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Give One, Give All: D.C. Circuit Requires FERC to Treat Public Utilities Equally

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by Gordon P. Erspamer, Roger E. Collanton

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If an agency gives one utility a filing deadline break, it needs to be willing to give it to all similarly situated utilities, unless it can state a very good reason not to. That was the message the D.C. Circuit recently sent FERC in *Westar Energy, Inc. v. FERC*, __ F.3d ___ , 2007 U.S. App. LEXIS 844 (D.C. Cir., January 16, 2007). The Court's opinion, while certainly not breaking new legal ground, reaffirms the Court's insistence that regulatory agencies like FERC apply the same rulebook to all the players.

The facts in *Westar Energy* are relatively straightforward. FERC allowed Kansas City Power and Light Company ("KCPL") to submit a corrected annual report for the amount of electricity that KCPL transmitted in interstate commerce in 2001, even though the deadline to do so had passed months before.[1] After learning that KCPL was allowed to file a late correction, Westar Energy reviewed its transmission reports and concluded that it too would submit a corrected report for the 2001 calendar year.

FERC rejected Westar Energy's request for a deadline waiver on the grounds that; (1) the clearly defined deadline had already passed, (2) waving the deadline would create a "snowball effect" of requests from other similarly positioned parties, (3) FERC had never suggested that it would ignore the express deadlines, and (4) denying a waiver for Westar Energy was not inconsistent with allowing KCPL to make a late finding because a FERC-mandated audit had caused KCPL's delay in filing a corrected report.

On review, the D.C. Circuit held that none of the first three grounds stated by FERC, either singly or in the aggregate, could explain the difference in treatment for KCPL and Westar Energy. Furthermore, while the Commission could treat parties differently if there was a timing delay due to an audit, the Court found "not a shred of evidence" that FERC was in fact responsible for any delay on the part of KCPL. Since "a fundamental norm of administrative procedure requires an agency to treat like cases alike," the Court vacated FERC's Order and remanded Westar Energy's request to the Commission for further review.

Footnotes:

[1] FERC charges public utilities an annual fee to recoup costs expended to regulate them. 42 U.S.C. § 7178. The amount each entity pays depends on each entity's share of the "megawatt-hours of transmission of electric energy in interstate commerce." 18 C.F.R. § 382.201(a)-(b). Each public utility must submit an annual report to FERC, of the megawatt-hours it transmitted in interstate commerce. Each calendar year's annual report is due April 30 of the following year (e.g., the 2001 report is due April 30, 2002), and can be corrected up until the end of the calendar year in which it is due (e.g., the 2001 report can be corrected up until December 31, 2002).