Bond Case Briefs

Municipal Finance Law Since 1971

PUBLIC UTILITIES - OHIO

Dayton Power & Light Company v. Federal Energy Regulatory Commission

United States Court of Appeals, Sixth Circuit - January 17, 2025 - F.4th - 2025 WL 227515

Electricity transmission utilities and Ohio Consumers' Counsel (OCC) petitioned for review of Federal Energy Regulatory Commission's (FERC) orders denying utilities' applications for incentive adders, in other words, surcharges or higher wholesale electricity rates, to their return on equity (ROE) for membership in regional transmission organization (RTO), pursuant to FERC rule promulgated under Federal Power Act (FPA), and removing existing RTO adder from only one utility's rates.

The Court of Appeals held that:

- In matter of first impression, very substantial risk standard applies to determining whether collateral attack on agency rule is impermissible;
- FERC's determination that voluntary participation in RTO was required to receive adder comported with FPA;
- Ohio law mandating participation in RTO was not preempted by FPA under conflict preemption doctrine;
- Ohio law mandating participation in RTO was not preempted by FPA under field preemption doctrine;
- FERC did not arbitrarily deny adder for utility whose RTO membership was state mandated; but
- FERC arbitrarily and capriciously removed adder from only one of three utilities.

Electricity transmission utilities' challenge to legality of Federal Energy Regulatory Commission's (FERC) order, creating incentive adder for utilities that joined regional transmission organization (RTO) in order to permit utilities to charge premium above their baseline returns on equity (ROEs), was not impermissible collateral attack, since reasonable firm in utilities' position would not have perceived very substantial risk that FERC's order precluded RTO adder for utilities legally mandated to join RTO, as FERC did not substantially indicate, in either order or on rehearing, any intent to categorically reject applications for adder based on compulsory rather than voluntary RTO membership.

Federal Energy Regulatory Commission's (FERC) determination, in denying applications of electricity transmission utilities for incentive adders to their return on equity (ROE) for membership in regional transmission organization (RTO), that utilities were ineligible for adders because Ohio law mandated their participation in RTO, comported with FPA that reserved RTO incentive adder for utilities that voluntarily chose to join RTO; consistent with Congress's goal in FPA of encouraging RTO participation, FERC excluded from receiving adder those utilities that were required to join RTO by state law because higher rate allowed by adder could not incentivize their membership in RTO.

Federal Energy Regulatory Commission's (FERC) abstention from determining whether FPA

preempted Ohio law mandating electricity transmission utilities' participation in regional transmission organization (RTO), thereby disqualifying them from receiving incentive adders to their returns on equity (ROEs) for voluntary membership in RTO, was not warranted, since FERC's sudden federalism concerns that prompted its abstention could not be reconciled with its past practices of resolving state law questions at the heart of ratemaking proceedings, FERC had authority to interpret validity of Ohio law as necessary to carry out its ratemaking function, and utilities were asking FERC to ignore Ohio law as preempted in agency ratemaking proceedings, not to invalidate that law writ large.

Ohio law, mandating electricity transmission utilities' participation in regional transmission organization (RTO), did not stand as obstacle to or frustrate purpose of FPA provision, reserving incentive adder for electricity utilities that voluntarily chose to join RTO, and thus, Ohio law was not preempted as conflicting with FPA, since Congress's decision not to mandate RTO membership federally in FPA did not imply intent to prevent states from imposing that requirement, especially given that Ohio law furthered Congress's overall goal of increasing RTO participation.

Ohio law, mandating electricity transmission utilities' participation in regional transmission organization (RTO), was not preempted by FPA, which did not occupy field of interstate electricity transmission and, instead, explicitly preserved state authority over certain transmission-related areas, including intrastate transmission and facilities supplying electricity to transmitting entity itself; Ohio's law fit within that scheme because it primarily regulated intrastate transmission.

Federal Energy Regulatory Commission's (FERC) rejection of electricity transmission utility's request for incentive adder to its return on equity (ROE) for membership in regional transmission organization (RTO), on ground that utility's participation in RTO was not voluntary as it was mandated by Ohio law, was not arbitrary and capricious, even though FERC approved similar adders for other utilities participating in same RTO in which utility was member as well as in nearby RTOs, some of which were subject to state RTO membership mandates, since FERC's differential treatment of utility was justifiable in that other members of RTO in which utility participated operated within state statutory schemes that did not mandate RTO participation.

Federal Energy Regulatory Commission's (FERC) rejection of electricity transmission utility's request for incentive adder to its return on equity (ROE) for membership in regional transmission organization (RTO), on ground that utility's participation in RTO was not voluntary as it was mandated by Ohio law, was not arbitrary or capricious due to utility's market disadvantage, particularly for capital improvements, without RTO adder, since neither FPA nor FERC's rule, creating adder for utilities that joined RTO which permitted them to charge premium above their baseline ROEs, required FERC to resolve economic disparities, and adder's purpose was not to ensure competitiveness or capital attraction.

Federal Energy Regulatory Commission (FERC) was permitted to revoke incentive adder given to electricity transmission utility for participating in regional transmission organization (RTO), without concluding utility's overall rate of return on equity (ROE) plus adder was unjust and unreasonable, under FPA, providing that whenever FERC found any "rate, charge, or classification," or "any rule, regulation, [or] practice" was "unjust, unreasonable, unduly discriminatory or preferential," FERC "shall determine the just and reasonable" rate, charge, rule, or practice and "shall fix [it] by order," since FERC found that its practice of granting RTO adders to Ohio utilities was wrong as their participation in RTO was mandated by Ohio law, not voluntary, so FERC "fixed it" by removing their adders.

Federal Energy Regulatory Commission (FERC) arbitrarily and capriciously removed incentive adder from only one of three electricity transmission utilities, whose participation in regional transmission

organization (RTO) was mandated by Ohio law, rather than voluntary as required for utilities to qualify for RTO incentive adder, under FPA, even though FERC determined that three utilities were not similarly situated in that FERC could easily excise its approval of one utility's adder, while removing adders from other two utilities would require disentangling them from multi-issue settlements, since settlements acknowledged that two utilities included 50-basis-point RTO adders, and other utility's rate had 50-basis-point RTO adder that similarly paralleled rates of those two utilities.

Federal Energy Regulatory Commission's (FERC) prior conclusion, in two-decades-old order from different context, that electricity transmission utility's parent company voluntarily integrated into regional transmission organization (RTO) under Public Utilities Regulatory Policy Act (PURPA) and Virginia law, did not estop FERC, under doctrine of regulatory estoppel, from finding that utility did not voluntarily join RTO because Ohio law mandated utility's membership in RTO, since inquiries were distinct and justifiably led to different conclusions, especially considering developments in law from two decades prior.

Copyright © 2026 Bond Case Briefs | bondcasebriefs.com