REPORT OF THE JUDICIAL REVIEW COMMITTEE 1996

I. INTRODUCTION

This Report summarizes the major energy cases in 1996, with a focus on cases at the appellate level. The majority of appellate cases in 1996 involved review of orders of the Federal Energy Regulatory Commission (hereinafter referred to as or (FERC). The discussion of cases below is divided into the following categories: Administrative Law, Antitrust Law, Federal Power Act — Hydroelectric Licensing, Federal Power Act — Electric Regulation, Interstate Commerce Act — Oil Pipelines, Natural Gas Act and Natural Gas Policy Act, and Public Utilities Regulatory Policies Act. Within each category, the cases are listed by highest court first, and then by ascending date. Where a case involved more than one category of law it is cross-referenced.

II. ADMINISTRATIVE LAW

A. *Burden of Proof* — Colorado Interstate Gas Co. v. FERC[1]

In *CIG*, CIG (an interstate pipeline) sought review of FERC orders finding that the FERC had jurisdiction to regulate natural gas gathering in connection with jurisdictional interstate transportation of that gas. CIG challenged was FERC's jurisdiction to regulate CIG's gathering rates.

The administrative law issue concerned the nature and scope of the burden of proof borne by the party seeking judicial review of agency orders. To seek review under the Natural Gas Act (NGA), a party must be "aggrieved" by a FERC order. The court found that, in order to be considered aggrieved, a party must demonstrate a "present and immediate injury in fact, or at least a looming unavoidable threat of injury by an agency determination." The petitioner bears the burden of alleging facts sufficient "to prove the existence of a concrete, perceptible harm of a real, non-speculative nature." The court continued, "[i]t is not sufficient for the petitioner to show merely that harm will result; rather, judicial review is limited to orders of a definitive impact, where judicial abstention would result in irreparable injury to a party." The court held that CIG had not established the immediacy or unavoidable nature of the alleged harm and declined to accept jurisdiction in the matter.

B. *Deference to Agency Interpretation* — Santa Fe Energy Products Co. v. McCutcheon[2]

In *Santa Fe Energy*, the resale affiliate of a Federal oil lessee sought review of a decision of the Interior Board of Land Appeals. Minerals Man-

1. 83 F.3d 1298 (10th Cir. 1996) (*CIG*).
2. 90 F.3d 409 (10th Cir. 1996).

agement Service (MMS) had required the production of documents relating to an alleged arm's length first sale of oil in connection with an audit to determine whether the correct royalty price had been paid. At issue was the agency's interpretation of its 1988 oil royalty regulations and whether, under the Federal Oil and Gas Royalty Management Act, the agency could require the challenged document production.

The court found that the agency had the authority to require the production of documents relevant to royalty sales, for the purpose of royalty valuation under the gross proceeds rule. The court stated that "an administrative agency's authority to request records and undertake other investigatory functions is extremely broad." This authority is analogous to a Grand Jury's power to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."

C. *Standard of Review* — Independent Petroleum Association of America v. Babbitt[3]

Independent Petroleum Association of America (IPAA) requested review of a decision of the DOI to collect royalties and interest charges generically from gas producers for monies received from a take-or-pay settlement. IPAA argued that the court should be bound by the Fifth Circuit in *Diamond Shamrock Exploration Co. v. Hodel*[4] where the court found take-or-pay payments (as contrasted with take-or-pay settlement payments at issue in *IPAA*) were not subject to royalties unless those royalty payments are allocated to gas produced. Furthermore, IPAA argued that the assessment by DOI as to the specific contract was barred by the statute of limitations. The District Court granted summary judgment for the DOI on both issues.

The D.C. Circuit Court discussed the difference between the arbitrary and capricious standard[5] and the *Chevron* doctrine[6] of deference to an agency decision so long as that decision is "not inconsistent with the unambiguously expressed congressional intent." The court specifically found that the two standards overlap. The court found that IPAA "falls within that overlap" and that applying either standard of review dictated the same result — reversal of the DOI decision. Applying the arbitrary and capricious standard to the DOI decision, the court found, that the DOI had provided insufficient "nonarbitrary" reasoning for its treatment of take-or-pay settlement payments as compared with actual take-or-pay payments as reviewed in *Diamond Shamrock.*

3. 92 F.3d 1248 (D.C. Cir. 1996) (*IPAA*).
4. 853 F.2d 1159 (5th Cir. 1988) (*Diamond Shamrock*).
5. Administrative Procedure Act, 5 U.S.C. § 706(a)(A).
6. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

D. *Standing* — First National Oil, Inc. v. FERC[7]

The *First National Oil* decision involved a proposal by an interstate pipeline to spin-down its gathering facilities to unregulated affiliates. In this case the FERC had approved such a spindown by Panhandle Eastern Pipe Line Company to its subsidiary PanEnergy Field Services (Field Services). But, as a precondition to authorizing Panhandle to transfer its facilities under section 4 of the NGA and to terminate its gathering services for these facilities under section 7 of the NGA, the Commission also required that Panhandle cause Field Services to offer to each pre-existing shipper a two-year "default contract" that essentially contained the same terms as Panhandle's then-current gathering service. While it was not required to do so, Field Services also offered the default contract to First National Oil (First National), which was a producer that sold its gas to marketers at the wellhead and, thus, was not an existing customer of Panhandle. But First National refused the contract and instead sought judicial review.

The Tenth Circuit Court dismissed First National's petition on the grounds that it was not "aggrieved" under section 19(b) of the NGA. The court first noted that First National was not a customer of Panhandle or Field Services and still sold its gas to others who had default contracts by which they received the same services from Field Services that they had formerly received from Panhandle. First National asserted that Field Services was likely to behave in a monopolistic, discriminatory fashion after the two-year default term. The court found such fear, to be speculative. The court held that if First National should suffer some future harm, the court continued, it could resort to state law, federal antitrust law, a proceeding under section 5 of the NGA, or any other available remedy.

E. *Standing* — City of Klamath Falls, Oregon v. Babbitt[8]

In *City of Klamath Falls*, the City disputed a decision of the Secretary of the Interior to designate an eleven-mile portion of the Klamath River as a National Scenic River, including the proposed site of the City's hydroelectric project. This would prevent construction of the project. The Secretary argued that the City had no standing, because it had suffered no injury in fact and had no interest sought to be protected by NEPA or the Wild and Scenic River Act. The court found that: (i) because designation of the river as scenic would prevent the City from developing the hydroelectric project, the City had suffered damage; and (ii) as a municipality, the City had an interest in the river and basin. As such, the City had standing pursuant to its claims.

7. 102 F.3d 1094 (10th Cir. 1996).
8. 947 F.Supp. 1 (D.D.C. 1996).

II. Antitrust Law

A. California CNG, Inc., et al. v. Southern California Gas Co., et al.[9]

In the *California CNG* case sellers of natural gas vehicle (NGV) fueling stations had brought an action against Southern California Gas Company (SoCal), a natural gas local distribution company (LDC) in the United States District Court for the Central District of California against, alleging violations of the Sherman Antitrust Act. Petitioners claimed SoCal engaged in a campaign to drive them from the market. The District Court dismissed the case on the ground that SoCal was protected from federal antitrust liability by the state action doctrine. Petitioners appealed, and the Court of Appeals held that the state action doctrine provided SoCal immunity from federal antitrust liability *only* during the period prior to issuance by the California Public Utilities Commission (CPUC) of a rule containing guidelines utility involvement in the market for NGV fuel.

