

## REPORT OF THE JUDICIAL REVIEW COMMITTEE

This report summarizes cases reviewing decisions by the Federal Energy Regulatory Commission (FERC or Commission) and other cases pertinent to energy regulation. The time frame covered by this report is January 2013 through December 2013.\*

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#### I. ADMINISTRATIVE LAW

##### A. APA § 556(e): Consideration of Extra-Record Evidence

In *Southern California Edison, Inc. v. FERC*, the D.C. Circuit considered a petition for review challenging FERC orders establishing rates for the recovery of the costs of three transmission projects constructed by Southern California Edison Company (SoCal Edison).<sup>1</sup> In a filing under section 205 of the Federal Power Act (FPA),<sup>2</sup> SoCal Edison proposed changes to its transmission rates to implement rate incentives approved by the FERC for SoCal Edison's three projects and proposing a base return on equity (ROE).<sup>3</sup> In its orders in the proceeding initiated by SoCal Edison's filing, the FERC concluded that the utility's base ROE should be established using the median of the range established by a proxy group of publicly-traded companies under the discounted cash flow (DCF) analysis, rather than the midpoint as SoCal Edison had proposed.<sup>4</sup> The FERC also determined that the ROE for the locked-in period under the FPA should be updated to reflect a decline in the average yields on ten-year U.S. Treasury bonds.<sup>5</sup> SoCal Edison's petition to the D.C. Circuit challenged the FERC's use of the median in its DCF analysis under section 205 of the FPA and under the Administrative Procedure Act (APA).<sup>6</sup> SoCal Edison also challenged the FERC's decision to require SoCal Edison to update its ROE to reflect recent financial data not within the record without considering proffered evidence as contrary to 5 U.S.C. § 556(e), which requires an agency to permit a party to present rebuttal evidence when an agency takes official notice of evidence not in the record of the proceeding.<sup>7</sup> The D.C. Circuit denied the petition with respect to the FERC's choice of the median in determining SoCal

1. *Southern Cal. Edison Co. v. FERC*, 717 F.3d 177 (D.C. Cir. 2013).

2. 16 U.S.C. § 824d (2012).

3. *Southern Cal.*, 717 F.3d at 179.

4. *Id.*

5. See generally Order on Paper Hearing and Request for Rehearing, *Southern Cal. Edison Co.*, 131 F.E.R.C. ¶ 61,020 at P 16 (2010).

6. *Southern Cal.*, 717 F.3d at 180-82.

7. *Id.* at 179.

Edison's ROE, but granted the petition and remanded the orders to the FERC regarding its decision to update the ROE using current financial information, in light of the court's determination the FERC failed to comply with the procedural requirements of 5 U.S.C. § 556(e).<sup>8</sup>

In calculating the 11.5% base ROE proposed by SoCal Edison pursuant to the DCF methodology, the utility selected a national proxy group of publicly-traded companies and established the midpoint of the proxy group's ROEs as the reference point for its proposed ROE.<sup>9</sup> Following a paper hearing, the FERC ordered several revisions to SoCal Edison's ROE. The FERC selected an alternative proxy group and ordered SoCal Edison to base its ROE on the median of that group, rather than the midpoint as the utility had proposed, yielding a base ROE of 10.55% rather than the proposed 11.5%.<sup>10</sup> The FERC also took official notice of financial data that had not previously been admitted into the record of the proceeding reflecting a 1.01% reduction in the ten-year U.S. Treasury bond yield and accordingly ordered SoCal Edison to reduce its base ROE further from 10.55% to 9.54%.<sup>11</sup>

Although SoCal Edison challenged the FERC's use of the median rather than the midpoint in its DCF analysis of the utility's ROE under both FPA section 205 and the APA, the court found that SoCal Edison's challenge under the FPA was "a statutory argument that effectively devolves into an argument that the [FERC's] use of the median was arbitrary and capricious."<sup>12</sup> The utility argued that under section 205(e) of the FPA, "if a utility proposes use of the midpoint in a Section 205 filing and the use of the midpoint is just and reasonable, then under the statute [the FERC] must accept it."<sup>13</sup> The court disagreed, noting that it has never required FERC to determine that the selection of a particular component used to determine a rate is "just and reasonable" under FPA section 205, provided that the overall rate is determined to be "just and reasonable."<sup>14</sup>

Regarding SoCal Edison's challenge under the APA that the FERC's selection of the median of the proxy group, rather than the midpoint, in determining the utility's base ROE was arbitrary and capricious, the court remarked that in its ratemaking function under the FPA, the FERC "may require the use of a particular ratemaking methodology so long as its embrace of that methodology is not arbitrary and capricious."<sup>15</sup> The utility argued that the FERC's

use of the median for a single electric utility of average risk is arbitrary and capricious because the [FERC] has previously determined, and [the D.C. Circuit]

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8. *Id.* at 188.

9. *Id.* at 180.

10. *Id.*

11. *Id.*

12. *Id.* at 181.

13. *Id.*

14. *Id.* at 181-82 (stating that the FERC "has discretion regarding the methodology by which it determines whether a rate is just and reasonable").

15. *Id.* at 182.

has affirmed, that the midpoint is a just and reasonable measure of the ROE for a group of electric utilities with diverse risk profiles.<sup>16</sup>

Contrary to this position, the court examined the FERC's previous decisions and determined that the FERC's use of the median was a logical development of its policy regarding rates for single utilities over the past fifteen years.<sup>17</sup> Further, it determined that the FERC had provided an adequate explanation of its decision to depart from its previous practice of using the midpoint for electric utilities, noting that the FERC had explained its conclusion in stating that "the median is appropriate because it is the most accurate measure of central tendency for a single utility of average risk, such as SoCal Edison."<sup>18</sup>

The court next addressed SoCal Edison's challenge to the FERC's decision to require the utility to reduce its ROE for the locked-in period. SoCal Edison contended that the FERC "erred by taking official notice of the change in U.S. Treasury bond yields as a proxy for its private cost of capital during the locked-in period without affording it an opportunity to show to the contrary."<sup>19</sup> As the court explained, section 556(e) of the APA provides that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."<sup>20</sup> Although SoCal Edison did not dispute the accuracy of the U.S. Treasury bond yields cited by the FERC, SoCal Edison contended that the FERC improperly ignored SoCal Edison's "proffered expert analysis of the unique conditions of the 2008 market collapse," which SoCal Edison claimed should have been considered in determining the appropriateness of the decrease in its ROE.<sup>21</sup>

The court agreed with SoCal Edison, noting its prior holding that identified two prerequisites that agencies must satisfy where the agency takes official notice of information that is not part of the record under APA section 556(e): "First, the information noticed must be appropriate for official notice. Second, the agency must follow proper procedures in using the information, disclosing it to the parties and affording them a suitable opportunity to contradict it or 'parry its effect.'"<sup>22</sup> The D.C. Circuit has "viewed Treasury bond rates to be a type of information that was appropriate for official notice because such information is not typically subject to dispute."<sup>23</sup> However, SoCal Edison claimed that it was denied the opportunity to "parry the effect" of the information of which the FERC took notice: The FERC did not take official notice of the U.S. Treasury bond yields until after the record had closed in the proceeding. Therefore, the first opportunity for SoCal Edison to respond to this information was during the rehearing stage.<sup>24</sup> Although SoCal Edison submitted an expert affidavit

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16. *Id.*

17. *Id.* at 183.

18. *Id.* (quoting 131 F.E.R.C. ¶ 61,020, at P 93).

19. *Id.* at 187.

20. *Id.* (quoting 5 U.S.C. § 556(e) (2012)).

21. *Id.*

22. *Id.* (quoting *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1202 (D.C. Cir. 1989)).

23. *Id.* (citing *Union Elec.*, 890 F.2d at 1202-03).

24. *Id.*

contending that the U.S. Treasury bond yields cited by the FERC were not a rational proxy for the cost of capital due to the unique circumstances surrounding the financial collapse of 2008, which caused investors to flee “from riskier corporate investments to less risky Treasury bonds, reaching proportions not seen since April 1933.”<sup>25</sup> Nevertheless, the FERC “declined to consider the affidavit, noting its general rule that once the record is closed it will not be reopened and that it generally does not allow new evidence to be introduced at the rehearing stage.”<sup>26</sup>

The court ruled that the FERC had improperly denied SoCal Edison the opportunity to “parry the effect” of the officially noticed information through its proffered affidavit.<sup>27</sup> The court noted the magnitude of the impact of the FERC’s decision to update the ROE—reducing the return by 101 basis points from 10.55% to 9.54%.<sup>28</sup> “This makes it somewhat odd that the [FERC] would turn a blind eye to the information SoCal Edison proffered on rehearing.”<sup>29</sup> The court stated that the FERC had not suggested that it had ever applied its updating policy “in such extreme economic circumstances as occurred in late 2008.”<sup>30</sup> The court ruled that SoCal Edison had accordingly “made the necessary ‘good showing’ that it could contest the significance of the [FERC’s] officially noticed information based on ‘a flaw in the evidence.’”<sup>31</sup> Accordingly, the FERC “was obligated to consider and appropriately respond to SoCal Edison’s effort ‘to parry the effect’ of the officially noticed information.”<sup>32</sup> The decision was remanded to the FERC on this issue.<sup>33</sup>

#### B. Failure of Reasoned Decisionmaking

In *Southwest Power Pool, Inc. v. FERC*, the D.C. Circuit vacated and remanded a decision of the FERC, finding that the FERC’s orders were arbitrary and capricious.<sup>34</sup> The case involved the court’s review of the FERC’s order on a petition for declaratory order and the subsequent rehearing order resolving a contractual dispute between two regional transmission organizations (RTOs).<sup>35</sup> The court determined that the FERC had “failed to provide a reasoned explanation for its decision” because it “leapt to an interpretation of one item of evidence without explaining its implicit rejection of alternative interpretations, and, equally without explanation (or at least adequate explanation), it disregarded evidence that the applicable law required it to consider.”<sup>36</sup>

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25. *Id.*

26. *Id.* at 188.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* (quoting *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006)).

32. *Id.*

33. *Id.*

34. *Southwest Power Pool, Inc. v. FERC*, 736 F.3d 994, 999 (D.C. Cir. 2013).

35. Order on Petition for Declaratory Order, *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 F.E.R.C. ¶ 61,010 at PP 2-9 (2011).

36. *Southwest Power Pool*, 736 F.3d at 995.

Accordingly, the court vacated the FERC's orders on the grounds that they were arbitrary and capricious under the APA.<sup>37</sup>

The dispute in the case arose between two adjacent RTOs, Southwest Power Pool, Inc. (SPP) and Midwest Independent Transmission System Operator, Inc. (MISO), and a public utility, Entergy Arkansas, an Entergy Corporation subsidiary that abutted both RTOs but was not a part of either at the time of the petition.<sup>38</sup> As of 2011, Entergy Arkansas, through various regulatory filings, signalled its interest in joining MISO. However, Entergy Arkansas's connections to the MISO area were relatively limited compared to its connections to SPP and other public utilities.<sup>39</sup> Accordingly, to move electricity to Entergy Arkansas, MISO would "need to rely on these other, non-MISO transmission providers."<sup>40</sup> To accomplish this transportation of electricity to Entergy Arkansas following its entry into the RTO, MISO contended that its existing Joint Operating Agreement (JOA) with SPP permitted it to provide transportation to Entergy Arkansas using SPP's facilities.<sup>41</sup> Specifically, section 5.2 of the JOA stated:

If the Parties have contract paths to the same entity, the combined contract path capacity will be made available for use by both Parties. This will not create new contract paths for either Party that did not previously exist. SPP will not be able to deal directly with companies with which it does not physically or contractually interconnect and the [MISO] will not be able to deal directly with companies with which it does not physically or contractually interconnect.<sup>42</sup>

Prior to Entergy Arkansas's entry into MISO, both RTOs had "contract paths to the same entity," i.e., Entergy Arkansas, and thus the contract section allowed MISO and SPP to use the other RTO transmission facilities to transport electricity to Entergy Arkansas.<sup>43</sup> However, following Entergy Arkansas's entry into MISO, the parties disagreed as to whether the section would continue to apply.<sup>44</sup> MISO contended that the contract provision included "any physical or contractual interconnection and . . . appl[ied] regardless of whether the 'entity' is a part of either RTO."<sup>45</sup> On the other hand, SPP argued that the contract provision would no longer apply once Entergy Arkansas joined MISO because "an RTO cannot have a 'contract path to' itself or to part of itself."<sup>46</sup> The FERC's orders adopted MISO's reading of the provision, finding that the contract section could be read broadly enough to encompass any "entity" whether or not it was a part of the RTOs party to the JOA.<sup>47</sup>

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37. *Id.* at 999.

38. *Id.* at 995. MISO was recently renamed "Midcontinent Independent System Operator, Inc."

39. *Id.*

40. *Id.* at 995-96.

41. *Id.* at 996.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 136 F.E.R.C. ¶ 61,010 at PP 61-62 (2011), *order on reh'g*, 138 F.E.R.C. ¶ 61,055 at P 19 (2012)).

