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ENERGY AND TELECOMMUNICATIONS

CLIENT ALERT

THE BIDEN-HARRIS ADMINISTRATION: WHAT ENERGY AND TELECOMMUNICATIONS POLICIES WILL IT LIKELY PURSUE?

Bob Dylan wrote "The Times They Are A-Changin'" nearly sixty years ago, but the song has renewed meaning after last week's inauguration of President Biden and Vice President Harris. The new administration—coupled with the installation of a Democratic majority Senate and House—means new directions for U.S. energy and telecommunication policy, and changes that are likely to impact our clients. As the Biden-Harris Administration begins, we pause to offer a few thoughts on what we may expect over the next four years. While we have no crystal ball, we do have decades of experience in Washington and we hope that our informed speculation will be helpful. We look forward to discussing—and experiencing with you—these momentous years for our nation.

Read more below on the following topics:

- Shifting Electricity Policies
- Continued and Likely Increased Focus on Cybersecurity
- More Emphasis on Public Participation
- Continued Focus on Enforcement at the Commodity Futures Trading Commission, Renewed Focus at FERC
- Telecommunication Policy Shift Away from Preemption and to Broadband Service Affordability

Shifting Electricity Policies

The prior Administration espoused a federal energy policy of "dominance" based on fossil fuels, implementing that policy largely through executive directives and agency actions that broadly and consistently favored expanded drilling rights and expedited pipeline development at the expense of investment in solar, wind, and storage resources. Already facing the market head winds of a fracking industry that has sustained over $300 billion in losses over the last decade, wind and solar becoming the lowest levelized cost of energy, and advances in storage with other technological innovations on the horizon, this fossil-fuel-centric energy model is now challenged by a U-turn in federal policy. In just the first week of the Biden-Harris Administration, the United States has rejoined the Paris Agreement, established an Interagency Working Group on the Social Cost of Greenhouse Gases, and implemented a sixty-day moratorium on new permitting for oil and gas extraction on federal sites.

Even more to the point, President Biden has called for decarbonization of the electricity industry by 2035.

To achieve that ambitious goal, the new President has assembled an experienced team, including many familiar faces from the Obama Administration. They include former Secretary of State John Kerry as the international climate envoy, former EPA Administrator Gina McCarthy to lead the new White House Office of Domestic Climate Policy, and former Michigan Governor Jennifer Granholm as Energy Secretary. Of his top climate lieutenants, only Representative Deb Haaland, his nominee for Interior Secretary, is associated with the Green New Deal.

Massive investment in research and technology will not, on its own, be sufficient. In pursuit of solutions to the climate crisis, we anticipate that the new administration will offer ambitious legislative proposals and that federal agencies under Biden and Harris will announce new policy directions. The Federal Energy Regulatory Commission's (FERC) authority over wholesale markets and transmission rates/incentives means that the agency will be a potential focal point of significant change. Indeed, upon being named new FERC Chair, Democrat Richard Glick stated that this was "an important moment to make significant progress on the transition to a clean energy future."

But how fast—and vast—that progress will be remains to be seen. Absent any early departures, Republican commissioners will continue to be in the majority until June 30, when Commissioner (and former Chair) Chatterjee's term ends. Thus, the scope of any near-term policy changes will depend on the extent to which the two Democratic commissioners—Glick and Allison Clements—are able to secure the support of at least one of their Republican colleagues.

We identify here four trends that we expect to play a major role in electricity policy during the Biden-Harris Administration.

Accelerated Shift in the Resource Mix

The electricity sector has already been leading the transition towards decarbonization, driven as much by economics and customer demand as by state policies. Under the Biden-Harris Administration, we expect that transition towards carbon-free resources to accelerate. President Biden has promised $400 billion over ten years to spur clean energy research and innovation. Storage technologies and small modular nuclear reactors are poised to benefit from that investment.

Significant legislative proposals may be offered to implement the promised generation mix transformation. Last June, the House Select Committee on the Climate Crisis issued a lengthy report filled with proposed congressional and agency actions. The Committee's recommendations include suggesting that Congress enact a "Clean Energy Standard" aimed at achieving net-zero emissions in the electricity sector, and an "Energy Efficiency Resource Standard" to smooth out rising electricity demand from electrification and save consumers money. Of course, the fifty-fifty Senate and slim Democratic majority in the House means that, even if offered, such proposals will face major challenges.

