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Election 2020: What Would a Biden Win Mean for the U.S. Electric Power Sector?

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Part One

As the 2020 election nears, the Democratic campaign has begun to talk policy specifics regarding energy and climate change. Although the Trump administration undertook to dismantle many Obama-era policies and regulations, a Biden administration may be unlikely simply to return to the pre-Trump *status quo*. Vice President Biden has a reputation as a moderate, but he is an experienced politician who gravitates not to the political center, but towards the center of his own party.[1] Shifts in the Democratic coalition have moved that center leftward, while the public as a whole expresses increasing concern about the impacts of climate change.[2] Reflecting this shift in the political winds, Biden's "Build Back Better Plan" for rebuilding the economy post-pandemic proposes ambitious energy goals. Among those goals are carbon neutrality in the power sector by 2035, economy-wide carbon neutrality by 2050, and a national Energy Efficiency and Clean Electricity Standard (EECES).[3]

Yet, despite its ambitious goals, the vision in the Build Back Better Plan is neither novel nor particularly revolutionary in its content when it comes to the power sector. Rather, it is primarily built of proposals that have been kicked around Democratic policy circles for years, or have already been widely adopted at the state level.[4] Biden's proposals bear marks of pragmatism, rejecting ideas popular on the progressive left —such as a 100 percent renewable energy mandate—in favor of an "all-of-the-above"[5] technology-neutral approach that includes carbon sequestration and nuclear power. This approach is shaped by both practical and political reality: current technology cannot support a 100 percent renewable grid, and a 100 percent renewable mandate would alienate needed political allies.

Although Biden's Build Back Better Plan emphasizes actions that the executive branch could conceivably take on its own, a Biden win alone would not bring about all of the changes his campaign has proposed. As both the Trump and Obama administrations have demonstrated, the power of the executive branch to implement policy shifts unilaterally is significant, but not unbounded. Major programs require legislation, particularly when federal dollars are involved. Therefore, given the role of Congress the scope of potential

legislative change will depend upon the outcome of the upcoming Congressional elections, including control of the Senate.[6]

This article is the first of two that will explore the possible impact on the U.S. power sector in the event of a Democratic win in November. This article will discuss the changes that a Biden administration could make in the executive branch: in particular, what a Biden-era Federal Energy Regulatory Commission (FERC or the "Commission") might look like.[7] A second article will explore the role of Congress and the changes that could occur if Democrats picked up control of the legislative branch.

The Federal Energy Regulatory Commission

While FERC has limited environmental responsibilities, FERC would nevertheless play a major role in implementing Biden's environmental goals vis a vis the power sector. The Commission's authority extends over the interstate transmission and sale of electricity for resale,[8] including all but one of the organized wholesale electric markets that serve roughly two-thirds of the country's population.[9] Thus, FERC's involvement would be pivotal for an effort to achieve net-zero emissions in the power sector by 2035 or to implement a national EECES.

FERC has not traditionally been an overly ideological agency. On most matters, the Commission has taken a technocratic, bipartisan approach; however, Democratic- and Republican-controlled FERCs have differed on certain issues affecting the power sector. Because of its largely economic mandate and its narrow environmental responsibilities, FERC has also traditionally been largely technology-neutral.[10]

We expect that any changes in a Biden-era FERC would be evolutionary in nature, rather than revolutionary. Indeed, we also expect a degree of continuity with the approach of the current Commission on some matters. In addition to a likely lag in Democratic control over the Commission due to the time required to nominate and confirm commissioners,[11] the current FERC has not been a rubber stamp for the Republican energy agenda, despite how it has been characterized in some circles.[12] Certain initiatives would likely transition smoothly into a Biden-era FERC. For example, we expect that FERC's interest in accommodating state carbon pricing mechanisms in the wholesale power markets would carry over into a Biden administration. Likewise, it is unlikely that a Biden-era FERC would reverse the current FERC's order on the implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA),[13] and there would be little daylight between the two rosters of commissioners regarding supply chain risks and cybersecurity. A Biden-era FERC also would likely continue the efforts of the present Commission in encouraging the development and interconnection of energy storage and distributed energy resources (DERs).

However, on other issues a Biden-era FERC would likely be marked by change. In that regard, we believe that a Biden-era FERC would likely fold the idea of grid "resilience," i.e., the electric system's ability to withstand disruptive events, back into the larger category of reliability, thus ending the Trump administration's push to provide financial support for merchant baseload generation units (such as coal and

nuclear) that are viewed as "fuel-secure." A Biden-era FERC would also likely view skeptically market rule changes intended to increase market prices, including the recent changes to PJM Interconnection, L.L.C.'s (PJM) Minimum Offer Price Rule (MOPR).

With resilience no longer a separate objective, concern about reliability would return to its traditional focus on transmission. A Biden-era FERC would likely view transmission planning, expansion, and modernization as priorities, not only for reliability and resilience, but as an integral part of a carbon-neutral future given the critical role transmission plays in the integration of intermittent renewables.[14]

FERC's Office of Enforcement (Enforcement), which made headlines regularly during the Obama administration, has largely faded into the background during the Trump administration. We expect that Enforcement efforts would begin to pick up during a Biden administration, perhaps resulting in the sort of high-profile investigations of market manipulation schemes that seem to have fallen by the wayside.

