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Energy Regulation And Legislation To Watch In 2020

By **Keith Goldberg**

Law360 (January 1, 2020, 12:04 PM EST) -- Efforts to craft significant energy regulations or legislation in 2020 will face a major obstacle: a presidential election this fall, which can be a death knell for any major policymaking.

While the looming election may slow big policy moves at some agencies, there's hope that the Federal Energy Regulatory Commission, an independent agency somewhat insulated from electoral politics, will finish crafting long-awaited rules for the energy sector. FERC's regulatory moves could include a revision of its pipeline approval policy, a rule giving aggregated distributed energy resources access to wholesale electricity markets, and changes to how it implements a four-decade-old clean energy procurement law.

Meanwhile, the energy industry is eager to see if the Trump administration can finalize major changes to how project developers must comply with the National Environmental Policy Act. They'll also be watching Congress to see if there's any additional deal to be made on extending energy tax credits after a last-minute spending bill in 2019 only produced limited extensions.

But time is growing short to get things done, experts say.

"I think we're getting a little late in the administration for significant rulemaking, because the administration has to worry about litigation and making sure things are well into the process before the administration changes," said Bracewell LLP environmental partner Ann Navaro, a former senior U.S. Department of the Interior official. "They may also have to worry about the Congressional Review Act deadline [for disapproving regulations]."

Here are five regulatory and legislative items worth watching in 2020.

Revising NEPA Compliance

The White House Council on Environmental Quality is mulling ways to make it easier for developers of energy, transportation and other projects to comply with the National Environmental Policy Act, a huge regulatory undertaking that is now entering its third calendar year.

In June 2018, the CEQ said it wanted feedback from affected parties on 20 questions related to how NEPA — the nation's cornerstone environmental law — is implemented, from whether environmental reviews involving multiple agencies should be made more efficient to whether key terms need to be redefined.

The CEQ received thousands of comments, with industry groups calling for changes that would allow them to complete projects faster and environmental groups defending the existing regulations and processes.

The CEQ finally sent a proposed rule to the White House's Office of Management and Budget in October, and industry groups in November urged CEQ Chair Mary Neumayr to follow through on the changes. But Navaro said that given the scope of what's being contemplated, the current administration is up against the clock to follow through.

"For that sort of significant rulemaking, that is essentially unprecedented, that is not going to be a quick process," Navaro said. "I question whether it can be finished before the end of President [Donald] Trump's term."

FERC Pipeline Approval Policy Update

In April 2018, FERC kicked off a review of its two-decade-old natural gas pipeline approval policy, expressing an eagerness to tackle issues such as its reliance on developers inking gas shipping contracts, landowner rights, and what role climate change should play in evaluating a project's need.

Nearly two years and approximately 1,600 public comments later, FERC watchers are still waiting for any changes to the 1999 policy statement.

"It's unclear where that policy statement is right now and how, if at all, it will be revised," said Steptoe & Johnson LLP of counsel Monique Watson, a former FERC pipeline official.

The wait will likely extend well into 2020. FERC Chairman Neil Chatterjee said in October that any change to such a fundamental policy is something that a full complement of five FERC commissioners should agree on, even though the agency currently has a sufficient number of commissioners to make a decision on a major policy.

In the meantime, FERC has been steadily approving pipeline projects amid now-familiar splits between Chatterjee and fellow Republican Commissioner Bernard McNamee and Democratic Commissioner Richard Glick over the adequacy of the agency's climate change reviews.

FERC Rule on Aggregated Distributed Energy

The electricity and clean energy industries are eagerly waiting for FERC to issue its long-gestating rule making a place for aggregated distributed energy resources, or DERs, such as rooftop solar panels and small-scale battery storage in wholesale electricity markets.

Unlike a potential pipeline policy statement revision, Chatterjee has said he doesn't believe FERC needs five commissioners to issue an aggregated DER rule. But Morgan Lewis & Bockius LLP energy regulatory partner Dan Skees wonders if FERC might hold off until the completion of legal challenges to its similar rule requiring wholesale market access for energy storage resources.

