a correcting entry which reduces retained earnings by the amount of the estimated unbilled revenues.

b. *Allowance for funds used during construction.* In *Kentucky Utilities Company*, Opinion No. 184, 24 FERC ¶ 61,158 (1983), the Commission reiterated its policy which requires computation of AFUDC using the gross-of-tax method unless some other regulatory agency having jurisdiction over the utility requires use of the net-of-tax method.

c. *Cash working capital.* Pending completion of the rulemaking convened in Docket No. RM79-49 and absent record evidence that actual fossil fuel and purchased power lags are reasonable, the Commission concluded in *Commonwealth Edison Company*, Opinion No. 165, 23 FERC ¶ 61,219 (1983), that it is appropriate to calculate the cash working capital allowance based upon the standard 45-day formula method.

In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission calculated cash working capital by use of the 45-day formula, adjusted for actual fossil fuel and purchased power expense lags. Further, in the absence of proof that maintenance of compensatory bank balances was essential to the ability of the company to secure bank loans, the Commission excluded such balances from the cash working capital calculation. On rehearing, Opinion No. 185-A, 24 FERC ¶ 61,380 (1983), the Commission ordered that calculation of the cash working capital allowance be made solely on the 45-day formula, without any adjustment, finding that adjustments for fossil fuel and purchased power expense lags were appropriate only when such lags were fully developed and reliable.

In *Public Service Company of New Mexico*, Opinion No. 164, 23 FERC ¶ 61,218 (1983), the Commission stated that pending additional analyses with respect to the question of the appropriate method for calculation of cash working capital, and where the effect of negative cash working capital is *de minimus*, a deduction from rate base for negative cash working capital should not be made.

d. *Construction Work in Progress*. The Commission determined, in *Public Service Company of New Mexico*, Opinion No. 164, 23 FERC ¶ 61,218 (1983), that an exception to Order No. 555, which generally permits pollution control construction work in progress in rate base, was warranted where the customer would not receive benefits from the plant for at least six years due to sale of one-half of the output of the plant. Thus, inclusion of construction work in progress in rate base for pollution control purposes was disallowed.

The Commission stated in *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), that a reservoir constructed to regulate the incursion of salt water into estuarine areas which naturally contain fresh water is not a pollution control facility as defined by Order No. 555 and therefore does not qualify for construction work in progress inclusion in rate base.

Radiation control facilities are not pollution control facilities as defined by Order No. 555, and, therefore, construction costs associated with such facilities must be excluded from rate base. *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983).

e. *Contributions in Aid of Construction*. The Commission held in *Commonwealth Edison Company*, Opinion No. 165, 23 FERC ¶ 61,219 (1983), that the proper accounting for a contribution in aid of construction is to include the contributed amount in jurisdictional rate base, then reduce the rate base allocated to the contributing customer by the full amount of the contribution.

f. *Estimated Rate Base*. Estimated amounts of plant-in-service which vary less than 1% from actual total rate base allocated to a customer are not unreasonable and should be accepted, the Commission said in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983).

g. *Operating Reserves*. In response to an argument that funds for operating reserves were supplied in part by ratepayers, the Commission ordered the exclusion of operating reserves from rate base in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983).

h. *Test Year Plant in Service*. In keeping with the test year ratemaking principle which excludes from rate base a unit placed into service after the test year, the Commission stated in *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), that units which are retired from service during the test year should be included in rate base.

2. *Expenses Other Than Fuel*

a. *Customer Service and Information Expenses.* In *Arizona Public Service Company*, Opinion No. 177, 23 FERC ¶ 61,419 (1983), the Commission did not permit an allocation of customer service and information expenses to wholesale customers where the evidence was inadequate to show that wholesale customers benefitted, directly or indirectly, from such expenditures.

b. *Depreciation.* In *Commonwealth Edison Company*, Opinion No. 165, 23 FERC ¶ 61,219 (1983), the Commission adopted depreciation rates of 2.96% for fossil steam production plant and 3.45% for nuclear plant based upon an average life straight line method of depreciation. In so doing, the Commission rejected the argument that the average life straight line methodology would necessarily leave some costs — such as those for future additions to the underlying facility — undepreciated after the plant is retired.

In affirming the Administrative Law Judge's use of a 3.82% depreciation rate on nuclear power plant in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission disagreed that the 3.82% rate was appropriate simply because approved by the state commission with primary regulatory control over the company, but nonetheless concluded that some justification for the use of the 3.82% rate could be found in the record before the Commission.

c. *Estimated Expenses.* In *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), the Commission reiterated its position that actual test year figures should not be substituted for estimated figures if the estimates were reasonable when made and will not produce unreasonable results.

d. *Post-Test-Year Expenses.* In *Arizona Public Service Company*, Opinion No. 177, 23 FERC ¶ 61,419 (1983), the Commission refused to depart from the test-year concept of ratemaking by not requiring a credit against the revenue requirement for any revenues which might be received from sales of excess capacity subsequent to the test year. The Commission questioned the fairness of requiring a credit for post-test year sales without also permitting an increase in expenses for post-test year cost increases.

e. *Revenue Credits.* In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission concluded that the appropriate ratemaking treatment for amounts received by the company from claims against a contractor of a cancelled plant was to amortize the gross amount of the credit over a nine year period, with the annual revenue reduction allocated to customers on the basis of the production plant allocator. On rehearing, Opinion No. 185-A, 24 FERC ¶ 61,380 (1983), the amortization period was reduced to five years at the request of the company.

f. *Tax Expense.* The Commission rejected a proposal by intervenors in *Arizona Public Service Company*, Opinion No. 177, 23 FERC ¶ 61,419 (1983), to

calculate investment tax credits based upon “actual” retail revenues rather than estimated revenues. The Commission noted that the proposal was inconsistent with its future test year scheme of rate regulation and that, in any event, the intervenors’ proposal did not reflect actual revenues.