Below, we discuss each of the areas mentioned above in more depth.

Carbon Pricing

Carbon pricing is an unexpected example of likely continuity between administrations; the concept is broadly popular across the various factions of the power sector as a way to address growing state and corporate preferences for clean energy.[15] On September 30, 2020, FERC will convene a technical conference to discuss legal and technical issues that may arise if a regional transmission organization or independent system operator (RTO/ISO) makes a filing under Section 205 of the Federal Power Act (FPA) to integrate a carbon price into its market.[16] As FERC Chairman Neil Chatterjee acknowledged, the "intersection of carbon pricing and the markets" is an "important and timely"[17] topic: New York Independent System Operator (NYISO) stakeholders have "thoroughly vetted"[18] a proposal to administer a carbon price in NYISO's energy market, and PJM has established "a task force with its states and stakeholders to discuss potential frameworks for incorporating a [regional or subregional] carbon price into" its markets.[19]

The technical conference is intended to explore accommodations for state carbon pricing schemes rather than a FERC-imposed carbon price across the RTO/ISO markets. However, the conference may provide a foundation for a Biden-era integration of carbon prices into the wholesale markets. Does this mean that carbon pricing would have its Cinderella moment under a Biden-era FERC? The first step will be for New York or PJM member states to demonstrate a willingness towards setting a carbon price for integrating into the NYISO/PJM markets.[20] A Biden-era FERC may be inclined to approve an RTO/ISO tariff proposal to incorporate this type of state-determined carbon price brought to it as a FPA Section 205 filing.[21] But the impact of such an approval would be limited to the proposal brought by the specific RTO/ISO, such as NYISO or PJM—it would not have a wider impact.

Some may optimistically expect that a Biden-era FERC would use its FPA Section 206 authority to compel the RTOs/ISOs to implement a carbon price; however, such an approach would be unlikely as it would require FERC to push the boundaries of its jurisdiction. A court may well find that FERC lacks the jurisdiction to impose a fundamentally environmental rule on its markets under FPA Section 206, even based on the economic argument that such a rule is pricing externalities rather than imposing an environmental penalty.[22] It is worth noting, however, that legislation could help force the issue. For example, House Democrats recommend in their Climate Action Plan that "Congress should amend the Federal Power Act to direct FERC to find rates unjust, unreasonable, unduly discriminatory, or preferential if they do not incorporate the cost of externalized greenhouse gas emissions."[23] Such legislation could find a willing partner in a Biden-era FERC, and will be discussed further in our next article.

PURPA

Another area where there may be less difference between the current FERC and a Biden-era FERC than many imagine is the implementation of PURPA. Earlier this summer, under pressure from Congress,[24] FERC overhauled its regulations implementing PURPA, a Carter-era law that facilitates the development of renewable energy resources by requiring certain utilities to purchase renewable projects'[25] output at the utilities' avoided costs.[26] In a "win" for incumbent utilities, the PURPA order[27] is viewed by many—including us—as reducing opportunities for renewable resources, particularly in areas of the country that are outside organized wholesale markets such as in the southeast and parts of the west. Among other things, the Commission's PURPA order gives states greater leeway to determine avoided cost based on market prices and removes the requirement that qualifying facilities (QFs) under PURPA be given the option of demanding a fixed price for energy for the duration of their power purchase agreement.[28] Another change was to lower the threshold at which small qualifying QFs located in a RTO/ISO footprint are presumed to have access to a competitive market. Previously, QFs up to 20 MW could require that the interconnecting utility buy their output at avoided cost, even when they had access to an RTO/ISO market—now only QFs under 5 MW can require purchases at avoided cost. Commissioner Glick, a Democrat, characterized the Commission's controversial reforms as "administratively gut[ting]" PURPA and questioned the legal viability of a regulatory regime that "does so little to encourage" the development of renewables, as the law was intended to do.[29] Meanwhile, proponents of the rule change cited the need for FERC's PURPA regulations to reflect the changes in the electricity market in the four decades since PURPA became law.[30]

A Biden-era FERC would likely have the opportunity to modify the PURPA order, either on rehearing or by requesting an appellate court remand the proceeding to the Commission. But despite Commissioner Glick's scathing dissent, we believe that a full reversal is unlikely. FERC, whether Democratic- or Republican-controlled, has generally supported market-based pricing mechanisms, and giving states the option to offer only market-rate contracts for energy output, rather than requiring that they offer a fixed price alternative, could be seen as a natural progression for the largely pro-market Commission, especially

as renewable energy becomes less expensive and the renewable industry self-sustaining. It is possible, however, that the Commission could pursue limited changes to its PURPA order. For example, the threshold for the presumption of access to a competitive market might return to 20 MW, giving a boost to small renewable projects that might otherwise struggle even in the competitive markets.

