FORTNIGHTLY'S

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Will we finally see significant energy legislation passed in this Congress? Fortnightly's editor-at-large Michael Burr takes a look at what Congress is up to and whether a bill is forthcoming.

Have unintended consequences arisen from the Nuclear Regulatory Commission's new licensing rules? Law Professor Richard Pierce, Jr. points out troubling flaws in the new procedures, which were supposed to herald new investment in nuclear power.

As the Federal Energy Regulatory Commission prepares to hold a conference on incentives to build new electric transmission, four governors in Western states have taken matters into their own hands with a new, proposed Frontier Line. Does this mark a new strategy for getting transmission built?

Lori A. Burkhart
Editor

ON THE HILL

Partisan Warfare Threatens Energy Policy

By Michael T. Burr

Analysts who track energy policy legislation might think they are watching a bizarre remake of *Return of the Living Dead*. The omnibus energy bill, ostensibly killed in the 108th Congress, has shrugged off its deathly veil to rise again in the U.S. House of Representatives.

Despite some major challenges, however, this bill stands a better chance of survival than any of its predecessors have since 1992. The most noteworthy reasons are that Republican lawmakers have a stronger majority in both houses of Congress, and voters are becoming increasingly vocal about rising energy prices and dependency on imports.

"The constituency for rationalizing energy policy with international trade and financial stability has grown," says Michael Zimmer, a partner with Thompson Hine in Washington, D.C. "With escalating reliance on imports, we are facing for the first time the specter of energy exacerbating the balance of trade problem. The case is all the more compelling now than it was two or three years ago."

Such trends lead to a degree of bipartisan cooperation that would be difficult to achieve in normal circumstances. Nevertheless, major stumbling blocks remain.

"There's a commitment on both sides in the House and »

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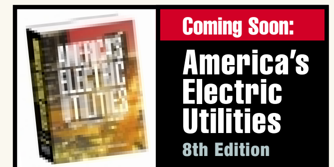

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Senate, as well as the White House, to have a comprehensive energy strategy," says Frank Maisano, a lobbyist with Bracewell & Giuliani in Washington, D.C. "There are as many ethanol Democrats who want to move it forward as there are Republicans. But like any comprehensive bill, it covers a lot of issues and includes some titles not everyone will like."

Indeed, critics already have tagged it the "No Lobbyist Left Behind" Act, owing to the bill's multitude of industry subsidies and special provisions. But whether such provisions will challenge the bill in the Senate, where it faces its toughest opposition, might depend on issues that bear no direct relationship to energy policy.

"The question that looms over everything is what will happen with judicial nominations," says Fred McClure, a partner with Sonnenschein Nath & Rosenthall in Washington, D.C. "There hasn't been a fight over a judicial nominee yet in this Congress." If Democrats filibuster the confirmation of judicial nominees and Republicans *en masse* respond with the so-called "nuclear" option (*i.e.*, changing Senate filibuster rules), the fallout could be deadly.

"If the Senate comes to a halt over that kind of fight, I don't know what we'll get out of Congress this year," McClure says.

MTBE Returns

At this writing, the Energy Policy Act of 2005 is still at an early stage of the legislative process – early enough that it does not yet have a formal title or bill number. Also, the contents were changing in real time – in House committees and behind the curtain in the Senate. Most of the bill, however, looks familiar to those who have followed the energy policy saga for the last several years.

Even measures specifically supported by President Bush – including incentives for domestic oil and gas development, clean coal and renewable energy – were excluded in the Ways & Means markup.

"The main issues are the same," says Tobyn Anderson, a vice president with Lighthouse Energy Group, a government and public affairs consulting firm in Washington, D.C. "But we have yet to see what the Senate will do. All we have now is the House bill."

Generally speaking, the Senate is less "disciplined" than the House, and thus the real debate will occur in the Senate. Nevertheless, House committee markups offer insight into which ways the political winds are blowing.

The bill faces a gauntlet of three committees in the House – namely, Energy & Commerce, Resources and Ways & Means – each of which jealously guards its jurisdiction. The bill's muscles, its tax provisions, originate in the Ways & Means committee.

The committee's markup is Spartan – surprisingly so. It slashes virtually all tax provisions except a few capital-cost depreciation measures for certain gas pipelines and pollution controls at newer coal-fired power plants. Even measures specifically supported by President Bush – including incentives for domestic oil and gas development, clean coal and renewable energy – were excluded in the Ways & Means markup.

"Congress has become skittish about budget deficits, and Bush has put a tight cap on the amount of additional tax reductions he'd like to see in the energy industry," says Keith Martin, a partner with Chadbourne & Parke in Washington, D.C. "Provisions at the heart of the energy bill for the last six years have been swept aside."

