

Rewiring The Future Of State Power Generation

Law360, New York (February 20, 2014, 4:28 PM ET) -- For decades, the division of authority between state and federal regulators in the electric utility industry was reasonably clear. The states had the power to authorize the construction of power plants within their borders, while the federal government generally did not. And the states regulated retail rates, while the Federal Energy Regulatory Commission, for the most part, regulated wholesale rates.

With industry restructuring and the evolution of the wholesale capacity markets overseen by FERC, some wonder whether a century of resource planning by state regulators has been, or should be, replaced by a market-based regime in which only the price signals sent by that market alone properly should drive developers to build new power plants. So far, though, where generation capacity markets do exist, not much baseload generation is being built — or not nearly enough compared to what would be needed to replace anticipated plant retirements.

Indeed in the coming years new and proposed U.S. Environmental Protection Agency and state environmental regulations, together with lower natural gas prices and declining political acceptability, could lead to the retirement of some 50,000 megawatts of coal plants — a significant portion of the country's capacity — while electricity demand is expected to grow in many areas of the country.

In response, a number of states, having determined on the basis of economic, environmental or policy reasons that new generation was needed, have required their jurisdictional utilities to enter into long-term contracts with plant developers to incentivize new generation construction. That has prompted lawsuits from utilities and existing power generators challenging the states' authority to do so.

The problem, they say, is that such initiatives intrude on FERC's authority to set wholesale rates or otherwise interfere with FERC's regulation of the wholesale markets. The question then, is, "Do states have the authority to require their jurisdictional utilities to pay developers to construct new generation when they see a need, be it for reliability, policy, or other reasons, even if a FERC-overseen capacity marketplace might not itself be recognizing that need, and if so, under what circumstances?"

Two cases, *PPL EnergyPlus v. Hanna* and *PPL EnergyPlus v. Nazarian*, were recently decided by federal district courts, which held that New Jersey and Maryland's efforts to facilitate new generation were preempted by the Federal Power Act and therefore unconstitutional. Both cases are being appealed, and might ultimately make their way to the U.S. Supreme Court.

How the court decides these cases could have broad ramifications, at least if the number of amicus curiae briefs filed in the appeals are any indication. Already, though, the district court rulings are being used to attack other kinds of state-sponsored programs, such as ones undertaken to encourage wind or

solar generation, or to accelerate the retirement of older, less environmentally-friendly plants.

The New Jersey and Maryland decisions addressed other constitutional issues that also might have far-reaching implications. Aside from arguing preemption, the plaintiffs challenged the states' authority to limit its support only to those generating resources that would be constructed within their borders or within a specified interstate region on the grounds that such geographic restrictions violate the dormant Commerce Clause because they don't give developers in other states a chance to compete. In the New Jersey and Maryland cases, the states prevailed on this point, but the issue is being litigated in other proceedings as well.

In sum, depending upon how these and similar disputes are resolved, we might well see the the development of new ground rules for how a state may encourage the development of such new power generation resources as it believes are needed within or near its borders; whether states are permitted to treat different types of power differently; and who ultimately has the final say as to how best to preserve reliability and/or decide the type and mix of generation in the customers' best interests.

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