REPORT OF THE JUDICIAL REVIEW COMMITTEE

This report summarizes cases reviewing decisions by the Federal Energy Regulatory Commission. The time frame covered by this report is January 2008 through December 2008.

I. ADMINISTRATIVE LAW

A. Standard of Review

In *Morgan Stanley Capital Group Inc. v. Public Utility District No. 1 of Snohomish County*, the Supreme Court considered the application of the "*Mobile-Sierra*" standard of review to bilateral contracts between electric power suppliers and utility purchasers.[1]

The origin of the case was in the western power markets crisis of 2000-2001.[2] Several western utilities had entered into long-term contracts with electric power suppliers.[3] The contract rates were high relative to historical standards, but were lower than what the utilities would have paid in the spot market at that time.[4] The purchasers later asked the FERC to modify the

1. 128 S. Ct. 2733 (2008).
2. *Id*. at 2743.
3. *Id.*
4. *Id.*

contract terms, arguing that: (1) the rates "should not be presumed to be just and reasonable under"[5] the *Mobile-Sierra* doctrine because the agency had not actually initially approved the rates, as they were negotiated in accordance with the sellers' market-based rate authority; and (2) in any event, the contracts could be modified under *Mobile-Sierra* because the "rates were so high that they violated the public interest."[6] After a hearing, the FERC rejected the purchasers' arguments, finding that the contracts were subject to the *Mobile-Sierra* presumption that contract rates are just and reasonable unless they harm the public interest, and that the purchasers did not overcome this presumption.[7] The purchasers petitioned the Ninth Circuit Court of Appeals for review of the FERC's orders.[8]

The Ninth Circuit granted the petitions, finding that rates set by contract–including those negotiated under the FERC's market-based rate regime–are presumed to be just and reasonable only where the agency "had an initial opportunity to review the contracts without applying the *Mobile-Sierra* presumption," and that this review must include looking at the market conditions under which the contracts were formed.[9] The Ninth Circuit stated that even if the *Mobile-Sierra* presumption applied, then "the standard for overcoming that presumption is different for a purchaser's challenge to a contract."[10] In that case, the FERC would determine whether the contract rate exceeded a "zone of reasonableness."[11]

The Supreme Court granted certiorari.[12] The Court first reviewed whether the Ninth Circuit erred in holding that contract rates are not presumptively reasonable unless the FERC had an initial opportunity to review those rates.[13] Speaking for the majority, Justice Scalia wrote that the Court agreed with the Ninth Circuit on a fundamental principle, namely, that "[t]here is only one statutory standard for assessing wholesale electricity rates, whether set by contract or tariff–the just-and-reasonable standard."[14] However, the Court disagreed with the Ninth Circuit's interpretation of the *Sierra* case (which dealt expressly with the Federal Power Act (FPA)) that the FERC had to "apply the standard differently depending on *when* a contract rate was challenged."[15] According to the Court, *Sierra* held that only when a mutually agreed-upon contract rate seriously harms the public may the FERC find that it is not just and reasonable; the Ninth Circuit's interpretation would act as essentially an "estoppel doctrine" under which the agency's initial review would prevent it "from modifying the rates absent serious future harm to the public interest."[16]

5. *Id*.
6. *Id.*
7. *Id*. at 2744.
8. *Id.*
9. *Id*. at 2744-2745.
10. *Id*. at 2745 (emphasis omitted).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id*. at 2746.

The Court found it "odd," given the FERC's "passive permission for a rate to go into effect," for such an initial review to curtail later challenges.[17] Further, the Court explained that one of the reasons that parties enter into bilateral contracts is to hedge against market imperfections.[18] The Court believed that the Ninth Circuit's holding, which would allow sophisticated parties to renounce their contracts after severe market dysfunctions passed, would reduce incentives for parties to enter into such contracts, thereby undermining "the role of contracts in the FPA's statutory scheme."[19] The Court stated that "the mere fact that the market is imperfect, or even chaotic, is no reason to undermine the stabilizing force of contracts that the FPA embraced as an alterative to 'purely tariff-based regulation.'"[20] The Court believed that evaluating whether a market was dysfunctional would be "a very difficult and highly speculative task."[21] The Court acknowledged that the FERC's market-based rate scheme had its critics, but concluded that "any needed revision[s] [to] that scheme is properly addressed in a challenge to the scheme itself, not through a disfigurement of the venerable *Mobile-Sierra* doctrine."[22]

As to the Ninth Circuit's holding regarding challenges raised by purchasers, the Court concluded that the lower court's decision "fails to accord an adequate level of protection to contracts" and that the standard of review of a purchaser's challenge to a contract rate "must be the same, generally speaking, as the standard for a seller's challenge: [t]he contract rate must seriously harm the public interest."[23] Again, the Court spelled out where it was in agreement with the Ninth Circuit–the factors that *Sierra* identified as harming the public interest are not "precisely applicable" in the context of a "high-rate challenge of a purchaser" and that those factors are not exclusive ones.[24] However, the Court held that the Ninth Circuit's "'overarching' 'zone of reasonableness' standard" was based on a misreading of *Sierra* and subsequent decisions, stating that these cases did not stand for the proposition that an "excessive burden" on consumers was found where the contract rate exceeded the marginal cost.[25] According to the Court, this standard would cause even more volatility in the markets "by undermining a key source of stability" (i.e., contracts) and would "impose an onerous new burden on the [FERC], requiring it to calculate the marginal cost of power sold under a market-based rate contract."[26] Instead, the Court believed that the FPA reserved to the FERC the authority to abrogate contracts in "those extraordinary circumstances where the public will be severely harmed."[27]

17. *Id.*

18. *Id*.

19. *Id.* at 2747.

20. *Id.*

21. *Morgan Stanley Capital Group Inc.*, 128 S.Ct. at 2747.

22. *Id.*

23. *Id.*

24. *Id*. The three factors identified in Sierra are where a rate: (1) might impair the financial ability of the public utility to continue its service, (2) might cause an excessive burden on other customers, or (3) is unduly discriminatory. *Id*.; See also *FPC v. Sierra Pacific Power Co*., 350 U.S. 348, 355 (1956).

25. *Id*. at 2748.

25. *Id*. at 2748.

26. *Id*. at 2749.

27. *Id.*

Although it disagreed with the Ninth Circuit's reasoning on these issues, the Court affirmed the decision on other grounds, concluding that the FERC had erred in two respects.[28] First, the Court stated that the agency may not have determined whether the contracts in question imposed an excessive burden on consumers "down the line."[29] The Court stated that a disparity "between the contract rate and the rates consumers would have paid (but for the contracts) further down the line, when the open market was no longer dysfunctional" was a relevant consideration for determining whether a contract could be abrogated under *Mobile-Sierra*.[30] Second, the Court found that the FERC did not look into whether allegations of market manipulation by suppliers "alter[ed] the playing field."[31] The Court stated that, like the traditional contract defenses of fraud and duress, "unlawful market activity that directly affects contract negotiations eliminates the premise on which the Mobile-Sierra presumption rest: that the contract rates are the product of fair, arms-length negotiations."[32] The Court emphasized that "the mere fact" that a party engaged in unlawful activity "does not deprive its forward contracts of the benefit of the Mobile-Sierra presumption," but that if there were a causal connection between the illegal activity and the contract rate the presumption should not apply.[33]

In dissent, Justice Stevens (joined by Justice Souter) argued that the majority's decision would require an application of the just and reasonable standard that has no support in the FPA or in precedent.[34] The dissent argued that if Congress wanted to impose significant constraints on the FERC's authority to approve rates, it would have done so in the statute, but the statute simply uses the general term "just and reasonable" and leaves it to the FERC to establish policy, not the courts.[35] The dissent asserted that the result of the decision was to bind the FERC "to a rigid formula of the Court's own making."[36]

Despite the majority's discussion of the important place of contracts within the statutory scheme of the FPA, the dissent argued that "Congress did not intend to immunize such [contract] rates from just-and-reasonable review."[37] In addition, the dissent contended that *Sierra* held that "whether a rate is 'just and reasonable' is measured against the public interest, not the private interests of regulated sellers."[38] "[T]he public interest is the touchstone for just-and-reasonable review of *all* rates, not just contract rates."[39] Moreover, the dissent contended that nothing in *Sierra* mandated a "serious harm" to the public interest standard that the majority adopted.[40] The dissent noted that the FERC itself had

28. *Id.*
29. *Id*. at 2749-2750.
30. *Id.* at 2750.
31. *Id.*
32. *Id.*
33. *Id.* at 2751.
34. *Id.*
35. *Id*. at 2752.
36. *Id*. at 2753.
37. *Id.*
38. *Id*. at 2754.
39. *Id*.
40. *Id.* at 2755.

no power to implement the majority's rule, and argued that the agency could not "abdicate" its obligation to ensure just and reasonable rates "through the expedient of a heavy-handed presumption."[41]

The D.C. Circuit tackled a separate *Mobile-Sierra* issue in *Maine Public Utilities Commission v. FERC*.[42] The court addressed a settlement agreement among ISO New England Inc. (ISO-NE) and a number of its stakeholders regarding ISO-NE's capacity market.[43] In earlier orders, the FERC had directed ISO-NE to develop a mechanism to provide compensation to capacity resources in New England that included a locational component so that capacity prices would be higher in regions with the severest capacity shortages.[44] ISO-NE filed tariff revisions that proposed, among other things, capacity auctions based on a demand curve that would establish the price and quantity of capacity that must be procured in various regions of New England.[45] The FERC set the matter for hearing and, ultimately, established settlement procedures in 2005.[46] After settlement discussions, ISO-NE and a majority of interested parties signed onto a settlement that was filed with the FERC.[47] The settlement established a Forward Capacity Market (FCM) that would replace ISO-NE's tariff proposal.[48] The settlement included a provision that bound the settlement parties, the FERC, and non-settling parties to the *Mobile-Sierra* standard of review applicable to future challenges of certain aspects of the settlement, such as the provision of interim, fixed "transition" payments to some generators.[49] Eight parties objected to the settlement.[50] The FERC approved the settlement and denied rehearing.[51] Several entities petitioned for review, attacking the merits of the settlement itself as well as the applicability of the *Mobile-Sierra* clause to non-settling parties.[52]

The court rejected arguments attacking the merits of the settlement, agreeing with the FERC that there is not a single just and reasonable rate "but rather a zone of rates that are just and reasonable; a just and reasonable rate is one that falls within that zone."[53] Using that yardstick, the court found that the FERC examined the record evidence and that, in light of the evidence, its determinations were sufficient.[54] The court also concluded that the FERC had

41. *Id.* at 2756.

42. 520 F.3d 464 (D.C. Cir. 2008).

43. *Id.* at 467.

44. *Id*. at 468; *See also Devon Power LLC*, 103 F.E.R.C. ¶ 61,082 (2003).

45. *Maine Pub. Utils. Comm'n*., 520 F.3d at 468; *See also Devon Power LLC*, 107 F.E.R.C. ¶ 61,240 at p. 62,022 (2004).

46. *Maine Pub. Utils. Comm'n*., 520 F.3d at 468-469; *See also Devon Power LLC*, 111 F.E.R.C. ¶ 63,063 (2005).

47. *Maine Pub. Utils. Comm'n*., 520 F.3d at 469; *See also Devon Power LLC*, 115 F.E.R.C. ¶ 61,340 at p. 62,306 (2006).

48. *Id.*

49. *Id.*; *See also Devon Power LLC*, 115 F.E.R.C. at p. 62,307.

50. *Maine Pub. Utils. Comm'n*., 520 F.3d at 469; *See also Devon Power LLC*, 115 F.E.R.C. at p. 62,306.

51. *Id.*

52. *Maine Pub. Utils. Comm'n*., 520 F.3d at 470.

53. *Id*. at 471.

54. *Id*. at 472.

sufficiently responded to some of the specific concerns raised by the petitioners, such as its approval of the settlement's provision of transition payments.[55]

The court also rejected arguments that the FERC exceeded its FPA jurisdiction by approving the settlement because the FCM mechanism "forces utilities to purchase a specific amount of capacity."[56] The court stated that the FERC has broad authority over the wholesale energy sales, and that the issue in this case was "fundamentally a dispute over the *rates* that will be paid to suppliers of capacity."[57]

However, the court remanded the case back to the agency because it concluded that non-settling parties could not be bound by the settlement's *Mobile-Sierra* clause.[58] The court pointed to judicial opinions that emphasized the importance of the *Mobile-Sierra* doctrine as they related to *parties*.[59] This case, according to the court, was "clearly outside the scope of the *Mobile-Sierra* doctrine. . .when a rate challenge is brought by a non-contracting third party, the Mobile-Sierra doctrine simply does not apply; the proper standard of review remains the 'just and reasonable' standard in section 206 of the [FPA]."[60] The court rejected the agency's argument that this standard of review would only apply to future challenges of a narrow category of rates, stating that even if the applicability of the provision was limited, non-settling parties would still be deprived of their statutory right to challenge those rates.[61] The court also rejected the FERC's argument that the Mobile-Sierra provision is necessary to promote price and contract stability, noting that "[i]t makes no sense to say that the values of 'stability' and 'certainty' are furthered by applying the deferential standard of review to the eight parties that *refused* to agree to the terms of the settlement."[62]

Mobile-Sierra was also a central issue in a 2008 D.C. Circuit decision involving the Natural Gas Act (NGA).[63] On July 25, 2008, the court vacated certain FERC orders on the basis that the challenged orders were inconsistent with the *Mobile-Sierra* doctrine.[64] In the underlying proceeding, Dominion Transmission, Inc. (Dominion), a natural gas transporter subject to FERC jurisdiction under the NGA, filed a request to increase its transportation and storage service rates under NGA Section 4 in 2000.[65] A settlement agreement was eventually filed and approved by the FERC in 2001.[66] Under the 2001 settlement, Dominion would not seek a Section 4 rate increase before July 2003, and would submit as part of its next Section 4 filing a fuel report that included

55. *Id*. at 474.

