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FIRE ALARM: POWER FINANCE IN A NEW NORMAL FOR WILDFIRES

The past 10 years have seen a tremendous uptick in the number and scale of wildfires affecting electric utility companies in the United States.

- **Pacific Gas & Electric Company** filed for bankruptcy protection on January 29, 2019 after a series of California wildfires.[1] The company had disclosed earlier that month that it faced about 750 complaints on behalf of at least 5,600 fire victims alleging damages caused by PG&E equipment, and estimated that its fire-related liabilities could ultimately exceed $30 billion.[2]
- **PacifiCorp**, a subsidiary of **Berkshire Hathaway Energy**, has been the subject of a number of lawsuits in connection with various wildfires in the western United States that occurred between 2020 to 2022. Claims against PacifiCorp total at least $46 billion following recent lawsuits in Oregon.[3]
- A deadly August 2023 wildfire in Maui destroyed the town of Lahaina. Since the fire, **Hawaiian Electric Industries, Inc.** has become the target of a number of suits brought by both the County of Maui and individual plaintiffs. Hawaiian Electric announced on August 2, 2024 that Hawaiian Electric and its subsidiary, Hawaiian Electric Company, Inc., and certain other parties including the State of Hawaii and the County of Maui, have reached an agreement in principle to settle all tort claims related to the August 2023 wildfires.[4] The defendants would collectively pay over $4 billion to resolve all tort claims arising from the August 8, 2023 wildfires on Maui. Hawaiian Electric and Hawaiian Electric

1 Balaraman, Kavya, *Wildfires pushed PG&E into bankruptcy. Should other utilities be worried?*, Utility Dive (Nov. 19, 2020).

2 Blunt, Katherine and Gold, Russell, *PG&E Files for Bankruptcy Following California Wildfires*, Wall Street Journal (Jan. 29, 2019); Hering, Garrett and Sweeney, Darren, *'There's always a risk': More wildfire, liability battles ahead for US utilities*, S&P Capital IQ (May 20, 2024).

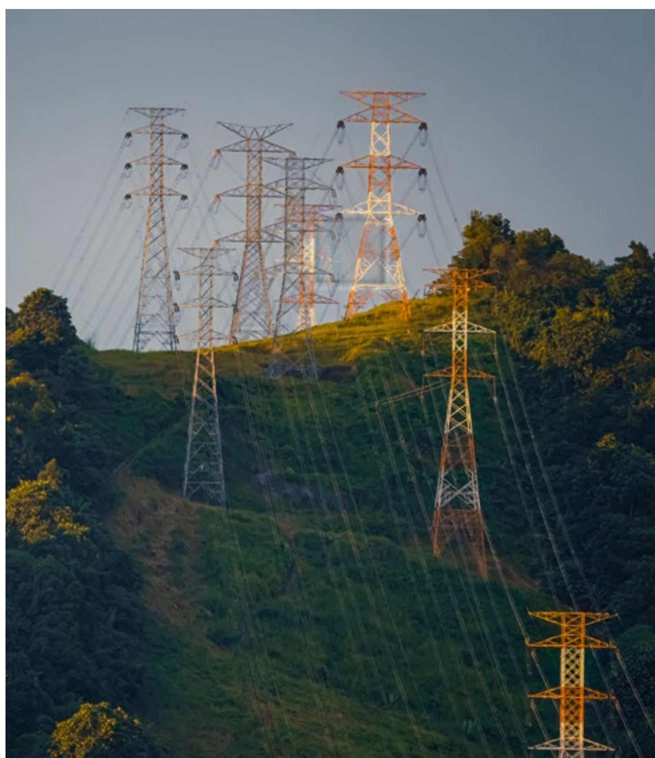
3 Hering, Garrett, *Wildfire claims against PacifiCorp surge to $46B on Oregon mass complaints*, S&P Global (Aug. 5, 2024).

4 Press Release, HEI Provides Update Following Global Settlement in Maui Wildfire Tort Litigation (Aug. 2, 2024).

Company's contribution is a total of $1.99 billion (pre-tax) to be paid in four installments. On August 12, 2024, shares of Hawaiian Electric dropped after the company disclosed a "going concern" risk and announced a steep quarterly loss due to swelling costs related to the Maui wildfire.[5]

- In February and March of 2024, the largest wildfire in Texas history, the Smokehouse Creek Fire, burned more than one million acres in the Texas Panhandle. The fire occurred in or near the service territory of **Southwestern Public Service Company**, a subsidiary of **Xcel Energy Inc**. Xcel Energy Inc. also faces a lawsuit in Colorado where the Marshall Fire, ignited in Boulder County, Colorado burned over 6,000 acres in December 2021.

