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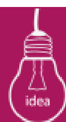

NextGenerationEnergyLaw.com

produced by Law Offices of Carolyn Elefant

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How Can My Law Firm Help Yours? Here's 5 Ways.

Most of my lawyer colleagues know that I have a varied energy practice, representing a diverse group of clients - landowners, consumers, public power and municipalities, renewable developers and energy entrepreneurs, trade associations, non-profits, conservation trusts, and state commissions. I represent these clients in FERC and state commission proceedings, compliance matters, government relations, siting, eminent domain and litigation in federal courts and appeals. But what many law firms and energy professionals don't know is that my firm frequently teams up with, or serves as counsel or strategic advisor to other law firms, lobbying groups and regulatory experts.

These collaborations result in a win-win for all involved. I have an opportunity to work on cases in different parts of the country as well as on larger matters than might ordinarily come to my small shop (which in addition to me, includes a long-time virtual assistant, part-time junior associate, occasional intern and experienced counsel whom I partner with). Meanwhile, my partners gain the benefit of my expertise, agency contacts and industry recognition without committing to a long term supply contract. To put my role in energy terms, I'm the equivalent of backup power - but without the ramping time or high market-based rates!

Below are five ways that my law firm can help yours:

1. Referrals and conflicts cases: Today's clients are increasingly reluctant to waive conflicts. And even when they do, client consent won't immunize a firm against malpractice claims based on alleged conflicts of interest - a scenario that occurs with increasing frequency. My firm welcomes conflicts referrals. We'll perform exceptional work to keep your clients happy and return them to your care at the end of the engagement because we don't poach other firms' clients. Ever. Moreover, in recognition of the costs associated with generating and maintaining energy clients and appreciation for your trust, the firm is willing to pay reasonable referral fees consistent with applicable ethics requirements.

2. Your Local FERC, DC or MD Counsel: My firm frequently serves as local counsel to other lawyers and firms nationwide in proceedings before FERC, the Washington D.C. and Maryland public service commissions and federal district and appellate courts. The firm is flexible in its involvement; we can do anything from serving as a passive local counsel to acting as partners or even taking the lead in the case. As a matter of professional courtesy, the firm is willing to sponsor colleagues for admission to courts or *pro hac vice* at no cost (time permitting and subject to the eventual level of involvement required. For example, in jurisdictions where *pro hac* counsel is required to appear, fees would be assessed for these services).

3.Subcontractors for routine or specialized work or RFPs: Our firm

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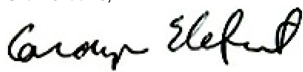
can team with yours to bid on an RFP or act as a subcontractor or of counsel for a larger project. On RFPs, you'll find that our involvement can considerably reduce your costs of participation and make you more competitive. Meanwhile, for longer term matters, we can offer lower priced but skilled associate-level labor for document review, litigation support , appearances and preparation of compliance materials, monitoring reports and white papers (the firm provides substantial training and hands-on experience). In addition to our core energy skills, the firm also offers specialized expert, ancillary services such as CEII and FOIA document requests and litigation, motions, social media policy review and expert witness services, and attorneys fees requests.

4. Attorney value added: Law firms that lack FERC expertise and energy non lawyer professionals (such as environmental permitting experts or lobbyists) frequently bring the firm on board as a value add either to demonstrate FERC capabilities to potential clients or provide legal analysis or regulatory monitoring.

5. Marketing, Energy Training and Management Services: My firm's success depends on my ability to keep abreast of new developments and predict where the market is headed. Consequently, I obsessively track and ingest dozens of news items several times a week and translate it into understandable copy for the firm's @nextgenerationenergylaw twitter account and this blog. But no pride of ownership here; I'm willing to help your firm understand social media, identify and capture new clients through creative marketing and create and manage industry consortia, trade associations and non-profits.

So don't be a stranger! Feel free to email me at carolyn@carolynelefant.com or call me at 202-297-6100 for a free lunch or phone consultation where we can discuss how we might work together. Meanwhile, please enjoy this month's newsletter which includes a round-up of FERC's compliance filing orders, an analysis of the IRS' recent ruling on availability of investment tax credits (ITC) to marine and hydrokinetic developers, a sample of my one of my DC Circuit briefs and a blurb on Google's proposed renewable energy tariff initiative. We've also redesigned the look of the newsletter to improve readability, facilitate printing and make it even more engaging, entertaining and (what else?!) energetic. Enjoy!

Until next time,



Carolyn Elefant

Order No. 1000 - Was I Right? Partly.

