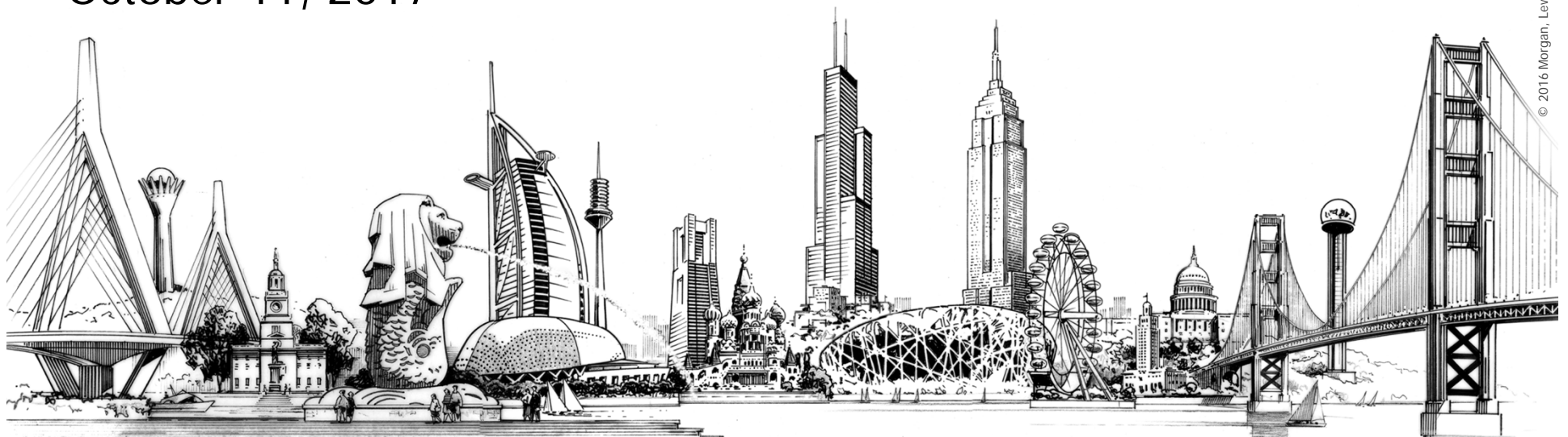


Morgan Lewis

OIL AND GAS: *REGULATORY ROUNDUP*

Levi McAllister and Pamela Wu
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Restoring a Quorum at FERC

- On August 3, the Senate confirmed Neil Chatterjee and Robert Powelson for commissioner posts at FERC.
 - Chatterjee was sworn in on August 8 and named Chairman on August 10.
 - Former energy policy advisor to Senate Majority Leader McConnell.
 - Principal in government relations at the National Rural Electric Cooperative.
 - Former staffer in the House.
 - Powelson was sworn in on August 10.
 - President of National Association of Regulatory Utility Commissioners.
 - Former member of Pennsylvania PUC (including 4 years as Chairman).
 - Pennsylvania's Marcellus Shale Advisory Commission.
 - Kevin McIntyre and Richard Glick have been nominated to fill the remaining two spots at FERC.

Restoring a Quorum at FERC

- Chatterjee and Powelson have provided some insight into their views on certain FERC-related issues.
 - Potential for coal and nuclear generation to receive higher compensation for the reliability and resiliency they provide to the grid.
 - Chatterjee – August 14 podcast
 - Cybersecurity and the need for coordination between FERC and the State PUCs.
 - Powelson – August 24 podcast
 - Infrastructure
 - Powelson – August 24 podcast
 - “How do we grapple with the need to get natural resources whether they're hydro, they're natural gas related, or oil pipelines. Getting infrastructure sited and doing it with the steadfast commitment to the environmental compact. And electric and gas safety and reliability are so critically important to that as well.”
 - FERC Enforcement