56. *Id*. at 479.

57. *Id.*

58. *Id*. at 480.

59. *Id*. at 476-478

60. *d.* at 477-78.

61. *Id*. at 478. The Court further stated that it was "skeptical" of the FERC's characterization of the *Mobile-Sierra* provision as limited. *Id*.

62. *Id.* at 479.

63. Dominion Transmission, Inc., v. FERC, 533 F.3d 845 (D.C. Cir. 2008).

64. *Id.*

65. *Id*. at 847-848.

66. *Id.* at 848; *See also Dominion Transmission, Inc.*, 96 F.E.R.C. ¶ 61,288, at p. 62,089 (2001).

sixteen specific types of information.[67] Dominion filed the fuel report in 2003 and 2004.[68] A Dominion customer, KeySpan Corp. (KeySpan), was concerned that Dominion may have been subsidizing certain of its customers, and therefore filed a motion asking the FERC to direct Dominion to include three additional types of information in the reports.[69] While the motion was pending, the New York Public Service Commission (NYPSC) informed Dominion that it planned to file a complaint under Section 5 of the NGA, arguing that Dominion's rates were excessive.[70] Ultimately, Dominion and the NYPSC entered into a settlement agreement in 2005 that lowered Dominion's rates.[71] The 2005 settlement included a moratorium on challenges to Dominion's generally applicable rates or fixed fuel retention percentages for a certain period.[72] Although there was a moratorium period, the FERC could still commence a Section 5 proceeding against Dominion if it acted "*on its own volition*."[73] Finally, Dominion would continue to file the fuel reports.[74] The FERC approved this settlement.[75]

When Dominion filed a fuel report in 2005, KeySpan filed a second motion with the FERC, asking it to direct Dominion to modify the report to include the additional information it had earlier requested.[76] The FERC agreed with KeySpan, finding that the 2005 settlement was unjust and unreasonable to the extent the fuel reports did not include these additional pieces of information, and directed Dominion to include that information for both past and future fuel reports.[77] On rehearing, the FERC generally upheld its earlier determination, although it agreed it could only require Dominion to include this information prospectively.[78] The FERC stated that the *Mobile-Sierra* standard of review did not apply, arguing that it had "not *modified* the terms of the 2005 settlement" but rather simply required that it be supplemented.[79] In addition, the FERC held that its directive was "consistent with the 'purpose and intent'" of the 2001 and 2005 settlements and thus did not implicate *Mobile-Sierra*.[80] Finally, the FERC stated that it acted on its own volition, consistent with the express language in the 2005 settlement.[81]

67. *Dominion Transmission Inc.*, 533 F.3d at 848; *See also Dominion Transmission, Inc.,* 96 F.E.R.C. at p. 62,088.

68. *Dominion Transmission Inc.*, 533 F.3d at 849.

69. *Id.*

70. *Id*. at 848-849.

71. *Id*. at 850; *See also Dominion Transmission Inc.*, 111 F.E.R.C. ¶ 61,285 (2005).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id*. at 851; *See also Dominion Transmission Inc.*, 113 F.E.R.C. ¶ 61,302 (2005).

77. *Id.*

78. *Dominion Transmission Inc.*, 533 F.3d at 851; *See also Dominion Transmission Inc.*, 118 F.E.R.C. ¶ 61,036 (2007).

79. *Dominion Transmission Inc.*, 533 F.3d at 853.

80. *Id.*

81. *Id*. at 854.

On appeal, the court (after addressing procedural issues) rejected the agency's arguments.[82] First, the court found that the FERC's argument that it was merely supplementing the 2005 settlement was unpersuasive, since the settlements contained unambiguous language that precisely set forth the specific types of information to be included in the fuel reports, and that the FERC's direction to supplement was in fact a modification.[83] Second, the court rejected the FERC's argument that its action was "consistent with the 'intent and purpose' of the settlements."[84] The court stated that the fuel report was an integral part of the 2005 settlement package.[85] Moreover, the court rejected the agency's assertion that it could request additional information if important to carry out is statutory oversight responsibilities.[86] Next, the court addressed whether the FERC acted "on its own volition," noting that the agency acted at the request of KeySpan.[87] Although the FERC argued that it could act "on its own volition" if acting on a motion rather than a complaint, the court concluded that the FERC's interpretation of the language was unreasonable, since it could effectively be nullified so long as an entity used a procedural vehicle other than a formal complaint to prompt FERC action.[88]

B. Standing

In *Klamath Water Users Association v. FERC*, the D.C. Circuit dismissed a petition for review of FERC orders that considered whether a rate contract included in the terms of an original hydroelectric project license would be included in an annual license issued to the project while relicensing proceedings were ongoing, pursuant to Section 15(a)(1) of the FPA.[89] The court dismissed the case on jurisdictional grounds, finding that Petitioner Klamath Water Users Association (Klamath Water Users) lacked standing to challenge the FERC orders.[90] The hydroelectric project at issue–the Klamath Hydroelectric Project–consists in part of the Link River Dam, constructed in 1917 by a predecessor company to PacifiCorp (the current licensee).[91] Pursuant to a 1917 contract with the United States, PacifiCorp provided water and low-cost electric power to the United States and Klamath Water Users.[92] In the 1950s, the Federal Power Commission (FPC) (predecessor agency to the FERC) determined that the project "was subject to its licensing authority."[93] As part of its order granting the project a license, the FPC required PacifiCorp to re-negotiate and file the 1917 contract with the same or substantially similar terms, and with a term equal to

82. *Id*. at 854-855.
83. *Id*. at 853.
84. *Id*. at 853-854.
85. *Id*. at 854.
86. *Id.*
87. *Id.*
88. *Id*. at 854-855.
89. 534 F.3d 735 (2008).
90. *Id.*
91. *Id*. at 736. All references to "PacifiCorp" refer to either PacifiCorp or its predecessor.
92. *Id.*
93. *Id*. at 737.

the fifty year term of the project license.[94] PacifiCorp filed a revised contract in 1956, under which it "agreed to provide electric power at fixed rates to the United States" and Klamath Water Users.[95] The revised contract was for a 50-year term commencing on the date it was approved by the California and Oregon public utility commissions.[96] Both the revised contract and the project license were thus set to expire in 2006.[97]

In 2004, PacifiCorp filed an application to relicense the project.[98] Under Section 15(a)(1) of the FPA, PacifiCorp was entitled to receive an annual license for the project "under the terms and conditions of the existing license" while relicensing proceedings were ongoing.[99] Anticipating the 2006 expiration of the original project license and the 1956 contract, the Interior Department sought a declaratory ruling from the FERC that the terms of any annual license for the project issued under Section 15(a)(1) would include the 1956 contract (and the fixed electric power rates in that contract).[100] The FERC denied the request, concluding that the 1956 contract would expire by its own terms, and thus would not be included in the annual license.[101] Further, the FERC stated that it never purported to approve the retail electric power rates in the 1956 contract when it ordered that the contract be included in the terms of the license; rather, it found only that the contract would adequately compensate the United States for use of its property, in accordance with Section 10(e) of the FPA.[102] The FERC noted that both Oregon and California had already exercised their independent authority to replace the rates in the 1956 contract with new rates.[103]

On appeal, Klamath Water Users argued that Section 15(a)(1) of the FPA requires that any annual license include the 1956 contract and the retail electric power rates in that contract, since both were express conditions of PacifiCorp's original license.[104]

The court did not reach the merits of this argument, however, concluding that Klamath Water Users lacked standing to challenge the FERC orders at issue.[105] Specifically, the court held that Klamath Water Users failed to satisfy the third of the minimum constitutional requirements for standing–"that it is likely as opposed to merely speculative that the [claimed] injury will be redressed by a favorable decision of the court."[106] Assuming that Klamath Water

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94. *Id.*

95. *Id*.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id*. at 738.

102. *Id.* FPA Section 10(e) provides that where a hydroelectric project involves the use of government dams or other structures owned by the United States, the FERC must fix a reasonable charge for the use of such property. *Id*. at 737.

103. *Id*. at 738.

104. *Id.*

105. *Id*. at 738-739.

106. *Id*. at 738. The "irreducible constitutional minimum" requirements to establish standing to seek court review of an administrative agency order are "that the petitioner suffered an injury-in-fact, that the injury is fairly traceable (casually connected) to the challenged agency action, and that it is likely as opposed to

Users were claiming injury from the loss of the low electricity rates in the 1956 contract, the court found that they had "offered no reason to believe that a decision requiring [the] FERC to include the 1956 contract in PacifiCorp's annual license" would result in either California or Oregon changing the retail rates each state had already approved to replace the rates in that contract.[107] In fact, the court noted, both states were cognizant of the ongoing FERC proceedings, but nonetheless proceeded to adopt new retail rates to replace those in the 1956 contract.[108] Further, Klamath Water Users did not respond in their reply brief to this redressability problem (which the FERC raised in its brief), a fact which the court found "dispositive [since] the burden of establishing redressability falls upon the petitioner."[109]

C. Res Judicata

The First Circuit addressed claim preclusion in *FPL Energy Maine Hydro LLC v. FERC*.[110] FPL Energy Maine Hydro LLC (FPL) held a hydroelectric license, originally issued in 1979, from the FERC for a project it owned on the Kennebec River in Maine.[111] Before the license could be renewed, FPL was required to obtain a certification from Maine's Department of Environmental Protection (DEP) that the project complied with state and federal water quality standards, pursuant to the Clean Water Act (CWA).[112] DEP staff provided that certification in November 2003.[113] However, a number of entities filed an appeal of this determination with the DEP Board.[114]

While that appeal was pending, the FERC granted FPL's application for a renewed license in March 2004.[115] In June 2004, the DEP Board rescinded the water quality certification.[116] As a result, the FERC stayed its order.[117] FPL sought rehearing of the stay order, which was rejected.[118] FPL then filed an appeal in Maine state court challenging the rescission of the DEP's certification.[119] FPL also petitioned the First Circuit for review of the FERC's stay order.[120] The First Circuit held the proceeding in abeyance pending the state

merely speculative that the injury will be redressed by a favorable decision of the court." *Id*. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992)).

107. *Id*. at 740.

108. *Id.*

109. *Id*.

110. 551 F.3d 58 (2008).

111. *Id*. at 60.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*; *See also FPL Energy Me. Hydro LLC*, 106 F.E.R.C. ¶ 62,232 (2004).

116. *FPL Energy Me. Hydro LLC*, 551 F.3d at 61; *See also FPL Energy Me. Hydro LLC*, 108 F.E.R.C. ¶ 61,261 (2004).

117. *Id.*

118. *Id*. at 61; *See also FPL Energy Me. Hydro LLC*, 111 F.E.R.C. ¶ 61,104 (2005).

119. *FPL Energy Me. Hydro LLC*, 551 F.3d at 61.

120. *Id.*

court proceeding.[121] In May 2006, the state court upheld the decision to rescind the certification.[122] In 2007, the Maine Supreme Judicial Court affirmed.[123]

Before the First Circuit, FPL argued that the DEP Board's rescission was null because it had failed to act within the one-year timeframe required by the CWA.[124] According to FPL, the DEP Board's action was waived or the original certification should have been reinstated and, therefore, the FERC's stay order was in error.[125] In the alternative, FPL asserted that the FERC had discretion to disregard the DEP's belated decision to rescind the certification.[126]

After disposing of certain jurisdictional issues, the court turned to the heart of FPL's argument.[127] The court concluded that it was bound by the doctrine of *res judicata* to give preclusive effect to the state court decisions finding the DEP Board's rescission to be effective.[128] The court found that FPL had litigated the issue fully before the Maine courts.[129] FPL had argued that res judicata may be disregarded when the public interest so requires.[130] However, the court stated that the only effect of preclusion in this case is that it would not address FPL's claim that the DEP's decision violated the CWA's one-year deadline, and that there was no showing that this would harm the public interest–the DEP decision did not "lock us or any other federal court into a specific reading of" the relevant CWA provision.[131] The court also rejected FPL's claim that because the Maine courts relied on the FERC's "own gloss" on the CWA provision, FPL was effectively deprived of its opportunity to get a FERC order reviewed on the merits in a federal court.[132] The court responded that "the right to a federal forum does not automatically dispense with res judicata or other ordinary limitations on review."[133] Next, the court rejected FPL's argument that the FERC cannot by its stay order "undo" a license that had already been granted.[134] The court stated that the FERC did not modify the license, and that the agency had unquestioned authority to revise a license in response to rehearing requests.[135] Finally, the court rejected FPL's claim that the FERC had the authority to disregard an untimely DEP decision and, therefore, the stay order

121. *Id.*

122. *Id.*

123. *Id*. *See also* FPL Energy Maine Hydro LLC v. Dept. of Env't Prot., 926 A.2d 1197 (Me. 2007).

124. *FPL Energy Me. Hydro LLC*, 551 F.3d at 61.

125. *Id.*

126. *Id.*

127. *Id*. at 61-62. The FERC had asserted that the case was not ripe for judicial review and, because it had not actually rejected the FPL's renewal application, the FPL lacked standing. The court disagreed. The court found that the FERC had rejected the FPL's contention that the rescission was untimely, thus making the case ripe for review, and that the FPL had standing because the effect of the stay order was that the FPL did not have an effective, renewed license and that it was "hostage" to further the DEP proceedings. *Id*.

128. *Id*. at 63.

129. *Id*.

130. *Id*. at 63-64.

131. *Id*. at 64.

132. *Id*.

133. *Id*. The court also dismissed FPL's reliance from a second exception to the general res judicata rule, i.e., that "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action." *Id*.

