

**2009 Groundbreaking Law  
And Lawyers Report**

# Policy Shift

Legal and  
regulatory changes  
are transforming  
the industry.

**By MICHAEL T. BURR**





he past year marked some of the most sweeping and portentous policy developments ever to hit this industry. From transmission pricing to environmental enforcement, the regulatory framework is going through a dizzying array of changes.

To more clearly understand these changes, *Fortnightly* interviewed a group of law professionals—all of them included in our hotlist of “Groundbreaking Lawyers”—who are counseling industry decision makers on a range of critical issues. Their insights suggest the industry’s policy transition has only just begun.

### Shifting Winds

Last November’s elections foreshadowed significant regulatory and policy changes in 2009, and the new administration and Congress wasted little time reversing the previous administration’s legacy on a range of issues. For the utility industry, the most obvious and dramatic changes involved environmental policies. During his first week in office, for example, President Barack Obama instructed the EPA to review the Bush-era decision to block California’s GHG regulations. For electricity and gas companies, the primary result has been a major upheaval in compliance programs and resource planning strategies.

“The industry is facing an unprecedented number of regulatory proceedings, as well as legislation and litigation,” says Bill Brownell, a partner in the environmental practice area at Hunton & Williams. “It all creates an enormous amount of uncertainty affecting compliance as well as investments in environmental upgrades and capacity additions.”

Brownell offers a laundry list of environmental policies that are changing under the Obama administration—from *Clean Air Act* (CAA) *New Source Review* (NSR) proceedings and the *Clean Air Interstate Rule* (CAIR), to cooling water discharge rules under the *Clean Water Act*, and ash management issues under the *Resource Conservation and Recovery Act*. Further, the EPA has taken a much more active approach to enforcement; in the words of Administrator Lisa Jackson, “The EPA is back on the job” after eight years of less aggressive enforcement by the agency.

On top of all that, companies are bracing for GHG regulation in the form of either legislation moving through Congress or forthcoming EPA rules under its CAA authority (see “*Bench Report: Top 10 Groundbreaking Legal Decisions in 2009*,” specifically “*EPA Endangerment Finding*”).

“The *Clean Air Act* isn’t an effective statute for regulating climate change,” Brownell says. “Nevertheless the EPA is moving forward, purportedly to put pressure on Congress to address the issue with legislation.” Such pressure also is mounting in

the courts, with civil litigation advancing on the grounds that GHGs and other air pollutants pose a public nuisance under tort law (see “*Bench Report—AEP v. Connecticut*” and “*North Carolina v. TVA*”). Legal developments in recent months seem to have erased remaining doubt about the inevitability of GHG constraints in U.S. jurisdictions. Substantial uncertainty remains, however, about how such constraints will shape the industry’s future.

“The biggest challenge of our time is global warming,” says William Lamb, a partner with Dewey Leboeuf and co-head of the firm’s utilities, power and pipelines practice group. “There’s now a social, political and industry consensus that we’re going



### Gov. George Pataki, Counsel

*Chadbourne & Parke*  
New York, N.Y.

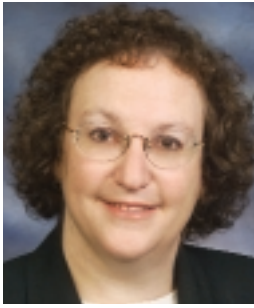
- JD, Columbia Law (1970)
- Practice: Focuses on energy, environmental and corporate matters, notably climate policy.
- Distinctions: Three-term governor of New York (1995 through 2006); former assemblyman, senator and mayor; Initiated Regional Greenhouse Gas Initiative (RGGI) in 2003.

to do something about it, on a national and international scale. Virtually all of the other things happening in this industry flow from that issue.”

For instance, as part of the overall trend toward green energy, more than half of the states have implemented renewable portfolio standards (RPS), and legislators in Congress have promised to enact a federal standard soon, either as part of climate policy or as stand-alone legislation. Of course, environmental issues aren’t the only factor driving RPS and other green-energy policy legislation; most notably, policy makers are seeking to reduce U.S. dependence on imported fuels and the attendant consequences, in terms of national security and the trade deficit. Taken together, environmental and energy security issues have created powerful momentum toward policy transformation.