Given the political popularity of many such provisions, they seem likely to re-emerge in a later iteration of the bill, or on a separate track. Nevertheless, their absence from the Ways & Means markup suggests Republican leaders in Congress are positioning for a tough fight.

"The process is unpredictable, but [Ways & Means Committee Chairman] Bill Thomas (R-Calif.) is setting up some room for negotiation in conference," Martin says. "Thomas favors wind, so he must figure these guys can take care of themselves in a [production tax credit] extender bill if necessary. But it is a disappointment for the wind industry."

Being left out of the energy bill, however, might prove to be a blessing in disguise for wind in the long term. When companies like GE and FPL are the big players, and 21 states have renewable portfolio standards (RPS) or something similar, lawmakers take notice. Wind has bipartisan support in both Houses. An extension for five or perhaps even 10 years is *(Cont. on p. 8)*

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THE NUCLEAR OPTION:

Will Investment Be Derailed By Process?

By Richard J. Pierce, Jr.

The combination of increasing concern about anthropogenic global warming and the increasing price of hydrocarbons has renewed interest in revitalizing the nuclear generating option in the U.S. That is a daunting task, however, given the manner in which regulators treated investors in nuclear power plants in the 1960s, 1970s, and 1980s. In the 1960s and 1970s, the Nuclear Regulatory Commission (NRC) implemented a licensing process that required applicants for a construction license or an operating license to run a procedural gauntlet that took an average of six years to complete.[1] In the 1980s, state regulators disallowed scores of billions of dollars in investments in nuclear power plants.[2] Those two forms of regulatory abuse of investors in nuclear power plants are related. Many scholars who have studied the demise of the nuclear power option in the U.S., including then-Professor, now-Supreme Court Justice, Stephen Breyer, have concluded that the lengthy licensing process contributed significantly to the cost of nuclear power plants and to the ultimate decisions of prospective investors to refuse to invest in any new nuclear plants.[3]

Thus, it was encouraging when the NRC proposed major changes in its procedures for conducting licensing proceedings in 2001.[4] Streamlining the licensing process is a necessary precondition to revitalization of the nuclear option. In December 2004, the United States Court of Appeals for the First Circuit upheld the NRC's new rules.[5]

The NRC's error in judgment will have major effects on everyone who is involved with the U.S. electricity industry.

—Richard J. Pierce, Jr.

It would seem logical to assume that the NRC's victory in court now satisfies at least that precondition to revitalization of the nuclear option. It does not. The NRC made a major error of judgment in defending its new rules that has the effect of rendering its new rules worthless for their intended purpose. Bear with me as I explain how the NRC forfeited its opportunity to revive the nuclear option. The explanation requires a brief primer on administrative law, but the basic principles are readily understandable, and the consequences of the NRC's error in judgment will have major effects on everyone who is involved with the U.S. electricity industry.

In 2001, the NRC proposed to switch from use of formal adjudication – the procedure it used in the lengthy licensing proceedings it conducted in the 1960s and 1970s – to informal adjudication. Formal adjudication is similar to a court trial, complete with cross-examination of every witness for the applicant. The Supreme Court has characterized formal adjudicatory hearings in regulatory proceedings as "nigh interminable."[7] In sharp contrast, an informal adjudicatory hearing can be conducted solely through a written exchange of evidence. An agency that conducts an informal adjudication can allow limited cross-examination if it chooses to do so, but no court can second-guess an agency's decision to grant or deny a request for cross-examination in an informal adjudication.[8] The vast majority of federal regulatory agencies have switched from formal adjudication to informal adjudication of most disputes over the past two decades, with the approval of the courts. Both agencies and courts now recognize that the kinds of issues that are usually the subject of regulatory disputes can be resolved as accurately through use of informal adjudication as through use of formal adjudication and far more expeditiously.[9]

In early 2004, NRC announced its decision to switch from formal adjudication to informal adjudication in licensing proceedings.[10] NRC's new rules of procedure replaced cross-examination with a process in which a presiding officer can solicit questions »

from opponents of a proposed license and can, in his discretion, ask those questions of the applicant's witnesses. The NRC also identified two circumstances that it characterized as "rare," in which a presiding officer should permit cross-examination of a witness: when there is a controversy concerning the alleged occurrence of some past event, and when there is a controversy about an individual's motive when he acted in some particular way in the past. As NRC recognized, few, if any, licensing cases will raise issues of that type. Virtually all of the controversial issues in licensing cases involve the safety or environmental effects of the applicant's proposed plant. NRC's new rules of procedure would not have allowed cross-examination on issues of that type. Based on other agencies'-experiences with the use of similar decision-making procedures, I estimate that NRC's new procedures would have reduced the average length of a licensing proceeding from six years to about eighteen months.

