



Transcript of CleanLaw Episode 2: Joe Goffman speaks with Ari Peskoe about the leaked DOE memo, June 2, 2018

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Robin Just: Welcome to this podcast from the Environmental and Energy Law Program at Harvard Law School. Today, Joe Goffman, our executive director and Ari Peskoe, the director of our Electricity Law Initiative are talking about the recently leaked DOE memo supporting coal and nuclear power. We hope you enjoy the podcast.

Joe Goffman: Hello, Ari.

Ari Peskoe: Hey, Joe.

Joe: I'm glad we're able to do this at relatively short notice, because just a couple of days ago Bloomberg News published a draft memo that one of its reporters apparently got her hands on, laying out the case, I guess for a potential administrative directive compelling the purchase of coal and nuclear generated electricity. It's not clear what that memo portends, but it's certainly gotten a lot of attention. This might be good opportunity to try to figure out what's going on and what it might mean.

Ari: Yeah, the leaked memo or the leaked document is an addendum to a draft Department of Energy directive, and the addendum purports to justify with facts and legal background, the directive's action. Unfortunately, no one has leaked the directive itself, so all that we know about the potential action is in just is sprinkled here and there really just hinted at in the addendum that was leaked.

Ari: It's also important to keep in mind that the Department of Energy hasn't actually issued this yet, and so we don't know if it ever will, but it is sort of this most recent step on this long winding path the administration has been on to provide some support for ailing coal and nuclear plants. This is now more than a year long process that Rick Perry himself kicked off by ordering his staff to conduct a study. That study was released back in August, which in the study itself didn't really support the need for any sort of bailout for coal and nuclear units.

Ari: Then the Department of Energy proposed a rule at FERC that would have provided special rates for these plants and that didn't work out. Then First Energy, one of the owners of these coal nuclear plants requested an emergency action by DOE. DOE didn't grant that, hasn't done anything on that. Now we see this memo, which again is this most recent step in this long journey that we're all on.



Joe: I'm tempted to describe it as a journey to nowhere, but perhaps that's wishful thinking. Let's take a couple of steps back. Within the first 24 hours of the release of this memo by Bloomberg News, a lot of stakeholders and interested parties and the press reacted as if this were an inevitability that would come to fruition in a very short period of time. Since then, reports have been that there is uncertainty as to whether and when this directive, which as you said, is not part of the memo, will ever be released.

Joe: We may or may not be talking about something that is ultimately real, but it seems as if there's a floor of attention below which this issue is not going to sink. Let's look at what we know and at what we might expect.

Ari: Again, I should also point out that on Friday the White House press secretary issued a short statement, which said the president orders Secretary Perry to do something about these coal and nuclear plants and looks forward reviewing the secretary's recommendation.

Joe: If that statement is to be taken at face value, there is a finish line that's being contemplated. We just don't know how far away it is or... There are definitely missing steps to that finish line. At this point, we're going to speculate about what they might be. You referred to nuclear and coal plants that might be the subject of this directive and are apparently the subject of this draft memo as ailing. You want to give us a little bit more definition to what it means to be an ailing nuclear or coal plant? I assume you mean in economic terms.

Ari: Right. They're struggling financially. We've seen low power prices for the past nearly a decade across the country, and that's due primarily to low natural gas prices. The way that interstate power markets work is that the price, the same price is essentially paid to all generators. That price is set by the most expensive unit needed to meet demand, and historically, traditionally that's been the natural gas fire unit that's called upon to meet demand. When natural gas prices were really high, that meant high prices for everyone, and that was great for these older coal and nuclear plants.

Ari: Now with low natural gas prices, a lot of these coal and nuclear plants find themselves unprofitable. The argument from this administration is that these coal and nuclear plants provide fuel security to the grid because as opposed to natural gas, which relies on pipeline delivery and doesn't store a whole lot of fuel onsite, if any. Coal and nuclear plants have this onsite fuel storage and they argue, although it's been widely disputed by nearly every independent expert, that this fuel security provides some value.