Prior to reaching a decision on the merits of the case, the court dismissed the FERC's challenge to SPP's petition for review on the threshold issues of standing and ripeness.<sup>48</sup> On standing, the FERC claimed that SPP's interest in the interpretation of the JOA was too attenuated to create an injury that was "actual or imminent," because SPP would suffer no harm unless and until Entergy Arkansas elected to join MISO and MISO then attempted to obtain transmission service under section 5.2 of the JOA.<sup>49</sup> The court rejected the FERC's standing challenge, stating that "an agency interpretation that defines contractual rights and obligations may itself create enough of an injury to confer standing on a party to that contract."<sup>50</sup> The court noted that the FERC's decisions "cast a very present shadow over the three-way maneuvering between SPP, MISO and Entergy Arkansas," and that SPP should not be required to "remain in limbo while its competitor MISO woos Entergy Arkansas with [the] FERC's assurance of access to SPP's infrastructure—an assurance that SPP believes is unlawful."<sup>51</sup> The court likewise rejected the FERC's ripeness challenge, noting that none of the parties had alleged the need for further factual development and that the FERC "nowhere suggest[ed] that its interpretation of Section 5.2 has not crystallized enough for this court's review."<sup>52</sup>

Turning to the merits, the court noted that the FERC relied significantly on the parties' prior practice in reaching its decision supporting MISO's interpretation of section 5.2 of the JOA.<sup>53</sup> However, this "course of performance evidence" consisted of only a single transaction over the course of the agreement—a transaction between MISO, SPP, and Entergy Arkansas.<sup>54</sup> At the time of that transaction, both RTOs had a contractual path to Entergy Arkansas, which was not part of either RTO. MISO utilized SPP's contractual path to Entergy Arkansas under section 5.2 of the JOA to permit Ameren, one of MISO's members, "to continue to serve its radial load on the Entergy transmission system."<sup>55</sup> FERC found that this prior performance under the relevant contract section supported MISO's view of the meaning of that provision.<sup>56</sup> The court stated that the FERC "seemed to find decisive the fact that the path in question was . . . used to provide transmission service to Ameren, an internal MISO operating member," even though the FERC had acknowledged that the only service provided by SPP under section 5.2 of the JOA was between MISO and a third party, Entergy Arkansas.<sup>57</sup> However, the FERC did not explain "[w]hy it is important that the MISO member using this service then

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48. *Id.*

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

50. *Id.* at 996 (citing *Dominion Transmission, Inc. v. FERC*, 533 F.3d 845, 852 (D.C. Cir. 2008)).

51. *Id.* at 997.

52. *Id.*

53. *Id.* at 998.

54. *Id.*

55. *Id.* (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 138 F.E.R.C. ¶ 61,055 at P 20 (2012)) (internal quotation marks omitted).

56. *Id.*

57. *Id.* (quoting 138 F.E.R.C. ¶ 61,055 at P 20).

went on to reach its own operating area via Entergy Arkansas.”<sup>58</sup> The court found that the transaction seemed to support the interpretations of section 5.2 of the JOA proffered by both SPP and MISO but was conclusive on neither interpretation. “Given the episode’s apparent complete consistency with both parties’ competing views,” the court stated that it was “at a loss to see why [the] FERC regarded the episode as decisive in favor of MISO.”<sup>59</sup>

The court found that the FERC’s failure to explain why the cited single instance of “course of performance” evidence supported MISO’s reading of section 5.2 rendered the agency’s decisions arbitrary and capricious under the APA, which requires that an agency “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”<sup>60</sup> Further, the court concluded that the FERC’s confident, but unexplained, reliance on the “course of performance” evidence led it to dismiss other evidence offered by SPP, including evidence about the intent of the parties at the time of the drafting of the JOA and common trade usage of the term “contract path.”<sup>61</sup> Although the court acknowledged that under the Restatement (Second) of Contracts and the governing law of the JOA, it is appropriate to give “greater weight” to “course of performance” evidence than other forms of evidence, the FERC refused to consider altogether any evidence other than the single instance of past performance under section 5.2.<sup>62</sup> The court stated that it “may assume *arguendo* that in some instances course of performance evidence would be so overwhelming as to justify disregard of other evidence, but the seemingly neutral impact of the single episode of Section 5.2’s use makes any such assumption irrelevant.”<sup>63</sup> Accordingly, the court held that, in conjunction with its failure to justify its reliance on the “course of performance” evidence, the FERC’s refusal to consider any additional extrinsic evidence regarding the interpretation of section 5.2 of the JOA was arbitrary and capricious.<sup>64</sup>

### C. Standing

In *Northern Laramie Range Alliance v. FERC*, the Tenth Circuit denied on standing grounds a petition for review of the FERC’s orders denying challenges brought by a group of retail electric ratepayers (the Alliance) to the certification of several wind facilities under the Public Utility Regulatory Policy Act (PURPA).<sup>65</sup> The case stemmed from the efforts by Wasatch Wind Intermountain, LLC (Wasatch) to construct, operate, and sell power from its wind energy projects in Wyoming.<sup>66</sup> Under PURPA, utilities are required to

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58. *Id.*

59. *Id.*

60. *Id.* at 997 (internal quotation marks omitted).

61. *Id.* at 998.

62. *Id.* at 999.

63. *Id.*

64. *Id.*

65. *Northern Laramie Range Alliance v. FERC*, 733 F.3d 1030, 1032 (10th Cir. 2013); 16 U.S.C. §§ 796(17), 824a-3 (2012).

66. *Northern Laramie Range Alliance*, 733 F.3d at 1032.



purchase power from small power-production facilities that meet certain criteria established by the statute and the FERC's regulations. Specifically, in order to qualify under PURPA, the size of a small power-production facility may not exceed eighty megawatts (MW).<sup>67</sup> If a facility meets the qualifications under PURPA and the FERC's regulations, "it can force a utility to buy the energy for its 'avoided cost.' . . . This cost is the incremental cost the utility would have paid to generate or purchase that electricity from another source."<sup>68</sup> The exact amount of the "avoided cost" that sets the price for power a public utility is required to purchase from a small power-production facility is established by the relevant state public utility commission.<sup>69</sup>

"If a producer of wind power believes it satisfies the statutory criteria, it can certify compliance" with PURPA by submitting a self-certification.<sup>70</sup> Wasatch submitted such a compliance certification to the FERC, which drew opposition from the Alliance, many of whose members paid retail electric rates charged by Rocky Mountain Power, a public utility that previously had two contracts to purchase power from Wasatch as required by PURPA.<sup>71</sup> The primary challenge to Wasatch's certification to the FERC was whether the wind developer's facilities fell below the eighty MW cap established in the statute.<sup>72</sup> The challenge turned on "whether Wasatch plans to develop a single facility or two facilities."<sup>73</sup> The court noted that Wasatch planned to construct two turbine clusters, which would be "considered parts of the same facility [under PURPA and the FERC's regulations] if they are located within a mile of each other. But the clusters will be more than a mile apart."<sup>74</sup> The Alliance filed a petition with the FERC requesting a declaratory order finding that Wasatch's certification was void due to the wind developer's failure to meet the size requirements of PURPA.<sup>75</sup> The FERC denied the Alliance's challenge to Wasatch's certification,<sup>76</sup> and the Alliance challenged the orders on petition for review to the Tenth Circuit.<sup>77</sup>

The court dismissed on the threshold issue of standing and did not reach the merits of the Alliance's challenge. The court found that the Alliance failed to meet its burden of satisfying "two constitutional requirements of standing: traceability and redressability," and therefore dismissed the Alliance's petition for failure to establish standing under Article III of the U.S. Constitution.<sup>78</sup> The court stated that "[t]he party invoking federal jurisdiction bears the burden of

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67. *Id.* at 1032-33 (citing 16 U.S.C. § 796(17)(A)(ii)).

68. *Id.* at 1033 (citing 16 U.S.C. § 824a-3(a)-(b), (d); 18 C.F.R. § 292.101(b)(6), .303(a), .304(a)(2) (2013)).

69. *Id.* (citing 16 U.S.C. § 824a-3(f)).

70. *Id.* at 1032 (citing 18 C.F.R. § 292.207(a)).

71. *Id.*

72. *Id.* at 1032-33.

73. *Id.* at 1033.

74. *Id.* (citing 18 C.F.R. § 292.204(a)(2)(i)-(ii)).

75. *Northern Laramie Range Alliance*, 139 F.E.R.C. ¶ 61,190 at PP 4-5 (2012).

76. *Id.* at P 27.

77. *Northern Laramie Range Alliance*, 733 F.3d at 1032.

78. *Id.* at 1033-34.

establishing traceability and redressability.”<sup>79</sup> Following the Seventh, Eighth, and D.C. Circuit Courts of Appeals, the court defined the burden of demonstrating traceability and redressability for the purpose of establishing standing by a party, such as the Alliance, that is directly appealing an agency decision to be analogous to the burden faced by a petitioner seeking a motion for summary judgment in district court.<sup>80</sup> The court found that “[t]o prove these elements, the Alliance must proffer ‘specific facts’ supported by ‘affidavit or other evidence’” to support its claim that standing was valid at the time it filed its petition and that if the “FERC contests these facts, the Alliance would not enjoy ‘the benefit of any inference’ and it would need to satisfy its burden of persuasion under a preponderance-of-the-evidence standard.”<sup>81</sup> The court concluded that under this standard, the Alliance could establish neither traceability nor redressability.<sup>82</sup>

Regarding traceability, the court stated that “[s]tanding exists only if the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court.”<sup>83</sup> However, in this case, the court determined that the Alliance’s alleged injury “depend[ed] on the unfettered choices made by independent actors”—in this case, Rocky Mountain Power and the Wyoming Public Service Commission.<sup>84</sup> The Alliance based its standing claim solely on the contention that the Wyoming Public Service Commission, the agency responsible for determining “avoided costs” under PURPA, approved a rate increase for Rocky Mountain Power as a result of the allegedly-erroneous certification to the FERC that Wasatch had met the small power-production facility criteria under the FERC’s regulations.<sup>85</sup> However, the court found that Wasatch’s certification did not, in itself, affect retail electricity rates. “Instead, electricity rates are determined by the actions of two third-parties: Rocky Mountain Power and the Wyoming Public Service Commission.”<sup>86</sup> Accordingly, the court determined that it could only find that Wasatch’s certification was traceable to the Alliance’s alleged injury if “Rocky Mountain Power sought higher rates as a result of the certification and the Wyoming Public Service Commission allowed Rocky Mountain Power to increase rates because of an agreement to buy wind power from Wasatch.”<sup>87</sup>

The court found that the Alliance failed to establish traceability by tying the Rocky Mountain Power rate increase to the costs of the wind projects for several reasons. First, it determined that Wasatch’s contracts with Rocky Mountain Power were relatively insignificant compared to Rocky Mountain Power’s other

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79. *Id.* at 1034 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

80. *Id.* (citing *Iowa League of Cities v. EPA*, 711 F.3d 844, 869-70 (8th Cir. 2013); *Citizens Against Ruining the Env’t v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008); *Sierra Club v. EPA*, 292 F.3d 895, 899-900 (D.C. Cir. 2002)).

81. *Id.*

82. *Id.* at 1033-34.

83. *Id.* at 1035 (internal quotation marks omitted).

84. *Id.* (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)).

85. *Id.*

86. *Id.* at 1034.

87. *Id.* at 1034-35.

operational costs. The Wasatch contracts constituted only about 0.85% of Rocky Mountain Power's total power costs.<sup>88</sup> Second, the court found that the Alliance's conclusion about the certification's impact on Rocky Mountain Power's rates relied upon unreasonable assumptions leading to the conclusion that the Wyoming Public Service Commission had improperly permitted Rocky Mountain Power to charge higher rates.<sup>89</sup> Finally, the court found that the Alliance had not properly supported or explained its allegation that the lack of "unutilized transmission capacity" to deliver Wasatch's wind energy demonstrated that the certification lead Rocky Mountain Power to impose higher rates on customers.<sup>90</sup>

Regarding the demonstration of redressability to establish standing, the court stated that "[t]he injury is redressable only if a favorable decree (an order requiring decertification) would likely provide redress. . . . This inquiry turns on what Rocky Mountain Power and the Wyoming Commission would do if the Wasatch projects were decertified."<sup>91</sup> The court found that on the record, there was no way to know how either Rocky Mountain Power or the Wyoming Public Service Commission would respond if the certification were vacated.<sup>92</sup> According to the court, the Alliance failed to demonstrate that if the certification were vacated, Rocky Mountain Power's rates would be lowered, either through a voluntary rate reduction or through an involuntary rate reduction imposed by the Wyoming Public Service Commission.<sup>93</sup> The court also rejected as unsupported the claim that consumers would benefit from lower energy costs from the utility's purchase of power derived from sources other than wind power, because the Alliance could not demonstrate that prices for wind energy would always be higher than prices for energy from other sources.<sup>94</sup> Having found that the Alliance failed to carry its burden of persuasion on the issues of traceability and redressability, the Tenth Circuit dismissed the Alliance's petition for lack of standing under Article III.<sup>95</sup>

## II. FEDERAL POWER ACT

### A. *Preemption State Law Property Damage Claims Arising From Hydroelectric Operations*

In *Simmons v. Sabine River Authority*, the Fifth Circuit affirmed a district court's dismissal of a property damage claim brought against the holders of a FERC-granted hydroelectric license.<sup>96</sup> Plaintiffs were landowners who alleged "that their properties were flooded and eroded" after defendants opened spillway

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88. *Id.* at 1036 n.5.