Compensating Coal and Nuclear Generation

- On September 29, US Secretary of Energy Rick Perry directed FERC to undertake a rulemaking to enable generation assets in regional transmission organizations (RTOs) and independent systems operators (ISOs) to receive payments for reliability and resiliency benefits that the US Department of Energy (DOE) views as uncompensated under current market rules.
 - Existing market rules for RTOs and ISOs result in “distorted price signals” that prevent traditional baseload generators from receiving payments for the positive benefits they provide to system reliability.
- Under the secretary’s proposed regulations, Part 35 of FERC’s regulations would be revised so that all RTO and ISO tariffs must provide a mechanism for “eligible grid reliability and resiliency resources” to:
 - Sell at cost-based rates;
 - Fully recover costs, including a return on equity (ROE); and
 - Be compensated for the reliability, resiliency, and onsite fuel assurance benefits provided to the electric grid.

Compensating Coal and Nuclear Generation

- Relevance to oil and gas issues?
 - The DOE NOPR poses a direct challenge to gas-fired generation development and, in turn, projections of increases in gas consumption.
 - In a report released in August, DOE concluded that cheap and abundant natural gas is the primary driver of coal and nuclear power plant retirements in the United States.
 - The proposal's ROI component to which coal and nuclear would be entitled puts ROI issues again in the forefront.
 - Pending NOI concerning ROE issues for pass-through entities in response to the DC Circuit's *United Airlines* decision in mid 2016.
 - Remember, the LaFleur comments!

Developments: FERC Infrastructure Certifications

- The overwhelming majority of infrastructure applications are not denied.
 - Since 2009, FERC has rejected only 0.187% of infrastructure applications.
- FERC does not engage in regional planning of natural gas infrastructure.
 - FERC does, however, consider any cumulative impacts a proposed project may have with other facilities.

Judicial Developments: FERC Infrastructure Certifications

- DC Circuit requires FERC to consider downstream GHG emissions that may indirectly result from interstate pipeline development.
 - *Sierra Club v. FERC*, No. 16-1329 (Aug. 22, 2017).
 - An EIS must look not only at the direct effects, but also at the indirect effects of a project that are reasonably foreseeable, said the court, and it was reasonably foreseeable that the cause of carbon emissions in a power plant would be the use of the natural gas that was transported on the pipelines.
 - The court noted that not only would natural gas travel through the pipelines, but also that "it's not just the journey, though, it's also the destination."
 - The natural gas will be delivered by the pipelines to be used by power plants, which will produce carbon dioxide, said the court.
 - The court concluded that the EIS should have included the downstream effects of the project, including the amount of carbon emissions the power plants would produce.
 - On remand, FERC must discuss the significance of the indirect effects by either providing a quantitative estimate of the downstream emissions for the transported gas or explain specifically why it couldn't do that, said the court. FERC also needs to discuss the incremental impact of the emissions in light of past, present, and reasonably foreseeable future actions.

FERC Developments: FERC Infrastructure Certifications

- FERC determines that a state's failure to act on a water quality certificate application within one year constitutes waiver.
 - In a September 15 ruling, FERC ruled that the New York State Department of Environmental Conservation waived its right to act on Millennium Pipeline Co.'s water quality certificate application by taking too long to issue a decision.
- The DC Circuit did not require a pipeline to wait indefinitely for state action.
 - In June, the DC Circuit directed Millennium to seek a ruling from FERC as to whether the pipeline is required to wait for NYSDEC approval.
- The ticking clock:
 - The application filing date vs. the date an application is deemed complete.
 - "To the extent there is any ambiguity in the statutory text, we interpret the triggering date for the waiver provision to be the date a certification application is filed with the relevant agency."

