Utility & Energy Litigation Digest

CRA Charles River Associates

May 2020

This newsletter contains a digest of trending utility and energy litigation matters in March and April. The abstracts included below are written by consultants of Charles River Associates.

COVID-19

The COVID-19 pandemic has caused an initial litigation slowdown with courts postponing testimony deadlines and transitioning to virtual hearings. However, we expect a flurry of utility- and energy-related disputes in the future, particularly around breach of contract claims.

In re Permian Highway Pipeline LLC and Kinder Morgan Texas Pipeline LLC

Texas Court of Appeals, Third District
https://www.leagle.com/decision/intxco20200406358

Permian Highway Pipelines LLC and Kinder Morgan Texas Pipeline LLC seek to continue construction on their $2.2 billion Permian Highway gas pipeline. A groundwater purification company had placed a temporary restraining order on construction, but due to "extenuating circumstances" caused by the COVID-19 pandemic, scheduled hearings to lift the restraining order were canceled. Permian Highway Pipelines and Kinder Morgan appealed, arguing that the Court should schedule a remote hearing and address the issue in a timely manner. Tex. R. Civ. P. 680, or "Rule 680," states that temporary restraining orders are not to exceed 14 days unless they are specifically extended.

The Texas Court of Appeals for the Third District declined to intervene in the case. According to the Appellate Court panel, the Trial Court's intention to hold the hearing as soon as technologically feasible constitutes a good-faith effort rather than abuse of Rule 680's time limitations.

Energy Earth LLC v. Just Energy (US) Corp.

333rd District Court, Harris County, Texas
https://www.hcdistrictclerk.com/Edocs/Public/Search.aspx?Tab=tabDocket# (search case #202022395)

Energy Earth LLC accuses Just Energy Corp., an electricity and gas retailer, of a breach of contract. The two entities entered a partnership in 2014. In 2016, Energy Earth developed a reward-based platform called "Just Energy Perks" for Just Energy's customers. Under a Master Services agreement, Just Energy agreed to enroll customers in the program, distribute rewards in a timely manner, and pay Energy Earth for running the platform. Just Energy was able to recover their costs through their rate base.

Energy Earth claims that for months, Just Energy has failed to fulfill the Master Services agreement. In March 2020, Just Energy abruptly canceled the agreement. Energy Earth alleges Just Energy is using the COVID-19 pandemic as a front to terminate their partnership and seeks over $22M in damages.

Buckeye Partners LP and Buckeye PT Terminals LP v. GT Wilmington USA LLC

Court of Chancery, Delaware
https://static.reuters.com/resources/media/editorial/20200409/buckeyevgt--tromotion.pdf

Beginning April 6, 2020, and with five days' notice, The Port of Wilmington's operator (GT Wilmington) barred the plaintiffs from accessing their petroleum storage tanks located at the Port. Buckeye purchased the tanks in mid-March 2020, inheriting approximately $1M in unpaid dock-usage fees from the previous owner, Magellan LP. GT Wilmington will not grant Buckeye and its customers access to their storage tanks unless Buckeye pays the fees. Buckeye argues that the fees are outside of the lease agreement, and that Magellan was wronged as well. The COVID-19 crisis adds urgency to the plaintiffs' argument, as Buckeye contends that petroleum distribution is an "essential" service and cannot be disrupted.

The Chancery Court of Delaware sided with the plaintiffs. The Court granted an order restraining GT Wilmington from denying Buckeye and its customers access to their storage tanks. The Chancery Court is also arbitrating damages for breach of contract. The bond is currently set at $1M.

Electricity Transmission

NextEra Energy Capital Holdings et al. v. Chairman, Public Utility Commission of Texas

US District Court, Western District of Texas, Austin Division
https://rtoinsider.com/wp-content/uploads/Injunction-Filed-030220.pdf

In May 2019, the State of Texas granted in-state utilities the "right of first refusal," or priority when selecting transmission providers to connect their generation facilities to the grid. According to NextEra Energy Inc., which operates as a transmission provider in the Midwest and Texas, the law violates the Commerce Clause and is unconstitutional. NextEra fears their certificate of public convenience and necessity (CPCN) for a 23-mile transmission project will be denied because they are an out-of-state entity.

However, in February 2019, a judge dismissed the case, arguing that most transmission providers in Texas are out-of-state entities and can still access the competitive market if they own an in-state utility. The Judge narrowly read the Texas law, noting intention to regulate only the construction and operation of transmission lines, not the actual act of transmission instead. Also, because Texas utilities are regulated by the state, the "loss of competition" claim was not valid.

