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.

LNG

Center for Biological Diversity and Sierra Club v. Federal Energy Regulatory Commission

US Court of Appeals, District of Columbia Circuit
https://s3-us-west-2.amazonaws.com/s3-wagtail.biolgicaldiversity.org/documents/Petition.pdf

On May 21, 2020, the Federal Energy Regulatory Commission (FERC) approved the siting and construction of a liquefied natural gas (LNG) terminal on Alaska's North Slope. The project is the largest of its kind, featuring a gas treatment plant and two 800+ mile pipelines to transport the treated gas to a liquefaction facility at the export terminal. The terminal would serve growing LNG markets in the Pacific.

In July 2020, and again in September 2020, FERC denied a rehearing of the approval order. The original May approval was a 2-1 decision. FERC Commissioner Richard Glick dissented, citing violations of the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). Under NEPA, gas projects require thorough environmental review. According to Glick, this project is unprecedented in scale with unknown environmental impacts. Under the NGA, gas projects must be in the public interest. A project that may exacerbate climate change is not in the public interest. Glick also notes falling LNG demand due to COVID-19.

The Center for Biological Diversity and the Sierra Club are now petitioning the US Court of Appeals to reconsider the denied rehearing. The plaintiffs reiterate Glick's assertion that the project violates NEPA.

Vecinos para el Bienestar de la Comunidad Costera, et al. v. Federal Energy Regulatory Commission

US Court of Appeals, District of Columbia Circuit
http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/case-documents/2020/20200327_docket-20-1093_petition-for-review-1.pdf

FERC filed a brief defending its approval of two LNG terminals in the Rio Grande Valley of Texas. According to the plaintiffs, low-income communities will disproportionately suffer the effects of pollution. FERC countered that pollution impacts were thoroughly considered prior to approval. The environmental impact statements for the projects comprise four years of effort and over 1,000 pages.

Many of Vecinos' demands, such as a calculation of the social cost of carbon, are not required by statute. FERC also recognizes that a worst-case scenario could result in ozone levels above national ambient air quality standards, but recognition of such a scenario is sufficient for NEPA compliance. Again, parties disagree about the public interest requirement of the NGA. Vecinos believes negative environmental and socioeconomic impacts are not in the public interest, while the Department of Energy and FERC tout the benefits of exported LNG.

Solar

Solar Energy Industries Association v. Federal Energy Regulatory Commission

US Court of Appeals, Ninth Circuit

https://www.seia.org/sites/default/files/202009/SEIA%20Petition%20for%20Review%20(Order%20872).pdf

In July 2020, FERC enacted significant changes to the Public Utility Regulatory Policies Act (PURPA) with Order No. 872. The Order prohibits qualifying renewable energy generators (those less than 80 MW) to enter long-term, fixed-rate contracts. The order also clarifies that any facilities sited more than one mile apart from the generation source will be considered separate, meaning that utility-scale solar spread out can meet PURPA's 80 MW size requirement. Though PURPA has saturated the market with renewable generators since its inception in 1978, SEIA argues that it is still necessary to promote market competition and renewable energy in vertically integrated utility territories. SEIA's petition cites contravention of PURPA's statutory intent.

NextSun Energy Littleton, LLC v. Acadia Insurance Company

US District Court, District of Massachusetts

https://dockets.justia.com/docket/massachusetts/madce/1:2018cv11180/199325

NextSun Energy Littleton, a solar panel company, experienced a fire in one of their arrays in 2016. The town of Littleton, Massachusetts subsequently suspended operations for all NextSun panels. NextSun believes that, under an insurance policy with Acadia Insurance, it should recover the income lost from energy generation. Acadia counters that the income recovery guarantee only applies to the 88 panels that caught fire, not all 11,000 that were shut off. Though the cause of the fire was unclear, Acadia asserted that it was caused during construction, a phase not covered by the insurance policy. NextSun brought the alleged breach of contract to the Massachusetts District Court.

The Court sided with NextSun and found that Acadia had breached the contract because the operation suspension occurred after the damage. NextSun may collect their claim in full. However, the judge viewed Acadia as acting in good faith, not intentionally engaging in deceptive trade practices in violation of Massachusetts law.

Oil & Gas

Application of MPLX Ozark Pipe Line LLC

Federal Energy Regulatory Commission
https://www.ferc.gov/sites/default/files/2020-06/20190625165229-OR19-14-000.pdf

Marathon Petroleum (MPLX) filed an application to change market-based rates for its Ozark crude pipeline, which extends from Oklahoma to Illinois, because it does not have market power in either the product market (crude oil transport, all grades) or the destination market (Wood River, Illinois region) to unduly influence rates. Husky Marketing and Supply and Phillips 66, current and future shippers of crude oil along the Ozark pipeline, protested MPLX's application. The defendants said that the requested market rate would harm competition.

Expert testifiers analyzed MPLX's Herfindahl-Hirschman Index (HHI), a measure of market concentration, under different permutations of competitors and destination markets. MPLX's HHI ranges from 2,676 to 2,859, or a market share of 30-34.5%. FERC's 2010 HHI threshold is 2500. Thus, MPLX fails the market power analysis test and FERC rejected its market-based rate change application.

Phillips Petroleum Company Venezuela Limited, et al v. Petróleos de Venezuela SA, et al.

US District Court, District of Delaware
https://www.docketbird.com/court-documents/Phillips-Petroleum-Company-Venezuela-Limited-et-al-v-Petroleos-De-Venezuela-S-A-et-al/Certified-Judgement/ded-1:2019-mc-00342-00001-001

Two subsidiaries of ConocoPhillips operating in Venezuela seek to confirm a breach of contract and obtain a seizure order against Venezuela's state-owned oil company, Petróleos de Venezuela SA (PDVSA). The parties signed a contract in 2018 that awarded ConocoPhillips $2 billion after PDVSA nationalized two onshore oil plays without compensation. The presiding judge clarified that in order to determine the legality of a seizure order, there must have been a breach of contract and, per the contract, any such dispute must be settled in a New York court.

The Delaware Court also addressed US sanctions against Venezuela. The plaintiffs argue that the Judge can issue a seizure order before the US Treasury Department issues ConocoPhillips a license to serve the writ. The defendants rebut that the US Treasury Department has not formally declared a stance for or against issuing a license before the seizure order, and it should not be assumed guaranteed.

Center for Biological Diversity to Governor Gavin Newsom

Intention to File Suit
https://www.biologicaldiversity.org/programs/climate_law_institute/energy_and_global_warming/pdfs/20-09-21-Ltr-to-Gov-Newsom-Re-Illegal-Permitting.pdf

On September 21, 2020, the Center for Biological Diversity wrote to California Governor Gavin Newsom stating its intention to sue. Since Newsom took office in 2018, the Center has urged the governor to block state-issued permits for new oil and gas wells. Permits for such wells allegedly violate California's Environmental Quality Act for insufficient environmental impact review. While the Center has not yet taken this case to court, a ruling could establish precedent for state power over energy-siting matters.

Town of Weymouth v. Massachusetts Department of Environmental Protection

US Appeals Court, First Circuit

https://casetext.com/case/town-of-weymouth-v-mass-dept-of-envtl-prot-2

In June 2020, the First Circuit vacated a state-issued air pollution permit for a compressor station along the Atlantic Bridge pipeline project. The town of Weymouth, Massachusetts successfully sued to vacate the permit in 2020, but the permit was reinstated in August 2020 after the Massachusetts Department of Environmental Protection (DEP) promised to correct the violations in the original permit approval.

However, in September 2020, a gasket at the compressor station failed and released natural gas and volatile organic compounds into the air. Residents of Weymouth have filed to re-vacate the air pollution permit, arguing that the Pipeline and Hazardous Materials Safety Administration did not investigate the incident. The residents also allege that the best available control technology for the compressor station's pollution will not be available until 2021. Against a backdrop of inequitable pollution siting in environmental justice communities, the residents ask the Massachusetts DEP to vacate the compressor station's permit until strong control technology can be installed.

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

US Court of Appeals, District of Columbia Circuit

https://earthjustice.org/sites/default/files/files/corps-appeal-reply.pdf

The 1200-mile Dakota Access Pipeline originating in North Dakota's Bakken Shale was ordered to shut down by a US district judge in July 2020. A month later, that order was stayed by the DC Circuit Court. The Army Corps of Engineers has now filed a brief to defend their compliance with NEPA when analyzing the project's risk.