134. *Id.*

135. *Id*. at 64-65.

should be remanded.[136] The court noted that FPL's argument was based on the premise that the state action was indeed untimely.[137] However, the court explained that the Maine courts had rejected this premise.[138] Accordingly, the court upheld the FERC's stay order.[139]

D. Collateral Attack Rule

In *Pacific Gas and Electric Co. v. FERC*, the D.C. Circuit reiterated its "collateral attack" rule, and refused to grant a petition for review that, "while cloaked in the guise of a challenge to [recent FERC orders], is in fact an impermissible collateral attack on a series of orders that FERC issued [long ago]."[140] The case arose from a dispute between Pacific Gas and Electric Co. (PG&E) and the FERC over whether interconnection studies would be conducted by the Transmission Provider (in this case, the California Independent System Operator (CAISO)), or by the Participating Transmission Owner (PTO) (in this case, PG&E).[141] PG&E submitted compliance filings in 2004 and 2005, which proposed that each PTO would conduct the interconnection studies for interconnections occurring in their respective service territories, rather than the CAISO.[142] The FERC rejected this proposal in four orders issued in 2005 and 2006, concluding that the CAISO would remain in control of the centralized study process, although PG&E could participate in the studies and retain review and recommendation rights.[143] Importantly, in the period of time before and during PG&E's series of compliance filings, the FERC issued a series of orders (Order Nos. 2003, 2003-A, and 2003-B), ruling that, as part of the *pro forma* interconnection procedures, interconnection studies would be performed under the control of the Transmission Provider.[144] In fact, filings in compliance with Order Nos. 2003 and 2003-A were those in which PG&E submitted its ultimately-rejected interconnection study proposal.[145]

The D.C. Circuit refused to allow PG&E to challenge the interconnection study rules in a petition for review of the FERC's PG&E orders on the ground that such challenges should have been brought in petitions for review of Order Nos. 2003, 2003-A, and 2003-B.[146] "If PG&E objected to that requirement, it therefore had to petition for review in this court no later than sixty days after

136. *Id*. at 65.

137. *Id*.

138. *Id*.

139. *Id*.

140. 533 F.3d 820, 822 (D.C. Cir. 2008).

141. *Id*. at 824.

142. *Id.*

143. *Id*. at 823-824.

144. *Id*. *See also Standardization of Generator Interconnection Agreements and Procedures,* Order No. 2003, FERC STATS. & REGS. ¶ 31,146 (2003)*, order on reh'g*; Order No. 2003-A, FERC STATS. & REGS. ¶ 31,160*, order on reh'g*; Order No. 2003-B, FERC STATS. & REGS. ¶ 31,171 (2004)*, order on reh'g*; Order No. 2003-C, FERC STATS. & REGS. ¶ 31,190 (2005)*, aff'd sub nom.*; Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC, 475 F.3d 1277 (D.C. Cir. 2007).

145. *Pacific Gas and Electric Co.*, 533 F.3d at 825.

146. *Id.*

December 20, 2004–the date the [FERC] issued Order No. 2003-B, which was the last order on rehearing that addressed that requirement."[147]

PG&E argued that its petition for review was not barred by the collateral attack rule on two grounds: (1) that Order Nos. 2003, 2003-A, and 2003-B did not give PG&E "sufficient notice" of the rule to which it objected;[148] and (2) that even if Order No. 2003-B gave sufficient notice of the rule, PG&E still filed its compliance filings prior to the FERC's issuance of that order.[149] The court rejected both arguments, concluding that all three orders in the Order No. 2003 series gave PG&E sufficient notice of the rule.[150]

II. FEDERAL POWER ACT

A. *Electric Rates*

1. Independent System Operator/Regional Transmission Organization Rates

In *Western Area Power Administration v. FERC*, the D.C. Circuit affirmed the FERC orders regarding the CAISO use of modeling "behind-the-meter" generation in calculating its Grid Management Charge.[151]

In 2000, the CAISO proposed a new Grid Management Charge that would cover the period running from January 1, 2001 to January 1, 2004.[152] The CAISO believed that the revised Grid Management Charge would better reflect cost causation than the charge that was currently on file with the FERC.[153] The CAISO proposed to "unbundle" the charge based on the three categories of services that it provided, including control area services.[154] For these services, the CAISO proposed to allocate costs to "Scheduling Coordinators on a "gross load" basis."[155] Following the CAISO's filing, PG&E, which acted as a Scheduling Coordinator, filed a "pass-through" tariff under which the Grid Management Charges assessed to it by the CAISO could be passed through to its customers.[156]

The proposed Grid Management Charge and PG&E's proposed pass-through tariff were both challenged by a number of entities.[157] Some parties argued that the gross load allocation of control area services charges violated cost causation because they included "behind-the-meter" loads that did not depend on the CAISO-operated grid to receive electric power.[158] Some protestors also argued that PG&E's pass-through tariff effectively modified

147. *Id*. (citing *Louisiana Pub. Serv. Comm'n. v. FERC*, 522 F.3d 378, 398 (D.C. Cir. 2007)).
148. *Id.* (citing *Southern Co. Servs. Inc. v. FERC*, 416 F.3d 39, 44-45 (D.C. Cir. 2005)).
149. *Id.* at 825-827.
150. *Id*.
151. 525 F.3d 40 (D.C. Cir. 2008).
152. *Id*. at 44.
153. *Id*.
154. *Id*.
155. *Id*. at 45.
156. *Id*.
157. *Id*.
158. *Id*. at 46.

existing customer contacts and violated the *Mobile-Sierra* doctrine because PG&E unilaterally filed a new rate that would supersede existing contracts.[159]

In its initial order, the FERC found that the gross load allocation of the charge for control area services did not violate cost causation principles, but found that behind-the-meter loads might end up paying too great a share of that charge.[160] Accordingly, it concluded that such loads should be allocated those charges based on their highest monthly demand on the CAISO-operated grid instead of gross load, and that this exemption would apply to generators with a certain percentage capacity factor.[161] The FERC also approved PG&E's pass-through tariff, explaining that existing contracts were not being modified.[162] The FERC explained that there was no duplication of service provided by the CAISO and by PG&E.[163] On rehearing, the FERC stated that the exemption it had carved out for behind-the-meter generation was not supported by record evidence, although it still believed that certain of these generators should be exempted.[164] The FERC thus revised its earlier finding, stating that those generators that do not cause the CAISO to incur administrative or operating expenses should be exempted.[165] After rehearing requests, the FERC issued a further order directing a hearing on the matter.[166] In a subsequent order, the agency explained, based on evidence from the hearing, how the CAISO analyzed models adopted by transmission owners and noted that generators included in the model would be assessed control area services charges.[167] Units that are not modeled (and thus "not seen" by the CAISO) would be exempt from such charges.[168] Ultimately, several parties filed petitions for review.[169]

After rejecting one petition as untimely, the court turned to the merits of the case and first tackled the issue of whether the revised Grid Management Charge and the PG&E pass-through tariff violated the *Mobile-Sierra* doctrine.[170] The court concluded that they did not, and agreed with the FERC that the Grid Management Charge represented the cost of "new" services provided by the CAISO and did not supersede existing services that had been provided by PG&E.[171] The court, citing earlier decisions involving similar services provided by the Midwest Independent Transmission System Operator, Inc., explained that entities such as the CAISO "generate significant benefits for all customers of a transmission system, including customers that had preexisting contracts with

159. *Id*. at 47.

160. *Id*.; *See also California Indep. Sys. Operator Corp.*, 103 F.E.R.C. ¶ 61,114, at p. 61,352 (2003).

161. *Western Area Power Admin.*, 525 F.3d at 47-48.

162. *Id*. at 48.

163. *Id*.

164. *Id*.; *See also California Indep. Sys. Operator Corp.*, 106 F.E.R.C. ¶ 61,032 (2004).

165. *Western Area Power Admin.*, 525 F.3d at 49.

166. *Id*.; *See also E. Tenn. Nat'l. Gas, Co.*, 106 F.E.R.C. ¶ 61,162 (2004).

167. *Western Area Power Admin.*, 525 F.3d at 49-50; *See also California Indep. Sys. Operator Corp.*, 113 F.E.R.C. ¶ 61,135 (2005).

168. *Western Area Admin.*, 525 F.3d at 50.

169. *Id*. at 51.

170. *Id*. at 53.

171. *Id*. at 57.

formerly vertically-integrated utilities for all services."[172] The court also explained that the FERC made factual findings that the CAISO "would generate significant new services for PG&E's existing customers," including the elimination of pancaked rates, regional planning and operation of the combined grid, and consolidated scheduling,[173] and noted that the petitioners failed to rebut the agency's analysis. The court pointed out that the FERC persuasively explained that, contrary to petitioners' arguments, that there was not a correspondingly smaller burden on PG&E for each service the CAISO provided and that the CAISO was providing different services than what PG&E provided to its customers.[174] "The point is that, together, PG&E and the ISO perform new and better services for customers. The pass-through tariff is dollar-for-dollar based on the Grid Management Charge . . . [t]he customers get the benefit of the new system and pay exactly the cost of the new system."[175]

Moving to the question of the FERC's modeling exemption, the court found that the exemption was not arbitrary and illogical, as argued by petitioners.[176] The court explained that the general cost causation principle requires that "all approved rates reflect to some degree the costs actually caused by the customer who must pay them . . . we have never required a ratemaking agency to allocate costs with exacting precision."[177] In this instance, the court determined that the agency had provided sufficient justification for ultimately approving the modeling exemption.[178] The court further noted that the exemption did not benefit the CAISO or PG&E, and that the exemption "is reasonable and relatively straightforward to administer, while other alternatives would be much more difficult to administer."[179]

In *Braintree Electric Light Department v. FERC*, the D.C. Circuit reaffirmed that Regional Transmission Organizations (RTOs) may include the cost of certain lobbying activities in their FERC-approved rates, so long as the FERC reviews the substance of the activities to ensure that the RTO has not acted imprudently or contrary to its core purpose and objectives.[180] The court also rejected petitioner's First Amendment argument.[181]

Braintree Electric Light Department (Braintree) petitioned for review of FERC orders approving ISO-New England, Inc.'s (ISO-NE) 2005 and 2006 revenue requirements.[182] Braintree challenged the FERC's approval of ISO-NE's tariffs on the grounds that the FERC failed to sufficiently determine that

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172. *Western Area Power Admin.*, 585 F.3d at 54 (citing Midwest ISO Transmission Owners v. FERC, 373 F.3d 1361 (D.C. Cir. 2004) and East Ky. Power Coop. v. FERC, 489 F.3d 1299 (D.C. Cir. 2007)).

173. *Id.* at 123.

174. *Id.*

175. *Western Area Power Admin.*, 525 F.3d at 56.

176. *Id.* at 40.

177. *Id*. (quoting *Midwest ISO Transmission Owners*, 373 F.3d at 1368-69) (internal quotations omitted).

178. *Id*. at 58.

179. *Id*. at 58.

180. 550 F.3d 6 (D.C. Cir. 2008).

181. *Id*. at 9-10.

182. *Id.* at 9.

costs pertaining to "Government Affairs," "Public Information," and "Regulatory Affairs" were just and reasonable under Section 205 of the FPA.[183]

In approving ISO-NE's rates, the FERC drew a line between what the court described as recoverable "informational lobbying" costs on the one hand,[184] and non-recoverable "political variants" on the other.[185] After reviewing "a detailed mass of [ISO-NE's] actual communications, in the form of speeches, correspondence, PowerPoint presentations and handouts . . . add[ing] up to nearly 600 pages,"[186] the FERC concluded that ISO-NE's costs were recoverable. To enhance transparency, the FERC ordered ISO-NE to publish "a monthly report concerning 'external affairs' and 'corporate communications,"[187] but on rehearing the FERC excluded from the reporting requirement "certain ISO-NE communications, such as 'inquiries to or from executive branch officials' and the 'provision of information to state and federal, executive and legislative officials regarding the status of New England's bulk-power system."[188]

In its petition for review, Braintree argued that by approving the tariffs, the FERC arbitrarily violated its own precedents and acted in a manner arbitrary, capricious, and without substantial evidence.[189] The court rejected each of those arguments.[190]

First, the court identified that, although the FERC's "prior statements on the subject had 'not always been clear,'"[191] a clear rule had been established: while it "would possibly be 'unfair' if such expenditures were presumed recoverable in all instances,"[192] such expenditures may be recoverable where a utility demonstrated that the lobbying activities in question "could benefit . . . ratepayers."[193] The FERC's ISO-NE orders were consistent with that rule.

Second, the court rejected Braintree's argument that the FERC's orders unreasonably assumed that ISO-NE operated in the best interests of its stakeholders. As the record on review demonstrated, the FERC "did investigate the expenditures in question . . . , reviewing mounds of material from ISO-NE, and found that 'no party has provided any evidence that ISO-NE has acted imprudently or contrary to its core purpose and objectives.'"[194] In that respect, the FERC's orders were not comparable to previous cases in which the court vacated orders because the "FERC appeared to have abdicated its role of

183. *Id.* (citing *ISO-NE*, 109 F.E.R.C. ¶ 61,383 at P 18 (2004); *ISO-NE*, 113 F.E.R.C. ¶ 61,341 at P 10 (2005)) (internal quotations omitted).

184. *Id*. at 10. Specifically, "informational and educational activities as well as monitoring and communicating on issues of direct operating concern to the RTO ." *Id.* (quoting *ISO New England Inc.*, 117 F.E.R.C. ¶ 61,070 at P 41 (2006)).

185. Specifically, "activities such as participation in Political Action Committees, candidate fundraising, [and] entertainment expenses." *Id.* (quoting *ISO New England Inc.*, 117 F.E.R.C. 61,070 at P 41).

186. *Id.* at 13 (emphasis omitted).

187. *ISO New England Inc.*, 117 F.E.R.C. ¶ 61,070 at P 52.

188. *Braintree*, 550 F.3d at 10 (quoting *ISO New England Inc.*, 118 F.E.R.C. ¶ 61,105 at P 39 (2007)).