89. *Id.* at 1036-37.

90. *Id.* at 1037.

91. *Id.* at 1038 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

92. *Id.* at 1038-39.

93. *Id.*

94. *Id.*

95. *Id.* at 1040.

96. *Simmons v. Sabine River Auth.*, 732 F.3d 469, 478 (5th Cir. 2013).

gates that were part of a FERC-licensed hydroelectric project (the Project).<sup>97</sup> The Project included the Toledo Bend Dam as well as a large reservoir, spillway, and hydroelectric plant.<sup>98</sup> The Toledo Bend Dam was located across the Texas/Louisiana state line.<sup>99</sup> In reviewing requests to modify the Project's operations, the FERC had previously concluded that "the Project 'cannot provide any significant flood control benefits.'"<sup>100</sup>

To analyze the preemption claim, the Fifth Circuit looked "to the text of the [FPA], its history, and the way in which the Supreme Court, our circuit, and our sister circuits have interpreted it."<sup>101</sup> The Fifth Circuit considered *California v. FERC* particularly relevant, as it "indicates that the Supreme Court has interpreted the FPA as occupying the field of public water use and power generation except for water use rights."<sup>102</sup> In that case, the Supreme Court "concluded that California's regulations [of minimum stream flow rights] were preempted because Section 27 of the FPA, 16 U.S.C. § 821, was a limited savings clause, exempting only rights that 'reflect or establish proprietary rights or rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.'"<sup>103</sup>

The Fifth Circuit found that "*California v. FERC's* interpretation of Section 27's general savings clause is instructive" for interpreting Section 10(c)'s limited savings clause, as "[t]he latter cannot be interpreted so broadly as to allow state tort law to supplant [the] FERC's exclusive control of dam operations."<sup>104</sup> And "[b]ecause the state law property damage claims" raised by the plaintiffs would "infringe on [the] FERC's operational control," the Fifth Circuit held "that they are conflict preempted."<sup>105</sup> In other words, the plaintiffs had alleged "[d]efendants were negligent because they failed to act in a manner [the] FERC had expressly declined to require. But [the] FERC, not state tort law, must set the appropriate duty of care for dam operators."<sup>106</sup>

Furthermore, the court noted that "damages can serve the same effect as regulations."<sup>107</sup> In this case, the plaintiffs had "attempted, through the proper administrative procedure channels, to impose changes on [d]am operations."<sup>108</sup> But the FERC had rejected these, and plaintiffs had not challenged the FERC's decision as improper. Instead, plaintiffs had sought "to use state law to accomplish the same aims, alleging that [d]efendants were negligent for not changing their operations."<sup>109</sup> Allowing plaintiffs to assert such claims "in an

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97. *Id.* at 472.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 474.

102. *Id.* at 476; *see also* *California v. FERC*, 495 U.S. 490 (1990).

103. *Simmons*, 732 F.3d at 476 (quoting *California v. FERC*, 495 U.S. at 498).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 477 (citing *Kurns v. Railroad Friction Prods. Corp.*, 132 S. Ct. 1261, 1269 (2012)).

108. *Id.*

109. *Id.*

attempt to force changes to a FERC-issued license would ‘constitute a veto of the project that was approved and licensed by [the] FERC.’”<sup>110</sup> Thus, the court held that the district court’s dismissal of the negligence claim based on preemption was proper.<sup>111</sup>

The Fifth Circuit also considered whether the district court had abused its discretion in denying the plaintiffs’ motions to amend their complaint by ruling in defendants’ favor and dismissing the case with prejudice. It concluded that the motions to amend “were futile in light of the district court’s holding that the FPA preempted their state law claims” and thus that the district court “did not abuse its discretion in implicitly denying [p]laintiffs’ motion to amend.”<sup>112</sup>

*B. FPA Section 206 and Line Loss Credits: No Undue Discrimination Against Financial Marketers; Refunds and Recoupments*

In *Black Oak Energy, LLC v. FERC*,<sup>113</sup> the D.C. Circuit affirmed in most respects FERC orders concerning PJM Interconnection, L.L.C.’s (PJM) allocation of transmission line loss revenues among PJM wholesale market participants.<sup>114</sup> The court agreed with the Commission that PJM can allocate surplus dollars solely to PJM market participants that physically use the transmission system and serve load and need not allocate surplus to virtual traders who do not use the transmission system and do not serve load.<sup>115</sup> The court also agreed with the Commission that virtual traders were on notice that they might not be entitled to dollars to the same extent as physical participants but remanded to the extent that the Commission failed to explain sufficiently why earlier refunds must be recouped by PJM.<sup>116</sup>

In one set of orders, financial marketers operating in the PJM energy market filed a complaint with the Commission arguing that they should be eligible to collect a share of PJM’s line loss surplus to the same extent as PJM’s physical transmission customers.<sup>117</sup> Noting that it had previously approved PJM’s tariff allocating line loss over-collection only to those customers contributing to the fixed costs of PJM’s transmission system, the Commission granted the complaint to the limited extent that financial marketers’ transactions included such a contribution.<sup>118</sup> The Commission subsequently ordered PJM to pay refunds to the financial marketers for the line loss credit they were due.<sup>119</sup> However, in a second set of orders, the Commission held that its initial requirement that PJM pay refunds to the financial marketers for erroneous line loss over-collection was

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110. *Id.* (quoting *California v. FERC*, 495 U.S. 490, 507 (1990)).

111. *Id.*

112. *Id.* at 477-78.

113. *Black Oak Energy, LLC, v. FERC*, 725 F.3d 230 (D.C. Cir. 2013).

114. *Id.* at 232-33.

115. *Id.* at 232.

116. *Id.* at 232-33.

117. *Id.* at 234.

118. *Black Oak Energy, LLC, v. PJM Interconnection L.L.C.*, 122 F.E.R.C. ¶ 61,208, *order on reh’g*, 125 F.E.R.C. ¶ 61,042 at P 49 (2008).

119. *Black Oak Energy, LLC, v. PJM Interconnection L.L.C.*, 136 F.E.R.C. ¶ 61,040 at PP 19-24 (2011).

incorrect, in view of its policy against awarding refunds for errors in rate design.<sup>120</sup>

The court agreed with the Commission that its failure to require PJM to pay the line loss credit for all transactions by financial marketers did not unlawfully discriminate against them in favor of actual transmission customers.<sup>121</sup> There are legitimate reasons for the agency to treat the two classes of market participants differently. “Virtual marketers with purely a speculative, financial interest in markets play a very different role than load-serving entities.”<sup>122</sup> In particular, the Commission’s decision to return PJM surpluses based on fixed cost contribution, rather than transaction volume, discourages potential market manipulation.<sup>123</sup>

The court also agreed that the Commission had legal authority to direct the virtual marketers to return to PJM \$37 million in refunds that PJM previously made to them. The virtual marketers had notice that the refund issue was alive throughout the proceeding and that the Commission might change its mind regarding refunds.<sup>124</sup> However, the court found that the Commission failed to explain adequately whether its general refund policy applies to recoupment of refunds already made.<sup>125</sup> The FERC lawfully can order PJM “to claw back money that has already been paid out,” but it has to explain better the distinction between denying refunds and recouping them.<sup>126</sup> Because the court found it “plausible that [the] FERC can redress its failure of explanation on remand while reaching the same result,” the court remanded but did not vacate the orders on review.<sup>127</sup>

### C. *EPAAct 2005 Penalty Procedures and Lessons Learned from Kourouma v. FERC*

In *Kourouma v. FERC*, the D.C. Circuit denied an energy trader’s challenge to a FERC order that (1) found that the trader had made false statements and material omissions to the FERC and a market operator regulated by the FERC and (2) assessed a \$50,000 civil penalty.<sup>128</sup>

First, the court rejected Kourouma’s argument that he was entitled to an administrative hearing at the FERC.<sup>129</sup> The court has routinely recognized that an agency need not hold an administrative hearing when no material facts are in dispute.<sup>130</sup> Because Kourouma in an affidavit had “admitted that he falsified and omitted multiple names on his forms, and that he had kept his involvement in

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120. *Id.* at P 26.

121. *Black Oak Energy, LLC, v. FERC*, 725 F.3d 230, 241 (D.C. Cir. 2013).

122. *Id.* at 240.

123. *Id.* at 239-41.

124. *Id.* at 241-43.

125. *Id.* at 243-44.

126. *Id.*

127. *Id.* at 244.

128. *Kourouma v. FERC*, 723 F.3d 274, 276 (D.C. Cir. 2013).

129. *Id.* at 277-78.

130. *Id.* at 278.

Quntum a secret to avoid alerting Energy Endeavors to his violation of the non-compete,” he had “resolved all disputes of material fact, making an evidentiary hearing unnecessary.”<sup>131</sup>

Second, the court rejected Kourouma’s argument that the FERC erred because there was no showing that he had any intent to deceive the FERC or PJM with his false filings.<sup>132</sup> Intent to deceive is not an element of the rule that the FERC found Kourouma had violated, 18 C.F.R. § 35.41(b), also called Market Behavior Rule 3.<sup>133</sup> Instead, the plain text of Market Behavior Rule 3 excuses false or misleading submissions only if they are made inadvertently despite the filer’s due diligence to avoid such errors. Because Kourouma’s actions were not inadvertent, the FERC reasonably concluded that he violated the rule.<sup>134</sup>

The court further rejected Kourouma’s argument that, without a requirement of intent, Market Behavior Rule 3 fails to provide constitutionally adequate notice to regulated parties of what is forbidden and invites discriminatory enforcement.<sup>135</sup> The rule’s “plain language” and the FERC’s “prior public statements” regarding the rule provide sufficient notice to regulated parties of what conduct the rule prohibits, and those clear enforcement parameters prevent the FERC from engaging in unconstitutionally discriminatory enforcement.<sup>136</sup>

Third, the court rejected Kourouma’s arguments under the APA:

(1) Kourouma argued that the FERC failed to follow its own summary disposition rule that “evidence must be ‘viewed in light most favorable’ to the non-moving party . . . [b]ut the summary disposition rule requires only that [the] FERC draw all ‘reasonable’ inferences in Kourouma’s favor.”<sup>137</sup> It would not have been reasonable for the FERC to draw the inference that Kourouma’s actions were inadvertent.<sup>138</sup>

(2) “At a late stage in the administrative process, Kourouma sought to introduce new evidence, and he argued” before the court that the FERC’s decision to exclude the evidence was an abuse of discretion.<sup>139</sup> However, the FERC’s procedural rules prohibit a respondent from submitting an additional answer, so it was not an abuse of discretion for the FERC to adhere to those procedural rules.<sup>140</sup>

(3) Kourouma argued that the “FERC failed to support its imposition of a \$50,000 penalty [over five years] with substantial evidence.”<sup>141</sup> But based on

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131. *Id.*

132. *Id.*

133. *Id.* at 276, 278.

134. *Id.* at 278.

135. *Id.* at 279.

136. *Id.*

137. *Id.* (citations omitted).

138. *Id.*

139. *Id.*

140. *Id.* at 279-80.

141. *Id.* at 280.

the FERC's judgment regarding the seriousness of Kourouma's violation—especially that “Kourouma had ‘knowingly and deliberately’ filed false information[ ]and the mitigating factor of his financial position[—]the [FERC] reasonably arrived at the decision to impose a \$50,000 penalty, payable over five years.”<sup>142</sup>

Finally, the court rejected Kourouma's argument that the FERC enhanced his penalty based on the goal of promoting general deterrence, in violation of court precedent.<sup>143</sup> In *Clifton Power*, while leaving the issue open, the court had questioned whether the FERC could increase the dollar amount of a penalty recommended by an administrative law judge in order to deter other market participants.<sup>144</sup> In the instant case, however, Kourouma made no showing that the FERC increased his penalty to promote general deterrence and instead the FERC only considered general deterrence when deciding whether to impose a monetary penalty, not when determining its amount.<sup>145</sup> “Thus, [the court's] unresolved discussion of general deterrence in *Clifton Power*” was found to be “inapposite.”<sup>146</sup>

#### D. Regional Cost Allocation Methodology for Multi-Value Projects in MISO

The proceeding in *Illinois Commerce Commission v. FERC*<sup>147</sup> involved ten consolidated appeals of FERC orders that largely approved the filing by MISO and certain transmission owners in MISO (collectively, with MISO, the Filing Parties) to establish a regional cost allocation methodology for the recovery of so-called Multi-Value Projects (MVPs).<sup>148</sup> In its June 7 Order, the Seventh Circuit denied the petitions for review on most issues, granted the petitions for review on the PJM Export Issue (defined below) and remanded that issue to the FERC, and dismissed as premature the petitions for review concerning departing transmission owners.<sup>149</sup>

MVPs are transmission facilities that meet minimum cost and voltage requirements and that have been approved following the MISO transmission expansion and planning process.<sup>150</sup> In the MVP Orders, the FERC generally approved the Filing Parties' proposal to recover the costs of MVPs from all transmission customers on an energy-usage basis, including from transmission customers whose transactions sink outside of MISO.<sup>151</sup> The FERC rejected, however, the proposal to recover costs from transmission customers whose transactions sink in the PJM RTO.<sup>152</sup>

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142. *Id.* (citation omitted).