Supply Chain Security

Supply chain security has become a major topic in the power sector after the Trump administration released an Executive Order in May on "Securing the United States Bulk Power System."[31] The Executive Order reflects concerns that a foreign adversary, such as China or Russia, would use its influence over companies under its jurisdiction to implant harmful software or hardware into equipment destined for the U.S. electric grid.[32]

Although the Department of Energy (DOE), and not FERC, has responsibility for implementing the Executive Order, the DOE stated in its recent Request for Information[33] that it would build on existing standards, including North American Electric Reliability Corporation (NERC) Critical Infrastructure Protection (CIP) standards. In fact, NERC has proposed and FERC has approved a set of CIP reliability standards addressing similar concerns. Due to become enforceable on October 1, 2020, CIP-013-1 sets standards for balancing authorities, transmission and distribution providers, generators, and reliability coordinators to establish processes ensuring that the relevant supply chains do not pose a risk to the grid.[34] Essentially, the Executive Order and the CIP standards address the same problem from different directions. The Executive Order imposes a top-down structure where the DOE determines what pieces of equipment from which "foreign adversaries" pose a risk and places restrictions on them, while the CIP standards are bottom-up, requiring that responsible entities develop processes for identifying and mitigating these risks regardless of their origin.

We expect that the DOE's implementation of the Executive Order will continue through any change in administrations, as it is a product of bipartisan concerns regarding bad actors, rather than (as some have alleged) a feature of President Trump's foreign policy.[35] It appears that the DOE did not make the September 28 deadline for issuing proposed rules implementing the Executive Order.

Although not named in the Executive Order, the DOE has said that FERC and NERC will be part of the Executive Order implementation process, and, as noted above, that it would build on existing standards. Nevertheless, we expect that some tweaks may need to be made to CIP-013-1 and perhaps other reliability standards to harmonize them with the DOE's rules implementing the Executive Order and to address evolving concerns regarding supply chain risk. In fact, FERC has already issued a Notice of Inquiry regarding the Executive Order, showing that it expects that there will be ongoing proceedings at the Commission to address these issues.[36] However, we do not expect that any of the DOE, FERC, or NERC would radically change their approach to this issue in response to a change in administrations.

MOPR, Resilience, and Price Suppression in the Wholesale Power Markets

In 2018, FERC made headlines when it unanimously rejected a Notice of Proposed Rulemaking (NOPR) from the DOE that would have propped up baseload power plants, providing a financial lifeline to struggling coal and nuclear merchant generation facilities.[37] While the Commission unanimously rejected the DOE NOPR, it appeared open to the underlying premise: that grid resilience is threatened by the rapid deactivation of baseload power plants that struggle to compete against subsidized, intermittent renewables and cheap natural gas-fired generation resources. FERC asked each RTO/ISO to submit a report examining the grid's resilience and committed to "promptly decide" whether further action was necessary.[38]

More than two years later, FERC has not acted in that docket, but it may be that the issue simply assumed a new identity. In June 2018, FERC issued a major order—on a 3-2, party-line vote—addressing the MOPR in the PJM capacity market. This controversial order found the existing PJM market rules unlawful because they failed to address price suppression in the wholesale capacity market[39] caused by state subsidies, primarily subsidies for renewables and other zero-carbon generation.[40] After a paper hearing, FERC declared that capacity market offers from state-subsidized generation must be mitigated to account for the out-of-market subsidies, a decision that could jeopardize these resources' ability to clear in the market and acquire a capacity obligation.

PJM is the largest RTO/ISO in the country and the organized market with the most merchant coal and nuclear plants. Nowhere, in other words, is the issue of financially struggling baseload power generation more pressing than PJM. While FERC's MOPR orders make no mention of the prior resilience debate, the MOPR reforms may achieve some of the same ends: increasing capacity revenues and market share for (unsubsidized) merchant baseload generation, mostly at the expense of clean power generation subsidized at the state level.[41] More recently, FERC rejected NYISO's proposal to modify its buyer-side mitigation rules (NYISO's equivalent of the MOPR) to account for New York's programs favoring cleaner generation on the grounds that it is unduly discriminatory for providing preferential treatment to resources favored by state public policy regardless of cost.[42] Meanwhile, in a separate proceeding, FERC recently approved reforms proposed by PJM that should have the effect of increasing energy and reserve market revenues for generators.[43]

The PJM MOPR orders (and likely a rehearing of the NYISO order) will be tied up in the federal courts well into 2021, and a Biden-era FERC could change its posture on appeal or request a voluntary remand to reconsider its position. A more robust federal policy response to climate change concerns could also reduce the importance of the MOPR, which targets state—but not federal—subsidies for electric generation. For example, if the Congress establishes an ambitious EECES, the federal program could supplement or encompass many state programs that seek to achieve the same policy goals, possibly allowing states to avoid or mitigate the MOPR problem altogether. Other, more modest administrative

maneuvers are possible, too. A Biden-era FERC could water down the MOPR, add additional exemptions, or take other actions under its statutory authority to weaken the impact of the MOPR without repealing it entirely.

