

## D.C. Circuit Reverses FERC Policy on Station Power

On May 4, 2010, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated and remanded for further proceedings orders of the Federal Energy Regulatory Commission (FERC) allowing generators interconnected to the California Independent System Operator (CAISO) to avoid paying retail charges by netting their station power against their gross output. *Southern California Edison Co. v. FERC*, No. 05-1327. Station power is the energy used for generators' own heating, lighting, air conditioning, and office equipment needs. The D.C. Circuit determined that FERC had failed to adequately explain how it could preempt California's authority to establish a netting period for station power in the retail market or otherwise allow utilities to impose consumption charges.

Charges to generators for station power have been a contentious issue at FERC. To address this issue, FERC adopted a policy that station power taken from the grid is not a retail sale if a generator's production of power over a one-month period exceeds its station power requirements. If, however, a generator takes more power from the grid than it produces in a month, the purchase of station power is treated as a retail sale. By netting station power consumption against gross generation output, generators avoid retail charges provided they produce more power than they consume over a one-month period.

Southern California Edison (SCE) challenged the implementation of FERC's netting policy under the CAISO tariff. SCE argued that FERC lacks jurisdiction over retail energy sales and exceeded its authority by using a netting methodology to determine whether utilities can assess full retail charges on the station power consumed by generators. The D.C. Circuit agreed with SCE and vacated FERC's orders. The court found that FERC's policy creates a jurisdictional standard that is "arbitrary and unprincipled," because the jurisdictional determination relies on the length of a netting period. In addition, the court explained that FERC cannot conclude that a transaction is not a retail sale, unless it can claim that the transaction is a wholesale sale or transmission that falls within FERC's jurisdiction.

### IMPLICATIONS

The D.C. Circuit opinion is likely to lead to potential challenges of other transmission tariff provisions governing station power. Consequently, the opinion could result in additional retail revenue streams for utilities and impose additional costs on generators.

### FOR ADDITIONAL INFORMATION

If you would like more information on the D.C. Circuit's opinion and its implications, please contact Andrew Art, Vincenzo Franco, Jay Ryan, or any member of the firm's Electricity Practice at (202) 298-1800.