REPORT OF THE JUDICIAL REVIEW COMMITTEE 1997

I. INTRODUCTION

This Report summarizes the major energy cases in 1997, with a focus on cases at the appellate level. The majority of 1997 appellate cases analyzed below involve review of orders of the Federal Energy Regulatory Commission (FERC).

II. ADMINISTRATIVE LAW

A. Federal Pre-emption: Concerned Citizens of Cohocton Valley, Inc. v. New York State Department of Environmental Conservation[1]

In *Cohocton Valley*, the Second Circuit affirmed the district court's dismissal of the case filed by local environmental groups which attacked local agencies' decisions for lack of jurisdiction on grounds of federal pre-emption. The matter at issue commenced when the FERC granted a NGA certificate to construct and operate a gas storage facility in New York. Upon issuance of the FERC certificate, the local regulators issued construction permits without addressing issues of compliance with the New York Environmental Quality Review Act (EQR Act). According to the agencies, the New York EQR Act was pre-empted by the NGA. The district court dismissed the federal suit because the federal pre-emption issue was not an element of the original claim but was only a defense. The NGA, the court concluded, did not so completely pre-empt state law so as to create federal question jurisdiction. On appeal the Second Circuit affirmed the district court, stressing the difference between "traditional pre-emption" and "complete pre-emption." The court emphasized that, de-

1. 127 F.3d 201 (2d Cir. 1997).

spite the district court's dismissal for lack of "complete pre-emption," nothing barred the project participants from arguing in state court that the NGA pre-empted the New York EQR Act, as the local agency had already ruled.

B. *Federal Pre-emption: In Re Cajun Electric Power Cooperative, Inc.*[2]

In the *Cajun* case, the court found that the Secretary of Agriculture, through the Rural Electrification Administration (REA, now the Rural Utilities Services), had exceeded his statutory authority by attempting to pre-empt rate orders issued by a state public utility commission (i.e., the Louisiana Public Service Commission (Louisiana PSC)). Cajun, a Louisiana electric cooperative, borrowed $1.6 billion from the REA to finance a nuclear power facility, pursuant to the Rural Electrification Act. Subsequently, the Louisiana PSC began an investigation into the prudence of Cajun's investments in the facility. Several years later, the Louisiana PSC approved the debt restructuring agreement (DRA) between Cajun and the REA related to the facility, but declined to guarantee recovery by Cajun of its debt payments under the DRA. In December, 1994, the Louisiana PSC found that Cajun's nuclear investments were imprudent and ordered a rate reduction. A few days later, the Secretary of Agriculture notified Cajun that the Louisiana PSC's rate order was pre-empted by federal law.

On review of the Secretary's order, the district court found in favor of the Louisiana PSC's authority. The Fifth Circuit affirmed. The court noted that the Rural Electrification Act neither expressly nor implicitly authorized the pre-emption powers that the Secretary claimed. The court further found that the purpose of the Act (to provide low-cost, reliable power) was contrary to approval of high rates to guarantee debt recovery. Finally, the court noted that the REA was more of a lending agency than a traditional public utility regulatory body.

C. *Federal Pre-emption: McCartin McAuliffe Mechanical Contractor, Inc. v. Midwest Gas Storage, Inc.*[3]

In the *MMMC* case, the court held that the NGA did not pre-empt an Indiana state law granting a mechanic's lien to a contractor that provided construction services to a company that was constructing a gas storage facility subject to FERC jurisdiction under the NGA. While the gas storage company argued that a foreclosure sale under the state lien law would conflict with the NGA's requirement for FERC approval to abandon or transfer any NGA-regulated facilities, the court found this argument unconvincing and instead merely noted that any creditor seeking to foreclose would also have to comply with the FERC's regulations for FERC approval of any transfer. The court found that while federal regulations "may complicate" the foreclosure proceeding, the lien's foreclosure would

2. 109 F.3d 248 (5th Cir. 1997).
3. 685 N.E.2d 165 (Ind. Ct. App. 1997).

not conflict with the NGA regulations.

D. Federal Pre-emption: No Tanks Inc. v. Public Utilities Commission[4]

In *No Tanks*, the Maine Supreme Court held that the NGA pre-empted a state law requiring approval from Maine's Public Utilities Commission (Maine PUC) for an interstate pipeline company to provide storage and delivery of liquefied natural gas to an affiliated local distributor. The court noted that the FERC's approval under the NGA was necessary for any such storage or transportation facilities, that the U.S. Department of Transportation had issued comprehensive safety regulations that would cover these facilities, and that the FERC's regulations take environmental and safety issues into consideration. Although the FERC had not yet acted on the pipeline's NGA certificate application, the court found that point insignificant in its decision.

E. Settlement/Evidence: Exxon Corp. v. FERC[5]

In the *Exxon* case, the court affirmed in part and remanded in part the FERC's orders which required an Administrative Law Judge (ALJ) to certify a contested settlement. Koch Gateway Pipeline Company (Koch) filed the settlement to resolve a pending rate case and the settlement was contested by some, but not all, parties. The ALJ refused to certify the settlement, stating that the FERC's rules prohibited him from certifying a contested settlement if it left genuine issues of material fact unresolved and if the record contained insufficient evidence for the FERC to adjudicate these issues. Several parties filed an interlocutory appeal. The FERC ordered the ALJ to certify the settlement, and required Koch to provide additional evidence. Exxon was afforded the opportunity to file evidence, but declined to do so. The FERC subsequently approved the settlement. On rehearing, however, Exxon included certain new evidence. The FERC denied all requests for rehearing, and refused to consider Exxon's new evidence.

While describing the FERC's procedures as somewhat unusual, the court upheld the FERC's orders, granting deference to the FERC's determinations that the subject settlement rules only applied to the ALJ's and not the FERC. The court further found that because Exxon was allowed to submit evidence and chose not to do so, it could not complain that it was unfairly harmed. The court also found that the FERC had no obligation to consider evidence brought before for it for the first time on rehearing, finding that Exxon had no right to "another bite at the apple." However, the court remanded on one substantive issue that the FERC had failed to adequately address certain evidence which was refuted.

4. 697 A.2d 1313 (Me. 1997).
5. 114 F.3d 1252 (D.C. Cir. 1997).

