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Opportunities for Shaping How Trump Administration Policies Might Affect Ongoing Transformation of the Electric Power Sector

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Energy

While the general direction of the Trump Administration to "scrap the Clean Power Plan" and promote more fossil fuel production is reflected in the "America First Energy Plan" released by the White House on inauguration day, the first two weeks of the Administration have revealed little new information on specific policies the Administration intends to pursue with respect to the electric power sector.

As of this writing President Trump's nominees to key energy posts—Governor Rick Perry, Secretary of Energy; Scott Pruitt, Environmental Protection Agency Administrator; and Rep. Ryan Zinke, Secretary of Interior—have yet to be confirmed. And with the February 3 resignation of former Federal Energy Regulatory Commission Chairman, Norman Bay, FERC's two remaining members of the five-member commission are unable to muster a quorum for new business.

With the policy landscape still obscured, this alert outlines a number of potential policy changes from the Trump Administration that could affect the ongoing transformation of the electric power system and identifies opportunities for businesses and other interested parties to help shape outcomes through engagement with policy makers. We will continue to monitor and report on this evolving policy landscape in our Inside Energy & Environment blog.

A Complex Power Industry in Transformation

Americans expect our electricity to be safe, cheap, ubiquitous, and reliable. To meet these expectations we rely on an immensely complex system of generation, transmission, distribution, demand response ,and consumption of electricity. Driven by a variety of federal and state policies and macroeconomic factors, that system is in the midst of major transformation toward greater efficiency, reduced carbon intensity, more varied and distributed sources of generation, and more collaborative and innovative business structures among an increasing variety of service providers and customers.

Despite federal policy uncertainty, we expect the current directional trends of transformation in the power industry to continue. This is due largely to macroeconomic factors and the role of state policies that are spurring the transformation.

From a macroeconomic perspective:

- efficiency gains across the industrial, commercial and residential sectors will keep electricity demand growth flat—less than 1 percent—despite moderate GDP growth in the 2-3 percent range;
- at the same time, flat overall demand, new technologies and cost-effective distributed energy choices will strengthen the hand of customers to reshape traditional utility relationships—particularly for customers in sectors of growing demand such as information technology and healthcare;
- preservation, protection, and refreshment of the aging and vulnerable grid requires massive capital investment—well in excess of $100 billion annually for the foreseeable future; and
- a large and growing set of businesses, investors, and consumers represented by groups such as Renewable Energy Buyers Alliance, We Mean Business coalition, Advanced Energy Economy, and RE 100 want lower carbon energy.

From a state policy perspective:

- state legislatures and public service commissions will continue to shape the transformation of the grid through traditional rate-making, siting, permitting, and zoning policies, and through policies that are tailored to address grid transformation such as net metering policies, renewable portfolio standards, and incentives for electric car integration;
- states and municipalities will have the opportunity to craft policy in response to changes in federal policies, and some states will continue to forge ahead with major initiatives. California and New York, for example, will try to fill gaps left open by the Trump Administration, and create a model for clean, competitive utility regulation elsewhere (see, e.g., California's 50 percent renewables target (SB 350) and New York's REV process).

Although the current direction of grid transformation will continue due to these macroeconomic and state policy factors, the pace and range of change may be significantly affected by federal policy choices.

Projecting Trump Administration Policies for the Power Industry

The Trump Administration's approach to the power sector continues to evolve. Below is an early reporting of what we know, and do not yet know, in five categories about its posture toward the industry.

1. Clean Power Plan and Carbon Regulation

First, we know that the Clean Power Plan will not survive. The manner and timing with which it is dismantled is less certain, and could lead to various outcomes. The outcome of the Clean Power Plan will depend on the D.C. Circuit's forthcoming decision on the rule.

