

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-1123

September Term, 2005

FILED ON: OCTOBER 20, 2005 [926065]

ARIZONA CORPORATION COMMISSION, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT

EL PASO NATURAL GAS COMPANY, ET AL.,
INTERVENORS

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

Before: GINSBURG, *Chief Judge*, and EDWARDS and ROGERS, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record compiled before the Federal Energy Regulatory Commission and on the briefs and arguments of the parties. It is

ORDERED AND ADJUDGED that the petition be dismissed without prejudice to the ability of the petitioners to argue in El Paso Natural Gas Company's pending rate proceeding, F.E.R.C. Docket No. RP05-422-000, that neither the Commission's orders in the Capacity Allocation Proceeding, *see El Paso Natural Gas Co.*, 99 F.E.R.C. ¶ 61,244 (2002); *El Paso Natural Gas Co.*, 104 F.E.R.C. ¶ 61,045 (2003), nor the decision of this court in *Arizona Corp. Commission v. FERC*, 397 F.3d 952 (2005), precludes the argument that El Paso caused the capacity shortfall in 2000-01 by exercising market power to withhold capacity.

Petitioners' chief concern in bringing this case is that if they do not prevail here with respect to their non-preclusion argument, then they may be estopped from arguing in the subsequent rate

proceeding that El Paso acted to withhold capacity on its pipeline. As a matter of prudence, this issue should not be resolved by the court unless it arises and is of consequence in the subsequent rate proceeding. To the extent the Commission later precludes petitioners from raising arguments they have raised in the proceeding under review, they may seek redress in this court at that time.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.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 rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

FOR THE COURT:

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk