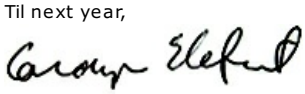
In This Issue:

Happy Holidays from the Law Offices of Carolyn Elefant!

Conventional wisdom says that newsletters should be short and sweet. This one's sweet (at least I think so), but hardly short: between a 50-minute webinar summarizing FERC's market mechanisms to encourage renewable energy development to my annual round-up and report of FERC appeals (only a dozen this year), this content should keep you busy during next week's holiday downtime.

As 2012 draws to a close, I look forward to a brand new year full of cases of first impression and last resort. To all of you, I hope that 2013 brings innovation and new ideas to the energy industry and prosperity and purpose to each of you. Best wishes for a joyful New Year and I look forward to seeing or working with you on the other side. Don't be a stranger!

Til next year,



2012 FERC Year in Review and Predictions: A Year of C's

In characterizing FERC's activities over 2012 and what's coming ahead, the C's (as opposed to the ayes) have it. Coincidentally -- or not -- FERC industry trends follow the law of the C's, neatly falling into one of the following categories: Clean Air Act convergence, conflict for renewables, cost, coordination, cyber (security), cumulative and compliance. "C" for yourself below:

Clean Air Act Convergence

If I had to identify the number one trend of significance to the

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energy industry and FERC practice, it would be the increasing impact of the Clean Air Act and climate change issues on the energy industry as a result of EPA's unveiling of new and more stringent regulations for power plant emissions. This past year alone, FERC issued a policy statement on how it would advise EPA on granting extensions to utilities to comply with new rules (due to potential reliability concerns) and Commissioner Moeller testified on HR 4273, Resolving Environmental and Grid Reliability Conflicts Act of 2012, which would relieve utilities of having to choose between Clean Air Act compliance and ensuring reliability. Most recently, at its December 2012 meeting, the Commission heard a staff briefing on California's newly implemented cap and trade policy, with reactions ranging from admiration (Commissioner Norris) to concerns about impacts on Western markets (Commissioner Clark) and cost impacts to consumers (Chair Wellinghoff). In the coming year, expect Clean Air Act issues to continue to impact the industry, opening the door to reliability concerns but also potential opportunities for renewable technologies.

Compliance
As Order No. 1000 winds its way through the courts, compliance filings are underway. (For convenience, here's the PJM Compliance Filing, MISO Compliance Filing, CAISO Compliance Filing and SPP Compliance Filing). Up next? Watch for an onslaught of comments and potential challenges to the filings.

On another compliance front, FERC has stepped up enforcement efforts going after powerhouse financial institutions like Deutsche Bank and Barclays, going so far as to suspend JP Morgan's market power authority for submitting false information to FERC. (On this count, I agree with dissenting Commissioner LaFleur's concerns that JP Morgan is being penalized more for its litigation position than false information) Next year, expect compliance actions to increase not just for market manipulation but for reliability matters as well.

Cost
All of these compliance filings and stakeholder extravaganzas and organization don't come without costs. Connecticut is challenging the Northeast ISO's ever-burgeoning budget, which reportedly increased by 34 percent over the past four years . State utility commissions don't have authority over the ISO budget, which is why Connecticut has brought its complaint to FERC. With the economy still sputtering and money tight, states are going to look to recover funds for ratepayers wherever they can, and RTOs and ISOs, despite their putative non-profit status aren't sacred cows. (As an independent practitioners who's incorporated business concepts like lean and agile, I don't have much sympathy for bloated corporate expenditures).

Conflicts...for renewables
As the renewables industry matures and reaches utility scale, new conflicts are emerging, not so much between old and new technologies but rather, between renewables. FERC's recent ruling in Iberdrola et. al. v. Bonneville Power Administration is one example, pitting hydro interests against wind. In *Bonneville Power*, FERC agreed on rehearing with the wind generators that BPA's curtailment practices accorded undue preference to federal hydropower resources over non-federal wind generation. FERC explained that by curtailing wind delivery, BPA was able to spare its customers added costs at the expense of wind generators. To remedy BPA's discriminatory practices, FERC, for the first time, invoked its authority under Section 211A of the Federal Power Act to order BPA to change its curtailment practices - and as part of the rehearing order, conditionally accepted BPA's compliance filing, subject to additional changes to include a cost allocation methodology.

