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May 2012

Friends and Colleagues,

It's hard to believe that its been four months since my last law firm newsletter. As the Year of the Dragon roars along, there have been many developments in my practice and the energy industry that I want to share - so settle in for a lengthy read.

On the practice front, there are a few exciting announcements. In April 2012, I was excited and humbled to be named an Energy and Natural Resources Superlawyer for Washington D.C. for 2012. As the sole small firm listed along with practitioners from the nation's most prominent law firm, I am proud that I can offer the same top quality of legal services to my clients as the peers whom I have long admired.

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Spring has been a busy month for speaking as well. In April 2012, I moderated a panel on regulatory issues at the Global Marine Renewable Energy Conference in Washington D.C. sponsored by OREC. In May 2012, I spoke at the Avvocating Conference in Seattle

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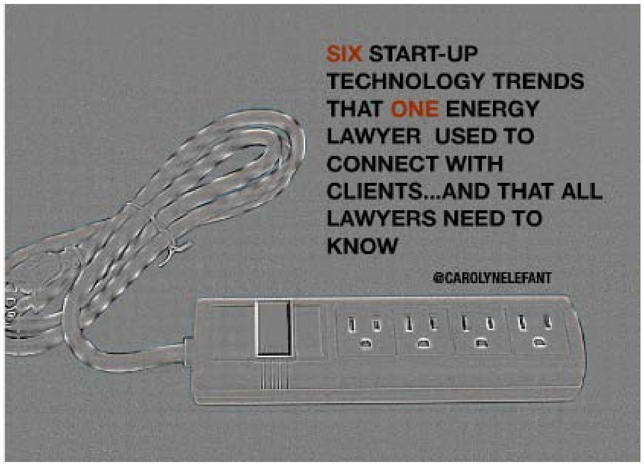
Washington D.C. on Six Start Up Technology Trends that One Energy Lawyer Uses to Connect with Clients. Subsequently, Slideshare.net chose my slide deck from hundreds uploaded as one of its "featured presentations" for May 11. You can view the slideshow at:

[Six Start-Up Technology Trends That Start Up Lawyers Can Use]



Finally, later this week, I'll travel across the pond to present on risk management issues at the SMI Social Media in the Utilities Sector Conference in London, UK. I'll be joined by some of the lead players in the field and I am looking forward to learning more about how our European colleagues in the energy biz are using social media.

It's been a busy few months for our industry as well. When you receive this newsletter, it is likely that FERC may have already released its rehearing decision on Order No. 1000, which was scheduled for the May 17 agenda. And as my newsletter discusses, things may be looking up for renewables on the regulatory front, with recent FERC initiatives on QFs and - somewhat counterintuitively, recent merger activity which as discussed below may actually be helping to drive renewable development. Renewables have business options for growth too - as discussed, many green tech and renewable companies choosing B-corporation status to demonstrate their commitment to socially responsible development.

Feel free to contact me at carolyn@carolynelefant.com or give me a call at 202-297-6100 if you have any questions about any energy issues here in Washington

D.C. or if you'd just like to chat. I'd also love to receive feedback on the firm newsletter and input on issues that you'd like to see covered in the future. Enjoy!

Carolyn Elefant

FERC Focus: A Quad(4) of Quick Qualifying Facility (QF) Updates

Back in October 2011, when I released Reviving PURPA's Purpose , commissioned by the Southern Alliance for Clean Energy, I was hard-pressed to find any scholarly works or FERC decisions discussing methodologies for setting avoided cost rates for qualifying facilities that had been published more recently than five years ago. And no wonder. To paraphrase Thomas Hobbes , the avoided cost ratemaking process is nasty (as in frequently contentious), brutish (as in extremely complicated) and anything but short (except perhaps in those jurisdictions with statutes establishing avoided cost rates as the market price for energy and capacity transactions in regional markets).

Yet, lately, there's been a small rush of QF activity. Though I'd like to credit my paper for "reviving" discussion on QF ratemaking, in my view, the conversation finds its genesis back in the 2010 California PUC feed-in tariff case. There, FERC determined that the Federal Power Act preempts states from setting feed-in tariffs for wholesale transactions but that states may set avoided cost rates pursuant to PURPA. Subsequently, FERC overruled earlier precedent that required states to base avoided cost rates on all power sources and held that states could establish resource-specific avoided cost rates. In addition, FERC reaffirmed that states may establish QF rates to reflect verifiable costs associated with avoided transmission construction or environmental compliance resulting from the purchase of QF power. FERC's *California CPUC* ruling represents the first step to making PURPA more relevant in today's markets. Allowing states the ability to set technology-specific rates can help boost QF rates even at a time of declining natural gas prices. Likewise, with utilities now subject to more stringent EPA emissions requirements, environmental compliance costs are verifiable and can be included in QF rates as well. Still, the *California CPUC* ruling does not force states to revise their avoided cost methodologies but merely provides an option for them to do so.

As summarized below, the most recent quad of FERC orders and pronouncements continue in the same vein -- interpreting PURPA in a manner favorable to QFs, but stopping short of interfering with states' avoided cost practices:

Projects One Mile Apart Are Separate Facilities for QF Certification

Potential New FERC Policy Directive on Avoided Cost for DG

According to this summary, FERC Chairman Jon Wellinghoff announced at a March 2012 ACORE-sponsored webinar that he has directed FERC lawyers and policy experts to research whether QF avoided cost rates should include additional compensation for distributed generation in light of avoided transmission costs and other value provided to consumers.

Chair Wellinghoff's initiative could possibly boost rates for smaller or newer green technologies that have been left out of carve-out programs. Though some types of DG like solar are the beneficiaries of carve-outs and favorable REC programs, others such as marine hydrokinetics (for which I have a soft spot) are not. Therefore, Chair Wellinghoff's proposal could potentially boost revenues for new and emerging QF technologies.

QFs Can Smile if Separated by A Mile

In Pioneer Wind issued March 15, 2012, FERC rejected a petition seeking to strip two wind park facilities developed and owned by the same entity of QF status because collectively,the two 46.8 MW projects which had each been self-certified as a QF exceeded the 80 MW size ceiling for QF eligibility under PURPA and FERC's regulations. The challengers contended that because the two facilities were developed at the same time and owned by the same entity, they should have been treated as a single unit for purposes of PURPA eligibility. While agreeing that the projects were developed and owned by the same entity, FERC nevertheless, found that the because the projects were located more than a mile apart from each other, they were each properly certified separately as QFs under FERC's regulations. FERC also emphasized that the "one-mile rule" is not a presumption that can be rebutted by a showing of common ownership or operation, but rather, is a bright-line test that FERC must abide irrespective of the relationship or operational dependency of the project units.

RECs Are Separate from Avoided Cost Rates

Ever since its ruling in *Am-Ref Fuel Co.*, American Ref-Fuel, 105 FERC ¶ 61004 (2003), FERC has taken the position that avoided cost rates do not include compensation for renewable energy credits (RECs). FERC reasons that avoided cost rates compensate only for energy and capacity and not the environmental attributes reflected in the RECs. Thus, states are free to assign ownership of RECs associated with QF power to the utility or the QF, or to allow the parties to negotiate ownership by contract. What the state is preempted from doing under PURPA, however, is to adopt a policy or rule, holding that avoided cost rates include compensation for RECs - or any costs other than those associated with avoided energy and capacity.

Thus, in Morgantown Energy Associates , the Commission found inconsistent with PURPA the Public Service Commission of West Virginia's reasoning that a utility is entitled to REC ownership where a contract with a QF is silent because avoided cost payments compensate the QF for avoided capacity and energy and also RECs. The aggrieved QFs argued that under PURPA and the *AmFuel* precedent, avoided cost compensation does not include payment for RECs. In response, the utilities argued that the case is not about PURPA but rather, the state's ability to determine which party owns RECs when a contract is silent. Because RECs are a creature of state law, the state can assign ownership, contend the utilities.

Significantly, FERC did not find that the West Virginia Commission's determination that the utilities owned the RECs in violation of PURPA. Rather, FERC deemed the West Virginia Commission's reasoning - that avoided cost payments include compensation for RECs, inconsistent with PURPA. Still, FERC did not initiate an enforcement action against West Virginia as requested by the QFs, and instead ruled that the parties could bring an action in federal court.

Two factors militate against a FERC enforcement action, in my view. For starters, the parties sought review of the West Virginia Commission's decision in the West Virginia Supreme Court which must determine whether state law supports utility ownership of RECs where the contract is silent. FERC is unlikely to intercede in these matters without first giving the state an opportunity to sort out matters of state law. Second, if it turns out that state law unequivocally deems utilities owners of RECs where the contract is silent, then West Virginia Commission's statement that avoided cost rates include QF payments amounts to little more than dicta and doesn't warrant a full on enforcement action by FERC. Still, that FERC went the extra mile to issue an order essentially to correct a statement by the West Virginia Commission that may not even be material to the ultimate outcome shows commitment to ensuring that PURPA's role is not compromised by inaccuracies.

PURPA Not State Law Defines Date of Firm Obligation to Purchase

Just as it did with a West Virginia Commission ruling, FERC took issue with a decision by the Idaho Commission in n Rainbow Ranch, finding that the Idaho Commission's ruling that the utility was not legally obligated to purchase power from two QFs was inconsistent with PURPA.

The arises out of the Idaho Commission's decision in February 2011 to reduce the size cap for QF rates from 10MW for wind and solar to 100kw, effective retroactively to December 14, 2010. Meanwhile, on December 10, 2010, Idaho Power and 2 QFs, Rainbow Ranch Wind and Rainbow West Wind submitted to the Idaho Commission two 20-year power purchase agreements for approval. In February 2011, the Idaho Commission rejected the contracts, finding that the projects exceeded the 100 kwh eligibility cap, and that the parties did not formally execute the contracts before the December 14, 2010 reductions in the cap size.

The aggrieved QFs asked FERC to initiate an enforcement action against Idaho Power for PURPS violations. The QFs argued that the Idaho Commission decision is inconsistent with FERC's rules which hold that a utility's legally enforceable obligation to purchase attaches when the parties filed the agreement even if it was not formally executed. Thus, FERC's rules on the meaning of "legally enforceable obligation" under PURPA preempt the Idaho Commission's contrary interpretation.

Again, FERC took no enforcement action here - albeit for different motivations than in *Morgantown Associates*. As I described, the West Virginia Commission's ruling didn't (in my view) violate PURPA; rather, a potentially immaterial statement by the West Virginia Commission was inconsistent with FERC's PURPA precedent. By contrast, in *Rainbow Associates*, the Idaho Commission's finding of no legally enforceable obligation to purchase is not only directly contrary to FERC precedent, but was also dispositive of the question of the QF's eligibility for PURPA based rates. In addition, whereas state law governed the question of REC ownership in *Morgantown*, PURPA preempts state law on the question of whether a legally enforceable obligation has been created.

Even so, FERC declined enforcement action. Most likely, it's because the Idaho Commission had already stated to take steps to comply with PURPA. FERC noted that since the issuance of the *Cedar Creek* decision, in which FERC resolved an identical issue, the Idaho Commission had gone back and reinstated many contracts. Given that the Idaho Commission was willing to abide FERC's initial ruling, FERC have decided against enforcement in this matter to allow for a comparable amicable resolution.

So there's my quick run down of the recent quad of QF actions and initiatives by FERC. If you have any questions, you can put them in the Q (queue, get it?) by dropping me an email at carolyn@carolynelefant.com.

How the Urge to Merge May Drive a Surge in Offshore Renewables Development

The latest injection of financial support for offshore renewables is coming from an unlikely and overlooked source: electric utility mergers. In February 2012, the offshore wind industry reaped substantial benefits from two utility mergers. In Maryland, the state's offshore wind development fund will pick up $32 million courtesy of Maryland Public Service Commission order issued in February 2012 approving a merger between Exelon and Constellation Energy that includes a commitment to fund offshore wind. Meanwhile, just up the East Coast, Massachusetts extracted an agreement from NStar Utilities to sign a 15-year contract with Cape Wind to purchase27.5 percent of the project's output as a condition of state approval for its acquisition of Northeast Utilities. NStar's purchase along with a previous purchase by National Grid means that 77 percent of Cape Wind's capacity is spoken for, which should lay the groundwork for Cape Wind's financing.

So how do offshore renewables come into play in merger proceedings? Actually, on the federal level, offshore renewables aren't all that relevant in merger approval proceedings at the SEC or FERC. Both of those agencies focus on largely financial issues such as anti-competitive impacts, economies and efficiencies and rates.

But the situation is different at the state level. For starters, state utility commissions have more at stake when a local utility like BGE or Northeast Utilities is gobbled up by a behemoth company halfway across the country or even overseas. These types of acquisitions can result in the departure of jobs and tax revenues, and diminish states' regulatory control over the newly merged company. For that reason, states will often play hardball in merger proceedings to extract the best possible benefits from companies to offset potential losses and to mitigate adverse impacts.

