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Understanding the Future Shape of U. S. Coal Regulations

Presented by

Bob Simons
Reed Smith LLP
225 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-7294
rsimons@reedsmith.com

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Understanding the Future Shape of the U. S. Coal Industry

Summary

There are three fundamental mechanisms through which to shape the future of U. S. coal regulation, each of which carries distinct advantages and disadvantages in terms of its expediency and effectiveness: (1) legislative, (2) executive/regulatory and (3) judicial (litigation and court appointments). The inter-relationship between these mechanisms has dictated the current state of the regulatory environment. For example, in a 5-4 decision in 2007 (Justice Stevens delivered the opinion of the Court, which Kennedy, Souter, Ginsberg, and Breyer joined. Justice Roberts filed a dissenting opinion in which Scalia, Thomas, and Alito joined), the United States Supreme Court in *Massachusetts v. EPA* addressed an enforcement petition brought by the State of Massachusetts and environmental groups against the Bush Administration EPA under the Clean Air Act ("CAA").

The CAA provides that the Environmental Protection Agency ("EPA") shall, by regulation, prescribe standards applicable to the emission of any air pollutant from any class of new motor vehicles which, in the EPA Administrator's judgment, causes or contributes to air pollution reasonably anticipated to endanger the public health and welfare. The Bush EPA argued that it did not have authority under the CAA to issue mandatory regulations to address climate change. The Court narrowly held that the Bush EPA: had statutory authority under the CAA to regulate emissions of greenhouse gases from new motor vehicles, refused to comply with this clear statutory command, and offered no reasoned explanation for its refusal. Therefore, the Court held the EPA's inaction was "arbitrary, capricious, or otherwise not in accordance with the law." The Court did not decide the question of whether, on remand, the EPA "must make an endangerment finding, or whether policy concerns can inform EPA's actions in the event if makes such a finding." The Court only held that the EPA must ground its reasons for action or inaction in the statute.

By the time the Court issued its opinion, President Obama was elected and his administration's EPA issued broad findings that carbon emissions contribute to air pollution that endangers the public health and welfare. This endangerment finding provided the basis for nearly all of the Obama Administration's EPA climate regulations, including the Carbon Emissions Guidelines for Existing Stationary Sources: Electric Utility Generating Units commonly referred to as the Clean Power Plan ("CPP"). Therefore, *Massachusetts v. EPA* provides an example of the interplay of the legislative, administrative, and judicial application of a statute, and the regulations that may flow from the statute, based on the policies of the Executive branch.

Mechanisms

1. Legislative Action. Legislative Action is the most expedient, efficient, and permanent mechanism through which to shape the future of Coal Regulations in the United States (subject to judicial challenge). Regulators, federal and state, derive their authority from legislative directives. However, under the current political environment, legislative change is unlikely. The following are pro-coal legislative actions or potential actions.

a. Limit EPA's budget to carry out regulations.

b. Actions limiting the power of EPA; See, for example, H.R. 637 and H.R. 958.

i. H.R. 637 - To prevent the EPA from exceeding its statutory authority in ways that were not contemplated by the Congress.

1. Congress finds that "the Environmental Protection Agency has exceeded its statutory authority by promulgating regulations that were not contemplated by Congress in the authorizing language of the statutes enacted by Congress; (2) the Environmental Protection Agency was correct not to classify greenhouse gases as pollutants prior to 2009; (3) no Federal agency has the authority to regulate greenhouse gases under current law; and (4) no attempt to regulate greenhouse gases should be undertaken without further Congressional action."

a. Bill proposes excluding carbon dioxide from definition of "Air Pollutant."

ii. H.R. 958 - Wasteful EPA Programs Elimination Act of 2017.

1. Congress proposes to eliminate the EPA's federal funding in connection with, but not limited to, (i) regulating greenhouse gas emissions from mobile sources, (ii) regulating greenhouse gas emission from fossil fuel-fired electric utility generating units under the CAA, and (iii) the Greenhouse Gas Reporting Program.

c. Actions limiting the scope of the CAA including, but not limited to, excluding "carbon dioxide" from the definition of the term "air pollutant."

d. Actions placing incentives (financial) on building new coal-fired generation, such as those enjoyed by producers of renewal energy (for example, we "get a tax credit if we build a lot of wind farms. They don't make sense without the tax credit." Warren Buffet, 2014). Include "clean coal," that is., low carbon technologies in an infrastructure bill.

2. Executive Action. President Trump's March 28, 2017 Executive Order, "Promoting Energy Independence and Economic Growth, "Section 1(c), 82 Fed Reg. 16, 093 (Mar. 28, 2017).

a. **CPP.** On March 28, 2017 President Trump issued Executive Order 13783, which affirms the "national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." Section 1(b) The Executive Order directs all executive departments and agencies,

including the EPA, to "immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest, or otherwise comply with the law." Section 1 (c). Moreover, the Executive Order specifically directs the EPA to review and initiate reconsideration proceedings to "suspend, revise, or rescind" the CPP, "as appropriate and consistent with the law." Section 4 (a) – (c). Furthermore, on March 28, 2017, the EPA announced its review of the CPP rule and the issued October 10, 2017 notice proposing to repeal the CPP on grounds that it exceeds the EPA's statutory authority in the EPA's interpretation of Section 111 of the CAA. The EPA is considering the scope of any potential new rule under Section 111(d) of the CAA to regulate greenhouse gas emissions from existing electric utility generating units. On December 18, 2017, the Administrator signed an Advance Notice of Proposed Rule Making ("ANPR") soliciting information on systems of emission reduction that are in accord with the legal interpretation that has been proposed by the EPA.

b. **Paris Climate Agreement:** United Nations Framework Convention on Climate Change ("UNFCCC"). Withdrawal from the Paris Agreement/UNFCCC is intellectually consistent with excluding carbon dioxide from the definition of "Pollutant" under the CAA.

   i. The new administration rescinded the Paris Agreement by issuing a new executive order superseding President Obama's executive order, which ratified the Paris Agreement (but with no Congressional approval).

   ii. Paris Agreement withdrawal clause reads: "At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal." See Article 28, Sections 1 and 2.

      a. Under the agreement, to seek withdrawal the new president would need to wait three years after notice of withdrawal and the withdrawal would take effect a year later.

   iii. Canceling UNFCCC: The Paris Agreement also provides that any party that withdraws from the UNFCCC convention will be considered as having withdrawn from the Paris Agreement. See Article 28, Section 3.

a. Withdrawing from the convention would allow the United States to withdraw from the agreement in accordance with the agreement without having to wait four years.

3. Regulatory action. Regulatory actions result from existing legislation. Modifications must be consistent with the underlying legislation. Nevertheless, the new EPA administrator can change the regulatory emphasis, and, in some instances, modify regulations themselves within statutory guidelines. For example:

a. On October 10, 2017, the EPA proposed the repeal of the CPP. Written public comments would be accepted until January 16, 2018 which was recently extended to April 26, 2018. In an interview, EPA Administrator, Scott Pruitt, said that it is a top priority for 2018 to replace CPP and that a new rule would come in 2018 but did not give any details as to what the new rule would contain. The current EPA proposes a change in the legal interpretation as applied to Section 111 (d) of the CAA, on which the CPP was based, to an "interpretation that is consistent with the Act's text, context, structure, purpose and legislative history, as well as with the EPA's historical understanding and exercise of its statutory authority." In issuing the CPP, the Obama Administration's EPA relied on Section 111 (d) of the CAA. The key language requires "standards of performance for any existing source" of certain air pollutants. Section 111 (a) defines this term to mean "the best system of emission reduction the administrator determines has been adequately demonstrated." The proposal to repeal the CPP states that the current CPP was premised on a novel and expansive view of agency authority that the current administration now proposes to determine is inconsistent with the CAA. Traditionally, EPA rules used under Section 111 of the CAA were based on measures that could be applied to, for and at a particular facility, also referred to as "inside the fence line" measures. The proposed rule would return the EPA's actions to its understanding of the "best system of emission reduction" for a source that should be based only on measures applied to that source and not industry wide. The EPA estimates repealing the CPP could lead to a $33 billion dollars in avoided compliance costs in 2030.

b. In addition, on December 18, 2017, the EPA's Advance Notice of Proposed Rule Making ("ANPRM") solicited information from the public about a potential future rulemaking to limit greenhouse gas emissions from existing utility generating units (namely, power plants). The ANPRM is a separate, but related, action to the proposal to repeal CPP. EPA Administrator Pruitt stated that these actions will combine to create a clean slate and allow regulatory certainty moving forward.

c. New Source Review ("NSR"). A permitting process created by Congress in 1977 as a part of a series of amendments to the CAA. The EPA put the NSR process in place in 1980 to apply to stationary sources of pollution.

The program requires any new or modified power plan to seek a pre-construction permit to ensure that modern environmental controls are in place for either building new facilities or any modifications to existing facilities that would have a "significant increase" (which was never defined) of a regulated pollutant. Much debate has been had over what kinds of projects trigger the need for an NSR permit.

i. Executive Order 13783 directed the EPA to undertake a process of review and reconsideration with regard to the NSR Rule used under CAA Section 111(b), which was a condition precedent to the promulgation of the CPP.

ii. In a December 7, 2017 memo to regional administrators, EPA Administrator Pruitt stated the EPA will no longer "substitute its judgment for that of the owner or operator by 'second guessing' the owner or operator's emissions projections." Administrator Pruitt announced that William Wehrum, confirmed to lead the Office of Air Radiation, will head up a task force on NSR.

d. Department of Energy's ("DOE") Grid Study. The DOE's grid reliability study identified environmental regulation as the reason behind baseload generation retirements. In the grid study, the DOE said that under NSR utilities have to walk a fine line between projects that are considered routine maintenance and major renovations the latter of which would subject the facility the stringent emission requirements. "The uncertainty stemming from NSR creates an unnecessary burden that discourages installation of CO_2 emission control equipment and investments in efficiency because of the additional expenditures and delays associated with the permitting process". According the DOE report, this uncertainty stalls projects that could lead to more efficient power generation, benefit grid management and reduce the environmental impact of power plants. In a June 2002 Report the EPA acknowledged "such discouragement results in lost capacity, as well as lost opportunities to improve energy efficiency and reduce pollution."

