WHITE & CASE

# Washington Energy Update

June/July 2013

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## Energy Highlights

- Senate Finance Committee Chairman Max Baucus (D-MT) and Ranking Member Orrin Hatch (R-UT) announced plans on June 27, 2013 to move forward with legislation to comprehensively reform the tax code. Their plan envisions a "clean slate" approach that starts by eliminating all tax expenditures and adding back only those provisions with merit. Tax expenditures describe the universe of credits, deductions, exclusions, preferential rates and other adjustments to the tax code enacted by Congress over the years. The production tax credit and at least 25 other tax provisions are aimed at the energy sector, according to the Joint Committee on Taxation. All could be curtailed or eliminated entirely under the Baucus/Hatch plan. "[W]e plan to operate from an assumption that all special provisions are out unless there is clear evidence that they: (1) help grow the economy, (2) make the tax code fairer, or (3) effectively promote other important policy objectives," Senators Baucus and Hatch said in a letter to colleagues. They also asked Senators to submit recommendations for preserving any tax expenditures to them by July 26, 2103. "We will give special attention to proposals that are bipartisan," they say.

- On June 27, 2013, President Obama sent to the Senate the nomination of Ron Binz to join the Federal Energy Regulatory Commission (FERC) as Chairman for a five-year term. Binz, a former Colorado Public Utilities Commission Chairman, has a record of supporting clean and renewable energy sources, which may spark opposition from some Republicans. A confirmation hearing in the Senate Energy and Natural Resources Committee is expected in September. Ranking Member Lisa Murkowski noted that it is rare for the newest FERC member to be elevated to Chairman. "I will carefully consider the nominee's qualifications and fitness to serve—not only as Commissioner, but also as Chair," she said. If confirmed by the Senate, Binz would replace outgoing FERC Chairman, Jon Wellinghoff, who recently told National Public Radio that renewable energy needs to stand on its own without federal subsidies. "[I] think we need to go to a market-based system and ultimately let solar compete with these other technologies and it will drive down costs," he said. Wellinghoff plans to stay until his replacement is confirmed.

- On July 18, 2013, FERC revised its regulations governing rate filings for intrastate and Hinshaw pipelines, adopting revised notice procedures intended to simplify the periodic rate review process.

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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## Bipartisan Bill Seeks Short and Long-Term Solutions for Nuclear Waste Storage

Patrick Holten

With hopes for restarting a plan to open a permanent nuclear waste storage site at Yucca Mountain all but dead, four senior Senators have introduced legislation that seeks new temporary and permanent solutions to storing the mounting radioactive spent fuel at nuclear power plants.

The legislation would create a new federal agency, the Nuclear Waste Administration (NWA), to manage the nation's nuclear waste, lifting this responsibility from the Energy Department. The NWA would be directed to site, build and operate a pilot storage facility to hold priority waste and one or more sites for non-priority waste. One or more permanent repositories would also be constructed. The bill mandates broad public input, and state and local consent to site a repository.

Entitled the Nuclear Waste Administration Act of 2013 and enrolled as S. 1240, the bill was introduced by Senators Ron Wyden (D-OR) and Lisa Murkowski (R-AK), the top Democrat and Republican on the Senate Energy Committee. It is also cosponsored by Senators Dianne Feinstein (D-CA) and Lamar Alexander (R-TN), who together lead the Senate Appropriations Subcommittee on Energy and Water.

Under current law, the federal government was supposed to start taking possession of spent fuel in 1998, paid for by the industry and its ratepayers. Since the early 1980s, nuclear utilities have paid an annual fee into the Nuclear Waste Fund at the rate of 1 mil (0.1 cent) per kilowatt-hour of electricity sold to consumers. The fees total approximately US$750 million annually, with an unspent US$28.2 billion balance in the Nuclear Waste Fund.

