

WSPP

SPRING 2009 OPERATING COMMITTEE LEGAL AND LEGISLATIVE UPDATE

By Wright & Talisman, P.C.

Below are

- Brief summaries of Federal Energy Regulatory Commission (“Commission” or “FERC”) decisions and court cases since September 8, 2008, that bear on WSPP or potentially of interest to Members, including: company-specific rate schedules for mitigated members; Order No. 890 compliance; electric quarterly reports; trading data and information; compliance with reliability standards; safe harbors from bankruptcy avoidance; and, permitting in national interest corridors.
- Brief summaries of legislation enacted or pending in the US Congress of potential interest to Members.

FERC AND JUDICIAL MATTERS

I. WSPP FERC Proceedings

A. Cost Cap Rulings

Docket Nos. ER91-195-051, EL07-69-001, *Western Systems Power Pool*, 124 FERC ¶ 61,300 (September 29, 2008); *Western Systems Power Pool*, 126 FERC ¶ 61,193 (March 3, 2009).

On September 29, 2008, the Commission addressed comments filed by WSPP and other interested parties on a proposal for incorporating into the WSPP Agreement company-specific rate schedules of members which are mitigated or lacking cost-based rate tariffs. *Western Systems Power Pool*, 124 FERC ¶ 61,300 (September 29, 2008) at P 1. The Commission noted, “WSPP support[ed] [the] proposal for incorporation of separately-filed company-specific rate schedules in the WSPP Agreement for mitigated members” and that “WSPP state[d] that [the] proposal will achieve the Commission’s goal of preserving the efficiencies and other benefits of the WSPP Agreement.” *Id.* at P 6. The Commission agreed and directed WSPP to submit a compliance filing with proposed revisions to the WSPP Agreement to allow for incorporation in the WSPP Agreement of company-specific rate schedules for mitigated members. *Id.* at P 10.

WSPP submitted that compliance filing, which the Commission accepted on March 3, 2009. *Western Systems Power Pool*, 126 FERC ¶ 61,193 (March 3, 2009) at P 1. The Commission explained that, in its compliance filing, WSPP proposed to revise the WSPP Agreement to state that the WSPP-wide rate caps are subject to the submission of cost justification by the seller and acceptance by the Commission, or are inapplicable if the seller has filed a company-specific cost-based rate schedule that has been accepted by the Commission. *Id.* at P 9. The Commission explained that WSPP proposed that a new Schedule Q be added to the

WSPP Agreement into which any Commission-approved company-specific rate schedule for mitigated members would be added. *Id.* The Commission accepted the tariff revisions, granting an effective date of February 1, 2009 as requested. The Commission also terminated the related section 206 proceeding instituted in Docket No. EL07-69.

B. Order 890 Compliance

Docket No. OA08-17-000, *WSPP Inc.*, Letter Order (November 10, 2008).

On November 10, 2008, the Commission issued an order accepting WSPP's filing of modifications to its open access transmission tariff (OATT) to comply with Order No. 890, subject to WSPP making a further compliance filing. *Id.* at P 1.

The items to be provided in a further compliance filing included: an Attachment L addressing WSPP's creditworthiness provisions, *id.* at P 6; a mechanism to credit revenues above the transmission provider's incremental costs to all non-offending transmission customers and to the transmission provider on behalf of its own customers, or an explanation why such a provision is not applicable to WSPP, *id.* at P 8; a description of how WSPP will process requests to cluster studies and how it will structure transmission customers' obligations when they have joined a cluster, or why such a provision is not applicable to WSPP, *id.* at P 10; and an unreserved use penalty rate, *id.* at P 11. The Commission subsequently accepted WSPP's compliance filing, subject to the further compliance filing, granting an effective date of December 3, 2007 as requested.

II. FERC Decisions of Potential Interest to WSPP Members

A. Electric Quarterly Reports

Docket Nos. RM01-8-009, RM01-8-010, *Revised Public Utility Filing Requirements for Electric Quarterly Reports*, Order No. 2001-I, 125 FERC ¶ 61,103 (October 28, 2008).