The effects of climate change are likely to continue to put stress on the financial condition of investor-owned utilities in the United States. For example, from 2005 to 2017, S&P downgraded two North American investor-owned utilities due to physical risks from climate change. From 2018 to 2023, S&P downgraded 19 investor-owned utilities due to such risks.[6]



Considerations for a rate regulated utility

Electric utility companies are usually required by state public utility commissions (PUCs) to implement certain policies that mitigate the risk of wildfires (or their spread). These policies may include:

- vegetation management;
- maintenance of power lines;
- burying powerlines;
- power shutoff plans (sometimes referred to as "public safety power shutoff" or "PSPS")

PUCs usually set the terms and conditions of a utility's business and as such, have authority over many of the utility's projects and the utility's requests for consumer rate increases. This includes the PUC's review and approval of the mitigation efforts described above.

When a wildfire occurs, PUCs may in some circumstances limit a utility's ability to recover costs associated with a wildfire through customer rates. For example, in 2017 San Diego Gas & Electric was not allowed to recover $379 million of costs resulting from 2007 wildfires.[7] The California PUC determined that San Diego Gas & Electric had failed to "reasonably manage and operate its facilities" prior the fires. The California PUC used a "prudent manager" standard to reach its conclusion.

In extreme scenarios, the wildfire liabilities may become existential for the utility and any parent company. In the case of PG&E, one factor contributing to the company's bankruptcy was California's interpretation of "inverse condemnation". Inverse condemnation is a legal concept that entitles private property owners to just compensation if their property is damaged by a "public use". Unlike most states, California's courts have applied the inverse condemnation doctrine as a strict liability rule, imposing liability regardless of any considerations of the fault on the part of the public actor.[8] Further, California courts have not restricted application of the remedy to the actions of public actors and have instead allowed recovery in the case of certain private entities who damage property in their provision of public services. Specifically, California appellate courts have held that inverse condemnation is validly applied to privately-owned utilities when electric equipment sparks a wildfire.[9]

5 Seal, Dean, *Hawaiian Electric Shares Slide After 'Going Concern' Risk, Maui Wildfire Losses*, MarketWatch (Aug. 12, 2024). In a Form 8-K filed on September 18, 2024, the company disclosed that of the total settlement amount, Hawaiian Electric and Hawaiian Electric Company would contribute a total of $1.91 billion (after reflecting a credit of $75 million for the previous contribution to the One `Ohana Initiative), to be paid in four equal annual installments, with the first installment of approximately $478 million expected to be made no earlier than mid-2025.

6 Walton, Robert, *Investor-Owned Utilities Facing Physical Climate Risks Should Expand Cost Recovery Options: S&P*, Utility Dive (Dec. 8, 2023).

7 Walton, Robert, *CPUC: SDG&E may not recover $379M from consumers for 2007 wildfires*, Utility Dive (Dec. 1, 2017).

8 Jacoby, Ariel, *Burning Down the House: Analyzing California's Inverse Condemnation Strict Liability Rule for Utility-Caused Wildfires*, Southern California Interdisciplinary Law Journal, Volume 31 (2022).

9 *See, e.g., Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744 (1999).

Warren Buffet's letter to Berkshire shareholders this year, dated February 24, 2024, focused on several of the wildfires mentioned above, with particular focus on Berkshire's own recent experience:

> It will be many years until we know the final tally from BHE's forest-fire losses and can intelligently make decisions about the desirability of future investments in vulnerable western states. It remains to be seen whether the regulatory environment will change elsewhere.
>
> Other electric utilities may face survival problems resembling those of Pacific Gas and Electric and Hawaiian Electric. A confiscatory resolution of our present problems would obviously be a negative for BHE, but both that company and Berkshire itself are structured to survive negative surprises. We regularly get these in our insurance business, where our basic product is risk assumption, and they will occur elsewhere. Berkshire can sustain financial surprises but we will not knowingly throw good money after bad.

Potential effects on secured debt under a utility mortgage indenture

Below is a chart of the "bonding ratio" of various utility operating companies under their respective mortgage indenture. Under a typical utility mortgage, one method the issuer may choose to issue mortgage bonds from time to time is on the basis of "property additions". If the issuer uses "property additions", then the issuer is able to issue mortgage bonds in an amount equal to some set percentage of unfunded "property additions" (after adjustments to offset retirements)—this percentage enumerated in the mortgage is referred to as the "bonding ratio". One trend we have seen over the past several decades is an increase in the bonding ratio under the typical utility mortgage,[10] whether as the result of an amendment to an existing mortgage indenture or as a term of a new mortgage.

