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I. ADMINISTRATIVE LAW

A. Jurisdiction

1. Subject Matter Jurisdiction

In *Pacific Gas & Electric Co. v. FERC*,[1] the court dismissed two petitions for review in cases arising out of the California electricity crisis on the basis that it lacked subject matter jurisdiction over both. The court dismissed the California Independent System Operator (CAISO) petition "because it implicate[d] [the] FERC's prosecutorial discretion," and it dismissed Pacific Gas & Electric Company's (PG&E) petition "because it [was] an impermissible collateral attack on a prior FERC order."[2]

In the CAISO orders under review, the FERC had denied certain tariff amendments proposed by the CAISO. In order to correct alleged double-selling, the CAISO had filed the proposed amendments to allow it to perform a preliminary "re-run" of Settlement Statements submitted to it during the California electricity crisis.[3] The FERC denied the proposed amendments because they would have varied in scope from what the FERC had ordered the CAISO to undertake in a separate, investigatory proceeding.[4]

The court held that it lacked subject matter jurisdiction over the CAISO's claim on the grounds that an agency "retains almost unfettered discretion to initiate investigations and prosecute violations of the [Federal Power Act] . . . ."[5] In reaching this decision, the court acknowledged that it was the CAISO, not the

1. Pacific Gas & Elec. Co. v. FERC, 464 F.3d 861 (9th Cir. 2006).
2. *Id.* at 863.
3. *Pacific Gas & Elec. Co.*, 464 F.3d at 861.
4. *California Ind. Sys. Operator Corp.*, 106 F.E.R.C. ¶ 61,099 at P 16-17 (2004).
5. *Pacific Gas & Elec. Co.*, 464 F.3d at 867.

FERC, that was seeking to investigate and remedy violations of the Federal Power Act, but it also recognized that the "FERC has exclusive jurisdiction to regulate electricity markets" so that its decision not to allow the CAISO to proceed to "re-run" the Settlement Statements equaled a decision not to exercise its enforcement powers.[6]

PG&E's petition for review concerned the FERC's approval of CAISO tariff provision amendments concerning the appropriate accounting method for performing a preliminary re-run of energy exchange transactions. In a separate proceeding prior to the FERC's approval of this tariff amendment, the FERC had approved a specific accounting method for performing this re-run.[7] The question the court addressed was "whether the order upon which the petition is based 'was merely a "clarification"' of a prior order, or whether it 'was a "modification"' . . . ."[8] The court determined that the FERC's order was a "clarification" because it did not "alter the meaning or scope of" its prior order and thus was not reviewable on appeal.[9]

2. Standing

Virginia Electric and Power Co. (Dominion) sought the FERC's approval to recognize Regulated Transmission Organization (RTO) start-up costs as a regulatory asset and to defer recovery of those costs until after a state-imposed retail rate cap expired.[10] The Virginia State Corporation Commission (Virginia Commission) raised questions as to whether the start-up costs were actually unrecoverable and whether it was probable that the costs would be recovered in future rates.[11] The FERC refused to rule on whether the costs were unrecoverable and whether they would be found to be recoverable and guided the utility to make its own assessment and record a regulatory asset for the costs if it determined that it was probable the costs would be recovered in rates.[12]

The Virginia Commission appealed the FERC's ruling. The D.C. Circuit held that the Virginia Commission lacked standing because it could not show an injury-in-fact.[13] The court elaborated on its ruling with the following statement as to the necessary showing to establish standing in these circumstances: "[r]eliance on standing in the form of probabilistic injury—here, an increase in the probability the investors will inaccurately evaluate Dominion's financial position—requires a showing of a 'substantial probability' of the alleged injury."[14] The court reasoned that the FERC's failure to decide the issue did not affect the ultimate rate treatment of the start-up costs and that any increase in

6. *Id.* at 868.

7. *See generally San Diego Gas & Elec. Co.*, 102 F.E.R.C. ¶ 61,317 (2003).

8. *Pacific Gas & Elec. Co.*, 464 F.3d at 868 (quoting Dominion Res., Inc. v. FERC, 286 F.3d 586, 589 (D.C. Cir. 2002)).

9. *Id.* at 869.

10. *PJM Interconnection, L.L.C.*, 109 F.E.R.C. ¶ 61,012 at P 47 (2004).

11. 109 F.E.R.C. ¶ 61,012 at P 48.

12. *Id.* at 54.

13. Virginia State Corp. Comm'n v. FERC, 468 F.3d 845, 847 (D.C. Cir. 2006).

14. *Id.* at 848.

likelihood that investors would inaccurately evaluate the utility's financial position was not shown to be more than trivial.[15]

CAISO filed a cross-petition in which it challenged the FERC interpretation of a section of its tariff and rejection of an increase in a tariff cap for certain charges.[16] The CAISO admitted that it had not been aggrieved by the FERC's decision.[17] The court determined that any injury to the CAISO was both conjectural and believed by the CAISO to be unlikely.[18] Although the court couched its dismissal of the CAISO's cross-petition as "lack of jurisdiction,"[19] the court applied a standing principle—that CAISO could not show injury-in-fact—in reaching its conclusion.