Citing the Supreme Court's decision in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[10] the Court applied a two-prong test for determining when state action immunizes a defendant's conduct from the federal antitrust laws. First, the challenged conduct must be clearly articulated and affirmatively expressed as state policy. Second, the policy must be actively supervised by the state itself. The court found that the California legislature had clearly articulated and affirmatively expressed a policy of encouraging "substantial market penetration of . . . compressed natural gas fueled vehicles" and of encouraging natural gas utilities "to pursue research, development and demonstration activities in furtherance of th[at] legislative goal."[11] The Court further found that in order to "jump start" the retail market for NGVs, the CPUC approved utility proposals, including that of SoCal, to construct NGV refueling stations and to charge the cost to ratepayers. In so doing, the CPUC indicated its intent to monitor closely the impact of utility participation in the market on the growth of competition.[12] However, the Court found that, in July, 1993, the CPUC articulated a new state policy balancing the legislative goals of utility participation in NGV markets and fair competition. Under the new policy, utilities are required to comply with the requirements of state and federal competition laws.[13]

Based on the foregoing findings, the Court concluded that SoCal had shown a clearly articulated state policy to allow utilities to use ratepayer funds to participate in the NGV-infrastructure market only in the period between July 1991 and July 1993. The Court, therefore, reversed the District Court's dismissal of the Sherman Act proceeding to the extent that it applied to claims based on conduct by SoCal after July 1993.

9. 96 F.3d 1193 (9th Cir. 1996).
10. 445 U.S. 97 (1980).
11. 96 F.3d at 1196.
12. *Id.* at 1198.
13. *Id.* at 1199.

B. Cost Management Services, Inc. v. Washington Natural Gas Co.[14]

The *CMSI* case contains a lengthy review of the interplay between state public utility regulation and federal antitrust law and of the elements of proof which an unregulated competitor must establish to show that a regulated natural gas distributor has violated section 2 of the Sherman Act. CMSI is an unregulated marketer of natural gas to various commercial and industrial consumers. In the area served by CMSI, Washington Natural Gas Company (WNG) owns the only delivery facilities for transporting gas from the interstate pipeline to end users. CMSI filed a complaint in the United States District Court for the Western District of Washington alleging that WNG had engaged in practices for the purpose of monopolizing the marketing of natural gas. The action was based on four claims: (1) WNG violated its tariff approved by the Washington Utilities and Transportation Commission (WUTC), because it had offered gas at the low rates specified in that tariff to customers who did not meet the mandatory minimum volume requirements in the tariff; (2) WNG had engaged in "monopoly leveraging" by using its monopoly over gas delivery facilities to enhance its monopoly over gas sales by including anticompetitive provisions in its tariff designed to make customer purchases from anyone other than WNG economically inefficient, *i.e.*, requiring those customers to install expensive telemetry equipment; (3) WNG manipulated the dates by which customers were to notify WNG of their conversion to transportation service so as to require CMSI to give a list of such customers to WNG by a date which WNG later extended in order to give it time to persuade such customers not to convert to transportation service; and (4) WNG unlawfully refused to allow CMSI to represent CMSI's customers in dealings with WNG.

In response to the complaint, WNG moved to dismiss, arguing: (1) CMSI had failed to allege the elements of a Section 2 Sherman Act violation; (2) the state action immunity doctrine was a bar to the claims; (3) the "filed tariff" doctrine was a bar to the claims; and (4) the primary jurisdiction doctrine was a bar to the claims. The District Court dismissed the suit, finding that CMSI's antitrust claims were barred by the state action immunity doctrine.

The Court of Appeals reversed the District Court and remanded for further proceedings consistent with its opinion. The Court of Appeals found that the District Court had not properly applied the state action immunity doctrine because there was no showing that any anticompetitive conduct by WNG was authorized and supervised by state officials. In fact, the court found that CMSI had alleged off-tariff pricing and that such practice was unlawful under applicable state law. The Court of Appeals also found: (1) the "filed tariff" doctrine was not a bar to the CMSI complaint because it does not extend to rate-related suits brought by competitors, as opposed to customers; (2) the primary jurisdiction doctrine was inapplicable to consideration of the motion to dismiss since the District Court would

14. 99 F.3d 937 (9th Cir. 1996) (*CMSI*).

have to accept as true CMSI's allegation that WNG had in fact violated its tariff (*i.e.*, there was no question for the primary jurisdiction of the WUTC); and (3) CMSI had alleged sufficient elements of a Section 2 Sherman Act violation.

C. Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.[15]

In the *SER* case, Schuylkill Energy Resources, Inc. (SER) filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging claims under the Sherman Antitrust Act and other state law claims against Pennsylvania Power & Light Company (PP&L). SER is an independent power producer that owns a qualifying cogeneration plant. Pursuant to the Public Utility Regulatory Policies Act (PURPA), PP&L is required to purchase electric energy from and sell electric energy to SER's cogeneration plant. SER and PP&L entered into a power purchase agreement to effectuate the electric energy purchase requirements of PURPA. This agreement permits PP&L to curtail its purchase of electric power from the SER plant in defined situations such as emergencies or the necessity of repairs on the PP&L system. SER alleged in its complaint that, beginning in July 1994, PP&L began to curtail purchases from SER much more frequently than in the past, causing SER to incur substantial revenue losses and forcing SER to purchase expensive equipment to minimize physical damage to its plant during curtailments. SER claims that most of PP&L's curtailments have been for reasons of "economic dispatch" rather than for the emergency or repair kind of situation contemplated by the power purchase agreement.

PP&L moved to dismiss SER's complaint on two grounds: (1) the central issues in the case are within the authority and expertise of the Pennsylvania Public Utility Commission (PaPUC); and (2) SER failed to state any claim upon which relief could be granted.

The District Court found that the central issues in the case concern matters "within the unique expertise of the [Pa]PUC." However, the court was reluctant to dismiss the complaint. For this reason the court stayed the proceedings in this case pending an evaluation of SER's claims by the PUC.

II. Federal Power Act — Hydroelectric Licensing (and related environmental issues)

A. Clifton Power Corporation v. FERC[16]

In *Clifton Power*, the operator of a small hydroelectric power facility was fined by the FERC for violating the terms of a compliance order by failing timely to install required monitoring and measuring devices. On appeal, the D.C. Circuit Court held that, although the operator had vio-

15. 1996 W.L. 32891, 1996 U.S. Dist. LEXIS 778 (E.D.Pa. 1996) (not reported in F.Supp.) (*SER*).

16. 88 F.3d 1258 (D.C. Cir. 1996).

lated the compliance order by not installing the required devices, the Commission's penalty assessment did not meet the standards of reasoned decisionmaking, because it sought to impose conditions not appearing in the City's license. Although the license referred to the power facility's dam as being designed to operate in "run-of-river" mode, it did not identify that as a condition of the license. The court determined that, under the Federal Power Act (FPA) the Commission must include as an explicitly identify each condition upon which an operator's license is issued, and cannot rely on a general reference in the description of the license to create such condition.

The operator next argued that its procedural due process rights were violated in that the Commission did not conduct a specific investigation prior to imposition of the penalty, as required by the FPA. The court determined that the Commission had conducted several routine inspections, but the compliance order that was issued contained factual errors concerning the operator's conduct. The court found the argument to be without merit, holding that the FPA did not require invalidation of an entire order because of the inadequacy of an investigation or errors contained in the order, but rather, it provided judicial review as a safeguard against such defects.

The operator also challenged the size of the penalty, accusing the Commission of ignoring an FPA requirement that it must consider the nature and seriousness of the violation. The Commission's findings will be upheld unless they are unsupported by substantial evidence, and its legal conclusions upheld unless they are found to be arbitrary and capricious. The court found several errors in the Commission's explanation of its penalty assessment and was generally unable to discern from the decision how the Commission had arrived at the penalty. Specifically, the court found that the Commission had failed to take into account the facility's operating expenses and revenues, and that it had failed to consider either the duration or seriousness of the violations. While the court acknowledged its limited role in reviewing Commission penalties, it found the Commission's order so deficient as to fall short of the required standard of reasoned decisionmaking. The court vacated the penalty and remanded for reduction of the penalty consistent with the court's decision.