Apparently, NRC was not sure that it could persuade a court to uphold its switch from formal adjudication to informal adjudication, however. When NRC announced its new rules, it provided a long explanation of its new rules as a means of implementing a transition from formal adjudication to informal adjudication. It added to that long explanation, however, a cryptic assertion that its new rules are valid even if it is required to use formal adjudication. NRC also stated that it interpreted a vaguely worded provision of its new rules that authorized its presiding officers to allow cross-examination in some circumstances to have the same meaning as the provision of the Administrative Procedure Act (APA) that creates a right to "such cross-examination as may be necessary for a full and fair adjudication of the facts" in a formal adjudication.[11] That representation was disingenuous. Courts interpret the statutory provision that creates a right to cross-examine witnesses in formal adjudications to create a broad right that is judicially enforceable and that applies to virtually all contested issues of material fact, while the NRC characterized as "rare" the circumstances in which it would exercise its discretion to allow cross-examination under its new rules.

> **NRC's entire multi-year effort to change its procedures in licensing proceedings has accomplished absolutely nothing.**
>
> *—Richard J. Pierce, Jr.*

The NRC's off-hand claim that its rules were consistent with the formal adjudication provisions of the APA proved to be an extraordinarily costly error in judgment. When the U.S. Court of Appeals for the First Circuit reviewed the validity of the NRC's new rules, it concluded that it did not need to decide whether NRC could switch from formal adjudication to informal adjudication because the court could uphold the validity of the rules as consistent with the APA provisions for formal adjudication. The court then went on to describe the right to cross-examination in a formal adjudication as a right of "basic importance." It cautioned that "judges should be extremely cautious about denying parties an opportunity to cross-examine witnesses." The court emphasized that it stood ready to reverse the NRC if it denied cross-examination in any instance in which the court considered cross-examination to be "appropriate."

Agencies that conduct informal adjudications are free to allow, or to disallow, cross-examination in their sole discretion. If a court had upheld NRC's rules on the basis that licensing proceedings can be conducted as informal adjudications, NRC could grant requests for cross-examination "rarely," if at all, with no fear that a court might second-guess an NRC decision to grant or to deny any request for cross-examination. Because the court upheld the NRC's rules on the agency's alternative theory that its rules are consistent with formal adjudication, NRC must instead allow cross-examination whenever it thinks that a court might conclude that cross-examination is "appropriate." As a practical matter, that means the NRC must continue to conduct its licensing proceedings the way it did in the 1960s and 1970s – with unlimited cross-examination – since NRC has no way of predicting in advance when a court will conclude that cross-examination is "appropriate." That, in turn, means NRC's entire multi-year effort to change its procedures in licensing proceedings has accomplished absolutely nothing.

NRC's error of judgment was in including in its new rules a vaguely worded provision that authorizes its presiding officers to grant requests for cross-examination and then attempting to defend its rules as consistent with the statutory provisions applicable to formal adjudications. If NRC had omitted that provision from its rules and/or refrained from making the disingenuous claim that it interpreted that provision to allow cross-examination to the same extent as cross-examination is required in formal adjudications, NRC would have forced the reviewing court to decide whether it can switch from formal adjudication to informal adjudication. Like every other agency that has made a similar switch in the last fifteen years, NRC would have been »

successful in convincing the reviewing court that it can make that change in decision-making procedures.[12]

Any court would have had no choice but to uphold NRC's decision to switch from formal adjudication to informal adjudication if NRC had forced the court to address that issue. The statute that authorizes NRC to issue construction and operating licenses for nuclear power plants – the Atomic Energy Act of 1954 – requires the NRC to provide a "hearing" before it issues a license. The statute does not describe the nature of the "hearing" the agency must provide. A trio of Supreme Court opinions creates a legal environment in which any regulatory agency can convince a reviewing court to uphold its decision to replace formal adjudication with informal adjudication when the agency is required to provide a "hearing" and its statute does not describe the nature of that "hearing." Until 1972, the undefined term "hearing" was often interpreted to refer to the trial-type hearing required in a formal adjudication. In its opinion in *United States v. Allegheny-Ludlum Steel Corporation*, however, the Supreme Court concluded that "hearing" is an ambiguous term when it is used in a regulatory statute.[13] The Court went on to uphold an agency's interpretation of the term to allow only a written exchange of evidence and views, with no cross-examination. Then in its 1984 opinion in *Chevron v. NRDC*, the Supreme Court concluded that a reviewing court must uphold any reasonable agency construction of an ambiguous provision in an agency administered statute.[14] Since the Atomic Energy Act is an agency administered statute, and the Supreme Court has already concluded that the term "hearing" is ambiguous, a reviewing court must uphold an agency's decision to switch to informal adjudication unless it concludes that the agency's decision is "unreasonable." No court has reached that conclusion with respect to any of the many agency decisions to switch from formal adjudication to informal adjudication since the Supreme Court issued its decision in Chevron. I doubt that any court ever will reach that conclusion, given the Supreme Court's regular admonitions that "the formulation of procedures was basically to be left to the agencies to which Congress confided the responsibility for substantive judgments" and that "the administrative agencies must be left free to fashion their own rules of procedure . . . ."[15] Finally, in its 1990 opinion in *PBGC v. LTV Corporation*, the Supreme Court concluded that no court can require an agency to use procedures other than those required by statute in any informal adjudication. No statute requires an agency to provide an opportunity for cross-examination in an informal adjudication.[16]