Brazos Electric Power Cooperative, Inc. (Brazos) asserted that a generation facility was not a QF and appealed the FERC's termination of an investigation into the facility's QF status.[20] In an unpublished opinion, relying on Justice Scalia's separate opinion in *Radiofone, Inc. v. FCC*,[21] and on *American Family Life Assurance Co. v. FCC*,[22] the court ruled that Brazos lacked standing. The court stated, "'mere precedential effect of [an] agency's rationale in later adjudications' does not establish standing."[23]

3. Preservation of Objections on Rehearing/Appeal

In *Allegheny Power v. FERC*,[24] Petitioner Allegheny Power (Allegheny) sought review of a Commission order relating to its rates for subtransmission service. The dispute arose after Allegheny's bundled partial requirements service contract with Allegheny Electric Cooperative (AEC) expired in 2001.[25] In order to comply with Order No. 888,[26] Allegheny offered AEC a one-year renewal contract with unbundled generation and transmission charges, the latter of which would be determined pursuant to the Open Access Transmission Tariff (OATT) of PJM Interconnection, L.L.C (PJM).[27] Under PJM's OATT, however, terms and conditions of service were only available for part of the necessary transmission service, the transmission over facilities with a voltage of 138 kV or greater, while lower voltage subtransmission service was to be

15. *Virginia State Corp. Comm'n*, 468 F.3d at 847-48.

16. IDACORP Energy L.P. v. FERC, 433 F.3d 879, 885 (D.C. Cir. 2006).

17. *Id.*

18. *IDACORP Energy L.P.*, 433 F.3d at 885.

19. *Id.*

20. *See generally* Request for Rehearing of FERC's Order, Brazos Elec. Power Coop., Inc., No. EL03-47 (F.E.R.C. May, 9, 2005).

21. Radiofone, Inc. v. FCC, 759 F.2d 936, 939 (D.C. Cir. 1985).

22. Brazos Elec. Power Coop., Inc. v. FERC, No. 05-1286, 2006 WL 3512150, at *1 (D.C. Cir. Nov. 22, 2006).

23. *Id.* (quoting *Radiofone*, 759 F.2d at 939).

24. Allegheny Power v. FERC, 437 F.3d 1215 (D.C. Cir. 2006).

25. *Id.* at 1216-17.

26. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, [Regs. Preambles 1991-1996] F.E.R.C. STATS. & REGS. ¶ 31,036 (1996), 61 Fed. Reg. 21,540 (1996) [hereinafter Order No. 888].

27. *Allegheny Power*, 437 F.3d at 1217.

provided on a case-by-case basis.[28] As a result, Allegheny filed a unilateral addendum to its contract with AEC which called for assessing subtransmission charges through direct assignment.[29] But the Commission rejected this proposal and instead determined that subtransmission charges should be assessed on a rolled-in basis.[30]

In reviewing the FERC's orders, the court first addressed a Commission argument that Allegheny had failed to adequately preserve its objections under section 313(b) of the Federal Power Act.[31] The Commission argued that it had articulated four bases for choosing the rolled-in method, the first of which was that the facilities at issue were integrated, and the latter three of which concerned failings on Allegheny's part in supporting its direct assignment proposal.[32] Allegheny objected to all four bases in its Brief on Exceptions from the ALJ's decision, but it only objected to the integration finding in its Request for Rehearing, while incorporating its Brief on Exceptions by reference.[33] The court found that "[u]nder § 313(b) an objection cannot be preserved 'indirectly,' . . . but must be raised with 'specificity' . . . ."[34] Thus, the court found that Allegheny had waived its objections to all three bases for the Commission decision except for the integration finding.[35]

Nevertheless, the court went on to determine that the FERC had failed to adequately explain its rejection of a proposal made by Allegheny on rehearing for an adjusted roll-in.[36] Since the Commission's rejection could only be explained as implicitly relying upon its integration finding, the court found that the Commission's order could only stand if the integration finding was not arbitrary and capricious.[37] The court held that the Commission's order was arbitrary and capricious for failure to adequately explain its rationale (which was exacerbated by the FERC's failure to point to any precedent that supported its decision) and vacated and remanded the FERC's roll-in determination. The court also dismissed Allegheny's petition challenging the rejection of direct assignment.[38]

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28. *Id.* at 1217-18.

29. *Allegheny Power*, 437 F.3d at 1218.

30. *See Allegheny Power*, 106 F.E.R.C. ¶ 61,241 at P 17 (2004), *order denying reh'g*, 108 F.E.R.C. ¶ 61,151 (2004).

31. Allegheny Power v. FERC, 437 F.3d 1215, 1219-20 (D.C. Cir. 2006); Federal Power Act § 313(b), 16 U.S.C. § 825(b) (Supp. 2004).

32. *Allegheny Power*, 427 F.3d at 1220.

33. *Id.*

34. *Allegheny Power*, 437 F.3d at 1220.

35. *Id.*

36. *Allegheny Power*, 437 F.3d at 1222.

37. *Id.*

38. Allegheny Power v. FERC, 437 F.3d 1215, 1226 (D.C. Cir. 2006).

II. THE FEDERAL POWER ACT

A. Tariffs

In *Niagara Mohawk Power Co. v. FERC*,[39] the Petitioners, transmission owning utilities in New York and the New York Public Service Commission, sought review of FERC orders that approved the New York Independent System Operator, Inc.'s (NYISO) proposed tariff provisions governing station power.[40] The Petitioners objected to the FERC's approval of the proposed tariff provision that would permit generators to net their station power purchases over their total output over a monthly period to determine if they should be assessed a transmission charge.[41] The Petitioners argued that the FERC, in approving the station power provisions, unlawfully intruded upon state retail jurisdiction because station power purchases were sales for end use and were thus not subject to the jurisdiction of the FERC.[42] The Petitioners further argued that in Order No. 888,[43] the FERC recognized that delivery of electricity to end use customers was a retail sale, and that order did not distinguish between merchant generators and retail customers such as industrial entities.[44] The Petitioners also pointed out that monthly netting was inconsistent with the time period that energy is priced, which is on an hourly basis.[45]

