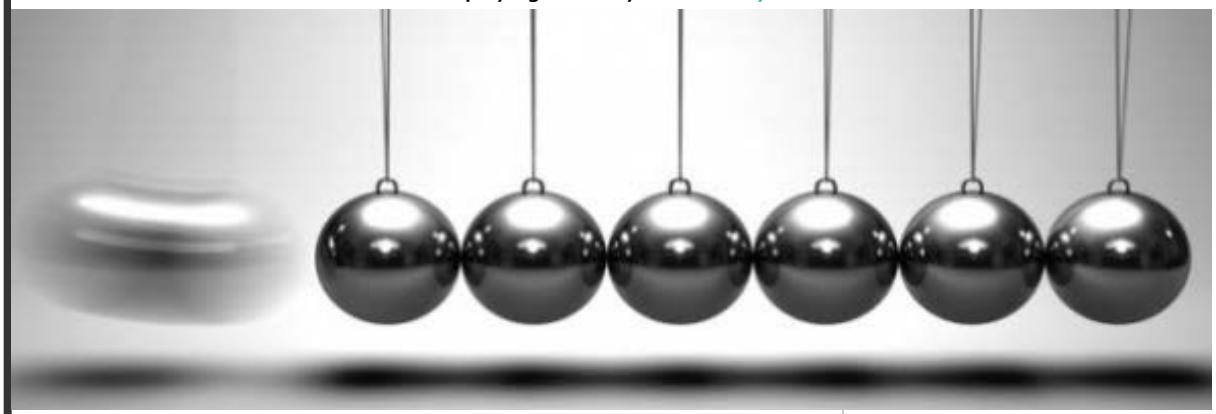

In This Issue:

Welcome to 2014

Happy New Year to all from the Law Offices of Carolyn Elefant. It's been an exciting an busy year for my firm. Here's a quick look back.

The year began with the filing of a PURPA enforcement action at the Commission -- and my firm continued our involvement in several PURPA matters as the year progressed, including several still ongoing before state commissions. The firm also assisted with development of compliance materials for a demand response provider operating in several RTOs and ISOs; represented two marine hydro-kinetic developers (MHK) in obtaining preliminary permits from the Commission and applying for nationwide water quality certificates from the Corps; advised several small renewable companies on Order No. 1000; counseled a small trading company on the scope of exempted RTO transactions under the CFTC's recently issued order and advised small renewable energy companies and municipal associations on new Commission rules on interconnection and the Order 1000 appeal pending at the D.C. Circuit.

My landowner rights/eminent domain and appellate practice also kept the firm busy. The firm completed an eminent domain matter in federal court where we helped to successfully block acquisition of century-old ancestral

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property that was the subject of a multi-million dollar environmental tort action. The firm also won two FOIA appeals before the Commission and is awaiting a decision in a pending FOIA matter at the United States federal district court for the District of Columbia. In addition, the firm briefed three cases and two motions before the U.S. Court of Appeals for the D.C. Circuit (argued one, two others are still ongoing) and assisted or served as local counsel on three others.

I had several speaking engagements this year. I was excited to present on PURPA at Energy Bar Association Annual Meeting - here's the summary of Commission PURPA cases that I included in the conference materials. I also spoke at the Pennsylvania Bar Institute Utility Commission on Social Media in the Utility Industry, and at various webinars for the CESA RPS Collaborative and NRDC on FERC Order 1000 and Energy and the Commerce Clause and on the impact of preemption under the Natural Gas Act on local communities in interstate pipeline proceedings. Finally, though I was not a speaker, I was honored to participate in a one-day consortium of select group of high level utility executives, government officials and entrepreneurs on distributed generation.

Perhaps the best part of this past year is that I had an opportunity to collaborate professionally with other energy industry legal friends and colleagues -- as well as two former classmates from law school. This year, I hope to actively pursue more of these collaborations, either through my law firm or my new venture, Energy Law on Demand (see story below).

Finally - and though I can hardly believe it, I celebrated my 25th year in energy law practice, starting as a baby attorney at the Federal Energy Regulatory Commission, then working as an associate at Duncan & Allen for three years and subsequently launching my own law firm that I've operated now for two decades. I have been grateful for both the mentorship of the many luminaries in our profession with whom I've been privileged to work and humbled to have been included, for the second time, as a D.C. Energy and Natural Resources Superlawyer for 2013.