For my last newsletter, I mustered up the courage to tackle the thicket of Order No. 1000 compliance filings by the six ISO/RTOs, focusing on the topics of most interest to my clients: consideration of public policy requirements and non-transmission alternatives and cost allocation. Yet bolder than my foray through the dense and dreary compliance filings was my willingness to publicly predict how FERC would rule knowing that I might be wrong on every count. Now, FERC's rulings on four of the six compliance filings (PJM, MISO, CAISO and NYISO) are in, with a summary chart of the decisions below.

Summary of ISO/RTO Public Policy Definitions, Planning, Cost Allocation and Consideration of Non-Transmission Alternatives

ISO/RTO	Public Policy Definition	Public Policy Planning	Cost Allocation	NTA
PJM	Partial compliance; PJM definition failed to include laws by local government entity	Partial compliance. PJM must describe just and reasonable process by which it will determine which public policy requirement suggested at the outset of the process will be incorporated into studies. PJM must also explain on its website why it adopted certain public policy requirements proposed by stakeholders and not others and clarify at what point in the regional transmission planning process it will make such a posting. PJM must also explain how its transmission owning members will account for public policy considerations in the local planning process.	FERC generally approved cost allocation methodology. *See* Para 411 et. seq. FERC found that PJM's proposal to allocate one-half of a Regional or Necessary Lower Voltage Facility's costs based on the postage-stamp method, and one-half based on the Solution-Based DFAX method or changes in load energy payments analysis (i.e., the hybrid method), generally meets the requirements of Order No. 1000 – with the exception of Principle 4. (See Para 422) FERC found that PJM did not comply with Principle 4 because it failed to identify the consequences of transmission facility in the regional plan on other planning regions (such as whether facility will require upgrades in other regions) and does not address whether the PJM	The public interest organizations criticized PJM's planning process for NTAs, noting that PJM has never selected an NTA over a transmission option (nt. 86). Although FERC initially found that an earlier version of PJM's tariff complied with the Order 1000 comparability requirements to treatment of NTAs, FERC noted that PJM recently proposed to withdraw several of these provisions from its tariff. Thus, FERC directed PJM to clarify in a subsequent compliance filing how it will comply to the comparability principles with these provisions removed. FERC declined to address whether NTAs selected in a regional transmission plan are eligible for cost allocation, explaining that Order No. 1000 addresses cost allocation only for transmission and not NTAs. *See para.* 52-53.

Prepared by Law Offices of Carolyn Elefant, Washington DC carolynelefant.com | nextgenerationenergylaw.com | follow us @nxtgenenergy

To view the entire chart in full size click here.
To view the FERC Compliance Orders discussed in the table, click here

So how did I fare on my predictions? I got them partially right - which pretty much sums up how the transmission organizations performed on their compliance filings. Here's a quick rundown:

Public Policy Definitions: In Order No. 1000-A, FERC expanded the scope of the required definition of public policy requirements to include not

just federal and state laws and mandates, but local rules as well. Yet apparently, only SPP bothered to reader Order No. 1000-A because all of the other compliance filings failed to include local policies in the definition. I predicted that FERC would require revisions - and no surprise, that's what happened. Earth to regulated entities: when the governing agency offers a specific definition as FERC did with regard to public policy requirements, either use the exact wording or challenge the definition if you object. But stealth changes, even in a 200 page filing, won't get you far.

Public Policy Planning: Although each transmission organization offered very different procedures for transmission planning, FERC found that generally, all of the ISO/RTO compliance filings partially complied with Order No. 1000. FERC faulted some of the filings for failing to provide sufficient detail on how the transmission organization will consider stakeholder proposed solutions or establish a process for evaluating and choosing between different transmission proposals. Likewise, I anticipated that FERC would approve a variety of planning processes so long as they fully allowed for stakeholder participation.

Cost Allocation: FERC had already previewed PJMs, MISO's and CAISO's cost allocation methodologies in other dockets so its approval here came as no surprise - though as I pointed out in my last newsletter, some question remains as to whether these methodologies will pass muster if reviewed by a court. FERC expressed more serious concerns over NYISO's cost allocation methodology, finding that NYISO did not support the default load ratio share cost allocation method that it proposed for public policy driven projects. I didn't see that coming - in fact, I thought that allocation of public policy in a single state would be less challenging (and therefore, more likely to gain approval) than allocating costs across a multi-state region. FERC also found that NYISO needed to speed up its process so that a transmission developer will know how transmission costs will be allocated in a timely manner. Finally, FERC found all of the filings failed to identify consequences of a transmission facility selected in the regional transmission plan for purposes of cost allocation on other transmission planning regions as required by Regional Cost Allocation Principle 4. I missed that issue entirely.