The court disagreed with the Petitioners. Although it found that the FERC had not clearly articulated the precise basis for asserting jurisdiction over station power, the court stated that the Petitioners conceded that a shorter netting period (*i.e.*, an hourly netting period) would not be problematic.[46] The court found it difficult to square the Petitioners' contention that a monthly netting period violated the Federal Power Act while a shorter netting period would be acceptable, which the court found to be "a recognition that, in drawing the jurisdictional lines in this area, some practical accommodation is necessary."[47] The court also concluded that the FERC could have reasonably exempted wholesale generators from the term "end user" that it employed in Order No. 888 to identify retail customers.[48] Turning to the Petitioners' argument that the FERC's approval of the monthly netting period was unreasonable, the court noted that the FERC did not require the NYISO to adopt the monthly netting period, and that it only endorsed the NYISO's choice of such a period.[49] Finally, the court accepted the FERC's argument that the hourly charge for energy is an

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39. Niagara Mohawk Power Co. v. FERC, 452 F.3d 822, 823 (D.C. Cir. 2006).
40. *Id.* at 823-24.
41. *Niagara Mohawk Power*, 452 F.3d at 827.
44. *Id.*
43. Order No. 888, *supra* note 26.
44. *Niagara Mohawk Power*, 452 F.3d at 827.
45. *Id.*
46. *Niagara Mohawk Power*, 452 F.3d at 828.
47. *Id.* at 828.
48. *Niagara Mohawk Power*, 452 F.3d at 829.
49. *Id.*

accounting entry rather than an actual power sale, and further observed that the NYISO's billing and accounting practices are "month-based."[50]

The court in *Constellation Energy Commodities Group, Inc. v. FERC* heard arguments raised by several parties relating to the bankruptcy of the California Power Exchange (CalPX).[51] CalPX's tariff required market participants to maintain enough collateral with CalPX to cover outstanding liabilities from the time they are incurred until payment is billed and settled.[52] The tariff also contained a "chargeback" provision, which was a cost allocation mechanism that would allow the CalPX to recover "uncollected receivables" from a defaulting debtor. CalPX used this provision when Southern California Edison Company (SoCal Edison) and PG&E defaulted on their debt to the CalPX.[53] In this proceeding, two power sellers (Sellers) sought review of orders that permitted the CalPX to retain a portion of the collateral the Sellers had posted with it.[54] One of the Sellers also sought a reimbursement of the "chargeback" it had paid to the CalPX.[55] In the challenged orders, the FERC concluded that, in connection with its investigation of the western energy markets crisis, the Sellers' refund liability had not been finally settled, and it was thus appropriate for the CalPX to retain a portion of the posted collateral to cover any potential refund liability.[56] Moreover, while the FERC had directed the CalPX to rescind the actions it took under the chargeback provision and refrain from using the provision until the FERC ruled on complaints related to the bankruptcy of SoCal Edison and PG&E, it concluded that the return of chargeback funds should wait until there was a "final computation" in the refund proceedings.[57]

The court affirmed the FERC, determining that the agency could reasonably conclude that the Sellers' liabilities would not be settled until it determined the "maximum just and reasonable price at which [those parties] could . . . sell power during the refund period,"[58] a conclusion that the language of the CalPX tariff supported.[59] At the same time, the court rejected a separate challenge from SoCal Edison and PG&E to the effect that the FERC should not have permitted the release of any collateral, again finding that the FERC's conclusion was reasonable.[60] The court also affirmed the FERC on its decision relating to its decision delaying the reimbursement of "chargeback" amounts held by the CalPX until final computations in the refund proceeding were made. The court again concluded that the FERC's decision was reasonable.

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50. Niagara Mohawk Power Co. v. FERC, 452 F.3d 822, 830 (D.C. Cir. 2006).
51. Constellation Energy Commodities Group, Inc. v. FERC, 457 F.3d 14, 16 (D.C. Cir. 2006).
52. *Id.*
53. *Constellation Energy Commodities Group*, 457 F.3d at 17.
54. *Id.* at 17-18.
55. *Constellation Energy Commodities Group*, 457 F.3d at 18.
56. *Id.* at 21.
57. Pacific Gas & Elec. Co. v. Cal. Power Exch. Corp., 109 F.E.R.C. ¶ 61,027 at PP 44-46 (2004).
58. *Constellation Energy Commodities Group*, 415 F.3d at 21.
59. *Id.* at 21.
60. *Constellation Energy Commodities Group*, 457 F.3d at 24.

In *Maine Public Utilities Commission v. FERC*,[61] the court heard arguments from both transmission owning utilities (Utility Petitioners) and state regulatory commissions (State Petitioners) in the New England region concerning FERC's conditional approval of RTO New England (RTO-NE).[62] The Utility Petitioners argued that FERC improperly rejected a provision contained in the Transmission Operating Agreement (TOA) between ISO New England, Inc. (ISO-NE) and the transmission owners. The TOA provision at issue provided that the FERC could only review withdrawals from RTO-NE under the deferential *Mobile-Sierra* public interest standard.[63] The Utility Petitioners also argued that the FERC improperly rejected a fifty-basis point incentive adder to their proposed rate of return on equity (ROE) for turning over their operational control of their local transmission facilities to an RTO.[64] Finally, the State Petitioners objected to the FERC's allowance of the ROE adder as an incentive to the transmission owners for turning over operational control of their regional transmission facilities to the RTO because it rewarded past action as the transmission owners had already turned over operational control of their facilities to ISO-NE, an independent system operator, prior to the establishment of RTO-NE.[65]

The court affirmed the FERC on all counts. First, it concluded that regional transmission organizations (RTOs) such as RTO-NE are a creation of the agency, and the FERC therefore has "substantial leeway"[66] in determining the conditions under which an RTO will be approved. The court noted that the original purpose of the *Mobile-Sierra* doctrine was to protect parties to a rate contract on file with the FERC when the other party sought to make a unilateral rate change, and that the situation was far different when the contract at issue was being submitted to the agency for the first time and involved a complex agreement to establish an RTO affecting market participants in the region.[67] In the absence of anything in the Federal Power Act that addresses the issue, the court concluded that the FERC's interpretation of the statute was permissible and entitled to deference.[68]

