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.

Texas Power Outages

Electric Reliability Council of Texas Inc. v. Panda Power Generation Infrastructure Fund LLC et al.

Supreme Court of Texas
http://docs.texasappellate.com/scotx/op/18-0781/2021-03-19.boyd.pdf

The final decision of a case filed in 2016, well before winter storm Uri struck the state of Texas in mid-February 2021, to some extent upholds the immunity of Texas's electric grid operator Electric Reliability Council of Texas (ERCOT) from governmental scrutiny. Panda Power Generation Infrastructure Fund LLC originally accused ERCOT of fraud and breach of fiduciary duty when ERCOT's $2.2 billion plans for a new power plant failed to materialize. ERCOT cited an immunity clause in the state constitution protecting it from lawsuits. The Supreme Court of Texas claimed it lacks jurisdiction to decide this case. However, the Court was divided 5-4. The minority opinion criticized the lack of a decision as an abdication of court responsibility. The last chance for a decisive ruling lies with the Fifth Court of Appeals in Dallas.

The case has ramifications in the wake of the recent winter storm event, from which ERCOT faces several lawsuits. However, as one opinion stated, the Court is not responsible for deciding cases with high public interest.

Canadian Breaks LLC v. JPMorgan Chase Bank, N.A.

US District Court for the Northern District of Texas
https://dockets.justia.com/docket/texas/txndce/2:2021cv00037/345281

In 2018, JPMorgan Chase Bank North America signed a "hedge" contract to purchase power at a fixed price from a 210 MW wind farm in western Texas operated by Canadian Breaks LLC. Should the wind farm fail to produce, it could purchase power from the market to meet its daily power delivery quota to JPMorgan. A force majeure clause in the hedge contract exempts Canadian Breaks from the power delivery quota in an extraordinary "unforeseen" event.

During winter storm Uri, which struck Texas in February 2021, the wind farm failed to produce power and meet its daily delivery quota for five consecutive days. JPMorgan believes the winter storm did not trigger the force majeure clause and charged Canadian Breaks $71 million for breach of contract.

Canadian Breaks contests the charge, claiming the weather disaster merits force majeure and that the charge is unreasonable given that the wind farm's annual revenue is just $15 million. The plaintiff seeks a judicial declaration of force majeure.

Bay Oaks IV, LP, et al. v. CenterPoint Energy. Inc., et al.

55th District Court of Harris County, Texas
https://www.law360.com/articles/1363913/attachments/0

Twenty-eight Houston-area apartment complexes have sued transmission and distribution utility CenterPoint Energy (CenterPoint) for negligence. The plaintiffs allege CenterPoint should have foreseen the impact of winter storm Uri. Texas utilities like CenterPoint were forced to implement rolling blackouts for days at a time. According to plaintiffs, Uri was not "unprecedented, unforeseeable, or unexpected" given that the state experienced similar (but lesser in magnitude) winter storms, most recently in 2011. The plaintiffs assert that CenterPoint should have prepared for a worst-case scenario by implementing recommendations and best practices from Texas's 2011 winter storm event. Such actions include: verifying the ability of dual fuel generators to operate in the cold, preparing black-start backup generation, and winterizing transmission facilities.

The plaintiffs seek damages for ruptured pipes, water damage, and damaged heaters and boilers. They allege the damages are both "direct and proximate" results of the electricity outage.

CPS Energy Inc. v. Electric Reliability Council of Texas et al.

District Court of Bexar County, Texas
https://www.cpsenergy.com/content/dam/corporate/en/Documents/2021-03-12%20CPS%20Energy%20Original%20Petition%20w%20Ex%20A(117202625_1).PDF

In March 2021, San Antonio's municipal utility CPS Energy filed suit against ERCOT for "one of the largest illegal wealth transfers in the history of Texas." The plaintiffs assert that ERCOT's $20 billion in customer charges from winter storm Uri in mid-February 2021 is an overcharge of at least $16 billion, given that the state's electricity demand in the final days of the storm no longer triggered the grid operator's scarcity pricing of $9,000 per MWh. CPS runs the risk of default should it fail to pay its portion of ERCOT's charge. CPS Energy also accuses ERCOT of a material breach, claiming ERCOT underpaid the municipal utility $18 million since the storm's landfall.

CPS seeks a temporary injunction to prevent ERCOT from forcing CPS Energy to default, based on both a force majeure event and ERCOT's $18 million material breach.

Renewable Energy

Trireme Energy Holdings, Inc. et al. v. Innogy Renewables US LLC et al.

US District Court, Southern District of New York
https://www.docketbird.com/court-cases/Trireme-Energy-Holdings-Inc-et-al-v-Innogy-Renewables-Us-LLC-et-al/nysd-1:2020-cv-05015

Federal Production Tax Credits (PTCs) subsidize wind farm output on a per-kWh basis. Before the COVID-19 pandemic struck the United States, all wind projects had to begin operation by no later than December 31, 2020 in order to receive the PTC. In May 2020, the Internal Revenue Service (IRS) extended all federal tax credits by one year, including the PTC, due to the COVID-19 pandemic.

Trireme Energy Holdings, Inc. (Trireme) sold the 125.5 MW Cassadaga Wind project in upstate New York to Innogy Renewables US LLC (Innogy) in 2017. Innogy agreed to pay Trireme ~$70 million if the

Cassadaga project was completed and operating by December 31, 2020. At the time, that was the deadline to reap the full PTC. After the IRS announced the PTC extension, Innogy decided to push back the construction date to March 5, 2021. Trireme believes that Innogy breached good faith and earned "unjust enrichment" via the ~$70 million windfall. Since the IRS extended the PTC deadline, Innogy can avoid the $70 million payment and still reap the full PTC benefit.

In The Matter of the Implementation of L. 2018, C. 16 Regarding the Establishment Of A Zero Emission Certificate Program For Eligible Nuclear Power Plants

Superior Court of New Jersey, Appellate Division
https://njcourts.gov/attorneys/assets/opinions/appellate/published/a3939-18.pdf

Three nuclear plants owned by New Jerseyan utility Public Service Enterprise Group (PSEG) are subsidized by a zero-emissions credit (ZEC) program. PSEG's customers pay $0.004 per kWh of clean electricity generated by the plants. The subsidy exists on the premise that the nuclear plants would not be financially competitive to fossil-fueled plants without it. However, the New Jersey Division of Rate Counsel believes this is a false premise: the plants are, in fact, financially viable and ratepayers are unnecessarily funding a plant that needs no extra market support.

New Jersey's appellate court upheld the ZEC program. Financial documents support PSEG's claim that the plants would close within three years without a ZEC subsidy. Costs exceed benefits by millions of dollars per year. The nuclear plants generate ~90% of the state's carbon-free power and retiring them could stymie New Jersey's 100% clean energy goal by 2050.

Corporate Governance

Gress et al. v. Commonwealth Edison Co. et al.

US District Court, Northern District of Illinois
https://www.courtlistener.com/recap/gov.uscourts.ilnd.378247/gov.uscourts.ilnd.378247.93.0.pdf

Commonwealth Edison Co. (ComEd) utility customers filed a class action lawsuit in March 2021. ComEd has been mired in a scandal where employees stand accused of bribing Illinois lawmakers to sponsor legislation that creates subsidies and increases rates to boost utility profits. The ComEd customers claim to be unwilling contributors to a "corrupt process" and want the Court to nullify the increased rates, which were eventually approved by the Illinois Commerce Commission before the bribery scandal came to light. However, the utility rebuts that the rates can only be nullified if the legislation is revoked through the legislative process, not through a class action lawsuit.

The Williams Cos. Stockholder Litigation

Court of Chancery, State of Delaware
https://courts.delaware.gov/Opinions/Download.aspx?id=317240

In March 2020, oil and gas company Williams Co. (Williams) experienced plummeting stock prices. Williams adopted a "poison pill" measure, which permits current shareholders to buy stock at a discounted price. This measure prevents potential acquirers of a company from owning a large enough percentage of stock to justify acquisition. Williams set its poison pill threshold at 5%, allowing discounted stock purchases once a potential acquirer achieved a 5% share. Most companies with poison pill provisions set the threshold at 15%. Fewer than two percent set their threshold beneath 10%.

A class action suit filed in August 2020 claimed that Williams breached fiduciary duty and attempted to suppress stockholder activism. Under precedent from the 1985 case *Unocal Corp. v. Mesa Petroleum Co.*, the Chancery Court of Delaware had to discern if Williams acted in good faith for a legitimate

purpose after reasonable assessments, or if their actions were unreasonable given what prompted them. The Chancery Court found that the poison pill measure was proactive rather than reactive. It was instituted to prevent future harms. Williams did not aim to counteract a specific takeover threat, or any specific threat, and thus the poison pill defense mechanism was unwarranted.

Electricity Transmission

International Transmission Co. et al. v. FERC

US Court of Appeals for the District of Columbia Circuit
https://www.cadc.uscourts.gov/internet/opinions.nsf/8D8FADB1ABDFBF50852586810056E073/$file/19-1190-1886139.pdf

In 2016, transmission-only entity International Transmission Co. (ITC) merged with multi-utility Fortis, Inc. Prior to the merger, ITC earned transmission-only adders on its return on equity (ROE). Once ITC merged with Fortis, the Federal Energy Regulatory Commission (FERC) conducted a review after other Midwestern transmission owners filed a complaint under Section 206 of the Federal Power Act. FERC decided to halve ITC's transmission ROE adders given ITC's recent interdependence with a generation owner.

ITC sued, claiming that FERC unlawfully revised its ROE-adder policy after the fact. FERC's old test for the transmission-only ROE incentive was geographic in nature: could a transmission company earn a bonus adder for being independent and equally well-suited as generation owners to build transmission facilities? The new test, which ITC failed, considered corporate governance as well as geography. The DC Circuit Court sided with the FERC Commissioners' 2-1 decision. The majority asserts that FERC has the right to adopt case-by-case independence tests, and that FERC does not need to prove that ITC's old rates were unjust and unreasonable before adjusting ROE adders.

Public Service Electric and Gas Co. v. FERC

US Court of Appeals for the District of Columbia Circuit
https://cases.justia.com/federal/appellate-courts/cadc/19-1091/19-1091-2021-03-02.pdf?ts=1614699073

The DC Circuit Court recently sided with FERC again on an electricity transmission case, that was approved in a unanimous 3-0 decision. In April 2016, FERC approved a cost allocation formula called DFAX for the $275.5 million Artificial Island transmission project that will span the Delaware River in New Jersey. The formula, proposed by regional grid operator PJM, allocated 90% of project costs ($246.4 million) to customers in the Delmarva Zone, which encompasses eastern Maryland and Delaware. The Public Service Commissions of Delaware and Maryland challenged the cost allocation, and FERC agreed to review it again.

Upon review, FERC denied the allocation method. New Jersey utility Public Service Electric and Gas (PSEG) and Pennsylvania utility PPL went to court, claiming that FERC failed to provide sufficient reasoning for reneging on the originally approved DFAX allocation method. The plaintiffs also asserted that FERC should have never agreed to reconsider DFAX at Commission request, as such action allegedly violated FERC Order No. 1000, requiring cost allocation methodologies to be solidified in advance.

The Court disagreed on both counts. FERC presented sufficient evidence that the DFAX method was leading to unjust and unreasonable outcomes, and FERC reserves the right to reconsider cost allocation rules before the project commences without violating Order No. 1000.

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