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Court vacates ACP permit over environmental justice issue

By Jim Day

Dealing yet another legal setback to the embattled project, a federal appeals court Tuesday vacated an air quality permit for a compression station for the stalled Atlantic Coast natural gas pipeline, saying Virginia regulators failed to explore the feasibility of using emissions-free electric turbines and did not adequately explore adverse health impacts on the historic African-American community of Union Hill.

The U.S. Court of Appeals for the 4th Circuit ruled that the Virginia Air Pollution Control Board and the state Department of

Continue on p4, click here

NNSA: No need for fresh review of revised plutonium pit strategy

By George Lobsenz

Despite making major changes last year to its strategy for expanding production of plutonium pits for nuclear weapons, the National Nuclear Security Administration said Tuesday it would conduct no fresh environmental review of the revised program, saying a 2008 programmatic assessment and various site-specific reviews of plutonium facilities would adequately cover all issues raised by the new strategy.

The announcement by the Energy Department's semi-autonomous nuclear weapons agency—which finalized a proposed decision issued by NNSA last June—drew immediate push-back from some environmental groups as illegal and a violation of previous commitments made by NNSA to conduct a fresh programmatic review if it significantly changed its plutonium pit strategy.

Environmentalists said NNSA's decision plainly violated review requirements set by the National Environmental Policy Act (NEPA) because the previous programmatic review conducted by NNSA in 2008 did not look at key elements of the specific plutonium pit strategy announced by the agency last year.

The critics also charged that NNSA wanted to avoid a fresh programmatic review because major questions have been raised about the cost and feasibility of its plan to increase its

Continue on p3, click here

Public power groups slam wide net cast by FERC MOPR order

By Jeff Beattie

Politically influential public power utilities have emerged as strong critics of the Federal Energy Regulatory Commission's December decision to dramatically expand an existing price floor in PJM Interconnection's capacity markets, with one trade group hinting it will sue over an order it says will pump up costs for its members and aid only a small group of merchant generators.

In a December 20 statement, the American Public Power Association (APPA) said FERC's decision, made at its monthly public meeting the day before, threatened the "fundamental business model" of APPA's publicly owned electric utilities by forcing their ratepayers to dramatically overpay for electric generating capacity.

"This order stands in sharp contrast to any definition of competitive markets, and represents the worst type of government interference in the markets—not to protect consumers but instead to support a selected group of sellers," said APPA President and CEO Sue Kelly in a statement. APPA also made clear it is considering legal action against FERC's 2-1, December 19 decision, which was supported by FERC's two GOP members and bitterly opposed by its sole Democratic Commissioner, Richard Glick.

APPA said it is "carefully reviewing the order and considering its options."

In evaluating court action, APPA joins green groups and at least one state that appear likely to sue. Several environmental and clean energy groups have hinted as much, and on December 20 Maryland Public Service Commission Chairman Jason Stanek said his agency was already "considering legal options to protect the public interest of Marylanders," on the grounds that FERC's order would improperly thwart the state's drive to install low-carbon energy sources.

Beyond court action, APPA and public power utilities can exert considerable political pressure on FERC and PJM because they hold substantial sway in statehouse and in Congress, where they have strong ties to

Continue on p2, click here

TC Energy exec named INGAA chairman

The Interstate Natural Gas Association of America announced Tuesday that TC Energy executive Stan Chapman has been elected by the group's board of directors to fill a one-year term as chairman of the trade group representing interstate gas pipelines.

Chapman, chairman of the general partners of TC Pipelines and president of TC Energy's gas pipelines, recently completed a term as INGAA's first vice chairman.

He steps into the role of chairman as INGAA member companies are facing growing opposition to the construction of new gas pipelines in some Democratic-leaning states that want to move to 100 percent renewables. INGAA members also are facing political pressure to reduce methane leakage and to address gas pipeline accidents.

Public power groups slam wide net cast by FERC MOPR...(Continued from p. 1)

senior energy policymakers of both parties.

APPA's opposition stems from the fact that public power was largely exempted from the price floor requirements in a version of the plan put forth by PJM in October 2018, only to be included in FERC's December 19 order.

To the surprise of many utility officials, FERC ordered that the price floor apply to most newly built "self-supply," including power plants owned by municipal utilities and rural electric cooperatives as well as regulated, ratepayer-supported plants built by investor-owned utilities (IOU).

FERC ordered an expansion of the price floor in an effort to prevent subsidized generation—typically state-supported nuclear or renewable facilities—from making low-ball bids and thus suppressing prices in PJM capacity auctions, in which utilities are required to pay generators for the promise of power deliveries three years hence. The system is designed to ensure that utilities are adequately supplied and to deliver an important stream of revenue to generators to encourage them to build new plants and keep marginal units running.

