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# Energy Law: Month in Review - August 2024

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Welcome to Dorsey's Energy Law: Month in Review. We provide this update to our clients to identify significant developments in the previous month. Please reach out to any of the authors, listed above, to discuss these issues.

## Related Capabilities

- Energy & Natural Resources
- Electric Power
- Environmental, Social, Governance (ESG)
- Sustainability

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**LITIGATION**

**D.C. Circuit Invalidates FERC Order Expanding Wheeling Obligations**

The D.C. Circuit invalidated a Federal Energy Regulatory Commission ("FERC") order expanding a San Francisco Utility's wheeling obligations. Section 824k(h)(2) of the Energy Policy Act of 1992 prohibits energy regulators from ordering utilities to wheel power, subject to a few exceptions. Among those exceptions are a grandfathering clause that allows FERC to order wheeling to a municipal utility's "ultimate customer," provided that the utility was providing electric service to such ultimate customer on October 24,

1992. In the underlying order, FERC had required the utility to wheel power to *classes* of consumers, rather than the discrete individual consumers who received power from the utility in 1992. In an August 26 decision, the D.C. Circuit reversed, concluding that the text of the grandfathering exception applied to discrete consumers, not classes of consumers.

**D.C. Circuit Rejects Suit Challenging Nuclear Waste Storage**

A panel of the D.C. Circuit rejected numerous challenges to a U.S. Nuclear Regulatory Commission decision granting a permit containing forward-looking provisions that would permit Holtec International to store federally owned nuclear waste in the event Congress passes legislation permitting such storage. The plaintiffs contended that the Nuclear Waste Policy Act prohibited the U.S. Department of Energy from asserting ownership over spent fuel from private reactors and that, consequently, the forward-looking provisions of the permit were illegal. The D.C. Circuit disagreed, concluding that the enabling regulations explicitly permitted conditional terms.

**Challengers Seek Supreme Court Review of Mercury Air Pollution Rule**

On August 20, numerous states and coal companies sought Supreme Court review of a D.C. Circuit decision declining to stay the EPA's recent mercury air pollution rules. The rule at issue required a 70% reduction in mercury from lignite coal-fired sources and a 67% reduction for filterable particulate matter. The petitioners (led by North Dakota) previously sought a stay of the rule from the D.C. Circuit, arguing that the EPA exceeded its authority under the Clean Air Act and that the rule's costs greatly outweighed any benefits. The D.C. Circuit, in an order lacking a written opinion, declined to issue a stay. The stay proponents subsequently sought Supreme Court review, noting that the D.C. Circuit denied the stay "with one sentence, and without any indication of why it determined a stay was unwarranted." The petitioners noted that "the rule will impose tremendous costs and risk destabilizing the nation's power grids without creating any relevant or quantifiable benefit to public health."

**Pennsylvania Regulator Seeks Third Circuit Affirmance of its Transmission Project Denial**

The Pennsylvania Public Utility Commission ("PUC") is seeking Third Circuit review of a district court decision invalidating the PUC's denial of an application for regional grid operator interconnection. The PUC had denied the interconnection application due to evidence suggesting that the application, rather than ameliorating congestion, would actually exacerbate it. The PUC also noted that the benefit-to-cost ratio of .081 was below the required 1.25 ratio. The project proponent sued, asserting that the PUC's denial of the project (which transversed the Pennsylvania-Maryland Border) violated the dormant commerce clause. The district court agreed. On August 15th, the PUC sought review of the decision at the Third Circuit.

### Ninth Circuit Affirms Tribal Victory in Dam Suit

The Ninth Circuit affirmed a district court order concluding that a fish ladder built by Electron Hydro, LLC failed to adequately allow migrating fish to cross a dam on the Puyallup River. The appeal stemmed from a suit by the Puyallup Indians, who alleged that the dam threatened endangered species of fish and their ability to transverse the river. During the underlying proceedings, the district court judge granted partial summary judgment to the plaintiff tribe and ordered Electron to modify the spillway to better protect endangered fish. Electron appealed, but the Ninth-Circuit panel affirmed the district court judge's decision, observing that Electron's own expert witness had admitted that the fish ladder would potentially prove inadequate. The dissenting judge asserted that sufficient unresolved fact issues remained to survive summary judgment, citing a lack of evidence of dead fish, evidence that fish were using the ladder, and expert testimony suggesting that the ladder could be effective.

## REGULATORY AND STATE POLICY

### FERC Rejects Utility's Cryptocurrency Mining Rate Proposal

On August 21, FERC rejected Basin Electric Power Cooperative's proposal to establish rate schedules for cryptocurrency operations. Basin's proposal asked FERC to approve three rate schedules for crypto and blockchain loads as well as non-crypto loads exceeding 75 MW. The proposal was FERC's first opportunity to consider specific cryptocurrency rates. FERC rejected the proposal, however, because it concluded that Basin failed to establish that treating cryptocurrency mining loads differently from other loads was not unduly discriminatory or preferential. Specifically, FERC stated that "Basin has not provided adequate evidence to support its assertion that all crypto loads pose a greater stranded asset risk than other loads of similar size." Basin had argued that cryptocurrency mining was distinguishable from other large loads because they don't require significant workforce or infrastructure investments, are therefore more ephemeral, and consequently pose a greater risk of stranded assets. FERC, however, rejected that argument, concluding that Basin failed to adequately substantiate that concern.

### DOI Issues First Offshore Wind Energy Lease for Floating Wind Farm

The Department of the Interior approved the first-ever wind energy research lease, on August 20. The lease will permit a maximum of twelve floating wind turbines in the Atlantic Ocean located 28 miles off the coast of Maine. The lease area covers 15,000 acres, and the turbines would have a capacity of 144 MW. The Department of the Interior granted the lease as part of an ongoing effort to study and evaluate floating offshore wind as a renewable energy source in the region. Construction activity will likely commence in a few years, and the project proponents must first submit a Research

Activities Plan for review under the National Environmental Policy Act.

**California Public Utilities Commission Advances Procurement Strategy**

On August 22, the California Public Utilities Commission promulgated a centralized procurement strategy, the objective of which is to increase the state's clean energy resources. The Commission's decision implements Assembly Bill 1373, and tasks the California Department of Water Resources ("DWR") with spearheading procurement of long lead-time clean energy resources. The underlying rationale of the decision reflects a belief that centralized procurement will streamline acquisition of renewable energy and, potentially, lower future costs for ratepayers. The policy specifically authorizes DWR to procure 7.6 GW of offshore wind, 1 GW of geothermal, 1 GW of multi-day long-duration energy storage, and 1 GW of long-duration energy storage with at least a 12-hour discharge period.

**New York Public Service Commission Opens Building and Vehicle Electrification Proceeding**

The New York Public Service Commission ("PSC") recently opened a proceeding aimed at evaluating the energy-load impact of transportation and building electrification. As part of the proceeding, the Commission will direct investor-owned utilities to develop and submit a plan to proactively address load demands driven by transportation and building electrification. The proceeding stems from the rapid expansion of building and vehicle electrification, which threatens to outpace existing grid plans for increased electrical service. Vehicle electrification can occur over mere months, markedly faster than the years typically required for utility upgrades. Accordingly, the PSC concluded that meeting the ongoing needs of utility customers requires proactive planning. The plans will be required to account for load forecast development and necessary upgrades, and will be required to describe their anticipated long-term planning processes.