

Energy Law: Month in Review - October 2024

by Kayla Race

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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.

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LITIGATION

Supreme Court Rejects Industry's and States' Bid to Stay EPA Power Plant Carbon Rule

On October 16, 2024, the U.S. Supreme Court rejected the "emergency applications" submitted by utilities, independent power producers, and conservative states seeking a stay on an Environmental Protection Agency (EPA) rule that limits carbon emissions from power plants. Specifically, the EPA rule would require coal-fired and gas-fired power plants that are expected to operate past 2039 to, by 2032, meet a carbon-dioxide-

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emission standard equal to installing a carbon capture and storage system running at 90% efficiency. The rule is being challenged in the D.C. Circuit by dozens of conservative states, coal-industry groups, and utilities and utility groups. In rejecting the emergency stay applications, the Court (in an opinion authored by Justice Kavanaugh) agreed that the applicants have shown a strong likelihood of success on the merits on at least some of their challenges to the EPA's rule but concluded a stay was not merited because the applicants were unlikely to suffer irreparable harm without a stay, given that the D.C. Circuit is expected to make a decision before compliance work would need to start.

Federal District Court Rules Texas Law Limiting New Transmission Line Ownership to Incumbent Utilities to be Unconstitutional

On October 28, 2024, the U.S. District Court for the Western District of Texas ruled that a 2019 Texas law (S.B. 1938, Tex. Util. Code § 37.056)—which limited the ability to build, own, or operate new transmission lines to owners of an existing transmission facility in Texas—violates the U.S. Constitution. Specifically, the court granted NextEra's and LSP Transmission's motions for judgment on the pleadings, ruling that the law violates the dormant Commerce Clause. The court noted that at least five other states had related right-of-first-refusal laws for transmission projects but that "none of those laws is as restrictive as Texas's." The court highlighted that not only did Texas's law place no time limit on an incumbent exercising its right, it completely barred out-of-state entrants, and allowed incumbents to designate a replacement if it declines a project, but only if that designee is "another electric utility that is currently certificated by Public Utilities of Texas within the same electric power region." The court rejected several arguments made by incumbent utilities including that the law was needed to ensure power-grid reliability. The court reasoned that grid reliability and new transmission line construction could be achieved through a variety of reasonable means that do not discriminate against interstate commerce.

The court had previously upheld the law in 2020, but the U.S. Court of Appeals for the Fifth Circuit in 2022 found the law likely violates the dormant Commerce Clause of the U.S. Constitution and ordered the district court to reconsider its earlier ruling.

Duke Energy Escapes Liability in House Fire Lawsuit Allegedly Caused During Meter Installation

The North Carolina Court of Appeals upheld a lower court's summary judgment ruling in favor of defendant Duke Energy, who had been sued by homeowners who alleged that Duke Energy's contractor negligently caused a fire when installing a new meter at the home. The plaintiffs alleged that the contractor failed to instruct them to unplug electronics during the meter installation and, as result, an electrical outlet caught fire. The court concluded that the plaintiffs' experts "failed to establish the relevant professional standard of care beyond what they would personally do in the circumstances."

REGULATORY AND STATE POLICY

FERC Prohibits Transmission Providers from Charging Transmission Customers

for Generating Facilities' Reactive Power

At its mid-October meeting, the Federal Energy Regulatory Commission (FERC) unanimously approved a rule that revises the pro forma tariffs to prohibit the inclusion in transmission rates of any charges related to the provision of reactive power within the standard power factor range, sometimes referred to as the “deadband.” FERC also removed the requirement that a transmission provider pay an interconnection customer for reactive power within the deadband range if the transmission provider pays its own or affiliated generating facilities for the same service. Transmission providers will be required to pay an interconnection customer for reactive power only when the transmission provider requests or directs the interconnection customer to operate its facility outside the standard power-factor range set forth in its interconnection agreement. The rule will take effect 60 days after it is published in the Federal Register.

FERC Revises Transmission Siting Rule, Adding Tribal Engagement Requirements

FERC unanimously re-approved, with amendments, its transmission siting rule that was initially approved in May, and subsequently reheard. The May rule (Order No. 1977) clarified FERC's authority and processes for issuing permits to construct or modify electric transmission facilities in U.S. Department of Energy-designated “national interest electric transmission corridors” when states deny siting applications. The October rule, issued on re-hearing (Order No. 1977-A), is largely the same as the May rule but adds a new requirement that that applications for transmission projects on tribal trust lands describe how the applicant will engage the tribe to obtain permission in advance.

IRS Issues Final Guidance on Semiconductor Tax Credits, Including Solar Ingot and Wafer Manufacturing

On October 23, 2024, the Internal Revenue Service issued final guidance on the 25% investment tax credits (ITCs) for semiconductors, established by the CHIPS Act of 2022 to incentivize the manufacture of semiconductors and semiconductor manufacturing equipment within the United States. Solar industry stakeholders stated that the rule would enable solar ingot and wafer production facilities and equipment to qualify for the credit, including advanced manufacturing facilities and equipment that produce semiconductors, including the slicing, etching, and bonding of the semiconductor-grade polysilicon used in photovoltaics modules. The credit is available for facilities that begin construction before 2027.

California Announces Success in 515 MW Demand-Side Load Management Program, Including 200 MW Virtual Power Plant

The California Energy Commission announced that its Demand Side Grid Support Program has enrolled 515 MW of capacity, with more than 265,00 participants. The Program, which was launched in 2022 and runs from May through October each year, incentivizes Californians to reduce electricity usage or send energy to the grid under certain conditions. The Program includes a 200+ MW “virtual power plant” that taps into a network of customer-owned battery storage systems that are typically paired with solar. Participants are paid based on the net load reduction they provide, with some earning \$2 per kilowatt-hour of energy shared with the grid.

AEP Ohio and Stakeholders Reach Settlement on Data Center Interconnection

AEP Ohio, the staff of the Public Utilities Commission of Ohio, and other stakeholders jointly asked the Public Utilities Commission of Ohio to approve their settlement agreement, setting terms and conditions for connecting data centers to the grid. Under the agreement, new data centers with a monthly maximum demand greater than 25 MW would be required to pay for at least 85% of the energy they say they need each month, even if they use less, to cover the cost of infrastructure needed to bring electricity to the facilities. Small and mid-sized data centers would have more flexibility. The agreement also requires data centers to show they are financially viable and meet certain collateral/credit requirements. Data centers must also pay an exit fee if their project is canceled or unable to meet obligations set in their electric service agreement contracts. The requirements would be in place for up to 12 years, including a 4-year ramp-up period.