e. Reformulate the Title V permit approval process to encourage new coal-fired plants.

f. The federal coal combustion residuals ("CCRs") rule and some of the state laws, such as North Carolina's, that deal with CCRs. Regardless of what happens with the regulation of air emissions made by coal-fired generation, these rules will remain. They are part of the status quo and present a cost for the development of any new coal-fired generation.

g. Overturn/withdraw/modify the endangerment finding. The Court's decision in *Massachusetts v. EP*A held that GHG is a pollutant under the CAA that can be regulated. The case resulted from litigation, a rule

making petition, brought by environmental advocacy groups against the EPA under the Bush Administration for allegedly failing to regulate under the CAA for GHG emissions. The Court found that the Bush EPA rejected the rule making petition based on impermissible considerations. The Court held that the EPA's action was therefore arbitrary, capricious and otherwise not in accordance with the law. Further, if scientific uncertainty is so profound that it precludes the EPA from making a reasoned judgment, the EPA must say so. The statutory question is whether sufficient information exists for it to make an endangerment finding. The Court remanded the case so that the EPA could ground its reasons for action or inaction under the CAA. The Court did not decide the question of whether, on remand, the EPA "must make an endangerment finding, or whether policy concerns can inform the EPA's actions in the event it makes such a finding." As result of this opinion, in 2009, the Obama Administration EPA administrator made an endangerment finding that greenhouse gases threaten the public health and welfare.

i. The Obama Administration EPA's "endangerment finding" provided the legal foundation for the EPA's subsequent carbon regulations, including CPP. The endangerment finding concluded that carbon dioxide emissions are "toxic" and that global warming is causing measurable amounts of sea-level rise, increased hurricane numbers or intensity, the spread of diseases, or other harms directly attributable to carbon dioxide emissions in the United States.

ii. Scott Pruitt, as the new EPA Administrator, may revisit the endangerment finding, and amend or retract the finding as it pertains to carbon dioxide.

1. In order to retract the finding, the Pruitt EPA would arguably need to charge EPA to demonstrate, through independent, validated scientific research, that carbon dioxide emissions are not "toxic," or that global warming is not causing measurable amounts of sea-level rise, increased hurricane numbers or intensity, the spread of diseases, or other harms directly attributable to carbon dioxide emissions in the United States. Arguably, if the EPA cannot directly link such problems to U.S. carbon dioxide emissions or cannot show such problems can be dramatically reduced by cutting U.S. carbon dioxide emissions, then EPA could withdraw the endangerment finding.

a. Experts believe any attempt to roll back climate regulations will face legal challenges,

"endangerment reversal would be especially vulnerable." This is argument is based on the various climate change opinions.

b. For example, a climate change analysis by the Intergovernmental Panel on Climate Change ("IPCC"), organized under the United Nations, concluded emissions from human activities substantially increased the atmospheric concentrations of greenhouse gases which were believed to enhance the greenhouse effect, resulting in an additional warming of the earth's surface. This was the basis for the UNFCCC signed by George H. W. Bush and ratified by the Senate. Five years later in 1995 the IPCC issued a second comprehensive report concluding that "the balance of evidence suggests there is a discernable human influence on global climate." The signatories of the report met in Kyto, Japan and adopted a protocol that assigned mandatory targets for industrialized nations to reduce greenhouse gas emissions. Because the targets did not apply to developing and heavily pollution nations such as China and India, the Senate passed a resolution that the U. S. should not enter into the Kyoto protocol. President Clinton did not submit the protocol to the Senate for ratification.

iii. Critics of the endangerment finding say that it was the product of a rush to judgment because much of the data upon which it was based was already dated by the time of its publication. In addition, computer climate models predicted far more warming that what actually occurred. Generally, new scientific research is said to have put the endangerment finding into question.

iv. Trump Administration EPA Administrator Pruitt has suggested a "red team" "blue team" debate among scientists as to the cause and effect of GHG. This could start the scientific analysis to provide a basis to withdraw the endangerment finding.

v. If CPP is withdrawn a replacement is arguably necessary because the *Massachusetts v. EPA* Court held that the Bush Administration's EPA's refusal to provide certain regulations for the CAA was arbitrary, capricious and otherwise not in accordance with the law. Therefore, if the CPP is totally withdrawn and not replaced with some level of regulation future litigation may result in another arbitrary and capricious ruling. There is also an

argument that if the Trump EPA successfully finalizes a CPP replacement that is upheld by the courts, there would be no opportunity for a new administration to redo the rule because CAA Section 111 (d) will have established a standard for existing sources. The EPA can refocus the CPP on emission reduction systems within the fence lines of power plants, which would effectively undermine the CPP without addressing the scientific record.

