

REPORT OF THE JUDICIAL REVIEW COMMITTEE

This report summarizes cases reviewing decisions by the Federal Energy Regulatory Commission (FERC) and other cases pertinent to energy regulation. The time frame covered by this report is January 2011 through December 2011.*

I.	Administrative Law.....	301
	A. Displacement of Federal Common Law	301
	B. Standing, Ripeness, and Aggrievement	304
	C. Bankruptcy, Mootness, and Vacature	304
	D. Applying <i>Chevron</i> Deference to Agency Retreat from Clarity to Ambiguity	306
II.	Federal Power Act.....	307
	A. Hydroelectric Licensing.....	307
	1. Rental Fees for Federal Land	307
	2. State Authority Under the Clean Water Act.....	311
	3. Defining Construction and Repair	312
	B. Electric Rates	315
	1. Market-Based Rates	315
	2. Burden in Complaints Under FPA Section 206	316
	3. Reactive Power	317
	4. Comparability Principle in Transmission Rates.....	318
	5. RTO Budgets.....	320
III.	Natural Gas Act.....	321
	A. Jurisdiction to Gather Market Information Under NGA Section 23	321
	B. Delegation of Certification Authority to Staff Under NGA Section 7	322
IV.	Interstate Commerce Act.....	323
	A. FERC Jurisdiction.....	323
	B. Rate Adjustments on the Trans Alaska Pipeline System	324
	C. Index Rates	324
V.	Other Statutes and Laws.....	327
	A. Atomic Energy Act; Standards for Re-Licensing	327
	B. Tax Injunction Act.....	328
	C. Civil Procedure and Common Law Property Rights	330

I. ADMINISTRATIVE LAW

A. Displacement of Federal Common Law

In *American Electric Power Co. v. Connecticut*, the United States Supreme Court held that the statutory delegation of authority to the Environmental Protection Agency (EPA) to regulate emissions of carbon dioxide and other greenhouse gases under the Clean Air Act (CAA) displaces federal common law

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public nuisance claims brought by governmental and private entities against operators of fossil-fuel fired power plants.¹

In several respects, *American Electric Power* is a sequel to *Massachusetts v. EPA*, in which the Court held that the CAA² authorizes federal regulation of greenhouse gas emissions.³ In response to the Massachusetts decision, the EPA formally declared greenhouse gas emissions to be air pollutants that contribute to climate change and initiated rulemakings to address such emissions from certain sources.⁴ But the rulemaking process remained incomplete as of the Court's decision on June 20, 2011. In describing this background, the Court "caution[ed]" that it "endorses no particular view of the complicated issues related to carbon-dioxide emissions and climate change."⁵

In 2004, long before the Massachusetts decision and the EPA's subsequent rulemaking efforts, eight states, New York City, and three nonprofit land trust groups brought suit against four utilities – American Electric Power Company, Inc., Southern Company, Xcel Energy Inc., and Cinergy Corporation – that operate fossil-fuel fired power plants.⁶ The plaintiffs sought injunctive relief in the form of emissions caps and reductions, alleging that the power plants' emissions violated the federal common law of nuisance and, alternatively, state tort law.⁷

"The [d]istrict [c]ourt dismissed [the] suits as presenting non-justiciable political questions."⁸ However, the U.S. Court of Appeals for the Second Circuit reversed, holding that the political question doctrine was not a bar and that the plaintiffs had adequately demonstrated standing.⁹ On the merits, the Second Circuit found that the plaintiffs had stated federal common law nuisance claims and that the CAA did not displace those claims.¹⁰ In the Second Circuit's view, federal common law could not be displaced "[u]ntil EPA completes the rulemaking process."¹¹

The Supreme Court summarily affirmed the Second Circuit's decision on standing by an equally divided Court.¹² Four members of the Court would find adequate standing under the Massachusetts decision; while four members would follow the Massachusetts dissent of Chief Justice Roberts and find that none of the plaintiffs has standing.¹³

Turning to the federal common law claims, the Court first explained that the area of environmental protection, and interstate, ambient air quality in particular,

1. *American Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2531 *2011).

2. Clean Air Act (CAA), 42 U.S.C. §§ 7401-7671q (2006).

3. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

4. Final Rule, Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (2009) (to be codified at 40 C.F.R. ch. 1).

5. *American Electric Power Co.*, 131 S. Ct. at 2533 n.2.

6. *Id.* at 2534.

7. *Id.*

8. *Id.* (summarizing *Connecticut v. American Elec. Power Co.*, 406 F. Supp. 2d 265 (2005)).

9. *Id.* (summarizing *Connecticut v. American Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009)).

10. *Id.*

11. *Id.* at 2535 (quoting *American Elec. Power Co.*, 582 F.3d at 380).

12. *Id.*; see also, *id.* at 2540 (noting that Justice Sotomayor, who was on the Second Circuit panel, did not participate in the Supreme Court's decision).

13. *Id.* at 2535.

is generally subject to governance by the federal common law.¹⁴ Earlier cases had permitted states to pursue claimed violations of the federal common law of nuisance arising from out-of-state pollution.¹⁵ But, the Court noted that it had not previously decided whether a state could challenge any out-of-state pollution source or whether private persons or political subdivisions could invoke the federal common law of nuisance.¹⁶

In this case, the Court found that it need not reach these questions because the CAA displaces any federal common law claim seeking to abate greenhouse gas emissions based on their contribution to climate change.¹⁷ The test for legislative displacement of federal common law is “whether the statute ‘speak[s] directly to [the] question’ at issue.”¹⁸ Building upon the Massachusetts Court’s holding that carbon-dioxide emissions are air pollutants subject to regulation under the CAA, the Court here held it “equally plain that the [CAA] ‘speaks directly’ to emissions of carbon dioxide from the [utilities’] plants.”¹⁹ In support, the Court explained that the CAA requires the EPA to issue emissions standards for sources including fossil-fuel fired power plants and, if the EPA does not issue such standards, allows states and private parties to petition for a rulemaking.²⁰ Thus, the Court held that the CAA “provides a means to seek limits on emissions of carbon dioxide from domestic power plants – the same relief the plaintiffs seek by invoking federal common law,” and the Court saw “no room for a parallel track.”²¹

Responding to the plaintiffs’ argument that there can be no displacement until the EPA finalizes the emissions standards, the Court disagreed with the Second Circuit and found that the delegation of authority to the EPA, standing alone, displaces federal common law.²² The delegation of authority in the CAA leaves “to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants.”²³ Even if the EPA declined to regulate these emissions, the courts would not be permitted to “employ the federal common law of nuisance to upset the agency’s expert determination.”²⁴

Finally, the Court turned to the plaintiffs’ state tort law claims, directing that these claims be left open for consideration on remand because the Second Circuit had not reached them in the decision on review.²⁵

Justice Alito, in a concurring opinion joined by Justice Thomas, agreed with the judgment of the Court based on the stated assumption that the Massachusetts decision’s interpretation of the CAA is correct.²⁶

14. *Id.* (citing *Illinois v. Milwaukee*, 406 U.S. 91, 93, (1972)).

15. *Id.* at 2535-36 (citing *Missouri v. Illinois*, 180 U.S. 208 (1901), *New Jersey v. City of New York*, 283 U.S. 473 (1931), *Georgia v. Tennessee Copper Co.*, 240 U.S. 650 (1916), and *Illinois*, 406 U.S. 691).

16. *Id.* at 2536.

17. *Id.* at 2537.

18. *Id.* (editorial marks in original) (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

19. *Id.*

20. *Id.* at 2538.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 2539.

25. *Id.* at 2540.

B. *Standing, Ripeness, and Aggrievement*

In *New York Regional Interconnect, Inc. v. FERC*, the D.C. Circuit held that the New York Regional Interconnect, Inc. (NYRI) lacked standing to challenge the Commission's orders approving a new transmission planning process for the New York Independent Transmission System Operator (NYISO).²⁷ The NYISO proposed to condition cost recovery for new transmission projects under its tariff on two requirements.²⁸ First, it required projects to have a "production cost benefit," meaning that "the forecasted production cost savings over the first ten years of the project's in-service life [must] outweigh the project's costs."²⁹ Second, NYISO also required new transmission projects to "be approved by a supermajority of the project's beneficiaries."³⁰ NYRI, which was formed to construct and maintain a new transmission line within the NYISO, argued that these proposed requirements deprived NYRI of an asserted interest in "an impartial assessment of its proposed project."³¹

The court found that NYRI was not aggrieved under Federal Power Act (FPA) section 313³² "because NYRI [did] not have any active proposals for new transmission projects that would be affected by the challenged FERC orders."³³ "NYRI has presented at most an allegation of injury to its procedural rights," which alone is insufficient to give a party standing.³⁴ Moreover, NYRI had withdrawn its application for state approval of the transmission project it proposed in 2009.³⁵ Thus, NYRI's purported injury was too speculative to support standing under Article III.³⁶ "Without an active application for a transmission project in the [NYISO], nothing distinguishes NYRI from any other party who might someday wish to build a high-voltage transmission line in New York."³⁷

C. *Bankruptcy, Mootness, and Vacature*

In *Oregon v. FERC*, Oregon and California challenged the FERC's orders authorizing the construction and operation of a liquid natural gas (LNG) facility and adjoining natural gas pipeline.³⁸ The Ninth Circuit held that the states' consolidated petitions for review were rendered moot when the companies who were developing the projects declared bankruptcy.³⁹ As a result, the court vacated the FERC's orders.⁴⁰

26. *Id.* at 2540-41 (Alito, J., concurring in part and in judgment).

27. *New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581 (D.C. Cir. 2011).

28. *Id.* at 584-585.

29. *Id.* at 585.

30. *Id.*

31. *Id.* at 587.

32. Federal Power Act (FPA) § 313, 16 U.S.C. § 8251 (2006).

33. *New York Reg'l Interconnect, Inc.*, 634 F.3d at 586.

34. *Id.* at 587.

35. *Id.* at 586.

36. *Id.* at 587 (applying the standard described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), and subsequent cases).

37. *Id.*

38. *Oregon v. FERC*, 636 F.3d 1203 (9th Cir. 2011).

39. *Id.* at 1206.

