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

NextEra Energy Marketing, LLC v. Shell Energy North America (US), LP

US District Court for the Southern District of Texas
https://dockets.justia.com/docket/texas/txsdce/4:2021cv02280/1836512

In November 2018, the parties entered into a contract through March 2021, wherein Shell would provide 240 billion BTU per day of gas transmission capacity for NextEra. However, during the winter storm event of February 2021, Shell allegedly failed to provide the promised capacity. NextEra sent Shell multiple force majeure warnings and a $309 million invoice for the imbalance, however, Shell returned payment of $289.5 million. Shell's invoice did not include charges for gas that was allegedly never received by Shell at the gas meters due to shortages. NextEra is seeking the remaining $18.8 million from their invoice, plus additional credits.

Cailip Gas Marketing, LLC v. Chevron Natural Gas, a division of Chevron U.S.A. Inc.

US District Court for the Southern District of Texas
https://fingfx.thomsonreuters.com/gfx/legaldocs/yzdvxledjvx/energy-chevron-texas-lawsuit-complaint.pdf

Chevron was contractually obligated to supply Cailip with 90,000 MMBtu of natural gas per day during the month of February 2021. However, during the winter storm event in February 2021, Chevron was unable to meet the contractual quota. Under the contract, Chevron would compensate for missing quantities by sending an invoice calculated with a "spot price standard" (or the midpoint daily gas price from the Katy Hub). However, Chevron argues that force majeure precludes the alleged $84.5 million payment.

Cailip contends that the breach of contract is inapplicable because 1) Cailip received no notice of the potential for missed deliveries; and 2) Chevron delivered part of its contractual obligation to Cailip. Cailip seeks the $84.5 million spot price-based invoice, plus interest.

Buckthorn Wind Project, LLC v. JPMorgan Chase Bank, N.A.
US District Court for the Northern District of Texas
https://dockets.justia.com/docket/texas/txndce/4:2021cv00562/346988

This case marks the second wind farm case filed against JPMorgan Chase Bank N.A., following Canadian Breaks LLC v. JPMorgan Chase Bank, N.A in the same Court. Buckthorn contends that JPMorgan overcharged on a March 15, 2021 invoice, while JPMorgan contends the calculation methodology has remained unchanged. The case centers on the differences between ERCOT locational marginal prices (LMPs), settlement point prices (SPPs), and price adders.

Renewable Energy

Georgia Power Company v. Campbell et al.
Court of Appeals of Georgia
https://casetext.com/case/ga-power-co-v-campbell

Former Georgia Power Company employee Colen Campbell developed lung cancer after years of working at the Edwin I. Hatch Nuclear Plant. In 2017, Campbell and his wife sued Georgia Power for liabilities. The Trial Court narrowed the claims to those pertaining to asbestos exposure and denied Georgia Power's effort to exclude testimony on causation from two doctors.

Upon appeal, Georgia Power contends that Campbell's contractor for his work at Hatch, not Georgia Power itself, was responsible for Campbell's health and safety. However, the Court of Appeals maintains that Georgia Power was ultimately responsible for the selection of hazardous materials and had the right to exercise control over working conditions at Hatch during Campbell's contractual tenure.

The Court acknowledged that Georgia Power could be entitled to summary judgment if it is found that Campbell and his contractor had full knowledge of the risks before beginning the work, or discovered the existence of risk during the work, not after the fact as the Campbells claim.

American Fuel & Petrochemical Manufacturers v. Environmental Protection Agency
US Court of Appeals, District of Columbia Circuit
https://law.justia.com/cases/federal/appellate-courts/cadc/19-1124/19-1124-2021-07-02.html

In 2019 the Trump administration's Environmental Protection Agency (EPA) made a ruling that allowed gasoline blended with 15% ethanol (E15) to be used year-round. That 2019 ruling overturned the previous ruling which had only allowed a 10% blend (E10) to be used year-round. The Court of Appeals for the DC Circuit overturned the 2019 E15 ruling, strictly interpreting the text of the Clean Air Act. According to the ruling, the Act clearly allows the EPA to permit E10 usage year-round, and nothing more. For year-round E15 to be permissible, Congress would have to revise the language of the Act.

HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Association

US Supreme Court
https://www.scotusblog.com/case-files/cases/hollyfrontier-cheyenne-refining-llc-v-renewable-fuels-association/

In 2005, Congress established the Renewable Fuel Standard program that required annual increases to the volume of renewable fuels either blended into petroleum-based transportation fuels or sold separately as biofuels. The EPA was given authority to adjust volumetric targets for various renewable fuels annually and to provide small refiners exemptions from their obligations under certain conditions. One small refiner (the plaintiff) allowed its initial exemption to lapse before reapplying for an extension, and the defendant argued that an extension is not available for refiners who allowed such a lapse.

The Supreme Court sided with the plaintiff. The ruling hinged upon the interpretation of a single word, "extension," which was not clearly defined in statute. The majority concluded that the meaning of the word, citing prior precedent, is inclusive of applicants with prior lapses.

City and County of Denver v. Boulder County

US District Court for the District of Colorado
https://www.law360.com/articles/1403204/attachments/0

The City of Denver's water company (Denver Water) owns the Gross Reservoir Hydroelectric Project, a hydropower facility regulated by the Federal Energy Regulatory Commission (FERC). The facility occupies special federal land designated for hydropower projects in neighboring Boulder County.

In July 2020, FERC granted Denver Water a license to expand Gross Reservoir's hydropower generation by 16.5% to meet customer needs. However, Denver Water alleges that Boulder County has delayed the 1041 permitting process, or local land use review, mandated under Colorado statute. Under a delayed time line, Denver Water fears the project will be abandoned. Denver Water seeks an injunction for Boulder County to complete 1041 permit review in a timely manner. Boulder County alleges that Denver Water did not provide all information necessary for the County to make a timely decision.

Electricity Markets and Rates

MISO Transmission Owners et al. v. FERC

US Court of Appeals for the District of Columbia Circuit
https://www.misostates.org/images/stories/Filings/CourtOfAppeals/20210310_-_Return_Brief.pdf

In May 2020, FERC increased the Midwestern grid operator MISO's return on equity (ROE) to 10.02%. In October 2019, the ROE was reduced from 12.38% to 9.88%. MISO argues that the changes in ROE have sown uncertainty in transmission investors and FERC's contention that it cemented the formula for the 10.02% rate in 2016 is "fiction." The plaintiffs are backdating ROE-setting cases to 2013 to prove that FERC's methodologies are not just and reasonable.

The companies seek one of two methods of reparation from FERC: 1) FERC can change the ROE, but only prospectively, or 2) FERC may ask for refunds for the difference between the old ROE and the new prospective ROE, but only for a 15-month time span.

DTE Electric Company et al. v. FERC

US Court of Appeals for the District of Columbia Circuit
https://dockets.justia.com/docket/circuit-courts/cadc/20-1493

The Midwestern grid operator MISO established a stakeholder working group to revise its tariff language to allow storage resources to participate as transmission assets (SATOA). In theory, SATOA alleviates congestion by shifting or reducing peak load and would thus eliminate the need for new transmission buildout from peaker plants to load centers. In August 2020 FERC approved MISO's request to update the tariff language to incorporate SATOA. However, in December 2020, DTE, Alliant Energy, and renewable organizations banded together to argue before FERC that its decision is arbitrary and capricious because it unfairly confers market power to incumbent storage resources, even if their physical characteristics are similar to planned and non-incumbent projects. Such benefits include an expedited interconnection process. The plaintiffs expect the Court to vacate FERC's approval of the new tariff language.

Delaware Division of the Public Advocate et al. v. FERC

US Court of Appeals for the District of Columbia Circuit
https://cms.ferc.gov/media/delaware-division-public-advocate-et-al-v-ferc

In April 2019, FERC approved a new way to estimate revenues for generation in PJM, the Eastern grid operator. In a future with higher peak demand and higher electricity load, reference plants are permitted to use an optional 10% adder to increase their offers in the PJM market—essentially 10% above their fuel costs—to hedge for cost uncertainties. Reference plants under the new plan are combustion turbines. Plaintiffs argue that PJM overestimated future demand and should have used a combined-cycle reference plant, while FERC contends that 1) the adder is optional and 2) the adder could make for a weaker economic case for a combustion turbine, as use of the adder may lead to overestimated revenues.

Natural Gas

California Restaurant Association v. City of Berkeley

US District Court for the Northern District of California
http://climatecasechart.com/climate-change-litigation/case/california-restaurant-association-v-city-of-berkeley/

The District Court sided with the City of Berkeley in this high-profile case that could have nationwide repercussions. In 2019, the City of Berkeley prohibited natural gas connection infrastructure in all new-construction buildings beginning January 1, 2020. According to the California Restaurant Association member chefs who had planned to open restaurants in new buildings could no longer do so because of the natural gas ban, as their natural gas cooking appliances would be rendered obsolete.

The plaintiffs argue that the gas ban was against the public interest as outlined in the City of Berkeley's municipal code, the California Energy Code, and the California Buildings Code, as well as a federal law: The Energy Policy and Conservation Act of 1975 (the Act). The Act seeks to standardize nationwide energy policy and the energy efficiency standards of certain appliances. The District Court Judge found that local gas distribution systems do not fall under the Act's purview, even though upstream and downstream policies (appliance efficiency being an example of the latter) do.

Preemptions based on municipal or state laws and codes must be settled in municipal or state court. It is unclear whether the California Restaurant Association will pursue that option. For now, they plan to appeal the federal ruling.

Barry Dudenhoeffer v. John J. Christmann, IV et al.

US District Court for the Southern District of Texas
https://dockets.justia.com/docket/texas/txsdce/4:2021cv02272/1836345

Stockholders for the gas exploration company Apache Corporation (now APA Corporation) filed a class action suit accusing APA of misleading claims about the economic viability of the Alpine High Play in Texas's Permian Basin. APA acquired the play in 2016, publicly touting it as a lucrative asset. The plaintiffs claim the value of the play was overstated throughout the years following 2016, and in 2020, shares plunged nine-fold year-over-year due to poor production, at which point APA abandoned the project. The shareholders seek acknowledgement of breach of fiduciary duty, costs to cover the suit, and any other damages the Court deems necessary.

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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. For more information, visit **crai.com/energy**.

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