The states' approach is perfectly legal: generally, most state laws authorize states to apply a broad public interest standard in deciding whether to approve a merger, taking account of a wide array of factors such as anti-competitive effects, impacts on jobs, potential harm to ratepayers and overall benefits to the state. States also have the power to override a merger that's been approved by federal agencies since federal law does not preempt state review.

Companies recognize that states can veto a multi-billion dollar transaction. Though companies won't willingly offer up voluntary concessions, if pressed by the states and intervenors, they'll do what it takes to push the deal through. It's just another cost of doing business, after all.

It's against this backdrop that offshore renewables – or to date, offshore wind – come into play. Even though a state may lose jobs when a hometown company leaves the state, the losses can be offset through investment in offshore renewables, thus allowing the state to stake a claim in a new industry with a promising future. Moreover, long term contracts with offshore wind developers, along the lines of what NStar has accepted with Cape Wind can actually reduce rates in the long run by acting as a hedge against the volatility of buying and selling electricity on the spot market. Finally, offshore wind can also mitigate potential market power since introducing additional power sources into a market puts downward pressure on price simply because there's greater supply.

Admittedly, most of the benefits of utility mergers have gone to offshore wind rather than MHK. Still a rising tide lifts all ships and development of a robust offshore wind industry in the U.S. will clear a path for MHK. Moreover, there may be future opportunities for MHK since experts predict that utility mergers will continue at least through 2012.

With funding opportunities diminishing for renewables, it's important to leave no stone unturned in identifying potential financial resources to promote development. Mergers may provide one opportunity, but there may be others for those companies with the vision and insight to cast a broad net.

To B (Corps) or Not to B?

Gigaom recently reported on the growing trend of start-up technology companies opting for certification as a B-Corporation, a **new type of corporation** committed to using the power of business to solve social and environmental structure. As described here, B-Corporations are certified by a third party, B-Labs "much in the same way that TransFair certifies Fair Trade Coffee or USGBC certifies LEED Buildings."

To ensure that socially responsible values are **baked into a company's DNA**, a B-corporation's (or LLC or partnership) organizational documents must commit to consider interests of employees, consumers, the community and environment when making business decisions. In addition to B-Labs' third party certification process, **seven states** have adopted legislation that allows companies to incorporate as a “public benefits corporation which enables them to place wider social interests above those of shareholders without running afoul of traditional corporate fiduciary requirements. Not surprisingly, many green tech and renewable energy start-ups are certified as B-Corporations. Because green and renewable companies often have a mission to improve the environment and promote sustainability, B-corporation status reinforces that commitment. But is B-Corporation certification the right choice for green energy and renewable companies -- or the law firms that serve them?

GigaOm evaluates the pros and cons of B-corporation status. On the plus side, some investors believe that B-Corps certification builds goodwill which can contribute to the success of the company. On the downside, B-Corporation certification can be time consuming and start-ups may not have the resources to go through the process. Felix Salmon, one of the expert interviewed by GigaOM believes that B-Corps certification can result in lower valuations for start-ups seeking to go public. Salmon adds that once a B-Corps goes public, there's no reason to expect that it won't grow as quickly as a conventional corporation. Further because B-Corps have a legal obligation to consider non-financial goals and not just shareholder interests, low earnings reports don't have the same negative impact on growth as they might for other public companies.

B-Corps status may be a good choice for socially responsible green and renewable companies. But I'm not comfortable with B-Corps status for law firms. A handful of law firms have certified as B-Corporations and I expect that others may do the same. As for me, while my firm implements many of the same practices as B-Corporations (we are green-conscious and perform pro boon to help the community), I am not willing to adopt a corporate structure which would require me to place the interests of interests of society, the community and the environment on par with the interests of my clients. That's what certification as a B-Corporation would **require.**

For a business, granting equal consideration to profits, employees, the community or society when making a corporate decision isn’t problematic; indeed, it’s even admirable. But this kind of equal consideration commitment doesn’t translate for lawyers for one single, simple reason: the client. For lawyers, our clients’ interests are the dominant and controlling factor in making our decisions; indeed, with limited exceptions for illegality, our clients’ interests are the only factor that count. When lawyers treat our clients' interests as equal rather than superior to other groups, we violate one of the prime directives of professional responsibility.

So, I'll continue to counsel green tech and renewable start-ups on the B-Corps status. But when it comes to B-Corps status for my practice, just as with the proverbial Purple Cow, I'd rather see than "B" one.

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