

# **Bond Case Briefs**

*Municipal Finance Law Since 1971*

---

## **UTILITIES - NEW YORK**

### **New York v. F.E.R.C.**

**United States Court of Appeals, Second Circuit - April 22, 2015 - F.3d - 2015 WL 1810416**

Federal Energy Regulatory Commission (FERC) (2012 WL 6641001) issued orders adopting standards and procedures for determining which power distribution facilities were subject to FERC's regulatory jurisdiction and which facilities fell within statutory exception for "local distribution of electric energy," and clarified its orders on rehearing (2013 WL 1700286). State of New York and Public Service Commission of State of New York petitioned for judicial review.

The Court of Appeals held that:

- FERC did not act unreasonably in including 100 kV threshold to clarify otherwise ambiguous distinction under Federal Power Act as amended by Electricity Modernization Act between power facilities over which it did and did not have regulatory jurisdiction within larger scheme of standards and procedures for clarifying its statutory jurisdiction;
- Orders did not authorize FERC to regulate any facility in advance of factually supported, explicit determination of jurisdiction; and
- Orders were not arbitrary and capricious.

Federal Energy Regulatory Commission (FERC) did not act unreasonably under FPA as amended by Electricity Modernization Act in including 100 kV threshold to clarify otherwise ambiguous distinction between power distribution facilities over which it did and did not have regulatory jurisdiction within larger scheme of standards and procedures for clarifying its statutory jurisdiction, since there was record support for selection of 100 kV threshold as initial standard and that standard was not determinative but subject to general and individualized adjustments.

Federal Energy Regulatory Commission (FERC) orders adopting standards and procedures for determining which power distribution facilities were subject to agency's regulatory jurisdiction and which facilities fell within statutory exception for "local distribution of electric energy" did not impermissibly authorize FERC to regulate any facility in advance of factually supported, explicit determination of jurisdiction. Orders established procedure for factfinding requisite to exercise of such jurisdiction, threshold finding of 100 kV operation was followed by further factfinding as to five specified inclusions and four exclusions, and factfinding process continued still further if facility not found within local distribution exception after operating voltage and configuration consideration petitioned FERC for individualized review.

Final orders of Federal Energy Regulatory Commission (FERC), adopting standards and procedures for determining which power distribution facilities were subject to FERC's regulatory jurisdiction, and which facilities fell within statutory exception for "local distribution of electric energy," did not require facilities, as precondition for petitioning FERC for individualized determination of jurisdiction, to apply for technical exemption to organization that had been certified by FERC to develop standards, and, thus, challenged orders did not impose unwarranted procedural obligations as preconditions. Filing of jurisdictional petition and filing for technical exemption were independent avenues by which facilities could seek different forms of relief.

Determination by Federal Energy Regulatory Commission (FERC) which had been based on factual record and its industry expertise, that 100 kV threshold, together with detailed predefined inclusions and exclusions, would effectively identify power distribution facilities comprising the bulk system while ensuring that most local distribution facilities were excluded from its regulatory jurisdiction as statutorily prescribed, was not arbitrary or capricious, and thus would be upheld on petition for judicial review, particularly where FERC would employ full notice-and-comment process upon request for individualized determination.