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Vol. 1: "If It's Stayed, Why Should I Go?"

By Brendan Collins

On February 9, the Supreme Court granted applications for a stay of the Clean Power Plan until the conclusion of the currently pending case in the D.C. Circuit and the conclusion of any review of the D.C. Circuit's decision by the Supreme Court. The five conservative justices (Chief Justice Roberts and Justices Scalia, Kennedy, Thomas and Alito) voted for the stay, while the four liberal justices (Justices Ginsberg, Breyer, Sotomayor and Kagan) voted against. No information was given as to the Court's rationale.

Four days later, Justice Antonin Scalia, a cornerstone of the conservative wing of the Supreme Court and one of the five justices who voted for the stay, passed away, leaving the Court evenly divided. Much has been said and written about the process of nominating and confirming Justice Scalia's successor, but that is not the subject of this article. This article offers a view of the trajectory of this dispute to help utilities assess the timeline on which they might – or might not – need to comply with Clean Power Plan-driven state law requirements, when they can hope to know, and what they ought to be doing in the meantime.

So, what exactly is stayed?

Put as simply as possible, the Clean Power Plan requires States to submit to EPA implementation plans that assure that certain carbon dioxide emission standards are achieved by fossil power plants. The States are also required to submit reports documenting the success of those plans in achieving those standards on an ongoing basis (every two or three years). The deadline for States to submit their initial plan is September 6, 2016, and States may request an extension of up to September 6, 2018 to submit a final plan, subject to certain conditions. However the emission standards do not go into effect until 2022, and the final standards do not take effect until 2030. So the obligation of States actually to enforce those plans is still more than five years off.

Without any elaboration, the Supreme Court said simply that the Clean Power Plan is "stayed" until both the D.C. Circuit and the Supreme Court complete their review. The judicial review process may take until June 2018 to complete. Until the stay is terminated, EPA cannot enforce the requirements of the Clean Power Plan, including the September 2016 deadline for submission of initial State plans. Therefore, States no longer face an imminent deadline to develop implementation plans.

What does the stay mean for the Clean Power Plan's chances?

The Court did not render an opinion explaining the basis of its decision, or even the legal standard that it applied. However, the Court's decision suggests that the majority found, among other things, that there is a "fair prospect" that the parties challenging the Clean Power Plan would ultimately succeed on the merits. This is the standard that would be applied if the Court were considering a final decision of a court below. Here, the Supreme Court granted a stay not only before there was a decision to review, but before the merits of the matter were even briefed in the court below.

When that decision is reviewed on the merits in Fall 2017, Justice Scalia will have been replaced, and the newest justice may hold the key to the fate of the Clean Power Plan.

Supporters of the rule, including EPA, have been emphasizing that this decision is not a decision on the merits, even if the Court implicitly considered the merits under the "fair prospect" of success standard. This is true, and the Supreme Court is free to conclude, when it eventually hears the case, that the Clean Power Plan is legal in all respects. However, there is no getting around the fact that five justices, including the "swing vote" Justice Kennedy, voted for the stay, implying at the very least robust skepticism of the rule.

Then Justice Scalia passed, leaving the Court equally divided regarding the stay. Justice Scalia's death has no retroactive impact on the stay. Nor does it have any effect on the likelihood that the Supreme Court will review the decision that the D.C. Circuit will issue later this year. Only four votes are necessary to grant a petition for certiorari, so the D.C. Circuit decision is likely to be reviewed whichever way it comes out. However, when that decision is reviewed by the Court on the merits in the Fall of 2017, Justice Scalia will have been replaced, and the newest justice on the Court may hold the key to the fate of the Clean Power Plan.

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If the Clean Power Plan survives, what happens when the stay is terminated?

The Stay Order states simply that it "shall terminate automatically" once the case is resolved. At a minimum, the stay absolves States from missing any deadlines while it is in effect, and prevents EPA from taking any action against States, such as imposing a federal implementation plan. However, assuming the Clean Power Plan survives, it is not at all clear what impact the stay would have on future deadlines and compliance periods. A plain reading of the order suggests that the stay simply ends, and the States will find themselves in the posture they would be had the stay not been granted. That would place States in a very difficult situation, given that the Supreme Court might not complete its review until June 2018, and final State implementation plans would be due three months later (assuming that States would not be immediately in default for having failed to request an extension and submit an initial plan).