vi. Another approach is to demonstrate that "pollutants" can be dramatically reduced by cutting U.S. carbon dioxide emissions. This may be accomplished by low carbon technologies also known as "clean coal" technology. The development of these technologies may require the same subsidies enjoyed by the renewable industry (for example, we "get a tax credit if we build a lot of wind farms. They don't make sense without the tax credit." Warren Buffett, 2014). Low Carbon technology projects such as Carbon Capture and Sequestration ("CCS") could be considered as a part of infrastructure legislation.

h. **Grid Reliability FERC Rule.** In a unanimous order issued on January 8, 2018, the FERC (or "Commission") ended further consideration of the DOE's Notice of Proposed Rulemaking on Grid Reliability and Resilience Pricing ("NOPR") in Docket No. RM18-1-000. Nonetheless, the Commission pledged to continue its inquiry into grid resiliency, albeit on different terms than previously set out in the NOPR.

i. In September 2017, the DOE directed the Commission to consider modifications to pricing structures in Regional Transmission Organizations ("RTO") and Independent System Operators (ISOs) administered wholesale electricity markets in order to bolster electrical generation sources that are capable of maintaining ninety (90) days of fuel onsite, a strategy purportedly designed to improve grid resilience. The fuel supply requirements tended to favor coal-fired and nuclear generation facilities.

ii. The Commission held that it did not have a sufficient record to justify adopting the NOPR's resiliency proposals. Under Section 206 of the Federal Power Act ("FPA"), proponents of the NOPR had the dual burden of first demonstrating that the existing pricing structures utilized in RTOs and ISOs across the country are unjust and unreasonable, and second that the DOE NOPR's proposals are a just and reasonable alternative.

iii. The Commission concluded that record did not show that the existing RTO and ISO tariffs are unjust, unreasonable, unduly

discriminatory or preferential, nor did it demonstrate that the NOPR's recommended remedy was just, reasonable, and not unduly discriminatory or preferential. The Commission found that the NOPR's advocates failed to meet their burden under Section 206 of the FPA and, therefore, terminated the rulemaking docket that had been initiated to consider the NOPR.

iv. The Commission simultaneously opened a new proceeding in Docket No. AD18-7-000 "to examine holistically the resilience of the bulk power system" in regions of the country operated by RTOs and ISOs.

v. Recognizing that "resilience remains an important issue," the Commission intends to develop a clearer understanding of what RTOs and ISOs currently do to assure or strengthen grid resiliency. To that end, the Commission's refined resiliency analysis will: (1) develop a common understanding of what resilience of the bulk power system means and requires; (2) determine how RTOs and ISOs assess resilience in their respective regions; and (3) use this information to evaluate whether additional Commission action regarding resilience is necessary.

vi. The Commission proposes to define "grid resiliency" as: "The ability to withstand and reduce the magnitude and/or duration of disruptive events, which includes the capability to anticipate, absorb, adapt to, and/or rapidly recover from such an event." By providing a preliminary definition, the Commission established an important baseline to begin a methodical and comprehensive debate over the issue of grid resiliency. Indeed, grid resiliency encompasses more than an evaluation of generator availability. Commissioner Glick observed, "if a threat to grid resilience exists, the threat lies mostly with the transmission and distribution systems, where virtually all significant disruptions occur."

vii. Reiterating its support for competitive wholesale electricity markets and market-based solutions, the Commission focused its new grid resiliency review on RTOs and ISOs.

viii. The Commission directed RTOs and ISOs to submit detailed information explaining (1) how they assess threats to grid resilience in their respective regions, and (2) how they mitigate those threats. The order provides a series of detailed questions that require RTOs and ISOs to further elaborate on these two core questions.

ix. RTOs and ISOs must submit their responses within sixty (60) days of the issuance of the order. Additionally, the Commission invited other interested entities to submit reply comments within thirty (30) days of the due date of the RTO/ISO submissions.

4. **Judicial action and court appointments.**

a. In *Massachusetts v. EPA*, a 5-4 decision, the Supreme Court's holding was narrow and technically only addressed the definition of "pollutant" under Title II of the CAA. It can be argued that the Supreme Court did not define "pollutant" under Titles I, III and V therefore there is an opportunity to limit *Massachusetts v EPA* to its facts under Title II. One option (perhaps the best option) is to bring up another case to the Supreme Court that limits *Massachusetts v. EPA* to its facts. By limiting the application of *Massachusetts v. EP*A to clean air act title II (mobile sources) and get a Supreme Court decision that says with regard to title III (stationary source - power plants etc.) the definition of "pollutant" does not include GHG. The CAA litigation - a title III case - could be that case. There is precedent under the CAA for definitions having different meanings under different titles/Sections. There is an argument *Massachusetts v. EPA* did not require the agency to change its position; it only required the agency to demonstrate that whatever it chooses to do complies with the CAA.

