SQUIRE PATTON BOGGS

COURT VACATES US EPA'S 100-HOUR EMERGENCY DEMAND RESPONSE EXEMPTIONS

On May 1, 2015, the United States Court of Appeals for the DC Circuit vacated the US Environmental Protection Agency's (EPA) emission standard exemptions for emergency reciprocating internal combustion engines that operate up to 100 hours a year for "emergency demand response." *Delaware Dep't of Nat. Resources & Envtl. Control v. EPA*, No. 13-1093 (May 1, 2015). The exemption allowed emergency backup generators to operate 100 hours a year when either a Level 2 Energy Emergency Alert is declared or there is a 5% drop in voltage or frequency below standard levels. 78 Fed. Reg. 6,674, 6,705 (Jan. 20, 2013).

The 100-hour exemption for demand response programs was adopted in 2013, and was an expansion of the 2010 rule that had allowed only 15 hours of generation for this purpose. Slip at 6. Commenters objected to EPA's decision to expand the exemption because they contended it would cause a shift in electricity production from traditional generation to backup generation in a self-reinforcing loop that would reduce efficiency and threaten reliability. Slip at 21–23. The court found that EPA "offered wan responses to these comments" and failed to address commenters' concerns over "the perverse effect" they claimed the 100-hour exemption would have on reliability and efficiency. Slip at 23. The court held EPA's failure to respond to "serious objections" rendered the rulemaking arbitrary and capricious. Slip at 24–25.

The court further found that EPA relied on "faulty evidence" in its rulemaking. Slip at 21. EPA had continued to rely on PJM's Emergency Load Response Program as a justification for the expanded exemption, even after PJM and others clarified during the rulemaking that EPA's assumptions about the program were incorrect. EPA claimed the program required generators to be available for a minimum of 60 hours per year, when in fact this minimum hour requirement could be met by aggregating engines and did not apply to engines individually. Slip at 25-26. The court held that EPA's failure to address this mistake also rendered the rulemaking "arbitrary and capricious." Slip at 26.

The court went on to find that "EPA too cavalierly sidestepped its responsibility to address reasonable alternatives" of limiting the 100-hour exemption to areas not served by organized capacity markets. Slip at 28. The court found EPA failed to "address why a more limited rule would not achieve the same outcome without posing risks to organized energy markets." Slip at 28.

To remedy the arbitrary and capricious aspects of EPA's rulemaking, the court "reverse[d] the challenged rules that contain the 100-hour exemption for emergency engines under the National Emissions Standards, 40 C.F.R. § 63.6640(f)(2), and the Performance Standards, 40 C.F.R. §§ 60.4211(f)(2), 60.4243(d)(2)" and "remand[ed] them to EPA for further action."[1] Meanwhile, the court ordered that the "rest of the 2013 Rule remains in effect." This leaves in place 40 C.F.R. §§ 63.6640(f)(1), 60.4211(f)(1), and 60.4243(d)(1), which allow emergency generators to operate for an unlimited number of hours in emergency situations. The opinion also leaves in place 40 C.F.R. §§ 63.6640(f)(3)-(4), 60.4211(f)(3), and 60.4243(d)(3), which allow emergency generators to operate up to 50 hours per year for non-emergency purposes so long as the engine is not used for peak shaving, non-emergency demand response, or as part of a financial arrangement with another entity.[2]

Per the usual practice in the DC Circuit, the court's ruling is automatically stayed and has no legal force until EPA and the parties have an opportunity to request that the case be reheard. In the meantime, the court also invited EPA and the parties to move to delay the legal force of the vacatur based on any administrative or other difficulties it causes. Slip at 30.

Contacts

Katy M. Franz
T +1 216 479 8368
E katy.franz@squirepb.com

Robert D. Cheren
T +1 216 479 8026
E bobby.cheren@squirepb.com

[1] This creates some uncertainty for the fate of 40 C.F.R. §§ 63.6640(f)(2)(i) 60.4211(f)(2)(i), and 60.4243(d)(2)(i), which address maintenance and readiness testing. The allowance for maintenance and readiness testing was never challenged by the petitioners in this case and was not addressed by the court. However, these provisions are part of the "rules that contain the 100-hour exemption for emergency engines," and the court vacated the entire provision without making an express allowance for the maintenance and readiness testing portions. This may be an area that requires clarification from the court or EPA. In the meantime, the provision allowing 50 hours of general non-emergency operation has not been vacated. See 40 C.F.R. §§ 63.6640(f)(3)-(4),60.4211(f)(3), 60.4243(d)(3).

[2] Using the engines to supply power as part of a financial arrangement with another entity is permitted in special circumstances for some units. See 40 C.F.R. §§ 63.6640(f)(4), 60.4211(f)(3), 60.4243(d)(3).

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