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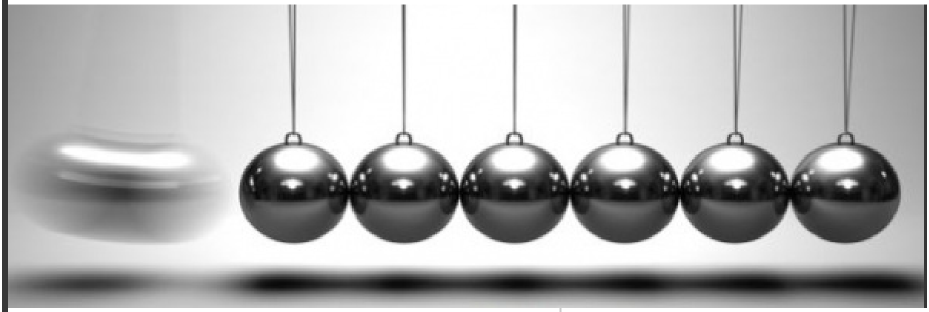

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The Fall Haul

Happy Autumn! It's hard to believe that summer has flown by without a newsletter since the June 2013 issue. This month we feature a harvest of odds and ends - a summary of the briefs filed at the D.C. Circuit in the Order No. 1000 appeal, a round-up of recent Commerce Clause sightings in energy cases and a report on new hydro legislation, the Hydroelectric Efficiency Reform Act of 2013 that the President signed into law in August.

As for me, I've been keeping busy with travel and several different cases in a number of federal district courts and the more familiar D.C. Circuit. While I enjoy traditional litigation and appellate work, I remain available for regulatory matters -- the more challenging, the better -- so please keep my firm in mind.

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As for what's ahead, after many years as a sole proprietor, I've incorporated my firm as a professional limited liability company to support continued growth - such as our recent collaboration Ide Law & Strategy in Boise, Idaho. Britt Ide, principal of the Ide firm brings extensive engineering and legal expertise in utilities and climate change along with corporate and alternative dispute resolution capabilities which will enable my firm to expand the scope of services that we offer our energy clients. Also, after years of membership in Energy Bar Association, I'm both excited and honored to be speaking as a panelist on PURPA at the upcoming MidYear Meeting, October 23-24, 2013.

Enjoy this month's newsletter!
Best,

Carolyn

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Spotlight Order No. 1000: The Briefs

Judicial review of Order No. 1000 continues to make its way through the United States Court of Appeals for the D.C. Circuit. Various petitioners filed initial briefs on May 28, 2013 raising challenges to Order No. 1000 and just last week, on September 28, 2013, the Commission lodged its response.

Before I dive into the weeds, a few words on the briefs themselves. The D.C. Circuit strictly enforces a "no duplication of content" requirement, so all petitioners, even if at odds on certain issues, are instructed to file a common brief (though the court will relax the page limits). Here, instead of filing a common brief, the petitioners chose to file eight separate briefs on each of the issues which is problematic. A brief -- particularly one on issues as complex and meaty as Order No. 1000 -- demands a unified voice and theme to read persuasively or simply bearably. Yet, trudging through brief after brief, each with a unique writing style and strategic approach, I had trouble keeping focus on the arguments -- and I wonder whether the court will have that same problem. I realize that it's nearly impossible for more than a dozen lawyers to collaborate on a single document (and even if they wanted to, their clients might veto cooperation) - but it's unfortunate that it wasn't possible here.

The Commission's brief isn't any more or less persuasive than those of petitioners but again, has the advantage that it's a unified body of work. Though weighing in at over 35,000 words (which is more than double the usual 14,000 word limit allowed under Local Rule 28.1e(2)(A)(i), it still falls short of the 47,000 word count allowed by the court.

Moving on to the substantive arguments, I previously made my predictions about how the court might rule here .

On the public policy issues (which I've been tracking most closely, the Petitioners' brief raises two overarching objections. First, Petitioners argue that the Order No. 1000 requirement that transmission owners include public policy considerations in transmission planning violates FPA Section 217(B)(4)'s directive that FERC facilitate planning by load serving entities. Second Petitioners argue that the planning requirements are overly vague and may even result in subjecting transmission owners to un-enacted state or local policies. In response, FERC argues that including provisions for public policy facilitates transmission planning and that planners are only required to consider public policies proposed by stakeholders but not forced to include all of them in the planning process.