143. *Id.* (citing *Clifton Power Corp. v. FERC*, 88 F.3d 1258, 1267 (D.C. Cir. 1996)).

144. *Id.* (discussing *Clifton Power*, 88 F.3d at 1271).

145. *Id.*

146. *Id.*

147. *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764 (7th Cir. 2013).

148. *Id.* at 769-71; *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 F.E.R.C. ¶ 61,221 at P 1 (2010), *order on reh'g*, 137 F.E.R.C. ¶ 61,074 (2011) [hereinafter *MVP Orders*].

149. *Illinois Commerce Comm'n*, 721 F.3d at 781.

150. 133 F.E.R.C. ¶ 61,221 at P 1.

151. *See generally MVP Orders*, *supra* note 148.

152. 133 F.E.R.C. ¶ 61,221 at P 65.



The court's decision divided the issues presented by the petitions for review in six broad areas: (1) Tenth Amendment Issues; (2) the proportionality of benefits to costs and the procedural adequacy of the FERC's treatment of proportionality; (3) the propriety of apportioning the MVP costs based on their total power consumption (MVP Usage Charge Issues); (4) the propriety of allocating no MVP costs to the plants that generate the power (Generator Cost Allocation Issues); (5) whether MISO should be permitted to allocate costs on transactions that sink in PJM (PJM Export Issues); (6) whether MISO should be permitted to allocate some MVP costs to transmission owners that depart from MISO (Departing TO Issues).<sup>153</sup>

#### 1. Tenth Amendment Issues

The court rejected as "frivolous" the claims by state petitioners and other parties that approval of the MVP tariff mechanisms improperly invalidated state prerogatives and violated the Tenth Amendment of the U.S. Constitution.<sup>154</sup> The court stated that while the MVP mechanisms might encourage states to permit utilities in their jurisdictions to incur MVP costs in order to receive the benefits of the MVP methodology, this does not amount to the FERC impermissibly "conscripting a state government into federal service."<sup>155</sup> The court also found that the FERC was not "ordering the states to build transmission lines that the federal government wants to use for its own purposes."<sup>156</sup>

#### 2. Proportionality and Procedure

The court rejected contentions by the Illinois petitioners that "the criteria for determining what projects are eligible to be treated as an MVP are too loose" and that consequently "all MISO members will be forced to contribute to the cost of projects that benefit only a few."<sup>157</sup> The court found that there was substantial evidence to support MISO's contentions that MVPs offered significant regional benefits and that the petitioners had not offered any evidence of the costs and benefits of MVPs to show inadequate benefits.<sup>158</sup> While the court found that it is "impossible to allocate these cost savings [of MVPs] with any precision across MISO members," if a crude match of costs and benefits "is all that is possible, it will have to suffice."<sup>159</sup>

The court also rejected arguments from a group of Michigan utilities and their state commission opposing the allocation of MVP costs to transmission customers in Michigan.<sup>160</sup> The court found that one of the initial set of approved MVPs will enable more power to be transmitted to Michigan at lower costs, undercutting the Michigan petitioners' assertions that they will receive little

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153. See generally *Illinois Commerce Comm'n*, 721 F.3d 764.

154. *Id.* at 773.

155. *Id.*

156. *Id.*

157. *Id.* at 773.

158. *Id.* at 774.

159. *Id.* at 774-75.

160. *Id.* at 775-77.

benefit from MVPs.<sup>161</sup> While the Michigan petitioners also argued that they should not be allocated MVP costs due to a state law which prohibits Michigan utilities from counting renewable energy generated outside the state for purposes of meeting the state-mandated renewable requirements, the court rejected this argument on the basis that this restriction violated the Commerce Clause.<sup>162</sup>

With respect to the procedural issues, the court rejected assertions that the FERC erred in not setting the MVP issues for an oral hearing, stating that the FERC is not required to hold an “oral hearing if it can adequately resolve factual disputes on the basis of written submissions.”<sup>163</sup> The court added that, given the highly technical issues presented, the expertise of the FERC’s members and its Staff, and petitioners’ access to the data presented by MISO, requiring an oral hearing at this time would amount to “gratuitous delay.”<sup>164</sup> The court also stated that membership in RTOs is voluntary and that MISO members who feel that they are being unfairly assigned MVP costs are free to leave MISO.<sup>165</sup>

### 3. MVP Usage Charge Issues

The court upheld the FERC’s approval of the usage-based MVP charge instead of a charge based on peak demand.<sup>166</sup> The court held that MVPs are intended to increase the supply of wind-powered energy, the availability of which varies by the amount of wind rather than demand.<sup>167</sup> The court also found that the FERC was “entitled to conclude that the benefits of more and cheaper wind power predominate over the benefits of greater reliability brought about by improvement in meeting peak demand.”<sup>168</sup>

### 4. Generator Cost Allocation Issues

The court rejected claims that the FERC erred by failing to allocate a portion of the MVP costs to generators, finding that MVPs will lead to more efficient siting of wind generators and the utilities that purchase wind energy from these generators will benefit from less expensive energy.<sup>169</sup>

### 5. PJM Export Issues

In the MVP Orders, the FERC rejected the Filing Parties’ proposal to require transmission customers exporting power from MISO to PJM to pay a portion of the MVP costs, based on its prior orders eliminating “rate pancaking” (i.e., the imposition of multiple transmission charges) for transactions between the two RTOs.<sup>170</sup> The court noted that the irregular seams between PJM and

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161. *Id.* at 775-76.

162. *Id.* at 776.

163. *Id.*

164. *Id.*

165. *Id.* (noting membership is voluntary in spite of a “departure fee”).

166. *Id.* at 777.

167. *Id.*

168. *Id.*

169. *Id.* at 777-78.

170. *Id.* at 778.

MISO that were part of the basis for the anti-pancaking orders had been resolved and that unlike MVPs, which provide regional benefits, the facilities at issue at the time the anti-pancaking orders were issued were local facilities.<sup>171</sup> The court also noted that the FERC had expressly found that MVPs “benefit all users of the integrated transmission system,” which justified requiring transmission customers exporting power to PJM to pay a share of the MVP cost.<sup>172</sup> Finding that the orders were “arbitrary in continuing to prohibit MISO from charging anything for exports of energy to PJM enabled by the multi-value projects while permitting it to charge for exports of energy to all the other RTOs,” the court remanded this aspect of the MVP Orders to the FERC for further analysis.<sup>173</sup>

#### 6. Departing TO Issues

The Filing Parties had sought authority to allocate a portion of the MVP costs to FirstEnergy Services Company (FirstEnergy) and Duke Energy Ohio, Inc. and Duke Energy Kentucky, Inc. (Duke), two transmission owners within MISO that had provided notice of their intent to withdraw from MISO as transmission owners prior to the effective date of the MVP filing.<sup>174</sup> The Departing TOs petitioned for review of the MVP Orders’ statement that they would be assigned MVP costs.<sup>175</sup> The court held that while the FERC ruled that the allocation of costs to departing utilities was appropriate in principle, the FERC had “reserved” issues of FirstEnergy and Duke’s liability to a separate proceeding.<sup>176</sup> The court accordingly dismissed the petitions for review of this aspect of the MVP Orders as premature.<sup>177</sup>

#### E. Mobile-Sierra: Auction Rates Are Not Contract Rates Subject to Mobile-Sierra Presumption

In *New England Power Generators Ass’n v. FERC*, the D.C. Circuit affirmed the FERC’s approval of a settlement provision requiring application of the *Mobile-Sierra* public interest mode of review to any challenge to rates produced by the forward electric capacity auctions in ISO New England, Inc. (ISO-NE).<sup>178</sup> The decision was the latest chapter in a controversy that had already produced two previous D.C. Circuit opinions and one U.S. Supreme Court decision.<sup>179</sup>

On remand from the D.C. Circuit’s *Maine Public Utilities Commission v. FERC (MPUC II)* decision, the FERC concluded that it was not required to

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171. *Id.* at 779.

172. *Id.* at 780 (quoting *Midwest Indep. Transmission Sys. Operator, Inc.*, 133 F.E.R.C. ¶ 61,221 at P 439).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 780-81.

178. *New England Power Generators Ass’n v. FERC*, 707 F.3d 364, 371 (D.C. Cir. 2013).

179. *Maine Pub. Utils. Comm’n v. FERC*, 520 F.3d 464 (D.C. Cir. 2008), *rev’d sub nom.* *NRG Power Mktg, LLC v. Maine Pub. Utils. Comm’n*, 130 S. Ct. 693 (2010), *remanded*, *Maine Pub. Utils. Comm’n v. FERC (MPUC II)*, 625 F.3d 754 (D.C. Cir. 2010).

accept a settlement provision adopting the *Mobile-Sierra* public interest review for challenges to rates established by the ISO-NE forward electric capacity auction mechanism because the auction rates were not contract rates to which a presumption of justness and reasonableness applies under the *Mobile-Sierra* Doctrine.<sup>180</sup> The FERC nonetheless approved the settlement's adoption of the *Mobile-Sierra* public interest mode of review for challenges to the auction rates, finding that accepting the provision was within its discretion in applying the FPA just and reasonable standard.<sup>181</sup> Two sets of petitioners challenged this decision. The New England Power Generators Association, Inc. (NEPGA), although agreeing with the FERC's approval of the *Mobile-Sierra* public interest review for the auction rates, objected to the FERC's conclusion that the auction rates were not contract rates to which the FERC was required to apply the public interest mode of review in future challenges.<sup>182</sup> On the other hand, several state agencies (State Petitioners), while endorsing the FERC's finding that the auction rates were not contract rates, objected to the FERC's decision to approve use of the *Mobile-Sierra* public interest standard notwithstanding this finding.<sup>183</sup>

The court dismissed NEPGA's petition for lack of standing, concluding that NEPGA had not established that it was injured by the FERC's order given that "its desired outcome—application of *Mobile-Sierra*'s public interest standard—has already been achieved."<sup>184</sup> The fact that NEPGA was dissatisfied with the FERC's reasoning in reaching the desired result, the court explained, did not establish standing "for neither a FERC decision's legal reasoning nor the precedential effect of such reasoning confers standing unless the substance of the decision itself gives rise to an injury in fact."<sup>185</sup> The court considered and rejected several NEPGA arguments as to why the organization allegedly had standing.<sup>186</sup> A potential increase in capital costs as a result of uncertainty fostered by the FERC ruling did not establish standing, the court concluded, because "broad-based market effects stemming from regulatory uncertainty are quintessentially conjectural."<sup>187</sup> Nor did the FERC's decision necessarily interfere with the ability of the parties to sue on the forward capacity supply contracts, as the finding that the forward capacity market auction rates are not contract rates for *Mobile-Sierra* purposes "does not, of its own force, foreclose any contract or bankruptcy claim NEPGA's members may one day choose to bring."<sup>188</sup>

Turning to the objections of the State Petitioners, the court rejected the argument that the FERC exceeded its authority by approving a *Mobile-Sierra* public interest standard of review for challenges to the auction rates

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180. *Devon Power LLC*, 137 F.E.R.C. ¶ 61,073 at P 1 (2011).

181. *Id.* at P 34.

182. *Id.* at P 11.

183. *Id.* at P 17.

184. *New England Power Generators Ass'n v. FERC*, 707 F.3d 364, 369 (D.C. Cir. 2013).

185. *Id.* (citing *Wisconsin Pub. Power Inc. v. FERC*, 493 F.3d 239, 268 (D.C. Cir. 2007)).

186. *Id.* at 369-70.

187. *Id.* at 369.

188. *Id.* at 370.

notwithstanding the FERC's finding that they were not contract rates.<sup>189</sup> The court observed that the State Petitioners' argument "boils down to a single misconception: because the existence of a contract rate mandates application of the *Mobile-Sierra* presumption, the absence of a contract rate precludes it."<sup>190</sup> Recognizing that the *Mobile-Sierra* public interest standard of review "is an instance of (rather than an exception to) the FPA's just and reasonable standard,"<sup>191</sup> the court found that the FERC had not exceeded the "considerable discretion" it possesses in applying the just and reasonable standard by approving a heightened mode of review for the auction rates.<sup>192</sup>

#### F. NYISO's Supply-Side Mitigation

In *TC Ravenswood, LLC v. FERC*, the D.C. Circuit denied the petition of TC Ravenswood, LLC (Ravenswood) for review of the FERC's order approving tariff amendments proposed by New York Independent System Operator, Inc. (NYISO) to implement supply-side market power mitigation in the NYISO energy and capacity markets.<sup>193</sup> In its order,<sup>194</sup> the FERC approved measures that would reduce the level of compensation paid to reliability generators in upstate New York when circumstances indicated that the generators had exercised market power in making their bids.<sup>195</sup> NYISO did not propose measures to mitigate either buyer-side market power or uneconomic market entry by subsidized generation, such as wind power.<sup>196</sup> While considering NYISO's proposal, the FERC rejected arguments from Ravenswood that it should require NYISO to implement such additional types of mitigation measures.<sup>197</sup>

In a protracted discussion of threshold issues, the court rejected the FERC's arguments that Ravenswood lacked standing because the challenged order applied only to generators in upstate New York, and not to generators such as Ravenswood, which is located in New York City.<sup>198</sup> The court explained that Ravenswood's injury arose "not from what the [FERC] did but from what it refused to do."<sup>199</sup> The court also noted that Ravenswood occasionally makes sales of capacity into upstate New York and could therefore be affected by the new rules.<sup>200</sup> Finally, the court held that the existence of a stakeholder process addressing buyer-side market power mitigation did not eliminate Ravenswood's

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189. *Id.*

190. *Id.*

191. *Id.* (citing *Morgan Stanley Capital Grp., Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 545 (2008)).

