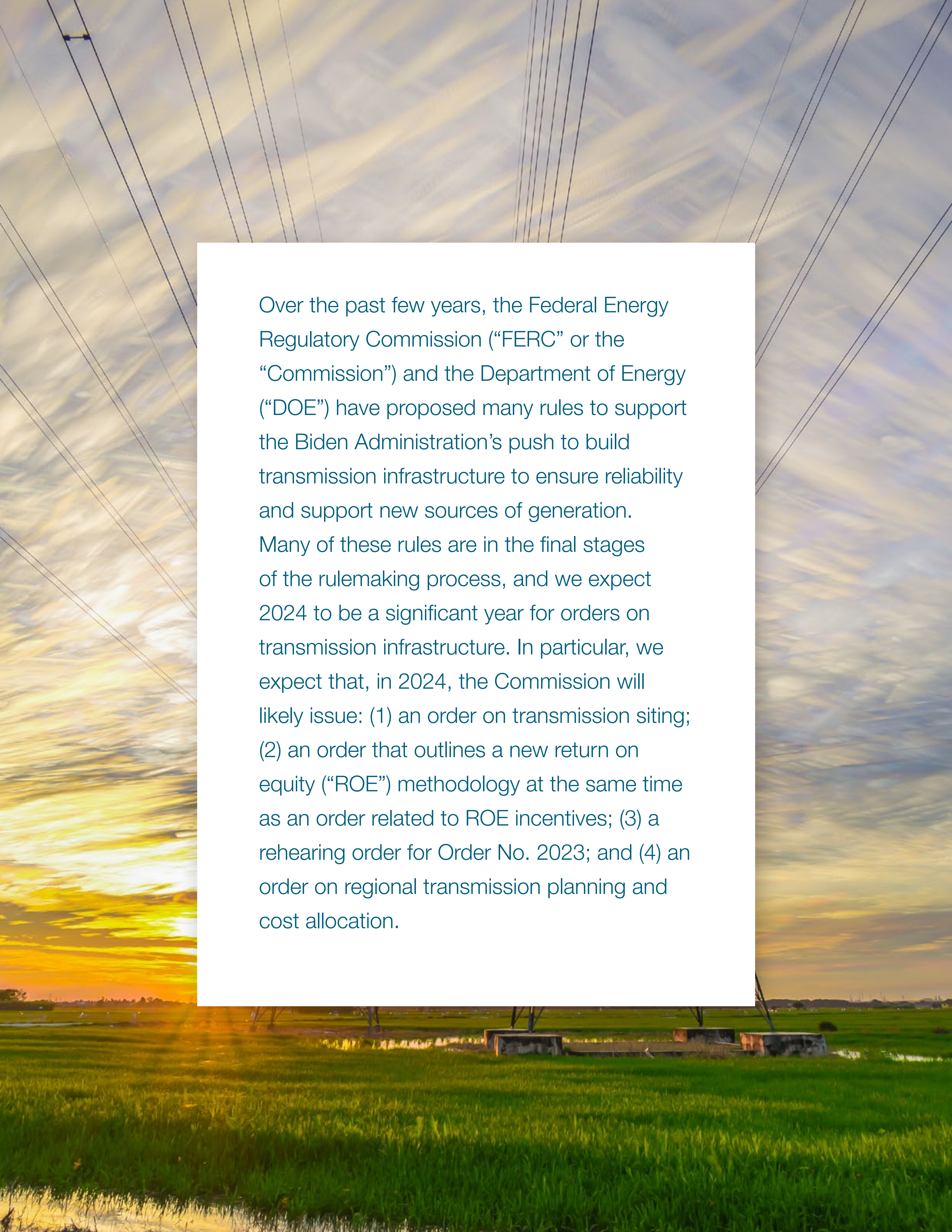
Vinson&Elkins

Power Play
Four Key Predictions for FERC's 2024 Electricity Agenda



Over the past few years, the Federal Energy Regulatory Commission ("FERC" or the "Commission") and the Department of Energy ("DOE") have proposed many rules to support the Biden Administration's push to build transmission infrastructure to ensure reliability and support new sources of generation. Many of these rules are in the final stages of the rulemaking process, and we expect 2024 to be a significant year for orders on transmission infrastructure. In particular, we expect that, in 2024, the Commission will likely issue: (1) an order on transmission siting; (2) an order that outlines a new return on equity ("ROE") methodology at the same time as an order related to ROE incentives; (3) a rehearing order for Order No. 2023; and (4) an order on regional transmission planning and cost allocation.