“I’m convinced that now we have the combination of political will and economic realities to drive toward [GHG] regulation,” says George Pataki, former governor of New York and now counsel with Chadbourne & Parke. “It’s not just about energy and the climate but also economic growth and strategic defense. We’re relying on people like Hugo Chavez to supply

Michael T. Burr is *Fortnightly*’s editor-in-chief. Email him at [burr@pur.com](mailto:burr@pur.com).



**Cynthia Bogorad, Partner**

*Spiegel & McDiarmid*  
Washington, D.C.

- JD, Harvard Law (1977)
- Practice: Bogorad represents cooperatives and municipals in legal and regulatory matters, most notably transmission planning and cost allocation.
- Distinctions: Represents Transmission Access Policy Study (TAPS) group in FERC proceedings and legislation involving transmission pricing and reliability compliance.

our energy, and it represents the largest transfer of wealth in the history of the world. The United States has a tremendous opportunity, and people are aware of that.”

Although legislation still faces major opposition, the current political calculus in Washington, D.C., seems to favor a combined federal RPS and carbon cap-and-trade policy. Proponents of this approach argue that it offers an effective carrot-and-stick combination to accelerate the industry’s green transition.

“Renewables look a lot more competitive, and indeed might be completely competitive when externality costs are factored in,” says Larry Eisenstat, partner and energy practice leader at Dickstein Shapiro. How quickly and readily this happens, however, might depend on how emissions credits are allocated in a carbon-trading regime. “Whether you’re really going to incentivize renewables depends on how allowances are determined. If you get the right price for carbon and you have true economic dispatch, dirtier units will be displaced. But if allowance values remain as low as they seem likely to be in the beginning, it will take a long while before [carbon regulation] has much effect on renewable development.”

Further, the allowance distribution mechanism will affect the way the carbon market evolves and develops. The Waxman-Markey *American Clean Energy & Security Act*, for example, which the House of Representatives approved in June 2009, would award allowances to retail electricity distributors, rather than to power generators. Eisenstat says this approach would skew the market in ways that are anti-competitive and ineffective. “You can’t just give all the allowances to jurisdictional utilities, because it will give them a huge advantage in the market. It makes sense to have a transitional period where they get a

large share, which would give them an appropriate chance to retire some units,” he says. “But in order for a cap-and-trade system to have a meaningful effect on the environment, we need truly competitive procurement of allowances.”

Political realities likely will determine whether the legislation evolves in that way. At this writing, lawmakers still were wrangling over basic structural issues, including whether,

and how many, credits will be allocated for free versus auctioned off, and what the government will do with the revenues generated in an allowance auction. Draft legislation sponsored by Sens. Barbara Boxer (D-Cal.) and John Kerry (D-Mass.) would auction 25 percent of emissions credits each year from 2012 through 2050, raising revenues intended to reduce the federal budget deficit. By comparison, the Waxman-Markey bill would auction 15 percent of allowances starting in 2011, with proceeds directed toward programs for low- and moderate-income taxpayers.

“My fear is that we’ll see allocations not necessarily based on rational economics or concern for the environment, but on the ability of those in Washington to influence Congress,” Pataki says. “This is why I think it’s critical for any process to be revenue neutral, and not used to create revenue for the federal budget.”

While the political wrangling continues, the industry finds itself in the uncomfortable position of needing to invest in new infrastructure but not knowing yet how GHG regulation and RPS requirements will change the economics of various alternatives. The only thing that seems certain is that the transition will bring rising prices.

“Reliability costs money,” says John McGrane, a partner in



**Bill Brownell, Partner**

*Hunton & Williams*  
Washington, D.C.

- J.D., Georgetown (1978)
- Practice: Brownell defends companies in environmental lawsuits, including Clean Air Act enforcement and climate change public nuisance lawsuits.
- Distinctions: Chairman, Co-Author, Clean Air Handbook, Environmental Law Handbook; National Park Trust Board; Executive committee member, National Coal Council.

**FORTNIGHTLY’S GROUNDBREAKING LAWYERS OF 2009**

**Rich Alonso**

*Bracewell & Giuliani*  
Clean air compliance

**Gov. George Pataki**

*Chadbourne & Parke*  
Climate-change strategy

**Bill Brownell**

*Hunton & Williams*  
Environmental litigation

**Carmen Gentile**

*Bruder Gentile & Marcoux*  
Antitrust, M&A

**Keith Martin**

*Chadbourne & Parke*  
Project finance, tax strategy

**William Lamb**

*Dewey & LeBeouf*  
Utility M&A and finance

the energy practice at Morgan Lewis. “If you’re shutting down coal plants, building windmills and installing new transmission lines, it’s going to be expensive.”

