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## Energy Cases To Watch In 2015

By **Keith Goldberg**

Law360, New York (January 02, 2015, 2:40 PM ET) -- While court battles over landmark regulations from the U.S. Environmental Protection Agency may grab much of the spotlight in the new year, energy attorneys will also be tracking high-stakes legal brawls over fracking, energy market manipulation and natural gas sales.

Here are the cases energy attorneys will be watching closely in 2015.

### Challenges to the EPA's Mercury Rule

The U.S. Supreme Court surprised many observers when it **decided in November** to review the EPA's rule limiting mercury and other toxic emissions from coal- and oil-fired power plants.

A divided D.C. Circuit panel **upheld** the EPA's 2012 **Mercury and Air Toxics Standards**, or MATS, in April, but petitioners including 23 U.S. states and two utility industry groups **claim** the regulations are too costly compared to the benefits they will produce and that the appeals court failed to adequately consider the costs associated with implementing the rule.

A reversal by the high court could have implications beyond the rule in question, attorneys say.

"The case itself gives the Supreme Court an opportunity to limit the EPA's discretion under the Clean Air Act and that concept could apply to everything that the EPA does under the Clean Air Act: mobile sources, power plants, conventional pollutants," Holland & Knight LLP partner Stephen Humes said. "It could change the course of history the EPA is pursuing with regulating greenhouse gas emissions under the Clean Air Act."

In fact, the impact of a reversal on future EPA regulations would likely dwarf the impact of invalidating MATS, attorneys say. It's highly unlikely that the Supreme Court will issue a decision before the rule's March 2015 compliance deadline, making it too late for plant owners who have already installed pollution controls — or shuttered plants.

"I think the big question is what the remedy would be," said Bracewell & Giuliani LLP partner Jeff Holmstead, a former EPA air administrator. "Would the court suspend the rule, stay MATS until EPA goes back and looks at the cost? No one has requested that relief yet. As a practical matter, plants have already spent tens of billions of dollars to install pollution controls."

The states are represented by their respective attorneys general.

Utility Air Regulatory Group is represented by F. William Brownell, Henry Nickel, Lee Zeugin, Lauren Freeman and Elizabeth Horner of Hunton & Williams LLP.

The National Mining Association is represented by Peter Glaser, Carroll McGuffey and Justin Wong of Troutman Sanders LLP.

Murray Energy Corp., which filed an amicus brief on behalf of the petitioners, is represented by J. Van Carson, Geoffrey K. Barnes, John D. Lazzaretti and Robert D. Cheren of Squire Patton Boggs LLP.

The EPA is represented by its own Avi Garbow, Wendy L. Blake and Paul R. Versace, and Eric G. Hostetler of the U.S. Department of Justice.

The cases are State of Michigan et al. v. EPA, case number 14-46; Utility Air Regulatory Group v. EPA, case number 14-47; and National Mining Association v. EPA, case number 14-49; in the U.S. Supreme Court.

### **Coalition for Responsible Regulation et al. v. EPA et al.**

In June, the Supreme Court **scaled back** the EPA's authority to regulate greenhouse gases from stationary sources, ruling that the agency violated the Clean Air Act when it expanded the law's Title V and Prevention of Significant Deterioration programs to include carbon dioxide emissions. The decision reversed a D.C. Circuit ruling **upholding the regulations**, and states, industry groups, the EPA and environmentalists now are **battling in the appeals court** over what the practical effect of the ruling should be.

DLA Piper partner Robert Alessi says a key point will be how the D.C. Circuit interprets the Supreme Court's contention that the EPA can continue to treat greenhouse gases as a pollutant for so-called anyway sources that already would need a permit under the Best Available Control Technology program for conventional pollutants like particulate matter, but the agency can't do the same for defining a "major emitting facility" for PSD or a "major source" for Title V.

"The issue is whether in light of [the Supreme Court's decision], the EPA can merely regulate the 'anyway' sources [for GHGs] or whether EPA may not regulate the 'anyway' sources in the absence of further notice-and-comment rulemaking," Alessi said. "That issue has, in my view, a very significant effect on stationary source facilities in this country."