189. *Id.* at 9.

190. *Id.*

191. *Id.* at 11 (quoting *ISO New England Inc.*, 117 F.E.R.C. at P 47).

192. *Id.* (quoting *Alabama Power Co.*, 24 F.P.C. 278, 286 (1960)).

193. *Id.* (quoting *Williams Natural Gas Co.*, 73 F.E.R.C. ¶ 63,015, at 65,072-73 (1995)).

194. *Id.* at 12 (quoting *ISO New England Inc.*, 118 F.E.R.C. at P 21).

verifying the reasonableness of prices paid by an ISO."[195] Similarly, the court rejected Braintree's argument that the FERC lacked substantial evidence for its conclusion that ISO-NE's claimed costs were recoverable, citing the "detailed mass of [ISO-NE's] *actual* communications" in the record.[196]

The court also rejected Braintree's argument that the orders violated its First Amendment rights by compelling its speech in the form of charging it the cost of ISO-NE's communications.[197] Setting aside the question of whether ISO-NE's rates constituted "state action" for purposes of First Amendment analysis,[198] the court concluded that ISO-NE's expenditures were "germane" to the purpose for which it was created, and as such did not give rise to unconstitutional compelled speech with respect to Braintree.[199] The court again stressed the fact that the germaneness of ISO-NE's communications was evidenced not by hypotheticals but, rather, by actual review of the record.[200]

Finally, the court rejected Braintree's argument that the FERC's exclusion of certain information from ISO-NE's new reporting requirements was arbitrary and capricious.[201] Affording the FERC's decision on remedies with the requisite "exceptional deference,"[202] the court concluded that the "FERC's posting directive appears to be a reasonable balance of competing interests."[203]

2. Cost Recovery for Interconnection Facilities

In *Old Dominion Electric Cooperative, Inc. v. FERC*,[204] the court denied a petition for review of FERC orders rejecting Old Dominion Electric Cooperative Inc.'s (ODEC) and CED Rock Springs, LLC's (Rock Springs) filing to recover costs and a return on equity (ROE) associated with certain facilities used to connect a generating facility to the transmission grid operated by PJM Interconnection, LLC. (PJM).

ODEC and Rock Springs each owned two generating units at an ODEC facility in Maryland.[205] They decided to build the facilities necessary to interconnect the facility to the PJM grid themselves rather than having the local transmission owner, PECO, provide that service due to timing issues.[206] Because they now owned transmission facilities, ODEC and Rock Springs became transmission owners under the PJM tariff and executed the existing Transmission Owners Agreement (TOA) among PJM and its various transmission-owning members.[207] The TOA included a provision stating that

195. *Id.* (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 796 (D.C. Cir. 2007)).
196. *Id.* at 13.
197. *Id.* at 14.
198. *See id.* at 13-14.
199. *See id.* at 14.
200. *Id.* at 14-15.
201. *Id.* at 6.
202. *Id.* at 15 (citing, *inter alia*, *Louisiana Pub. Serv. Comm'n v. FERC*, 522 F.3d 378, 393 (D.C. Cir. 2008)).
203. *Id.* at 16.
204. 518 F.3d 43 (D.C. Cir. 2008).
205. *Id.* at 46.
206. These facilities included a 500 kV substation and two 900-foot 500 kV transmission lines.
207. *Id.* at 46-47.

ODEC and Rock Springs would opt out of cost recovery for their interconnection facilities, which was added to address ODEC's and Rock Springs' concerns about their exempt wholesale generator (EWG) status.[208]

Subsequently, ODEC and Rock Springs concluded that these concerns were addressed by the repeal of the Public Utility Holding Company Act of 1935 and other events.[209] Accordingly, they filed to recover O&M and depreciation expenses, property taxes, and the ROE on their transmission facilities.[210] The FERC rejected the filing, stating that Section 37.2 of the PJM tariff, which governs cost responsibility associated with interconnection facilities, precluded ODEC and Rock Springs from recovering the costs of constructing these facilities.[211] The FERC stated that ODEC's and Rock Springs' facilities were "Network Upgrades" under the PJM tariff,[212] and that the costs of these facilities should be assigned to ODEC and Rock Springs because the facilities would not have been built but for the interconnection of the generating facility to the PJM transmission system. The FERC also noted that ODEC and Rock Springs expressly disclaimed any right to receive transmission revenue from their facilities.[213] The FERC affirmed on rehearing, stating that ODEC and Rock Springs had not presented evidence that their facilities were necessary but for their interconnection request and, therefore, the PJM tariff barred them from recovering the costs of those facilities.[214]

The D.C. Circuit affirmed the FERC orders.[215] First, the court noted that it grants "substantial deference to FERC's orders" and would only set them aside if they were arbitrary and capricious.[216] Further, the court stated that it "'generally gives substantial deference to [FERC's] interpretation of filed tariffs, even where the issue simply involves the prior construction of language'" but does not defer to the agency's interpretation of unambiguous tariff language.[217]

The court found that the FERC "sensibly rejected" the petitioners' contention that because the facilities in question were transmission facilities they could not also be "Network Upgrades."[218] The court next rejected the petitioners' claim that the provision did not apply because they are not "'ordinary' Generation Interconnection Customers."[219] The court stated that the

208. ODEC, Rock Springs, and PJM had executed a Facilities Operation Agreement (FOA). Because ODEC and Rock Springs wished to preserve their status as EWGs, the FOA included a provision that waived their right to receive any revenue that PJM may collect for transmission services for which PJM may use their generating facility. However, other transmission owners objected to the FOA and, as a result, ODEC and Rock Springs became parties to the TOA.

209. *Id.* at 47.

210. *Id.*

211. *CED Rock Springs, LLC, et al.*, 114 F.E.R.C. ¶ 61,285 (2006).

212. Under the PJM tariff, "Network Upgrades" are those "[m]odifications or additions to transmission-related facilities that are integrated with and support the Transmission Provider's overall Transmission System, for the general benefit of all users of such Transmission System." PJM Tariff at § 1.26.

213. *Old Dominion*, 518 F.3d at 47.

214. *CED Rock Springs, LLC, et al.*, 116 F.E.R.C. ¶ 61,163 (2006).

215. *Id.* at 47-48.

216. *Old Dominion Elec. Coop., Inc.*, 518 F.3d at 48.

217. *Id.* (*quoting* Southern Calif. Edison Co. v. FERC, 415 F.3d 17, 21 (D.C. Cir. 2005).

218. *Id.* at 49.

219. *Id.* at 50.

FERC appropriately relied on the PJM tariff's definition of Generation Interconnection Customers and "examining it in light of the policy underlying Section 37.2,"[220] reasonably concluded that the policy of this provision–to promote efficient interconnection and enhance overall economic efficiency–would be undermined by requiring generators to initially pay for interconnection costs and then having the generators allocate those costs to their transmission service customers.

Having made these conclusions, the court stated that it was reasonable for the FERC to apply Section 37.2's cost responsibility provisions. Under that provision, Interconnection Customers are allocated "'100 percent of the costs of the minimum amount of. . .Network Upgrades necessary to accommodate an. . .Interconnection Request and that would not have'" occurred but for the interconnection request.[221] The court upheld the FERC's finding that there was no evidence that the facilities "would have been built but for the need to connect to the transmission grid."[222] Although the petitioners argued that these facilities permit the delivery of more than double the maximum capacity of the generating facility, the "FERC reasonably attributed this extra capacity to the need for the interconnection facilities to match the transmission capacity of the grid so as not to adversely affect the reliability of the grid."[223]

The petitioners had also pointed to Section 2.2 of the TOA and Section 9.1(a) of the PJM Tariff, which stated that transmission owners had the right to make unilateral filings under Section 205 of the FPA to change revenue requirements underlying rates for services. The court found that the TOA only provides transmission owners with the right to submit rate filings under Section 205 of the FPA, but did not provide it with the right to recovery.[224] Finally, the court rejected the petitioners' argument that the FERC's interpretation of Section 37.2 was unduly discriminatory since PECO had recovered costs for transmission interconnection facilities through transmission rates.[225] The court found that the FERC reasonably concluded that the evidence presented was not persuasive.[226]

3. Cost Allocation for Transmission Expansions

In March 2004, the Midwest Independent Transmission System Operator, Inc.'s (Midwest ISO) stakeholders formed a Regional Expansion Criteria and Benefits Task Force (Task Force), which was assigned the job of developing criteria for including transmission projects in the Midwest ISO's regional transmission expansion plan, as well as developing mechanisms for allocating and recovering the costs of such projects.[227] In June 2005, the Midwest ISO published its 2005 transmission expansion plan, which listed upgrade projects as either "planned" or "proposed." "Planned" expansions were those that the

220. *Id.* at 51.
221. *Id.* at 50.
222. *Old Dominion Elec. Coop., Inc.*, 518 F.3d at 51.
223. *Id.*
224. *Id.* at 52.
225. *Id.*
226. *Id.* at 53-54.
227. *Midwest Indep. Transmission Sys. Operator, Inc.*, 114 F.E.R.C. ¶ 61,106 at P 4 (2006).

preferred solution to an identified issue, while "proposed" expansions were tentative solutions.[228] In September 2005, the Task Force adopted a policy for allocating the costs of upgrades, and the Midwest ISO submitted revisions to its tariff shortly thereafter.[229] The proposed revisions included language stating that the cost allocation provisions would not be applicable to certain designated projects, which were designated as "planned" in the 2005 expansion plan and listed in proposed Attachment FF-1, as well as "some additions of proposed projects that the Transmission Provider has determined to [be] in the advanced stages of planning."[230]

The FERC approved the proposed cost allocation mechanism as just and reasonable under Section 205 of the FPA, finding that it was a reasonable compromise that recognized the existing state of the transmission system, as well as planned transmission projects, and put transmission owners on an "equal footing."[231] The FERC subsequently denied requests for rehearing.[232]

The Pubic Service Commission of Wisconsin and American Transmission Company LLC (ATCLLC) petitioned the D.C. Circuit for review of the FERC's orders.[233] The petitioners argued that the FERC erred in giving weight to a "non-consensus" stakeholder process, i.e., by relying on the Task Force recommendations.[234] The petitioners asserted that what the FERC described as a "reasonable compromise" was not a compromise midpoint between competing positions.[235] Regardless, the petitioners argued that the FERC had an independent duty under the FPA to assess whether the proposal was just and reasonable.[236] Moreover, the petitioners contended that the FERC's reliance on the Task Force's distinction between "planned" and "proposed" projects was arbitrary, arguing (among other things) that the FERC failed to adequately explain why some projects were treated differently from others and that the proposal had the "perverse effect" of penalizing transmission owners that had been proactive in pursuing transmission upgrades while rewarding those that had been less diligent. Moreover, the petitioners contended that the FERC deviated from its earlier order directing the Midwest ISO develop a cost recovery policy based on payment for upgrades by those who cause and benefit from them.[237]

The D.C. Circuit upheld the FERC orders. First, the court stated that, in concluding that the proposal was just and reasonable, the FERC "'articulated a rational connection between the facts found and the choice made' [238] and was consistent with its policy of deferring to "'regional choices . . . on how to

228. *Id.*

229. *Id.*

230. *Id.* at P 113.

231. *Id.*

232. *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 F.E.R.C. ¶ 61,241 (2006).

233. Pub. Serv. Comm'n of Wis. v. FERC, 545 F.3d 1058 (D.C. Cir. 2008).

234. *Id.* at 1059.

235. *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 F.E.R.C. ¶ 61,241 at P 95-96 (2006).

236. *Id.* at P 62.

237. The petitioners cited *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 F.E.R.C. ¶ 61,027 (2004).

238. *Public Serv. Comm'n of Wis.,* 545 F.3d at 1062 (quoting *MotorVehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)).

allocate the costs of transmission expansions.'"[239] The court explained that the FERC often gives weight to proposals by Regional Transmission Organizations that are endorsed by a majority of stakeholders, even if there is not unanimous support.[240] The court also dismissed the petitioners' concerns about whether the proposal was truly a "compromise," pointing out that the FERC's independent assessment concluded that the proposal was just and reasonable.[241]

Next, the court rejected the petitioners' argument that the distinction between "planned" and "proposed" projects was arbitrary, finding that the FERC's explanation for approving the distinction between "proposed" and "planned" additions–that the distinction was reasonable because it provided a "going forward" cost sharing mechanism that limits cost-sharing to those upgrades planned after the Midwest ISO's proposal was filed–was adequate.[242] The court pointed out that the petitioners did not point to any project that they believed was wrongly designated. The court noted that ATCLLC itself would benefit from the cost-sharing mechanism, and that it would not be unfair to require ATCLLC to pay for the costs of projects that were planned prior to the introduction of the proposal.[243]

The court also found that the FERC had earlier simply encouraged–and not required–the Midwest ISO to adopt its own cost allocation policy, and noted that, in any event, the Midwest ISO had adopted such a policy.[244] The court found that the FERC reasonably concluded that the policy the Midwest ISO did adopt was consistent with cost causation principles.

4. Late Payment Charges

On July 16, 2008, the First Circuit vacated and remanded FERC orders requiring the New England Power Company (NEP) to charge a customer a lower interest rate than what had been set forth in NEP's tariff for late payments associated with the customer's early termination of a full requirements service contract.[245]

In 1998, Norwood, Massachusetts (Norwood) terminated a full requirements service contract with NEP earlier than the contract term, which it was permitted to do provided that it pay a contract termination charge.[246] NEP began charging the termination fee, including a late payment charge of eighteen percent per year, consistent with its tariff.[247] In an earlier First Circuit decision, the court had directed the FERC to determine whether the eighteen percent late payment charge constituted an unreasonable penalty.[248] The court had also rejected Norwood's claim that even if the eighteen percent charge was applicable, it should not be applied to payments earlier than a February 2006

239. *Id.* (quoting *New England Power Pool*, 105 F.E.R.C. ¶ 61,300 (2003)).
240. *Id.* at 1057.
241. *Id.* at 1062.
242. *Id.* at 1064-1065.
243. *Id.*
244. *Id.* at 1063.
245. New England Power Co. v. FERC, 533 F.3d 55 (1st Cir. 2008).
246. *Id.* at 57.
247. *Id.*
248. *Id.* at 58.