Impact of Danly’s Departure

With Commissioner Danly’s term over, that leaves the Commission with a three-person quorum. Absent individual recusals, which may happen from time to time, a quorum of three Commissioners can issue orders on a unanimous or 2-1 vote basis. Indeed, for quorum purposes, there is no legal distinction between an order issued on a 5-0 versus 2-1 basis. Thus, the Commission’s ability to conduct business and issue orders is generally not impacted by only having three sitting members.

Practically, we expect the three remaining Commission members being able to reach consensus on many issues and orders. As a general matter, the remaining three members all get along personally with each other, which is helpful in maintaining the dialogue needed to achieve agreement on key issues. To be sure, there will be times when the Commission is forced to use orders on a 2-1 vote. But we expect that to be the exception more than the rule in 2024. That would be in line with the historic practice of the Commission achieving consensus on a large number of orders each year.

Finally, we expect the Commission to operate with three members for much of 2024. With 2024 being a significant election year, it could well be difficult confirming new members to the Commission. Under applicable law, the Commission cannot have more than three sitting members from any one political party. If history is any guide, that suggests that the only realistic chance of new members being confirmed in 2024 is with two nominees, one from each party, who have widespread support and are not controversial. And even then, with the election cycle now in full throttle, and a packed Congressional agenda (e.g., budget/deficit and appropriation issues, aid to Israel and Ukraine, and border security, to name but a few), the priority to confirm a new Commission member will not be high, especially if the Commission is operating as efficiently and collegially as we expect it will. While we do not rule out getting two new members confirmed, we think the odds are low.

Prediction 1

The Commission will likely issue an order on transmission siting.

Background

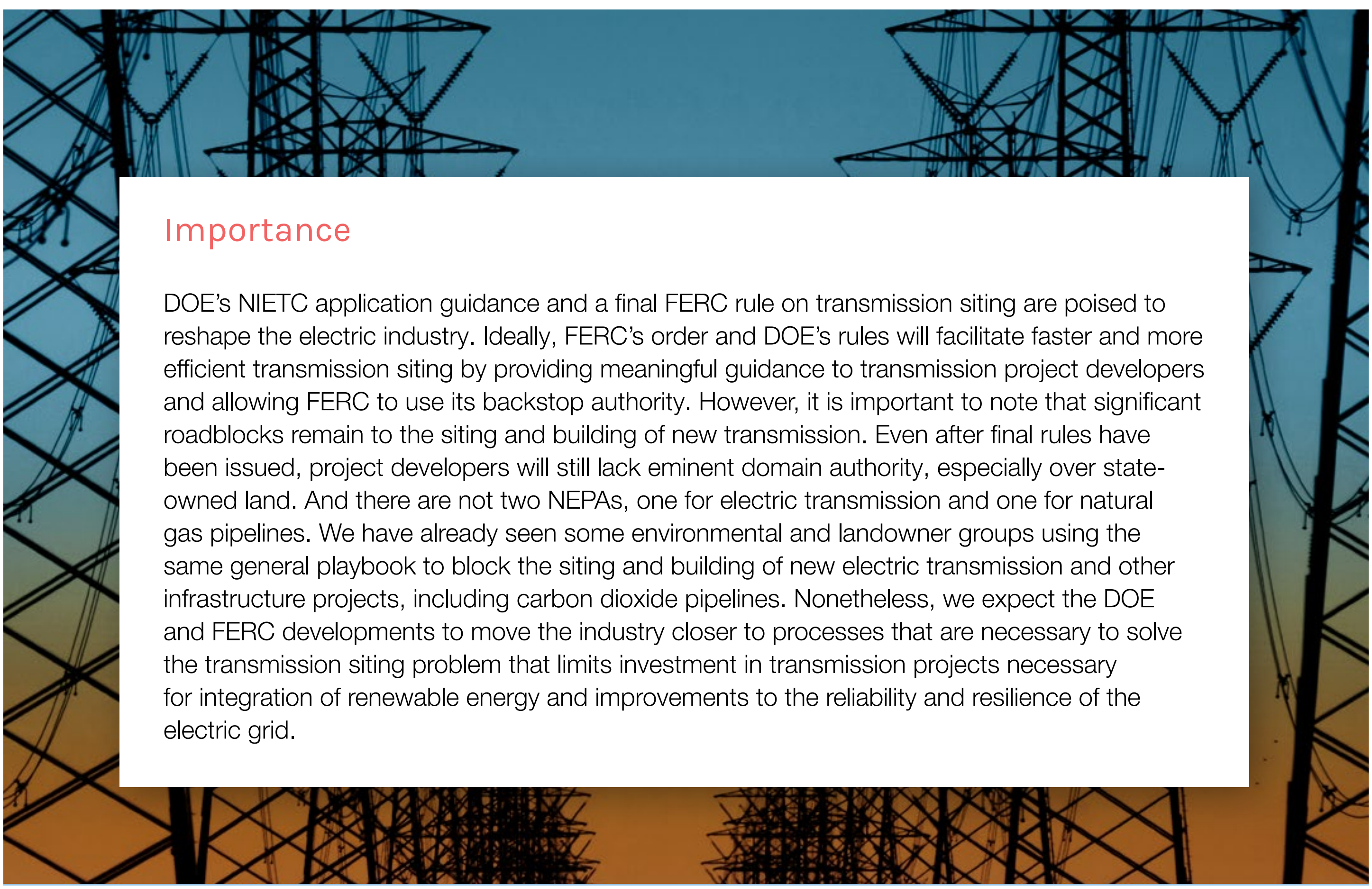
Over the past few years we have seen a significant focus on legislative and regulatory solutions to alleviate difficulties with the siting of electric transmission facilities. While the Energy Policy Act of 2005 added Section 216 to the Federal Power Act to allow the DOE to designate National Interest Electric Transmission Corridors ("NIETCs") and empower the FERC with "backstop authority" to site transmission projects within an NIETC over states' objections, the efficacy of Section 216 was limited by two circuit court decisions—one from the Fourth Circuit in 2009 and one from the Ninth Circuit in 2011. In 2021, the Bipartisan Infrastructure Law (i.e., the Infrastructure Investment and Jobs Act of 2021) clarified DOE's process for designating NIETCs as well as FERC's backstop authority in situations where states deny an application for approval of an electric transmission project. After the Bipartisan Infrastructure Law and the Inflation Reduction Act created loan and grant programs for transmission siting, the attention turned to DOE and FERC to catalyze the construction of additional transmission infrastructure. DOE has since taken steps intended to accelerate transmission siting, including issuing a Notice of Inquiry ("NOI") and Request for Information ("RFI") as a first step in establishing a process to create an applicant-driven, route-specific NIETC designation process, proposing revisions to categorical exclusions under the National Environmental Policy Act ("NEPA") to make the siting process faster, and proposing a rule to streamline federal approvals. On October 30, 2023, DOE also released its National Transmission Needs Study assessing historic and anticipated future transmission needs to inform transmission investment and planning decisions and released final NIETC application guidance on December 19, 2023. Similarly, in late 2022, FERC issued a Notice of Proposed Rulemaking ("NOPR") related to its backstop authority and has been reviewing initial and reply comments on this NOPR over the past year.

Prior results do not guarantee a similar outcome.