Transmission

As a general matter, Republicans and Democrats in Congress have supported efforts to modernize the grid and promote investment in transmission, and both Biden's Build Back Better Plan and climate action plans from Congressional Democrats further propose new investment in and expansion of transmission.[44] Expanded transmission will aid utility scale renewable generation, which tends to be located far from load. Biden's Build Back Better Plan includes proposals that may not need Congressional cooperation to move forward, such as prioritizing the repowering of existing transmission lines with new technology and the leveraging of existing rights-of-way to make permitting easier. FERC could further these goals by using its well-worn tool of incentive adders and through transmission planning programs, particularly in the organized markets.[45] Already under consideration is the use of transmission adders to encourage investment in cybersecurity measures by transmission owners.[46]

A Biden administration may also push to make the most of existing statutory authority, for example, by making use of National Interest Electric Transmission Corridors (NIETCs). NIETCs, which were authorized in the Energy Policy Act of 2005,[47] are areas designated by the DOE as suffering from a lack of transmission capacity that adversely impacts customers. If state and local governments fail to act on requested permits to construct transmission in a NIETC, FERC has the authority to approve the transmission project in their stead.[48] FERC's authority with regard to NIETCs falls far short of the federal eminent domain power it has under the Natural Gas Act, as its authority is based on the failure of state and local authorities to act—it cannot override them if they outright deny a transmission project. So far as we are aware, no transmission construction has resulted from FERC's permitting authority with respect to NIETCs. But with greater coordination between DOE and FERC, perhaps through an expanded transmission planning process, it is possible that NIETCs might still result in transmission development.[49]

Interregional transmission planning may also return as a hot topic, nearly a decade after FERC's Order No. 1000[50] promised a new era of planning coordination, which has to date failed to manifest. Both the Moving Forward Act (H.R. 2) and the Clean Economy Jobs and Innovation Act (H.R. 4447) passed by the House in June and September, respectively, contain provisions requiring FERC to revisit the issue of interregional transmission planning by issuing a report and then initiating a rulemaking. However, FERC might also decide to revisit the issue on its own, given the limited success of Order No. 1000 and its progeny in producing functional interregional planning.[51] Current FERC Chairman Neil Chatterjee has floated the idea of revisiting Order No. 1000,[52] but has also described a new proceeding as "biting off more than [FERC] could chew," suggesting that a new transmission planning order is not eminent.[53] A Biden-era FERC would have stronger incentives to do so, as improving interregional transmission planning

mechanisms would be critical to the development of a super grid tying the Eastern and Western Interconnections together and bringing renewable power to urban areas. As with carbon pricing, however, interregional transmission planning would benefit from a legislative mandate clarifying and expanding FERC's authority.

There is also another distinct spot of continuity between the current FERC and a Biden-era FERC in the transmission space. The current FERC has moved forward on the integration of DERs and energy storage into the grid by requiring that each RTO/ISO revise their rules to allow these resources to sell energy, capacity and ancillary services on a more even footing with more conventional resources. DERs reduce the need for transmission by decentralizing generation and moving it closer to load. For its part, energy storage, which can serve roles of transmission,[54] generation, and responsive load, has long been viewed as a critical component of a greener grid, as it can compensate for intermittent renewables. FERC's energy storage order was upheld in July,[55] and has been described by Chairman Chatterjee as the "crown jewel" of his term at the Commission.[56] Both Biden and Congressional Democrats have included storage among the technologies they wish to invest in, with Biden promising a "moonshot" effort to develop grid-scale storage at one-tenth the current price of lithium-ion batteries.[57]

Enforcement

FERC Enforcement, after a dramatic run during the Obama administration, has largely faded into the background during the Trump administration. Last year, five senators wrote a letter to FERC expressing their concern regarding the "apparent erosion" of FERC's role in preventing market manipulation.[58] The senators pointed to a decline in Enforcement activity and various reorganizations and policy changes at FERC as evidence that FERC might not be fully "committed and eager" to address market manipulation and fraud.

FERC did continue with a significant number of civil penalty actions, including for market manipulation, during the Trump administration.[59] Still, fewer investigations have resulted in an order to show cause, and the Commission has pursued fewer high-profile manipulation cases that characterized the Obama-era FERC. Some of these Obama-era cases drew criticism from the business community, as FERC's understanding of market manipulation differs in a subtle but significant way from that of the Securities and Exchange Commission (SEC).[60] One possible reason for the apparent decline in Enforcement activity may be a significant increase in both compliance programs and self-reporting.[61]

To the extent the decline in FERC Enforcement actions arises from policy choices, and not from greater clarity as to what is forbidden in the FERC-regulated markets and improved compliance programs,[62] we expect that Enforcement cases will increase under a Biden-era FERC.

Conclusion

FERC under a Biden administration is likely to be marked by areas of continuity as well as gradual change. From both a timing perspective and that of substance, this change is not likely to be revolutionary but rather evolutionary.[63] Indeed, the foundations have already been laid, in some cases by the present Republican-controlled Commission, for a Democratic-controlled FERC to take steps to expand the transmission system and remove barriers to renewables, energy storage, and DERs. Ultimately, the industry is changing due to forces outside of FERC's control, including ever-improving technology, lower prices for renewables, and state mandates. The outcome of the Presidential election will further determine the extent to which FERC will leverage its authority to take additional steps to shape the power sector. However, as we will discuss in our next article, Congress might play a role in addressing these issues, including whether to give FERC additional authority to act in this space.

