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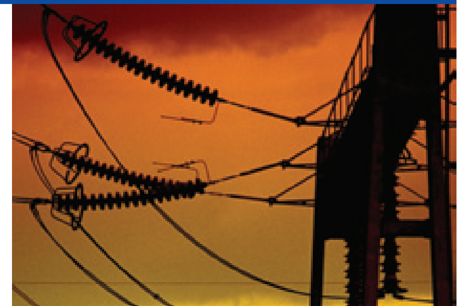

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Energy Highlights

- On November 14, 2012, FERC suspended J.P. Morgan Ventures Energy Corporation's market-based rate authority for a six-month period, starting April 1, 2013, as a result of its conclusion that J.P. Morgan had provided false or misleading information or omitted material information in communications with FERC. Commissioner LaFleur dissented because she did not find a sufficient nexus between the specific facts of the violations and J.P. Morgan's market-based rate authority to warrant the six-month suspension.
- The California Air Resources Board (CARB) held its first cap-and-trade auction of greenhouse gas (GHG) emissions allowances on November 14, 2012, even as the California Chamber of Commerce filed a lawsuit seeking to invalidate CARB's allocation of emissions allowances via the auction. The lawsuit did not stop the auction from occurring, and although it created some uncertainty about initial levels of participation in the CARB program, the first auction resulted in the sale of all available 2013 GHG allowances. For more information about the CARB program, click here.
- On November 15, 2012, FERC opened two new investigations under Section 5 of the Natural Gas Act into alleged over-recovery of the cost of service by two interstate natural gas pipelines, Wyoming Interstate Company, L.L.C. (WIC) and Viking Gas Transmission Company (Viking). Based on Form 2 data, FERC calculated that WIC's estimated return on equity (ROE) in 2010 and 2011 was 19.55 percent and 18.51 percent, respectively; likewise, FERC calculated Viking's ROE in 2010 and 2011 to be about 21 percent each year. Interventions are due by December 15, 2012.
- The Office of the General Counsel ("OGC") of the Commodity Futures Trading Commission ("CFTC") has offered a non-binding interpretation of certain definitions promulgated in connection with implementation of the Dodd-Frank Act that would exclude certain physical commercial agreements that include a two-part rate structure, such as interstate transportation agreements for natural gas, tolling (energy conversion) agreements and re-gasification of imported liquefied natural gas, from treatment as commodity options.

Each bimonthly issue of the *Washington Energy Update* highlights useful energy regulatory tips and a wide range of issues impacting the energy markets.

If you have any questions or would like more information about anything appearing in this issue, please contact the editors or your White & Case relationship lawyer. Please let the editors know if you would like a particular topic covered in a future issue or have suggestions on how this newsletter can be improved.

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When Energy and Antitrust Worlds Collide—Sixth Circuit Rules That Filed-Rate Doctrine Did Not Bar Price Discrimination Claim Against Electric Utility

Noah Brumfield and Daniel Hagan

In *Williams v. Duke International, Inc.*, 681 F.3d 788 (6th Cir. 2012) ("*Duke*"), the US Court of Appeals for the Sixth Circuit ruled that end-users of electricity can bring a Robinson-Patman claim over rebates provided to their competitors. In the case, certain individuals and companies ("Plaintiffs") filed suit in federal district court challenging side agreements that Duke Energy Carolinas, LLC ("Duke") entered into with various customers allegedly competing in the same market as the Plaintiffs. Allegedly, the side agreements provided rebates to customers in return for the customers' support of a stipulation that was submitted to the Public Utilities Commission of Ohio ("PUCO") by Duke to resolve a proceeding that was pending with the PUCO.

The District Court dismissed the suit because it found it had no jurisdiction under federal law to hear the case because of the filed-rate doctrine. The Court of Appeals reversed the District Court and allowed the case to proceed. Importantly, the Court of Appeals did not rule on the merits. Instead, it held that Plaintiffs had presented causes of action with sufficient factual support to deny Duke's motion to dismiss the case for failure to state a valid cause of action. While this does not constitute a finding on the merits, the case is important because of its potential significance for side agreements between utilities and their customers, particularly if the agreements are not filed with the relevant regulatory commission.