40. *Id.*

In the underlying FERC proceeding, Bradwood Landing LLC (Bradwood) requested a permit under section 3 of the Natural Gas Act (NGA)⁴¹ to construct and operate an LNG import terminal in Clatsop County, Oregon.⁴² Bradwood's co-developer, NorthernStar Energy LLC (NorthernStar) requested a certificate of public convenience and necessity under NGA section 7⁴³ to "construct and operate a natural gas pipeline that would connect the new Bradwood LNG terminal to the Pacific Northwest's existing . . . gas pipeline network."⁴⁴ The FERC granted the requested authorizations and twice denied rehearing.⁴⁵ The states of Oregon and Washington, along with several environmental groups, petitioned for review of the FERC's orders on a variety of grounds.⁴⁶ While the petitions for review were pending, "Bradwood and NorthernStar filed petitions in bankruptcy for Chapter 7 liquidation."⁴⁷ "[A]ll permits and intellectual property owned by Bradwood" were purchased by a holding company at a foreclosure auction,⁴⁸ but it was unclear to the court what had happened with NorthernStar's assets.⁴⁹ In light of these developments, the court held that the consolidated petitions for review were moot because the case had "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law."⁵⁰

The court observed that the FERC's regulations permitted transfer of Bradwood's section 3 permit to a new project proponent.⁵¹ However, the same is not true of NorthernStar's certificate of public convenience and necessity, which "is not transferable in any manner."⁵² Given this difference, the court emphasized that no party disputed "the terminal and the pipeline essentially constitute a single project that will go forward together or not at all" and concluded that "the future of the project as currently permitted is in grave doubt."⁵³ Applying these facts to the law, the court held that "the possibility that the [LNG] project . . . could be revived so as to threaten the interests of petitioners 'is too remote and too speculative a consideration to save this case from mootness.'"⁵⁴ And, because the petitions had been rendered moot, the court further held that "the proper course is to vacate the underlying order."⁵⁵

41. Natural Gas Act (NGA) § 3, 15 U.S.C. § 717b(a) (2006).

42. *Bradwood Landing LLC*, 124 F.E.R.C. ¶ 61,257 (2008).

43. 15 U.S.C. § 717f(c)(1)(A).

44. *Oregon*, 636 F.3d at 1205; 124 F.E.R.C. ¶ 61,257 at P 1.

45. *Oregon*, 636 F.3d at 1205.

46. *Id.*

47. *Id.* (citing the companies' bankruptcy petitions in the Southern District of Texas).

48. *Id.* at 1206.

49. *Id.* at 1206 n.4.

50. *Id.* at 1206 (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969)).

51. *Id.* (citing 18 C.F.R. § 153.9(a) (2011)).

52. *Id.* (quoting 18 C.F.R. § 157.20(e) (2011)).

53. *Id.*

54. *Id.* at 1205 (quoting *Center for Biological Diversity v. Lohn*, 511 F.3d 960, 964 (9th Cir. 2007)).

55. *Id.* (citing *A.L. Mechling Barge Lines, Inc. v. United States*, 368 U.S. 324, 330-31 (1961)).

D. Applying Chevron Deference to Agency Retreat from Clarity to Ambiguity

In *PSEG Energy Resources & Trade LLC v. FERC*,⁵⁶ the D.C. Circuit remanded the FERC's orders accepting the results of the ISO New England Inc.'s (ISO-NE) first forward capacity auction.⁵⁷ The forward capacity auction allows electricity providers to acquire capacity from generators three years before the capacity is to be provided.⁵⁸ Under the parameters of the auction, the ISO-NE announces a starting price and generators bid "for how much capacity they are willing to provide at that price."⁵⁹ The auction continues until enough capacity has been purchased to meet the Installed Capacity Requirement, *i.e.*, the amount of capacity the ISO-NE has determined to be necessary to preserve the reliability of the system three years later.⁶⁰ Additionally, a price floor is established for the auction.⁶¹

The set up of the forward capacity auction allows for the price floor to be hit before the Installed Capacity Requirement is met.⁶² When such a scenario occurs, electricity providers could purchase an excess of capacity.⁶³ The tariff in place during the ISO-NE's first forward capacity auction prevented this result by prorating the price generators received for capacity and allowing generators to accordingly prorate the quantity of capacity they bid into the auction.⁶⁴ Additionally, the tariff stated that "[a]ny proration shall be subject to reliability review."⁶⁵

During the ISO-NE's first forward capacity auction, the price floor was hit before the Installed Capacity Requirement was met, thereby triggering the tariff's Proration Rule.⁶⁶ PSEG, having bid capacity into the auction, attempted to prorate the quantity of capacity it offered but was barred from doing so because the ISO-NE found that PSEG's capacity was necessary for the reliability of the system.⁶⁷ Though PSEG was not allowed to prorate its capacity, the ISO-NE nevertheless prorated the price PSEG received for providing capacity.⁶⁸ This resulted in PSEG receiving less per megawatt of capacity than other generators who had been allowed to prorate their capacity.⁶⁹

PSEG protested the ISO-NE's auction results before the FERC, arguing that the ISO-NE's tariff resulted in "undue discrimination" against the resources most necessary for reliability.⁷⁰ PSEG further argued that the results

56. *PSEG Energy Res. & Trade LLC v. FERC*, 665 F.3d 203 (D.C. Cir. 2011).

57. *Id.* at 205, *remanding, ISO New England Inc.*, 123 F.E.R.C. ¶ 61,290 (2008), *order denying reh'g*, 130 F.E.R.C. ¶ 61,235 (2010).

58. *PSEG Energy Res.*, 665 F.3d at 205.

59. *Id.* at 206.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* (citing *ISO New England Inc.*, 122 F.E.R.C. ¶ 61,049 (2008); FERC Electric Tariff No. 3, Market Rule 1 § II.12.2.7.3(b), 2d Rev. Sheet No. 7314Q, FERC Docket No. ER07-1388-000 (effective Jan. 9, 2008)).

66. *Id.* at 206-7.

67. *Id.* at 206.

68. *Id.*

69. *Id.* at 207.

70. *Id.*

contradicted the basic goal of a forward capacity market, which is to incentivize resources to remain in and be constructed in the areas with the greatest need.⁷¹ The FERC rejected PSEG's arguments and denied its rehearing request, finding instead that the tariff clearly established that "when [a] reliability review precludes quantity proration," price proration must still occur.⁷² Less than one month later, the FERC accepted a revised tariff filing from the ISO-NE in which the Proration Rule was prospectively changed such that when quantity proration was required, price proration did not also occur.⁷³

In reviewing the FERC's order, the D.C. Circuit found that the FERC failed to respond to PSEG's undue discrimination and policy arguments.⁷⁴ Instead, the FERC merely "noted the objections and – without more – characterized them as 'more broadly' supporting PSEG's position."⁷⁵ Because an agency is required to answer all "objections that on their face seem legitimate,"⁷⁶ the D.C. Circuit remanded the case to the FERC in order for the Commission to answer PSEG's objections.⁷⁷

Further, the D.C. Circuit objected to the FERC's decision that the tariff language was clear and the result reached by the FERC was required by the tariff's text.⁷⁸ Applying a *Chevron* analysis, the D.C. Circuit stated that when "an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see."⁷⁹ The D.C. Circuit found the underlying order "a particularly appropriate case for remand" because "[a]lthough FERC denied PSEG the relief it sought, it subsequently . . . revised the tariff language to make [PSEG's requested relief] applicable in future situations."⁸⁰ In remanding the case, the D.C. Circuit stated that "[a] remand will permit the Commission to determine whether, knowing that it has more discretion than it thought it had, PSEG's position would be an appropriate way to interpret the unrevised language as well."⁸¹

II. FEDERAL POWER ACT

A. Hydroelectric Licensing

1. Rental Fees for Federal Land

In *City of Idaho Falls, Idaho v. FERC*, the D.C. Circuit vacated a FERC order setting rental fees to be imposed upon licensees of hydropower projects under Part I of the FPA.⁸² Pursuant to section 10(e)(1) of the FPA, licensees of

71. *Id.*

72. *Id.*

73. *Id.* (citing *ISO New England*, 131 F.E.R.C. ¶ 61,065, at p. 61,345 (2010)).

74. *Id.* at 209.

75. *Id.* at 210.

76. *Id.* at 209 (citing *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005)).

77. *Id.* at 210-11.

78. *Id.* at 208-9.

79. *Id.* at 209 (quoting *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991)).

80. *Id.*

81. *Id.*

82. *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222, 231 (D.C. Cir. 2011).

hydropower projects subject to Part I of the FPA must “pay to the United States reasonable annual charges in an amount to be fixed by the Commission.”⁸³ This charge is assessed, among other things, to “recompens[e] [the federal government] for the use, occupancy, and enjoyment of its lands or other property.”⁸⁴

The current methodology that the FERC uses in calculating the annual rental fee to be assessed to licensees for the use of federal land was adopted in Order No. 469.⁸⁵ In that order, the FERC explained that it would use the fee schedule published by the U.S. Forest Service (Forest Service) to determine rental fees for “linear rights-of-way” across National Forest System – *i.e.*, a “right-of-way for a linear facility, such as a road, trail, pipeline, electronic transmission line, fence, water transmission facility, or fiber optic cable.”⁸⁶ The Forest Service used a 1986 joint survey conducted “by the Forest Service and the Bureau of Land Management (BLM) of market values for the types of land those agencies allowed linear rights-of-way to occupy.”⁸⁷ Using this data, the Forest Service methodology divided the various counties in the continental United States into “eight different fee zones based upon the county’s ‘raw land values.’”⁸⁸ Each fee zone was then assigned a “zone value” ranging from \$50 to \$1,000 per acre.⁸⁹ Rental fees under the Forest Service methodology were determined by multiplying the zone value per acre of a project right-of-way “by two additional factors designed . . . to [capture] the land use impact of different rights-of-way and to provide the government with a reasonable rate of return for using its land.”⁹⁰ The Forest Service method also included a mechanism to adjust the fees annually for inflation.⁹¹ The FERC’s adoption of the Forest Service’s calculation was incorporated into section 11.2(b) of the FERC’s regulations.⁹² That regulation reproduced the Forest Service fee schedule and authorized the FERC’s Executive Director to update the fee schedule in the FERC regulation “to reflect changes in land values established by the Forest Service.”⁹³

From 1987 until 2008 the methodology utilized by the Forest Service underlying the FERC’s annual rental fees remained the same, and fees were unchanged except for annual adjustments for inflation.⁹⁴ In late 2008, following a directive by Congress for the Forest Service and the BLM to update the methodology for setting rental fee zone values to reflect current values of land in

83. *Id.* at 223 (quoting 16 U.S.C. § 803(e)(1) (2006)).

84. *Id.* (editorial marks in original) (quoting 16 U.S.C. § 803(e)(1) (2006)).

85. Final Rule, *Revision of the Billing Procedures for Annual Charges for Administering Part I of the Federal Power Act and to the Methodology for Assessing Federal Land Use Charges*, F.E.R.C. STATS. & REGS. ¶ 30741, 52 Fed. Reg. 18,201 (1987) (to be codified at 18 C.F.R. pt. 11).

86. *Idaho Falls*, 629 F.3d at 223 (quoting 36 C.F.R. § 251.51 (2011)).

87. *Id.* at 223-24.

88. *Id.* at 224.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; *see also* 18 C.F.R. § 11.2(b) (2011).

93. *Idaho Falls*, 629 F.3d at 225.