192. *Id.* at 371.

193. *TC Ravenswood, LLC v. FERC*, 705 F.3d 474, 475 (D.C. Cir. 2013).

194. *New York Indep. Sys. Operator, Inc.*, 133 F.E.R.C. ¶ 61,030 (2010), *reh'g denied*, 135 F.E.R.C. ¶ 61,157 (2011).

195. *TC Ravenswood*, 705 F.3d at 475.

196. *Id.* at 475-76.

197. *Id.* at 476.

198. *Id.* at 476-77.

199. *Id.*

200. *Id.* at 477.

standing because delay in implementing the mitigation is itself a cognizable harm.<sup>201</sup>

The court then rejected Ravenswood's argument that the FERC improperly approved supply-side market power mitigation "without any counterbalancing buyer-side mitigation measures."<sup>202</sup> The court stated that the commission may not abuse its discretion in determining how best to address related issues by "slic[ing] and dic[ing] issues to the prejudice of a party," but held that the FERC had not acted improperly in its market power mitigation order.<sup>203</sup> The court held that Ravenswood had "exaggerate[d] the integrated character of the two issues" because, while supply-side and buyer-side exercises of market power "both involve distortion of competitive results," they are "different brands of distortion."<sup>204</sup>

Finally, the court rejected Ravenswood's argument that the FERC failed to "provide for a comprehensive market design."<sup>205</sup> The court observed that the FERC has pursued an iterative process to address the complexities posed by regional integration of the electricity industry and noted that the court had explicitly condoned this iterative approach in at least one prior case.<sup>206</sup> The court held that the FERC had again properly engaged in an iterative process of addressing market problems: It first considered NYISO's proposal to apply mitigation measures to specific generators and then addressed NYISO's more generally-applicable mitigation proposal.<sup>207</sup> Furthermore, the court observed that buyer-side market power mitigation is currently being considered as part of a stakeholder process and that the FERC can therefore be expected to address it in due course.<sup>208</sup> The court held that while delay is expensive, "it would take a far clearer case than this to justify . . . disrupting the pattern created by the [FERC's] choices over how to sequence its consideration of issues."<sup>209</sup>

*G. PJM Modeling of Transmission Outages and FTRs: PJM Is Not Required to Prioritize Revenue Adequacy over All Other Regulatory Goals*

In *PPL EnergyPlus, LLC v. FERC*, the D.C. Circuit denied a marketing firm's petition for review of a FERC order that dismissed the firm's complaint against PJM.<sup>210</sup> In its complaint, "PPL alleged that PJM violated the terms of its open access transmission tariff when it failed to include all transmission outages expected to last two months or longer in its annual modeling of the transmission system it administers."<sup>211</sup> As a result, PPL claimed there was an "underfunding

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201. *Id.*

202. *Id.* at 478-79.

203. *Id.* at 478.

204. *Id.* at 479.

205. *Id.* at 478.

206. *Id.* (citing *TC Ravenswood, LLC v. FERC*, 331 F. App'x 8 (D.C. Cir. 2009)).

207. *Id.* at 479.

208. *Id.*

209. *Id.*

210. *PPL EnergyPlus, LLC v. FERC*, 503 Fed. App'x 1, 1-2 (D.C. Cir. 2013).

211. *Id.* at 2.

of financial rights relied on by PPL and other market participants to hedge against congestion charges, leading to ‘unjust, unreasonable, and unduly discriminatory results’ prohibited under the [FPA].”<sup>212</sup>

According “substantial deference to the [FERC]’s interpretation of filed tariffs,” the D.C. Circuit “[saw] nothing in the [FERC]’s order that suggests it has acted outside the limits of its discretion.”<sup>213</sup> The court reasoned that although “PPL is correct that the tariff includes a goal of revenue adequacy,” that goal must be balanced by PJM “against other considerations.”<sup>214</sup> Tension between FERC-recognized goals arises in the modeling of transmission system outages because while omitting some outages “increases the risk that the financial rights derived from the model will fail to fully hedge against congestion charges, . . . it also increases the amount of firm service a transmission provider can offer prospective customers.”<sup>215</sup>

The FERC had “read the tariff as granting PJM discretion in deciding which outages merited inclusion in its system model.”<sup>216</sup> The court found that PPL had “not drawn [its] attention to any language in the tariff that compels the conclusion that PJM must in every modeling decision allow the goal of revenue adequacy to trump other regulatory goals.”<sup>217</sup> The court also considered PPL’s argument that a PJM manual had stated outages lasting two months or longer “will be included” in the modeling but concluded that the FERC reasonably determined “the manual is not binding on PJM and that the manual means merely that PJM must *consider* including outages lasting two months or longer.”<sup>218</sup>

#### *H. Contested Settlements and the Substantial Evidence Standard*

In *NRG Power Marketing, LLC v. FERC*, the D.C. Circuit denied NRG Power Marketing, LLC’s (NRG) petition for review of the FERC orders approving a contested settlement and granting and denying in part NRG’s rehearing request.<sup>219</sup> NRG had objected to the settlement because it “[gave] [Consolidated Edison Company of New York, Inc. (ConEd)] transmission rights not available to other market participants,” and thus “violated FERC’s open-access principles as explained in Order No. 888.”<sup>220</sup> In its petition for review, NRG further argued that the “FERC’s rationales to justify the settlement as just and reasonable and not unduly discriminatory were flawed and not supported by substantial evidence.”<sup>221</sup>

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212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 3.

218. *Id.*

219. *NRG Power Mktg., LLC v. FERC*, 718 F.3d 947, 949 (D.C. Cir. 2013).

220. *Id.*

221. *Id.*

The contested settlement arose from an underlying dispute between ConEd, Public Service Gas & Electric Company (PSE&G), NYISO, and PJM over how certain transmission service agreements executed between ConEd and PSE&G should be treated following ConEd joining NYISO and PSE&G joining PJM.<sup>222</sup> An initial operating protocol to effectuate the transmission service agreements was approved in 2005, but both it and the service agreements were to expire in 2012.<sup>223</sup> PJM and ConEd thus “entered into replacement agreements, which they styled as [section] 2.2 roll-over agreements, with an effective date of 2012.”<sup>224</sup> These non-conforming agreements were filed by PJM with the FERC; NYISO filed a companion joint operating agreement protocol with the FERC.<sup>225</sup> The FERC accepted and suspended these filings and set them for hearing but suspended the hearing to provide the parties an opportunity to settle.<sup>226</sup> Negotiations ultimately produced a settlement that would “allow[] ConEd to submit contract elections in NYISO’s day-ahead market for the 400 MW and 600 MW transactions, and require[] NYISO and PJM to establish flow schedules across the transmission lines entering New York City from New Jersey.”<sup>227</sup> FERC trial staff and NRG opposed the settlement, and after setting the matter for briefing, the FERC ultimately approved the contested settlement.<sup>228</sup> In doing so, the FERC concluded that it was “a just and reasonable means for ConEd to obtain a continuation of its grandfathered transmission service.”<sup>229</sup>

NRG’s first challenge to the settlement was that it was “inconsistent with [the] FERC’s open access orders, [D.C. circuit] precedents, and [section] 2.2 of the pro forma [open access transmission tariff (OATT)] itself.”<sup>230</sup> The D.C. Circuit did not accept NRG’s view “that a transmission provider cannot rollover a non-conforming agreement.”<sup>231</sup> The FERC had determined that the non-conforming protocol here was necessary “due to the operational issues raised by the service that cannot be accommodated under standard OATT service,” and that the settlement “reflect[ed] the needs of [PJM and NYISO] in order to be able to provide service to ConEd.”<sup>232</sup> The court found helpful PJM’s explanation of the “operational difficulties present in this case,” which were due in part to how PJM provides through-and-out service, and it noted that NRG had failed to acknowledge these facts in its absolutist argument that no non-conforming OATT agreements could ever be approved.<sup>233</sup> Furthermore, the court found that

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222. *Id.*

223. *Id.* at 951.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 951-52.

229. *Id.* at 952 (quoting *PJM Interconnection, L.L.C. v. Public Serv. Elec. & Gas Co.*, 132 F.E.R.C. ¶ 61,221 at P 23 (2010)).

230. *Id.* at 953.

231. *Id.*

232. *Id.* at 954 (quoting *PJM Interconnection, L.L.C. v. Public Serv. Elec. & Gas Co.*, 135 F.E.R.C. ¶ 61,018 at PP 29-30 (2011)).

233. *Id.*



NRG had failed to cite any language from Order No. 888 or the pro forma OATT “that prevents FERC from approving *any* rolled-over transmission service agreement filings that deviate from the OATT,” and “[t]o the contrary, FERC has approved agreements in the past that allow deviations from filed OATTs.”<sup>234</sup> Relying on its own precedent, the court explained that “when entities before [the] FERC present ‘intensely practical difficulties’ that demand a solution, [the] FERC ‘must be given the latitude to balance the competing considerations and decide on the best resolution.’”<sup>235</sup> It therefore concluded that, “[g]iven the operational difficulties in effectuating the rolled-over service through two neighboring transmission operators, we do not read [the] FERC’s orders so strictly as to deny [the] FERC discretion to approve transmission service agreements that do not completely conform with the relevant OATT.”<sup>236</sup>

NRG’s second challenge was that the FERC had failed to establish its orders were not unduly discriminatory.<sup>237</sup> The court considered but rejected the FERC’s argument that NRG waived this argument, finding that NRG “properly raised these issues in its petition for review,” even though “NRG did not explicitly include a subheading for ‘Undue Discrimination’ in its request for rehearing” because “the substance of [NRG’s] arguments in both filings is sufficiently similar to preserve its objection before us.”<sup>238</sup> On the merits, however, the court concluded that NRG had failed to meet its burden.<sup>239</sup> “To prevail on an undue discrimination challenge, NRG must demonstrate that it and ConEd are similarly situated for purposes of the approved settlement.”<sup>240</sup> But NRG had not shown that either it or any other parties were similarly situated to ConEd because it had not shown that it or any other parties sought the same through-and-out service that ConEd had; the court thus concluded “that [the] FERC did not unduly discriminate against NRG by approving the settlement agreement.”<sup>241</sup>

NRG’s third challenge was that the FERC lacked a sufficient record and that the FERC failed to base its decision on substantial evidence.<sup>242</sup> After reviewing the record and the FERC’s reasons for approving the settlement in great detail, the court found that the FERC’s analysis was sufficient.<sup>243</sup>

### *I. NYISO’s Demand Curves*

In *TC Ravenswood, LLC v. FERC*, the D.C. Circuit denied the New York City suppliers’ (Petitioners) petition for review of orders that accepted and suspended proposed capacity market demand curves for a longer period than

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234. *Id.* at 954-55 (discussing examples of past agreements).

235. *Id.* at 955-56 (quoting *Blumenthal v. FERC*, 552 F.3d 875, 885 (D.C. Cir. 2009)).

236. *Id.* at 956.

237. *Id.* at 957.

238. *Id.* at 958.

239. *Id.*

240. *Id.*

241. *Id.* at 958-59.

242. *Id.* at 953.

243. *Id.* at 959-64.

five-months.<sup>244</sup> The FERC had issued an order suspending NYISO's Proposed Curves for five months and directed the NYISO to make a compliance filing reflecting corrections to problems identified in the FERC's order.<sup>245</sup>

The court first considered the challenge to the FERC's suspension of the proposed demand curves for more than five months.<sup>246</sup> Such challenges to the suspension of rates are reviewed "deferentially," and "so long as the [FERC]'s reasons are 'in some way relevant to [its] statutory inquiries,' [the court] will remand only if the [FERC] 'impos[es] two different suspension lengths in cases that [a]re absolutely indistinguishable' or imposes a suspension length 'plainly and absolutely foreclosed' by existing rules or precedent."<sup>247</sup>

There were two issues with respect to the suspension of the curves. First, the court evaluated whether or not the FERC had properly applied *West Texas Utility Co.*<sup>248</sup> The FERC had found that "the unique nature and purpose of the rates filed, in contrast to typical rate" cases where *West Texas* would apply, "brought the case within *West Texas*'s 'extraordinary factors' exception."<sup>249</sup> The Petitioners argued that the FERC "had no basis for concluding under *West Texas* that the Proposed Curves would be excessively high or that customers would suffer irreparable harm without a maximum suspension."<sup>250</sup> But the court found that the extraordinary factors exception is not limited to situations where higher prices may be at issue and that in this case, "the unique nature of the auction markets and the bidders' need for the 'actual re-calculated rates'" properly fell within the exception.<sup>251</sup> The court also rejected Petitioners' claim that the FERC had ignored "their argument that the Compliance Curves would necessarily exceed the Proposed Curve," because the FERC had in fact recognized this argument and relied on the countervailing concern of bidders' need for access to the price curves before bidding in the auction.<sup>252</sup> The court procedurally rejected the Petitioners' claim that there was a case with "absolutely indistinguishable" facts because Petitioners had not raised the argument before their reply brief.<sup>253</sup>

Second, the court considered Petitioners' argument that the FERC exceeded its FPA section 205(e) authority by suspending the proposed rates for longer than five months.<sup>254</sup> But the "obvious defect" of this argument was that the

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244. *TC Ravenswood, LLC v. FERC*, 741 F.3d 112, 114 (D.C. Cir. 2013).

