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Energy Law: Month in Review - June 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.

Related Capabilities

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

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REGULATORY AND STATUTORY DEVELOPMENTS

Maryland Public Service Commission Rejects Exelon Utility's $213.6 Million Multiyear Rate Plan

The Maryland Public Service Commission ("Maryland PSC") rejected Exelon subsidiary Potomac Electric Power Co.'s ("PEPCO") proposal for a $213.6 million rate increase over approximately four years. Instead of approving the multi-year rate plan, the Maryland PSC authorized a $44.6 million rate hike for one year, down from the $117.2 million the utility was seeking in the first year of its four-year proposal. PEPCO had asked for a 10.5% return on equity ("ROE"). The Maryland PSC instead approved a 9.5% ROE. In support of its rate proposal, PEPCO argued that the multi-year plan would give the utility

predictable revenue to make needed reliability and safety-related investments. PEPCO also argued that the proposed rate plan would allow customers to know what their rates would be for several years instead of facing annual changes. The Maryland Office of People's Counsel opposed the plan, however, arguing that multi-year rate plans benefit utilities but hurt customers.

U.S. Senate Approves Three Federal Energy Regulatory Commission Nominees

On June 12–13, 2024, the U.S. Senate confirmed three nominees to fill vacant commissioner positions at the Federal Energy Regulatory Commission ("FERC"). FERC staffer David Rosner and Massachusetts Undersecretary for Energy and Climate Solutions Judy W. Chang were confirmed to fill the two Democratic vacancies. West Virginia Solicitor General Lindsay S. See was confirmed to fill the Republican vacancy. The confirmed nominees give FERC a full slate of five commissioners. Commissioner Rosner was a FERC energy-industry analyst who had been temporarily assigned to the Democratic staff on the Senate Energy Committee. Commissioner Chang, an energy economist and policy expert who is a managing principal at economic consulting firm Analysis Group, was Massachusetts Undersecretary of Energy and Climate Solutions from 2020 to 2023. Commissioner See had been West Virginia Solicitor General and handled oral arguments before the U.S. Supreme Court for Republican-led states in West Virginia v. E.P.A., limiting the U.S. Environmental Protection Agency's authority to regulate greenhouse gas emissions from power plants.

FERC Concludes that Utility Self-Funding Rules for Interconnection Upgrades May Unfairly Increase Costs

In a show-cause order issued June 13, 2024, FERC questioned four regional transmission providers' rules concerning transmission owners' right to pay for, and to profit from, network upgrades needed to connect generation and energy storage to the grid. According to FERC, rules for "initial funding" may increase interconnection costs without corresponding improvements to that service, may block interconnection, and may allow transmission owners to discriminate in favor of themselves and their affiliates. FERC required Midcontinent Independent System Operator ("MISO"), PJM Interconnection, Southwest Power Pool, and ISO New England to respond to the show-cause order within 90 days. FERC's order requires the operators to respond to a series of questions concerning: (1) whether their rules had protections to prevent transmission owners from boosting their rate base by unjustly increasing network-upgrade costs paid for through initial funding, (2) the rules' impact on potential discrimination in favor of themselves, and (3) proposals to establish new network-upgrade funding rates that could be used if FERC ultimately rejects the initial-funding paradigm but finds that transmission owners face uncompensated risks from the upgrade projects.

U.S. Senate Approves Bipartisan Nuclear Energy Legislation

Following its May 8, 2024, passage by the House of Representatives, on June 20, 2024, the U.S. Senate approved bipartisan legislation streamlining the Nuclear Regulatory

Commission's ("NRC") oversight of the existing U.S. nuclear-reactor fleet and potentially accelerating the permitting and deployment of advanced nuclear reactors. The bill would require the NRC to update its mission statement to include that licensing and regulation of the civilian use of radioactive materials and nuclear energy be conducted in an efficient manner that does not unnecessarily limit their use. The bill also directs the NRC to: (1) reduce certain licensing application fees, (2) study and develop licensing-review processes for nuclear facilities located on brownfields sites, (3) create expedited procedures for combined reactor-license applications for already-certified commercial reactor sites on or adjacent to existing or previous commercial-reactor sites, (4) establish risk-informed and performance-based guidance for micro-reactor licensing, and (5) coordinate with the U.S. Department of Energy on advanced nuclear-fuel qualification and licensing.

NV Energy Seeks New Tariff to Supply Google with 24/7 Power from the Fervo Geothermal Plant

On June 7, 2024, Google and NV Energy asked the Nevada Public Utilities Commission for permission to enter into a power-supply agreement based on a proposed "Clean Transition Tariff" that would allow large energy users to pay a premium for 24/7 clean energy from new resources. Under the proposed supply agreement, NV Energy would buy electricity from Fervo Energy's 115-MW Corsac Station Enhanced Geothermal Project, which remains under development, and sell it to Google for a premium set rate. Google would, in turn, receive credit for the project's energy and generation capacity on electric bills for its data centers in Storey County, Nevada, offsetting demand charges associated with those facilities. Google also argues that the tariff is needed to incent the deployment of more carbon-free dispatchable energy resources (like geothermal and nuclear generation) by allowing users to make up the difference between the cost of these capital-intensive resources and low-cost options like solar or natural gas. While the agreement, if approved, will only provide enough energy to supply its data center, Google argues that it will model a framework that other customers and other states could replicate to the benefit of users and suppliers alike.

New York Public Service Commission Adopts Energy Storage Framework Detailing Path to 6 GW by 2030

On June 20, 2024, the New York Public Service Commission ("New York PSC") approved a new framework for deploying 6 GW of new energy storage by 2030. The 6 GW target represents at least 20% of New York's peak electricity load and could trim nearly $2 billion from projected future statewide electric-system costs as New York transitions to generating 70% of its electricity needs from renewable sources by 2030. The approved framework will require an additional 4.7 GW in new storage deployments to complement 1.3 GW of existing storage assets already procured or under contract. New York's framework aims for 3 GW of new utility-scale storage to be procured under the state's new competitive Index Storage Credit mechanism and 1.5 GW of new retail storage, both for assets with discharge durations up to four hours. Retail storage includes commercial, industrial, and community-scale installations. The framework also envisions 200 MW of new residential storage assets with durations up to two hours.

LITIGATION AND DISPUTES

D.C. Circuit Court of Appeals Rejects New York Electricity Rate Challenge

On June 14, 2024, a D.C. Circuit Court of Appeals panel rejected the New York PSC's attempt to unravel FERC's approval of the state grid operator's wholesale electricity rates, leaving in place an estimated 17-year lifespan for new fossil-fueled power plants. The New York Independent Systems Operator ("NYISO") initially filed its proposed rates for electricity-generating entities in 2020 for the 2021–2025 period, shortening the estimated power plant amortization period from 20 years to 17 years. NYISO justified the shortened amortization period, which is intended to reflect the number of years an investor in a new plant should expect to recover the costs of developing the plant, on the ground that a 2019 climate law—known as the New York Climate Leadership and Community Protection Act—requires the statewide electrical-demand system to be emission-free by 2040. In an earlier case, the D.C. Circuit overturned FERC's rejection of the proposed rates with respect to the amortization period. On remand, FERC initially reasserted its determination that the shorter life span was inappropriate because the New York PSC had yet to enact a plan to reach a zero-emission electricity system by 2040. On rehearing, however, FERC concluded that NYISO made reasonable assumptions about the impact of the climate, leading the New York PSC to turn to the D.C. Circuit in September.

On the second appeal, the D.C. Circuit stated that, because FERC approved NYISO's proposal, the issue before the court was simply whether the agency reasonably concluded the 17-year amortization period fell within "the zone of reasonableness." The court noted that its "prior judgment vacating FERC's original decision held that NYISO needed to show that it had chosen a 'reasonable estimate' of how long an investor would expect a new gas-fired plant to remain 'commercially viable.'" Emphasizing the climate law's "open-ended language," which "gives no indication whether each plant must generate zero emissions, or whether zero net statewide emissions will suffice," the court held that a reasonable investor could predict that a new fossil-fueled power plant would not "remain commercially viable" past 2039. Accordingly, FERC was obligated to accept the NYISO's reasonable interpretation of the act.