The main rulings of the Court of Appeals are as follows:

1. **Filed-Rate Doctrine.** The Court of Appeals ruled that the suit "does not concern the particular rate set by the PUCO, but rather payments made outside of the rate scheme." *Id.* at 797. As the agreements were not filed with the PUCO, the Court of Appeals ruled that the filed-rate doctrine, which it said "bars challenges to the reasonableness of a filed rate," was not applicable. *Id.*

2. **Robinson-Patman Act.** The Robinson-Patman Act makes it unlawful for persons "engaged in commerce...to discriminate in price between different purchasers of commodities of like grade and quality." *Id.* at 799. The antitrust statute is typically applied to claims of discriminatory pricing offered to a person who then resells the product, or to claims of predatory pricing. The effect of the discrimination must be to substantially lessen competition or tend to create a monopoly, or at least there must be a substantial possibility of either effect. The Court of Appeals concluded that electricity is a commodity of like grade and quality. *Id.* Without ruling on the merits, the Court of Appeals also found that Plaintiffs had sufficiently alleged competitive injury to permit the case to go forward on the basis that Plaintiffs were competitors to the favored buyer even if the two were never competing in the resale of the electricity. *Id.* at 800.

3. **RICO Claim.** The Court of Appeals found that Plaintiffs had adequately alleged mail or wire fraud based on the bills that Duke had sent to its customers that said that certain electricity charges were "mandatory and unavoidable," which Plaintiffs contended implied that all customers had to pay these charges. The Court of Appeals concluded that Plaintiffs' allegation that the statements concealed the alleged fraud, i.e., the side agreements that provided rebates to these "mandatory" charges provided a legally sufficient basis. *Id.* at 802.

4. **State Law Claims.** Having found that the District Court had jurisdiction over the federal claims, the Court of Appeals said that the District Court had jurisdiction to hear the state law claims as an exercise of its supplemental jurisdiction. These state law claims included claims that Duke had violated Ohio's corrupt practices law because Plaintiffs alleged that counsel for Duke had deceptively denied to the Ohio Supreme Court that he had "any knowledge of the existence of any...side deals." *Id.* at 803-04. This allegedly hindered the discovery of the alleged unlawful rebates. The Court of Appeals also found that Plaintiffs' common law fraud and civil conspiracy claims could proceed.

We do not know whether these claims will survive later motions or trial. Notably, this decision was not on the merits, and the Court did not opine on the underlying claim that downstream competition between the plaintiff and the favored customers was substantially lessened. The opinion leaves open for the trial court to determine what evidence is relevant and sufficient to prove competitive injury when the favored and disfavored purchasers do not compete in the sale of electricity.

Still, the decision raises issues that should be taken into account when assessing legal and business strategies and risks. For example, the Court of Appeals ruling indicates that under some circumstances unfiled side agreements between utilities and customers that provide the latter with rate benefits may be unlawful. While agreements not to challenge or to oppose a filed rate may be immune from subsequent challenge, the decision creates a risk if the agreement relates back to a rebate or other negotiated pricing.

California Cap-and-Trade Scheme

Claire Hall

On November 14, the first auction of California Cap-and-Trade Program Greenhouse Gas Allowances ("GHG Allowances") was held, effectively kicking off California's Cap-and-Trade Program (the "Program"). The Program, which was approved by the California Air Resources Board in December 2010 and which is authorized by California's Global Warming Solutions Act of 2006 (known as AB 32), was originally scheduled to come into effect on January 1, 2012. AB 32 required CARB to prepare a scoping plan (the "Scoping Plan") to reduce greenhouse gas emissions to 1990 levels by the end of 2020. The Program's original start date was delayed due to litigation around the Scoping Plan earlier this year which put the implementation of the Program on hold. However, in June of this year, the California First District Court of Appeal ruled in favor of CARB and upheld its Scoping Plan. A ruling against CARB could have forced it to revise the Scoping Plan and freeze implementation of the Program. Following the resolution of the litigation, implementation of the Program resumed, and it will now become effective on January 1, 2013.