FERC order that approved the contract termination charge.[249] The court noted that the relevant tariff section stated that interest would accrue even if the amount billed was in dispute.[250]

On remand, the FERC found that the eighteen percent charge was unjust and unreasonable, and directed NEP to calculate interest in accordance with the agency's regulations.[251] On rehearing, NEP argued that under Section 206 of the FPA the FERC could only order prospective relief when rates are determined to be unreasonable and, accordingly, the eighteen percent charge should apply prior to the FERC's determination that the rate was unreasonable (and that the revised rate should be applied prospectively from that date).[252] NEP argued that to do otherwise would violate the filed rate doctrine and the rule against retroactive ratemaking. The FERC disagreed, explaining that the First Circuit had already decided the issue of the revised interest rate's effective date.[253]

On appeal, a majority of the First Circuit panel rejected the FERC's determination that the court had decided the issue, stating that the court did not evaluate NEP's retroactivity question, "nor would we have purported to decide such a complex question in a single sentence and without the benefit of briefing and argument from the parties."[254] Rather, the court explained that it had decided the narrow issue of whether Norwood owed any interest at all for the period before February 2006.[255] The majority stated that the broader retroactivity question fell outside of the court's mandate to the FERC.[256]

One judge on the panel dissented, arguing that the FERC's decision was fair because it provided a remedy for Norwood's non-payment of the termination charge while denying NEP a windfall.[257] The dissent noted that the court's earlier mandate to the FERC "leaves no room for the [FERC] to shorten the period of assessment of reduced interest payments."[258] The dissent also argued that NEP should have sought *en banc* rehearing or Supreme Court review of the mandate if it objected to its language.[259] Finally, the dissent stated that the "FERC acted reasonably in taking the court at its word that on remand, it should consider only the reasonableness of the interest rate to be applied to late payments."[260]

5. Allocation of Generation Costs Among Operating Companies

Entergy's "System Agreement," which is described as "an interconnection and pooling agreement for the energy generating in the" Entergy system, includes a process for adding generating capacity that uses a "system-planning

249. *Id.*
250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 59.
254. *Id.*
255. *Id.* at 61-62.
256. *Id.* at 61.
257. *Id.*
258. *Id.* at 61.
259. *Id.* at 62.
260. *Id*. at 62.

approach," for additions that benefit the entire system, and a "rotational approach, which adds new capacity on a rotating basis to the jurisdiction" in the Entergy system.[261] The rotational approach has the effect of essentially equalizing investment costs over time among Entergy's five operating companies.[262]

In the FERC proceedings, an Administrative Law Judge (ALJ) concluded that cost allocations were no longer "roughly equal" and were thus unduly discriminatory, noting that Entergy's operating company in Louisiana had been socked with large deviations above the system average between 2000 and 2003, while its operating company in Arkansas had "enjoyed greater than mirror image double-digit disparities below System average."[263] Accordingly, the ALJ determined that the bandwidth remedy, effective from the start of 2003, was appropriate to ensure that costs were again in rough equalization.[264] In addition, the ALJ found that when calculating production costs for the bandwidth remedy, the Vidalia hydropower plant in Louisiana should be included, because there was evidence that the plant provided system-wide benefits (contrary to Entergy's argument that it was not a system resource).[265]

The FERC addressed the initial decision, agreeing with the ALJ that a bandwidth remedy was appropriate, but tweaked the construct of the remedy, adopting the plus or minus eleven percent bandwidth (which it based on historical costs).[266] However, the FERC reversed the ALJ on the inclusion of the Vidalia plant, agreeing with Entergy that the plant was primarily built as a local resource.[267] The FERC also concluded that the bandwidth remedy should apply prospectively, i.e., beginning in 2006 rather than 2003.[268]

The petitions for review of the FERC orders raised several points, and from all sides, including the following: (1) the FERC inappropriately exercised jurisdiction over a generating facility in contravention of the FPA; (2) the FERC erred in finding that the Entergy system was not in rough equalization; (3) or (from another petitioner), the bandwidth remedy was too broad and did not do enough to ensure rough equalization; (4) the FERC's determination on the Vidalia power plant was incorrect; (5) the FERC should have issued refunds; and (6) the FERC unreasonably delayed implementation of the bandwidth remedy.[269]

With respect to the jurisdictional question, the court pointed out that it had previously decided the precise issue raised in the petition, and it had found in that earlier case that the FERC was within its statutory authority when it asserted jurisdiction over all wholesale transmissions, regardless of the nature of the facility.[270] Here, the court stated that the gas production costs affected the

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261. Louisiana Pub. Serv. Comm'n v. FERC, 522 F.3d 378, 383 (D.C. Cir. 2008).

262. *Id*. at 383.

263. *Id.* at 386.

264. *Louisiana Pub. Serv. Comm'n v. Entergy Services, Inc.*, 106 F.E.R.C. ¶ 63,012, at P 42-43 (2004).

265. *Louisiana Pub. Serv. Comm'n*, 522 F.3d at 386.

266. *Id.* at 383.

267. *Id.* at 386.

268. *Id.* at 388.

269. *Id.* at 378.

270. *Id.*

wholesale price.[271] The court also affirmed the FERC's use of the bandwidth remedy, finding that the agency could conclude on the evidence that large deviations in production costs could undermine the rough equalization principle and that it had reasonably determined how the remedy should be constructed.[272] Regarding the Vidalia plant, the court stated that the FERC's decision that the plant was not a system resource and that it was a "local affair" was supported by substantial evidence.[273] However, the court also found that the FERC had not offered a reasoned explanation why it decided to decline to issue refunds or why it decided to delay implementation of the bandwidth remedy.[274] Therefore, the court remanded the case to the agency for further proceedings.[275]

The System Agreement was also the focus of a second D.C. Circuit opinion in 2008.[276] In 2005, Entergy filed with the FERC a proposed revision to the System Agreement that would reallocate generating capacity via a "paper transfer" among certain of the Entergy operating companies. Entergy Arkansas and Entergy Gulf States (Gulf States) would "sell" their cheaper capacity to Entergy New Orleans and Entergy Louisiana.[277] The proposal would have the effect of lowering the production costs of Entergy Louisiana and Entergy New Orleans, but would raise the production costs of Gulf States.[278] The Louisiana state commission (LA PSC) protested Entergy's filing, arguing that the allocations were discriminatory and harmed Gulf State's customers. The case was set for hearing and the reallocation proposal was approved by the FERC.[279]

During the FERC hearing, the LA PSC learned that Entergy Arkansas had been making short-term capacity sales without first offering that capacity to the other operating companies, which it argued was contrary to Section 3.05 of the System Agreement.[280] The presiding ALJ rejected this claim.[281] The FERC agreed, finding that the issue did not involve the long-term allocation issues that were central to the hearing.[282] The FERC also noted that it did not believe that Section 3.05 applied to such sales.[283]

The LA PSC petitioned the D.C. Circuit for review of the FERC's orders, both with respect to the longer-term allocation question and the short-term capacity sales.[284] In regard to the latter, the LA PSC argued that the short-term

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271. *Id.*

272. *Id.*

273. *Id.* at 397.

274. *Id.* at 400.

275. *Id.*

276. Louisiana Pub. Serv. Comm'n v. FERC, 551 F.3d 1042 (D.C. Cir. 2008).

277. *Id.* at 1044.

278. *Id.*

279. *Id.* at 1043.

280. Section 3.05 of the System Agreement provided that each of the operating companies wanted to have its proportionate share of "Base Generating Units available to serve its customers either by ownership or purchase," and that if any of them had excess capacity, it "shall offer the right of first refusal for this capacity and associated energy to the other Companies." *Id.* at 1044.

281. *Entergy Servs., Inc.*, 111 F.E.R.C. ¶ 63,077 (2005).

282. *Entergy Servs., Inc.*, Opinion No. 485, 116 F.E.R.C. ¶ 61,296, *order on reh'g*, Opinion No. 485-A, 119 F.E.R.C. ¶ 61,019 (2007).

283. *Louisiana Pub. Serv. Comm'n*, 551 F.3d at 1044.

284. *Id.* at 1042.

capacity sales "'ha[d] substance independent of the resource allocation'" issue because the FERC's determination that the provision of the agreement did not apply to these sales allowed Entergy to sell cheap resources such that Louisiana customers were harmed.[285] As to the former, the LA PSC contended that although equalizing production costs among the operating companies was a valid goal, the FERC's approval of the paper trade proposal advanced by Entergy was not an appropriate way to go about it because it simply made some of the companies' costs go up while at the same time making other companies' costs go down. The LA PSC pointed to the result, i.e., Entergy New Orleans' production costs went from twelve percent above the system average to roughly one percent below, while Gulf States' costs went from right around the system average to about eight percent above the average.

The court first affirmed the FERC's approval of the reallocation proposal, noting that "[w]here the subject of our review is, as here, a predictive judgment by [the] FERC about the effects of a proposed remedy for undue discrepancies among operating companies, our deference is at its zenith."[286] In this case, the court found itself "unconvinced by the Louisiana Commission's arguments for second-guessing [the] FERC's judgment."[287] The court explained that while the ALJ did note the rise in Gulf States' costs, he could not attribute it only to the paper transfer and that the ALJ pointed to record evidence that tended to contradict the direct correlation between the paper transfer and the change in production costs, as well as evidence that the rise in Gulf States' production costs could also be attributed to the rise in natural gas prices.[288] Turning to the question of whether the FERC erred in stating that Section 3.05 of the System Agreement did not apply to short-term capacity sales, the court held that the FERC's statement was not a final decision on the matter; rather, it was dicta that signaled where the agency might ultimately come down on the issue.[289] Accordingly, the court found that the LA PSC was not harmed by the FERC's dicta because it could raise this issue in another proceeding.[290]

6. Rates for Standby Service

On May 23, 2008, the D.C. Circuit denied a petition for review of a FERC order approving modifications to rates for standby service filed by Pacific Gas and Electric Company (PG&E).[291] PG&E provides standby service to entities that generate their own electricity but require backup supply in the event of an outage of their own generation facilities.[292] For all other customers except those in the standby class, PG&E calculated rates by using the "12-coincident peak method" (12-CP), which looks to the demand share of each customer class during system peak periods.[293] However, for standby customers, PG&E

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285. *Id.* at 1044.
286. *Id.* at 1045.
287. *Id*.
288. *Id.* at 1045.
289. *Id.* at 1046.
290. *Id.*
291. Cogeneration Assoc. of Cal. v. FERC, 525 F.3d 1279 (D.C. Cir. 2008).
292. *Id.* at 1279.
293. *Id*. at 1281.

determined rates using a "probabilistic method" which is based on the percentage of contract demand that the standby class is likely to use, and consists of both regional and local transmission cost allocation factors.[294] Based on this methodology, PG&E's proposed rates for standby service increased from $0.26/kW to $0.35/kW.[295]

The FERC suspended the proposed rates and set them for hearing to determine whether they were just and reasonable. The ALJ determined that although in principle it was reasonable to assign unique rates to standby customers based on contract demand because they were not similarly situated to other customer classes, insofar as their demand is random, recent data supported using the 12-CP methodology rather than the probabilistic method. On review, the FERC reversed this finding, holding that substantial evidence supported PG&E's application of the probabilistic method to standby rates.[296]

A majority of the D.C. Circuit panel dismissed the claim that PG&E's proposed rates for standby customers violated the cost-causation principle and lacked substantial evidence in the record. The court noted that petitioners did not contest that standby customers are not similarly situated to other customer classes because of the random nature of their demand, or that PG&E incurs costs by standing ready to serve the random demands of standby customers.[297] The court rejected petitioner's argument that standby customers only impose costs on PG&E insofar as they contribute to the system peak, finding that the FERC reasonably approved PG&E's rates for standby service calculated under the probabilistic methodology because substantial evidence existed in the record that the unpredictability of standby customer demand imposes costs not captured by measuring that class's contribution to system peak demand.[298] Having determined that the FERC did not act arbitrarily and capriciously in approving the probabilistic methodology for determining standby rates, the court next examined the specific cost allocation factor for standby customers calculated by PG&E and concluded that it was reasonable and supported by substantial evidence.[299]

One judge on the panel dissented, stating that nowhere in the record was there a calculation of PG&E's costs for standing ready to serve standby customers, and without such a calculation, the FERC could not determine whether the rate proposed by PG&E related to the costs imposed by standby customers.[300]

C. Hydroelectric Licenses

In *Albany Engineering Corp. v. FERC*,[301] the court considered the FERC's jurisdictional reach under Part I of the FPA. In 2002, the FERC had issued licenses to the Hudson River-Black River Regulating District (District), a New

294. *Id.*
295. *Id*. at 1281-82.
296. *Id*. at 1282-83.
297. *Id*. at 1283-84.
298. *Id*. at 1284-85.
299. *Id*. at 1286.
300. *Id*. at 1286-87.
301. 548 F.3d 1071 (D.C. Cir. 2008).

