

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

Maryland Public Service Commission v. Federal Energy Regulatory
Commission

394 U.S. App. D.C. 187 (D.C. Cir. 2011) · No. 09-1296 · Decided February 8, 2011

SUMMARY

The United States Court of Appeals for the District of Columbia Circuit denied Maryland and New Jersey's petition challenging electricity rates established under the Federal Energy Regulatory Commission's Reliability Pricing Model. The court held that FERC adequately explained why the rates were just and reasonable and that substantial evidence supported its conclusion that price increases resulted from transmission constraints and legitimate market factors rather than supplier market power.

CASE DETAILS

COURT	United States Court of Appeals for the District of Columbia Circuit
WRITING FOR THE COURT	Rogers, Circuit Judge; Griffith, Circuit Judge; Edwards, Senior Circuit Judge
JURISDICTION	Federal
DECIDED	February 8, 2011
DOCKET	09-1296
DISPOSITION	denied
PROCEDURAL POSTURE	Petition for review of Federal Energy Regulatory Commission orders adopting and approving the Reliability Pricing Model for electricity-capacity pricing.
STANDARD OF REVIEW	The court reviewed FERC's orders under the arbitrary-and-capricious standard and applied highly deferential review to rate-design judgments. FERC's factual findings were conclusive if supported by substantial evidence.
PRECEDENTIAL VALUE	published
PARTIES	Maryland Public Service Commission, New Jersey Board of Public Utilities v. Federal Energy Regulatory Commission

TOPICS

judicial review of agency action

administrative law

standard of review

appellate procedure

PRACTICE AREAS

administrative law

energy regulation

electricity rate regulation

appellate procedure

QUESTIONS PRESENTED

1. Whether FERC adequately determined that the challenged electricity-capacity rates were just and reasonable.
2. Whether substantial evidence supported FERC's finding that the challenged price increases resulted from legitimate factors, including transmission constraints and incentives for new capacity, rather than supplier market power.
3. Whether FERC's adoption and application of the Reliability Pricing Model was arbitrary and capricious.

HOLDINGS

1. FERC adequately explained why the challenged rates were just and reasonable; it was not limited to finding merely that the Reliability Pricing Model's provisions had been followed.
2. Substantial evidence supported FERC's conclusion that the price increases were attributable to legitimate causes, not the exercise of market power by electricity-capacity suppliers.
3. FERC's orders adopting and applying the Reliability Pricing Model were not arbitrary and capricious and should be upheld.
4. A petitioner challenging a rate need not propose an alternative rate that is itself just and reasonable; determining and fixing the replacement rate is FERC's responsibility.

KEY QUOTATIONS

“Because issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential.” (632 F.3d at 1286)

“It is the Commission's job—not the petitioner's—to find a just and reasonable rate.” (632 F.3d at 1286 n.1)

FACTUAL BACKGROUND

PJM, the regional transmission organization for thirteen mid-Atlantic states and the District of Columbia, proposed replacing its existing capacity-pricing model because it did not sufficiently encourage investment in generating capacity. FERC adopted the Reliability Pricing Model, which used advance auctions, mitigation measures for supplier market power, and pricing that accounted for transmission constraints. Petitioners challenged higher rates in auctions occurring before the model's full three-year advance-delivery mechanism was available, contending that suppliers had used market power to inflate prices.

PROCEDURAL HISTORY

FERC found PJM's preexisting capacity-pricing model unjust and unreasonable, approved a modified Reliability Pricing Model, and later clarified the scope of its approval. Maryland and New Jersey challenged higher rates produced by the new model, arguing that the rates were not shown to be just and reasonable and that suppliers had exercised market power. The D.C. Circuit denied the petition for review.