NTAs: Previously, I noted that most of the compliance filings did not have a separate process for consideration of non-transmission alternatives (NTAs) but rather took NTAs into account as part of the transmission needs analysis. FERC did not object to this approach - but it did fault several of the transmission organizations for failing to offer a procedure for considering NTAs on a comparable basis to transmission options. Also of note, PJMs filing highlighted FERC's approval of one of PJMs earlier submissions as compliant with comparability requirements for consideration of NTAs - but then proposed to withdraw several of the provisions that FERC had approved. Not so fast, said FERC to PJM: if you plan to pull the rug out from under the comparability provisions already in place, then you need to explain how you intend to continue to comply in the absence of these provisions. Further evidence that the stealth approach that I mentioned earlier doesn't play well at FERC.

Although my review focuses on public policy requirements and cost allocation procedures in organized markets, Order No. 1000's requirement that transmission owners eliminate from their tariffs the right of first refusal (i.e., priority held by incumbent transmission providers to own, construct and operate transmission within their local service territory) continues to generate controversy - as well as divided rulings. Commissioner Moeller dissented from FERC's conditional approval of the PJM and MISO tariff, citing his concerns expressed in his original Order No. 1000 dissent that elimination of ROFR would stymie regional cost allocation of local transmission projects. This is because in order to qualify for regional cost allocation, incumbents must forfeit their ROFRs which they are loathe to do.

Meanwhile, Commissioner Clark, who was not at FERC when Order No. 1000 issued, made up for lost time by dissenting from *all four* compliance rulings. As with Commissioner Moeller, Commissioner Clark's dissent was motivated by Order No. 1000's ROFR removal policy - which in Clark's view, could lead to a scenario where a non-incumbent sponsored transmission projects selected in the transmission planning process might never be built due to state and local restrictions on non-incumbents' rights to build transmission. It's unclear whether we can expect these divided FERC rulings to spill over into other matters - but that's an issue for another newsletter.

Despite heroic efforts to release several compliance rulings each month, FERC has scarcely made a dent in review of all of the filings. Which means that at the very least, I'll have fodder for this newsletter for many months to come. In the meantime, stay tuned for the continuing saga that is [the Transmission-induced] Daze of Our Lives.

Will New IRS Commencement of Construction Ruling Start Benefits for MHK?

Although the Energy Policy Act of 2005 recognized electricity generated from waves, tides, currents, ocean thermal gradient and other non-impounded , free flowing water resources (collectively, marine and hydrokinetic or MHK) as a bonafide renewable energy source, MHK technologies have rarely benefited from many of the federal tax incentives available to other renewables. That's because incentives like the production tax credit (PTC) or the investment tax credit (ITC) (which was extended to MHK under the American Recovery and Reinvestment Act of 2009 [ARRA]) frequently have stringent in-service dates that rarely align with the protracted permitted process for MHK.

Consider for example, the ARRA's cash grant program, which allowed renewable energy companies to forego tax credits in exchange for a check from the United States Treasury for thirty percent of the project's overall cost. The only catch? Funds were available for MHK projects placed in service in 2009 or 2010. At the time of the ARRA's enactment, most viable MHK projects were mired in the permitting process and as a result, none were able to take advantage of the ARRA cash benefits. That's a huge loss for the MHK industry since the value of the ITC amounts to thirty percent of project costs.

But now, as a result of a helpful IRS tax ruling, MHK technologies may have a second chance to capture federal tax benefits. At the end of 2012, Congress passed fiscal cliff legislation that continues the availability of the ITC to MHK projects larger than 150 kw that commence construction by the end of 2013 (unfortunately, the legislation did not re-authorize the cash grant program). And importantly, the IRS' expanded definition of "commencement of construction" issued on April 17, 2013 may enable MHK developers previously excluded from the ITC to now claim this important tax benefit.

The IRS Ruling describes two methods for a renewable project to meet the "commencement of construction" requirements to qualify for the ITC. Specifically, To qualify for either the PTC or the ITC, MHK projects must either start physical work of a significant of a significant nature or incur 5% of the total project cost (known as the Safe Harbor test) by December 31, 2013.

Work of a significant nature includes groundbreaking activity on site or assembly or fabrication of project components offsite pursuant to a binding contract. Permitting studies and other work preparatory to project development do not count as "physical work." Possibly, an MHK project that was recently licensed could meet the "physical work" method for commencement of construction - although with financial restraints and compliance with post-license conditions, even the more advanced companies may have trouble meeting the "physical work" prong.

MHK companies will fare better under the "Safe Harbor" prong. That's because even though permitting work alone does not count as commencement of construction under the "physical work" prong of the IRS rule, permitting *costs* are properly considered part of the overall cost of the facility - and therefore paying or incurring permitting costs counts towards the 5 percent threshold needed to qualify for the ITC. As the chart below shows, most MHK projects that have gone through the FERC licensing process pay or incur roughly $2.5 to $3 million in permitting costs which amount to 15 to 20 percent of the project's expected overall costs.