On October 28, 2008, the Commission issued an order revising its Electric Quarterly Report ("EQR") Data Dictionary to define and rename Field 22 of the EQR to "Commencement Date of Contract Terms." *Id.* at P 1. The Commission explained that the "Commencement Date of Contract Terms" was defined as the date the terms of the contract became effective, and that if the terms of the contract became effective on multiple dates, then the most recent date is to be reported. *Id.* at P 23. The Commission further explained that if the contract does not have an effective date, then the date service began pursuant to the contract may be used. *Id.* The Commission also explained that it may be more convenient to begin reporting a contract upon execution and that it would not prohibit such earlier reporting of contracts. *Id.* at P 25.

The Commission also clarified the EQR reporting requirements related to ancillary services provided in association with unbundled sales of transmission services. *Id.* at P 29. The Commission explained that Order No. 2001 provided the policy regarding the reporting of ancillary service transactions in the EQR; specifically, that "ancillary service transaction data associated with transmission need not be reported when the transmission services are provided

on an unbundled basis” but that “ancillary service transaction data associated with power sales” that were at that time “required to be filed in Quarterly Transaction Reports” were to be reported in the EQR. *Id.*

B. Subpoenaed Trading Data and Information

Docket No. IN06-3-007, *Energy Transfer Partners, L.P.*, 125 FERC ¶ 61,387 (December 30, 2008).

On December 30, 2008, the Commission denied the McGraw Hill Companies’ request for reconsideration of a September 4, 2008 Commission order requiring McGraw Hill to produce information on eleven trading points throughout the country in response to a subpoena submitted by Energy Transfer Partners, L.P. *Id.* at P 1. As part of its response to the Commission’s investigation into natural gas market manipulation at the Houston Ship Channel trading point, Energy Transfer Partners requested certain trade data and information regarding the compilation of *Inside FERC* gas indices for eleven trading points other than the Houston Ship Channel trading point to disprove the Commission’s theory and to prove its own contention that the changes in prices were instead due to weather and other market fundamentals. *Id.* at P 2 & n.3 (*Inside FERC* is published by Platts, a division of McGraw Hill).

The Commission explained that in its September 4 order it directed McGraw Hill to produce the requested information because Energy Transfer Partners could not obtain it from the Intercontinental Exchange, voice brokers and individual trading companies since the data from such sources represented only a small fraction of the sales reported by Platts. *Id.* at P 4. In denying McGraw Hill’s request for reconsideration, the Commission explained that Energy Transfer Partners had shown qualitative and quantitative differences between the information available from Platts as compared to the Intercontinental Exchange and other publicly available sources, and ordered McGraw Hill to provide the requested information. *Id.* at P 10 & ordering paragraph (A).

C. Compliance Initiatives at FERC

Docket No. AD09-3-000, *Compliance with Mandatory Reliability Standards*, 126 FERC ¶ 61,038 (January 15, 2009).

On January 15, 2009, the Commission issued an order to NERC and the eight Regional Entities providing guidance on conducting compliance audits, *id.* at P 1, specifically with respect to Section 3.1 of NERC’s Compliance Monitoring and Enforcement Program. *Id.* The Commission will require NERC and the Regional Entities to adhere to professional auditing standards such as Generally Accepted Accounting Standards, Generally Accepted Government Accounting Standards, and standards sanctioned by the Institute of Internal Auditors. *Id.* at P 3. The Commission further explained that NERC and the Regional Entities must ensure that their audit training include developing skills in interviewing, sampling of matters to be audited, and evaluating evidence. *Id.* at P 6. The Commission also explained that the pre-audit procedures should be consistent among the Regional Entities, and that during the audit NERC and the

Regional Entities must be as consistent as possible about the level of evidence that is needed to demonstrate compliance for particular requirements. *Id.* at P 7.

D. Safe Harbors from Bankruptcy Avoidance

In re National Gas Distributors, LLC, 2009 U.S. App. LEXIS 2830, at *1 (4th Cir. 2009).

On February 11, 2009, the United States Court of Appeals for the Fourth Circuit reversed and remanded for further proceedings a decision by a bankruptcy court that held that certain contracts for the delivery of natural gas were not “swap agreements,” and therefore not exempt from the Bankruptcy Code’s avoidance provisions. *Id.* at *3-4. The Fourth Circuit explained that the bankruptcy court determined the contracts were not “commodity forward agreements,” a type of swap agreement, because they were “insufficiently tied to financial markets,” *id.* at *8, and “were simple supply contracts.” *Id.* at *26. The Fourth Circuit further explained that forward agreements, like forward contracts, are not required to be traded on an exchange or in a market, *id.* at *22, and that they may be physically settled. *Id.* at *27. Rather than direct the bankruptcy court to find that the contracts were commodity forward agreements or swap agreements, the Fourth Circuit remanded the question for further consideration in light of its findings. *Id.* at *29.