245. *Id.* at 115.

246. *Id.* at 116.

247. *Id.* (quoting *Exxon Pipeline Co. v. United States*, 725 F.2d 1467, 1473-74 (D.C. Cir. 1984)).

248. *Id.* Under *West Texas*, the FERC indicated that it would suspend rates under section 205(e) of the Federal Power Act for only one day if its "preliminary analysis indicates that no more than ten percent of the increase appears to be excessive," absent extraordinary factors. *West Tex. Util. Co.*, 18 F.E.R.C. ¶ 61,189, at p. 61,375 (1982).

249. *TC Ravenswood*, 741 F.3d at 116-17 (quoting *New York Indep. Sys. Operator, Inc.*, 134 F.E.R.C. ¶ 61,178 at P 17 n.13 (2011)).

250. *Id.* at 117.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

FERC had only suspended the rates for five months.<sup>255</sup> The FERC accepted the NYISO's "voluntary decision to delay implementation of the new curves until approval of the Compliance Curves" but never prohibited NYISO from implementing the Proposed Curves at the end of the five-month period.<sup>256</sup> With respect to Petitioners' policy concerns about NYISO's voluntary decision to delay implementation of the curves, the court found them "understandable," but there was still "nothing in section 205(e) prohibit[ing] the [FERC] from accepting such a voluntary delay."<sup>257</sup> Nor was the court convinced by the Petitioners' claim that the FERC had violated the piecemeal ratemaking doctrine because "the [FERC] never modified an existing rate."<sup>258</sup>

Petitioners also raised challenges to certain technical aspects of the demand curves.<sup>259</sup> The court reviewed these under the "highly deferential arbitrary and capricious standard."<sup>260</sup> It rejected Petitioners' objection to the FERC's approval of a proposed 1.7% escalation factor based on "a general inflation index," as opposed to the Petitioners' "preferred escalation factor of 7.8%, which they derived from the industry-specific Handy-Whitman index."<sup>261</sup> But the FERC had never held the Handy-Whitman Index to be "the only reasonable measure" of inflation, and it had "weigh[ed] competing record evidence."<sup>262</sup> The court thus deferred "to its reasonable choice."<sup>263</sup> The court similarly rejected the Petitioners' objection to the NYISO's energy and ancillary services revenues estimate, stating that "Petitioners have given us no cause to second-guess the [FERC]'s reasonable resolution of this technical question."<sup>264</sup> Finally, the court rejected the Petitioners' objection to the FERC's decision to exclude property taxes from the cost of new entry calculations based on a new state law that created tax exemptions to new power generators.<sup>265</sup> The court distinguished the case from *Independent Power Producers of New York*, which had a different procedural posture, and it found that the FERC had not ignored substantial evidence on the issue, as Petitioners had not offered any that would call into question the FERC's assumption that a hypothetical new peaker plant would qualify for the new tax exemptions.<sup>266</sup>

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255. *Id.* at 118.

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* at 119.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.* at 119-20.

266. *Id.* at 120.

## III. NATURAL GAS ACT

A. *Limits of FERC Jurisdiction*

In *Hunter v. FERC*, the D.C. Circuit granted the petition for review filed by Brian Hunter and rejected the FERC's decision fining him \$30 million for manipulating natural gas futures contracts.<sup>267</sup> The court found that the Commodity Futures Trading Commission (CFTC) has exclusive jurisdiction over transactions involving commodity futures, and thus, the FERC lacked authority to fine Hunter.<sup>268</sup>

Hunter, an employee of Amaranth, traded natural gas futures contracts on the New York Mercantile Exchange (NYMEX).<sup>269</sup> Hunter sold a significant number of natural gas futures contracts during the February through April 2006 settlement periods.<sup>270</sup> On July 25, 2007, the CFTC instituted an enforcement action alleging that Hunter had violated the Commodities Exchange Act (CEA) by manipulating the price of natural gas futures contracts.<sup>271</sup> The next day, the FERC also instituted an enforcement action alleging that Hunter had violated section 4A of the Natural Gas Act (NGA), 15 U.S.C. § 717c-1, which prohibits manipulation.<sup>272</sup> The FERC eventually found that Hunter had violated NGA section 4A and assessed a \$30 million civil penalty.<sup>273</sup> Hunter filed a petition for review, asserting that the FERC lacked jurisdiction to pursue an enforcement action.<sup>274</sup> The CFTC intervened in support of Hunter on this issue.<sup>275</sup>

The court stated that CEA section 2(a)(1)(A), 7 U.S.C. § 2(a)(1)(A), provides the CFTC with exclusive jurisdiction over agreements and transactions involving contracts for the sale of a commodity for future delivery, including transactions on exchanges such as NYMEX.<sup>276</sup> While the FERC claimed it has an enforcement role where manipulation in futures markets affects the physical markets it regulates, the court rejected these arguments, stating that accepting this assertion "would eviscerate the CFTC's exclusive jurisdiction over commodity futures contracts."<sup>277</sup> The court also rejected the FERC's arguments that the Energy Policy Act of 2005 (EPA 2005) repealed by implication the CFTC's exclusive jurisdiction under CEA section 2(a)(1)(A), stating that repeals by implication are disfavored and will not be found unless there is a "clear and manifest" indication of the intent to repeal.<sup>278</sup> While EPA 2005 contained a provision requiring the CFTC and the FERC to enter into a memorandum of

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267. *Hunter v. FERC*, 711 F.3d 155, 156-57 (D.C. Cir. 2013).

268. *Id.* at 156.

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Hunter*, 135 F.E.R.C. ¶ 61,054, *reh'g denied*, 137 F.E.R.C. ¶ 61,146 at P 92 (2011).

274. *Hunter*, 711 F.3d at 156.

275. *Id.* at 156-57.

276. *Id.* at 157.

277. *Id.* at 158.

278. *Id.* at 159-60 (quoting *Agri Processor Co. v. National Labor Relations Bd.*, 514 F.3d 1, 4 (D.C. Cir. 2008)).

understanding concerning information sharing, this was not enough to show that the EAct 2005 was intended to repeal CEA section 2(a)(1)(A).<sup>279</sup> The court found that there was also no contradiction between CEA section 2(a)(1)(A) and NGA section 4A that merited a finding that the EAct 2005 was intended to repeal CEA section 2(a)(1)(A).<sup>280</sup>

*B. State Agency Delay: NGA Remedy*

In *Dominion Transmission, Inc. v. Summers*, the D.C. Circuit addressed an appeal brought by Dominion Transmission, Inc. (Dominion) asking the court to review the Maryland Department of the Environment's (MDE) failure to act on an air quality permit necessary for Dominion to construct a natural gas compressor station.<sup>281</sup> The appeal was brought under section 19(d)(2) of the NGA, a provision added as part of the EAct 2005 to address concerns with delayed agency action on permits required for facilities proposed under sections 3 or 7 of the NGA.<sup>282</sup> Agreeing with Dominion that MDE had failed to timely act on Dominion's air quality permit application, the court remanded the case to MDE and directed MDE to adopt a schedule to ensure prompt action on Dominion's application.<sup>283</sup>

The Maryland air quality rules, which have been incorporated by reference into the Code of Federal Regulations under the procedures of the Clean Air Act, include a requirement that before issuing a permit, a proposed project must meet all applicable zoning and land use requirements.<sup>284</sup> In this case, the Town of Myersville was faced with local opposition to the location of the compressor station and "denied Dominion's zoning application on the grounds that the . . . compressor station was contrary to the local development plan, endangered public health, and posed a nuisance."<sup>285</sup> In the meantime, the FERC granted Dominion a certificate of public necessity under the NGA to construct the project, finding, in spite of comments from local interests critical of the proposed location, the site to be "appropriate."<sup>286</sup> Notwithstanding the FERC's action, MDE continued to refuse to process Dominion's application for an air quality permit because the local approval required by its regulations had not been obtained.<sup>287</sup>

Dominion petitioned the U.S. Court of Appeals for the D.C. Circuit under section 19(d)(2) of the NGA, which permits the direct appeal to the D.C. Circuit of a state administrative agency's "failure to act . . . to issue, condition, or deny any permit required under [f]ederal law" related to facilities subject to sections 3

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279. *Id.* at 160.

280. *Id.*

281. *Dominion Transmission, Inc. v. Summers*, 723 F.3d 238, 240 (D.C. Cir. 2013).

282. *Id.* at 245.

283. *Id.*

284. *Id.* at 241.

285. *Id.* at 241-42.

286. *Id.* at 242.

287. *Id.*

or 7 of the NGA.<sup>288</sup> MDE argued in response that (1) the court lacked jurisdiction because MDE had not failed to act but had taken numerous actions in concluding that Dominion's air quality permit application was inadequate and (2) as an agency of the State of Maryland, the appeal was foreclosed by the Eleventh Amendment to the U.S. Constitution.<sup>289</sup>

The court rejected both of the jurisdictional arguments asserted by MDE.<sup>290</sup> First, it found that the key consideration under the NGA was whether MDE had failed to act "to issue, condition, or deny" a permit.<sup>291</sup> Finding MDE had failed to act, the court concluded it had jurisdiction under section 19(d)(2) of the NGA to consider the lawfulness of the decision.<sup>292</sup> Second, because Dominion was seeking prospective relief, the court concluded that Dominion could proceed against MDE under a doctrine that permitted such prospective relief, without reaching the question of whether the Eleventh Amendment had been otherwise waived by MDE.<sup>293</sup>

On the merits, the court concluded that because the FERC certificate would have preempted local law with which it conflicted, MDE should have acted to determine which local laws would be preempted and which would remain "applicable" to the compressor station.<sup>294</sup> Finding this to be a determination that in the first instance should be made by MDE, the court: (1) remanded the case to MDE for its further action; and (2) by separate order directed the parties to adopt a schedule for prompt action on the remand.<sup>295</sup>

### C. Preemption

#### 1. Federal Preemption Does Not Preclude State Law Antitrust Claims Arising Out of Nonjurisdictional Transactions

In *In re Western States Wholesale Natural Gas Antitrust Litigation*, the Ninth Circuit reversed a district court ruling granting summary judgment for defendants in consolidated lawsuits over alleged market manipulation of gas prices during the energy crisis of 2000 to 2002.<sup>296</sup> The Ninth Circuit held that, contrary to the district court's ruling, federal preemption doctrines do not preclude state law antitrust claims arising out of transactions not subject to the jurisdiction of the FERC under the NGA.<sup>297</sup>

The consolidated lawsuits involved alleged manipulation of published gas industry price indices through misreporting of the data to the publishers.<sup>298</sup> The

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288. *Id.* at 242-43.

289. *Id.*

290. *Id.* at 242.

291. *Id.*

292. *Id.*

293. *Id.* at 243.

294. *Id.* at 245.

295. *Id.*

296. *In re Western States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 724 (9th Cir. 2012).

297. *Id.* at 729.

298. *Id.* at 727.

plaintiffs contended that this misreporting distorted the indices, which in turn affected actual gas sales and purchase prices.<sup>299</sup>

In an earlier opinion involving some of the same transactions at issue in *Western States*, the Ninth Circuit held that the filed-rate doctrine did not bar state or federal antitrust claims arising out of manipulation of the price indices because the challenged price indices were compiled using transactions outside of the FERC's jurisdiction as well as transactions within the FERC's jurisdiction.<sup>300</sup>

In *Western States*, the district court below found that "any" manipulation of prices indices necessarily falls within the FERC's exclusive jurisdiction, because NGA section 5(a) grants the FERC jurisdiction over "any practice" affecting jurisdictional rates.<sup>301</sup> The Ninth Circuit rejected this reasoning, holding that section 5(a) does not preempt state antitrust claims associated with transactions falling outside of the FERC's jurisdiction.<sup>302</sup> Congressional intent, the "touchstone" of any pre-emption analysis, reflected an intent to "delineate carefully the scope of federal jurisdiction through the express jurisdictional provisions of Section 1(b) of the Act."<sup>303</sup>

The Ninth Circuit further ruled that the district court did not abuse its discretion in denying either of the two motions for leave to amend complaints, holding that the plaintiffs failed to demonstrate good cause for their delay in seeking the amendments.<sup>304</sup> The Ninth Circuit further held that the plaintiffs alleged sufficient facts to establish personal jurisdiction over the defendants on the theory that the defendants "purposefully directed" their anticompetitive conduct at the forum state.<sup>305</sup>

## 2. NGA Does Not Preempt State Eminent Domain Law

In *Bison Pipeline, LLC v. 102.84 Acres of Land*, the Tenth Circuit affirmed a district court's holding that the law of the state where the subject property is located can prescribe the measure of just compensation in an eminent-domain proceeding under the NGA.<sup>306</sup> The appeal arose out of an easement-condemnation suit between Plaintiff-Appellant Bison Pipeline, LLC (Bison) and Defendant-Appellee Barlow Ranch, LP (Barlow).<sup>307</sup> "Barlow owns the Barlow Ranch, which contains a forty-two acre oil and gas development area called the Dead Horse Hub."<sup>308</sup> The FERC awarded Bison the right to construct a pipeline across the Barlow Ranch to connect to the Dead Horse Hub.<sup>309</sup> Bison and Barlow could not agree on an appropriate amount of compensation for easements

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299. *Id.*

300. *Id.* at 728 (citing *E. & J. Gallo Winery v. Encana Corp.*, 503 F.3d 1027, 1048 (9th Cir. 2007)).