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[1] *See* Perry Bacon Jr., *The Pandemic Has Pushed Biden To The Left. How Far Will He Go?*, FiveThirtyEight (May 21, 2020, 6:00 AM), https://fivethirtyeight.com/features/the-pandemic-has-pushed-biden-to-the-left-how-far-will-he-go/; Jim Geraghty, *Joe Biden Drifts to Wherever the Center of the Democratic Party Is*, Nat'l Review (Sept. 10, 2019, 2:57 PM), https://www.nationalreview.com/corner/joe-biden-drifts-to-wherever-the-center-of-the-democratic-party-is/.

[2] Cary Funk & Brian Kennedy, *How Americans see climate change and the environment in 7 charts*, Pew Research Ctr. (Apr. 21, 2020), https://www.pewresearch.org/fact-tank/2020/04/21/how-americans-see-climate-change-and-the-environment-in-7-charts/; Danielle Deiseroth, et al., *Joe Biden Moves Left on Climate, Votes Love to See It*, Data for Progress (July 14, 2020), https://www.dataforprogress.org/blog/2020/7/14/biden-moves-left-on-climate.

[3] *The Biden Plan to Build a Modern, Sustainable Infrastructure and an Equitable Clean Energy Future*, https://joebiden.com/clean-energy/ (last accessed Sept. 21, 2020) ("Build Back Better Plan").

[4] The EECES envisioned in the Build Back Better Plan, for example, "will scale up best practices from state-level clean energy standards." Build Back Better Plan at 10. As of August 2019, twenty-nine states and the District of Columbia have adopted mandatory "renewable portfolio standards," with twelve of those twenty-nine states having "either expanded their portfolio standard or adopted complementary clean energy policies that when considered in aggregate could constitute" a more technology-neutral clean energy standard. Similarly, twenty-three states and the District of Columbia have adopted mandatory energy efficiency standards. *See* Center for Climate and Energy Solutions, Clean Energy Standards: State and Federal Policy Options and Considerations 23 (2019), https://www.c2es.org/site/assets/uploads/2019/11/clean-energy-standards-state-and-federal-policy-options-and-considerations.pdf.

[5] To be clear, Biden himself has not referred to his plan as taking an "all-of-the-above" approach, but others close to the campaign have, including a union representative sitting on the campaign's Climate

Engagement Advisory Council. *See* Adam Aton, *Climate heresy in Wis. as Democrats call for 'clean coal'*, Climate Wire (Sept. 10, 2020), https://www.eenews.net/stories/1063713317; Josh Siegel, *Major union backs Biden for 'all of the above' energy approach*, WA Examiner (Feb. 5, 2020, 11:33 AM), https://www.washingtonexaminer.com/policy/energy/major-union-backs-biden-for-all-of-the-above-energy-approach.

[6] The continued existence or abolishment of the filibuster will also affect the degree of legislative change post-election.

[7] Hereinafter we refer to a Democratic-controlled Federal Energy Regulatory Commission under a Biden administration as the "Biden-era FERC."

[8] FERC is responsible for considering environmental issues only in certificating natural gas pipelines and licensing hydroelectric dams. Environmental considerations are not part of its jurisdiction over the interstate transmission and sale of electric power.

[9] The Electric Reliability Council of Texas, the operator of the electric grid covering most of Texas, is not under FERC's jurisdiction.

[10] Arguably, FERC has favored certain technologies in a backdoor way. For example, the Commission's Order No. 888, the landmark 1996 order that created the modern open-access transmission grid, can be interpreted as intentionally giving a boost to gas-fired generation over the then-predominant coal and nuclear baseload plants. Similarly, some have suggested that the current FERC disfavors renewable generation in comparison to baseload resources, although the pattern of its decisions is more nuanced than popularly recognized. *See, e.g.*, Tom Rutigliano, *FERC's Power Grab*, Nat. Resources Defense Council (April 21, 2020), https://www.nrdc.org/experts/tom-rutigliano/fercs-power-grab; David Roberts, *The Trump administration just snuck through its most devious coal subsidy yet*, Vox (Dec. 19, 2019, 9:40 AM), https://www.vox.com/energy-and-environment/2019/12/23/21031112/trump-coal-ferc-energy-subsidy-mopr.

[11] President Trump announced on July 27, 2020, that he would nominate two new members to FERC, one from each party. Assuming the nominees are confirmed by the Senate, FERC would enter a new administration with a full complement of five commissioners and a 3-2 Republican majority. Since Chairman Neil Chatterjee has stated that he intends to stay through the end of his term in June 2021, it is unlikely that the Commission would be majority Democratic until the third quarter of 2021. A President Biden, however, would be able to nominate one of the sitting Democratic commissioners to replace Chatterjee as chairperson after his inauguration, which would in turn require Senate confirmation.

[12] *See supra* note 10.

[13] *Qualifying Facility Rates & Requirements; Implementation Issues Under the Pub. Util. Regulatory Policies Act of 1978*, Order No. 872, 172 FERC ¶ 61,041 (2020) ("Order No. 872"). See our analysis of the final rule here.