The Clean Power Plan is an EPA regulation promulgated under the Clean Air Act that would require each state to develop and implement plans to reduce CO2 emissions from power plants based on various prescribed levels of rate or mass reductions. The 27 states that sued in

federal court to challenge the plan and the 16 states that supported it and their respective aligned industry and public interest groups are awaiting a ruling from the Court of Appeals for the D.C. Circuit. Whether the D.C. Circuit upholds, strikes down, or remands the Clean Power Plan to the lower court or EPA for further proceedings will affect the Administration's next move to "scrap the plan."

In any case, absent Congressional action to remove greenhouse gas regulation from the scope of the Clean Air Act, or the Supreme Court's reversal of *Massachusetts v. EPA* (2007) (requiring the EPA Administrator to determine whether greenhouse gas emissions from motor vehicles posed a threat to human health or welfare), EPA will still have the authority and responsibility to regulate carbon emissions. Some Senate Republicans have signaled an interest in the Trump Administration EPA developing a strategy to target the 2009 endangerment finding, which was a central component of the previous administration's reading of *Massachusetts v. EPA*. Hence, opportunities will be plentiful for advocacy by interested parties in rulemaking and legislative action.

2. Renewables

We remain uncertain as to how a range of federal tax, land use, procurement, and budget allocation policies that have supported renewable energy will proceed.

Tax. The last Congress extended both the Investment Tax Credit for solar (with phase-downs from 2019 through 2021), and the Production Tax Credit for wind (with phase-outs from 2017 through 2019). Advocates argue that this extension already represents tax reform, and that the credits should not be further altered. But even if the credits remain in place, an expected reduction of corporate tax rates could diminish the "tax appetite" and corresponding supply of tax equity financing which is the backbone of renewable energy project financing.

With tax reform being a high priority for the Republican-led Congress, industry groups are already positioning to protect the ITC and PTC. There may be opportunities for advocacy groups to promote other tax reforms that could help finance renewables. Programs that are budget-neutral, seen as a tax reduction, or that promote domestic job creation may be particularly attractive. Reintroduction of the bipartisan Master Limited Partnership Parity Act, extension of the ITC to energy storage investments, or other tax incentives for public-private infrastructure projects are possibilities.

Federal Land Use. This Congress has already begun consideration on a set of bipartisan bills that would streamline solar, wind, and geothermal development on federal lands in the West. The bills—two versions of the "Public Land Renewable Energy Development Act of 2017"—are authored by Rep. Gosar (R-AZ) and Sen. Heller (R-NV), and reintroduce stalled legislation from last session. The legislation proposes a revenue-sharing scheme that would allocate development revenues to the respective states and counties in which projects are located, as well as to the Bureau of Land Management (BLM) and other federal and state agencies administering the projects.

The Trump Administration has so far been largely silent as to the future regarding a set of Obama Administration policies promoting renewables development on federal lands. The Department of Interior managed a number of these processes: the BLM's solar and wind leasing and permitting rules, designed to streamline the process, as well as its

creation of Solar Energy Zones in southwestern states, and the Bureau of Ocean Energy Management's (BOEM) active practice of granting leases and permits for offshore wind projects are among the policies that will likely garner attention.

Government Procurement. Through executive orders, President Obama set objectives for the federal government—the world's largest energy consumer—to increase its renewable energy procurement to at least 25 percent by 2025. Some conservative groups have urged the Administration to rescind those orders. The Trump White House has yet to address this subject.

Energy Research and Development. The Department of Energy (DOE) also invests more than $7 billion annually for civilian energy technology research and development, largely through the National Labs and the Advanced Research Projects Agency-Energy (ARPA-E). The Department of Defense invests in energy R&D, as well, through research programs like DARPA, or the Navy's Great Green Fleet. In his confirmation hearing, DOE Secretary Designate Perry committed to protecting the department's science programs. But we will need to await the Administration's budget proposals to learn how energy R&D will be impacted.

3. Fossils Generation

By contrast to what is an uncertain future for renewables policies, the Trump Administration will certainly work to advance policies that strengthen fossil fuel generation.