301. *Id.*

302. *Id.* at 729.

303. *Id.*

304. *Id.* at 737-38.

305. *Id.* at 743-44.

306. *Bison Pipeline, LLC v. 102.84 Acres of Land, More or Less, Located in Campbell Cnty, Wyo.*, 732 F.3d 1215, 1218 (10th Cir. 2013).

307. *Id.* at 1217.

308. *Id.* at 1218.

309. *Id.*

on Barlow's property, so Bison brought suit in district court to resolve that issue.<sup>310</sup>

At the district court level, Bison and Barlow agreed that the amount of "just compensation" would be determined according to Wyoming's eminent-domain statutes.<sup>311</sup> "The district court rejected Bison's argument that, in Wyoming, just compensation must be measured using a certain 'before-and-after' valuation method."<sup>312</sup> The court reasoned that the applicable Wyoming Statute specifically provides for a different method of determining just compensation—the use of prices and values paid for comparable easements or leases.<sup>313</sup> Bison appealed the district court decision, arguing *inter alia*, that (1) "Wyoming law required that 'just compensation' be determined under the 'before-and-after' method;" and (2) "the district court's interpretation of Wyoming law would make awards for just compensation so disproportionate to actual land values as to frustrate the purposes of the [NGA] and to violate the Fifth Amendment of the U.S. Constitution."<sup>314</sup>

The court rejected Bison's argument that Wyoming eminent domain law was so oppressive to pipeline companies that it violates the Fifth Amendment of the U.S. Constitution and so frustrates federal law that it triggers federal preemption.<sup>315</sup> The court declined to address the Fifth Amendment argument because Bison made this argument for the first time on appeal.<sup>316</sup> Because Bison did not make this argument below, the court stated that it would adhere to its general rule that a failure to raise an issue below results in forfeiture on appeal.<sup>317</sup>

The court also rejected Bison's argument that the application of Wyoming law in this case so frustrated the purposes of the NGA that principles of federal preemption mandate a new trial applying federal common law.<sup>318</sup> "Nothing about the application of Wyoming law in this case gives us cause for immediate concern."<sup>319</sup> The court found that Bison's arguments on this score were "mostly speculative."<sup>320</sup>

### 3. NGA Does Not Preempt County Zoning Plans That Impact Local Distribution Companies Only

In *Washington Gas Light Company v. Prince George's County*, the Fourth Circuit affirmed the district court's dismissal of Washington Gas Light Company's (Washington Gas) challenge to Prince George's County's zoning

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310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 1219.

315. *Id.* at 1220.

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 1221.

320. *Id.*



determinations and grant of summary judgment in favor of Prince George's County (the County).<sup>321</sup> The court held that the district court's dismissal of a mandatory referral claim was proper under the abstention doctrine articulated in *Burford v. Sun Oil Co.*, and that summary judgment was proper because the two laws alleged did not preempt county zoning ordinances.<sup>322</sup>

Washington Gas operates a natural gas substation in Prince George's County, Maryland.<sup>323</sup> In 2004, Washington Gas sought to expand the substation to include liquefied natural gas storage.<sup>324</sup> Washington Gas requested approval for the expansion from the County, which denied it based on recently enacted county zoning plans that prohibited industrial use in the area of the substation.<sup>325</sup> After the denial, Washington Gas filed a federal action against the County seeking a declaration that the County erroneously denied the company permission to proceed under Maryland's mandatory referral statute; a declaration that the National Gas Pipeline Safety Act (PSA), NGA, and state law preempt county zoning regulations; and, finally, an injunction prohibiting enforcement of the zoning plans.<sup>326</sup>

In an order dated February 9, 2009, the district court first dismissed the mandatory referral claim for failure to state a claim upon which relief could be granted and on *Burford* abstention grounds.<sup>327</sup> The court stated that the mandatory referral law did not provide a state law cause of action or federal question, and federal adjudication of the issue would frustrate state efforts to establish coherent policies regarding zoning.<sup>328</sup> On March 9, 2012, the district court granted summary judgment on the preemption claims and thus denied the request for an injunction.<sup>329</sup> The court concluded that the PSA only applied to safety standards, so the County zoning plans were not preempted.<sup>330</sup> Also, the NGA does not preempt because Washington Gas is a local distributor exempt from NGA regulation.<sup>331</sup> Washington Gas appealed the dismissal based on *Burford* and the ruling that the PSA and NGA do not preempt county zoning laws.<sup>332</sup>

The Fourth Circuit first stated that *Burford* abstention is allowed where the federal forum would frustrate and intrude on a state's administrative system.<sup>333</sup>

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321. *Washington Gas Light Co. v. Prince George's Cnty.*, 711 F.3d 412, 414 (4th Cir. 2013).

322. *Id.* Under the *Burford* abstention doctrine, "courts may abstain when the availability of an alternative, federal forum threaten[s] to frustrate the purpose of a state's complex administrative system." *Id.* at 418 (quoting *Martin v. Stewart*, 499 F.3d 360, 364 (4th Cir. 2007)); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)).

323. *Washington Gas Light*, 711 F.3d at 413.

324. *Id.* at 413-14.

325. *Id.* at 414.

326. *Id.*

327. *Id.*

328. *Id.* at 416.

329. *Id.* at 414, 417.

330. *Id.* at 417.

331. *Id.*

332. *Id.*

333. *Id.* at 418.

Maryland's mandatory referral statute allowed for certain privately owned utilities to be exempt from zoning, but the County had ruled this did not apply to Washington Gas.<sup>334</sup> Plaintiff argued that the question was one of straightforward statutory construction.<sup>335</sup> The Fourth Circuit disagreed, stating that "Washington Gas's mandatory referral claim turns entirely on the construction of state or local land use law."<sup>336</sup> The court held that abstention is proper where plaintiffs' federal claims stem solely from construction of state or local land use or zoning law, not involving the constitutional validity of the same and absent exceptional circumstances.<sup>337</sup>

When turning to preemption, the court noted that the PSA seeks to prevent harm from underground pipelines and that the PSA preempts state laws with regards to safety.<sup>338</sup> However, "the [c]ounty [z]oning [p]lans are not safety regulations."<sup>339</sup> Furthermore, since Washington Gas could comply with both the PSA and zoning laws, the PSA does not preempt.<sup>340</sup> Finally, the court looked to provisions of the NGA that stated gas companies that deal in interstate commerce are subject to the NGA while local distributors are subject to local regulations.<sup>341</sup> Even though Washington Gas technically provides service to customers in numerous states, the NGA allows the FERC to make a determination about companies whose service areas straddle state lines.<sup>342</sup> Here, the FERC had determined that Washington Gas was still a local provider.<sup>343</sup> Therefore, Washington Gas is subject to local, not federal, regulation.<sup>344</sup>

*D. State Action for Damages Dismissed As Collateral Attack on FERC Order Approving Pipeline*

In *Rockies Express Pipeline LLC v. 4.895 Acres of Land*, the Sixth Circuit affirmed a district court determination that the plaintiffs-appellees, Murray Energy Corporation, Consolidated Land Company, and American Energy Corporation (the Murray Companies), could not claim compensable damages to their Ohio coal mine operations as a result of pipeline construction and operation by Rockies Express Pipeline LLC (REX).<sup>345</sup> The court held that construction and operation of the natural gas pipeline did not force the Murray Companies to

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334. *Id.*

335. *Id.*

336. *Id.* at 419.

337. *Id.*

338. *Id.* at 420.

339. *Id.* at 420-21.

340. *Id.* at 423.

341. *Id.* at 426.

342. *Id.* at 423.

343. *Id.* at 424.

344. *Id.* at 426.

345. *Rockies Express Pipeline LLC v. 4.895 Acres of Land, More or Less*, 734 F.3d 424, 432 (6th Cir. 2013).

accelerate coal-mining operations in advance of pipeline construction and suffer unanticipated costs.<sup>346</sup>

The Sixth Circuit agreed with the district court that the coal companies had suffered “self-inflicted” damage.<sup>347</sup> The companies incurred higher costs because they mined a longwall panel earlier and in a less efficient manner than they originally planned in an attempt to avoid potential regulatory delays that they expected if they had waited until the pipeline started operations.<sup>348</sup> However, the Sixth Circuit said the companies provided no evidence that this hurried approach was necessary.<sup>349</sup>

“We do not read the district court’s decisions as categorically prohibiting, as a matter of Ohio law, damages of the sort the Murray Companies request,” the court stated.<sup>350</sup> The court read the district court’s decision “as preventing such damages in part because the companies utterly failed to demonstrate, as a matter of proof, that they rested upon more than speculation.”<sup>351</sup>

The Sixth Circuit found that the Murray Companies’ claim for damages also failed because it was based on a collateral attack on the FERC’s findings that the construction and operation of the REX pipeline was in the public interest.<sup>352</sup> In its decision to approve the REX pipeline, the FERC concluded that measures proposed by REX would prevent the pipeline from interfering with mining, and the FERC required REX to work with the Murray Companies on an operations plan as a condition of approval.<sup>353</sup> The basis of the Murray Companies’ damage claims “require[d] ignoring or attacking the essential fact findings made by the FERC,” the court stated.<sup>354</sup> “That we may not allow.”<sup>355</sup>

#### IV. OTHER STATUTES AND ACTS

##### A. *Nuclear Waste Policy Act*

###### 1. Inadequacy of DOE Analysis in Support of Nuclear Waste Assessment Fee

On November 19, 2013, the D.C. Circuit issued a unanimous decision in *National Ass’n of Regulatory Utility Commissioners v. U.S. Department of Energy*.<sup>356</sup> The D.C. Circuit ordered the Secretary of the Department of Energy (DOE) to submit to Congress a proposal to change the Nuclear Waste Fund fee, currently one-tenth of one cent for each kilowatt-hour generated and sold from

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346. *Id.* at 432.

347. *Id.*

348. *Id.* at 430.

349. *Id.* at 431.

350. *Id.*

351. *Id.*

352. *Id.* at 431-32.

353. *Id.* at 432.

354. *Id.* at 431.

355. *Id.*

356. *National Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy*, 736 F.3d 517 (D.C. Cir. 2013).

nuclear power plants,<sup>357</sup> paid by nuclear plant operators, to zero until the Secretary conducts a legally adequate fee assessment pursuant to the Nuclear Waste Policy Act or until “Congress enacts an alternative [waste management] plan.”<sup>358</sup> The D.C. Circuit held that once again the DOE failed to conduct a sufficient analysis to permit it to conclude that the annual fee imposed on power plant operators is adequate.<sup>359</sup>

The decision follows the June 2012 D.C. Circuit decision that the Secretary’s annual fee evaluation under the Nuclear Waste Policy Act (NWPA) was legally inadequate.<sup>360</sup> In the prior case, the D.C. Circuit remanded to the Secretary to conduct an adequate evaluation, but it did not suspend fee collection.<sup>361</sup> On remand, the Secretary issued a new determination concluding that neither insufficient nor excess revenues are being collected to recover the federal government’s NWPA costs and did not propose any fee adjustment.<sup>362</sup> The National Association of Regulatory Utility Commissioners and the Nuclear Energy Institute, along with several individual utilities, moved to reopen the proceeding, arguing the new determination was fundamentally flawed and further fee collections should be suspended.<sup>363</sup>

The D.C. Circuit found a number of issues with the Secretary’s defenses of the nuclear waste fee at its current level. It found that “the Department has again declined to reach the statutorily required determination.”<sup>364</sup> The DOE failed to conduct a sufficient analysis to permit it to conclude that the annual fee imposed on power plant operators is adequate. The D.C. Circuit denied the Secretary’s request to remand the decision for additional analysis if the court concluded that “the Department’s latest position is contrary to law,” stating that “the Secretary’s position is so obviously disingenuous that we have no confidence that another remand would serve any purpose.”<sup>365</sup>

## 2. Failure of NRC to Complete Licensing Process Violates NWPA

In *In re Aiken County*, the D.C. Circuit granted a rare petition for a writ of mandamus, ordering the Nuclear Regulatory Commission (NRC) to comply with the NWPA and resume the processing of the DOE’s pending license application

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357. National Ass’n of Regulatory Util. Comm’rs v. U.S. Dep’t of Energy, 680 F.3d 819, 821 (D.C. Cir. 2012).

358. *National Ass’n of Regulatory Util. Comm’rs*, 736 F.3d at 520-21; Nuclear Waste Policy Act, 42 U.S.C. §§ 10101-10270 (2012).

359. *Id.* at 519.

360. *National Ass’n of Regulatory Util. Comm’rs*, 680 F.3d at 820.

361. *Id.* at 826.

362. U.S. DEP’T OF ENERGY, U.S. DEPARTMENT OF ENERGY NUCLEAR WASTE FUND FEE ADEQUACY ASSESSMENT REPORT E2-2 (2013), available at <http://energy.gov/sites/prod/files/January%2016%202013%20Secretarial%20Determination%20of%20the%20Adequacy%20of%20the%20Nuclear%20Waste%20Fund%20Fee.pdf>.