Following the methodology used in Opinion No. 54, the Commission, in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), approved a methodology of interest synchronization which calculated the interest expense for tax purposes by multiplying the weighted cost of long-term debt times rate base. The cost of long-term debt used in the methodology approved by the Commission was determined by using the same interest as that used in the rate of return calculation.

The Commission stated in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), that where Delmarva had chosen an Option 3 ratemaking treatment for investment tax credits respecting pre-1981 property additions pursuant to § 46(f) of the Internal Revenue Code, the accumulated deferred credits will be deducted from rate base.

In *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), the Commission stated that, because of the Commission’s history with respect to normalization versus flow-through accounting and in light of the Commission’s existing full normalization policy, there is a corresponding presumption of underfunding in a utility’s deferred tax account. Consequently, there is also a presumption that “excess” amounts resulting from the decrease in the corporate tax rate from 48% to 46% do not result in overfunding of the deferred tax account and the burden of proof of overfunding is on the party challenging that presumption.

In *New England Power Company*, Opinion No. 49-C, 25 FERC ¶ 61,009 (1983), the Commission followed the stand-alone tax policy announced in *Columbia Gulf Transmission Company*, Opinion No. 173. Thus, since none of the expenses which gave rise to the parent utility’s tax deductions and consequent tax savings were reflected as expenses in establishing the subsidiary utility’s rates, the Commission stated that the utility subsidiary should be considered as a separate entity for tax purposes and its rates should not be reduced to reflect the parent utility’s savings.

Based on Commission precedent and pending a reevaluation of Commission policy, investment tax credits must be normalized, the Commission said in *Southwestern Public Service Company*, Opinion No. 162, 22 FERC ¶ 61,341 (1983).

3. Fuel Expense

a. *Fuel Expense and Revenue Synchronization.* In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission required the Company to refile its cost of service so as to reflect synchronized test period fuel expenses and fuel revenues.

b. *Fuel Procurement Practices.* Absent a *prima facie* case showing that customers had been subjected during preceding years to overcharges due to non-compliance by fuel suppliers with fuel contracts, an investigation into a company’s fuel procurement practices during those earlier years is not warranted, the Commission stated in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983).

c. *Purchases From Affiliated Sources.* In *Public Service Company of New Mexico*, Opinion No. 164, 23 FERC ¶ 61,218 (1983), the Commission found that, where a utility owns an interest in coal mines and where the coal prices paid by the utility for coal purchased from the mine are reasonable when judged by the market test, it is not appropriate to reduce the coal price reflected in rates by the amount of economic interest payments received by the utility from the sale of the coal.

d. *Spent Nuclear Fuel.* The Commission concluded in *Boston Edison Company*, Opinion No. 156-B, 23 FERC ¶ 61,176 (1983), that its allowance as an element of cost of service of estimated disposal costs for spent nuclear fuel does not supersede and is not inconsistent with the Nuclear Waste Policy Act.

In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission concluded that spent nuclear fuel does not have a positive salvage value at this time, and that it is appropriate to reflect as an element of cost of service nuclear fuel disposal costs in the amount of 1 mill/kwh, or approximately \$168/kg — the amount set forth in the Nuclear Waste Policy Act. The Commission further ordered refunds of amounts collected, without Commission permission, for nuclear fuel disposal costs during prior periods.

e. *Test Power.* In *Pennsylvania Power & Light Company*, Opinion No. 176, 23 FERC ¶ 61,395 (1983), the Commission approved a waiver of its Rules and Regulations governing the fuel adjustment clause so as to permit the utility to exclude from its fuel clause the effect of test power during test operations of the utility's new nuclear plant and to apply the fair value of the test power, which would include fuel savings, as a credit to the construction work in progress account. The Commission stated that such action would avoid the problem of intergenerational inequity which would result if current ratepayers received the benefits of fuel savings from a plant not yet included in rate base, and would be consistent with its accounting regulations.

C. Cost Allocation

1. Allocation of Demand Costs

In developing a demand cost allocator, it is appropriate to apply historical coincidence and load factors to the sales forecast to compute class and system peaks, the Commission said in *Kentucky Utilities Company*, Opinion No. 184, 24 FERC ¶ 61,158 (1983).

In *Southwestern Public Service Company*, Opinion No. 162, 22 FERC ¶ 61,341 (1983), the Commission noted that in determining whether to adopt the 3-CP or the 12-CP method of demand cost allocation, the *use* of new plant (to meet peak demand or merely to reduce base load energy costs) as well as the *type* of new plant (base load or peaking) must be considered. The Commission then found that use of the 3-CP method was appropriate even where base load units were planned and constructed when, because of growth in peak demand, those base load units are used to meet peak demand.

In *Wisconsin Public Service Corporation*, Opinion No. 194, 25 FERC ¶ 61,101

(1983), the Commission was faced with the appropriateness of increasing the level of demand costs allocated to wholesale interruptible customers following the implementation of interruptible rates at the retail level. The Commission found that such an increase was just and reasonable and made a corresponding assignment of revenue credits to the wholesale interruptible customers in recognition of increased reservation sales made possible by the implementation of the interruptible rates.

In *Arizona Public Service Commission*, Opinion No. 177, 23 FERC ¶ 61,419 (1983), the Commission adhered to its policy of allocating capacity costs based upon actual or projected peak demand for wholesale customers and thus rejected Arizona's proposal to allocate capacity costs based upon contract minimums.

In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission stated that customers served under an interruptible load tariff should share no responsibility for peak load under a peak demand cost allocation methodology and therefore should be excluded in determining the percentage responsibility of each class under the 12 CP demand cost allocation methodology. In Opinion No. 185-A, 24 FERC ¶ 61,380 (1983), the Commission held that this treatment is consistent with the inclusion of a demand charge in the rate for energy sold to non-firm customers, which demand charge is then credited against cost of service for the benefit of full requirements customers who bear capacity costs.

