IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NRG Power Marketing LLC and Louisiana Generating LLC, Petitioners,	)	
v.	)	No. 10-1061
Federal Energy Regulatory Commission, Respondent.	)	

RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION'S REPLY IN SUPPORT OF ITS MOTION FOR DISMISSAL OR, ALTERNATIVELY, FOR ABEYANCE

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Respondent Federal Energy Regulatory Commission ("Commission" or "FERC") files this reply in support of its motion for dismissal or, alternatively, abeyance. Petitioners fail to adequately explain why immediate judicial review is necessary, or even preferable, while the Commission considers Petitioners' technical concerns in another proceeding.

1. Petitioners' arguments on ripeness (Response at 3-5). Petitioners' claim (Response at 3) that the Commission is "seeking to circumvent the plain text of the statute" is mistaken.

In support of their claim, Petitioners argue (Response at 3) that FERC issued a final order, timely rehearing requests were filed and resolved, and, accordingly, "[u]nder the plain language of [16 U.S.C. § 825*l*(b)], the final order is now ripe for

judicial review." An order may be final, however, yet still not ripe for review. *Sprint Corp. v. FCC*, 331 F.3d 952, 956 (D.C. Cir. 2003) (finding that although challenged order was final, issues still may not be fit for review). Thus, Petitioners' argument (Response at 4) that they are entitled to immediate review "since FERC has issued a final order" is insufficient where, as here, the issue is ripeness.

Petitioners (Response at 4) seek to distinguish *FTC v. Standard Oil Co*., 449 U.S. 232 (1980), by arguing that there the Court held that there was no right to judicial review prior to the agency taking final action, and here the challenged orders are a "*product* of FERC's decisionmaking" (emphasis Petitioners'). However, "cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Here, the challenged orders make no final decision regarding the issues and TLR procedures of concern to Petitioners.

As FERC's motion explains (Motion at 7), the challenged orders rejected Petitioners' efforts to expand the proceeding to broader issues and instead instituted a new proceeding to address those issues. Petitioners' rehearing request pertained only to those broader issues and the Commission has issued no definitive ruling on them. Consequently, the challenged orders are not ripe for review as to those issues. *See, e.g., Toca Producers v. FERC*, 411 F.3d 262, 265-266 (D.C. Cir.

2005) (petition not ripe for review where challenged orders had dismissed complaint on condition that pipeline company make a tariff filing, company had made the filing (which might give petitioners the relief they sought), and the filing was still pending at the Commission).

Petitioners' contentions that the challenged orders "impose an obligation" (Response at 4), and that the issues they seek to raise are entirely legal (Response at 5), are in error for similar reasons. The TLR provisions that Petitioners object to were in effect prior to the issuance of the challenged orders. *See* discussion *infra* at 4; FERC's Motion at 7 and the citation therein. Accordingly, the challenged orders did not impose a new obligation. Moreover, as the objected-to TLR provisions had been approved in a previous proceeding and were already in effect, Petitioners' claim that the challenged orders approved these provisions without considering the statutory standard lacks merit. *See* discussion *infra* at 6-7; FERC's Motion at 3-4.

2. Petitioners' arguments regarding the proceeding FERC instituted to address their concerns (Response at 6-8). Petitioners claim (Response at 7-8) that the Notice of Inquiry is not a substitute for judicial review because Petitioners are entitled to a before-the-fact review of competitive harm. Petitioners' argument again ignores the fact that the two changes to Reliability Rule IRO-006-3 that were the subject of the challenged orders did not implicate the TLR procedures to which

Petitioners object. Those procedures would have remained in effect regardless of whether or not the Commission approved the two proposed changes. The Commission has instituted a proceeding to address Petitioners' objections to the TLR procedures, Petitioners may receive the remedy they seek in that proceeding, and, if not, they may petition for review of any final order, including consideration of any burden of proof arguments they may contend they have (*see* Response at 8).