Both FERC and PJM are concerned about subsidized generation offering into auctions at artificially low prices, depressing market-clearing prices and discouraging generators from investing in PJM markets.

To remedy that, FERC's order requires PJM to expand a price floor that PJM currently imposes only on new gas-fired plants. Going forward, PJM would impose the minimum price on nearly all new generation and demand-side resources, while exempting most existing resources.

Importantly for public power, FERC classified plants built by municipal utilities and customer-owned rural electric cooperatives as subsidized, likely because they benefit from low-cost financing available to those tax-exempt entities.

FERC also said that state-regulated plants built by IOUs are subsidized because they benefit from ratepayer support, unlike merchant generators.

APPA's primary concern about the expanded MOPR is that the price floor will prevent their plants from clearing capacity auctions, which it says will effectively force their customers to double-pay for capacity.

If public power utilities' plants win contracts in a capacity auction, ratepayers see a financial wash, with capacity revenues off-setting their mandatory purchases of capacity in the auction, APPA says.

But if their plants fail to clear a capacity auction, public power utilities do not get any revenues, leaving their customers to pay to support operation of their self-supply power plants and again to buy capacity from PJM auctions. Additionally, the price of that capacity will be higher due to FERC's imposition of the broader price floor, says APPA.

"For public power...every new resource built in the future—whether it is a renewable, storage, or energy efficiency resource—will run the risk of not clearing the capacity auction..., causing public power utilities and their customers to face the risk of paying twice for that resource every year and directly interfering with public power's fundamental business model," said APPA in the December 20 statement.

"It is the ultimate irony that the public power business model has been deemed a subsidy and a threat to competitive markets," stated Marc Gerken, president and CEO of American Municipal Power, a power provider to 135 public utilities in the Midwest and Mid-Atlantic. "Our approach to new resources is closer to a true market than PJM's [capacity auction] has ever been."

Glick, in a lengthy dissent to last month's order, suggested public power utilities would be unhappy. He called FERC's order "a fundamental threat to the long-term viability of the public power model" because public power's "selection and development of new capacity resources will now be dependent on the capacity market outcomes, not the self-supply model on which it has traditionally relied."

Glick said "that fundamentally upends the public power model because it limits the ability of public power entities to choose how to develop and procure resources over a long time horizon." He also suggested the order as a whole was designed to protect existing fossil-fueled generation and snuff out capacity revenues for low-cost renewables that are increasingly dominating fleet additions.

And in general, Glick said FERC's definition of "subsidy" was overly broad, meaning it would impose price floors on certain generating facilities inappropriately.

That is also the view of the National Rural Electric Cooperative Association (NRECA), according to its regulatory counsel, Randolph Elliott, who says the group is still evaluating FERC's order and considering seeking rehearing.

"We believe that public power and cooperative utilities' self-supplied capacity is not subsidized in any economically meaningful sense of the word," he told *The Energy Daily* Tuesday.

"Public power and cooperative utilities are economically rational actors; they are evaluating investment decisions and buy-or-build decisions on a strictly economic basis, and they are not distorting the market simply by engaging in capacity transactions or self-build decisions outside of the PJM capacity market."

FERC Chairman Neil Chatterjee was queried after FERC's December 19 meeting about Glick's claims that the order would "up-end" the public power sector. Talking with reporters, Chatterjee said that assertion was "unfounded" and contrary to industry expertise he gained in working at NRECA's government affairs office years ago.

"I disagree with that," he told reporters. "I used to work in the electric cooperative program; I know that the electric co-op model was founded decades before even the creation of capacity markets. So, I think that's an unfounded argument; I don't think their business model is based on the capacity market."

NNSA: No need for fresh review of revised plutonium pit...(Cont'd from p. 1)

pit production capability to 80 pits per year (ppy) by 2030, as was required by the Pentagon last year under a nuclear weapons expansion decision by the Trump administration.

"NNSA does not want to expose the contradictions in its pit production plans to further scrutiny by the public, tribes, affected governments, Congress, or even by other NNSA and DOE programs, some of which will suffer as a result of the rush into pit production," said Greg Mello, head of the Los Alamos Study Group, a DOE watchdog group in New Mexico.

"A new plutonium pit production plan involving multiple sites in multiple states, with ramifying effects on transportation and on waste management at *all* DOE sites that produce, store, or dispose of transuranic waste, inherently requires programmatic analysis under NEPA. To repeat, much has changed since 2008."

Mello also said NNSA's decision violated a specific commitment made by DOE in a 1998 court settlement with his group and other environmental organizations that it would conduct a programmatic EIS if pit production was increased above 20 ppy or expanded to multiple DOE sites.

Given that and other legal problems with NNSA's refusal to conduct a programmatic review, "we will challenge this decision, to the best of our ability," he added.