2. *Transmission Loss Factors*

In *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61,199 (1983), the Commission reaffirmed its policy, announced in Opinion No. 110, that transmission loss factors must be supported by record evidence which is reliable and is based on voltage and type of line and customer class.

D. *Capital Structure and Return*

1. *Capital Structure*

In *Philadelphia Electric Company*, Opinion No. 197, 25 FERC ¶ 61,165 (1983), the Commission stated that, as a general rule, when a subsidiary is wholly financed by its parent, the consolidated capital structure of the parent should be imputed to the subsidiary. However, the Commission found that application of the general rule was inappropriate where the consolidated capital structure had not been used to establish rates for the parent in its last rate case and where the risks of the parent and the subsidiary were substantially different.

2. *Return on Equity*

In *New England Power Company*, Opinion No. 158, 22 FERC ¶ 61,123 (1983), the Commission authorized a return on equity of 16.14%. This return was derived using a dividend yield of 11.95% to 12.44%, a dividend growth rate of 2.4% to 4.0% and an adjustment for flotation costs estimated at 5% of the gross proceeds from new shares. The Commission emphasized that in determining dividend yield, the data

used must be the most current historic data available and the periods used for yields and stock prices must match. The Commission also reaffirmed its practice of excluding the utility's investment in the Yankee companies (companies which own and operate nuclear generating plants and which are partially owned by the utility) from the utility's common equity in calculating the rate of return, since the rate of return for each Yankee company is determined in a separate proceeding on a stand alone basis and thus an inclusion of the Yankee investment in the utility's equity would result in the utility earning a double return on that investment.

It is proper to reduce a utility's equity by ADITCs, since the ADITC account should earn only the overall rate of return and not the return on equity rate, the Commission stated in *Southwestern Public Service Company*, Opinion No. 162, 22 FERC ¶ 61,341 (1983).

In *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), the Commission clarified that a growth rate which is reliable for use in a DCF analysis cannot be based solely on historical, or backward-looking, data.

3. Rate of Return

Unless a unit sales contract clearly provides to the contrary, it is appropriate to use incremental costs associated with the given unit, rather than systemwide embedded costs, to calculate the rate of return under a unit sale contract, the Commission said in *Public Service Company of New Hampshire*, Opinion No. 161, 22 FERC ¶ 61,229 (1983). The Commission further found that under a true incremental costing approach, the rate of return is calculated by using the capital structure and cost of capital at the time the bulk of the project is completed, with an updating only for the costs of common equity. In Opinion No. 161-A on rehearing, 23 FERC ¶ 61,326 (1983), the Commission rejected the utility's request to adjust the calculated rate of return to reflect, at the cost of common equity, internal financing associated with the unit subsequent to the time when the bulk of the project was completed. The Commission found that the requested adjustment failed to take into account the depreciation which had provided a return of capital on the unit since the time the unit was completed.

In *Public Service Company of New Mexico*, Opinion No. 164, 23 FERC ¶ 61,218 (1983), the Commission found that arbitrage income should be used to reduce long term debt and further found that the arbitrage should be amortized over the book life of the asset with respect to which the bonds giving rise to the arbitrage were issued.

E. Rate Design

In its Order on Rehearing in *Arizona Public Service Company*, Opinion No. 177-A, 25 FERC ¶ 61,166 (1983), the Commission required the Company to calculate unit demand charges by dividing contract billing demands, rather than projected non-coincidental peak demands, into allocated demand costs.

The Commission rejected the proposal for a rate tilt in *Delmarva Power and Light Company*, Opinion No. 189, 25 FERC ¶ 61,022 (1983), based upon its finding that the record evidence failed to justify a departure from the Commission's policy against non-cost-based rate tilts.

1. *Demand Ratchet*

In *Kansas Gas and Electric Company*, Opinion No. 188, 25 FERC ¶ 61,007 (1983), the Commission reiterated its general rule disallowing use of a demand ratchet in conjunction with the 12-CP method of demand allocation absent proof by the utility that an exception to the general rule was justified. The Commission then deferred ruling on the merits of the request for a demand ratchet, permitting the Company to provide further evidence in support of the ratchet in a subsequent proceeding.

In *Commonwealth Edison Company*, Opinion No. 165, 23 FERC ¶ 61,219 (1983), the Commission adopted an 80% demand ratchet based upon a 4-CP demand allocation method, finding that such a ratchet provides rate stability yet still recognizes the peak use demand cost responsibility within the customer class.

2. *Time of Day Rates*

In *Wisconsin Electric Power Company*, Opinion No. 186,³ the Commission adopted time differentiated rates based on marginal cost pricing, with peak rates applied from 8 a.m. to 8 p.m. The energy component of the rates was based upon pure marginal costs and the demand component was based upon less than full long-term marginal cost in order to reconcile revenues received to the traditional revenue requirement. The Commission stated that time-differentiated rates are a variation of, and improvement over, traditional peak-load pricing methodologies. The Commission further stated that use of marginal costs as the basis for the time differentiated rates results in a more accurate tracking of costs, a more accurate price signal, and improved economic efficiency.

3. *Customer Classification*

In determining whether or not wholesale customers are sufficiently dissimilar to warrant their placement in different rate classes, it is appropriate to look to all factors, not only to load and coincidence factors, the Commission said in *Kentucky Utilities Company*, Opinion No. 184, 24 FERC ¶ 61,158 (1983).

F. *Services*

1. *Economy Purchases.*

In *Ohio Edison Company*, Opinion No. 170, 23 FERC ¶ 61,344 (1983), the Commission stated that in order to provide an incentive for coordination transactions or to meet other policy objectives, rates may be based on costs which are less closely related to strict accounting costs and which more nearly approximate economic costs. The Commission subsequently approved emergency rates which included an uncapped 10% adder, and approved a 30 mill per kWh minimum charge for emergency service.

