Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

The Biggest Energy Decisions Of 2015

By **Keith Goldberg**

Law360, New York (January 5, 2016, 6:12 PM ET) -- Several high-profile court rulings rocked the energy sector in 2015, from the Supreme Court striking down the U.S. Environmental Protection Agency's rule limiting mercury emissions by power plants to the high court blurring the lines between federal and state jurisdiction over the U.S. natural gas market.

Here are the biggest energy-related court decisions of last year:

Michigan et al. v. EPA

The EPA's ongoing efforts to regulate emissions from the U.S. power sector suffered a setback in June, when the Supreme Court nixed its landmark rule limiting mercury and other toxic emissions from coal-fired and oil-fired power plants.

By a 5-4 vote, the high court held that the EPA "strayed well beyond the bounds of reasonable interpretation" of the Supreme Court's standard set by Chevron v. NRDC, which granted significant deference to federal agencies in interpreting ambiguous laws, when the agency determined that cost was not a determining factor in crafting the so-called MATS rule. The high court didn't overturn the rule, sending it back to the D.C. Circuit for review.

While the practical effect of the ruling is limited, since most plant operators are already complying with the rule, attorneys say it serves as a warning to the EPA that when crafting future regulations, costs will be a major factor in whether they can survive legal challenges.

"I think the Supreme Court decision signaled that there's at least a significant group of justices that are willing to take a hard look at that, so I think that's going to affect the rulemaking process within the agency," Akin Gump Strauss Hauer & Feld LLP partner Paul Gutermann said. "They've had a historically easy pass when it comes to that; they're going to have to do a better job in estimating costs and benefits."

Back at the D.C. Circuit, over 20 states and industry groups urged the appeals court to scrap the rule entirely instead of allowing the EPA to revise it to comply with the Supreme Court's ruling. However, the D.C. Circuit rejected that request Dec. 15.

Meanwhile, the EPA in November floated a supplement to the rule to state that a consideration of compliance costs — which the agency estimated would cost $9.6 billion annually — doesn't change its determination that the rule is necessary to protect public health and the environment.

Oneok et al. v. Learjet et al.

The high court surprised many observers in May when it affirmed a Ninth Circuit ruling that revived state-law claims against natural gas companies over price-fixing by holding that Congress did not give the Federal Energy Regulatory Commission the right to oversee first sales or retail sales of natural gas, and said the Natural Gas Act provided "a regulatory role for the states" in the production of natural gas.

A slew of energy companies had argued that because state-law claims of the plaintiffs in multidistrict litigation — all retail buyers of natural gas — deal with so-called “index manipulation” by wholesale sellers within FERC’s jurisdiction, their suits are preempted by the NGA. However, writing for the 7-2 majority, Justice Stephen Breyer said the court has repeatedly stressed that the NGA was crafted with “meticulous regard” for preserving state power and that the MDL specifically targeted retail gas sales, which are firmly in the territory of the states.

As a result, both FERC and the states could wind up regulating the effects of the same gas transaction, attorneys say. Interstate pipelines and other gas companies used to dealing solely with FERC may be forced to navigate the antitrust laws of every state, a major regulatory headache. The decision also gives states a road map to determine whether any of their laws, antitrust or otherwise, have room to operate under the NGA, a potential regulatory and litigation nightmare for the gas industry.

“It exposes natural gas producers to two different sets of regulations that could potentially be conflicting,” Mayer Brown LLP partner Mike Lennon said. “Companies that find themselves complying with the NGA may not find themselves complying with state retail gas requirements.”

FERC v. Barclays Bank PLC et al.

It wasn't a final ruling, but a California federal judge's refusal in May to nix FERC's bid to enforce a $453 million market manipulation penalty imposed against Barclays PLC and four of its traders was a significant victory for the commission in its efforts to broadly assert its enforcement powers over U.S. energy markets

FERC claims Barclays and traders Daniel Brin, Scott Connelly, Karen Levine and Ryan Smith manipulated electricity prices in western U.S. markets between November 2006 and December 2008 by scheming to trade day-ahead fixed-price electricity to boost the bank's financial swap positions. The crux of their dismissal bid was that FERC didn't have the authority to fine the bank or the traders and that it hadn't adequately stated a manipulation claim, because the transactions at issue involved real customers and real money.

However, U.S. District Judge Troy L. Nunley said May 20 that argument "wasn't supportable" and that FERC had a factual and legal basis under the Federal Power Act to support its manipulation allegations.

If Judge Nunley had granted Barclays' dismissal bid, it would have, for the first time, imposed significant limits on FERC's anti-manipulation authority. Instead, the judge held that the commission had the authority to pursue manipulation cases against entities even if they weren't directly involved in physical transfers of electricity.

The judge also rejected arguments that the individual traders didn't qualify as entities under the FPA that are subject to FERC enforcement, putting traders and other individuals squarely in FERC's anti-

manipulation enforcement sights.

“I think it was significant because it was the first time any authority had been acknowledged for the agency to go after individuals,” Lennon said. “That opens some doors previously unavailable to FERC.”