94. *Id.*

each zone, the BLM and Forest Service respectively published final rules.⁹⁵ Among other changes from the previous 1987 methodology, the new methodology implemented by the Forest Service and BLM adopted a new data source, replacing the agencies' "internally-generated 1986 index with a new index called the Census of Agriculture, which the National Agricultural Statistics Service (NASS) publishes every five years."⁹⁶ The new methodology also increased the number of fee zones from eight to twelve.⁹⁷ Acting under the authority delegated to him pursuant to section 11.2 of the FERC's regulations, in 2009, the Executive Director published notice of the final rules adopted by the Forest Service and BLM in the Federal Register and in the Code of Federal Regulations, amending 18 C.F.R. § 11.2 to reflect the fee schedule generated by the Forest Service under the new methodology (2009 Update).⁹⁸

On review, the petitioners argued that the 2009 Update amounted to a substantive change in the methodology underlying the FERC's regulations and, thus, constituted a legislative rulemaking for which notice and comment are required under the Administrative Procedure Act (APA).⁹⁹ In response, the FERC claimed that its action in issuing the 2009 Update merely implemented its existing regulations and did not change the underlying methodology for determining the fees specified in its regulation.¹⁰⁰

In his opinion for the court, Judge Tatel stated that, notwithstanding the substantial deference the court owes to a federal agency's interpretation of its own regulations, the court could not sustain the FERC's interpretation of section 11.2.¹⁰¹ The court framed the key question as whether, in promulgating the 2009 Update, the FERC changed "its methodology for setting rental fees charged to hydropower licensees from the methodology it . . . adopted in Order No. 469."¹⁰² If the FERC's methodology had been changed, then the agency would have been in violation of the APA for failing to first engage in the notice-and-comment procedures of that statute.¹⁰³ The court was not persuaded by the claim that the FERC had not adopted any specific methodology for determining zone fees in Order No. 469 but had instead chosen to incorporate rental fees for linear rights-of-way adopted by the Forest Service, however those fees might be calculated.¹⁰⁴ Reviewing the regulatory history of the regulation adopted in Order No. 469, the court determined that the FERC, in weighing the merits of the 1986 rental fee methodology along with other proposed alternatives, had in fact specifically

95. *Id.* at 225 (citing Final Rule, Update of Linear Right-of-Way Rent Schedule, 73 Fed. Reg. 65,040 (2008) (codified at 43 C.F.R. pts 2800, 2880, 2920); Notice of Adoption, Fee Schedule for Linear Rights-of-Way Authorized on National Forest System Lands, 73 Fed. Reg. 66,591 (2008)).

96. *Id.*

97. *Id.*

98. *Id.* (citing Final Rule, *Update of the FERC's Fees Schedule for Annual Charges for the Use of Government Lands*, F.E.R.C. STATS. & REGS. ¶ 31,288, 74 Fed. Reg. 8,184 (2009) (codified at 18 C.F.R. pt. 11, app. A)).

99. *Idaho Falls*, 629 F.3d at 227.

100. *Id.* at 226.

101. *Id.* at 228.

102. *Id.* at 227.

103. *Id.*

104. *Id.* at 228-29.

adopted the 1986 Forest Service methodology.¹⁰⁵ The D.C. Circuit noted that the FERC's reasoning could lead to the "absurd" result that the FERC would be compelled to adopt, without notice and comment, any new methodology adopted by the Forest Service – including even a methodology that the FERC had expressly rejected in Order No. 469.¹⁰⁶ The court found that the FERC's interpretation would undermine the values of the notice-and-comment process prescribed by the APA.¹⁰⁷

Judge Tatel's opinion stated that the FERC's interpretation also improperly delegated the FERC's responsibilities under FPA section 10(e)(1) to fix reasonable charges for rental fees to licensees for their use of federal land and to avoid increasing the price passed on to consumers through such charges.¹⁰⁸ The D.C. Circuit has held that the FERC's power to set such charges is exclusive and that its duty to ensure that rates are reasonable is mandatory and non-delegable.¹⁰⁹ "Although nothing in section 10(e)(1) prevents FERC from using externally generated information to set appropriate rates, the statute does prohibit the Commission from relying on outside cost assessments without engaging in its own independent review to ensure that, in its judgment, the resulting rates are reasonable."¹¹⁰ Under the FERC's interpretation of 18 C.F.R. § 11.2, it would be required to use the Forest Service's current schedule regardless of how that agency decided to value the land it administers, in effect permitting the Forest Service to set rental fees charged to licensees, in violation of the FPA's exclusive grant of authority to the FERC to perform that function.¹¹¹

The FERC contended that, even if it had incorrectly interpreted its regulations in violation of section 10(e)(1) of the FPA, the petitioners were engaged in an impermissible collateral attack on the regulation promulgated by Order No. 469.¹¹² However, the court rejected this argument, stating that in order for the FERC's collateral argument to be sustained, the court would have to find that the FERC's interpretation of its regulation should have been reasonably anticipated at the time it was promulgated.¹¹³ Given that the court ruled that the FERC's interpretation impermissibly delegated its authority to set rental fees in violation of the statute the FERC was charged with administering, the D.C. Circuit refused to conclude that this interpretation should have been anticipated and rejected the FERC's defense of improper collateral attack.¹¹⁴

105. *Id.* at 228.

106. *Id.* at 228-29.

107. *Id.* at 229.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 229-30.

112. *Id.* at 230.

113. *Id.*

114. *Id.* On November 17, 2011, eleven months after the decision in *Idaho Falls*, the FERC issued a notice of proposed rulemaking in Docket No. RM11-6 proposing to adopt a new fees schedule based upon the 2008 methodology adopted by the Forest Service and the BLM. Notice of Proposed Rulemaking, *Annual Charges for Use of Government Land*, F.E.R.C. STATS. & REGS. ¶ 32,684, 76 Fed. Reg. 72,134 (2011) (to be codified at 18 C.F.R. pt. 11). The FERC's "fee schedule would base county land values on average per-acre values from the [NASS c]ensus" and would incorporate all of the formula components of that, except that the FERC's charges would not use the zone system adopted by the 2008 Forest Service and BLM rulemakings. *Id.* at P 1. The FERC has yet to issue a final rule in this proceeding.

2. State Authority Under the Clean Water Act

In *Alcoa Power Generating Inc. v. FERC*,¹¹⁵ the D.C. Circuit affirmed two FERC orders interpreting section 401(a)(1) of the Clean Water Act (CWA).¹¹⁶ In those orders, the FERC found that a state issuing a CWA certification within the statutory one-year time limit has not waived its authority if the certification provides that it is not effective until the applicant satisfies a condition that can only be satisfied, if at all, outside of the one-year period.¹¹⁷ Under the CWA, as a precondition to the issuance of any federal license, an applicant must obtain a certification from the affected state that any discharges into navigable waters attributable to the applicant's project will comply with relevant provisions of the CWA.¹¹⁸ Any conditions to a certification must be incorporated by the issuing federal agency into the final license.¹¹⁹ Section 401(a)(1) of the CWA provides that the state shall have waived its certification authority with respect to a federal license application if it "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt" of a request for certification.¹²⁰

As part of its FERC relicensing application for the Yadkin hydroelectric project under the FPA, Alcoa Power Generating Company (Alcoa) applied to the North Carolina Department of Environment and Natural Resources for a CWA certification for the project.¹²¹ The state agency issued the certification a day before the expiration of the one-year time limit but provided that the certification would not be "effective" until Alcoa, among other things, posted a surety bond in the amount of \$240 million.¹²² The certification was subsequently stayed in a state administrative proceeding for review of its compliance with state law.¹²³ Pursuant to its current policy, the FERC delayed further action on the relicensing application pending the resolution of the state proceeding.¹²⁴

Alcoa petitioned the FERC for an order declaring that the State of North Carolina had waived its certification authority under CWA section 401(a)(1), arguing that in establishing the posting of a surety bond as a condition precedent to the effectiveness of the certification (an act Alcoa contended could not be accomplished, if ever, within one year), the agency had failed to act within the statutory time limit "because the effectiveness clause of the bond condition rendered the 'purported certificate . . . incomplete.'"¹²⁵ The State of North Carolina countered that it did not intend to require Alcoa to satisfy its surety bond condition prior to the FERC's issuance of a license. Rather, North

115. *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011).

116. *Id.* at 965 (citing 33 U.S.C. § 1341(a)(1) (Supp. 2011)).

117. *Id.*

118. *Id.* (citing 33 U.S.C. §§ 1311-13, 1316-17).

119. 33 U.S.C. § 1341(d).

120. *Alcoa*, 943 F.3d at 965 (quoting 33 U.S.C. § 1341(a)(1)).

121. *Id.*

122. *Id.* at 966.

123. *Id.*

124. *Id.* at 967.

125. *Id.* at 966 (quoting Petition for Declaratory Order at 1).

Carolina stated that the requirement to post the bond should be interpreted as a condition incorporated into the final license issued by the FERC.¹²⁶

The D.C. Circuit upheld the FERC's determination that the "effective" clause of the bond condition to the State's certification did not cause the agency's action to be incomplete or invalid under the CWA, and thus, the State did not waive its authority under that statute.¹²⁷ The court agreed that the CWA requires the FERC to wait only for an applicant to "obtain" a certificate prior to issuing a license, and that such certificate need not necessarily become "effective."¹²⁸ Under the FERC's procedures it "would be free to issue a license, regardless of whether the certification provided that it was not yet effective."¹²⁹ "As a result, there is no waiver issue because the 'effective' clause would not operate to delay or block the federal licensing proceeding beyond section 401's one-year period."¹³⁰ The court noted that Alcoa had not challenged the FERC's policy of delaying a licensing proceeding pending the resolution of a state challenge to an otherwise valid certification.¹³¹

Prior to reaching the merits of Alcoa's petition, the court dismissed the FERC's arguments that the issue presented was unripe, finding that the slight judicial interest in delay was outweighed by the hardship Alcoa would suffer from withholding a decision.¹³² The FERC contended that Alcoa's waiver claim might be mooted by the State's ongoing administrative review of its certification and that Alcoa would suffer little hardship if a decision on the issue was delayed until the conclusion of the state proceeding.¹³³ The court disagreed, noting that the question presented was purely legal and that the possibility that the state proceeding would moot the issue was insubstantial. "Any institutional interest in deferring adjudication is thus remote and theoretical."¹³⁴ Although regulatory delay is not typically a "legally cognizable hardship,"¹³⁵ the court found that Congress, in providing for long licensing periods (30-50 years) for hydroelectric projects under the FPA, recognized the necessity of some business certainty for such activities.¹³⁶ Therefore, the court found that Alcoa would suffer a legally cognizable hardship if resolution of the issue were delayed.¹³⁷

3. Defining Construction and Repair

In *L.S. Starrett Co. v. FERC*,¹³⁸ the First Circuit affirmed the Commission's orders requiring L.S. Starrett Co. to seek licensing in connection with the

126. *Id.* at 973.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 972.

132. *Id.* at 969-70.

133. *Id.*

134. *Id.*

135. *Id.* at 970.