³FERC ¶61,204 (1983), *petition for review docketed sub nom.* Electric Consumer Council v. FERC. No. 84-1006 (D.C. Cir. Jan. 11, 1984).

The Commission also found in *Ohio Edison Company*, Opinion No. 170, 23 FERC ¶ 61,344 (1983), that it is reasonable to recover revenues foregone from economy energy transactions as an out-of-pocket cost of providing emergency power and non-displacement energy, but that foregone revenues should not be included in the 10% adder otherwise applicable to these transactions.

Finding that a split-savings pricing scheme provides benefits to both the buyer and the seller and assures the efficient use of generating resources, the Commission, in *Commonwealth Edison Company*, Opinion No. 165, 23 FERC ¶ 61,219 (1983), approved a rate schedule for economy purchases based upon a split-savings formula. For maintenance and emergency purchases, the Commission approved a price set at 110% of the seller's incremental costs.

2. *Notice of Cancellation.*

In *Kentucky Utilities Company*, Opinion No. 169, 23 FERC ¶ 61,317 (1983), the Commission found that a required three year notice of cancellation for customers with loads of less than 25 mW and a required five year notice of cancellation for customers with loads of 25 mW or greater were reasonable in light of planning needs of the utility, and that a provision requiring that the notice of cancellation be accompanied by a specification of the new source and date of supply and an affidavit from the new supplier was just and reasonable to insure good faith by customers when giving notices of cancellation. On rehearing, in Opinion No. 169-A, 25 FERC ¶ 61,205 (1983), the Commission limited the aggregate loss of load to which the utility could be subjected as a result of customer cancellations to 25 mW during any one year.

3. *Restricted Service.*

In *Kentucky Utilities Company*, Opinion No. 169, 23 FERC ¶ 61,317 (1983), the Commission found that a provision in the utility's rate schedule which made service under the schedule available solely to full requirements customers, and not to partial requirements customers, constituted a change in service. Since, according to the Commission, the utility had not justified the change, the Commission ordered the restriction removed. In Opinion No. 169-A on rehearing, 25 FERC ¶ 61,205 (1983), the Commission affirmed its action removing the restriction. In doing so, however, the Commission clarified that it did not intend to make service under the schedule available to all customers in all circumstances, but rather intended solely to prohibit the utility from foreclosing use of the schedule to partial requirements customers.

4. *Termination of Rate Schedule.*

Where a contract on file with the Commission as a rate schedule has not been used to conduct business for a number of years, and is unlikely to be so used in the future, it is appropriate to terminate both the rate schedule and the Commission's investigation into the contract and related practices and agreements, the Commission stated in *Pacific Power & Light Company*, Opinion No. 175, 23 FERC ¶ 61,402 (1983).

G. *Discriminatory Practices*

Relying upon *Central Illinois Public Service Company*, Opinion No. 142, 20 FERC ¶ 61,043 (1982), the Commission determined in *Kansas Gas and Electric Company*, Opinion No. 188, 25 FERC ¶ 61,007 (1983), that a temporary difference in rates charged to cooperative versus municipals which was logically explained, did not involve bad faith or improper conduct by the utility, and was not shown to be likely to result in actual competitive harm or other undue discrimination, did not violate Sections 205(b) and 206 of the Federal Power Act.

Upon remand of Opinion No. 54, 8 FERC ¶ 61,083 (1979), from the United States Court of Appeals for the District of Columbia Circuit, the Commission determined in *Alabama Power Company*, Docket No. E-8851, Opinion No. 54-A, 23 FERC ¶ 61,392 (1983), that rates are not “unduly” discriminatory simply because a disparity of 0.45% exists in rates of return earned from two customers within the same class. The Commission stated that such disparities are inherent when two or more customers are placed in the same rate class, and that there is no undue discrimination if the rate classification is reasonable.

The fact that the estimated cost of spent nuclear fuel disposal is reflected in the rates of only one of a utility's various customers does not result in discriminatory rates for that customer when the spent nuclear fuel allowance is justified on the record, the Commission said in *Boston Edison Company*, Opinion No. 156-C, 23 FERC ¶ 61,410 (1983).

The Commission stated in *Delmarva Power and Light Company*, Opinion No. 185, 24 FERC ¶ 61, 199 (1983), that a temporary disparity in rates between customer classes which arises as a result of settled versus litigated rates, and not as a result of bad faith or improper conduct by the utility, is not unlawful absent actual competitive harm or evidence that the disparity would otherwise be unduly discriminatory.

H. *Wheeling*

Southeastern Power Administration v. Kentucky Utilities Company, Opinion No. 198, 25 FERC ¶ 61,204 (1983), *rehearing denied*, 26 FERC ¶ 61,127 (1984), was a case of first impression before the Commission involving the interpretation of the Commission's authority to require wheeling granted by the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117 (1978) (PURPA). The case was initiated upon the application by the Southeastern Power Administration (SEPA) for an order to compel Kentucky Utilities Company (Kentucky) to wheel to certain municipal systems power and energy generated by SEPA after attempts by SEPA and Kentucky to negotiate a wheeling agreement were unsuccessful. The Commission denied SEPA's request on the grounds that its authority to order wheeling under PURPA is limited and may not be invoked where an order to wheel would affect the competitive relationship between the wheeling utility and the party who seeks to have the power wheeled vis-a-vis the customers to be served.