A. Kelley, ex rel. Michigan Department of Natural Resources v. FERC[17]

In *Kelley*, the Michigan Department of Natural Resources (DNR) requested judicial review of FERC orders licensing the use of an old hydroelectric facility to a utility and refusing to require conditions sought by the DNR. The court initially focused on procedural flaws in the DNR's request, finding that it had failed to seek rehearing, a pre-requisite to judicial review under the FPA, as to two issues raised by the DNR on appeal. Accordingly, the court could not hear those issues.

17. 96 F.3d 1482 (D.C. Cir. 1996).

The DNR urged that the Commission had failed to distinguish a prior, inconsistent order concerning different hydroelectric licensing proceedings. While the court acknowledged the rule that an agency adjudication must either be consistent with prior rulings or offer a reasoned basis for its departure, it agreed with the Commission that the earlier order was merely an approval of a settlement agreement and, as such, did not establish precedent. Finally, the DNR argued that the Commission's imposition of an annual fee for the replacement cost of fish killed by the facility and its refusal to require installation of fish protection devices was arbitrary. The court rejected this argument, finding that the fish entrained by the project were not endangered and, more practically, that the facility had co-existed with the fish population for some ninety years without serious damage.

C. City of Oswego, New York v. FERC[18]

In *City of Oswego*, the City sought review of FERC orders issuing a license for operation of a hydroelectric project and imposing retroactive annual fees for a period of unauthorized operation. The FERC had denied the City's request for an exemption from the fees and for a waiver of the penalty for late payment.

The court refused the City's request for consideration of the retroactive fee issue because the City had failed to request rehearing at the FERC prior to bringing the court action, as required by the FPA. The court rejected the City's claim that it fell under section 10(e) of the FPA which exempts municipalities from such annual fees so long as the project's power is sold to the public without profit. The court found that the FPA did not define the word "profit," and thus, the court was compelled to rely on the FERC's interpretation, so long as it was reasonable, according to the *Chevron* doctrine. The City's revenue arrangement fell outside traditional power sale situations. It involved the leasing of the facility to Niagara Mohawk Power Company, which in turn generated and sold power. In agreeing with the FERC's interpretation, the court observed that any municipality could structure a resale arrangement as a lessor-lessee relationship, wherein it received lease payments for use of the facility, rather than fee payments for power — an impermissible circumvention of the intent of the FPA.

The final issue involved the FERC's refusal to waive penalties for late payment. The City argued that, because of its own requirement for a public hearing and its summer schedule, it was unable to obtain municipal authority to make the required payment until after the deadline imposed by the FERC. The FERC responded simply that the City had no more difficulty in arranging for this payment than others who managed to pay on time. The court held that this was not responsive to the City's argument and, therefore, did not meet the requirement that the FERC be free from arbitrary conduct. It remanded the issue for further consideration.

18. 97 F.3d 1490 (D.C. Cir. 1996).

4. *City of New Martinsville, West Virginia v. FERC*[19]

In *City of New Martinsville*, the City sought review of FERC orders requiring payment of compensation by the City for loss of fish in connection with the operation of the City's hydroelectric facility. One of the conditions to the City's license required it to undertake a study concerning the hydroelectric project's impact on fish populations and to make necessary adjustments in the project's operation to minimize any adverse effect. The FERC issued an order requiring an annual payment of more than $156,000 to fund "resource enhancement plans," with no more specific purpose being stated. The annual payment was allegedly based on the value of game and non-game fish using hatchery production costs for restocking. In the appeal, both parties agreed that the fee was nothing more than a yearly charge as compensation for the value of fish killed by entrainment. The City challenged the valuation of the fish and the authority of the FERC to impose such a fee under the license.

The court agreed with the City, observing that virtually all the fish being killed were non-game fish (gizzard shad) which actually supported the game fish population. The court found it highly unlikely that one could find hatchery production of non-game fish of this type and flatly rejected the valuation system. The court further found that, while the FPA does call for the adoption of a comprehensive plan to assess beneficial public uses, there was no reason to extend that requirement to include compensation for population losses of a fish that provided nothing more than forage for the existing game fish. Finally, the court found that the FERC had not even established that the hydroelectric project would have a significant impact on the gizzard shad population.

E. *Scenic River Designation* — City of Klamath Falls, Oregon v. Babbitt[20]

In *City of Klamath Falls*, the City disputed a decision of the Secretary of the United States Department of Interior (DOI) to designate an eleven-mile portion of the Klamath River as a National Scenic River, encompassing the proposed site for, and thus prohibiting the City's hydroelectric project. Initially, the DOI Secretary argued that the City had no standing, because it had suffered no injury and had no interest that is to be protected by National Environmental Policies Act (NEPA) or the Wild and Scenic River Act (WSRA). The court disagreed. Because designation of the river as scenic would preclude the City from developing its hydroelectric project, the City had suffered damage. Further, as a municipality, the court found that the City had an interest in the river and basin, and thus had standing.

The City's first challenge to the designation was based on the claim that the Environmental Assessment prepared for the basin was flawed and thus violated NEPA. In particular, the City asserted that the EA had failed to consider building the hydroelectric project as an alternative to Scenic

19. 102 F.3d 567 (D.C. Cir. 1996).
20. 947 F.Supp. 1 (D.D.C. 1996).

River designation. The court determined that requiring the DOI Secretary to consider every "speculative use" of the river in the process would place too great a burden on the Department. The EA had reviewed at length the environmental conditions in the basin and the impact of the designation on the area, which was sufficient for NEPA compliance. The City next argued that the DOI Secretary should have prepared an Environmental Impact Statement rather than issuing a Finding Of No Significant Impact. The court rejected this argument, finding the DOI Secretary had determined that the designation would not change the environmental status quo. The court concluded that the City's hydroelectric project would significantly change the environment in the basin, while designation as a scenic river would not.

The City asserted that the designation violated the Administrative Procedures Act because the DOI Secretary failed to prepare an explanation of the reasons for his actions. Applying the requisite "arbitrary and capricious standard," the court found the DOI Secretary's conduct acceptable. Finally, the City argued that the designation violated the WSRA, because it was not based on an "act of the legislature" of the state of Oregon, as required by the Act. The original designation, at the state level, came as a result of a voter initiative. The court concluded that the initiative was a form of direct legislation by the voters, and as such, met the requirements of the WSRA.

III. Federal Power Act — Electric Regulatory Law

A. Town of Norwood, Massachusetts, v. FERC[21]

In *Town of Norwood*, the D.C. Circuit Court set aside and remanded a FERC order allowing a nuclear power plant owner to recover from ratepayers 100% of its remaining investment, construction work-in-progress, decommissioning costs, and operating expenses associated with the facility after it was shut down. The court, as a threshold matter, found that the FERC had acted reasonably in permitting the plant owner full recovery of these costs. However, the court then held that the FERC's reduction of the owner's rate of return to reflect the plant shutdown was arbitrary and capricious because the FERC had determined that, in reducing the return on equity, it could not go below the previously established zone of reasonableness. The court concluded that the FERC should have developed a new zone of reasonableness from either the evidence before it or, if necessary, after supplementing the record. The court remanded with instructions that the FERC should establish a new zone of reasonableness that takes into account the plant owner's reduced risk.

21. 80 F.3d 526 (D.C. Cir. 1996).