The Petitioners' brief on rights of first refusal (ROFR) makes a persuasive argument about the impact of eliminating ROFRs on reliability and the lack of evidence to support their elimination. As for the Mobile Sierra arguments, FERC argues that resolution of these issues is premature until FERC has an actual contractual provisions before it.

Meanwhile, if you have a few hours to spare, feel free to check out the briefs on cost allocation and jurisdictional threshold issues. The remaining briefs can be downloaded from court website - or you can just wait until November 15, 2013, when the responses are filed.

Do you have an appellate case that you'd like evaluated? Contact us at carolyn@carolynelefant.com for more information about our flat fee appellate "second opinion" services

Commerce Clause Sightings and Implications for Order No. 1000

Even if the Order No. 1000 public policy provisions survive judicial review, a recent Seventh Circuit, Illinois Commerce Commission v. FERC (June 2013) suggests that there may be another hurdle to consideration of state public policy in transmission planning: the Commerce Clause. Although *ICC v. FERC* began as a run of the mill cost allocation case, one of the party's offhand reference to Michigan's restrictive renewable portfolio standard (RPS), which favors in-state renewables, triggered a Con Law 101 lecture by Judge Posner, who authored the opinion. Here's the scoop.

In 2011, FERC approved the Midwest ISO's proposal to regionally allocate the costs of multi-value transmission projects (MVPs) (i.e. projects that provide multiple system benefits, such as increased reliability and efficiency and lower costs) that would deliver wind power throughout the region. Multiple parties appealed, arguing that MISO's formula for assigning costs –which was based on a utility's share of total regional wholesale electricity consumption rather than on customers' proximity -- violated principles of cost-causation by disproportionately saddling ratepayers with the cost of new transmission even though they did not enjoy commensurate benefits.

The Seventh Circuit rejected the challenges, finding that FERC's "crude" assessment of the benefits of the MVP projects to utilities throughout the region "would have to suffice." The court also acknowledged the benefits that an influx of wind power from more remote locations could bring to the region by replacing more expensive local wind power and reliance on oil and coal.

Various Michigan parties (regulators and utilities) explained that Michigan's RPS requires utilities to rely only on in-state resources to meet RPS obligations. Consequently, Michigan consumers do not enjoy any benefits from the MVPs since they deliver wind power from out of state that cannot be used to satisfy the Michigan RPS – and therefore, they do not deserve to shoulder 20 percent of the MVP costs.

The court found that the Michigan parties' argument "trips over an insurmountable constitutional objection." The court explained that "Michigan cannot, without violating the commerce clause of Article I of the Constitution, discriminate against out-of-state renewable energy."

The *ICC v. FERC* ruling doesn't invalidate the Michigan statute. For starters, the court's commentary on the constitutionality is dicta. The constitutional issues are not relevant to the holding of this case, which is that FERC's approval of a cost allocation formula based on a "crude" assessment of benefits is entitled to deference. Moreover, jurisdiction of appellate courts, particularly over review of FERC decisions or in addressing constitutional issues is tightly circumscribed.

Under Section 313 of the Federal Power Act, courts only have jurisdiction to address issues raised before FERC by the parties, and none of the parties objected to Michigan's program on Commerce Clause grounds.

Moreover, jurisprudential considerations counsel courts to avoid reaching constitutional arguments where a matter can, as here, be resolved on other grounds.

Nevertheless, the Seventh Circuit's decision has longer term implications because it may impact how -- and whether -- transmission planners consider state public policy as part of the Order No. 1000 process. In light of the Seventh Circuit's decision, a transmission planning organization might decline to consider a state public policy on grounds that it violates the Commerce Clause. To avoid this risk, states that wish to see their public policies duly represented in the transmission planning process should re-revaluate them to ensure that they are constitutionally compliant. Even so, the Seventh Circuit decision opens up another avenue for transmission owners to reject at least some state policies in the transmission planning process.