According to the appellant, consistent and forceful outcry led the District Judge to incorrectly order further environmental review. Statutorily, the Army Corps of Engineers is only required to conduct an internal analysis, which they did. Further, the Army Corps distinguishes between vacating an easement and full shutdown. Even if a land easement is vacated, the pipeline could still operate legally.

Energy Markets

PNE Energy Supply LLC v. Eversource Energy and Avangrid, Inc.

US Appeals Court, First Circuit

https://www.courthousenews.com/wp-content/uploads/2020/09/energy.pdf

In 2017, economists from the Environmental Defense Fund released a report alleging that New England consumers were overpaying billions of dollars for electricity. Since then, plaintiffs have filed multiple court cases against Eversource and Avangrid for market manipulation, all of which have been dropped. In the latest case, New Hampshire's PNE Energy filed a class action suit against defendants Eversource and Avangrid—major gas and electric utilities in New England—for purposefully constraining gas capacity on Enbridge Inc.'s Algonquin pipeline system and manipulating both gas and power prices.

The First Circuit dismissed the case because use of Algonquin's pipeline system was approved by a FERC tariff. Under such a tariff, Eversource and Avangrid were not required to release their firm transmission capacity. FERC conducts regular market power analyses and does not investigate utilities without the necessary market power to manipulate prices.

In re: Complaint of Direct Energy Business, L.L.C. v. Duke Energy Ohio, Inc., and Public Utilities Commission of Ohio

Ohio Supreme Court
https://www.supremecourt.ohio.gov/rod/docs/pdf/0/2020/2020-Ohio-4429.pdf

In 2013, Duke Energy Ohio miscalculated usage data for one of Direct Energy's largest customers, and Direct Energy was overbilled. The Public Utilities Commission of Ohio (PUCO) sided with Direct Energy, claiming that Duke's miscalculation was an instance of inadequate service. PUCO ordered Duke Ohio to pay $2 million in restitution to Direct Energy. Duke Ohio appealed to the Ohio Supreme Court, who reversed PUCO's order and dismissed the $2 million fee. The Court found that Duke Ohio was not acting as a public utility when serving as Direct Energy's meter-data-management agent, so the public utility's duty of "adequate service" did not apply.

Center for Biological Diversity, et al. v. Tennessee Valley Authority

US District Court, Northern District of Alabama
https://law.justia.com/cases/federal/district-courts/alabama/alndce/3:2018cv01446/167547/52/

In 2018, the Tennessee Valley Authority (TVA) adjusted its rate structure for residential and commercial customers. While total revenue remained steady, the wholesale standard service rate decreased and a new "grid-access charge" was added. The grid-access charge is meant to reflect each customer's contribution to grid maintenance. The new charge is disproportionately borne by residential and commercial customers who own distributed energy resources (DERs). TVA, justifying the charge, explained that customers who use distributed generation still rely on TVA's power grid to supply energy when they are unable to produce enough, and thus need to pay their fair share for infrastructure maintenance.

The plaintiffs allege that TVA did not properly assess the environmental impact of their new rate. According to the plaintiffs, if DERs are discouraged, then fossil-emitting power plants will have to combust more carbon-polluting fuel to compensate.

The US District Court for the Northern District of Alabama found that the plaintiffs lack standing. While the Court did not refute TVA's suppression of DERs, it did not find causative evidence that fewer DERs would lead to greater emissions. The "chain of inferences" proposed by the plaintiffs was too tenuous.

Coal

Sierra Club v. United States Environmental Protection Agency

US Appeals Court, Tenth Circuit
https://law.justia.com/cases/federal/appellate-courts/ca10/18-9507/18-9507-2020-07-02.html

PacifiCorp's coal-fired Hunter Power Plant (Hunter) 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 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. However, the state of Utah filed for rehearing en banc, citing a Fifth Circuit decision that states Title V of the Clean Air Act does not mandate reexamination of the underlying permits. PacifiCorp also accused the Sierra Club of exceeding the five-year window to reclassify Hunter as a major source of emissions.

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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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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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