B. Oglethorpe Power Corp. v. FERC[22]

In *Oglethorpe Power* the D.C. Circuit affirmed in part, vacated in part, and remanded two FERC orders dismissing the appellant's complaint against Georgia Power Co. Oglethorpe, a territorial wholesale power customer, claimed that: (1) Georgia Power had violated the filed-rate doctrine when it charged for certain reserve capacity in contravention of Georgia Power's tariff; and (2) in the alternative, if Georgia Power properly charged Oglethorpe for this capacity, then Georgia Power must share with it the settlement Georgia Power received from a third party that had breached its contractual obligation to purchase that same capacity from Georgia Power.

The court held that the FERC had properly construed Georgia Power's tariff to permit it to charge Oglethorpe for the additional reserve capacity. However, the court held that the FERC had failed to offer a reasoned basis for denying Oglethorpe's claim that it should share in the settlement proceeds. In particular, the court rejected the FERC's argument that sharing the settlement proceeds with Oglethorpe would constitute retroactive ratemaking because the settlement covered a period of time prior to Oglethorpe's complaint. The court found that the FERC had no valid basis for treating the settlement as though the entire amount was paid to settle the claim for early years, prior to Georgia Power's reallocation of the excess capacity to its territorial customers, and none to settle the claim for later years after the reallocation had begun. The court remanded the case to the FERC to determine the share of settlement proceeds to which Oglethorpe was entitled.

C. Florida Power & Light Co. v. FERC[23]

In *Florida Power & Light I* the D.C. Circuit reversed and remanded FERC orders rejecting a provision of a tariff filed by Florida Power & Light Co. (FP&L) to restrict certain resales of electricity by its partial requirements wholesale customers as a means of preventing an inefficient interaction between those customers and subsequent, third-party purchasers through bulk sales transactions. The FERC's orders, while acknowledging that FP&L's proposal would properly thwart some inefficient transactions, nevertheless rejected the proposal as "overly broad" because there were other, efficient transactions that the FERC claimed would also be frustrated.

The court held that the FERC had failed to respond to FP&L's argument that where the tariff provision thwarted an "efficient" sale by one of its partial requirements customers, FP&L, itself, would be in a position to make the same sale. Moreover, the court found that the FERC's apparent effort to push FP&L towards marginal cost pricing for its partial requirements customers, as a substitute for the FERC's reasoned decisionmaking on the issue presented, ignored the fact that the FERC has only in one prior proceeding actually approved wholesale power rates based on margi-

22. 84 F.3d 1447 (D.C. Cir. 1996).
23. 85 F.3d 684 (D.C. Cir. 1996) (*Florida Power & Light I*).

nal costs.[24] The court ordered the FERC on remand to either adopt and follow a *per se* rule against resale transactions, or point out the actual anticompetitive effects of FP&L's proposal and any possible alternative solutions to FP&L's concerns.

D. Florida Power & Light Co. v. FERC[25]

In *Florida Power & Light II* the D.C. Circuit remanded FERC orders rejecting FP&L's proposal for compensation for providing standby transmission service to two cities, which were independently connected to FP&L, but which had a joint economic dispatching operation to transfer power between them, as necessary.

FP&L had filed the request for compensation after the line between the cities was knocked out of service by lightening, causing the first outage in 36 years. For two weeks, the cities continued their economic dispatch system via FP&L's lines, ceasing to do so once they realized that they were not authorized to transfer power back and forth via FP&L's lines. The FERC's orders rejected FP&L's proposal, finding that the two cities had sufficient resources to meet their power needs and, therefore, would never use backup service from FP&L for more than 30 minutes at a time, the grace period within which a Florida Coordination Group (FCG) control area must restore operating reserve margins after a contingency has occurred. The FERC distinguished this case from its so-called "New Smyrna Orders,"[26] in which it approved a backup tariff arrangement by concluding that FP&L actually was providing such service to the Utilities Commission of New Smyrna Beach.

The court agreed that FP&L's arguments questioning the FERC's reliance on the FCG grace period were "relevant" in distinguishing between a utility's internal transmission line loss and a break in an economy transmission line such as that linking the two cities. The court concluded that the FERC had failed to support its orders with substantial evidence, finding that the court could not discern the exact meaning of the FCG guidelines and that the FERC's orders provided no interpretive guidance.

IV. INTERSTATE COMMERCE ACT — OIL PIPELINES

A. ARCO Alaska, Inc., et al. v. FERC[27]

In its decision in *ARCO Alaska* the Court of Appeals reversed the FERC's determination under Section 2 of the Interstate Commerce Act (ICA) that "pumpability factors" continue to be used to calculate rate differentials on the TransAlaska Pipeline System (TAPS) and remanded the case for renewed consideration. The court also reversed the FERC's deci-

24. *See New England Electric Power Co.*, 52 F.E.R.C. ¶ 61,090 (1990), *reh'g denied*, 54 F.E.R.C. ¶ 61,055 (1991), *aff'd*, Town of Norwood v. FERC, 962 F.2d 20 (D.C. Cir. 1992).

25. 88 F.3d 1239 (D.C. Cir. 1996) (*Florida Power & Light II*).

26. *Florida Power & Light Co.*, 62 F.E.R.C. ¶ 61,251, *reh'g denied*, 65 F.E.R.C. ¶ 61,411 (1993).

27. 89 F.3d 878 (D.C. Cir. 1996).

sion to require publication in tariff form of the operating rules governing allocation of capacity among TAPS carriers.

Petitioners challenged the FERC's decision to continue a ratemaking methodology developed when TAPS operated at capacity in order to compensate for the greater opportunity costs of carrying denser, more viscous oil as opposed to lighter oil. The methodology determined "pumpability factors" based on the difference in flow rates between heavier and lighter oil. Petitioners claimed that, because TAPS now operates at less than capacity, there are no longer opportunity costs to carrying heavier oil, only slightly increased costs of more fuel and drag-reducing agent. As a result, petitioners argued, the traditional rate differentials between carrying heavier or lighter oil were no longer justified and constituted discriminatory pricing in violation of section 2 of the ICA. The court agreed, finding that:[28]

> . . . given the concession that once the rate for heavier oil is adjusted for extra fuel and drag-reducing agent, cost is not affected by oil's heaviness, we are left with no clue as to how a "use of capacity" differential could contribute to any kind of rational pricing system.

The court also held that the FERC cannot require publication of certain operating information in tariff form without some indication that it makes a difference to shippers. The operating information related to how capacity on TAPS was allocated among the carriers. The court found that Section 6 of the ICA only required the compulsory publication and posting of rates, fares, and charges and that the FERC had not explained why the capacity allocation rules would have any effect on the value of service to the shipper. The court assumed that the allocation of capacity policy might be relevant in a proceeding involving rate discrimination but found that publication in tariff form was not essential for this purpose.

V. Natural Gas Act and Natural Gas Policy Act

A. Hadson Gas Systems, Inc. v. FERC[29]

In the *Hadson* case, Hadson Gas Systems (a gas marketer affiliated with intrastate pipelines and LDCs) unsuccessfully sought judicial review of Commission Order No. 567 which modified regulations based on the Natural Gas Wellhead Decontrol Act. Hadson argued that, under Section 553 of the Administrative Procedure Act the Commission should have given Hadson and other parties notice and an opportunity to comment before issuing its order. Of concern to Hadson was the deletion of Section 270.203(c) of the Commission's regulations, which generally provided that sales by non-pipelines affiliates (such as Hadson) of any interstate, intrastate, or Hinshaw pipeline constitute "first sales" under the Natural Gas Policy Act (NGPA). Without this provision, Hadson was concerned that its gas sales might be treated as jurisdictional sales under the NGA after

28. 89 F.3d at 882.
29. 75 F.3d 680 (D.C. Cir. 1996).

implementation of Order No. 567 and, thus, that it might thereafter be subject to intense NGA regulation.

