KIRKLAND & ELLIS

Energy Blog

The Prospect of a Biden Administration: What Does it Mean for the Electricity Sector?

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Electricity sector companies and investors should give careful consideration in the coming months to the implications of a potential Joe Biden presidency — possibly combined with a Democratic-controlled Congress — and the implications for their portfolios and business strategies (this follows an earlier blog post in which we analyzed implications on the oil and gas sector). Over the course of the 2020 Democratic presidential primary season, candidates and party leaders have shaped what seems to be an emerging consensus Democratic Party view on electricity sector regulation and on the approach to energy policy more generally.

This new consensus is reflected in (i) the House of Representatives' Select Committee on the Climate Crisis Action Plan issued on June 30, 2020; (ii) the recommendations of the Biden/Sanders Unity Task Force; and (iii) the Biden Energy Plan issued on July 14, 2020, and represents the Democratic Party's roadmap for accelerating the deployment of clean energy technologies as part of a $2 trillion "clean energy revolution" to reduce and limit greenhouse gas ("GHG") emissions.

Potential Policies and Actions

Here are some policies and actions impacting the electricity sector that we expect under a Biden administration:

1. **Adopting an Energy Efficiency and Clean Electricity Standard ("EECES") and Pursuing Clean Energy Tax Credits.** A Biden administration is likely to pursue aggressive measures to achieve net-zero emissions from the power

sector by 2035. Those measures likely will include an EECES requiring utilities and grid operators to improve energy efficiency and procure electricity generated by clean energy resources. Such an EECES would favor resources that provide electricity using wind, solar, energy storage, nuclear, hydropower and fossil energy with carbon capture technology. We expect the EECES will be loosely based on the renewable portfolio standard and clean energy standard programs various states have had in place for many years, and will set interim emissions reduction targets that provide for a phased-in approach to achieving net-zero emissions. Importantly, it is possible the EECES could require a lifecycle GHG analysis in determining the emissions associated with a particular resource or technology. If so, a resource's direct emissions (or lack thereof) alone, would not determine its EECES value. In addition, a Biden administration would likely seek legislation extending the production tax credit for wind resources and investment tax credit for solar resources, as well as legislation adopting new tax credits for offshore wind and other renewable energy technologies, including a possible standalone investment tax credit for energy storage.

2. **Building More Electricity Transmission and Distribution Infrastructure.** To facilitate the increased deployment of clean energy resources, a Biden administration likely will pursue significant investment in electricity transmission and distribution infrastructure. Those measures would include development of a national supergrid (also referred to as a "macrogrid") with incentives for development of a high voltage direct current electric transmission backbone, to unlock geographically remote renewable resources and to improve power transfers across the three main segments of the grid: the Eastern Interconnection, the Western Interconnection and the Electric Reliability Council of Texas. In support of that goal, a Biden administration likely would seek to expand federal authority over the siting of transmission infrastructure and prioritize re-powering of existing transmission lines with new, advanced technology that could be achieved without new legislation.
3. **Reforming Wholesale Power Markets to Support Clean Energy Resources.** In response to some of the highly controversial Federal Energy Regulatory Commission ("FERC") actions over the past two years, a Biden administration is likely to seek reforms that would make wholesale power markets more favorable to clean energy resources. Those reform efforts could include rulemakings to increase revenue for, and better integrate, renewable energy resources, energy storage resources, distributed energy resources and demand response resources. Other market changes under consideration likely would require legislation, including proposals set forth in the House of

Representatives' Select Committee on the Climate Crisis Action Plan to (a) prohibit FERC from administratively mitigating a resource's offer in the wholesale markets on the basis that the resource receives support from state or local governments and (b) internalize the cost of GHG emissions by requiring FERC to consider such emissions in reviewing the lawfulness of wholesale energy prices.

4. **Strengthening Energy Storage Incentives.** Although the Trump administration has made significant strides facilitating the deployment of energy storage resources, a Biden administration likely would seek to accelerate that trend with legislation that creates an investment tax credit specifically for energy storage systems. A Biden administration might also adopt regulatory mandates requiring consideration of energy storage systems in public utilities' resource planning.
5. **Supporting Vehicle Electricification.** The Biden Energy Plan calls for major strides in transitioning to electric vehicles by (i) offering rebates and other incentives for consumers and manufacturers and (ii) using government procurement to upgrade federal, state, tribal, postal and municipal vehicle fleets. It also proposes to make significant public investment in electric vehicle charging infrastructure, including 500,000 new charging stations.
6. **Accelerating Carbon Capture, Use and Storage ("CCUS") Technology.** Some in the Democratic Party have recently begun calling for increased investment in CCUS. The Biden Energy Plan reflects that increased focus by indicating that a Biden administration will "double down" on research investments and tax incentives for CCUS and CCUS technology, including for retrofits to existing power plants. A Democratic policy initiative on CCUS would likely include an increased focus on carbon utilization opportunities (e.g., using carbon in building materials such as concrete).
7. **Hindering Development of Fossil Fuel-Fired Generators and Midstream Infrastructure.** In addition to the policy changes addressed above, there are several measures we expect a Biden administration would try to adopt through executive action that could hinder fossil fuel-fired generators and midstream infrastructure. As we noted in a separate blog post on this topic, FERC may revise its natural gas pipeline siting policy to implement a high threshold for new interstate natural gas pipelines and liquefied natural gas projects, requiring applicants to show that they will not contribute to climate change. Further, in a change that would extend well beyond FERC, a Biden administration could seek to adopt a similar type of "climate test" as part of the National Environmental Policy Act review, which could disfavor fossil fuel-related actions at the upstream, midstream and downstream levels.

Implementation and Challenges

Executive Actions. In general, a Biden administration would exercise substantial discretion on a broad set of policies that could impact the U.S. power sector through the use of executive actions. These executive actions typically are implemented by regulations (either by promulgating new regulations or making changes to existing regulations) or through administrative decisions made by agency heads who report, ultimately, to the president.

Traditional Regulatory Tools and Legislation. Policy change by executive action in the electricity space is easiest to accomplish where the focus of the executive action is on public (federal) lands, federal government assets (e.g., government-owned vehicles) or rates for wholesale sales of electricity, and where the action is prospective in nature. The more traditional tools available to FERC (such as adopting policies to inhibit investment in, and development of, new interstate natural gas pipelines and LNG facilities) and the Department of Energy (such as investing in new renewable energy, energy storage, electricity transmission or CCUS technologies) could also be used to implement Democratic policy on clean energy. And if the Democrats control both chambers of Congress, it will be easier for a Biden administration to pass legislation to achieve its energy goals.

Fiscal Impacts. A Biden administration also is likely to consider the fiscal impact of potential new regulations, such as the consumer impact of increased electricity prices that may result from increased infrastructure development and deployment of renewable resources and the energy storage systems needed to counteract their intermittency. These fiscal concerns, if they materialize, may prove to be a significant barrier to new energy policy implementation.

Conclusion

A Biden administration is likely to pursue policies intended to accelerate the transition to a net-zero emission power sector by 2035, and many of those policies would represent a dramatic shift from the policies of the Trump administration. In general, the Biden administration's policy platform would require significant levels of public and private capital investment and could significantly alter the economics of various types of electricity generation resources and energy transportation assets. Companies should work with energy and environmental counsel to conduct specific analysis on the potential effects of a new regulatory regime as the election approaches.

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