Company	Mortgage Indenture	Bonding Ratio
Florida Power & Light Company	January 1, 1944	60%[11]
Duke Energy Florida, LLC	January 1, 1944	60%
Northern States Power Company – Minnesota (Xcel)	February 1, 1937	66 2/3%
Kentucky Utilities Company	October 1, 2010	66 2/3%
Public Service Company of Colorado (Xcel)	October 1, 1993	70%
Pacific Gas and Electric Company	June 19, 2020	70%
CenterPoint Energy Houston Electric, LLC	October 10, 2002	70%
Entergy Texas, Inc.	October 1, 2008	70%
Ameren Illinois Co.	November 1, 1992	75%
NorthWestern Corp.	August 1, 1993	75%

Despite the trend in greater bonding ratios, it's unlikely that holders of utility mortgage bonds would be precluded from recovery either as a result of the wildfire destroying certain of the issuer's properties or as a result of a bankruptcy. Further, many modern mortgages includes extensive provisions detailing the insurance coverage that must be maintained as well as detailing how any such amounts will be paid by the mortgage trustee to the company.

In the case of bankruptcy, assuming the collateral subject to the mortgage is sufficient to pay first mortgage bondholders in full (and there are no junior secured creditors), the excess collateral would then go to unsecured creditors in accordance with the priority waterfall established by the bankruptcy code.

10 A higher bonding ratio allows the company to issue a greater amount of bonds based on a specific value of mortgaged property.

11 Florida Power & Light Company has reserved the right to amend the Mortgage without the consent or other action by the holders of any First Mortgage Bonds created on or after May 1, 2024 to, among other things, revise a basis for the issuance of additional First Mortgage Bonds from 60% to 70%.

Recent wildfire disclosure and diligence developments

Over the past several years, there has been renewed focus by utility issuers on disclosures with respect to wildfire risk and risk management. Below is a list of utility issuers in the United States that included some wildfire risk disclosures in their most recent 10-K filing, whether in forward looking statements, Risk Factors or in Management Discussion and Analysis. One obvious theme from the below list is that the list is skewed toward the western United States.

Company	Forward Looking Statements	Risk Factors	MD&A
ALLETE, Inc.	No	Yes	Yes
Avangrid Inc.	No	Yes	No
Avista Corporation	Yes	Yes	Yes
Berkshire Hathaway Energy Co.	Yes	Yes	Yes
CenterPoint Energy Inc.	No	Yes	No
Edison International	Yes	Yes	Yes
Entergy Corp.	Yes	Yes	No
Hawaiian Holdings Inc.	No	Yes	Yes
Idacorp Inc.	Yes	Yes	Yes
NiSource Inc.	No	Yes	No
NorthWest Natural Holding Company	No	Yes	No
NorthWestern Energy Group, Inc.	Yes	Yes	Yes
PG&E Corp.	Yes	Yes	Yes
Pinnacle West Capital Corporation	No	Yes	Yes
Portland General Electric Co.	No	Yes	Yes
Sempra	Yes	Yes	Yes
Xcel Energy Inc.	Yes	Yes	Yes

While wildfire risk factors are common in utility 10-Ks, deal participants should consider whether specific disclosure around rating agency action in response to such wildfire risk is warranted. In the past twelve months, such disclosure has become very common in prospectus supplements for several of the above issuers that have accessed the debt capital markets.

Further, wildfire risk and risk management, including insurance coverage, has become a more frequent topic on transaction due diligence calls. These questions typically cover both (1) exposure to wildfire risk in the utility's service territory, (2) wildfire mitigation plans in response to such risks, and (3) associated insurance policies, current availability and coverage limits.

Disclosing wildfire risks when contemplating a capital markets offering

As discussed above, prior to accessing the capital markets, deal participants should ensure that the disclosure package includes relevant wildfire risk factors. In general, such disclosure would include risk factors relating to (1) the impact of climate change, (2) risks inherent in the operations of transmission and distribution assets, (3) risks relating to litigation and adverse regulatory decisions, (4) risks relating to insurance coverage and related limits and (5) rating agency risks in response to wildfire scenarios.

Preparing disclosure to address wildfire risk is a relatively straightforward exercise prior to an offering. A particularly bad time to have a wildfire, though, is when the issuer has priced a securities offering and has yet to close. We are aware of at least one instance over the past several years when this exact scenario has occurred. For guidance on how to manage such a scenario—specifically when an unforeseeable and materially adverse event occurs after the pricing of the securities but before closing, see *When Very Bad Things Happen After Pricing: Legal and Practical Considerations* in the September 2013 issue of Baseload.