With no permanent storage facility on the horizon, nuclear plants currently hold the mounting piles of spent fuel onsite in dry casks or giant pools. Courts have found the federal government in default of its obligations, with billions of dollars awarded in damages to utilities. Like the spent fuel itself, these legal liabilities continue to mount and are predicted to top US$20 billion by 2020.

Almost everyone agrees the problem needs a permanent solution, but partisan and regional differences remain. The President pulled the plug on Yucca several years ago and appointed a commission to come up with an alternative plan. The legislation introduced in June is based in part on the commission's recommendations.

The Administration has not taken a position on the bill yet. However, the bill received cautious praise from the Nuclear Energy Institute (NEI), which has long supported the opening of a permanent storage site at Yucca Mountain—and still does. "This bipartisan legislation recognizes the urgency for Congress to reform federal used fuel policy," said Alex Flint, NEI's Senior Vice President for Governmental Affairs. "Whether the Congress decides to pursue consolidated storage or Yucca Mountain or, as the industry recommends, both, there needs to be attention focused to this issue. We welcome the introduction of bills, hearings and, eventually, consideration in the House and Senate of used fuel legislation."

The Senate Energy and Commerce Committee plans to hold a hearing on the legislation this summer. For more information on the Nuclear Waste Administration Act, see:

- Nuclear Waste Administration Act of 2013.pdf
- Nuclear Waste Administration Act of 2013 One Page Summary.pdf
- Nuclear Waste Administration Act of 2013 Section-by-Section Analysis.pdf

## President Announces Regulatory Approach to Reduce Carbon Emissions

Patrick Holten

On a sweltering day in late June, President Obama announced an ambitious, largely regulatory-driven initiative to reduce carbon-based emissions and combat climate change. The centerpiece of the President's plan is a first-ever effort to regulate and restrict the carbon emissions of existing power plants. The plan also lists other efforts to encourage renewable energy, reduce reliance on fossil fuels and improve energy efficiency.

### Power Plants

Under the plan, outlined in a Presidential Memorandum, President Obama directed the Environmental Protection Agency (EPA) to:

(i) *Issue proposed carbon pollution standards, regulations or guidelines, as appropriate, for modified, reconstructed, and existing power plants by no later than June 1, 2014*

(ii) *Issue final standards, regulations or guidelines, as appropriate, for modified, reconstructed and existing power plants by no later than June 1, 2015 and*

(iii) *Include in the guidelines addressing existing power plants a requirement that States submit to the EPA the implementation plans required under section 111(d) of the Clean Air Act and its implementing regulations by no later than June 30, 2016*

For new plants, the President noted that 15 months ago the EPA published a Notice of Proposed Rulemaking entitled "Standards of Performance for Greenhouse Gas Emissions for New Stationary Sources: Electric Utility Generating Units." As first proposed, the rule would generally require new fossil fuel-fired plants with greater than 25-megawatt electric output to meet an output-based standard of 1,000 pounds of $CO_2$ per megawatt hour. In light of comments received, the President directed the EPA to issue a new proposal by no later than September 20, 2013 but did not set a deadline for a final rule, saying only that it should be promulgated "in a timely fashion."

### Conserving Fuel and Promoting Renewables

Another key provision in the President's plan is a new effort to further increase fuel economy standards for heavy-duty vehicles. Noting that such vehicles are the second-largest source of greenhouse gas emissions in the transportation sector, the plan pledges to develop new fuel standards for this sector for 2019 and beyond.

To promote renewable energy, the plan seeks US$8 billion in loan guarantee authority available for certain advanced fossil energy and efficiency projects to support investments in new clean technologies. The President will also direct the Interior Department to permit renewables projects on public lands by 2020 to power more than six million homes. The plan also directs the Defense Department to install three gigawatts of renewable energy and sets a new goal to install 100 megawatts of renewables in federally assisted housing by 2020.

The plan again reiterates the long-sought goal of repealing several tax preferences used by large oil and gas companies that subsidize fossil fuel energy development and production.