All that NRC had to do to streamline its licensing procedures was to switch from formal adjudication to informal adjudication. By making the disingenuous alternative argument that its new procedural rules are consistent with formal adjudication, NRC set a trap for itself and created a set of procedural rules that are no better than the rules that produced results that potential investors found to be unacceptable in the past. If the NRC is serious about its desire to revitalize the nuclear option, it must again amend its new rules by eliminating the provision that confers broad discretion on its presiding officers to grant requests to cross-examine. It can then defend its new rules as a lawful change from formal adjudication to informal adjudication. If it takes those actions, NRC will have satisfied one of the preconditions for revitalization of the nuclear option. If it does not take those actions, I cannot imagine why any potential investor would put large sums of money at risk in licensing proceedings identical to the "nigh interminable" hearings that contributed significantly to the demise of the nuclear option in the past. ■

Richard J. Pierce, Jr. is Lyle T. Alverson Professor of Law, at George Washington University.

Endnotes

1. Stephen Breyer, Vermont Yankee and the Court's Role in the Nuclear Energy Controversy, 91 Harvard Law Review 1833 (1978).
2. Richard J. Pierce, Jr., Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions? 77 Georgetown Law Journal 2031 (1989).
3. Breyer, supra. note 1.
4. 66 Federal Register 19,610 (Apr. 16, 2001).
5. *Citizens Awareness Network v. United States, 391 F. 3d 338 (1st Cir. 2004).*
6. For a description of formal adjudication, see Richard J. Pierce, Jr., Sidney. A. Shapiro & Paul R. Verkuil, Administrative Law and Process §6.4.3 (4th ed. 2004).
7. *FPC v. Louisiana Power & Light Co., 406 U.S. 621, 644 (1972).*
8. For a description of informal adjudication, see Pierce, et al., supra. note 6 at §6.4.10.
9. See the cases discussed in Richard J. Pierce, Jr., Administrative Law Treatise §8.2 (4th ed. 2002).
10. 69 Federal Register 2182 (Jan. 14, 2004).
11. U.S.C. §556(d).
12. For a list of the many judicial decisions that have upheld agency decisions to switch from formal to informal adjudication, see Pierce, supra. note 9, at §8.2.
13. 406 U.S. 742 (1972). See also *United States v. Florida East Coast Ry., 410 U.S. 224 (1973).*
14. *467 U.S. 837 (1984).*
15. *Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 524, 543.*
16. *496 U.S. 633 (1990).*

TRANSMISSION PLANNING

Western Governors Take Matters Into Their Own Hands

By Lori A. Burkhart

Building electric transmission facilities nowadays constitutes an expensive and uncertain prospect. Earlier this month, four western governors seized on the lack of transmission capabilities in the region by proposing the construction of a 1,300-mile, high-voltage line called the Frontier Line.

The project has its genesis in a charter created by Wyoming Governor Dave Freudenthal and then-Utah Governor Michael Leavitt. Blaming "regulatory uncertainty" as making the electric power industry reluctant to invest in new transmission infrastructure, the two western governors in August 2003 formed the Rocky Mountain Area Transmission Study (RMATS).

The RMATS footprint covers Colorado, Idaho, Montana, Utah and Wyoming. The two Governors believed that without new transmission investment, the region might not be able to tap into low-cost coal or wind generation allowing for load growth in the Rocky Mountain area, or for exporting of generation to other parts of the Western Interconnection.

Among other proposals, the RMATS, released in Sept. 2004, recommends transmission expansions beyond the Rocky Mountain States to enable exports of generation. That study assumed predicted construction of an added 3,900-MW of coal generation and remote wind generation would occur in the region. It called for building of two export paths to the West Coast, including Nevada and Arizona markets.