Currently, Los Alamos National Laboratory (LANL) is the only DOE site with pit production capability, and NNSA says LANL's aging plutonium facility has a maximum potential output of 10 ppy, although it is not clear that production rate has been demonstrated to date.

Under its new strategy announced last May, NNSA pledged to meet the 80 ppy requirement by repurposing a half-built plutonium disposal plant at DOE's Savannah River Site (SRS) in South Carolina to produce 50 ppy, with the remaining 30 pits to come from refurbishment of the decades-old PF-4 plutonium facility at LANL, which has significant safety problems.

The agency selected that dual-site approach over several other options that would meet the 2030 deadline for 80 ppy by increasing production at LANL alone. NNSA officials said producing pits at LANL and the repurposed Mixed Oxide (MOX) Fuel Fabrication Facility—which previously was intended to convert surplus weapons plutonium to reactor fuel to meet U.S. nonproliferation commitments to Russia—would provide needed redundancy and resiliency for the critical weapons program.

** However, since then, an independent study done by the Institute for Defense Analyses concluded that NNSA's dual-site program provided no advantages over far cheaper alternatives that focus solely on increased production at LANL. NNSA already has acknowledged its dual-site plan would cost $28 billion more than a LANL-only strategy.

New Mexico officials also have challenged NNSA's plan to repurpose the MOX plant, saying the agency made that decision to appease South Carolina officials angered by DOE's decision to cancel the MOX project. DOE said the MOX plant had been plagued by cost overruns and that it would be far less expensive to dispose of surplus weapons plutonium through dilution and burial in a repository.

However, South Carolina officials say cancellation of the MOX project meant DOE was abandoning legal commitments to the state to start removing plutonium from SRS. The termination of the project also has cost the state hundreds of MOX construction jobs—some of which would be restored through NNSA's ambitious plan to repurpose the MOX plant.

Importantly, NNSA has committed to conducting a site-specific environmental impact statement (EIS) to look at the MOX plant conversion project and subsequent pit production at SRS.

However, NNSA in its announcement Tuesday did not commit to conducting a full EIS for increased pit production at LANL, saying only that it would provide "site-specific documentation" to authorize expanding pit production at the site beyond its current 20 ppy limit.

More broadly, NNSA said that despite the increased production at LANL and its entirely new plan to repurpose the MOX plant for pit production, there was no need for a full programmatic review of its revised plutonium strategy.

It said all relevant impacts and issues raised by its new pit strategy already were covered by a 2008 programmatic EIS it conducted on restructuring its weapons production complex.

"In 2008, NNSA prepared the Complex Transformation supplemental programmatic EIS (SPEIS), which evaluated, among other things, alternatives for producing 10-200 plutonium pits per year at different sites including LANL and SRS," NNSA said in a *Federal Register* notice Tuesday.

At that time, NNSA noted, it "did not make any new decisions related to pit production capacity and did not foresee an imminent need to produce more than 20 pits per year to meet national security requirements."

However, after announcing its new plan to meet the Trump administration's 80 ppy requirement, NNSA said it launched a supplemental analysis to determine whether additional programmatic review of the revised pit strategy—which under NEPA would require review of alternative strategies—was needed.

Then in June 2019, NNSA announced that its supplemental analysis had preliminarily determined that no further programmatic review was needed.

"This supplemental analysis evaluates the potential impacts from producing up to 80 pits per year at both LANL and SRS and considers any new circumstances or information relevant to environmental concerns," NNSA said at the time. "For all resource areas, the [supplemental] analyses verified that the potential programmatic environmental impacts would not be different, or would not be significantly different than impacts in existing NEPA analyses."

NNSA put that preliminary conclusion out for public comment, drawing strong opposition from environmental and antinuclear groups that said NNSA's new plutonium strategy was not considered in the 2008 programmatic review and thus a new programmatic review was needed.

In its final decision announced Tuesday, NNSA acknowledged that its 2008 programmatic review was based on then-current requirements for 20 ppy.

Nonetheless, the agency said the 2008 review, in conjunction with a site-specific EIS on the repurposed MOX plant and additional LANL documentation, eliminated the need for a fresh programmatic review.

"The final supplemental analysis includes NNSA's determination that no further NEPA documentation at a programmatic level is required," the agency said.

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** This paragraph is erroneous.

NuScale moves on SMR licensing in Canada

Already in the lead among small modular reactor developers in getting U.S. approval of its design, NuScale Power announced Tuesday it has filed its first licensing documents in Canada, submitting some of the information needed for a pre-licensing vendor design review by the Canadian Nuclear Safety Commission.

