

Electricity Litigation

The Brattle Group has extensive experience in disputes regarding electricity-related contracts and transactions.

Our experts frequently testify before courts, arbitration panels, and regulatory commissions on topics such as liability, the quantification of damages, commercially reasonable mitigation, industry fundamentals and practices, and other relevant issues.

- **As experts:** we pride ourselves on our rigor and objectivity.
- **As expert witnesses:** we excel because we transform complex topics into clear and simple language – easily accessible and compelling for non-expert adjudicators.
- **As consultants:** we provide full-service litigation support, from the formulation of economic arguments to managing the content, process, and budget with one or many expert witnesses. We assist counsel with discovery, depositions, cross examination, briefs, litigation risk analysis, and settlement negotiations.

Our electric industry expertise spans wholesale and retail electricity markets, generation technologies, transmission planning, and system operations, as well as market design, market performance, and regulatory support. We work in both litigation and non-litigation settings for a broad range of industry participants: regulated utilities, merchant generators and transmission owners, asset developers, investors, regional transmission organizations (RTOs), fuel suppliers, regulators, and customers.

Our unparalleled finance expertise complements our industry experience, enabling us to accurately value physical and financial assets and risks. These are often key issues in disputes involving contracts or transactions that may span many years and involve considerable uncertainty.



OUR APPROACH

Three basic considerations guide our approach:



Application of Best Practices

Sound economic and valuation principles must be applied in estimating damages.

Our experts speak authoritatively on international best practices in business and asset valuation. Brattle is always in a strong position to defend its valuation work because we apply the same techniques to measure damages as we use in our non-litigation work and teaching, and our valuation methods are consistent with the academic literature.



Withstanding Cross-Examination

Analyses must be transparent and able to withstand intense scrutiny by opposing experts and lawyers.

We take extraordinary measures to ensure that our analyses and conclusions will withstand the scrutiny of cross-examination. Our “peer review” process provides internal challenges and testing to ensure that our work is compelling and reliable. Our numerical work contains detailed notes and documentation allowing it to be followed and defended effectively. We perform internal audits to ensure that there are no errors.



Clear and Concise Communication

Sophisticated analyses must be easily understandable by audiences that may have limited technical expertise.

The clear and concise presentation of ideas is a critical skill for experts in litigation. We design our reports and oral testimony to be understood by the “intelligent non-expert.” Brattle experts have sharpened their presentation skills through public speaking, classroom teaching, and testifying before courts and tribunals.

Our principals are fully engaged throughout the duration of each case on which they work, either as consulting or testifying experts.

REPRESENTATIVE ENGAGEMENTS

Damages and prudence evaluation of a terminated nuclear power plant project.

For a co-owner of a nuclear power plant project in the Southeastern U.S., Brattle evaluated the prudence of past decisions to start and continue construction until the project was eventually terminated. These investment decisions by the co-owners of the project were subject to multiple lawsuits regarding the appropriateness of recovering the past investment costs from the utility's customers. The Brattle team evaluated the ranges of long-term outlooks on major market fundamentals and project costs as of the past decision points to assess the projected economics of continuing the project against options involving termination and replacement by other new resources.

Damages analysis for major California generation plant failure

Brattle provided written and oral expert testimony on damages in a high-profile international arbitration case involving equipment failure that forced the retirement of a major electricity generation plant in California. The Brattle team developed simulation models to forecast power prices and greenhouse gas allowance prices in California and throughout the Western states through 2050, accounting for market and regulatory uncertainties. The resulting range of prices was used to estimate damages. We also assessed the economic viability of potential mitigation measures (repairing or replacing the faulty equipment) as compared with retiring the plant.

Hydropower contract litigation

In court proceedings in Canada, Brattle provided expert witness testimony in a dispute related to a 65-year hydropower contract that involved several hundred million dollars annually. The case centered on the economic and financial rationale behind the pricing of the contract between Hydro-Québec and Churchill Falls Labrador Corporation for over 5,000 MW of electricity from the Churchill Falls hydro-electric power plant. We testified on industry environment and resource options available at the

time, the way the contract price and other terms allocated risk between the parties, the impact of industry evolution on the contract, alleged unforeseen circumstances that had occurred since the contract was signed, and their effect on the performance of the contract. The court sided with our client, consistent with the evidence and recommendations presented by our witnesses, and the verdict was upheld by the Québec Court of Appeal.

Termination of tolling agreement with gas-fired power plant

In a dispute over damages from the premature termination of a long-term tolling agreement, Brattle testified on behalf of the plant owner that a primary contributor to damages was the change in risk resulting from the loss of the contract. Regional power markets had changed fundamentally between the time of contract signing and termination, and it was no longer possible to obtain a long-term replacement contract at any price. The "replacement" revenues available consisted of a possible short-term contract, followed by merchant operation at uncertain future market prices. Determining damages required accounting for this change in risk, in this case by using two distinct discount rates: a low rate for the lost low-risk revenues under the original agreement, and a higher rate for uncertain replacement revenues from the short-term market. The arbitration panel agreed that the loss of the secure contract meant a significant loss in value and adopted this approach, leading to a favorable judgment.

Demand response arbitration

Brattle provided expert testimony on behalf of a client that had acquired a demand response company and alleged that the company had overstated its demand response capacity and technical capabilities. We analyzed discovery materials including detailed demand response data to assess the magnitude of alleged overstatements. In addition, we calculated damages primarily based on a fair market valuation of the company with and without alleged overstatements, and provided deposition, an expert report, and oral testimony in arbitration before the American Arbitration Association.

Impact of environmental retrofits on viability of coal-fired power plant

In a dispute before the U.S. District Court between Ameren Missouri and the U.S. Environmental Protection Agency (EPA) regarding the appropriate remedies for violations of Prevention of Significant Deterioration (PSD) standards under the Clean Air Act at the Rush Island coal-fired plant, Brattle submitted expert testimony on the impact of the proposed mandate to install environmental retrofits on economic viability of the plant and on retail rates to Ameren's electric customers. We evaluated the economics of early retirement of the Rush Island plant under several scenarios including with and without the proposed retrofits, and under various future wholesale power market conditions. We also estimated the likely range of increase in SO₂ emissions from other units in the region if the proposed mandate to install retrofits at Rush Island were to result in early retirement of the plant.

Market manipulation by suppliers in Western power markets

Brattle experts have testified on multiple occasions in several related proceedings before the U.S. Federal Energy Regulatory Commission (FERC) dealing with the California Energy Crisis of 2000 and 2001. In 2011, we testified on the nature and price impacts of manipulation and the exercise of market power on hourly power transactions. A second round of testimony explained how the distorted hourly markets affected bilateral spot market transactions in California and the Pacific Northwest. A third round of testimony in 2016-17 demonstrated that the price distortions in these spot markets elevated prices in long-term electricity supply contracts negotiated by the California Department of Water Resources to alleviate the Crisis. Together, this testimony established that the Mobile-Sierra presumption of contract validity should be set aside because supplier misconduct distorted the markets which affected contract negotiations, or should be overcome by the undue economic burden the contracts imposed upon California electricity consumers. To date, litigation in these various proceedings has yielded settlements from suppliers totaling over \$8 billion, and a favorable initial decision in the long-term contract matter is pending before the FERC.

Spent nuclear fuel storage litigation

In eight different litigation cases involving 11 U.S. nuclear plants, Brattle experts have evaluated the U.S. Department of Energy's (DOE) failure to honor its contractual commitment to remove spent nuclear fuel from U.S. nuclear plants. The timing of spent fuel removal from individual plants was not specified in the contract, so the key to establishing damages was to describe how the DOE program should and would have accepted spent fuel in the non-breach world. We simulated a nationwide market for the exchange of spent fuel removal rights under the program. Such exchanges—simply a re-ordering of the acceptance priority queue—were explicitly enabled by the contract and would have significantly reduced the industry's non-breach storage costs. The resulting characterizations have been used to support damage claims by nuclear owners to recover ongoing spent fuel storage costs that would have been unnecessary if the DOE had fulfilled its contract obligations.

Fraudulent conveyance and solvency litigation

In a highly complex litigation arising from the Mirant bankruptcy, Brattle experts consulted on behalf of Mirant's unsecured creditors to recover alleged fraudulent conveyances by Mirant to Southern Company just prior to the spin-off of Mirant. The case addressed whether Southern Company knowingly spun-off an effectively insolvent company and further contributed to its insolvency by stripping it of valuable assets. The work involved the valuation of dozens of assets, including power plants, vertically integrated electric utilities, distribution companies, and power purchase agreements in Asia, Europe, Latin America, and the United States. As the central consulting experts, we advised counsel for the duration of the case, from initial discovery through the ultimate settlement. We identified and helped manage all aspects of the analyses by over 15 high-profile testifying experts on valuation, solvency, capital market performance, corporate governance, risk management, industry practices, and related areas. The case resulted in a favorable settlement for the client.