DISPOSITION

denied

CASES CITED

- PJM Interconnection, L.L.C., 115 FERC ¶ 61,079 (2006)
- PJM Interconnection, L.L.C., 117 FERC ¶ 61,331 (2006)
- PJM Interconnection, L.L.C., 119 FERC ¶ 61,318 (2007)
- FPL Energy Maine Hydro LLC v. FERC, 287 F.3d 1151, 1160 (D.C. Cir. 2002)
- Public Utilities Commission v. FERC, 254 F.3d 250, 254 (D.C. Cir. 2001)
- Sithe/Independence Power Partners v. FERC, 165 F.3d 944, 948 (D.C. Cir. 1999)
- Blumenthal v. FERC, 552 F.3d 875, 885 (D.C. Cir. 2009)
- Tennessee Gas Pipeline Co. v. FERC, 860 F.2d 446, 454 (D.C. Cir. 1988)

OPINION

PER CURIAM.

632 F.3d 1283 (2011) MARYLAND PUBLIC SERVICE COMMISSION and New Jersey Board of Public Utilities, Petitioners v. FEDERAL ENERGY REGULATORY COMMISSION, Respondent American Municipal Power, Inc., et al., Intervenor. No. 09-1296. United States Court of Appeals, District of Columbia Circuit. Argued November 15, 2010. Decided February 8, 2011. Randall L. Speck argued the cause for petitioners.

With him on the briefs was David L. Cousineau. *1284 Robert A. Weishaar Jr., Robert Weinberg, Randolph Lee Elliott, Susan N. Kelly, Paula M. Carmody, William F. Fields, Charles F. Wheatley Jr., David R. Straus, and Stephanie A. Conaghan were on the brief for intervenors PJM Industrial Customer Coalition, et al. in support of petitioners. Joshua E. Adrian entered an appearance.

Carol J. Banta, Attorney, Federal Energy Regulatory Commission, argued the cause for respondent. With her on the brief were Thomas R. Sheets, General Counsel, Robert H. Solomon, Solicitor, and Jennifer S. Amerkhail, Attorney. Paul M. Flynn argued the cause for intervenor PJM Interconnection, L.L.C. in support of respondent. With him on the brief was Barry S. Spector.

John N. Estes III, argued the cause for intervenors PJM Power Providers Group, et al. in support of respondent. With him on the brief were John L. Shepherd, Ashley C. Parrish, David G. Tewksbury, Richard Paul Bress, Randall Verne Griffin, John Longstreth, Donald A. Kaplan, Kenneth R.

Carretta, David O. Dardis, Cortney Madea, A. Karen Hill, Stephen L. Huntoon, Kirk J. Emge, and Michael J. Rustum.

James C. Beh, Shay Dvoretzky, Nicholas G. Terris, and Paul F. Wight entered appearances. Before: ROGERS and GRIFFITH, Circuit Judges, and EDWARDS, Senior Circuit Judge. Opinion PER CURIAM. PER CURIAM: Petitioners, the Maryland Public Service Commission and the New Jersey Board of Public Utilities, challenge higher electricity rates that were the result of a new pricing model the Federal Energy Regulatory Commission adopted to encourage increased investment in capacity.

We deny the petition for review because the Commission adequately explained why the new rates were just and reasonable. Respondent-Intervenor PJM Interconnection, LLC, ("PJM") is the regional transmission organization for thirteen mid-Atlantic states and the District of Columbia. Among its duties, PJM is responsible for preventing interruptions to the delivery of electricity in that region by ensuring that its system has sufficient generating capacity.

In August 2005, PJM filed a proposal to replace its old pricing model with what it called the Reliability Pricing Model (RPM), arguing that the old model did not sufficiently encourage investment in electrical capacity. FERC agreed, and adopted the RPM with some modifications. See PJM Interconnection, L.L.C., 115 FERC ¶ 61,079 (2006) (finding preexisting pricing model to be unjust and unreasonable); PJM Interconnection, L.L.C., 117 FERC ¶ 61,331 (2006) (approving, with conditions, the RPM); PJM Interconnection, L.L.C., 119 FERC ¶ 61,318 (2007) (clarifying nature and extent of order approving the RPM).

Petitioners argue that the RPM allowed suppliers of electric capacity to exercise their market power to set artificially inflated prices in auctions held before May 2008. The Commission anticipated concerns about the suppliers' market power and adopted three measures to mitigate this market power.

