

Energy Law: Week in Review - March 25, 2024

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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
- Environmental
- Commercial Litigation

Litigation and Disputes

Texas PUC price caps face scrutiny in state court – The Texas Public Utility Commission's ("PUCT") policy of setting price caps during extreme weather events faced scrutiny before the Texas Supreme Court this week. Specifically, two renewable energy providers filed a direct appeal arguing that the Public Utility Commission exceeded its authority by imposing a \$9,000 price cap during power grid emergencies, contending that state law requires that the market set prices. The challengers had previously prevailed at the State Appellate Court, which led the PUCT to appeal to the Texas Supreme Court.

Texas law favoring incumbent transmission companies faces scrutiny – A national Energy Company—NextEra—recently asked a Texas federal court to strike down a state law reserving new power line development for transmission companies with an existing presence in the state. A panel of the Fifth Circuit had previously declared the law to be a facial violation of the commerce clause and, therefore, unconstitutional. Moreover, the Supreme Court rejected the State's request for an appeal, notwithstanding an evident circuit split with the Eighth Circuit, which has previously affirmed a Minnesota law substantially similar to the Texas statute at issue. In light of the Fifth Circuit's ruling (and the State's subsequent failure to secure further review), the petitioners requested that the district court implement the Fifth Circuit's decision and strike down the law.

SEC litigation consolidated in the Eighth Circuit – The litany of cases challenging the SEC's climate-change rules, which require companies to report their greenhouse gas emissions and climate related risks, have been consolidated in the Eighth Circuit. The suits—initially filed in numerous appellate courts—involve challenges from a variety of

parties, including state attorneys general, the U.S. Chamber of Commerce, the Sierra Club, and various energy suppliers. The regulations face challenges from both sides, with some contending that the rules don't go far enough, and others contending that the rules patently exceed the SEC's statutory authority. In light of the consolidation in the Eighth Circuit, the Federal Court of Appeals for the Fifth Circuit, which had previously granted an emergency stay of the rules, dissolved its existing stay.

Court upholds pause on power line – A Federal Judge in Wisconsin extended a preliminary injunction preventing a land swap designed to facilitate the completion of a high-voltage transmission line in Wisconsin. Conservation groups had previously sued to prevent the land swap, contending that it violated the National Environmental Policy Act, among other statutes, by rushing flawed approvals and failing to perform adequate environmental review. Petitioners also contend that the line, which crosses part of the Upper Mississippi River National Wildlife and Fish Refuge, will weaken protections for protected areas if approved. The preliminary injunction will remain in place while the Judge awaits receipt of the full administrative record from the federal agencies.

Regulatory Actions

FERC affirms Order No. 2023 – On March 21, 2024, the Federal Energy Regulatory Commission issued a rehearing order for Order No. 2023, largely upholding the original order, with clarification. Order No. 2023 seeks to improve the generator interconnection process. The rehearing order, known as Order No. 2023-A, clarifies: (1) transmission providers' and interconnection customers' roles in the interconnection process, (2) the availability of public interconnection information, (3) the cluster study process, and (4) consideration of alternative transmission technologies. Order No. 2023-A also affirmed the adoption of late-study penalties and broadened acceptable forms of security deposits. The rehearing order additionally extended the submission deadline for transmission providers to submit compliance filings to within 30 days of Order 2023-A's publication in the Federal Register.

FERC nominees appear before Congress – President Biden's FERC nominees recently appeared before the Senate Committee on Energy and Natural Resources and faced questioning on climate change. Senators inquired whether FERC has the authority to consider greenhouse gases in fulfilling its statutory mandate. Although the nominees emphasized that their primary mandate is to keep the energy system reliable and affordable, none of the nominees went so far as to rule out considering greenhouse gases in carrying out their statutory obligations.

California legislators reconsider income-based utility charges – In 2021, California passed a law ordering regulators to implement an income graduated fixed charge, which would shift the rate structure away from the volumetric per kWh charge to income-based fixed charges. Opponents of the change recently introduced a law to reverse that shift. The California Public Utilities Commission is currently considering how it will implement the fixed charge.

Texas regulators approve loan program – The Texas Public Utility Commission

recently unanimously approved a program granting low-interest loans to fund the construction of gas-fired electric plants. The loan program, funded by a new \$5 billion energy fund approved by voters in a constitutional amendment, opens for applications on June 1, 2024. The program seeks to increase dispatchable generation in Texas' power grid. The fund excludes renewable resources and battery storage, and requires that qualifying projects have at least 100 megawatts of capacity.

FERC declines enforcement action against utility – FERC declined to launch an enforcement action against the Salt River Project, an electric utility, over its residential solar rules. Several customers of Salt River Project had petitioned FERC for an enforcement action, contending that the utility's rooftop solar rules violated PURPA because they discriminated by making customers with solar panels pay discriminatory fixed charges and reimbursed those customers at rates below the utility's full avoided cost. The utility contended that the challenge belonged in state court because it dealt with retail rates, and FERC agreed. The dispute may now proceed directly in state court without the need for rehearing before FERC.

Deals and Transactions

Talos Energy sells sequestration business – Talos Energy recently sold Talos Low Carbon Solutions LLC (TLCS) for \$148 million. TLCS focuses on carbon capture and sequestration, and the sale included its stake in emission projects along the Gulf Coast, specifically: Bayou Bend, Harvest Ben and Coastal Bend, though the purchaser intends to divest a portion of those interests. The Purchaser—a French company named TotalEnergies—closed the deal on March 18, 2024.

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.