The D.C. Circuit held that the Natural Gas Wellhead Decontrol Act required the Commission to delete this regulation which had been issued solely under the authority of now-removed price-ceiling provisions of the NGPA. The court, thus, concluded that "the Commission's complete lack of choice in the matter of excising §270.203(c)" either renders the provisions on notice and prior comment "inapplicable or makes its disregard harmless error." Nonetheless, the court added in dictum that Hadson may have a basis for requiring the Commission to open a rulemaking proceeding for purposes of adjusting its blanket-certificate regulations for gas marketers to the new realities.

A. Grynberg Petroleum Co. v. FERC[30]

In *Grynberg* (another decision addressing finality), the court upheld the Commission's refusal to reopen a final determination of the Bureau of Land Management (BLM) that Grynberg's gas field underlying BLM lands was not a "tight formation" under Section 107 of the NGPA. Despite the Natural Gas Wellhead Decontrol Act, tight formation designations remain important because Section 29(f) of the Internal Revenue Code still permits a tax credit for certain tight-formation gas. In 1992, Grynberg filed an application asking the BLM, as the "jurisdictional agency" under Section 503 of the NGPA, to designate Grynberg's formation on Federal lands as a tight formation; that same formation on state lands had been designated as a tight formation. The BLM initially ruled that the formation was not a tight formation under Section 107. Although Grynberg sought Commission review of that order, the Commission took no action and that order became final by operation of the Commission's regulations. Thereafter, relying on conclusions by a different engineer and a different geologist, the BLM petitioned the Commission to reopen the negative determination and allow the BLM to replace it with a revised determination qualifying the area as a tight formation. The Commission refused to reopen the proceeding, citing Section 503(d) of the NGPA.

The D.C. Circuit rejected the Commission's initial argument that Grynberg lacked standing on the ground that it was mere speculation whether the IRS would defer to the FERC's refusal to reopen the proceeding to give effect to the BLM's revised determination. The court noted that the issue was also relevant to an ongoing dispute between the producer and a purchaser over gas sales under their 1975 long-term gas-purchase contract. But the court upheld the Commission's refusal to reopen the BLM decision. Under Section 503(d) of the NGPA, a final determination by the jurisdictional agency is not binding if the agency: (1) relied on an untrue statement of material fact; or (2) was affected by an omission of material fact. Following its opinion in *ANR Pipeline Co v. FERC*,[31] the court

30. 77 F.3d 517 (D.C. Cir. 1996).
31. 870 F.2d 717 (D.C. Cir, 1989).

emphasized that "an expert's analysis of raw data is a professional opinion subject to dispute, not a material fact" and stressed "the strong interest in finality that counsels against reopening when an agency simply reinterprets, *via* an additional expert opinion, the same data it reviewed in rendering an earlier determination." Thus, the court concluded, the analysis by Grynberg's expert which the BLM did not have for its first determination but relied on for its attempted revised determination was not a "material fact" under the NGPA.

C. Panhandle Eastern Pipeline Co. v. Oklahoma ex rel. Commissioners of the Land Office[32]

In *Panhandle*, several interstate pipelines joined by several natural gas producers in Oklahoma challenged the constitutionality of an Oklahoma law (Senate Bill 160 — effective from 1985 until it was repealed effective January 1, 1993) which imposed royalty payment obligations on all first purchasers of gas produced from a "drilling and spacing unit established under the Oklahoma Corporation Commission." The Tenth Circuit affirmed a summary judgment in favor of the pipelines and producers.

Noting the long history of the NGA and NGPA and the extensive case law prohibiting states from regulating interstate gas sales, the court held that the Oklahoma statute was preempted under both the NGA and the NGPA to the extent it applied to interstate pipelines. Construing Oklahoma law, the court further agreed that the non-preempted portions of the statute were not severable from the preempted portions and, thus, the entire statute was invalid.

D. Colorado Interstate Gas Co. v. FERC[33]

In the *CIG* case, as discussed above under Administrative Law, the Tenth Circuit Court was also considering the issue of jurisdiction over gathering lines — in May 1996. CIG operated approximately 3000 miles of gathering lines. The Commission had rejected CIG's argument that it lacked jurisdiction over CIG's gathering services. On rehearing the Commission reaffirmed its earlier ruling but noted that CIG's claims were moot because it had entered into a settlement agreement in which it agreed to post firm gathering rates through September 1996.

In its May 1996 decision, the Tenth Circuit dismissed CIG's petition because CIG was not aggrieved under Section 19(b) of the NGA. The court stressed that for the period through September 1996 CIG had voluntarily agreed to subject its gathering services to Commission regulation.[34] For the period after September 1996, the court determined that CIG would be aggrieved only if three contingencies occurred: (1) CIG was required to

32. 83 F.3d 1219 (10th Cir. 1996).

33. 83 F.3d 1298 (10th Cir. 1996) (*CIG*).

34. While CIG appears not to have raised the point, this conclusion is in tension with the D.C. Circuit's suggestion in Louisiana Intrastate Gas Corp v. FERC, 962 F.2d 37 (D.C. Cir. 1992), that Commission jurisdiction is not necessarily established whenever a pipeline filed for rate approval of facilities that it later argues perform exempt gathering services.

continue to provide gathering services; (2) "those gathering services must be 'performed in connection with jurisdictional interstate transportation,' which is a factual issue that must be resolved by the Commission"; and (3) CIG must be sufficiently dissatisfied with the Commission's regulation at that time that CIG "is willing to expend its resources to challenge the Commission's jurisdiction." The court distinguished earlier cases that found petitioners to be aggrieved where they were likely to be bound by the challenged decision in future proceedings that were unavoidable.

E. United Distribution Companies v. FERC[35]

In *UDC*, the D.C. Circuit issued a decision on review of the Commission's Order Nos. 636 *et al.*[36] The *UDC* decision upheld the "broad contours" of Order No. 636 but remanded certain issues for further explanation.

The fundamental unbundling requirements of Order No. 636 were left intact. The court upheld the Commission's NGA Section 5 authority to direct customers to enter into new contracts for the transportation volumes underlying bundled gas sales contracts that were abrogated pursuant to the Order No. 636.[37] The unbundling mandate was found to be consistent with the stated goal of eliminating the unjust and unreasonable sales component of bundled gas supply contracts. The court also affirmed the Commission's decision not to allow customers the unilateral right to reduce entitlements to reserved firm capacity upon unbundling.

The Commission's jurisdiction over capacity release and buy-sell transactions, and the rules established for the capacity release program, were upheld.[38] The Commission's authority to regulate the capacity release program was challenged on the ground that its jurisdiction over pipeline initial sales of interstate transportation capacity extends to the provision of interstate transportation, but not to third-party sales of the right to pipeline transportation capacity. The court decided that the distinction between right to capacity and the provision of interstate transportation was not meaningful because the pipeline provides transportation services throughout the capacity release process. The court held that the Commission's jurisdiction over interstate transportation extends to all capacity release transactions, including an LDC capacity sale to its own end user and to capacity release by municipalities. As to buy-sell transactions, the court sustained the Commission's right to pre-empt state regulation and ruled that such arrangements involve Commission regulation of jurisdictional interstate transportation.

35. 88 F.3d 1105 (D.C. Cir. 1996) (*UDC*).

36. Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation Under Part 284 of the Commission's Regulations, and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, FERC STATS. & REGS. ¶ 30,939, *order on reh'g*, Order No. 636-A, F.E.R.C. STATS. & REGS. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 F.E.R.C. ¶ 61,272 (1992), *reh'g denied*, 62 F.E.R.C. ¶ 61,007 (1993).

37. 88 F.3d at 1130-33.

38. 88 F.3d at 1148-60.