The study explains that exports from the Rocky Mountain region would help the West diversify fuel sources and reduce opportunities to exercise market power by allowing new generators to develop projects that compete with incumbents. RMATS finds that by building transmission to the West, annual consumer and generator benefits for the Rocky Mountain region would increase to between $926 million and $1.7 billion. Also, California consumers could benefit by $325 million to almost $400 million annually, which is why RMATS suggested that the RMATS Phase II should coordinate work with California's transmission planning institutions and other western Governors.

The result is seen in the April 4 announcement by Governors Arnold Schwarzenegger of California, Jon Huntsman Jr. of Utah, Kenny Guinn of Nevada and Wyoming's Freudenthal for proposed construction of the Frontier Line across the West. The Governors signed a joint memorandum of understanding (MOU) expressing strong support for the project. The MOU also refers to an Aug. 2001 study, "Conceptual Plans for Electricity Transmission in the West—Western Governor's Association," identifying the need for improving transmission in the West.

According to Jim Sims, executive director of the Western Business Roundtable, the announcement "sends a very powerful signal to the private sector that the political leadership in the West are prepared to do what is necessary to help the private sector make this project happen."

He added that while developing new transmission across multiple states is extraordinarily difficult due to a myriad of legal, technical, siting and regulatory issues, that the Governors "are forging a whole new way to approach regional planning and implementation of critical interstate energy infrastructure."

The MOU cites the Western power crises of 2000-2001, growing consumer electric demand, remotely located renewable and conventional resources »

FERC Takes A Look

The Federal Energy Regulatory Commission on April 22 in Washington, D.C. will hold a technical conference to examine impediments to investment in electric transmission infrastructure. It will explore potential solutions, including formation of new business models, as well as appropriate rate-making policies and incentives that would encourage new investment in transmission. The FERC will look at risk to such projects, as well as whether and how to encourage formation of transmission-only companies. Technologies to enhance transmission reliability and efficiency also will be examined. *Re Transmission Independent and Investment, Docket No. AD05-5-000, and Re Pricing Policy for Efficient Operation and Expansion of the Transmission Grid, Docket No.PL03-1-000. —**L.A.B.***

and a constrained Western electric transmission system as reasons for the needed cooperation. It states the purpose of declaring support for the construction of a line through Wyoming, Utah, Nevada and into California. But it allows for possible inclusion of other states.

The MOU creates a coordinating committee with a member from each state to act as a "surrogate" developer until the project can be made available for further feasibility analysis and handed over to a real developer. It says while preliminary routes have been identified, the committee will need to further define and study any route.

For now, the Frontier Line as proposed in its pre-feasibility stage, could travel three different routes to connect Wyoming, Utah, Nevada and California, and is expected to serve major load centers such as Salt Lake City, Reno, Las Vegas, and southern and northern California. It would connect coal fields in northeastern Wyoming (Powder River Basin) with those areas with increasing appetite for power.

The cost of the line could be as high as $3.3 billion, and is expected to entice building of new generation along the route. Optimistically, the developers hope to have the project in-service by 2011.

The proposal already has the backing of the California Independent System Operator. California ISO chairperson of the board of governors, Ken Wiseman and CEO Yakout Mansour gave their stamp of approval. "The Frontier Line will link the growing demand for electricity in California, Nevada and Utah with new sources of power generation in Wyoming," Wiseman said. "This is exactly the kind of regional cooperation and forward planning the western interconnection has been working toward," Mansour added. ■

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State Regulatory Roundup

Standard-Offer Rates. In series of orders involving various utilities, Ohio PUC reviews free-market supply auctions held to set level of generation component of retail standard-offer electric rates: (1) FirstEnergy (Ohio Ed., Cleve. Elec. Illum., Toledo Ed.) — PUC will consider requiring further bids after auction yielded prices higher than current rates, see *Case No. 04-1371-EL-ATA, Apr. 6, 2005; (2) Monongahela Pwr.* — bars rate recovery of administrative charge, see *Case No. 04-1047-EL-ATA, Apr. 6, 2005. (3) AEP (Columbus So., Ohio Pwr.)* — rejects auction result, citing too-few offers from competitive suppliers, and instead allows utilities to boost generation rates over next 3 years without formal review of costs—to chagrin of state's consumer advocate, which has appealed similar rate hike granted last November for Cincinnati G&E, see *Case No. 04-169-EL-UNC, Mar. 23, 2005*.