At FERC, on the other hand, we expect to see proposed changes to Regional Transmission Organizations (RTO) market rules to facilitate greater participation of new resource types, and to compensate resources for the attributes and services they provide to the grid. FERC's new Distributed Energy Resources (DER) Rule (Order No. 2222), which is still pending on rehearing, is intended to remove barriers to DER from participating in RTO markets—but whether that objective will be achieved depends on the technical details of how the various RTOs implement FERC's principles. At the same time, high penetrations of renewable resources, along with decreasing usage of fossil generation, make it more challenging to maintain adequacy and reliably operate the grid. In response, the Commission has already signaled an interest in expanding the role of storage-enhanced renewable resources by focusing on so-called "hybrid" resources. We anticipate there will be proposals coming out of FERC to address RTO operational needs, including those aimed at new ancillary services and other compensation models.

Cooperative Federalism and Capacity Markets

The states and FERC have spent the last four years in a tug-of-war over which of them will control the nation's resource mix. Many states have adopted policies to encourage or mandate utilities to purchase more renewable energy, including via renewable portfolio standards and carbon pricing. While FERC has accepted a form of carbon pricing in the CAISO context, in the eastern RTOs FERC has been hostile to state policies that, by "subsidizing" clean energy resources, can impact capacity market prices. In the name of market efficiency and leveling the competitive playing field, FERC has imposed minimum offer pricing rules. FERC's efforts will keep older fossil-fueled resources in operation longer while undermining state programs to promote clean energy. And, as a result, consumers are facing billions in unnecessary charges. That treatment has faced significant criticism from now-Chairman Glick, as well as from consumers, states, public-interest advocates, and municipal and cooperative systems whose resources have been subjected to that same treatment. Some states have begun public dialogues about whether to leave their RTOs.

We anticipate that the Biden-Harris Administration will move in the opposite direction and seek to reconcile federal-state tensions in ways that accommodate state policies within an RTO structure. The new FERC Commissioners have already signaled an interest in doing so, and there is no question that détente with the states will be a key objective for Chairman Glick. And he may well find support from new Republican Commissioner Christie, who comes to the Commission after nearly seventeen years on the Virginia State Corporation Commission.

While we expect significant activity in this area at FERC, efforts at the RTO level are also likely to continue. California—which procures capacity through bilateral transactions largely overseen by local regulators instead of through a centralized market—has embarked on a process to revamp its resource adequacy construct to address ongoing capacity issues, and a majority of the current FERC commissioners have indicated that they are paying close attention to the capacity challenges CAISO is facing. As the process unfolds over the coming year and beyond, we expect CAISO to move ahead with efforts to reduce state and local regulatory authority over resource adequacy and bring more decisions under its own control.

Need for New Transmission

There seems to be broad based consensus among academics, clean power advocates, and certain of the FERC Commissioners (including Chairman Glick) that the nation requires substantial new investment in transmission to deliver power from remote locations with high renewable energy potential to load centers. That includes transmission to facilitate construction of new offshore wind resources, for which many states have set aggressive targets. We expect FERC and the U.S. Department of Energy (DOE) to use the full range of their statutory authority to encourage new transmission construction.

One likely focus will be transmission planning. While FERC's Order No. 1000 implemented significant improvements in transmission planning processes, particularly in RTO regions, it has become clear since that order's issuance that additional modifications are needed. For example, the cumbersome interregional coordination process set out in that order has meant that interregional projects are rarely completed. We expect a Democrat-led FERC (either on its own or, potentially, in response to new legislative directives) to revisit Order No. 1000 in an effort to move from mere interregional "coordination" to a more robust interregional transmission "planning" process. Order No. 1000's regional transmission planning process is also primed for review, given the concerns expressed that very long queues are frustrating efforts to interconnect renewable generation. And FERC may also attempt to implement changes to make regional transmission planning more effective in non-RTO regions. In reopening Order No. 1000, FERC will likely need to take a fresh look at difficult cost allocation issues.

State siting requirements have been identified as posing a large barrier to major, multi-state transmission projects. While new legislation to facilitate siting of interstate transmission projects is possible, some have called on the DOE and FERC to exercise existing authority under Federal Power Act (FPA) section 216. That provision allows DOE to designate "National Interest Electric Transmission Corridors," and authorizes FERC to issue federal permits for transmission lines that are built within those corridors. While FERC and DOE authority under section 216 has been limited by the courts, the Biden-Harris Administration might make a new attempt to use it or modify it. There have been proposals floated to amend the statute to authorize FERC, rather than the DOE, to make "Corridor" designations, and to use them to advance national climate goals.

We also expect FERC to use its FPA section 219 authority to provide incentives to transmission owners who develop interregional projects to deliver renewable energy to load centers. FERC's earlier proposal to grant large financial incentives, in the form of enhanced returns on equity for (among other things) building transmission projects that provide economic and reliability benefits, did not make it over the finish line, getting struck from the final Republican-chaired open meeting on January 19, 2021. While we do not see that proposal moving forward in its current form under the new administration, we expect continued efforts to revise FERC's transmission incentive policy, perhaps by focusing more directly on incentivizing projects that can be characterized as addressing climate change concerns.

Electrification of Transportation

The transportation sector has now surpassed the electricity sector as the country's largest contributor to greenhouse gas emissions, and most view electrification of transportation as the best path to address that problem. The Biden-Harris Administration aims to make 100% of new car sales be electric vehicles by 2030, through a combination of tighter fuel standards, new tax credits, and deployment of charging stations across the nation.

The electrification of the transportation sector will have significant impact on electricity consumption and the ability of balancing authorities to perform their duties. The new DER Rule already identifies electric vehicles as potential participants in DER aggregations, opening the door for the consideration of operational changes that will give balancing authorities more visibility into the types of loads and resources on distribution systems.

Continued and Likely Increased Focus on Cybersecurity

As grid operations have grown increasingly complex and reliant on technology, the threat of cyber attacks on utility industrial control systems—particularly from state-sponsored actors—has grown. The recent massive SolarWinds hack, the extent of which remains under investigation, highlights the risks.

We expect cybersecurity, and supply chain in particular, to be a major focus of the Biden-Harris Administration. Reflecting that focus, one of President Biden's earliest executive orders gave his administration ninety days to recommend modification or replacement of a Trump-era order that prohibited the acquisition of bulk-power system equipment with a nexus to a foreign adversary. In addition to executive action, we see the potential for new, bipartisan legislation addressing cybersecurity, with implications for the electricity sector.

FERC is likely to be active on the cyber front as well. Now-Chairman Glick has repeatedly highlighted the importance of cybersecurity, and in late 2020 noted that more work is needed on supply chain protection. For example, FERC will likely act on the information it received from its September 2020 notice of inquiry on the use of equipment produced by entities that have been identified as security risks. While Glick has questioned whether incentives are the right approach to enhancing cyber protections, FERC may move forward on some aspects of the new incentives rulemaking by proposing costly incentives for certain cybersecurity investments that go beyond North American Electric Reliability Corporation (NERC) standards. And even though mandatory standards are not well-suited to effectively addressing quickly evolving cyber threats, FERC may well direct changes to NERC's Critical Infrastructure Protection (CIP) standards, rather than rely on NERC's other tools.

Small utilities, including municipals and coops, are viewed by many as having fewer cybersecurity protections than larger ones. Despite their lower risk to the grid, many policymakers believe that cyberattacks on small utilities pose a grave threat to national security, and we should anticipate the possibility of legislative and regulatory proposals aimed at small utilities. Because cost recovery for non-public utilities poses unique challenges, obtaining federal assistance to enhance cybersecurity for such utilities should be a priority.

More Emphasis on Public Participation

In an omnibus appropriation bill passed in December 2020, Congress gave FERC until June 2021 to report how it will establish an Office of Public Participation. By statute, this Office is required to "coordinate assistance" to the public on matters within FERC's jurisdiction and to participants in proceedings before FERC. The Office may also provide compensation for reasonable attorney and expert fees to participants that prevail in FERC proceedings, if the participant faces significant financial hardship. Some public interest groups have called on FERC to structure and finance this new office to conduct outreach to small environmental justice groups and community organizations about FERC actions that could affect them, and to provide compensation for participating in FERC proceedings. Chairman Glick expressed excitement about this new office and said that it will allow for participation of consumers, landowners and others that cannot afford "expensive legal representation." While it is difficult to predict the impact of this new Office of Public Participation, we expect it will result in more participation from parties that have not historically been heard at FERC.

Continued Focus on Enforcement at the Commodity Futures Trading Commission, Renewed Focus at FERC

FERC Enforcement

During the Trump Administration, FERC's enforcement of tariff violations and manipulative market behaviors was reduced, both in terms of actions initiated and penalties imposed. In the fiscal year ending September 2020, the Commission opened only five investigations and levied $550,000 in penalties and disgorgements, compared to the last year of President Obama's Administration, which saw FERC open seventeen investigations and levy almost $18 million in penalties and disgorgements. The pandemic is only partially to blame for the low numbers: Trump's Commission garnered an average of $53.6 million in settlements over its four years, whereas the last four years of the Obama Administration saw FERC assessing an average of $94.5 million in penalties and disgorgements.

Chairman Glick, by contrast, intends to emphasize enforcement. The Chairman has been vocal about his displeasure with FERC's reduced enforcement profile, questioning at the November 2020 FERC open meeting whether the Commission remains committed to its enforcement responsibilities. FERC Enforcement Staff report directly to the Chairman, so we expect a recommitment of Commission resources to enforcement activity under the new Administration.

CFTC Enforcement

The Commodity Futures Trading Commission (CFTC) also has significant enforcement power over financial energy transactions such as futures, options and swaps. In contrast to FERC, the CFTC continued significant enforcement efforts under the Trump Administration and 2020 was a record-breaking year, with 113 investigations opened. The $1.3 billion in monetary relief garnered in 2020 was the fourth highest on record.

The CFTC currently has a three-to-two Republican majority, with Democratic Commissioner Rostin Behnam now serving as acting Chairman. However, one of the Republican commissioners has finished his term and is serving until his replacement is selected, so the timing on a replacement awaits the Biden-Harris Administration. Acting Chairman Behnam's acceptance statement emphasized the CFTC's role in strong oversight and regulation of derivatives markets and highlighted his own actions as commissioner "focus[ing] on ensuring our rules prioritize customer protections, examining potential systemic market risk, and gaining a better understanding of what regulators can do to address climate-related financial market risk."

Telecommunication Policy Shift Away from Preemption and to Broadband Service Affordability

President Biden has named Jessica Rosenworcel, currently one of two Democratic FCC commissioners, as the Acting FCC Chair. But the FCC will remain split (with two Democrats and two Republican Commissioners) until President Biden fills the fifth seat with a Democrat. Rosenworcel will be among the candidates for permanent FCC Chair. Here are some of the policy trends you can expect from a Biden Harris FCC:

Broadband Availability and Affordability:

Promotion of broadband service availability was a priority of the Trump FCC, and it will also be a top priority for the FCC under the Biden Harris Administration. But the Biden-Harris FCC's policies to promote broadband will likely be quite different than under the Trump Administration. The Trump FCC focused only on broadband deployment, not affordability, and viewed deregulation and preemption as the predominant tools to promote deployment. We expect the Biden-Harris FCC to focus far more on broadband affordability, along with spectrum sharing and an expanded E-rate program. The Biden-Harris FCC will also address broadband availability and affordability in low-income urban areas, not just rural areas. And it will rely far less on deregulation and preemption of state and local governments as a means of promoting broadband, and far more on mandatory and more reliable data collection from broadband providers.

Preemption of State and Local Government Authority

As part of its program to promote broadband infrastructure deployment, the Trump FCC took several actions to preempt broad swaths of state and local right-of-way and land use authority. It imposed new limits on utility pole attachment rates and practices. And it also sought to preempt all state and local regulatory authority over broadband services. The Biden-Harris FCC will bring an end to the Trump FCC's war on state and local government authority, but whether it will take the additional step of undoing the Trump FCC's preemption actions is less clear.

Open Internet and Internet Privacy Rules

The Trump FCC undid the Obama FCC's open internet and internet privacy rules. The Biden-Harris FCC may well reinstate those Obama FCC rules; it will certainly seriously consider that option. But you can also expect a substantial, and possibly bipartisan, effort to have Congress eliminate this FCC ping-pong game and enact a statutory resolution of open internet and internet privacy issues.

Online Content Issues

The heated debate over whether and, if so, to what degree online providers should be liable for third-party content carried on their platforms will continue, but the FCC will largely steer clear of that battle, leaving it to Congress or the courts to resolve.

Concluding Thoughts

In energy and communications, policy disputes and technology innovations mean the times are *always* changing. But with the new administration yawing hard from what it sees as an existential climate threat, change is accelerating. We look forward to working with our clients and friends to (in, again, Dylan's words) "keep your eyes wide" for chances that "won't come again."

PLEASE CONTACT ANY SPIEGEL & MCDIARMID ATTORNEY IF YOU HAVE QUESTIONS.

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