Predictions

Issuance of the NIETC application guidance in December 2023 kicked off the first window for public submission of information and recommendations on NIETC designations, with a deadline for submissions of February 2, 2024. The information received during this submission period will culminate in a preliminary list of potential NIETC designations as early as the second quarter of 2024. We expect the preliminary list to start a lengthy, contentious process of environmental review and public engagement that will sharpen the focus on which arguments and issues will be the most difficult roadblocks to successful use of NIETC designations.

We are optimistic that FERC will issue a final rule on transmission siting in 2024. Not only has DOE been moving forward with clarifications on the NIETC process to enable FERC to use its transmission siting backstop authority, but FERC is hearing Congressional calls to complete the transmission siting rulemaking. Specifically, Senators Charles Schumer and Sheldon Whitehouse both wrote letters urging FERC to finalize this rule in 2023, and Senator John Barrasso submitted a number of questions and a letter showing his focus on the rulemaking. Legislation recently introduced by Representatives Sean Casten and Mike Levin would direct FERC to issue new rules on improving interregional transmission planning and siting. With significant agency, industry, and political focus on transmission siting, we are optimistic that FERC will issue an order on transmission siting in 2024. Moreover, Chairman Phillips has indicated that issuing this rule is a high priority for the Commission.



Importance

DOE's NIETC application guidance and a final FERC rule on transmission siting are poised to reshape the electric industry. Ideally, FERC's order and DOE's rules will facilitate faster and more efficient transmission siting by providing meaningful guidance to transmission project developers and allowing FERC to use its backstop authority. However, it is important to note that significant roadblocks remain to the siting and building of new transmission. Even after final rules have been issued, project developers will still lack eminent domain authority, especially over state-owned land. And there are not two NEPAs, one for electric transmission and one for natural gas pipelines. We have already seen some environmental and landowner groups using the same general playbook to block the siting and building of new electric transmission and other infrastructure projects, including carbon dioxide pipelines. Nonetheless, we expect the DOE and FERC developments to move the industry closer to processes that are necessary to solve the transmission siting problem that limits investment in transmission projects necessary for integration of renewable energy and improvements to the reliability and resilience of the electric grid.

Prediction 2

The Commission will likely issue an order that outlines a new ROE methodology while concurrently issuing an order regarding permitted ROE incentives.

Background

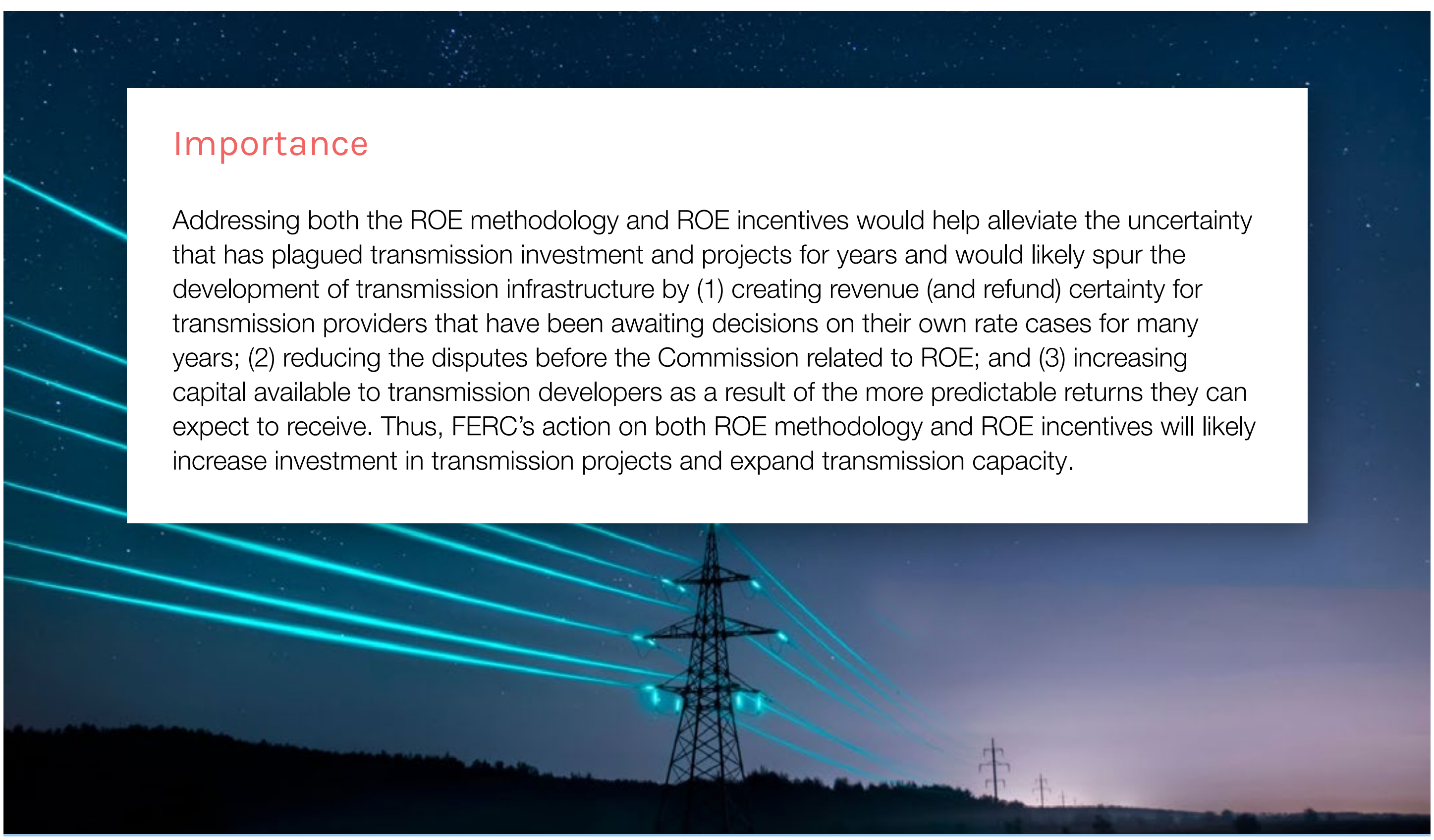
FERC's policy on ROE for the electric industry has been in flux for around a decade. Most recently, in August 2022, the D.C. Circuit vacated FERC's established ROE methodology, stating that it "agree[d] with the customers that FERC's development of the new Return methodology was arbitrary and capricious," deciding to "vacate its rate-determination orders and remand for further proceedings," and declining to reach the "other challenged aspects of FERC's orders" because they "flow from FERC's rate determination." See MISO Transmission Owners v. FERC, 45 F.4th 248 (D.C. Cir. 2022). FERC has yet to propose a new ROE methodology.

Relatedly, FERC issued in March 2020 a NOPR to revise the scope of ROE incentives it offers to transmission owners. FERC, however, has not issued a final rule and has not issued anything in the docket for that rulemaking since 2021. A likely reason FERC has not moved on this rulemaking is the pending litigation related to FERC's refusal to apply an ROE incentive for joining a regional transmission operator ("RTO") or independent system operator ("ISO") to entities that are required to join RTOs under state law. As part of that litigation, FERC filed a briefs with the Court of Appeals for the Sixth Circuit and is currently awaiting the Sixth Circuit's decision.

Predictions

We are optimistic that FERC will act (or, at a minimum, propose) a new ROE methodology in 2024, given the Biden Administration's push to build transmission infrastructure that is desperately needed to ensure reliability and support renewable energy. The Biden Administration has stated that one of its priorities is to expand transmission capacity and, accordingly, administrative agencies have been proposing new policies aimed at eliminating barriers to transmission project development, as we have discussed in previous articles. FERC's failure to establish a durable ROE methodology, however, creates uncertainty and limits investment in transmission projects, and so is a barrier to expanding transmission capacity.

