United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1085 **September Term, 2015**

FILED ON: JULY 1, 2016

AMERICAN TRANSMISSION SYSTEMS INCORPORATED, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

EXELON CORPORATION, ET AL.,
INTERVENORS

Consolidated with 14-1136

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

Before: KAVANAUGH, MILLETT, and WILKINS, *Circuit Judges*.

JUDGMENT

These petitions for review were considered on the record from the Federal Energy Regulatory Commission and on the briefs and arguments of the parties. 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). For the reasons stated below, it is

ORDERED and ADJUDGED that the petitions for review be dismissed.

Petitioners are American Transmission Systems, Inc. and other electricity transmission providers that together have formed PJM Interconnection, LLC ("PJM"), a regional transmission organization that coordinates the movement of electricity in the eastern United States. Petitioners and PJM entered into two contractual agreements that govern the interstate generation and transmission of electricity, subject to the jurisdiction of the Federal Energy Regulatory Commission. Those agreements are the 2005 Consolidated Transmission Owners Agreement ("Owners Agreement") and the PJM Operating Agreement ("Operating Agreement").

Under the *Mobile-Sierra* doctrine, contractual agreements governing the rates for electricity are presumptively valid and may be altered by the Commission only if it determines that they "seriously harm[] the public interest." *Morgan Stanley Capital Group Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 554 U.S. 527, 530 (2008); *see United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *see generally Oklahoma Gas and Electric Co. v. FERC*, No. 14-1281 (D.C. Cir. July 1, 2016).

In 2011, the Commission directed transmission providers to remove all provisions from any tariffs or agreements subject to the Commission's jurisdiction that "grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, FERC Stats. & Regs. ¶ 31,323 (2011), 76 Fed. Reg. 49,842, 49,885 ¶ 253 (August 11, 2011) ("Order No. 1000"). Such provisions generally gave incumbent providers the right to construct new facilities "even if the proposal for new construction came from a third party." *South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014). The Commission reasoned that such provisions were anti-competitive because they deterred development efforts by those who were not parties to the agreements. Order No. 1000, 76 Fed. Reg. at 48,886 ¶ 256.

Petitioners objected that Order No. 1000 violated the *Mobile-Sierra* doctrine. The problem for petitioners, however, is that Order No. 1000 applies only to the removal of rights of first refusal, and petitioners have preserved no argument that either one of their agreements actually contained a right of first refusal for the *Mobile-Sierra* doctrine to protect. That leaves this court without jurisdiction. Congress has generally foreclosed judicial review of any objections to Commission orders unless they are first presented to the Commission itself in a request for rehearing. *See* 16 U.S.C. § 825*l*(b) (limiting judicial review to objections "urged before the Commission in [an] application for rehearing unless there is reasonable ground for [the petitioner's] failure so to do"); *Indiana Utility Regulatory Comm'n v. FERC*, 668 F.3d 735, 739 (D.C. Cir. 2012) (confining the courts' jurisdictional "purview * * * to the four corners of [petitioner's] request for rehearing").

In their compliance filing with the Commission, petitioners identified four provisions from their agreements that purportedly established rights of first refusal forbidden by Order No. 1000: Section 4.2.1 of the Owners Agreement, and Sections 1.4(c), 1.7, and 1.5.6(f) of the Operating Agreement. J.A. 6–9, 11.

Regarding Section 4.2.1, the plain text only obligates petitioners to build certain projects when ordered to do so by the Commission. In its compliance order, the Commission rejected petitioners' assertion that the Section also contained an implied right of first refusal to build those projects. J.A. 75. Then, in its order on rehearing and clarification, the Commission specifically held that Order No. 1000 did *not* require the removal of Section 4.2.1 from the Owners Agreement. *Id.* at 158 (¶ 129 & n.250); *see id.* at 156 (¶ 122 n.229). Petitioners did not seek rehearing of either the Commission's initial decision or its rehearing and clarification decision. So our review is barred.

Ditto for Section 1.7 of the Operating Agreement. The Commission held in its rehearing and clarification order that the provision did not need to be removed because it was only a "reliability default provision[] that obligate[d] an incumbent transmission owner to build." J.A. 158 (¶ 129 & n.250); *id.* at 156 (¶ 122 n.229). Once again, petitioners did not challenge that determination in a request for rehearing, precluding our review.

The Commission failed to address Section 1.4(c) of the Operating Agreement in its compliance order, but petitioners never challenged that failure or sought to compel the Commission's decision on rehearing. Thus any claim that Order No. 1000 somehow interfered with rights of first refusal under Section 1.4(c) is also jurisdictionally barred.

As for Section 1.5.6(f) of the Operating Agreement, PJM argued in its own compliance filing that removing that provision was unnecessary because the Commission had already held in a prior proceeding that it did not create a right of first refusal. J.A. 144 (citing *Primary Power LLC*, 131 FERC ¶ 61,015 PP 63–64 (2010); *Primary Power, LLC*, 140 FERC ¶ 61,052 P 18 (2012) (order on rehearing)). PJM nevertheless proposed modifying the provision to "alleviate any confusion as to [its] interpretation or application." *Id.* Petitioners did not object to PJM's proposed modification, and the Commission accepted PJM's proposed change. The Commission then explicitly held in its rehearing and clarification order that, "following the effective date" of PJM's single proposed revision, "neither PJM's [tariff] nor its Agreements provides a federal right of first refusal." *Id.* at 162 (¶ 148). Petitioners did not seek rehearing of that decision or otherwise object to PJM's proposed revision on rehearing. Most importantly, petitioners did not seek rehearing of the Commission's final determination that nothing in either the Owners Agreement or the Operating Agreement created a right of first refusal. Accordingly, we again lack jurisdiction to consider any argument that this provision might contain a right of first refusal.

Finally, at oral argument in this court, petitioners contended that, when "read together in the circumstances of their negotiation and filing with [the Commission]," Sections 5.2 and 5.6 of the Owners Agreement created a right of first refusal with respect to certain types of construction projects. Oral Arg. Tr. 45–46 (May 4, 2016). As a general rule, this court does not consider points raised for the first time at oral argument. *See Chamber of Commerce of the United States v. EPA*, 642 F.3d 192, 210 (D.C. Cir. 2011). Here, we are jurisdictionally barred from doing so. *See* 16 U.S.C. § 825*l*(b); *Indiana Utility Regulatory Commission*, 668 F.3d at 739.

Accordingly, because petitioners failed to preserve any argument before the Commission that either the Owners Agreement or the Operating Agreement actually contained a right of first refusal that is even arguably subject to *Mobile-Sierra* protection, we lack jurisdiction to entertain their challenges to the Commission's determination that *Mobile-Sierra* does not apply to their agreements, and the petitions for review must be dismissed.

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 the resolution of any timely petition for rehearing or rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a).

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk