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.

Rate Increases

State of North Carolina ex rel. Utilities Commission et al. v. Attorney General Joshua H. Stein et al.

North Carolina Supreme Court
https://law.justia.com/cases/north-carolina/supreme-court/2020/271a18.html

In 2018, the North Carolina Utilities Commission (NCUC) approved Duke Energy's inclusion of $778 million in customer retail rates to fund coal ash cleanup efforts. However, a recent ruling by the North Carolina Supreme Court will force NCUC to consider another option that was proposed at the time. The Public Staff of NCUC suggested that Duke's stakeholders share some of the coal ash cleanup cost burdens with ratepayers given Duke's history of environmental violations. According to the Court, the NCUC handled Duke's proposal in a reasonable manner, but declined to determine whether Duke's environmental violation history lends merit to the Public Staff plan. According to the Court, NCUC is required by law to properly evaluate the extent to which environmental violations occurred, even if they are not required to "make definitive decisions" about the issue.

Public Utility Commission of Texas et al. v. Texas Industrial Energy Consumers, et al.

Supreme Court of Texas
https://data.scotxblog.com/scotx/no/18-1061

In 2010, Southwestern Power Electric Co. (SWEPCO) continued construction of a coal plant at a time when natural gas prices were falling. The Public Utility Commission of Texas (PUCT) approved an $83 million rate increase to fund the plant's construction. The Texas Industrial Energy Consumers and other stakeholders sued the PUCT in 2019, claiming that it did not prudently conduct an "independent retrospective analysis test" to support the rate increase. The PUCT countered that such a test is an unfair standard, claiming that the PUCT's mandate is to test for prudence at the time of the decision, not conduct retrospective analysis. A decision is pending.

COVID-19

Public Citizen Inc. et al. v. Railroad Commission of Texas et al.

53rd District Court of Travis County, Texas
https://mkus3lurbh3lbztg254fzode-wpengine.netdna-ssl.com/wp-content/uploads/2020-7-22-Original-Petition-for-Writs-of-Mandamus-and-Injunction.pdf

The Texas Railroad Commission, which regulates the state's oil and gas industry, adopted rules to ease environmental regulations at a May 5, 2020 open meeting about COVID-19 economic mitigation strategies. The approved rules allow oil and gas companies to temporarily store oil and gas underground outside salt formations, and extend deadlines to plug abandoned gas wells. However, the Commission did not alert the public to the specific content of the rules before the meeting.

Consumer advocacy group Public Citizen and two ranch owners challenged the Commission's rules. The District Court sided with Public Citizen, asserting that the Commission violated the Texas Open Meetings Act, which requires the Commission to provide written notice to the public of the "date, hour, place, and subject" of their meetings.

The Commission will appeal the decision.

Renewable Energy

Fisheries Survival Fund, et al. v. David Bernhardt, et al.

US Court of Appeals, District of Columbia Circuit
https://dockets.justia.com/docket/circuit-courts/cadc/20-5094

In 2016, the US Bureau of Ocean Management (BOEM) awarded a $42.5 million lease to Statoil Wind to scope the offshore wind potential of a 130-square-mile region off the coast of New York for a 1-GW project called Empire Wind. Fishing trade groups claim that the BOEM violated the Outer Continental Shelf Lands Act (OCSLA) and the National Environmental Policy Act (NEPA), since an offshore wind farm in that location would disturb marine habitats. However, the US Department of the Interior (DOI) has recommended that the Court of Appeals drop the case. The DOI argues that the case is too early, and that any NEPA violations cannot be claimed until Statoil Wind submits development plans. The BOEM also claims that the OCSLA has no merit because the fishing groups did not observe a 60-day waiting period after the lease was issued before filing. The fishery groups countered that the lease and the final sale notice were only 45 days apart, and that exceptions exist for immediate legal interests.

SEC v. SCANA Corporation, et al.

US District Court for the District of South Carolina
https://www.sec.gov/litigation/litreleases/2020/lr24751.htm

SCANA Corporation, now Dominion Energy South Carolina, misled shareholders about the progress of the abandoned VC Summer nuclear plant. The US Securities and Exchange Commission's (SEC's) complaint sought a permanent injunction and disgorgement of alleged ill-gotten gains. Federal district court found that SCANA violated the Securities and Exchange Act of 1934 by misreporting project progress and outlook in SEC filings. SCANA will pay a $25 million civil penalty and will disgorge $112.5 million in ill-gotten gains, plus interest.

Comments of Innu Nation Inc. on Hydro-Québec TransÉnergie Application for the Appalaches-Maine Interconnection Power Line Project, Application No. C01914

The Canada Energy Regulator
https://docs2.cer-rec.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90548/3119846/3828338/4028012/C10115-1_Comments_of_Innu_Nation_Inc_on_M-A_line_-_A7L3K7.pdf?nodeid=4028013&vernum=-2

In 2019, HydroQuébec applied for a permit to build a direct current transmission line to export hydropower from the 5.43 GW Churchill Falls hydropower generating station to the United States. The Churchill Falls station is located upon the ancestral lands of the Innu Nation. The Innu Nation, represented by in-house counsel, claims that Hydro-Québec's construction and use of the Churchill Falls station have violated Innu rights under the United Nations' Declaration on the Rights of Indigenous Peoples, including the rights to retain their ancestral lands and profit from the land's resources. According to their brief, the Innu believe that Hydro-Québec will unlawfully profit from the hydropower resource. The Innu Nation requests that Hydro-Québec lawfully obtain permission for the transmission project and fairly compensate all affected First Nations.

Grid Modernization

Maria Povacz v. Pennsylvania Public Utilities Commission

Commonwealth Court of Pennsylvania
https://law.justia.com/cases/pennsylvania/commonwealth-court/2020/607-c-d-2019.html

Pennsylvania's Act 129 of 2008 requires utilities to install advanced metering infrastructure in all homes and businesses by 2023. PECO Energy customers claim that advanced "smart" meters release harmful radio frequency emissions and violate customer privacy, and a smart meter mandate thus violates the Fourteenth Amendment. PECO objects that it has already spent $2 billion on smart meter deployment.

The Commonwealth Court of Pennsylvania sided with the constituents in supporting customer choice via an opt-out clause. PECO plans to appeal to the state Supreme Court.

FERC Jurisdiction

In re: Pacific Gas & Electric Corp. et al. v. FERC

US Court of Appeals for the Ninth Circuit
https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/10/07/19-71615.pdf

An ongoing battle continues between the Federal Energy Regulatory Commission (FERC) and bankruptcy courts about which entity has authority to shape the terms of utility bankruptcies. In October 2020, the US Court of Appeals denied the FERC unilateral ability to force Pacific Gas & Electric Corporation (PG&E) to abandon its wholesale power purchase agreement (PPA) contracts. Since PG&E completed its Chapter 11 bankruptcy proceedings with the PPA contracts still in place, the Ninth Circuit Court rendered FERC's challenge moot.

The Ninth Circuit Court did not address the merits of FERC's orders. That issue may be resolved in the US Supreme Court.

Belmont Municipal Light Dept. et al. v. FERC

US Court of Appeals, District of Columbia Circuit
https://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=15372602
In June 2020, FERC approved ISO-New England's "Inventoried Energy" plan to ensure winter fuel supply and reliability. The program would subsidize coal, oil, nuclear, biomass, and hydroelectric plants to store fuel during the 2023-2024 and 2024-2025 winter seasons in case of a natural gas shortage.

However, such a plan will cost ratepayers in Massachusetts and New Hampshire $300 million, a charge which state attorneys general Maura Healey and Gordon MacDonald claim is unjust and unreasonable. According to the attorneys general, FERC's approval of the plan, given inadequate evidence, violates the Federal Power Act. Notably, the June FERC approval was a split decision. Commissioner Glick dissented, claiming that the $300 million subsidy was issued "without any indication that those payments will cause the slightest change in those generators' behavior."

Public Citizen, Inc. v. FERC

US Court of Appeals, District of Columbia Circuit
https://dockets.justia.com/docket/circuit-courts/cadc/20-1156

The Midcontinent Independent System Operator (MISO) held a capacity auction for its Load Resource Zone 4 in 2015. Capacity prices for Zone 4 increased 800%, or $100 million, from the previous year. Later in 2015, following a complaint by Public Citizen, the FERC ruled that market participant Dynegy's tariff manipulations were unjust and unreasonable. MISO updated its rules for subsequent auctions, and prices returned to normal levels. However, in 2019, the FERC finally ruled that the 2015 capacity auction in itself was neither unjust nor unreasonable because the auction was conducted under a MISO tariff which had previously been approved by the FERC.

Public Citizen claims that the FERC's 2019 ruling represents an abdication of its duty under the Federal Power Act. Sections 205 and 206 of the Act require the FERC to determine if wholesale rates are just and reasonable, and if not, rectify the rate. FERC stands by its 2019 ruling, but the FERC's lack of transparency in the ruling may favor the plaintiff.

Fossil Fuels

US v. DTE Energy et al.

US District Court for the Eastern District of Michigan
https://www.eenews.net/assets/2020/05/15/document_gw_01.pdf

In May 2020, DTE Energy (DTE) reached a consent decree with the Sierra Club and the US government. DTE would pay a penalty of $1.8 million and reduce pollution at its coal-fired power plants. Later in the year, the Sierra Club and DTE struck a separate, more stringent deal for DTE to pay $2 million, invest in an energy efficiency project, and promise to retire three coal plants. The US Department of Justice challenged the deal, claiming that the two parties could not negotiate outside deals, since they grant unlawful policy-setting authority of third parties like the Sierra Club. However, the US District Court ruled that the settlement agreement was not a consent decree and therefore not subject to court oversight, and also that the terms of the settlement were consistent with the goals of the Clean Air Act. DTE, meanwhile "looks forward" to implementing their agreement with the Sierra Club.

ETC Northeast Pipeline LLC v. Commonwealth of Pennsylvania, Department of Environmental Protection

Pennsylvania Environmental Hearing Board
https://ehb.courtapps.com/efile/documentViewer.php?documentID=50953

In September 2018, the Revolution Pipeline exploded in Beaver County, Pennsylvania. The Pennsylvania Department of Environmental Protection (DEP) fined pipeline owner ETC Northeast Pipeline LLC (ETC) $30.6 million and ordered an injunction against filling the pipeline with natural gas until the DEP deemed ETC's plans for pipeline safety compliant with a conditional approval letter. ETC argues that they have been compliant with the DEP's terms for some time, yet the DEP still refuses to allow ETC to resume operations. ETC has filed a complaint with the state's Environmental Hearing Board to challenge the decision. ETC claims that it has met the conditional approval letter's compliance standards already and seeks redress for lost profits.

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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, Munich, Toronto, and Washington, DC.

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