FERC's ROE methodology and its permitted ROE incentive adders are intertwined, so we expect FERC will issue its rule on ROE incentives at the same time that it takes action on ROE methodology. As a result, we think that part of the reason FERC has delayed both issuing the rule on ROE incentives and taking action on ROE methodology could be that it is waiting on the Sixth Circuit's decision on ROE incentives. Given that the Sixth Circuit's decision is expected in early 2024, we are hopeful that FERC will take action on both the ROE methodology and ROE incentive adders in 2024.



Importance

Addressing both the ROE methodology and ROE incentives would help alleviate the uncertainty that has plagued transmission investment and projects for years and would likely spur the development of transmission infrastructure by (1) creating revenue (and refund) certainty for transmission providers that have been awaiting decisions on their own rate cases for many years; (2) reducing the disputes before the Commission related to ROE; and (3) increasing capital available to transmission developers as a result of the more predictable returns they can expect to receive. Thus, FERC's action on both ROE methodology and ROE incentives will likely increase investment in transmission projects and expand transmission capacity.

Prediction 3

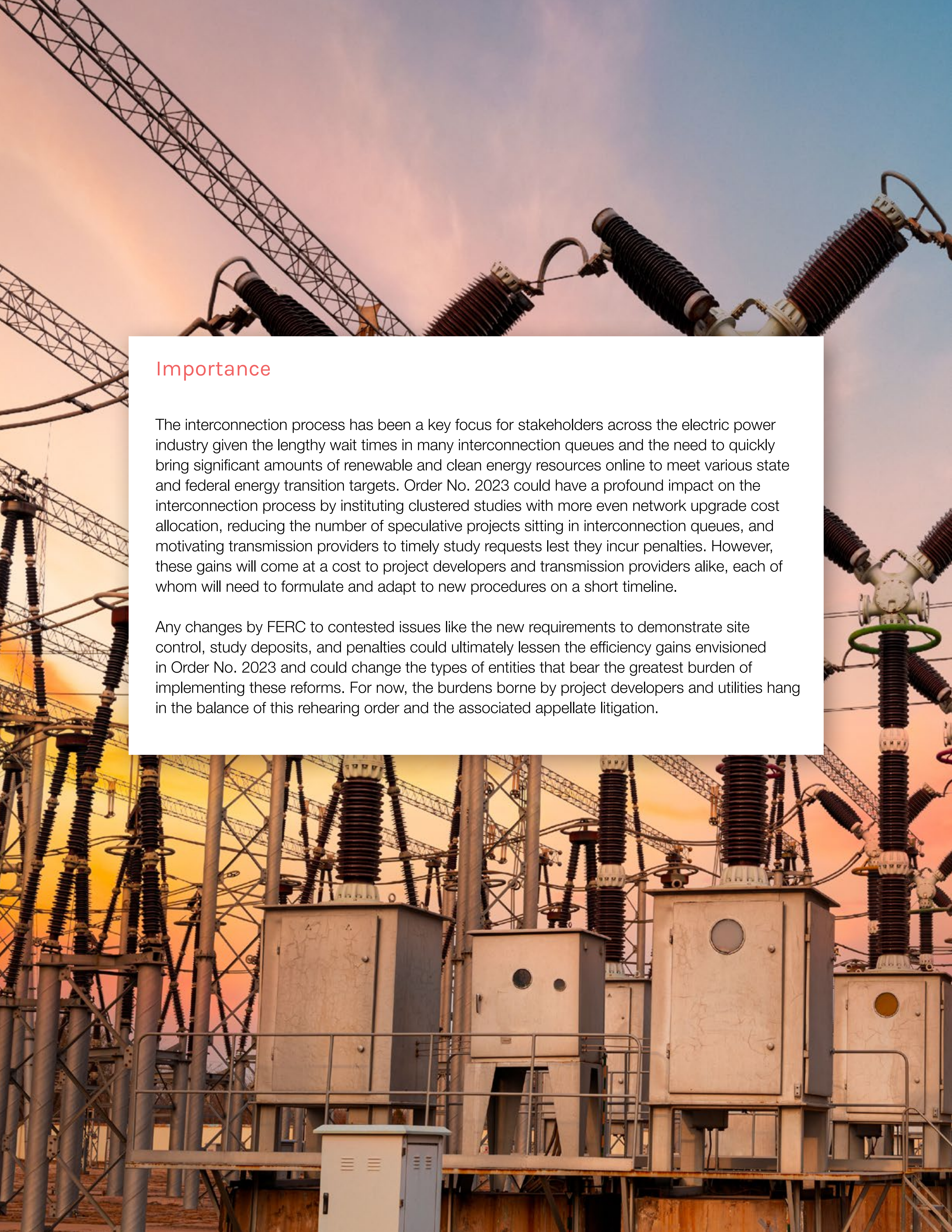
The Commission will likely issue a rehearing order on Order No. 2023 in early 2024.

