Federal Energy Policy Update
Developments Affecting Renewable Energy

Kevin J. McIntyre, Jones Day
Eighth Annual Conference: Renewable Energy in the Midwest
Presented by Law Seminars International
October 3, 2016, Minneapolis, MN

• Happenings at the Federal Energy Regulatory Commission
  ➢ Changes in FERC Leadership
  ➢ New Requirements for Renewable Generators: Order Nos. 827 and 828
  ➢ Competitive Transmission Planning Update

• Developments in the Appellate Courts
  ➢ FERC v. EPSA and Hughes v. Talen Energy; DC Circuit to Review the CPP

• Federal Legislative Update
  ➢ Extension of the Production/Investment Tax Credits
  ➢ Senate and House Pass Energy Legislation

• Other Federal Agencies Update
  ➢ IRS Issues Guidance to Wind Developers
  ➢ Plans for Grid Modernization and Offshore Wind

• Presidential Candidates’ Energy Platforms
Happenings at the FERC: Changes in FERC Leadership

FERC as of September 2016

Norman C. Bay

Tony Clark  Cheryl A. LaFleur  Colette D. Honorable
Changes in FERC Leadership

FERC as of October 2016

Norman C. Bay

Cheryl A. LaFleur

Colette D. Honorable

Changes in FERC Leadership

Filling FERC Vacancies

• President Obama has not yet nominated anyone to either vacancy; no consensus on likely nominees

• Possibilities:
  o Pat McCormick: Chief Counsel, Senate Energy and Natural Resources Committee
  o Robert Powelson: Commissioner, Pennsylvania Public Utility Commission; incoming President, National Association of Regulatory Utility Commissioners
  o Travis Kavulla: Commissioner, Montana Public Service Commission; President, National Association of Regulatory Utility Commissioners
Happenings at the FERC:
New Requirements for Renewable Generators

Order No. 827: Reactive Power Requirements for Wind Generators

- In June 2016, FERC amended the pro forma LGIA and SGIA to require newly interconnecting wind generators to provide reactive power, eliminating an existing exemption
  - Technology improvements and cost reductions
  - Increasing wind generation as share of overall generation, especially in certain markets
- Effective September 21, 2016
- Compensation issue deferred to a new proceeding
Order No. 828: Frequency and Voltage “Ride Through” Capability for Small Generators

- In July 2016, FERC amended the *pro forma* SGIA to require that newly interconnecting small generators (≤ 20 MW) not automatically disconnect during under- or over-frequency or under- or over-voltage situations
  - Technology improvements and cost reductions
  - Increasing amounts of distributed and small generation as share of overall generation, especially in certain markets
- Effective September 21, 2016
- States maintain authority to adopt (or not) similar rules for state-jurisdictional interconnections
The Latest on Order No. 1000 and Competitive Transmission Planning

• Too early to declare victory under Order No. 1000
• The transmission planning and project selection “machinery” of Order No. 1000 is still fairly new and results are mixed
  – SPP: Awarded first project under its planning process in April 2016, but cancels the line three months later
  – PJM: Awarded its first project in July 2015 after already having reopened bidding once, and imposed a six-month halt in August 2016 after finding modeling errors
  – MISO: Issued RFP for its first project in January 2016, and received 11 proposals by July deadline; anticipates award by December 2016
• In July 2016, FERC held a technical conference on progress with Order No. 1000 and competitive transmission planning – and stakeholder reviews are mixed

Supreme Court on the State-Federal Jurisdictional Divide:
FERC v. EPSA
FERC’s Demand Response Order

• Order 745: Demand Response Compensation in Organized Wholesale Energy Markets (March 2011); affirmed on rehearing, Order No. 745-A (Dec. 2011)
• Required organized wholesale energy markets (e.g., MISO) to pay compensation for demand response (DR).
• Specifically: In an organized energy market, a DR resource must be compensated for the service it provides to the market at the market price for energy (LMP), provided:
  • the DR resource is able to balance supply and demand as an alternative to a generation resource, and
  • dispatch of that DR resource is cost-effective as measured by net benefits.
• Drew dissent, controversy, appeals.

