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.

Storage

National Association of Regulatory Utility Commissioners v. Federal Energy Regulatory Commission

US Court of Appeals, District of Columbia Circuit
https://www.cadc.uscourts.gov/internet/opinions.nsf/E12B1903B0477E21852585A1005264D7/%24file/19-1142-1851001.pdf

The Federal Energy Regulatory Commission (FERC) did not exceed its authority in issuing Order No. 841, according to the US Court of Appeals for the DC Circuit. According to Constitutional law, federal agencies regulate interstate commerce, and that power can override state-level regulations on the interconnection of storage to a local power grid. Furthermore, the Court ruled that small-scale, distribution-level, and even behind-the-meter storage resources can participate in regional storage markets. This outcome will likely increase the business case for residential and commercial storage, and widespread storage could be a potentially useful tool for demand response.

Ethics

Potter et al. v. Madigan et al.

US District Court, Northern District of Illinois, Eastern Division
https://www.politico.com/f/?id=00000173-d959-db69-a777-fdfff03b0000

Customers of Illinois utility ComEd have filed a RICO complaint, demanding a jury trial against their electricity provider and Illinois House Speaker Michael Madigan. The plaintiffs describe an eight-year racketeering scheme in which Illinois legislators accepted bribes from ComEd in return for passing utility-friendly legislation. The plaintiffs seek at least $450 million in damages, including $150 million in ComEd's unethical profits and an additional $300 million under the RICO Act's treble damages provision. The plaintiffs also seek an injunction for Mr. Madigan from political activity. Finally, the plaintiffs argue against consumer charges for subsidizing ComEd's nuclear power plants.

ComEd executives have apologized for their lobbyists' conduct, indicating that they did not live up to the values of the company.

Oil & Gas

Santa Fe Pipeline Partners, LP v. Federal Energy Regulatory Commission, et al.

US Appeals Court, District of Columbia Circuit
https://www.cadc.uscourts.gov/internet/opinions.nsf/F9110225326D9BB9852585B600531D20/$file/19-1067PC.pdf

In March 2018, FERC stated it would no longer allow master limited partnerships to recover income tax allowances in cost-of-service ratemaking calculations. FERC then refused Santa Fe Pipeline Partners' (SFPP) income tax allowance on the same day the new policy was announced, lest it be double counted. SFPP took issue with the claim of double counting and sued FERC, seeking retroactive income tax allowances. FERC countered that the policy was issued because typical returns on equity already compensated master limited partnerships adequately.

The Federal Court sided with FERC, ruling that discounted cash flow methodology would not change under the new rule and that an additional tax allowance would double count acceptable returns.

Allegheny Defense Project, et al. v. Federal Energy Regulatory Commission

US Appeals Court, District of Columbia Circuit
https://www.ferc.gov/sites/default/files/2020-06/Allegheny-CADC-en-banc-decision.pdf

Since the 1960s, FERC has issued "tolling orders" that delay landowners' judicial challenges to pipeline development projects. The Natural Gas Act requires a landowner to first obtain a final rehearing decision from FERC before going to court. With a tolling order, FERC can extend the 30-day deadline defined by the Natural Gas Act to "act upon" a rehearing request.

The US Appeals Court ruled that FERC's tolling order procedure violates the Natural Gas Act, because FERC's simply granting a rehearing does not count as "acting upon" a rehearing request. Now, landowners have a faster track to protest developers' decisions to build on their property.

Southern California Gas Company, Utility Workers Union of America Local Unions Nos. 132, 483 and 522, Clean Energy v. California State Energy Resources Conservation and Development Commission

Superior Court of the State of California, Orange County
https://www.documentcloud.org/documents/7012907-CEC-lawsuit.html

Southern California Gas (SCG), which serves nearly 22 million customers, is petitioning for a writ of mandamus against California's Energy Commission (CEC). SCG believes the CEC violated California state law, specifically the Warren-Alquist Act. Since 2013, the Act requires the state Public Utilities Commission to consult with the CEC every four years to identify natural gas efficiency savings that are cost effective, reliable, and feasible. SCG interprets the Act to mean that natural gas and its greenhouse gas reduction potential must be considered in California's energy future. The CEC must direct companies like SCG to maximize gas benefits rather than abandon gas as an energy source.

SCG alleges that the CEC's 2019 analysis of gas benefits was much sparser than the 2015 version. The SCG contends the analysis was in a report appendix rather than a separate docket, and ultimately intended to minimize the use of natural gas. SCG argues that even if the state chose to wean itself from natural gas, that decision is for the California legislature to make, not the CEC.

Standing Rock Sioux Tribe, et al. v. United States Army Corps of Engineers, Dakota Access LLC

US Appeals Court, District of Columbia Circuit
https://earthjustice.org/sites/default/files/files/dc-cir-decision.pdf

The Standing Rock Sioux Tribe sued the United States Army Corps of Engineers on two contested counts: that an incomplete environmental review had been performed, and that Energy Transfer Partners, the pipeline's owner, ignored the federal Mineral Leasing Act when approving construction and operation under Lake Oahe.

In August 2020, US Appeals Court overturned a lower court injunction against the Dakota Access Pipeline's operation, ruling that the plaintiffs did not make the necessary findings for injunctive relief. However, the same ruling also vacates the Mineral Leasing Act easement authorizing the Dakota Access Pipeline to cross the Missouri River at Lake Oahe, rendering the entire pipeline in violation of federal law. The US Army Corps of Engineers must now decide whether to reissue permits for the pipeline. A full environmental review is not required.

United States v. Bay State Gas Co.

US District Court, District of Massachusetts
https://www.justice.gov/usao-ma/page/file/1252071/download

In September 2018, over-pressurized natural gas distribution pipelines exploded in the Merrimack Valley of Massachusetts, killing one person, causing mass evacuations, and damaging over 100 properties. Prosecutors determined that the explosions were preventable. In 2015, Bay State Gas Company d/b/a Columbia Gas of Massachusetts referenced the dangers associated with over-pressurized underground control lines. Columbia Gas pled guilty to violation of the federal Pipeline Safety Act. On February 25, 2020, Columbia Gas agreed to pay a fine of over $53 million within 30 days, which is twice the amount they received from the state for their gas enhancement plan.

Workman, Charles, et al. v. Texas Eastern Transmission LP, et al.

Kentucky Circuit Court, Lincoln County
https://kcoj.kycourts.net/CourtNet/Search/Index

In August 2019, Texas Eastern Transmission's natural gas distribution pipeline exploded in Lincoln County, Kentucky, killing one person, hospitalizing six, and damaging several mobile homes. A group of 87 plaintiffs believes the explosion was preventable and requested a jury trial to hold Texas Eastern Transmission accountable for their negligent conduct.

In the complaint, the plaintiffs describe an aging gas pipeline and cite numerous deadly accidents that occurred near the explosion site in the past few decades. Texas Eastern Transmission failed to perform necessary repairs and properly inspect the line. The local compressor station operator also allegedly did not shut off the emergency valve in time. The plaintiffs seek compensation for loss of life, property damage, medical expenses, lost earnings, future loss of earnings, and emotional suffering.

Breach of Contract

Eni S.p.A v. Gulf LNG Energy (Port) LLC

Supreme Court of the State of New York, County of New York
https://www.law360.com/articles/1297519/attachments/0

Eni S.p.A. (Eni SpA) accused an affiliate of energy infrastructure company Kinder Morgan of a contract breach at the Gulf LNG Energy Port in Mississippi. The Energy Port was slated to be an LNG import terminal, but Kinder Morgan now plans to convert the port into an export terminal given the prevalence of shale gas in the United States. Eni SpA, one of two contracted customers of the import terminal, believes that the conversion should terminate their contract, which runs through 2031. A decision is expected by 2021.

According to the July 31, 2020 complaint, Eni states that Kinder Morgan affiliates fought their arbitration loss and filed in the Supreme Court of the State of New York against Eni SpA under a Guarantee Agreement. Kinder Morgan's affiliates contend that Eni SpA must continue to pay the Terminal Use Agreement (TUA) "Reservation" and "Operating" fees pursuant to the Guarantee Agreement notwithstanding that the TUA was terminated effective more than four years ago.

CRA Vice President Bob Stillman was the expert witness for Eni SpA when the dispute was heard by the International Centre for Dispute Resolution (ICDR) in July 2018 (*Eni USA Gas Marketing v. Gulf LNG Energy LLC and Gulf LNG Pipeline LLC* (ICDR Case No. 01-16-0000-7065)).

City of Jacksonville, Florida and JEA v. Municipal Electric Authority of Georgia

US District Court, Northern District of Georgia, Atlanta Division
https://www.documentcloud.org/documents/6951637-Order-1.html#document/p1

In 2008, Jacksonville Electric Authority (JEA) signed a 20-year power purchase agreement (PPA) with the Municipal Electric Authority of Georgia (MEAG). In exchange for affordable electricity from the Vogtle nuclear power plant, JEA agreed to pay $1.4 billion to finance Vogtle's construction and debt. However, Vogtle's construction was delayed five years and the contractor, Westinghouse, filed for bankruptcy in 2017. Under a new PPA, JEA's obligation more than doubled to $2.9 billion. In 2018, JEA sued MEAG, claiming that the City Council never approved the new deal. MEAG countered with a breach of contract suit.

In June 2020, a federal judge ruled JEA's contract to be valid and enforceable, since the PPA required JEA to pay for Vogtle's costs "unconditionally." JEA agreed to settle with MEAG and drop the appeal. JEA has already spent $9 million in legal costs, and the settlement spares another $5 million. JEA's next payment of $41 million is due by the end of 2022, before Units 3 and 4 come online.

Ground/Water Treatment & Technology LLC v. Georgia Power Co.

US District Court, Northern District of Georgia
https://www.pacermonitor.com/public/case/34912089/GroundWater_Treatment__Technology,_LLC_v_Georgia_Power_Company

In 2018, Ground/Water Treatment & Technology LLC (GWTT) was contracted by Georgia Power to build a $5.87 million temporary wastewater treatment facility at coal-fired Plant Bowen in Bartow County, Georgia. Georgia Power then asked the plaintiff to build a permanent wastewater treatment facility instead, promising a cost true-up after GWTT completed the work. However, GWTT claims it was not

fairly compensated for work on the permanent facility and now requests $7.2 million plus interest for breach of contract and unjust enrichment. Georgia Power insists that the claims have no merit, given that no official second contract was made.

Nuclear

Friends of the Earth et al. v. United States Nuclear Regulatory Commission et al.

US Court of Appeals, D.C. Circuit
https://www.nrc.gov/docs/ML2003/ML20037A720.pdf

In December 2019, the Nuclear Regulatory Commission (NRC) extended the operating license of NextEra Energy's Turkey Point nuclear plant in Miami. Turkey Point's operating license had already been extended once before, in 2013. The plant is now licensed to operate into the 2050s. However, the NRC used the same approval criteria for the most recent license extension as they did in 2013.

Friends of the Earth, Miami Waterkeeper, and the National Resources Defense Council believe that for a second operating license extension, a more thorough environmental review is required per the National Environmental Policy Act (NEPA). In July 2020, the petitioners filed their initial brief, in which they highlight groundwater violations as an example of an oversight by the NRC.

The NRC claims that license renewals are not final and that they are still fielding environmental evaluations, hence adhering to NEPA. However, the plaintiffs believe that the NRC renewals are final, and recent court precedent affirms that view. See *Allegheny Defense Project et al. v. FERC*.

Coal

Sierra Club v. U.S. Environmental Protection Agency et al.

US Court of Appeals, Tenth Circuit
https://cases.justia.com/federal/appellate-courts/ca10/18-9507/18-9507-2020-07-02.pdf?ts=1593723630

PacifiCorp's coal-fired Hunter Power Plant in Utah received a Title V Clean Air Act permit in 1998 and applied for renewal in 2001. In 2015, Utah approved the plant's application and issued Hunter a state-level permit. The Environmental Protection Agency (EPA) declined to review the permit renewal since Utah had already granted the plant a state-level permit. The Sierra Club challenged the EPA about interpretation of the Clean Air Act. Under Title V of the Clean Air Act, coal plants can only renew their compliance permits if they can adhere to all "applicable requirements." The Sierra Club believes that the applicable requirements include all existing statutory requirements at both the federal and state level, while the EPA interprets the clause to mean only requirements described in state-level permits.

The Court of Appeals sided with the Sierra Club's interpretation of the Clean Air Act. The EPA now has a responsibility to ensure compliance before any permits are issued, and must reconsider Hunter's 2001 permit renewal application.

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