UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2020 Hot Topics in Gas and Power Studio Webcast

December 11, 2020
Studio Webcast

Federal Regulatory Update

Frederick G. Jauss IV

Author Contact Information:
Frederick G. Jauss IV
Husch Blackwell LLP
Washington, DC

fred.jauss@huschblackwell.com
202-378-2309

Federal Energy Regulatory Update

I. Supreme Court

A. Natural Gas Pipeline Rights-of-Way

In *United States Forest Service v. Cowpasture River Preservation Association*,[1] the Supreme Court ruled that because the Interior Department's assignment of responsibility over the Appalachian Trail to the National Park Service did not transform the land over which the trail passes into land within the National Park System, the Forest Service had the authority to issue the special use permit for the construction of the Atlantic Coast Pipeline. The Fourth Circuit had previously vacated the permit for a right of way of approximately 0.1 miles of natural gas pipeline approximately 600 feet below the Appalachian Trail. In its ruling, the Fourth Circuit held that the Mineral Leasing Act did not give the Forest Service the authority to grant the right-of-way, because the Appalachian Trail became part of the National Park System when the Secretary of the Interior delegated authority over the administration of the Appalachian Trial to the National Park Service, and that the Mineral Leasing Act prohibits pipeline rights-of-way though lands in the National Park System.

The Supreme Court determined that the National Trails System Act gave the Forest Service authority to enter into "right-of-way" agreements with both federal agencies and private landowners. The language in the National Trails System Act gave the National Park Service an easement or non-possessory interest to develop and maintain the trail, but ultimate ownership was retained by the Forest Service. Accordingly, the land never entered into the possession of the National Park Service, and the Forest Service retained authority to grant the special use permit for the construction of the Atlantic Coast Pipeline.

II. Appellate Court Developments

A. Electric Power

1. Review of Market Manipulation

In *Federal Energy Regulatory Commission v. Powhatan Energy Fund, LLC*,[2] the Fourth Circuit affirmed the finding of a federal district court that FERC had not waited too long to file its enforcement suit against alleged electricity market manipulation. In 2015, FERC issued a penalty assessment order against several alleged violators of electric anti-market manipulation rules. The alleged violators elected to proceed under the option of having their case heard before a United States Federal District Court. Once before the district court, the parties filed a partial motion to dismiss the complaint, arguing that the bulk of FERC's claims were no longer actionable under the statute of limitations.[3]

The United States District Court for the Eastern District of Virginia held that FERC's claim had not accrued under the statute of limitations until the penalty assessment order had been

[1] 140 S.Ct. 1837 (2020).
[2] 949 F.3d 891 (2020).
[3] 28 U.S.C. § 2462.

issued and the respondents had failed to pay the civil penalties within 60 days of the issuance of the order.[4] The Fourth Circuit agreed, finding that FERC "had no complete and present cause of action until each statutory prerequisite was met . . . ."[5]

2. FERC Authority over Rejection of Power Contracts in Bankruptcy

The Sixth Circuit reviewed the request of Chapter 11 bankruptcy debtors to enjoin FERC from interfering with its plan to reject several electricity purchase contracts that FERC had previously authorized under the Federal Power Act (FPA) or under the Public Utilities Regulatory Policies Act (PURPA). First Energy Solutions, as a market participant with wholesale power purchase agreements and other contracts subject to FERC's authority under the FPA, sought to reject those executory contracts in its restructuring.

Writing *In re First Energy Solutions*,[6] the Sixth Circuit held that the bankruptcy court did possess the ultimate authority to determine whether the debtors could reject the executory contracts. Furthermore, the bankruptcy court was within its rights to enjoin FERC from compelling the debtor from performing under the contracts at issue. However, the bankruptcy court was required to invite FERC to participate in the proceedings and provide an opinion on the disputed contracts. Furthermore, the Sixth Circuit held that the bankruptcy court should not have applied only the business-judgment standard in determining that the debtor could reject the electricity purchase contracts, and should have applied an adjusted standard that accommodated FERC's concurrent jurisdiction in the contracts and considered the impact of the rejection of the contracts on the public interest.

3. Federal/State Jurisdiction in Energy Storage

In Order No. 841, FERC issued a rulemaking that required Regional Transmission Organizations (RTO) and Independent System Operators (ISO) to revise their tariffs to allow for participation by electric storage resources in the capacity, energy, and ancillary services markets.[7] In considering comments on the rulemaking, FERC rejected arguments that states have the jurisdiction to decide whether electric storage resources in the distribution level or behind a retail meter can participate in those RTO and ISO markets. On rehearing in Order No. 841-A, [8] FERC clarified its statements on state jurisdiction, determining that states may not "broadly prohibit" participation by electric storage resources in RTO and ISO markets, as doing so would intrude on FERC's exclusive jurisdiction by prohibiting all consumers from selling into the wholesale electric markets.[9] Petitioners appealed the FERC decisions, arguing that FERC had exceeded its jurisdiction by barring states from "broadly prohibiting" participation by certain types of electric storage resources in the RTO and ISO markets, and had infringed on state jurisdiction to regulate state and local utility matters.

---

[4] *FERC v. Powhatan Energy Fund, LLC*, 345 F. Supp. 3d 682, 695 (E.D. Va. 2018).
[5] *Powhatan*, 949 F.3d at 894.
[6] 945 F.3d 431 (2019).
[7] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018).
[8] *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841-A, 167 FERC ¶ 61,154 (2019).
[9] *Id*. at P. 41.

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Federal Regulatory Update

Also available as part of the eCourse
Hot Topics in Gas and Power

First appeared as part of the conference materials for the
2020 Hot Topics in Gas and Power session
"Federal Regulatory Update"