Paying for those costs would be difficult in any economic environment. In the current ailing economy, energy consumers demand that companies and regulators allocate costs in ways that result in both fairness and efficiency. Thus, the industry is tackling the momentous challenge of climate change in the same way it addresses every challenge—namely, by designing the most effective regulatory framework that can be created in a pluralistic society.

### Green Highway

With the possible exception of GHG regulation, no aspect of the industry’s transition has generated more vigorous argument than transmission cost allocation. In some sense, transmission policy represents a crucible containing all the factors in the green-energy revolution.

“The overriding issue now, especially in the organized markets, is whether there’s enough money in the system to do what the policy makers want done,” says Bob Fallon, a shareholder with Leonard Street & Deinard. “They want clean-burning generation for energy security, but the system is built with technology from the 1960s and ’70s. I don’t think the capacity and energy markets will generate the amounts of revenue that people need to build all the new assets that are needed.”

Resource planners at all levels are constrained by the limitations of today’s transmission systems—and by the cost of building new ones. The effort to update and expand the transmission system to achieve energy policy goals has brought fierce conflict—most notably at the boundary between federal and state regulatory authority. During the past year, that process has yielded some new policies for fairly and effectively distributing incentives and costs for transmission investments. But at the same time, the process has raised almost as many questions as it’s answered (see “Bench Report—Chinook/Zephyr; NRG Power Marketing v. Maine PUC; ComEd v. FERC,” etc.). As a result, conflicts seem certain to continue, especially involving projects designed to move power from remote renewable resource sites to urban load centers.

In what’s viewed as an effort to clarify various perspectives

and speed up the policy process, in early October 2009, FERC solicited comments from stakeholders about pricing and cost-allocation issues (*Docket No. AD09-8-000*). The commission is expected to incorporate those comments into its transmission-planning reform process.

“I think FERC has finally recognized that the transmission-planning process never did work correctly, and unless you have some broader-based cost-allocation mechanism, you’re not



### Larry Eisenstat, Partner

*Dickstein Shapiro*

Washington, D.C.

- JD, University of Chicago Law (1985)
- Practice: Represents energy companies in regulation, litigation and transactional matters, notably transmission access and renewable project development.
- Distinctions: Represented respondents in Connecticut’s appeal before the D.C. Circuit of district court decision in *Connecticut DPUC v. FERC*.

going to get transmission built,” Eisenstat says.

However, recognizing this need is much easier than resolving it, given the broad divergence of interests among various stakeholders—and the lack of clear policy direction from the legislative branch.

“The FERC has some political reluctance to take the lead on this,” McGrane says. “I think they’d like some cover from Congress to give them the authority to do multi-regional or even interconnect-wide cost allocation.”

But whether Congressional action would help or hurt is

### ABOUT THE GROUNDBREAKING LAWYERS

To identify lawyers at the forefront of the industry’s groundbreaking legal developments, *Fortnightly* conducted an online survey of in-house counsel at utilities, public utility commissions and trade associations. We asked them to nominate law-firm attorneys who deserve recognition for their work in several practice areas. With the confidential survey results as a starting point, *Fortnightly*’s editors developed the first-ever hotlist of “Groundbreaking Lawyers.”

In-house counsel are invited to email nominations for next year’s hotlist to [burr@pur.com](mailto:burr@pur.com).

## FORTNIGHTLY’S GROUNDBREAKING LAWYERS OF 2009

**Larry F. Eisenstat**

*Dickstein Shapiro*

Project development,  
finance

**Thomas Campbell**

*Lewis & Roca*

Project siting,  
contracting

**Floyd L. (“Mac”) Norton**

*Morgan Lewis*

Antitrust, energy  
trading

**Bill Scherman**

*Skadden Arps*

Energy trading,  
risk management

**Michael Zimmer**

*Thompson Hine*

Renewable and  
cogen development

**Kevin Fitzgerald**

*Troutman Sanders*

M&A, finance and  
reorganization



**Bob Fallon, Shareholder**

*Leonard, Street & Deinar*

Washington, D.C.