[14] As we will discuss in further detail in our next article, reports by the House and Senate Democrats both envision a "super grid" of direct current lines allowing the movement of renewable power over long distances, and stitching up the "seams" between the Eastern and Western Interconnections. *See* House Select Comm. on the Climate Crisis, Majority Staff Report, Solving the Climate Crisis: The Congressional Action Plan a Clean Energy Economy and a Healthy, Resilient, and Just America 51 (2020) ("House Climate Action Plan"), https://climatecrisis.house.gov/sites/climatecrisis.house.gov/files/Climate%20Crisis%20Action%20Plan.pdf; Senate Democrats' Special Comm. on the Climate Crisis, The Case for Climate Action: Building a Clean Economy for the American People 22-24 (2020), https://www.schatz.senate.gov/download/sccc-climate-crisis-report.

[15] *See, e.g.*, New England Power Generators Association, Inc., Comments, Docket No. AD20-14-000 (filed May 5, 2020); First Solar, Inc., Comments, Docket No. AD20-14-000, at 2-3 (filed May 13, 2020); ISO New England Inc., Comments in Support of Request for Technical Conference on Carbon Pricing in Wholesale Electricity Markets, Docket No. AD20-14-000, at 2 (filed May 19, 2020); Shell Energy North America (US), L.P., Comments in Support of Request for Technical Conference or Workshop, Docket No. AD20-14-000, at 3-4 (filed May 20, 2020); Public Generating Pool, Comments, Docket No. AD20-14-000, at 2-3 (filed May 20, 2020); Potomac Economics, Motion to Intervene and Comments, Docket No. AD20-14-000, at 2 (filed May 21, 2020); Exelon Corp., Comments on Request for Technical Conference, Docket No. AD20-14-000 (filed May 21, 2020).

[16] Supplemental Notice of Technical Conference, Docket No. AD20-14-000 (Sept. 16, 2020). We will summarize key takeaways from the technical conference in a forthcoming article.

[17] Eric Wesoff, *3 key takeaways from FERC Chairman Neil Chatterjee's keynote at REFF*, PV Mag (Sept. 14, 2020), https://pv-magazine-usa.com/2020/09/14/3-key-takeaways-from-ferc-chairman-neil-chatterjees-keynote-at-reff/

[18] *See* NYISO, Comments on the Whitepaper to Address the CLCPA Requirements for a Renewable Energy Program, NYPSC Case No. 15-E-0302, at 2-3 (Aug. 31, 2020). In June 2019, NYISO finalized a proposed market design for implementing its carbon pricing proposal, which would reflect a state-determined "social cost of carbon" in wholesale energy market offers via "carbon charges" on emitting generators. Since then, NYISO has embarked on an advocacy campaign to secure the support of the New York State government, stressing that it will "move forward with a stakeholder vote . . . only with agreement on the proposal from New York State." NYISO 2020 Master Plan 19 (Sept. 2020),

https://www.nyiso.com/documents/20142/15116287/04%202020_Master_Plan_Sept_Draft_clean.pdf/7e065759-7513-561d-9602-e0b11e6090de.

[19] PJM, *Responses to House Energy & Commerce Comm. Inquiry on GHG Regulation*, at 8 (Oct. 11, 2019) ("PJM House Responses"), https://pjm.com/-/media/library/reports-notices/testimony/20191011-pjm-response-to-house-ec-climate-inquiry-on-greenhouse-gas-regulation.ashx?la=en. PJM's Carbon Pricing Senior Task Force (CPSTF) is educating its members on potential "process and rule changes necessary to integrate a regional or sub-regional carbon pricing mechanisms into its wholesale electricity markets," recognizing that carbon pricing within its members states may become more widespread. To inform the CPSTF, PJM has studied "the potential impact of carbon prices in a specific sub-region of the RTO," finding that carbon pricing "could be accommodated by PJM's competitive markets, with border adjustment constraints possibly mitigating the resulting impacts on generation, emissions and price." *See* PJM, *Carbon Pricing Senior Task Force Monthly Progress Report* (Jan. 21, 2020), https://www.pjm.com/-/media/committees-groups/committees/mc/2020/20200121-webinar/20200121-item-08f-cpstf-report.ashx; *Initial PJM Carbon Pricing Study Results Presented*, PJM Inside Lines (Jan. 21, 2020), https://insidelines.pjm.com/initial-pjm-carbon-pricing-study-results-presented/.

[20] To clarify, both PJM and NYISO have stressed that they do not intend to "establish a carbon price" on their own accord; both contemplate situations in which a state-determined carbon price is then integrated somehow into the market design. PJM's CPSTF is exploring potential market design changes resembling those currently in place in CAISO, whereby a "bid adder," or carbon price, would be applied to electricity imports from PJM states without carbon prices into a "subregion" of PJM states with an existing carbon price—i.e., the Regional Greenhouse Gas Initiative-participating PJM states. *See Cal. Indep. Sys. Operator Corp.*, 165 FERC ¶ 61,050 (2018). NYISO, on the other hand, proposes to directly administer—and collect and allocate revenues from—a "carbon charge" in its market based on a carbon price set by New York State (i.e., the "Social Cost of Carbon," or SCC). While NYISO has explained that the New York Public Service Commission (NYPSC) would set this SCC "pursuant to the appropriate regulatory process," the NYPSC has expressed no interest in doing so, and the State has been silent on NYISO's proposal.