b. Status of Pending Judicial Challenge to Current CPP in *State of West Virginia v. EPA*. The EPA filed a status report on January 10, 2018 pursuant to the Court's August 8, 2017 Order holding the appeal in abeyance (rather than remanding the consolidated cases to the agency) and Order requiring the EPA to file a status report every 30 days. The Report referred to the President's March 28, 2017 Executive Order, "Promoting Energy Independence and Economic Growth," Section 1 (c), 82 Fed Reg. 16, 093 (March 28, 2017). The EPA further referred to the EPA's notice on March 28, 2017 announcing EPA's review of the CPP rule and the October 10, 2017 notice proposing to repeal the CPP on grounds that it exceeds EPA's statutory authority under a proposed change in the EPA's interpretation of Section 111 of the CAA. The report states the EPA is considering the scope of any potential new rule under Section 111 (d) of the CAA to regulate greenhouse gas emissions from existing electric utility generating unties. On December 18, 2017, the Administrator signed an ANPR soliciting information on systems of emission reduction that are in accord with the legal interpretation that has been proposed by the EPA. The EPA extended the public comment deadline until April 26, 2018. The EPA requested that the Court continue to hold the case in abeyance. On January 17, 2008, several states, local governments and environmental groups asked the D.C. Circuit to restart litigation over the

validity of the CPP, saying that the EPA's request to keep the case in suspended animation is not justified.

c. Court appointments of judges who are less deferential to an administrative agency's interpretation and application of a statute is necessary to make regulatory rollbacks based on strict application of a statute under the Trump administration more permanent. For example, prior to his appointment to the Supreme Court, Neil Gorsuch was a critic of the "Chevron Deference," which provided the courts should defer to the agency's interpretation of an ambiguous statute. The application of the Chevron Deference was in play in *Michigan v. EPA*:

i. *Michigan v. EPA*:

a. Decision has implications for the Obama EPA's ability to regulate hazardous air pollution emissions going forward and on future EPA rule making authority more generally.

b. In a 5-4 decision the Court reversed a D.C. Circuit decision which upheld the EPA Mercury and Air Toxic Standards Rule ("MATS") setting limits on mercury, arsenic and acid gas emissions from coal-fired power plants. Justice Scalia delivered the opinion of the Court, in which Roberts, Kennedy, Thomas and Alito joined. Justice Kagan filed a dissenting opinion in which Ginsburg, Breyer and Sotomayor joined.

c. Court found that the Obama EPA needed to consider costs at the outset of deciding whether regulate pollutants. Commentators also suggest the opinion represents a further shift away from providing broad deference to EPA rule making decisions.

d. The EPA is authorized under the CAA to regulate emissions of hazardous air pollutants from certain stationary sources, such as power plants. 42 U.S. C. Section 7412.

e. Fossil fuel-fired power plants may be regulated only if the EPA first "preform[s] a study of the hazards to public health reasonably anticipated to occur as a result of emissions by [power plants] of [hazardous pollutants] after imposition of the requirements imposed by law. 42 U.S. C. 7412(n)(1)(A). If the EPA "finds [the] regulation is appropriate and necessary after considering the results of

the study" it shall regulate [power plants] under Section 7412.

f. The Obama EPA concluded that the regulation of coal-fired and oil fired power plants was "appropriate and necessary" but did not consider costs as part of the statutory analysis. The EPA's impact analysis for MATS estimated a cost of $9.6 billion per year and an estimated benefit of $4 million $6 million per year. Industry groups and over 20 states sought D.C. Circuit review by challenging the EPA's refusal to consider costs in the "appropriate and necessary" analysis. The D. C. circuit upheld the EPA's decision not to consider cost.

g. Upon appeal of the D.C. Circuit opinion, the majority of the Court reviewed the EPA's decision not to consider costs at the inception of the MATS rule as "appropriate and necessary" under precedent established in *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984) which directs the Court to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers.

h. The Court stated that even under the Chevron deferential standard "agencies must operate within the bounds of reasonable interpretation." The Court found that the EPA "must consider cost – including, most importantly, cost of compliance – before deciding whether regulation is appropriate and necessary." As a result, the Court reversed the D.C. Circuit and remanded the case for further proceedings.

i. In his concurring opinion, Justice Thomas wrote that the EPA's "request for deference raises serious questions about the Court's broader practice of deferring to agency interpretations of federal statutes under Chevron."

j. The dissent, written by Justice Kagan, stated that the "EPA's power plant regulation would be unreasonable if the agency gave cost no thought at all" and that cost is almost always relevant – and usually, highly important – factor in regulation" but did not agree that costs must be considered at the first stage of regulation under Section 7412.

k. Commentators have written that the decision can be read as a continuation of the trend away from deference to agency statutory interpretations.

l. The MATS rule will remain in effect while on remand to the D. C. Circuit. If the D. C Circuit vacates the MATS rule the EPA will have to start the regulatory process from scratch. The court could also remand the rule to the EPA for considerations of costs and to otherwise keep the rule in effect. The timing of the decision will impact power plant units that have an April 2016 compliance date with resulting capital expenditure savings. For those units already in compliance, capital costs have already been incurred or required shut downs have already taken place. If the court stays or vacates the MATS rule, these units will need to consider the effects of any relevant permit conditions on their actions going forward.

