



Litigation

Our Approach

Van Ness Feldman lawyers look for creative and traditional solutions to assist clients in preventing and resolving controversies. Our litigation team has extensive experience in representing client interests before the U.S. Supreme Court, the U.S. Courts of Appeals, federal district courts, state courts and administrative agencies, as well as negotiating multi-party settlements involving state and federal agencies and nongovernmental organizations.

Experience with FERC Regulations and Administrative Proceedings

The firm is actively involved in administrative litigation before the Federal Energy Regulatory Commission (FERC) as well as in cases in the U.S. District Courts and the U.S. Courts of Appeals. For three decades, we have represented clients in some of the most hotly contested issues, bringing our experience and in-depth knowledge of federal energy, environmental and natural resource laws to help clients successfully resolve controversies ranging from judicial challenges of regulatory decisions, to enforcement proceedings brought by Federal or state agencies, to litigation before district courts, appellate courts, and the U.S. Supreme Court.

Among the precedent-setting proceedings the firm has been involved with include: litigation of the reliability consequences of a transmission order; defending against allegations of the exercise of market power in new ISO-administered, bid-based reserves markets; supporting a pipeline's request for market-based pipeline transportation rates; and conventional FERC rate and certificate matters.

Success in FERC administrative proceedings often requires that clients maintain ongoing contact with FERC Commissioners and Staff. These meetings include not only formal visits with Commissioners, but also smaller, less formal meetings with key officials on specific matters. Van Ness Feldman regularly assists clients with setting up these meetings, developing position papers and talking points, and participating in the meetings, as appropriate. A number of our attorneys have served in senior legal positions at the FERC, including Solicitor (Howard Shapiro), General Counsel (Bob Nordhaus and Doug Smith), Associate General Counsel for Energy Projects (Bob Christin), Senior Attorney for Energy Projects and Director of the Office of Hydropower Licensing (John Clements) and Staff Attorney for Electric Rates and Corporate Regulation (Peg Moore and Cheryl Ryan). Our broad experience in client representations before the FERC and our professionals' first-hand experience within the agency demonstrate that the firm has substantial working knowledge of FERC rules, orders, and procedures.

As required by federal statute, appeals of FERC orders must be filed in the U.S. Courts of Appeal. Van Ness Feldman provides a full range of appellate litigation services including representation in the Courts of Appeal and the U.S. Supreme Court. One of the firm's members, Howard Shapiro, has argued 17 cases before

the Supreme Court.

Environmental and Natural Resources Litigation

Van Ness Feldman is an effective advocate before agencies and in the courtroom, whether clients face a difficult enforcement action or potentially costly cleanup liability. Among other matters, we have represented clients in private cost recovery actions, enforcement proceedings brought by EPA or state agencies, and review proceedings concerning conditions or denials of permits based on environmental or ecological requirements. These representations have resulted in numerous settlements and voluntary cleanup agreements, both with private parties and with governmental entities, and have greatly reduced both costs and uncertainty for our clients.

In one case, after almost ten years of dialogue and additional study, EPA finally agreed to amend its Record of Decision and dramatically scale back the remedy it had chosen under CERCLA to clean up a closed municipal landfill.

In another, EPA agreed to assign cleanup liabilities in a former mining district based upon the geographic location of each company's former activities, notwithstanding EPA's position that the environmental harm was indivisible throughout the mining district.

Although we have enjoyed considerable success in resolving conflicts informally and collegially, we do not hesitate to recommend more adversarial approaches. The firm's litigation team includes former enforcement officials of the agency, some of whom were instrumental in developing key provisions of EPA's settlement policy.

Representative Matters

Energy Litigation

- **Western Markets Energy Crisis Refund Proceedings.** We represent several electric utilities (both investor-owned and municipally-owned) and marketers in the ongoing administrative litigation concerning refunds for sales in western markets during California's 2001 electricity crisis. We also represented parties that argued successfully for termination, without refunds, of a related case concerning sales in the Pacific Northwest.
- **Market Manipulation Proceedings.** We represented numerous sellers, including investor-owned electric utilities, power marketers and municipally-owned utilities, during a FERC investigation into allegations that the companies engaged in "Enron-like" market-manipulation practices. We were involved in all aspects of the proceedings, and the matters were either dismissed or settled with FERC Trial Staff based on a finding of no market manipulation.
- **Rate and Tariff Proceedings.**

