

Appellate Decisions Highlight Requirements for Review of FERC Orders

By Jackson Myers

The *Federal Power*

Act allows any party "aggrieved by an order" issued by FERC to "obtain a review of such order" in a federal court of appeals. But three decisions in the past year by the U.S. Court of Appeals for the D.C. Circuit — which hears most FERC cases — show that, in practice, parties must satisfy several threshold requirements before courts will consider the merits of a petition for review.

The first two decisions concern "standing to sue." Virtually anyone can participate in FERC proceedings, but only entities with "standing" can litigate in federal court. To establish standing, a party must show: (1) a concrete and particularized injury that is (2) traceable to the challenged action and (3) redressable by the court.

In *Independent Market Monitor for PJM v. FERC*, PJM's Independent Market Monitor challenged an order excluding it from certain informal stakeholder meetings. The D.C.



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Circuit dismissed the petition for review, holding that the IMM failed to establish the first prong for standing: injury.

For an organization, establishing injury requires showing that the challenged action directly affected and interfered "with its core business activities" and that the organization "used its resources to counteract that harm." (Organizations with constituent members will have standing if one of their members does, but that principle did not apply here.)

The court held the IMM hadn't made either showing. The court found no evidence that the meetings included information necessary to the IMM's "core business activities," which the court understood to be "monitoring, advising, encouraging compliance and informing others" about PJM's markets. Nor was the IMM's assertion that it had "expended resources" to learn what occurred at the meetings sufficient, at least not without evidence of specific actions it had taken.

The D.C. Circuit's decision in *MISO Transmission Owners v. FERC* considered different elements of standing. There, electricity customers had challenged the rate of return built into MISO's transmission

Why This Matters

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rates and sought refunds for the alleged overcharges.

But the FPA permits refunds going back only 15 months, so 15 months and one day after the first complaint was filed, a different group of customers filed a second complaint challenging the same rate of return, ostensibly trying to extend the refund window.

FERC ultimately set a lower rate of return and ordered refunds based on the first complaint, but it neither granted nor awarded refunds based on the second complaint. Transmission owners petitioned for review, and one of their arguments was that customers' second complaint was improper because it was trying to circumvent the FPA's 15-month cap for refunds.

The D.C. Circuit held that the petitioners lacked standing to challenge the second complaint. Since that complaint hadn't resulted in refunds, the petitioners asserted two other injuries: costs incurred to litigate the complaint, and the threat of similar improper complaints in the future.

The court rejected both theories. Though it assumed that litigation costs were a sufficient injury, that injury was not redressable: Because the petitioners weren't asking for their litigation costs back, the court could not "redress" their asserted injury. And petitioners' concern about future complaints was too speculative. To support standing, a future injury must be "imminent" or "certainly impend-



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ing" rather than merely "possible," and there was no evidence that the transmission owners would imminently face another allegedly improper complaint.

A third recent decision, *Municipal Energy Agency of Nebraska v. FERC*, dealt with a different prerequisite for appellate review: exhausting administrative remedies. There, three cities filed a Section 206 complaint arguing that they should not bear costs for a new transmission project they claimed would not benefit them.

FERC disagreed, relying on a presumption of cost-sharing within an "integrated system" and finding no "special circumstances" that could overcome that presumption. On rehearing before FERC, the cities claimed that special circumstances had rebutted the cost-sharing presumption.

But at the D.C. Circuit, the cities advanced a new argument: that the commission hadn't actually found that the relevant service area was an "integrated system" to trigger the presumption in the first place.

The court refused to consider that new argument. The FPA has an "unusually

strict" exhaustion rule, the court explained. A party not only must seek rehearing before the commission; it also must make "with specificity" every argument it later wishes to press on appeal.

Although the cities had argued on rehearing that FERC's order was "arbitrary, capricious and not the product of reasoned decision-making," the court held that was not specific enough to preserve their "integrated system" argument. Nor did the cities offer any justification for not making that argument to the commission.

So, what can potential litigants take away from these cases? First, take procedure seriously. As these (and other) cases illustrate, the D.C. Circuit enforces non-merits requirements strictly, and it regularly dismisses cases for noncompliance. No matter how strong your merits argument may be, it might never get a hearing unless you comply with the court's procedural requirements.

Second, think about appellate review before the appeal. The FPA's exhaustion requirements mean you need to go into the rehearing process with a firm idea of what you'd like to argue on appeal.

The same goes for standing. Telling the commission about your stake in the case and the costs of an adverse decision isn't just good advocacy — it can also provide a record to support your standing to seek appellate review. Building that record at the commission is especially important, since not all courts of appeals clearly allow parties to introduce new evidence about standing on appeal.

Third, be specific. Throwing in boilerplate language to check a procedural box likely won't cut it. The D.C. Circuit scrutinizes factual representations about standing. In the IMM case, general statements about not receiving (unspecified) information and taking (unclear) remedial actions weren't enough.

And vague criticisms in a rehearing submission that a decision is "arbitrary and capricious" won't preserve more specific arguments advanced on appeal, as *Municipal Energy Agency of Nebraska* shows. ■

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