As we enter 2013, watch for conflicts in the Order No. 1000 compliance proceedings and ensuing transmission planning

processes between large transmission-dependent renewables pressing for additional transmission into markets against distributed generation renewables whose USP (unique selling proposition) is transmission-displacement.

Coordination
As natural gas becomes the preferred source of fuel for many power plants, coordination between gas and electric operations is critical. This past year, FERC expressed a growing concern that lack of coordination between the electric and gas industry or barriers to free flow of communication may imperil reliability. Up next year - another technical conference and gas-electric coordination and perhaps a rulemaking or policy statement after that. But my guess is that we'll see some of the affiliate-walls between gas and electric operations come a tumbling down.

Cyber-Security
Vegetation and solar storms and terrorism, oh my! Threats to grid reliability abound, and FERC is on it! In October 2012, FERC proposed two new reliability standards to address vegetation encroachment and geomagnetic interference with the grid, Joseph McClelland, former director of Office of Reliability, has gone to the Hill multiple times to urge increased FERC authority to deal with cyber security matters, and he now leads FERC's newest cyber-security initiative, the newly created Office of Energy Infrastructure Security (OEIS) that will seek comprehensive solutions to FERC-jurisdictional facilities. These initiatives are just the start; we'll see more activity on the cyber-security front in 2013, I'm sure.

Cumulative
In 2012, environmental groups pressed FERC to consider the cumulative and secondary impacts of Marcellus Shale development and fracking in several different Section 7 Natural Gas Act pipeline certificate proceedings such as Tennessee Gas (pending rehearing) and Texas Eastern NY/NJ Expansion Project (now on appeal at the DC Circuit; disclosure - I've been involved in this case but not with regard to raising this particular issue). To date, FERC has shied away from opening this can of worms, finding no causal relationship between pipeline development and fracking activities which FERC points out are regulated by states and outside its jurisdiction. Thus, far, Second Circuit agrees.

But the pressure to study the impacts of fracking aren't going away any time soon. Environmental groups are pressing the Department of Energy to consider the impacts of fracking as part of the process of authorizing LNG gas exports. Hollywood's entre into the fracking debate with the upcoming release of Promised Land will further highlight the issue. Still, I don't expect FERC to change course on its current position on consideration of fracking in the pipeline process unless a case with unique factual considerations presents itself. And at some point, I expect that these questions will be resolved by the Supreme Court which hasn't dealt with a good, juicy cumulative impacts NEPA case in quite a while.

So that's the FERC year in review as I "C" it. If you have any questions or FERC matters that you're mulling, feel free to contact me directly at carolyn@carolynelefant.com or 202-297-6100.

FERC and Market Pull Mechanisms for Renewables

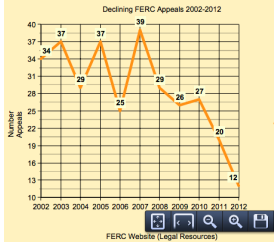
This past year, creating market mechanisms to encourage renewables has been a common theme running throughout FERC's orders. Here's a webinar I presented in October 2012 discussing the concept of market pull and summarizing FERC's policies including:

•PURPA and QF avoided cost rates/mandatory purchase

obligations
•VERS (integration of variable energy resources into the grid)
•FERC ruling on net metering
•Order No. 1000 and transmission for "public policy,"Order No. 679 (green transmission incentives)
•NOPR Re: ancillary services and storage

You can access the 50-minute webinar here - http://www.anymeeting.com/carolynelefant/EC52DC86884B (Instructions: click on webinar link above. You'll be prompted to enter your name and email after which time the webinar will load. Loading may take up to a minute so please be patient).

FERC Appeals Down to A Dozen in 2012



When I published last year's FERC Appellate Report 2011, I remarked on the relatively low number of FERC appeals - 20 in total. This year, that number has dropped even more; down to just a dozen appeals for 2012 (though it's possible the court may release another opinion or two before the end of the year). As this graph shows, over the past decade, the number of FERC appeals has fluctuated between 25 and 30-something annually, before beginning a precipitous decline from 2008's high of 39 down to twelve.