136. *Id.*

137. *Id.*

138. *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 21 (1st Cir. 2011), *aff'g*, *L.S. Starrett Co.*, 129 F.E.R.C. ¶ 62,053 (2009), *order on reh'g*, 130 F.E.R.C. ¶ 61,112 (2010)).

company's planned repairs to the Crescent Street Dam Project.¹³⁹ Section 23(b) of the FPA,¹⁴⁰ requires a company to "seek licensing if (1) its facility is located on a stream over which Congress has Commerce Clause Jurisdiction, (2) its proposed changes constitute 'post-1935 construction' within the meaning of the FPA, and (3) the proposed modifications will affect the interests of interstate or foreign commerce."¹⁴¹ Starrett did not challenge on appeal the Commission's finding that the Crescent Street Dam Project is located on a Commerce Clause stream.¹⁴² With regard to the second and third statutory requirements, the First Circuit found – "regretfully,"¹⁴³ and "without much enthusiasm,"¹⁴⁴ – that the Commission did not unreasonably determine that the proposed repairs would constitute "post-1935 construction" because the changes would increase the dam's capacity¹⁴⁵ and also that the repairs would affect interstate commerce because the dam is part of a class of "small hydroelectric projects that displace power from the national grid" and "have a significant cumulative effect on interstate commerce."¹⁴⁶

In 1992, the Commission concluded that the Crescent Street Dam Project did not at that time require licensing under section 23(b) because there had been no post-1935 construction.¹⁴⁷ At that time, the Crescent Street Dam Project's "combined installed capacity was 362 kW," but actual capacity was only 192 kW "because of the physical limitations of the site."¹⁴⁸ When one of two generators at the facility failed in 2007, Starrett, believing it did not need FERC licensing to proceed, began repairs to the dam which included replacing one of the generators.¹⁴⁹ The replacement generator would increase the dam's installed capacity to 448 kW and its actual capacity to 278 kW.¹⁵⁰ As a result, the Commission concluded that the increase in capacity "would be considered post-1935 construction . . . triggering the Commission's licensing jurisdiction" and required Starrett to seek licensing for the proposed repairs.¹⁵¹

On appeal, Starrett argued that the Commission erred "because the proposed work was merely a repair, and would not increase actual capacity beyond the 1992 installed capacity" and, therefore, the work "was not post-1935 construction."¹⁵² The Commission contended that Congress had not specifically addressed the meaning of "construction" in section 23(b) and, therefore, it was reasonable to determine that the proposed changes to the Crescent Street Dam Project would constitute post-1935 construction because it would increase both

139. *L.S. Starrett Co.*, 650 F.3d at 20, 22.

140. 16 U.S.C. § 817(1) (Supp. 2011).

141. *L.S. Starrett Co.*, 650 F.3d at 21.

142. *Id.* at 24.

143. *Id.* at 29 n.15.

144. *Id.* at 21 n.2.

145. *Id.* at 26.

146. *Id.* at 29.

147. *Id.* at 21 (discussing *L.S. Starrett Co.*, 61 F.E.R.C. ¶ 62,200 (1992)).

148. *Id.*

149. *Id.* at 22.

150. *Id.* at 21.

151. *Id.* at 23.

152. *Id.* at 25.

the actual and installed capacity of the dam.¹⁵³ The Commission also argued that the proposed changes would “increase the Project’s ‘head,’” which would also result in post-1935 construction.¹⁵⁴ However, the First Circuit did not “analyze the head issue or resolve any of the factual disputes related to that issue.”¹⁵⁵

The First Circuit, applying *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁵⁶ concluded that “construction” was ambiguous as used in section 23(b) of the FPA.¹⁵⁷ Rejecting Starrett’s argument, the court determined under step two of *Chevron* that “the Commission’s determination was reasonable because there is no doubt that, under Starrett’s plan, there would be an increase in capacity no matter how the capacity was measured; both the actual and the installed capacities would be greater than their respective 1992 values.”¹⁵⁸

The First Circuit also concluded that the Commission reasonably relied upon the “cumulative effect” theory to find that facilities like the Crescent Street Dam Project meet the interstate commerce requirement of section 23(b) because they “effectively displace[d] electricity that the [facility] otherwise would draw from the interstate grid,” and together “account for a substantial portion of the nation’s hydroelectric generating capacity.”¹⁵⁹

At the outset, the court explained that it had “no choice but to affirm.”

Given the state of the law as herein expounded, we are required to affirm the exercise of the FERC’s jurisdiction over the dam in question. We do so without much enthusiasm, however. It may not be coincidental that Starrett, which was established in 1880 and is the principal employer in Athol, Massachusetts, is the last of its kind remaining within our borders. Its attempt to keep its manufacturing costs down to allow it to remain competitive with foreign industry has unfortunately come to naught in the face of bureaucratic outreach.¹⁶⁰

And, after stating at the conclusion of its opinion that the FERC’s orders were affirmed, the court dropped a footnote, stating that its affirmance was issued “regretfully because [the panel was] not blind to the economic realities of the situation. Under the facts of this case, the FERC could have certainly exercised its administrative discretion.”¹⁶¹ A concurring opinion – joined by the panel opinion’s author – reinforced the “great reluctance” with which two judges affirmed the Commission’s decision, emphasizing that “*Chevron* deference requires the result reached here, not that the result makes economic or realistic sense.”¹⁶²

153. *Id.* at 24.

154. *Id.* at 24, 24 n.11.

155. *Id.* at 26, 26 n.13.

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

157. *L.S. Starrett Co.*, 650 F.3d at 24-26.

158. *Id.* at 26.

159. *Id.* at 28-29 (quoting *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992)).

160. *Id.* at 21, 21 n.2.

161. *Id.* at 29 n.15.

162. *Id.* at 29 (Stahl, J. concurring, joined by Torruella, J.).

B. Electric Rates

1. Market-Based Rates

In *Montana Consumer Counsel v. FERC*,¹⁶³ the Ninth Circuit considered whether the FERC's market-based rate policy, as established in Order Nos. 697 and its sequels,¹⁶⁴ is consistent with the agency's duty under FPA section 205.¹⁶⁵ Those orders allow certain sellers of wholesale electricity to charge market-based rates provided that they demonstrate to the FERC that "they lack . . . both horizontal . . . and vertical . . . market power."¹⁶⁶ Sellers are also required, among other things, to "file an updated market power analysis every three years."¹⁶⁷

The Montana Consumer Counsel, Public Citizen, Inc., Colorado Office of Consumer Counsel, Public Utility Law Project of New York, Inc., and the state Attorneys General for Connecticut, Illinois, and Rhode Island broadly attacked the Commission's market-based rate policy as an abdication of the Commission's duty to ensure that rates are just and reasonable, "contend[ing] that FERC cannot outsource its regulatory duties to the 'Invisible Hand' of the market."¹⁶⁸ In particular, the petitioners "assert[ed] that FERC's screening [methods are] inadequate because [they] evaluate[] only the market power of the individual sellers, not the competitiveness of the market as a whole."¹⁶⁹ And, in the petitioners' view, the FERC's undue reliance on market forces was not supported by "substantial evidence that competition will drive prices to fair and reasonable levels."¹⁷⁰ The FERC's reporting requirements are likewise deficient, the petitioners claimed, because the FERC's review of market-based rate filings is merely for evidence of market power or manipulation and does not consider whether the rates actually charged are just and reasonable under the FPA.¹⁷¹

The court rejected each of these arguments. Relying on *California ex rel. Lockyer v. FERC*,¹⁷² the court held that the FERC has no obligation to determine the overall competitiveness of the market because it is sufficient to screen for the market power of the individual sellers.¹⁷³ Moreover, the FERC was not required

163. *Montana Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2010).

164. Order No. 697, *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils.*, F.E.R.C. STATS. & REGS. ¶ 31,252, 72 Fed. Reg. 39,904 (2007), *clarified*, 121 F.E.R.C. ¶ 61,260 (2007), *order on reh'g and clarification*, Order No. 697-A, F.E.R.C. STATS. & REGS. ¶ 31,268, 73 Fed. Reg. 25,832 (2008), *order on reh'g and clarification*, 124 F.E.R.C. ¶ 61,055, *order on reh'g and clarification*, Order No. 697-B, F.E.R.C. STATS. & REGS. ¶ 31,285, 73 Fed. Reg. 79,610 (2008), *order on reh'g and clarification*, Order No. 697-C, F.E.R.C. STATS. & REGS. ¶ 31,291, 74 Fed. Reg. 30,924 (2009), *order on reh'g and clarification*, Order No. 697-D, F.E.R.C. STATS. & REGS. ¶ 31,305, 75 Fed. Reg. 14,342 (2010), *order on clarification*, 131 F.E.R.C. ¶ 61,021, *reh'g denied*, 134 F.E.R.C. ¶ 61,046 (2010), *reh'g denied*, 134 F.E.R.C. ¶ 61,046 (2011), *reh'g pending* (codified at 18 C.F.R. pt. 35), *aff'd sub nom. Mont. Consumer Counsel*, 659 F.3d at 910.

165. 16 U.S.C. § 824d (2006).

166. *Montana Consumer*, 659 F.3d at 914.

167. *Id.*

168. *Id.* at 916.

169. *Id.*

170. *Id.*

171. *Id.*

172. *California ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004).

173. *Montana Consumer Counsel*, 659 F.3d at 916.

to provide evidence for the proposition that competition drives prices to fair and reasonable levels because it is rational to assume that when buyers and sellers do not have market power, “the terms of their voluntary exchange are reasonable.”¹⁷⁴ The court further held that the FERC had not abused its broad discretion by requiring updated filing from sellers every three years.¹⁷⁵ The court approved the manner in which market-based rate filings are evaluated, finding that “[i]f the data [filed] are consistent with a competitive market, the FERC may properly assume that the charged rates fall within a zone of reasonableness.”¹⁷⁶

The petitioners’ second broad argument was that the FPA “commands that changes in rates be filed with the FERC before they go into effect.”¹⁷⁷ In their view, market-based rates violate the sixty-day notice requirement for rate changes under FPA section 205(d)¹⁷⁸ because market-based rates inherently fluctuate with the market, yet sellers need not provide any notice of these changed rates.¹⁷⁹ In response, the FERC argued that it has broad authority under the statute to waive prior notice of rate changes for “good cause,” and, in any event, “the ‘rate’ filed by authorized power wholesalers is the ‘market rate,’ and that rate does not ‘change’ even though the prices charged by the wholesalers may rise and fall with the market.”¹⁸⁰

The court agreed with the Commission, finding that FPA section 205(d) “clearly authorizes FERC to make an exception to the notice requirement for market-based rates.”¹⁸¹ Even if the text of the FPA were not clear, the court further found that the FERC’s construction of the statute was “not impermissible.”¹⁸² Accordingly, the court held that the market-based rate policy established by the Order was not in violation of the FPA.¹⁸³

2. Burden in Complaints Under FPA Section 206

In *Maryland Public Service Commission v. FERC*,¹⁸⁴ the D.C. Circuit denied petitions for review by the state regulatory commissions of Maryland and New Jersey arguing that the results of the first capacity market auctions held by the PJM Interconnection, L.L.C. were unjust, unreasonable, and unduly

174. *Id.* (quoting *Tejas Power Corp. v. FERC*, 908 F.2d 998, 1004 (D.C. Cir. 1990)).