E. FERC Permitting Jurisdiction in National Interest Corridors

Piedmont Environmental Council v. FERC, 2009 U.S. App. LEXIS 2944, at *1 (4th Cir. 2009).

On February 18, 2009, the United States Court of Appeals for the Fourth Circuit reversed the Commission’s interpretation of Federal Power Act § 216(b)(1)(C)(i), and affirmed the Commission’s determination that it was not required to provide an environmental assessment or an environmental impact statement in connection with its issuance of procedural regulations related to the content of permit applications under FPA § 216. *Id.* at *6-7. The court also found that the Commission had violated certain Council on Environmental Quality regulations when it failed to consult with CEQ before amending its regulations covering FPA § 216 permit applications that implement the National Environmental Policy Act. *Id.* at *7.

FPA § 216 provides the Commission with authority in national interest corridors to issue permits for the construction or modification of transmission facilities when a state entity with authority to approve the siting of facilities has withheld approval for more than one year after the filing of an application for a permit. *Id.* at *8. The Commission interpreted its authority to include a state’s denial of a permit within the one-year statutory timeframe. *Id.* at *10. The court held that the Commission’s interpretation was contrary to the plain meaning of the statute, explaining that the FPA § 216 does not give the Commission permitting authority when a state has affirmatively denied a permit application within the one-year deadline. *Id.* at *15.

The Commission, by regulations detailing information requirements for permit applications under FPA § 216, had determined that it was not required to provide an environmental assessment or an environmental impact statement because adoption of the new regulations did not amount to a major federal action (as the regulations were merely procedural).

Id. at *24. The court agreed, holding that the Commission was not required to provide an environmental assessment or an environmental impact statement, and explaining that the promulgation of regulations specifying the content of permit applications was not a major federal action significantly affecting the quality of the human environment. *Id.* at *29-30.

However, the court found that, when the Commission issued its regulations for filing applications for permits under FPA § 216, it included a number of substantial amendments to its regulations that implement the National Environmental Policy Act. *Id.* at *31. Because the Commission failed to consult with CEQ before amending its regulations that implement the National Environmental Policy Act, the court vacated those regulations. *Id.* at *33.

ENACTED OR PROPOSED LEGISLATION

Designations: H.R. refers to House of Representatives and S. to the Senate. Upon introduction, a bill receives a unique number.

I. Enacted

H.R. 1 – American Recovery and Reinvestment Act of 2009

(Enacted on February 17, 2009)

- The American Recovery and Reinvestment Act of 2009 is the \$787 billion “Stimulus Bill.”
- Appropriates \$17 billion to the U.S. Department of Energy for transmission-related activities, including:
 - \$4.5 billion in direct funding for, among other things, modernizing the electric grid, worker training activities, transmission planning and coordination, integrating Smart Grid technologies
 - \$6 billion in loan guarantees, expanding those available under the Innovative Technology Loan Guarantee Program established in the Energy Policy Act of 2005
 - \$3.25 billion in loans each for Bonneville Power Administration and Western Area Power Administration to build transmission for the delivery of renewable energy
- It appropriates an additional \$17 billion for promotion of renewable generation, energy efficiency and conservation, state programs, environmental clean-up, and other related programs

II. Proposed

A. Proposed Amendments of Commodity Exchange Act (CEA)

H.R. 977 – Derivatives Markets Transparency and Accountability Act of 2009

(Pending)

- Subjects over-the-counter transactions for all commodities to reporting and recordkeeping requirements as determined by Commodity Futures Trading Commission (CFTC).
- Includes over-the-counter (OTC) contracts, as determined by CFTC, as part of large trader reporting requirements of section 4i of the CEA.

- Gives the CFTC special call authority so that it can obtain any OTC market positions held by any person pursuant to exemptive provisions of the CEA.
- Records must be kept for 5 years.