F. Standing: City of Bushnell, Ill. v. FERC[6]

In its one-paragraph opinion in *Bushnell*, the court abided by the rule that to seek judicial review of a FERC order under the NGA, the petitioner must have also participated in the FERC proceedings below. Because petitioners in this case (five Illinois municipalities) "did not participate," the court granted the FERC's motion to dismiss their petition for lack of jurisdiction. The petitioners' allegation that "the FERC acted in clear violation" of the NGA, the court noted, is not enough to bypass this bright-line rule.[7]

G. Standing/Late-filed Comments: Reytblatt v. United States Nuclear Regulatory Commission[8]

In the *Reytblatt* decision, the court upheld challenges to the Nuclear Regulatory Commission's (NRC) rules on the reporting of containment leakage rate tests. The NRC rules at issue only required failed leakage rate tests to be filed publicly. Both Reytblatt and the Ohio Consumers for Responsible Energy (OCRE) filed comments which were considered by the NRC; however, the NRC ignored late-filed comments submitted by Reytblatt. As a preliminary matter, the court determined that both Reytblatt and OCRE met the requirements for standing to bring an appeal of the Final Rules. Both parties had suffered an injury in fact (reduced access to information) traceable to NRC's rules. Therefore, the parties' interests were within the zone of interests Congress intended to protect in enacting the controlling statutes (as public participants in the oversight of nuclear facilities). On the merits, the court found in favor of the NRC, finding that the NRC's responses to comments filed by Reytblatt were adequate (especially given what the court felt was the limited and invective nature of those comments). The court further held that the agency had no obligation to consider comments submitted after the end of the comment period.

III. ANTITRUST LAW

A. State Oil Co. v. Khan[9]

In *Khan*, the U.S. Supreme Court reversed a 1968 decision finding that vertical maximum pricing constraints were *per se* illegal, instead determining that they were to be evaluated under the rule of reason standard. Kahn had entered into an agreement with State Oil to lease and operate a gas station owned by State Oil. Under the agreement, Kahn would purchase gasoline from State Oil at a price equal to State Oil's suggested retail price, minus a margin of 3.25 cents per gallon. While Kahn was not required to sell the gas at the suggested retail price, if it charged an amount

6. No. 97-1291, 1997 WL 634553 (D.C. Cir. Sept. 3, 1997).
7. *Id.*
8. 105 F.3d 715 (D.C. Cir. 1997).
9. 118 S. Ct. 275 (1997).

more than this price, it was obliged to remit the excess to State Oil. Kahn could charge a price that was less than the suggested retail price, but this would reduce the 3.25 cents per gallon margin.

Kahn's business failed and Kahn sued State Oil, alleging the maximum price scheme was an illegal pricing constraint. The district court found in favor of State Oil, holding that Khan had failed to show that a different pricing arrangement would have increased its sales, or that State Oil had market power or had affected competition in the relevant market. The court of appeals reversed, holding that under the Supreme Court's ruling in *Albrecht v. Herald Co.*,[10] the pricing scheme was *per se* illegal.

The Supreme Court, in evaluating the continued validity of its *Albrecht* holding, stated that stare decisis, while of importance in establishing settled principles of law, is not an inexorable command. Finding that there was insufficient economic justification for the use of the *per se* rule, the Court determined that the rule of reason should apply (minimum vertical price constraints would remain illegal per se). The Court reasoned that unless the supplier is a monopsonist, it could not set the maximum price too low, or else it will drive its dealers to competing suppliers. The Court stated that maximum pricing schemes might be necessary to prevent a dealer from exploiting any monopoly power it may have, and may benefit consumers by leading to lower prices. In addition, a supplier might set a maximum price to prevent dealers who are willing to suffer decreased sales volumes in exchange for a higher profit from each unit sold, from setting prices at a level that reduce the volume of goods the dealer purchases from the supplier. The problems inherent in maximum pricing constraints, such as a loss of dealer flexibility or the fact that they may be a disguised form of minimum pricing, can be adequately dealt with through the application of a rule of reason analysis.

B. *County of Stanislaus v. Pacific Gas & Electric Co.*[11]

In the *Stanislaus* case, a class action involving those who received service from Pacific Gas and Electric between 1988 and 1993, the Ninth Circuit affirmed the district court's determination that the filed-rate doctrine bars federal antitrust market preclusion claims, federal antitrust price-fixing claims, and state antitrust price-fixing and market preclusion claims. Appellants argued that Canadian producers and Alberta & Southern Gas Company (A&S), a wholly-owned subsidiary of PG&E, conspired to sell Canadian gas to PG&E for a price above the market rate. A&S sold the gas to Pacific Gas Transmission Company (PGT), a wholly-owned subsidiary of PG&E that owns and operates the pipeline that carried the gas from the U.S.-Canadian border to California. PGT, in turn, sold the gas to PG&E. Appellants also claimed that PG&E and PGT prevented PG&E's competitors from gaining access to PGT's pipeline by "stuffing" the pipeline through excessive purchases of Canadian gas. The Economic

10. 390 U.S. 145 (1968).
11. 114 F.3d 858 (9th Cir. 1997).

Regulatory Administration (ERA), the FERC and the California Public Utilities Commission (CPUC) approved the various transactions giving rise to this proceeding.

The Ninth Circuit found that the filed rate doctrine "has barred antitrust recovery by parties claiming injury from the payment of filed rates for goods or services."[12] The court stated that the doctrine prohibits the federal price fixing claim. In addition, the court asserted that the filed rate doctrine precludes the claim that PG&E and PGT prevented competitors from gaining access to PGT's pipeline. Noting that this was a matter of first impression, the court stated that such claim is, in effect, "a challenge to the quantity of gas that PG&E purchased from Canadian producers; because such quantities had received ERA approval and authorization, the claims cannot overcome the filed rate doctrine's clear instruction that ERA-approved volumes are conclusively reasonable."[13] Finally, the court denied the state law claims, finding that the filed rate doctrine also bars those claims.

C. *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*[14]

In the *Schuykill* case, the Third Circuit affirmed the district court's dismissal of an antitrust claim filed by Schuylkill Energy Resources, Inc. (SER) against Pennsylvania Power & Light Company (PP&L). SER's claim alleged that PP&L's curtailment practices constituted illegal acts of monopolization and attempted monopolization. PP&L purchased power from SER, a qualifying cogeneration facility as defined under PURPA. Under the agreement, PP&L was entitled to curtail its purchases when required by a force majeure or system emergency. PP&L interpreted these provisions to include instances when demand fell below certain levels. SER claimed that PP&L had used the provisions to curtail purchases for economic reasons, rather than legitimate system emergencies.