NextEra Energy Resources, LLC v. Maine Public Utilities Commission et al.

Maine Supreme Judicial Court
https://law.justia.com/cases/maine/supreme-court/2020/2020-me-34.html

The Maine Supreme Judicial Court upheld the Maine Public Utilities Commission's (PUC's) issuance of a CPCN for the New England Clean Energy Connect project, a 145-mile transmission line that will deliver 1200 MW of hydropower from Québec to Lewiston, Maine. The plaintiff, NextEra Energy Resources, LLC argued that the Maine PUC did not adequately consider state renewable energy goals or the benefit to customers when issuing the CPCN. However, the Court found evidence in the Maine

PUC's record that cited specific monetary benefits to consumers and Maine's GDP. The record also thoroughly discusses scenic impact, transmission reliability, and greenhouse gas emission reductions from a sufficient variety of stakeholders. **Christopher Russo** testified on behalf of NextEra Energy Resources in related cases before the Maine Department of Public Utilities, Maine Department of Environmental Protection, and the Maine Land Use Planning Commission.

New Jersey Board of Public Utilities v. FERC

US Court of Appeals for the District of Columbia
https://dockets.justia.com/docket/circuit-courts/cadc/20-1081

At the PJM Interconnection's behest, the New Jersey Board of Public Utilities (BPU) and Public Service Electric & Gas (PSE&G) upgraded a transmission line serving the Bergen and Linden power plants in the northern part of the state. The project cost $1.2 billion. PJM originally allocated the project amongst PSE&G and Consolidated Edison in New York and a few other parties. However, the New York entities exited their obligations and left PSE&G to recover the project costs from their ratepayers. In 2018, the Federal Energy Regulatory Commission (FERC) rejected the BPU's attempt to ease PSE&G's cost burden and rebuffed a request for rehearing.

The BPU argues that New York entities should pay for their share of the project since the upgrade enables power flows into New York and benefits customers there. FERC countered that the New York ISO's tariff already outlines cost allocations for beneficial projects located outside the state, and that these allocations are just and reasonable. The BPU has appealed.

Coal & Natural Gas Generation

Clean Wisconsin, Inc. and Sierra Club v. Public Service Commission of Wisconsin

Dane County Circuit Court
https://www.cleanwisconsin.org/wp-content/uploads/2020/02/002-Petition-for-Judicial-Review-F-S-2-28-20.pdf

Clean Wisconsin and the Sierra Club's Wisconsin chapter petitioned a state circuit court to review the Wisconsin Public Service Commission's (PSC) January approval of the 625 MW Nemadji Trail Energy Center, a proposed natural gas-fired power plant in Superior, Wisconsin. According to the plaintiffs, the plant's CPCN did not adequately consider the environmental sensitivity of the facility's preferred site. The site encompasses just over four acres of fragile wetlands and an aquifer that plaintiffs fear may be drained at an unsustainable rate to support the plant's operations.

Additionally, witnesses testified that construction of a gas-fired power plant is at odds with Wisconsin's Energy Prioritization Law of 2005, which details an ordinal list of preferred energy technologies the Wisconsin PSC must consider in all energy-related decisions and orders. Conservation and efficiency are the priority, followed by clean, large-scale renewables and battery resources, with carbon-based fuels last. The witnesses claim that the PSC failed to fulfill its duty to consider the prior two options before proposing a natural gas-fired facility.

The plaintiffs seek to reverse or remand the Wisconsin PSC's decision to grant a CPCN to the Nemadji Trail Energy Center's owners, the Dairyland Power Cooperative, and South Shore Energy, LLC.

Solar and Wind Energy

Bridgestone Americas Tire Operations, LLC v. Dominion Energy South Carolina, Inc.

South Carolina Public Service Commission
https://dms.psc.sc.gov/Attachments/Matter/cbbd6dc2-ca6a-43c4-aa1a-a3bedd95f0b0

Bridgestone Americas Tire Operations, LLC is petitioning the Public Service Commission (PSC) of South Carolina to require Dominion Energy South Carolina to expedite approval of a 1.98 MW solar energy array at its light truck manufacturing plant in Graniteville, South Carolina. Bridgestone wanted to supply needed energy to the recently expanded facility and protect the facility from high utility costs. However, Bridgestone missed the project application deadline to receive bill credits for returning excess energy to Dominion's system. Bridgestone instead opted for an off-grid solar array to further "a commitment to renewable energy"—the company set a goal to reduce its carbon emissions 50% by 2050.