Both the best and worst part of this crazy industry is that it's always changing. That can make it a challenge to keep apace, particularly for a small firm like mine. Yet, every time the work threatens to become mundane or I consider leaving energy law behind entirely - something novel and exciting and utterly magnetic comes along to pull me back in. I can't wait to marvel at what 2014 will bring.

Best wishes for an electrifyingly prosperous and fulfilling New Year! Don't be a stranger.

Renewables Offshore

Carolyn

Energy Law on Demand - Pre-Launch Announcement!

I'm excited to announce the pre-launch of a new service that my firm has been developing for the past several months - Energy Law on Demand - to serve the unique business and regulatory requirements of energy start-ups and small energy companies. In addition, Energy Law on Demand will offer seconded services to law firms and corporate law departments for appearances and overflow and temporary needs.

What's the impetus for Energy Law on Demand? Currently, the legal profession is undergoing a period of incredible transformation with new business models for delivery of legal services cropping up all over. From outside e-discovery companies to offshore legal process outsource (LPO) providers like Pangea3 to managed legal services like Axiom Legal to online matchmaking platforms like UpCounsel and PrioriLegal, the past five years has seen an eruption of cost-effective, high-quality alternatives to the traditional one-size-fits-all legal practice. These new entrants are creating competition and reducing the cost of legal services for many corporate and business clients.

But because of the highly specialized nature of energy work, our industry hasn't enjoyed these same benefits. That's certainly not a problem for the large players who either have the financial means to access excellent counsel or the regulatory authority to pass costs on to captive ratepayers. Still, large segments of the energy sector remain underserved - and that's what Energy Law on Demand seeks to change. By creating a network of with qualified energy and corporate lawyers, streamlining the representation

process through use of technology and document automation tools (so that retaining counsel is "as easy as flipping a switch") and offering different levels of flat fee service (baseload, intermittent and back-up), Energy Law on Demand will provide cost-effective counsel to a broader swath of energy clients.

If you are interested in Energy Law on Demand - either working with us, using our services or simply learning more about the services, register here for updates and news of our official launch date.

FERC Appellate Round-Up 2013: The Overview

It's that time of year again - the NextGenerationEnergyLaw.com annual appellate round-up. Though there are plenty of excellent resources for appellate summaries (including the Energy Bar Association website) I try to give the summaries a personal spin from my perspective as a seasoned appellate practitioner. With that, here's the overview.

Wins, Ties and Losses

This year, federal circuit courts heard thirteen appeals of Commission decisions, up one from last year's dozen -- but still far short of the twenty cases decided in 2011. This year, the Commission's win record took a tumble with the Commission scoring full victories in just eight of the thirteen cases - roughly 61 percent and down from last year's impressive 92 percent win record.

In addition to these eight wins, the Commission also picked up two partial victories in two cases (*Black Oak v. FERC* and *SCE v. FERC*, where the court issued split rulings affirming the Commission on the substance of its orders, but remanding the proceedings for further evaluation of the remedy ordered (in *Black Oak*) and consideration of evidence raised that was not considered (*SCE v. FERC*). Although technically, these cases may be classified as partial wins for the Commission, from the perspective of a petitioner-side appellate attorney, a remand is nearly always

a victory for the petitioners because at the very least, they can often extract additional concessions through settlement when the case is returned to the Commission. So that's why I haven't included these two split cases in tallying the Commission's win record.

As for the Commission's losses, I could have told you over a year ago that *Hunter v. FERC*, challenging the Commission's jurisdiction to impose $30 million civil penalty on a trader for alleged manipulation of natural gas futures contract, was dead-on-arrival for the Commission. Traditionally, the Commission has not fared well in challenges to its enforcement jurisdiction under a new statute (see, e.g., *Wolverine v. FERC*) and this case was no different. Plus, the CFTC took the petitioner's position that the Commission lacked jurisdiction over futures contracts - and my gut tells me that whenever the Commission enters into a turf war with another federal agency at the D.C. Circuit, the Commission is going to lose. The only aspect of the *Hunter* case that was surprising was the relative speed - just five weeks - in which the court rendered a decision.