SER's complaint in the district court was initially stayed pending a related proceeding before the Pennsylvania Public Utility Commission and eventually dismissed. The court of appeals affirmed this dismissal, finding that SER had not stated a claim for which relief could be granted. The court noted that the antitrust laws were intended to protect consumers and competition in the market in which the competition occurs. The court denied SER's claims that, by harming SER, PP&L's practices harmed competition; the court found that since SER was supplier rather than a competitor, no injury under these provisions arose. The court also rejected SER claims that PP&L's consumers were harmed by artificially high rates, holding that this issue was one for the Pennsylvania Public Utility Commission. As to SER's claims that consumers were harmed by the environmental impact of PP&L's actions, the Court held that this type of issue was beyond the scope of the antitrust laws.

12. *Id.* at 862 (*citing* Keogh v. Chicago Northwestern Ry. Co., 260 U.S. 156 (1922)).

13. 114 F.3d at 863-64.

14. 113 F.3d 405 (3d Cir. 1997).

D. *Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc.*[15]

In the *Crossroads* case, the court dismissed claims brought by the owner of a qualifying cogeneration facility that Orange and Rockland Utilities, Inc. (O&R) had engaged in acts of monopolization and price discrimination. The court found that Crossroads Cogeneration Corp. (Crossroads) failed to state a claim that was actionable under the antitrust laws. In 1987, O&R entered into an agreement to purchase power from an energy supplier; the agreement was assigned to Crossroads in 1990. Both the original agreement and the assignment were approved by the New York Public Service Commission (NYPSC). Subsequently, Crossroads added a gas turbine to the facility and began to deliver and charge O&R for the output from this turbine. O&R filed a petition for a declaratory order from the NYPSC that it was not obliged to take or purchase power in excess of the amounts called for under the agreement. After the NYPSC granted O&R's petition, Crossroads initiated the instant proceeding, asserting that O&R had engaged in acts of monopolization and attempted monopolization contrary to the Sherman Act and acts of price discrimination illegal under the Robinson-Patman Act.

The court dismissed the Sherman Act claims for failure to state an actionable claim, holding that Crossroads failed to plead a relevant market or to plead that O&R possessed or threatened to possess monopoly power in such market. In addition, the court found that because Crossroads was not a consumer or a competitor of O&R, its injuries were not of the type the antitrust laws were intended to redress. The Robinson-Patman Act price discrimination claims, which were based on O&R's attempt to sell power at a discounted rates to one of Crossroad's customers, were also dismissed; the court held that such a claim required two or more sales at differing rates resulting in an injury to competition, and no such sale or injury had occurred.

E. *Snake River Valley Electric Ass'n v. PacifiCorp*[16]

In the *Snake River* case, the district court denied PacifiCorp's motion to dismiss or stay antitrust claims relating to a refusal to provide service. Snake River Valley Electric Association (Snake River an association of non-profit electric cooperatives) sued, alleging that PacifiCorp's failure to transmit power to it constituted a restraint of trade and an illegal form of exclusive dealing. Snake River sought to purchase power from PacifiCorp to sell to its members, or to purchase power elsewhere and have it transmitted by PacifiCorp; many of Snake River's members also purchased power from PacifiCorp or its subsidiaries.

PacifiCorp moved to dismiss the claims arguing that its actions were immunized under the state action doctrine, or, in the alternative, should be stayed because the FERC or the Idaho Public Utilities Commission (Idaho

15. 969 F. Supp. 907 (D. N.J. 1997).
16. No. CV 96-0308, 1997 WL 241086 (D. Idaho Apr. 25, 1997).

PUC) had primary jurisdiction over such claims. The court denied PacifiCorp's motion for dismissal. The court found that although Idaho law discouraged cooperatives from competing for existing customers of an electric utility, PacifiCorp's actions were not immunized to the extent PacifiCorp prevented Snake River from serving its existing customers. As to the second prong of the state-action test, the court found that the state had failed to actively supervise the challenged activity. As to the denial of service on behalf of new customers, the court found that Idaho statutes allowed competition for new customers in some instances; thus there was no state policy immunizing actions by PacifiCorp that sought to prevent Snake River from serving new customers. The court also denied the request for stay, finding that no special expertise by an agency (such as the FERC or the Idaho PUC) was required in this instance.

IV. FEDERAL POWER ACT -- HYDROELECTRIC LICENSING (AND RELATED ENVIRONMENTAL ISSUES)

A. *Farmington River Power Co. v. FERC*[17]

In *Farmington*, the court vacated and remanded the FERC's order, which required the operator of an unlicensed dam to pay the owners of upstream dams for headwater benefits. The court construed section 10(f) of the FPA to permit the FERC to assess the owner of an unlicensed dam for headwater benefits only for periods following actual notice to the owner of its potential liability for such charges. The court remanded to the FERC the question of when the dam operator had received the required notice. The court also ruled that the FERC violated section 27 of the FPA by charging the dam owner for water to which it had a vested right under state law.

B. *State of Wisconsin v. FERC*[18]

In the *Wisconsin* case, the court denied the petitions for review of two state agencies that challenged the FERC's orders approving the transfer of the licenses for two hydroelectric projects. The state agencies contended that the FERC should have inquired further into the financial ability of the transferee to ensure the projects' continued environmental compliance and to provide sufficient financial resources to cover the costs of decommissioning the dams.

The court held that the FERC was not required to hold an evidentiary hearing on the applications. It rejected the state agency's argument that it was entitled to comment on the FERC staff's proposed decision to approve the license transfer applications and review the documents on which the staff was relying before the staff issued an order to that effect. The court further held that the FERC's decision to approve the license transfer

17. 103 F.3d 1002 (D.C. Cir. 1997).

18. 104 F.3d 462 (D.C. Cir. 1997).

was supported by substantial evidence, and it rejected the claim that the FERC should have inquired into the cost of future environmental compliance or decommissioning rather than deferring these issues until the relicensing of the project at the expiration of the existing license.