- JD, University of Louisville Law (1986)
- Practice: Represents energy companies in federal and state matters, notably FERC transmission, reliability, security and anti-manipulation cases.
- Distinctions: Staff attorney at FERC for 12 years, including senior counsel to the chairman.

questionable, given the complex and contentious nature of transmission issues. For example, energy legislation approved by the Senate Energy & Natural Resources Committee this summer included an amendment by Sen. Bob Corker (R-Tenn.), which would hold FERC to a high standard for quantifying the economic and reliability benefits of transmission investments before the commission could allocate costs to ratepayers in multiple states. “It’s tough to measure these benefits, given the interconnected, interrelated and long-lived nature of the assets,” says Cynthia S. Bogorad, a partner with Spiegel & McDiarmid. “If it becomes law, the Corker amendment could put a crimp on the regional cost allocations necessary to get the transmission built that consumers need.”

And that, of course, is the source of all conflict; not everyone agrees exactly what transmission investments are really necessary, and nobody wants to pay for investments viewed as unnecessary or even detrimental to local interests. While it’s true that some 60 percent of the states have enacted RPS requirements and Congress is moving toward a federal standard, state lawmakers are reluctant to burden their ratepayers with capital expenses that primarily might benefit out-of-state generators.

“If we make commitments to transmission, it will dictate how we develop energy resources,” says Randy Speck, a partner with Kaye Scholer. “If we build a transmission line to North Dakota, you can be sure we’ll site lots of wind turbines in North Dakota, but that might not ultimately be the best solution to the problem. There may be other, more localized alternatives that won’t require such a huge investment in transmission.”

Of course, the broader the costs are

spread—*i.e.*, across multiple states—the more affordable they become for individual consumers. Nevertheless, PUCs and public-power interests in many states are mounting a fierce resistance to what they view as overreaching by federal regulators and RTOs.

“FERC has generated a lot of controversy, for better or worse, by involving themselves in issues that heretofore have been the province of the states,” Fallon says. “But it

shouldn’t be news to anybody that FERC has to work through transmission issues. As an energy policy matter, if the country wants to move a lot of wind generation out of the Midwest, and solar generation from Arizona to California, then we’ll have to drastically rethink [transmission-cost allocation] issues.”

Case by case, docket by docket, that rethinking process is happening across the country. And while many stakeholders agree that FERC eventually will need to assert its authority to establish clearer rules for transmission planning and cost allocation, they remain skeptical that FERC will do the right thing with its authority. Memories of the commission’s abortive standard-market design initiative under Chairman Pat Wood remain fresh in the industry’s collective mind.

“Pushing down a federal policy on states isn’t going to work,” says Cliff Sikora, a partner and co-lead of the energy practice group at Troutman Sanders. “Ultimately there has to be a partnership, where a state can make its decisions as to how it wants to source its energy, and those decisions go hand-in-glove with federal policy. How that partnership gets worked out has yet to be seen, but it has to be reconcilable.”

The trick will be working it out in a way that accommodates regional differences and also achieves overriding national policy goals—all while delivering the greatest value for *(Cont. on p. 31)*



**William Lamb, Partner**

*Dewey & LeBoeuf*

New York, N.Y.

- JD, New York University Law (1983)
- Practice: Represents energy companies in M&A and financial transactions.
- Distinctions: Represented Puget Energy, Energy East, PSEG and MidAmerican Energy in recent M&A deals; Counsel to American Transmission Co. board of directors.