Regulatory Assessments. Pennsylvania court says state PUC cannot assess competitive retail electric suppliers for administrative costs of operating the agency, nor assess the state's consumer advocate. *Delmarva P&L Co. v. Pennsylvania, Nos. 16 & 26 MAP (Pa.Sup.Ct.), Mar. 31, 2005.*

Gen Interconnection. North Carolina OK's rules for small-scale power customer-owned plants to hook up with the power grid (residential: 20 kW or less; non-residential: 100 kW or less). Finds no need for added special liability insurance, as long customers have policies already in place (at least $100,000 coverage for residential; $300,000 for nonresidential). *N.C.U.C. Dkt. No. E-100, sub 101, Mar. 22, 2005.*

Net Metering I. Iowa court rules that federal law (PURPA — Public Utility Regulatory Policies Act) did not require electric co-op to offer net metering to retail electric customer with self-generating capability. The co-op (not rate-regulated) was immune from state's net metering law. *Windway Technologies, Inc. v. Midland Pwr. Co-op., No. 02-1113 (Iowa Sup.Ct.), Apr. 1, 2004.*

Net Metering II. Michigan regulators adopt voluntary statewide program for net metering for retail electric customers with generating capacity. *Mich.P.S.C. Case No. U-14346, Mar. 29, 2005.*

Aluminum Smelters. Missouri regulators authorize Union Electric (Ameren) to sell power at retail to an aluminum smelter located outside the utility's service territory in first case arising under new state law designed to ease power costs for such customers. *Mo.P.S.C. Case No. EA-2005-0180, Mar. 10, 2005.*

Carbon Taxes. Colorado PUC includes a virtual carbon emissions tax (a $9/ton rate surcharge, starting in 2010) in long-term resource plan OK'd for Pub. Serv. Co. of Colorado. The plan would boost wind- and coal-fired generation (avoiding purchased power and gas-fired plants) to satisfy utility's need for some 3,600 MW in new capacity over next 10 years. *Colo. PUC Dkt. No. 04A-214EP, effective Jan. 21, 2005.*

Retail Gas Choice. Wyoming regulators revised the state's retail gas choice program so that participating customers need not make an affirmative election each year simply to stay on the program with their current competitive supplier. *Wyo.P.S.C. Dkt. No. 30022-GT-04-48, Record No. 9501, Mar. 11, 2005.*

Retirement Benefits. New York advises state's regulated electric and gas utilities that for ratemaking purposes they must defer all cost savings expected to accrue from the new federal law authorizing employers to include a prescription drug benefit in retirement plans for employees. *N.Y.P.S.C. Case Nos. 04-M-1693, 91-M0890, Feb. 2, 2005.*

Resource Planning. State regulators force Public Service Co. of New Hampshire to file an integrated resource plan, even though utility had separated (but not divested) its generation operations from transmission and distribution activities. *N.H.P.S.C. No. DE 04-072, Order No. 24,435, Feb. 25,2005.*—***B.W.R.***

ON THE HILL

(Continued from p. 2)

not inconceivable, especially if it has a declining rate in the later years.

Or it might fall victim to partisan warfare. Time will tell.

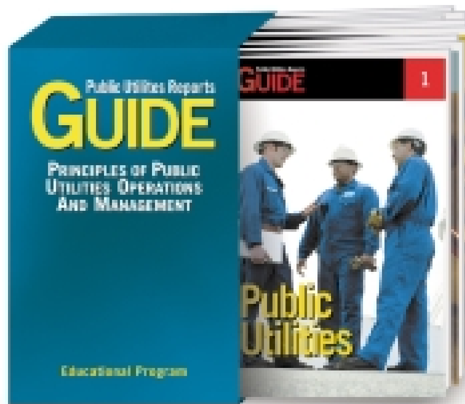
Another divisive issue – oil and gas drilling in the Arctic National Wildlife Refuge (ANWR) – also returned to the energy policy debate. The House Committee on Resources approved the Domestic Energy Security Act, which would open ANWR to drilling. (Earlier this year the U.S. Senate voted to include such legislation in its budget bill, which only needs 51 votes.) While the Resources committee is contributing the ANWR title to the omnibus energy bill, the ANWR provisions likely will be stripped out in conference, presumably to reappear in the budget-reconciliation bill.

In the Energy & Commerce committee, meanwhile, legislators revived a provision that killed the energy bill in the 108th Congress – specifically, language that would limit the liability of fuel companies for contamination from methyl tertiary butyl ether (MTBE), a gasoline additive that has been deemed carcinogenic.

Supporters of the MTBE-liability provisions argue the fuel was made to order for the oxygenate specifications of the U.S. Environmental Protection Agency, and thus oil companies should not be penalized for making the substance. Opponents – including both Democrats and Republicans in states where MTBE contamination is a problem – say the courts should decide who is culpable in each case.

The Republican majority – encouraged by increasing momentum toward defendant-friendlier liability laws – is pressing the issue in the energy bill rather than pursuing it as part of tort-reform efforts in the Judiciary committee.

