



Appeals court speeds up Clean Power Plan review

The federal judiciary will complete its review of the Environmental Protection Agency's (EPA) Clean Power Plan sooner than expected, following surprise court action announced in mid-May.

The U.S. Court of Appeals for the District of Columbia Circuit will proceed straight to *en banc* review of the plan (CPP), bypassing first-stage review by a three-judge panel and bringing the controversial regulation directly before the circuit's full roster of active judges.

Oral arguments before a three-judge panel had been scheduled June 2 and 3 on challenges to the CPP by dozens of plaintiffs including the National Rural Electric Cooperative Association and consolidated as *West Virginia v. EPA*. Irrespective of the outcome at that stage, the losing side was expected to petition for an *en banc* hearing, but

for the court to skip the small-panel review and proceed to such a hearing without a petition is highly unusual.

Arguments are now pushed back three months to September 27, but that delay will avert what would almost certainly have been an even longer one with both sides spending months preparing arguments to address a three-judge panel's opinion; thus it's anticipated last month's move will pave the way for earlier Supreme Court review.

Predicting how the appellate court's knuckleball may shape the fate of entities that would come under CPP regulation is risky, but for those anticipating two separate steps of litigation before the plan's likely trip to the U.S. Supreme Court, the action means at minimum an accelerated time frame and potentially a significant adjustment of tactics.

Superficially, the move may ap-

pear to shift the composition of the reviewers to be slightly more favorable to those challenging the rule. From an initial panel of one Reagan appointee and one each named by Presidents Clinton and Obama, the case goes instead to a court with seven Democratic appointees and four nominated by Republican presidents. However, Chief Judge Merrick Garland's non-participation in cases while he is under consideration as a Supreme

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New OSHA rule adds electronic reporting

Nearly all utilities and farm-supply and grain cooperatives—those with fewer than 20 employees are exempt—will be required to submit work-related injury and illness reports electronically under a final rule published in May by the Occupational Safety and Health Administration (OSHA).

The rule takes effect January 1, 2017. No later than July 1, 2017, employers will be required to electronically submit their Form 300A, "Summary of Work-Related Injuries and Illnesses." One year later, cooperatives with 250 or more employees will also be required to submit their Form 300, "Log of Work-Related Injuries and Illnesses," and Form 301, "Injury and Illness Incident Report," to OSHA electronically for posting (without personal identifying information) on OSHA's website.

According to an OSHA Fact Sheet, the new requirements are intended to spur increased efforts to prevent worker injuries and illnesses and encourage employers "to race to the top in terms of worker safety."

The new rule expands employee whistleblower protection by allowing OSHA to pursue employers who deter or discourage workers from reporting violations, rather than limiting protections to cases of employer retaliation.

Bruce's briefs

by CN Lobbyist Bruce Kleven

Right-of-way bill a bright spot in session's murky end

Legislation supporting reasonable, predictable standards to govern rail-crossing right-of-way transactions passed both houses of the Minnesota Legislature Sunday, May 22, and Governor Mark Dayton was expected to sign the bill during the month's closing days.

Cooperative Network collaborated actively with the Minnesota Rural Electric Association (MREA) to advance this important legislation. It addresses a significant challenge for electric and telecommunications cooperatives in the form of fees charged by railroads for crossing right-of-way in order to serve co-op member-owners. The fees railroads charge for these crossings are often inconsistent and excessive in proportion to the diminution of value to the railroad, and can require months of negotiation and construction delays.

In fact, delay has become routine while trying to settle on a reasonable crossing fee, costing Cooperative Network members both time and money. Rep. Deb Kiel (R-Crookston) and Sen. Dan Sparks (DFL-Austin) authored the bipartisan legislation (H.F. 963/S.F. 877), which sets a standard, one-time crossing fee of \$1,250 for a utility to perform construction, operation, maintenance, or repair of a utility facility under, over, or across a *private* railroad right-of-way, and \$0 for crossing within a *public* right-of-way (reflecting the original purpose of public right-of-way to allow for the movement of people or services). The legislation also includes a 35-day timeline to gain approval for the crossing, allowing for construction to begin in a timely manner and requiring the utility to have the insurance the railroads demand for construction of the crossing.

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Energy utilities: Customer satisfaction slipping

Electric cooperatives still outperform other providers, but no segment of the energy utility business is escaping a long-term trend of declining customer satisfaction confirmed in May by the newest American Customer Satisfaction Index (ACSI).