**FORTNIGHTLY’S GROUNDBREAKING LAWYERS OF 2009**

**Donald Dankner**

*Winston & Strawn*

FERC cases, bankruptcy

**Jacob Dweck**

*Sutherland*

LNG projects

**Robert A. Weishaar Jr.**

*McNees Wallace & Nurick*

Industrial consumers, DR

**Robert Weinberg**

*Duncan Weinburg Genzer & Pembroke*

Co-ops and RTO markets

**Elisa Grammer**

*GKRSE*

California munis and Cal ISO

**Denise Goulet**

*Miller Balis & O’Neil*

Public power in RTO markets

# TOP 10 GROUNDBREAKING LEGAL DECISIONS IN 2009

By Bruce W. Radford and Michael T. Burr

## ■ *NRG Power Marketing v. Maine PUC*: High Court Reconsiders 'Just and Reasonable' Standard

When the U.S. Supreme Court granted *certiorari* to hear NRG's appeal, it raised uncertainty about the industry's longstanding "just and reasonable" standard for assessing wholesale power rates, based on the *Mobile-Sierra* doctrine (referring to a pair of Supreme Court decisions from 1956). The *Mobile-Sierra* doctrine holds that FERC must presume that rates established in freely negotiated wholesale energy contracts are just and reasonable. Just last year, the Supreme Court clarified *Mobile-Sierra*, deciding in *Morgan Stanley v. PUD No. 1* that the only way to overcome the *Mobile-Sierra* presumption is if FERC concludes a contract "seriously harms the public interest." In the NRG case now before the Court, petitioners argue that a D.C. Circuit decision conflicts with *Morgan Stanley*. In a case involving a FERC settlement establishing ISO New England's capacity market, the D.C. Circuit ruled that the *Mobile-Sierra* doctrine doesn't apply to transactions between parties who weren't part of the FERC settlement. NRG alleges that any participant in the ISO New England market is, in effect, entering a contract that's subject to the FERC settlement agreement and any such transactions should be covered by *Mobile-Sierra*. If the High Court agrees with NRG and vacates the D.C. Circuit's decision, it might mean that *Morgan Stanley's* public-interest standard applies not only to parties to the FERC settlement, but to anyone who participates in a competitive wholesale market. But if the Court affirms the decision, it would clarify that FERC's settlement agreement doesn't make a *de facto* just-and-reasonable rate out of any trade conducted in an organized market. *NRG Power Marketing, LLC v. Maine PUC* (No. 08-674), *USSC granted cert.*, April 27, 2009.

## ■ EPA Endangerment Finding: Implementing *Massachusetts v. EPA*

When the U.S. Supreme Court ruled in April 2007 that EPA has authority to regulate greenhouse gases (GHG) under the *Clean Air Act* (CAA), it marked a major turning point in the climate policy debate. Then, when voters elected President Obama in November 2009, the new administration was expected quickly to reverse the previous EPA's position on GHG emissions. In April 2009, EPA Administrator Lisa Jackson did exactly that, signing a proposed finding that increasing concentra-

tions of atmospheric GHGs "endanger the public health and welfare of current and future generations," with observable effects that trigger regulation under CAA. Further, the administrator proposed defining new motor vehicle GHG emissions as pollutants endangering public health and welfare. The finding set the stage for federal regulation of GHGs from both stationary and mobile sources, and indeed this fall the White House formally asked Jackson to draft such regulations. *EPA Docket ID No. EPA-HQ-OAR-2009-0171*.

## ■ *ComEd v. FERC*: Paying the Postage for Grid Expansion

In August, a federal appeals court in Chicago struck a blow against those advocating a national program to remake the nation's electric grid—akin to Eisenhower's 1950s Interstate Highway Project—by insisting that local ratepayers in one state can't be forced to pay for new lines built in a far-off region.

By a 2-1 vote, the court endorsed the traditional utility "cost-causer" practice of "beneficiary pays" and struck down a FERC order that had OK'd PJM's policy of "postage-stamp" funding that had required all RTO members to share costs equally for new transmission lines 500-kV or greater. Writing for the majority, Judge Posner said that Commonwealth Edison, an Illinois utility, should not have to help pay for "Project Mountaineer," a set of new 500- and 765-kV lines designed to facilitate power imports into the eastern Mid-Atlantic—at least not without a better explanation from FERC. *Illinois Comm. Comm'n. v. FERC*, Aug. 6, 2009, 576 F.3d 470 (7th Cir.).

## ■ *Connecticut v. AEP*: Weighing the Certainty of Climate Change

In September, a federal appeals court in New York City (2nd Circuit) gave the go-ahead to a common law lawsuit filed by eight states, the City of New York, and several private land trusts, against a group of large U.S. utilities operating fossil-fired power plants (including the five largest U.S. CO<sub>2</sub> emitters, according to claims), by which the plaintiffs had sought to force the utilities to cap and then reduce their carbon CO<sub>2</sub> emissions, on the theory that such greenhouse-gas emissions (GHG) represent a public nuisance that has, and will cause, harm to human health and natural resources.

## FORTNIGHTLY'S GROUNDBREAKING LAWYERS OF 2009

### Cynthia Bogorad

*Spiegel & McDiarmid*  
Municipals and public  
power utilities

### Harvey Reiter

*Stinson Morrison & Hecker*  
Gas and electric  
competition

### G. Philip Nowak

*Akin Gump*  
Litigation & M&A

### Michael Ward

*Alston & Bird*  
Cal ISO and  
federal litigation

### Howard Shafferman

*Ballard Spahr Andrews & Ingersoll*  
ISO New England  
and transmission

### Stephen Teichler

*Duane Morris*  
RTOs and  
federal cases

Citing evidence of California water shortages from reduced winter snowpack, plus flooding from earlier and heavier springtime melts, the appeals court found a sufficient allegation of certainty of “injury in fact” to support standing to sue, adding in its 139-page opinion, “there is no probability involved.”