Barclays continues to fight FERC's efforts to enforce the manipulation penalty, and Judge Nunley hasn't yet ruled on the merits of their claims that the trading activity was aboveboard.

Little et al. v. Louisville Gas & Electric Co. et al.

In November, the Sixth Circuit became the latest appeals court to rule that the Clean Air Act doesn't preempt state common-law claims, leaving utilities and other regulated industries vulnerable to lawsuits and regulatory second-guessing despite federal permits.

The Sixth Circuit on Nov. 2 upheld a proposed class of residents’ right to pursue Kentucky nuisance, trespass and negligence claims against utility giant PPL Corp. and subsidiary Louisville Gas & Electric Co. over alleged damage to health and property caused by coal dust from a nearby power plant. The appeals linked that decision to a ruling issued that same day that property owners could pursue similar claims against Diageo Americas Supply Inc. over ethanol emissions from its Louisville, Kentucky, whiskey distillery.

The rulings come two years after the Third Circuit concluded that the CAA doesn't bar state-law pollution claims brought by property owners against the operators of a Pennsylvania coal-fired power plant. Combined, they give significantly more power to the states — state governments, administrative bodies, courts and private citizens — to quasi-regulate already heavily regulated utilities and other industries that have federal permits, attorneys say.

“Every last move of a power plant is already being covered by a federal law,” said McGuireWoods LLP partner Scott Oostdyk, who represented the Pennsylvania plant in the Third Circuit case. “[The rulings] will see judges and juries issuing injunctions.”

With two circuit courts siding with the states on CAA preemption, it will be easy for other circuit courts to follow suit. But it only takes one circuit court to rule the other way to potentially force the Supreme Court to tackle the issue. To this point, the high court has shown little desire to take up the CAA preemption issue. That includes refusing to review the Third Circuit's decision in June 2014.

“It will take a split to get the issue to the Supreme Court,” Oostdyk said.

BP Deepwater Horizon Settlement

It wasn't a court ruling, but the global settlement with BP PLC over the 2010 Deepwater Horizon oil spill formally released in October closes the book on one of the highest-profile cases involving an energy company in recent years.

The sprawling multidistrict litigation spawned from the catastrophe included a high-stakes courtroom battle between BP and the U.S. Department of Justice that had the energy giant facing tens of billions of dollars in Clean Water Act penalties alone.

But in July, BP said it struck an $18.7 billion global settlement resolving claims made by the federal

government, as well as Alabama, Florida, Louisiana, Mississippi and Texas and more than 400 local government entities. The final terms were unveiled in October, and the deal awaits approval by a Louisiana federal judge.

According to the consent decree, BP unit BP Exploration & Production Inc. will pay the federal government a CWA civil penalty of $5.5 billion over a 16-year period, the largest civil penalty in the history of environmental law, according to the DOJ. BPXP will also pay $7.1 billion to the U.S. and the five Gulf states over 16 years for natural resource damages, on top of the $1 billion already committed for early restoration. The company will also pay up to an additional $700 million to cover any further natural resource damages that are unknown at the time of the agreement, composed of $232 million already set aside and interest accrued on the $8.1 billion natural resource damage payments.

A total of $4.9 billion will be paid over 18 years to settle economic and other claims made by the five Gulf Coast states, and up to $1 billion will be paid to resolve claims made by the local government entities.

BPXP will also shell out $250 million to the federal government for costs of responding to the spill and lost royalties and to resolve a False Claims Act probe, as well as $350 million in previously unreimbursed natural resource damages.

All told, BPXP could pay out as much as $20.8 billion, according to the DOJ. It's the largest pollution judgment in U.S. history.

Environmental Processing Systems LC v. FPL Farming Ltd.

Energy companies seemingly scored a win in February when the Texas Supreme Court unanimously held that landowners have the burden to show they did not consent to a subsurface trespass of wastewater — a higher burden than simply showing a subsurface water migration happened.

However, case watchers say it's a hollow victory because the high court didn't rule on the key issue: whether wastewater that migrates under neighboring land can be considered a trespass.

The Supreme Court reversed a state appeals court ruling that put the burden on Environmental Processing Systems Inc. to show it did get consent from rice farmer FPL Farming Ltd. before water from its underground injection well allegedly migrated into a saltwater pool 7,000 feet below FPL’s property.

But that's as far as it would go, much to the disappointment of both energy companies and landowners, who were hoping the court would decide whether deep subsurface wastewater migration is actionable as a common law trespass in Texas. The high court refused to rehear the decision in May, leaving the door open for future court battles between energy companies that rely on wastewater injection wells for drilling activity and landowners, attorneys say.

“They punted on the issue,” Norton Rose Fulbright partner Brian Boyle said. “Right now, it's unclear whether there's an actual trespass claim. Without the Supreme Court stepping up on that, we have some uncertainty.”

--Additional reporting by Juan Carlos Rodriguez and Jess Davis. Editing by John Quinn and Philip Shea.