"It's always been in the fuels package," Maisano says. "It would be fine in tort-reform legislation, but tort reform has struggled for years and now is just barely rising above the fray.



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MTBE is part of oxygenate standards, and those pieces move together in the energy bill."

How the Senate will treat the issue in the energy bill remains unknown, but Hill watchers expect proponents will find a way to pass the legislation.

Desperately Seeking Energy Strategy

For utilities, now-familiar legislative language in the energy bill would repeal the Public Utility Holding Company Act. Also it would give the federal government broader authority to claim rights of way for transmission lines, and would clarify FERC's authority over siting liquefied natural gas (LNG) terminals. These titles have achieved broad support in the face of transmission bottlenecks and rising gas prices. But a proposal that recently has drawn fire from co-ops, munis, independents and a few IOUs involves who pays for transmission upgrades.

The draft bill that circulated in March included Section 1242 from past versions of the bill, which set forth voluntary transmission-pricing plans, and favored participant-funded plans. The section was removed during mark-up in the House, but Chairman Barton has promised it will reappear in some form when the bill gets to the conference committee stage. The title is controversial becasue some stakeholders are calling it discriminatory. "Mandating that FERC approve participant-funded pricing plans will not promote the proper expansion of the transmission grid, to the detriment of the wholesale electricity market and, ultimately, to consumers," reads a letter to Energy Committee Chairman Barton, which was signed by 52 utility and power companies.

Many transmission-owning utilities, however – especially those in the Southeast – favor Section 1242 because it protects their ratepayers from paying for transmission lines to serve competitive power plants in their integrated service territories. The title included a specific provision that ensures participant funding will apply to an Entergy interconnection case that was "pending rehearing as of November 1, 2003."

Such language exemplifies the special-interest lawmaking some analysts believe thwarts efforts to develop a truly comprehensive national energy strategy. Rather than focusing energy policy legislation on achieving a long-term vision, legislators have focused on satisfying the immediate interests of various constituencies while attempting to lay the groundwork for some long-term improvements.

"Energy policy is being managed »

in the most narrow and parochial way," Zimmer says. "Political leaders are not drawing linkages between energy policy and our long-term economic, environmental, security and employment considerations."

That does not mean, however, the energy bill is without strategic merit. Incentives for research and development, for example, will help advance non-polluting energy technologies that make use of domestic resources – assuming they make it back into the legislation.

"It's about as comprehensive as the political dynamic will allow it to be," Anderson says. "Outside the realm of the political world you can talk about things that will do a lot more, but the political reality is many of these provisions are the best we can do."

At least for now, that is. Advocates for long-term energy strategy – specifically to reduce U.S. energy dependence – have gained strength lately from alliances with noteworthy conservatives, such as former CIA Director James Woolsey, former National Security Adviser Robert McFarlane and pundit Frank Gaffney. In a variety of forums, these and other conservative analysts are raising alarm bells about U.S. energy dependence and national security.

As energy prices and geopolitical tensions rise, politicians likely will feel increasing pressure to respond to these concerns with long-term strategic policy. Until then, the resurrected energy bill promises to clarify the landscape on some important energy policy issues. If Republicans and Democrats in Congress can avert mutually assured destruction over judicial nominees and other divisive issues, the country actually might see major energy policy legislation this year for the first time in more than a decade. ■

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Federal Regulatory Roundup

Speculative Grid Expansion. In a case with obvious national implications, the California Dept. of Water Resources, joined by publicly owned utilities, irrigation districts, and transmission agencies (plus PSE&G and the National Rural Electric Co-op. Asso.) oppose a novel request by So.Calif. Edison (supported by the California PUC and Energy Comm'n, plus FPL and wind energy advocates) that asks FERC to waive legal precedent to aid grid expansion projects in California's Antelope Valley, both to facilitate future but not-yet-guaranteed wind energy projects, and to aid compliance with state law that mandates a 20% share for renewable energy resources. SCE seeks revenue guarantees for 3 speculative, 500-kV grid projects, with assured cost recovery, rolled-in rates, and ISO network status, even if wind projects are canceled or never materialize, forcing abandonment of the newly built lines. Opponents warn of untold costs and challenge idea of allowing FERC regulatory exceptions for a state-mandated renewables program not strictly driven by market forces. *FERC Dkt. No. EL-08*, comments filed thru Apr. 15, 2005.

Energy Demand Response. Industrial customers ask FERC to compel AEP to participate in PJM's emergency load-response programs (LRPs). AEP has declined, claiming retail LRPs fall outside FERC jurisdiction, and are inappropriate for AEP service territories not covered by retail electric choice programs. *FERC Dkt. No. EL05-93*, filed Apr. 15, 2005.