York state agency with authority to operate the Conklingville Dam and the Great Sacandaga Lake, because a project located on the dam used the District's facilities to generate hydroelectric power.[302] State law permitted "the District to recover its capital, maintenance, and *operating* costs through assessments on those that benefited by the construction of dams and reservoirs."[303]

Albany Engineering, Inc. (Albany), an operator of a downstream project, filed a complaint against the District pursuant to the FPA. According to Albany, Section 10(f) of the FPA empowers the FERC with the authority to determine the level of reimbursement for costs associated with headwater benefits. The FERC concluded that the District's recovery of interest, maintenance, and depreciation costs under state law was preempted by Section 10(f).[304] However, the FERC also found that it lacked authority to require the District to rescind assessments that it made or to provide refunds.[305] In addition, the FERC decided not to convene a settlement conference and stated that any further involvement would require the affected entity to request a headwater benefits determination.[306] At that time, the FERC stated that it could determine whether a settlement conference would be appropriate.[307] The FERC subsequently denied rehearing.[308]

The court noted that there is a "familiar presumption against preemption," but that "presumption may be overcome if. . .the court finds that the preemptive purpose of Congress was 'clear and manifest.'"[309] The court noted that the FERC's counsel admitted that Section 10(f) did not permit the FERC to impose charges for headwater benefits other than interest, maintenance, and depreciation, and stated that this concession was consistent with the plain language of the statute.[310] Thus, the court stated, the agency's position "must be that although Congress would not allow *it* to mandate the collection of other types of costs, it meant to allow the states to do so freely."[311] The court, however, rejected this contention.[312] The court looked to Supreme Court precedent regarding the circumstances under which the FPA preempted state law in the area of hydroelectric regulation, and noted that the Court found that the FPA enacted "a *complete scheme of national regulation* which would promote the *comprehensive* development of the water resources of the Nation."[313] Thus, given Congress' "commitment to comprehensive federal regulation, and

302. *Id.* at 1073.

303. *Id.*

304. *Fourth Branch Assocs. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 117 F.E.R.C. ¶61,321 (2006).

305. *Id.* at P 55.

306. *Id.* at P 57.

307. *Id.*

308. *Fourth Branch Assocs. (Mechanicville) v. Hudson River-Black River Regulating Dist.*, 119 F.E.R.C. ¶ 61,141 (2007).

309. *Albany Engineering, Inc.*, 548 F.3d at 1075 (quoting Geier v. American Honda Motor Co., 166 F.3d 1236, 1237 (D.C. Cir. 1999)).

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* (quoting First Iowa Hydro-Elec. Coop v. FPC, 328 U.S. 152, 180 (1946) (internal citations omitted)).

preclusion of dual licensing authority," the court found it "hard to imagine why Congress would have countenanced disparate state reimbursement schemes" including those that might assess charges on downstream projects located in a different state.[314] The court also looked to the statutory language and the legislative history, and concluded that the FERC's interpretation of Section 10(f)–that the single federal interest was ensuring that downstream projects participated in the financial burden associated with the construction of hydroelectric facilities in a river basin–was incorrect.[315] The court explained that if this interest was the sole intent of the statute, there would be no reason why Congress should have limited the FERC's own authority to interest, maintenance, and depreciation.[316] The court went on to state that Section 10(f) reflects a balancing of the goal of compensating upstream owners and the goal of protecting downstream ones, but that the FERC's orders, finding that the statute and the legislative history did not prevent the District from assessing charges other than interest, maintenance, and depreciation, did not take this balancing into account.[317]

Further, the court believed that the FERC's orders "would generate complex issues of meshing state charges with FERC-approved ones,"[318] which would disrupt Congress' "intent to create a comprehensive scheme of hydropower development."[319] The court envisioned that different states could use different accounting methods for cost recovery, which could result in duplicative charges or "the creation of an accounting mess that some institution–FERC or a court–would have to sort out."[320] The court also noted that the FERC's interpretation would allow states to apportion costs among downstream owners in a manner that will ultimately allow recovery of charges in excess of the actual benefit that is received.[321]

The court did not address the issue of whether the FERC erred in refusing to require refunds or to convene a settlement conference, and pointed out that its decision here would change the context for the agency's consideration of these issues.[322] Accordingly, the court remanded these issues to the FERC for further consideration.[323]

In concurrence, Judge Brown stated that he was not, at this point, "willing to say that [the] FERC's orders are irredeemable, or that. . .we need to resolve the scope of § 10(f)'s preemption."[324] Therefore, Judge Brown wanted to remand the case back to the FERC for a fuller explanation of its decision.

314. *Id.*
315. *Id.* at 1076.
316. *Id.*
317. *Id.* at 1076-77.
318. *Id.* at 1078.
319. *Id.*
320. *Albany Engineering, Inc.*, 548 F.3d at 1078.
321. *Id.*
322. *Id.* at 1079.
323. *Id.* at 1081.
324. *Albany Engineering, Inc.*, 548 F.3d at 1081.

In *Fall River Rural Electric Cooperative, Inc. v. FERC*,[325] the Ninth Circuit denied a petition for review filed by Fall River Rural Electric Cooperative, Inc. (Fall River) regarding the FERC's dismissal of Fall River's hydroelectric license application. Back in 2001, the FERC had granted Fall River a three-year preliminary permit to conduct investigations to determine the feasibility of a hydroelectric project at Hebgen Dam in Montana.[326] Fall River cooperated with PPL Montana, which held a license from the FERC for a hydroelectric project that was also located at Hebgen Dam.[327] In May 2004, Fall River filed a final license application for its proposed project, which proposed several modifications to the existing project licensed to PPL Montana.[328] The FERC subsequently informed Fall River that it could not approve a proposal that would modify the existing project without PPL Montana's concurrence, consistent with Section 6 of the FPA, and it therefore conditioned its processing of Fall River's application on a showing that PPL Montana would not rule out agreement to the modifications.[329] In 2005, PPL Montana terminated negotiations with Fall River, and filed a letter to that effect with the FERC.[330] In a status report to the FERC, Fall River expressed its intent to continue working with PPL Montana to resolve differences and requested that FERC hold the proceeding in abeyance.[331] However, PPL Montana responded that it did not intend to resume negotiations.[332] Subsequently, the FERC dismissed the license application under Section 6 of the FPA and rejected the request to hold the proceeding in abeyance, citing PPL Montana's unwillingness to resume negotiations.[333] Fall River sought rehearing, which was denied.[334] The FERC pointed to several of the proposed modifications to the existing project, finding that they were not insubstantial.[335]

On review, the court first noted that Section 6 provides that a proposed project must substantially alter an existing one, and that the FERC may authorize *de minimis* changes.[336] The court also stated that FERC precedent explains that whether an existing project is substantially altered is primarily a case-specific issue.[337] The court looked to see whether the FERC's determination was supported by substantial evidence, and concluded that it was.[338] Specifically, the court stated that by "[c]hoosing to focus on the impact of each of these proposed modifications individually, Fall River apparently does not appreciate the cumulative impact of its proposed project . . . . Collectively, these alterations

325. 543 F.3d 519 (9th Cir. 2008).
326. *Id*. at 522.
327. *Id*.
328. *Id*.
329. *Id*. at 523.
330. *Id*. at 524.
331. *Id*. at 523-524.
332. *Id*. at 524.
333. *Id*.
334. *Id*.
335. *Id*. at 524-525.
336. *Id*. at 525.
337. *Id*. at 526.
338. *Id*.

fundamentally change the physical characteristics" of the existing project.[339] The court also found that the FERC appropriately distinguished the cases cited by Fall River in support of its contention that it was not making an insubstantial modification.[340] Further, the court rejected Fall River's argument that the challenged orders were inconsistent with FERC's regulations and its issuance of a preliminary permit.[341] The regulations and precedent provide that unless there is a permanent legal barrier that does not permit the FERC from licensing a project, it will issue a preliminary permit.[342] However, the court noted that had Fall River and PPL Montana reached agreement, there was no indication that there would have been any such permanent legal barrier, and thus concluded that the challenged orders were consistent with the regulations and the issuance of the preliminary permit.[343] Finally, the court dismissed Fall River's argument that the FERC did not adequately consider whether PPL Montana implicitly consented to Fall River's proposal by not protesting or commenting on the preliminary permit application or the final license application.[344] According to the court, Fall River failed to cite any case for the proposition that the FERC must "thoroughly analyze each and every argument in order to engage in reasoned decision making."[345] In any event, the court stated that it was unaware of any precedent holding that consent could be implied. Thus, the court "harbor[ed] no doubt that [the] FERC recognized Fall River's implied consent argument and rejected it."[346]

In another hydroelectric case from the Ninth Circuit, the court affirmed the FERC orders issuing a new license to Puget Sound Energy, Inc. (Puget Sound) for its Snoqualmie Falls Hydroelectric Project.[347] The FERC had rejected requests by the Snoqualmie Indian Tribe (Tribe) to decommission the project or otherwise return the site to its natural condition in order to increase water flows and water mist to enhance the Tribe's religious experiences at the falls.[348] However, the FERC did impose more stringent minimum flow requirements than otherwise required by state water quality certifications.[349] Both the Tribe and Puget Sound appealed the FERC's decision, with each side claiming that the agency had either been too sensitive, or not sensitive enough, to the Tribe's concerns.[350]

The court rejected the Tribe's claim that the FERC violated the federal Religious Freedom Restoration Act (RFRA), noting that the FERC actually took a closer look at the concerns than what was actually required under RFRA.[351] The court also rejected the Tribe's claims that the FERC was required to consult

339. *Id.* at 527
340. *Id*. at 529.
341. *Id*. at 530.
342. *Id*.
343. *Id*.
344. *Id*. at 530-531.
345. *Fall River Rural Elec. Coop.*, 543 F.3d at 530.
346. *Id.* at 531.
347. Snoqualmie Indian Tribe v. FERC, 545 F.3d 1207 (9th Cir. 2008).
348. *Id*. at 1211.
349. *Id*.
350. *Id*. at 1212.
351. *Id*. at 1214.

with the Tribe under the National Historic Preservation Act.[352] Next, the court rejected Puget Sound's argument that the FERC should not have imposed stricter minimum flow requirements.[353] The court stated that the FERC is permitted to add conditions on a license if they do not conflict with or weaken protections provided under the Clean Water Act's water quality certification requirement.[354] The court concluded that the FERC appropriately balanced the beneficial public purposes specified in Section 10 of the FPA in issuing the new license.[355]

III. NATURAL GAS ACT

A. Liquefied Natural Gas

On July 18, 2008, the D.C. Circuit granted Washington Gas Light Company's (WGL) petition for review of FERC's approval of the expansion of the Cove Point Liquefied Natural Gas (LNG) Terminal (Cove Point).[356] WGL, a local distribution company and recipient of natural gas from Cove Point, sought review of two FERC orders approving the Cove Point Expansion Project, which would increase Cove Point's LNG output and cause low heavy-hydrocarbon LNG not blended with traditional natural gas to flow to local distribution companies.[357] WGL argued that the expansion project will cause severe leakage on its system, inconsistent with the public interest requirements of the NGA.[358] The FERC approved the expansion,[359] finding that WGL's use of hot tar while installing compression couplings on its system damaged the couplings' seals such that low heavy-hydrocarbon LNG, decreased operating pressure, or cold temperatures could cause increased leakage, and that unblended LNG would not have done so absent the installation damage.[360] The FERC concluded that WGL had sufficient time to repair its system to safely accommodate LNG before the expansion's in-service date and thus the expansion could proceed consistent with the public interest.[361]

The D.C. Circuit held that the FERC's conclusion that the installation-related defects caused the leakage was supported by substantial evidence, and refused to second-guess the FERC in light of the deference due to the agency's evaluation of such technical matters.[362] However, the court granted WGL's petition because, while the FERC attempted to satisfy its duty under the NGA to ensure that the expansion could proceed consistent with the public interest by finding that WGL could repair its system before the expansion's November 2008

352. *Id*. at 1215-1216.

353. *Id*. at 1218.

354. *Id*. at 1219.

355. *Id*.

356. Washington Gas Light Co. v. FERC, 532 F.3d 928, 929 (D.C. Cir. 2008).

357. *Id*. at 929-930.

358. *Id*.

359. The court also rejected WGL's claims that the process was inadequate, finding that WGL failed to explain why the technical issues "required more process than FERC normally has the discretion to afford." *Id*. at 933 n.5.

360. *Id*. at 931.

361. *Washington Gas Light Co.*, 532 F.3d at 930-931. *See also Dominion Cove Point LNG, LP*, 115 F.E.R.C. ¶ 61,337 (2006), *order on reh'g*, 118 F.E.R.C. ¶ 61,007 (2007).

362. *Washington Gas Light Co.*, 532 F.3d at 929-32.

in-service date, substantial evidence did not support that finding.[363] Thus, the court vacated the FERC's orders to the extent that they approved the expansion, and remanded to the FERC to "more fully address whether the Expansion can go forward without causing unsafe leakage."[364]

B. Rates

In *Transcontinental Gas Pipe Line Corp. v. FERC*,[365] the court considered the question of whether the FERC reasonably concluded that Transcontinental Gas Pipe Line Corporation's (Transco) rate proposal related to its addition of new compressors on its system impermissibly subsidized new shippers at the expense of existing customers. In the underlying filing, Transco sought rolled-in rate treatment to recover the costs of the new compressors, which would socialize costs among all of Transco's customers.[366] Several existing shippers protested the filing, arguing that the new compressors were built to accommodate new shippers on the pipeline and did not benefit existing customers.[367] After a hearing, the FERC concluded that Transco's proposal would subsidize new shippers at the expense of existing ones, in contravention of the agency's 1999 policy statement on the certification of new pipeline facilities.[368] Having found Transco's approach to be unjust and unreasonable under Section 5 of the NGA, the FERC directed Transco to adopt an "incremental rate" on the new shippers.[369] The FERC affirmed its decision on rehearing.[370] Transco petitioned the D.C. Circuit for review of these orders.[371]

The court upheld the FERC's determinations, explaining that it must uphold an agency's action where it "'has considered the relevant factors and articulated a rational connection between the facts found and the choice made'"[372] and that its review was "'particularly deferential' when [the] FERC is involved in the highly technical process of ratemaking."[373] Here, the court rejected each of Transco's contentions.[374] Transco had argued that the Policy Statement dealt only with capital costs, not power costs, and its rate filing involved recovering power costs. The court found, however, that the FERC reasonably concluded that the Policy Statement could be interpreted to cover the recovery of both capital and operational costs.[375] Transco had next asserted that the FERC was mistaken in holding that the rate proposal improperly subsidized new customers,

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363. *Id.* at 929, 931-33.

