

Energy Law: Week in Review - March 19, 2024

AUTHORS [Nate Webster](#), [Brian Bell](#), and [Zev Simpser](#)

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

Related Capabilities

- Energy & Natural Resources
- Mergers & Acquisitions

Litigation and Disputes

D.C. Circuit upholds denial of cost recovery from certain customers – The D.C. Circuit recently affirmed a FERC decision rejecting Lincoln Electric System's attempt to collect power-plant transmission costs from transmission customers who had not contributed to those costs. Specifically, the utility had invested in a power plant in one service zone, but that plant only benefited customers in an adjacent service zone, not the zone in which the plant was actually located. The Utility nevertheless sought to collect costs from customers in the service zone encompassing the plant, despite the fact that the customers geographically proximate to the plant received no benefits from it. FERC and the D.C. Circuit rejected the utility's request under the "cost-causation principle."

FERC denies merger – FERC recently blocked a proposal by Bridgepoint Group PLC (a British limited partnership engaged in asset management) to acquire Energy Capital Partners LP (a Delaware limited liability with indirect ownership interests in companies with public utility subsidiaries) for \$1.1 billion. FERC based its rejection on its position that the companies had not adequately demonstrated that the merger wouldn't affect competition in U.S. electricity markets. FERC noted that Bridgepoint had failed to comply with rules requiring that applicants disclose the assets of certain affiliates; rules designed to facilitate FERC's competition analysis. Bridgepoint contended that it didn't need to disclose the assets of the entities at issue because the affiliates had relinquished their voting rights in Bridgepoint and, therefore, could not influence prices, but FERC was unpersuaded. FERC therefore rejected the proposed merger without prejudice, and

invited Bridgepoint to re-submit a complete application.

3rd Circuit strikes down capacity market rules – The Third Circuit also recently rejected FERC's efforts to retroactively alter the results of an electricity capacity auction run by a large regional grid operator. Specifically, FERC approved the grid operator's proposal to craft new capacity market rules decreasing reliability requirements for local portions of the grid after initial results of the auction showed major power price hikes for some consumers. The Third Circuit rejected FERC's approval of the grid operator's changes because, under the filed-rate doctrine, once FERC publishes rules for an electricity capacity auction, those rules are locked in to ensure predictability.

Regulatory Actions

New FERC commissioners named – President Biden recently nominated three new FERC commissioners—Judy W. Chang, David Rosner, and Lindsay S. See—in an effort to bring the Commission up to a quorum. By statute, the commission contains five members with no more than three from the same political party. Chang is the former Undersecretary of Energy and Climate Solutions for Massachusetts. Rosner is an industry expert currently assigned to the U.S. Senate Energy and Natural Resources Committee Democratic staff. See is the Solicitor General of West Virginia, and was recommended by Senate Minority Leader Mitch McConnell.

EPA changes scope of current carbon emissions rulemaking – In recent months, the EPA has been working on a rule to update carbon emissions standards for gas-fired power plants. It plans to release final standards in the spring that would cut climate pollution from existing coal and new natural gas fired plants. Recently, however, the Agency announced that it planned to remove proposed controls on existing natural gas plants from the forthcoming rule. Instead, the Agency promises that it will pursue regulations on existing natural gas facilities in a subsequent rulemaking procedure. The proposed rule, as previously written, would have required almost all coal plants and certain gas-fired plants to cut or capture nearly all of their carbon emissions by 2038, and it would have required retirement of plants unable to meet the new standards.

FERC evaluating changes to blanket authorization for investment companies – FERC is seeking comments on a Notice of Inquiry that is examining whether the commission should modify its policies governing the availability of blanket authorizations for investment companies under section 203(a)(2) of the Federal Power Act. The Notice of Inquiry stems from Commission concerns that large investors in public utilities are using blanket authorization to acquire utility securities and, subsequently, influence utility decisions. The deadline for comments is March 26, 2024.

FERC announces new policy for hydro permits on tribal lands – FERC recently granted Native American Tribes more authority to block hydroelectric projects on their land. Specifically, the Commission recently rejected seven proposals for projects on the Navajo Nation. In issuing the rejections, the Commission announced a change in policy, clarifying the Commission “will not issue preliminary permits for projects proposing to use Tribal lands if the Tribe on whose lands the project is to be located opposes the project.”

The Commission stated that, if applicants wish to avoid permits denials, they should “work closely with Tribal stakeholders prior to filing.”

Bill introduced to grow transmission capacity – Several Democratic lawmakers in the U.S. House recently introduced an Act—entitled the Advancing GETs Act—which would require FERC to establish a shared savings incentive for grid-enhancing technologies. The purpose of the bill is to provide additional transmission capacity. The bill would allow a developer to be paid for the cost of grid-enhancing technologies, and would also allow the developer to retain some of the cost savings, while passing the remainder of the savings onto consumers. The legislation would also require transmission owners to report congestion costs to FERC for subsequent analysis and public circulation.

We will be following these issues as they develop. Please let us know if you have any questions or would like to discuss how these issues pertain to your business.