The court also upheld the Commission's authority to require implementation of a straight fixed variable (SFV) rate design and the reasonableness of the Commission's support for the SFV approach.[39] In the context of approving the Commission's SFV requirement, the D.C. Circuit authoritatively determined that when the Commission orders a change in rate design, without allowing an increase in overall revenue collection, rate increases for certain customers caused by cost shifting among rate components does not violate the NGA Section 5 prohibition against the Commission ordering a rate increase in an existing rate schedule.[40]

Additionally, the court did not upset the Commission's curtailment policies[41] or the burden of proof requirement placed on an LDC trying to demonstrate that Order No. 636 transition costs should be allocated to a customer who departs its system because of a pipeline bypass.[42] As to curtailment of pipeline gas, the court ruled that the issue of curtailment compensation was not ripe for review and that Order No. 636 industry restructuring did not change circumstances to the extent that it should reconsider its previous determination that the Commission is bound to require end use curtailment for shortages in the supply of pipeline gas.[43] The court also ruled that the Commission acted appropriately in considering the issue of pipeline transportation capacity curtailment on a case-by-case basis, rather than making a generic determination, and in not adopting an industry-wide approach to curtailment of third-party gas supply. With respect to bypass, it was found that the Commission reasonably concluded that the LDC must show a direct nexus between the bypass and the pipeline.

The court also remanded certain issues. The court required the Commission to explain why it restricted the availability of no-notice transportation service to those customers who were entitled to receive bundled firm sales service at the city-gate on May 18, 1992 (*i.e.*, the effective date of Order No. 636).[44] The court stated that the Commission failed to sufficiently support its decision not to extend no-notice service to customers who had already converted from bundled firm sales service prior to that date pursuant to the Commission's Order No. 436.

The court also directed the Commission to provide an adequate explanation in support of a 20-year contract term cap when matching bids under the right of first refusal mechanism for capacity held under expired transportation service contracts.[45] The court stated that the Commission needed to explain how the 20-year term protects against a pipeline's pre-existing market power on capacity constrained systems. The court also noted that the 20-year contract term was typical for transportation service from newly

39. 88 F.3d at 1161-70.
40. 88 F.3d at 1163-66.
41. 88 F.3d at 1142-48.
42. 88 F.3d at 1180-81.
43. *See* Elizabethtown Gas Co. v. FERC, 10 F.3d 866 (D.C. Cir. 1993).
44. 88 F.3d at 1136-37.
45. 88 F.3d at 1140-41.

constructed pipeline facilities, but the Commission had not given a reasonable explanation as to why it relied on a new construction contract term for purposes of the right of first refusal mechanism.

The court also remanded the Commission's holding that initial mitigation from "significant cost shifting" due to the impact of switching to the SFV rate design should be implemented on an individual customer basis. The court stated that the Commission should explain why it did not allow for mitigation based on the impact on historical customer classes, given that the customer class approach was adopted for purposes of phasing in SFV rates when use of the initial mitigation measures still leave a cost shift of 10% or more.[46]

The Commission also was directed to reconsider its limitation on the availability of small customer discounts to the class of customers who were direct customers of the pipeline and eligible for such treatment on May 18, 1992. Certain small customers argued that the special rate treatment should be made available by an upstream pipeline to direct customers of a downstream pipeline who were eligible for the discount on the downstream pipeline on May 18, 1992, and became direct customers of the upstream pipeline upon unbundling.[47] The court agreed with those challenging the Commission's approach, finding that the Commission made an arbitrary distinction between former indirect small customers of upstream pipelines, who became direct customers upon unbundling, and small customers who were historically direct customers of the same pipelines.

Finally, aspects of the Commission's policy regarding pipeline recovery of gas supply realignment (GSR) costs were remanded for further explanation. The Commission was asked to explain why it allowed pipelines the opportunity to recover 100% of their GSR costs, particularly in light of the equitable-sharing approach adopted in Order No. 500 which required pipelines to absorb a portion of take-or-pay costs.[48] Also, the Commission was directed to adequately support its decision to allocate 10% of GSR costs to pipelines' interruptible transportation customers.[49] The court stated that the Commission did not explain why 10%, rather than 5% or 15%, was appropriate in all instances.

F. Williams Natural Gas Company v. FERC[50]

In the *Williams* case, the D.C. Circuit reviewed Commission orders requiring an interstate pipeline to refund to its customers the interest which it had collected for the period between the Commission's approval of a tariff revision and the actual date on which the pipeline billed the customers. Upon Commission approval of a proposed take-or-pay surcharge, the interstate pipeline began charging its customers for the volumetric portion of the approved surcharge. However, the pipeline did not begin billing for

46. 88 F.3d at 1173-74.
47. 88 F.3d at 1174-75.
48. 88 F.3d at 1181-91.
49. 88 F.3d at 1186-88.
50. 90 F.3d 531 (D.C. Cir. 1996).

the fixed charge portion of the surcharge until thirteen months later; when it began such charges, it included an amount for interest over those thirteen months. The Commission found that the pipeline was not entitled to such interest because it had voluntarily delayed billing.

The D.C. Circuit Court affirmed the Commission's decision, denying recovery of interest and confirming that such action was consistent with long-standing Commission policy. The court also affirmed the Commission's determination that "the absence of a final order" did not justify a delay in billing.

G. Conoco, Inc. v. FERC[51]

In *Conoco* issued in August 1996, the D.C. Circuit issued the most recent decision on review of a set of Commission orders on a spin-down of gathering facilities from an interstate pipeline to an unregulated affiliate. The Commission held that the facilities at issue constituted gathering facilities and that, upon transfer, would not be subject to Commission jurisdiction under the NGA so long as the affiliate's gathering service functioned independently of the interstate pipeline's transportation service. But the Commission imposed the same pre-condition under sections 4 and 7 of the NGA as described above for *First National Oil* — namely, that the interstate pipeline cause the gathering affiliate to offer to all pre-existing shippers a two-year "default contract" that essentially contained the same terms as the pipeline's then-current gathering service. Both producers and pipelines sought judicial review.

The D.C. Circuit upheld the Commission's determination that, upon transfer, the facilities would not be subject to NGA jurisdiction. The court determined that the Commission properly consideration each of the pertinent factors of the primary function test" for determining whether a facility constitutes gathering or transmission. The court also deferred to the Commission's determination that a gathering affiliate with no jurisdictional sales or transportation is not subject to the NGA as long as it did not engage in anticompetitive behavior with its affiliated interstate pipeline. In its decision the court rejected the Eighth Circuit Court's suggestion to the contrary in *Northern Natural Gas Co. v. FERC*[52] and distinguished the Supreme Court's many statements that the gathering exemption in Section 1(b) of the NGA must be narrowly construed.

The court refused to uphold the Commission's default-contract requirement as a condition under NGA Section 7(b) for the interstate pipeline to abandon its gathering facilities. While the court did not find that the default-contract requirement as impermissible, the court rejected the Commission's reasoning and remanded the issue for further consideration.

51. 90 F.3d 536 (D.C. Cir. 1996), *petition for cert. filed sub nom* Amoco Energy Trading Corp. v. FERC, Docket No. 96-686 (October 31, 1996).

52. 929 F.2d 1261 (8th Cir.), *cert. denied*, 502 U.S. 856 (1991).

H. Public Service Company of Colorado v. FERC[53]

In *PSC of Colorado* the D.C. Circuit Court reviewed another series of orders addressing the now-obsolete maximum lawful price provisions under the NGPA — whether *ad valorem* taxes in Kansas, Colorado, and Wyoming qualified as state severance taxes which were recoverable under section 110 of the NGPA. The Commission had initially agreed with the producers that all three states' taxes were severance taxes and recoverable under section 110. But, after remand from the court in *Colorado Interstate Gas Co. v. FERC*,[54] the Commission reversed its position and found that the Kansas *ad valorem* taxes did not qualify for recovery under section 110. The Commission ordered the Kansas producers to refund excess payments from pipelines for all production occurring after the court's 1988 opinion in *Colorado Interstate*. The Commission also ordered the pipelines to pass along those refunds to their customers, but decided not to make the pipelines liable to their customers for any amounts not received from producers. Interested parties on all sides attacked almost every aspect of the Commission orders.