175. *Id.* at 918.

176. *Id.* at 919.

177. *Id.* at 920.

178. The statute provides, in pertinent part, as follows:

Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days’ notice to the Commission and to the public. . . . The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days’ notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

16 U.S.C. § 824d(d) (2006).

179. *Montana Consumer Counsel*, 659 F.3d at 921.

180. *Id.*

181. *Id.*

182. *Id.* at 922.

183. *Id.* at 922-23.

184. *Maryland Pub. Serv. Comm’n v. FERC*, 632 F.3d 1283, 1284 (D.C. Cir. 2011).

discriminatory under FPA section 206.¹⁸⁵ In an unusually short opinion, the court held that the Commission's orders dismissing the states' complaint was supported by substantial evidence.¹⁸⁶ In doing so, however, the court addressed a "preliminary matter" of broader significance with regard to the burden of proof in complaint proceedings under FPA section 206. Recent Commission precedent and language in *Blumenthal v. FERC*,¹⁸⁷ stated that "it is not enough for a petitioner to show that the challenged rates are not just and reasonable; the petitioner must also propose rates that are."¹⁸⁸ The court explained that the language used in *Blumenthal* "was unnecessary to [its] holding and inaccurate insofar as it implied that a challenge to rates must propose alternative rates that are just and reasonable."¹⁸⁹ Citing the court's more venerable precedent in *Tennessee Gas Pipeline Co. v. FERC*,¹⁹⁰ the court clarified that "[i]t is the Commission's job – not the petitioner's – to find a just and reasonable rate."¹⁹¹

3. Reactive Power

In *Dynegy Midwest Generation, Inc. v. FERC*, the D.C. Circuit vacated the Commission's orders approving reactive power rates filed by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO).¹⁹² In contrast to the bulk power sold for consumption, "reactive power" [is] a support service used to maintain adequate voltages to transmit real power, and to prevent damage such as overheating of generators and motors."¹⁹³ Generators sell reactive power "to the Midwest ISO and the cost [is] passed on to transmission owners and operators."¹⁹⁴ In this case, the Commission approved a proposal to permit transmission owners to choose between the existing cost-based rate for reactive power or a new rate under which the transmission owners would only pay generators for reactive power outside of the "deadband" – defined as the "range between a 0.95 'leading' power factor . . . and a 0.95 'lagging' power factor."¹⁹⁵ This proposal was based on the Commission's discussion of reactive power within the deadband and principles of comparability at issue in Order No. 2003 and its sequels.¹⁹⁶

Petitioners and their supporting intervenors argued before the Commission and the court of appeals that the transmission owners' ability to choose between

185. *Id.* at 1285, 1285 n.1 (citing 16 U.S.C. § 824e (2006)).

186. *Id.* at 1285.

187. *Blumenthal v. FERC*, 552 F.3d 875 (D.C. Cir. 2009).

188. *Maryland Pub. Serv. Comm'n*, 632 F.3d at 1285 n.1 (citing *Blumenthal*, 522 F.3d at 885).

189. *Id.*

190. *Tennessee Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C. Cir. 1988).

191. *Maryland Pub. Serv. Comm'n*, 632 F.3d at 1285 n.1.

192. *Dynegy Midwest Generation, Inc. v. FERC*, 633 F.3d 1122, 1125 (D.C. Cir. 2011).

193. *Id.* at 1124.

194. *Id.*

195. *Id.* at 1124 n.1, 1124-25.

196. Order No. 2003, *Standardization of Generator Interconnection Agreements and Procedures*, F.E.R.C. STATS. & REGS. ¶ 31,146 at P 546, 68 Fed. Reg. 49,846, 49,891 (2003), 68 Fed. Reg. 69,599 (2003) (codified at 18 C.F.R. pt. 35), *order on reh'g*, Order No. 2003-A, F.E.R.C. STATS. & REGS. ¶ 31,160 at P 416, 69 Fed. Reg. 15,932, 15,964 (2004), *order on reh'g*, Order No. 2003-B, F.E.R.C. STATS. & REGS. ¶ 31,171, 70 Fed. Reg. 265 (2005), *order on reh'g*, Order No. 2003-C, F.E.R.C. STATS. & REGS. ¶ 31,190, 70 Fed. Reg. 37,661 (2005), *aff'd sub nom.* National Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007).

the alternative compensation schemes for reactive power would result in unduly discriminatory rates across transmission zones in violation of FPA section 205(b).¹⁹⁷ The court held that the Commission's orders "disregard[ed] the core of petitioners' theory," describing the Commission's orders as either "a complete non-answer" or one "based on a misconception of rudimentary economics."¹⁹⁸ The court also went on to address the merits, holding that "the Commission's approval of [the tariff amendment at issue] violated § 205(b)'s ban on undue discrimination and must be vacated."¹⁹⁹

In reaching that conclusion, the D.C. Circuit disposed of two other issues. First, it rejected the Commission's claim that the petitioners were making an impermissible collateral attack on Order No. 2003.²⁰⁰ Second, the court rejected petitioners' claim that transmission owners could not legally make the tariff filing, holding that the Filing Rights Settlement between the transmission owners and the Midwest ISO was ambiguous on this point and that the Commission reasonably construed the agreement to allow transmission owners' the right to file an amendment to the Midwest ISO's reactive power rate.²⁰¹

4. Comparability Principle in Transmission Rates

In *Alabama Municipal Electric Authority v. FERC*,²⁰² the D.C. Circuit denied a petition challenging the lawfulness of a difference in rates Southern Company (Southern) charges for transmission services it provides for Alabama Power Company, a retail distribution subsidiary of Southern, and Alabama Municipal Electric Authority (AMEA), a non-affiliate that uses Southern's transmission system to re-sell power the AMEA purchases at wholesale to a group of municipal utilities.²⁰³

The AMEA purchases "unbundled" transmission services based on "the average cost of transmission service across Southern's operations."²⁰⁴ Alabama Power Company, by contrast, pays only the lower unit cost of the Alabama component of the Southern Company system for the transmission component of its "bundled" retail rates.²⁰⁵ As a result, the "AMEA pays Southern a transmission rate that is higher than the implied transmission rate encompassed in the rates for Southern's own bundled retail sales in Alabama."²⁰⁶ The AMEA argued that this discrepancy violates the "comparability principle" for transmission pricing that springs from the FPA's prohibition against "unduly discriminatory or preferential" rates.²⁰⁷ The FERC has described the comparability standard as "a 'golden rule of pricing'" providing that "a

197. *Dynegy Midwest Generation*, 633 F.3d at 1126 (citing FPA § 205(b), 16 U.S.C. § 824d(b) (2006)).

198. *Id.* at 1127.

199. *Id.* at 1129.

200. *Id.* at 1126-27.

201. *Id.* at 1128-29.

202. *Alabama Mun. Elec. Auth. v. FERC*, 662 F.3d 571 (D.C. Cir. 2011), *aff'g*, *Alabama Mun. Elec. Auth. v. Alabama Power Co.*, 119 F.E.R.C. ¶ 61,286 (2007), *reh'g denied*, 131 F.E.R.C. ¶ 61,101 (2010).

203. *Alabama Mun. Elec. Auth.*, 662 F.3d at 572-73.

204. *Id.* at 572.

205. *Id.* at 573.

206. *Id.*

207. *Id.* (quoting 16 U.S.C. § 824e(a) (Supp. 2011)).

transmission owner should charge itself on the same or comparable basis that it charges others for the same service.”²⁰⁸

Southern Company’s transmission rate methodology is a “postage stamp” system in which “the price of unbundled transmission service is the same across Southern’s transmission network; yet the rates for the transmission element of bundled retail transactions vary by location.”²⁰⁹ The AMEA’s chief argument on review was that the comparability standard requires the FERC to make Southern Company adopt zonal or “license-plate” pricing – that is, to charge the same price “for all power delivered in Alabama, whether retail or wholesale, whether unbundled or part of bundled sale and transmission.”²¹⁰ The AMEA’s “fallback” argument was that the FERC should “order Southern to unbundle its retail sales and use its transmission tariff rate for the transmission component of its (hitherto) bundled retail sales.”²¹¹

The D.C. Circuit first addressed the AMEA’s argument that the FERC should force Southern to unbundle the transmission and energy components of its retail sales in Alabama, noting that AMEA’s proposal “would in effect render jurisdictional an economic activity that has until now been non-jurisdictional.”²¹² When the FERC required functional unbundling of the wholesale transmission system in Order No. 888, the agency expressly stopped short of ordering the unbundling of retail sales.²¹³ Moreover, “when the Supreme Court reviewed Order No. 888, it emphatically rejected a contention (made by Enron) that the Commission should subject the transmission used for bundled retail sales to the same sort of ‘open access’ measures that the order imposed on wholesale transmission.”²¹⁴ Observing that “all justices took it as given that FERC was not engaged in regulating the transmission involved in bundled retail sales,” the D.C. Circuit rejected the AMEA’s proposal to require “a drastic revision of prevailing jurisdictional boundaries.”²¹⁵

The court then turned back to AMEA’s primary contention, rejecting the argument “that comparability compels Southern (and perhaps any utility spanning multiple states and selling unbundled and bundled transmission service) to use a zonal pricing system.”²¹⁶ Noting that the “express goal” of the Transmission Pricing Policy Statement was “to allow much greater transmission pricing flexibility,”²¹⁷ the court declined to interpret “a document opening the door to flexibility” as “slamming the door on all but the ‘license plate’”

208. *Id.* (quoting Final Rule, *Inquiry Concerning the Commission’s Pricing Policy for Transmission Servs. Provided by Pub. Utils. Under the Federal Power Act; Policy Statement*, F.E.R.C. STATS. & REGS. ¶ 31,005, 59 Fed. Reg. 55,031, 55,035 (1994) [hereinafter *Transmission Pricing Policy Statement*] (codified at 18 C.F.R. pt. 2)).

209. *Id.* at 574.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* (citing Order No. 888, *Promoting Wholesale Competition Through Open-Access Non-Discriminatory Transmission Servs. by Pub. Utils.*, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540, 21,558, 21,625 (May 10, 1996) [hereinafter Order No. 888] (codified at 18 C.F.R. pts 35, 385)).

214. *Id.* (citing *New York v. FERC*, 535 U.S. 1, 25-28 (2002)).

215. *Id.* at 575.