The survey results reveal a third straight year of downward-trending satisfaction, according to an ACSI statement accompanying the data release. Across all utility sectors, customer satisfaction over the past year dropped 3.2 percent to a score of 71.9 on a scale of 0 to 100, ACSI said. By category:

- Large, investor-owned, combined utilities fell 2.7 percent to an ACSI score of 72.
- Municipal utilities took the hardest hit, falling to a score of 68—a 6.8

percent decline from a year ago, driven, ACSI said, by “a sharp decline” in satisfaction with smaller municipals that dominate the category.

- ACSI reported a divide between Touchstone Energy Cooperatives and non-Touchstone providers, while noting that cooperatives “still do better than investor-owned and municipal utilities.” Satisfaction with Touchstone cooperatives slid 4 percent to a score of 77 against an overall co-op rating of 76. But ACSI noted a considerable gap “as all other smaller cooperatives plunge 8 percent to 72.”

The affected businesses may face limited ability to address the problem, which ACSI founder and Chairman

Claes Fornell traced in part to prolonged economic stagnation.

“Demand for energy is inelastic and nondiscretionary, meaning consumers have little choice but to pay regardless of price,” Fornell said. “While energy prices have been stable and have not increased dramatically, wages remain stagnant and monthly energy bills are a constant drain on disposable income.”

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Court nominee changes the ratio to 6–4. Of the six, four were nominated by President Obama.

In addition, one Obama appointee, Judge Cornelia Pillard, joined Garland in sitting out the decision to grant an *en banc* hearing. She could participate in the case in September, but if she continues her recusal, the edge held by likely EPA supporters would drop to 5–4.

Beyond the D.C. Circuit, the existing Supreme Court vacancy comes into play even more strongly than before. Assuming accelerated arrival of a petition for High Court review, the case has a greater chance of being presented to a court divided 4–4 on the issue. Absent a Supreme Court majority favoring one side or the other, the D.C. Circuit’s opinion would stand.

Minnesota commissioner to head national panel

Minnesota Public Utilities Commission Vice-Chair Nancy Lange will chair the Energy Resources and Environment Committee of the National Association of Regulatory Utility Commissioners (NARUC) in an appointment announced in May.

Lange was named to the post by Travis Kavulla, who heads the Montana Public Service Commission and serves as NARUC president. She was appointed to the Minnesota commission in 2013 by Governor Mark Dayton.

Lange also serves on NARUC’s Washington Action Committee. Before joining the Minnesota commission, she served as manager of policy and engagement at the Center for Energy and Environment. All 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands are represented in NARUC, organized in 1889 to improve the quality and effectiveness of public utility regulation nationwide.

Gas leak has California angling for another energy remake

The 1990s redesign of California’s electric utilities crashed system reliability, and now activists and elected officials say it’s time to remake the system again.

A five-month leak at a southern California natural gas storage facility—now sealed—may lead to blackouts this summer, and the reliability solution, advocates say, is reduced reliance on gas and broader deployment of

renewables and energy storage technology. State Senator Fran Pavley called for less reliance on “dangerous fossil fuel facilities,” according to *Greenwire*.

Pavley has introduced legislation requiring utilities and cooperatives to factor energy storage into resource

planning and justify choices other than storage when adding generation capacity. The Los Angeles municipal water and electric utility was reportedly analyzing how it could manage a transition to 100 percent renewable energy.

Bruce’s briefs

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It’s also important to note that the bill contains a provision making the fee somewhat retroactive. If a utility has paid the amount of the one-time fee over the existence of the crossing, no additional fee can be charged. In practice this should mean an end to most annual fees cooperatives are paying.

Several surrounding states including Iowa, Nebraska, South Dakota, and Wisconsin already have similar standards. Although the original legislation was amended, including an increase of the fee from the proposed \$750 to \$1,250, the positive final outcome ensures certainty and predictability for Cooperative Network’s electric co-op members.

In addition to strong leadership provided by MREA, key allies in the effort included the Minnesota Telecom Alliance and the Minnesota Municipal Utilities Association. With end-of-session details still uncertain and a possible special session still on the horizon, the successful right-of-way effort is a bright spot amidst the settling dust.—Bruce Kleven, Matt Hughes, and Patrick Murray contributed to this article.

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