Based on the lack of Congressional direction on the precise issue and the determination that the Commission's explanations were reasonable, the D.C. Circuit upheld the Commission's post-remand determinations for the three states' *ad valorem* taxes. On the issue of refunds, the court disagreed with the Commission and held that the producers must refund all the Kansas taxes they collected not just from 1988 but instead from October 1983, when all interested parties were put on notice that the taxes might not be recoverable under section 110. Noting that agency adjudication should generally be applied retroactively unless new law is replacing clearly defined old law, the court found that the Commission did not change the law and that the producers had not relied upon the continuing validity of the Commission's initial determination that the Kansas tax qualified under section 110. However, the court upheld the Commission's refusal to make the pipelines guarantors of all refunds due. The court found that, although an escrow arrangement would likely have preserved the rights of the parties, there was found no legal or equitable principle by which an agency can be required to hold a pipeline accountable for the agency's own error.

I. Altamont Gas Transmission Co. v. FERC[55]

In *Altamont*, another dispute over who should regulate what portions of California's gas market, the Commission had authorized Pacific Gas Transmission (PGT) to construct an interstate pipeline from the Canadian border to an interconnection in northern California with its parent, Pacific Gas and Electric Company (PG&E)(a California Hinshaw pipeline). The Commission had initially authorized a rate structure for PGT that included

53. 91 F.3d 1478 (D.C. Cir. 1996), *petition for cert. filed sub nom* Amoco Production Company v. PSC of Colorado, Docket No. 96-954 (December 13, 1996) (*PSC of Colorado*).

54. 850 F.2d 769 (D.C. Cir. 1988).

55. 92 F.3d 1239 (D.C. Cir. 1996).

a 12.75% return on equity. But, because it viewed various CPUC requirements imposed on PG&E as unduly discriminatory towards interstate shippers wanting to deliver gas to northern California, the Commission later reduced PGT's rate of return to 10.13% as an "incentive" for PGT to eliminate PG&E's and the CPUC's discrimination against these new interstate shippers.

The court first rejected the shippers' argument that the Commission should have treated PGT and PG&E as a single company, as it had for other affiliated companies in other coordinated projects, and that the Hinshaw exemption under 1(c) of the NGA should no longer apply to PG&E once the interstate pipeline was built. The court agreed with PGT and the CPUC that the Commission cannot impose a condition on PGT for the sole purpose of influencing a nonjurisdictional entity such as PG&E.

After determining that the Commission's rate-of-return reduction was improper, the court did not remand the case to the Commission to re-assess the shippers' coordinated-system argument under these new circumstances. This was because neither the Commission nor the shippers requested such relief in the event the court upheld the pipeline's attack on the rate reduction.

J. Panhandle Eastern Pipe Line Co. v. FERC[56]

The court in *Panhandle Eastern* reviewed a set of Commission orders addressing the now-repealed price-ceiling provisions of the NGPA — specifically, orders on the appropriate allocation of production-related costs incurred from 1980 to 1983. These orders were issued while the Commission was completing its rulemaking proceeding for determining how much producers could collect under Section 110 of the NGPA for their production-related costs. The D.C. Circuit Court had twice struck down the Commission's initial methods for the pipelines to recover the amounts they ultimately had to pay producers. With the long delays in resolving the cases, the accrued interest roughly equaled the principal amounts at issue. In response the Commission ultimately ruled that the pipeline customers get back the principal amount of the unlawful charges they paid, but the pipelines get the time value of the money by not having to pay back interest. Each side appealed.

Noting that neither the pipelines nor the customers presented any compelling equitable reason why one side should bear more of the burden of uncertainty from the Commission's admitted legal error than should the other, the court refused to upset the Commission's split. Two customers argued that the Commission lacked jurisdiction to order them to refund interest they had initially collected from two pipelines because they no longer had contracts with the pipelines. Rejecting that argument, the court noted that the Commission has remedial authority to undo the effects of its past legal error and that, when they were first paid, these two customers

56. 95 F.3d 62 (D.C. Cir. 1996).

had adequate notice that the pipelines were seeking to recover these amounts.

One pipeline and customer had reached a settlement, but the Commission refused to approve it because, the customer would have fared better under the Commission's later orders. The court found the Commission's reasoning an abuse of the Commission's discretion to reject a settlement proposal and, thus, directed the Commission to approve the settlement as proposed.

K. El Paso Natural Gas Co. v. FERC[57]

In the *El Paso* case, El Paso had transferred certain mineral property to a producer as a part of a settlement to resolve their longstanding "take or pay" contract dispute and then, in accord with Commission policy, submitted an NGA tariff filing seeking to recover 75% of the costs for this settlement from its customers. A dispute arose over the fair market value of the property that El Paso transferred. While the parties ultimately stipulated that the property had a value of roughly $98 million solely using a discounted cash flow (DCF) methodology, El Paso maintained that the fair market value was $135 million because the market for gas-producing properties in the area at the time was highly competitive. In support, El Paso provided expert testimony on sales of other properties and on valuation methods computing price paid per Mcf-equivalent of gas reserves. The Commission accepted the DCF methodology over El Paso's other choices and, thus, fixed the property's value at the stipulated DCF value.

The court upheld the Commission's valuation. While the court agreed that evidence of contemporaneous sales of comparable properties is generally the preferred method of valuation, the court upheld the Commission's finding that El Paso had failed to establish the *comparability* of the other properties. The court agreed with the Commission that El Paso's Mcf-valuation computations contained too many holes to be reliable. Because El Paso failed to present sufficient evidence for comparable sales, the court found it entirely proper for the Commission to rely on the DCF methodology for fixing the transferred property's value.

L. Public Utilities Commission of California v. FERC[58]

In *California PUC*, after a long dispute over which agency (the FERC or the CPUC) should regulate proposed expansions of pipeline facilities in California by Mojave Pipeline Company, the D.C. Circuit Court dismissed appeals by the CPUC and Mojave's competitor, PG&E as moot. The Commission had authorized Mojave to build two pipeline extensions deep into California and, over the CPUC's and PG&E's objections, asserted that under the NGA it would have exclusive jurisdiction over those facilities. While these appeals were pending, Mojave notified the Commission that it declined to accept the Commission's certificate of public convenience and

57. 96 F.3d 1460 (D.C. Cir. 1996).

58. 100 F.3d 1451 (9th Cir. 1996) (*California PUC*).

necessity issued under Section 7 of the NGA. The Commission then filed two motions with the Ninth Circuit Court: one to dismiss the appeals as moot, and a second for leave to issue an order to vacate all orders regarding Mojave's application. In addition, subject to leave of the Ninth Circuit, the Commission issued an order vacating all such orders, including those under judicial review.

Certain industrial consumers moved the court to dismiss the appeals for lack of standing because, they argued, the Commission's last order vacated the orders that the CPUC and PG&E were appealing. Noting that the certification of the record had been filed with the court before the Commission issued its last order, the court held that under Section 19 of the NGA the Commission had no jurisdiction to vacate its earlier orders. Thus, it concluded, the CPUC and PG&E remained aggrieved by those earlier orders.