Cost-recovery: Wildfire funds and securitization for wildfire costs and wildfire mitigation

In a November 2023 S&P report, S&P opined that "we believe it's important for the [investor-owned utility] industry to significantly increase and broaden recovery capabilities. This includes implementing storm reserves, increasing commercial insurance levels, incorporating self-insurance, participating in a special wildfire fund, and securitization."[12]

In July 2019, a special wildfire fund for investor-owned utilities was established in California under Assembly Bill 1054. The law provides for the establishment of a statewide fund that will be available for eligible electric utility companies to pay eligible claims for liabilities arising from wildfires occurring after July 12, 2019 that are caused by the applicable electric utility company's equipment. Each of California's large electric investor-owned utilities has elected to participate in the wildfire fund.

Electric utility companies that draw from the wildfire fund will only be required to reimburse amounts that are determined by the California Public Service Commission (CPUC) in a proceeding for cost recovery not to be just and reasonable, after applying the prudency standard in AB 1054 and after allocating costs and expenses for cost

12 Grosberg, Gabe, *A Storm Is Brewing: Extreme Weather Events Pressure North American Utilities' Credit Quality*, S&P Global (Nov. 9, 2023).

recovery based on relevant factors both within and outside of a utility's control, subject to a disallowance cap equal to 20 percent of the utility's transmission and distribution equity rate base.

The wildfire fund and disallowance cap will be terminated when the amounts therein are exhausted. The wildfire fund will be capitalized with (i) $10.5 billion of proceeds of bonds supported by a 15-year extension of certain charges to customers, (ii) $7.5 billion in initial contributions from California's three large electric utilities and (iii) $300 million in annual contributions paid by the participating electric utilities for a 10-year period.

Securitization has also played an increasing role in wildfire mitigation efforts and cost recovery. Since 2021, Southern California Edison Company has issued several secured recovery bonds for the purposes of wildfire mitigation and wildfire related capital expenditures. SCE Recovery Funding LLC is a bankruptcy remote, wholly owned special purpose subsidiary, consolidated by Southern California Edison.[13] SCE Recovery Funding LLC has issued a total of $1.6 billion of securitized bonds.[14] The proceeds were used to acquire Southern California Edison's right, title and interest in and to non-bypassable rates and other charges to be collected from certain existing and future customers in Southern California Edison's service territory, associated with "Excluded Capital Expenditures "under AB 1054. Under AB 1054, approximately $1.6 billion of spending by Southern California Edison on wildfire risk mitigation capital expenditures made after August 1, 2019, cannot be included in the equity portion of Southern California Edison's rate base.[15]

The CPUC voted in 2021 to approve a financing order giving Pacific Gas & Electric Co. authority to securitize $7.5 billion in costs related to wildfires caused by its power lines in 2017.[16] The securitization paved the way for PG&E to retire about $6 billion in debt and accelerate final payments to victims of the wildfires. The securitizations were effected pursuant to Senate Bill 901, one of the two state securitization laws passed during PG&E's bankruptcy that set the terms of ratepayer bond issuances covering utility wildfire costs.

Pursuant to the financing orders for the first and second Assembly Bill 1054 securitization transactions, Pacific Gas & Electric sold its right to receive revenues from the non-bypassable *wildfire hardening* fixed recovery charges to PG&E Recovery Funding LLC. On November 12, 2021, PG&E Recovery Funding LLC issued approximately $860 million of Senior Secured Recovery Bonds. On November 30, 2022, PG&E Recovery Funding LLC issued approximately $983 million of Series 2022-A Senior Secured Recovery Bonds.

Legislators in Hawaii recently killed various pieces of securitization legislation. Senate Bill 2922, which would have allowed for securitization as a financing option to be used for financing wildfire mitigation investments and for costs and expenses arising out of catastrophic wildfires, was deferred on April 25, 2024.[17] Senate Bill 3344 would have established a fund for property owners to recover damages from future catastrophic wildfires and provide support in case of another catastrophic event.[18] Both bills are effectively dead for this legislative session in Hawaii, which ended on May 3, 2024.

Conclusion

Wildfire liabilities have cast a new light on a historically safe investment—the rate regulated electric utility company. As the landscape has changed, issuers are well advised to monitor developments in the industry, including with respect to (1) disclosure, (2) due diligence, (3) mitigation efforts, and (4) when wildfires do occur, cost recovery.

13 Edison International, Form 10-K for the Fiscal Year Ended December 31, 2023, *EDGAR*, Securities and Exchange Commission, 2024.

14 *Id.*

15 Edison International, Form 10-Q for the Quarterly Period Ended March 31, 2021, EDGAR, Securities and Exchange Commission, 2021.

16 Balaraman, Kavya, *PG&E gets greenlight for $7.5B wildfire securitization, but consumer advocates raise challenges*, Utility Dive (May 7, 2021).

17 *No Immediate Rating Impact on Hawaiian Electric From Recent Legislative Developments*, Fitch Ratings (May 6, 2024).

18 *Id.*

HYBRIDS STAY HOT: DEVELOPMENTS IN HOLDCO JUNIOR SUBORDINATED DEBT

The hybrid market has seen a significant increase in utility holdco issuances in 2024, with at least 15 offerings to date from 12 separate issuers, several of which represented the issuer's inaugural junior subordinated offering and one of which was issued as a convertible product. With the exception of PNM Resources' convertible hybrid, all of these issuances adopted a fixed-to-fixed reset rate structure—with several opting for a dual tranche approach of five-year and 10-year initial interest periods.

As we previously noted in the October 2023 edition of *Baseload*, Moody's proposed in September 2023 (and ultimately adopted in February 2024) an update to its hybrid methodology for investment grade issuers—the ultimate effect of which was to reduce equity credit from five baskets to three baskets (similar to the methodology S&P and Fitch employ), corresponding to 0 percent, 50 percent and 100 percent equity credit. The majority of the examples below fall into Moody's "Basket M" (50% equity credit). Moody's also simplified the structural criteria to three primary factors: (1) whether the security contains any mandatory conversion features; (2) coupon deferability; and (3) maturity (initial maturity of at least 30 years with at least 10 years remaining until maturity).

Holdco Hybrid Issuances in 2024

Issuer	Amount	Security	Closing Date
PG&E Corporation	$1,000,000,000	7.375% Fixed-to-Fixed Reset Rate Junior Subordinated Notes due 2055	September 2024
NiSource Inc.	$500,000,000	6.375% Fixed-to-Fixed Reset RateJunior Subordinated Notes due 2055	September 2024
Sempra	$1,250,000,000	6.400% Fixed-to-Fixed Reset Rate Junior Subordinated Notes due 2054	September 2024
Duke Energy Corporation	$1,000,000,000	6.45% Fixed-to-Fixed Reset Rate Junior Subordinated Debentures due 2054	August 2024
CenterPoint Energy Inc.	$400,000,000 $400,000,000	7.000% Fixed-to-Fixed Reset Rate Junior Subordinated Notes, Series A, due 2055 6.850% Fixed-to-Fixed Reset Rate Junior Subordinated Notes, Series B, due 2055	August 2024
American Electric Power Company Inc.	$400,000,000 $600,000,000	7.050% Fixed-to-Fixed Reset Rate Junior Subordinated Debentures, Series A 6.950% Fixed-to-Fixed Reset Rate Junior Subordinated Debentures, Series B	June 2024
Emera US Holdings Inc.[1]	$500,000,000	7.625% Fixed-to-Fixed Reset Rate Junior Subordinated Notes due 2054	June 2024
NextEra Energy Capital Holdings, Inc.	$1,200,000,000	Series R Junior Subordinated Debentures due June 15, 2054	June 2024
PNM Resources Inc.[2]	$550,000,000	Junior Subordinated Convertible Notes due 2054	June 2024
Entergy Corporation	$1,200,000,000	Junior Subordinated Debentures due December 1, 2054	May 2024
AES Corporation	$950,000,000	7.600% Fixed-to-Fixed Reset Rate Junior Subordinated Notes due 2055	May 2024
NiSource Inc.	$500,000,000	6.950% Fixed-to-Fixed Reset RateJunior Subordinated Notes due 2054	May 2024
Dominion Energy, Inc.	$1,000,000,000 $1,000,000,000	2024 Series A Enhanced Junior Subordinated Notes due 2055 2024 Series B Enhanced Junior Subordinated Notes due 2054	May 2024
Sempra	$600,000,000	6.875% Fixed-to-Fixed Reset Rate Junior Subordinated Notes due 2054	March 2024
NextEra Energy Capital Holdings, Inc.	$1,000,000,000	Series Q Junior Subordinated Debentures due September 1, 2054	February 2024

As noted above, several issuers (CenterPoint, AEP and Dominion) utilized a dual-tranche structure for their offerings, with a five-year initial interest period for one tranche (reset every five years thereafter) and a 10-year initial interest period for the other tranche (reset ever five years thereafter). Both series in these examples reset based on the five-year treasury rate at the time of such reset plus an agreed spread set at issuance. We've also seen several issuers (PG&E and Dominion) include a coupon floor upon reset (i.e., the coupon for each reset period will not slip below the initial coupon at issuance in the event the five-year treasury rate is lower at the time of such reset), which presumably came with some pricing benefits to the issuer in exchange for the certainty investors receive.

