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D.C. Circuit Sides with State Petitioners Challenging Reliability-Must-Run Agreement Rates for Mystic Units 8 & 9 and Everett LNG Terminal

August 23, 2022 | *Scott H. Strauss, Jeffrey A. Schwarz*

Spiegel & McDiarmid LLP attorneys achieved a significant victory that should reduce the bills paid by New England wholesale electric ratepayers to retain two gas-fired generators and their affiliated fuel supplier. In 2018, the owner of Mystic Units 8 & 9 moved to retire the generators, but the system operator, ISO New England ("ISO-NE") found that the units were needed for reliability because they receive their fuel from the Everett LNG Terminal ("Everett"), and thus relieve pressure on the New England's constrained interstate gas pipeline system. ISO-NE and Mystic's owner negotiated a contract to retain the generators under cost-of-service rates from June 2022 through May 2024 and filed the arrangements with the Federal Energy Regulatory Commission ("FERC").

Spiegel attorneys Scott Strauss, Jeff Schwarz, and Amber Martin Stone represented the Connecticut Public Utilities Regulatory Authority, Connecticut Department of Energy and Environmental Protection and Connecticut Office of Consumer Counsel in the evidentiary hearing before FERC and on appeal of aspects of FERC's decision to the D.C. Circuit. On appeal, the Connecticut parties briefed and argued the case jointly with the Massachusetts Attorney General and New England States Committee on Electricity (collectively, State Petitioners). Jeff Schwarz argued the case for State Petitioners in the D.C. Circuit.

In a lengthy August 23 opinion by Chief Judge Srinivasan, and Judges Henderson and Rao, the D.C. Circuit granted State Petitioners' petitions for review, denied Mystic's cross-petitions, and remanded the matter back to FERC. The panel agreed with State Petitioners that FERC acted arbitrarily in holding New England ratepayers responsible for 91 percent of Everett's fixed operating costs—the entire amount allocated to Everett's vaporized LNG sales—even though Everett also sells vapor to customers besides Mystic. The panel also found arbitrary FERC's claim that while it had jurisdiction to approve the Mystic agreement's pass-through of Everett costs, the Commission lacked jurisdiction to require inclusion of a claw-back provision mandating refunds of those costs in the event that Mystic (or Everett) continues operating when the agreement ends. In contrast, the court affirmed the aspects of FERC's decisions challenged by Mystic, including the Commission's decision to reduce the generating units' rate base and to exclude the Mystic owner's cost of purchasing the Everett facility.

A copy of the decision is linked below.

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