The court further rejected the arguments from both the Utility Petitioners and the State Petitioners regarding the ROE incentive adder.[69] The court observed as a general matter that the FERC's ROE determinations "are technical and involve policy judgments" on the part of the agency, and that judicial review of whether a rate design is just and reasonable under the Federal Power Act is "highly deferential."[70] As for the State Petitioners' contentions, the court found that the FERC appropriately determined that the adder would not reward past

61. Maine Pub. Util. Comm'n v. FERC, 454 F.3d 278, 281 (D.C. Cir. 2006).
62. *Id.*
63. *Maine*, 454 F.3d at 281.
64. *Id.*
65. *Maine*, 454 F.3d at 281.
66. *Id.* at 283.
67. Maine Pub. Util. Comm'n v. FERC, 454 F.3d 278, 283 (D.C. Cir. 2006).
68. *Id.*
69. *Maine*, 454 F.3d at 283.
70. *Id.* at 287.

action, performed the "necessary calibration"[71] and found that the adder would be within the zone of reasonableness. Finally, the court rejected the Utility Petitioners' assertion that the fifty-basis point adder should apply to local transmission facilities, pointing out that the transmission owners retained a large amount of control over local service.

The key issue in *Boston Edison Co. v. FERC*[72] was largely one of contract interpretation. In this case, Boston Edison Co. (Boston Edison) petitioned for review of a FERC order that denied its attempt to impose a transmission charge in delivering electric energy to certain municipalities (Towns). Pursuant to a settlement agreement entered into in 1980 (1980 Agreement), the Towns agreed to pay a specified amount to Boston Edison in exchange for, among other things, an exemption from the payment of charges for interconnecting the Towns' local network facilities with "Pool Transmission Facilities," *i.e.*, the higher voltage transmission facilities in New England.[73] Boston Edison had attempted to charge the Towns a transmission rate to transmit the power from the Towns' supplier to the Towns.[74] The Towns asserted that the 1980 Agreement exempted them from such charges. The FERC agreed with the Towns.[75]

The First Circuit ultimately affirmed the FERC's decision, observing first that an administrative agency is normally afforded deference in interpreting jurisdictional contracts.[76] From this principle, the court determined that it was reasonable to interpret the 1980 Agreement as supporting the Towns' positions. Although acknowledging that such an interpretation may run counter to cost causation principles, the court pointed out that the 1980 Agreement was a settlement that likely included compromises that were not "strictly cost-based, such as discontinuance of the higher charges for connection to low-voltage Town lines."[77] The court also looked to subsequent agreements between Boston Edison and the Towns to infer the parties' intentions, and found that these agreements again supported the conclusion that a reasonable interpretation of the 1980 Agreement was that Boston Edison was not permitted to impose the transmission charge.[78]

B. Mobile-Sierra Doctrine

In *Public Utility District No. 1 of Snohomish County v. FERC*,[79] Petitioners, a group of utilities located in the Western United States, sought review of FERC orders concluding that market-based power sales contracts between the utilities and electric power sellers should not be modified. The contracts had been executed in 2000-2001, during the height of the western power markets crisis. The crux of the FERC's reasoning was that the deferential *Mobile-Sierra* public

71. *Maine*, 454 F.3d at 288.
72. Boston Edison Co. v. FERC, 441 F.3d 10 (1st Cir. 2006).
73. *Id.*
74. *Boston Edison Co.*, 441 F.3d at 12.
75. *Id.*
76. *Boston Edison Co.*, 441 F.3d at 12.
77. *Id.* at 13.
78. Boston Edison Co. v. FERC, 441 F.3d 10, 13-14 (1st Cir. 2006).
79. Public Util. Dist. No. 1 of Snohomish County Wash. v. FERC, 471 F.3d 1053 (9th Cir. 2006).

interest standard of review should be applied to the contracts in question, and that the utilities had not satisfied the high burden imposed by *Mobile-Sierra*.

The Ninth Circuit sided with the utilities, explaining that the regulatory context in which *Mobile-Sierra* arose—where the FERC would conduct its historical cost-based just and reasonable review—had changed as a result of the development of market-based rate contracts. The court first set forth three prerequisites for *Mobile-Sierra* review:

> (1) the contract by its own terms must not preclude the limited *Mobile-Sierra* review; (2) the regulatory scheme in which the contracts are formed must provide FERC with an opportunity for effective, timely review of the contracted rates; and (3) where, as here, FERC is relying on a market-based rate-setting system to produce just and reasonable rates, this review must permit consideration of all factors relevant to the propriety of the contract's formation.[80]

While it found that market-based rate authority could justify *Mobile-Sierra* review, that standard can only be used "when accompanied by effective oversight permitting timely reconsideration of market-based authorization if market conditions change."[81] In this case, the court concluded that the FERC did not adopt a mechanism to monitor whether market-based rate authorizations should be modified in light of changed conditions and thus did not provide for sufficient oversight of these contracts to ensure that they yielded just and reasonable results. In addition, the court found that the FERC erred in its substantive analysis of whether the contracts affected the public interest, because it used the *Mobile-Sierra* standard's "low-rate" analysis, which provides that, generally, rates lower than those the FERC would approve do not directly affect the public interest. In this case, the utilities complained that it had been charged a rate that was too *high*, and the court found that the FERC should have examined whether the public paid fair rates for the energy provided for in the challenged contracts.