Unsurprisingly, the Program has both supporters and detractors: those who applaud the potential environmental benefits of reduced emissions and those who are concerned about the costs to California businesses in a tough economic climate. For now, at least, those entities that are covered by the Program must be ready to comply by the end of this year. The Program regulations[1] are extremely detailed, and those entities that are either required to or intend to participate in the Program should seek advice from their legal counsel with respect to the minutiae of the regulations. While the Program has an obvious impact on those entities that are mandated to comply, a less obviously impacted group are those financial institutions and other lenders involved in project finance deals where financing is provided to a project entity that must comply with the Program either directly or as part of a group of entities subject to the Program. Such lenders will need to be aware of the Program from both a due diligence and cost perspective; costs to the project may include the cost of obtaining sufficient GHG Allowances and any penalties for non-compliance (discussed further below). This article seeks to introduce the reader to the Program and the key dates and requirements thereof.

The Program seeks to reduce greenhouse gas emissions from certain "Covered Entities" (discussed further below) in the following ways: (i) by setting a statewide cap on greenhouse gas emissions which will be reduced over time and (ii) employing market mechanisms to cost-effectively achieve the emission-reduction goals by permitting GHG Allowances and offset allowances to be bought and sold. The basic premise of the Program is as follows: Each Covered Entity will be required to surrender one permit to emit for each ton of greenhouse gas emissions that they emit. These "permits to emit" will take the form of GHG Allowances and offset allowances (which are permitted on a more limited scale than GHG Allowances). GHG Allowances and offset allowances are together referred to as "Compliance Instruments." GHG Allowances will be distributed to the market through auctions and free allocations and may be purchased by Covered Entities from the secondary market. A GHG Allowance is a tradable permit to emit one metric ton of a carbon dioxide-equivalent greenhouse gas emission. Offset allowances may also be purchased (a detailed discussion about offset allowances is beyond the scope of this article).

Who and What Does the Program Cover?

In its initial phase, the Program will cover major emitters of greenhouse gases such as electricity generators (including importers of electricity), operators of large facilities involved in the production or processing of certain specified products (such as petroleum refineries, cement production facilities, oil and gas production facilities, and pulp and paper manufacturing facilities), entities that distribute or use natural gas in California, and suppliers of liquefied petroleum gas or carbon dioxide that emit more than 25,000 metric tons of carbon dioxide equivalent ("CDE") per year. The Program will expand to cover other entities (such as fuel distributors) in later years. To determine which entities emit the required level of CDE, the Program relies on data collected through the Mandatory Reporting of Greenhouse Gas Emissions Regulation (the "MRR"). Pursuant to the MRR, certain industrial facilities, fuel and carbon dioxide suppliers, and electric power entities are required to report their annual greenhouse gas emissions to CARB each year—this data is used to determine which entities are Covered Entities and the size of their respective compliance obligation. In addition, CARB will allocate a proportion of GHG Allowances to qualified facilities subject to the Program based on the data collected through the MRR.

In addition to Covered Entities, the Program allows other participants to voluntarily opt-in to the Program as follows:

- Opt-In Covered Entities—those entities that would be Covered Entities other than for the fact that their emission levels do not exceed the required threshold
- Voluntarily Associated Entities—those entities that will participate in the secondary market, such as banks and traders
- Other Registered Participants, such as verification bodies and offset project registries

How Does an Entity Comply With the Program?

