[Bond Case Briefs]

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PUBLIC UTILITIES - FEDERAL

[PJM Power Providers Group v. Federal Energy Regulatory Commission]

United States Court of Appeals, Third Circuit - December 1, 2023 - F.4th - 2023 WL 8291307

Electricity generators, nonprofit associations representing electricity generators, Pennsylvania Public Utility Commission, and Public Utilities Commission of Ohio petitioned for review, under Federal Power Act (FPA), of Federal Energy Regulatory Commission's (FERC) order approving electricity tariff, filed by regional transmission operator (RTO), which took effect by operation of law after FERC commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days.

The Court of Appeals held that:

- Petitioners had associational standing to challenge FERC's order;
- FERC's constructive action by operation of law was reviewable under same deferential standards of FPA and Administrative Procedure Act (APA) as for actual action;
- Judicial review encompassed commissioners' mandatory statements explaining their reasons for approving or denying tariff; and
- FERC's rationale for approving tariff was neither arbitrary nor capricious and was supported by substantial evidence.

Electricity generators had associational standing to seek review, under FPA, of Federal Energy Regulatory Commission's (FERC) order approving regional transmission operator's (RTO) tariff that took effect by operation of law, even though generators did not articulate any injuries in their opening briefs, since joint appendix incorporated records from generators' protest before FERC that demonstrated their members suffered economic losses from new tariff that became effective by operation of law due to FERC commissioners deadlocking and failing to issue order accepting or denying change within 60 days, and affidavit attached to one generator's reply brief elaborated on those harms, so generators articulated redressable concrete and particularized injury traceable to FERC approving tariff.

Pennsylvania Public Utility Commission and Public Utilities Commission of Ohio had associational standing to seek review, under FPA, of Federal Energy Regulatory Commission's (FERC) order approving regional transmission operator's (RTO) new tariff that took effect by operation of law due to FERC commissioners deadlocking and failing to issue order accepting or denying change within 60 days, since state entities established cognizable injury by demonstrating they represented states' interests in protecting their citizens and electric ratepayers in traditional government field of utility regulation, their injury was traceable to FERC's approval of tariff by operation of law, and their injury was redressable because vacating or rescinding order would reinstate prior tariff.

Federal Energy Regulatory Commission's (FERC) order accepting electricity tariff that took effect by operation of law, after FERC commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days, was reviewable under same deferential substantial evidence standards set forth in FPA and Administrative Procedure Act (APA) for FERC's orders that took effect by FERC's actual action rather than constructive action by operation of law, and thus, Court of Appeals was not required to review de novo whether new tariff was just and reasonable as predicate to deciding whether FERC's discretion to approve was properly exercised, since FPA and APA prohibited court from substituting its judgment for that of FERC.

Judicial review of Federal Energy Regulatory Commission's (FERC) order accepting electricity tariff that took effect by operation of law, under FPA, after commissioners deadlocked two-to-two and failed to issue order accepting or denying change in tariff within 60 days, encompassed entire record, including commissioners' statements explaining their reasoning; commissioner's statements did more than record each individual rationale for affirming or rejecting rate filing, as they played integral role in judicial review by collectively illuminating FERC's reasons for inaction construed as affirmative order, so thorough consideration of entire record was required to ensure commissioners who did not find tariff unlawful engaged in decisionmaking that was reasoned, principled, and based on record.

FPA's provision, stating that if Federal Energy Regulatory Commission (FERC) permitted 60-day period to expire without issuing order accepting or denying change in rates filed by public utilities because commissioners were divided two against two as to lawfulness of change or if FERC lacked quorum, then failure to issue order accepting or denying change "shall be" considered to be order issued by FERC accepting that change, did not contradict FERC's enabling statute, stating that FERC's actions "shall be" determined by majority vote of members present, since FPA provision concerned only how agency inaction should be construed for limited purposes of rehearing and review but did not illuminate what constituted agency action per se.

Even if Federal Energy Regulatory Commission's (FERC) enabling statute, stating that FERC's actions "shall be" determined by majority vote of members present, were contradicted by FPA's provision, stating that if FERC permitted 60-day period to expire without issuing order accepting or denying change in rates filed by public utilities because commissioners were divided two against two as to lawfulness of change or if FERC lacked quorum, then failure to issue order accepting or denying change "shall be" considered to be order issued by FERC accepting that change, specific FPA's terms prevailed over general terms of enabling statute, as Congress identified narrow circumstances in FPA under which to construe FERC's inaction, in particular way, for specific purpose.

Federal Energy Regulatory Commission's (FERC) rationale set forth in joint statement by two commissioners, construing FERC's deadlocked vote by articulating their reasons for approving as just and reasonable regional transmission operator's (RTO) new electricity tariff that took effect by operation of law, under FPA, was neither arbitrary nor capricious and was supported by substantial evidence, including that new tariff permissibly reflected shift away from regime embraced in prior tariff, to address concern that some market participants might have incentive to depress market clearing prices by offering supply at less than competitive level, and commissioners determined that investors' reliance on prior tariff did not tilt balance against those policy concerns.