

Energy Law: Month in Review - January 2025

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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.

Table of Contents

- [DC Circuit Rejects Challenge to Iowa Transmission Project Abandonment Incentive on Standing](#)
- [Massachusetts Supreme Court Holds Noise Impact from Wind Power Substation Allowed under State Law](#)
- [Michigan Supreme Court Holds that City's Electricity Fee is an Illegal Tax](#)
- [Sixth Circuit Court of Appeals Directs FERC to Strip Energy Producers' RTO Incentive](#)
- [Sixth Circuit Holds that Michigan Local-Generation Rule Requires Strict Scrutiny](#)
- [Trump Taps Mark Christie to Lead FERC, Replacing Willie Phillips](#)
- [Trump Halts Federal Permitting and Support for Wind Development](#)
- [U.S. Senate Confirms Liberty Energy CEO, Chris Wright, as Department of Energy Secretary](#)
- [California Public Utilities Commission Streamlines Transmission Permitting Process](#)
- [FERC Approves Southwest Power Pool's Markets+ Western Power Market](#)

LITIGATION AND DISPUTES

DC Circuit Rejects Challenge to Iowa Transmission Project Abandonment Incentive on Standing

On January 14, 2025, a panel of the D.C. Circuit Court of Appeals ruled that a coalition of energy consumers lacked standing to challenge the Federal Energy Regulation Commission's (FERC) grant of an abandonment incentive to ITC Midwest LLC (ITC), the developer of an Iowa transmission project. The abandonment incentive would allow ITC to recover up to 100% of its "prudently incurred costs" from ratepayers if the grid project

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is canceled for reasons beyond ITC's control. The challengers contended that, in approving the abandonment incentive, FERC did not consider pending Iowa state court litigation over a state right-of-first-refusal law under which Midcontinent Independent System Operator, Inc. (MISO) assigned the Iowa segment of its long-range transmission plan to ITC. The challengers argued that this state litigation casts doubt on ITC's legal title to the project and the abandonment incentive could leave consumers responsible for the costs. The unanimous panel concluded that a "speculative, attenuated chain of events" would need to unfold before the abandonment incentive could harm the energy users.

Massachusetts Supreme Court Holds Noise Impact from Wind Power Substation Allowed under State Law

In *Johnson v. Energy Facilities Siting Board et al.*, the Massachusetts Supreme Judicial Court unanimously affirmed a judgment by the Energy Facilities Siting Board (Siting Board) authorizing connection of an electric substation to an 800-MW wind turbine generating facility in federal waters south of Martha's Vineyard. In so doing, the court rejected a resident's contention that the new facility would be too noisy. The court determined that, although the substation would not be silent, the Siting Board and its experts had ensured that by implementing certain design features, the noise at the resident's Barnstable home would be no more than eight A-weighted decibels under even the worst-case conditions, which is within the allowable noise impact set by the Massachusetts Department of Environmental Protection. In support of its decision, the Siting Board considered expert testimony and an acoustical analysis of the proposed substation's sound-level impacts. The Board also included a condition requiring the developer to show it is complying with modeled noise impacts both before and after construction.

Michigan Supreme Court Holds that City's Electricity Fee is an Illegal Tax

In *Heos v. City of East Lansing*, the Michigan Supreme Court held that an East Lansing franchise fee added to residents' energy bills is a disguised tax, concluding that the fee was used to raise revenue for the city without first being approved by voters. East Lansing and the Lansing Board of Water and Light (LBWL) entered into an agreement finalized in June 2017 requiring LBWL to collect a franchise fee from consumers and to remit the fee to the city to continue providing electric service to East Lansing residents. The fee, which amounted to 5% of the revenue from LBWL's sale of electricity within the city, was collected on residents' energy bills and passed through to the city, with LBWL receiving a 0.5% administrative fee from the city for collecting the fee from the customers. The court noted that the charge would be patently improper under the Michigan Constitution's Headlee Amendment if the city levied it directly because the voters did not consent to the change. The court held that the city cannot circumvent the Headlee Amendment by requiring an electricity provider "to act as the city's tax collector."