C. Refunds

The factual background of *Public Utilities of the State of California v. FERC*[82] involved two section 206 proceedings that had been initiated by a complainant and the FERC itself concerning the energy crisis in California in 2000. While the Ninth Circuit examined a number of issues in its opinion, including questions regarding the appropriate scope of the section 206 refund proceedings, two key issues were: (1) whether the refund effective date the FERC established for the section 206 proceedings was correct; and (2) an evaluation of the different refund authorities contained in section 206 and section 309.[83]

The court concluded that the FERC properly established the refund effective date, which it had issued in accordance with the section 206 complaint rather than the later section 206 investigation it had opened because the complaint had provided affected parties with sufficient notice that transactions

80. *Id.* at 1060.

81. *Public Util. Dist. No. 1 of Snohomish County Wash*., 471 F.3d at 1080.

82. Public Util. Comm'n of Cal. v. FERC, 474 F.3d 587 (9th Cir. 2006).

83. *Id.*

might be subject to refund. Finally, the court found that the FERC erred in not considering its section 309 refund authority to remedy tariff violations in this case, and disagreed with the FERC's rationales for not using that authority.[84] In short, the court stated that the time limit, *i.e.*, the refund effective date, that binds the FERC's section 206 refund authority does not apply to refunds under section 309 and that there were tariff violations that would permit the exercise of that authority.

D. PURPA Mandatory Purchase Obligation

The court in *Southern California Edison v. FERC* denied SoCal Edison's petition for review of a FERC order which permitted a PURPA geothermal Qualifying Facility (QF) to sell capacity in excess of its net output and which distinguished between brine extraction and reinjection in calculating that net output.[85] The QF at issue, Ormesa LLC (Ormesa), generates electricity by using pumps to extract brine from geothermal wells. The brine is then vaporized into a gas to that flows into turbines and creates electricity, after which the brine is reinjected into the well. Ormesa sold its output to SoCal Edison under a power purchase agreement. In 2004, Ormesa filed an application for recertification as a QF, seeking certification at a higher capacity of 16.7 MW. SoCal Edison disputed the capacity increase and argued for a capacity of 11.98 MW. In the order under review, the Commission partially agreed with both parties, and set the net output at 15.22 MW.[86] In a footnote to its order, the Commission also authorized Ormesa to sell an additional 1.35 MW in excess of its net output without jeopardizing its QF status.[87]

In its decision, the court first considered the applicability of the Energy Policy Act of 2005 (EPAct 2005) and Commission rulemakings removing the statutory ownership limitations on QFs. As a result of the elimination of those restrictions, QFs were authorized to sell non-QF power while remaining QFs. The court determined that these subsequent regulatory reforms did not in any way moot the controversy.[88]

The court then reviewed SoCal Edison's petition concerning the FERC's authorization of sales by Ormesa of the additional 1.35 MW. In upholding the FERC's order on this point, the court determined that the FERC had not improperly expanded the exception to the statutory ownership requirement in allowing Ormesa to sell the additional 1.35 MW.[89] The court next examined whether the FERC had arbitrarily distinguished between power for brine extraction and power for brine reinjection, a distinction which had the effect of increasing the authorized net output. After reviewing the FERC's rationale for its decision, the court found that "[w]hile the Commission's reasoning is perhaps

84. *Public Util. Comm'n*, 474 F.3d at 587.

85. Southern Cal. Edison Co. v. FERC, 443 F.3d 94 (D.C. Cir. 2006).

86. *See Ormesa LLC*, 107 F.E.R.C. ¶ 61,043 (2004), *reh'g denied*, 108 F.E.R.C. ¶ 61,299 (2004).

87. 107 F.E.R.C. ¶ 61,043 at 61,151 n. 10.

88. *Southern Cal. Edison Co.*, 443 F.3d at 97.

89. *Id.* at 100.

less than robust, we are not persuaded that its distinction between extraction and reinjection is so deficient as to warrant our intervention."[90]

III. THE NATURAL GAS ACT

A. Standards of Conduct

In *National Fuel Gas Supply Corp. v. FERC*,[91] the D.C. Circuit found that the FERC had not justified extending its standards of conduct to include interstate natural gas pipelines' relationships with their non-marketing affiliates in Order No. 2004.[92] The court vacated Order No. 2004 as applied to natural gas pipelines and remanded to the FERC.[93]

The standards of conduct governing the relationships between pipelines and their marketing affiliates had been adopted in the FERC's Order No. 497.[94] In evaluating the challenges to the expanded standards adopted in Order No. 2004, the court was guided by its decision in *Tenneco Gas v. FERC*, in which the court had addressed challenges to Order No. 497.[95] The court explained that *Tenneco* stood "for the proposition that FERC cannot impede vertical integration between a pipeline and its affiliates without 'adequate justification.'"[96] In *Tenneco*, the court had found adequate justification to apply the standards of conduct to the relationship between pipelines and their marketing affiliates based upon the FERC's reliance on "*both* (i) a plausible theoretical threat of anti-competitive information-sharing between pipelines and their marketing affiliates *and* (ii) vast record evidence of abuse."[97]

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90. *Southern Cal. Edison Co.*, 443 F.3d at 101-02.

91. National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831 (D.C. Cir. 2006).

92. Order No. 2004, *Standards of Conduct for Transmission Providers*, [Regs. Preambles 2001-2005] F.E.R.C. STATS. & REGS. ¶ 31,155 (2003), 68 Fed. Reg. 69,134 (2003), *order on reh'g*, Order No. 2004-A, [Regs. Preambles 2001-2005] F.E.R.C. STATS. & REGS. ¶ 31,161 (2004), 69 Fed. Reg. 23,562 (2004), *order on reh'g*, Order No. 2004-B, [Regs. Preambles 2001-2005] F.E.R.C. STATS. & REGS. ¶ 31,166 (2004), 69 Fed. Reg. 48,371 (2004), *order on reh'g*, Order No. 2004-C, [Regs. Preambles 2001-2005] F.E.R.C. STATS. & REGS. ¶ 31,172 (2004), 70 Fed. Reg. 284 (2004), *order on clarification or reh'g*, Order No. 2004-D, 110 F.E.R.C. ¶ 61,320 (2005) (codified at 18 C.F.R. pt. 358).