C. *Rainsong Co. v. FERC*[19]

In *Rainsong*, the court upheld the FERC's interpretation that, when considering an application for a license for a hydropower project on a federal reservation, the FERC must make a threshold finding under section 4(e) of the FPA that the project "will not interfere or be inconsistent with the purpose for which such reservation was created or acquired" before the FERC discharges its further responsibility under section 4(e), "in deciding whether to issue any license," to give "equal consideration" to energy conservation, fish and wildlife, recreation, and environmental-quality concerns, as well as "power and development purposes."[20] The court nonetheless remanded the FERC's orders denying the license application in this case because the FERC, rather than making its own finding that the project would be inconsistent with the purposes of the national forest at issue, relied instead on the Forest Plan issued by the Forest Service.

D. *OMYA, Inc. v. FERC*[21]

In *OMYA*, the court rejected a hydroelectric project licensee's objections to the conditions the FERC imposed upon relicensing the project, including the requirement to file a recreation plan and to implement a historic preservation plan. The court's per curiam decision upholding the FERC's decision found that most of the licensee's arguments had not been preserved for appeal. The court also rejected the proposition that a Fifth Amendment taking claim was valid because the licensee's exclusive remedy is an action under the Tucker Act. The licensee had argued that the license conditions made the project uneconomic, and the FERC failed to give "equal consideration" to "the power and developmental purposes" of the dam as well as the recreational and historic purposes. The court held this argument was not yet ripe, but the licensee could raise this issue in further FERC proceedings once the costs of compliance with the license conditions were established.

E. *State of North Carolina v. FERC*[22]

In *North Carolina*, the court upheld the FERC's amendment of a hydropower license to permit the City of Virginia Beach, Virginia, to build intake facilities within the project to withdraw water for transport to the city. The State of North Carolina contended that the FERC violated sec-

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19. 106 F.3d 269 (9th Cir. 1997).
20. *Id.* at 272.
21. 111 F.3d 179 (D.C. Cir. 1997) (per curiam).
22. 112 F.3d 1175 (D.C. Cir. 1997).

tion 401(a)(1) of the Federal Water Pollution Control Act (the Clean Water Act) by issuing the license amendment without first requiring a water quality certification from North Carolina.

The court held that the FERC did not have to require that water quality certification be obtained from North Carolina before amending the project license to permit the City's project. The court adopted the FERC's view that the relevant activity permitted by the license amendment was the construction and operation of the City's water intake project, and that this activity required only a water quality certification from Virginia. The court also upheld the FERC's decision to amend the license to permit the City's water withdrawal project, including the finding that the Virginia Beach region needed the water to be withdrawn by the project.

Judge Wald dissented, disagreeing with the Court's conclusion that no water quality certification by North Carolina was required and concluding that the FERC's finding that Virginia Beach needed the water was arbitrary and capricious.

F. *Keating v. FERC*[23]

In *Keating*, the court rejected a challenge to the FERC's denial of a hydroelectric license application for a project located in a national forest. Agreeing with the Ninth Circuit's decision in *Rainsong*,[24] the court held that the FERC erred in deferring to the Forest Service's plan to determine whether the project would be inconsistent with the purposes for which the forest was created. Nonetheless, the court denied the petition for review, because the FERC's decision also rested on the alternative finding that complying with the Forest Service's section 4(e) license conditions would render the project uneconomic.

G. *Southern California Edison Co. v. FERC*[25]

In *Southern California Edison*, the court rejected objections to other license conditions imposed under section 4(e) of the FPA, this time in the context of the relicensing of existing projects located on federal lands. The court upheld as reasonable the FERC's interpretation that section 4(e) of the FPA requires the FERC to include in such new licenses the conditions recommended by the federal agency administering the federal lands on which the project is located. The court also held that, in developing their mandatory license conditions pursuant to section 4(e), the federal land agencies are not confined to the purposes for which the federal reservation was originally acquired or created, but may look to the purposes for which the land is managed at the time of relicensing, including current environmental, wildlife, and recreational objectives.

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23. 114 F.3d 1265 (D.C. Cir. 1997).
24. See Section IV.C. of this article for a discussion of *Rainsong*.
25. 116 F.3d 507 (D.C. Cir. 1997).

H. *Skokomish Indian Tribe v. FERC*[26]

In *Skokomish*, the court denied an Indian tribe's petition for review of FERC orders denying the tribe's application for a preliminary permit to develop a hydroelectric project. The FERC held that the tribe's proposal conflicted with a municipality's pending relicensing application for an existing project in violation of FERC regulations. The court upheld the FERC's interpretation of its regulations that the tribe's proposal to use the same water that the municipality proposed to use conflicted with the municipality's application.

I. *American Rivers, Inc. v. FERC*[27]

In *American Rivers*, the court vacated and remanded orders in which the FERC issued licenses for hydroelectric projects without license conditions that a state had sought to impose pursuant to its water quality certification authority under section 401(a)(1) of the Clean Water Act. The FERC declined to include these license conditions because it determined they exceeded the state's certification authority under section 401. The court held section 401 requires the FERC to incorporate all state-imposed water-quality certification license conditions and the legality of such license conditions can only be challenged by the licensee in a court of appropriate jurisdiction. The court distinguished the D.C. Circuit's 1991 decision in *Keating v. FERC*,[28] on which the FERC relied, concluding *Keating* addressed "the narrow question of the [FERC's] authority to determine whether a valid section 401 certificate exists prior to issuing its license."[29]

The court also rejected the FERC's arguments that the FPA preempts state law and the state-imposed license conditions in this case conflicted with requirements of the FPA.

V. FEDERAL POWER ACT -- ELECTRIC REGULATORY LAW

In 1997, the U.S. Courts of Appeals issued no reported decisions involving judicial review of the FERC decisions issued under Part II of the FPA. In part, this development is due to an apparent willingness by the D.C. Circuit to dispose of more of the FERC's appeals by unpublished orders.[30] Moreover, the absence of reported decisions in 1997 is undoubtedly due in large part to the fact that the FERC, the public utilities it regulates under part II of the FPA, and the energy bar devoted most of their energies in late 1996 and 1997 to the implementation of the FERC's regulations on open-access transmission in Order No. 888[31] and the open access same-

26. 121 F.3d 1303 (9th Cir. 1997).

27. 129 F.3d 99 (2d Cir. 1997).

28. 927 F.2d 616 (D.C. Cir. 1991).

