Utility & Energy Litigation Digest

CRA Charles River Associates

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

COVID-19 fallout

EFS Midstream LLC v. Sundance Energy Inc.

District Court of Harris County, Texas, Court 165
https://www.spilmanlaw.com/Spilman/media/PDF/ESF-Petition.pdf

Plaintiff EFS Midstream LLC alleges that driller Sundance Energy Inc. violated a 2018 contract. The contract requires Sundance to pay "deficiency fees" if it cannot reach a minimum threshold for gathering and processing gas. Sundance, which missed its target in 2019, refuses to pay the outstanding $2.3 million and any future obligations. Sundance argues that the COVID-19 pandemic triggered a force majeure in the 2018 contract. EFS counters that the gathering fees in question were specifically excluded from force majeure events.

In re Cambrian Holding Company, Inc., et al.

US Bankruptcy Court, Eastern District of Kentucky
https://document.epiq11.com/document/getdocumentbycode/?docId=3673889&projectCode=CDC&source=DM

Coal company American Resources Corporation (ARC) and subsidiary Perry County Resources received $2.7 million from a federal coronavirus relief package and did not use the funds to satisfy outstanding debt to Kentucky Mutual Insurance Company. The debt is from a transaction in which Cambrian Holding Company transferred mining assets to ARC. Kentucky Mutual is holding ARC in contempt. The Judge's May 2020 order requires ARC to surrender $1.1 million on or before June 1, 2020, with an additional $2,500 fine for each subsequent day the claims are not paid. As of publication time, ARC still owes over $400,000. According to ARC, the coal contracting industry has recently suffered such that $2.7 million would not have been sufficient to pay off remaining liabilities. In this scenario, the funds must be spent to make up for lost contracts.

Sanare Energy Partners LLC v. Shell Trading (US) Co.

District Court of Harris County, Texas, Court 189
https://www.law360.com/articles/1270504/attachments/0

Sanare filed for a temporary injunction and restraining order against Shell for a breach of contract. Shell agreed to purchase Sanare oil at a fixed price of $46 per barrel between the months of March and August 2020. Shell did not pay Sanare for oil offtake in March and April 2020. Shell requests $1.5 million from Sanare as an "assurance for performance" before purchasing Sanare oil. Shell justifies its actions by citing an invoice dispute between Sanare and its partner Ankor Energy LLC as a source of uncertainty. Sanare says that the conflict is unrelated to the contract with Shell.

According to the petitioners, without a constant revenue stream from Shell, Sanare is not insulated from shocks in the oil market caused by the COVID-19 pandemic. Sanare warns that it may be forced to breach contracts and lay off employees.

Casillas Petroleum Resource Partners II LLC v. Continental Resources Inc.

District Court of Tulsa County, Oklahoma
https://www.oscn.net/dockets/GetDocument.aspx?ct=tulsa&bc=1046552431&cn=CJ-2020-1346&fmt=pdf

On March 6, 2020, the parties signed a $200 million purchase and sale agreement on certain oil properties and assets. Oil prices plunged in the following weeks. Continental postponed the deal and attempted to terminate the deal on March 24, 2020, citing failure to disclose an exploration agreement and alleged wastewater incidents. Casillas rebuts that the exploration agreement had expired, and that the wastewater incidents did not occur on Casillas property. Casillas requests that the Court enforce the deal, lest the company suffer "irreparable harm."

Transmission

Application of Enbridge Energy, Limited Partnership, for a Determination pursuant to Wis. Stat. § 32.02(13) that the Proposed Real Estate Interest Acquisitions Associated with the Relocation of Line 5, Located in Ashland County and Iron County, Wisconsin, are in the Public Interest

Public Service Commission of Wisconsin
https://midwestadvocates.org/assets/resources/Line-5-Request-to-Intervene.pdf

Enbridge Energy must reroute a 12-mile segment of the Line 5 gas pipeline. The original route crossed the Bad River Reservation near Lake Superior, so Enbridge intends to use eminent domain to acquire land that circumvents the reservation. Eminent domain requires the Public Service Commission of Wisconsin (PSC) to deem the pipeline to be in the public interest. A coalition of intervenors is urging the Wisconsin PSC to hold a hearing as a contested case. If the pipeline is not in the public interest, as the intervenors believe, eminent domain is prohibited by the Fifth Amendment of the US Constitution.

Re: Notice of Denial of Water Quality Certification, Transcontinental Gas Pipe Line Company, LLC

New York State Department of Environmental Conservation
https://www.dec.ny.gov/docs/permits_ej_operations_pdf/nesewqcdenial05152020.pdf

On May 17, 2019, Transcontinental Gas Pipe Line Company, LLC (Transco) submitted a Clean Water Act Water Quality Certification application to the New York State Department of Environmental Conservation (NYSDEC) for a proposed gas pipeline to serve Brooklyn, Queens, and Long Island. NYSDEC rejected Transco's application, citing an inability to meet all state water-quality standards. According to the NYSDEC, pipeline construction would disturb toxic sediment at the bottom of New York Harbor and threaten sensitive habitats of oysters and clams. In addition, the pipeline would not align with a legally binding state target of net-zero emissions by 2040.

Hyundai Heavy Industries Co. Ltd. v. United States of America

US Court of International Trade
https://www.law360.com/articles/1275139/attachments/0

Hyundai Heavy Industries Co. is contesting an anti-dumping tariff on Korean transformers used to step up voltage for long-distance power transmission. The tariff requires Korean manufacturers such as Hyundai to pay a 60% duty on transformer imports to match a "fair market value" in the US. Hyundai filed a complaint in May 2020 to prevent the US from liquidating any Hyundai transformer shipments while the anti-dumping dispute is in progress. The final order enjoined the US Department of Commerce from liquidating any Korean transformer shipments, pending appeals.

Fossil Fuels

Westmoreland Mining Holdings v. US Environmental Protection Agency

US Court of Appeals, D.C. Circuit
https://www.eenews.net/assets/2020/05/22/document_gw_03.pdf

In April 2020, the US Environmental Protection Agency (EPA) rescinded the legal necessity of its Mercury and Air Toxics Standards (MATS) rule. While the EPA did not amend the maximum mercury emission levels outlined in MATS, mercury regulation was deemed no longer "appropriate and necessary" according to a cost-benefit analysis conducted by the EPA in 2011. Westmoreland is petitioning for judicial review of the standards. The petition does not disclose the basis of Westmoreland's challenge to MATS.

BP America Production Co. v. United States

US Court of Federal Claims
https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2018cv0607-46-0

The Federal Oil and Gas Royalty Management Act of 1982 requires lessees of federally owned land to pay royalties to the US government equivalent to the value of oil or gas extracted. However, the Act also allows lessees to earn interest on any overpaid royalties. In 2015, the Fixing America's Surface Transportation (FAST) Act removed the allowance to collect interest. BP America Production Co., which leases 150 lots in New Mexico for oil extraction, collected approximately $1.3 million in royalty payment interest days after the FAST Act was signed. The Department of the Interior then asked for the interest money back.

The US Court of Federal Claims ruled that the interest payments BP earned cannot be applied retroactively, and the government owes BP $1.3 million.

People of the State of Illinois v. Hilco Redevelopment LLC et al.

Illinois Circuit Court for Cook County, Chancery Division
https://www.environmentallawandpolicy.com/wp-content/uploads/sites/452/2020/05/1271000-1271029-hilco-complaint_filed_5-5-2020.pdf

Illinois Attorney General Kwame Raoul joined a class action lawsuit against a developer for demolishing a coal factory's smokestack in April 2020. The demolition blanketed Chicago's Little Village neighborhood in coal dust. The developer, Hilco, warned residents of the demolition ahead of time, but the anti-pollution measures did not work. The demolition violated Illinois's legal air pollution standards. The Illinois Environmental Protection Agency has asked Raoul to seek damages ($50,000 for each air pollution violation and an additional penalty of $10,000 for each day of each violation) and remediation.

Slamon v. Carrizo (Marcellus) LLC et al.

US District Court for the Middle District of Pennsylvania
https://bergermontague.com/wp-content/uploads/2020/05/5-18-20-Opinion-Granting-and-Denying-Class-Cert-Carrizo.pdf

Landowners in Susquehanna County, Pennsylvania, which sits atop the Marcellus Shale, were granted status in two class actions regarding damages for breached contracts. The plaintiffs accused Carrizo and other entities of underpaying gas royalties and forcing landowners to take financial responsibility for post-production costs. According to the terms of Carrizo's Paid Up Oil and Gas Lease, Carrizo must pay its lessors 18% of the greater of fair market value and gross revenue for all gas on the property. Plaintiffs accused Carrizo of paying royalties "based on prices that are consistently below both the NYMEX spot price for natural gas and prices paid by other comparable gas producers in the same area." Plaintiffs accused Carrizo of improperly deducting post-production costs from their royalty payments.

The District Court granted two statuses to filing landowners: 1) lessors with leases outlining payment based on the greater of the market value of the gas or the gross amount of revenue for all gas produced by the property; and 2) lessors with leases that forbade deduction of post-production expenses. A third class, Implied Duty, was rejected for being too broad. Implied Duty contained every lessor of a Paid Up Oil and Gas Lease in Pennsylvania, past and present.

State of Louisiana, et al. v. Louisiana Land & Exploration Co., et al.

Louisiana, Court of Appeal, Third Circuit
https://www.liskow.com/portalresource/LAvLLE

In 2004, Union Oil Co. of California (Unocal), now Chevron, caused environmental damage to soil, surface waters, and ground waters due to negligence and breach of contract. The damaged land is owned by the State of Louisiana and managed by the Vermilion Parish School Board (VPSB), who granted a mineral lease to Unocal in 1935 and a surface lease in 1994.

