

TVA Defeats Clean Air Act Case

In a bellwether case followed by much of the electric utility industry, the Tennessee Valley Authority (“TVA”) defeated a Clean Air Act enforcement action following a multi-week bench trial. Winston & Strawn partner Nash Long teamed with the TVA Office of General Counsel to try the case, and presented the evidence and argument on the affirmative defense on which the U.S. District Court for the Eastern District of Tennessee ultimately ruled for TVA.

Plaintiffs, National Parks Conservation Association, Inc., Sierra Club, Inc., and Our Children’s Earth Foundation, sued TVA in 2001, alleging that two projects performed at TVA’s Bull Run Steam Station in Clinton Tennessee in 1988 had triggered Clean Air Act permitting requirements known as “New Source Review.” In a 1988 planned outage, TVA replaced an economizer, replaced a superheater, and performed other projects at the Bull Run plant. This case represents one of a series of New Source Review enforcement actions commenced in 1999 by the U.S. Environmental Protection Agency, state governments, or citizen plaintiffs. A key issue for trial was whether TVA could carry its burden to prove that the 1988 component replacement projects were “routine maintenance, repair and replacement” and thus excluded from Clean Air Act New Source Review requirements. The trial court had assigned TVA the burden of proof on this issue at an earlier pretrial stage.

In a memorandum opinion issued March 31, 2010, U.S. District Judge Thomas A. Varlan ruled that TVA had indeed carried its burden to prove its projects were “routine maintenance, repair and replacement” and entered judgment dismissing the case in TVA’s favor. This ruling is significant in that it represents the first time in the enforcement initiative that a defendant has tried the “routine” issue and won.

The trial court found that although the nature and extent of the projects were “somewhat significant,” TVA had implemented many other projects that similarly required outside labor, approval from TVA’s board of directors, and multiyear planning. Moreover, economizer and superheater replacements were common in the industry, and the costs of the projects were not high. The court also pointed out that the purpose of the projects was to reduce the number of forced outages, not to increase electricity output. As the court found, Bull Run has been one of the most efficient performers in the TVA fossil generating system. The projects “did not increase the generating capacity of the Bull Run plant on either a continuous basis or a peaking basis,” the court held. “Nor did the replacement make the unit physically bigger. Nor, finally, did the replacement increase the maximum hourly emissions capability of the unit for either sulfur dioxide or nitrogen oxides.”

Judge Varlan distinguished earlier decisions finding similar projects non-routine on the grounds that those decisions did not account for the context in which utility maintenance projects take place. In other words, the court concluded that in order to decide whether a project is “routine,” one must look at the experience of similar plants across the electric utility industry – not just at the individual unit in question. When viewed in the context of industry experience and the history of TVA’s maintenance program, the court concluded, the challenged projects were routine and never triggered New Source Review requirements.

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Briefing

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