- *Interconnection Agreements.* We represented one of the largest municipal utilities in the country in a proceeding concerning the allocation of the costs of upgrading a substation to accommodate the interconnection of five new electric generating facilities. The generators challenged our client's method of allocating the costs of actual and anticipated upgrades, and pressed for a refund over time of the amounts they would pay for the upgrades. The result was that our client received full reimbursement for the upgrade costs, a cost allocation methodology acceptable to our client was established, and our client was not required to give the generators transmission credits.
- *ISO/RTO Proceedings.*
 - We also represent a major public utility in ongoing CAISO tariff proceedings in which the CAISO is seeking to redesign its market and restructure market rules for energy sales and use of transmission into and out of the CAISO control area. The outcome of these proceedings will strongly affect our client's decision as to whether, and to what extent, it will participate in CAISO-administered markets for the sale of energy that is surplus to the requirements of our client's native load.
 - We represented a large Midwestern investor-owned utility in the extremely contentious lost revenue recovery proceedings involving the integration of numerous transmission owners in the Midwest and Mid-Atlantic regions into FERC-approved Regional Transmission Organizations. The firm successfully negotiated and filed the first comprehensive bilateral settlement agreement accepted by the FERC, which served as the model settlement agreement for numerous other bilateral settlements.
 - We represented Georgia Transmission Corporation (GTC) as intervenor in a federal district court proceeding in Georgia to uphold the federal government's issuance of a special use permit authorizing GTC to construct, operate, and maintain a transmission line and substation on a portion of a national forest.
- *Natural Gas Proceedings.*
 - The firm represented Texas Gas Transmission, LLC in its Natural Gas Act Section 4 rate proceeding before the FERC, including providing comprehensive legal and regulatory counseling with respect to expert rate testimony and strategic FERC litigation matters. The case was settled without a requirement that the company file another rate case.
 - On behalf of the Trailblazer Pipeline Company, the firm was instrumental in developing a strategy which resulted in a settlement with FERC staff and most parties and which severed the interests of those parties who would not settle. The severed parties chose to litigate the case before an Administrative Law Judge and the decision by the presiding Administrative Law Judge would have resulted in a rate higher than the rate filed by the company. Following that decision, the severed parties withdrew their opposition to the settlement.
 - The firm represented Canyon Creek Compression Company in a Section 4 rate proceeding with a highly unusual and successful outcome. Because of the unique nature of the applicant, the company was able to negotiate a settlement that provides for a cost of service rate tracked through annual filings instead of a stated rate tariff.

- The firm has represented pipelines in tariff proceedings dealing with natural gas quality, interchangeability and hydrocarbon dew point. In 2006, the firm successfully litigated the issue of the appropriate dew point safe harbor on behalf of Natural Gas Pipeline Company of America.
- **State Court Litigation.** We represent a municipal utility in a complex commercial litigation contract dispute regarding rights and responsibilities under a 50-year power sales agreement.
- **Renewable Energy Credit Litigation.** We successfully represented a coalition of renewable generators in obtaining a declaratory order from the Federal Energy Regulatory Commission on the ownership of RECs under PURPA contracts. We also represent renewable generators in litigation before federal courts regarding REC ownership.
- **Annual Charges Litigation.** The firm successfully represented a consortium of hydropower licensees before FERC and the U.S. Court of Appeals for the D.C. Circuit regarding FERC's annual charges program, which concluded in 2006 and resulted in over \$10 million in refund credits and substantially reduced annual charges bills.
- **Judicial Review Proceedings.**
 - *Ninth Circuit Proceedings.* We represent several electric utilities (both investor-owned and municipally-owned) and marketers as both petitioners and intervenors in the ongoing Ninth Circuit appellate litigation stemming from FERC-ordered refunds for sales in western markets during California's 2001 electricity crisis. In several of these proceedings, our lawyers have argued the case before Ninth Circuit panels on behalf of individual clients or larger coalitions.
 - *Endangered Species Act.* We represented a hydroelectric facility in seeking judicial review of an order of FERC regarding the scope of Section 7(a)(2) of the Endangered Species Act.

Environmental and Natural Resources Litigation

- **Judicial challenges to major EPA regulations.** A challenge to effluent limitations for the secondary precious metals industry under the Clean Water Act, resulted in the government's agreement to proposed revised regulations (which were ultimately enacted).
- **Endangered Species Act Proceedings.** Members of our practice have participated in the litigation and resolution of landmark ESA disputes, including the negotiation of an agreement between Colorado, Nebraska, and Wyoming and the Department of the Interior regarding the allocation of water and other resources to benefit endangered species in the central Platte River Basin.
- **Mobile Source Rulemaking Litigation.** Van Ness Feldman was involved in litigation brought by the Sierra Club to force EPA to issue air toxics standards for mobile sources; challenges to EPA's California waiver approval for OBD II systems; and the aftermarket industry's attempt to obtain detailed OBD design information from vehicle manufacturers. Over the years, we have been involved in litigation arising from other EPA mobile source rules.

Indian Law Litigation

- **Contract Dispute Litigation.** Van Ness Feldman successfully litigated before the Court of Federal Claims for AeroCare Medical Services, an emergency ambulance service on the Navajo Reservation, in

a contract dispute with the reservation's health provider. Arguing that the health provider's procurement process was outside of the Federal Acquisition Regulations and had no other statutory base, Van Ness Feldman secured a summary judgment motion with the Department of Justice that was very favorable to our client.