QF Output Deficiency. Federal court affirms FERC ruling that where a cogeneration facility (QF) fell short in output, it could deliver available power to its thermal host, and then make up the shortfall through a wholesale imbalance transaction with the native utility, rather than force its host to buy at retail rates. *Entergy v. FERC, D.C.Cir. No. 03-1271*, Mar. 8, 2005.—***B.W.R.***

Next Month's FORTNIGHTLY

In May, *Fortnightly* magazine takes a look at the future of renewable energy and what factors will affect the fate of wind power in the U.S. Can this nation really reduce its dependence on fossil fuels? We also look at the proposed merger of Exelon and Public Service Electric and Gas, which would create an energy giant, from the viewpoints of Exelon CEO John Rowe and the regulators.

Here is some of what you will find:

▶ **Windpower: Beyond Boom and Bust**
With the Production Tax Credit subject to the whims of a fickle Congress, U.S. windpower remains in an ongoing state of uncertainty. Will the United States embrace the technology, or will Europe and Asia widen the renewables gap with America?

▶ **DER: Hastening Genco Obsolescence?**
Do distributed energy resources result in more pollution, or less? The final installment of our series from Oak Ridge National Laboratory.

▶ **The Next M&A Wave: Fulfilling the Value Proposition**
The industry stands at an inflection point regarding consolidation. But this time, it is less likely to retreat from the march toward more and larger combinations. What factors are driving the renewed interest in mergers and acquisitions?

▶ **The EPA Speaks Out: The Clean Air Interstate Rule Explained**
Currently, 132 areas do not meet the new National Ambient Air Quality Standards for fine particles or ozone, affecting some 160 million people, or 57 percent of the U.S. population. What efforts are under way by the EPA to bring these areas into compliance?

▶ **Spot-Market Clearing: Ending the Electricity Credit Malaise**
Most U.S. markets continue to operate on a monthly billing cycle, resulting in exposures of up to 60 days' settlement. The likelihood of participant default—and the potential loss arising from such an event—is significant. The spot-market can solve these problems.

SNEAK PEAK:

Coming In June *Fortnightly* Top 10 Power Deals of 2004

After three years of slow activity, 2004 was a banner year for power-plant acquisitions. More than 50 GW of net capacity changed hands, much of it going into the portfolios of financial investors such as Goldman Sachs and the Blackstone Group. Significant assets also were acquired by load-serving entities, including IOUs and municipal utilities.

The 10 largest transactions accounted for more than half of the total megawatts sold. Most of these involved portfolios of numerous plants – as many as 72 in a single transaction. Some of the biggest represented bankruptcy liquidations.

In the June issue *of Fortnightly*, Michael Burr will examine trends in the secondary market for power plants, including a complete inventory of 2004 deals prepared by Bodington & Co. of San Francisco. This Top 10 list provides a sneak preview. ■

Buyer	Seller	Units	Gross MW	Net MW	$MM	$/kw	Contract Status
GC Power Acquisition (1)	Texas GenCo	13	14,349	12,915	3,650	283	NA
Dynegy (2)	Exelon	9	1,021	1,021	1,054	1,032	Contract
Brascan	Reliant	72	770	770	900	1,169	Contract
Dominion	USGen New England	3	2,839	2,939	656	494	NA
Goldman Sachs	NEG&T	11	2,618	1,329	641	482	Contract
TransCanada Power	NEG&T	2	567	567	505	891	NA
KGen Partners	Duke Energy	8	5,098	5,098	475	93	Merchant
Sempra Carlyle/Riverstone	Texas Central (AEP)	10	3,813	3,813	430	113	Contract
TransCanada Power	TransCanada Corp	2	360	360	403	1,118	NA
CPSSA / Texas Genco (3)	Texas Central (AEP)	1	2,500	630	333	528	Merchant
TOTAL TOP 10		**131**	**33,935**	**29,442**	**9,046**		
TOTAL 2004 DEALS		**216**	**60,003**	**50,317**			

Source: Bodington & Co., San Francisco

Notes: NA = Not available at press time

(1) GC Power Acquisition is a consortium of private equity firms, including The Blackstone Group, Hellman & Friedman LLC, Kohlberg Kravis Roberts & Co. L.P. and Texas Pacific Group.

(2) Dynegy's purchase includes the 1,021 MW Sithe/Independence Station plus four gas-fired and four hydro facilities in the Northeast, whose capacity is not reflected in MW total here.

(3) CPSSA is City Public Service Board of San Antonio, a municipal utility.

(4) Complete Energy Partners is a newly created partnership with offices in Houston and Pittburgh.

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