I. Bulk Power Experimental Rates

In *Public Service Company of New Mexico*, Opinion No. 203, 25 FERC ¶ 61,469 (1983), the Commission approved as just and reasonable a much-publicized experimental rate for bulk power transactions among four utilities doing business in the Southwestern United States. Under the experiment, which may continue for no more than two years, the utilities agreed "to trade in two fairly standardized commodities, economy energy and block energy." With certain limitations, the utilities must make their transmission facilities available to each other for such transactions involving economy energy and block energy. The price for sales of economy and block energy may vary, so long as the price falls within a zone delimited at the upper end by twice the average fully allocated cost for the participating utilities and at the lower end by half the average regional incremental running cost. With respect to accounting for revenues received under the transactions, the utilities must apply 75% of the revenues received as a credit against fuel and purchased power expense and may retain the remaining 25% for the benefit of their shareholders. The Commission emphasized that the filing approved in Opinion No. 203 was indeed an experiment, which it characterized as "highly significant," and explained the Commission's interest in the filing as the potential of the filing "to help us examine our regulation of coordination sales to ensure that we are administering the Federal Power Act in a manner which ensures that electricity is being produced at the lowest possible cost."

IV. APPELLATE REVIEW

American Paper Institute v. American Electric Power Service Corporation, ___ U.S. ___, 76 L.Ed.2d 22, 103 S.Ct. 1921 (1983). American Electric Power Service Corporation appealed two of the Commission's cogeneration rules issued in 1980 (Order No. 69) to implement Section 210 of PURPA. Specifically, the first rule required electric utilities to purchase energy from qualifying cogenerators and small power producers (qualifying facilities) at a rate equal to full avoided cost, and the second rule required the utilities to make such interconnections with qualifying facilities as are necessary to effect purchases or sales of electricity authorized by PURPA. The Court of Appeals held that the Commission had not adequately explained its full avoided cost rule and had exceeded its statutory authority in promulgating the interconnection rule. *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982). The Supreme Court reversed. Central to the Supreme Court's decision was the intent of Congress to encourage and facilitate cogeneration and small power production.

The Court held that it was not unreasonable for the Commission to prescribe the maximum rate authorized by PURPA (full avoided cost) in light of (1) the increased incentive such a rate would provide cogenerators and small power producers, (2) the benefit to ratepayers and the nation as a whole as reliance on fossil fuel decreases, (3) the great difficulty in establishing a rate at less than full avoided cost, and (4) the potential flexibility of the full avoided cost rule.

The Court also held that the Commission was not acting beyond its statutory authority by requiring utilities to interconnect with qualifying facilities without first

affording an opportunity for an evidentiary hearing. The Court recognized that Section 210(e)(3) of PURPA could be interpreted as requiring such a hearing but found that such a requirement was not intended by Congress. The Court stated that a requirement of an evidentiary hearing for every interconnection necessary to complete a purchase or sale under PURPA “would seriously impede the very development of cogeneration and small power production that Congress sought to facilitate.”

Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission, ___ U.S. ___, 76 L.Ed.2d 1, 103 S.Ct. 1095 (1983). In this case the Supreme Court sustained the Arkansas Public Service Commission’s attempt to regulate the wholesale rates charged by the Arkansas Electric Cooperative Corporation (AECC) to its member cooperatives. The seventeen member cooperatives who made up the AECC in turn served the ultimate consumers. In reaching its decision the Supreme Court held that the state commission was neither pre-empted by federal regulation nor precluded by the Commerce Clause from exerting regulatory authority over such wholesale rates.

Initially, the Court recognized that the Commission had previously held that it had no jurisdiction under the Federal Power Act to regulate wholesale rates charged by rural power cooperatives which operated under the administration of the Rural Electrification Administration (REA). In addition, the Court conceded that if rural cooperatives fell within the regulatory scheme of the Federal Power Act, or if the REA validly promulgated a rule prohibiting state regulation, the states would then be pre-empted from exercising jurisdiction.

In deciding the Commerce Clause issue, the court used a “balance of interests” test applied in modern Commerce Clause cases. Under this test, the Court found (1) that state regulation of the wholesale rates charged by the AECC was “well within the scope of ‘legitimate local interests’”, particularly since the AECC’s operations were chiefly (though not solely) intrastate in nature and (2) that the incidental effect of state regulation on interstate commerce in relation to the purported local benefits was inadequate to preclude state regulation.

Exxon Corp. v. Agerton, ___ U.S. ___, 76 L.Ed.2d 497, 103 S.Ct. 2296 (1983). The Supreme Court, in a ruling applicable to the Federal Power Act, held that the Natural Gas Act preempts state regulation of whether or not costs should be reflected in rates under the Commission’s jurisdiction.

In 1979, the State of Alabama enacted a statute which increased the severance tax on oil and gas extracted from Alabama wells from 4% to 6%. The statute also exempted royalty owners from liability for the increased tax and stated that producers were prohibited from passing on the costs of the increased tax, either directly or indirectly, to consumers. The producers challenged the statute as unconstitutional.

The Supreme Court rejected the arguments that the pass-through prohibition and royalty exemptions violated either the Equal Protection or the Contract Clauses. The Court held, however, that the state pass-through prohibition “trespassed upon the Commission’s statutory authority over wholesale sales of gas in interstate commerce” under the Natural Gas Act and thus was preempted by federal law insofar as it applied to sales of gas in interstate commerce.

Boroughs of Ellwood City, v. FERC, 701 F.2d 266 (3rd Cir. 1983). In this case the

Third Circuit held that a Commission decision setting a rate suspension period of one day rather than five months is not subject to review.

The Petitioner Boroughs alleged that the Commission failed adequately to explain why it did not suspend the rates for the maximum period of five months. In reaching its decision, the Court relied on *Arrow Transportation v. Southern Railway Company*, 372 U.S. 658 (1963) which concerned a suspension decision by the ICC pursuant to a nearly identical suspension provision of the Interstate Commerce Act. The Supreme Court held that the Act gave the agency "the sole and exclusive power to suspend" and such power could not be subject to interference by the courts. The Court further stated that the suspension decision herein involved was an interlocutory order and review of such a decision could "constitute a particularly disruptive encroachment on the administrative process."