Licensing Costs As Part of Overall Pilot Project Costs
Source: FERC Project EAs (available at FERC ELibrary)

Company	Pilot Proj. #	Site	EA Date	License Costs	Construct Costs	Issue Date
Verdant	P-12611	East Riv, NYC	5/11	$3 MIL	$16.4 MIL	1/12
ORPC	P-12711	Cobscook Bay, ME	1/12	$2.5 MIL	$16 MIL	3/12
Snohomish PUD	P-12690	Admiralty Pass, WA	1/13	$2.5 MIL	$16 MIL	pending

So long as MHK developers pay or incur these permitting and licensing costs by the end of December 31, 2013, they may be eligible for the ITC. As such, they should further explore the procedures for claiming these benefits with a qualified tax attorney or professional.

Energy Sparks: Quick News Bits

Google's Alternative to Searching for Renewable Energy Suppliers Google may be king of search, but as a company, it's tired of searching for user-friendly renewable energy supply options. As Google sees it, on-site generation (such as solar) isn't sufficient to meet a large user's needs,

power purchase agreements (PPAs) for renewables from third party providers require too much management oversight and purchasing renewable energy credits (RECs) (particularly unbundled RECs which are not tied to a given renewable asset) does not necessarily translate to additional investment in renewables. Google's solution? Creation of a voluntary renewable energy tariff available to large industrial customers who want to purchase renewables. Last week, Google took its findings a step further with its announcement that concomitant with Google's expansion of its Lenoir, NC data center, Duke Energy has pledged to develop a new program for large companies like Google who want to buy renewable power for their operations and to file for approval of this plan at the state utility commission within 90 days.

Go Southwest, Ye Energy Lawyers! Even in this era of the new normal, 2012 earnings were up for several AmLaw 50 law firms with strong energy law practices reports Bloomberg TV. (Discussion begins at 2:15 of the clip). The energy boom generated significant transactional work for firms which in turn fed regulatory and other related practice areas. On the downside, the report notes that the Texas energy market is now highly concentrated firms have laid down roots, and moving forward, competition for new work is expected to be stiff.

Harnessing CrowdPower to Power Solar Investment

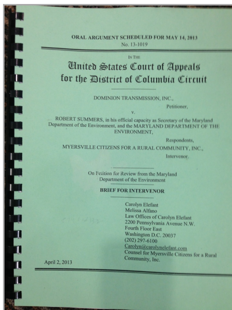
What do you get when you combine two of the 21st Century's hottest trends -- cleantech and crowdsourcing? The answer --Mosaic, a startup funding company that allows individuals to invest in solar to the tune of returns of 4.5 to 6.38 percent over five to 10 years. Thus far, according to Renewable Energy Access, Mosaic has funded nonprofit and affordable housing projects --but the company has its eyes on utility-scale investment as well. And while the potential expiration of the investment tax credit in 2016 may cloud Mosaic's sunny future, declining costs of solar will make up the difference. Plus, the opportunity for individual investors to do well by doing good is another trend that never goes out of style.

News from the Law Offices of Carolyn Elefant

•The ABA Journal (April 2013) ran a quick follow-up story on Carolyn's energy law practice and her ten years as a blogger at MyShingle.com.

•For the second year in a row, the Law Offices of Carolyn Elefant was named DC Energy/Environmental Superlawyer for 2013. Once again, the firm was the only small firm on a list of AmLaw 200 practices.

Brief of the Month



ORAL ARGUMENT SCHEDULED FOR MAY 14, 2013
No. 13-1019

IN THE
United States Court of Appeals
for the District of Columbia Circuit

DOMINION TRANSMISSION, INC.,
Petitioner,
v.
ROBERT SUMMERS, in his official capacity as Secretary of the Maryland Department of the Environment, and the MARYLAND DEPARTMENT OF THE ENVIRONMENT,
Respondents,
MYERSVILLE CITIZENS FOR A RURAL COMMUNITY, INC.,
Intervenor.

On Petition for Review from the Maryland Department of the Environment

BRIEF FOR INTERVENOR

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Counsel for Myersville Citizens for a Rural Community, Inc.

April 2, 2013

This month, I'm sharing a fairly substantive intervenor brief that I authored for my clients, the Myersville Citizens for a Rural Community in the D.C. Circuit case, *Dominion Transmission Inc. v. Summers (Maryland Department of Environment*. The case is one of a handful under Section 19(d) of the Natural Gas Act (NGA) which allows for expedited review of a state agency decision denying or delaying action on an authorization required for a certificate under the NGA. This case involves a clash between preemption and protection of local siting decisions under the NGA and the Clean Air Act respectively.In short, it's the kind of issue of first impression and last resort (for all the players) on which my firm thrives.

Lightbulb, Texas, Questions & Money images courtesy of Shutterstock

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