The Oregon-based company, which is majority owned by Fluor, said much of the information filed with Canadian regulators on its 60 megawatt light-water reactor was based on documents it has submitted to the Nuclear Regulatory Commission as part of its U.S. design certification application.

NuScale's SMR is the first to undergo design certification review by NRC, and the company announced December 12 that the agency had completed four phases of that six-phase review process.

NuScale has an agreement with Bruce Power, operator of several Canadian-design reactors in Ontario, to develop a business case for deployment of its SMR in Canada.

Court vacates ACP permit over environmental justice issue...(Cont'd from p. 1)

Environmental Quality (DEQ)'s decision to permit the compressor station in Buckingham County was "arbitrary and capricious" and in violation of state law that requires environmental justice reviews of new polluting facilities.

The court's decision could become a political hot potato for Virginia Gov. Ralph Northam (D) because he intervened in state deliberations on the compressor—and because of questions about his role in racially charged photos dating from his time in medical school decades ago.

The ruling on the compressor in favor of the Southern Environmental Law Center and other environmental groups is the latest in a series of 4th Circuit decisions vacating permits for the Atlantic Coast pipeline. The court previously ruled that the Trump administration improperly issued permits related to endangered species protections and that allowed the pipeline to cross the Appalachian Trail.

The dispute over the Appalachian Trail crossing is now before the Supreme Court, which is scheduled to hold oral arguments in the case next month.

The growing number of adverse court rulings has substantially delayed construction of the $7.5 billion Atlantic Coast Pipeline (ACP), a joint project between Dominion and Duke Energy that is to carry 1.5 billion cubic feet per day of cheap Marcellus shale gas mostly to fuel power plants in Virginia and North Carolina.

Still, Dominion officials said the latest legal setback would not affect their existing plans to resume construction of the pipeline this summer and to bring it into service by early 2022.

Dominion spokesman Aaron Ruby said the Buckingham compressor station—one of three along the pipeline route from West Virginia to eastern North Carolina—would have "the strictest air permit of any compressor station in the country, with protections far exceeding the U.S. Environmental Protection Agency's guidelines for vulnerable populations."

Nevertheless, green groups and many residents of Union Hill have been vehemently fighting against the siting of the compression station in the community, which was first settled by freed slaves in the aftermath of the Civil War.

Several big-name environmentalists including Al Gore have joined the high-profile fight, arguing that emissions of fine particulate matter (PM2.5) and other pollutants known to cause asthma, heart disease and other ailments would have a disproportionate impact on the community that is more than 80 percent African-American and other minority groups.

The 4th Circuit did not rule directly on the potential health impacts, but found that DEQ and the air pollution board violated Virginia environmental justice laws by not making key findings about the demographic makeup of Union Hill and the potential health impacts on the vulnerable population.

"Environmental justice is not merely a box to be checked, and the board's failure to consider the disproportionate impact on those closest to the compressor station resulted in a flawed analysis," the court wrote.

The air quality permit has been hotly contested, and in August 2018 a state advisory committee on environmental justice recommended that the permitting decision be suspended "pending further review." In November 2018, Northam—who has been a supporter of the Atlantic Coast pipeline—removed two members or the Air Pollution Control Board who had expressed concerns about the environmental justice issues.

The board subsequently approved the permit, but the court decision Tuesday will send it back to the board, which must rule again on the permit in a political climate that has changed dramatically in Virginia.

Earlier in 2019, Northam defied calls for his resignation after photos surfaced from his page in a medical school yearbook showing two men wearing blackface and regalia of the Ku Klux Klan. Northam has since embraced racial reconciliation as a core element of his political rehabilitation—a strategy that will be tested in the high-profile environmental justice permitting decision.

Northam also proposed plans last year to cut greenhouse gas emissions sharply as Virginia moves toward 100 percent carbon-free power generation by 2050—a goal that appears largely incompatible with construction of a major gas infrastructure project.

The ACP developers have argued that Union Hill is the only viable site for the compression station in Virginia because it allows the pipeline to interconnect with the nearby Transco pipeline and was available for the pipeline to purchase. They also said use of electric turbines is not feasible, in part because it would require construction of about 12 miles of new power lines to the site.

However, the 4th Circuit ruled that the board erred by not considering whether the compressor station could use electric rather than gas-powered turbines. DEQ staff had told the board it did not have to consider the electric turbines as a "best available control technology" to minimize emissions because that would mean "redefining the source," or completely redesigning the project using a different technology.

The court, however, found that nothing in Virginia law allowed for "redefining the source" to be grounds for dismissing an alternative technology.

"We are not satisfied that the board provided a sufficient and rational explanation of its failure to consider electric turbines in place of gas-fired turbines," the court wrote. "None of these arguments or regulations support the decision made by DEQ during the permitting process to decline to even *consider* electric turbines."

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