29. American Rivers, 129 F.3d at 109.

30. A computer search using LEXIS discloses thirty-nine FERC decisions in the D.C. Circuit during 1997, resulting in sixteen published opinions and twenty-three decisions by unpublished opinions.

31. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory*

time information system and standards of conduct in Order No. 889.[32] Petitions for review of these orders have been filed and may result in a decision during 1998.

The Ninth Circuit decided an interesting non-FERC case relating to electric rate issues and contracting in *Association of Public Agency Customers, Inc. v. Bonneville Power Administration.*[33] In *APAC*, the court upheld a series of decisions by the Bonneville Power Administration (BPA) to enter into long-term transmission and sales agreements with one class of customers (direct services industries customers, or DSI's). In 1992, the BPA began renegotiating its contracts with the DSI customers. Over the next three years, the BPA issued a series of decisions and environmental impact statements, deciding to participate fully as a competitor in the market for power transmission, and entering into long-term transmission and sales agreements with the DSI customers. The BPA concluded that these agreements and its participation as a competitor in the transmission markets best balanced its mandate to market and provide power to the region, while still meeting its environmental concerns. Under the transmission contracts, the BPA would transmit non-federal power on behalf of the DSI customers.

Petitioners in *APAC* (a group of trade associations and public and energy policy organizations) challenged the BPA's decisions, claiming the BPA exceeded its statutory authority by agreeing to transmit non-federal power. The court found that the BPA's organic statutes were silent on the issue. The court further found, in light of the BPA's broad-based authority and obligation to act in its best business interests, the BPA had not exceeded its statutory authority. The court accepted as reasonable the BPA's determination that the contracts would generate sufficient revenues so that there would be no stranded costs associated with these services.

VI. INTERSTATE COMMERCE ACT -- OIL PIPELINES

A. *Amerada Hess Pipeline Corp. v. FERC*[34]

In *Amerada Hess*, the court affirmed the FERC's ruling that the Trans Alaska Pipeline System (TAPS) carriers may not recover the costs of litigating and settling civil suits arising out of the *Exxon Valdez* oil spill in their tariff rates. The FERC held that these litigation and settlement costs were "extraordinary expenses," not "operating expenses," under the

Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, F.E.R.C. STATS. & REGS. ¶ 31,036, 61 Fed. Reg. 21,540 (1996), *order on reh'g*, Order No. 888-A, F.E.R.C. STATS. & REGS. ¶ 31,048, 62 Fed. Reg. 12,274 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed Reg. 64,688 (1997).

32. Order No. 889, *Open Access Same-Time Information System and Standards of Conduct*, F.E.R.C. STATS. & REGS. ¶ 31,035, 61 Fed. Reg. 21,737 (1996), *order on reh'g*, Order No. 889-A, F.E.R.C. STATS. & REGS. ¶ 31,049, 62 Fed. Reg. 12,484 (1997), *order on reh'g*, Order No. 889-B, 81 F.E.R.C. ¶ 61,253 (1997).

33. 126 F.3d 1158 (9th Cir. 1997)[hereinafter *APAC*].

34. 117 F.3d 596 (D.C. Cir. 1997).

FERC's Uniform System of Accounts (USOA) and that a settlement agreement between the carriers and the State of Alaska prohibited the carriers from recovering extraordinary expenses in their tariffs. The court held the FERC's interpretation of the USOA was entitled to considerable deference and the FERC reasonably treated the litigation and settlement costs as extraordinary expenses under the USOA. The court also accorded deference to the FERC's interpretation of the TAPS settlement agreement to prohibit recovery of extraordinary expenses. Although the carriers had proffered extrinsic evidence supporting their contrary interpretation, the court upheld the FERC's determination that the extrinsic evidence was not probative of the parties' mutual intent when they negotiated the settlement agreement.

VII. NATURAL GAS ACT -- PIPELINE RATE REGULATION

A. *Natural Gas Clearinghouse v. FERC*[35]

In *Natural Gas Clearinghouse* (NGC), the court affirmed the FERC's approval of Koch's tariff provision allowing shippers to choose between paying Koch in cash for fuel usage or in-kind. NGC argued Koch's "fuel-gas option" was actually an attempt by the pipeline to sell natural gas in violation of Order No. 636. The court rejected this argument, finding that energy used for transportation is an aspect of the transportation service. The court also found the FERC was reasonable in concluding that NGC's concerns about cross-subsidization were unfounded.

B. *Exxon Corp. v. FERC*[36]

In *Exxon*, as discussed above, with the exception of one provision, the court affirmed the FERC's approval of a partially contested settlement between Koch and its customers. On the non-procedural issues, the court noted Koch's interruptible transportation service (ITS) rate increased for Type I service (transportation from one to one hundred miles), although the rates for all greater distances decreased. The court found that the increase in short-haul rates would result in subsidization of long-haul shippers by short-haul shippers. In addition, the court deferred to the FERC's approval of Koch's use of demand data from the entire twelve-month test period, rather than requiring Koch to limit its demand analysis to the last two months of the test period. Although Koch's firm transportation demands did increase during the last two months of the test period, the court agreed with the FERC that the increase was not necessarily predictive of future demand.

35. 108 F.3d 397 (D.C. Cir. 1997).
36. 114 F.3d 1252 (D.C. Cir. 1997).

C. *Williston Basin Interstate Pipeline Co. v. FERC*[37]

In *Williston*, the court affirmed the FERC's order requiring Williston to sell certain stored gas at cost rather than market price. Williston had stored the gas when it performed a merchant function, before the enactment of Order No. 636. Noting that the FERC had been reluctant to require pipelines to bear losses related to surplus gas supplies resulting from Order No. 636, the court asserted that symmetry required disallowing pipelines to benefit economically from surplus gas sold due to restructuring. In addition, the court found that the Commission's decision was consistent with its general cost allocation scheme under Order No. 636.

