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Biggest Energy Regulatory Moves Of 2018: Midyear Report

By **Keith Goldberg**

Law360 (June 22, 2018, 6:57 PM EDT) -- It's been a half-year of regulatory upheaval for the U.S. energy industry, from the Federal Energy Regulatory Commission crafting major electricity and pipeline policy changes to the Environmental Protection Agency ramping up its rollback of Obama-era energy and environmental rules.

Here's a list of significant energy-related regulatory moves from the first half of 2018:

Trump Pushes to Bail Out Coal, Nuclear Plants

Technically, it hasn't happened yet, but it's still the talk of the electricity industry: the Trump administration's calls to prop up struggling coal and nuclear power plants.

President Donald Trump recently ordered Energy Secretary Rick Perry to "take immediate steps" to prevent closures of coal and nuclear plants. The move followed news reports of U.S. Department of Energy plans to use its emergency and national security authority to force regional grid operators to buy electricity from a list of coal and nuclear plants the department deems crucial to national security.

The plans have sparked fierce opposition from just about every stakeholder outside of staunch coal and nuclear advocates, with some saying it amounts to a nationalization of the U.S. grid.

"If the Trump administration does something, you'll see a number of organizations filing in federal courts to try and get that stopped," K&L Gates LLPenergy regulatory partner Will Keyser said. "It could be extremely disruptive to the markets."

Devising a way to pay certain coal and nuclear plants without distorting regional wholesale electricity markets will be a difficult balancing act for the DOE, Haynes and Boone LLP partner Phil Lookadoo said.

"You could minimize the impact, or you could have a painful impact," Lookadoo said.

The DOE's actions would also put it on a collision course with FERC, which is trying to craft its own definition of "grid resiliency" and how power generators could be compensated for providing it. That process kicked off after FERC rejected Perry's notice of proposed rulemaking urging the agency to craft market rules that would compensate coal and nuclear plants for contributing to grid resiliency.

FERC commissioners, including Chairman Kevin McIntyre, have said preserving the integrity of wholesale electricity markets is a priority, though McIntyre recently told Law360 he's confident FERC will be able to deal with any DOE policy if it has to.

"We'll see whether FERC's actions can be harmonized with DOE's proposals," Snell & Wilmer LLP energy associate Liz Brereton said. "Secretary Perry's proposal was more interventionist."

FERC Mulls Gas Pipeline Approval Policy Changes

FERC in April formally kicked off a review of its nearly 20-year-old natural gas pipeline approval policy. In a notice of inquiry seeking public feedback on potential changes to the 1999 policy statement, FERC hit on several potential issues, including its reliance on developers reaching gas shipping contracts to help determine a project's need and how large a role the agency will give climate change in its evaluation of a project's need.

"It's really a very soup-to-nuts review," said K&L Gates partner Sandra Safro, who works on pipeline issues.

FERC is still taking comments on its NOI, but the process is already drawing controversy. The agency's willingness to re-examine its consideration of so-called precedent shipping agreements and service contracts as evidence of a pipeline project's need is rattling a pipeline industry that historically has relied on those deals to justify their projects.

Meanwhile, environmental groups have criticized FERC for attempting to jump ahead of its pipeline policy review when the agency's Republican majority announced that FERC would no longer estimate greenhouse gas emissions on certain pipeline projects on which production or downstream use of the gas is not considered a cumulative or indirect impact. The policy change was slipped into a May 18 order denying rehearing for a small Dominion Energy Inc. project, prompting a fierce dissent from FERC's two Democratic commissioners and deepening the partisan divide over the role of climate change in FERC's pipeline reviews.

"That showed a bit of a fracture between the commissioners," Morgan Lewis & Bockius LLP energy regulatory partner Levi McAllister said.

Still, McIntyre told Law360 that he hopes to build a consensus among commissioners on how to best update FERC's policy.

EPA Eyes Rollback of Vehicle GHG Emissions Standards

The EPA has taken several steps this year to undo energy and environmental policies crafted by the Obama administration, such as suspending implementation of a rule defining the federal government's authority under the Clean Water Act while crafting a proposed replacement and proposing a rollback of several key provisions of a chemical risk management rule.

But the agency's most significant, and controversial, rollback may be its April withdrawal of the Obama administration's so-called midterm evaluation, which determined that corporate average fuel economy, or CAFE, standards for model year 2022 to 2025 light-duty vehicles were still appropriate, amid pressure from automakers that the requirements would be too tough to meet under current market conditions.

The EPA and National Highway Traffic Safety Administration also kicked off a process to set new greenhouse gas emissions and CAFE standards.

"It is a very fraught controversy," Ballard Spahr LLP environmental partner Brendan Collins said. "In the end, rolling back the fuel economy standards will be a significant act by this administration."

The EPA has already been sued by California, which was part of the original Obama-era rulemaking that set the current GHG and CAFE vehicle standards, over the midterm evaluation withdrawal. Joining the Golden State are 16 other states and the District of Columbia that altogether represent about 43 percent of new U.S. car sales, as well as electric utility groups and electric vehicle maker Tesla.