What accounts for the sharp drop? Overall, federal appeals dropped between 2010 and 2011 by 1.5 percent according to the federal judiciary's statistics -- but that's nowhere near the roughly 40 percent decline in FERC appeals between 2011 and 2012. Last year, I postulated that a combination of FERC's penchant for negotiated settlements along with a down economy contributed to the 2011 decline. But perhaps FERC's improving track record at the court - 75 percent last year, and a whopping 92 percent affirmance rate this year (FERC lost just one of the twelve cases) also deters parties from bringing challenges.

To give credit where due, FERC has stepped up its game both in crafting reasoned orders and defending them on appeal. Even so, in a field as complex as energy regulation, no one side can be right 92 percent of the time - and without a robust appellate process, errors may go unchecked for years, thus creating uncertainty for the industry.

What's your view? Are you troubled by the diminishing number of appeals? Or is it a positive development that eliminates costs and contentiousness? Send me your comments at carolyn@carolynelefant.com

Feature: FERC Appellate Round-Up 2012

Without further adieu, here's one of the most popular features of this newsletter: our annual FERC appellate round up -

where I read and riff on FERC appeals, so you don't have to. This year's buzzword was *Chevron*, with the court expressly invoking that timeworn doctrine three or four times. The list also includes the usual bunch of procedural rejections for want of standing or satisfaction of jurisdictional prerequisites. Enjoy!

Indiana Utility Regulatory Commission v. FERC (D.C. Circuit) (Jan 17, 2012)
IURC v. FERC gives insight into the best and worst of appellate practice; beginning with a run of the mill failure-to- preserve-an-argument on rehearing and ending with praise for an intervenor's arguments.

IURC v. FERC involved an interesting question over the extent of a state's ability to oversee and approve retail customers' sales of demand response in FERC-regulated wholesale markets. Unfortunately, the court dismissed the IURC's argument that PJM's demand response program (which allows retail customers to participate through third-party aggregators) directly interferes with the IURC's regulatory authority over retail customers. The court found that the IURC's incorporation by reference on rehearing of its earlier arguments regarding encroachment did not suffice to preserve the arguments for judicial review under Section 313.
With the guts of its arguments eviscerated by the D.C. Circuit's mighty jurisdictional sword, IURC was left to argue that FERC should have adopted the IURC's modifications to PJM's demand response proposal. On brief, PJM acknowledged that both its proposal and IURC's had merit, thus underscoring the reasonableness of FERC's action (because either way, FERC would have been right). The court praised PJM's argument, noting that "it has the virtues of being modest and correct." Kudos to the PJM for such a sweet shout out from the court - it's every appellate practitioner's dream!

Score: FERC win (largely procedural)

Freeport-McMoran v. FERC (D.C. Circuit Jan. 17, 2012)
The case resolves various challenges by a pipeline and shipper to a FERC order approving El Paso's 2005 rate filing and its interpretation of a subsequent settlement agreement. Lots of arguments raised here, but from what I could discern, little precedent set as the court essentially found reasonable FERC's interpretations of all of the disputed settlement provisions. Between us, this is one of those FERC cases that is both fascinating and challenging to the participants but a bit of a snooze even for an avid appellate practitioner like me.

Score: Full FERC win.

Braintree Department and Light v. FERC (D.C. Cir. Feb. 7, 2012) As in *Freeport-McMoran* discussed above, *Braintree* involved various challenges to FERC's interpretation of a Settlement Agreement, particularly the scope of various litigation rights reserved thereunder. The court clarified that *Chevron deference* applies to FERC interpretation of settlement agreements - whether FERC expressly says the agreements are ambiguous or not. But aside from a money quote from the court ("But the Chevron two-step is a dance for the court, not the Commission."), *Braintree* is pretty much a run-of-the-mill decision finding FERC's resolution of various complex arguments reasonable.

Score: Full FERC win merits.

Jim Lyons, Polly Lyons v. FERC (4th Cir. March 8, 2012) I don't know the merits of this case, but essentially, the petitioners challenged FERC's dismissal of a late-filed rehearing of a letter that FERC classified as an agency decision. The deadline for filing rehearing is statutory leaving FERC no discretion to waive the deadline or excuse an untimely filing. Not much the petitioners could do with this one.

Score: Easy FERC win, procedural.