Joe: It sounds like that if this directive were issued and the various participants in the system found a way to implement it, consumers or customers would end up



paying higher prices for electricity than they are now or otherwise would, that these plants are more expensive and avoidably so than other sources of electricity.

Ari: Right. That's by definition the outcome of this proceeding. They're going to provide some sort of economic benefits, some sort of subsidy of these plants, that's certainly going to have the effect of raising prices. The earlier version of Perry's bailout proposal, one that was rejected by FERC back in January envisioned essentially carving these plants out of the market and providing them with a special compensation rate. There were a lot of questions about how that would then interact with the markets themselves, and when you would decide when these plants would run. Would they run whenever they wanted to run? Would there be some market operator that was still tell them how they're going to run?

Ari: Those same questions are still on the table. Nobody knows whatever this directive might say, it's not clear how often these plants might run, what the total expense might be. We don't even know right now how many plants are actually going to be subject potentially to the secretary's directive. There's still a lot of unknowns, but I think you're still right, that by definition when you're providing some sort of out of market payment, and you're going to potentially be displacing lower cost plants, you're going to be adding costs to consumers.

Joe: It sounds like some of the practical steps that would be required to be defined in order to deliver this additional payment to these plants and obtain their electricity generation haven't been defined in this memo.

Ari: That's right, and we actually, we don't even know if they're going to be paid for energy or just for capacity, which is the idea that the plant will be available to generate energy but might not actually generate any. One of the proposals that's hinted at in this leaked memo is what's called a strategic electric generation reserve. I don't know what that means because it's not explained here.

Joe: A giant battery.

Ari: Maybe, but it's, well, probably not. It's probably going to be paying coal and/or nuclear plants or probably just coal plants to just be available. In other words, they may not actually produce any energy on the regular course of business, but if there were some emergency they might be called upon. The reason I think that would be coal and not nuclear because usually once nuclear plants go offline, they just go offline forever and they're decommissioned. There's a very long, highly regulated process that goes along with that. With coal units, it might be simpler to just keep them available without actually running them on a regular basis. But that's just speculation.



- Joe: Speculation. You described the argument that's made in the draft memo, and it sounds very similar to the argument made in the notice of proposed rulemaking that DOE issued at the end of 2017, and FERC rejected earlier this year. Do you see any difference between the arguments made in support of the notice of proposed rulemaking that FERC acted on and projected and the arguments in this draft?
- Ari: Well, the leaked draft is a much longer than the NOPR, so that's a difference. There's a lot more words, and a DOE has added additional justifications for the action. The NOPR was really focused on this idea of fuel secure generation being a relevant property for the grid in its own right, and here they add a layer of national security justification. They basically argue that the natural gas pipeline system is subject to physical and cyber attack, and therefore we shouldn't rely on it as a matter of national security. We need these alternative sources as sort of, I suppose, a backup in case there ever is some sort of attack. Although, they don't quite connect the dots on all of this, but there's a lot of information in here about the vulnerability of the pipeline system.
- Ari: Then the other big differences is the legal justification, which it's being generous to say this addendum includes a legal justification, but it does cite three different laws passed by Congress. There's the Federal Power Act, which is what gives FERC authority to regulate wholesale power sales. In particular, there's a provision that provides the department of energy with authority when there's an emergency on the grid, and usually that's due to natural disasters or some localized event.
- Ari: The second law is the FAST Act, which was passed 2015, and that has a provision that talks about "defense-critical" electric infrastructure. These are facilities that have some importance for our energy system and for national defense, and DOE has never defined what those facilities are, so that's the second piece of law. The third piece of law is the Defense Production Act, which was passed by Congress in 1950 and gives the president all sorts of powers relevant to ensuring that the nation is able to prepare itself for national defense and for war.
- Ari: Citing these three laws essentially implicitly concedes that there is no single law that provides DOE with the authority to do what it wants to do. DOE's argument is that the whole is greater than the sum of its parts here, and that if you add up these provisions of law, it allows them to do what they want to do. They don't really explain that legal argument. They sort of just provide background on each law itself, but never explain how when you add these things up, it allows for what's contemplated here, which is two year contracts for unidentified coal and nuclear power plants as well as the strategic electric generation reserve.



