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 at Charles River Associates.

Natural Gas and Oil Transmission

Dana Nessel, Attorney General of the State of Michigan v. Enbridge Energy Company, Inc.

State of Michigan Circuit Court for the 30th Judicial Circuit
https://www.courthousenews.com/wp-content/uploads/2019/06/mich-enbridge.pdf

On June 27, 2019, Attorney General of Michigan Dana Nessel filed a complaint alleging that a 1953 easement allowing the construction and operation of two oil pipelines in the state-owned Straits of Mackinac violates the public trust doctrine and is therefore void. Nessel claims the pipelines will be a public nuisance, as they are susceptible to damaging anchor strikes in open water and threaten the delicate ecological balance of the Great Lakes.

On October 31, 2019, the Michigan Court of Claims ruled that former Michigan governor Rick Snyder (R) did not violate Michigan's constitution when granting Enbridge, a Canadian developer, legislative permission to build the pipelines because the title of the project was descriptive enough. Nessel had argued that the project title did not have a clear statement of purpose and need.

Nessel plans to appeal.

US Forest Service v. Cowpasture River Preservation Association
Atlantic Coast Pipeline, LLC v. Cowpasture River Preservation Association

Supreme Court of the United States
https://www.supremecourt.gov/docket/docketfiles/html/public/18-1587.html

The US Court of Appeals for the 4th Circuit maintained that the entire 2,200-mile Appalachian National Scenic Trail is exempt from transmission rights-of-way under the Mineral Leasing Act. According to the Court, only Congress, not the US Forest Service, can grant a pipeline developer permission to cross underneath the trail.

On October 4, 2019, the Supreme Court agreed to hear the case. The Court will likely reach a decision in the summer of 2020.

Jersey Central Power & Light v. Montville Board of Education, New Jersey

Superior Court of New Jersey, Appellate Division
https://njcourts.gov/attorneys/assets/opinions/appellate/unpublished/a2183-17.pdf

The New Jersey Board of Public Utilities had accepted Jersey Central Power & Light's petition to construct a seven-mile transmission line between Montville Township and East Hanover, New Jersey. However, the Montville Township Board of Education argued that the transmission line's path could expose children at a local middle school to harmful electric and magnetic fields and create an auditory nuisance.

On November 1, 2019, the Court affirmed the New Jersey Board of Public Utilities' 2017 approval of the pipeline. Contrary to the Board of Education's claims, the Board of Public Utilities did not lack evidentiary support at the time of the original approval.

Bernheim Arboretum and Research Forest v. Louisville Gas & Electric

Kentucky Public Service Commission
https://psc.ky.gov/PSCSCF/2019 cases/2019-00274/20190802_Bernheim Arboretum and Research Forest Complaint.pdf

Louisville Gas & Electric (LG&E) plans to build a natural gas pipeline in Bullitt County, Kentucky. LG&E sought land easements from Bernheim Arboretum and Research Forest and threatened to condemn Bernheim-owned land via eminent domain. However, Bernheim argued that LG&E did not earn the necessary Certificate of Public Convenience from the Kentucky Public Service Commission (Kentucky PSC). Bernheim claims to suffer a denial of due process and requests relief in the form of a properly filed Certificate of Public Convenience for the Bullitt County Pipeline's construction.

On August 21, 2019, the Kentucky PSC granted the Kentucky Attorney General a motion to intervene. The Attorney General will review necessary permits, LG&E's compliance with pipeline safety standards, LG&E's internal processes, and the expected project cost increase from $27.6 million to $38.7 million.

On September 19, 2019, Louisville Gas & Electric filed a brief claiming Bernheim Arboretum has no legal standing in the case, as they have not suffered an actual injury and their alleged "injury" is not redressable.

On November 15, 2019, the Commonwealth of Kentucky filed a motion to dismiss LG&E's original condemnation lawsuit to acquire Bernheim property via eminent domain. According to the state, LG&E did not offer to buy a conservation easement beforehand as required by law.

In re: PennEast Pipeline Co. LLC

US Court of Appeals, 3rd Circuit
https://cases.justia.com/federal/appellate-courts/ca3/19-1191/19-1191-2019-09-10.pdf?ts=1568134806

PennEast Pipeline Co. is building a 115-mile natural gas pipeline from Wilkes-Barre, Pennsylvania across the Delaware River to Pennington, New Jersey. FERC approved the project in January 2018 and PennEast filed condemnation petitions for 131 parcels of land, 42 of which are owned by the state of New Jersey. The state sued, asserting immunity from PennEast's requests for eminent domain.

On September 10, 2019, the Court of Appeals for the 3rd Circuit reversed PennEast's condemnation. The 11th Amendment of the United States Constitution grants states sovereign immunity from lawsuits by private parties unless Congress abrogates immunity. Abrogation only occurs in rare cases. On November 5, 2019, the Court refused a rehearing request.

As of November 14, 2019, PennEast indicated intention to petition the Supreme Court.

Coal Generation

State of California et al. v. Environmental Protection Agency et al.

US Court of Appeals for the District of Columbia Circuit
https://www.epa.gov/sites/production/files/2019-08/documents/stofny_19-1165_pfr_08132019.pdf

On August 13, 2019, a coalition of states and cities sued the US Environmental Protection Agency (EPA) for replacing the Clean Power Plan with the less stringent Affordable Clean Energy rule. The Agency had determined that the Clean Power Plan exceeded statutory authority under the Clean Air Act. The Affordable Clean Energy rule will allow states to develop unique plans to regulate greenhouse gas emissions from the power sector and will recommend Heat Rate Improvement (HRI) as the upgrade of choice for coal plants. However, the plaintiffs allege that the Affordable Clean Energy rule violates the Clean Air Act section 307(d)(9), which requires the Agency to require the "best system of emission reduction available." Heat rate improvement recommendations and a general lack of standards for coal plants, according to plaintiffs, represent unlawful negligence.

Thus far, three coal mining companies have testified that the EPA cannot directly regulate CO2 emissions. A coalition of states, led by West Virginia, have also filed motions to intervene as respondents.

Midwest Energy Emissions Corp. et al. v. Vistra Energy Corp. et al.

US District Court for the District of Delaware
https://d1io3yog0oux5.cloudfront.net/midwestemissions/files/documents/20190723/Complaint.pdf

Midwest Energy Emissions Corporation (ME2C) had received a patent for a mercury removal technology for coal plants. ME2C had since attempted to negotiate supply contracts with coal-fired power plants in anticipation of 2015 and 2016 Mercury and Air Toxics Standards regulations.

On July 17, 2017, ME2C issued a complaint alleging that it has a market disadvantage when defendant utilities encourage power plants to use ME2C's patented technology instead of developing new technologies for refined coal. According to the plaintiffs, the defendants have induced power plants to infringe the patent by subsidizing the technology at no, or artificially low, cost to the plant.

On November 5, 2019, 15 owners of refined coal operations filed a request for oral argument.

Tennessee Clean Water Network and Tennessee Scenic Rivers Association v. Tennessee Valley Authority

US Court of Appeals for the 6th Circuit
https://www.supremecourt.gov/DocketPDF/18/18-1307/96449/20190415122101782_Petition.pdf

A coalition of conservation groups complained that unlined coal ash impoundments at the Tennessee Valley Authority's Gallatin Fossil Plant were polluting sensitive groundwater and karst terrain, and therefore violated the Clean Water Act.

On September 4, 2019, the parties reached a settlement and the plaintiffs agreed to dismiss their petition to the US Supreme Court without any award of cost. The Tennessee Valley Authority agreed to excavate all coal ash in violation of the Clean Water Act and contain it in lined storage receptacles. The plaintiffs agreed that the principal goals of the suit have been achieved.

Renewables

Stop B2H coalition et al.

Oregon District Court
https://dockets.justia.com/docket/oregon/ordce/2:2019cv01822/149297

Idaho Power, in partnership with PacifiCorp and the Bonneville Power Administration plans to build a 300-mile, 500 kV transmission line from Boardman, Oregon to Hemingway, Idaho. Idaho Power's 2019 Integrated Resource Plan identified the transmission line "B2H" to be the least-cost solution to bidirectionally deliver 1,000 MW of clean energy, meet summer peak demand, and fulfill the utility's stated goal of 100% clean power by 2045.

On November 12, 2019, two Eastern Oregonian coalitions filed in federal court against the construction of B2H. The plaintiffs argue that the Environmental Impact Statement issued by the US Bureau of Land Management and US Forest Service to Idaho Power did not adequately review B2H's potential environmental and historical impacts. The coalitions fear B2H's construction and operation will generate noise pollution, threaten habitats of deer, elk, and salmon, and mar wagon ruts with historical value along the Oregon Trail.

Public Statement Hearing on the Application of Deep Water Wind South Fork LLC for Certificate of Environmental Compatibility and Public Need

State of New York Public Service Commission
http://www3.dps.ny.gov/W/AskPSC.nsf/All/AD9EDFFF204B42A28525840B004C81DC?OpenDocument

Deep Water Wind and Ørsted are developing a 130 MW offshore wind farm 35 miles off the coast of Long Island. A group of residents in East Hampton, New York voiced concern about the economic and ecological impacts of the proposed transmission cable's interconnection site along a beach in Wainscott.

On September 24, 2019, the parties agreed to a series of settlement meetings related to the Certificate of Environmental Compatibility and Public Need.

Ørsted is considering an alternative transmission cable landing site near Montauk Point.

Jurist et al. v. The Long Island Power Authority et al.

US District Court for the Eastern District of New York
https://dockets.justia.com/docket/new-york/nyedce/2:2019cv03762/435103

The Long Island Power Authority plans to build an $18 million Energy Center at Jones Beach State Park in Wantagh, New York. The Center will educate visitors about sustainable living and power its operations with solar and geothermal energy sources. However, according to local plaintiffs, construction of the Center violates New York's state-level Coastal Zone Management Act, Parkland Alienation law, and Tidal Wetlands Act, as well as the federal-level National Environmental Policy Act and National Historic Preservation Act.

On August 23, 2019, the plaintiffs filed a letter expressing desire not to withdraw or dismiss their claims. The case will proceed.

Bear Gulch Solar, LLC, et al. v. Montana Public Service Commission, et al.

US District Court for the District of Montana, Helena Division
https://cases.justia.com/federal/district-courts/montana/mtdce/6:2018cv00006/56967/79/0.pdf?ts=1543661189

Solar projects less than 3 MW in size were eligible for a blended avoided cost rate of about $66/MWh under Montana's Qualifying Facilities (QF) tariff. However, on May 17, 2016, NorthWestern Energy filed a motion before the Montana Public Service Commission (MPSC) for emergency suspension of the QF tariff. The plaintiffs had already negotiated power purchase agreements under the prior QF tariff. The new avoided cost rate, closer to $22/MWh, effectively excluded the solar projects from the qualifying facility bids. Solar developers argued that the MPSC had violated the Public Utility Regulatory Policies Act (PURPA).

On June 6, 2019, the Court ruled that the federal government cannot force MPSC to order NorthWestern Energy to purchase power from solar developers at previously set contract prices in accordance with PURPA. There will be no valuation of damages to the solar developers.

Retail Energy

American Public Power Association et al. v. FERC

US Court of Appeals, District of Columbia Circuit Court
https://www.publicpower.org/system/files/documents/Petition for Review Order 841 07152019_0.pdf

On July 15, 2019, a coalition of state utility regulators and utilities petitioned the Court to review FERC Order No. 841. According to the plaintiffs, Order 841 violates the Federal Power Act, which delineates authority over wholesale and retail transactions between state and federal entities, respectively. Order 841 directs independent system operators (ISOs) to create models for storage to participate in wholesale markets. If ISOs choose to allow aggregate behind-the-meter storage resources to participate in wholesale electricity markets, plaintiffs allege that FERC would intrude on states' rights to regulate a retail-only resource.

FERC has already granted PJM and SPP partial compliance with Order 841. In addition, behind-the-meter storage resources already participate in wholesale markets in CAISO and ISO-New England. We expect the case will be in court for years to come, by which time behind-the-meter storage resources will be actively participating in most US wholesale electricity markets.

Grid Modernization

Deien v. Seattle City Light

Superior Court of Washington State
https://crosscut.com/sites/default/files/files/6071811.pdf

Customers of Seattle City Light filed a class action lawsuit against the municipal utility on August 21, 2019. In 2016, Seattle City Light installed digital "smart" meters and a software system to replace its fleet of employees who recorded each meter's monthly output manually. According to the plaintiffs, the smart meters did not work as intended, so Seattle City Light used estimates of electricity usage rather than actual values, resulting in inflated monthly bills. The plaintiffs seek damages from their inflated bills as well as attorney fees.

The parties await a decision in the King County Superior Court to grant class-action status to the case.

In re Application of Ohio Edison Company et al.

Ohio Supreme Court
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2019/2019-Ohio-2401.pdf

Ohio Edison Company and other Ohioan subsidiaries of FirstEnergy had requested a rate increase of $3.33/month for residential customers. This surcharge was meant to cover the cost of "grid modernization," what FirstEnergy defined as an upgrade to existing distribution systems in its Ohio service territory. The Public Utilities Commission of Ohio at first approved the surcharge, and FirstEnergy began collecting it in 2017. A broad coalition of manufacturers, environmentalists, and consumer groups appealed the Commission's conclusion.

On June 19, 2019, the Ohio Supreme Court affirmed the Commission's order but ultimately rejected the surcharge 4-3 claiming no entity can force FirstEnergy to use the additional revenue for the express purpose of grid modernization. As such, FirstEnergy may owe $204 million from 2017 and $168 million collected or scheduled for 2018 and 2019, but a refund to customers is not guaranteed.

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 U.S. 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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