364. *Washington Gas Light Co.*, 532 F.3d at 933.

365. 518 F.3d 916 (D.C. Cir. 2007) [hereinafter *Transco*].

366. *Id*. at 917.

367. *Id*. at 918.

368. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 F.E.R.C. ¶ 61,227 (1999) (Policy Statement).

369. *Transco*, 518 F.3d at 918.

370. *Id*.

371. *Id*. at 919.

372. *Id.* (quoting *Nat'l Ass'n of Clean Air Agencies v. EPA,* 489 F.3d 1221, 1228 (D.C. Cir. 2007) (internal quotations omitted)).

373. *Id*. (quoting *East Ky. Power Coop. v. FERC*, 489 F.3d 1299, 1306 (D.C. Cir. 2007) (internal quotations omitted)).

374. *Id*. at 919-920.

375. *Id*. at 919.

and contended that the compressors provided benefits to all of its customers, not just the new shippers, by improving system flexibility and reliability, and that they caused other compressors to be used less.[376] The court stated that the FERC reasonably rejected these claims, pointing to the FERC's statement that "a claim of generalized system benefits is not enough to justify requiring the existing shippers to subsidize the uncontested increase in electric costs caused" by the new project.[377] The court noted that Transco did not provide any evidence of specific benefits to existing customers.[378] Although the court acknowledged that existing customers might receive an indirect benefit, it stated that it was "bound to respect [the] FERC's policy decision that such benefits fail to justify imposing substantial new costs on captive customers who have no need for the added compression."[379] The court also rejected Transco's claim that the FERC's decision will make its system less efficient, stating that although the agency's policy decision may result in less efficiency, the FERC still believed that it was more important to ensure that new customers were not subsidized–and that this was "exactly the type of policy choice about which we defer to [the] FERC."[380] Finally, the court concluded that the FERC adequately supported its imposition of a new rate as just and reasonable.[381] The court stated that the FERC's new rate ensured that new shippers were not subsidized and that it was consistent with other precedent.[382]

Judge Brown dissented from the majority opinion, finding that the FERC did not meet its burden under Section 5 that the rate it imposed on Transco was just and reasonable.[383] In particular, the dissent stated that the FERC did not show that it was just and reasonable for the new shippers to pay the full energy costs for the operation of the new compressors, in addition to paying their proportionate share of existing compressors.[384] The dissent asserted that the agency "failed to grapple with the cost-shifting and pipeline efficiency impacts of its new rates." [385] The dissent contended that even the FERC's own analysis indicated that the new rates it imposed would lead to reverse-subsidization of existing customers by the new shippers.[386] Further, the dissent argued that the FERC did not support the policy articulated in the Policy Statement and, in particular, did not address the fact that the Policy Statement was concerned with construction costs of new projects, not the energy costs of running them.[387] The dissent concluded with a question: "why is subsidization *by* existing customers more problematic than reverse-subsidization *of* existing customers?"[388]

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376. *Id*. at 919-920.

377. *Id*. at 920 (quoting *Transcontinental Gas Pipe Line Corp.*, 112 F.E.R.C. ¶ 61,170 at p. 61,924 (2005)).

378. *Id*.

379. *Id.*

380. *Id*.

381. *Id*. at 921.

382. *Id*.

383. *Id*. at 923 (J. Brown dissenting).

384. *Id*. at 924 (J. Brown dissenting).

385. *Id.* at 924 (J. Brown, dissenting).

386. *Id*. (J. Brown dissenting).

387. *Id*. at 924-925. (J. Brown dissenting).

388. *Id*. at 925 (emphasis in original).

In *Williston Basin Interstate Pipeline Co. v. FERC*,[389] the court granted a petition filed by Williston Basin (Williston), a natural gas transportation and storage company, challenging a FERC order that directed Williston to convert individually certificated transportation service provided to Northern States Power Company (NSP), a natural gas distributor, under 18 C.F.R. Part 157 to open access service under 18 C.F.R. Part 284.[390]

Williston and NSP were parties to two contracts under which NSP received transportation service from Williston along a pipeline called the Mapleton Extension, which Williston had built under arrangement with NSP to carry gas to an NSP distribution system in eastern North Dakota.[391] The first contract, Rate Schedule X-13, was filed as an individually certificated transportation service under 18 C.F.R. Part 157, while the second contract was for open access service under Williston's Rate Schedule FT-1 pursuant to 18 C.F.R. Part 284.[392] Under Part 284, firm shippers that do not use all of their capacity can "release" the unused portion and enjoy the revenue paid by the replacement shipper, either directly or as a credit to the pipeline's charges.[393] At about the time that Williston and NSP finalized Rate Schedule X-13, the FERC issued Order No. 636, which encouraged pipelines and their customers to convert transportation service under Part 157 to open access service under Part 284, but imposed no mandate to do so.[394] The instant case arose in the course of a rate proceeding filed by Williston in which, the FERC found that Part 157 service under Rate Schedule X-13, without capacity release rights, was no longer just and reasonable, and accordingly granted NSP's request that the service be converted to Part 284.[395]

In challenging the FERC's decision, Williston first argued that the agency should have applied "the stricter 'public interest' standard rather than merely the 'just and reasonable' standard."[396] The court disagreed, finding that the FERC had appropriately applied the just and reasonable standard.[397] The court reached this conclusion based on language in Rate Schedule X-13 stating:

> that the agreement should not be construed as 'in any way' affecting NSP's rights "to intervene, protest or otherwise participate in such proceedings or to seek to initiate proceedings under Section 5 of the Natural Gas Act, other provisions thereof, or the FERC's rules and regulations thereunder, or any other applicable statute(s).[398]

The court reasoned that this language was similar to a contract at issue in a previous case, in which the court had held that "'specific acknowledgment of the possibility of future rate change is virtually meaningless unless it envisions a

389. 519 F.3d 497 (D.C. Cir. 2008).
390. *Id.* at 498-99.
391. *Id*. at 498.
392. *Id*.
393. *Id*.
394. *Id.* at 499.
395. *Id.*
396. *Id*.
397. *Id*. at 497.
398. *Id*. at 500.

just-and-reasonable standard.'"[399] The court also rejected Williston's argument that the FERC was required to apply the public interest standard based on *ExxonMobil Corp. v. FERC*,[400] in which the court upheld the FERC's finding that despite contract language to that effect it could not apply the just and reasonable standard to a pipeline's proposal to shift certain shippers from interruptible to firm service because it would have required "'the customer to take and pay for additional service for which the customer has not contracted.'"[401] The court distinguished *ExxonMobil* on the basis that the proposed change in that case would have imposed the risk of pipeline under use on customers not hitherto bearing that risk, while the instant order merely denied Williston the opportunity to garner additional revenue from replacement shippers.[402]

Williston also argued that the FERC's action was an unexplained departure from its longtime policy of making conversions to open access transportation voluntary.[403] The court agreed with Williston that although the FERC had the authority to order the conversion of service, it also had the obligation to explain its policy, particularly given that: (1) Order No. 636[404] had deliberately refrained from imposing the mandate that it imposed on Williston in the instant case, and (2) this was the first instance in which the FERC imposed such a mandate.[405] In examining the reasons articulated by the FERC in its order on rehearing for ordering the conversion, the court quickly dismissed three out of the five as irrelevant.[406] With respect to the other two reasons–the fact that Williston's largest customer is its affiliate and the impairment of market health resulting from diminished competition–the court agreed that a capacity resale market with an abundance of independent resellers would be more competitive than one dominated by the pipeline, but noted that this was surely just as true when the FERC adopted its general policy of not forcing conversion in Order No. 636.[407] The court also noted that although the FERC had viewed enhanced competition as a generic reason for a preference for capacity release, it had never hitherto found a case that justified ordering a pipeline to convert at the request of a shipper.[408] The court concluded that the FERC's failure to either identify the special characteristics applicable to Williston justifying the conversion of service, or to explicitly revise its policy, left a serious gap in its reasoning, such

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399. *Id*. (citing Papago Tribal Util. Auth. v. FERC, 723 F.2d 950, 954 (D.C. Cir. 1983)).

400. 430 F.3d 1166 (D.C. Cir. 2005).

401. *Williston Basin*, 519 F.3d at 500 (quoting *Transcon. Gas Pipe Line Corp.*, 107 F.E.R.C. ¶ 61,156 at P 17 (2004)).

402. *Id*.

403. *Id*. at 499.

404. *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines after Partial Wellhead Decontrol*, Order No. 636, FERC Stats. & Regs. ¶ 30,939, *order on reh'g*, Order No. 636-A, FERC Stats. & Regs. ¶ 30,950, *order on reh'g*, Order No. 636-B, 61 FERC ¶ 61,272 (1992), *order on reh'g* , 62 FERC ¶ 61,007 (1993), *aff'd in part and remanded in part sub nom.* United Distributors Cos. v. FERC, 88 F. 3d 1005 (D.C. Cir. 1996), *order on remand*, Order No. 636-C, 78 FERC ¶ 61,186 (1997) (Order No. 636).

405. *Williston Basin*, 519 F.3d at 501.

406. *Id*. at 501-02.

407. *Id*. at 502.

408. *Id*.

that the FERC had failed to articulate "a 'rational connection between the facts found and the choice made.'"[409] The court remanded the orders to the FERC but did not vacate them, stating that there appeared to be a significant possibility that the FERC might find an adequate explanation for its actions, and in any event, the consequences of its rulings could be unraveled if it failed to do so.[410]

IV. OTHER STATUTES

A. *Public Utility Regulatory Policies Act of 1978 (PURPA)*

On December 23, 2008, the D.C. Circuit denied a petition for review by the American Forest and Paper Association (AFPA) of the FERC's interpretation of "markets" as it appears in an exception to electric utilities' mandatory obligation to purchase energy from qualifying facilities (QFs) under PURPA.[411]

In 2005, Congress created several exceptions to PURPA's mandatory purchase obligation, including one available if the relevant QF "has nondiscriminatory access to—(A)(i) independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and (ii) wholesale markets for long-term sales of capacity and electric energy."[412] The Commission, in Order Nos. 688 and 688-A,[413] interpreted "markets" in subparagraph (A)(ii) to encompass both competitive and non-competitive markets.[414] AFPA challenged that interpretation, arguing that "markets" must always denote a competitive market.[415]

The D.C. Circuit disagreed, and denied AFPA's petition for review.[416] Applying the two-step analysis set forth in *Chevron USA, Inc. v. Natural Resources Defense Council*,[417] the court found that "markets" in subparagraph (A)(ii) was ambiguous because Congress omitted any explicit competitiveness requirement in subparagraph (A) but used "competitive" as a descriptor of the markets referenced in subparagraphs (B) and (C). That silence created ambiguity.[418]

The court next determined that the FERC's interpretation of "markets" in subparagraph (A)(ii) was reasonable.[419] First, the court found that omission of language from one section of a statute where the same language is used

409. *Id*. at 499 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The court also found flaws in the responses provided by FERC to Williston's argument that the conversion order would result in significant costs to Williston and its customers. *Id*. at 503-04.

410. *Id.* at 504.

411. Am. Forest & Paper Ass'n v. FERC, 550 F.3d 1179 (D.C. Cir. 2008).

412. 16 U.S.C. § 824a-3(m)(1)(A)(i)-(ii).

413. *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶ 31,233 (2006), *order on reh'g*, Order No. 688-A, FERC Stats. & Regs. ¶ 31,250 (2007).

414. *American Forest and Paper Ass'n*, 550 F.3d at 1180.

415. *Id.* 1180-81.

416. *Id*. at 1183.

417. Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). The *Chevron* analysis asks whether the statutory language at issue is ambiguous, and if it is, whether an agency interpretation of that language is reasonable. *Id.*

418. *American Forest and Paper Ass'n*, 550 F.3d at 1181.

419. *Id.* at 1180-81.

elsewhere in the same statute, particularly in a neighboring sentence, suggested that Congress intentionally omitted any competitiveness requirement in subparagraph (A)(ii).[420] Second, the court's prior decisions, various dictionary definitions, and common usage suggest that "markets" can be competitive or non-competitive and that when non-competitiveness is intended, it is often expressed.[421] Because statutory text should, where possible, be given its ordinary meaning, a "market" can be either competitive or non-competitive.[422] The court rejected AFPA's argument that courts consistently require markets to be competitive under the FPA, finding that the modifier "competitive" does not mean that *all* markets must be competitive, but merely that the market in question was found to be competitive, and noted that the cases AFPA relied upon addressed the use of "markets" in court decisions, not statutory text.[423] Third, the FERC's view that the structure of subparagraph (A)[424] indicated that Congress intentionally omitted a competitiveness requirement in (A)(ii), while perhaps not the correct view, need only be *reasonable* under *Chevron*.[425]

The court also highlighted the parties' disagreement regarding the related exception in subparagraph (C), which can apply if the FERC finds that a QF has nondiscriminatory access to markets "of comparable competitive quality" to those in subparagraphs (A) and (B).[426] The FERC argued that subparagraph (C) referred only to the fact that (A)(i) and (B) contained inherent or explicit competitiveness elements; AFPA argued that subparagraph (C) required an equal, not lower, level of competitiveness in *all clauses* of subparagraphs (A) and (B).[427] The court found that, because subparagraph (C) is also unclear, both positions were reasonable.[428] Thus, under *Chevron*, the FERC's interpretation was entitled to deference, even if it is not the best interpretation.[429]

The court next rejected AFPA's argument that, absent a competitiveness requirement in the (A)(ii) exception, the requirement in PURPA Section 210(m)(3) of a "factual basis" for application of any exceptions would be a nullity, reasoning that the other requirements of subparagraph (A) and the Commission's system for applying the exceptions creates only a rebuttable presumption that an exception applies.[430] In response to an application to the FERC to invoke one of the exceptions, a QF can always show that it lacks non-discriminatory access to the relevant market.[431] The court noted that the FERC's decision to adopt such a rebuttable presumption through rulemaking, rather on a

420. *American Forest and Paper Ass'n*, 550 F.3d at 1181.

