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# Energy Cases To Watch In 2016

By **Keith Goldberg**

*Law360, New York (December 24, 2015, 8:37 PM ET)* -- Between fights over the Obama administration's landmark suite of climate change regulations and the extent of the Federal Energy Regulatory Commission's authority over the nation's electricity system, 2016 is shaping up to be a blockbuster year for energy-related litigation.

"We've witnessed unprecedented executive expansion and we're bumping into the lines of congressional authority and the executive branch's ability to enact regulations," McGuireWoods LLP partner Scott Oostdyk said. "I think we're in uncharted territory, and going in a lot of different directions."

Given the massive transformation of both U.S. and global energy and environmental policy that's currently taking place, fierce court battles over that transformation shouldn't come as a surprise, according to Larry Eisenstat, who chairs Crowell & Moring LLP's energy group.

"There are so many issues that are driven by the interplay of disruptive technologies, climate change and the need for infrastructure development," Eisenstat said. "That makes it clear there are going to be winners and losers. When you see that, it's easy to see litigation not far behind."

Here are six cases that energy attorneys are going to be watching closely in 2016.

**West Virginia et al. v. EPA et al.**

The linchpin of President Barack Obama's plan to combat climate change is the Clean Power Plan, which requires existing power plants to slash their carbon emissions by 32 percent from 2005 levels by 2030. Dozens of states and industry groups have challenged the rule, claiming the U.S. Environmental Protection Agency doesn't have the Clean Air Act authority to enact it.

The challengers will likely rely on arguments that they have raised in both comments on the proposed rule and previous suits seeking to block the agency from issuing the rule. That includes the contention that Congress never gave the EPA the authority under the CAA to encourage emission control methods outside the fence line of a power plant, such as switching from coal-fired to gas-fired power and increased renewable energy use, and that the EPA can't regulate power plants under Section 111(d) because they are already regulated under Section 112, which covers hazardous air pollutants.

"The questions are fascinating and they're all systemic," Oostdyk said. "Who decides, is the question in

each instance."

It's either the federal government or the states who decide. For that reason, Holland & Knight LLP partner Steve Humes says it's worth watching how the U.S. Supreme Court rules in a pair of cases over where the line is between federal and state authority over the U.S. electricity system, especially since the Clean Power Plan litigation is a virtual lock to eventually land before the high court.

"For the first time in 30-plus years, we have the Supreme Court ready to issue important decisions involving the role of the federal government versus the states in deciding energy infrastructure," Humes said. "Considering the Clean Power Plan involves the EPA attempting to require states to adopt clean energy, I think it's very important to see where the court lines up on federalism versus states rights."

A key, early signpost will be whether the D.C. Circuit stays the Clean Power Plan while it's challenged, a ruling that could come early in 2016. Challengers argue that they'll be irreparably harmed by having to comply with the rule while its legal status is still in question and that they're likely to succeed on the merits of their case, while the EPA and its backers claim the opposite.

The state petitioners are represented by their respective attorneys general.

The private petitioners are represented by Sidley Austin LLP, Hunton & Williams LLP and Troutman Sanders LLP, among others.

The EPA is represented by Eric G. Hostetler, Norman L. Rave Jr., Amanda S. Berman, Brian H. Lynk and Chloe H. Kolman of the U.S. Department of Justice.

The case is West Virginia et al. v. EPA et al., case number 15-1363, in the U.S. Court of Appeals for the District of Columbia Circuit.

**New Power Plant GHG Rule Litigation**

The EPA's rule capping carbon emissions from new power plants is far less controversial than the Clean Power Plan, because building new coal-fired plants is currently uneconomical thanks to an abundance of cheap natural gas. Yet a handful of states as well as coal giant Murray Energy Corp. have challenged the rule, claiming the agency has exceeded its CAA authority.

The challengers' main arguments is that the carbon capture and storage technologies the EPA says are best for reducing new coal-fired plants' emissions are not viable. The challengers contend the agency improperly relied on federally subsidized CCS projects to show that the technologies have been proven to work, flouting the Energy Policy Act of 2005.

But the suits may be more strategic gambits than anything else, attorneys say. Challenges against the new plant rule could serve as a proxy to delay or derail implementation of the Clean Power Plan, on the notion that under the CAA, the EPA can issue rules addressing emissions only from existing sources after it has issued rules addressing emissions from new sources.

"It's a gateway rule," Oostdyk said. "Without the new plant rule, [the EPA] couldn't segue to the existing plant rule."

North Dakota is represented by Attorney General Wayne Stenehjem.

Murray Energy is represented by Geoffrey K. Barnes, J. Van Carson, Wendlene M. Lavey, John D. Lazzaretti and Robert D. Cheren of Squire Patton Boggs LLP.

EELI is represented by Chaim Mandelbaum of the Free Market Environmental Law Clinic.