A leaked draft plan by the EPA to freeze the vehicle standards after the 2020 model year as well as prevent California from exercising its Clean Air Act-derived authority to impose its own vehicle standards would produce an even nastier legal fight, as well as raise the possibility of two sets of requirements for automakers to comply with.

It has also stoked divisions within the auto industry, which has been pilloried by California and its allies over its push to revisit the midterm evaluation. While many automakers believe the current standards too difficult to achieve, they oppose the drastic rollbacks the EPA is contemplating.

"They're left a little bit tongue-tied in the middle," Collins said.

FERC Makes Room For Energy Storage

When FERC in February finalized its rule creating a place for energy storage in wholesale electricity markets, it improved not only the long-term prospects for the storage industry but also the renewable energy industry that frequently goes hand-in-hand with it.

FERC's Order 841 directs regional grid operators to revise their tariffs to establish market rules that "properly recognize" the physical and operational characteristics of electricity storage providers. Regional grid operators must ensure that energy storage resources are allowed to provide all the energy, capacity and ancillary services they're capable of, can be dispatched onto the grid by request, and can set wholesale market clearing prices as both a seller and buyer of electricity.

"[The rule's] significance is that this isn't going to be an issue left to the states to regulate on their own," McAllister said. "It's giving storage resources the opportunities that other [electricity] resources have. It's good for the markets because it provides additional resources, it's also good for the development of energy resources."

Regional grid operators still have to submit their compliance plans for FERC approval, and they won't go into effect immediately. There are also questions of how FERC's regulations will jibe with state authority over electricity distribution and state energy storage mandates.

Still, FERC's order is a potential game-changer for both energy storage and renewables. Chip Cannon, who co-heads Akin Gump Strauss Hauer & Feld LLP'senergy regulation, markets and enforcement practice, said the agency provided a further boost in April when it revised its regulations covering how new power generators hook up to the grid.

"Specifically, FERC proposed to revise the definition of 'generating facility' in the FERC-approved interconnection procedures to expressly include electric storage resources," Cannon said. "This decision was much more low-key than the Order No. 841, but still provides additional certainty for storage providers."

Pipeline Cos. Taxed by FERC Policy About-Face

FERC delivered a jolt to the pipeline industry in March when it announced that it would no longer allow pipeline master limited partnerships to recover income tax allowances in the cost-of-service rates they charge.

The revised policy statement was in response to the D.C. Circuit's 2016 ruling that scrapped SFPP LP's tax allowance that several airlines and oil companies had complained resulted in a double recovery for the liquids pipeline MLP's investors.

At the same time, FERC initiated a notice of proposed rulemaking that directs gas pipeline operators to disclose the effect of that policy change on its rates, as well as disclose the rate effects of recently enacted corporate tax rate reductions. The agency said it would hold off on addressing the tax changes on oil and liquids pipelines until 2020, but that's not that far away.

"Those two things together have the potential to provide tremendous benefits to pipeline shippers and customers, while introducing some uncertainty to investors in pipeline projects," McAllister said.

Indeed, the policy changes have already prompted pipeline giants like The Williams Cos. and Enbridge Inc. to abandon the MLP structure for a traditional corporate structure.

But Safro said the impact of FERC's tax policy moves could ultimately reach even farther. She noted that the revised policy statement specifically left open the possibility of changes for FERC-regulated entities that aren't structured as MLPs, such as regular limited partnerships or limited liability companies.

"There may be a continued shift if we do get a decision out of FERC for a pipeline that isn't organized as an MLP," Safro said.

Solar Industry Buffeted by Trump Tariffs

The U.S. solar industry took a financial hit in January when Trump slapped a four-year tariff on imported solar cells and modules that starts at 30 percent and decreases by 5 percent each year before bottoming out at 15 percent in the final year.

Solar cells and modules are the building blocks of solar panels. Solar industry groups claim the tariffs have translated to at least a 10 cent-per-watt increase in solar panel costs, which has made for more expensive solar projects.

"There was some stockpiling of panels that has caused a bit of a delay," said Michael Woodard, who chairs McGuireWoods LLP's renewable energy practice. "But the projects I've worked on, there has been an increase in costs."

The subsequent steel and aluminum tariffs imposed by Trump have also had an impact, albeit a much smaller one, on solar development. But the industry appears to be weathering the financial storm so far. The Solar Energy Industries Association said earlier this month that the U.S. added 2.5 gigawatts of solar power in the first quarter of 2018, a 13 percent year-over-year increase. That includes 1.4 gigawatts of utility-scale solar, according to the SEIA.

With China's recent decision to pull back on solar project development, there's a potential oversupply of solar panels that could even offset the impact of the tariffs, according to Woodard.

"I think most of the solar industry is just learning to cope with the tariffs," Woodard said. "There's some certainty around pricing. The impact of the tariffs could have been worse. Projects are getting done."

--Additional reporting by Juan Carlos Rodriguez. Editing by Brian Baresch and Catherine Sum.