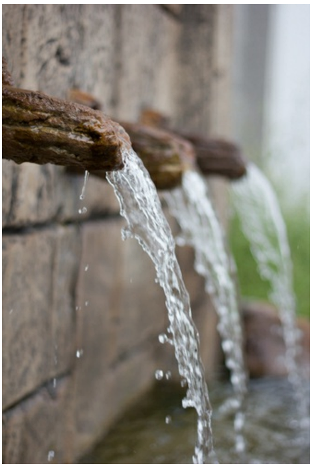
Meanwhile, two other circuits issued energy-related commerce clause rulings over the past few months. In Entergy Nuclear Vermont Yankee v. Shumlin (August 2013), the Second Circuit preliminarily determined that a Vermont requirement conditioning reauthorization of Entergy's nuclear power plant on an award of a power purchase agreement (PPA) with preferential rates for Vermont customers did not on its face violate the Commerce Clause. The court found that the requirement did not discriminate against out of state utilities because they were not precluded from likewise negotiating favorable rate treatment with Entergy. Nevertheless, the court declined to issue a final ruling, finding that in the absence of a completed PPA, it could not determine whether the PPA would have direct or incidental effects on interstate commerce.

Just last week, the Ninth Circuit addressed a Commerce Clause challenge to California's low carbon fuel standards in Rocky Mountain Farmers Union v. Corey. Under the California program, fuels are assigned carbon intensity scores that take account of all emissions related to the life cycle of the fuel, from extraction and refining to transportation. Opponents argued that the

California program violated the Commerce Clause because the carbon intensity scores impermissibly differentiated between ethanol based on the geographic origins. The Ninth Circuit disagreed, finding that the fuel standards did not discriminate based on where fuel was produced, but simply tallied up all potential sources of emissions. Not surprisingly, fuels imported from a greater distance would have more emissions - but these might also be counterbalanced by other factors (such as fewer emissions in production). Nevertheless, even though the Ninth Circuit found that the fuel standards did not facially discriminate, it remanded the case to the lower court to make factual findings on whether the law might have an incidental impact on interstate commerce.

Ultimately, the Second, Seventh and Ninth Circuit decisions did not overturn any state laws on Commerce Clause grounds -- yet. As such, these decisions serve as a cautionary reminder to states crafting energy policies that courts take the Commerce Clause seriously - and will closely scrutinize state policies that impact interstate commerce.

Hydro Alert: HERA and FERC HydroWorkshop



On August 9, 2013, the President signed into law the Hydropower Regulatory Efficiency Act of 2013. Of interest to both conventional hydro and marine hydrokinetic (MHK) developers, Section 5 of HERA allows FERC at its discretion to extend the term of a preliminary permit, which is ordinarily three years, for up to two additional years, upon finding that the permittee has carried out activities under the permit "in good faith and with reasonable diligence."

Prior to this provision, companies that could not complete and file a license application within the three year term of their preliminary permit could only apply for a subsequent three year preliminary permit in order to retain priority rights to file a license. However, in order to apply for a subsequent permit, companies had to wait until the initial permit expired - and would then have to compete for the subsequent permit with other competitors. Thus, the incumbent permittee was at risk of losing the site to a municipality asserting preference rights, or another competitor (if a competitor filed for the site on the same day as the incumbent permittee, neither would have a "first to file" preference and FERC would award the license based on a lottery). *See* *Petersburg Municipal Power & Light v. FERC*. This was so even if the incumbent permittee invested significant efforts under its initial permit term.

The new legislation eliminates the risk that a company which needs more time to complete work under the preliminary permit will lose a site by allowing FERC to simply extend the term of the permit upon request of the permit holder. At the same time, the legislation guards against site-banking by imposing a "due diligence" requirement on preliminary permits holders seeking an extension.

The legislation takes effect immediately, meaning that it will benefit companies that currently hold preliminary permits. FERC has already published guidance here on how companies can apply for an extension and stated that after September 9, 2013, FERC will not accept extension requests filed less than 30 days prior to the termination of the permit.

Section 6 of HERA also directs FERC to explore the feasibility of a two-year process for the issuance of a license for hydropower development at non-powered dams and closed loop pumped storage projects. To initiate this process, FERC will be holding a Workshop on October 2, 2013 to solicit comments and recommendations for expediting the license process . Information on the workshop is available here, along with this information on an alternative date if the government shutdown continues.

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