Bridgestone's solar project is in Dominion's queue for interconnection approval behind nearly 400 other projects. Bridgestone wants Dominion to waive its project's review, given that Bridgestone does not intend to return electricity to the grid and is thus not subject to South Carolina's Generator Interconnection Procedures. Dominion spokeswoman Rhonda O'Banion countered that "the law does not allow Dominion Energy to provide special treatment to any solar developer, including Bridgestone…Dominion Energy is simply requiring that Bridgestone play by the same rules as everyone else." Because the solar array is one of the largest in the state, Dominion believes the potential grid impacts merit thorough review, even if Bridgestone only intends to self-consume.

In the Matter of the Joint Application of Westar Energy, Inc. and Kansas Gas and Electric Company

Supreme Court of the State of Kansas
https://www.kscourts.org/KSCourts/media/KsCourts/Opinions/120436_1.pdf?ext=.pdf

Westar Energy, Inc. and Kansas Gas and Electric use two-part rates to recover their costs. Infrastructure and capital costs are recovered through a fixed charge, while energy costs are recovered through a variable charge. However, to avoid prohibitively high fixed charges, the utilities have allocated some fixed costs to the variable charge. Customers with distributed generation (DG) tend to pay fewer variable charges and thus evade payment of their "share" of infrastructural costs. Therefore, Westar and KG&E designated a separate rate class for DG owners with an additional demand charge levied on a user's highest instantaneous power consumption.

The Kansas Supreme Court reversed the Kansas Corporation Commission's approval of the DG rate class. Kansas statute allows separate rate classes, but not discriminatory pricing. The Court ruled that since the demand charge does not recover any specific time-based or peak costs, it represents unlawful price discrimination. The Court instead suggested recovering all fixed costs through the fixed charge or using a sliding scale rate that grants cheaper energy to high-volume purchasers.

Fisheries Survival Fund, et al. v. David Bernhardt, et al.

US District Court for the District of Columbia
https://www.bloomberglaw.com/public/desktop/document/FISHERIESSURVIVALFUNDetalvJEWELLetalDocketNo116cv02409DDCDec08201/1?1587494664

In 2016, a fishery advocacy group and coastal towns in Massachusetts, New York, and Rhode Island sued the US Department of the Interior (DOI) for granting an offshore wind permit to Equinor LLC. Empire Wind, an 816 MW project south of Long Island, allegedly threatens scallop and squid fisheries and endangered right whales. In 2018, the US District Court found that the DOI's lease was valid because the government had not committed "irreversible and irretrievable commitment of resources." The plaintiffs have decided to appeal.

Oil

Northern Plains Resource Council, et al. v. U.S. Army Corps of Engineers, et al.

US District Court for Montana, Great Falls Division
https://www.bloomberglaw.com/public/desktop/document/NorthernPlainsResourceCounciletalvUSArmyCorpsofEngineersetalDocke/4?1587492499

In 2017, the US Army Corps of Engineers granted Nationwide Permit 12 to the Keystone XL pipeline and other related pipeline projects in the United States. The permit allows "discharges of dredged or fill material into jurisdictional waters" in order to support construction, provided that less than one-half of an acre of water is affected. At that time, The Army Corps of Engineers determined the aquatic environs near the Keystone XL pipeline would be harmed only minimally.

On April 15, 2020, the US District Court for Montana found Keystone XL's Permit 12 to be invalid and revoked it. The Court also revoked Permit 12 for all related pipeline projects ongoing in the country. Now, instead of undergoing a streamlined permitting process under Permit 12, all projects must resubmit individual impact statements in compliance with the Clean Water Act and Endangered Species Act.

New Jersey Department of Environmental Protection et al. v. Hess Corp. et al.

Superior Court of New Jersey, Appellate Division
https://njcourts.gov/attorneys/assets/opinions/appellate/unpublished/a2893-18.pdf

The New Jersey Department of Environmental Protection (DEP) filed a complaint against the Hess Corp. and the Buckeye Partners, LP for oil spills and discharges that occurred in the 1960s and the 1990s at an oil refinery site owned by Hess since 1958 and sold to Buckeye Partners in 2013. Hazardous materials discharged at the site have affected the surrounding groundwater and wildlife for decades. The DEP alleges that Hess and Buckeye Partners have not adequately remediated the site. The DEP seeks damages under New Jersey's Spill Compensation and Control Act, Water Pollution Control Act, and common law for public nuisance and strict liability. Hess and Buckeye Partners sought to dismiss the claims, citing the DEP's delay and cooperation in cleaning the site as an indicator of satisfaction. The claim was dropped by the Superior Court in December 2018. The DEP appealed.