Though many would characterize *Hunter* as one of the major cases of the year, for me one of the most important (from an appellate perspective) was *SPP v. FERC*, a seeming sleeper of a case in which SPP challenged the Commission's interpretation of a contractual provision. Ordinarily, a case like this goes down in eight weeks on *Chevron* grounds - but not so here. Instead, the court found that the Commission failed to take a fair look at evidence presented by SPP showing a counter-interpretation of the provision and sent the case back to the Commission to reconsider. In my experience, I have noticed that the Commission sometimes seems to engage in "results-oriented" decision making; adopting one position and then discounting opposing arguments simply to make its own case. That's advocacy, not reasoned decision-making. To be fair, many times opponents raise frivolous objections that don't deserve extensive consideration. But there are also situations where the Commission overlooks credible, fact-based counter arguments to achieve the result it wants. Here, the court caught on and put a stop to the practice.

Trends in Substance of Cases

This year, the D.C. Circuit heard all but two of the thirteen Commissions orders under review. Interestingly, eight of the cases — roughly two thirds - challenged some aspect of an ISO or RTO cost-allocation methodology or tariff provision that had been approved by the Commission. Not surprisingly, the RTO/ISO challenge category also accounted for the largest percentage of Commission victories, with the Commission winning in all of these cases, except for a partial petitioner win in *Black Oak v. FERC*. Given the complex and

technical nature of the RTO/ISO regime, it's not surprising that they're tough to win.

Finally, best news of all: the D.C.Circuit announced in May 2013 that it would begin making oral arguments available online at no charge. You can find the recorded arguments dating all the way back to 2008 here. This is a tremendous service for appellate practitioners, particularly those like me for whom appeals constitute only a portion of my workload. The recorded arguments give practitioners a chance to hear themselves, their opponents and most importantly, the superstars of the appellate bar - and thus, facilitate preparation for oral argument and enable practitioners to improve their performance. Definitely a feature well worth the wait.

FERC Appellate Round-Up 2013: Case Summaries

TC Ravenswood v. FERC (December 13, 2013)

This appeal arose out of NYISO's development of demand curves.

Every three years, NYISO files demand curves that are used to predict the available quantity and price for capacity in the NYISO market. NYISO's demand curve reflected included a 1.7% escalation factor but excluded the cost of property tax from the cost of new entry. The Commission approved the escalation cost, but found that the exclusion of property tax might be unjust and unreasonable so it suspended the proposed curve for up to five months and directed NYISO to make a compliance filing. Ravenswood and other generators sought review, arguing that the compliance filing effectively extended the suspension period beyond five months in violation of Section 205 and the Commission's *West Texas* precedent. The court found that the Commission acted reasonably because and that the case was distinguishable because the beyond-five-months suspension resulted from NYISO's voluntary decision to delay implementation of demand curves and not from Commission action. The court also rejected one of petitioner's arguments citing "an absolutely indistinguishable case" because it was not raised until the reply brief and as such, was too late.

Highlight of the case? When the court translated "Commission lingo" describing calculation of the cost of new entry into NYISO markets into "plain English." Lesson for practitioners: jargon kills cases.

FERC Win, Merits.

Southwest Power Pool v. FERC (Dec. 3, 2013)

This appeal has a bit of a surprise ending. Involving a

challenge to a Commission Declaratory Order that interpreted a contractual provision and resolved in just five weeks, I would have bet money that the petition was summarily dispatched on *Chevron* grounds as was true in several cases reviewing FERC's interpretation of settlement agreements last term. Not so - and in fact, the court expressly stated that *Chevron* didn't play a part in the decision at all; instead, "FERC's treatment of the issue founder[ed] on Administrative Procedure Act (APA) principles."