5. State Powers

a. The FPA vests in the FERC, the exclusive jurisdiction over wholesale sales of electricity in the interstate market. FERC's regulatory scheme includes an auction-based market mechanism to ensure wholesale rates that are "right and just".

b. But the law places beyond FERC's power, and leaves to the States alone, the regulation of "any other sale – most notably, any other retail sale – of electricity." The States reserved authority includes control over in-state "facilities used for the generation of electric energy".

c. The United States Supreme Court in *Hughes v. Talen Energy Marketing* (2016) addressed a regulatory program enacted in Maryland to provide subsidies through state-mandated contracts, to a new generator, but conditioned the receipt of those subsidies on the new generator selling capacity into a FERC regulated wholesale auction.

d. The Court stated that "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate whole sale prices, as Maryland has done here. Providing supplemental capacity payments effectively set the capacity price, which was precluded by the FPA and FERC's regulatory policies; "[b]y adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf."

e. The Court stated its holding was limited: they rejected Maryland's program only because it disregards an interstate wholesale rate required by FERC. The Court did not address "the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector," so long as the measure "is untethered to a generator's wholesale market participation."

f. The challenge is to develop a mechanism for increasing the revenue stream to coal plant operators to support low-carbon technology, without running afoul of the FPA and the Supremacy Clause

Other Considerations

The above analysis is only to outline certain options that may be taken to reduce or eliminate regulations detrimental to the coal industry. The goal should also be to prevent the premature retirement of coal-fired power plants and approaching that issue through any of the above outlined mechanisms may not provide a timely solution. Other legal and non-legal solutions to maintain the full life of existing coal-fired power plants and provide justification for new coal-fired plants is needed.

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Robert P. Simons

Partner

Bob has more than 35 years of experience in resolving commercial disputes, litigation, bankruptcies, and restructuring matters and recently received a life time achievement award from the Turnaround Management Association for his extraordinary contributions to the corporate restructuring industry. He is a member of Reed Smith's Business & Finance Department and leads the firm's Coal Industry Team. His national practice has included appearances in more than 25 jurisdictions throughout the United States in energy (coal, oil and gas) , aviation, hospitality, telecommunications, automotive, steel, and health care industry cases, which have resulted in extensive knowledge of state and federal regulatory agencies such as the MSHA, Federal Aviation Administration, the Pension Benefit Guaranty Corporation, the FCC and environmental agencies.

Bob has recently advised on state legislation in mine safety, environmental, severance tax and other areas. He has also represented coal companies in various litigation matters including an action under the NLRA against the UMWA, breach of contract actions and arbitration matters. Bob has also represented energy suppliers as a non-debtor parties to executory contracts , unexpired leases , reclamation claims and other claims against bankruptcy debtors .

Other cases include representing buyers in bankruptcy Section 363 sales and secured and unsecured creditors in bankruptcy cases. In addition, he served bankruptcy counsel in the mass tort chapter 11 case involving former producers of asbestos products. He routinely represents companies in commercial transactions.

Bob has written on bankruptcy and creditors' rights topics for various trade and legal publications, including *West's Publishing, The Journal of Commercial Bank Lending, The American Bankruptcy Law Journal, Norton's Annual Survey of Bankruptcy Law, The Bankruptcy Strategist* and the *Journal of Bankruptcy Law and Practice*.

Bob has served as Chairperson for 2016 Platts 24th Annual Coal Properties and Investment Conference, the 2016 Platts 39th Annual Coal Marketing Days Conference and the 2017 Platts 40th Annual Coal Marketing Days Conference. He is a frequent lecturer on such legal topics as energy, officer and director liability, telecommunications, aviation, intellectual property, environmental,

Pittsburgh
+1 412 288 7294

rsimons@reedsmith.com

Education

West Virginia University College of Law, 1982, J.D., Member of the *Law Review*; Served on the *Law Review* Editorial Board and as Lead Articles Editor for *The Journal of College and University Law*

Concord University, 1977, B.S.

Court Admissions

U.S. Supreme Court

U.S. Court of Appeals - Third Circuit

U.S. Court of Appeals - Ninth Circuit

All State and Federal Courts - Ohio

All State and Federal Courts - Pennsylvania

All State and Federal Courts - West Virginia

U.S. District Court - Northern District of Illinois

U.S. District Court - Southern District of New York

U.S. Bankruptcy Court - Northern District of Illinois

U.S. Bankruptcy Court - Southern District of New York

State Supreme Court - Pennsylvania

State Supreme Court - West Virginia

State Supreme Court - Ohio

State Supreme Court - New York

Professional Admissions

New York

Ohio

Pennsylvania

West Virginia

health care, real estate and bankruptcy issues. In this regard, he has made presentations nationwide for trade groups, lawyers, and students, including for the National Conference of Bankruptcy Judges, the Third Circuit Judicial Conference, the International Bar Association, the American Bankruptcy Institute, the National Association of Credit Management, the American Bar Association, the Commercial Law League, the Pennsylvania Bar Institute, and the National Business Institute.