D. *Michigan Gas Co. v. FERC*[38]

The court in *Michigan Gas* affirmed the FERC's orders authorizing ANR Pipeline Company (ANR) to construct a new delivery point, *i.e.*, a point which allowed the customer to bypass Michigan Gas Company's (MiGas) local distribution system. The Board of Public Works of the City of Holland, Michigan (BPW) contracted with ANR and Consumers Power, another LDC, to obtain natural gas as a replacement for oil used for ignition purposes at one of its coal-fired stations. The BPW proposed to construct the pipeline to connect to ANR's system, and ANR proposed to construct the delivery tap. The FERC granted the requested authority over MiGas's argument that the cost of the ANR connection would be greater than the cost of connecting BPW's pipeline to MiGas and would create "wastefully duplicative facilities."[39]

The court found that MiGas presented no evidence that any redressable injury would be caused by the construction of the ANR delivery tap and that all of MiGas's arguments were related to the construction of the BPW pipeline. Hence, the court concluded that reversing the FERC order allowing the construction of ANR's delivery tap would not remedy the alleged harm that MiGas described and, therefore, that the petition for review should be denied.

E. *JMC Power Projects v. FERC*[40]

The court in *JMC* affirmed the FERC's regulations requiring natural gas companies which file new rate schedules to also file "[a] motion, in case of minimal suspension, to place the proposed rates into effect at the end of the suspension period; or, a specific statement that the pipeline reserves its right to file a later motion to place the proposed rates into effect at the end of the suspension period."[41] JMC argued that section 4(e) of the NGA required such a motion to be filed only in cases of rate increases, not

37. 115 F.3d 1042 (D.C. Cir. 1997).
38. 115 F.3d 1266 (6th Cir. 1997).
39. *Id.* at 1269.
40. No. 96-1225, 1997 WL 358188 (D.C. Cir. May 15, 1997).
41. *Id.* at *2.

rate decreases. However, the court agreed with the FERC's interpretation that a motion must be filed with any type of rate change, because the FERC may suspend any change in rates or services.

F. *Williams Natural Gas Co. v. FERC*[42]

In *Williams,* the court affirmed the FERC's interpretation of Williams' 1992 settlement with its customers concerning how Williams would recover amounts over the first fifty million dollars in gas supply realignment costs and costs related to restructuring under Order No. 636. Williams argued that it was entitled to recover the costs from historic customers by means of direct billing. The FERC found that the language in the settlement was ambiguous, and allocated the costs in question among Williams' current customers according to a formula established by Order No. 636, under which such costs are charged ten percent to the pipeline's current interruptible shippers through a volumetric surcharge and the remainder to current firm transportation customers through a reservation charge.

The court agreed with the FERC's decision that the settlement's language was ambiguous, and deferred to the FERC's resolution of the ambiguity. The court also noted the FERC had issued an order on remand of Order No. 636 determining the allocation of costs to it's customers depended on the circumstances and not a generic ten percent. The court stated that the amounts at issue in the proceeding would be resolved in the Order No. 636 remand proceeding.

G. *Union Pacific Fuels. Inc. v. FERC*[43]

In *Union Pacific*, the court upheld the FERC's orders requiring an interstate pipeline to change its rate structure from "modified fixed/variable"(MFV) to "straight fixed/variable" (SFV), even as to shippers which had previously obtained long-term contracts with the pipeline company that provided for MFV rates. While this change shifted economic risks from the pipeline to the shippers, the court affirmed the FERC's finding that that was acceptable given the larger policy considerations. The court noted that each shipper's contract contained a standard *Memphis* clause specifying that the contract's rates were subject to the FERC's regulation and, thus, to change in FERC rate regulation. Noting that this change followed Order No. 636's policy decision to require SFV rates in order to prevent price distortions among competing pipelines, the court emphasized the FERC's duty and ability to make and, at times, change policies. The court concluded that one person may benefit from a change in policy to the detriment of others (inherent in most policy decisions) but that was not enough to hold that the FERC's order was arbitrary and capricious.

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42. No. 96-1280, 1997 WL 244256 (D.C. Cir. Apr. 30, 1997).
43. 129 F.3d 157 (D.C. Cir. 1997).

H. Northern Border Pipeline Co. v. FERC[44]

In *Northern Border*, the court upheld a FERC ruling in an accounting proceeding that an interstate pipeline which had purchased a pipeline segment from another pipeline at its original construction costs must take into account the accumulated depreciation before the sale in computing its rate base. The court noted that the FERC was following its "bedrock principal" of original cost accounting, pursuant to which a purchaser of a pipeline facility must generally book the facility at its original cost less accumulated depreciation unless it can prove that an excess amount paid "accrued to" the benefit of the pipeline's ratepayers. The court emphasized that the pipeline company was free to seek to prove such accrued benefit in a separate NGA section 4 rate proceeding or NGA section 7 certificate proceeding, where the ratepayers could participate and make their view known. The court upheld the FERC's decision not to consider such accrued benefit claims in accounting proceedings, which are generally conducted between the pipeline company and the FERC's accounting division without any intervenors.

I. Pennsylvania Office of Consumer Advocate v. FERC[45]

In *Pennsylvania OCA*, the court upheld the FERC's decision approving Carnegie Natural Gas Company's (Carnegie) tariff provisions permitting the pipeline to retain revenues from its assessment of imbalance and OFO penalties. Appellants challenged the FERC's approval, arguing that it should have required Carnegie to credit the revenues to customers who were not responsible for such imbalances or OFOs; otherwise, the tariff provided the company with an incentive to assess penalties and resulted in windfall profit above its cost of service. The court upheld the FERC's orders because Carnegie did not collect penalty revenues in 1996, the FERC pledged to monitor the level of penalty revenues, and the FERC established accounting practices to help track the revenues. The court reserved the issue on future penalty revenues for another day.

VIII. NATURAL GAS ACT (NON-PIPELINE RATE REGULATION) AND NATURAL GAS POLICY ACT

A. WRT Energy Corp. v. FERC[46]

In the *WRT* case, the court upheld the FERC's reversal of the Louisiana Office of Conservation's determination that gas producers' wells that previously produced gas cap gas, until fit with new technology for removing gas from the brine in the acquifer, did not qualify for NGPA purposes as high-cost natural gas under section 107 of the NGPA.

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44. 129 F.3d 1315 (D.C. Cir. 1997).
45. 131 F.3d 182 (D.C. Cir. 1997), *corrected by*, 134 F.3d 422 (D.C. Cir. 1998).
46. 107 F.3d 314 (5th Cir. 1997).