93. *National Fuel*, 468 F.3d at 845.

94. Order No. 497, *Inquiry into Alleged Practices Related to Marketing Affiliates of Interstate Pipelines*, [Regs. Preambles 1986-1990] F.E.R.C. STATS. & REGS. ¶ 30,820 (1988), 53 Fed. Reg. 22,139 (1988), *order on reh'g*, Order No. 497-A, [Regs. Preambles 1986-1990] F.E.R.C. STATS. & REGS. ¶ 30,868 (1989), 54 Fed. Reg. 52,781 (1989), *order extending sunset date*, Order No. 497-B, [Regs. Preambles 1986-1990] F.E.R.C. STATS. & REGS. ¶ 30,908 (1990), 55 Fed. Reg. 53,291 (1990), *order extending sunset date and amending final rule*, Order No. 497-C, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. STATS. & REGS. ¶ 30,934 (1991), 57 Fed. Reg. 9 (1992), *reh'g denied,* 58 F.E.R.C. ¶ 61,139 (1992), 57 Fed. Reg. 5815 (1992), *aff'd in part and remanded in part, sub nom.*, Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992), *order on remand*, Order No. 497-D, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. STATS. & REGS. ¶ 30,958 (1992), 57 Fed. Reg. 58,978 (1992), *order on reh'g and extending sunset date*, Order No. 497-E, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. STATS. & REGS. ¶ 30,987 (1994), 59 Fed. Reg. 243 (1994), *order on reh'g*, Order No. 497-F, 66 F.E.R.C. ¶ 61,347 (1994), 59 Fed. Reg. 15,336 (1994), *order extending sunset date,* Order No. 497-G, [Regs. Preambles Jan. 1991-June 1996] F.E.R.C. STATS. & REGS. ¶ 30,996 (1994), 59 Fed. Reg. 32,884 (1994) (codified at 18 C.F.R. pts. 161, 250, and 284).

95. *National Fuel*, 468 F.3d at 840 (citing Tenneco Gas v. FERC, 969 F.2d 1187 (D.C. Cir. 1992)).

96. *Id.* (quoting Tenneco Gas, 969 F.2d at 1199).

97. *National Fuel*, 468 F.3d at 840.

The court noted that, in extending the standards of conduct to pipelines' non-marketing affiliates in Order No. 2004, the FERC again relied on both a theoretical threat of abuse and record evidence allegedly showing actual abuse by pipelines and their non-marketing affiliates.[98] The court concluded, however, that the factual justification advanced by the FERC in Order No. 2004 lacked support. "Unlike in Order [No.] 497," the court observed, "FERC here has provided no evidence of a real problem with respect to pipelines' relationships with non-marketing affiliates."[99] The court found that all the evidence cited by the FERC either involved problems between pipelines and *marketing* affiliates, or simply stated a *theoretical* threat of abuse.[100] Because the factual evidence did not support the FERC's extension of the standards of conduct to include non-marketing affiliates, and because the FERC had not relied exclusively on the theoretical threat, the court could not affirm the orders.[101]

The court observed that on remand the FERC could try to support the extension of the standards of conduct to non-marketing affiliates by relying exclusively on a theoretical threat of abuse.[102] In this regard, the court discussed at some length the type of analysis that the FERC would need to undertake if it chose to try to justify the broader standards of conduct based solely on a theoretical threat.[103]

B. FERC Jurisdiction Under the Natural Gas Act

In *Williams Gas Processing–Gulf Coast Co. v. FERC,*[104] the D.C. Circuit vacated FERC orders that had held certain off-shore natural gas pipeline facilities owned by Transcontinental Gas Pipe Line Company (Transco) to be jurisdictional transportation facilities rather than gathering facilities. In the orders under review,[105] the FERC had reconsidered a prior finding, affirmed by the D.C. Circuit, that the Transco facilities served a gathering function.[106] The court found that the FERC, in reversing its earlier determination and finding the facilities to serve a transportation function, "neither explained its action as consistent with precedent nor justified it as a reasoned and permissible shift in policy."[107]

Relevant to the court's analysis, the Transco facilities at issue were downstream of certain natural gas pipeline facilities of Jupiter Energy Corp.

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98. *Id.* at 833-34, 841.

99. *National Fuel*, 468 F.3d at 841.

100. *Id.* at 841-44. The court noted that the FERC had identified one case of alleged affiliate abuse that involved a non-marketing affiliate (a gathering company), but observed that in its own review of the case, the court "expressly rejected the contention that the affiliate relationship between the gatherer and a pipeline was related to the alleged abuse." National Fuel Gas Supply Corp. v. FERC, 468 F.3d 831, 842 (D.C. Cir. 2006) (citing Williams Gas Processing, 373 F.3d 1335, 1342-43 (D.C. Cir. 2004)).

101. *Nat'l Fuel*, 468 F.3d at 839-40, 843-44.

102. *Id.* at 844.

103. *National Fuel*, 468 F.3d at 844-45.

104. Williams Gas Processing. v. FERC, No. 05-1342, 2006 WL 3716638 (D.C. Cir. Dec. 19, 2006).

105. *Transcontinental Gas Pipe Line Corp.*, 111 F.E.R.C. ¶ 61,090 (2005), *order on reh'g*, 111 F.E.R.C. ¶ 61,498 (2005).

106. *Williams Gas Processing*, 2006 WL 3716638, at *1.

107. *Id.* at *2.