Briefly, the facts. In 2011, Entergy announced that it would join MISO rather than SPP which had been another option. SPP opposed the move, arguing that it would have adverse economic consequences for Entergy Arkansas resulting from changed power flows. To resolve these issues (which threatened to hold up regulatory approval of Entergy Arkansas's move), MISO filed a petition for Declaratory Order at FERC, asking it to confirm that Entergy Arkansas's rights to rely on transmission service from SPP under the Joint Operating Agreement (JOA) would continue to apply if Entergy Arkansas joined MISO. SPP disagreed with MISO's interpretation, arguing that these provisions applied only if Entergy Arkansas operated as a stand-alone utility and not if it transferred control of transmission to SPP or MISO. FERC agreed with MISO. The D.C. Circuit vacated FERC's decision finding that the Commission was arbitrary and capricious in declining to consider virtually all of the evidence offered by SPP in support of its interpretation and remanded the case to FERC for further consideration.

Petitioner Win, Merits.

City of Anaheim v. FERC

It's a bit difficult to figure out what happened in this case because the court issued a per curium, unpublished order with minimal detail. From what I could glean, the petitioners initially challenged a cost allocation criteria set forth in Attachment E of CAISO's tariff as inconsistent with cost allocation principles. On rehearing, the Commission directed CAISO to modify Attachment E to make it more consistent with cost causation. On appeal, the petitioners argued that the Commission disregarded the version of the Attachment E criteria that had been adopted - an argument that the court characterized as "transparently wrong." Ouch.

Commission Win, Merits.

Northern Laramie Range Alliance v. FERC (October 22, 2013).

The North Laramie Range Alliance, an opponent of ratepayer subsidized wind-energy industrialization

(according to its website) challenged the Commission's certification of Wasatch Wind as a qualifying facility (QF). The Alliance argued that it was aggrieved by the Commission's certification order which would lead to higher electric rates for Alliance members. But the court dismissed the petition for want of standing, finding that linkage between the certification and harm to the Alliance in the form of rate increases was both tenuous and speculative. The court also found that Alliance's claimed injury was not redressable since even if the court were to vacate the certification order, ratepayers would not necessarily save money.

Commission Win, Procedural.

Black Oak Energy v. FERC (August 6, 2013)

Although courts permit administrative agencies to change course, they're often on shaky appellate ground when they do (recall the Commission's flip-flop on municipal preference in City of Bountiful Merwin Dam if you don't believe me). That phenomenon is true, at least in part, in *Black Oak v. FERC* where the petition for review was precipitated by FERC's change in its position on PJM's methodology for allocation of surplus transmission losses.

Black Oak involved review of two Commission orders and a split decision. The first FERC order approved PJM's surplus disbursement system, which ties distribution to payment of fixed costs of the grid. Under PJM's system virtual marketers did not receive a share of surplus because they did not contribute to grid costs - and they challenged the system as discriminatory. The court agreed that PJM's system was in fact discriminatory but that virtual marketers were not similarly situated because their ability to recover surplus could give rise to market manipulation. FERC therefore determined that that barring virtual marketers from recovering surplus would deter this conduct and the court agreed that FERC's determination was reasonable. Score one for the Commission.

But the court agreed with the virtual marketers' challenge to the second Commission order. There, the Commission ordered PJM to recoup refunds previously granted to virtual marketers under an earlier PJM policy which allowed virtual marketers to share in surpluses. The Commission characterized its order as a mere denial of refunds, consistent with the policy articulated in its first order. The court disagreed, findi

Kourouma v. FERC (July 23, 2013).

This is such a sad case. An unemployed energy trader attempting to support his family after his former employer's non-compete contract limited his options, filed false

information in an application seeking authorization for market-based rates to conceal his participation from his employer. The application was not even necessary for the intended transaction and was subsequently withdrawn, but the damage was already done. The Commission cracked down, imposing a $50,000 penalty on Mr. Kourouma for activity that did no harm to markets and yielded minimal financial gain.

Mr. Kourouma found no relief on appeal. First, the D.C. Circuit found that Kourouma was not entitled to a hearing because there were no disputed facts (unrepresented below, Kourouma was damned by his admissions). Second, the court found that the Commission reasonably found that Mr. Kourouma's filing of false information violated Market Rule 3 even though there was no evidence of intent to deceive. The court held that "intent to deceive" is not an element of Market Rule 3. Finally, the court found that Mr. Kourouma made no showing that the Commission increased his penalty to promote deterrence in violation of Clifton Power (my precedent!)