A Covered Entity is required to surrender one Compliance Instrument for each metric ton of CDE it emits in any given compliance period. Compliance periods are three years long, with the first compliance period commencing on January 1, 2013. In each of the first two years of the three-year compliance period, a Covered Entity must surrender Compliance Instruments to cover 30 percent of its compliance obligations, with the balance due by the end of the compliance period. If a Covered Entity does not meet its compliance deadlines, it will be subject to the compliance obligation for the excess emissions. Excess emissions are defined as the difference between the calculated compliance obligation and the Compliance Instruments that were timely surrendered. In situations where there is untimely surrender, the Covered Entity's compliance obligation will increase to four times the entity's excess emissions. The Covered Entity will then have 30 days to secure the required allowances. If the failure to meet the compliance deadline is the result of a reversal of an offset allowance, the Covered Entity's submission will not be considered to be untimely until 30 days after the notice of reversal is issued.

If a Covered Entity does not meet its compliance obligations, the regulations provide that each Compliance Instrument that has not been surrendered will constitute a separate violation. In addition, each day that the Compliance Instruments are not surrendered will be considered a separate violation. The regulations provide that penalties can be assessed under Health and Safety Code Section 38580 for violations of the Program, and penalties can include monetary fines up to US$40,000 per violation.[2]

Registration: All entities that will participate in the Program, regardless of whether their participation is mandated or voluntary, are required to register as Program participants with CARB by the following deadlines:

- By January 31, 2012, if the Covered Entity exceeded inclusion thresholds in the reporting period of 2008 – 2011
- Within 30 days of the applicable MRR reporting deadline if an entity not covered as of January 1, 2013 exceeds inclusion thresholds as demonstrated by such MRR report
- For opt-in entities, by November 30 of the year prior to the year in which it voluntarily elects to be subject to a compliance obligation
- For voluntarily associated entities, prior to first acquiring an allowance

The registration requirements are detailed in the Program regulations. Information submitted to CARB as part of the registration process must be updated within certain prescribed timeframes. In addition, direct and indirect corporate associations must also be disclosed as part of the registration process. A registrant has a direct association with another if it holds (or has a purchase option for or right to acquire) more than 20 percent of its listed shares; holds or controls more than 20 percent of the director positions or votes (or controls more than 20 percent of the other entity's affairs through some other means); or it holds allowances in its account in which the other entity has an ownership interest. An indirect association is determined through a chain of direct ownership which, when multiplied, is greater than 20 percent. Corporate associations are relevant with respect to auction bidding and the holding and surrender of Compliance Instruments (discussed below). In addition, each registrant must appoint an account representative who will be required to provide a sworn statement attesting to his/her authority.

CITSS: Participants in the Program must open and maintain accounts in the Compliance Instrument Tracking System Service (CITSS).[3] CITSS is a management and tracking system for accounts and Compliance Instruments that tracks Compliance Instruments (emissions allowances and offsets) from the point of issuance by jurisdictional governments, to ownership, transfer by regulated greenhouse gas emitters and other voluntary or general market participants, and to final compliance retirement.

Accounts: A number of accounts are required to participate in the Program depending upon the type of entity that is registered with CARB. Registered participants will be assigned the appropriate accounts by CARB. All Program participants will be assigned a holding account. Covered Entities and opt-in covered entities will also be assigned a compliance account into which Compliance Instruments will be transferred from the holding account to meet their compliance obligations.

Obtaining Compliance Instruments

As noted above, Compliance Instruments may be obtained through free allocation, auction or purchase in the market. The holding and obtaining of GHG Allowances is subject to a number of requirements and limitations; for example, entities (i) may only hold and "carry over" a certain number of GHG Allowances from year to year, (ii) are limited in the number of GHG Allowances that can be purchased at any one auction, and (iii) within a corporate association are limited in the number of GHG Allowances they may collectively obtain.

Free Allowances: CARB will allocate a certain number of GHG Allowances cost-free. Initially, a majority of GHG Allowances will be allocated for free in an effort to minimize the number of firms that decide to relocate outside California as a result of a perceived competitive disadvantage imposed by the Program. In addition, CARB will provide electricity distribution utilities with free GHG Allowances to help reduce the cost burden on electricity users from electricity price increases expected to result from the implementation of the Program.

