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Decision may signal problems for new EPA rules

ANALYSIS The Supreme Court's decision earlier this month could signal more changes for Environmental Protection Agency emission rules still in draft form than for the completed rules the decision addressed.

The Supreme Court's June 23 decision largely upheld the EPA's rules limiting greenhouse gas emissions from new sources, such as power plants and refineries.

Even though it rejected the approach the EPA took to limit the scope of GHG emissions from new sources that would come under its jurisdiction by crafting its "tailoring" rule, the court said almost all of the sources it is seeking to limit in its rule could be gathered up using its existing power to issue prevention of

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High Court will hear gas market antitrust case

MARKETS The US Supreme Court on Tuesday said it will review an appeals court decision that would allow purchasers of natural gas during the Western energy crisis to go after companies accused of market manipulation under state antitrust law.

The decision comes in defiance of the Obama administration as US Solicitor General Donald Verrilli last month said the case did not warrant a review.

The review will primarily focus on whether federal regulation

- Decision in defiance of Obama administration
- Energy firms asked for review in August 2013

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Trade groups ask FERC to reject CPV contracts

MARKETS A host of utilities and generators are blasting what's being called an "end run" by Competitive Power Ventures to have the Federal Energy Regulatory Commission approve power contracts at the center of litigation over FERC-state jurisdiction.

The Edison Electric Institute, the Electric Power Supply Association and others are asking FERC to reject CPV's proposal

- CPV says contracts are outside of FERC's jurisdiction
- Trade associations seek rejection of contracts

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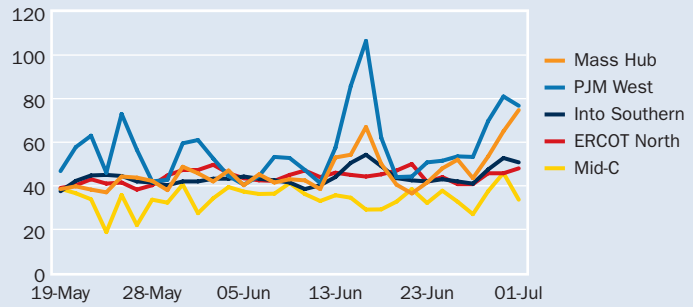
Holiday Notice

Megawatt Daily will not publish Friday, July 4, because of the Independence Day holiday. Assessments of daily electricity markets based on trading Thursday, July 3, will be published in the July 7 issue. Flow dates for power traded Thursday vary among markets, and will be specified in published tables.

Price trends at key trading points ($/MWh)



Source: Platts

Low and high average day-ahead LMP for Jul 2 ($/MWh)

	On-peak low	On-peak high	Off-peak low	Off-peak high
ISONE	62.88	68.69	33.76	37.09
NYISO	56.93	98.81	31.67	41.09
PJM	39.55	92.64	20.89	35.84
MISO	33.19	45.62	12.41	30.38
ERCOT	44.97	141.64	29.75	30.01
SPP	26.37	38.39	15.09	23.30
CAISO	50.77	52.72	37.84	39.36

Note: Lows and highs for each ISO are for various hubs and zones. A full listing of average LMPs are availible for the hubs and zones inside this issue.

Day-ahead bilateral indexes and spark spreads for Jul 2

	Index	Marginal heat rate	Spark spreads @7k	@8k	@10k	@12k	@15k
Northeast							
Mass Hub	74.75	16250	42.55	37.95	28.75	19.55	5.75
N.Y. Zone-A	75.00	19355	47.88	44.00	36.25	28.50	16.88
PJM/MISO							
PJM West	76.75	20144	50.08	46.27	38.65	31.03	19.60
Indiana Hub	41.75	9456	10.85	6.43	-2.40	-11.23	-24.48
Southeast & Central							
Southern, Into	50.75	11462	19.76	15.33	6.48	-2.38	-15.66
ERCOT, North	48.00	11169	17.92	13.62	5.03	-3.57	-16.46
West							
Mid-C	33.62	8126	4.66	0.52	-7.76	-16.03	-28.44
SP15	54.00	11477	21.07	16.36	6.95	-2.46	-16.58

Note: All indexes are on-peak. Spark spreads are reported in ($) and Marginal heat rates in (Btu/kWh). A full listing of bilateral indexes and marginal heat rates are inside this issue.

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FTRs that appear to run from the CLECO hub (CLEC.CPWR_1.AZ) to the CLECO load zone (CLEC.CLEC) were the most popular in terms of volume, with a total of about 2.8 million MWh cleared on the path for about negative $663,201 net dollars. FTRs that appear to run from unit 1 of the Prairie State Energy Campus power plant in Washington County, Illinois (AMIl.PSGC1.AMP) to the Indiana Hub (INDANA.HUB) had the highest net and total absolute dollars of any path in this month's auction with about $2.3 million net and total absolute dollars for about 538,266 MWh of FTRs.