That leaves the EPA, industry, environmentalists and states uncertain over how greenhouse gases will be regulated when it comes to "anyway" sources, if at all, he added.

"In light of [the Supreme Court's decision], many states have their state implementation plans based on what the Supreme Court has said is invalid," Alessi said. "It's not only about how will the EPA apply [the ruling], but how will states apply [the ruling]. The stakes are very high."

The states and industry groups are represented by Norman W. Fichthorn, F. William Brownell, Henry V. Nickel and Allison D. Wood of Hunton & Williams LLP, Roger R. Martella Jr., Peter D. Keisler, Timothy K. Webster and Quin M. Sorenson of Sidley Austin LLP, Eric Groten of Vinson & Elkins LLP, Peter Glaser of Troutman Sanders LLP, Jeffrey A. Rosen, Robert R. Gasaway and William H. Burgess of Kirkland & Ellis LLP, various state attorneys general and others.

The EPA is represented by Jon M. Lipshultz, Perry M. Rosen and Amanda Shafer Berman of the U.S. Department of Justice and Elliot Zenick, Brian Doster, Michael G. Lee, Melina Williams and David Coursen of the EPA's Office of General Counsel.

The environmentalists are represented by Sean H. Donahue of Donahue & Goldberg LLP, Howard I. Fox of Earthjustice, Graham G. McCahan, Vickie L. Patton and Peter Zalzal of the Environmental Defense Fund, Joanne Spalding and Nathan Matthews of the Sierra Club, David Doniger of the Natural Resources Defense Council, Ann B. Weeks of the Clean Air Task Force, James Murphy of the National Wildlife Federation, and Frank W. Rambo and Morgan Butler of the Southern Environmental Law Center.

The case is Coalition for Responsible Regulation et al. v. U.S. Environmental Protection Agency et al., case number 09-1322, in the U.S. Court of Appeals for the District of Columbia Circuit.

### **In re: Murray Energy Corp.**

The fact that coal giant Murray Energy Corp. **is challenging** the EPA's proposed rule to slash greenhouse gas emissions at existing power plants isn't surprising. What is surprising is that the D.C. Circuit in November ordered a full briefing and oral arguments in the case, even though courts

have consistently held that nonfinal agency actions can't be challenged.

"A lot of people thought it was going to be dismissed early on," Holmstead said.

That speaks to the sweeping and controversial nature of the EPA's proposal, the linchpin of President Barack Obama's climate change policy. According to Murray, the proposed rule represents illegal "double regulation" by the EPA, as it would require state-by-state emission standards for existing power plants that are already subject to national standards.

Murray has argued that under ordinary circumstances, courts can only review final actions by federal agencies, but they have the authority to prohibit unlawful actions before they are taken in "extraordinary circumstances."

"You have to go back a long time to see where a court has done that," Holmstead said. "It would really turn things upside down."

Final briefs are due March 9, 2015, but an oral argument date hasn't been set yet.

The states supporting the EPA are represented by their attorneys general.

The environmentalists are represented by Sean H. Donahue of Donahue & Goldberg LLP, Benjamin Longstreth and David Doniger of the Natural Resources Defense Council, Ann B. Weeks and Darin Schroeder of the Clean Air Task Force, Megan Ceronsky, Tomas Carbonell, Karimah Schoenhut and Vickie Patton of the Environmental Defense Fund, and Joanne Spalding and Andres Restrepo of the Sierra Club.

The EPA is represented by Amanda Shafer Berman of the U.S. Department of Justice's Environmental Defense Section.

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

The states supporting Murray are represented by their attorneys general.

The case is *In re: Murray Energy Corp.*, case number 14-1112, in the U.S. Court of Appeals for the District of Columbia Circuit.

### **FERC Demand Response Rule**

U.S. Solicitor General Donald B. Verrilli Jr. said in December that the **government will appeal** the D.C. Circuit's invalidation of the Federal Energy Regulatory Commission's rule requiring that consumers be paid for using less power during high-demand periods.

A **divided appeals court panel** in May sided with power company groups and held that the commission's March 2011 demand response compensation rule violates the Federal Power Act by getting involved in price-setting regulation at the retail level, which is the exclusive territory of the states.