1 Issued in a private placement, with registration rights, under Rule 144A and Regulation S under the Securities Act of 1933, as amended, to eligible purchasers.

2 Issued in a private placement under Rule 144A under the Securities Act of 1933, as amended, to eligible purchasers.

While there is a fair amount of continuity in the interest deferral flexibility (and associated restrictions during such optional deferral period), the arrival of the first junior subordinated convertible product has prompted several issuers to specifically allow for the flexibility to settle conversions of any convertible notes that rank equally with "straight debt" junior subordinated notes during such optional deferral period for the straight debt junior subordinated notes. This addition of the carve-out is helpful, as absent such provision, settlement of a conversion of a convertible junior subordinated note while the issuer is deferring interest on its straight debt junior subordinated notes could complicate the issuer's no contravention representation and opinion delivered at closing.[3] Note the vast majority of junior subordinated precedents have a limited covenant default (or none at all) which cannot, by itself, result in acceleration of the security. Further, absent extenuating circumstances, it seems highly unlikely an issuer would defer interest on one subordinated instrument and not the other (just as it seems highly unlikely the issuer would choose to take advantage of the deferral provisions in the first place, as first and foremost doing so would preclude the issuer from paying a common stock dividend).

We've also noted that several issuers have chosen to clarify the interest payment restriction during an optional deferral period for indebtedness that ranks equal or junior to the series of junior subordinated notes on which the issuer is optionally deferring payment of interest. In these precedents, the issuer has clarified that the restriction on paying interest only applies to those securities where interest is deferrable. Said another way, the clarification in this instance is helpful in the unlikely scenario where the issuer has a series of securities *pari passu* or junior to the junior subordinated notes on which it wishes to defer interest which securities do not allow for optional deferral of interest payments.

3 The same could also be said if the issuer has two separate series of convertible junior subordinated notes.

CASELAW SPOTLIGHT: LOOKING AGAIN AT LOPER

On June 28, 2024, the United States Supreme Court overturned the *Chevron* doctrine. The *Chevron* doctrine was originally established in 1984 by the Supreme Court's ruling in *Chevron U.S.A. v. Natural Resources Defense Council*.[1] This jurisprudential doctrine has underpinned US administrative law ever since.

The *Chevron* case considered how to define the term "source" in the Clean Air Act, which was amended in 1977 to enact requirements on certain states that had not achieved the Environmental Protection Agency's previously legislated national air quality standards. Pursuant to the Clean Air Act, these states regulated permits to build "new or modified major stationary sources" of air pollution, such that permits for new or modified major stationary sources of pollution required fulfillment of certain stringent conditions or "new-source review."[2] Chevron sought to bundle its new source of pollution with an existing one that would be modified, such that the two together as a single "source" resulted in a zero net emissions change.

The *Chevron* doctrine required courts to undertake a two-step test.[3] First, the question is whether the legislation is clear on the question, *i.e.*, did Congress define "source" to allow for a combination of two pollution-emitting devices into one under the Clean Air Act? Second, if the legislation is unclear, imprecise or ambiguous, then *Chevron* asks whether the executive agency's interpretation is "based on a permissible construction of the statute," or rather, reasonable, with the understanding that vague or ambiguous legislation is Congress delegating its authority to the executive agency.[4] *Chevron* required courts to defer to the expertise of executive branch agency interpretations of ambiguously worded statutes[5] if such interpretation is reasonable.[6]

Twenty years after *Chevron*, we turn from the utility industry to the fishing industry. Prior to 1976, the fishing industry was dominated by unregulated foreign ships in international waters merely twelve miles off the United States coastline. This ended with the enactment of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), to be administered by the National Marine Fisheries Service (NMFS), which gave the United States jurisdiction 200 nautical miles beyond its territorial sea and "management authority over all fish"[7] in the area. Such management includes requirements that fishing vessels have "one or more observers be carried on board" for purposes of conservation and fishery management data collection. The MSA requires that certain groups cover such observer costs but is silent as to Atlantic herring fishermen. In the past, the NMFS has funded the observer for Atlantic herring fishermen, but after 2013, the MSA was amended "to require fishermen to pay for observers if federal funding became unavailable." The MSA created an industry funded program for Atlantic herring fishermen intended to cover observer costs for 50 percent of certain types of trips and with certain conditions for qualification.[8]

Loper is an Atlantic herring fishery that challenged the MSA, arguing that the MSA does not authorize the NMFS to mandate that the fishery pay for the required observers. The DC Circuit Court affirmed the lower court's ruling for the government, agreeing that even if the MSA was ambiguous, deference to the NMFS interpretation was "'warranted' under Chevron" and that such interpretation was a "'reasonable' construction of the MSA."[9] The Supreme Court disagreed, not only finding for the petitioners, but also abandoning twenty years of *Chevron*.

