

# Legislative Update



November 2016

## D.C. Circuit Dismisses Public Citizen Suit on FCA8

On Oct. 25, the D.C. Circuit Court of Appeals dismissed Public Citizen's petition for review of the Federal Energy Regulatory Commission's (FERC) failure to address the results of ISO-New England's Forward Capacity Auction 8 (FCA8). FCA8 left consumers with \$3 billion in capacity costs after the last-minute closure of Brayton Point – which many surmised was calculated to benefit the plant's owners, who received significantly higher payments to their other facilities as a result of the constrained supply.

Following the 2014 auction, the Commission voted 2-2 on whether to investigate allegations of manipulation, allowing the rate to go into effect under operation of law. Chairman Bay and Commissioner Clark issued a joint statement saying they would vote to investigate whether the auction results were manipulated by the withholding of capacity. Commissioners LaFleur and Moeller believed the tariff had not been violated and did not appear to be tainted by market power.

Under the Federal Power Act, only Orders of the Commission are reviewable - Because the deadlock meant there was no FERC Order, petitions for rehearing were not considered.

Many hoped the Court of Appeals would intervene, seeing the inherent unfairness of not only the auction, but also the absurd result that would have at least been reviewable if another Commissioner had voted against investigating. Unfortunately, the court of appeals interpreted FERC's organizing statute and the Federal Power Act literally and determined that FERC had not taken action, leaving the court with nothing to review. However, a similar case concerning another government agency was compelling, and the Court dismissed for lack of jurisdiction.

The decision strengthens the need for the "Fair RATES Act," legislation that passed the House this Congress with NEPPA's support. The bill would make deadlocked votes reviewable by both FERC and the courts.

## Generators Challenge NY Subsidies

Generators in the New York ISO system filed suit challenging recently-enacted subsidies to nuclear plants in the state. The competitive generators say the subsidies run afoul of a recent Supreme Court decision limiting state remedies to bring new generation online inside regions with a mandatory capacity market. The Court said the Federal Energy Regulatory Commission preempted out-of-market state actions, but also indicated that some subsidies would be allowable.

## Clean Power Plan Cases Advance

On Sept. 27, the U.S. Court of Appeals for the D.C. Circuit heard over seven hours of arguments in the case challenging the Environmental Protection Agency's (EPA) Clean Power Plan.

One question will be whether the Court applies the usual *Chevron* deference to an agency's reasonable interpretation of an ambiguous statute, or a more heightened standard for regulations of "great significance." That question implicates the

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“transformative” nature of the rule, which was heavily debated. Challengers spoke to the vast economic consequences of the rule and the unusual use of beyond-the-fence-line measures, saying that Congress would have had to give clearer direction to EPA if it intended to authorize such dramatic requirements. Defenders pointed out that the rule simply accelerates existing trends in the power sector, and that EPA’s interpretation was a pragmatic and reasonable reading of the statute.

Surprisingly, the judges did not seem persuaded by one of the most prominent issues in the challengers’ case. Challengers had found fault with EPA’s use of Sec. 111(d), which curiously was codified with two competing versions – one of which appeared to preclude regulating any point source already subject to regulations under Sec. 112, the air toxics section. EPA regulated mercury from power plants under Sec. 112 in 2013.

On Oct. 13, litigants filed opening briefs in the case challenging EPA’s emissions standards for new, modified, and reconstructed power plants under Sec. 111(b) of the Clean Air Act. The case is separate from, but corollary to, the case against the Clean Power Plan (which covers existing plants). Challengers argue the standards for new and reconstructed plants are based on technology that is not “adequately demonstrated” – carbon capture and sequestration – and that they are unachievable by commercial plants that did not receive federal clean coal demonstration funds. EPA has said the “individual components” of the technology have been adequately demonstrated, and under the Clean Air Act, that is sufficient to show the technology is viable.

Any rule for existing sources under the Clean Air Act must come after a rule governing new sources. Therefore, if the new source rule is struck down, EPA would be unable to implement the Clean Power Plan for existing sources until it is rewritten.

## **CR Funds Government Through Dec. 9**

Late in the evening on Sept. 28, the House of Representatives passed a ten-week long Continuing Resolution (CR) to fund the federal government at the current year level of \$1.067 trillion through Dec. 9. Members then left to campaign and will return after the Nov. 8 election for a four-week session to pass additional funding, which could serve as a vehicle for tax extenders, energy bill provisions, and other matters.

## **Senate Sends House First Energy Bill Volley**

On Oct. 26, the Senate Conferees considering S. 2012 sent a bipartisan package to the House Conferees for consideration. The details of the package have not been released to stakeholders, but the move comes after several weeks in which negotiations appeared to be at an impasse. How and when the House Conferees will respond is unclear at this time. Given that the two bills are very different, and the time left in the session is short, the prospect of reaching a stand-alone agreement that can pass both chambers and be signed into law this year remain low. Provisions may be included in a year-end omnibus, but which sections have enough support to be enacted is not yet clear.

## **FERC Announces Technical Conference on Storage Resources**

FERC will hold a Nov. 9 technical conference on electric storage resources. FERC staff will explore the circumstances under which it may be appropriate for electric storage resources to provide multiple services, whether the RTO/ISO tariffs need to include provisions to accommodate these business models, and how the Commission may ensure “just and reasonable compensation” for these resources in the RTO/ISO markets.

## **FERC Finalizes New Reliability Standard on Geomagnetic Disturbance**

On Sept. 22, FERC approved Order 830, a new reliability standard addressing the vulnerability of electric transmission systems to geomagnetic disturbances (GMD), which occur when the sun ejects charged particles that interact with and cause changes in the earth’s magnetic fields. In a related action, On Oct. 13, President Obama signed an executive order directing the Department of Energy (DOE) to conduct tests to protect the electric grid and other infrastructure from “space weather,” such as solar flares.