[21] There are two major provisions in the FPA governing utility tariffs. FPA Section 205 requires that utilities file their proposed tariffs with FERC and that FERC approve those tariffs if they are found to be just and reasonable and not unduly discriminatory. FPA Section 206 requires FERC to direct that a tariff be changed if the Commission finds it to be unjust and unreasonable or to be unduly discriminatory.

[22] By contrast, FERC approval of a proposal by an RTO/ISO under Section 205 involves a lower legal burden and FERC takes a much more passive role in evaluating FPA Section 205 submissions than in addressing allegedly unjust and unreasonable rates under FPA Section 206. In fact, the default under FPA Section 205 is approval; although this very rarely happens, by statute, if FERC fails to act under Section 205, the proposed tariff change goes into effect by operation of law after 60 days.

[23] House Climate Action Plan at 60.

[24] Many of the reforms contained in FERC's PURPA order align with changes contained in the UPDATE PURPA Act (S. 1760) sponsored by Sen. John Barrasso (R-WY), and the PURPA Modernization Act (H.R. 1502) sponsored by Rep. Tim Walberg (R-MI). *See* Press Release, Sen. John Barrasso, Senators Applaud FERC's Final Rule to Modernize PURPA, Protect Electricity Customers (July 16, 2020), https://www.barrasso.senate.gov/public/index.cfm/news-releases?ID=C6FC3971-E6B9-431A-BA46-A6C41659C6CE; *see also* Letter from Sen. John Barraso, et al. to Neil Chatterjee, FERC Chairman (June 20, 2019) (urging FERC to examine and "modernize" its PURPA regulations), https://elibrary.ferc.gov/eLibrary/docinfo?document_id=14808648.

[25] PURPA also applies to qualifying cogeneration (i.e., combined heat and power facilities). However, although such facilities will be impacted by the PURPA order, they are not the focus of the controversy.

[26] "Avoided cost" is essentially what it would cost the utility to either produce the power itself or buy it elsewhere. States calculate the "avoided cost" rates for its utilities using many different, and sometimes highly complex, methodologies.

[27] *See* Order No. 872, *supra* note 13.

[28] Qualifying facilities are still, however, entitled to a fixed price for **capacity**, even if their energy price is set to the market rate.

[29] Order No. 872 (Glick, Comm'r, dissenting in part at PP 1, 29).

[30] *See, e.g.*, Press Release, Sen. John Barrasso, Senators Applaud FERC's Final Rule to Modernize PURPA, Protect Electricity Customers (July 16, 2020), https://www.barrasso.senate.gov/public/index.cfm/news-releases?ID=C6FC3971-E6B9-431A-BA46-A6C41659C6CE.

[31] E.O. 13920, Securing the United States Bulk-Power System, 85 Fed. Reg. 26,595 (May 4, 2020).

[32] Read our discussions on the Executive Order and related issues here, here and here.

[33] Securing the United States Bulk-Power System, 85 Fed. Reg. 41,023 (July 8, 2020).

[34] *Supply Chain Risk Management Reliability Standards*, Order No. 850, 165 FERC ¶ 61,020 (2018).

[35] *See* our summary of a recent Senate Energy and Natural Resources Committee hearing examining issues related to readiness of the bulk-power system for a cyberattack.

[36] *Equip. & Servs. Produced or Provided by Certain Entities Identified as Risks to Nat'l Sec.*, 172 FERC ¶ 61,224 (2020).

[37] *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012 (2018).

[38] *Id.* PP 1, 28.

[39] *See PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,236 (2018). PJM's capacity market uses a three-year forward auction mechanism that produces a single price for capacity. According to FERC, state subsidies result in suppressed capacity prices, because companies that receive such subsidies can afford to submit lower bids in the auction or enter the auction as "price takers," i.e., submit an offer priced at zero. A lower offer price increases the chance that a given generator will "clear" the auction and puts downward pressure on the price paid to all generators for capacity.

[40] The MOPR does not affect federal subsidies, such as tax credits for renewable generation. It does, however, include not only outright state subsidies, but programs such as renewable portfolio standards.

[41] To what extent these various reforms give struggling coal units a meaningful lifeline remains to be seen, however, as coal generation has struggled as much from competition from (unsubsidized) generators running on cheap natural gas as from competition from renewables.

[42] *See N.Y. Indep. Sys. Operator, Inc.*, 172 FERC ¶ 61,206 (2020).

[43] *See PJM Interconnection, L.L.C.*, 171 FERC ¶ 61,153 (2020).

[44] *See supra* note 14; Build Back Better Plan at 10. As previously noted, we will discuss the Congressional Democrats' transmission proposals in our next article.

[45] In the past, FERC has used transmission adders and incentive rates to encourage membership in RTOs/ISOs, the deployment of advanced transmission technology, and the construction of transmission projects that improve reliability or reduce congestion. *See, e.g.*, *Promoting Transmission Investment through Pricing Reform*, Order No. 679, 116 FERC ¶ 61,057, *order on reh'g*, Order No. 679-A, 117 FERC ¶ 61,345 (2006), *order on reh'g*, 119 FERC ¶ 61,062 (2007).

