



## Litigation

### ENERGY LITIGATION & APPELLATE REVIEW

#### *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.

### *Representative Matters*

#### *Electric 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.
- **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.
- **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.
- **Hydropower Litigation.** Demonstrating how the firm's regulatory capabilities also apply to litigation and administrative proceedings, the firm argued before the U.S. Court of Appeals for the D.C. Circuit, on behalf of intervenor PacifiCorp, in *Hoopa Valley Tribe v. Federal Energy Regulatory Commission* (FERC) (Case No. 09-1134). The case involves the Hoopa Valley Tribe's appeal of FERC's denial of certain interim environmental conditions to be imposed on the annual license for PacifiCorp's Klamath Hydroelectric Project. The firm also serves as counsel to PacifiCorp on licensing matters and in connection with the Klamath Hydroelectric Settlement Agreement, an agreement among the United States, the Governors of California and Oregon, and a number of local counties, irrigators, tribes and conservation groups providing for the future removal of PacifiCorp's licensed Klamath River dams. The D.C. Circuit justices requested information from FERC about the Settlement and, because FERC is not a party to the Settlement, FERC attorneys deferred to Van Ness Feldman to present facts about the Settlement and its impact on the D.C. Circuit proceeding.

### *Natural Gas Litigation*

- Represented Dominion Cove Point LNG, LP in a Natural Gas Act Section 4 rate proceeding. The firm was instrumental in developing strategy, managing discovery, and helping the client reach an uncontested settlement with Commission Staff and all active parties.
- 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.
- We represented the operator of natural gas pipelines in seeking judicial review of a FERC order regarding the scope of FERC's jurisdiction under the Hinshaw Amendment, Section 1(c) of the Natural Gas Act.