Eminent Domain and Pipeline Development

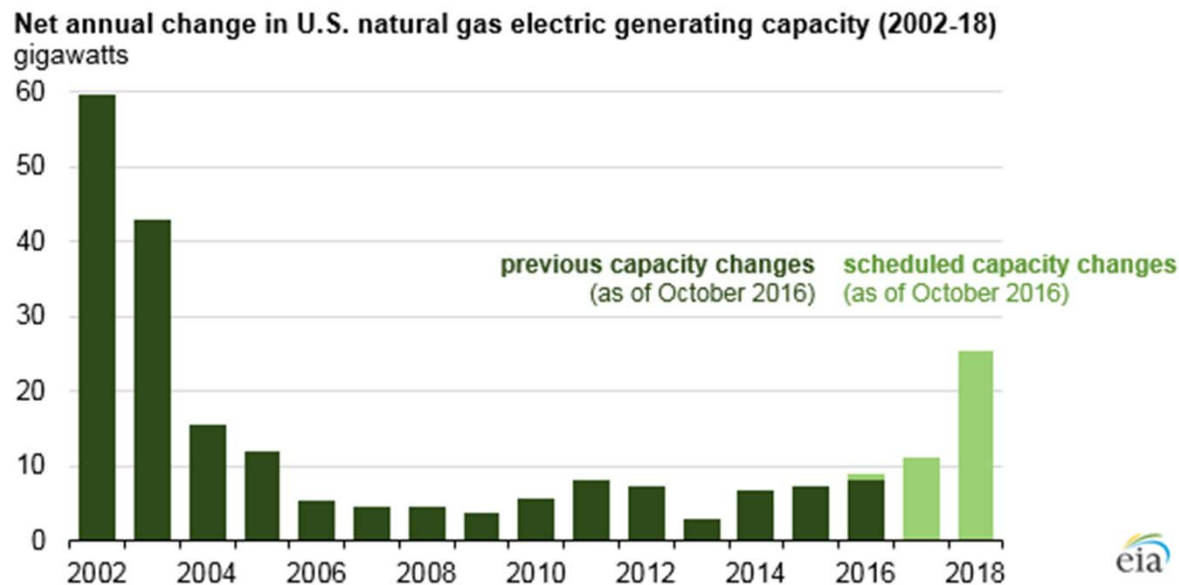
- Group of landowners sued FERC in federal court and claimed that FERC's pipeline permitting process unconstitutionally allows pipeline developers to seize property through eminent domain.
 - *Bold Alliance v. FERC*
 - Allegations:
 - FERC fails to require pipeline companies to demonstrate that their projects serve a public use, as required by the takings clause.
 - Congress did not delegate the power of eminent domain to private entities that have failed to obtain the necessary state and federal approvals for the construction of natural gas pipelines.
 - Relief requested:
 - Declaratory judgment that certificate holders do not possess power of eminent domain if the certificates are conditioned on the receipt of federal or state approvals.

Accommodating Utilities and End-Users

- Natural gas sector market participants continue to make efforts that, if implemented, would serve to accommodate electric utilities and end-users.
- Gulf South Pipeline Co. LP – Docket No. RP17-851-000
 - Gulf South proposed tariff revisions that would allow direct-serve customers to be exempted from a 90-day limitation for executing service agreements with the pipeline.
 - “Direct-serve customers” is an undefined term in the tariff, but appears to comprise natural gas-fired generation facilities and industrial customers.
 - Pipeline asserts that the proposal will provide those customers with more flexibility in managing gas supplies.
 - This flexibility is necessary because many of the direct-serve customers may contract with third parties that could choose to end pipeline capacity contracts, thereby creating a fuel source uncertainty circumstance for the generators or industrial end-users.
 - Proposal would be an exception to an existing FERC policy concerning service agreement contracting.
 - Proposal is not without protest, however.

Accommodating Utilities and End-Users

- Why is this important?
 - The electricity industry is planning to increase natural gas-fired generating capacity by 11.2 gigawatts (GW) in 2017 and 25.4 GW in 2018.



- Consistent with other efforts to accommodate growing gas demand of utilities and end-use customers.
 - Gas/Electric coordination efforts of FERC (approved)
 - Proposal in New England for utility customers to pay for capacity (withdrawn)

Statute of Limitations in FERC Market Manipulation Case

- Eastern District of California District Court Judge held that FERC's action against a former Barclays trader was time-barred by the 5-year statute of limitations in 28 U.S.C. § 2462.
 - *FERC v. Barclays Bank PLC, et al.*
 - Primary issues:
 - (1) whether the tolling agreement that Mr. Smith entered into terminated on the date FERC issued its Show Cause Order, and if so,
 - (2) whether the 5-year statute of limitations continued to run until FERC filed its action with the District Court.
 - Outcome:
 - E.D. Cal. granted Mr. Smith's motion to dismiss. Even after taking into account the period of time that was tolled, more than 5 years passed from the last days of misconduct.
 - Takeaway:
 - FERC may revamp its enforcement processes and procedures and may start negotiating more explicit tolling agreements.