[46] FERC Staff, Notice of Cybersecurity Incentives Policy White Paper, Docket No. AD20-19-000 (June 2020), https://www.ferc.gov/sites/default/files/2020-06/notice-cybersecurity.pdf.

[47] 16 U.S.C. § 824p.

[48] *Id.* § 824p(b).

[49] Given a friendly Congress, a Biden administration might also seek to have the FPA amended to afford FERC the same authority to site electric transmission lines as natural gas transmission lines.

[50] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012).

[51] *See* Herman K. Trabish, *With new transmission urgently needed, FERC Chair hints at a new Order 1000 proceeding*, Utility Dive (May 31, 2019), https://www.utilitydive.com/news/with-new-transmission-urgently-needed-ferc-chair-hints-at-a-new-order-1000/555586/; Abby Smith & Josh Siegel, *Daily on Energy, presented by API: No easy fix for upgrading power lines to deliver wind and solar power, energy regulator says*, Washington Examiner (July 30, 2020, 11:58 AM), https://www.washingtonexaminer.com/policy/energy/daily-on-energy-presented-by-api-no-easy-fix-for-upgrading-power-lines-to-deliver-wind-and-solar-power-energy-regulator-says; Bill Yingling, *Experts tell lawmakers: FERC transmission order is failing*, Daily Energy Insider (May 10, 2018), https://dailyenergyinsider.com/infrastructure/12381-experts-tell-lawmakers-ferc-transmission-order-failing/.

[52] *See* Herman K. Trabish, *With new transmission urgently needed, FERC Chair hints at a new Order 1000 proceeding*, Utility Dive (May 31, 2019), https://www.utilitydive.com/news/with-new-transmission-urgently-needed-ferc-chair-hints-at-a-new-order-1000/555586/.

[53] *See* Rich Heidorn Jr., *WIRES Conference Talks Order 1000, Tx Incentives*, RTO Insider (July 31, 2020), https://rtoinsider.com/wires-talks-order-1000-transmission-incentives-169622/.

[54] Because energy storage can be installed as an alternative to transmission upgrades, and can modify transmission line flows, it is sometimes treated for regulatory purposes as transmission.

[55] *Nat'l Ass'n of Regulatory Comm'rs v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

[56] Arianna Skibell, *Chatterjee promises to remove barriers to renewable energy*, Energy Wire (Sept. 11, 2020), https://www.eenews.net/energywire/stories/1063713443.

[57] Emma Foehringer Merchant, *Biden Pledges $2T in Clean Energy and Infrastructure Spending*, Greentech Media (July 14, 2020), https://www.greentechmedia.com/articles/read/biden-bumps-planned-clean-energy-spending-to-2-trillion-in-new-proposal.

[58] Letter from Sen. Maria Cantwell, et al. to Neil Chatterjee, FERC Chairman, et al. (Sept. 19, 2019), https://elibrary.ferc.gov/eLibrary/idmws/common/OpenNat.asp?fileID=15361292.

[59] *See* FERC Office of Enforcement, 2019 Report on Enforcement 86 (2019), https://cms.ferc.gov/sites/default/files/2020-05/11-21-19-enforcement.pdf; FERC Office of Enforcement, 2018 Report on Enforcement 68-69 (2018), https://cms.ferc.gov/sites/default/files/2020-04/11-15-18-enforcement.pdf; FERC Office of Enforcement, 2017 Report on Enforcement 60-61 (2017), https://cms.ferc.gov/sites/default/files/2020-04/11-16-17-enforcement.pdf.

[60] Whereas the SEC is inclined to set out very explicit rules defining the boundaries of acceptable conduct, FERC tends to assume that market participants will act within the spirit of the market rules. This culture clash underlays a number of high profile FERC Enforcement actions. *See, e.g.*, *FERC v. Powhatan Energy Fund, LLC*, 949 F.3d 891 (4th Cir. 2020).

[61] Kate Winston, *FERC enforcement increasingly focused on manipulation, staff tells agency*, SNL Generation Markets Week (Nov. 20, 2018), 2018 WLNR 36131794.

[62] Esther Whieldon, *FERC enforcement actions prompt stronger compliance programs, experts say* SNL Power Policy Week (May 9, 2018), 2018 WLNR 14351890.

[63] On the natural gas side, a more radical shift is possible. The question of whether greenhouse gas emissions should be taken into account in FERC's certification of interstate pipelines, and if so how, remains a very contentious and highly litigated question. How a Biden-era FERC might chose to tackle this problem is likely to be heavily dependent on the individual commissioners' interpretation of FERC's mandate as well as appellate court decisions such as *Sierra Club v. FERC*, 867 F.3d 1357, 1376 (D.C. Cir. 2017), where the court concluded that "FERC must either quantify and consider the [pipeline] project's downstream carbon emissions or explain in more detail why it cannot do so."

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Energy Regulation, Markets & Enforcement | Transmission | Smart Grid/Energy Storage | Lobbying & Public Policy | Power | Renewable Energy | North America | Hydroelectric