In place of *Chevron*, the Supreme Court ruled in *Loper Bright Enterprises v. Raimondo*, courts should "do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch"[10] when a statute delegates authority to an agency.[11]

Much has been said about how this decision turns judges into policymakers; the court's reasoning is based on a desire to correct the *Chevron* doctrine's insistence that courts ignore their own independent judgment in binding deference to agency interpretations.

1 *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2 *Id.* at 840.

3 *Id.* at 842-843.

4 *Id.* at 843-844.

5 *Id.* at 843.

6 *Id.* at 844.

7 *Loper Bright Enterprises v. Raimondo*, 603 U.S. __ (2024), at 2. *Consolidated with Relentless, Inc. et al. v. Dep't. of Com. et al.*, No. 22–1219.

8 *Id.* at 2-4.

9 *Id.* at 5.

10 *Id.* at 25.

11 *Id.* at 35.

One question is whether *Loper Bright* will create more stability over time and stop different administrations from taking vastly differently positions with respect to interpreting existing statutes. From the opinion of the majority:

> Rather than safeguarding reliance interests, *Chevron* affirmatively destroys them. Under *Chevron*, a statutory ambiguity, no matter why it is there, becomes a license authorizing an agency to change positions as much as it likes, with "[u]nexplained inconsistence" being "at most…a reason for holding an interpretation to be…arbitrary and capricious."…By its sheer breadth, *Chevron* fosters unwarranted instability in the law, leaving those attempting to plan around agency action in an eternal fog of uncertainty.[12]

Another question is the extent to which courts will follow *Loper Bright's* directive to give "due respect" to agencies. While the standard of deference to agencies has certainly been reduced, it is to be seen exactly how much less deference the agencies will receive under the "due respect" standard of *Loper Bright.*

Under *Chevron*, environmental groups have succeeded in delaying utility companies from investing in infrastructure improvement projects by challenging them through agency appeals processes and judicial appeals. There is the chance that utility companies will delay certain infrastructure investment until judicial reviews run their full course before moving forward with any plans.[13] And yet, utility companies may find that their day-to-day operations are more consistent and predictable under *Loper Bright* courts that are now free to exercise judgment while still providing agencies "due respect" for their technical expertise. For a further discussion of the decision's impact on environmental regulation, see The Nickel Report: SCOTUS Overrules 40-Year-Old Chevron Doctrine Reshaping Future Environmental Regulation, July 2, 2024.

For a discussion of the decision's impact on FERC proceedings, see Analysis: Loper Bright's and Jarkesy's Impacts on the Federal Energy Regulatory Commission, July 8, 2024. While the decision had an immediate impact on (i) a public dispute between two FERC Commissioners concerning Order No. 1920 and (ii) a Supreme Court order vacating a notable DC Circuit decision on FERC's regulation of Qualifying Facilities, the *Loper Bright* decision is less likely to affect most routine FERC proceedings. *Loper Bright* should come into play more in matters where FERC seeks to pursue new policy objectives or new technologies which are not clearly addressed by existing statutes.

12 *Id.* at 33.

13 Howland, Ethan, Supreme Court's Chevron, Corner Post decisions could delay energy investments, spur litigation: analysts, Utility Dive, (July 2, 2024).

RECENT CLIENT ALERTS AND PUBLICATIONS

Over the past year, Hunton lawyers have authored client alerts and blog posts covering a range of topics relevant to the power and utilities capital markets industry:

Storm Warning—Reminder to Review Your Insurance Policy and Procedures for Hurricane Season, September 24, 2024

Update: California Legislature Approves Targeted Changes to Climate Disclosure Laws Without Delaying Reporting Deadlines, September 5, 2024

What's next for California climate disclosure and accountability laws?, August 1, 2024

Supreme Court Will Consider Whether Agency is Required to Consider Downstream GHG Emissions Beyond Agency's Control in NEPA Review, July 11, 2024

