BLANK ROME LLP
COUNSELORS AT LAW

FEBRUARY 2016 ■ NO. 2

Energy, Petrochemical and Natural Resources

2016 Starts with a Bang: A Review of Major Environmental and Energy Developments This Year to Date

Action Item: There have been three energy developments of note in 2016 already: (1) The Supreme Court put the brakes on the administration's Clean Power Plan; (2) the Supreme Court reversed the Circuit Court, upholding FERC Rule 745 regarding demand response in a decision that could actually increase air pollution; and (3) new rules related to hydraulic fracturing in Pennsylvania went live with controversy and doubt about their legal validity. Businesses should keep a close eye on these legal developments and others arising in the energy industry, as they could have significant implications on their organizations.

The first two months of 2016 have started off with a bang in energy law. Here is just a sampling of what has happened to date.

Supreme Court Stays EPA's Clean Power Plan

On February 9, the United States Supreme Court issued orders on a 5 to 4 vote granting emergency stay applications filed by opponents of EPA's Clean Power Plan ("CPP"). The orders do not explain the majority's rationale for the stays. The petitioners had argued that the CPP was already causing irreparable harm and that the CPP was way out of line with the powers granted to EPA under the Clean Air Act.

The stay is unprecedented because it marks the first time in history that the Supreme Court has stayed a federal regulation before the D.C. Circuit has ruled on the merits of the challenge to the regulation.

The CPP had required states to start submitting implementation plans by 2018. Pennsylvania was already well underway with crafting its CPP plan. Despite the stay, though, Pennsylvania Governor Tom Wolf has said that Pennsylvania will continue full speed ahead with the state plan.

Some legal experts have said that the chances that the D.C. Circuit would uphold the CPP went from very low after the stay to better than even—overnight—upon the sudden death of Supreme Court Justice Scalia who voted for the stay. Even if the CPP is eventually upheld by the D. C. Circuit Court and then the Supreme Court, it is virtually impossible that EPA can maintain its current CPP deadlines.

Supreme Court Upholds FERC's Demand-Response Rule

On January 26, the Supreme Court, by a 6 to 2 vote (Justice Alito recused himself), overturned the D.C. Circuit's decision on FERC's demand-response rule, thereby upholding FERC Order 745. Rule 745 established uniform compensation levels for suppliers of demand response resources in the market.

The PJM Market Monitor has said that the essential concept of true demand-response (also known as load response) is end users reducing their use of electricity in response to power grid needs or from competitive wholesale electricity market economic signals. When end users simply go off the power grid and turn on their own diesel generator (in non-emergency situations), that is not demand response but simply shifting how demand is met. When that happens, demand is being met by less efficient and less clean sources of energy than is produced by the wholesale generation market.

While those diesel engines (being used in non-emergency situations) are regulated in some respects by federal and state law, they are not subject to the same stringency and standards of air pollution laws or costs of compliance under which wholesale power plants operate as major sources under the Clean Air Act. What's worse is that those end users and aggregators (who operate and dispatch groups of diesel generators at different locations) are able to sell the faux "demand response" into the market for a price to them.

This is no insignificant issue. One aggregator identifies its resources as a "Virtual Power Plant" and total demand response under its control as over 8,000 MW. That is a substantial amount of generating capacity to be allowed to escape emissions accountability on the same standards applicable to real power plants.

Those were the reasons that FERC Rule 745, which allowed these practices, was challenged. The D.C. Circuit held that while the FERC rule applied technically only to the wholesale market, its real target was about demand response, which is part of the state level retail market and, thus, out of bounds for FERC. The court reasoned that Congress provided FERC with the authority to remove barriers to demand response, not to regulate it.

The Supreme Court reversed—surprising most legal and energy experts. The court rejected the notion that if FERC's action relating to the wholesale market has some effect on the retail market, then FERC is out of bounds. Just because FERC's actions in the wholesale market have an effect on the retail market does not mean that FERC is regulating the retail market.

Environmentalists call this decision a "win," but it may very well result in more air pollution as those big diesel generators crank up more and more (and their owners are enriched every time they do, to boot). Also, the decision creates an unlevelled competitive playing field as private diesel generators, sans the same air emissions control equipment and costs of compliance as regular generating plants, are allowed to compete in the same marketplace.

EQB Approves Updates to PADEP's Oil and Gas Regulations

While the administration has proven unable to craft a consensual budget for the Commonwealth, it has passed (some would say crammed down) new conventional and unconventional oil and gas regulations. The Pennsylvania Environmental Quality Board ("EQB") approved the Chapter 78 rules on February 3.

The new rules govern surface activities and complement the existing rules, which govern subsurface activity. The new rules governing unconventional (i.e., deep) drilling cover things like use of pits for drilling waste, disposal of drill cuttings on site, secondary containment, gathering lines, temporary pipelines, water management plans, beneficial reuse of brine, and protection of public resources.

This rules package has been a firestorm of controversy. The process used by DEP to "add on" to the Chapter 78 draft package that was on the table when the Wolf administration came on board was labeled by an industry group as "flawed to the point of being fraudulent" and an "abuse of process."

The story behind these rules began back in 2011, and the direction therefor took guidance from the strictures of Act 13 of 2012. Out of the gate, the Wolf administration pulled the pending draft rules package. Then they "reworked" them several times. In the meantime, the whole Oil and Gas

Technical Advisory Board ("TAB"), the body that is supposed to be a partner in making such rules, was fired and replaced. A new separate advisory board for unconventional oil and gas development was created. They actually disapproved the reworked package. But the administration went ahead anyway and the EQB, which is hardly independent of any administration, approved the rules.

DEP and the industry differ wildly on the prospective costs of the new regulatory regime. DEP said the maximum annual cost for unconventional operators would be $31 million, with a maximum initial cost of $73 million. But an industry estimate pegs the costs at $2 billion—with no corresponding environmental benefit. The Independent Regulatory Review Commission ("IRCC") was so struck by this difference that it commented that there must be some basic misunderstanding about what the new Chapter 78 package even involves.

The process may leave the Chapter 78 package vulnerable. DEP made what some have said are substantial changes to the package in April 2015 via Advanced Notice of Final Rulemaking ("ANFR"). Some examples cited were a new definition of "other critical communities," new standards for centralized storage tanks, site remediation provisions, prohibition of use of centralized wastewater impoundments, and noise mitigation. Indeed, DEP in the ANFR admitted that it contained new and significant changes to the pending proposed rules.

An ANFR is a mechanism used for DEP to comment on comments to the original proposed regulations, not to make new substantive rules. So there is a real question about whether the new Chapter 78 Rules are proper under the Regulatory Review Act.

All of this, and still 10 months left in 2016!

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