Auctions: The first auction of GHG Allowances was held on November 14, 2012 between 10:00 a.m. and 1:00 p.m. Pacific Standard Time.[4] Subsequent auctions will be held quarterly. On November 19, CARB posted results of the auction online; the available 2013 GHG Allowances sold out at a price of US$10.09 per GHG Allowance (just above reserve price). Notice of each auction, including the number of allowances to be auctioned, is to be issued 60 days in advance. At each auction, CARB will offer one quarter of the GHG Allowances available that year and one quarter of the GHG Allowances for the calendar year three years in advance. GHG Allowances are therefore issued with respect to a particular year and each year is known as a "vintage." At the November auction, participants were able to purchase GHG Allowances from the 2013 and 2015 vintages. Auction bids were required to be sealed and submitted in multiples of 1,000 metric tons of CDE. Bids were considered in declining order by price, subject to the reserve price, and the quantity of GHG Allowances that a participant may purchase is constrained by holding and purchase limits applicable to such entity and the size of its bid guarantee. GHG Allowances allocated through the auction were to be sold at the "settlement price," which is the lower of the reserve price and the price at which the supply of GHG Allowances for that auction is exhausted.

An entity that wishes to participate in the auction must be registered for the Program, with CITSS and as an auction participant. Once an auction registration application is approved, the entity does not need to register for future auctions, although it must provide any applicable updates to the auction administrator 30 days prior to an auction in order to be eligible to participate.

A bid guarantee, in the form of one or a combination of cash (wire transfer or certified funds), irrevocable letter of credit issued by a financial institution with a US banking license, or a bond issued by a financial institution with a US banking license, is due 12 days in advance for the full amount of the intended purchase; GHG Allowances awarded will be limited to the amount of the posted guarantee. A valid bid guarantee may not expire any sooner than 21 days after the auction date.

Carrying Over Allowances: GHG Allowances can be banked in an entity's holding account for future use. However, the regulations establish a holding limit of the maximum number of GHG Allowances that an entity, or group of associated entities, is allowed to hold.

Trading: As mentioned, non-Covered Entities may participate in the Program as buyers and sellers of GHG Allowances. As the number of GHG Allowances allocated by CARB reduces, demand for GHG Allowances, and the price, will increase. At present, a number of traders are involved in the market either bilaterally or through exchange trading. The IntercontinentalExchange, Inc. ("ICE") reported its first trade in GHG Allowances on August 29, 2011,[5] and prices for contracts promising the delivery of 1,000 GHG Allowances in December 2013 hit an 11-month high of US$20.10 per metric ton on July 24 of this year, although the price has since dropped to under US$16. This price is likely to drop further given the recent auction at which 2013 GHG Allowances sold at US$10.09 each. The International Swap and Derivatives Association, Inc. ("ISDA") has published an emissions annex for use with its ISDA Master Agreement that covers bilateral trades in GHG Allowances.

Offsets: A Covered Entity may satisfy up to eight percent of its Program compliance obligations through the surrender of offset allowances. To be valid, an offset allowance must "represent a GHG emission reduction or GHG removal enhancement that is real, additional, quantifiable, permanent, verifiable and enforceable."[6] Therefore, offsets can only satisfy these requirements if they reduce or remove greenhouse gases that would not have otherwise been required under the Program, or have been required by federal, state or local laws and regulations. CARB has approved four Compliance Offset Protocols to date: (1) Ozone Depleting Substances Projects (involving the destruction of ozone depleting substances), (2) Livestock Projects (involving manure biogas control), (3) Urban Forest Projects (involving planting trees in urban areas), and (4) US Forests Projects (involving forest preservation).[7] Offset allowances from any of the foregoing four Compliance Offset Protocols may be surrendered against a Covered Entity's compliance obligation.