— Juliana Brint

National Grid seeks renewable energy deals

National Grid is seeking long-term renewable energy contracts in Rhode Island, in the last of four renewables solicitations required under state rules.

The utility issued the solicitation July 1. The deadline for bids is August 5.

The RFP does not designate how much power the utility will buy. National Grid said it will depend on the contract offers it receives.

The utility intends to sign 10 to 15-year contracts for capacity, energy, renewable energy credits and related attributes.

The RFP emanated from a state rule that requires that National Grid secure at least 90 MW or 788,400 MWh/year, of newly developed "commercially reasonable" renewables under long-term contract. The state requires that the contracts be signed by December 30.

The utility has issued three solicitations since 2010 and signed deals for about 75% of the requirement. About 22.5 MW remains to be secured, and the utility may also voluntarily purchase more.

Under the law, the contracts must help stabilize long-term energy prices, enhance the environment and create local jobs and economic benefit. The law also encourages projects that foster financing of renewables within the state or adjacent state or federal waters.

National Grid plans to evaluate the bids in three stages.

First, bids must meet threshold requirements. For example, projects must meet the state's definition of a new development. That means they cannot be operating yet; nor can they have finished their investment or lending arrangements for construction. An exception is made if the project is within Rhode Island borders – then it can participate in the bidding, as long as it secured financing after 2008.

The second stage will evaluate proposals on price and non-price factors, with price factors accounting for 80 percent of the score.

The utility will accept various configurations of pricing, under approaches described in the RFP. However, it will not accept bids conditioned on the federal production tax credit, investment tax credit, or other government incentives.

National Grid said it plans to use a price forecast that considers the impact of any future federal regulation of carbon dioxide emissions.

And in their pricing proposals, bidders must contemplate a payment adjustment to compensate National Grid for any energy delivered at negative market clearing prices at the delivery node.

For non-price factors, the utility will look at siting and permitting; project development status and operational viability; bidder and team experience; and financing, if applicable. The utility also will consider the project's assignment of an ISO New England queue position.

In the final stage, National Grid will look at project viability. The utility also will consider how the resources meet certain objectives, such as cost and resource diversity.

Projects must offer at least 1 MW, or 250 kW for solar. There is no upper limit on project size.

The utility will consider contracts for more than 15 years, but the bidder must demonstrate why the longer contract term is appropriate.

National Grid said projects should be completed in a reasonable time, with construction beginning within two years of signing the contract. Projects should be operating within five years. Solar projects are an exception. The utility expects them to be in operation within two years.

A bidder conference is planned for July 15. Bidders must submit a notice of intent to bid by July 18. Bids are due August 5. The utility expects to short list bids October 20, negotiate and execute contracts December 5 and submit contracts for Public Utilities Commission review on January 5.

The RFP contact is Corinne DiDomenico, renewablecontracts@nationalgrid.com, (516) 545-5435.

— Lisa Wood

Decision may signal problems for new rules

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significant deterioration, or PSD, permits.

But the language the court used in striking down EPA's tailoring rule could spell trouble for the second portion of the EPA's program to limit GHGs, namely, the draft rules for existing sources EPA issued June 23, commonly referred to as 111(d) for the pertinent section of the Clean Air Act.

In the 5-4 decision (Utility Air Group v. EPA), Justice Antonin Scalia wrote, "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' … we typically greet its announcement with a measure of skepticism."

That language shows that the EPA could have an "uphill battle with 111(d)," Jeffrey Holmstead, a partner with Bracewell & Giuliani and a former assistant administrator at the EPA in the first Bush administration, said.

And while the criticism the court leveled at the new source rules are specific to that section of the Clean Air Act and the proposed rules for existing sources are based on a different section of the law, the common theme is regulatory overreach.

"You can be sure that what the Supreme Court said will come up" in filings to challenge the rules that are certain to be filed with the US Court of Appeals for the District of Columbia Circuit, Thomas Lorenzen, a partner at Dorsey & Whitney, who used to be in the environmental division at the Department of Justice.

In the proposed 111(d) rules, the EPA lays out four building blocks that states can use to fashion their own emissions reduction program, as long as it meets the 2030 targets set out by the agency.

The blocks include measures such as efficiency improvements at power plants, changes in how plants are dispatched, the building of more renewable energy plants, and energy efficiency measures.

The proposed rules are not just about electricity generation – what comes out of a power plant stack – but also about how it is distributed and dispatched, Lorenzen said.