I shepardized the underlying Re: Kourouma Commission order and learned that it's the been cited as precedent in some of the Commission's blockbuster enforcement actions this year —JP Morgan Ventures, Barclays and Silkman. Seriously, was the Commission so desperate for precedent to go after the big Kahunas that it had to take down an unemployed trader who was trying to support his family? Meanwhile, how many far worse cases are settled at the outset because alleged violators have the resources to hire counsel? At least the Kourouma case makes one thing clear: big energy markets aren't open to small players.
ng a vast difference between denying a refund and requiring a claw-back of money already paid, which could lead to market uncertainty. The court remanded the case to the Commission to explain further why it required recoupment. Score one for petitioners.

Finally, it bears mention that the court did not vacate the recoupment order. The court found that doing so while the Commission reconsidered its order, could lead to even greater uncertainty.

Split Win: Commission order affirmed, but recoupment methodology remanded.
Commission Win.

NRG Marketing v. FERC
(June 14, 2013)

NRG challenged the Commission's approval of a contested settlement between PJM, NYISO, two utilities and the New Jersey Board of Publuic Utilities resolving litigation over how

to transition transmission agreements executed in the 1970s to the open-access regime created under Order No. 888. NRG argued that the agreement gave ConEd transmission rights that were unavailable to other market participants and a such, the settlement was unduly discriminatory and inconsistent with open access tariffs on file. While acknowledging that the settlement was inconsistent, the court found that the Commission's rationale that the non-conforming settlement was the necessary to address operational challenges — was reasonable.

Commission Win.

Illinois Commerce Commission v. FERC (June 7, 2013).

ICC v. FERC offers insight into the level of evidence that the Commission will need to support cost allocation decisions. 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. In particular, Michigan parties also argued that they could not use wind power to satisfy the state renewable portfolio standard (RPS) as was the case for other MISO states because Michigan's RPS statute does not allow use of out of state power to satisfy the RPS. The court rejected that argument as well, finding 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 moral for appellate lawyers here? Even if the parties don't challenge a constitutional infirmity in an argument (as was true here; none of the parties raised a commerce clause objection), federal appellate courts are pretty smart and will jump on it anyway. So think through those arguments before raising them.

Commission Win.

Southern California Edison v. FERC (May 10, 2013)

Southern California Edison (SCE) challenged a Commission order approving an incentive rate for SCE's transmission. Following a paper hearing in which parties submitted evidence and affidavits, the Commission established the return on equity (ROE) at the median of a proxy group of similar IOUs rather than at the mid-point as SCE proposed. In addition, the Commission also took judicial notice of a change in ten year U.S. Treasury bond rate yields and reduced the ROE to account for a lower cost of capital. On rehearing, SCE disputed the downgrade, and presented an expert affidavit explaining that given the unique conditions of the 2008 market collapse, the Commission erred in assuming a traditional relationship between bond rates and cost of capital. The Commission, however, refused to consider the affidavit arguing that the record had closed.

On review, the court affirmed the Commission's methodology for setting ROE, i.e., use of the median rather than midpoint within the proxy group. But the court found that the Commission's refusal to consider SCE expert's affidavit violated Section 556(e) of the APA by depriving SCE of the opportunity to respond to "official notice of a fact."

Split Decision. Commission wins on methodology, Petitioner wins on APA violations.

Brian Hunter v. FERC (March 15, 2013)

Hunter v. FERC resolved a jurisdictional turf war between the Commission and the CFTC. Lots on the line for both sides; Hunter faced a $30 million fine while the Commission faced a rollback of jurisdiction. The significance of the case for the Commission is evidenced by the fact that the solicitor himself, Bob Solomon argued it. But unfortunately, (though from where I sit, not surprisingly), the court gave the win to Hunter.

The back story? The Commission fined Petitioner Hunter $30 million for alleged manipulation of natural gas futures contacts. Needless to say, Hunter disputed the Commission's ruling on rehearing and appeal arguing that the the CFTC has exclusive jurisdiction over commodity futures contracts. The court agreed finding that nothing in the Energy Policy Act gave the Commission's jurisdiction to charge Hunter with manipulation of gas futures contracts and granted the petition for review.