Some opponents of the Clean Power Plan suggest that the stay automatically extends all deadlines in the rule, including the far-off final emission standards that would not take effect until 2030, for the same amount of time that the stay remains in place – likely at least two years. But the Supreme Court's order is silent on this issue.

If the Supreme Court ultimately upholds the rule, the Court may provide some clarity as to the stay's effect on future deadlines, particularly if the parties address the issue in their merits briefs. The Court could need not choose one extreme – an abrupt termination that leaves States scrambling to make imminent deadlines – or the other – an automatic extension of far-off deadlines without any demonstration that the original deadlines cannot be met. The Court may take an equitable approach, extending nearer term deadlines to reflect part or all of the duration of the stay, but leaving long-term deadlines like the effective dates of the interim (2022) and final (2030) emission standards unchanged.

What does the litigation timeline look like?

The stay did not disturb the D.C. Circuit's ongoing review of the Clean Power Plan, and briefing in that matter is already underway. The court will hold oral argument on June 2-3, 2016, and render its decision later in the year, possibly as early as August. Even if the court renders its decision quickly, post-decision maneuvering is kept to a minimum and petitions for *certiorari* are promptly filed, it is unlikely that the Supreme Court's calendar will allow the merits of the case to be heard before Fall 2017. The Court's decision could be rendered any time from about two months after argument until the end of June 2018. Nevertheless, there is a small possibility that the case could be among the last cases argued in April 2017; if so, the Supreme Court – as then constituted – would render its decision by June 2017.

What are the States doing in the meantime?

States are still deciding how to react to the stay. In general, though, States are sorting themselves into three categories. Most of the States that have opposed the Clean Power Plan from the start will simply ignore the rule, and urge other States to do so. Several of the rule's challengers (e.g., Colorado, Louisiana and Wyoming) have expressed a desire to continue some level of planning, even while challenging the rule in court.

At the other end of the spectrum are States that have existing carbon control regimes (California and the nine Regional Greenhouse Gas Initiative states), or are moving towards such programs to fulfill their own independent policy goals (e.g., Washington, which is establishing a carbon cap independent of its Clean Power Plan obligations). These States will continue to develop programs under state law and under the guise of preparing to implement the to-be-vindicated Clean Power Plan, albeit without the September 2016 deadline as a driver.

The third category of States is agnostic, and will likely focus on other policy priorities. Some of these States may completely suspend stakeholder meetings while others may continue outreach with reduced intensity. One recent survey showed that 38 States are evenly divided between those suspending all implementation activities and those who will continue with planning, with nine States still considering how to proceed. (Alaska, Hawaii and Vermont are not subject to the rule.)

Notwithstanding these diverse reactions, there are several good reasons for States to continue working on ways to reduce carbon emissions. First, there is no guarantee that the Clean Power Plan will not go into effect more or less on schedule, and it would be unwise for States to count on a lengthy extension of

Cartoon drawn exclusively for Public Utilities Fortnightly by Tim Kirby

their obligation to submit final plans in 2018. Second, regardless of the fate of the Clean Power Plan, long-term energy planning requires States to consider what will replace aging power plants that are being retired due to low gas prices, high heat rates and conventional pollution regulation. Whether the conversation is called "energy planning" or "Clean Power Plan Implementation," the substance is important and largely the same.

Finally, in light of the Paris Agreement, even if the Clean Power Plan is struck down, the United States has committed to carbon reductions by 2025, and to reset its goals each five years. Given that the electric power sector emits forty percent of the country's carbon pollution, the United States will have to require reductions in power sector emissions to fulfill its international commitments. Regardless of the form these obligations take, States that preserve existing low- and zero-carbon generation resources and promote new resources will be less impacted by these future requirements. These sentiments are reflected in what many States are saying about moving ahead with planning efforts despite the stay.

What does all this mean to me?

For the regulated community, the best policy remains one of engagement. Many States are continuing planning efforts and will seek out stakeholder participation. In States that have suspended all implementation activities, there are opportunities for private collaboration among utilities, generators, customers and consumer advocates. Perhaps more importantly, utilities should use this time to formulate informed positions on the implementation issues that most affect their business.

One of the complaints often made about the Clean Power Plan was that initial plans were due only thirteen months after the rule was released. Now States and the electric power industry have additional planning time to consider their options. In addition, utilities should consider how existing programs such as renewable portfolio standards and energy efficiency mandates can be realigned or repurposed in the context of the Clean Power Plan. We will talk about some of these issues in our continuing series, "Obligations and Opportunities: Wires Cos. Plug In to the Clean Power Plan." PUF