The ruling reversed a 2005 district court order that had dismissed the lawsuit as essentially a political matter better decided by Congress or the president. The appeals court found no example of legislation or federal regulation on GHGs that had usurped the field. Of course, with proposals moving forward in both Congress and EPA, such regulation might arrive soon. *Connecticut et al. v. American Elec. Pwr. Co., Inc., et al., Nos. 05-5104-cv, 05-5119-cv, Sept. 21, 2009 (2d Cir.)*.

#### ■ **North Carolina v. TVA: Lawful Emissions Deemed Public Nuisance**

As a stand-alone decision, Judge Lacy Thornburg’s ruling opened the door to a possible flood of civil lawsuits challenging power plant operators on environmental grounds. It lays the groundwork for states, cities and other governments to use public-nuisance litigation to force emitters in neighboring jurisdictions to install emissions controls beyond what’s required by statute. But also it could serve to strengthen such cases as *Connecticut v. AEP*, which demand reductions in GHG emissions to remedy the alleged public nuisance of climate change. In this case, North Carolina alleged TVA coal-fired plants in Tennessee and Alabama emit air toxins that create a public nuisance for North Carolinians. Federal Judge Thornburg, sitting in North Carolina’s western district, agreed and ordered TVA to install and operate scrubbers at four power plants, even though the plants were in compliance with EPA regulations under the Clean Air Act. *North Carolina v. Tennessee Valley Authority (Civ. 1:06CV20, 2009 WL 77998 (W.D. N.C., Jan. 13, 2009)*.

#### ■ **Piedmont Environmental Council v. FERC: Not Quite a Leak-proof Backstop**

In February, a federal appeals court ruled that FERC’s right under the 2005 EAct law to step in as a “backstop” and grant a federal permit for a new transmission line when the applicable state permitting agency has failed for 12 months to act on a permit application does not apply if the state agency has taken action within 12 months to expressly deny the permit application.

FERC had argued that a “denial” should be equated with a failure to act because otherwise, Congress would never have included another clause in the EAct law that had granted backstop authority to FERC

when the state agency nominally OKs a permit but also imposes impossible conditions that effectively kill the project anyway. *Piedmont Environmental Council v. FERC, Feb. 18, 2009, 558 F.3d 304 (4th Cir.)*.

#### ■ **NStar/Northeast: FERC Bends Rules to Boost Renewables**

In May, the FERC showed itself willing to violate its own open-access policy—if only to ensure that enough transmission gets built to boost imports of renewable energy from Canada into the United States.

The case involved NStar and Northeast Utilities, which had joined with Hydro-Quebec to propose a new 1,200-MW, high-voltage DC line from Quebec to New England. With a clever multi-contract deal structure that traded grid rights for construction funding, NStar and NU won rate-base treatment for their U.S. line segment, but HQ also won the right to export renewable hydropower at market rates, without having to bid the exports into New England’s regional wholesale market, in competition against private power producers. *NE Utils. Serv. Co., NStar Elec. Co., Docket No. EL09-20, May 22, 2009, 127 FERC ¶161,179*.

#### ■ **Chinook/Zephyr: An ‘Anchor’ for Merchant Transmission**

In February, the FERC relaxed its rules for financing “merchant” electric transmission lines when it allowed power line developers to set aside a 50-percent share of future line capacity for the exclusive use of an unnamed wind farm project developer who would serve as an “anchor tenant” and help with upfront funding of line construction—thus allocating only half the line’s capacity through an “open-season” solicitation process.

FERC agreed that market realities warranted a new approach to reduce risk and boost the credit-standing of merchant lines, and to break the stalemate when downstream utilities and upstream wind farm developers each hesitate to commit funds without assurances from the other.

The case involved Chinook and Zephyr Transmission LLC, two second-tier subsidiaries of the Canadian pipeline giant TransCanada, and twin proposed high-voltage (500 kV), 3,000-MW DC power lines, running from Montana and Wyoming to just south of Las Vegas. *See, Chinook Pwr. Trans. LLC, Zephyr Pwr. Trans. LLC, Docket Nos. ER09-432, ER09-433, Feb. 19, 2009, 126 FERC ¶161,134*.