(Jupiter).[108] In a separate proceeding that postdated its original finding that the Transco facilities were gathering facilities, the FERC had concluded that these Jupiter facilities served a transportation function.[109] In so finding, the FERC rejected Jupiter's argument that its facilities must serve a gathering function because they were upstream of the Transco gathering facilities.[110] The FERC stated that "[t]he presence of upstream transmission facilities determines the classification of downstream facilities, not the opposite."[111] The FERC's ruling as to the Jupiter facilities, however, prompted it to revisit its prior determination that the upstream Transco facilities served a gathering function.[112]

The court rejected the petitioners' arguments that the FERC was without authority to revisit its prior finding that the Transco facilities were gathering facilities.[113] The court explained, however, that the FERC's reconsideration of its prior determination had to be "justified either as consistent with precedent or as a considered departure there from."[114] The court noted in this regard that the FERC had offered two rationales for reconsidering its earlier decision: (1) the previous decision had been based on incomplete information because the FERC had not known that the Transco facilities were upstream of facilities that served a transportation function, *i.e.*, the Jupiter facilities; and (2) no gas was collected along the length of Transco's downstream facilities.[115]

The court concluded that the FERC's "incomplete information" rationale was inadequate because the FERC "never explained why the classification of the Jupiter facility is relevant to the jurisdictional status of the Transco lateral under existing precedent."[116] The closest the FERC had come to providing the requisite explanation, the court observed, was its reiteration of the assertion it had made in the context of ruling on the Jupiter facilities.[117] The court found, however, that this assertion was itself inconsistent with prior precedent.[118]

The court went on to observe that the FERC's "incomplete information" rationale may have been intended as a tacit adoption of "two interrelated principles which FERC once embraced but recently rejected: (1) there is one point along every route at which gathering ceases and transportation begins, and (2) a transportation facility cannot feed into a gathering facility."[119] Likewise, the FERC may have intended to adopt the related policy that where a

108. *See also Williams Gas Processing*, 2006 WL 3716638, at *1.

109. *Id.* at *1.

110. *Williams Gas Processing*, 2006 WL 3716638, at *5 (citing *Jupiter Energy Corp.*, 105 F.E.R.C. ¶ 61,243 (2003)).

111. *Id.* at *7 (quoting *Jupiter Energy Corp.*, 105 F.E.R.C. ¶ 61,243, 62,286 at n.8 (2003)).

112. Williams Gas Processing. v. FERC, No. 05-1342, 2006 WL 3716638, at *5 (D.C. Cir. Dec. 19, 2006) (citing *Transcontinental Gas Pipe Line Corp.*, 107 F.E.R.C. ¶ 61,122 (2004)).

113. *Id.* at *2.

114. *Williams Gas Processing*, 2006 WL 3716638, at *7.

115. *Id.* at *6 (citing *Transcontinental Gas Pipeline Corp.*, 111 F.E.R.C. ¶ 61,498 at PP 7, 14 (2005)).

116. *Williams Gas Processing*, 2006 WL 3716638, at *7.

117. *Id.* at *7 (quoting *Transcontinental Gas Pipeline Corp.*, 111 F.E.R.C. ¶ 61,090 at P *6 (2005)).

118. Williams Gas Processing. v. FERC, No. 05-1342, 2006 WL 3716638, at *8 (citing Exxon-Mobil Gas Marketing Co. v. FERC, 297 F.3d 1071, 1087 (D.C. Cir. 2002); *Sea Robin Pipeline Co.*, 92 F.E.R.C. ¶ 61,072, at p. 61,295 (2000)).

119. *Williams Gas Processing*, 2006 WL 3716638, at *8.

transportation facility sits upstream of a gathering facility, the presence of upstream transmission facilities will control the classification determination.[120] The court concluded, however, that it could not uphold the orders because the FERC had not articulated these rationales or addressed contrary precedent in the orders themselves.[121]

Finally, the court concluded that the inadequacy of the FERC's "incomplete information" rationale was dispositive because, while the FERC had also based its decision on a finding that no gas was collected along the length of Transco's downstream facilities, the orders under review did not indicate whether the FERC would have reclassified the Transco facilities on this latter rationale alone.[122] The Court observed in closing that it offered "no judgment on the merits of FERC's choice to reverse the Transco lateral's jurisdictional determination."[123]

C. *Tariffs*

The dispute in *Columbia Gas Transmission Corp. v. FERC*[124] involved an interruption of service at a Columbia Gas Transmission Corp. (Columbia) LNG storage facility in Virginia. As a result of a cold winter in 2003 and mechanical failures at the LNG storage facility, Columbia was unable to deliver the full amount of natural gas that one of its customers, Virginia Natural Gas (VNG), was entitled to receive under Columbia's tariff. After forty-one days of receiving reduced volumes, VNG sought damages reflecting the reduced volumes and the return of demand charges and contributions in aid of construction paid by VNG to Columbia over a ten-year period. For its part, Columbia raised a defense of *force majeure*. The FERC rejected Columbia's *force majeure* defense and also declined to award the damages sought by VNG based on its conclusion that a state court would be the most appropriate forum for determining damages under a breach of contract claim.[125]

The court quickly disposed of Columbia's petition for review, determining that "substantial evidence" in the record supported the FERC's rejection of the *force majeure* defense.[126] In its petition for review, VNG claimed that Columbia had "abandoned" its service obligations in violation of section 7(b) of the Natural Gas Act and also argued that the FERC improperly refused its request for monetary damages. The court found the abandonment claim to be "essentially frivolous," but it granted VNG's appeal of the FERC's attempt to re-route its damages claims to state court.[127] The court granted VNG's petition regarding damages on the basis of the FERC's failure to explain why the relief

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120. *Id.* at *7 (citing *Transcontinental Gas Pipeline Corp.*, 111 F.E.R.C. ¶ 61,090 at P 6 (2005)).

