

D.C. Circuit Upholds FERC Reduction of Transco Adder

February 19, 2021 | *Cynthia S. Bogorad, David E. Pomper, Stephen C. Pearson*

On February 19, 2021, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion affirming Federal Energy Regulatory Commission (FERC) orders reducing the return on equity (“ROE”) adders paid to three stand-alone transmission companies (“transcos”) operating in the Midcontinent Independent System Operator (MISO) footprint. *Int’l Transmission Co. v. FERC*, No. 19-1190 (D.C. Cir. Feb. 19, 2021).

The appeal stemmed from a 2018 Federal Power Act section 206 proceeding in which Spiegel attorneys Cindy Bogorad, David Pomper and Steve Pearson represented a coalition of MISO transmission customers challenging the ROE adders that three MISO transcos (collectively, the ITC Transcos) were receiving based on their past independence from electricity market participants. FERC had awarded 100 basis point adders to Michigan’s International Transmission Company and Michigan Electric Transmission Company, and a 50 basis points adder to ITC Midwest. The customer coalition had argued that the ITC Transcos lost their independence as a result of a merger through which they were indirectly acquired by two foreign companies — Fortis, Inc. and GIC (Ventures) Pte. Ltd. — whose generation and distribution affiliates participate in Eastern Interconnection energy and capacity markets. FERC had found that the transmission companies’ independence from other market participants had been compromised (though not eliminated) by the merger, and reduced the ITC Transcos’ ROE adders to 25 basis points.

The ITC Transcos challenged FERC’s decision at the D.C. Circuit, arguing primarily that FERC’s determination should have been based on an analysis of the transcos’ geographic proximity to affiliated generation, rather than the broader review of the ITC Transcos’ independence that FERC actually employed. Spiegel attorneys Cindy Bogorad, David Pomper and Amber Martin Stone, along with other parties’ counsel, drafted an intervenor brief defending FERC’s orders.

In the February 19 opinion, the court affirmed FERC’s orders, finding that FERC had reasonably determined that the ITC Transcos’ independence had been compromised. The court’s opinion recited intervenors’ showing that ITC had affiliates “located in [MISO-]bordering areas close enough to be affected by [the ITC Transcos’] decisions.” The court also rejected the ITC Transcos’ contention that FERC’s analysis was limited to a strictly geographic test. The decision preserves substantial refunds and rate reductions resulting from the FERC orders appealed from. A copy of the court’s opinion is available [here](#).

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