United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1224 **September Term, 2014**

FILED ON: FEBRUARY 3, 2015

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

CONSUMERS ENERGY COMPANY, ET AL.,
INTERVENORS

Consolidated with 14-1020

On Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*

J U D G M E N T

These petitions for review of orders of the Federal Energy Regulatory Commission were presented to the Court and briefed and argued by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the petitions be dismissed.

Petitioner Midland Cogeneration Venture Limited Partnership seeks review of five FERC orders issued over the course of four years. We conclude that we lack jurisdiction over all of Midland's challenges and therefore dismiss its petitions for review.

Midland's challenges primarily center around two orders that FERC issued in 2010: the Facilities Agreement Order, 133 FERC ¶ 61,238 (2010), and the Agency Agreement Order, 133 FERC ¶ 61,238 (2010). In particular, Midland argues that: (1) in orders addressing requests to rehear and/or clarify the Facilities Agreement Order and Agency Agreement Order, FERC

unlawfully allowed late-filed contracts to be enforceable prior to their effective dates; (2) the Agency Agreement Order failed to consider that the contract it accepted for filing breached the contract accepted for filing by the Facilities Agreement Order; and (3) certain rates billed to Midland by Intervenor METC were impermissible. Because petitioners seeking to invoke our jurisdiction to review FERC orders "must first 'petition for rehearing of those orders and must *themselves* raise in that petition *all* of the objections urged on appeal,'" *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1114 (D.C. Cir. 2001) (quoting *Platte River Whooping Crane v. FERC*, 876 F.2d 109, 113 (D.C. Cir. 1989)), we lack jurisdiction over all of Midland's challenges. *See id.*; 16 U.S.C. § 825*l*(b); *see also City of Nephi v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998) (holding that, if a petitioner fails to challenge a particular FERC order, it lacks jurisdiction to collaterally attack that order in challenges to other orders).

Although Midland was a party to the Facilities Agreement Order proceeding, it failed to seek rehearing of that order at all. Midland is therefore barred from seeking judicial review of that order; indeed, it does not directly challenge that order before this court. Instead, Midland attempts to collaterally attack that order in petitions for review of subsequent FERC orders. That prevents us from addressing all of Midland's challenges arising out of the Facilities Agreement Order as we are generally prohibited from exercising jurisdiction over collateral attacks on prior FERC orders. *See City of Nephi*, 147 F.3d at 934. Midland argues that this rule does not apply to its challenge regarding pre-filing contract enforceability because FERC only explained that it would allow such enforceability in response to Intervenor METC's subsequent motion to clarify the Facilities Agreement Order. But FERC's response to METC's request for clarification did not relieve Midland of its duty to seek rehearing of the Facilities Agreement Order if "a reasonable firm in [Midland's] position 'would have perceived a very substantial risk that [the Facilities Agreement Order] meant' what the Commission [later said] it meant." *Dominion Res., Inc. v. FERC*, 286 F.3d 586, 589 (D.C. Cir. 2002) (quoting *ANR Pipeline Co. v. FERC*, 988 F.2d 1229, 1234 (D.C. Cir. 1993)). Given FERC's *Prior Notice Order*, 64 FERC ¶ 61,139 (1993), providing that, if a utility files "an otherwise just and reasonable cost-based rate" after new service has commenced, it will only require the utility to refund the time value of the revenues collected before filing, Midland was on notice of such a risk. For the same reason, because FERC only imposed a time-value-of-revenues remedy in the Facilities Agreement Order, Midland was on notice that the Order found the rates contained in that agreement to be just and reasonable. Accordingly, we lack jurisdiction to hear Midland's present challenges to the Facilities Agreement Order.

We are similarly without jurisdiction to hear Midland's claims relating to the Agency Agreement Order. Although Midland sought rehearing of that order, it did so only to challenge rates billed to it by METC -- a claim that itself was an impermissible collateral attack on a prior FERC order, as those rates were set by the contract at issue in the Facilities Agreement Order. Midland's failure to raise either prefiling enforceability or breach of contract in its petition for rehearing of the Agency Agreement Order deprives this court of jurisdiction over those claims.

After oral argument, Midland submitted a letter pursuant to Rule 28(j), in which it contends that FERC did not argue below that one of Midland's challenges constituted an impermissible collateral attack. It further contends that *PSEG Energy Resources & Trade LLC v. FERC*, 665 F.3d 203, 210 (D.C. Cir. 2011), stands for the proposition that FERC waives an argument that a petitioner's claim constitutes an impermissible collateral attack on an order unless FERC so states in that order. But *PSEG* did not address that issue in the context of a holding concerning this court's jurisdiction. Because our jurisdiction to review FERC orders is limited by statute, and "[n]either FERC nor this court has the authority to waive th[o]se statutory requirements," *Platte River Whooping Crane*, 876 F.2d at 113, FERC's failure to argue below that one of Midland's challenges was an impermissible collateral attack does not affect our jurisdiction.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk