Utility & Energy Litigation Digest

CRA Charles River Associates

February 2020

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

Transmission

Driftless Area Land Conservancy and Wisconsin Wildlife Federation v. Huebsch et al.

US District Court, Western District of Wisconsin
https://www.wpr.org/sites/default/files/chc_federal_complaint_12.11.19.pdf

Dairyland Power Cooperative, American Transmission Company (ATC), and ITC Midwest acquired approval from the Wisconsin Public Service Commission (WPSC) to build a 100-mile electricity transmission line from Madison, Wisconsin to Dubuque, Iowa. The high-voltage line crosses the Driftless Area Land Conservatory's property in Dane, Grant, and Iowa counties in Wisconsin.

On December 11, 2019, the plaintiffs stated that Commissioners Huebsch and Valcq on the PSC should have recused themselves from the decision-making process. Commissioner Huebsch is an advisory member for the Midcontinent Independent System Operator (MISO). Chairperson Valcq has strong ties to We Energies, which owns a 60% share in ATC. The plaintiffs seek fair due process of law under the Fourteenth Amendment of the US Constitution. The plaintiffs also allege that land seizure via eminent domain under a thereby void law would violate the Fifth Amendment.

David K. Paylor and State Water Control Board v. Mountain Valley Pipeline

Henrico County Circuit Court, 14th Judicial Circuit of Virginia
https://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/MVPConsentDecree.pdf

On December 7, 2018, the Virginia Department of Environmental Quality (DEQ) filed a complaint against Mountain Valley Pipeline, LLC (MVP) for failure to control sediment erosion. The in-progress Mountain Valley Pipeline is a $5.5 billion, 303-mile natural gas transmission pipeline spanning West Virginia and southwest Virginia.

On December 11, 2019, the two parties officially entered a judicial consent decree wherein MVP will pay a fine of $2.15 million for environmental damages. Trenches constructed along steep mountainsides dislodged harmful sediments into vulnerable waterways and private properties. The fine will be used to further environmental protection initiatives, and MVP construction will receive closer scrutiny in the future.

Friends of Buckingham et al. v. State Air Pollution Control Board et al.

US Court of Appeals, Fourth Circuit

https://chesapeakeclimate.org/assets/uploads/2020/01/Fourth-Circuit-opinion-Friends-of-Buckingham-19-1152.pdf

The Atlantic Coast Pipeline, LLC planned to construct one of three compressor stations for the 600-mile natural gas pipeline in the predominantly low-income, African-American community of Union Hill, Virginia. The Buckingham County Board of Supervisors granted a special use permit to the project in February 2017. On January 8, 2019, the Virginia State Air Pollution Control Board approved the compressor station's construction permit, after the state Department of Environmental Quality received numerous public comments about disproportionate air quality impacts on Union Hill residents.

On January 6, 2020, the Court of Appeals for the Fourth Circuit vacated the compressor station's construction permit. The Court argued that the Board failed to perform its statutory duty to determine the suitability of the compressor station facility for Union Hill through the lens of environmental justice. The State Air Pollution Control Board must review the permit to address environmental justice concerns. Dominion intends to work closely with the Board to resolve the issues and will aim to complete construction in late 2021.

Portland Pipe Line Corp. v. City of South Portland

US Court of Appeals, First Circuit

http://media.ca1.uscourts.gov/pdf.opinions/18-2118P-01A.pdf

The City of South Portland, Maine passed a "Clear Skies Ordinance" in 2014 which prohibits the loading of crude oil onto tankers in South Portland's harbor to protect local air quality. As a result of the ordinance, the Portland Pipe Line Corp. (PPLC) was unable to enact its preexisting plans to pump oil from Montréal to South Portland. PPLC alleged that the Clear Skies Ordinance is preempted by laws from higher jurisdictions, such as Maine's state acts and the dormant Commerce Clause, which prohibits states from interfering with interstate transactions.

On January 10, 2020, the appellate court sent the case to the Maine Law Court with questions for consideration: Is PPLC's license to operate considered an "order," and if so, does Maine's Coastal Conveyance Act, a state law, preempt the local Clear Skies Ordinance?

Coal & Natural Gas Generation

Federal Energy Regulatory Commission et al. v. FirstEnergy Solutions Corp. et al.

US Court of Appeals, Sixth Circuit

http://www.opn.ca6.uscourts.gov/opinions.pdf/19a0294p-06.pdf

FirstEnergy Solutions Corp. (FES) filed for Chapter 11 bankruptcy in March 2018. Soon after, FES sought to cancel its stake in a power purchase from two of Ohio Valley Electric Cooperative's (OVEC) coal-fired power plants, projecting losses from the uneconomic plants to be $268 million through 2040. In May 2018, a bankruptcy court allowed FES's power purchase cancellation and ruled that the bankruptcy court alone, not the Federal Energy Regulatory Commission (FERC), had jurisdiction to decide the case.

On December 12, 2019, a federal appeals court ruled that FERC has standing under the Federal Power Act to participate in court proceedings. The appeals court ruling does not in itself challenge the validity of the canceled agreements. The ruling issues a remand to the bankruptcy court, and FERC will ultimately provide input as to whether OVEC's customers should be charged to recover FES's share of the costs to run and decommission the coal-fired power plants.

Duke Energy Carolinas, LLC and Duke Energy Progress, LLC v. North Carolina DEQ

Settlement Agreement

https://www.southernenvironment.org/uploads/words_docs/Final_Agreement_12-31-19_signature_version_-_with_signatures.pdf

Duke Energy has historically deposited coal ash, the residual byproduct of coal-fired power generation, in unlined pits prone to toxic chemical leaching. In August 2019, an administrative law judge in North Carolina affirmed the authority of North Carolina's Department of Environmental Quality to require Duke to clean polluted groundwater and remove the ash from unlined pits.

On January 2, 2020, Duke agreed to settle the case and close its nine remaining coal-ash impoundments in North Carolina by 2039. Ash from seven of the impoundments will be moved to lined enclosures, while the other two sites will be fortified with additional buffers and closely monitored. Duke estimates the cost of removal in North Carolina to be $3.5 billion.

All pending disputes about coal-ash excavation in lower North Carolinian courts will be resolved as a result of the settlement.

Minnesota Center for Environmental Advocacy et al. v. Minnesota Public Utilities Commission

Minnesota Court of Appeals

http://macsnc.courts.state.mn.us/ctrack/document.do?document=82de290ed11f2bcd6a3ed45186003f92aa523f535a87abf967db2bcacceeb3f9

Minnesota Power received approval from the Minnesota Public Utilities Commission (MPUC) to purchase 250 MW of capacity share from the Nemadji Trail Energy Center, a proposed natural gas-fired power plant in Superior, Wisconsin. However, a coalition of environmental interests argued that investment in the gas-fired plant was neither necessary nor reasonable for Minnesotan consumers, nor did the MPUC conduct an adequate environmental review of the project.

On December 23, 2019, the Minnesota Court of Appeals ruled in favor of the plaintiffs. Though the Nemadji Trail Energy Center is sited in Wisconsin, it is still subject to an environmental review by the MPUC. According to Minnesota Power, the MPUC has never conducted an environmental review for out-of-state capacity ownership. The MPUC is reviewing the ruling and as of this writing has not yet decided whether to appeal. On January 16, 2020, the Wisconsin Public Service Commission voted to approve the plant, but construction faces delays until the Minnesota case is resolved.

Clean Energy

American Bird Conservancy et al. v. Brouillette et al.

US District Court, District of Columbia

https://www.courthousenews.com/wp-content/uploads/2019/12/Save-the-Birds.pdf

Icebreaker Wind, an offshore wind facility in Lake Erie has received funding and approval from the US Department of Energy (DOE) and the US Army Corps of Engineers. However, the $40 million project traverses sensitive avian feeding and breeding grounds.

Icebreaker was authorized under an "Environmental Assessment" (EA), which the plaintiffs argue is an insufficient environmental impact analysis compared to the Environmental Impact Statement (EIS) required by the National Environmental Policy Act. Because no alternatives to the project were considered, the

plaintiffs also claim violations of the Clean Water Act and the Administrative Procedure Act. The plaintiffs seek to restrict project funding until DOE and the Army Corps of Engineers conduct an EIS.

In the matter of the application of DTE Electric Company for approval of its IRP

Michigan Office of Administrative Hearings and Rules for the Michigan Public Service Commission
https://mi-psc.force.com/sfc/servlet.shepherd/version/download/068t0000008u4DZAAY

On December 23, 2019, an administrative law judge recommended that the Michigan Public Service Commission (MPSC) reject DTE Electric Company's most recent Integrated Resource Plan (IRP). Chapter 460.6t of Michigan's state law requires utilities to issue a request for proposals (RFP) for supply-side generation resources to serve the utility's electric load. DTE did not issue an RFP for renewable resources.

According to the judge, renewable resources are not exempt from the RFP requirement. The judge sent the IRP back to the MPSC to direct DTE to issue an RFP for clean energy resources, and recommended a more thorough analysis of distributed generation and battery storage in the next iteration of the IRP. DTE will likely be required to file an updated IRP 24–30 months after the MPSC's decisions.

Mergers & Acquisitions

Laredo Ridge Wind, LLC et al v. Nebraska Public Power District

US District Court, District of Nebraska
https://farmoffice.osu.edu/sites/aglaw/files/site-library/2019.02.04%20-%20Nebraska%20Wind%20Lawsuit%20TRO.pdf

The Nebraska Public Power District (NPPD) seeks early cancellation of power purchase agreements from the plaintiffs, who seek $38.5 million in damages. NPPD stated that Global Investment Partners' acquisition of the wind farms from NRG Energy was a breach of contract and an acceptable basis for contract termination.

The plaintiffs were granted a restraining order, forcing NPPD to honor the power purchase agreements.

Order on Westar's Application to Recover Certain Costs Through its R.E.C.A. Related to the 8% Portion of Jeffrey Energy Center

State Corporation Commission, State of Kansas
http://estar.kcc.ks.gov/estar/ViewFile.aspx/20190912101745.pdf?Id=a3473a11-528a-46eb-9195-7b5425701361

Westar Energy sought a $93 million rate increase from its retail customers over the next 15 years to support the seven-month lease and subsequent purchase of an eight-percent interest in Jeffrey Energy Center (JEC), a coal-fired power plant near St. Mary's, Kansas. On September 12, 2019, the Kansas Corporation Commission (KCC) rejected Westar's request. Westar failed to prove that the lease and purchase was prudent. The KCC explained that Westar suspected JEC's unprofitability and that the 8% share was not necessary to meet capacity requirements.

Joint Report and Application of El Paso Electric Company, Sun Jupiter Holdings LLC, and IIF US Holding 2 LLP

Public Utilities Commission of Texas
https://interchange.puc.texas.gov/Documents/49849_1_1029016.PDF

On August 13, 2019, El Paso Electric Company sought approval from the Public Utilities Commission of Texas (PUCT) for a merger with Sun Jupiter Holdings LLC. Under the merger, El Paso Electric will be a wholly owned subsidiary of Sun Jupiter and a portfolio company of Infrastructure Investments Fund (IIF) US. The merger is valued at $2.78 billion. El Paso Electric and Sun Jupiter Holdings contend that the merger meets the Public Utility Regulatory Act's requirement that a merger be in the public interest. Current El Paso Electric customers would receive a direct $21 million bill credit over 36 months and $100 million economic growth fund would be established in El Paso Electric's Texas and New Mexico service territories.