Natural Gas. Natural gas production will likely be a major beneficiary of the Administration's policies and receive continued support in Congress. For example, the Senate and House have both passed resolutions under the Congressional Review Act to rescind the BLM's methane rule that would regulate venting, flaring, and leakage of methane on federal and tribal lands.

Coal. President Trump touted clean coal and a commitment to restore coal mining jobs during the campaign. Toward this end, the Administration will likely support a shift of some research and development funding toward clean coal technology, and seek to lift relevant EPA regulations, such as mercury and other air toxics standards that hamper coal development. The Administration will also support Congressional efforts to lift rules and regulations that slow coal development, as it has already done last week in the case of the EPA's Stream Protection Rule, which the Senate voted to repeal (54-45) under its Congressional Review Act authority.

Notwithstanding this congressional and regulatory action, it is unlikely that the Administration will develop more proactive coal power mandates or subsidies. These policy matters more generally fall to the states. Even in Wyoming coal country, a recent bill that would have promoted coal generation by creating disincentives for renewables could not muster support to get out of committee. Support for and macroeconomic forces that better position natural gas will likely temper market demand for new coal-fired generation.

4. Nuclear

While the Trump transition team sought information from the Department of Energy employees as to how to keep nuclear reactors operating, as well as on restrictions preventing work from

resuming at the nuclear storage facility at Yucca Mountain, it remains unclear how aggressively the Trump Administration will push nuclear power. The market will likely push the industry toward lower-cost development. For example, low gas prices will temper market appetite for high-cost light water reactors, but we could see ongoing efforts with DOE for commercializing less-costly small modular reactors.

5. Grid Modernization, Security, and Resiliency

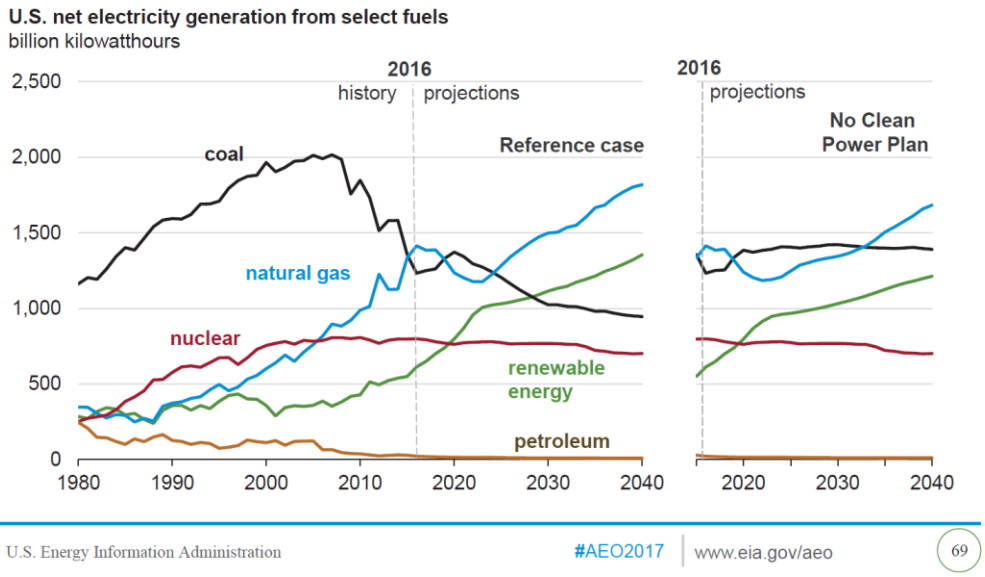
Federal efforts to continue grid modernization work should continue in the Trump Administration. The Administration has already designated electric grid infrastructure as "high priority" in its executive order on expediting permitting, and the President is reportedly soon to issue an executive order on protecting the grid and other critical infrastructure from cyber-attacks. Grid security and resiliency is also receiving congressional scrutiny, including in a hearing last week before an Energy and Natural Resources subcommittee chaired by Rep. Fred Upton. And the FERC has an open rulemaking addressing costs and market implications of expanding energy storage resources on the grid.