In District Court, Unocal was ordered to pay $1.5 million to the VPSB, but not for negligence or breach of contract. Both parties appealed. Unocal claimed VPSB had no right to litigate on behalf of the state, and VPSB claimed Unocal was guilty of negligence and breach of contract.

The VPSB won on both counts in the Third Circuit. As a trustee of state land, the VPSB is allowed to defend the state. According to the 1935 and 1994 leases, an obligation to return the land in a near-pristine state was either implied (1935) or explicitly stated (1994). Unocal's failure to do so represents a breach of contract. The Court ordered Unocal to spend $3.5 million to remediate the property.

Renewables & Storage

Green Development, LLC v. Town of Exeter Zoning Board of Review et al.

Rhode Island Superior Court
https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/18-0519.pdf

In 2018, the Zoning Board of Review in Exeter, RI denied Green Development LLC's application to build a ground-mounted commercial solar array within town limits. The seven-acre project was rejected after multiple hearings from the Zoning Board in 2017 and 2018. The solar array was deemed too large, exceeding the Zoning Board's 15% lot coverage limit and would be visible from the road. Board members said the array would not complement the town's rural nature and constituted an "industrial" use not allowed in residential zones. Green Development took issue with classification as an "industrial" use and argued that, under a July 2018 amendment (later revoked), solar project construction became a "matter of right" and no longer needed Zoning Board approval. The Rhode Island Superior Court sided with the town planners and dismissed the case.

National Association of Regulatory Utility Commissioners et al. v. FERC

US Court of Appeals, D.C. Circuit
https://www.naruc.org/default/assets/File/19-1142%20-%20NARUC%20Reply%20Brief%20-%202020-03-02%20-%20court%20filed%20copy.pdf

Judges on the D.C. Circuit Court seem to be leaning in favor of upholding FERC Order No. 841, which allows electric storage resources to participate in wholesale and retail markets. NARUC and other parties have challenged Order No. 841, claiming that distribution-level storage resources cannot be forced to participate in national-level wholesale markets without an opt-out option for the states. Doing so, the parties allege, would violate the Federal Power Act of 1935, which grants states sole jurisdiction over distribution system reliability, and possibly the Commerce Clause of the Constitution.

The Judges cited the precedent of FERC Orders No. 719 and 745, which allow demand response products to access wholesale markets. Demand response, a distribution-side product, also affects wholesale rates, but Orders 719 and 745 were deemed acceptable by the US Supreme Court in 2016. The plaintiffs argue the two Orders contain opt-out clauses and that energy storage differs from demand response in that it physically makes use of distribution system infrastructure. The Judges note that no state has issued a law against energy storage, and many states have already wholly accepted Order No. 841.

Invenergy Renewables LLC, et al. v. United States of America

US Court of International Trade
https://www.cit.uscourts.gov/sites/cit/files/20-73.pdf

In 2018, the US issued a blanket tariff on certain imported solar panels. In June 2019, bifacial solar modules, which generate electricity from both sides of the panel, were granted an exemption to duties because they had not reached market maturity. When utility-scale bifacial modules began to grow in popularity, the US Trade Representative (USTR) revoked the exemption in October 2019 to protect the domestic solar industry, whose panels are mostly monofacial. After a complaint from Invenergy Renewables LLC, which alleged the USTR failed to provide advance notice and a comment period before revocation, the US Court of International Trade reinstated the exemption in December 2019.

In April 2020, the USTR again revoked the bifacial modules exemption, reiterating the need to safeguard domestic industries. USTR opened a docket with a comment period. Invenergy seeks to supplement their original October 2019 complaint with the April 2020 one to the Court of International Trade, alleging that

the new latest order “was an arbitrary and capricious decision.” The Court rejected USTR’s motion to dismiss the case and has allowed Invenergy to supplement its complaint.

Mattwaoshshe et al v. NextEra Energy, Inc. et al

US District Court, District of Columbia
https://www.law360.com/dockets/download/5ee911332863bf0cfe786a1e?doc_url=https%3A%2F%2Fecf.dcd.uscourts.gov%2Fdoc1%2F04517882233&label=Case+Filing

The Kickapoo Nation of Kansas filed a class action lawsuit against a NextEra Energy, Inc. wind project, the Soldier Creek Wind array. The plaintiffs live near the site. Construction began in May 2018 without input from local residents and federal agencies, according to the plaintiffs. Each of Soldier Creek’s 140 turbines will be nearly 500 feet tall and will cause “irreparable harm” (including property value reduction) and be a “nuisance” to the surrounding environs, according to the plaintiffs. Plaintiffs claim NextEra violated the National Environmental Policy Act, the Endangered Species Act, and the Indian Religious Freedom Act by refusing to consult local stakeholders and forcing residents to comply. NextEra believes the lawsuit is “without merit” and intends to “vigorously defend” the case.

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Jim McMahon has testified in federal and state regulatory settings, including before the Federal Energy Regulatory Commission and 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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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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