
Energy Sector Alert Series: Appellate Courts Hearing More Energy Cases

MARCH 17, 2016

In this eight-week alert series, we are providing a broad look at current and emerging issues facing the energy sector. Attorneys from across the firm will discuss issues ranging from environmental disclosures and risk management in business transactions to insolvency, compliance programs and intellectual property. Please [click here](#) to read all of our recent publications.

Over the last several years, a number of important energy-related cases have reached the US Supreme Court or the federal courts of appeals. Many of these cases concern the scope of authority of the Federal Energy Regulatory Commission (FERC) and the Environment Protection Agency (EPA) to regulate in this area. And many of the agency actions challenged in these cases reflect responses to evolving conditions not necessarily addressed explicitly by the applicable statutes. While certain common themes are starting to emerge, it will likely be some time until the extent of each agency's jurisdiction is fully delineated.

FERC

Under the Federal Power Act, FERC has authority to regulate wholesale electricity rates and any rule or practice "affecting" such rates but not retail sales, authority over which is reserved to the states.¹ To help reduce electric price volatility, mitigate generation market power, and enhance reliability, FERC has supported the practice of "demand response," which "pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent grid breakdowns."² Earlier this term, the Supreme Court held in *FERC v. EPSA* that FERC has authority to regulate wholesale demand response even though it indirectly affects retail rates, and that FERC's order specifying that the price for wholesale demand response would equal the price paid for wholesale energy supply was reasonable.³ (WilmerHale submitted a brief on behalf of a group of demand-response providers and customers as *amici curiae* supporting FERC.)

Two other recent Supreme Court cases have raised related questions about the scope of FERC's authority. In *Oneok v. Learjet, Inc.*, a group of natural gas purchasers claimed that interstate pipelines had violated state antitrust law by reporting false information to natural-gas indices.⁴ The

Court held that these state-law claims were not preempted by the Natural Gas Act (which is structured like the Federal Power Act) because, although the conduct at issue affected both wholesale and retail sales, the claims were “directed at practices affecting retail rates.”⁵ And *Hughes, et al. v. PPL Energy Plus, LLC*, which has been argued before the Supreme Court and is now awaiting decision, asks whether the Federal Power Act preempts a Maryland law requiring electric distribution companies to pay state-selected generators specified amounts tied to the generators' wholesale sales of capacity.⁶ Given that the Court has said that “federal and state powers” under the Federal Power Act and the Natural Gas Act are “complementary and comprehensive,”⁷ any decision in *Hughes* about whether a state law is preempted may implicitly also determine the scope of FERC's own authority.

EPA

EPA's controls of greenhouse-gas emissions and of power plants are the subject of several lawsuits that have reached the Supreme Court and the federal courts of appeals. EPA's Clean Power Plan⁸ sets limits on carbon dioxide pollution emitted by power plants. In *West Virginia v. EPA*, the challenger states and industry groups contend that EPA has improperly rested the plan on a newfound statutory authority to regulate a significant portion of the nation's economy.⁹ They also claim that the plan intrudes on traditional state authority. The US Court of Appeals for the DC Circuit will hear oral argument on June 2—a highly unusual summer sitting. In the meantime, the Supreme Court has stayed implementation of the plan.

Last term, the Supreme Court in *Michigan v. EPA* set aside EPA's determination that it was “appropriate and necessary” to regulate emissions of coal- and oil-fired power plants because they posed risks to human health and the environment.¹⁰ The Court held that in reading the Clean Air Act to allow it to ignore the costs of the regulation, EPA had “strayed far beyond” “the bounds of reasonable interpretation,” for “‘appropriate’ is the classic broad and all-encompassing term that naturally and traditionally includes consideration of all relevant factors.”¹¹

Finally, the latest renewable fuel standard—which EPA is supposed to issue annually and which therefore is the subject of frequent litigation—is the subject of a pending challenge in *Americans for Clean Energy v. EPA*.¹² Representatives of the renewable fuel industry claim that EPA lacked authority to reduce the renewable fuel volume requirements set by statute for 2014-2016 based on its finding that the “domestic supply” of renewable fuels would be “inadequate.” Representatives of the conventional fuels industry, on the other hand, argue that EPA should have set the volume requirements even lower. (WilmerHale represents Americans for Clean Energy and other petitioners from the renewable fuel industry.)

Conclusion

As energy cases continue to reach the Supreme Court and appellate courts, the courts are gaining greater facility with legal issues that once seemed “somewhat opaque and surely complicated.”¹³ As the contours of federal jurisdiction continue to be defined, litigation will be a key strategic asset for entities with related interests.

¹ *FERC v. Electric Power Supply Ass'n* (EPSA), 136 S. Ct. 760, 766 (2015).

² *Id.* at 769-770.

³ *Id.* at 775-778.

⁴ 135 S. Ct. 1591 (2015).

⁵ *Id.* at 1600.

⁶ Nos. 14-614 & 14-623 (S. Ct.).

⁷ *EPSA*, 136 S. Ct. at 780.

⁸ “Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” 80 Fed. Reg. 64,662 (Oct. 23, 2015).

⁹ No. 15-1363 (D.C. Cir.).

¹⁰ *Michigan v. EPA*, 135 S. Ct. 2699 (2015).

¹¹ *Id.* at 2707.

¹² No. 16-1005 (D.C. Cir.).

¹³ *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477 (D.C. Cir. 2009).

Authors



H. David Gold

SPECIAL COUNSEL

✉ david.gold@wilmerhale.com

☎ +1 617 526 6425