421. *Id*. at 1183.

422. *Id.* at 1181-82.

423. *American Forest and Paper Ass'n*, 550 F.3d at 1182.

424. Specifically, language indicating competitiveness in (A)(i) and absence of any such language in (A)(ii).

425. *American Forest and Paper Ass'n*, 550 F.3d at 1182.

426. *Id*. at 1181.

427. *Id*. at 1182.

428. *Id*. at 1183.

429. *Id.*

430. *Id.*

431. *Id.*

case-by-case basis, is permissible under PURPA and within the FERC's discretion.[432]

Finally, the court rejected AFPA's argument that, absent a competitiveness requirement in subparagraph (A)(ii), QFs might be subject to rates not meeting the "just and reasonable" requirements of the FPA,[433] reasoning that any rates that might result from invocation of any exception to the mandatory purchase obligation were not at issue in this appeal, and suggesting that a QF could always challenge a rate under the FPA that it believes is unjust or unreasonable.[434]

B. *Natural Gas Policy Act (NGPA)*

The origin of *Burlington Resources Inc. v. FERC*[435] involved the proper interpretation of NGPA provisions that have since been repealed. Section 601 of the NGPA imposed a maximum price ceiling on first sales of natural gas; however, gas producers were allowed to charge above this ceiling to recoup the cost of certain categories of state taxes.[436] In earlier orders interpreting the provision, the FERC held that a state *ad valorem* tax could be added to the maximum price, but changed course following a court remand.[437] In its order on remand, the FERC concluded that such a tax could not be added to the maximum price and that producers must refund some of the tax-related revenues they had received.[438] In 1997, the FERC ordered pipelines from which *ad valorem* taxes had been collected to present producers with a statement of refunds owed for a specified period.[439] The FERC also encouraged producers and pipelines to engage in settlement talks to avoid litigation.[440] Subsequently, the FERC approved "omnibus" settlements between the pipelines and most producers.[441] Burlington Resources Inc. (Burlington), a gas producer, did not join these settlements.[442] It had, however, executed separate settlements with the pipelines, the main purposes of which were to resolve claims regarding "take-or-pay" purchase obligations.[443] These settlements included language that appeared to dispose of all claims relating to the contracts. Based on this language, Burlington had argued that it was not required to refund the tax amounts.[444]

In 2005, the FERC rejected the Burlington settlements and required Burlington to return the *ad valorem* taxes it had collected above the maximum ceiling.[445] These orders had found that because the NGPA bars a purchaser from

432. *Id.*

433. 16 U.S.C. § 824d(a).

434. *American Forest and Paper Ass'n*, 550 F.3d at 1183.

435. 513 F.3d 242 (D.C. Cir. 2008).

436. This provision of the NGPA was repealed in 1993.

437. Colorado Interstate Gas Co. v. FERC, 850 F.2d 769 (D.C. Cir. 1988).

438. *Colorado Interstate Gas Co.*, 65 F.E.R.C. ¶ 61,292 (1993). The D.C. Circuit generally affirmed. *Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478 (D.C. Cir. 1996).

439. Public Serv. Co. of Colorado v. FERC, 91 F.3d 1478 (D.C. Cir. 1996).

440. *Id*.

441. *Northern Natural Gas Co.*, 93 FERC ¶ 61,311, at 62,075 (2000); *Panhandle E. Pipe Line Co.*, 96 FERC ¶ 61,274, at 62,039-40 (2001).

442. *Burlington Res. Inc.*, 513 F.3d at 245.

443. *Id*.

444. *Id*.

445. Burlington Res. Oil & Gas Co. v. FERC, 396 F.3d 405 (D.C. Cir. 2005).

paying more than the maximum price for a first sale of gas, the statute also barred a post-hoc settlement if the producer was allowed to retain the excess over the maximum price ceiling.[446] The court remanded the case back to the FERC in light of the agency's decision to approve the omnibus settlements. [447] The FERC reaffirmed its earlier decision, pointing out distinctions between the Burlington settlements and the omnibus settlements.[448] The FERC stated that because the NGPA included a ceiling that essentially invalidated any private agreement to pay more than the maximum lawful price, the settlements themselves were unlawful.[449] The agency also asserted that the Burlington settlements, unlike the omnibus settlements, were not uncontested, since the pipelines had challenged their legality.[450]

On appeal, the court vacated the FERC orders.[451] First, the court stated that it must consider the "actual meaning" of the Burlington settlements, and agreed with the FERRC that the main purpose of the settlements "was to exchange immediate payments for a reduction in the pipelines' future 'take-or-pay' obligations."[452] However, the court explained that while the issue of refunding ad valorem taxes may not have been the primary purpose of the settlements, "they were within their language, written at a time when. . .the law was deeply unsettled and the parties would have had reason to seek accord."[453] The court also noted that in its approval of the omnibus settlements, the FERC found that they were a reasonable compromise and further encouraged other settlements of the tax refund claims.[454] However, in its remand order, the FERC suggested that "'all such agreements'—including, it seems, the Omnibus Settlements—'are unlawful and unenforceable.'"[455] The court concluded: "[w]e doubt any agency could coherently find a settlement 'fair and reasonable and in the public interest' and 'unlawful and unenforceable' all at the same time."[456] Further, the court stated that the FERC only enjoys prosecutorial discretion when it is actually acting as a prosecutor, which was not the case here; rather, the court stated that the agency acted as an adjudicator.

The court went on to state that if the FERC did not have prosecutorial discretion in this case, then it must either recognize that "'the NGPA does not render unlawful all private agreements allowing a producer to retain funds collected pursuant to unlawfully high prices'" or "accept that it erred by approving the Omnibus Settlements."[457] The court concluded that this was not a case of "simple inconsistency," since the FERC's decision was "unsupported by

446. *Id.*

447. *Id.*

448. *Burlington Res. Oil & Gas Co.*, 112 F.E.R.C. ¶ 61,053, *order on reh'g*, 113 F.E.R.C. ¶ 61,257 (2005).

449. *Id*.

450. *Id*.

451. *Burlington Res. Oil & Gas Co.,* 396 F.3d at 405.

452. *Burlington Res. Inc. v. FERC*, 513 F.3d at 246.

453. *Id.*

454. *Id*.

455. *Id*. at 247 (quoting *Burlington Res. Oil & Gas Co.,* 396 F.3d at 411 (internal quotations omitted)).

456. *Burlington Res.*, 513 F.3d at 247.

457. *Id.* at 247-48 (quoting *Burlington Res. Oil & Gas Co.*, 396 F.3d at 411.

law."[458] The court rejected the FERC's argument that the NGPA's maximum ceiling provisions bars any settlement agreement over past sales gas, finding it to be a misreading of the filed rate doctrine precedent on which it relied.[459] Those cases did not "la[y] down any rule with respect to retrospective settlement agreements concerning past payments for gas."[460] In one case on which the FERC relied, *Southern Union Co. v. FERC*,[461] the issue concerned future sales and not past sales, which was the case here. Further, the court stated that the FERC's "theory completely miscomprehends the nature of settlements negotiated under conditions of uncertainty. . . . [T]he law does not prevent purchasers from later exchanging those accrued rights [i.e., the right to a refund of overpayments] for other valuable consideration."[462] The court also stated that the Burlington settlements appeared to have been negotiated in good faith "with no apparent detriment to third parties."[463] Finally, the court concluded that the pipelines' "second thoughts" about their joining the Burlington settlements did not convert the settlements to "contested" ones or makes their enforcement "coercive."[464]

C. Other Statutes

The Eighth Circuit upheld FERC orders authorizing the reconstruction of AmerenUE's Taum Sauk Pumped Storage Project in Missouri, rejecting arguments that the agency violated the National Environmental Policy Act (NEPA).[465]

The Taum Sauk project's upper reservoir collapsed in 2005, and AmerenUE sought FERC approval to reconstruct it.[466] In response, the FERC issued a Final Environmental Assessment (FEA), which found that the reconstruction activity would not be a major federal action significantly affecting the quality of the human environment.[467] The FEA was focused on the impact of the reconstruction itself, and did not look at the potential impacts of operating the project once its existing license expired in 2010.[468] The FERC also issued a letter order approving AmerenUE's request. Several organizations requested rehearing, arguing that the relicensing of the project in 2010 was a "'reasonably foreseeable future action'" and that, under NEPA, the FERC was required to consider the cumulative environmental impact from *both* the reconstruction of the project and its operation under a future license.[469] The FERC denied rehearing.[470]

458. *Id.* at 248.
459. *Id*.
460. *Id.*
461. 857 F.2d 812 (D.C. Cir. 1988).
462. Burlington Res. Inc. v. FERC, 513 F.3d at 249.
463. *Id.* at 250.
464. *Id.*
465. Missouri Coalition for the Env't v. FERC, 544 F.3d 955 (8th Cir. 2008).
466. *Id*. at 957
467. *Id*.
468. *Id*.
469. *Id*.
470. *AmerenUE*, 121 F.E.R.C. ¶ 61,270 (2007).

On appeal, the court (after finding that one of the petitioners lacked standing for failure to seek rehearing) rejected arguments that relicensed operation was reasonably foreseeable because the reconstruction activity makes licensing more likely.[471] The court pointed to the FERC's letter order, which expressly stated that the approval of the dam reconstruction did not prejudge a determination of the relicense application.[472] The court distinguished precedent cited by the petitioner, finding that none of the cited cases addressed the relationship between reconstruction under an existing license and future operation under a new license.[473] In response to the petitioner's note that the U.S. Forest Service filed comments stating that reconstruction and future operation were connected actions, the court pointed out that, under NEPA, an agency does not have to accept the input of other agencies.[474]

In another case involving an Ameren hydroelectric project in Missouri, the D.C. Circuit concluded that the FERC did not contravene NEPA, the National Historic Preservation Act (NHPA), or the Clean Water Act (CWA).[475] In a 2004 letter to Ameren, the FERC stated that Ameren had violated the terms of its hydroelectric license for the Osage Hydroelectric Project located on the Lake of the Ozarks in Missouri by granting a developer an easement for an effluent discharge pipe and permission to build a seawall on project property.[476] The FERC ordered that the seawall construction cease and that Ameren take steps to mitigate any harm, including facilitating public access to the Lake of the Ozarks and creating a park near the new development.[477] Petitioners, an association of property owners in a resort bordering the lake filed a complaint with the FERC asserting that Ameren's actions concerning the discharge pipe and the seawall violated the license, NEPA, NHPA, CWA, and easements and covenants running with the land.[478] The FERC denied the complaint, finding that most of the violations did not fall within the agency's jurisdiction and that those that were had been adequately resolved.[479] In the meantime, the FERC staff continued to monitor Ameren's actions and issued letter orders reminding Ameren of its obligations.[480] The petitioners sought rehearing of these letter orders, which were denied.[481]

The court upheld the FERC orders on review.[482] With respect to NEPA, the court noted that the agency was only required to prepare an environmental impact statement (EIS) if the work constituted a major federal action that significantly affected the quality of the human environment.[483] The court found

471. *Missouri Coalition for the Env't*, 544 F.3d at 958-59.

472. *Id.* at 958.

473. *Id.* at 958-59.

474. *Id.* at 959.

475. Duncan's Point Lot Owners Ass'n v. FERC, 522 F.3d 371 (D.C. Cir. 2008).

476. *Id*. at 374.

477. *Id*.

478. *Id*.

479. *Duncan's Point Lot Owners Ass'n v. Union Elec. Co.*, 111 F.E.R.C. ¶ 61,190, *order on reh'g*, 112 F.E.R.C. ¶ 61,289 (2005).

480. *Duncan's Point Lot Owners Ass'n*, 522 F.3d at 375.

481. *Union Elec. Co.*, 116 F.E.R.C. ¶ 61,045 (2006).

482. *Id*. at 375.

483. *Id*. at 376.

reasonable the FERC's response that there was no need to prepare an EIS for the pipe and seawall because these activities were not major or significant, and that the FERC permits licensees to do such work without prior approval.[484] The court found "insufficient" the petitioners' argument that an EIS should be prepared for the pipe and seawall because they are under federal control, since that was "not enough to trigger the EIS requirement."[485]

Turning to the NHPA, the court rejected the petitioners' argument that the FERC did not consider the effect of the developer's activities on Duncan's Point, which is eligible to be listed on the National Register of Historic Places.[486] The FERC stated that it had took into account the effect of the pipe and seawall on Duncan's Point, pointing out that agency staff had visited the site, consulted with authorities, and ultimately concluded that there would be no adverse impact on Duncan's Point.[487] The court found this reasonable.[488]

With respect to the CWA, the court noted that the petitioners had not stated why they believed the FERC had violated that statute and, accordingly, failed the requirements of the Federal Rules of Appellate Procedure.[489] Even on the merits, the court stated that the FERC's CWA obligations were limited to verifying the licensee's compliance with obtaining necessary permits for the discharge pipe, and that the FERC had met this obligation.[490]

Finally, the court rejected arguments that the FERC denied the petitioners due process, finding that the FERC "acted professionally and gave petitioners ample notice and opportunity to participate in the proceedings."[491]

484. *Id*.
485. *Id.*
486. *Id*. at 377.
487. *Id*.
488. *Id*.
489. *Id*.
490. *Id*. at 378
491. *Id.*

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