EQR Renovation: FERC Changes Scope, Content and Filing Procedures for Electronic Quarterly Reports

Caileen Gamache

FERC's regulations currently require all public utilities to file Electric Quarterly Reports (EQRs) summarizing the contractual terms and conditions in their agreements for jurisdictional services and information on market-based and cost-based power sales transactions that occurred in each calendar quarter. The reports are made by downloading EQR software from FERC's website, entering data into the software and submitting the EQR to FERC. FERC has recently taken two significant steps to change these rules and procedures. First, on September 21, 2012, FERC issued Order No. 768, a Final Rule on Electricity Market Transparency Provisions of Section 220 of the Federal Power Act.[1] Order No. 768 both extends the EQR obligation to certain non-public utilities that have more than a *de minimis* market presence and also modifies the type of data that is required to be reported in the EQRs. Meanwhile, FERC has issued a Notice of Proposed Rule Making on Revisions to Electric Quarterly Report Filing Process, which is pending final action.[2] Below is an overview of the EQR changes.

FERC Expands the Scope of EQR Reporting Entities

Order No. 768 extends the EQR reporting requirement to include "non-public utility" market participants that "have more than a *de minimis* market presence."[3] FERC bases its authority on section 220 of the Federal Power Act ("FPA"), which allows FERC to develop rules to obtain information "about the availability and prices of wholesale electric energy and transmission service… from any market participant" with more than a *de minimis* market presence.[4] FERC interprets "any market participant" broadly, including "non-public utilities that fall under FPA Section 201(f)."[5] Although it appears FERC contemplates that other entities may qualify as "market participants," Order No. 768 only extends the scope of the EQR rules to "non-public utilities," which FERC defines as those entities that are specifically excluded from the definition of "public utility" in FPA Section 201(f). Specifically, non-public utilities are: "the United States, a State or any political subdivision of a State, and electric cooperative that receives financing under the Rural Electrification Act of 1993 [] or that sells less than 4,000,000 megawatt hours of electricity per year," or agents and instrumentalities of the foregoing.[6]

There are two exemptions from the expanded EQR reporting requirement applicable to non-public utilities. First, as noted above, FPA Section 220 does not authorize FERC to collect EQRs from entities with a *de minimis* market presence. Although FPA Section 220 does not define "*de minimis*," FERC concluded in Order No. 768 that it means "non-public utilities that make 4,000,000 MWh or less of annual wholesale sales."[7] The *de minimis* threshold is calculated using the average of an entity's total wholesale sales volumes made in the preceding three years, as reported in the Energy Information Administration's Form 861 under "Sales for Resale." In addition to the *de minimis* exemption, there is a geographic exemption for non-public utilities located entirely in Alaska and Hawaii.

There are also three types of transactions that are exempt from the expanded reporting requirement, including:

- Transactions for the purchase or sale of wholesale electric energy or transmission services within ERCOT
- Sales by a non-public utility, such as a cooperative or joint-action agency, to its members
- Sales by a non-public utility under a long-term cost-based agreement required to be made to certain customers under a Federal or state statute

Note, however, that it appears FERC expects that these transactions will factor into computing whether an entity meets the *de minimis* threshold.[8]

FERC concluded that the expanded scope of the EQR reporting requirement is necessary because non-public utilities have a significant presence in wholesale electric markets, and therefore collecting EQRs from such entities will increase market transparency and support competitive markets. FERC also stated that having access to this data will facilitate the Commission's oversight of its market-based rate program under FPA Section 205, and will augment its ability to assess whether to approve merger and acquisition proposals under FPA Section 203.[9]

FERC Modifies EQR Content

Order No. 768 also revised the data required in EQRs. The following changes to EQR content applies to all reporting entities:

- **Trade Date:** The Commission requires EQR filers to include the trade date in the EQR and defines the term as "the date upon which the parties made the legally binding agreement on the price of the transaction."[10]
- **Type of Rate:** EQR filers must include the type of rate (i.e., fixed, formula, electric index or RTO/ISO) by which the price was set for each transaction reported in the EQR.[11]
- **Standardized Unit for Reporting Energy and Capacity Transactions:** FERC standardized reporting units as follows: quantity of energy (MWh); price for energy ($/MWh); quantity of capacity (MW-month); and price for capacity ($/MW-month).