3. Petitioners' arguments regarding redress by the Court (Response at 8-14). Petitioners contend (Response at 9) that they will suffer additional harm if the appeal is dismissed or held in abeyance. However, there is no basis for Petitioners' claim. The TLR procedures are the same now as before. The two changes addressed alternatives to the TLR procedures and transferred the business practices aspects to the North American Energy Standards Board, but did not change the TLR procedures themselves. NRG conceded this before the Commission. *See* NRG's rehearing request at 11 (complaining that "NERC has . . . proceeded to recommend that the Commission adopt TLR procedures identical to those in place . . . ."); *see also* Order No. 713-B P 12 ("All other provisions of the modified TLR procedure, previously approved by the Commission in Order No. 693, remain the same.").

Despite NRG's statement to the contrary on rehearing, Petitioners now claim (Response at 9) that the new TLR reliability standard is not substantively similar to

the standard it replaced. In the two pages of discussion that follow, however, Petitioners point to no actual changes in the TLR procedures. Instead, Petitioners argue that earlier orders required NERC to make more changes and the challenged orders did not, so they "represent[] a step backwards" (Response at 11). To the contrary, the Commission's undertaking to examine the issues Petitioners raise, instead of waiting for NERC, would seem to be a step forward. In any case, Petitioners have pointed to no immediate effect caused by the challenged orders.

Petitioners also emphasize (Response at 9) that the Commission "conceded" that NRG "raised valid concerns" about the TLR Reliability Standard. However, recognizing that the issues require examination is not a concession that changes will ultimately be needed, is not a substitute for receipt and consideration of public comment, and does not address the precise changes, if any, that might be needed.

Petitioners' assertion (Response at 12) that the Commission could have ordered NERC to submit a modified reliability standard is true but not very relevant. Petitioners' argument seems to assume that a new standard can be devised with the snap of a finger, but as Petitioners' own filings demonstrate, the TLR procedures are technical and complex. *See* Response at 11 (arguing, *inter alia*, that the Interchange Distribution Calculator inaccurately measures flows across a transmission line potentially leading to numerous problems, including interconnection reliability operating limits violations). Additional proceedings

would be necessary regardless of whether the Commission chose to address Petitioners' concerns by instituting a separate proceeding or by remanding to NERC. The Commission chose to institute a separate proceeding which is ongoing, and Petitioners have provided no credible reason why the Court should interfere with that decision.

4. Petitioners' arguments regarding issues at stake (Response at 14-15).

Petitioners' argument, that the Court must take immediate action because FERC is ignoring statutory requirements to consider competitive effects, is wholly without merit. Petitioners' argument ignores the fact that Reliability Rule IRO-006-4 (the rule at issue here) is, in all relevant respects, the same as its predecessor, IRO-006-3. *See* discussion *supra* at 4. In 2007, the Commission approved IRO-006-3 (along with 82 other proposed standards) as satisfying Federal Power Act § 215, 16 U.S.C. § 824o (which requires, *inter alia*, consideration of "effect of a standard on competition"). *See* Order No. 713 P 42 ("In Order No. 693, the Commission approved an earlier version of [IRO-006-4], IRO-006-3"); *Mandatory Reliability Standards for the Bulk-Power System*, Order No. 693, FERC Stats. & Regs., Regs. Preambles ¶ 31,242, P 1 (the 83 approved standards "meet the requirements of Section 215 of the FPA") and P 960 (specifically approving IRO-006-3). These findings were not appealed.

In the orders challenged here, the Commission approved two narrow changes to IRO-006-3. Petitioners did not contend that these two changes would render the TLR reliability standard anti-competitive or, indeed, that the changes would have any unlawful effect. Instead, Petitioners launched a general attack on IRO-006-4, contending that provisions carried over from IRO-006-3 (which had already been approved) result in discriminatory service curtailments because of flaws in the Interchange Distribution Calculator contains flaws. As Petitioners raised objections to TLR procedures that were not changed by the orders at issue, the Commission's decision to address these objections in a separate proceeding is entirely proper.

Conclusion

In sum, as demonstrated in the Motion to Dismiss, the challenged orders are not ripe for review, and the petition for review should be dismissed. In the alternative, the petition should be held in abeyance until the Commission has completed the ongoing proceeding.

Respectfully submitted,

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May 24, 2010

NGR Power Marketing, LLC, et al. v. FERC **Docket No. RM08-7**
D.C. Cir. No. 10-1061

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P.25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 24th day of May 2010, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system or via U.S. Mail, as indicated below:

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