

Energy Law: Month in Review - July 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.

Table of Contents

- [D.C. Circuit Allows Power Plant GHG Rule to Stand](#)
- [Assignment of \\$100 million in Transmission System Upgrade Costs Affirmed](#)
- [D.C. Circuit Rejects Challenges to MISO Capacity Market Changes](#)
- [Ninth Circuit Denies En Banc Review of Dismissal of Youth Climate Suit](#)
- [Arizona Supreme Court holds that PPA May Be Considered in Plant Tax Valuation](#)
- [Ohio Supreme Court Upholds Dismissal of Cross-Subsidization Complaint](#)
- [CenterPoint Customers Sue Over Hurricane Beryl Power Outages as AG Opens Investigation](#)
- [FERC Accepts ISO New England's Longer-Term Transmission Planning Tariff](#)
- [Ten Northeastern States Form Collaborative on Interregional Transmission](#)
- [New York PSC Adopts Geothermal Rules](#)
- [Central Hudson Gas & Electric Corporation Rate Increase Cut by Over 50%](#)
- [Illinois Appellate Court Strikes Down Power Line Certification](#)

LITIGATION

D.C. Circuit Allows Power Plant GHG Rule to Stand

On July 19, 2024, the D.C. Circuit Court of Appeals, by per curiam order, declined to stay the Environmental Protection Agency's (EPA) power plant emissions rule in *State of West Virginia et al. v. EPA*, No. 24-1120. The West Virginia-led coalition of states and industry parties had asked the court to stay the effective date of the rule pending resolution of the legal challenges. Under the challenged rule, power plants emitting greenhouse gases that intend to operate past 2039 must meet emission mitigation

Related Capabilities

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

standards by 2032 by implementing carbon capture and sequestration or storage technology operating at a 90% capture efficiency rate. The court determined that the challengers had not met their burden to prove a likelihood of success on the merits of their challenge. In particular, the court concluded that the challengers had not shown a likelihood of success on their claim that carbon capture and sequestration technology is too unproven to support the EPA's determination that the power plants can meet the rule's carbon reduction benchmarks. The court also rejected an argument that the rule violates the major questions doctrine. The court concluded that the rule does not rise to the level of a large-scale regulatory initiative but is instead an emissions limitation and well within the scope of the EPA's delegated authority. Consequently, unless the U.S. Supreme Court intervenes, the emissions rule will be allowed to take effect while its legality is resolved in the courts. The earliest compliance deadline under the rule is a requirement for states to submit implementation plans by 2026.

Assignment of \$100 million in Transmission System Upgrade Costs Affirmed

In *Tenaska Clear Creek Wind, LLC v. FERC*, No. 22-1059, on July 19, 2024, the D.C. Circuit affirmed a FERC ruling approving Southwest Power Pool's decision assigning approximately \$100 million in transmission system upgrade costs to Tenaska Clear Creek Wind LLC ("Clear Creek") related to interconnection of a 242-megawatt wind farm in northwest Missouri. Clear Creek had argued that the transmission system facilities were already overloaded and that it should not have been required to carry the burden of upgrading them alone. The court noted, however, that while SPP's system was technically overloaded prior to the addition of Clear Creek's wind turbine project, the operational problems did not begin to arise until Clear Creek was added to the system, which fact FERC relied on in affirming SPP's cost-allocation decision. Ultimately the court determined that FERC sufficiently explained its decisions and they did not run afoul of the cost causation principle or the but-for causation standard.

D.C. Circuit Rejects Challenges to MISO Capacity Market Changes

On July 26, 2024, in *Entergy Arkansas, LLC et al. v. FERC*, No. 22-1335, the D.C. Circuit denied a petition to review FERC's approval of the Midcontinent Independent System Operator's (MISO) proposed overhaul of its capacity market and adoption of a seasonal capacity market, a new capacity accreditation methodology, and new rules regarding generator planned outages brought by five Entergy operating companies (Entergy). The Mississippi, Louisiana, and Arkansas public utilities commissions along with the East Texas Electric Cooperative intervened and supported Entergy's positions. Entergy alleged that FERC acted in an arbitrary and capricious manner when it found MISO's changes to be just and reasonable and then denied rehearing in 2022. The court rejected each of Entergy's claims, finding that FERC adequately explained its approval of MISO's changes and denying Entergy's petitions for review. Additionally, the court did not reach any of the issues raised by intervenors for a variety of procedural reasons, including that the intervenors had not raised the issues in their petitions for rehearing at FERC and the intervenors' arguments were not raised by Entergy in the first instance.

Ninth Circuit Denies En Banc Review of Dismissal of Youth Climate Suit

On July 12, 2024, the Ninth Circuit Court of Appeals denied a petition for an en banc

hearing of *Juliana v. United States*, No. 24-684. *Juliana* is a suit filed in August of 2015 by a group of twenty-one young people in the District of Oregon, in which the youth alleged that the United States was violating their constitutionally protected right to a sustainable climate system that can sustain human life. The youth asserted that this right arises from the Fifth and Ninth Amendments of the Constitution and the public trust doctrine. Previously, in January 2020, the Ninth Circuit held that the youth lacked Article III standing because they had no redressable injury and issued a mandate requiring the district court to dismiss the action. Instead of dismissing, the District of Oregon allowed the youth to amend their complaint. The United States then sought a writ of mandamus ordering the district court to dismiss the case from the Ninth Circuit, which the circuit court granted on May 1, 2024. The youth sought en banc review, which was denied after the motion was provided to the full Ninth Circuit and no judge requested a vote on whether to rehear the matter.