The Commission may not have been happy with the outcome, but now that jurisdictional lines are clear, both the CFTC and the Commission can move forward. And that they

have; just a few days ago, the two agencies signed an Memorandum of Understanding (MOU)establishing terms by which the Commission and CFTC will share market surveillance information and other data related to the gas and electricity financial markets.

New England Power Generators Association v. FERC (February 15, 2013)

This case returns to the court following a remand of a remand order. Recall that back in 2010, the United States Supreme Court ruled that the Mobile-Sierra doctrine (which permits modification of contractual rates only if the public interest so demands) applies even where contractual rates are challenged by third-parties. But the Supreme Court was not clear on whether prices set by New England ISO's Forward Capacity auctions were in fact contract rates subject to *Mobile Sierra* and remanded the case to the D.C. Circuit.

Before the court, the Commission declared that the Forward Capacity Auctions did not actually produce contract rates but that the agency had the discretion to treat them as such. The court concluded that the Commission's earlier orders did not support this position, so it returned the case to the Commission to address the question more fully.

On remand, the Commission reiterated its position that Forward Capacity Market rates were not technically contracts, but because they possess certain characteristics that are similar to contracts, FERC was using its discretion to enforce the settlement agreement's Mobile-Sierra provision. The New England Power Generators Association Inc. ("NEPGA") challenged the order, agreeing that the Mobile-Sierra standard applied, but that the Commission should have determined that the Forward Capacity Market rates were contracts. The court dismissed NEPGA's petition for lack of standing because the desired outcome — the application of the Mobile-Sierra standard — had been achieved and therefore, NEGPA was not injured. Several states also challenged the decision, arguing that the Forward Capacity Market results are not contract rates and that without a contract rate, FERC cannot apply the Mobile-Sierra standard. The D.C. Circuit rejected these arguments, finding that the Commission had discretion to apply the Mobile-Sierra doctrine whether the auction rates are contract rates or not.

Commission Win.

PPL Energy v. FERC (February 5, 2013)

PPL challenged the Commission's dismissal of PPL's complaint against PJM, alleging that PJM violated its tariff by failing to include all transmission outages expected to last two months or longer in its annual modeling. PJM's omission

of outages resulted in underfunding of financial rights relied on by PPL, leading to an unjust and discriminatory result under the Federal Power Act. The Commission rejected the complaint, finding that PJM's tariff allows it discretion to determine which outages are included - and the court found the Commission's decision reasonable.

Perhaps the only additional point worth noting here for those doing business in RTOs and ISOs is that the court agreed with the Commission that PJM's manual is not binding on PJM.

Commission Win.

Ravenswood v. FERC (1/22/2013)

This case involves a challenge to a Commission approving a NYISO tariff provision that allows rates for reliability energy be reduced as mitigation to a generator's exercise of supply-side market power. The provisions did not apply to the petitioner, Ravenswood, which owns only one generator in New York City and Ravenswood did not challenge them. However, Ravenswood asked the Commission to mandate other mitigation measures to protect seller from "buy-side" market power, i.e., conduct that artificially depresses rates. The Commission declined to do so and Ravenswood appealed. The court ruled the Commission's decision reasonable. The court found that Ravenswood had "exaggerated" the connection between the two issues. The court also observed that the Commission had chosen an iterative process to address complexities posed by regional integrated markets and that Ravenswood would still have an opportunity to present its proposal to NYISO stakeholders for consideration.

For a summary of the court rulings and panels in each case, see this chart below:

