09/24/85 Mid-Tex Electric v. Federal Energy Regulatory

1985.CDC.0000223 (1985) | Cited 0 times | D.C. Circuit | September 24, 1985

Before: BORK and STARR, Circuit Judges, and CORCORAN,* United States Senior District Judge for the District of Columbia.

2. The two FERC orders under review are Order No. 298, Final Rule, 48 Fed. Reg. 24,323 (June 1, 1983), and Order No. 298-A, 48 Fed. Reg. 46,012 (Oct. 11, 1983).

3. Although the court in South Carolina Elec. & Gas Co. v. ICC, 236 U.S. App. D.C. 258, 734 F.2d 1541 (D.C. Cir. 1984), did not expressly make this point, that is the clear implication of its discussion of the shippers claim that "depreciation accounting was currently being used in ratemaking." Id. at 1545. If the ICC's accounting rule had operated like FERC's CWIP rule, the ICC rule would have bound both the agency and the customers to accept depreciation accounting in ratemaking. Instead, in the case the shippers cited, the ICC has simply set out cost figures based on the new system of accounting, along with cost figures based on the old system of accounting, not as a matter of record (and a fortiori, not as a matter of law) but as additional information relevant to the reasonableness of the rates. Id. at 1545-46.

4. In Public Systems v. FERC, 196 U.S. App. D.C. 66, 606 F.2d 973 (D.C. Cir. 1979) (Public Systems I), we noted that "on numerous occasions the Supreme Court has recognized both the importance of competition in regulated industries and the responsibility of regulatory agencies to encourage competitive forces. has been required to examine the impact on competition of ratemaking orders, the issuance of utility securities, and industry supply practices." Id. 982 (footnotes omitted). It may well be that FERC's responsibility to "encourage competitive forces" compels FERC either to consider the potential anticompetitive effects of a proposed rule at the rulemaking stage or to supply an adequate remedy that allows wholesale customers to avoid those effects when the rule is applied in ratemaking. As explained in text, we do not reach this question but we believe FERC may find it necessary to do so on remand.

5. Lest this aspect of our decision be misunderstood, we emphasize that we are not relying on Pubic Systems' claim that it "presented a detailed comparative analysis of state and federal regulation" that demonstrated "a high probability that price squeeze would result from liberalized or indiscriminate CWIP." Brief for Public Systems at 18. We have examined the record citations offered in support of this allegation, and we think that Public Systems greatly exaggerates. The first citation, J.A. at 691-92, contains nothing more than an assertion that FERC practices such as tax normalization and forecasted test year periods "already often yield wholesale rates greatly in excess of comparable retail rates." Id. at 692 n.1. The second, J.A. at 702, contains what Public Systems referred to as a "laundry list of favorable [federal] regulatory practices," id., including those already mentioned and others -- with no showing that state regulatory practices, in these respects or in other offsetting respects, were any less "favorable." The final citation, J.A. at 1062, simply reiterates, citing only the citations we have just discussed, the assertion that FERC's "rate-setting methods are more generous to suppliers than are the methods of virtually all state commissions." We do not see in Public Systems' allegations, unsubstantiated as they are, a quantum of evidence sufficient to oblige FERC to undertake a detailed comparative study of state and federal

ratemaking policies on remand, though, as earlier noted, FERC might well conclude that this is now necessary.

6. We vacated the price-squeeze portion of FERC's Pennsylvania Power Co. decision in Boroughs of Ellwood City, see 731 F.2d at 963 n.5, 979, but we expressly stated that "we do not have occasion in this case to consider the validity of the Commission's announced 'general rule' of not remedying a price squeeze that is the product of different policies and procedures at the state and federal level." Id. at 974. Instead, we found that FERC "went beyond its 'general rule' in this case; while stating that a price squeeze resulting from a utility's discretionary decision as to when to file retail and wholesale rate increases presents a more compelling case for a price squeeze remedy," the Commission found mitigating circumstances to excuse just such a result in this case. Id. at 975. We reversed because FERC had completely ignored the effects of the price squeeze and because we found no circumstances that would mitigate or even excuse price discrimination. Id. at 979. We concluded that FERC had "not exercised its discretion under Conway in a manner consistent with the purpose of the Conway doctrine to guard against price discrimination by retail suppliers against their municipal competitors." Id.

7. We note that even if we assume the validity of FERC's general policy against remedying "regulatory" price squeezes, it by no means necessarily follows that FERC is not obliged to consider "regulatory" price squeeze effects in the rulemaking context. FERC's general policy is addressed to situations in which federal ratemaking policy, as expressed in a valid FERC rule or regulation, differs from state ratemaking policy. That is not inconsistent with the proposition that, in promulgating rules and regulations, FERC is obliged to consider "regulatory" price squeeze effects and any other anticompetitive effects the proposed rule make have. Federal policy, as expressed in the Federal Power Act, may in fact mandate that FERC do so. We express no opinion on that question.