B. *Rocky Mountain Natural Gas Co. v. FERC*[47]

In *Rocky Mountain*, the court remanded the FERC's orders for a second time, responding to the FERC's approval of retroactive abandonment of Grynberg's interstate dedication of gas from six wells. At issue in the case was a 1968 contract between Grynberg and Mountain Fuel Company which provided that Grynberg sell gas from certain acreage to Mountain Fuel, and the FERC certificate covering that sale. Gas from one well on that acreage was sold to Mountain Fuel. Subsequently additional wells from surrounding acreage was committed to Rocky Mountain, an intrastate pipeline. Rocky Mountain later decided that the gas had been dedicated to interstate commerce, reducing its payments to Grynberg based on the FERC's ceiling price for interstate gas. On the first appeal, the Court vacated the FERC's order, holding that the FERC had not properly interpreted the 1968 contract as a whole to determine the issue of dedication. On remand, the FERC upheld its original contract interpretation, but allowed retroactive abandonment because no interstate purchaser was harmed regardless of whether Grynberg acted with knowledge (or presumed knowledge) of the scope of interstate dedication.

On the second appeal, the court held that the FERC's failure to analyze Grynberg's knowledge of the scope of dedication was not consistent with its precedent in *Mitchell Energy Corp.*[48] The court again remanded the matter for FERC to explain its decision further.

C. *Pacific Gas & Electric Co. v. FERC*[49]

The court in *Pacific Gas* affirmed the FERC's order allowing El Paso Natural Gas Company (El Paso) to abandon certain facilities, finding those facilities to be non-jurisdictional gathering facilities when "spundown" to El Paso Field Services Co. (Field Services), a wholly-owned subsidiary of El Paso. Appellants argued that allowing Field Services to operate El Paso's gathering facilities without regulatory oversight or significant competition would lead to unreasonably high gas prices. In addition, Appellants cited *Northern Natural Gas Co. v. FERC*[50] in support of its argument that the FERC may regulate gathering facilities owned by affiliates of natural gas companies. The court found that *Conoco, Inc. v. FERC*[51] controlled the issue, although it noted that the creation of an affiliated gathering company changed a heavily regulated service into a service outside the FERC's jurisdiction. Finally, although it found curious the FERC's suggestion that it does not have the power to examine whether abandonment of facilities to a nonjurisdictional entity would be in the public interest, the court concluded that the FERC had adequately considered and protected against possible antitrust problems that could result from El

47. 114 F.3d 297 (D.C. Cir. 1997).
48. 37 F.E.R.C. ¶ 61,128 (1986).
49. 106 F.3d 1190 (5th Cir. 1997).
50. 929 F.2d 1261 (8th Cir. 1991).
51. 90 F.3d 536 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 1017 (1997).

Paso's abandonment.

D. *Sea Robin Pipeline Co. v. FERC*[52]

In *Sea Robin*, the court vacated the FERC's finding that Sea Robin Pipeline Company's (Sea Robin) gathering facilities were jurisdictional as transmission facilities. The FERC had found that Sea Robin's extensive offshore facilities did not perform a gathering function under its primary function test. The court found that despite the FERC's stated policy (*i.e.*, that the test involves balancing of factors and a sliding scale as to size and diameter), it appeared that the FERC treated Sea Robin's large size as a single-factor, bright-line test. The court noted that the FERC excluded at least four factors from the primary function test on the basis that they were not informative for offshore pipelines. The result, according to the court, was a size litmus test. The court further criticized the FERC's emphasis on business purpose, ownership, and prior certification as running afoul of Congress' choice to define the FERC jurisdiction by physical characteristics. The court stated that these factors must be secondary to physical criteria; however, the court was careful not to dictate that a different result was necessary on remand, stating that the FERC could reformulate its primary function test.

IX. PUBLIC UTILITY REGULATORY POLICIES ACT

A. *Niagara Mohawk Power Corp. v. FERC*[53]

In the *Niagara Mohawk* case, the court dismissed petitions for review of the FERC declaratory orders holding that state statutes requiring a utility to purchase electricity from a qualifying facility (QF) at a rate higher than the utility's "avoided cost" are pre-empted by section 210 of PURPA. The FERC issued an order generally recognizing that state statutes are pre-empted by section 210 to the extent that they require a utility to purchase electricity at rates higher than the utility's avoided cost. However, the FERC stated that in this case it would not apply its general pre-emption analysis to invalidate existing QF-utility contracts that had already been approved under state law and were not the subject of challenges on pre-emption grounds. Parties sought review of both the pre-emption holding and the failure to apply that holding to existing contracts.

The court dismissed the petitions for lack of jurisdiction. Relying on its analysis of the enforcement scheme of section 210 of PURPA in *Industrial Cogenerators v. FERC*,[54] the court held that the FERC's declaratory order had no legally binding effect and did nothing more than set forth the position that the FERC would take in an enforcement action before a federal district court. The court held that its pre-enforcement review of the

52. 127 F.3d 365 (5th Cir. 1997), *pet. for reh'g and suggestion for reh'g en banc pending.*
53. 117 F.3d 1485 (D.C. Cir. 1997).
54. 47 F.3d 1231 (D.C. Cir. 1995).

FERC's declaratory orders would interfere with this statutory enforcement scheme, because the court would necessarily have to determine whether the state had properly implemented PURPA.

B. *New York State Electric & Gas Corp. v. FERC*[55]

In the *NYSEG* case, the court followed its *Niagara Mohawk* analysis that was decided the same day. In its orders on review, the FERC ruled that the rate a utility pays to purchase power under two long-term QF contracts complied with section 210 of PURPA because the rate was equal to the utility's estimated avoided costs at the time the utility entered into the contract. Before the court, the utility sought to distinguish *Industrial Cogenerators*[56] on the ground that: (i) it had petitioned the FERC to modify the QF contract rates under section 206(a) of the FPA; (ii) it had not commenced an enforcement action in district court and would not need to do so if the FERC granted it relief; and (iii) it had asked the FERC to revise or waive its PURPA regulations to require modifications of the rates under its QF contracts.

The court concluded it was irrelevant that the utility had not yet commenced an action in the district court. It also declined to review the FERC's denial of relief under the FPA or its refusal to modify its PURPA regulations. The court held that reviewing either question would necessarily decide matters that should be decided in the first instance by the district court under the PURPA enforcement scheme.

