

Energy Law: Month in Review - May 2024

by Kayla Race

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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.

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REGULATORY AND STATUTORY DEVELOPMENTS

FERC Approves Landmark Transmission and Cost Allocation Reform Rule

On May 13, 2024, the Federal Energy Regulatory Commission (FERC), in a 2-1 vote, approved a long-awaited transmission and cost allocation reform rule. The order is numbered 1920, the year the Federal Power Commission was established, underscoring FERC's view that the order presages a new era. This final rule adopts requirements for transmission providers to conduct long-term (20-year horizon) planning and cost-allocation for regional transmission facilities, with updates to those long-term plans every

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5 years. Development of these plans must consider certain forward-looking factors, such as state energy goals, utility resource plans, planned power plant retirements, corporate energy procurement commitments, interconnection queues, and grid-enhancing technologies that could reduce the need for new wires and poles. Seven specific economic and reliability factors must also be evaluated when considering potential long-term transmission projects. The final rule also requires transmission providers to identify opportunities to expand (or “right-size”) transmission that is being replaced, when needed, and to give incumbent transmission owners a right of first refusal (ROFR) to develop those “right-sized” replacement facilities. However, the final rule does *not* include the ROFR that had been included in the 2022 proposed rule, which would have given incumbent investor-owned utilities and public power utilities a ROFR for jointly built new transmission projects. The final rule also requires an enhanced, 6-month engagement process with state entities to discuss cost allocation and payment of new transmission projects, prior to filing the long-term transmission plans. The rule will take effect 60 days after publication in the *Federal Register*, which has not yet occurred as of June 5, 2024.

DOE and 21 States Launch “Federal-State Modern Grid Deployment Initiative”

The Biden-Harris Administration announced the launch of a Federal-State Modern Grid Deployment Initiative involving the DOE and 21 states. Parties to the Initiative, which was announced on May 28, 2024, have pledged to prioritize expanded use of grid-enhancing technologies and increase state-federal cooperation and intraregional and interregional transmission planning. The 21 states involved are Arizona, California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, Washington, and Wisconsin.

DOE Announces Initial List of National High-Priority Areas for Accelerated Transmission Expansion

On May 28, 2024, the DOE unveiled a preliminary list of 10 potential “National Interest Electric Transmission Corridors” to accelerate the development of transmission projects in certain areas where such infrastructure is needed. Designation of such corridors unlocks certain federal financing and permitting tools. Public comments are due by June 24, 2024, on the geographic boundaries of the designations, associated transmission needs, and potential environmental and community impacts.

California PUC Restructures Residential Electric Bills, Adds Flat Fee

The California Public Utilities Commission (CPUC) announced, on May 9, 2024, changes to how California electric investor-owned utilities (IOUs) bill residential customers for infrastructure-related costs. The changes add a flat infrastructure charge and a reduced usage rate. Specifically, starting in late 2025 to early 2026, California IOUs will bill most residential customers a \$24.15 per month flat rate for the cost of certain infrastructure that connect customers to the grid, while electric usage rates will be reduced by 5 to 7 cents per kilowatt hour compared to current rates. Additionally, reduced fees and rates are approved for low-income customers. The CPUC’s fact sheet is publicly available.

New Jersey BPU Proposes Grid Modernization Rules

On April 30, 2024, the New Jersey Board of Public Utilities (NJBPU) announced that it will issue proposed grid modernization rules that, according to the NJBPU, will “include a streamlined process for utility interconnection applications, clearer and more consistent distribution system information available to potential project applicants, and a pre-application and verification process that will provide interconnection applicants with an early indication of feasibility and costs.” The proposed rules were published in the New Jersey Register on June 3 and are subject to a 60-day public comment period. 56 N.J.R. 993(a).

LITIGATION AND DISPUTES

EPA Power Plant GHG and Hazardous Air Pollutant Rules Challenged in D.C.

Circuit

Challenges to the EPA’s two new power plant air pollution rules, noted in our energy law roundup from last month, were filed in the D.C. Circuit. Specifically, the National Rural Electric Cooperative Association and 27 states, led by West Virginia and Ohio, are challenging the new source performance standards for greenhouse gas emissions from fossil-fuel fired power plants. In addition, 21 states, led by North Dakota, are challenging the national emission standards for hazardous air pollutants from coal and oil-fired power plants. On May 17, the D.C. Circuit denied a motion for a temporary administrative stay on the GHG rule, which would have blocked implementation of the rule until the court rules on a separate motion to stay the rule for the duration of litigation.

Ninth Circuit Vacates and Remands Stay in PG&E Investor Suit over Wildfire

Liability Disclosures

On May 3, 2024, the Ninth Circuit vacated and remanded a California federal district court’s *sua sponte* order that had stayed securities fraud claims pending completion of PG&E’s chapter 11 bankruptcy case. The claim was brought by PG&E investors against the utility and its officers, directors, and bond underwriter over statements made about the utility’s wildfire safety policies and wildfire liability. The Ninth Circuit ruled that the district court did not adequately consider whether the stay would impose hardship on plaintiffs that outweighed efficiencies to be gained by the stay.

Ohio Supreme Court Rules that PUC, Not Trial Court, Has Jurisdiction Over Tort Claims Stemming from Utility Gas Shutoff

On May 24, 2024, the Ohio Supreme Court ruled that only the Public Utilities Commission of Ohio, and not a state trial court, has jurisdiction over wrongful death and negligence claims brought against Dominion Energy after the utility shut off natural gas service to the decedent. The Ohio Supreme Court reasoned that the claims relate to utility service, giving the state PUC jurisdiction in the first instance, not the court of common pleas.

DEALS AND TRANSACTIONS

CPUC Rejects PG&E's Proposal to Transfer 5.6 GW of Non-Nuclear Generating Assets to Subsidiary

On May 9, 2024, the CPUC rejected PG&E's plan to spin-off its non-nuclear generating assets (5.6 GW) into a subsidiary called Pacific Generation and sell a minority interest in that subsidiary to a third-party private equity firm, KKR. The CPUC concluded that PG&E's proposal would result in additional costs and rate increases, would decrease legal accountability for safe and reliable operation of generating assets, and did not meet "even the minimal public interest standard."

Portland General Electric, Grid United, and ALLETE

Portland General Electric, Grid United, and ALLETE announced the May 28, 2024, signing of a non-binding memorandum of understanding for the development of a 415-mile high-voltage direct current (HVDC) transmission line known as the North Plains Connector, to run between Bismark, North Dakota, and Colstrip, Montana. According to the press release, the line will more than double the transfer capacity between eastern and western U.S. electric grids and will be "the nation's first HVDC transmission connection among three regional U.S. electric energy markets - the Midcontinent Independent System Operator, the Western Interconnection and the Southwest Power Pool." Definitive agreements regarding Portland General Electric's participation and ownership (anticipated to be 20%) are in the works.