Carolina Power and Light Company v. FERC, 716 F.2d 52 (D.C. Cir. 1983). In this case Carolina Power and Light Company sought review of a Commission decision refusing to allow the company to include, as a cost of service, expenses associated with the permanent disposal of spent nuclear fuel. The spent fuel had been stored in anticipation of its being reprocessed. However, due to a number of factors all of the reprocessing plants were closed. Evidence gathered at a hearing before the Commission suggested that the reopening of the reprocessing plants would occur no earlier than the 1990's. Furthermore, even at that time only the most recently spent fuel would be reprocessed due to a tremendous backlog and over time the valuable fissionable material of spent nuclear fuel decays.

The Court remanded the case, finding that the Commission had failed to set forth clearly the basis for reaching its decision. In particular, the Court cited as inadequate the Commission's conclusory dismissal of the reprocessing issue and its failure to discuss the implications of the backlog. In addition, the Court recognized the apparent inconsistency between the Commission's disposition of the present case and its decision in *Boston Edison Co.*, 18 FERC ¶ 63,059 (1982). In *Boston Edison*, the Commission allowed a utility to include costs associated with permanent disposal of spent nuclear fuel in rates charged to customers.

Cities of Carlisle and Neola v. FERC, 704 F.2d 1259 (D.C. Cir. 1983), *petition for rehearing pending* (argued March 23, 1984). The Cities sought review of a Commission decision to accept without suspension a rate filing by Iowa Power and Light. The Court delineated the determinative factors concerning review of agency decisions as: (1) the finality of the order (2) the irreparability of injury to the petitioner if review is refused, and (3) the degree to which review will invade a province reserved to agency discretion.

The Court held that the Commission's decision to accept the rate filing without suspension did not constitute approval of the rates, but only determined that review would not take place pursuant to Section 205 of the Federal Power Act. The Court further held that nonreview would not result in irreparable injury since the Cities had no right to the remedies granted by Section 205. "Rather, the plain language of the Act places exclusively within the discretion of the agency the decision whether to institute proceedings under that section." Finally, the Court held that judicial review of a Commission decision not to suspend rates would unduly interfere with the agency's administration.

City of Chanute v. Kansas Gas & Electric Company, 564 F.Supp. 1416 (D. Kan. 1983).

The District Court granted a request by three cities (Cities) for a preliminary injunction and ordered Kansas Gas & Electric (KG&E) to wheel to the Cities their entitlements to power generation by the Southwestern Power Administration and the Normal Creek Generating Plant, at the prevailing rate KG&E charges other municipalities for its wheeling services.

The Cities filed the action charging KG&E with an antitrust violation arising out of its refusal to wheel energy to the Cities from those sources. KG&E asserted that Cities could petition the Commission to order wheeling and therefore had an adequate remedy at law which pre-empted the Cities' right to injunctive relief. The Court disagreed. After reviewing the relevant sections of PURPA's legislative history the Court concluded "it was not contemplated that a court entertaining an antitrust suit should defer to the FERC matters requiring application of the antitrust laws."

The Court went on to balance the interests involved, finding that (1) the Cities face a substantial and possibly irreparable hardship resulting from KG&E's refusal to wheel; (2) KG&E's hardship will be significantly less if the Court orders it to wheel, and (3) the public interest in this case favors wheeling, so as to help insure the availability of relatively low cost alternative sources of power.

Electricities of North Carolina v. FERC, 708 F.2d 783, (D.C. Cir. 1983). This appeal, by wholesale customers of Carolina Power & Light Company (CP&L), challenged the Commission's interpretation and application of Order No. 530-B, which Order allowed normalization of book/tax timing differences. The Commission had interpreted Order No. 530-B to permit normalization for all timing differences, specifically including seven items of timing differences listed in Order No. 530, and had thus approved normalization by CP&L with respect to four items, included in the list of seven, without making a specific finding that the items would result in timing differences only, and would not result in permanent tax savings. Petitioners argued that Order No. 530-B required the Commission to make a specific determination that a tax deferral, and not a tax savings, resulted from the use of normalization whenever opponents of normalization put forth evidence of such a tax savings.

The Court found that, under Order No. 530-B, opponents of normalization were permitted to submit evidence of a permanent tax savings only when there existed some question with respect to the issue of tax deferral versus tax savings, and that no such question existed with respect to the seven items of timing differences listed in Order No. 530. The Court further found that, since the four items normalized by CP&L were included among the seven items listed in Order No. 530, the Commission had correctly interpreted and applied Order No. 530-B.

The petitioners further argued that Commission Opinion No. 19-A, which approved CP&L's use of normalization without any consideration of evidence by opponents of normalization, was arbitrarily inconsistent with an interim order, issued subsequent to Opinion No. 19-A, which permitted all parties to file testimony on the question of tax deferral versus tax savings if the utility seeking to use normalization first filed testimony on the issue. The Court disagreed with the petitioners' arguments.

The petitioners finally argued that the Commission should not have permitted CP&L to normalize construction-related interest expenses. Petitioners' argument

was based upon the fact that CP&L had stated that its treatment of construction-related interest was intraperiod tax allocation rather than normalization. The Court, however, found that CP&L's intraperiod tax allocation was, in fact, one form of tax normalization and, therefore, the Commission had properly permitted normalization of CP&L's construction-related interest.

Florida Power and Light Co. v. FERC, 711 F.2d 219 (D.C. Cir. 1983). In this case, the Court of Appeals for the District of Columbia Circuit upheld a refusal by the Commission to consider challenges made by Florida Power & Light (FPL) to self-certification made by Resource Recovery (Dade County) Inc. (RRD) as a qualifying small power production facility and to RRD's filing of initial energy rates at full avoided costs under PURPA.