The applicants and interest groups reached a non-unanimous settlement agreement, or stipulation, that resolves outstanding issues. The PUCT approved the merger application on January 16, 2020. A final order will soon follow.

Risk Mitigation

BW Partners II, LLC v. Los Angeles Department of Water & Power, City of Los Angeles

Government Claim
https://www.mcnicholaslaw.com/lawsuit-filed-against-ladwp-for-getty-fire/

On October 28, 2019, the Getty Fire swept across the Los Angeles Department of Water and Power (LADWP) service territory. BW Partners II, LLC owned a multimillion-dollar property that was destroyed in the wildfire. The plaintiffs allege that LADWP was responsible for the Getty Fire because they did not properly manage vegetation and maintain electrical transmission lines in accordance with industry standards. LADWP did not administer fire-prevention protocols on the days leading up to the Getty Fire though high winds were forecasted. According to the plaintiffs, LADWP knew about the risks of encroaching vegetation, high winds, and exposed power lines, as three prior fires in the area shared similar causes.

The plaintiffs seek damages for their property value and loss of wages due to displacement.

People of the State of New York v. Exxon Mobil Corp.

Supreme Court of the State of New York
https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=/N/2DxDTaU8Gqsq9lN5w0A==&system=prod

The New York Attorney General's office has been investigating the Exxon Mobil Corporation for more than three years for fraudulent disclosure of climate change risks to investors. Exxon Mobil purportedly falsified public-facing information about the company's financial risks should greenhouse gas-emission regulation become stricter. The Martin Act and Executive Law prohibits falsifying information when promoting and issuing securities. Exxon confirmed that it did perform two estimates for future impacts of strict regulation and said their rationale and process was transparent to investors.

On December 11, 2019, the Supreme Court of New York ruled that the New York Attorney General failed to accumulate evidence that Exxon had violated the Martin Act and Executive Law. On January 13, 2020, the New York Attorney General announced that she would not appeal the case.

Rhode Island v. Shell Oil Products Company, LLC, Chevron Corp., et al.

US Court of Appeals, First Circuit
http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200107_docket-19-1818_amicus-brief.pdf

In July 2018, the State of Rhode Island sued 21 oil and gas companies for climate-related damages to the State, including rising sea levels. Rhode Island claims that extraction and marketing of fossil fuels without honestly communicating their hazards is a direct cause of Rhode Island's climate-related damages and constitutes a public nuisance. The state seeks damages, abatement of nuisance, and disgorgement of profits.

On November 20, 2019, the oil and gas companies filed their opening brief, arguing the case ought to be removed for multiple reasons. One reason cited is that "[the claims] ...are completely preempted by the Clean Air Act because they seek to challenge nationwide emissions standards."

States including California, Connecticut, New Jersey, and New York recently filed amicus curiae briefs in support of Rhode Island. Other states including Georgia and Texas have taken broad pejorative stances against climate change-related lawsuits.

Charters & Contracts

Edward E. (Ted) Coates et al. v. City of Tacoma

Washington State Court of Appeals, Division Two
http://www.courts.wa.gov/opinions/pdf/D2%2051695-1-II%20Unpublished%20Opinion.pdf

Tacoma Power, a municipally-owned electric utility, consists of six sub-units, including the telecommunications network Click! Tacoma Power's funds are supposed to be independent from Click! funds. A coalition of ratepayers alleged that the City of Tacoma uses Tacoma Power's revenues to support Click! The ratepayers prevailed in Pierce County Superior Court in 2018, but the City of Tacoma won on appeal on December 10, 2019. The majority opinion in the Appeals Court explains that Click! constitutes a "betterment" of Tacoma Power, and thus aligns with the Tacoma City Charter.

The plaintiffs may seek review from the State Supreme Court. If so, litigation will continue.

Exxon Mobil Corporation et al. v. Mnuchin et al.