Sixth Circuit Court of Appeals Directs FERC to Strip Energy Producers' RTO Incentive

On January 17, 2025, the Sixth Circuit Court of Appeals held that FERC erred when it declined to strip Duke Energy and FirstEnergy of an extra 0.5% return on equity as an

incentive to join a Regional Transmission Organization (“RTO”) in Ohio. The Sixth Circuit rejected FERC’s argument that the adder was appropriate because it was a part of a settlement. The Sixth Circuit reasoned that an Ohio law required the utilities to join an RTO and it was irrelevant whether FERC approved the adder separately or as part of a settlement. The Sixth Circuit upheld FERC’s rejection of the adder for Dayton Power & Light because the adder is meant for the utilities that voluntarily choose to join an RTO. The court rejected utility arguments that the Ohio law requiring RTO membership is preempted by federal law.

Sixth Circuit Holds that Michigan Local-Generation Rule Requires Strict Scrutiny

In *Energy Michigan, Inc. v. Michigan Public Service Comm’n*, the Sixth Circuit Court of Appeals held that a requirement for Michigan electricity suppliers to source some of their power locally may be unconstitutional under the commerce clause and must be reviewed by a district court because it disadvantages out-of-state energy producers. The rule at issue required Michigan power providers in much of the Lower Peninsula to either buy, or be able to produce, at least 2.7% of their energy locally. The district court concluded that the rule did not discriminate against out-of-state producers because both in-state and out-of-state producers were subject to the same requirement. The Sixth Circuit disagreed, holding that the rule plainly discriminates against out-of-state producers, thus triggering strict scrutiny. The rule, it held, is discriminatory, not because of how it applies to retail energy providers but because it limits where these providers can source energy.

REGULATORY DEVELOPMENTS

Trump Taps Mark Christie to Lead FERC, Replacing Willie Phillips

On January 20, 2025, President Donald Trump elevated Mark Christie to lead FERC, replacing Willie Brown. Christie emphasized that his top priority is to protect consumers from excessive power costs. Christie has called for advancing a pending rulemaking that would reduce incentives for utilities and other transmission owners to build power lines. He has also warned that the United States faces a reliability crisis driven by the pace of power plant retirements without adequate replacement generation. Christie has also emphasized the important role that states and their utility regulators play in meeting reliability and affordability challenges, noting that “[a] close partnership between FERC and the states is absolutely essential to address these problems.”

Trump Halts Federal Permitting and Support for Wind Development

In a January 20, 2025, Executive Order, President Trump withdrew all federal waters from consideration for offshore wind leasing and halted all permitting, approvals, and loans for all onshore and offshore wind projects. As justification for the move, the Executive Order cites “various alleged legal deficiencies underlying” the federal government’s leasing and permitting of wind projects and harm that could result to transportation interests, national security interests, and commercial interests from continued federal involvement.

U.S. Senate Confirms Liberty Energy CEO, Chris Wright, as Department of Energy Secretary

The U.S. Senate confirmed President Trump’s nominee for Secretary of the Department

of Energy (DOE), Chris Wright. Secretary Wright told the Senate Energy and Natural Resources Committee that he would try to increase U.S. power supplies to help lower electricity costs to consumers. He testified that he would like the U.S. to grow all sources of “affordable, reliable, . . . pure energy.” Secretary Wright identified three priorities: (1) expanding energy production and cutting costs, (2) accelerating the work of DOE’s national laboratories, and (3) building energy infrastructure. The Senate approved Wright’s nomination on a 59-38 vote.

California Public Utilities Commission Streamlines Transmission Permitting Process

The California Public Utilities Commission (CPUC) recently adopted rules to streamline its transmission permitting requirements as part of a broader effort to meet the state’s clean-energy goals. The CPUC now requires project developers to meet with CPUC staff before filing a permit application to help the review process run more smoothly. The revised rules also give transmission developers a chance to submit a draft version of California Environmental Quality Act documents instead of an environmental assessment to help speed permit review. The CPUC will also assume a project is needed if the California Independent System Operator (CAISO) has determined that it is needed, a change that the CPUC expects will avoid duplicative analysis.

FERC Approves Southwest Power Pool’s Markets+ Western Power Market

FERC conditionally approved the Southwest Power Pool’s Markets+, a real-time and day-ahead market the grid operator expects will begin operating in the West in 2027. FERC’s approval of Markets+ is a key advance in market development in the West. Utilities and others will be able to choose between joining Markets+ and the Extended Day-Ahead Market, which CAISO plans to launch this year. In its decision, FERC did not consider how the seams between Markets+ and other western markets will be managed. The rules and procedures governing transmission commitments to and withdrawals from Markets+, with implications for abusing market power, will be further developed in filings and market participants.