December 6, 2023

Third Circuit Decision on Judicial Review of Constructively Approved Tariff Revisions

In a December 1 decision in *PJM Power Providers Group v. Federal Energy Regulatory Commission*, the U.S. Court of Appeals for the Third Circuit (the Court) clarified what constitutes a reviewable Federal Energy Regulatory Commission (FERC) order.[1] In its precedential opinion, the Court held that it had the authority to review *constructively* approved tariff revisions filed under Section 205 of the Federal Power Act (FPA) resulting from a two-to-two deadlock among the FERC Commissioners. In such a circumstance, the Court explained that a reviewing court applies the same standard governing judicial review of an order approved by a FERC majority.[2] Thus, *PJM Power Providers Group* helps to clarify the judicial review process of FERC actions accepted by operation of law.

The focal point of the dispute was PJM Interconnection, LLC's (PJM) Section 205 filing amending PJM's then-existing Minimum Offer Price Rule (MOPR) tariff provisions. When PJM submitted the tariff changes in 2021, FERC had four sitting Commissioners (instead of a full staff of five), who were deadlocked two-to-two and thus unable to issue an order accepting or denying the tariff changes within 60 days.[3] As a result, the tariff revisions took effect by operation of law.[4] Per Section 205(g)(1)(B), the Commissioners issued statements expressing their respective views on PJM's proposal.[5] After rehearing requests challenging the acceptance of the tariff changes were denied by operation of law and without an order, various parties petitioned the Court, asking it to review FERC's "action by inaction."[6]

The Court held that Section 205(g) conveyed "Congress's intent to allow [the Court's] review of rate filings enacted by operation of law."[7] Moreover, the Court held that Congress's mandate directing the deadlocked Commissioners to provide statements supporting or opposing the proposed tariff changes to the record "play[ed] an integral role in the Court's review."[8] Indeed, the Court noted that the statutorily mandated statements evidenced FERC's reasoning for inaction, which the Court was bound to construe as an affirmative order.[9] As applied to PJM's 2021 MOPR filing, the Court found that the Commissioners' joint statement supporting the tariff changes identified reasons for finding PJM's filing to be just and reasonable.[10] Further, the Court concluded that FERC's constructive acceptance of PJM's 2021 MOPR tariff revisions was neither arbitrary nor capricious and was supported by substantial evidence in the record.

In summary, *PJM Power Providers Group* instructs that, in enacting Section 205(g) of the FPA, Congress provided an avenue for the federal appellate courts to review tariff changes implemented due to FERC's inaction.

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[1] *PJM Power Providers Grp. v. Fed. Energy Reg. Comm'n*, Nos. 21-3068, 21-3205 and 21-3243 (3d Cir. 2023). The Court's decision is found here.

[2] *Id.* at 40.

[3] *Id.* at 27.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 12.

[7] *Id.* at 32.

[8] *Id.* at 37.

[9] *Id.*

[10] *Id.* at 43.

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