Occidental Permian v. FERC (D.C Cir. March 27, 2012) *Occidental* addresses one of those little secrets known only to most manic (and nerdy) of FERC practitioners: that standing for purposes of intervening at the agency level doesn't necessarily amount to Article III standing for purposes of judicial review. Occidental is a holding company for various subsidiaries which function as large retail electric customers, power marketers or ancillary-service suppliers within ERCOT and SPP. Occidental and its subsidiaries timely intervened in the FERC Section 205 proceeding for approval of negotiated rates for the Tres Amigas energy transmission project a multi-billion dollar New Mexico transmission project project would tie together the three independent electric grid and integrate renewable wind and solar power. FERC approved the negotiated rates, and Occidental sought rehearing, arguing that Tres Amigas did not qualify for negotiated rates because it has captive customers and could exercise monopoly power without bearing any of the risks of the project.

Rehearing denied, Occidental proceeded to the D.C. Circuit, where it found itself locked out by Article III standing requirements. The court held that Occidental's injury - the possibility that utilities might interconnect with Tres Amigas and then pass higher cost of transmission on to customers like Occidental and its subsidiaries - was too speculative and remote to give rise to standing. The court added that FERC had not yet even been asked to determine or approve rates that Occidental subsidiaries will pay for Tres Amigas related service, effectively "stacking speculation upon hypothetical upon speculation." If and when these events occur, the court assured that Occidental "will have every opportunity to challenge future orders."

From what I could tell from the docket, the court, and not any party, raised the standing question. That's not surprising. Most practitioners assume that parties who meet the statutory jurisdictional prerequisites to judicial review (timely intervention and rehearing) won't have a problem satisfying Article III requirements as well and thus, don't raise standing challenges at the court. *Occidental* suggests that perhaps they should.

Score: FERC win, procedural.

Mobil Pipeline v. FERC (D.C. Cir. April 17, 2012)
Mobil Pipeline represents FERC's sole loss of the year. The court vacated FERC's order denying Mobil's market-based rate application for the Pegasus pipeline, finding that the record did not support FERC's conclusion that Pegasus had market power. In particular, the court repeatedly referenced testimony by FERC's staff expert, who characterized Mobil's market-based rate application as a slam-dunk in his testimony before the ALJ. Bottom line: even if the court doesn't credit FERC's reasoning, it may still credit its fact experts.

Score: FERC loss.

Coalition for Responsible Growth & Resource Conservation et. al. v. FERC (Second Cir. June 12, 2012) This case is the first in what I anticipate will be a long line of cases pushing FERC to consider the secondary impacts of Marcellus Shale drilling in Section 7 pipeline certifications. Petitioners argued that FERC violated NEPA in issuing a certificate of necessity and convenience to the Central New York Oil & Gas Company for the MARC 1 pipeline by failing to prepare an EIS or analyze more closely the cumulative impacts of Marcellus Shale development that would be caused by the pipeline. The court found reasonable FERC's conclusion that the impacts of shale drilling are not sufficiently causally-related to the pipeline to warrant a more in-depth analysis. With so much contention - and growing concern - over the practice of fracking, the *Coalition for Responsible Growth* decision is likely the first rather than last of court cases asking FERC to expand the scope of its NEPA analysis.

Score: FERC win on NEPA and cumulative/secondary impacts issue. (But maybe not for long?).

Council of City of New Orleans v. FERC, (Aug. 14, 2012 D.C. Cir) This case involves a challenge to the Commission's approval of the departure of Entergy Arkansas and Entergy Mississippi from the Entergy Systems Operating Agreement without payment of certain exit fees. The Commission determined that the Agreement did not compel payment of exit fees by withdrawing parties. Citing *Chevron* (a common theme in FERC review this year), the court deferred to FERC's interpretation of the agreement.

Score: FERC win, merits.

City of Redding v. FERC (9th Cir. September 2012) So it's 2012, and the Ninth Circuit is *still* hearing cases spawned by the California energy crisis. This time, it's the City of Redding, a public power utility that sought review of a FERC order retroactively resetting the unjust market rates charged back in 2000-2001 and ordering refunds. Previously, in *Bonneville Power v. FERC*, the Ninth Circuit found that FERC lacked authority under Section 206 to order non-jurisdictional entities like City of Redding (a public power utility) to issue refunds. Subsequently, FERC recalculated market rates for the 2000-2001 period at just and reasonable levels in order to properly order refunds. The City of Redding objected, arguing that FERC should not have reset market power rates for non-jurisdictional entities, and that doing so violated *Bonneville*.

