

info@spiegelmc

E P A

In this issue:

CLIENT ALERT:

Delaware Department of Natural Resources v. EPA — Reading the tea leaves for the Clean Power Plan

On May 1, 2015, the Court of Appeals for the D.C. Circuit issued an opinion reversing EPA's recent modifications to the National Emission Standards for Hazardous Air Pollutants and the New Source Performance Standards for Reciprocating Internal Combustion Engines ("RICE").¹ We have been involved in this case on behalf of Kansas Power Pool, which (together with APPA and NRECA) intervened in support of the rule. While the vacatur of this rule will have implications for our clients and others that use RICE engines, the focus of this memo is on the broader implications of the court's opinion for other EPA rulemakings—in particular, the Clean Power Plan. The opinion is a clear message from the D.C. Circuit regarding the type of analysis EPA should engage in to support its final Clean Power Plan rule.

THE RULING

EPA has established national emissions standards for pollutants emitted by RICE units. In January 2013, EPA issued a final rule that revised its fifteen-hour limit for such engines operating without emissions controls. The new rule allowed for 100 hours of operation annually for what EPA termed "emergency demand response." The court reversed EPA's modifications as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²

The court held that EPA committed at least three errors, any one of which it indicated would have warranted reversal. However, the court went beyond these points and criticized EPA's failure to consult FERC or NERC on reliability issues and its failure to grapple with comments regarding the

¹ *Delaware Department of Natural Resources v. EPA*, No. 13-1093 (D.C. Cir. May 1, 2015), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/2E87E0199203E71B85257E3800500091/\\$file/13-1093-1550129.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/2E87E0199203E71B85257E3800500091/$file/13-1093-1550129.pdf).

² 42 U.S.C. § 7607(d)(9)(A).

impact of its rule on dynamic markets. The court's decision to address these issues should be read as a warning to EPA as to what it expects in terms of support for the Clean Power Plan.

Energy Markets and Reliability

The court held that EPA failed to provide a meaningful response to commenters' concerns that the rule would threaten the efficiency and reliability of energy markets by creating incentives for backup generators to enter the capacity markets, potentially forcing out other generators:³

EPA offered wan responses to these comments. EPA construed the concerns as arguments that the 2013 Rule "will encourage the use of backup generators in lieu of cleaner alternatives of energy" but "there is no guarantee that this would be the case." EPA seems to have missed the forest for the trees: the overriding concern ... was the perverse effect the 100-hour exemption would have on the reliability and efficiency of the capacity and energy markets ... EPA essentially said that it was not its job to worry about those concerns: "The issues related [to] management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities for setting standards under the CAA." ... But EPA cannot get away so easily from its obligations under the [Administrative Procedure Act] to respond to "relevant and significant" comments.

As the court saw it, EPA wrongfully "refused to engage" with the market and reliability issues raised. The court stated that EPA contradicted itself as to whether reliability was central to the rule or not, and it rejected the contention that these issues were beyond EPA's area of expertise as a justification for failing to engage.

The court seemed particularly concerned that EPA appeared to disregard the potential for the rule to distort organized capacity and energy markets. The court found EPA's stated rationale for a nationwide rule merely a "vague desire for uniformity," and concluded that "EPA too cavalierly sidestepped its responsibility to address reasonable alternatives."⁴ The court may be signaling dislike of imposing a one-size-fits-all approach on different types of market structures.

Consultation with FERC and NERC

Significantly for the electric power sector, the court found it problematic that EPA appeared to justify the rule on the basis of supporting system reliability, yet the record failed to reflect consultation with either FERC or NERC:⁵

³ Slip op. at 23-24 (internal citations omitted).

⁴ Slip op. at 28.

⁵ Slip op. at 29 (internal citations omitted).

An undercurrent coursing through this case has been that, while EPA justifies the [rule] on the basis of supporting “system reliability,” grid reliability is not a subject of the Clean Air Act and is not the province of EPA. There is no indication that either FERC, the federal entity responsible for the reliability of the electric grid, or NERC, FERC’s designated electric reliability organization, was involved in this rulemaking or submitted their views to EPA.

The court urged EPA to seek input from FERC as necessary on remand.

IMPLICATIONS FOR OTHER RULEMAKINGS

The Clean Power Plan rule is scheduled to be final in June 2015.⁶ Legal challenges (beyond those already filed) are a near-certainty.

Many of those legal challenges will likely cite this opinion. The D.C. Circuit has now emphasized that EPA cannot selectively address reliability and competition issues while generally disclaiming expertise on those matters. The court has signaled a desire to see record evidence reflecting EPA consultation with FERC and NERC. While such consultation between agencies has been encouraged or required in other contexts, the court rather pointedly suggests that EPA’s failure to consult with FERC and/or NERC, and to consider the reliability and market impacts of its rules, may constitute arbitrary and capricious decision-making. The implication is that EPA must directly confront reliability and market issues in the record—including working with FERC and NERC—when it finalizes the Clean Power Plan.

FOR ADDITIONAL INFORMATION, PLEASE CONTACT THE FOLLOWING SPIEGEL ATTORNEYS:

Lisa Dowden	202.879.2046	lisa.dowden@spiegelmc.com
Melissa Birchard	202.879.4015	melissa.birchard@spiegelmc.com
Jessica Bell	202.879.2037	jessica.bell@spiegelmc.com

www.spiegelmc.com

⁶ <http://www2.epa.gov/carbon-pollution-standards/clean-power-plan-proposed-rule>.