FPL's challenge to RRD's qualifying status was premised upon its contention that RRD was contractually obligated to relinquish ownership of the electric generating facility to FPL and to provide steam at agreed upon rates. FPL claimed that the allegations concerning RRD's obligations required the Commission to make a formal determination of RRD's qualifying status pursuant to 18 C.F.R. § 292.207(b) rather than merely allow RRD to claim this status through the self-certification process under Section 292.207(a).

On appeal, the Court rejected FPL's assertion that the Commission was required to examine whether RRD's claim to qualifying status conflicted with its contractual obligations under the *Mobile-Sierra* doctrine. The Court held that the doctrine was not applicable to a claim of qualifying status under Section 292.207(a). Additionally, the Court refused to overrule the Commission's determination not to disturb RRD's facially valid self-certification. By regulation, RRD was entitled to seek qualifying status for a facility so long as it is the owner or operator and thus met the criteria of Section 292.203. Although FPL challenged RRD's ownership status, RRD was in fact the operator of the facility. Finally, the Court sustained the Commission's conditional acceptance of RRD's initial rate filing.

Kansas Cities v. FERC, 723 F.2d 82 (D.C. Cir. 1983). In this appeal, various cities in Kansas which were customers of Kansas Gas and Electric Company (KG&E) challenged three aspects of a Commission order approving a rate increase for KG&E. The Cities argued that the Commission (1) erred in applying the just and reasonable standard to rate charges under contracts between KG&E and the Cities of Bronson and Neodesha, (2) erred procedurally and substantively in applying the just and reasonable standard to a contract between KG&E and the City of Iola, and (3) erred in approving rates without first resolving allegations of price squeeze.

The Court reviewed the "three contractual regimes for electricity rate changes" under the Federal Power Act as set forth in the concurrently issued *Papago Tribal Utility Authority* decision, discussed in more detail below. Those three "regimes" are unilaterally proposed rate changes under Section 205 which must meet the "just and reasonable" standard, Commission initiated changes under Section 206 which must meet the "public interest" standard, and Commission initiated changes under Section 206 applying a "just and reasonable" standard.

With respect to the Bronson and Neodesha contracts, which contained language subjecting rates under the contracts to changes "ordered or approved" by any regulatory body having jurisdiction to do so, the Court found the Commission's interpretation of the contracts requiring application of the just and reasonable

standard “amply supported.” The Court also noted the prevailing tendency by courts and the Commission to interpret contracts as calling for application of the just and reasonable standard rather than the public interest standard.

With respect to the Iola contract, the Commission in 1978 had determined that rates for firm service under the contract were subject to change only if the public interest standard were met. Later, the Commission determined in Opinion No. 80-B that rates for nonfirm service were subject to change under the just and reasonable standard. The Court held that the Commission’s finding with respect to nonfirm service was procedurally permissible, since the 1978 Order addressed firm service rates, and not nonfirm rates, and since, even if Opinion No. 80-B had been a departure from the 1978 Order, such a departure is permissible in response to an application for rehearing. The Court also held that the Commission’s finding with respect to application of the just and reasonable standard to nonfirm service rates was substantively correct because it was “amply supported” in the record.

In response to the Cities’ argument that the Commission may not permit new rates to become effective without first adjudicating allegations of a price squeeze, the Court stated that no such requirement was imposed by the Federal Power Act or by decisions of the United States Supreme Court and that the approval of just and reasonable rates prior to resolution of the question of an alleged squeeze is within the sound discretion of the Commission.

New York State Electric and Gas Corporation v. FERC, 712 F.2d 762 (2d Cir. 1983). At issue in this proceeding was the application of the *Mobile-Sierra* doctrine to an Agreement between New York State Electric & Gas Corporation (NYSEG) and the Power Authority of the State of New York (PASNY). The Agreement provided that PASNY would compensate NYSEG for wheeling services “at such rates as shall be approved by FERC,” and that the first rate to be filed by NYSEG would be “\$2.85 per month per kilowatt of billing demand.” Initially the Commission accepted the proposed \$2.85 rate for filing, ordered hearings to determine the reasonableness of the rate, and ordered NYSEG to revise its filing to reflect the Commission’s newly issued normalization rule promulgated by Order No. 144-A. NYSEG’s revised filing, effective immediately, produced a rate of \$3.13. After receipt of a motion to reject the filing based on the *Mobile-Sierra* doctrine, the Commission reinstated the \$2.85 rate and ordered refunds.

NYSEG challenged the Commission’s latter action on procedural grounds and on the substantive grounds that the Commission had “approved” the higher \$3.13 rate and thus the *Mobile-Sierra* doctrine was not violated, and that the *Mobile-Sierra* doctrine was inapplicable in any event when a third party, such as the FERC, had ordered the rate increase. The Court disagreed with NYSEG’s arguments and enforced the Commission order which had reinstated the \$2.85 rate. With respect to the procedural challenge based on the timeliness of the motion to reject, the Court deferred to the Commission’s reasoning that the time for filing such a motion begins to run only after the effect of an order was reasonably discovered, and based upon such reasoning, the motion to reject was timely filed. With respect to the *Mobile-Sierra* arguments the Court agreed with the Commission that the language in the NYSEG/PASNY agreement which talked about rates “approved by the FERC” referred to an ultimate determination of justness and reasonableness of proposed rates — not merely to an acceptance of the rates for filing. The Court thus held that

the Commission's first order accepting the proposed rates for filing as adjusted to take into account the Order No. 144-A normalization rule was not an approval of those rates and that the Commission's reinstatement of the \$2.85 rate out of deference to the *Mobile-Sierra* doctrine was not an abuse of discretion.

Papago Tribal Utility Authority v. FERC, 723 F.2d 950 (D.C. Cir. 1983), *petition for cert. filed*, No. 83-1652 (April 10, 1984). The controversy in this case centered on the interpretation of a contract provision for rate changes set forth in a contract between Papago Tribal Utility Authority (PTUA) and Arizona Public Service Company (APS).