- Joe: Does the memo make any attempt to explain why these plants would be somehow less susceptible to being disabled or rendered unusable in a national security event than other parts of the grid?
- Ari: No, as I mentioned, it focuses on the natural gas pipeline system and it sort of, I think generally ignores the other vulnerabilities that might be on the grid. Obviously, most outages are caused by the wires not the generating plants. Hopefully we'll never have to deal with a cyber, physical attack on our natural gas system. We've never had a major attack that this memo contemplates here, but there are certainly other vulnerabilities. It's not clear how having a coal plant online is necessarily the answer to cybersecurity issues. Maybe the answer is focusing on cybersecurity, not coal plants.
- Joe: Yes. Your description of the national security argument really begs the question about what it is that really creates proof against the effects of a cyber attack, and it doesn't sound like the memo explains why coal or nuclear plants are distinctively capable of either withstanding such attacks or functioning in the wake of such attacks, if other parts of the grid are disabled. It also sounds as if... Though the memo cites these three statutory authorities, there's no discussion of the facts at hand or the hypothetical facts at hand or the remedy and how on a granular level any or all of that relates to the actual statutes. Is that a fair?
- Ari: I think like the NOPR, there's a failure to connect all the facts that are in the document in a cohesive way and then to connect them back to the law. I think the final justification that DOE offers, really the bottom line of all this, is that DOE's conducting a two year study to identify "defense-critical" electric infrastructure. That's this term that's in the FAST Act in 2015, and they say in the meantime we need to take preventive measures just in case any of these plants end up being defense-critical infrastructure. This is all really... It's an excuse to do something they've been trying to do for the past 15 months or so, which is provide this bailout for these uneconomic plants. This is their latest justification for it, is we need two years to do this study.
- Joe: And therefore we need to throw this as yet to be defined set of plants, other than the fact that they have the characteristics of being fueled by coal or nuclear energy, we have to throw them a lifeline for a couple of years while we study the problem. In case some of these plants turn out to be part of the remedy at the end of our study, we want to make sure they're still operating. Is there a path that you can imagine, and I use the word imagine because it sounds like there's not enough there in the memo to answer these kinds of questions.
- Joe: Is there a path that you can imagine whereby the directive after being fully fleshed out and issued, would deliver the money to the plants, create the



reserves, the strategic electricity reserve, and at the same time not be subject to any kind of challenge or review by a court or the courts or even FERC?

Ari: No. Yeah, I think there's going to be multiple ways of challenging this. One is that DOE's order itself would be subject to a court challenge. Usually when DOE issues an emergency order under the Federal Power Act authority that it has, which again is usually for natural disasters, other local reliability issues. If someone is dissatisfied with that emergency order, they asked DOE for rehearing, and then once DOE denies, they even go to federal court, so that's one way the challenge here would play out, presumably.

Ari: The other issue is that any contracts that DOE orders are ultimately going to be wholesale power contracts. It's really I think impossible to get around that, and therefore FERC has jurisdiction over the rates and terms of those contracts. Now, you could avoid FERC review in the first instance by using existing tariffs that are already on the books. For example, the regional markets already have rates in place for emergencies, and so you might utilize those emergency rates, but that would not prevent opponents of this plan from then filing a complaint at FERC and arguing that those rates are unjust and unreasonable. That's sort of the key standard that FERC has to ensure that it's upheld with all of the contracts under its authority.

Ari: You'd have one challenge happening at federal court, and separately, you could have complaints at FERC about each contract arguing that the rate is unjust and unreasonable. Then separately you could also have more action at FERC arguing that these contracts are disrupting the larger market, and therefore other market rules are now going to be subjected to challenge as well.

Joe: Well, thank you very much, Ari, for laying this all out. It sounds like some of the more salient questions that you and others have identified remain to be answered, but if, as has occurred in the last several days, various pieces of information or informed speculation comes out, we'll at least have a basis of knowing what the product here might be.

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