



To: EFTA Members

From: Kurt Helwig, President & CEO

Date: January 17, 2014

Subject: Today's Leon Appeal Hearing

Earlier today I attended the appeal of the NACS vs FRS ruling at the U.S. Court of Appeals, District of Columbia Circuit. The three judges hearing the appeal were: Edwards, Tatel, and Williams. The judges asked probing and insightful questions and spent time discussing the difference between fixed, variable and incremental costs and which costs the Fed is allowed to consider.

At one point Judge Williams expressed surprise that the Fed didn't define the word "incremental". The attorney for the Fed stated that they "looked at all costs that were not strictly prohibited, and felt that unless prohibited, other costs could be considered." Further, the Fed felt that it did not have to define "incremental costs."

The attorney for The Clearing House (Seth Waxman) noted that it was never the intention of Congress that issuers not be allowed to recover legitimate costs. Mr. Waxman was unflappable and handled the Judges questions with aplomb. On the face of it, his reasoning seemed to resonate with the Judges. There is a reason why he was the former Solicitor General for the United States.

I'm not sure that you can always get a sense on how Judges may rule based on their Q&A, but I felt that the Fed had a good day. The Judges seemed to express skepticism of significant parts of the NACS arguments. At one point, Judges Edwards and Tatel basically told the NACS attorney that they are going to lose the Chevron 1 argument so he might want to focus on something else. The Chevron 1 argument holds that Courts should defer to agency interpretations of statutes unless such interpretations are found to be unreasonable.

EFTA will continue to keep you apprised of events as they unfold. If you have any questions or wish to discuss this matter, please feel free to contact me.