121. Williams Gas Processing-Gulf Coast Co. v. FERC, No. 05-1342, 2006 WL 3716638, at *9 (D.C. Cir. Dec. 19, 2006).

122. *Id.* at *10.

123. *Williams Gas Processing-Gulf Coast Co.*, 2006 WL 3716638, at *11.

124. Columbia Gas Transmission Corp. v. FERC, 448 F.3d 382 (D.C. Cir. 2006).

125. *See Virginia Natural Gas, Inc. v. Columbia Gas Transmission Corp.*, 108 F.E.R.C. ¶ 61,086 (2004).

126. *Columbia Gas Transmission*, 448 F.3d at 385.

127. *Id.* at 386.

sought by VNG was beyond its remedial authority.[128] The court, however, limited its decision by noting that it was not holding that the FERC must remedy any violation of the Natural Gas Act.[129]

IV. THE INTERSTATE COMMERCE ACT: OIL PIPELINES

In *Frontier Pipeline Co. v. FERC*,[130] the D.C. Circuit granted Frontier Pipeline Company's (Frontier) and Express Pipeline, LLC's (Express) (collectively, Carriers) petition for review of FERC orders which had rejected a Frontier reparations calculations compliance filing (the result of a settlement on Frontier's local rates). The FERC had concluded that Frontier's joint rate (in conjunction with Express) was unreasonable in that it exceeded the sum of the local rates on file.[131] The court also denied the petition made by shippers, Big West Oil, LLC (Big West) and Chevron Products Company (Chevron Products) (collectively, Shippers) requesting review of the FERC's decision in the same case that reparations were only to be awarded to shippers in privity with the pipeline and not to Shippers who had contracted for the purchase of crude oil in "cost-plus" contracts with third-parties.[132]

Frontier and Express were participants in a joint tariff with two other pipelines for the shipment of crude oil from the Canadian border to refineries in Salt Lake City, Utah, owned individually by Big West and Chevron Products. The joint tariff acted as a through rate option to shippers paying four local rates for each segment of pipeline used to transport oil to the refineries.[133]

After a settlement involving the local rates, Frontier filed a stipulated just and reasonable rate and subsequently argued that it owed no reparations. On the joint tariff the FERC, however, requested this argument, ordering reparations to be calculated based the difference between "(1) the joint rate filed and actually charged and (2) the sum of . . . the stipulated rate . . . and . . . the local rates on file for the . . . remaining three segments."[134] The Carriers argued that while one local rate may be found to be excessive, other segments may be well below ceiling levels and that the FERC must consider the joint rate as a whole before it could be found to be unreasonable. The Carriers further argued that the FERC had offered no explanation why it rejected the Carriers' argument under the lens of either the ICA or the EPAct 2005.[135]

The court found that the FERC had misapplied the logic of the Supreme Court in the seminal cases, *Louisville & Nashville Railroad v. Sloss-Sheffield Steel & Iron Co.*[136] and *Great Northern Railway Co. v. Sullivan*[137] by failing to

128. *Columbia Gas Transmission*, 448 F.3d at 387.

129. *Id.*

130. Frontier Pipeline Co. v. FERC, 452 F.3d 774 (D.C. Cir. 2006).

131. *See Big West Oil Co. v. Frontier Pipeline Co.*, 108 F.E.R.C. ¶ 61,183 at P 25 (2004).

132. *Big West Oil Co. v. Frontier Pipeline Co.*, 106 F.E.R.C. ¶ 61,171 (2004).

133. *Frontier Pipeline*, 452 F.3d at 779.

134. *Id.* at 781.

135. *Frontier Pipeline*, 452 F.3d at 781.

136. Louisville & Nashville Railroad v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217 (1935) (finding that a joint rate must be reasonable as a whole).

137. Great N. Railway Co. v. Sullivan, 294 U.S. 458 (1935).

assess the joint rate as a whole.[138] Additionally, the court found that the FERC had departed from long-standing ICC principle that while a through rate in excess of the sum of the local rates is presumed unreasonable under section 1(5) of the ICA, that presumption may be rebutted. The court further reasoned that the joint rate of the Carriers only exceeded the sum of the intermediates when the stipulated rate was substituted for one of the contemporaneously-filed rates. In addition to using a mixed batch of rates, the FERC compounded the misapplication of precedent by making the presumption of unreasonableness irrebuttable.[139] In remanding the case, the court directed the FERC to "consider whether the prior judicial constructions of [the] ICA . . . in *Sloss-Sheffield, Great Northern*, and . . . [other cases] preclude its condemnation of the joint rate here without considering the reasonableness of the rate as an aggregate,"[140] or to explain why its approach is a reasonable construction within the context of the ICC's pre-1977 application of section 1(5) and the relevant precedent.[141]

Regarding the Shippers who had cost-plus[142] contracts for the purchase of oil with third-parties' and their complaint for reparations, the Court denied the petition finding that the "pass-on" argument was properly rejected by the FERC, upholding the FERC's determination that reparations could only be sought by parties directly contracting with carriers either themselves or through an agent.

Finding that the FERC made a reasoned judgment in its previous order that to allow the pass-on theory for reparations would "complicate unnecessarily the Commission's administration of the ICA,"[143] the Shippers' petition was denied and the case remanded to the FERC for further proceedings.

138. *Frontier Pipeline*, 452 F.3d 774 at 782.

139. *Id.* at 785.

140. *Frontier Pipeline*, 452 F.3d at 788.

141. *Id*. at 788-89.

142. Defined as the cost of transportation plus other charges.

143. *Frontier Pipeline*, 452 F.3d 744 at 792-93.

JUDICIAL REVIEW COMMITTEE