216. *Id.*

217. *Id.* (quoting *Transmission Pricing Policy Statement*, *supra* note 208, at n.1).

scheme.”²¹⁸ The court also rejected the AMEA’s argument that the comparability requirement in section 28.2 of the FERC’s pro forma Open Access Transmission Tariff (OATT) required license plate transmission pricing.²¹⁹ The comparability described in that section, and similar language in other sections of the pro forma tariff, concerns non-price terms and conditions such as transmission availability. As the court has previously held, the FERC’s comparability requirement for non-price terms and conditions is consistent with the agency’s “general non-exercise of jurisdiction over bundled retail service.”²²⁰ In short, the comparability principle “does not require comparable pricing as between unbundled and bundled transmission service.”²²¹

The AMEA also put forward a “price squeeze” theory developed under the Supreme Court’s decision in *FPC v. Conway*,²²² but the D.C. Circuit rejected that argument because the AMEA failed to make that argument to the FERC on rehearing.²²³

5. RTO Budgets

In *Jepsen v. FERC*,²²⁴ the D.C. Circuit determined that the FERC did not act arbitrarily or capriciously in approving the 2010 budget of ISO-NE.²²⁵ The Connecticut Attorney General and the Connecticut Office argued that the Commission should have required the ISO to submit the report of an independent consultant finding the company’s 2009 executive pay to be reasonable.²²⁶ The court concluded that this was not necessary, “[g]iven the ‘highly deferential’ standard of review that applies to FERC decisions involving ‘matters of rate design.’”²²⁷ The court noted that various stakeholders had extensively vetted the budget and that the Commission had previously approved the consultant’s methodology.²²⁸ The court also rejected Connecticut’s due-process argument, finding that “[a]lthough petitioners lacked an opportunity to review . . . the consultant’s . . . report, they did have an opportunity to argue . . . [on] rehearing that [the Commission] should have required ISO-NE to submit the report before approving the company’s 2010 budget. In the context of this case, the Due Process Clause required nothing more.”²²⁹

218. *Id.*

219. *Id.* (discussing Order No. 888, *supra* note 213, at 21,718).

220. *Id.* at 576 (citing Entergy Servs. v. FERC, 375 F.3d 1204, 1210 (D.C. Cir. 2004)).

221. *Id.*

222. *FPC v. Conway*, 426 U.S. 271, 279 (1976).

223. *Alabama Mun. Elec. Auth.*, 662 F.3d at 576 (D.C. Cir. 2011).

224. *Jepsen v. FERC*, 420 Fed. App’x 1 (D.C. Cir. 2011).

225. *Id.* at 2.

226. *Id.*

227. *Id.* at 2 (quoting *Maine Pub. Utils. Comm’n v. FERC*, 454 F.3d 278, 287 (D.C. Cir. 2006)).

228. *Id.*

229. *Id.* (citing *Blumenthal v. FERC*, 613 F.3d 1142, 1143, 1146–47 (D.C. Cir. 2010)).

III. NATURAL GAS ACT

A. *Jurisdiction to Gather Market Information Under NGA Section 23*

In *Texas Pipeline Association v. FERC*, the Fifth Circuit issued an opinion vacating FERC Order Nos. 720 and 720-A, in which the FERC required major non-interstate pipelines to post daily scheduled volume information and design capacity at certain receipt and delivery points.²³⁰

The Texas Pipeline Association (TPA) and the Railroad Commission of Texas sought judicial review of the orders arguing that the orders exceed the FERC's statutory authority under section 1(b) of the Natural Gas Act (NGA), which provides that the NGA "shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or the facilities used for such distribution."²³¹ On judicial review, the FERC relied on NGA section 23, recently enacted as part of the Energy Policy Act of 2005, which allows the FERC to obtain relevant information from "any market participant."²³²

The court stated that NGA section 23 must be read in the context of the FERC's jurisdiction under NGA section 1(b) which "unambiguously denies FERC the power to regulate entities specifically excluded from [the NGA], including wholly-intrastate pipelines, given that they either are involved solely in the 'local distribution of natural gas' or are otherwise involved in 'other transportation' of natural gas not in interstate commerce."²³³ The court explained that because the entirety of the NGA is inapplicable to intrastate pipelines, the phrase "any market participant" in NGA section 23 cannot apply to intrastate pipelines.²³⁴ The court rejected the FERC's claims that NGA section 23 was intended to expand the FERC's jurisdiction beyond NGA section 1(b), holding that "the NGA unambiguously precludes FERC from issuing the Posting Rule so as to require wholly intrastate pipelines to disclose and disseminate capacity and scheduling information."²³⁵ In support of that determination, the court added that the text and history of the NGA confirms that Congress did not intend to regulate the entire natural gas field but instead intended to leave regulation of certain entities to the states.²³⁶ For example, NGA section 1(c) leaves to states the regulation of so-called Hinshaw pipelines.²³⁷ The court concluded by reaffirming its determination that the FERC's rulemaking orders failed under *Chevron* step one, stating that "agencies cannot manufacture statutory ambiguity with semantics to enlarge their congressionally mandated border."²³⁸

230. *Texas Pipeline Ass'n v. FERC*, 661 F.3d 258, 259 (5th Cir. 2011). Order No. 720, *Pipeline Posting Requirements Under Section 23 of the Natural Gas Act*, F.E.R.C. STATS. & REGS. ¶ 31,283, 73 Fed. Reg. 73,494, 73,494 (2008) (codified at 18 C.F.R. pt. 284), *order on reh'g*, Order No. 720-A, F.E.R.C. STATS. & REGS. ¶ 31,302, 75 Fed. Reg. 5178, 5178-82 (2010).

231. *Texas Pipeline*, 661 F.3d at 259 (quoting 15 U.S.C. § 717(b) (Supp. 2011)).

232. *Id.* at 260 (quoting 15 U.S.C. § 717t-2(a)(3)(A)).

233. *Id.* at 262 (quoting 15 U.S.C. § 717(b)).

234. *Id.*

235. *Id.* at 263.

236. *Id.*

237. *Id.* at 263 n.10 (citing 15 U.S.C. § 717(c)).

238. *Id.* at 264.

B. Delegation of Certification Authority to Staff Under NGA Section 7

In *Murray Energy Corp. v. FERC*, the D.C. Circuit affirmed the FERC's issuance of certificate of public convenience and necessity under section 7(c) of the NGA²³⁹ to Rocky Mountain Express Pipeline LLC (REX) in connection with its REX-East Pipeline.²⁴⁰ REX-East is a recently-constructed, approximately 639-mile pipeline that "crosses land above the Century Mine, an underground longwall coal mine that is owned and operated by Murray Energy Corporation (Murray)."²⁴¹

In granting the certificate, the FERC required REX to file a construction and operations plan (COP) for approval by FERC's Director of the Office of Energy Projects (OEP) prior to the start of construction.²⁴² The FERC also required REX to collaborate with Murray Energy Corporation with regard to the portion of the 639-mile pipeline project traversing the Century Mine, a mine with operating characteristics that raised certain safety concerns.²⁴³

After REX filed its COP with the FERC, the Chief of Gas Branch 2 in OEP issued a letter order authorizing REX to construct the pipeline segment traversing the Century Mine.²⁴⁴ Murray then filed a request for rehearing, "arguing that the Chief of Gas Branch 2 lacked authority to issue [it], that REX failed to collaborate adequately with Murray," that the COP was deficient with regard to safety measures at the Century Mine, and that REX's experts were not qualified.²⁴⁵ In its order on rehearing, the "FERC affirmed [its] delegation of authority to the Chief of Gas Branch 2" and adopted her findings as its own.²⁴⁶ The "FERC also concluded that REX . . . satisfied [the] collaboration requirement" and that the COP adequately protected Murray's operations.²⁴⁷ The FERC also rejected Murray's attacks on the adequacy of REX's experts.²⁴⁸

In its petition for review, Murray argued "that Chief of Gas Branch 2 lacked authority to issue the Construction Order" and also attacked the adequacy of the COP.²⁴⁹ The court dismissed Murray's first claim, holding that the Commission's adoption of the Construction Order "resolved any potential delegation problems."²⁵⁰ The court also rejected Murray's assertions that REX's collaboration was inadequate, further noting that the Certificate Order did not require REX to obtain Murray's consent to the COP.²⁵¹ The court also found

239. 15 U.S.C. § 727f(e) (Supp. 2011).

240. *Murray Energy Corp. v. FERC*, 629 F.3d 231, 234 (D.C. Cir. 2011).

241. *Id.* at 234. As described by the court, longwall mining is a mining technique that "causes the surface above [the mine] to subside in a planned control manner as coal seams are extracted." *Id.*

242. *Id.* (citing *Rockies Express Pipeline LLC*, 123 F.E.R.C. ¶ 61,234 at app. E, Condition 147 (2008)).

243. *Id.*

244. *Id.* at 235 (citing Letter Order, *Rockies Express Pipeline LLC*, FERC Docket No. CP07-208-000 (Mar. 19, 2009)).

245. *Id.* (citing *Rockies Express Pipeline LLC*, 128 F.E.R.C. ¶ 61,045 (2009) [hereinafter *Rehearing Order*]).

246. *Id.* (citing *Rehearing Order*, *supra* note 245, at P 23).

247. *Id.*; see also, *Rehearing Order*, *supra* note 245, at PP 29-30, 41.

248. *Rehearing Order*, *supra* note 245, at PP 49-50.

249. *Murray Energy Corp.*, 629 F.3d at 236.

250. *Id.*

251. *Id.* at 237.

that the FERC reasonably determined that REX's experts were qualified.²⁵² Finally, the court rejected Murray's arguments that the FERC should not have approved the COP without binding REX to any post-construction mitigation measures.²⁵³ The court stated that REX will be obliged to submit a more detailed plan at a later date once the contours of the plan are known, and that "[a]bsent evidence to the contrary, [the court would] assume . . . REX will exercise good faith in developing this plan."²⁵⁴

IV. INTERSTATE COMMERCE ACT

A. FERC Jurisdiction

In *Western Refining Southwest, Inc. v. FERC*, the Fifth Circuit affirmed the Commission's orders dismissing a complaint filed by Western Refining Southwest, Inc. and its affiliate Western Refining Pipeline Company (collectively, Western) against Enterprise Crude Pipeline, LLC (Enterprise).²⁵⁵ The complaint arose out of an oil pipeline capacity lease agreement between Western, as lessee, and Enterprise, as lessor, that the Commission determined to be outside of its jurisdiction.²⁵⁶ The outcome of the case turned on the differences between the Commission's jurisdiction over oil pipelines under the Interstate Commerce Act (ICA), and its jurisdiction over gas pipelines and public utilities under the NGA and FPA, respectively.²⁵⁷

Before addressing the merits of the appeal, the Fifth Circuit first addressed a ripeness challenge by the Commission based on the existence of state proceedings involving many of the same issues.²⁵⁸ The court had little difficulty in dismissing the ripeness challenge, noting that the ongoing state proceedings between the parties did not obviate the need to address the scope of the Commission's jurisdiction because the state proceeding would examine the substance of the contractual dispute rather than the Commission's authority under the ICA.²⁵⁹ Furthermore, the court found that "Western would suffer [adversely from] not having access to a judicial forum to review" the Commission's actions.²⁶⁰

Unlike the NGA and FPA, which provide specifically for Commission jurisdiction over facilities used to provide jurisdictional services, the ICA vests the Commission with jurisdiction over common carriers engaged in the transportation of oil by a pipeline.²⁶¹ Western's main contention on appeal was that the ICA permits it to lodge a complaint against Enterprise as its common carrier because the ICA defines "transportation" broadly "irrespective of

252. *Id.*

253. *Id.*

254. *Id.* at 240.