Representative Matters

- Represented plaintiff in Consolidation Coal Company v. U.M.W.A (N. Dist. of W. Va.) in NLRA issue..
- Represented PNC Equipment Finance as sale/lease- back lessor in Tidewater bankruptcy case (Bankr. D. Del.)
- Represented PNC Bank as plaintiff in fraudulent transfer action and in several breach of contract actions in Pennsylvania, Ohio and Illinois.
- Represented mortgagee, BlackRock, in Shubh Hotels (f/k/a Pittsburgh Hilton) bankruptcy case (a 700-room hotel).
- Represented secured lender in Max & Erma's bankruptcy case (a 70-restaurant regional chain).
- Represented debtor in a large, complex asbestos-driven bankruptcy, negotiating large contributions from prior owners of these companies and from insurance companies to fund the asbestos trusts that enable an exit from bankruptcy.
- Represented secured lender in multiple direct and participated loans, including position financings, to a single borrower engaged in the business of selling aircraft in the international market. Coordinated the orderly liquidation of the aircraft collateral consisting of most types of aircraft including long range aircraft. Representation required extensive interaction with aviation regulatory agencies.
- Represented secured lender in the wind down of an international aircraft finance portfolio consisting of over 100 loans with exposure exceeding $ 2 billion.
- Represented equipment leasing groups of national banks as owner participants, lenders and trustees in leverage lease transactions in the Delta and American Airlines Bankruptcy cases with exposure totalling $30 million.

Honors and Awards

- Listed in *The Best Lawyers in America* in the areas of Bankruptcy and Creditor-Debtor Rights/Insolvency and Reorganization Law (2011-2017)
- Listed in *Corporate Counsel's Top Lawyers* in the area of Bankruptcy and Creditor-Debtor Rights Law
- Selected for inclusion in *Pennsylvania Super Lawyers* (2014-2015); also included in *Super Lawyers Business Edition* in the area of Bankruptcy/Business

Publications

- 12 October 2015 "'Operating Interests ,' 'Working Interests ,' 'Product ion Payments ' and 'Overriding Royalty Interests ' – How Do These Interests Fit Within 'Property of a Debtor's Estate' Under the Bankruptcy Code?" *Commercial Restructuring & Bankruptcy Alert*; Co-Authors: Alison Wickizer Toepp, Brian M. Schenker, Christopher O. Rivas, Chrystal Puleo Mauro, Derek J. Baker, Estelle Macleod, Jared S. Roach, Marsha A. Houston, Peter S. Clark
- June 2015 "'Operating Interests,' 'Working Interests,' 'Production Payments' and 'Overriding Royalty Interests' – How do These Interests Fit Within 'Property of a Debtor's Estate' Under the Bankruptcy Code?" *The Bankruptcy Strategist, Law Journal Newsletters*
- 23 March 2015 "Third Circuit refuses to permit Debtor Lessor to Reject an Oil and Gas Lease" *Reed Smith Client Alerts*
- 4 February 2015 "Oil Price Decline: Positioning for Turnaround or Sale" *Global Restructuring Watch*
- 3 February 2015 "Oil Price Decline: Positioning for Turnaround or Sale" *Reed Smith Client Alerts*
- 2015 "Conversion of a Chapter 11 Case to a Liquidation Under Chapter 7 or Structured Dismissal: The Debate Continues" *Inside the Minds: Chapter 7 Commercial Bankruptcy Strategies (2015-2016 ed.), by Aspatore Books*
- 2015 "Year 2015: A Battle for Equity Players and a War for Energy Companies Producing Fossil Fuels" *Bankruptcy and Financial Restructuring Law (2015 ed.), by Aspatore Books*

- June 2012 "Supreme Court Upholds Secured Creditor's Right to Credit Bid in a Bankruptcy Case"
  Commercial Restructuring & Bankruptcy Alert; Co-Authors: Ann E. Pille, Brian M. Schenker, Christopher O. Rivas, Georgia M. Quenby, Jared S. Roach, Peter S. Clark, Stephen T. Bobo
- 4 June 2012 "Supreme Court Upholds Secured Creditor's Right to Credit Bid in a Bankruptcy Case"
  Reed Smith Client Alerts
- December 2011 "What Anna Nicole Smith's Bankruptcy Case May Mean to Credit Managers Everywhere; FDIC Treatment of Creditor Claims Under Orderly Liquidation Process"
  Commercial Restructuring & Bankruptcy Alert; Co-Authors: Ann E. Pille, Brian M. Schenker, Christopher O. Rivas, Elizabeth A. McGovern, Jared S. Roach, Luke A. Sizemore, Peter S. Clark, Victoria Thompson
- 25 October 2011 "FDIC Treatment of Creditor Claims Under Orderly Liquidation Process"
  BNA's Banking Report (97 BNKR 723); Co-Author: Luke A. Sizemore
- 17 May 2011 "How to Get Your Slice of the Dodd-Frank Liquidation Pie"
  Reed Smith Client Alerts; Co-Author: Luke A. Sizemore
- 7 September 2007 "Recent Repo Developments - The Risk of Leaving Anything in the Seller's Possession"
  Commercial Restructuring & Bankruptcy Alert; Co-Authors: Elizabeth A. McGovern, Peter S. Clark
- 24 August 2007
  Legal Update
- 22 September 2005 "The Effects of the New Bankruptcy Amendments on the Health Care"
  Commercial Restructuring & Bankruptcy Alert; Co-Author: Peter S. Muñoz

