SPIEGEL & MCDIARMID LLP

Victory for Orangeburg: Court Directs FERC on Remand to Justify Apparent Unlawful Discriminatory Treatment of Wholesale Customers

July 17, 2017 | *Peter J. Hopkins*

The U.S. Court of Appeals for the D.C. Circuit on July 17, issued a decision vacating and remanding FERC orders challenged by Spiegel & McDiarmid on behalf of the City of Orangeburg, South Carolina. The decision is important to Orangeburg and a step forward in the city's efforts to avail itself of the wholesale market opportunities promised under Order No. 888 and the Federal Energy Regulatory Commission's ("FERC's") restructuring efforts.

Orangeburg's struggle dates back to 2008 when it signed a 10-year contract to purchase electric power for its municipal electric system from a new supplier, Duke Energy Carolinas, at Duke's average system costs. Orangeburg was thwarted in its efforts to implement the contract by decisions of the North Carolina Utilities Commission ("NCUC") and by FERC's refusals to address Orangeburg's claims that the NCUC was interfering with FERC's exclusive jurisdiction over wholesale sales in interstate commerce. The Court's opinion notes that Orangeburg lost some $100 million in expected wholesale power savings due to the loss of the Duke contract.

Orangeburg's prior efforts at judicial review at the state level had been derailed on grounds of standing, mootness, and ripeness. Orangeburg subsequently challenged Duke's and Progress's proposed Joint Dispatch Agreement ("JDA") at FERC on grounds that the JDA would operate in conjunction with and perpetuate the NCUC's control over the utilities' wholesale sales by means of state merger conditions. FERC approved the JDA over Orangeburg's objections and on appeal unsuccessfully claimed Orangeburg lacked standing or should pursue it claims elsewhere. The court held otherwise.

The court of appeals has now squarely directed FERC on remand to answer the merits of Orangeburg's objections that FERC is improperly allowing the disparate treatment of interstate wholesale customers and allowing the state commission to exercise control over wholesale sales. The court succinctly distilled these concerns by saying that "FERC loaded the gun" and "let NCUC grab hold of the gun by declining to preempt the state regulatory regime . . . ."

Orangeburg was represented on appeal by Spiegel & McDiarmid lawyers Jim Horwood, Peter Hopkins and Jessica Bell.

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Related Practices and Services

- Electric
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