#### ■ **John Deere v. SW Public Service: Texas Throws a Curve at Small Wind Developers**

The Texas PUC held in May that because wind energy is intermittent, and thus non-firm, state rules implementing the 1978 federal PURPA law do not allow wind-powered QFs (qualifying facilities) to bind retail elec-

## FORTNIGHTLY’S GROUNDBREAKING LAWYERS OF 2009

### Ted J. Murphy

Hunton & Williams

RTOs, transmission and reliability

### Randall Speck

Kaye Scholer

PUCs, transmission and reliability

### Bob Fallon

Leonard Street & Deinard

Trading, transmission and reliability

### John McGrane

Morgan Lewis

Transmission and NERC compliance

### Donald J. Sipe

Preti Fleherty Beliveau & Pachios

Demand response, market design

### David Raskin

Steptoe & Johnson

Transmission projects and contract

tric utilities to a legally enforceable purchased-power obligation, as would ordinarily occur 90 days after the QF tenders a sales offer to the utility.

Involving Southwestern Public Service (SPS) and wind farms owned by John Deere Renewables, the ruling means that wind-driven QFs in Texas cannot secure in advance a sales rate based on avoided costs calculated as of the day the obligation matures—a step that Deere argues is needed to gain project financing—but instead must settle only for a sales rate calculated on delivery of energy. PURPA's purchase-and-sale obligation still applies in SPS territory, per a 2008 FERC ruling that QFs there lack non-discriminatory access to transmission.

Calling the PUC order “potentially devastating” for other wind- and solar-powered QFs, Deere filed a complaint at FERC on September 24, seeking to enjoin the Texas rule. *Complaint of JD Wind v. SW Pub. Serv. Co., Tex., PUC Docket No. 34442, May 1, 2009.*

### ■ **Connecticut DPUC v. FERC: Resource Adequacy**

In June, a federal appeals court in Washington, D.C., denied claims by Connecticut state utility regulators that FERC action approving the installed capacity requirement under ISO New England's Forward Capacity Market was an illegal federal intrusion on state regulation of generation and resource adequacy.

The court likened FERC's order as more a rate-setting action, in the nature of a peak-demand forecast, since the ICAP target affects the market-clearing capacity price, as set via the FCM's bidding auction.

It also cited 30-year-old legal precedent from the 1970s that FERC had jurisdiction over deficiency charges imposed by NEPOOL on member utilities that fell short of required capacity. As the court put it, “this particular camel has long since entered—indeed, ransacked—the tent.” *Conn. DPUC v. FERC, June 23, 2009, 569 F.3d 477 (D.C.Cir.).*

*(Cont. from p. 28)*

the least cost to ratepayers. Such a utopian ideal might be unachievable, but the industry's advocates insist that FERC has no choice but to keep working toward it, if only because the alternatives are worse.

“You can't get away from having a market design,” says Donald J. Sipe, a partner with Preti Flaherty. “The failure to have a certain type of market design is itself a market design. It's less helpful and efficient than making a conscious choice, and it might lead to a clumsy result.

“I don't think FERC will ever be able to get off the market-design horse,” he says.

### **Market Mashup**

The major energy policy debates proceeding in America today might be distilled to a pair of questions: 1) What is the purpose of competition in U.S. electric and gas markets? and 2) What regulatory mechanisms will best ensure competitive markets achieve their purpose? These aren't new questions, and how the industry's leaders and lawmakers answer them largely determines the direction of energy policy at federal, regional and state levels.

“One school of thought suggests regulation should just set



### **Donald J. Sipe, Partner**

*Preti Flaherty*

Augusta, Maine

- JD, University of Maine Law (1989)
- Practice: Counsels energy and utility companies on market transition matters, including transmission and demand response policies.
- Distinctions: Former staff attorney for Maine PUC, focusing on gas policy, industry restructuring and antitrust; vice chair of New England Power Pool (NEPOOL).

up a system of markets based on the commodity model and let the prices fall where they may,” Sipe says. “The other says the purpose is to produce rates that are just and reasonable.”

Over time, these viewpoints fundamentally shape U.S. energy markets, and produce the signals policy makers attempt to send through regulations. As various market forces play out, and as social trends evolve and shift direction, policy makers respond with changes in regulations and market structures—for better or worse. Such changes are happening today in both wholesale and retail energy markets, with outcomes that are difficult to predict.

