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BLOG

Supreme Court Stays Clean Power Plan

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On the evening of February 9, the Supreme Court of the United States issued a highly unusual ruling to grant a motion to stay implementation of EPA's Clean Power Plan (CPP). The stay will remain in effect during the pendency of litigation in the U.S. Court of Appeals for the D.C. Circuit and on subsequent review by the Supreme Court, if a writ of *certiorari* is sought and granted.

The Court split 5-4 in granting the stay, with Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito voting in favor of the stay and Justices Ginsburg, Breyer, Sotomayor, and Kagan voting against it. As is common in these circumstances, the Court gave no rationale for granting the stay. The legal standard for granting a stay includes an assessment of whether the movants' have a reasonable likelihood of success on the merits, as well as the risk of irreparable harm absent a stay. Thus, the Court's decision may signal something about how it views the merits of states' and industry's challenge to the CPP—albeit based on a preliminary look

As a result of the stay, all of the CPP's requirements, including the September 6, 2016 deadline for states to submit final plans for implementation of the rule, are on hold until the underlying litigation is resolved. A number of states intervened in support of EPA and the CPP, and these (and even states opposing the rule) have made progress toward developing their implementation plans. It remains to be seen whether these states press forward to implement a rule that may ultimately be rejected by the courts in whole or in part. Moreover, uncertainty over enforceability of the rule may impact decisions about coal-fired power plant retirements and new generation investments, with repercussions for pricing and new investments in wholesale power markets.

The timeline for a final disposition of the CPP is difficult to forecast as it depends on which side prevails before the D.C. Circuit, the timing of that court's decision, and the schedule for subsequent processes. The D.C. Circuit has set an accelerated briefing schedule, with oral argument scheduled for June 2 and June 3 reserved for additional arguments, if necessary. Given this expedition and the gravity of the issues, we would expect the D.C. Circuit to rule relatively quickly, perhaps even issuing a written decision within a few weeks of the oral argument.

Given the stay, if the states and industry members challenging the CPP lose, they may have an incentive to request reconsideration *en banc* by the full appellate court, which would add at least a few weeks before the 90-day period to petition for *certiorari* begins. In this scenario, the briefing might not be completed – and the case not set for the Supreme Court's conference on whether to take the case – until after the Supreme Court's typical mid-January

cutoff for review in that term. If so, the case, if taken up, would be heard in late 2017, and a Supreme Court decision could come as late as June 2018. By contrast, if EPA loses in the D.C. Circuit, the United States may push to get the case heard in the 2016/2017 term, in which case oral argument is likely to occur in the March-April 2017 time frame with a final decision by June 2017.

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