[Bond Case Briefs]

Municipal Finance Law Since 1971

PUBLIC UTILITIES - FEDERAL

[SFPP, L.P. v. Federal Energy Regulatory Commission and United States of America]

United States Court of Appeals, District of Columbia Circuit - July 31, 2020 - F.3d - 2020 WL 4377850

Partnership oil pipeline filed tariff increases and, after Federal Energy Regulatory Commission (FERC) issued three orders, the Court of Appeals vacated the orders in part.

On remand, FERC issued two further orders that removed the income tax allowance, among other holdings. Pipeline and shippers petitioned for review.

The Court of Appeals held that:

- FERC's decision to remove income tax allowance was not arbitrary and capricious;
- Pipeline was not entitled to reopen administrative record;
- FERC decision to direct partnership oil pipeline to use its originally filed index rates was not arbitrary;
- FERC did not act contrary to law or arbitrarily and capriciously in permitting pipeline to remove deferred tax account from its cost of service; and
- FERC's decision to allow pipeline to recover litigation expenses through three-year surcharge was adequately explained and reasonable.

Federal Energy Regulatory Commission (FERC) reasonably identified double-recovery problem in granting both an income tax allowance and a discounted cash flow return on equity, and thus FERC's decision to remove income tax allowance for partnership oil pipeline was not arbitrary and capricious; FERC explained that granting an income tax allowance for investor-level taxes did not alter investor's discounted cash flow rate of return, but rather it only inflated pipeline's cost of service with tax costs already covered by that return.

Partnership oil pipeline was not entitled to reopen record at Federal Energy Regulatory Commission (FERC) regarding tariff dispute and FERC's decision to remove income tax allowance; even though other parties would not be precluded from arguing that their recovery of income tax allowance did not result in double-recovery of investors' income tax costs, pipeline had fully litigated issue at FERC and Court of Appeals, and FERC could deny pipeline another bite at the apple while leaving door open for others to argue issue on facts of their cases.

Federal Energy Regulatory Commission's (FERC) decision to direct partnership oil pipeline to use its originally filed index rates in its compliance filing, which calculated certain refunds, was not arbitrary; FERC explained that it would not permit refunds following a rate case that were based on index rates different from those previously filed by pipeline and accepted by FERC, cost-of-service litigation neither altered industry-wide annual inflationary changes justifying annual index changes nor addressed annual cost changes pipeline itself experienced, and allowing pipeline retroactive adjustment would have inoculated pipeline from risk of its chosen ratemaking strategy.

Federal Energy Regulatory Commission (FERC) did not act contrary to law or arbitrarily and capriciously in permitting partnership oil pipeline to remove deferred tax account from its cost of service; refunding tax account to ratepayers or continuing to remove it from rate base would have constituted impermissible retroactive ratemaking, as decision by FERC to return account to shippers would have as a necessary predicate a conclusion that account should not have been collected in the first place, regardless of reason that account became overfunded.

Federal Energy Regulatory Commission's (FERC) decision to allow partnership oil pipeline to recover tariff litigation expenses through three-year surcharge was adequately explained and reasonable, despite contention that costs should have been spread over 11 years of litigation, where 85.9% of expenses were incurred over three-year period to which surcharge would apply.