When the case appears at the DC Circuit, as it is very likely to do, that section is likely to be treated critically, particularly from the court's conservative judges — Janice Rogers Brown, Thomas Griffith and Brett Kavanaugh – because the Supreme Court has given them license, Lorenzen said.

In fact, the proposed rules have already been challenged. Coal company Murray Energy filed a writ of mandamus in the DC Circuit court on June 18 arguing that the rules are so "illegal, irrational and destructive" that the EPA should not even be allowed to propose them.

Since then attorneys general from nine states — Alabama, Alaska, Kentucky, Nebraska, Ohio, Oklahoma, South Carolina, West Virginia and Wyoming — have filed a brief with the DC court supporting Murray's action.

It is unlikely that the writ will be successful, Lorenzen said, but there are certain to be more challenges. The regulation of greenhouse gases is new territory for the EPA; it is "basically an invitation to legal challenges," he said, adding that the EPA has a year to finalize the rules, so most of the challenges are likely to surface next summer.

The big question is whether or not the rule is stayed by the courts until the appeals are satisfied, he said.

Even if challenges are likely, the path may not be as clear as some presume. The new source rules rely on Section 111(b) of the Clean Air Act and ultimately, particularly in the wake of the Supreme Court decision, call for the use of best available control technology, or BACT, to meet those rules. Existing sources are covered by Section 111(d) and are remediated by the best system of emissions reductions, or BSER.

BSER can be applied more broadly than BACT, which was part of EPA's intention when it decided to rely on 111(d).

Scalia's concern when he was commenting on possible regulatory overreach was on BACT and the possibility of reaching beyond the emissions from a single plant, Benjamin Longstreth, senior attorney with the National Resources Defense Council, said. BSER allows for a wider approach and broader interpretation, he said.

Additionally all the building blocks that the EPA has incorporated into the proposed rules go directly back to a power source and they are all practices that utilities have already been following, so it is not reaching into some other part of the economy, Longstreth said.

The EPA also could benefit from the fact that 111(d) delegates the creation of the actual emission standards to the states, under guidance from the EPA.

If a state in crafting its compliance plan were to pass legislation, for instance instituting an energy efficiency plan, that would shift the legal basis for those regulations and could put that program beyond the reach of a challenge to EPA's rules.

Despite the challenges that the 111(d) rules are sure to draw, EPA is on firm legal footing in limiting GHG emissions. The agency's jurisdiction in the matter has already been vetted by the Supreme Court, so it is going to have to do something to address GHG emissions from existing sources. The question, Lorenzen said, "is how far the courts will let EPA go."

— Peter Maloney

Court will hear gas market antitrust case

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should preempt energy companies accused of gas market manipulation from state antitrust lawsuits.

Gas consumers, including manufacturers, hospitals and schools, began filing suits in 2005 under the laws of different states, alleging that gas traders manipulated markets through false price reporting to private index publishers, including Platts, and wash trades that artificially expanded market activity, causing an artificial spike in gas — and consequently power — prices.

As a result of the trading activity and a 2003 review by the Federal Energy Regulatory Commission that concluded the market was manipulated, the Commodity Futures Trading Commission fined gas marketing companies hundreds of millions of dollars, and criminal charges were brought against several traders who received fines and jail time.

Many of the energy companies implicated have since scaled back their marketing operations or gotten out of the business altogether.

A district court in Nevada, however, ruled in 2011 that state market manipulation claims were preempted under the jurisdiction of FERC. That decision was reversed by an April 2013 ruling in the 9th US Circuit Court of Appeals in San Francisco (*LearJet Inc., et al. v. Oneok Inc., et al.,11-16786, et. al.),* allowing large commercial and industrial gas purchasers, such as LearJet, Northwest Missouri State University, Briggs and Stratton and Sargento Foods, to continue their pursuit of claims.

Energy companies — including American Electric Power, CMS Energy, Coral Energy Resources, Duke Energy, Dynegy, El Paso, Northern States Power, Oneok, The Williams Companies and others — asked the Supreme Court last August to review the appellate court's ruling, arguing that the federal Natural Gas Act gives FERC exclusive jurisdiction in this area and shields them from state-level suits.

The votes of only four of the nine justices are needed to grant a *writ of certiorari* and place a case on the high court's calendar. The court will hear the gas antitrust preemption case (*Oneok Inc., et al. v. LearJet Inc., et al., 13-271*) during its next term, which begins in October.

The Supreme Court in December asked the Obama administration for its take on whether the high court should hear the dispute. In a brief filed May 27, Verrilli argued that any decision made by the Supreme Court on the scope of FERC's authority to oversee market manipulation would be "of limited prospective significance."

He cited a 2005 law that expanded FERC's authority over market manipulation. That law would "make it highly unlikely