"The fact that the solicitor general has elected to file a petition really increases the odds that the court will take that case," said Crowell & Moring LLP partner Frank Lindh, the former general counsel for the California Public Utilities Commission and who was involved in the earlier stages of the litigation.

Virtually every grid operator, whether regional transmission organization or independent system operator, has its own demand response program, many of them voluntarily created. For FERC and the RTOs and ISOs that run the wholesale electricity markets, the D.C. Circuit's ruling leaves them with the potentially messy task of removing demand response resources that have become a significant part of those markets. That includes potential refunds to affected entities, putting tens of millions of dollars in play.

"This is a real dilemma for the entire industry," Humes said. "People have already put money on the table, and many parties are preparing to participate in the forward capacity auctions."

Utility FirstEnergy Corp. and power company group New England Power Generators Association have already petitioned FERC to direct their respective grid operators to strip demand response from their operating tariffs. However, attorneys say the government's decision to pursue Supreme Court review of the D.C. Circuit's ruling could buy FERC some time.

The government has until Jan. 15 to file petition for writ of certiorari.

The government is represented by U.S. Solicitor General Donald B. Verrilli Jr.

A coalition of demand response companies, state utility regulators and electricity consumer groups seeking to intervene on FERC's behalf are represented by Carter G. Phillips of Sidley Austin LLP, among others.

Lead petitioner Electric Power Supply Association is represented by Ashley C. Parrish and David G. Tewksbury of King & Spalding LLP. The American Public Power Association and National Rural Electric Cooperative Association, which joined EPSA's petition, are represented by Harvey L. Reiter of Stinson Leonard Street LLP. The Edison Electric Institute, which also joined the petition, is represented by David B. Raskin of Steptoe & Johnson LLP.

FERC is represented by Solicitor Robert H. Solomon, general counsel David L. Morenoff and FERC attorney Holly E. Cafer.

The cases are Federal Energy Regulatory Commission v. Electric Power Supply Association et al., case number 14A596; and EnerNOC Inc. et al. v. Electric Power Supply Association et al., case number 14A599; in the U.S. Supreme Court.

The original case is Electric Power Supply Association et al. v. Federal Energy Regulatory Commission, case number 11-1486, in the U.S. Court of Appeals for the District of Columbia Circuit.

### **Oneok Inc. et al. v. Learjet Inc. et al.**

In a dispute rooted in the energy crisis of the early 2000s, the Supreme Court **in July granted a petition** for writ of certiorari filed by several natural gas companies appealing **an April 2013 ruling** by the Ninth Circuit. That ruling held that Congress did not give the Federal Energy Regulatory Commission the right to oversee first sales or retail sales of natural gas and that the Natural Gas Act didn't preempt state antitrust challenges to energy rates and practices related to those types of sales.

It's a clash between federal and state jurisdiction over gas markets rooted in well-established laws on both sides, Alessi said.

"The Natural Gas Act has some of the strongest preemption language of any energy laws out there, and on the other side you have state antitrust laws that are very long-standing," Alessi said. "The court is going to focus on where do you look to draw the line in retail transactions — it'll boil down to where state antitrust laws can still apply yet not unduly interfere with the pricing."

If the court can't draw that clear line, the justices will likely conclude that the NGA preempts state antitrust challenges to energy rates linked to retail sales and reverse the Ninth Circuit's ruling, Alessi said.

Oral arguments are scheduled for Jan. 12.

The energy companies are represented by Neal Kumar Katyal, Robert B. Wolinsky, Dominic F. Perella, Elizabeth B. Prelogar and Sean Marotta of Hogan Lovells.

The natural gas purchasers are represented by Jennifer Gille Bacon of Polsinelli PC and Donald D.

Barry of Barry Law Offices LLC, among others.

The case is *Oneok Inc. et al., v. Learjet Inc. et al.*, case number 13-271, in the U.S. Supreme Court.

### **Texas City's Anti-Fracking Law Challenges**

Fights between state and local governments over hydraulic fracturing are occurring all over the U.S., yet, Denton, Texas, made waves in November when voters made it the first city in the Lone Star State to **approve a ban on fracking** within city limits. That immediately prompted suits from the Texas Oil & Gas Association and the state's General Land Office, **claiming the ban** was preempted by state law in the form of drilling regulations promulgated by the state Railroad Commission and environmental regulations promulgated by the Texas Council on Environmental Quality.

