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Inflation Reduction Act Aims to Promote Electricity Transmission and Offshore Wind Development

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On August 16, President Biden signed the Senate budget reconciliation package known as the Inflation Reduction Act of 2022 ("IRA"), which was approved by the U.S. House of Representatives on August 12.

As reported previously in the Firm's Stay Current article focusing on the tax aspects of the IRA, the most significant and immediate benefits to the development of U.S. renewable energy and storage projects contained in the IRA come in the form of several clean energy tax incentives.¹ As noted in that article, besides the extension of Production Tax Credits and Investment Tax Credits ("ITCs") for certain renewable energy resources, the IRA for the first time makes stand-alone energy storage facilities eligible for ITCs.

Indeed, we understand from market sources that, almost immediately after the July 27 release by Senate Majority Leader Chuck Schumer (D-NY) and Senator Joe Manchin (D-WV) of legislative text for budget reconciliation, some renewable project developers began to see marked increases in the value of their projects. We anticipate that similar increased valuations for certain renewable projects will ripple through the market, especially with the IRA enacted into law. Storage projects will also likely see a boost, now that stand-alone energy storage projects are eligible for ITCs for the first time.

But tax incentives are not the only provisions of the IRA aimed at promoting the development of renewable energy projects in the U.S. In addition to tax incentives providing immediate financial benefits, there are several other provisions in the IRA that potentially could benefit the development of renewable energy projects in the U.S. over the longer term; specifically, those provisions seeking to promote the development of high-capacity and interregional transmission facilities and increasing the geographic area for offshore wind leases. However, other provisions included in the IRA to secure its passage potentially could hinder the development of offshore wind projects by tying offshore wind leases to oil and natural gas leasing.

Funding for Electricity Transmission Development – NIETCs Redux

Section 50151 of the IRA appropriates \$2 billion to the Secretary of Energy through September 30, 2030, for direct loans² to non-federal borrowers for the construction or modification of electricity transmission facilities located within a National Interest Electric Transmission Corridor ("NIETC") designated by the Secretary of Energy under Section 216(a) of the Federal Power Act ("FPA").³ Although

NIETCs first were introduced in the Energy Policy Act of 2005 ("EPAct 2005"), currently no NIETCs are in effect.⁴

However, in January, following the IIJA amendments to Section 216 of the FPA, the U.S. Department of Energy ("DOE") issued a Notice of Intent ("NOI") announcing its "Building a Better Grid" initiative, which is "focused on catalyzing nationwide development of new and upgraded high-capacity transmission lines," as provided in the Infrastructure Investment and Jobs Act ("IIJA") enacted in November 2021.⁵ In announcing the new initiative, DOE argued that, in order to meet President Biden's goal of 100 percent clean electricity by 2035 and a zero emissions economy by 2050, "[i]ndependent estimates indicate that [the U.S.] need[s] to expand electricity transmission systems by 60% by 2030, and may need to triple it by 2050."⁶

In the NOI, DOE found that although "multiple pathways exist" for the U.S. to meet President Biden's clean energy goals, "all require upgrading and expanding the Nation's transmission infrastructure"; particularly, "deploying interstate high-voltage lines connecting areas with significant renewable energy resources to demand centers and linking together independently operated grid regions."⁷

With respect to its authority under Section 216 of the FPA to designate NIETCs, as clarified in the IIJA, DOE indicated that, instead of designating NIETCs on its own initiative, as it did in 2007, following passage of EPACT 2005, it intends to provide a process for the designation of NIETCs on "a route-specific, applicant-driven basis," in order to facilitate the efficient consideration of projects seeking a permit from FERC under Section 216 of the FPA. DOE also said that it intends to "give particular consideration to proposed [NIETCs] that, to the greatest degree possible, overlap with or utilize existing highway, rail, utility, and federal land rights-of-way."⁸

In addition, Section 50152 of the IRA appropriates to the Secretary of Energy \$760 million, through September 30, 2029, to make grants to State, local, or Tribal governmental entities with authority to make a final determination regarding the siting, permitting, or regulatory status of high-voltage interstate or offshore electricity transmission lines proposed to be constructed and to operate (i) at a minimum of 275 kV or (ii) offshore and at a minimum of 200 kV to be located in an area under the jurisdiction of the relevant State, local or Tribal entity. These grants could be used for transmission project studies, examination of alternative siting corridors, hosting negotiations with projects backers and opponents, participating in federal and state regulatory proceedings, and promoting economic development in affected communities, and would be contingent on the State, local or Tribal entity agreeing to make a final decision whether to approve a proposed transmission project within two years.

Finally, Section 50153 of the IRA appropriates \$100 million, through September 30, 2031, to the Secretary of Energy to allow DOE to convene stakeholders and conduct analyses for the development of interregional electricity transmission and transmission of offshore wind-generated electricity and consider the economic, reliability, resilience, security, public policy and environmental benefit of such transmission.

Increasing Areas for Offshore Wind Leases – But, Wait a Minute . . .

Under the Outer Continental Shelf Lands Act ("OCSLA"),⁹ as amended by EPAct 2005,¹⁰ the Department of the Interior's Bureau of Ocean Energy Management ("BOEM") grants leases, easements and rights of way for renewable energy development on the Outer Continental Shelf ("OCS"),¹¹ including offshore wind, ocean wave energy, and ocean current energy.

On July 20, President Biden announced several new executive actions to address climate change, accelerate clean energy and create jobs, including directing the Secretary of the Interior to advance wind energy development in federal waters off the mid- and southern Atlantic Coast, including Georgia, North Carolina and South Carolina, and Florida's Gulf Coast.¹² Former President Trump withdrew these areas from OCS leasing disposition in September 2020, for a ten-year period from July 1, 2022, through June 30, 2032.

Section 50251(a) of the IRA authorizes the Secretary of the Interior to issue renewable energy leases, easements and rights-of-way in areas off the coasts of North Carolina, South Carolina, Georgia, and Florida in the Atlantic, and off the coast of Florida in the Gulf of Mexico, notwithstanding the prior withdrawal of these areas by former President Trump.¹³

Although the IRA increases the geographic areas within which BOEM may issue leases for offshore wind projects, it also arguably limits BOEM's ability to issue offshore wind leases by tying the issuance of offshore wind leases to offshore gas and oil lease sales. For a ten-year period following enactment of the IRA, Section 50265(b)(2) of the IRA prohibits BOEM from issuing leases for offshore wind development unless, at the time of each new lease of an offshore wind area, it has held an offshore oil and gas lease sale in the previous year that offered at least 60 million acres on the OCS and, if any acceptable bids have been received for any offered tract, issued leases.

Section 50265(b)(2) of the IRA is understood to be one of several compromises necessary to secure Sen. Manchin's support for the IRA.

We continue to monitor developments related to the IRA and its implementation.



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¹ See *U.S. Senate Passes Inflation Reduction Act*, Paul Hastings, Stay Current, August 2022.

² A direct loan provided under Section 50151 must have a term that does not exceed the lesser of 90 percent of the projected useful life (in years) of the eligible transmission facility and 30 years, may not exceed 80 percent of the project costs, must, on first issuance, be subject to the condition that the direct loan is not subordinate to other financing, and will at a rate of interest to be determined by the Secretary of Energy.

³ As a general matter, the siting of electricity transmission facilities is within the jurisdiction of state authorities. However, in EPAct 2005, Congress amended the FPA by adding Section 216 (Siting of Interstate Electric Transmission Facilities), which authorized the Secretary of Energy, in consultation with affected states, to designate areas experiencing electricity transmission constraints or congestion as NIETCs, and further authorized FERC to issue permits for interstate electricity transmission facilities in designated NIETCs if the state with jurisdiction to approve the facilities has withheld approval for more than one year.