Case Name	Circuit	Decision	Oral Arg.	Issue Date	Panel	Column1	Column2
Southwest Power Pool v. FERC	D.C.	FERC loss on both standing and APA grounds	'10/18/2013	'12/3/2013	Williams (Opinion)	Tatel	Griffith
TC Ravenswood v. FERC	DC	FERC win	'10/15/2003	'12/13/2013	Tatel (opinion)	Kavanaugh	Sentelle
Northern Laramie Range v. FERC	Tenth Circuit	Dismissed for want of standing	unknown	10/22/2013	Bacharach (opinion)	Seymour	Briscoe
City of Anaheim v. FERC	D.C.	Unpublished FERC Win	unknown	'11/5/2013	Rogers (opinion)	Brown	Williams
Black Oak Energy v. FERC	DC	FERC wins one issue; Petitioner wins on one issue with remand to FERC	'4/16/2013	'8/6/2013	Griffith	Garland	Rogers
Kourouma v. FERC	D.C.	FERC Win	'12/13/2012	'7/23/2013	Griffith	Rogers	Garland
ICC v. FERC	7th	FERC Win	'4/10/2013	'6/7/2013	Posner (opinion)	Wood	Williams
Southern California v. FERC	DC	Split; FERC order affirmed, Petitioners win APA issue	'3/25/2013	'5/10/2013	Rogers (opinion)	Sentelle	Ginsburg
NRG Market Power v. FERC	DC	FERC Win	'10/12/2012	'6/14/2013	Tatel	Sentelle	Randolph
Brian Hunter v. FERC	DC	Petitioner Win	'2/7/2013	'3/15/2013	Tatel	Henderson	Williams
PPL Energy Plus v. FERC	DC	Commission Win, Unpublished		'2/5/2013	Sentelle (opinion)	Tatel	Williams
NEGPA v. FERC	DC	FERC Win, procedure and merits	'11/15/2012	'2/15/2013	Brown (opinion)	Tatel	Griffith
TC Ravenswood v. FERC	DC	FERC Win	'12/7/2012	'1/22/2013	Williams (opinion)	Tatel	Brown

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Appellate Bonus: Dominion Transmission Inc. v. Summers, 723 F.3d 328 (D.C. July 19, 2013)

This ruling came in a case that I mentioned in an earlier newsletter in which I represented the Myersville Citizens for a Rural Community (MCRC). *Dominion Transmission v. Summers* is one of just a handful of cases brought 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.

Dominion applied for and received a Section 7 certificate for a proposed storage project expansion that included a compressor station to be sited in Myersville, Maryland. Because the compressor station is a source of pollutants, Dominion was also required to obtain an air quality permit under the Clean Air Act (CAA), a federal statute administered by states through federally-approved "state implementation plans" (SIPS). Accordingly, Dominion applied to the Maryland Department of Environment (MDE) for an air quality permit. But MDE would not process the application because of a statutory provision (MD Env. 2-404) that prohibits MDE from accepting an air quality permit application unless the company can show that the project has received local approval or otherwise complies with applicable local law. Because the Town of Myersville denied a Dominion's requested zoning variance, there was no local approval and as such, MDE advised that it could not process the permit under MD Env. 2-404.

Dominion challenged Maryland's decision to withhold action. First, Dominion argued that MD Env. 2-404 was preempted entirely by the NGA and even if it were not, the NGA preempted "applicable local law," and thus, Dominion was in compliance and Maryland could process the application. My clients made two arguments. First, we argued that MD Env. 2-404 was part of a federally-approved SIP and as such, was not preempted by the NGA. Second, we argued that the CAA expressly reserves decisions about local siting to states - and that by deeming the "compliance with local law provisions" in MD Env. 2-404 preempted by the NGA, the court would effectively trump the "preservation of local law" provisions of another competing federal statute, the CAA. The court adopted our full argument (nearly verbatim, I must boast! - here's my brief) and ruled that MD Env. 2-404 was not preempted. This was a very significant ruling. Unfortunately, though we won one battle, we lost the war since the court concluded that that NGA preempted local law. This was my first time representing parties as intervenors rather than petitioners or respondents - and while it's an odd and somewhat marginal posture, I made certain that my clients' position was heard.

Energy Bytes:

Does spending days on end in stakeholder meetings have you feeling out of shape? Now, you can get fit and = become a market participant at the same time with the PULSE Jump Rope, which converts the kinetic energy generated by jumping rope into electricity. Though with a $129 price point, the device probably costs more than the value of the energy produced, perhaps the price also reflects "scarcity pricing:" PULSE currently plans to make only 100 jump ropes as part of a limited first edition.

Sure, you can sign up for an American Bar Association (ABA) or Energy Bar Association (EBA) continuing legal education training program any time. But how often can you learn about the energy industry by doing? This intriguing new device, Circuit Scribe , a rollerball pen that writes with conductive silver ink, is a hands-on way to learn more about how circuits work and to create your own mini-systems. For more information, check out the Kickstarter Demo Video.