Background

FERC issued Order No. 2023 on July 27, 2023, making significant changes to the large generator interconnection process. As discussed in greater detail in our previous article, Order No. 2023 seeks to increase the efficiency of the interconnection process by transitioning from a serial study based "first-come first-served" process to a cluster study based "first-ready, first-served" process. Order No. 2023 institutes additional reforms across the interconnection process, including new requirements to demonstrate site control, study deposits, and withdrawal penalties for project developers in an effort to reduce the number of speculative interconnection requests and new penalties for transmission providers that fail to meet study deadlines. Many parties have since filed rehearing requests and petitions for review at various Courts of Appeals, which have been consolidated at the D.C. Circuit. On October 25, 2023, FERC issued an order extending the compliance deadline from December 5, 2023 to April 3, 2024. FERC has yet to issue an order on the pending rehearing requests.

Predictions

We expect that FERC will issue its rehearing order in early 2024 and may make significant changes to the interconnection framework set forth in Order No. 2023. Chairman Phillips had indicated this was a high priority and there have been indications by FERC overall that a substantive rehearing order was in the works in its order extending compliance deadlines. FERC does not face a strict timeline to issue a rehearing order. However, it may feel pressure to do so rather quickly given the ongoing appellate challenges to Order No. 2023. FERC has not signaled what changes may be forthcoming, but the rehearing requests set out the issues parties have had with Order No. 2023 in general. Utilities' rehearing requests focus on Order No. 2023's study delay penalties and the increased data sharing obligations for transmission providers. We expect revisions to these two issues in particular in any final rule. Project developers, particularly renewable and clean energy developers, take issue with the Order No. 2023's modified site control and deposit regime. RTOs seek clarity on how Order No. 2023 will interact with recent interconnection queue reforms that many RTOs, notably PJM, have undertaken in recent years in an effort to increase the efficiency of generator interconnection within their market regions.



Importance

The interconnection process has been a key focus for stakeholders across the electric power industry given the lengthy wait times in many interconnection queues and the need to quickly bring significant amounts of renewable and clean energy resources online to meet various state and federal energy transition targets. Order No. 2023 could have a profound impact on the interconnection process by instituting clustered studies with more even network upgrade cost allocation, reducing the number of speculative projects sitting in interconnection queues, and motivating transmission providers to timely study requests lest they incur penalties. However, these gains will come at a cost to project developers and transmission providers alike, each of whom will need to formulate and adapt to new procedures on a short timeline.

Any changes by FERC to contested issues like the new requirements to demonstrate site control, study deposits, and penalties could ultimately lessen the efficiency gains envisioned in Order No. 2023 and could change the types of entities that bear the greatest burden of implementing these reforms. For now, the burdens borne by project developers and utilities hang in the balance of this rehearing order and the associated appellate litigation.

Prediction 4

The Commission will likely issue an order on regional transmission planning and cost allocation.

Background

FERC launched its ambitious effort to reform regional transmission planning and cost allocation with the issuance of an Advanced Notice of Proposed Rulemaking ("ANOPR") in July 2021, followed by a NOPR in April 2022. As we wrote at the time, if implemented, the NOPR would result in significant changes to regional transmission planning processes by requiring transmission providers to conduct long-term, forward-looking regional transmission planning focused on predicting the transmission needs of a shifting generation resource mix and changing demand. The NOPR also would revise cost allocation principles by requiring transmission providers in each transmission planning region to include in their tariffs either (1) the Long-Term Regional Transmission Cost Allocation Method, an ex ante cost allocation method; (2) the State Agreement Process, an ex post cost allocation process; or (3) a combination of the two. The NOPR further would require that transmission providers identify the set of benefits they will use in evaluating transmission facilities for purposes of cost allocation, explain how the benefits will meet identified transmission needs, and evaluate the benefits over a 20-year period from the estimated in-service date of the facilities. The NOPR did not mandate the use of a specific cost allocation method, nor did it prescribe which benefits should be considered.

The ANOPR and NOPR attracted considerable attention with hundreds of comments and reply comments submitted through September 2022. Since then, however, there has been little activity in the docket, as FERC appears to have prioritized the issuance of Order No. 2023.

Predictions

We expect that FERC will issue a final rule on regional transmission planning and cost allocation in 2024 although the breadth of the rule is uncertain. In 2023, FERC made a logical decision to prioritize interconnection queue reform over regional transmission planning, likely in part because the NOPR included proposals that are impacted by the interconnection process (such as considering certain transmission facilities that had been identified in the interconnection process as required network upgrades but were never built due to cancellation of generation projects), and the interconnection process is widely viewed as broken. Now that FERC has issued Order No. 2023, FERC can focus more on transmission planning and cost allocation.

Moreover, Congress's failure to pass meaningful transmission siting reform has caused elected Democrats to look to FERC to advance the Biden Administration's energy transition goals. Senators Charles Schumer and Sheldon Whitehouse have separately written to FERC urging the issuance of a final rule on regional transmission planning and cost allocation, as have more than 230 state legislators from 43 states in a joint letter. In response to the joint letter, Chairman Phillips stated that this proceeding is "among [his] chief priorities," so it seems likely that the rule will be issued in 2024.

Importance

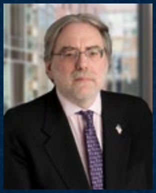
The final rule has the potential to cause dramatic shifts in the way the nation's electric transmission system is planned, constructed, and funded. At its heart, the NOPR would make transmission planning more predictive and less reactive. Moreover, the mandate to consider an expanded set of benefits from the construction of new facilities may allow transmission providers to allocate costs more broadly, which may lower the barrier to construction for new generation. However, any expanded benefits analysis and tests could be a double-edge sword, inviting closer scrutiny from those who do not see commensurate benefits and burden.

However, the NOPR does not go so far as to mandate a specific cost allocation method and specific benefits to be considered, which may indicate an unwillingness by FERC to engage in top-down regulation. Despite this, there has been some backlash to the NOPR from states that do not believe their ratepayers will benefit from an expansion of the transmission system to serve renewable generation, as evidenced by comments from the Louisiana Public Service Commission that accused FERC of imposing a national renewable portfolio standard. Advocates of an expanded transmission system, on the other hand, have urged FERC to mandate a specific cost allocation method and set of benefits for planners to consider in the final rule. While we expect the final rule to extend the transmission planning horizon and to give transmission providers greater flexibility to allocate costs, it remains to be seen whether FERC will go further than the proposals in the NOPR.

Overall Wild Card

Looming over any 2024 electric policy predictions are the ever-increasing concerns about the reliability and stability of the nation's electric grid. NERC's 2023 Long-Term Reliability Assessment issued this past December was a stark and sobering warning about the fragile state of the grid especially in certain regions of the country. Any major reliability event in 2024 has the potential to reshape instantly the DOE's and FERC's agenda and priorities.

Key Contacts



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