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⁴ In 2007, the Secretary of Energy designated two NIETCs – the Mid-Atlantic Area National Corridor (including certain counties in Ohio, West Virginia, Pennsylvania, New York, Maryland, Virginia, and all of New Jersey, Delaware, and the District of Columbia), and the Southwest Area National Corridor (including certain counties in California and Arizona) – after conducting a required congestion study in which it concluded that customers in these geographic areas are adversely affected by transmission capacity constraints or congestion. However, in 2011, the U.S. Court of Appeals for the Ninth Circuit held that, in preparing the 2006 Congestion Study upon which the 2007 NIETC designations were based, DOE had not adequately consulted with affected states, as required by Section 216 of the FPA. The Court vacated the 2006 Congestion Study and DOE’s designation of the Mid-Atlantic and Southwest NIETCs, and remanded the matter to DOE for further proceedings, including a new congestion study. *California Wilderness Coalition v. U.S. Dep’t of Energy*, 631 F.3d 1072 (9th Cir. 2011). In 2015, DOE issued a Congestion Study in which, citing the Ninth Circuit’s 2011 decision, it stated that “[t]his Congestion Study differs from previous studies in the manner in which state consultation has been sought throughout the preparation of the study. . . .” U.S. Department of Energy, *National Electric Transmission Congestion Study* (Sept. 2015). At the same time, DOE also issued a *Report Concerning Designation of National Interest Electric Transmission Corridors*, concluding that the information it collected during the preparation of the draft congestion study, with the additional information received through a public comment process, did not provide a basis for the designation of a NIETC. DOE added, however, that its determination does not preclude the possible designation of one or more future NIETCs, consistent with Section 216 of the FPA, and in situations where designation would serve the public interest. DOE further stated that it would first propose designation of NIETCs for public comment (after completion of a relevant congestion study), and no designation would become final until an environmental analysis as required by the National Environmental Policy Act had been completed. While not stated explicitly, it appears that, in the 2015 Congestion Study and the *Report Concerning Designation of National Interest Electric Transmission Corridors*, DOE was, among other things, acting in response to the Ninth Circuit’s remand. The Secretary of Energy has not made any new NIETC designations.

In addition, in 2009, the U.S. Court of Appeals for the Fourth Circuit held that Section 216(b) of the FPA does not allow FERC to issue permits for the construction of new electric transmission facilities where the state authority denied a permit application. *Piedmont Envtl. Council v. FERC*, 558 F.3d 304 (4th Cir. 2009), *cert. denied sub nom. Edison Elec. Inst. v. Piedmont Envtl. Council*, No. 09-343, 2010 WL 154946 (U.S. Jan. 19, 2010).

In 2021, in Section 40105 of the IIJA, Congress amended Section 216 of the FPA to allow the Secretary of Energy to designate as a NIETC any geographic area that is experiencing *or is expected to experience* electric energy transmission capacity constraints or congestion that adversely affects consumers. Section 40105 of the IIJA further clarifies that FERC also may issue permits for the construction or modification of electric transmission facilities in a NIETC if it finds that the State commission or other entity that has authority to approve the siting of the facilities has denied an application seeking approval pursuant to applicable law.

⁵ *Building a Better Grid Initiative To Upgrade and Expand the Nation’s Electric Transmission Grid To Support Resilience, Reliability, and Decarbonization*, Notice of Intent, Department of Energy, Office of Electricity, 87 Fed. Reg. 2769 (Jan. 19, 2022).

⁶ *DOE Launches New Initiative From President Biden’s Bipartisan Infrastructure Law to Modernize National Grid*, Department of Energy, Jan. 12, 2022.

⁷ DOE NOI, 87 Fed. Reg. 2770.

⁸ DOE NOI, 87 Fed. Reg. 2773. DOE also said that, in order to enable effective use of both DOE’s route-specific NIETC process and FERC’s permitting process, it will work with FERC, as appropriate, to establish coordinated procedures that facilitate efficient information gathering related to the designation of NIETCs by DOE and the issuance of permits by FERC under Section 216 of the FPA.

⁹ 43 U.S.C. §§ 1331, et seq.

¹⁰ Section 388 of EPAct 2005 amended the OCSLA to permit DOI to grant leases for activity that involves the production, transportation or transmission of energy on the OCS lands from sources other than gas and oil.

¹¹ The OCS is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters . . . and of which the subsoil and seabed appertain to the United States.” 43 U.S.C. § 1331.

¹² FACT SHEET: President Biden’s Executive Actions on Climate to Address Extreme Heat and Boost Offshore Wind, July 20, 2022. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/20/fact-sheet-president-bidens-executive-actions-on-climate-to-address-extreme-heat-and-boost-offshore-wind/>

¹³ Section 50251(b) the IRA also amends the definition of the OCS in the OCSLA to include certain submerged lands adjacent to U.S. Territories.