First, the Commission oversees the availability of physical capacity and, as a general matter, requires that suppliers offer all available capacity at RPM auctions. Second, where the Commission determines that a supplier has market power, it requires PJM to substitute a proxy bid, determined by a formula that the RPM provides, in the place of the supplier's actual offer.

This pushes high bids down to more competitive levels. And third, what is most relevant to this petition, the RPM encourages the entry of *1285 new suppliers into the market with auctions that set rates three years in advance of delivery.

For example, the May 2008 auction set the rate for the delivery year beginning in May 2011. This lag time allows competition from new suppliers that lack the capacity to deliver electricity now but could develop that capacity within three years of winning a bid. Of course, the protection of the three-year lag would not be available for the sale of electricity that needed to be delivered

before May 2011, and the Commission allowed auctions for those deliveries to proceed under the RPM with a shorter lag.

Petitioners claim that this shorter lag time allowed suppliers to exercise market power to artificially inflate prices in those auctions. They fault the Commission for failing to determine whether the challenged rates were just and reasonable, and for relying instead on the conclusion that the provisions of the RPM were followed.[1] But the Commission did determine that the rates were just and reasonable.

It reviewed analytical reports from expert consultants retained by the states, PJM's Market Monitor (who reviewed the auctions and specifically addressed the issue of market power), and an independent consulting group hired by PJM. Only then did it conclude that there was no reason to believe that market power was being exercised.

The Commission found instead that prices went up in some areas because the RPM accounted for transmission constraints that increased the costs of delivering electricity to those areas. The old pricing model, by contrast, had assumed that capacity created anywhere within PJM's territory could readily be transmitted to any other point in that territory, an assumption that created artificially low prices for areas facing transmission constraints.

The Commission recognized that the price hikes petitioners challenge would encourage much needed long-term investment in energy capacity. And there is substantial evidence the Commission was right. The PJM's independent report found that the RPM spurred an unprecedented amount of potential new resources including approximately 33,000 MW of new generation projects and that reliability had been increased to meet the PJM's target levels.

Given this evidence, we conclude that the Commission had a substantial basis on which to conclude that the RPM was an appropriate tool for increasing reliability in electricity markets, that the RPM did precisely what it was intended to do, even during the transition period before the three-year lag could take effect, and that the price hikes in its wake were attributable to legitimate causes, not the suppliers' exercise of market power.

See, e.g., *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (D.C.Cir.2002) (stating that the Commission's factual findings are conclusive if supported by substantial evidence, which "requires more than a scintilla, but can be satisfied by something less than a preponderance of the evidence").

As we have stated before, "[b]ecause issues of rate design are fairly technical and, insofar as they are not technical, involve policy judgments that lie at the core of the regulatory mission, our review of whether a particular rate design is just and reasonable is highly deferential." *Pub. Utils. Comm'n v. FERC*, 254 F.3d 250, 254 (D.C.Cir.2001) (internal quotation marks omitted).

Accordingly, we uphold the Commission's orders under the arbitrary and capricious standard. See, e.g., *Sithe/Independence Power Partners v. FERC*, 165 F.3d 944, 948 (D.C.Cir.1999). For the foregoing reasons, the petition for review is Denied. NOTES [1] As a preliminary matter, the Commission contends that under our decision in *Blumenthal v. FERC*, 552 F.3d 875 (D.C.Cir.2009), it is not enough for a petitioner to show that the challenged rates are not just and reasonable; the petitioner must also propose rates that are.

See *id.* at 885. But the language cited by the Commission was unnecessary to our holding and inaccurate insofar as it implied that a challenge to rates must propose alternative rates that are just and reasonable. As the Federal Power Act clearly provides, "[w]henver the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate... [under its jurisdiction] is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate... to be thereafter observed and in force, and shall fix the same by order."

16 U.S.C. § 824e(a) (emphasis added); see also *Tenn. Gas Pipeline Co. v. FERC*, 860 F.2d 446, 454 (D.C.Cir.1988) ("Once [FERC determines a rate is unjust], the Commission is required to reach a further determination: the just and reasonable rate to be fixed in place of either an unlawful proposed or existing rate."). It is the Commission's job not the petitioner's to find a just and reasonable rate.