Overturned at Court of Appeals

• In May 2014, the D.C. Circuit ruled against Order No. 745, acknowledging that while DR “affects” wholesale markets, that rationale cannot justify FERC action because that would bar any limit to FERC authority on the subject, evading FPA requirement that retail markets be regulated by states alone.
  • “[D]emand response is not a wholesale sale of electricity; in fact, it is not a sale at all.”
• FERC and EnerNOC filed petitions for certiorari, which the Supreme Court granted in May 2015; briefs filed in summer 2015; oral argument held on October 14, 2015
Supreme Court Review

**Issues on Appeal:**

1) Whether FERC “reasonably concluded that it has authority … to regulate the rules used by operators of wholesale electricity markets to pay for reductions in electricity consumption and to recoup those payments through adjustments to wholesale rates.”

2) Whether the D.C. Circuit “erred in holding that the rule issued by the [FERC] is arbitrary and capricious.”

Supreme Court Upholds FERC Authority

- On January 25, 2016, the Supreme Court held 6-2 in *FERC v. EPSA* that FERC’s DR rule was within the agency’s Federal Power Act authority as a practice that “directly affect[s] wholesale rates,” and that it “meet[s] that standard with room to spare”
- The Court also held that the DR rule did not interfere with state authority over retail electricity rates because FERC’s DR rule addressed transactions in the wholesale markets in order to improve those markets
- Finally, the Court held that FERC’s decision on how to compensate DR providers was not arbitrary and capricious
Supreme Court on the State-Federal Jurisdictional Divide:
Hughes v. Talen Energy Mktg., LLC

Maryland Acts to Build New Generation

- Maryland is in a congested transmission corridor, has high wholesale electricity prices, and faced coal-fired plant retirements
- Maryland Commission orders state’s utilities to enter a contract for differences with a company to build a new power plant southeast of DC
- Power is sold into PJM market, but operator receives the contract price – not the auction clearing price
Judicial Review of Maryland’s Plan

- Incumbent PJM generators filed suit, claiming that the Maryland program amounted to state interference with FERC jurisdictional wholesale electricity rates that was preempted by the Federal Power Act; District Court and Fourth Circuit agreed
- On review, the Supreme Court affirmed the Fourth Circuit in *Hughes v. Talen Energy Mktg., LLC* in an 8-0 decision issued on April 19, 2016
- Maryland’s contract, “by adjusting an interstate wholesale rate . . . invades FERC’s regulatory turf,” and is different from a standard bilateral contract because it operates within the PJM auction

Relief for Renewable Generators

- States have a variety of policies encouraging the development of renewable generation
- The Supreme Court decision in *Hughes* is narrow:
  - “We reject Maryland’s program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation . . . .”
- Other state actions could be permissible as long as they are “untethered to a generator’s wholesale market participation.”
EPA’s Clean Power Plan Under Review: The D.C. Circuit Hears *West Virginia v. EPA*

**Basics on the Clean Power Plan**

- Aims to reduce carbon dioxide emissions from the power sector by 32% from 2005 levels by 2030
- EPA sets emissions-rate and emissions-mass targets for each state; states develop plan to comply with targets
- EPA will impose federal plan if state does not develop own plan
- Before legal challenges, state plans were due between 2016 and 2018, with compliance period beginning in 2022
Legal Challenges to the CPP

- In August 2015, EPA announced the final CPP rule, eliciting lawsuits; D.C. Circuit rejects as premature
- In October, EPA published the CPP in the Federal Register and was immediately sued by a group of what is now 27 states and various industry groups
- D.C. Circuit rejected challengers’ request for a stay in January 2016
- Challengers instead asked the Supreme Court to grant a stay; in February, it did – surprisingly
- In May, the case took another unexpected turn when D.C. Circuit decided *sua sponte* to go straight to en banc review and bypass a three-judge panel
Key Legal Arguments Against the CPP

- Discrepancy between House and Senate versions of Section 111(d) of the Clean Air Act, enacted with 1990 amendments
- Targets were impermissibly set by reference to changes that could happen “outside the fenceline” of individual power plants – not on-site
- Tenth Amendment commandeering

DC Circuit Hears Oral Arguments on Clean Power Plan

- The D.C. Circuit held seven hours of oral arguments on September 27, 2016
- Arguments focused on how much deference the court should give EPA’s interpretation and application of its statutory authority under section 111(d) of the Clean Air Act
- Decision likely issued in late 2016 or early 2017
Supreme Court Review Almost Certain. But…

EPA’s Clean Power Plan Under Review

Federal Legislative Update:
Congress Extends PTC and ITC
Congress Extends the Production and Investment Tax Credits

- In December 2015, Congress passed a spending package that provides longer-term certainty on the PTC and ITC
- PTC extended through 2016 at existing rate ($0.023/kWh) for wind projects; will be reduced 20% annually from 2017-2020
- ITC for solar extended for three years at existing rate (30%); will ramp down through 2021 and permanently remain at 10% starting in 2022

Bridging to a Renewable Future?

