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COURT REJECTS DOE STAY OF TEST PROCEDURES RULE

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A federal district court has rejected the Department of Energy's (DOE) stay of a test procedures rule.[1] If the ruling survives, it could be a factor bearing on DOE decision-making.

DOE issues the Test Procedures Rule

The court's decision involves a DOE rule (Test Procedures Rule) published on January 5, 2017, in the final days of the Obama Administration.[2] It amended DOE's test procedures in order to address testing of unmatched outdoor units of central air conditioners. The published effective date of the Test Procedures Rule was February 6, 2017, and its published compliance deadline was July 5, 2017. As discussed below, DOE subsequently sought to delay the rule, which resulted in a successful challenge by the Natural Resources Defense Council (NRDC).

White House directs agencies to postpone regulations

On January 20, 2019, the inauguration day of President Trump, the incoming White House Chief of Staff, Reince Priebus, issued a memorandum (Priebus Memo) directing agencies generally to temporarily postpone for 60 days the effective date of all regulations that had been published in the Federal Register but had not yet become effective.[3] This postponement would be for the purpose of "reviewing questions of fact, law, and policy" the regulations raise. The Priebus Memo also provided that, where appropriate and as permitted by applicable law, agencies "should consider proposing for notice and comment a rule to delay the effective date for regulations beyond that 60-day period."

DOE postpones the Test Procedures Rule

Pursuant to the Priebus Memo, DOE on February 2, 2017, published without notice or opportunity for public comment a rule (February Delay Rule) temporarily delaying the February 6, 2017, effective date of the Test Procedures Rule by 60 days starting from January 20, 2017.[4] On March 21, 2017, DOE published a further postponement (March Delay Rule), this time until July 3, 2017, again without notice and opportunity for public comment.[5]

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1 *Natural Res. Def. Council v. U.S. Dept. of Energy*, 17 Civ. 6989 (S.D.N.Y., Feb. 22, 2019).

2 DOE, Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 1426 (Jan. 5, 2017) (final rule).

3 Reince Priebus, Assistant to the President and Chief of Staff, Memorandum for the Heads of Executive Departments and Agencies, Regulatory Freeze Pending Review (Jan. 20, 2017), 82 Fed. Reg. 8346 (Jan. 24, 2017).

4 DOE, Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 8985 (Feb. 2, 2017) (final rule).

5 DOE, Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps, 82 Fed. Reg. 14425 (March 21, 2017) (final rule).

In the meantime, Johnson Controls, Inc. (JCI) filed a petition for court review of the Test Procedures Rule;[6] filed a request for waiver of the Rule;[7] requested a 180-day extension of the effective date of the Rule on the grounds of hardship;[8] and requested an administrative stay of the Rule pursuant to Section 705 of the Administrative Procedure Act.[9] Section 705 provides that ''[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.''

On June 2, 2017, DOE granted JCI's request for a 180-day extension. On July 12, 2017, DOE filed with the Office of the Federal Register a Section 705 stay (Section 705 Delay Rule) of two provisions of the Test Procedures Rule.[10] DOE said that "it is in the interests of justice" to postpone the effectiveness of the two provisions. DOE postponed the effectiveness based on JCI's submissions to DOE "that raise concerns about significant potential impacts on JCI, and further to ensure all manufacturers of central air conditioners and heat pumps have the same relief granted to JCI." On August 3, 2018, DOE granted an interim waiver to JCI and announced that it was lifting the Section 705 Delay Rule.[11]

Court rejects DOE's delay of the Test Procedures Rule

On September 14, 2017, NRDC filed a complaint challenging the Section 705 Delay Rule. It claimed that the effective date of the Test Procedures Rule had already passed when DOE published the Section 705 Delay Rule and that Section 705 does not authorize an agency to postpone the effectiveness of a rule after it has gone into effect. NRDC also claimed that the Section 705 Delay Rule was arbitrary and capricious. On March 15, 2018, NRDC filed an amended complaint adding a claim that the Section 705 Delay Rule had been issued without notice and opportunity for comment. The court granted NRDC's request to invalidate the Section 705 Delay Rule.

The court first rejected DOE's claim that the case was moot because the agency had lifted the Section 705 Delay Rule and the formerly postponed provisions of the Test Procedures Rule had gone into effect. It said DOE's voluntary cessation of the stay didn't deprive the court of its power to determine the stay's legality. The court ruled that DOE had not established that it could not reasonably be expected to delay the Test Procedures Rule again. In the court's view, DOE's suggestion that the agency would not again delay the Test Procedures Rule in specific situations did not amount to an assurance that it would not do so in any reasonably plausible scenario.

The court also rejected DOE's argument that the case had been mooted by the removal of the stay and the grant of an interim waiver in its stead. It said that the interim waiver disadvantaged the plaintiffs in the same fundamental way that the stay had, by freeing JCI from needing to comply

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6 *Johnson Controls, Inc. v. U.S. Dep't of Energy*, No. 17-1470 (7th Cir. filed March 3, 2017).

7 *See* 10 C.F.R. § 430.27.

8 *See* 42 U.S.C. § 6293(c)(3).

9 5 U.S.C. § 705.

10 DOE, Energy Conservation Program: Test Procedures for Central Air Conditioners and Heat Pumps. 82 Fed. Reg. 32227 (July 13, 2017) (notification of administrative stay).

11 Id. at 39873 (Aug. 13, 2018).

with the Test Procedures Rule. And, the court said, the interim waiver was conclusory and unreasoned, thus having the same flaws as the stay.

The court then rejected DOE's argument that Section 705 delays are judicially unreviewable because they are arguably "committed to agency discretion by law."[12] It ruled that there is a strong presumption of reviewability, and the requisite "justice so requires" finding for a Section 705 delay didn't bring the matter within the scope of the discretion exception.

The court said that DOE's "conclusory statements" supporting the Section 705 Delay Rule did not carry the agency's burden of providing a reasoned explanation for its action; were contrary to the record that was before the agency; and failed to consider arguments in the record against a delay. It also rejected DOE's argument that the agency had broad latitude to issue the Section 705 Delay Rule in the face of the Seventh Circuit litigation. The court pointed to the fact that the Seventh Circuit proceedings had been delayed indefinitely.

The court further ruled that Section 705 only allows an agency to postpone the effective date of action taken by it and not to suspend a rule that has already taken effect. It said that DOE had not appropriately amended the Test Procedures Rule's effective date. It rejected DOE's delays in the February Delay Rule and March Delay Rule since, it ruled, neither delay was "exempt from notice and comment because it constitutes a rule of procedure" or exempt for "good cause." Further, the Federal Register notice for the Section 705 Delay Rule was not filed with the Office of the Federal Register until July 12, 2017, seven days after the purportedly rescheduled effective date of July 5, 2017, and five months after the actual effective date of February 6, 2017.

Conclusion

The court's decision expresses some clear limits on DOE's authority to delay rules that it has adopted. Perhaps more importantly, it is a valuable reminder both for industry and advocacy groups that the courts are willing to scrutinize DOE's justifications for its decisions, and to reverse those decisions as arbitrary and capricious where they deem appropriate.

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[12] 5 U.S.C. § 701(a)(2).