Nonetheless, over the CPUC's objection, the court agreed that the appeals were now moot. Because the only relief the CPUC requested was that the Commission's orders be vacated, the court had no ongoing controversy between the Commission and the CPUC. The court also concluded that no exception to the mootness doctrine applied. The case did not present an issue capable of repetition while evading review; Commission proceedings, the court noted, are not speedy affairs. The court also concluded that Mojave's decision to abandon its project did not fall within the "voluntary cession" exception and noted that the Commission could not assert jurisdiction until another application is filed. Finally, the court found no collateral consequences that the CPUC or PG&E would suffer if the orders were not reviewed; rejecting as irrelevant the argument that PG&E had entered into long-term contracts with discounted rates to meet the potential competition from Mojave. The court found no exception "for the mere possibility of continuing, present adverse effects" and stressed that the collateral consequences must be "legal effects that would arise because of FERC's opinion in this case." In sum, describing its general approach to vacatur as "automatic," the court granted the Commission leave to vacate its prior orders and directed the Commission to dismiss the entire Mojave proceedings.

M. Texas Eastern Transmission Corp. v. FERC[59]

In *Texas Eastern* the Fifth Circuit addressed numerous issues on the filed-rate doctrine under the NGA. Texas Eastern Transmission Corporation and Transcontinental Gas Pipe Line Corporation each filed proceedings under Section 7 of the NGA for approval to build new pipeline projects and each proposed an SFV rate design method to which their customers had agreed. The Commission approved the project, but directed the two companies initially to use the modified fixed variable (MFV) method that they had previously used. While Transco sought rehearing, Texas Eastern did not. Thereafter, Texas Eastern began service and used

59. 102 F.3d 174 (5th Cir. 1996).

the MFV method for another year, before filing for new rates. Thereafter, the Commission granted Transco's rehearing request and allowed it to use the initially proposed SFV method. Texas Eastern then filed for rehearing of that order and argued that the Commission should have allowed it to use the SFV method also for the one-year period when Texas Eastern's initial rates were in effect. The Commission granted rehearing. More than 30 days thereafter, and after Texas Eastern had filed new tariff sheets to make the change to SFV retroactive to the date it began its new service, several customers filed "a motion to clarify" that any change should not be retroactive. Relying on the filed-rate doctrine against retroactive ratemaking, the Commission confessed that it had erred in granting Texas Eastern's rehearing and, thus, refused to permit Texas Eastern to make the retroactive change.

The Fifth Circuit affirmed the Commission's refusal to approve the retroactive rate-design change that Texas Eastern sought. Discussing the many policies behind the filed-rate doctrine, the court first rejected Texas Eastern's argument that the doctrine applies only to proceedings under sections 4 and 5 of the NGA and does not apply to initial rates under Section 7 proceedings. The court then addressed Texas Eastern's failure to seek rehearing of the Commission's initial order. While the court agreed that Texas Eastern originally had given its customers adequate notice for seeking an SFV rate, once Texas Eastern did not seek rehearing from the Commission's order imposing the MFV rate those customers no longer had reasonable notice that they would be subject to an SFV rate from Texas Eastern. In short, the court concluded, Texas Eastern's failure to seek rehearing was fatal and prevented it from enjoying the same benefits as its competitor Transco.

But Texas Eastern's customers did not suffer the same fate for waiting too long. Even though the customers had filed their motion to clarify more than 30 days after the Commission order in Texas Eastern's favor, the court ruled that the Commission was free under Section 19(a) of the NGA to address this untimely motion because no record had been filed in any court of appeals in the meanwhile.

N. First National Oil, Inc. v. FERC[60]

As indicated above (under the discussion of Administrative Law cases), the *First National Oil* decision involved the latest of many proceedings in which interstate pipelines sought to spin-down their gathering facilities to unregulated affiliates. In this case the Commission had approved such a spindown by Panhandle Eastern Pipe Line Company to its subsidiary PanEnergy Field Services. But, as a precondition to authorizing Panhandle to transfer its facilities under Section 4 of the NGA and to terminate its gathering services for these facilities under Section 7 of the NGA, the Commission also required that Panhandle cause Field Services to offer to each pre-existing shipper a two-year "default contract" that

60. 102 F.3d 1094 (10th Cir. 1996).

essentially contained the same terms as Panhandle's then-current gathering service. While it was not required to do so, Field Services also offered the default contract to First National Oil, which was a producer that sold its gas to marketers at the wellhead and, thus, was not an existing customer of Panhandle. But First National refused the contract and instead sought judicial review. As discussed in above, the Tenth Circuit Court dismissed First National's petition on the grounds that it was not "aggrieved" under Section 19(b) of the NGA.

VI. Public Utility Regulatory Policies Act

A. Mid-South Cogeneration, Inc. v. Tennessee Valley Authority[61]

In *Mid-South Cogeneration*, the court held that the Tennessee Valley Authority (TVA) did not violate Section 210 of PURPA by failing to enter into an agreement to purchase energy from the owner of a small power production facility. The court pointed out that Section 210 prohibits the FERC from requiring a utility to purchase energy at a rate which exceeds the incremental cost to the electric utility of alternative electric energy. Therefore, the court reasoned, it was barred from, under the guise of enforcing PURPA, requiring the TVA to purchase electric energy from Mid-South at rates in excess of TVA's avoided costs, absent an enforceable contract providing for such rates. The court further found that Mid-South had no contractual claim for relief under PURPA because it was not ready, willing, and able to sell electricity to TVA.

B. Massachusetts Institute of Technology v. Massachusetts Department of Public Utilities[62]

The *Massachusetts Institute of Technology* case concerned MIT's claim against the Massachusetts Department of Public Utilities (MDPU), certain of its officials, and Cambridge Electric Company (CEC), alleging that the MDPU's approval of CEC's stranded costs recovery charges to MIT violated PURPA.

MDPU moved the court to dismiss the claim for lack of subject matter jurisdiction. In granting MIT's motion, the court noted that cases interpreting the jurisdictional grant of Section 210(h) of PURPA have distinguished between claims challenging the implementation of FERC/state agency regulations and claims challenging the application of such regulations.[63] Section 210(h)(2)(B) of PURPA, the court stated, limits federal court jurisdiction to claims that state agencies have failed to comply with their obligation under PURPA to devise an implementation plan that is consistent with FERC regulations. As the MDPU had, in fact, developed an implementation plan consistent with FERC regulations, any challenge raised by MIT must be to the lawfulness of the regulations as implemented.

61. 926 F.Supp. 1327 (E.D.N.D. Tenn. 1996).

62. 941 F.Supp. 233 (D. Mass. 1996).

63. *See, e.g.*, Indus. Cogenerators v. FERC, 47 F.3d 1231 (D.C. Cir. 1995).

Therefore, the court granted MDPU's motion to dismiss for lack of subject matter jurisdiction.

C. Rosebud Enterprises, Inc. v. Idaho Public Utilities Commission[64]

In *Rosebud Enterprises* the Supreme Court of Idaho held that the Idaho Public Utilities Commission's (IPUC) allowance of adjustments to the utility's published avoided cost rates for smaller qualifying facilities was consistent with PURPA. At issue was the IPUC's method in evaluating the various factors set forth in the FERC's regulations [section 292.304(e)(2)(i) - (vi)] to determine a utility's avoided costs. Rather than specifically adjust the rates Idaho Power proposed to pay Rosebud, the Commission found reasonable Idaho Power's proposal to purchase only 75% of Rosebud's annual generation. The court found that the IPUC's determination that project reliability could best be addressed in a security provision of a contract between the utility and the cogeneration facility, rather than in a specific adjustment to the rates the utility was willing to pay Rosebud, was reasonable and complied with PURPA.

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Santa Fe Energy Products Co. v. McCutcheon, 90 F.3d 409 (10th Cir. 1996).
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FEDERAL POWER ACT — HYDROELECTRIC LICENSING

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