The cases are North Dakota v. U.S. Environmental Protection Agency, case number 15-1381, Murray Energy Corp. v. U.S. Environmental Protection Agency, case number 15-1396, and Energy & Enviroment Legal Institute v. U.S. Environmental Protection Agency, case number 15-1397, all in the U.S. Court of Appeals for the District of Columbia Circuit.

**State of Arizona et al. v. EPA et al.**

If not for the Clean Power Plan, the EPA's recent tightening of national ozone standards might be the most sweeping and hot-button environmental regulation recently crafted by the agency.

The EPA lowered the national ambient air quality standards, or NAAQS, for ground-level ozone from 75 parts per billion to 70 parts per billion over the objections of several states, business groups and Republican lawmakers. Several states led by Arizona as well as Murray Energy have petitioned the D.C. Circuit to block the new standards, claiming, among other things, that the EPA ignored Congress' intent under the CAA to set ozone standards that are actually attainable and didn't adequately show how the benefits outweigh the costs.

However, challengers face an uphill battle in courts that have historically given the EPA free rein when it comes to setting NAAQS, thanks in part to the Supreme Court's 2001 decision in Whitman v. American Trucking Associations Inc., which held that the EPA couldn't consider costs when setting the standards.

Just last fall, the high court refused to consider an electric utility group's bid to overturn the 2008 NAAQS of 75 parts per billion.

But Oostdyk, who is representing Murray Energy, says the argument that the 70 parts per billion standard will be unattainable in several areas due to naturally occurring background ozone is one a court can't easily brush aside.

"The standard is not uniformly capable of being complied with," Oostdyk said. "We've gone to a level below which the country can meet. The question becomes: Is there a control out there that can go below natural levels, short of a treaty to keep China and Japan from exporting ozone to America?"

Arizona is represented by Attorney General Mark Brnovich. Arkansas is represented by Attorney General Leslie Rutledge. The New Mexico Environment Department is represented by general counsel Jeffrey M. Kendall. Oklahoma is represented by Paul Clayton Eubanks of the Oklahoma Attorney General's Office. North Dakota is represented by Attorney General Wayne Stenehjem.

Murray Energy is represented by Scott C. Oostdyk, E. Duncan Getchell Jr. and Michael H. Brady of McGuireWoods LLP.

The EPA is represented by Assistant Attorney General John C. Cruden, Simi Bhat and Justin D. Heminger of the U.S. Department of Justice.

The cases are State of Arizona et al. v. EPA et al., case number 15-1392, and Murray Energy Corp. v. EPA, case number 15-1385, both in the U.S. Court of Appeals for the District of Columbia Circuit.

**Federal Energy Regulatory Commission v. Electric Power Supply Association et al.**

The electric industry is eagerly awaiting the Supreme Court's ruling on whether FERC could issue a rule that consumers be paid for using less power during high-demand periods, a case with billion-dollar implications that could clarify the Federal Power Act's boundaries between federal and state authority.

The D.C. Circuit concluded that FERC's so-called demand response rule usurps state authority over retail electricity markets, and the Supreme Court justices seemed ideologically split on the issue during oral arguments in October.

If the high court upholds the D.C. Circuit's ruling, FERC and the regional grid operators that run the wholesale electricity markets could be left with the potentially messy task of removing demand response resources that have become a significant part of their markets and issuing potential refunds to affected entities.

"These high-use industrial entities that get breaks by managing their peak use get paid a lot of money to not do that," Mayer Brown LLP partner Mike Lennon said. "If [demand response] is found to be improper or illegal, they're potentially at risk for losing a lot of money."

With Justice Samuel Alito recusing himself from the case and the apparent split during oral arguments, many observers believe the court may issue a 4-4 split decision, meaning the D.C. Circuit's ruling would be upheld.

The government is represented by Donald B. Verrilli Jr., Edwin S. Kneedler and John F. Bash of the U.S. Department of Justice's Office of the Solicitor General. FERC is represented in-house by Robert H. Solomon, David L. Morenoff and Holly E. Cafer.

The private petitioners are represented by Carter G. Phillips of Sidley Austin LLP.

The respondents are represented by Ashley C. Parrish and David G. Tewksbury of King & Spalding LLP, Paul D. Clement and Erin E. Murphy of Bancroft PLLC, Harvey L. Reiter and Adrienne E. Clair of Stinson Leonard Street LLP, David B. Raskin of Steptoe & Johnson LLP and Sandra E. Rizzo of Arnold & Porter LLP.

The cases are Federal Energy Regulatory Commission v. Electric Power Supply Association et al., case number 14-840, and EnerNOC Inc. et al. v. Electric Power Supply Association et al., case number 14-841, both in the Supreme Court of the United States.

**Hughes et al. v. PPL EnergyPlus LLC et al.**

In what many attorneys are calling the flip side to the demand response case, the Supreme Court agreed in October to consider whether subsidies offered by Maryland to entice new power plant development usurp FERC's authority over wholesale electricity markets.