The Court of Appeals set forth the three means by which to effect rate changes under the Federal Power Act.

First, the parties may agree that new rates can be unilaterally and immediately imposed by the utility, subject, under § 205, to commission suspension for no longer than five months, and to ultimate Commission disallowance if they are not just and reasonable. Second, by broad waiver, the parties may eliminate both the utility's right to make immediately effective rate changes under § 205 and the Commission's power to impose changes under § 206, except the infeasible right of the Commission under § 206 to replace rates that are contrary to the public interest. . . . Third, the parties may contractually eliminate the utility's right to make immediately effective rate changes under § 205 but leave unaffected the power of the Commission under § 206 to replace not only rates that are contrary to the public interest but also rates that are unjust, unreasonable, or unduly discriminatory or preferential to the detriment of the contracting purchaser.

723 F.2d at 953. The provision of the contract at issue provided:

The rates hereinabove set out in this Section 3 . . . are to remain in effect for the initial one (1) year of the term of this contract and thereafter unless and until changed by the Federal Power Commission or other lawful regulatory authority, with either party hereto to be free unilaterally to take appropriate action before the Federal Power Commission or other lawful regulatory authority in connection with changes which may be desired by such party."

The Court of Appeals concurred with the Commission that the contract provision permitted changes under the just and reasonable standard of Section 206. The Court held that since the restriction on rate changes during the initial year "cannot abridge the right of the parties to bring to the attention of the Commission during that period rates not in the public interest. . . . The scheme to be in effect 'thereafter' — obviously intended to be less restrictive — must therefore permit changes that are just and reasonable." This intent becomes clearer upon recognition of the fact that the "public interest standard" is practically impossible to meet. The Court went on to hold that the presence of an automatic adjustment in the base monthly rate did not imply the intent to restrict just and reasonable rate revisions. "Since reasonableness is not a fixed point but a zone, there would be scope for operation of the adjustment provisions before the factors producing the adjustment took the rate entirely outside the zone of reasonableness."

The Court also sustained the Commission's January 25, 1982 decision which made the rates effective retroactively to August 1, 1978. This holding was reached even though the Commission did not make a finding that the rates existing at the time of the 1978 order were unjust, unreasonable, unduly discriminatory or

preferential (as required by Section 206) until its January 25, 1982 order on remand. The Court, recognizing the “substance of the requirements of § 206(a), rather than to its rigid formalities,” concluded (based on the wide disparity between the then existing rates, and those subsequently approved as reasonable rates) that the Commission’s 1982 determination as to the reasonableness of the new rates amounted to a finding that the former rates were not reasonable.

Public Systems v. FERC, 709 F.2d 73 (D.C. Cir. 1983). This appeal addressed the Commission’s action on remand from *Public Systems v. FERC*, 606 F.2d 973 (D.C. Cir. 1979) (*Public Systems I*). In *Public Systems I*, the Court reviewed Commission Order Nos. 530, 530-A and 530-B which adopted a general policy of normalization (ratable flow-through) rather than current flow-through with respect to all book/tax timing differences not covered by previous Commission orders. Because the Court in *Public Systems I* found that the Commission had failed adequately to explain several aspects of its normalization orders, the orders were remanded to the Commission.

Following remand, the Commission held a new rulemaking proceeding which culminated in Order Nos. 144 and 144-A. These Orders adopted a rule which requires normalization of all book/tax timing differences not previously covered by Commission orders and which requires adoption of some form of “make-up” provision with respect to deficiencies or excesses in existing deferred tax reserves resulting from prior current flow-through treatment of book/tax timing differences.

On appeal, the Court determined that, through Order Nos. 144 and 144-A, the Commission had adequately addressed each of the concerns set forth by the Court in *Public Systems I* and had adequately explained its rationale for adoption of a normalization policy. Consequently, and emphasizing that “[t]he choice between normalization and flow-through is for the Commission,” the Court affirmed the Commission’s normalization orders.

The following appeals were decided between January 1 and June 1, 1984 affecting Part II rules or opinions issued before 1984; these decisions will be reviewed in the Report for calendar year 1984.

Escondido Mutual Water Co., v. La Jolla, et al., — U.S. —, Util L. Rep. (CCH) ¶ 12,878 (1984);

Anaheim v. FERC, 723 F.2d 656 (9th Cir. 1984);

Bethany v. FERC, 727 F.2d 1131 (D.C. Cir. 1984);

Boroughs of Ellwood City, et al. v. FERC, 731 F.2d 959, (D.C. Cir. 1984);

Cincinnati Gas & Electric Company v. FERC, 724 F.2d 350 (6th Cir. 1984);

Commonwealth of Massachusetts v. FERC, 729 F.2d 886, (1st Cir. 1984);

Towns of Concord, et al., v. FERC, 729 F.2d 824, (D.C. Cir. 1984);

Fort Pierce Utilities Authority v. FERC, 730 F.2d 778, (D.C. Cir. 1984);

Jersey Central Power & Light v. FERC, 730 F.2d 816, (D.C. Cir. 1984); and

Nantahala Power & Light v. FERC, 727 F.2d 1342 (4th Cir. 1984).

The Office of the Solicitor advises that additional appeals are pending on the following matters from 1983 or earlier:

1. Opinion 133-A, *Public Service Commission of New Mexico*.
2. Opinion 143, *Pacific Gas & Electric Company*.

3. Opinion 152, *Florida Power & Light Co.*
4. Opinions 164 and 164-A, *Public Service Company of New Mexico.*
5. Opinion 175, *Pacific Power & Light Co.*
6. Opinion 177, *Arizona Public Service Co.*
7. Opinions 185 and 185-A, *Delmarva Power & Light Co.*
8. Opinions 186 and 186-A, *Wisconsin Electric Power Co.*
9. Opinion 188, *Kansas Gas and Electric Co.*

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