Figure 1: Change in generation from AE20015 reference case, 2015-2030

Source: Rhodium Group analysis. Note: “Wind and Solar” includes utility-scale generation only. “Other Fossil” includes coal, oil, and “Other” includes nuclear, hydro, and biomass.
Federal Legislative Update: House and Senate Each Pass Energy Bills

Senate Passes the Energy Policy Modernization Act of 2016

- In April 2016, the Senate passed Senate Bill 2012 by a bipartisan vote of 85-12
- Key provisions:
  - Speeding up FERC review of gas pipelines, review by DOE of LNG export projects
  - Easing hydropower licensing
  - Boosting energy efficiency, weatherization programs
  - Promoting R&D for a wide variety of energy technologies
  - Reauthorizing Land and Water Conservation Fund

- Similar to Senate Bill in terms of energy infrastructure and permitting, R&D, etc.
- Also includes provisions unacceptable to Democrats and/or subject to veto threats:
  - Expediting logging in National Forests
  - Resurrecting Keystone XL
  - Overriding endangered species protections
  - Blocking efforts to crack down on illegal ivory

Can the bills be reconciled?

- Both Senate and House leaders express interest in passing a bill that President Obama can sign
- Senate and House have both named conference committees in order to reconcile the two versions, and have committed to producing a version with no provisions subject to a veto threat
- Environmentalist groups ramp up opposition
- Unclear whether Congressional leadership would move a bill during the lame duck
- Stay tuned…
Update on Other Federal Agencies:
IRS Issues Guidance on Production Tax Credit

IRS Issues Updated Guidance for Wind Developers in May 2016

- IRS issues Notice 2016-31 pursuant to law that extended the PTC
- Extends time developers have to qualify for the PTC and provides greater certainty that projects qualify
- Key provisions:
  - Project meets “Continuity Safe Harbor” if completion occurs within four years of the beginning of construction, instead of previous two-year deadline
  - Modifies list of “excusable disruptions”
  - Allows for project disaggregation for assessing Continuity Safe Harbor
  - Permits certain retrofitted facilities to be treated as originally placed in service
Update on Other Federal Agencies: DOE Releases Blueprint for Grid Modernization

DOE Announces Grid Modernization “Blueprint” and Funding

- DOE released grid modernization “blueprint” in January 2016, seeking to coordinate a wide variety of activities to help lead toward a modernized grid
- Up to $220 million in funding over three years for DOE labs and partners to work on projects related to advanced storage systems, clean energy integration, standards and test procedures
Update on Other Federal Agencies:
National Offshore Wind Strategy Laid Out by DOE and DOI

DOE and Interior Release National Offshore Wind Strategy

- Envisions 86 GW of offshore wind capacity installed by 2050 producing 340 TWh per year, of which about 15% would come from the Great Lakes region
- Identifies three critical challenges that will need to be overcome in order for the US to take advantage of offshore wind resources:
  - Reducing costs and technical risks
  - Providing regulatory certainty and mitigating environmental risks
  - Increasing understanding of the costs and benefits of offshore wind
Presidential Candidates’ Energy Platforms

They don’t agree on much.
Energy is no exception.
Hillary Clinton Energy Platform

- Envisions renewable energy supplying one-third of electricity by 2027, half billion solar panels by end of 2020
- Supports the Clean Power Plan; opposes Keystone XL
- Advocates a variety of clean energy, energy efficiency, and grid expansion programs
- Wants to cut oil/gas tax subsidies and extend clean energy tax credits

Donald Trump Energy Platform

- Envisions “American energy dominance” as a U.S. economic/foreign policy goal
- Wants to get “bureaucracy out of the way of innovation” and “pursue all forms of energy,” including renewables
- Opposes the Clean Power Plan and the Paris climate agreement and supports Keystone XL
- Pledges to save coal industry
Thank you!

Kevin J. McIntyre, Jones Day
Eighth Annual Conference: Renewable Energy in the Midwest
Presented by Law Seminars International
October 3, 2016, Minneapolis, MN