The outline summarizes Section 13 as follows:

- All prospective over-the-counter transactions must be settled and cleared through a CFTC-regulated designated clearing organization (DCO).
- The CFTC may permit an over-the-counter transaction relating to an excluded commodity (i.e. financials) to be settled and cleared through a SEC-regulated clearing agency or a Federal Reserve-regulated central counterparty.
- The CFTC may exempt a transaction from the clearing requirement
 - The CFTC shall consult with the SEC and Fed regarding exemptions that relate to excluded commodities or entities for which the SEC and Fed is the primary regulator.
 - Exemptions should be granted for transactions that are highly customized, transacted infrequently, do not serve a significant price discovery function in the marketplace, and are entered into by parties that can demonstrate their financial integrity.
 - Exempted transactions shall be reported to CFTC with sharing with other agencies.
- Add additional Core Principles for DCOs of (1) daily publication of pricing information, (2) fitness standards, and (3) disclosure of operational information.
- All OTC transactions in effect prior to date of enactment must be either cleared as stated above or reported to CFTC.

As a practical matter, under the proposed Act, over-the-counter derivatives would need to be:

- (a) cleared through a clearing organization regulated by the CFTC or the Securities Exchange Commission; or
- (b) reported directly to the CFTC, if the party has demonstrated specified levels of financial integrity and provides additional information about the integrity of the reported transaction.

See similar companion bill in Senate, S.272. Also see S. 221, S. 272, and S. 447.

B. Fostering Renewable Energy/Energy Independence

S. 539 – Clean Renewable Energy and Economic Development Act

(Pending)

- Would require the President (through the Secretary of Energy) to designate national renewable energy zones within the Eastern and Western Interconnections
- It would require FERC to certify two Interconnection-wide regional planning entities responsible for planning transmission projects that will deliver energy from the renewable energy zones to load within each Interconnection.
- Proposes new siting authority for FERC.

S. 271 – Fuel Reduction using Electrons to End Dependence on the Mid-East (FREEDOM) Act of 2009

(Pending)

- Would, among other things, provide for 5-year (accelerated) depreciation recovery for qualified smart electric meters and qualified smart electric grid systems.

S. 320 – Clean Energy Stimulus and Investment Assurance Act of 2009

(Pending)

- Includes funding for smart grid research, development and demonstration under the power grid digital information technology portion of the Energy Independence and Security Act of 2007; a 5-year depreciation recovery for qualified smart electric meters and qualified smart electric grid systems; and additional borrowing authority for transmission system projects by BPA.
- Provides for renewable generation development, green jobs, reducing dependence on foreign oil, and energy efficiency.

H.R. 312 – Clean Energy Investment Act of 2009

(Pending)

- House Bill No. 312 would amend the Internal Revenue Code to extend the existing tax credit for producing electricity from renewable wind resources by extending the date before which a facility must be placed in service from January 1, 2010 to January 1, 2017; for other renewable generation facilities, the in-service requirement is changed from January 1, 2011 to January 1, 2017.

H.R. 435 – Renewable Energy Production Tax Credit Extension Act of 2009

(Pending)

- Would extend for five years the existing tax credit for producing electricity from renewable resources placed into service from 2010, 2011 or 2012 to 2015, 2016 or 2017 respectively.

H.R. 889 – Save American Energy Act

(Pending)

- Would set nationwide minimum levels of electricity and natural gas savings to be achieved through utility efficiency programs, building energy codes, appliance standards, and related efficiency measures.

H.R. 890 - American Renewable Energy Act

(Pending)

- Would apply to electric utilities that sold over 1 million megawatt hours to consumers in the previous year and establish a national renewable electricity standard for solar, wind, geothermal, biomass, landfill gas, some hydroelectric, marine, and hydrokinetic resources, requiring 6% use of renewables by 2012, and up to 25% by 2025; would establish a renewable energy credit program. See also **S. 433 – Renewable Electricity Standard** (Pending).

C. Compliance Authority

H.R. 71 – Save America's Utility Infrastructure and Secure America Now Act of 2009

(Pending)

- Would amend the Federal Power Act to remove penalty authority from the Electric Reliability Organization (“ERO”) and return it directly to FERC, create criminal penalties including imprisonment not to exceed five years for any person who violates any Commission-approved reliability standard, eliminate the ERO’s ability to delegate enforcement authority to Regional Entities, require FERC to issue rules to prohibit electric reliability disturbances lasting greater than five days, and instruct the Secretary of the Department of Homeland Security to study and report to Congress on gaps in emergency planning preparedness and management regarding specified vulnerable populations.