Finally, the President made news in declaring that he would approve construction of the Keystone pipeline from Canada's tar sands to the Gulf of Mexico "only if this project does not significantly exacerbate the problem of carbon pollution." A final decision is not expected until late this year or in early 2014.

Taken together, the President's initiatives aim to reduce carbon pollution by at least three billion metric tons cumulatively by 2030, which would roughly halve the current carbon emission output of the energy sector in the United States. Much of the effort hinges on regulatory fiat to be executed by the EPA and other federal regulators. However, tax law changes, agency funding for loan increases and other energy programs sought by the President would need to clear Congress, which may prove difficult given the partisan divide in both chambers.

The President's Climate Action Plan is posted at: http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf.

The President's memorandum directing the EPA to issue carbon emission rules for new and existing power plants is posted at: http://www.whitehouse.gov/the-press-office/2013/06/25/presidential-memorandum-power-sector-carbon-pollution-standards.

## FERC Extends Refund Obligations to Non-Public Utilities With Revenue Requirements Included in FERC-Jurisdictional Rates

Jennifer Mersing

In *Transmission Agency of Northern California v. FERC* (495 F.3d 663 (D.C. Cir. 2007) (TANC)), the DC Circuit Court of Appeals found that FERC did not have the authority under the Federal Power Act (FPA) to impose a refund requirement on the rates of a non-public utility, such as municipally owned utilities and electric cooperatives. FERC has interpreted this decision as not allowing it to impose a refund obligation on the revenue requirements of non-public utilities that are included in FERC-jurisdictional rates. But, most non-public utilities that have applied to include their revenue requirement in an FERC-jurisdictional rate have voluntarily committed to pay refunds of all amounts found to be in excess of the just and reasonable rate. *See, e.g., City of Riverside, California*, 128 FERC ¶ 61,207, at n.35 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 135 FERC ¶ 61,131, at n.92 (2011). Through recent decisions, FERC has made this practice of voluntarily committing to provide refunds a condition of allowing the revenue requirements of non-public utilities to go into effect within 60 days of the filing of the revenue requirement.

Prior to FERC instituting its current policy, several non-public utilities, despite the general practice, submitted (either directly or via an RTO/ISO) revenue requirements to be included in a FERC-jurisdictional rate without agreeing to provide refunds if the proposed revenue requirement was found to be unjust and unreasonable. *Lively Grove Energy Partners, LLC* (140 FERC ¶ 61,252, at P 47, n.59 (2012) (*Lively Grove*)) involved (in addition to the rates submitted by Lively Grove Energy Partners, LLC) proposed rate schedules submitted by several non-public utilities (Prairie Power, Inc., American Municipal Power, Inc., Southern Illinois Power Cooperative, Illinois Municipal Electric Agency, Kentucky Municipal Power Agency, Missouri Joint Municipal Electric Utility Commission, Northern Illinois Municipal Power Agency and Indiana Municipal Power Agency) for Reactive Supply and Voltage Control in the Midwest Independent Transmission

System Operator, Inc. (MISO), without a refund commitment. In its decision on September 28, 2012, FERC instituted an investigation of the non-public utilities' proposed revenue requirements under FPA Section 206 and ruled that the effective date would be the date that FERC approves a revenue requirement following the hearing and settlement judge procedures that had been initiated. As hearing and settlement judge procedures can take years to complete, FERC's order would severely delay when the non-public utilities would be able to collect their revenue requirements. But, FERC did offer the non-public utilities in *Lively Grove* the option to agree to provide refunds (as other non-public utilities have done) and thereby establish a different refund-effective date. The non-public utilities in *Lively Grove* accepted FERC's offer and agreed to provide refunds of the amounts determined to be in excess of the just and reasonable rate. In response, FERC modified the effective date of the revenue requirements to be the day the non-public utilities submitted their compliance filing agreeing to the refund commitment.