In response, FERC argued that the City lacked standing since it was shielded from refund liability by the *Bonneville* order and therefore wasn't aggrieved. The Ninth Circuit found standing, noting that the City could still face refund liability but ruled against the City on the merits finding that FERC's order merely recalculated rates for all market participants but did not assign liability to the City or other non-jurisdictional utilities. Judge McKeowen dissented, pointing out that if the City wasn't liable for refunds, then standing was speculative. In fact, McKeowen explained that the opposite was true: that FERC did indeed retroactively set rates for non-jurisdictional entities -- exactly what the *Bonneville* court prohibited and in so doing, and therefore violated Section 206 and injured the petitioners. The dissent also accused the majority of candy-coating FERC's decision to prop it up on appeal.

Score: FERC wins but not without taking a beating from the dissent. The Ninth Circuit's ruling also suggests a growing impatience with California refund cases.

Green Island Power v. FERC (Second Circuit Nov. 2012). A second trip to the Second Circuit didn't turn out as well as the maiden voyage for petitioner Green Island Power. In Round I, the Second Circuit vacated a FERC license order issued for the School Street Project and remanded the case to FERC to determine whether the applicant's offer of settlement materially amended the application, thus triggering another round of notice. No surprise, on remand, FERC concluded that the settlement hadn't amended the application, and therefore did not need to consider Green Island's competing proposal.

Score: FERC win, merits.

Northern Natural Gas v. FERC (DC Cir. November 27, 2012) Northern Natural Gas challenged FERC's interpretation of Section 4(f) of the Natural Gas Act which authorizes market rates. Initially, Northern Natural obtained market rate authority, but when it attempted to expand market rate authority, FERC found it it didn't qualify under the statute. Citing (what else?) *Chevron*, the court deferred to FERC's interpretation of the statute.

Score: FERC, clean win on the merits.

Calpine Corporation v. FERC.
Even for the FERC-uninitiated, *Calpine*, which addresses FERC's

authority over generator's procurement of station power, is a bit of tricky case to follow. But from an appellate practitioner's perspective, *Calpine* offers a sneak peek at how agencies respond to judicial opinions and how parties' concessions can impact a court's decision. Juicy stuff!

So here's the rundown. Generators like Calpine can procure station power either through self-generation or through purchase from the grid at retail rates. FERC devised the concept of "netting intervals" whereby the power that a generator uses is netted against what it sends to the grid; the generator is only charged if it uses more than it sends back. Longer netting intervals give generators a greater chance to return power to the grid and avoid retail charges.

So the question arises, is the generator's net purchase a retail sale regulated by the state or a wholesale transaction? It's a question that courts attempted to address on two prior occasions. In one earlier case, the court never reached the jurisdictional issue since the generators challenging a reduced netting interval conceded that FERC had jurisdiction over the transaction and objected only to FERC's limitation of the interval. In the next case, the court rejected FERC's argument that netting is not a retail sale; the court' found that FERC's characterization was irrelevant since FERC did not attempt to assert its wholesale authority over the sale. Still, apparently FERC viewed the court's opinion as requiring it to characterize netting as a retail transaction - which is what FERC did in *Calpine*. Calpine accused FERC of flip-flopping - first saying that net-metering is a wholesale transaction, then changing its mind. But FERC countered that it was forced to modify its position on netting in light of earlier precedent. The D.C. Circuit affirmed.

FERC win, merits.

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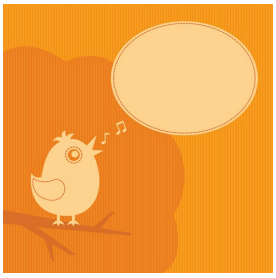

If you're not already following my firm on Twitter at @nxtgenenergylaw , now's the time to start. With the help of @MelissaAlfano, a new attorney working with my firm, we tweet about everything from latest developments out of FERC to renewable policy and international energy issues. If you want to keep up with the latest and greatest in the energy biz, all you have to do is follow!

**New Year 2013 , Webinar and Chirping Bird Photos appear courtesy of Shutterstock*