363. Initial Brief for the Petitioners, *National Ass’n of Regulatory Util. Comm’rs*, 680 F.3d 819 (Nos. 11-1066 & 11-1068), 2013 WL 1804073.

364. *Nat’l Ass’n of Regulatory Util. Comm’rs*, 736 F.3d at 519.

365. *Id.* at 520.

to construct a permanent nuclear waste repository at Yucca Mountain.<sup>366</sup> The decision followed an order more than a year prior in which the court held the petition in abeyance “in light of the [NRC]’s strenuous claims that Congress did not want the licensing process to continue,” and to “allow[] time for Congress to clarify this issue if it wished to do so.”<sup>367</sup> But after more than a year, “the [NRC] ha[d] not acted, and Congress ha[d] not altered the legal landscape. As things stand, therefore, the [NRC] is simply flouting the law.”<sup>368</sup>

The court’s grant of mandamus flowed from “settled, bedrock principles of constitutional law” that dictate “the President must follow statutory *mandates* so long as there is appropriated money available and the President has no constitutional objection to the statute.”<sup>369</sup> Furthermore, neither the President nor subordinate executive agencies may “decline to follow a statutory mandate or prohibition simply because of policy objections.”<sup>370</sup>

In response to the justifications asserted by the NRC for its inaction in the Yucca Mountain licensing process, the court found none satisfactory.<sup>371</sup> First, Congress’s appropriation of some, but not the “full amount of funding necessary for the [NRC] to complete the licensing proceeding” did not justify inaction because “Congress often appropriates money on a step-by-step basis, especially for long-term projects.”<sup>372</sup> Second, the NRC’s speculation that Congress may not ultimately appropriate the full amount of funds necessary to complete the licensing process did not justify inaction because “an agency may not rely on political guesswork about future congressional appropriations as a basis for violating existing legal mandates.”<sup>373</sup> Third, Congress’s relatively low or zero appropriations to the NRC and the DOE for the Yucca Mountain project do not repeal the laws that have been enacted—and “where previously appropriated money is available for an agency to perform a statutorily mandated activity,” the court saw “no basis for a court to excuse the agency from that statutory mandate.”<sup>374</sup> Fourth, the court rejected the suggestion that the NRC could override congressional policy determinations.<sup>375</sup>

The opinion emphasized that the court had “repeatedly gone out of [its] way over the last several years to defer a mandamus order against the [NRC] and thereby give Congress time to pass new legislation that would clarify this matter if it so wished.”<sup>376</sup> But in the absence of any change in the law, the court concluded that the NRC’s continued inaction amounted to “simply defying a law enacted by Congress . . . without any legal basis.”<sup>377</sup> This, the court reasoned,

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366. *In re Aiken Co.*, 725 F.3d 255, 267 (D.C. Cir. 2013).

367. *Id.* at 258.

368. *Id.* at 259.

369. *Id.*

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.* at 259-60.

374. *Id.* at 260.

375. *Id.*

376. *Id.* at 266.

377. *Id.*

“has serious implications for our constitutional structure. It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law in the manner asserted in this case by the [NRC].”<sup>378</sup>

The opinion was a split decision, with one judge concurring with the majority of the opinion except for one section that discussed presidential pardon authority and prosecutorial discretion.<sup>379</sup> The concurrence also provided additional background information regarding the history of the Yucca Mountain license application—including the “systematic campaign of noncompliance” that was “orchestrated” by a former NRC Chairman.<sup>380</sup>

The dissenting opinion by Chief Judge Garland argued that “granting the writ in this case will indeed direct the [NRC] to do ‘a useless thing,’”<sup>381</sup> because the NRC had concluded that \$11 million in appropriations was insufficient to make any “meaningful progress” on the licensing application.<sup>382</sup> Thus, the dissent concluded that “given the limited funds that remain available, issuing a writ of mandamus amounts to little more than ordering the [NRC] to spend part of those funds unpacking its boxes, and the remainder packing them up again,” which in turn “will do nothing to safeguard the separation of powers.”<sup>383</sup>

#### *B. Clean Air Act: EPA Cellulosic Biofuel Projections*

In *American Petroleum Institute v. Environmental Protection Agency*, the D.C. Circuit affirmed, in part, and remanded and vacated, in part, an Environmental Protection Agency (EPA) rule<sup>384</sup> setting the renewable fuel standards for 2012.<sup>385</sup>

The Clean Air Act, as amended by the EPA Act 2005, specifies annual minimum volumes (applicable volumes) of renewable fuel that refiners, importers, and blenders must purchase, subject to fines for non-compliance.<sup>386</sup> Renewable fuels include a subclass of advanced biofuels, which in turn include cellulosic biofuel.<sup>387</sup> Each year, an increasing amount of advanced biofuels must be derived from cellulosic biofuel.<sup>388</sup>

The Act requires the EPA annually to project cellulosic biofuel production, in recognition of the emerging nature of the technology.<sup>389</sup> When the production projection falls short of the applicable volume, the EPA must reduce the

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378. *Id.* at 267.

379. *Id.* (Randolph, J., concurring) (“I believe [this part] is unnecessary to decide the case.”).

380. *Id.*

381. *Id.* at 269 (Garland, C.J., dissenting).

382. *Id.*

383. *Id.* at 270.

384. Regulation of Fuels and Fuel Additives: 2012 Renewable Fuel Standards, 77 Fed. Reg. 1320 (2012) (to be codified at 40 C.F.R. pt. 80).

385. *American Petroleum Inst. v. EPA*, 706 F.3d 474, 481 (D.C. Cir. 2013).

386. *Id.* at 475-76 (citing 42 U.S.C. § 7545(o)(2) (2012)).

387. *Id.* at 476.

388. *Id.*

389. *Id.*

applicable volume to the projected volume.<sup>390</sup> The EPA may also reduce the applicable volume of renewable and advanced biofuels for that year.<sup>391</sup>

In the rulemaking on review, the EPA projected cellulosic biofuel production of 8.65 million gallons and reduced the applicable volume (500 million gallons) accordingly.<sup>392</sup> The EPA declined, however, to reduce the applicable volume of total advanced biofuel, reasoning that other fuels would make up the shortfall.<sup>393</sup>

The court rejected the EPA's 2012 cellulosic biofuel production projection, finding that the EPA placed inappropriate reliance on the Act's undisputed purpose to increase renewable fuel production.<sup>394</sup> "[T]hat general mandate does not mean that every constitutive element of the RFS program should be understood to individually advance a technology-forcing agenda, at least where the text of the [Act] does not support such a reading."<sup>395</sup> The court found that the Act does not authorize the EPA to "let its aspirations for a self-fulfilling prophecy divert it from a neutral methodology."<sup>396</sup> The court distinguished other "technology-forcing" regulations, noting the "asymmetry in incentives" here, where producers control industry growth, but the Act subjects purchasers to potential fines.<sup>397</sup>

Setting aside this error, the court found the EPA's projection appropriately "based on" an Energy Information Administration (EIA) estimate, as required by the Act.<sup>398</sup> "Congress didn't contemplate slavish adherence by EPA to the EIA estimate."<sup>399</sup> And the EPA did not inappropriately rely upon producer projections, because producers were "an almost inevitable source of information" and "a principal source of EIA's estimates."<sup>400</sup>

Finally, the court affirmed the EPA's exercise of its discretion not to reduce the applicable volume of renewable fuel and advanced biofuel, notwithstanding the projected shortfall of cellulosic biofuel production. The EPA offered a rational basis for its decision, and, in the absence of a statutory mandate to the contrary, "rationality does not always imply a high degree of quantitative specificity."<sup>401</sup>

### *C. Atomic Energy Act of 1954 and Preemption*

In *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, the United States Court of Appeals for the Second Circuit affirmed, in part, and reversed, in part, a

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390. *Id.*

391. *Id.*

392. *Id.*

393. *Id.*

394. *Id.* at 479.

395. *Id.*

396. *Id.*

397. *Id.* at 480.

398. *Id.* at 476.

399. *Id.* at 478.

400. *Id.*

401. *Id.* at 481.

district court decision in favor of Entergy Nuclear Vermont Yankee, LLC (Entergy).<sup>402</sup> Entergy filed a complaint with the district court against the State of Vermont, its Governor and Attorney General, as well as the Vermont Public Service Board that asserted three claims: (1) that three statutes, Acts 74, 160, and 189, passed by the Vermont Legislature were preempted by the Atomic Energy Act of 1954 (Claim One); (2) that Vermont's attempt to condition a purchase power agreement (PPA) in favor of Vermont residents was preempted by the FPA and thus sought a permanent injunction (Claim Two); and (3) that those same actions by Vermont were a violation of the Dormant Commerce Clause of the United States Constitution (Claim Three).<sup>403</sup> The district court found that Entergy's Claim Two was premature and thus not ripe for review.<sup>404</sup> The district court agreed with Entergy regarding Claims One and Three.<sup>405</sup> However, with respect to Act 189, the district court found that the challenge was moot as the study mandated by the statute had already been completed.<sup>406</sup> Vermont appealed the district court decision regarding Claims One and Three, and Entergy cross-appealed the district court's decision regarding Claim Two.<sup>407</sup> The Second Circuit affirmed the district court decision regarding Claims One and Two but reversed the decision of the district court on Claim Three.<sup>408</sup>

As to Claim One, Entergy successfully argued to the district court that Acts 74 and 160 passed by the Vermont Legislature were facially invalid because federal law preempted state action.<sup>409</sup> Act 160 required the Vermont Legislature to approve continued operations of Entergy's Vermont Yankee nuclear plant after the current license expired in March of 2012.<sup>410</sup> Similarly, Act 74 required Entergy after March 21, 2012, to seek an affirmative vote of the Vermont Legislature to store any new spent nuclear fuel in Vermont.<sup>411</sup> The Atomic Energy Act precluded state action on issues relating to the regulation of safety aspects of nuclear development and general radiological safety.<sup>412</sup> The district court found, and the Second Circuit agreed, that the legislative history of the two Acts clearly showed that radiological safety was the Vermont Legislature's "primary purpose" in enacting the statutes.<sup>413</sup> The Second Circuit also concluded that both statutes shifted the decision-making process from an administrative agency that is reviewable by the courts, to the Vermont Legislature, which is not reviewable by the courts.<sup>414</sup> The Second Circuit found little merit in the arguments advanced by Vermont that the statutes (1) increased

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402. Entergy Nuclear Vt. Yankee, LLC. v. Shumlin, 773 F.3d 393, 398 (2d Cir. 2013).

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.* at 408.

407. *Id.*

408. *Id.* at 398.

409. *Id.* at 433.

410. *Id.* at 403.

411. *Id.* at 400.

412. *Id.* at 409.

413. *Id.* at 420, 424.

414. *Id.* at 426-27.



use of renewable resources; and (2) promoted sources that were more cost-effective, finding that neither reason is possibly served by the statutes' conferring unreviewable decision making to the Vermont Legislature nor does the legislative history support those arguments.<sup>415</sup> Based on the legislative history and the "innumerable expressions of concern for radiological safety," the Second Circuit agreed that Acts 74 and 160 were preempted by the Atomic Energy Act under the standards set forth in *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*.<sup>416</sup> Finally, with respect to Acts 74 and 160, the Second Circuit affirmed the district court's grant of a permanent injunction that enjoined Vermont from enforcing Act 160.<sup>417</sup>

As to Claim Two, the Second Circuit rejected Entergy's argument that Vermont's attempt to position Vermont residents in a more favorable position with respect to rates was a violation of the FPA, and more specifically, the FERC's exclusive jurisdiction over the sale of energy at wholesale in interstate commerce.<sup>418</sup> The Second Circuit agreed with the district court on its decision that this issue was not ripe for review as the PPA was yet to be executed and implemented.<sup>419</sup> Additionally, the Second Circuit found that before Entergy could file a complaint with the courts on this issue, it would need to exhaust its administrative remedies with the FERC.<sup>420</sup>

Finally, as to Claim Three, the Second Circuit agreed with Vermont's argument that the district court's decision regarding the PPA and its violation of the Dormant Commerce Clause was in error because the issue was not ripe for review, and therefore, the Second Circuit reversed the district court's decision on this claim.<sup>421</sup> The court found that "in the absence of a completed PPA and without evidence regarding its effect on out-of-state power consumers," the issue was not ripe for review because the court could not determine if there was a "direct impact on commerce in other states."<sup>422</sup>

In a separately concurring opinion, Judge Carney believed that Congress did not intend, with the enactment of the Atomic Energy Act, to reach the result that the majority did in this case.<sup>423</sup> The concurring opinion stated that neither statute imposed safety requirements on a nuclear plant; it was only the Vermont legislators' opinions of general safety concerns that were the basis for the majority's finding that Acts 74 and 160 are preempted by federal law.<sup>424</sup>

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415. *Id.* at 424.

416. *Id.* at 426 (citing *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983)).

417. *Id.* at 422.

418. *Id.* at 433.

419. *Id.*

420. *Id.*

421. *Id.* at 428, 431-32.

422. *Id.* at 430.

423. *Id.* at 434 (Carney, J., concurring).

424. *Id.* at 435-36.

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