Similar to the non-public utilities in *Lively Grove*, Tri-County Electric Cooperative, Inc. (Tri-County), via a filing made by the Southwest Power, Inc. (SPP), submitted its proposed revenue requirement to be included in the SPP Annual Transmission Revenue Requirement without agreeing to provide refunds of those rates found to be in excess of the just and reasonable rate. But, unlike in *Lively Grove*, FERC, on March 30, 2012, initially accepted the revenue requirement, subject to hearing and settlement judge procedures to determine its justness and reasonableness, and allowed the revenue requirement to go into effect without any refund commitment. Acting on requests for rehearing protesting this lack of refund protection (*Southwest Power Pool, Inc.*, 142 FERC ¶ 61,135, at PP 13-16 (2013) (*SPP*)), FERC, on February 21, 2013, admitted that it "erred" in allowing the proposed revenue requirement to go into effect without a commitment to refund the difference between the as-filed rate and the rate ultimately found to be just and reasonable by FERC. FERC found that, absent a refund commitment, it would not be just and reasonable to allow SPP to continue to pass through the Tri-County revenue requirement prior to a FERC order establishing a just and reasonable rate following the hearing and settlement judge procedures. Therefore, FERC ordered, pursuant to its authority under FPA section 206, SPP to submit a compliance filing either (a) removing the Tri-County revenue requirement from SPP's Tariff and ceasing collecting the revenue requirement until FERC issues an order following the hearing and settlement judge procedures or (b) providing a voluntary commitment by Tri-County to refund the difference between the proposed revenue requirement and the rate ultimately determined by FERC to be just and reasonable following the hearing and settlement judge procedures. Tri-County has since provided a voluntary refund commitment.

As can be seen from FERC's decisions in *Lively Grove* and *SPP*, FERC will now only allow a non-public utility revenue requirement contained in a FERC-jurisdictional rate to go into effect if the non-public utility commits to provide refunds. Absent such a commitment, the non-public utility will be forced to wait until FERC issues an order approving the proposed revenue requirement as just and reasonable (which could take years). As an increasing number of non-public utilities join RTOs and ISOs and participate in the FERC-regulated markets, it is important to protect ratepayers from paying unjust and unreasonable rates. By providing non-public utilities with the choice of agreeing to refund commitments or delaying the effective date of their proposed revenue requirements until FERC approves them as just and reasonable, the effect of FERC's decisions in *Lively Grove* and *SPP* is to provide, to the maximum extent possible, the same protections to ratepayers that are available in the case of public utility rate filing, which FERC can make subject to refund. Thus, FERC is working to ensure that ratepayers are not harmed by the increasing involvement of non-public utilities in RTOs and ISOs and FERC-regulated markets.

## International Perspective: Take-or-Pay Conditions in Gas Supply Agreements

Michael Polkinghorne

Take-or-pay provisions are now fairly common in long-term offtake and supply agreements in the energy sector, a notable example being gas supply agreements. In essence, take-or-pay provisions provide that a buyer must pay for specified quantities of energy (gas, for example) from a seller, even if the buyer is unwilling or unable to take such quantities. At the most basic level, take-or-pay clauses require the buyer either to purchase and take delivery of certain quantities of gas, or to pay for the gas regardless of whether or not it takes delivery.

Although take-or-pay clauses are widely used, the rules applicable to such clauses, under most national laws, are not fully settled. The concern frequently expressed is whether these provisions constitute a form of penalty that a court or arbitral tribunal should not enforce. This article is intended to shed light on some of the uncertainties surrounding the legal treatment of take-or-pay clauses, by presenting an overview of the practice of take-or-pay conditions in gas supply contracts (II.) and reviewing how these clauses are interpreted and enforced in common law and civil law systems, as well as under European Union (EU) and certain Arabic laws (III.).

Click here to read the entire article, part of the White & Case Paris Energy Series.