Energy Law: Month in Review - March/April 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.

Litigation and Disputes

SEC Voluntarily Stays Implementation of Climate Regulations – On Thursday, April 4, 2024, the U.S. Securities and Exchange Commission announced it would stay its climate disclosure regulations while litigation proceeds at the Eighth Circuit. Several parties to the litigation had sought to have the Eighth Circuit issue an emergency order keeping the regulations from going into force. The SEC stated that its voluntary stay will "facilitate the orderly judicial resolution" of the challenges to the regulations and also avoid potential regulatory uncertainty. The regulations were first proposed in 2022 and a less stringent version was then adopted by the SEC in early March.

Fifth Circuit Vacates NRC License for New Mexico Storage Facility – In a brief order issued on March 27, 2024, a panel of the U.S. Court of Appeals for the Fifth Circuit vacated the license previously granted to Holtec International by the Nuclear Regulatory Commission for a nuclear waste storage facility in Lea County, New Mexico. In an earlier ruling in a separate case, the Fifth Circuit had determined that the NRC lacked statutory authority to license a nuclear waste storage facility in Andrews County, Texas. In this new order, the Fifth Circuit stated that its holding in the Texas case dictated the outcome in the New Mexico case.

Gross Negligence and Intentional Misconduct Claims Against Texas Utilities Survive – The Texas Fourteenth Court of Appeals considered motions to dismiss brought by transmission and distribution utilities in multi-district proceedings arising out of Winter Storm Uri, and decided that claims for negligence, negligent nuisance, and strict-liability nuisance should be dismissed in four underlying bellweather cases. However, the

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court also decided that claims for gross negligence and intentional misconduct should not be dismissed. A section in the relevant tariff stated that transmission and distribution utilities could be liable if found to be grossly negligent or to have committed intentional misconduct and the court concluded that plaintiffs had adequately pleaded those claims based on allegations regarding decisions made concerning blackouts, including allegations that certain neighborhoods were favored and that utilities refused to follow any plan for load shedding.

Regulatory and Statutory Developments

New Washington State Law Merges Gas and Electric Planning for Puget Sound Energy – Washington Governor Jay Inslee signed a new law on March 28, 2024, that will merge gas and electric resource planning for Puget Sound Energy. The new integrated planning process is to begin in 2027, and the law contains various requirements aimed at pushing PSE and its customers to electrify. The law also requires PSE's current gas rate base to be fully depreciated by 2050 and provides that the utility may request that the Washington Utilities and Transportation Commission allow it to have an integrated gas and electric rate base.

Massachusetts Recommendations for Faster Clean Energy Project Approvals – The Massachusetts Commission on Energy Infrastructure Siting and Permitting has recommended changes, including new legislation, which would speed up the permitting process for clean energy infrastructure projects. Under the proposal, the state's Energy Facilities Siting Board would issue a single, consolidated permit for projects above a certain size and decisions as to whether to grant the permit would be made within 15 months. Siting Board decisions could then be appealed to single justice of the Massachusetts Supreme Judicial Court within 20 days. The Commission also recommended a consolidated process for smaller projects, which municipalities would permit.

GAO Recommends NRC Assess Whether it is Fully Accounting for Climate Risk – The U.S. Government Accountability Office released a report recommending that the Nuclear Regulatory Commission assess whether its licensing and oversight process fully account for increased risks due to climate change. Currently, the NRC considers risks to nuclear plants from natural hazards; however, GAO reported that the NRC primarily uses historical data in doing so, as opposed to climate-prediction data. GAO also recommended NRC address any gaps it finds and determine what climate projection to use in licensing and oversight going forward. NRC indicated that GAO's recommendations are consistent with NRC actions that are either underway or in development.

Hawaiian Electric Offers New Commission-Approved Incentives for Rooftop Solar and Batteries – Hawaiian Electric announced that it is replacing most of its rooftop solar programs with a new "Smart Renewable Energy" program approved by the Hawaii Public Utilities Commission. Under the new program, payments for energy provided to the grid will vary based on customer location and time of day. Hawaiian Electric is also replacing its Battery Bonus program, which paid an upfront credit of $850 per committed kW, with a Bring Your Own Device Program that will have a smaller upfront payment of $100 per committed kW. The new battery program will still have a per month payment of $5 per committed kW.

DOE Finalizes Energy Efficiency Requirements for Distribution Transformers – The U.S. Department of Energy announced its final new energy efficiency rules for distribution transformers. DOE had initially proposed the new rule back in 2022 and faced opposition from utilities who cautioned that overly stringent standards could worsen the existing distribution transformer shortage. In the final rule, DOE extended the deadline for compliance from three years to five years and changed efficiency targets so that less amorphous electrical steel will be needed. The changes to the rule were welcomed by the Edison Electric Institute and the National Rural Electric Cooperative Association.

Treasury Department Clarifies Energy Community Definition – A new U.S. Department of Treasury guidance document offered further explanation regarding what qualifies as an "energy community" under the Inflation Reduction Act. Projects located in energy communities can receive a bonus of up to 10% of the Investment Tax Credit and an increase of 10% for the Production Tax Credit. The department had earlier issued guidance on the issue last April. The new guidance document offered further explanation and also addressed the rule regarding the attribution of offshore wind projects to on-shore communities.

Deals and Transactions

$1.5 Billion Loan Guarantee for Nuclear Plant Recommissioning – The Department of Energy announced a conditional commitment of $1.5 billion for a loan guarantee to Holtec Palisades to finance the recommissioning of the 800-MW Palisades Nuclear Plant in Covert Township, Michigan. The plant ceased operations in May 2022. In October 2023, Holtec made its initial filing at the Nuclear Regulatory Commission to begin the process of reauthorizing operations at Palisades.

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.