Arizona Supreme Court holds that PPA May Be Considered in Plant Tax Valuation

In *Mesquite Power, LLC v. Arizona Department of Revenue*, issued July 22, 2024, the Arizona Supreme Court reversed a decision from the state tax court that had concluded that the Arizona Department of Revenue erred when it declined to consider a guarantee held by Mesquite Power LLC for future power sales from the Mesquite Power Plant when it was valuing the Mesquite Power Plant. The tax court had concluded that the income approach to valuation did not permit consideration of a power purchase agreement. The Arizona Supreme Court disagreed, stating that the power purchase agreement is not “automatically and entirely irrelevant” and, therefore, income from the power purchase agreement could be considered. Under the income approach, consideration of intangible business contracts, such as the power purchase agreement at issue, may skew the property valuation. However, the court further stated that consideration of the power purchase agreement is not mandated. The court remanded back to the tax court and instructed the tax court that it must allow Mesquite an opportunity to offer a new valuation under the income approach consistent with the court’s opinion.

Ohio Supreme Court Upholds Dismissal of Cross-Subsidization Complaint

On August 1, 2024, by slip opinions, the Ohio Supreme Court unanimously affirmed a decision from the Public Utilities Commission of Ohio that AEP Ohio was not illegally subsidizing its competitive electric generation services with funds from non-generation customers in its service territory in *In re Application of Ohio Power Co.*, case number 2024-Ohio-2890. The challenger, Interstate Gas Supply LLC (“IGS”)—a competing utility—failed to meet its burden of showing the Ohio Public Utilities Commission committed reversible error when it dismissed IGS’s complaint.

CenterPoint Customers Sue Over Hurricane Beryl Power Outages as AG Opens Investigation

A class of approximately 300 Houston and Galveston area restaurants have sued CenterPoint Energy related to the lengthy power outage during Hurricane Beryl, claiming that the utility failed to adequately invest in infrastructure and maintain equipment. The restaurants allege that the utility’s negligent investment and maintenance is the reason for the lengthy delay in restoration of power. The restaurants, whose ranks continue to

grow, are seeking to be compensated for the revenue lost during the outage in an amount in excess of \$100 million. Separately, Texas Attorney General Ken Paxton opened an investigation into CenterPoint's provision of service during Hurricane Beryl. The Attorney General will investigate allegations that CenterPoint's conduct resulted in harm to customers, including higher rates, outages, and delays in restoring power.

REGULATORY AND STATE POLICY

FERC Accepts ISO New England's Longer-Term Transmission Planning Tariff

On July 8, 2024, FERC found the second phase of ISO New England's long-range transmission planning process to be just and reasonable and approved the Phase 2 Longer-Term Transmission Planning tariff (LTTP). FERC in particular noted that the LTTP is poised to maximize long-term transmission solutions, by making system upgrades based on a longer-term study instead of five-to-ten-year studies as had been the case. The new longer-term study will provide an overview of transmission system limitations, identify at a high-level the transmission infrastructure required to satisfy those limits, and may also identify associated cost estimates. The Commission approved the LTTP over comments that it may create greater challenges for nonincumbent transmission projects.

Ten Northeastern States Form Collaborative on Interregional Transmission

On July 9, 2024, ten north eastern states—Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont executed memorandum of understanding adopting a non-binding framework for interregional transmission planning. The goal of the program is to enhance grid reliability and accelerate the clean energy transition. The group also hopes to bolster transmission ties between regions to increase reliability and decrease costs. The next step is for the group to create a strategic plan. The group has been working with the Department of Energy to develop the collaboration.

New York PSC Adopts Geothermal Rules

On July 18, 2024, the New York Public Service Commission adopted Utility Thermal Energy Network Rules, as required by New York's Utility Thermal Energy Network and Jobs Act of 2022. The new rules establish fair market access rules for utility-owned thermal energy networks, exempts certain small-scale thermal energy networks from regulatory compliance, supports training efforts under the new rules, and encourages community participation and competition. The purpose of the rules is to facilitate and encourage the use of thermal energy, rather than relying upon fossil fuels for heating, cooling, and hot water. Under the new rules, the seven largest investor-owned utilities in New York are asked to submit pilot projects. These new pilot projects will join the twelve projects, totaling \$880 million, that are already actively being developed.

Central Hudson Gas & Electric Corporation Rate Increase Cut by Over 50%

The New York State Public Service Commission announced on July 18, 2024, that it had reduced Central Hudson Gas & Electric Corporation's rate request by more than half. The Commission cut costs it deemed unnecessary and applied regulatory assets and a \$4 million shareholder fund to offset the burden on rate payers. As a result of the cuts,

the utility was permitted only a 5.5 percent and 7.3 percent revenue increase for electric and gas respectively, down from the utility's requested amounts of 13.3 for electric and 14.2 for gas.

Illinois Appellate Court Strikes Down Power Line Certification

The Illinois Appellate Court struck down the Illinois Commerce Commission's issuance of a certificate of public need and necessity. The court concluded that the Commission erred by failing to consider whether Invenenergy, the applicant, could pay for the 800-mile line. The court concluded that a financing contingency did not cure the defect in the Commission's decision. The court reasoned that the contingency demonstrated the Commission new Invenenergy could not presently finance the project. The suit is just one part of a long-standing row between landowners and transmission developers over the ambitious Grain Belt Express spanning Indiana, Illinois, Missouri, and Kansas.