Speaking Engagements

- 26-27 September 2017 40th Annual Coal Marketing Days Conference, Pittsburgh, Pennsylvania
- 25 April 2017 Latest Trends in Corporate Restructuring and Bankruptcy, Pittsburgh, Pennsylvania
- 15 November 2016 2017 Coal Industry Outlook
- 21-22 March 2016 Platts' 24th Annual Coal Properties & Investment Conference, Fort Lauderdale, Florida
- 28-29 October 2015 Turnaround Management Association's Pittsburgh Energy Summit, Pittsburgh, Pennsylvania
  "Bank Restructuring Challenges for the Energy Market"
- 17 March 2015 Reed Smith University, Pittsburgh, Pennsylvania
  "Contingency Planning in the Distressed Energy Market: Legal Considerations Involving a Shutdown, Restructuring, Acquisition or Bankruptcy Filing"
- 14 January 2015 Reed Smith Teleseminar Series: The Coal Industry – A New Reality
  "2015 Coal Industry Outlook: The Export Market"
- 5 December 2014 Allegheny County Bar Association's 27th Annual Bankruptcy Symposium, Pittsburgh, Pennsylvania
  "Business Development – Bankruptcy Filings in the Energy Sector"
- 15 October 2014 Reed Smith Teleseminar Series: The Coal Industry – A New Reality
  "Litigation Trends in the Energy Industry"
- 11 June 2014 Reed Smith Teleseminar Series: The Coal Industry - A New Reality
  "Legacy Liabilities: Related Restructuring and Bankruptcy Issues Part 2"
- 13 May 2014 Reed Smith Teleseminar Series: The Coal Industry – A New Reality
  "Legacy Liabilities: Related Restructuring and Bankruptcy Issues"
- 4 March 2014 Reed Smith Teleseminar Series: The Coal Industry – A New Reality
  "Coal Industry Survival Guide"
- 22 February 2013 Pennsylvania Association of Credit Management's Bankruptcy Seminar, Pittsburgh, Pennsylvania
  "Recent Legal Developments in Bankruptcy and Creditors Rights"
- 9 November 2012 National Business Institute, Pittsburgh, Pennsylvania
  "Bankruptcy Litigation 101"
- 12 September 2012 Pennsylvania Bar Institute's 17th Annual Bankruptcy Institute, Pittsburgh, Pennsylvania
  "Stern v. Marshal: Have We Figured Out What It Means?"
- 10 February 2011 National Business Aviation Association, Delray Beach, Florida
  "Aircraft Registration Conference"

- 14 November 2008 Pennsylvania Association of Credit Management's Bankruptcy Seminar, Pittsburgh, Pennsylvania
  "What Credit Managers Need To Know For the Coming Wave of Bankruptcies"
- 11 November 2008 Commercial Law League of America, in conjunction with the National Conference of Bankruptcy Judges, "The Impact of the Subprime Meltdown", Phoenix, Arizona
- 27 February 2008 Reed Smith's "Bankruptcy and Insolvency: The Ripple Effect of the Home Loan and Sub-prime Meltdown" Teleseminar, United States of America
- 7 May 2006 International Bar Association's Insolvency Conference: Restructuring Among the Ruins, Athens, Greece
  "Who pays the ferryman?"
- 13 November 2003 Reed Smith University, Pittsburgh, United States of America
  "Insolvency and Energy: Imperfect Together"

In the News

- "Restructuring of energy loans likely, experts say," *Pittsburgh Tribune-Review*, 30 October 2015
- "Ch. 11 No Easy Way Out For Bankrupt Coal Cos.," by Keith Goldberg, *Law360*, 5 August 2015
- "Criminal charges raise questions about funds in Freedom bankruptcy," by Ken Ward Jr., *wvgazette.com*, 10 December 2014
- "W.Va. chem spill co. paid $6M to related parties," *Observer-Reporter*, 19 February 2014

Clerkships

- Honorable Edwin F. Flowers, U.S. Bankruptcy Court - Southern District of West Virginia

Professional and Community Affiliations

- American Bankruptcy Institute
- American Bar Association's Business Bankruptcy Committee – past Chair, Technology Oriented Bankruptcies, the Intellectual Property Task Force, and the Tax and Federal Claims Subcommittees
- Board of Directors for the Passavant Memorial Homes Family of Services
- International Bar Association
- Mediation Panel - Western District of Pennsylvania
- New York Bar Association
- Ohio Bar Association
- Pennsylvania Bar Association
- West Virginia Bar Association