"I wouldn't be surprised if FERC wanted to make sure the storage fight works out in FERC's favor before pushing hard on aggregated DER providers," Skees said.

Utility industry groups and state utility regulators claim that FERC's energy storage rule unlawfully intrudes on state authority under the Federal Power Act and some have voiced similar concerns about a potential aggregated DER rule. It highlights the growing difficulty in clarifying the line between state and federal FPA jurisdiction as new energy resources make their way onto the grid, said Ken Irvin, who co-leads Sidley Austin LLP's global energy practice and focuses on FERC matters.

"In this market, with all of these new technologies available, that is a very fuzzy area," Irvin said. "We'll have very pitched battles about what's state jurisdiction and what's federal jurisdiction."

FERC Takes Aim at PURPA

FERC in September proposed major changes to how it implements the Public Utility Regulatory Policies Act, which requires utilities to buy power from small-scale renewable energy producers.

Among the most significant changes, FERC would allow state utility regulators to set variable rates in contracts utilities sign with small-scale power producers in order to reflect changing electricity market conditions. The proposal would also allow utilities in competitive markets run by regional grid operators to be exempted from purchasing power from small-scale power producers larger than 1 megawatt. That’s down from the previous exemption threshold of 20 megawatts and a major change to how FERC implements PURPA's power-purchase requirements known as the "mandatory purchase obligation."

The proposal contemplates an overhaul of the so-called one-mile rule to determine whether affiliated power producers are close enough to be considered a single facility and would require states to set criteria to determine a small-scale project's viability before directing a utility to contract with it.

The proposal has been welcomed by the utility industry and many state utility regulators who claim PURPA, enacted in 1978, is outdated. But clean energy developers are far from thrilled and Commissioner Glick said the changes would "administratively gut the statute," and that much of what's proposed requires Congressional action.

"Where FERC comes out on that will be a big driver of how some of these projects get developed and whether we keep moving at a pace where we've got lots of 80MW projects getting built and sold as qualifying facilities, or you have folks that have these giant facilities that they're trying to find [power purchase agreements] for," said Holland & Hart LLP partner Billi McCullough, who frequently represents renewable project developers.

Energy Tax Credit Extensions

Getting any significant legislation through Congress is a challenge, and it's even tougher in an election year. Still, experts will be watching to see if any proposed bills extending energy tax credits scheduled to expire or decrease in value can make it through the Capitol Hill gantlet.

"Tax incentives will be one item that gets hammered out with significant implications for solar, for onshore and offshore wind, and potentially reaching as far as storage," said Kirkland & Ellis LLP of counsel Ali Zaidi, a former energy and climate change official in the Obama administration.

There is legislation calling for extensions of the investment tax credit for solar, production tax credit for wind and the Section 45Q tax credit for carbon capture and sequestration. There's also proposals to expand the investment tax credit to cover energy storage. But a one-year extension of the PTC was the only significant one to make it into a year-end appropriations bill signed by President Donald Trump last month, disappointing clean energy advocates.

"The extenders package, while potentially helpful, excludes what would arguably be the most impactful changes Congress could have made: extension of the 30% ITC for solar, a new ITC incentive for storage, and an extended ITC for offshore wind," said Stoel Rives LLP partner Greg Jenner, a former head of the U.S. Department of Treasury's Office of Tax Policy.

The odds of those tax credit extensions happening in 2020 are long, though energy tax credits have enjoyed a modicum of bipartisan support. Still, experts say the best legislative shot this time around will come through a broader tax extenders or appropriations package and it likely won't occur until after Election Day.

"I would be shocked if it didn't happen in the last 35-day sprint after Nov. 3," said Kelly Johnson, the administrative partner of Holland & Hart's Washington, D.C., office. "I don't think we'll see much legislative activity before Nov. 3."

--Additional reporting by Juan Carlos Rodriguez. Editing by Kelly Duncan and Alanna Weissman.