In April 2020, the Appeals Court upheld the dropped claims against Buckeye Partners but revived the strict liability claim against Hess. A prior New Jersey Supreme Court case against Vectron Corp. allows strict liability common law claims to proceed if the defendant was engaged in "abnormally dangerous" activity during its operations. The Appeals Court concluded that Hess stored and processed its petroleum in an abnormally dangerous manner.

Communities for a Better Environment v. South Coast Air Quality Management District

Court of Appeal for the State of California, Second Appellate District, Division Eight
https://law.justia.com/cases/california/court-of-appeal/2020/b294732.html

In 2018, the Communities for a Better Environment (CFBE) challenged a permit for a Marathon Oil (formerly Tesoro Refining) refinery upgrade granted by the South Coast Air Quality Management District (SCAQMD). The plaintiffs contend that the SCAQMD violated the California Environmental Quality Act, a statute with an overarching goal to "protect public health and welfare." CFBE lost the initial challenge and the appeal because they interpreted the Environmental Quality Act too strictly. SCAQMD used the Environmental Protection Agency (EPA) standard to evaluate the refinery's air pollution impacts. The EPA measures pollutants on the 98th percentile of pollution level days, but CFBE believes the Act requires a stricter standard. However, on appeal, the Court reasoned that because the EPA and the Act share goals to protect public welfare, and that the EPA is a larger entity with greater funding, the EPA's 98th percentile baseline method validates the SCAQMD's approach. That is, the Environmental Quality Act does not require California to go above and beyond federal standards.

What is Revealed in Times of Crisis?

Today we are faced with uncertainty and economic and financial disruption as a result of the global pandemic. However, severe crises are not dependent on a pandemic or other foreign actor. In one example, a rogue trader made headlines by losing billions for his employer and attempting to recoup losses by making increasingly large bets, hiding his activities by keeping two sets of books. One lesson learned was that the greatest risks to a company are not always financial. What can CRA do to help our clients mitigate the risks?

Our experts include investigators, former prosecutors and regulators, forensic accountants, and geopolitical and business intelligence experts. They maintain a global network of human source information and are pioneers in the application of social media analytics to gather and model information from disparate data feeds. They specialize in the collection and analysis of data from complex financial, accounting and operational transaction systems. They help clients uncover fraud and financial crime, recover stolen assets and advise on internal controls. They also serve as experts, presenting findings to courts, regulatory authorities, management and boards of directors.

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Christopher Russo has testified in regulatory matters and civil litigation on issues regarding the economics, planning, and operation of energy markets, including in international arbitration. He has supervised the valuation of hundreds of power assets in a commercial context, including coal, nuclear, and gas-fired power plants, transmission lines, pipelines, and distribution systems. He has offered expert testimony before judges and panels at trial in numerous litigation and arbitration proceedings. He recently served as the lead power expert in a litigated proceeding related to the value of power plants with damages in excess of $1 billion USD.

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Jim McMahon has testified in federal and state regulatory settings, including before the Federal Energy Regulatory Commission and with the regulatory commissions of California, Wyoming, Arkansas, Missouri, Oklahoma, Kansas, Georgia, and Indiana. He has testified on matters involving qualifying facilities, renewables development, coal plant subsidization, retail choice, and community choice aggregation. Mr. McMahon also has significant experience in utility strategy and M&A and was the lead commercial and regulatory consultant in two of the most recent private equity utility transactions. Mr. McMahon has more than 20 years of experience as an advisor and expert in the energy industry.

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Seabron Adamson has significant experience in energy regulation and litigation matters in North America, the European Union and other countries. Seabron has testified in international arbitration proceedings regarding energy sector disputes (under UNCITRAL, NAFTA, and bilateral rules) in Latin America, Asia, Canada, and other countries. He has also testified in American Arbitration Association and US Federal District Court cases. He has provided expert testimony before the Federal Energy Regulatory Commission, the Ontario Energy Board, and state public utility commissions.

The editors would like to acknowledge the contributions of Caroline Heilbrun.

About CRA's Energy Practice

CRA's Energy Practice comprises energy experts and economists that apply rigorous economic analysis to every engagement. We consult with a wide range of clients, including investor-owned utilities, generators, power pools, industry organizations, transmission companies, distribution companies, competitive retailers, companies from other industries, governments, and regulators. We provide expert-witness support in energy-focused disputes in civil litigation and arbitration, regulatory proceedings, and international arbitration. Our experts are routinely called upon in high-stakes litigation cases where the amounts at stake are frequently in the billions.

Our offices are located in Boston, London, Washington, DC, and Toronto.

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