US District Court, Northern District of Texas, Dallas Division
https://cases.justia.com/federal/district-courts/texas/txndce/3:2017cv01930/290850/110/0.pdf?ts=1577874105

In August 2011, the Exxon Mobil Corporation partnered with Rosneft, a Russian state-owned oil company, to jointly explore the Arctic Sea. After Russia entered and annexed Crimea in 2014, President Barack Obama enacted economic sanctions on certain Russian nationals, including Rosneft's CEO Igor Sechin. When Exxon and Rosneft extended their partnership in May 2014, Sechin signed the contracts. In July 2017, the US Treasury Department fined Exxon $2 million for violating US sanctions.

Exxon maintains that the US Department of the Treasury did not adequately warn them that their contract with Rosneft as a company would violate Obama's sanctions. After the contract signing date, the Treasury released cautionary statements about contracting with sanctioned individuals. On

December 31, 2019, a district judge in Texas ruled that Exxon did not receive due process of law under the Fifth Amendment of the US Constitution. Exxon's fine is void.

Stock Price Disclosure

Joshua Flynn, et al. v. Exelon Corporation, et al.

US District Court, Northern District of Illinois, Eastern Division
http://securities.stanford.edu/filings-documents/1072/EC1600_16/20191216_f01k_19CV08209.pdf

Customers of Commonwealth Edison (ComEd), a subsidiary of the Exelon Corporation filed a class action lawsuit against the investor-owned utility on December 16, 2019. Exelon and ComEd have been subpoenaed by the US Attorney and investigated by the US Securities and Exchange Commission since July 2019 for suspect lobbying practices and corruption but did not disclose details of the investigations until months later. Exelon's market value declined at the time of disclosure.

The plaintiffs who purchased Exelon securities between February 9, 2019 and November 1, 2019, seek damages for the artificial inflation of stock prices within this period. The plaintiffs allege that had Exelon disclosed the investigations earlier, they may have reconsidered their investments.

In re SCANA Corporation Securities Litigation

US District Court, District of South Carolina (Columbia Division)
http://securities.stanford.edu/filings-documents/1063/SC00_05/202017_r01x_17CV02616.pdf

Top executives at SCANA Corp. (now Dominion Energy) withheld information about the financial struggles of the Virgil C. Summer Nuclear Power Plant (V.C. Summer) during its construction. In July 2017, the V.C. Summer project was abandoned, and stock values declined.

Dominion agreed to settle a class-action lawsuit brought by former SCANA shareholders in 2017, granting the plaintiffs $160 million in cash and $32.5 million in stock to address damages. Dominion does not admit wrongdoing. A federal judge must still sign the terms of the settlement.

Smilovits v. First Solar, Inc., et al.

US District Court, District of Arizona
http://securities.stanford.edu/filings-documents/1048/FSLR00_01/2012817_r01c_12CV00555.pdf

In August 2012, First Solar stockholders filed a class action lawsuit against the solar manufacturer for artificially inflating the value of its stock between 2008 and 2012. The company allegedly violated the Securities Exchange Act of 1934 by withholding instances of solar panel defects and misleading investors about the company's financial status. First Solar disclosed this information in February 2012. In the contested period, First Solar's stock price fell from $310 to $30 per share.

On January 6, 2020, First Solar and the plaintiffs settled the case. First Solar will grant the shareholders $350 million in claims without admission of wrongdoing in an effort to "focus on driving the business forward."

About the Charles River Associates 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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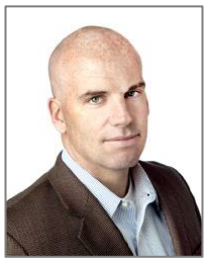
Christopher Russo has testified in regulatory matters and civil litigation on issues regarding the economics, planning, and operation of energy markets, including in international arbitration. He has supervised the valuation of hundreds of power assets in a commercial context, including coal, nuclear, 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.

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