"In Texas ... downhole drilling activities were regulated by the state," said Baker Botts LLP partner Bill Kroger, who is representing the TXOGA. "What the Denton ordinance raises is whether that's not correct in that each city can be its own regulator when it comes to downhole and fracking activity. It's a fundamental question over regulating oil and gas drilling activity in Texas."

The state-versus-local preemption argument isn't well-developed in Texas case law, and attorneys say there is plenty of wiggle room for lawyers on both sides to make creative arguments about whether the ban should be upheld or not.

Texas also has the quirk of giving some cities what's known as home-rule authority, which essentially means unless the Legislature has expressly taken away the right of a city to regulate a particular area, local governments have the power to do almost whatever they want in that field, making it historically difficult for industry groups to challenge local ordinances.

"The Railroad Commission has fairly broad powers, it'll be interesting to see if the Texas courts are receptive to the local authority to pass referendums that impinge on the state authority," said Ken Klemm, who co-chairs the oil and gas industry service team at Baker Donelson Bearman Caldwell & Berkowitz PC.

TXOGA is represented by Tom Phillips, Evan Young, Bill Kroger and Jason Newman of Baker Botts LLP.

The GLO is represented by Ken Slavin, Drew Miller, Deborah Trejo and Sarah Faust of Kemp Smith LLP.

The cases are *Texas Oil & Gas Association v. Denton*, case number 14-08933-431, in the 431st Judicial District Court of Denton County, Texas; and *Patterson v. Denton*, case number D-1-GN-14-004628, in the 53rd Judicial District Court of Travis County, Texas.

### **FERC v. Barclays Bank PLC et al.**

With FERC's aggressive pursuit of energy market manipulation encountering increased resistance from investigation targets, attorneys are closely watching one enforcement fight that's actually made it to court.

Barclays PLC and traders Daniel Brin, Scott Connelly, Karen Levine and Ryan Smith are fighting in California federal court the **\$453 million fine** handed down by FERC in July 2013 for allegedly manipulating energy markets in the U.S. The commission also ordered the bank to disgorge some \$35 million in unjust profits.

It's the largest civil penalty ever imposed by FERC — and it's the first time the commission has had to go to court to try and enforce a penalty.

Barclays, which has maintained that its trading was aboveboard, claims among other things that FERC doesn't have the authority to fine the bank or the traders and that it hadn't adequately

stated a manipulation claim.

Previous FERC market manipulation enforcement actions have ended in either fines or settlements. That's why attorneys are eager to hear what U.S. District Judge Troy L. Nunley, who is presiding over the Barclays case, has to say.

"If the court were to decide for Barclays, it could place significant limitations on FERC's enforcement regime," Hogan Lovells partner John Lilyestrom said. "The commission has taken an extremely expansive view of market manipulation and no court yet has put restrictions on that."

Barclays is represented by Paul J. Pantano Jr. and Gregory A. Markel of Cadwalader Wickersham & Taft LLP, Thomas J. Nolan, John N. Estes III, Jay B. Kasner and Patrick Fitzgerald of Skadden Arps Slate Meagher & Flom LLP, and Seth P. Waxman, Dan M. Berkovitz, Jonathan G. Cedarbaum, Heather M. Zachary and Mark C. Kalpin of WilmerHale.

Brin and Connelly are represented by Susan L. Germaise, Todd Mullins and Allison D. Charney of McGuireWoods LLP.

Levine and Smith are represented by Michael L. Spafford, Victoria Taylor Earls and J. Bub Windle of Paul Hastings LLP.

FERC is represented by staff attorneys Wesley J. Heath, Todd L. Brecher, Emily C. Scruggs and M. Cristina Melendez.

The case is Federal Energy Regulatory Commission v. Barclays Bank PLC et al., case number 2:13-cv-02093, in the U.S. District Court for the Eastern District of California.

--Additional reporting by Jess Davis and Juan Carlos Rodriguez. Editing by Katherine Rautenberg and Andrew Park.

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