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MEGAN P. CALDWELL

DENVER:

303.749.7204

MEGAN.CALDWELL@

HUSCHBLACKWELL.COM

Uncertainty in the Supreme Court Could Impact the Clean Power Plan

On February 9, 2016, the U.S. Supreme Court issued a stay of the Clean Power Plan rule requiring states to significantly limit carbon dioxide emissions from existing fossil fuel-fired power plants. The unexpected death of Justice Antonin Scalia four days later creates an uncertain future for the Court and may dramatically affect the future of the program.

Background of the Supreme Court's Stay

To date, 27 states and numerous industry groups (the Petitioners) have challenged the rule. (Read more about the requirements of the rule in our previous client alert.) Their lawsuits have been consolidated into a single action before the U.S. Court of Appeals for the D.C. Circuit. On October 23, 2015, the Petitioners filed motions for stay of the rule. To succeed on a motion for stay, a petitioner must establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” See *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The Petitioners argued that challenges to the rule would succeed on the merits because the Environmental Protection Agency (EPA) lacks the authority to force states to restructure the electric grid, and because the Clean Air Act prohibits EPA from regulating an air pollutant emitted from a source category that is already regulated under Section 112. The Petitioners also argued that they would face irreparable harm because the rule requires states to act immediately and incur significant costs to consider and decide on legislative and regulatory changes to programs governing intrastate electricity markets prior to the rule’s September 2016 deadline. Finally, they argued that the “ripple effects” caused by the rule counseled in favor of maintaining the status quo.

On January 21, 2016, the D.C. Circuit denied the motions for stay, holding simply that “Petitioners have not satisfied the stringent requirements for a stay pending court review.” The Petitioners then filed applications for stay with the U.S. Supreme Court. On February 9, 2015, the Supreme Court voted 5-4 to stay the rule pending disposition of the petitions for review in the D.C. Circuit, as well as pending disposition of the petitions for a writ of certiorari if such a writ is sought and granted by the Court.

States Get a Reprieve

As a result of the stay, states will not have to meet the rule’s September 2016 deadline to either submit plans to implement the rule’s emission reduction goals or to request a two-year extension. The deadlines for states to achieve the required emission reductions — currently set at 2030, with interim goals to be met for the period beginning 2022 — could be pushed back as well. However, given the lengthy timeline for achieving reductions, which opponents of the stay argued should weigh against the finding of irreparable harm necessary to a stay, the rule’s deadlines may not see a day-for-day extension. Some states may therefore continue to develop plans, while others will wait to see how courts resolve the legal challenges.

The course the case will take through the courts and the pace at which the courts will issue their decisions are uncertain. The D.C. Circuit is hearing challenges to the rule on an expedited basis before a three-judge panel, with oral arguments scheduled for June 2, 2016. Once the D.C. Circuit panel has ruled, the case may be reheard by the full D.C. Circuit Court of Appeals before the decision is appealed to the U.S. Supreme Court. A final ruling in the D.C. Circuit may not come for months. If the D.C. Circuit rules quickly enough and the decision is appealed as anticipated, the U.S. Supreme Court could consider the case in the nine-month term that begins this October. Nonetheless, a final decision on the merits is not anticipated until 2017 at the earliest.

The death of Justice Antonin Scalia, who was among the five justices voting to stay the rule, brings additional uncertainty to the future of the Clean Power Plan. If an appointee joins the bench by the time the Supreme Court hears the Clean Power Plan in 2017, the future of the country’s electric industry could hinge on the vote of the to-be-named justice. However, if Justice Scalia’s seat remains vacant and the issue is taken up by the remaining eight justices, a challenge to the rule may result in a 4-4 tie, in which case the decision of the lower court would stand.

What This Means to You

The Supreme Court’s stay and the appointment of a new justice following the unexpected death of Justice Scalia during the presidential election season should be carefully followed as the Clean Power Plan works through the appeals process. Our Energy & Natural Resources team can help you

understand and assess the potential impacts of this complicated case on the industry and your business.

Contact Us

For additional information on the Clean Power Plan, contact Ali Nelson at 303.749.7263 or Megan Caldwell at 314.480.1648, both members of Husch Blackwell's Climate Change & Sustainability team.