X. ENERGY TAXES

A. *General Motors Corp. v. Tracy*[57]

In *General Motors*, the U.S. Supreme Court upheld Ohio sales and use taxes applying to natural gas purchases from all sellers that do not fit Ohio's definition of a "natural gas company." Ohio's local distribution companies (LDCs) fit within the definition, but pursuant to the Ohio Supreme Court's decision on review at the United States Supreme Court, producers and independent marketers generally do not. Therefore, under the Ohio law, only Ohio LDCs were protected from these taxes. General Motors, which purchased almost all the gas for its plants from out-of-state marketers, was subject to tax through its marketers and challenged the tax scheme as violative of the Commerce and Equal Protection clauses of the United States Constitution.

The Supreme Court upheld Ohio's taxes on the ground that Ohio LDCs and producers and independent marketers are not similarly situated for purposes of constitutional analysis because they serve different markets. The Court found that the LDC's bundled product serves the core

55. 117 F.3d 1473 (D.C. Cir. 1997).
56. 47 F.3d 1231 (D.C. Cir. 1995).
57. 117 S. Ct. 811 (1997).

and residential market, and that the core market would not be better served by interstate sellers. The residential market, according to the Court, would not thrive if Ohio removed the tax disparity. Without the tax differential, competition between LDCs and marketers for the non-core market, a market without a need for bundled protection, would likely increase. The Court emphasized the need to protect the captive core market and, therefore, decided to treat marketers and LDCs differently for Commerce Clause analysis. The Court similarly rejected General Motor's Equal Protection argument, finding that the challenge was hypothetical because Ohio might apply the taxes to out-of-state LDCs.

B. *Nielson-True Partnership v. Commissioner of Internal Revenue*[58]

In *Nielson-True*, the Tax Court agreed with the Internal Revenue Service's (IRS's) disallowance of a section 29 "non-conventional fuels" tax credit. This tax credit related to revenues from gas produced from a tight formation under NGPA section 107 (at least for tax periods prior to the date the Natural Gas Wellhead Decontrol Act of 1989 went into effect) where no such formal determination was made by the FERC or a designated jurisdictional state agency under NGPA section 503. After reviewing the history of the NGPA's provisions on tight formation incentive pricing and the related tax credits, the court agreed with the IRS that it was not enough for the gas to meet the NGPA's definition of a tight formation (in effect prior to deregulation). Because the taxpayer had failed to obtain a tight formation determination for the well's production from the state agency or the FERC, the court upheld the IRS's disallowance of the tax credit.

XI. LIST OF CASES DISCUSSED

(In alphabetical order under each topic.)

ADMINISTRATIVE LAW

City of Bushnell, Ill., et al. v. FERC, 1997 WL 634553 (D.C. Cir. 1997) (unpublished).

Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envtl. Conservation, 127 F.3d 201 (2d Cir. 1997).

Exxon Corp., et al v. FERC, 114 F.3d 1252 (D.C. Cir. 1997).

In re Cajun Electric Power Cooperative, Inc., 109 F.3d 248 (5th Cir. 1997).

McCartin McAuliffe Mechanical Contractor, Inc. v. Midwest Gas Storage, Inc., 685 N.E.2d 165 (Ind. Ct. App. 1997).

No Tanks Inc. v. Public Utilities Commission, 697 A.2d 1313 (Me. 1997).

Reytblatt and Ohio Citizens for Responsible Energy v. United States Nuclear Regulatory Commission, 105 F.3d 715 (D.C. Cir. 1997).

58. 109 T.C. 112 (1997).

ANTITRUST LAW

County of Stanislaus v. Pacific Gas and Elec. Co., 114 F.3d 858 (9th Cir. 1997).

Crossroads Cogeneration Corp. v. Orange and Rockland Utilities, Inc., 969 F. Supp. 907 (D. N.J. 1997).

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State Oil Co. v. Khan, 118 S. Ct. 275 (1997).

FEDERAL POWER ACT -- HYDROELECTRIC LICENSING

American Rivers, Inc. v. FERC, 129 F.3d 99 (2d Cir. 1997).

Farmington River Power Co. v. FERC, 103 F.3d 1002 (D.C. Cir. 1997).

Keating v. FERC, 114 F.3d 1265 (D.C. Cir. 1997).

OMYA, Inc. v. FERC, 111 F.3d 179 (D.C. Cir. 1997).

Rainsong Co. v. FERC, 106 F.3d 269 (9th Cir. 1997).

Skokomish Indian Tribe v. FERC, 121 F.3d 1303 (9th Cir. 1997).

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State of North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997).

State of Wisconsin v. FERC, 104 F.3d 462 (D.C. Cir. 1997).

FEDERAL POWER ACT -- ELECTRIC REGULATION

Ass'n of Public Agency Customers, Inc. et al. v. Bonneville Power Admin., 126 F.3d 1158 (9th Cir. 1997).

INTERSTATE COMMERCE ACT -- OIL PIPELINES

Amerada Hess Pipeline Corp., et al. v. FERC, 117 F.3d 596 (D.C. Cir.1997).

NATURAL GAS ACT -- PIPELINE RATE REGULATION

Exxon Corp., et al. v. FERC, 114 F.3d 1252 (D.C. Cir. 1997).

JMC Power Projects v. FERC, 116 F.3d 941 (D.C. Cir. 1997) (unpublished).

Michigan Gas Co. v. FERC, 115 F.3d 1266 (6th Cir. 1997).

Natural Gas Clearinghouse v. FERC, 108 F.3d 397 (D.C. Cir. 1997).

Northern Border Pipeline Co. v. FERC, 129 F.3d 1315 (D.C. Cir. 1997).

Pennsylvania Office of Consumer Advocate v. FERC, 131 F.3d 182 (D.C. Cir. 1997).

Union Pacific Fuels, Inc., et al. v. FERC, 129 F.3d 157 (D.C. Cir. 1997).

Williams Natural Gas Co. v. FERC, 116 F.3d 942 (D.C. Cir. 1997)(unpublished).

Williston Basin Interstate Pipeline Co. v. FERC, 115 F.3d 1042 (D.C. Cir. 1997).

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Pacific Gas & Electric Co., et al. v. FERC, 106 F.3d 1190 (5th Cir. 1997).

Rocky Mountain Natural Gas Co. v. FERC, 114 F.3d 297 (D.C. Cir. 1997).

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ENERGY TAXES

General Motors Corp. v. Tracy, 117 S. Ct. 811 (1997).
Nielson-True Partnership v. Comm'r of Internal Revenue, 109 T.C. 112 (1997).

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