- **Contract Time Zone:** FERC eliminated the requirement to report the Contract Time Zone.
- **Identification of Transactions Reported to Index Publishers:** EQR filers must report whether their transactions are reported to Index Publishers, the name of such publishers and, if the EQR filer only reports specific types of transactions, those transaction types.[12]
- **Identification of the Exchange/Broker Used to Consummate a Transaction:** EQR filers must report whether an exchange or broker was used to consummate a transaction. Moreover, if an exchange was used, the name of the exchange must be reported. FERC will not require entities to identify the names of brokers.[13]
- **E-Tag IDs:** EQR filers must report e-Tag IDs for each transaction reported in the EQR if an e-Tag was used to schedule the transaction.[14]
- **DUNS Requirement:** FERC eliminated the requirement to report DUNS numbers.

Although non-public utilities are generally required to report the same information as public utilities, FERC recognized that there are certain fields that may be inapplicable. A non-public utility should enter "NPU" in any data fields that do not apply because it is not a public utility.[15]

FERC announced that the revised EQR requirements set forth in Order No. 768 will become enforceable in the third quarter of 2013. Several entities have requested rehearing and/or clarification of Order No. 768, however, which may impact the specific requirements and delay implementation.

FERC Proposes to Revise EQR Procedures

On June 21, 2012, FERC issued a Notice of Proposed Rulemaking regarding Revisions to Electric Quarterly Report Filing Process ("NOPR on Process").[16] FERC explained that the current system, which was established approximately ten years ago and is dependent on the software Microsoft Visual FoxPro, is "outmoded, ineffective and unsustainable."[17] Thus, FERC is proposing to overhaul its EQR reporting platform.

Under the proposed system, FERC would move from a software-based system to a web-based automated interface that would allow the EQR filer to enter data directly through FERC's website. Entities will have the option to continue to use a comma-delimited text format, which is used with the current EQR system, or to submit an Extensible Mark-Up Language (XML)-formatted file. FERC is also proposing to eliminate the EQR "PIN" numbers and instead require EQR filers to file using the FERC-issued "Company Identifier" used to make tariff filings.

As with the changes proposed in Order No. 768, FERC proposes to implement the new EQR filing procedures beginning with data from the third quarter of 2013.

ITC Issues Affirmative Final AD/CVD Determinations for Chinese Solar Cells

Scott Lincicome and Justin Miller

On November 7, 2012, the US International Trade Commission (ITC) rendered a unanimous affirmative determination that imports of certain crystalline silicon photovoltaic cells and modules from China were materially injuring the US industry. The ITC reached a negative finding with respect to critical circumstances, meaning that duties will not be applied retroactively. The US Department of Commerce (DOC) determined in October 2012 that such imports are subsidized and sold in the United States at less than fair value.

Scope

The solar cells covered by the AD/CVD investigations fall under Harmonized Tariff System of the United States (HTSUS) subheadings 8501.61.0000, 8507.20.80, 8541.40.6020, 8541.40.6030 and 8501.31.8000. The scope of the AD/CVD investigations covers "not only imports of solar cells produced in China and solar modules/panels produced in China from Chinese-made solar cells, but also imports of solar modules/panels produced outside China from solar cells produced in China [but not covering] imports of modules/panels produced in China from solar cells produced in a third country."

Reaction to ITC Injury Determination

Reaction to the ITC's November 7 vote has been mixed:

- **Coalition of American Solar Manufacturing Leader and SolarWorld President Gordon Brisner** lauded the ITC's affirmative injury determination, noting that it provides "hope that the United States can maintain a viable solar manufacturing base, conduct ongoing research and development and continue to make solar an increasingly viable part of the American renewable energy portfolio;" but
- **Recurrent Energy Chairman and Chief Executive and Solar Energy Industry Association Chairman Arno Harris** expressed concern in regard to the ITC's affirmative injury determination, noting that imposing AD/CVD duties on such Chinese goods could spark a trade war which would "not be good for anyone," and that the focus should rather be to "simply […] drive down the cost of solar [energy]."