Restoring a Quorum at the CFTC

- On August 3, the U.S. Senate voted on Thursday to confirm two Republicans and one Democrat to serve on the Commodity Futures Trading Commission.
 - Chris Giancarlo to serve as CFTC chairman
 - Brian Quintenz to serve as a new commissioner
 - Rostin “Russ” Behnam to serve as a new commissioner
- The Senate declined to vote to confirm another Republican nominee, Dawn Stump.
 - *Reuters* reported that “a Senate Democratic aide, speaking on condition of anonymity, said Stump was not on the slate of nominees because the party did not want to approve a total of three Republican commissioners and only one Democrat.”

CFTC Investigations: Self-Reporting and Cooperation Guidance

- On September 25, 2017, the Division of Enforcement of the CFTC issued an “Updated Advisory On Self Reporting And Full Cooperation.”
 - The advisory updates a pair of January 19, 2017 advisories addressing “Cooperation Factors in Enforcement Division Sanction Recommendations” for individuals and companies.
 - The update and the Director’s remarks are an effort to encourage more self-reporting and cooperation from wrongdoers subject to the Commission’s jurisdiction.
- The updated advisory and the Director’s remarks attempt to offer greater transparency about what the Division expects and how meeting those expectations will result in substantially reduced penalties or, in “truly extraordinary circumstances” (e.g., self-reporting misconduct that is pervasive in an industry), decisions not to prosecute.

CFTC Investigations: Self-Reporting and Cooperation Guidance

- The September advisory identifies three expectations that the Division has of companies seeking to self-report and receive cooperation credit.
 - *First*, wrongdoing must be voluntarily reported to the Division “before an imminent threat of disclosure” and “within a reasonably prompt time after becoming aware” of the wrongdoing.
 - *Second*, there will be an enforcement investigation to confirm the scope of the wrongdoing, and the company must fully cooperate in accordance with the January advisory throughout the investigation.
 - *Third*, the company must take timely and appropriate remedial measures to fix the flaws that allowed the wrongdoing to occur.

PHMSA Leadership

- On September 8, President Trump nominated Howard R. Elliott to be the Administrator of the Pipeline and Hazardous Materials Safety Administration.
 - Mr. Elliott is a 40-year veteran of the U.S. freight rail industry, serving over the last decade as group Vice President of Public Safety, Health, Environment and Security for CSX Transportation in Jacksonville, FL.
 - Portfolio of responsibility included hazardous materials transportation safety, homeland security, railroad policing, crisis management, environmental compliance and operations, occupational health management and continuity of business operations.
- Confirmed by the Senate on October 5.

PHMSA Enforcement

- Developments in PHMSA caselaw:
 - In *Exxon Mobil v. US Department of Transportation*, the Fifth Circuit:
 - Clarified the obligations imposed on pipelines developing integrity management plans; and
 - Rejected arguments that would provide near-unfettered deference to PHMSA's interpretation of its regulations.
 - Fifth Circuit determined that the PHMSA's determination that pipeline failed to properly assess integrity was arbitrary and capricious.
 - PHMSA regulations are process-based and not outcome-based. They require a pipeline to consider certain risk factors; they do not require a particular outcome following such consideration.
 - PHMSA failed to give fair notice of its interpretation of its regulations;
 - PHMSA argued that the requirement to “consider” mandated that the pipeline determine that a pipeline was susceptible to seam failures since the pipeline had a history of other failures.
 - When an agency's regulations provide for civil penalties, the agency must provide a clear standard of culpability.

Questions?



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