

4. Whether FERC erred as a matter of law by permitting utilities to set rates under the Federal Power Act by private agreement or by auction without providing any reference to an objective cost or other standard by which FERC can verify that the resulting rates meet the statutory requirement that they be “just and reasonable” and not “unduly preferential or discriminatory?”

5. Whether FERC erred as a matter of law by substituting its own, invented remedy of “disgorgement” of “unjust profits” by individual market participants, found to have manipulated markets or to have otherwise behaved badly, for the statutory remedy in Federal Power Act sections 205 and 206 of refunds to consumers of amounts collected in excess of just and reasonable rates?

6. Assuming FERC has the statutory authority to eliminate the filing and review of actual rates and charges followed by either FERC acceptance or challenge of such rates and charges, whether FERC’s claimed reliance on the “filed rate doctrine” to deny statutory refunds to ratepayers of amounts collected in excess of just and reasonable rates is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law?

7. Whether FERC was arbitrary and capricious in failing to address petitioners’ arguments regarding its lack of statutory authority?

8. Assuming FERC has the statutory authority to rely on the behavior of market participants to determine statutory just and reasonable rates, whether the behavioral rules established in the orders under review are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law and whether the factual findings underlying them are supported by substantial evidence?

Certificate as to Parties, Rulings, and Related Cases

(A) Parties and Amici: The parties to this case are petitioners Colorado Office of Consumer Counsel, Rhode Island Attorney General, New Mexico Attorney General, Utah Committee of Consumer Service, Public Utility Law Project of New York, Inc., National Consumer Law Center on behalf of their low-income clients, and Public Citizen, Inc. (together, “Consumer Advocates”), and respondent Federal Energy Regulatory Commission (“FERC”). Petitioners participated in the proceeding before FERC that is the subject of this petition. The Electric Power Supply Association, Duke Energy Corporation, American Electric Power Service Corporation, The Transmission Dependent Utility Systems and Constellation Power Source, Inc. have moved to intervene in No. 04-1238. Numerous parties have intervened or moved to intervene in the consolidated cases.

Rulings Under Review

Petitioners seek review of orders issued by FERC as set forth below:

1. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, *Order Seeking Comments on Proposed Revisions to Market-Based Rate Tariffs and Authorizations*, FERC Docket Nos. EL01-118-000 and EL01-118-001, 103 FERC ¶ 61,349 (June 26, 2003).
2. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, *Order Amending Market-Based Rate Tariffs and Authorizations*, FERC Docket Nos. EL01-118-000 and EL01-118-001, 105 FERC ¶ 61,218 (November 17, 2003).

3. Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations, *Order on Rehearing*, Docket No. EL01-118-003, 107 FERC ¶ 61, 175 (May 19, 2004).

(C). **Related Cases:** This case was not previously before this Court or any other court. There are four related cases pending before this Court: *Cinergy Marketing & Trading, L.P. v. FERC*, No. 04-1168; *Cinergy Services, Inc. v. FERC*, No. 04-1170; *Public Utilities Commission of the State of California v. FERC*, No. 04-1235; and *Western Gas Resources, Inc. v. FERC*, No. 04-1237. It is our understanding that each of these cases seeks review of the same final orders challenged in this case. By Order issued July 23, 2004, this Court by motion and on its own motion consolidated these four cases with this No. 04-1238 under the lead docket No. 04-1168, *Cinergy Marketing & Trading, L.P. v. FERC*.

Two cases pending in the Court of Appeals for the Ninth Circuit seek review of different FERC orders but raise related issues regarding FERC's statutory authority in regard to "market-based rate tariffs." *See, State of California v. FERC*, 9th Cir. No. 02-73093 ["Whether the filing of a market-based tariff, which states only that rates will be determined "by agreement," coupled with after-the-fact, quarterly reporting of rates for "information purposes," amounts to reliance on unfiled, privately negotiated rates in violation of the Federal Power Act ("FPA")?," etc.]; and *Public Utility District No. 1 of Snohomish County, et al. v. FERC*, 9th Cir. No. 03-74208 ["Whether FERC erred as a matter of law in determining that its prior grant of market-based rate authority to sellers of electricity such as Enron fulfills its obligation under Sections 205 and 206 of

the Federal Power Act to ensure that the rates under contracts subsequently entered into are just and reasonable?"].

Other Attachments

The Docketing Statement and two copies of the orders that are the subjects of the petition are attached.

Respectfully submitted,

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Dated: August 19, 2004