Power plant cancellation during construction

Brattle assisted a merchant generating company in determining the value lost when the government agency with whom it had contracted to develop a gas-fired power plant terminated the contract after construction had begun. A key contributor to the value lost was the risk associated with the contract revenues. The contract's unusual structure insulated the merchant generating company from many of the risks normally associated with electricity markets, transferring these risks to the government agency over the contract's 20-year term. This transfer of risk had a major effect on the value of the contract to the merchant generator, and thus on the magnitude of the arbitration claim. The case resulted in a favorable settlement for the client.

New Source Review (NSR) cases

Brattle experts have been at the forefront of the major NSR cases over the past decade, providing defendants with a breadth of analytic support and expert testimony in cases brought by the U.S. Environmental Protection Agency (EPA) and U.S. Department of Justice (DOJ), states, and advocacy groups. These cases have focused on the emissions consequences of historic maintenance projects, and Brattle experts have successfully countered the plaintiffs' experts' theories and calculations of alleged increased emissions with credible, persuasive, and rule-compliant alternatives of causation and measurement. In addition to litigation support, Brattle experts assist generation owners in NSR-related compliance analysis, as ongoing NSR scrutiny requires many generation owners to reassess current compliance liabilities and assess the NSR implications of possible capital projects at existing plants to improve efficiency, availability, or lifespan.

International arbitration regarding power plant construction dispute

For an international engineering, procurement, and construction (EPC) contractor in an international arbitration proceeding, Brattle estimated the fair market value of a power plant at a future date (the "Valuation Date") based on projected cash flows in combination with other assets

and foreseeable liabilities. The analysis combined a forecast of wholesale electricity prices in the Northeast U.S. as well as modeling to-go capital expenditures, associated debt financing, additional claims such as mechanics liens, and cash retention scenarios through the Valuation Date. (*American Arbitration Association, International Centre for Dispute Resolution. Case Number: 01-18-0001-6009*)

Regulatory dispute regarding utility special purpose subsidiary

For the Massachusetts Water Resources Authority (MWRA) in a regulatory dispute with a special-purpose subsidiary of NSTAR Electric Company (NSTAR) over the cost of dedicated electric transmission facilities, Brattle showed that the business risk related to serving MWRA was below that for NSTAR generally. In testimony before the Massachusetts Department of Public Utilities (MDPU), Brattle rebutted NSTAR's assertion that the special purpose subsidiary and NSTAR shared "similar financial and operational risks, making [the adoption of NSTAR's proposed cost of capital] an appropriate modification to the calculation of the revenue requirement". In its 2016 order, the MDPU found that the special-purpose subsidiary's "capital requirements differ from those of NSTAR Electric, and therefore it would be inappropriate to impute NSTAR Electric's capital structure to the [special-purpose subsidiary]". The result was a lower rate approval for dedicated service to MWRA via the special-purpose subsidiary. (*Commonwealth of Massachusetts Department of Public Utilities, Case D.P.U. 15-157.*)

Regulatory dispute regarding industrial load-retention rates

For Ameren Missouri in a regulatory dispute over preferential electricity rates, we analyzed the business of a major industrial customer to assess the liquidity and financing consequences of not receiving special, single customer rate reduction. Testimony before the Missouri Public Service Commission (MPSC) addressed the customer's claim of imminent liquidity crisis, potential alternative capital sourcing, and competitive position in the U.S. industry. The Brattle analysis underpinned key criteria cited by the MPSC in a unanimous 2014 ruling against granting the requested rate reduction that, as reflected in the Commission order, could have transferred as much as \$530 million in cost burden to other Ameren stakeholders over a ten year period. (*Missouri Public Service Commission, Case No. EC-2014-0224.*)

CONTACT US

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ABOUT BRATTLE

The Brattle Group answers complex economic, regulatory, and financial questions for corporations, law firms, and governments around the world. We aim for the highest level of client service and quality in our industry.

We are distinguished by our credibility and the clarity of our insights, which arise from the stature of our experts; affiliations with leading international academics and industry specialists; and thoughtful, timely, and transparent work. Our clients value our commitment to providing clear, independent results that withstand critical review.

Brattle has over 350 talented professionals across three continents. For additional information about our experts and services, please visit [brattle.com](https://www.brattle.com).