255. *Western Refining Sw., Inc. v. FERC*, 636 F.3d 719, 720 (5th Cir. 2011).

256. *Id.* at 720, 728, *aff'g*, *Western Refining Sw., Inc. v. TEPPCO Crude Pipeline, LLC*, 127 F.E.R.C. ¶ 61,288, *reh'g denied*, 129 F.E.R.C. ¶ 61,053 (2009).

257. *Id.*

258. *Id.* at 722.

259. *Id.* at 722-23 (analogizing holdings in the Ninth, Eighth, and First Circuits which rejected similar ripeness challenges to federal appellate review).

260. *Id.* at 722.

261. *Id.* at 723-25 (citing 49 U.S.C. app. § 1(1)(b) (1988)).

ownership or of any contract.”²⁶² However, applying *Chevron*, the Fifth Circuit explained that the ICA unambiguously applies only to “common carriers engaged in the transportation of oil.”²⁶³ Since the contract between the parties provided that, regardless of its ownership of the pipeline, Enterprise would not be providing any transportation services, would have no tariff, and that the only tariff for transportation services using the leased capacity would be Western’s, the court concluded that Enterprise was not acting as a “common carrier.”²⁶⁴

Moreover, the court was not persuaded by Western’s argument that the Commission had jurisdiction because the ICA’s definition of “transportation” includes the clause “irrespective of ownership or of any contract.”²⁶⁵ The court reasoned that this clause alone cannot “create common carrier duties where they would not normally exist” because its purpose is to ensure that “parties cannot contract out of common carrier liability under the Act” and Western, likewise, “cannot evade common carrier liability by claiming that it is not the owner of the pipeline but only a lessee.”²⁶⁶ Therefore, the Fifth Circuit held that the Commission had correctly dismissed the complaint for lack of jurisdiction over the contract between the parties.²⁶⁷

Western’s final arguments on appeal were “that the Act require[d] the Commission to conduct a hearing regarding its claims” and that the Commission erred in adjudicating disputed factual issues in response to a motion to dismiss.²⁶⁸ The court disagreed. Reasoning that an evidentiary hearing was only needed when “a genuine issue of material fact exist[ed]” and when the disputed issue could not be adequately addressed or resolved by reference to the parties’ written submissions, the court held that neither circumstance was present in this case.²⁶⁹ The court also held that “factual issues relating to an adjudicative body’s subject-matter jurisdiction may be resolved ‘before the adjudication of a case on its merits.’”²⁷⁰

B. Rate Adjustments on the Trans Alaska Pipeline System

In *Flint Hills Resources Alaska, LLC v. FERC*, the D.C. Circuit granted a petition for review challenging the FERC’s interpretation of section 4412 of the Motor Carrier Safety Reauthorization Act of 2005,²⁷¹ which limits the retroactivity of the relief the FERC may grant under the ICA when the FERC modifies “‘quality bank adjustments’ paid to oil shippers on the Trans Alaska Pipeline System” (TAPS).²⁷² As explained by the court, “[t]he TAPS quality bank is an accounting arrangement designed to put [TAPS] shippers in the same

262. *Id.* at 724-26 (citing 49 U.S.C. app. §§ 1(3), 13(1)).

263. *Id.* at 725.

264. *Id.* at 725-27.

265. *Id.* at 725 (quoting 49 U.S.C. app. § 1(3)(a)).

266. *Id.* at 726.

267. *Id.* at 727.

268. *Id.* at 727-28.

269. *Id.*

270. *Id.* at 728 (citing *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010)).

271. Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59, § 4412, 119 Stat. 1144, 1778-79 (2005).

272. *Flint Hills Res. Alaska, LLC v. FERC*, 631 F.3d 543, 544 (D.C. Cir. 2011) (citing Pub. L. No. 109-59, § 4412(b)(2)).

economic position that they would have enjoyed absent” the commingling of crude oil of varying quality for transport on TAPS.²⁷³ The portion of section 4412 at issue in the case states that the FERC “may not order retroactive changes in TAPS quality bank adjustments for any period that exceeds the 15-month period immediately preceding the earliest date of the first order of the [FERC] imposing quality bank adjustments in the proceeding.”²⁷⁴ The primary issue addressed in the case was the meaning of the phrase “the first order . . . imposing quality bank adjustments in the proceeding.”²⁷⁵

The underlying FERC proceedings involved a dispute over a change to the quality bank calculation proposed by the TAPS carriers.²⁷⁶ The FERC issued an initial order setting the matter for hearing (Hearing Order), and later issued an order on the ALJ’s Initial Decision and an order accepting a compliance filing that the FERC’s order on Initial Decision had required the TAPS carriers to submit.²⁷⁷ The FERC took the position that its Hearing Order constituted “the first order . . . imposing quality bank adjustments.”²⁷⁸ Applying a *Chevron* analysis, the court concluded that the FERC’s position did not reflect a permissible interpretation of section 4412.²⁷⁹ The court found that the Hearing Order merely allowed the carrier-proposed rate to go into effect (after suspension) and, thus, could not be regarded as “imposing” an adjustment within the meaning of section 4412.²⁸⁰ Under the FERC’s interpretation, the court further observed, section 4412(b)(2) would accomplish nothing unless the FERC delayed issuance of an initial hearing order until fifteen months after a filing’s effective date, a level of delay that the court found is apparently inconsistent with the FERC’s regulations and, in any event, wholly at odds with ordinary FERC practice.²⁸¹ The court rejected the FERC’s argument that its interpretation was reasonable because the section 4412(b)(2) limitation is concerned solely with guarding against prolonged refund periods caused by “unlawful orders,” *i.e.*, FERC orders that are reversed by the courts and must be reconsidered on remand.²⁸² The court likewise found that the FERC’s position was not salvaged by an argument that its interpretation might hypothetically limit refunds in complaint proceedings brought under section 13(1) of the ICA.²⁸³ The court found that the FERC’s assertion that unjust and unreasonable rates could go “partially unremedied” if its interpretation was not adopted did not lend support to the FERC’s position because “any fixed time limit on correction of a rate later found unjust and unreasonable obviously entails such a partial lack of remedy.”²⁸⁴ Although finding the FERC’s interpretation of section 4412 to be

273. *Id.* at 544.

274. Pub. L. No. 109- 59, § 4412(b)(2).

275. *Flint Hills*, 631 F.3d at 544.

276. *See generally*, *BP Pipelines (Alaska), Inc.*, 116 F.E.R.C. ¶ 61,291 (2006).

277. *Flint Hills*, 631 F.3d at 545 (citing 116 F.E.R.C. ¶ 61,291 (2006); Opinion No. 500, *BP Pipelines (Alaska), Inc.*, 122 F.E.R.C. ¶ 61,236 (2008); *BP Pipelines (Alaska), Inc.*, 125 F.E.R.C. ¶ 61,254 (2008)).

278. *Id.* at 544.

279. *Id.* at 545.

280. *Id.* at 546.

281. *Id.* at 547.

282. *Id.* at 547-48.

283. *Id.* at 548.

284. *Id.*

impermissible, the court did not decide which of the other FERC orders in the case should be deemed “the first order . . . imposing . . . adjustments in the proceeding.”²⁸⁵ The court also declined to reach the issue of whether section 4412(b)(2) “limits refunds to a maximum total period of 15 months.”²⁸⁶

Judge Randolph dissented, arguing that the FERC’s Hearing Order could be reasonably interpreted as “imposing” a quality bank adjustment.²⁸⁷ Moreover, Judge Randolph found support in the legislative history for the FERC’s view that section 4412 was intended to guard against potentially lengthy refund periods caused by court reversals, a purpose that the FERC’s statutory interpretation would accomplish, contrary to the majority’s view that adopting the FERC’s position would render section 4412 meaningless.²⁸⁸

C. Index Rates

In *MarkWest Mich. Pipeline Co., LLC v. FERC*, the D.C. Circuit upheld a FERC order regarding the ceiling level of indexed rates following a settlement period.²⁸⁹ MarkWest, the owner of a crude pipeline in Michigan, entered into a settlement with certain shippers following a proposed rate increase, which the shippers had protested.²⁹⁰ The settlement, which the Commission approved, contained a three year “Moratorium Period,” extending from January 31, 2006 through January 31, 2009, during which MarkWest could charge rates no higher than the maximum rates set forth in the settlement.²⁹¹ More specifically, the settlement agreement permitted MarkWest to annually increase its rates by applying an “Annual Inflation Cap.”²⁹² The settlement agreement further provided that MarkWest could also choose to annually increase its rates by applying the FERC oil pipeline indexing methodology,²⁹³ but only if the increase permitted under the indexing methodology resulted in a rate that would be less than the rate computed by applying the Annual Inflation Cap.²⁹⁴ In each year of the settlement, the rates generated by the Annual Inflation Cap were below the level of the rates generated by the indexing methodology.²⁹⁵

Following the Moratorium Period, MarkWest proposed to calculate its going-forward rates by taking the 2006 rate, which it deemed its initial rate, and applying the FERC index to that rate each year of the Moratorium Period.²⁹⁶ In other words, MarkWest proposed to charge the rates that would have existed had

285. *Id.* at 549 (quoting Motor Carrier Safety Reauthorization Act of 2005, Pub. L. No. 109-59, § 4412(b)(2), 119 Stat. 1144, 1778-79 (2005)).

286. *Id.*

287. *Id.* at 549 (Randolph, J., dissenting).

288. *Id.* at 549-50.

289. *MarkWest Mich. Pipeline Co. v. FERC*, 646 F.3d 30, 31 (D.C. Cir. 2011).

290. *Id.* at 33.

291. *Id.*

292. *Id.*

293. *Id.* As noted by the court, under the FERC’s indexing methodology, an oil pipeline is permitted to annually increase its rates by applying the index published by the FERC to its existing rates. The resulting rate is referred to as the pipeline’s “ceiling level,” and the pipeline is permitted to charge a rate at or below the ceiling level. *Id.* at 32.

294. *Id.* at 33.