Supreme Court Limits SEC's Use of In-House Administrative Proceedings, July 8, 2024

Analysis: Loper Bright's and Jarkesy's Impacts on the Federal Energy Regulatory Commission, July 8, 2024

SCOTUS Overrules 40-Year-Old Chevron Doctrine Reshaping Future Environmental Regulation, July 2, 2024

Biden Administration Releases Voluntary Carbon Markets Principles, June 3, 2024

Summary: Divided FERC Issues Order No. 1920—Makes Sweeping and Controversial Changes to Transmission Planning and Cost Allocation Rules, May 21, 2024

Supreme Court Rules that MD&A Omission Does Not Give Rise to a Claim for Securities Fraud, April 22, 2024

SEC Climate Rules: What Now?, March 27, 2024

SEC Adopts Long-Awaited Final Climate Disclosure Rules, March 21, 2024

IRS Expands Favorable Tax Treatment to Utility Securitizations That Use a State or Political Subdivision as Issuer, March 12, 2024

Corporate Transparency Act: FinCEN Updates FAQs on Beneficial Ownership Information, January 24, 2024

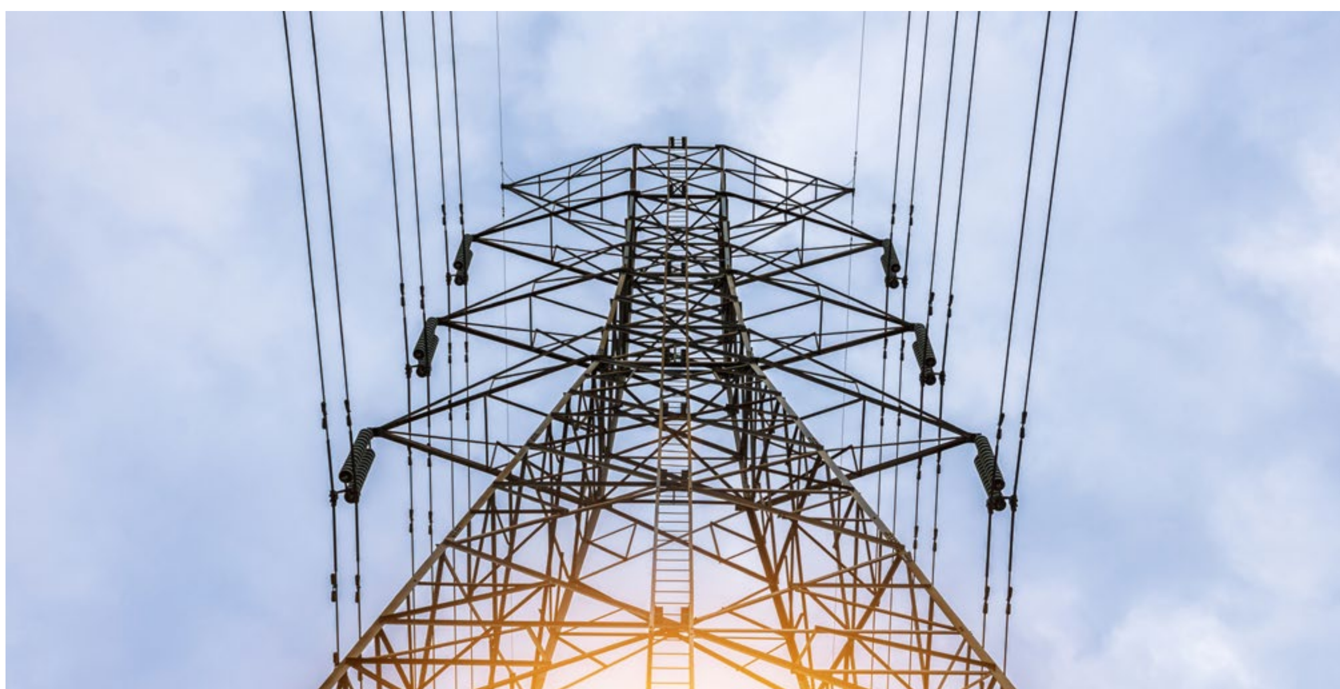
SEC Adopts Changes to Schedule 13D and Schedule 13G Reporting, October 26, 2023

European Union Advances Mandatory ESG Reporting Standards, October 24, 2023

EPA's Latest Proposed Coal Ash Rule May Impact Beneficial Use, October 19, 2023

The nascent hydrogen economy is one step closer to liftoff; DOE selects hydrogen hubs, October 17, 2023

First-in-the-Nation Climate Disclosure Bills Become Law In California, October 16, 2023



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