COVID-19: FEDERALLY REGULATED ENERGY BUSINESSES

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U.S. Energy Infrastructure and Resources Alert

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As the number of COVID-19 cases increases across the United States and in light of the World Health Organization's ("WHO") declaration of a pandemic, the risks posed by the virus to the broader economy are expanding. Here we begin to consider how COVID-19 may impact federally regulated energy businesses, including utilities, infrastructure developers, pipeline companies, and investors.

WORKFORCE REDUCTION AND FINANCIAL IMPACTS

Widespread infection or federal or state government mandates to limit the number of onsite employees could significantly reduce the workforce available to operate energy infrastructure. While this could result in capacity constraints and widespread outages, many grid operators already have adopted virtual meetings and other precautions for limiting the spread of the virus among their workforce. For example, New York Independent System Operator, Inc. ("NYISO"), PJM Interconnection LLC ("PJM"), and California Independent System Operator ("CAISO") are implementing virtual or teleconference stakeholder meetings rather than in-person meetings. In addition, many grid operators have suspended non-essential and business travel to certain countries, are limiting on-site visitors, and have advised employees on preventative actions. Remote technology is likely to prove essential to keeping energy infrastructure and the broader economy running. Nevertheless, a significant increase in the use of VPNs and videoconferencing systems could slow these remote access systems down, thereby limiting how effectively they enable business continuity and reduce financial stress as companies increasingly implement work-from-home policies.

The financial distress caused by workforce reductions or a decrease in production is most likely to be felt by the already troubled oil and gas market. Any related significant reduction in available capacity or demand may also impact shippers on interstate natural gas pipelines with the potential for medium-term impacts on rate structures for remaining shippers, similar to the early 2000s energy crisis. As markets remain volatile, oil and gas companies across the value chain may want to consider storage options.

U.S. FEDERAL AGENCY OPERATIONS

Federally regulated natural gas and oil pipeline companies, hydropower companies, and electric utilities rely heavily on action by the Federal Energy Regulatory Commission ("FERC"). This includes approval of pipeline certificate applications and revisions to tariff provisions and the rates charged by utilities and interstate pipeline companies as well as the resolution of ongoing disputes and pending enforcement actions. FERC currently only has three sitting commissioners, which is the minimum required to vote on matters before the Commission. If one FERC commissioner tests positive for COVID-19 or others within the agency do and an agency-wide self-quarantine is required, FERC would cease to have a quorum and significant matters requiring Commission approval would be stalled, at least temporarily. Of course, the Commissioners do have the authority to delegate certain functions to agency staff, which it used in early 2017 when it faced the loss of a quorum with the impending departure of former Chairman Norman Bay. Further, on Thursday, March 12, 2020, the Senate confirmed a fourth commissioner, James Danly. If Mr. Danly is sworn-in quickly, the risk of losing quorum will diminish.

Additionally, FERC staff are essential to keeping applications for new infrastructure and rate-related issues moving, and we are watching closely for any reduction in the availability of staff as a result of the virus. If the federal government were to issue rules imposing limits on the percentage of staff permitted to be in an agency on any given day or establish rotating schedules for staff to increase social distancing within each agency, this could have a real impact over the next few months on FERC staff's productivity. With WHO's pandemic declaration, the likelihood of such action or that government employees will be asked to work remotely increases. While this should help prevent the spread of COVID-19 and is a necessary action, it seems likely that it will impact day-to-day agency activities and the speed at which agencies are able to process and engage on matters pending before it.

The government also may limit public attendance at federal agency meetings. The Government in the Sunshine Act (the “Sunshine Act”) requires every meeting among a quorum of the members of a federal agency's governing body to be open to the public, subject to limited exceptions. [1] The Sunshine Act applies to FERC, and the Commission currently hosts a monthly open meeting at which the commissioners vote on various matters that are before the Commission. Just this morning, FERC Chairman Chatterjee announced that the next meeting scheduled for March 19, 2020 will be closed to the public but will be livestreamed (as all commission meetings are). The exceptions to the Sunshine Act open meeting requirements do not account for health and safety concerns other than with respect to law enforcement officials. It is unclear how long such measures will need to be in place given the uncertainty of the COVID-19 threat.

ORAL ARGUMENTS IN PENDING APPEALS OF FEDERAL AGENCY DECISIONS

Numerous appeals of federal agency decisions related to U.S. energy infrastructure are pending before the federal appellate courts, many of which are before the U.S. Circuit Court for the District of Columbia (“DC Circuit”). Delays in briefing schedules seem unlikely because the preparation of briefs and appendices can be completed electronically and remotely. While cancellation of in-person oral arguments has so far been rare, the situation is developing and several courts have started to postpone routine nonemergency matters. Many appellate courts, including the D.C. Circuit, can choose to hear oral arguments via videoconference. Parties should monitor court websites for updates on how the virus is impacting the courts before which they have pending litigation.

CONCLUSION

The COVID-19 situation is evolving rapidly and we will continue to monitor and provide updates on the potential impacts of COVID-19 on the federally regulated energy industry. Our team is available to answer any questions you may have.

NOTES:

[1] 5 U.S.C. § 552b (2017).

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