295. *Id.*

296. *Id.*

it applied the FERC index each year of the Moratorium Period, rather than the Annual Inflation Cap.²⁹⁷ In the orders under review, the Commission rejected this proposal and instructed the pipeline to begin applying the index to the last rate generated under the settlement agreement.²⁹⁸

The court began its analysis by determining that the settlement agreement was silent on the issue of how to establish new ceiling levels following the Moratorium Period.²⁹⁹ Accordingly, the court deferred to the Commission's interpretation of the settlement agreement, rejecting MarkWest's argument that the agreement's references to the FERC indexing methodology meant that the parties to the agreement intended for indexing to be applied following the Moratorium Period, as though the settlement had not existed.³⁰⁰ Similarly, the court rejected MarkWest's alternative argument that, under the Commission's regulations, a settlement agreement cannot change the pipeline's initial rates (*i.e.*, the rates that existed at the time of the settlement).³⁰¹ The court found that, like the settlement agreement, the Commission's regulations were ambiguous on this point and that the Commission's interpretation of its own ambiguous regulations was controlling.³⁰²

V. OTHER STATUTES AND LAWS

A. *Atomic Energy Act; Standards for Re-Licensing*

In *New Jersey Environmental Federation v. NRC*, the Third Circuit denied a petition for review challenging the Nuclear Regulatory Commission's (NRC) decision granting license renewal for Oyster Creek Nuclear Generating Station (Oyster Creek), in Ocean County, New Jersey.³⁰³ Oyster Creek is the oldest operating commercial nuclear power plant in the country, having been originally licensed in 1969 for a forty-year term.³⁰⁴ Exelon Generation Company, LLC – Oyster Creek's current operator – applied to the Atomic Safety and Licensing Board (Board) for a twenty-year extension of the license in 2005.³⁰⁵ The Board approved the license renewal in 2007, and the NRC affirmed, issuing its final order in 2009.³⁰⁶

The New Jersey Environmental Federation and other interest groups (collectively Citizens) opposed the license renewal on a number of grounds, including several safety-related contentions regarding corrosion in Oyster Creek's steel containment shell.³⁰⁷ On appeal, Citizens further argued that the

297. *Id.*

298. *Id.*; *see also*, *MarkWest Mich. Pipeline Co.*, 126 F.E.R.C. ¶ 61,300, *order corrected by*, 127 F.E.R.C. ¶ 61,049 (2009), *reh'g denied*, 130 F.E.R.C. ¶ 61,084 (2010), *petition for rev. denied*, 646 F.3d 30 (D.C. Cir. 2011).

299. *MarkWest Mich. Pipeline*, 646 F.3d at 34.

300. *Id.* at 34-35.

301. *Id.* at 36.

302. *Id.* (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003)).

303. *New Jersey Env'tl. Fed'n v. NRC*, 645 F.3d 220, 222-23 (3d Cir. 2011).

304. *Id.* at 223.

305. *Id.*

306. *Id.* at 226-28.

307. *Id.* at 225-26, 225 n.4.

Board and NRC made a number of procedural errors.³⁰⁸ Specifically, Citizens challenged (i) the NRC's ruling that some contentions were untimely and inadmissible;³⁰⁹ (ii) the NRC's refusal to reopen the record to consider evidence of metal fatigue;³¹⁰ (iii) the adequacy of record evidence indicating that Exelon had made a "reasonable assurance" of its ability to safely operate the facility, including the determination not to reopen the record to include an inspection report;³¹¹ and (iv) the NRC's denial of Citizens' request for a "a comprehensive overhaul" of the license renewal process.³¹²

The court observed that the Atomic Energy Act "does not provide standards that the NRC must apply when issuing a renewed license,"³¹³ although the Act does explicitly allow parties with an interest to be admitted as a party in a licensing proceeding.³¹⁴ Additionally, the court noted that the NRC has broad discretion in fulfilling its statutory obligations.³¹⁵ Further, under the NRC's regulations, a successful license renewal requires "reasonable assurance" the licensee's plan can maintain acceptable safety levels and address the adverse effects of aging.³¹⁶

The court held "that the NRC did not abuse its discretion in rejecting Citizens' various challenges to Exelon's license renewal application for Oyster Creek."³¹⁷ The court observed the voluminous record by the Board and NRC, which included "hundreds of pages detailing their decision making."³¹⁸ In deference to the NRC, the court added: "[w]e are confident that the NRC's review of Exelon's application was well-reasoned, and we will not second-guess technical decisions within the realm of its unique expertise."³¹⁹ Finally, in referring to the Fukushima Daiichi Nuclear Power Station, the court also indicated that "it appears that the events in Japan do not provide a basis to grant the petition for review in this case."³²⁰

B. Tax Injunction Act

In *GenOn Mid-Atlantic, LLC v. Montgomery County, Maryland*, the Fourth Circuit held that GenOn Mid-Atlantic's challenge to a Montgomery County carbon dioxide emissions charge is not barred by the Tax Injunction Act,³²¹ which limits the federal district courts' power to enjoin, suspend, or restrain any

308. *Id.* at 223.

309. *Id.* at 228.

310. *Id.* at 232.

311. *Id.* at 235.

312. *Id.* at 227.

313. *Id.* at 224.

314. *Id.* (citing 42 U.S.C. § 2239(a)(1)(A) (2006)).

315. *Id.* (quoting *In re Three Mile Island Alert, Inc.*, 771 F.2d 720, 727-78 (3d Cir. 1985); *Westinghouse Elec. Corp. v. NRC*, 598 F.2d 759, 771 (3d Cir. 1979)).

316. *Id.* (citing 10 C.F.R. § 54.29(a) (2004)).

317. *Id.* at 237; *see also id.* at 230, 231, 232, 234, 236, 237 (applying the standard of review articulated in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 728 (3d Cir. 1989); *Beazer East, Inc. v. EPA*, 963 F.2d 603, 606 (3d Cir. 1992)).

318. *Id.* at 237.

319. *Id.*

320. *Id.* at 223 n.2.

321. 28 U.S.C. § 1341 (2006).

tax under state law where a complaining party could obtain an adequate remedy in state court.³²² Reversing and remanding the United States District Court for the District of Maryland, the Fourth Circuit found that the county's carbon emissions charge is not a tax, but instead a regulatory fee, because the charge affects only one entity, GenOn, and is an integral part of a wide-ranging County regulatory program to reduce carbon dioxide emissions.³²³ The court expressed no opinion on the merits of GenOn's underlying constitutional challenges to the County's emissions charge, holding only that the Tax Injunction Act was "no bar to federal jurisdiction."³²⁴

The County contended that its emissions charge is a tax because (1) the bill that established the charge was enacted using the same process typically used to enact taxes and (2) the charge was expected to raise significant revenue for the County's general fund.³²⁵ The court acknowledged that the County's emissions charge "does bear some of the indicia of a tax" but held that the features cited by the County were "mere masks that cannot be used to disguise what is in substance a punitive and regulatory matter."³²⁶

The court emphasized "[t]he fact that th[e] charge affects the narrowest possible class is compelling evidence that it is a punitive fee rather than a tax" because taxes "generally apply to at least more than one entity."³²⁷ Moreover, the court found "the fact that GenOn will likely be unable to pass the cost of the charge on to its customers," because it sells its power at auction, strengthened its conclusion that the charge is a punitive fee, not a tax.³²⁸ The court further noted that the County was "well aware that the . . . charge would fall entirely [up]on GenOn"³²⁹ and concluded that, "in addition to its punitive scope, [the] charge falls outside the ambit of the Tax Injunction Act because of its plainly regulatory purpose" of reducing greenhouse gas emissions – a purpose the court found that the County made no effort to hide.³³⁰

Rejecting the County's contention that the charge was not intended to regulate GenOn or any other carbon dioxide emitter because it does not compel any standard of conduct or limit emissions, the court found that the County's "regulatory toolbox is not so limited."³³¹ On the contrary, such charges "may serve regulatory purposes directly by, for example, deliberately discouraging particular conduct by making it more expensive."³³² The carbon charge at issue – unlike, *e.g.*, a tax on cigarettes, which affects a broad class of persons without mandating a particular standard of conduct – "targets a single emitter and is located squarely with the County's own 'programmatically efforts to reduce'

322. GenOn Mid-Atl., LLC v. Montgomery Cnty., Md., 650 F.3d 1021, 1023-24 (4th Cir. 2011).

323. *Id.* at 1024.

324. *Id.* at 1026.

325. *Id.* at 1023-24.

326. *Id.* at 1024.

327. *Id.*

328. *Id.*

329. *Id.* at 1024-25.

330. *Id.* at 1025.

331. *Id.* at 1026.

332. *Id.* (quoting San Juan Cellular Tel. Co. v. Public Serv. Comm'n of P.R., 967 F.2d 683, 685 (1st Cir. 1992)).

greenhouse gas emissions.”³³³ Accordingly, the court found, the emissions charge “is a punitive and regulatory fee over which the federal courts retain jurisdiction.”³³⁴

An absence of federal court jurisdiction over such matters, the court noted, would “turn . . . truly interstate issues over to local authorities” and could “encourage punitive financial strikes against single entities with national connections . . . with no accountability in federal court,” the implications of which would be profound.³³⁵

C. *Civil Procedure and Common Law Property Rights*

In *Enbridge Pipelines (Illinois) L.L.C. v Moore*, the Seventh Circuit rejected consolidated appeals of rulings by district courts that had granted declaratory judgments upholding Enbridge Pipeline (Illinois) L.L.C.’s right to operate an oil pipeline on the defendant-appellants’ property.³³⁶ The defendants contended that the original easements, which had been used to construct a pipeline in 1939, had been forfeited because Enbridge’s predecessors in ownership had failed “to maintain the pipeline in good working condition.”³³⁷

The opinion first addresses contentions by some of the defendants that the cases did not meet the threshold amount in controversy for each of the cases of \$75,000.³³⁸ The court quickly dispatched this argument, noting that to build around the existing easements would cost at least \$75,000 per easement and the cumulative costs of delay and buying new easements from the existing landowners would likewise meet the threshold.³³⁹

The opinion then turns to what is meant by the word “maintained.” It concluded that in this circumstance, the most plausible interpretation was in the sense of “occupied or retained, as when one says that one maintains an office.”³⁴⁰ Finding that the pipeline owners had not intended to abandon the easement and had undertaken sufficient if limited maintenance on the pipeline, even while unused, the court concluded that the easements had not been forfeited.³⁴¹

Embedded in the opinion by Judge Posner is an ethical warning to practitioners against holding back a jurisdictional challenge for potential tactical gain, cautioning that:

a defendant who lies back, holding such a challenge in reserve because he hopes to obtain a judgment on the merits (which unlike a dismissal for want of subject-matter jurisdiction would preclude re-filing a diversity suit in state court), in which

333. *Id.* (quoting Montgomery Cnty. Code § 52-95(b)).

334. *Id.*

335. *Id.*

336. *Enbridge Pipelines (Ill.) L.L.C. v. Moore*, 633 F.3d 602, 607 (7th Cir 2011).

337. *Id.* at 604.

338. *Id.* at 605.

339. *Id.* at 605-06.

340. *Id.* at 606.

341. *Id.* at 607.

event he would not raise a jurisdictional objection, engages in misconduct for which he can be disciplined.³⁴²

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342. *Id.* (citing BEM I, L.L.C. v. Anthropologie, Inc., 301 F.3d 548, 551-52 (7th Cir. 2002); Aves *ex rel.* Aves v. Shah, 997 F.2d 762, 767 (10th Cir. 1993); Mansfield, Coldwater & Lake Mich. Ry. v. Swan, 111 U.S. 379, 388-89 (1884); Belleville Catering Co. v. Champaign Mkt. Place, L.L.C., 350 F.3d 691, 694 (7th Cir. 2003); *In re* Brand Name Prescription Drugs Antitrust Litig., 248 F.3d 668, 670 (7th Cir. 2001)).