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United Power, Inc. v. Federal Energy Regulatory Commission

United States Court of Appeals, District of Columbia Circuit - September 16, 2022 - F.4th - 2022 WL 4281979

Utility member of generation and transmission cooperative petitioned for review of declaratory order of the Federal Energy Regulatory Commission (FERC), which determined that upon admission of natural gas supplier to electrical cooperative, cooperative was subject to jurisdiction of FERC, and that FERC had exclusive jurisdiction over exit charges, which cooperative charged to exiting utility members of cooperative.

Second utility member and Colorado Public Utilities Commission (PUC) intervened in support of utility member. Cooperative, and a third and fourth utility member intervened in support of FERC.

The Court of Appeals held that:

- Utility member failed to exhaust argument that FERC acted ultra vires or beyond agency's statutory authority, as required for Court of Appeals to exercise jurisdiction over argument;
- Utility member exhausted issue before FERC as to whether FERC's actions were arbitrary and capricious;
- FERC's issuance of declaratory order was within its broad discretion to determine when and how to hear and decide matters; and
- Cooperative's exit charge was a rate charged in connection with provision of wholesale electricity, and thus FERC had exclusive jurisdiction to determine reasonableness of exit charge.

Utility member failed to raise with specificity in application for rehearing its argument that Federal Energy Regulatory Commission (FERC) acted ultra vires or beyond statutory authority in finding generation and transmission cooperative was subject to FERC jurisdiction, such that utility member failed to exhaust argument before FERC as required for Court of Appeals to exercise jurisdiction over issue, and thus Court of Appeals was without jurisdiction to consider utility member's argument; utility member argued in footnote to introduction of its request for rehearing that FERC's action was premature and inefficient, but did not describe FERC's action as ultra vires or beyond agency's statutory authority.

Utility member's discussion in footnote of its application for rehearing before Federal Energy Regulatory Commission (FERC), which described FERC's action in asserting jurisdiction over generation and transmission cooperative as premature and inefficient and specified what FERC ought to have done, was sufficiently specific to permit finding that utility member raised argument before FERC that FERC's actions were arbitrary and capricious, and thus utility member exhausted issue before FERC as required for appellate jurisdiction under Federal Power Act (FPA); utility member's description of what FERC did and what FERC ought to have done, which was wait for state tribunal's resolution of related issue, were specific enough to make out an "arbitrary and capricious" argument without squinting.

Federal Energy Regulatory Commission's (FERC's) decision to issue declaratory order as to FERC's

jurisdiction over generation and transmission cooperative to determine utility member's exit charge was within FERC's broad discretion to determine when and how to hear and decide matters, despite fact that proceeding before state agency was still pending as to whether natural gas supplier's admission to cooperative, from which FERC's jurisdiction was rendered, was proper; FERC explained it had statutory obligation to act on rate filings submitted by electrical cooperative, it did not matter that FERC might have had to revisit its determination and some later time, and providing temporary clarity to parties was useful and reasonable.

Generation and transmission cooperative's exit charge, levied against a withdrawing member, was a rate charged in connection with the provision of wholesale electricity, and thus Federal Energy Regulatory Commission (FERC) had exclusive jurisdiction to determine reasonableness of cooperative's exit charge, although exit charge was not a rate or charge for a jurisdictional service; exit charge protected cooperative's members against rate increases caused by exit of a member while also increasing membership commitment and stability, exit charge was important part of bargain to which a firm agreed when it became part of cooperative, and if there were no obligation to pay an equitable exit charge, cost of electricity under requirements contract would have been higher.

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