Electricity providers including PPL EnergyPlus LLC, now doing business as part of Talen Energy Corp., claimed the incentives offered by Maryland and similar incentives offered by New Jersey would artificially depress wholesale prices that are regulated by FERC. Federal district courts in New Jersey and

Maryland agreed, and were backed in 2014 by the Fourth and Third Circuits, respectively.

In its opening Supreme Court brief, the Maryland Public Service Commission argued that under the FPA, Congress gave states a wide berth in its rate-setting authority and FERC's role was limited to reviewing the rates.

"These types of decisions are important to understand where the dividing line is between FERC's jurisdiction to set wholesale power rates and states' rights to incentivize or regulate generation," said Martin Booher, who co-leads BakerHostetler's national energy team. "When you have states that are looking to reregulate and subsidize facilities that are supposed to participate in the free market, those states are dictating winners and losers in the market."

That has a significant impact on the viability of the competitive, wholesale power markets, according to Arnold & Porter LLP partner Sandy Rizzo.

"I really think there's a lot at stake," Rizzo said. "The generator community is already struggling financially."

The fact that the Supreme Court took the case despite no apparent circuit split raised some eyebrows. However, Humes said one possible explanation is that the high court knows that it was likely split in the demand response case, so it might view the Maryland case as its best opportunity to issue a controlling, precedential decision on the FPA's federal-state divide.

"The case gives the court an opportunity under the Federal Power Act to send a clear message about federalism and states' rights in the electric sector," Humes said.

The Maryland Public Service Commission is represented by Scott H. Strauss, Peter J. Hopkins and Jeffrey A. Schwarz of Spiegel & McDiarmid LLP and James A. Feldman.

CPV is represented by Clifton S. Elgarten, Larry F. Eisenstat, Richard Lehfeldt and Jennifer N. Waters of Crowell & Moring LLP.

PPL EnergyPlus is represented by Paul D. Clement of Bancroft LLP.

The cases are Hughes et al. v. PPL EnergyPlus LLC et al., case number 14-614, and CPV Maryland LLC v. PPL EnergyPlus LLC et al., case number 14-623, both in the Supreme Court of the United States.

**Enterprise Products Partners LP et al. v. Energy Transfer Partners LP et al.**

It's not a federal case, but oil and gas attorneys are closely watching the fight between Enterprise Products Partners LP and Energy Transfer Partners LP over a soured crude oil pipeline deal that's made its way to a Texas appeals court after a $535 million judgment was imposed against Enterprise.

ETP sued Enterprise for allegedly breaking a partnership agreement to build a crude oil pipeline through Texas, saying that after securing a key customer for the planned pipeline, Enterprise went behind ETP's back to partner with Enbridge USA Inc. on a similar line. A Dallas County jury concluded in 2014 that although Enterprise and ETP had described their pursuit in 2011 of the so-called Double E pipeline as nonbinding, the companies' actions in developing the pipeline during its open season showed their true intent to form a binding partnership.

Enterprise has insisted it never formed a binding partnership with ETP and owed nothing to the company after an unsuccessful open season. In its appeal, Enterprise argues that because it signed contracts with ETP to explore the possibility of forming a partnership to build the pipeline, a jury had no leeway to review the relationship between ETP and Enterprise to determine whether a partnership was formed by their actions.

Meanwhile, ETP claims the Texas Uniform Partnership Act trumps the prepartnership agreements because it provides that the conduct of the two companies showed their intent to work together as full partners even if they previously agreed not to form a partnership or did not meet conditions precedent.

With the plunge in oil prices putting many joint ventures and projects in doubt, the ultimate resolution of this case could have a significant ripple effect, attorneys say.

"You might have some future case where there are companies that were in similar situations and were negotiating a deal, but it fell through," Norton Rose Fulbright partner Brian Boyle said. "Companies will look at [the Enterprise-ETP case] and be much more careful when they're planning one of these joint ventures or project partnerships, they're not going to indicate they're forming a partnership until it's all said and done."

Enterprise is represented by David Beck, David Gunn, Russell Post and Jeff Golub of Beck Redden LLP, Wallace B. Jefferson and Rachel Ekery of Alexander Dubose Jefferson & Townsend LLP, Michael Jung of Strasburger & Price LLP and David Keltner and Marianne Auld of Kelly Hart & Hallman LLP.

ETP is represented by Mike Lynn, Christopher Akin, Jeremy Fielding and David Coale of Lynn Tillotson Pinker & Cox LLP, Nina Cortell, Jeremy Kernodle and Kelli Bills of Haynes and Boone LLP and Craig Enoch and Melissa Lorber of Enoch Kever PLLC.

The case is Enterprise Products Partners LP et al. v. Energy Transfer Partners LP et al., case number 05-14-01383-CV, in the Texas Court of Appeals for the Fifth District.

--Additional reporting by Jess Davis and Juan Carlos Rodriguez. Editing by John Quinn and Katherine Rautenberg.