Earlier this month, the Obama DOE published the second installment of the Quadrennial Energy Review which set forth 76 policy recommendations for grid modernization. It stands to reason that not all 76 will conflict with the new Administration's policies.

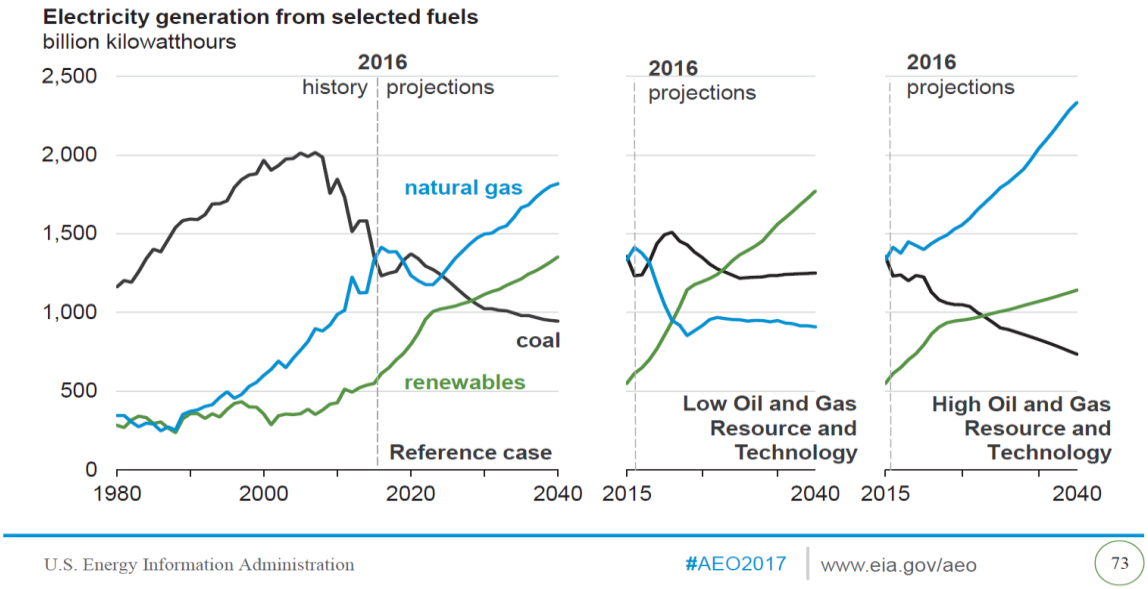
Potential Range of Federal Policy Impacts on Power Sector Transformation

The overall direction of the electric power sector's transformation will likely continue. The macroeconomic trends toward lower demand, greater efficiencies, and newer, smarter technology will not quickly reverse course. But the timing, pace, and range of change will be influenced by policymaking.

According the EIA's Annual Energy Outlook, renewables and gas-fired power will continue to take increasing shares of the energy mix, but coal's share will vary significantly depending on the future of the Clean Power Plan.



Similarly, in a high gas price scenario, coal will replace some of the gains made by natural gas, but the share of renewables continues to grow.



Conclusion—Opportunities for Policy Engagement

Given the complexity of the electric power sector, it is not surprising that there are a lot of moving pieces of federal policy. The potential range of changes in the electric power sector transformation will be dramatically affected by federal policy choices that remain inchoate and uncertain. More policy details will emerge as the White House, the agencies, and Congress clash or coordinate in varying degrees.

As the Trump Administration and Congress seek to regulate and legislate, there will be many opportunities for individual companies or coalitions to advocate their positions. There will also be opportunities to challenge federal actions in the courts. And as policies evolve, new policies and policy gaps will create new opportunities for corporate deal making.

Our energy industry team can assist clients to better understand these opportunities and to advance their interests on all of these fronts. If you have any questions concerning the material discussed in this client alert, please contact the following members of our Energy practice:

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