Sen. Wyden (D-OR), whose Oregon constituency includes petitioner SolarWorld's manufacturing plant, also issued a statement expressing satisfaction with the ITC's affirmative injury determination and noting that, as Chairman of the Senate International Trade Subcommittee, he will ensure that "federal agencies follow through and fully enforce the trade laws." Sen. Wyden previously expressed concern in regard to DOC's refusal in its October 2012 final determinations to expand the scope of the AD/CVD investigations to cover imports of solar modules/panels produced in China from solar cells produced in a third country, noting that he would continue to monitor such "loophole," and would "pursue additional measures if necessary to protect [US] manufacturers and workers."

Next Steps

The ITC's November 7 determination marks the end of the investigation phase in one of the largest and most widely monitored US-China trade disputes in recent history. However, the ITC's final affirmative injury finding comes as no surprise and is unlikely to "ratchet up" tension in the United States' bilateral trade relations with China because Chinese solar producers and exporters largely expected the ITC affirmative injury finding. Also, due to DOC's October 2012 scope revision to exclude imports of solar modules/panels produced in China from solar cells produced in a third country, many Chinese producers and exporters have already begun shifting production in order to fall outside of the investigations' scope.

The ITC is expected to notify DOC of its affirmative injury determination on or before November 30, 2012. DOC will subsequently issue AD and CVD orders.

Click here for a copy of an ITC press release.

Due to the general nature of its content, this information is not and should not be regarded as legal advice. No specific action is to be taken on the information provided without prior consultation with White & Case LLP.

Endnotes

California Cap-and-Trade Scheme

1 The Program appears at sections 95800 to 96023 of title 17, California Code of Regulations.

2 Cal. Health and Safety Code, § 42400.2

3 https://www.wci-citss.org.

4 One day prior to the first auction, the California Chamber of Commerce ("CCC") filed a lawsuit against CARB seeking to invalidate portions of the Program authorizing the sale of GHG Allowances via auction. *See Cal. Chamber of Commerce v. Cal. Air Res. Bd.*, No. 34-2012-80001313 (Sup. Ct. of Cal., Sacramento, Nov. 13, 2012). The CCC alleges that the sale of GHG Allowances amounts to an unauthorized "tax" or "fee" under California law. *Id.* CARB proceeded with the auction despite the lawsuit. At the time of this writing, the lawsuit remains pending and businesses in the market for GHG Allowances should closely monitor its progress.

5 The transaction was a forward contract for 100 contracts, representing 100,000 GHG Allowances, at a price of US$17/allowance. The terms for the first trade were agreed to on August 10, between NRG Power Marketing and Shell Energy North America (US).

6 C&T Regulations, § 95970(a).

7 C&T Regulations, § 95973. In addition, the offset project dates must have started after December 31, 2006 and be located in the United States, Canada or Mexico.

EQR Renovation: FERC Changes Scope, Content and Filing Procedures for Electronic Quarterly Reports

1 *Electricity Market Transparency Provisions of Section 220 of the Federal Power Act*, Final Rule, 140 FERC ¶ 61,232 (2012) ("Order No. 768").

2 *Revisions to Electric Quarterly Report Filing Process*, 129 FERC ¶ 61,234 (June 21, 2012).

3 Order No. 768, at 1.

4 16 U.S.C. 824t(a)(2), (3).

5 Order No. 768, at p. 10.

6 Order No. 768, at fn 3 (citing 16 U.S.C. 824(f)).

7 Order No. 768, at p. 54.

8 Order No. 768, at p. 57, fn 114.

9 *Id.* at p. 22.

10 *Id.* at p. 90.

11 *Id.* at p. 105.

12 *Id.* at p. 127.

13 *Id.* at p. 140.

14 *Id.* at p. 156.

15 *Id.* at pp. 74 – 75.

16 139 FERC ¶ 61,234 (2012).

17 *Id.*, Summary.

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