“In general, deregulation hasn't produced the competition and price reductions that were anticipated, so a number of states have begun a process of retrenching,” Speck observes. “This has been stimulated by reliability concerns in both PJM and the Northeast ISO, when [load-serving entities] had to go out-

## **FORTNIGHTLY'S GROUNDBREAKING LAWYERS OF 2009**

### **David D'Alessandro**

*Stinson Morrison & Hecker*

PUCs and RTO cases

### **Cliff Sikora**

*Troutman Sanders*

Transmission project development

### **Doug Smith**

*Van Ness Feldman*

Gas and electric FERC cases

### **Stuart Caplan**

*White & Case*

Gas and electric market

### **Amanda Riggs Connor**

*Wright & Talisman*

Market design and retail restructuring

side the market for capacity. They concluded the energy markets alone weren't sufficient to give generators enough incentive."

With wholesale markets being pushed and pulled in multiple directions, and with retail deregulation going through trial by fire in such states as Michigan and Texas, policy makers face a difficult challenge in deciding what market mechanisms will most effectively yield cost-effective energy services.

"What is the paradigm that will be most satisfactory for developing new base load and variable generation?" Eisenstat asks. "Are we going back to the old utility-build scenario, an essentially non-competitive model? Or are we going forward toward more competitive products and markets?"

Additional pressure is coming from securities regulators. Perceived abuses in financial derivatives for a variety of commodities have attracted scrutiny from regulators in Washington, D.C.—and energy traders haven't escaped that scrutiny. For example, the Commodity Futures Trading Commission (CFTC) issued a notice of intent recently that it might for the first time designate several electricity futures contracts on the InterContinental Exchange (ICE) as "significant price discovery contracts" in CFTC parlance, triggering regulations, limitations and requirements affecting how these contracts are traded.

"There's a robust debate among policy makers on whether you want to put position limits or trading limits on various markets," says Bill Scherman, a partner with Skadden, Arps. "It amounts to a referendum on markets. I don't know how you put the genie back in the bottle, but that's where it's heading if the federal government imposes restrictions that diminish the tools used to make commodity markets work and manage volatility. The folks who use those tools will just get out of the market, and we'll go back to traditional command-and-control regulation. That's the logical outcome."

Such actions might portend a general slide backward toward vertical integration and cost-plus ratemaking, or they might be only a short-term effect of the past year's financial market turmoil. But to the degree policy makers impose such restrictions on markets, they will affect competitive processes, with potentially widespread effects on price signals and resource planning strategies at national and local levels. The challenge now, as the industry and its lawmakers continue hammering out market structures and regulatory mechanisms, will be to facilitate effi-

cient competition while balancing the interests of local ratepayers against evolving national interests. Doing so will require policy makers to marshal tremendous political will and wisdom—especially at the federal level, where America's national leaders establish the country's energy strategy.

"What will we do as a nation regarding the development of renewable energy?" Sikora asks. "Is it something we're really going to focus on? Will policy makers on Capitol Hill and the administration come together with a national energy plan, in the face of significant political opposition? It's not clear the policy makers will follow through—and if they do, will they understand all the implications of the policies they put in place?"

If history offers any guide, they won't anticipate all the consequences of a major energy policy shift. For instance, when Congress enacted energy legislation in 1978, it didn't foresee the transformative effects of the *Public Utility Regulatory Policies Act* (PURPA)—which opened the door to wholesale market competition and ultimately led

the industry down the path of deregulation. But also lawmakers didn't understand what they were doing when they prohibited using natural gas as a power generation fuel as part of the same package of legislation. Today's policy changes are, if anything, much more dramatic than the 1978 legislation, or indeed anything that's happened since. But while these changes are far from complete, and their destination remains unknown, their general direction seems clear.

"With the higher awareness of the need to take action to develop clean and domestic, renewable sources of energy, we will see a very real change in a short period of time," Pataki says. "This can be a positive change for the environment and for the economy, if it means we'll rely more on domestic sources of energy. But it also can damage our economy if [lawmakers use it for] playing to political favorites."

The key to executing this policy shift successfully will be for decision makers at all levels within the industry and policy communities to consider their immediate interests and concerns in the context of the long-term, big-picture trends facing America—a deceptively simple challenge.

"On all these policies—smart grid, transmission, reliability and climate—we have to be really smart," Bogorad says. "We can't throw money where it's not needed. We have to find cost-effective ways to deal with the issues we face." ■

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—Cliff Sikora  
Troutman Sanders